Foreword

Medical law emerged as something of an outlier. Arising as an amalgam of, principally, tort law and the criminal law (and now infused with human rights law amongst other subjects), it might be said that it is a field of legal enquiry that looks at how the law is applied to a particular group of people in a way that it was not applied to others. In this case, of course, that group of people is health professionals, broadly defined. It has always been something of a conversation, involving the medical profession and lawyers, but it also includes philosophers, bioethicists, economists, statisticians, social scientists and more. Indeed, what we now call ‘health law’ includes other medical professionals and other scientists, suggesting a subject that is expanding rather than narrowing its focus. Sometimes these conversations are friendly but at other times, notably when medical law was carving out its own space, they have been less so. Ian Kennedy’s *The Unmasking of Medicine* is symbolic of the latter, with its vision of a medical profession that must be brought to heel and the law as the vehicle that can achieve that. Needless to say, this was greeted somewhat sceptically by the medical profession. There is perhaps less conflict today, and it is important to remember that we all want the same things, and it might be said that today’s health law is more of a constructive dialogue between interested parties.

Within this context, the issue of medical negligence has always loomed large. The (in)famous *Bolam* test for negligence, and the way that it was interpreted by the courts for a time, made the medical profession truly unique: the assessment of the standard of care for doctors was different to that for all other professions, and they were essentially allowed to define their own legal standards and, to all intents and purposes, regulate themselves. The fact that *Bolam* grew to be used far outside of the negligence context – and indeed in areas that did not require the application of technical medical skill – was a key point of criticism for those who believed that the law should take a more active role in protecting patients. Indeed, it was a good part of the justification for the emergence of medical law as a subject in its own right. In this context, the role of clinical guidelines becomes key. They set the standards that health professionals are not only expected but in some cases *obliged* to follow. How they interact with the law is therefore of critical importance. If they are treated as quasi-legal and following them is determinative of the standard of care being satisfied, then the medical profession is essentially defining its own legal

duties. On the other hand, if the courts are to treat them as mere guidelines then where is the certainty in the rules that justice and the subjects of that justice require? But there are further questions that present themselves: how do medical professionals themselves treat the guidelines? Can and should they be used by solicitors and barristers as evidence of reasonableness (or a lack of it)? How do other countries use them?

The only thing that is clear is that a conversation needs to be had, and that it is an important one. Indeed, it is one that cuts to the very heart of medical law and the tensions inherent in it. Sadly, it is also not one that is well represented in the current literature.

What makes this book important is that it opens that conversation up. What we see here is a collection of authors that contain not just legal voices, but medical ones too. Furthermore, there is also an exploration of other jurisdictions (the US, South Africa and the Netherlands are considered in individual chapters, and there is also a whole chapter on global perspectives), from which we may learn much, or perhaps appreciate the value in our own approach. There are also chapters not just on the interface between clinical guidelines and ethics from a medical practitioner but also from a barrister on the use of guidelines in the courtroom. There are further chapters from solicitors, as well as surgeons and anaesthetists. This demonstrates the range of uses that guidelines may be put to, and the breadth of issues that they cover, as well as the equally wide range of people who will use them. These chapters are buttressed by the academic commentary of Rob Heywood and Ash and Jo Samanta themselves. All in all, this is a book that does not just highlight and discuss the complexities of the interaction between the law, lawyers, medicine and the medical profession and clinical guidelines. It starts a conversation that very much needs to be had.

José Miola
School of Law, University of Leeds