Book reviews

Medical Malpractice Law, A Comparative Law Study of Civil Responsibility arising from Medical Care

Dr Jarvis Dieter Giesen. Bielefeld, Giesecking - Verlag. 1981, pp 514 US \$68/DM 146.

The most conspicuous, though not the most important, achievement of this remarkable work is in the field of technical scholarship. The author, who is a Professor of Law at the Free University of Berlin (West), has produced by far the fullest and most accurate comparative study of the law of medical penal practice now available. He writes in German, then, in the same volume, translates into impeccable English - a feat which one can contemplate only with respectful amazement.

The book will be of primary value for the most part to practising and academic lawyers. That in no way detracts from its value to the student of medical ethics. To equate law with ethics is no doubt a delusion; it is equally deceptive to ignore the ethical basis of law. Professor Giesen points out that, even in non-common law countries, much of the law relating to liability for negligent acts or omissions is deducible not from the relevant Codes but from judicial decisions. This, however, only goes to confirm that the sources of the law are fundamentally the same whether the law-giver is a judge, a code, or a statute, enjoining this or prohibiting that. What motivated the law-maker or law-giver if not primarily his sense of right and wrong?

A general treatise of the legal liability of medical practitioners, especially when it provides material for comparison with many jurisdictions other than one's own, will be of great value in identifying and assessing the moral considerations which lie behind the rules of law. In this field, too, as Professor Giesen says, the unanimity of these rules is much more striking than the differences between them. This is under-

standable, if one accepts that there is a far greater similarity, throughout the world, between national or racial conceptions of right and wrong, than there are basic variations among them. The lawyer, if he were rather old-fashioned, (or merely getting old), might use this in support of the doctrine of natural law, which is today less discredited than our rationalistic forebearers would have believed possible.

From the ethical standpoint, the more interesting side of malpractice is not the fault which the word most readily brings to mind - negligence in diagnosis, in the selection of treatment, or in carrying it out. Negligence in a clear breach of duty, immoral as such, and one would expect the law to demand reparation from him who is guilty of it, should damage result. The more interesting branch is where correct treatment is correctly applied, but without the patient's informed consent. It is impossible to generalise about such an allegation of malpractice as one can about negligence, which is a word carrying intrinsically its own condemnation. But absence of consent must always be susceptible of some explanation, and that explanation may or may not provide exculpation, which is impossible where negligence is concerned. It is difficult to figure an intelligible legal system, or for that matter a school of ethics, which would brand as malpractice an urgent life-saving treatment successfully carried out when consent either from the patient (unconscious) or his relatives (unknown) could not possibly have been obtained. Then let us suppose such treatment to have been carried out in defiance of the patient or his guardian. This is not unknown when blood transfusion - which is, after all analogous to an organ transplant operation, - is critically necessary. In such circumstances, under what juridical or moral concept are damages exigible, and how can they be quantified? With the greatest respect to Justice Cardozo, I myself

doubt the attribution to assault. The law of privacy, too, at least in Britain, is at present hazy and uncodified. So we are not surprised when the author tells us, 'There is a striking absence of English cases on consent in medical suits'. It is such difficulties which make the learned author's extended treatment of the consent question so essential and so valuable.

The author makes a penetrating, and telling, analysis of some contrasted characteristics, reaching far back into educational and ethical divergences, of the medical and legal professions respectively. I am perhaps more hopeful than he is of a relaxation of the tensions between them to which he refers, when I contemplate the great change for the better, during my own professional lifetime, in the quality and candour of medical evidence, and in the more enlightened acceptance by lawyers of certain medical skills which ignorant public opinion once encouraged them to belittle.

Finally, I must commend the appendices. Here are collected such often hard-to-come-by references as the Hippocratic Oath, the Code of Nuremberg, the Declarations of Helsinki and Tokyo, various Resolutions of international bodies, Statutes, draft Statutes and professional regulations of the medical professions in several countries. The juxtaposition of these authorities alone would make this book an essential part of a medical or legal library.

LORD KILBRANDON
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Birth Control and Controlling Birth: Women-Centred Perspectives

Helen B Holmes, Betty B Hoskins, Michael Gross (ed), The Humana Press Inc., 1981, 338 pp, £11.90 hardback, £7.15 paperback.

This book is one of two volumes that