

Book reviews

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

Dr Jarvis Dieter Giesen. Bielefeld, Gieseking - 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.

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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

emerged from a workshop on Ethical Issues in Human Reproductive Technology—Analysis by Women, held in June 1979 at Hampshire College in Amherst, Massachusetts.

With admirable speed (the book was published in the US only one year after the conference) the editors have put together all the papers from the workshop and have added analyses and summaries. The result is a powerful, controversial, thought-provoking and highly stimulating book.

The goals of the workshop were to identify the ethical issues involved in setting priorities in research on human reproduction and in the application of such research, to identify the values underlying such issues, to explore any alternative values offered by women and to recommend new approaches for assessing values and determining policy.

The issues covered in the first volume include the ethics of contraceptive development and deployment, Depo Provera and sterilisation abuse, childbirth technologies (with particular reference to electronic fetal monitoring) and the social control of childbirth (with particular reference to the controversy surrounding home versus hospital confinements). The second volume—*The Custom-Made Child*—which has not yet been published in Britain, includes consideration of prenatal diagnosis, sex pre-selection, neonatal care and test tube fertilisation. Although published separately, and reviewed separately below the volumes are to some extent interdependent, the first containing a detailed synthesis of many of the ideas that emerged from the workshop while the second ends with some general resolutions and specific policy proposals that emerged from the workshop.

The editors have not attempted to produce a consistent argument but have reflected the intention of the workshop to 'highlight the diversity of views that emerges from the varied experiences and situations of women'.

The contributors were mostly women involved in health care as doctors, nurses, midwives, scientists, historians, sociologists, ethicists, educators and consumers and they offer a fairly radical view. But a few

liberals and a sprinkling of conservatives enliven the proceedings by challenging some of the more romantic and idealistic assumptions of some of the speakers with the result that the reader is swayed back and forth by the argument and counter-argument.

The level of argument varies from the highly personal to the most academic, the latter including the most detailed documentation the reviewer has seen on the risks of Depo Provera. Even when dealing with well-worked issues, there are often original insights offered. For example, when discussing informed consent, it is suggested that this should include feedback from the patient to show that the explanation offered has been understood—not a normal practice on either side of the Atlantic. But there are also new issues considered such as 'women-controlled research'—research which recognises individual differences rather than trying to eliminate them and where the woman is both subject and experimenter.

For the British reader, the American origin of the book may have its drawbacks as some of the issues may not seem relevant here. But in many cases the differences are only of degree and the starker form in which some issues appear in America often allows a clearer analysis which has definite relevance to Britain too.

Although this book should be read by all those involved in family planning, obstetrics and gynaecology, in practice the readership will probably be confined to the more liberal fringe. The presentation of the book and the emphasis on women's views will cause it to be dismissed by many, while the controversial and hard-hitting arguments will antagonise others. This is a pity—but it is not the fault of the book.

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**The Custom-Made Child?:
Women-Centred Perspectives**

Helen B Holmes, Betty B Hoskins, Michael Gross, (ed), Humana Press Inc, Clifton New Jersey, 1981, 368 pp, US \$14.95.

Huxley's *Brave New World* of scientifically graded human beings is happily still far off. But as we know

genetic engineering is rapidly moving out of the realms of futuristic fiction to become a fact of advanced medical practice. The range of techniques for scientifically controlling, manipulating and intervening in human fertility and reproduction is growing steadily. Ectogenesis may still be largely experimental, but pre-natal diagnosis already permits of the detection of fetal abnormality and sex, and thus the possibility of rejecting the fetus who does not meet our expectations of human normality, or desired sex. Hence we can already make our children according to our particular culture's customs and value systems of human perfection and gender preference, even if this does not yet occur as widely in British as in American practice.

Two thirds of this report of an American women's conference on Ethical Issues in Human Reproductive Technology are devoted to wide ranging consideration of the political and moral assumptions in ectogenesis, pre-natal diagnosis, and sex pre-selection, and the potential social and eugenic implications of such techniques. Since the conference attempts to confront topics which especially affect women and their children, it also has sections on attitudes and policies in neonatology, and mortality and morbidity in diethylstilboestrol use. This is not a discussion of reproductive ethics as they affect doctors but as they affect women who bear and nurture the next generation. For as this volume points out, women are the main recipients of policy and practice in reproductive medicine, and therefore have a legitimate voice which must be heard. Hitherto women have had little or no say in an area of medicine which has such a profound impact, not simply on female biology but also on the physical and emotional health and wellbeing of women and their families.

Biologists, geneticists, bioethicists and health professionals provide informed and wide ranging contributions to the book. Most of them are women, many are mothers themselves. The contributors are thus well placed to appreciate real benefits which accrue from humane applications of science, and equally are equipped to be properly critical of the potential which science contains for depersonalising, exploiting

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