454

LAW COUNCIL OF AUSTRALIA

LAW NEWS

BOOK REVIEW

J K MASON AND R A McCALL-SMITH, 'LAW AND MEDICAL ETHICS'

VERNON D PLUECKHAHN, 'ETHICS, LEGAL MEDICINE AND FORENSIC PATHOLOGY'

August 1983

LAW COUNCIL OF AUSTRALIA

LAW NEWS

BOOK REVIEW

J K MASON AND R A McCALL-SMITH, 'LAW AND MEDICAL ETHICS'

VERNON D PLUECKHAHN, 'ETHICS, LEGAL MEDICINE AND FORENSIC PATHOLOGY',

Two recent books turn a stone that has hitherto covered some of the most puzzling dilemmas of our time. The book by Mason and McCall-Smith is a combined effort written by the Regius Professor of Forensic Medicine at the University of Edinburgh and a Lecturer in Civil Law at the same university. It is written principally for lawyers. It reviews mainly English and Scottish cases on a range of medico-legal problems. But it also contains a number of interesting references to Australian, New Zealand and Canadian cases. Dr Plueckhahn's book is mainly written for medical practitioners. Hence it starts with a layman's description of the Australian legal system and court structure. It reflects the author's academic and hospital appointments in pathology and forensic medicine in Victoria. Nonetheless it contains a great deal of material that will be of enormous value to lawyers in preparing cross examination of medical and other forensic experts. The material is necessarily gruesome at times. The colour photographs of wounds and cadaveric injuries beautifully illustrate the points being made in the text. Dr Plueckhahn provides simple descriptions of post-mortem changes, cooling and rigor mortis. He explores various alternative causes for sudden unexpected deaths in adults and in children. He identifies the things to look for in the examination of wounds, gunshot bruises and contusions and stab wounds. He provides a handy catalogue of what to look for in cases of suffocation, strangulation, drowning, death by immersion and various other means by which victims are despatched.

But it is in the discussion of bio-medical advances and their implications for ethics and the law that Dr Plueckhahn's book intersects the subject matter examined by Professor Mason and Dr McCall-Smith. To list the contents of their book is to chronicle a number of intractable law reform tasks that await judges or law reformers in Britain and Australia:

* trans-sexualism and the law
* contraception and the right of minors to treatment and advice, independent of their parents

* abortion and the 'rights' of the foetus
* the law and genetic counselling (amniocentesis)
* neonaticide — a problem identified in Britain by the Arthur trial and by the decision of the Court of Appeal, in Re B [1981] 1 WLR 1421
* medical confidentiality — a matter of pressing concern with the growing computerisation of medical records
* the diagnosis of 'death'
* the law on organ transplantation
* euthanasia and the 'right' to die
* biomedical human experimentation
* foetal experimentation
* human rights and psychiatric treatment

Because many of the problems dealt with rarely get to the higher courts, the authors have taken pains to refer to such cases and scholarly or law reform as exists. They have then offered their personal views. Because of the intensely controversial nature of the subject dealt with, it will be no surprise that those views sometimes appear dogmatic and occasionally even old-fashioned. Not everybody in Australia, for example, would agree:

* that South Australian reforms permitting prosecution for rape within marriage is 'a compromise of doubtful effect' (p.21)
* that the call for removal of the Armed Forces from the special exceptions for homosexual law reform in England 'borders on absurdity and will probably be resisted by the troops themselves' (p.25)
* that artificial insemination donor should only be available to married couples (p.33), and
* the doctors should lecture young girls on the dangers of oral contraception and pregnancy and warn them that if sexual intercourse occurs, their male friends would be committing a criminal offence (p.55).

Indeed, on this last point, the authors seem rather more cautious than was Mr Justice Woolf in the recent case of Gillick v West Norfolk Health Authority(unreported, Times, 20 July 1983, 3). In that case the English High Court refused Mrs Gillick, a mother of ten, a declaration forbidding the health authorities from giving her daughters contraceptive advice without her consent. Certainly, the tone of the discussion by Mason and McCall-Smith is a long way distant from the strong statements of the United States Supreme Court in Carey v Population Services International 431 US 678 (1977). That case explicitly recognised the medical privacy rights of young people and on that ground overruled a New York statute prohibiting the sale or distribution of contraceptives to young persons. Interestingly enough, the only case on this point cited by the authors was Casey v. Grossman. It is described as a decision of the 'Supreme Court of Australia' (sic) reported in (1949) 51 WALR 77.

In that case the court took the view that the sale of contraceptives to a child did not establish a causal connection with the 'actual pursuit of a career of vice'.

It should not be concluded from the sample offered above that Mason and McCall-Smith are irretrievably conservative on matters of medical morality:

* On the subject of surrogate motherhood, for example, they propose enabling legislation that would permit the procedure, though under restricted circumstances which they seek to identify. In this regard, they adopt a more relaxed position than the English Law Society which recently urged that the procedure should be made totally illegal in all circumstances.

* Likewise, on the subject of neonaticide, the authors offer the view that there 'are some infants who ought not to live' (p.88). They suggest both a procedure for determination of the decision and certain criteria ('further life would be intolerable by virtue of pain and suffering or because of severe cerebral incompetence and the underlying condition is not amenable to reasonable medical or surgical treatment').

Just to state these difficult problems and the responses of Mason and McCall-Smith is to indicate how difficult are the decision that lie ahead for lawyers as the new medical and biotechnological procedures are disclosed to the gaze of lawyers and courts.

Both books are well produced. Each has a thoroughly detailed index. Save for the reference to the 'Supreme Court of Australia' -- a permissible mistake for every other country has a Supreme Court — I found no other egregious errors about Australian law in the Mason and McCall-Smith book. Dr Plueckhahn's effort is a useful handbook for the criminal lawyer and judge, coroners, medical witnesses and especially forensic pathologists. It is specifically an Australian text, though its gruesome descriptions of death and injury are universal to man's cruelty. The discusson in both books of the frontiers of bioethics is also universal.

Some lawyers regard these as 'soft' issues. They think the lawyers' realm is limited to land titles, wills, partnerships and trusts. It is not so. A casual glance at the Law Reports from England, Canada and the United States will show the increasing number of problems of a bioethical character facing the courts. Judges in the midst of a busy list are asked to determine whether babies should die, whether trans-sexuals are 'men' or 'women', whether contraceptive advice can be forbidden to minors and so on.

Even in Australia we recently saw a claim of a Queensland father to prevent an abortion running through the courts to the High Court of Australia in the space of little more than a week.

Lawyers must be ready to provide answers, however imperfect they may be, to these puzzling dilemmas of morality and law. Neither Dr Plueckhahn's book nor the text by Mason and McCall-Smith will offer the answers. But each of them will be useful to provide us with first bearings.

M D Kirby

J K Mason and R A McCall-Smith, Law and Medical Ethics, London, Butterworths, 1983, hard cover $42.00; soft cover $27.50

V D Plueckhahn, Ethics, Legal Medicine and Forensic Pathology, Melbourne University Press, Melbourne, 1983, $39.50