BOOK LAUNCH

"MISHAP OR MALPRACTICE?" by Clifford Hawkins.

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"A DEFENCE OF MEDICAL NEGLIGENCE CASES"

SUMMARY OF SPEECH BY JUSTICE KIRBY

EMBARGO: MONDAY, 18 NOVEMBER, 1985 6.00 P.M.

SUBJECT: MEDICAL NEGLIGENCE CASES DEFENDED BY JUDGE
MEDICAL DEFENCE UNION PRAISED
"PATIENT DEFENCE UNION" MAY BE NEEDED, SAYS KIRBY

SYDNEY, MONDAY

Malpractice suits against doctors and dentists in Australia were defended today by Justice Michael Kirby. The former Chairman of the Australian Law Reform Commission was launching a book "Mishap or Malpractice" by Clifford Hawkins, published to celebrate the centenary of the Medical Defence Union. The Medical Defence Union, established in England, pro ides advice and representation to doctors sued in their professional capacity. It was established in London and has branches in many countries, including Australia.

Justice Kirby said that the book illustrated the:

* Mistakes which can occur in treatment of patients by doctors and dentists.
* The attitudes of doctors to lawyers and vice versa.
* The changes in medical practice reflecting growing insistence on the full consent of the patient.
* The new difficulties posed to confidentiality by computerisation of medical records and
* The "growth industry" in medical malpractice litigation in the United States and the fear this had generated of a spread to other countries, including Britain and Australia.

EXPLOSION IN MALPRACTICE

Justice Kirby said that the increase in medical practice suits in the United States was the result of a number of changes in the relationship between doctors and patients in the past twenty years. He instanced:-

* The decline in unquestioning faith accorded to doctors by earlier generations.
* The growing dependence of doctors and dentists on technology, with the risk that it would break down or become out of date or be incompetently applied.
* The growth of the legal profession in the United States.
* The "contigency fee" which permitted lawyers to provide a "free enterprise" legal assistance. If the lawyer judged the case as likely to succeed, he would take the risk of recovering no fees and bring the action on a speculative basis.

Justice Kirby said that in Australia, although there was likely to be an increase in medical malpractice litigation, it was unlikely to approach the size of the "malpractice industry" in the United States. He said that this was because of:-

* Differing community attitudes to the medical profession and the likelihood that doctors still enjoy a higher respect in Australia than in the United States.
* The different cost rules which exist in Australia, forbidding pure contigency fees and requiring that unsuccessful patients have to pay the costs of the doctor they sue.

* Different legal rules, relating to the shifting of the onus of proof from the patient to the doctor. Justice Kirby said that under the so called "res ipsa loquitur" rule in the United States, and even in England, the onus shifted to the doctor to prove that he was not negligent when the patient showed that something had occurred which would not normally occur in the ordinary experience of mankind. Justice Kirby said that the High Court of Austra ia ad made it plain in a series of cases that, in this country, the onus of proof did not shift, even if foreign bodies where left inside a patient after an operation. In Australia the onus was always up n the patient.

* The difficulty of securing medical evidence against colleagues was also a major consideration in the proof of malpractice cases in Australia. In the United States, in response to demand a market of "out of town experts" had developed to overcome the "brotherhood syndrome" which tended to exist in any profession.

MALPRACTICE SUITS DEFENDED

Justice Kirby said that he could understand the concerns of the medical profession and the Medical Defence Union about the trends of medical malpractice in the United States. He said that particular attention was directed at:-

* The "staggering" increase in medical insurance.

* The growth of "defensive medicine" in order to avoid the risk of litigation.

* The refusal of some doctors to engage in high risk practice because of the costs of premiums.

* The diversion in professional time away from treating to defending malpractice suits.

* The inefficiency of litigation to improve general medical standards, which can be better achieved by peer review and self scrutiny within the medical profession.

Justice Kirby said that the book "Mishap or Malpractice" dem nstrated the dangers of "embracing unreservedly" the American developments. However, he said that there was a place for medical malpractice actions and many doctors did not fully understand this.

"The civil law of negligence does not exist simply to punish people, let alone to stigmatise them in the community. It exists to provide recompense to the victim, when things go wrong. By awards of money, it seeks to spread the risks that inevitably occur and to do this through the medium of insurance. In this way too, it hopes to encourage (for fear of a successful negligence action) obvervance of minimum standards of care and attention. This book, with its vivid photograph of the collection of odds and ends left inside surgical patients shows (if proof were needed) that mistakes do happen. The miscellaneous array of instruments and other objects left in patients by surgeons, disclosed in this book is truly remarkable. It rivals the objects left in the Sydney Opera House which, a recent report suggested included a pair of false teeth and two pork chops! In any human endeavour, even one of high dedication,

mistakes are inevitable. The problem is then posed: who is to bear the burden of those mistakes? Is it to be borne by the hapless patient, who is generally entirely innocent? Is it to be borne from the public purse through social security payments? Or is to be borne by all patients who contribute a small part of their consultation fee, through a system of insurance, against the risk that they might have been the victim and that their families and dependents might suffer financial loss. If doctors could only look onmalpractice as lawyers do, it would seem less unattractive. To the doctor, it is a public denunciation of his professional efforts. To the lawyer, it is generally nothing more than a means of spreading the risk and ensuring that people who suffer get adequate compensation.

In the United States, contingency fees have encouraged the bringing of meritless actions which would not get off the ground in Australia. Punitive damages laws have promoted enormous verdicts that are not compensatory and therefore unlikely to be followed in this country. But when an operation goes wrong and a person and his family suffers, our law exists to permit the ventilation of the claim for negligence. If it is seen as a means of spreading the risk amongst all patients lest, by the Grace of God they might have been the victim of momentary carelessness, the malpractice ogre becomes a perfectly useful instrument of loss distribution", Justice Kirby said.

NO FAULT LIABILITY

Justice Kirby said that one of the most interesting sections of the book was the review of no fault compensation in New Zealand. He agreed that many sophisticated, modern medical

techniques were ill suited to litigation in the court room. The cost intensive nature of court procedures and the chance factors in litigation made other means of improving medical practice more cost effective. However, he pointed out that still left the problem of compensating the victim as well as preventing similar mistakes in the future.

"The Medical Defence Union has been a marvellous guardian of the medical profession in Australia. It is known as a doughty fighter in the courts. Its loyalty to doctors who have done their best is admirable. But perhaps we also need a patients' defence union. Otherwise, the litigious battle may not be an equal one. The suburban patient who seeks to sue his doctor fights an uphill battle, not only against the Medical Defence Union and the lawyers of high quality it secures for the doctor. But also against the resistance of fellow doctors to come forward and give evidence against a colleague of proper procedures and of careful practices. In Australia, the practice is now developing of calling medical witnesses from interstate or even overseas. I suspect that we will see more cases of medical malpractice in Australia. The legal profession, fearful of the loss of the conveyancing monoply and motor car cases may turn to medical malpractice as an untilled field. This is a development to be watched. Lawyers and doctors will do well to read this book, full of warnings and good advice. In a week of heroic book launches, it deserves attention because it looks to the future, not the past.

NOTE ON BOOK LAUNCH

The above launch will be delivered at the Hilton Hotel, Sydney on Monday, 18 November, 1985 a about 6.00 p.m. The launch will take place in the Sydney Cove Room between 5.30 p.m. and 7.30 p.m. The launch coincides with the Centenary of the Medical Defence Union. For contact with that Union or questions concerning the book telephone John R. Vallentine, Medical Defe..ce Union (02) 267 3259. The book Clifford Hawkins, "Mishap or Malpractice?" is pub ished for the Medical Defence Union, London by Blackwell Scientific Publications.