

COMMONWEALTH LAW BULLETIN

BOOK REVIEW

INTERNATIONAL MEDICAL MALPRACTICE LAW

A COMPARATIVE STUDY OF CIVIL LIABILITY ARISING FROM

MEDICAL CARE

BY DIETER GIESEN

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A COMPARATIVE STUDY OF CIVIL LIABILITY ARISING FROM  
MEDICAL CARE, BY DIETER GIESEN

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This is an outstanding work of comparative law. Maitland once urged the study of foreign law "for the sake of English law". He suggested that, "only by comparison of our law with her sisters will some of the most remarkable traits of the former be adequately understood". And as Andre Tunc, a noted expert in the comparison of the English and French legal systems has observed, encounters between legal civilisations have often brought about revivals of legal culture, stimulating the local law by knowledge of the response to common problems offered elsewhere.

In Australia we have a particular reason for a revival of interest in comparative law. The termination of appeals to the Privy Council has severed our last formal links with the English legal system, which for nearly 200 years provided authority, inspiration and stimulus to Australian law. A glance at the case books of the Australian courts will show the profound and enduring influence of English legal

decisions.

In part, this is a product of law libraries to which practitioners are largely captives. But this will change over time. The change is already appearing. Formally, English law is now only one source of comparative law stimulus. See eg Cook v Cook (1986) 162 CLR 376, 390. There is an increasing willingness of Australian judges to look to Canadian, New Zealand and United States authority.

Professor Giesen, in the field of medical negligence takes the reader even further afield. He has correspondents also in Ireland, Scotland and Southern Africa. And as befits a law professor in West Berlin, he has direct access to statutes and court decisions in the Federal Republic of Germany, Austria, Switzerland and also France and Belgium. The range of his material is truly astonishing. The accuracy and precision of his reference to Australian authority seems quite remarkable until it is noted in the preface that he acknowledges correspondents amongst the leading Australian academic writers in this field. One of his United States colleagues is Professor John Fleming, whose textbook on the law of torts, in daily use in the courts in Australia and now in its 7th edition, is itself an important monument to the special utility of comparative law in the field of civil wrongs.

Such wrongs are such a universal feature of life in a modern society that it is inevitable that like problems are occurring all the time, calling on lawyers in a multitude of

jurisdictions to offer legal principles by which the problems can be solved. In the past, Australian lawyers, in the absence of binding local authority, would look to English cases - and their trends - to offer advice or decisions upon the liability of medical practitioners and other health workers in the case of suggested negligence. In the future, the universal nature of the problem, stimulated by high technology and common predicaments, will send the lawyer searching for guidance in a wider field. This is where Giesen's exemplary book will prove most useful. If it opens the eyes of Australian lawyers and judges to the particular utility of comparative law, beyond the English comparisons, that will be a contribution to our legal system which goes beyond the special field of which Giesen has written. It is in that sense that this substantial and scholarly work has an importance far beyond medical malpractice. Releasing Australian judges and lawyers from capture by English comparative law - long after the formal links have been severed - will remain a major intellectual obligation of judges and law teachers in the years ahead. Because of the provision of easy access to an enormous range of readily available comparative law material in the chosen field, Giesen pioneers an endeavour specially relevant for the somewhat isolated and conservative Australian legal tradition and apt for the world of computers, instantaneous telecommunications and rapid global travel.

The book is the second release of an earlier edition

which appeared in 1981. It has, however, been substantially rewritten, with a huge additional component of case law. It records decisions relevant to medical negligence in the jurisdictions chosen up to early 1988. The first edition was written partly in English and partly in Giesen's native German. The 1988 edition drops the German text. The author explains this on the basis that a comparative law text, which reaches to the widest audience of lawyers, must now necessarily be in English. This is an ironic development at a time of German resurgence and when EEC documentation is now increasingly to be translated also into German. But Anglophones, especially in Australia, will not be complaining. The text is entirely clear with very few artificialities of expression, doubtless because of Professor Giesen's extensive experience working in universities in England, Canada and the United States.

The German intellectual tradition is evidenced in the outstandingly detailed tables which accompany the text, the numerous appendices of basic international and local codes of ethics, statutes, cases, persons and authors and the exceptionally detailed subject index. The latter permits ready access by the user to the vast range of material in the text which in turn is supplemented by copious footnotes. All of the Australian cases footnoted to which I have made access are accurately referred to and cited and pertinent to the text. A minor point of criticism is the use by the author of citation of nonauthorised reports (eg All ER instead of AC).

Numerous helpful law review articles are also referred to, as befits an author who cautions against slipping into the common law habit of thought uncritical of the judicial pronouncements of the higher judiciary. Perhaps it is his civil law background that emboldened Giesen to express the opinion that "arguments rather than names ... count and it should be kept in mind ... that court decisions which are paraded as the law today are in fact sometimes little more than a 'thin cloak for arbitrariness which leaves too much to the dogmatic say-so of ... leading judges'". In a sense, it is the comparative law analysis of problems that can help to display arbitrary or wrong turnings of the common law in a clearer light. Trends in the law become more clear when the focus of the camera shifts from a strictly Australian or Australian and English perspective to one of a wider field.

It may be that this presents at once the weakness and the strength of Giesen's text. From the point of view of the local practitioner its weakness may be in its provision of not quite sufficient detail in analysis of the law of the jurisdiction of that practitioner. In Federal countries, the nuances of difference from State to State, though reflected in this text, can scarcely attract comprehensive attention. Yet that, inescapably, is the duty of local lawyers and courts working within their own legal hierarchies. Neither in the United States, Canada, Australia or other like Federations is there a single medical law. Local statutes at least will sometimes affect the liabilities and duties of

practitioners. Broad approaches must submit to the necessity of careful study of the local law.

Furthermore, legal scholars might find the mass of detail of references to legal decisions an insufficient substitute to a conceptual analytical examination of the issues of liability at stake. This is always the problem of a comparative law textbook, at least in compilations based on the decisions of common law countries where the tradition is pragmatic and problem-solving rather than theoretical and conceptual.

This said, the book is an absolutely outstanding companion for judges and advocates who regularly face questions about professional negligence which test the borderlines of liability. It is also of great use to health policy makers in the design of health legislation and regulations which take into account modern legal trends. It is in this context that a knowledge of the trends and decisions of other jurisdictions is especially useful.

The book is divided into three parts. Part I deals with the general liability of medical practitioners. Part II deals with civil liability with respect to new methods of treatment and experiments. Part III covers conflicting values in law and medical ethics.

Part I comprises nearly 80% of the text. It deals with the historical origins of causes of action against medical practitioners. It analyses the original contractual bases of the medical practitioner's duty to take care of his patient.

It traces the development of the liability by the tort of negligence. It points to the frequent irrelevance of contract law to the relationship of a patient and his health carers under, eg, a system such as the English National Health Service. It then examines the development of the principle of vicarious liability, especially in relation to the negligent acts of members of the staff of a modern hospital. There is an extremely perceptive discussion of the liability of hospitals for the negligence of skilled medical staff. The authority traces the historical movement from the principle that hospitals were not liable for negligence involving the use of professional skills (Hillyer v St Bartholomew's Hospital [1909] 2 KB 820 (CA)) to the erosion of that view in Canada in 1938, in Australian in 1939 (Henson v Perth Hospital (1939) 41 WALR 15) and in England in 1942. Gold v Essex CC [1942] 2 KB 293. The further move from vicarious to direct liability of hospitals reflected in Albrighton v Royal Prince Alfred Hospital [1980] 2 NSWLR 542 (NSWCA) is examined in numerous jurisdictions both of the civil and the common law. The author refers with obvious approval to the line of liability opened up by Kondis v State Transport Authority (1984) 154 CLR 672. Not content with the reference to authority alone, he points to the highly integrated and mutually dependent nature of the modern hospital team as relevant to the duty which the hospital owes to a patient independently of the health professionals working within the hospital. This was an issue explored in



the recent decision in Ellis v Wallsend District Hospital (1989) Aust Torts Reporter 80-289 (NSWCA) in which Giesen's book was referred to. The High Court refused special leave to appeal from that decision leaving Australian authority in much the same state as that of Canada on this question. See Yepreman v Scarborough General Hospital (1980) 10 DLR (3d) 513 (Ont CA). The detailed discussion in the book of a controversial issue, recently raised for decision in the Australian courts illustrates the practical utility of this book.

There is then the substantial review of the cases dealing with medical liability. This the author divides into what he terms "treatment malpractice", "disclosure malpractice", "substandard patient-physician communication", and "health care decisions" for minors and incompetent persons. Part I closes with a discussion of various statutory attempts at no fault loss distribution. There is a review of the New Zealand compensation scheme (whose parallel almost came to pass in Australia in 1975); of the Swedish patient insurance scheme and the drug injury compensation scheme of the Federal Republic of Germany.

Part II deals with the application of the general principles to new and experimental areas of treatment. These include the use of newly developed drugs, participation in clinical trials, organ and tissue transplants and the burgeoning field of artificial reproduction. The up-to-dateness of the book can be judged by the fact that it

includes discussion of the decision of the New Jersey State Supreme Court in the United States in the Baby M case on surrogacy - a court decision which gained internationally much popular coverage.

Finally, Part III deals with the frequent conflict that arises between law and medical ethics. This is a short section in which the author attempts to interpret the perspective of each discipline for the other. The fundamental problem is that medical professionals tend to be concerned to avoid the malpractice "explosion" of the United States, with its consequences for defensive treatment, high insurance premiums and thus increased medical costs. Lawyers, on the other hand, tend to be concerned about loss distribution in the cases of inevitable mistakes and defaults that accompany human activity - even that of highly skilled professionals.

The collection of various codes of medical ethics (including the Australian Medical Association's Code of Ethics (1984)(Appendix VIII)) and excellent and detailed case and author lists and a splendid general index add to the value of the text.

The work is opened with a graceful foreword written by Lord Kilbrandon, who died soon after the text was published. He reminds readers of the observations of "an elderly Scottish judge" in Farguhar v Murray (1901) 3 F 859, 862 who said:

"This action is certainly one of particularly unusual character. It is an action of damages

by a patient against a medical man. In my somewhat long experience I cannot remember having seen a similar case before."

The massive text of Giesen, with its references to numerous jurisdictions - including those of Australia - show what a long way we have come this century. But more importantly, the text also suggests the directions of the way ahead.