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BOOK REVIEW

MEDICAL LAW: TEXT AND MATERIALS

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MEDICAL LAW : TEXT AND MATERIALS, Ian Kennedy and Andrew Grubb. Page i-xxvi, Table of Statutes, xxvii-xxxii, List of Cases xxxiii-xliiii, 1-1210A. Index 1211-1224. Butterworth & Co (Publishers) Limited, 1989, London. Price Limp \$81 (Cloth unavailable).

Ian Kennedy first leapt to international attention when he gave the 1980 Reith Lectures for the BBC. These were subsequently published as the Unmasking of Medicine, George Allen & Unwin, London, 1981. Kennedy is now Professor of Medical Law and Ethics at Kings College, London. His co-author in this new book is Andrew Grubb, Director of Studies in Law at Fitzwilliam College, Cambridge. The authors' preface records that the book was put together after many weekly journeys "up and down M11 usually in the rain and often in the fog". The distance between their respective academic bases is given as the reason why they took so long to finish the book. The period over which it is written is not disclosed. But it contains material to December 1988.

Inevitably, the focus of the book is the law of England, where the authors teach. This is shown by the substantial body of local legislation which is referred to in the text. It is also shown by occasional questions at the end of sections of text and materials such as "what view would an English court prefer?". (See eg p 888). This is

not to say that the book is of relevance only to English readers. There is a very large amount of material from other jurisdictions, especially Canada and the United States. There are occasional references to Australian case law, law reform reports and other materials, although these are substantially in the minor key.

Kennedy's interest in American law stems from his leading role as a writer and broadcaster in England on bioethical concerns. Inevitably in the litigious society of the United States, many of the problems which are later to present in England (and Australia) show themselves first in the United States. So it is with cases involving the selective treatment of neonates, the refusal to treat incompetent dying persons, surrogate birth and other forms of abnormal conception. Professor Grubb has had visiting appointments at a number of universities in the United States. Doubtless this reinforces the interest of the authors in the enormous amount of material coming from the courts and law schools of that country on the subjects of their concern.

The Canadian courts have also been extremely active and interesting in the fields of medical law. Thus the decision of the Supreme Court of Canada in Reibl v Hughes (1980) 114 DLR (3d) 1 (on informed consent) and in Re Eve (1986) 115 DLR (3d) 283 (sterilisation of a mentally retarded girl) come in for detailed treatment. There are also numerous citations from the Canadian provincial Courts of Appeal. Reference to

Australian and other common law authority is less frequent. Albrighton v Royal Prince Alfred Hospital and Others [1980] 2 NSWLR 542 (NSWCA) and Kondis v State Transport Authority (1984) 154 CLR 672 are referred to in relation to the direct liability of a hospital to a patient for the negligence of professional staff. So is the decision of the Supreme Court of South Australia in F v R (1983) 33 SASR 189. But it is perhaps a mark of the state of medical law in Australia at least - or our reputation for uninteresting or unadventurous decisions - that there are relatively few Australian and other cases referred to. Perhaps it is just that Australians and other jurisdictions of the common law have lessons to learn from United States (and Canada) in promoting knowledge of their legal decisions.

The attribute of a legal culture bound formally to another (as Australia's was to England before the final abolition of Privy Council appeals) may be a derivative system with little original thinking to write about. Freed of the umbilical cord to England, it is possible that Australian (and other Commonwealth) jurisprudence will in the future figure more prominently in texts and materials on medical law in books such as that of Kennedy and Grubb.

As an inducement to interest in the subject matter, the authors begin the book with an analysis of the decision of the House of Lords (and the preceding decisions) in Gillick v West Norfolk and Wispech Area Health Authority [1986] AC 112 (HL). Mildly irritating is the citation of the All ER

references here and elsewhere; but this may be a publisher's requirement. Gillick, it will be remembered, is the case involving a mother who sought assurance that contraceptive or abortion advice would not be given to any of her daughters without her prior knowledge and consent. Woolf J refused to make the declaration. He was reversed unanimously by the English Court of Appeal. The House of Lords, in a narrow majority, restored Woolf J's order. The case provides a good case study for issues of advice and consent to medical treatment, confidentiality of medical treatment and medical law and ethics generally. The authors take the differing judicial opinions apart. They pose questions by reference to copious citations from the judgments and speeches delivered.

The book then examines the parties to the medical relationship, with particular reference to the English legislation and the National Health Service of that country. It sketches the legal framework in which the practitioner/patient relationship develops including the criminal law of assault, battery, maim and homicide and the civil law of contract, tort (especially negligence) and breach of confidence.

There then follows a general section on medical law. This includes examination of the law of consent which lies at the heart of lawful medical treatment in the common law legal system. The authors do not avoid examining the basic problem here. This is that it is difficult, if not impossible, for a highly skilled medical practitioner to convey to a troubled

dependent lay person in economical but accurate terms all of the considerations which, necessarily, the practitioner takes into account in evaluating the advisability of a medical procedure. Not perhaps sufficiently touched upon is the problem of language and communication in conveying that wealth of experience in language which patients - in their infinite variety - will understand. Lawyers and other professionals face similar, though frequently less urgent and desperate, difficulties.

There is then a lengthy section on medical malpractice with an examination of the case law, especially on medical negligence. This involves consideration of the cases on the duty of care, the standard of care, proof of negligence, proof of causation; and the defences open to the practitioner. An interesting item in this section is a comparison of so-called defensive medicine in North America (on the one hand) and England and Europe (on the other). The level of caesarean section at childbirth is markedly higher in the former being of the order of 18% in the United States but only 3% in The Netherlands. Perhaps as an indication of the growth of malpractice litigation in the United Kingdom, the figures have crept up in that country over a decade from 2 per 100,000 to 6. There could, of course, be other explanations.

In this section the authors also review material on systems of accountability outside tort, eg by the law of professional misconduct and registration. There then follows

a section on medical records and the legal duty of confidence.

In the third part of the work, involving the balance of the book, the materials collected relate to what the authors call "medical law in action". Chronologically this begins with the law relating to contraception, facilitating conception, abortion, prenatal injury and actions for wrongful life and wrongful birth. There then follow materials on research on human subjects, the selective treatment of neonates, donation and transplantation of human tissues and fluids. Finally the materials deal with treatment of the dying and the definition of death.

Many of these topics are the subject of law reform and other reports, as well as speculative writing in law review articles. A special service of this book is to collect a number of legal decisions of courts in various jurisdictions which have already had to cope with issues arising in the painful and contentious areas that are reviewed. Thus there is a detailed extract from the judgment of Barkett J in Rasmussen v South Florida Blood Service 500 So 2d 533 (1987) (Supreme Court of Florida) in which a plaintiff who allegedly acquired AIDS from blood transfusion was unsuccessful in an attempt to secure access to the records of the blood service to identify the volunteer blood donors who had been the source of the virus. The court held that the privacy interests of the volunteer blood donors in the event outweighed the interest of the plaintiff in securing access

to the records. It is interesting to note that a similar conclusion was reached in Australia necessarily before the Florida decision by Master Allen (as Allen J was) in Loker v St Vincent's Hospital (Darlinghurst) & Anor, unreported, 11 October 1985.

Another value of a book such as the present is that it gives an insight into comparative law treatment of problems which necessarily are very similar despite differences of legal jurisdiction. The human body, the human predicament and scientific developments in Australia being very similar to those faced in the United Kingdom and the United States, make the materials collected here of pertinence to Australia and other like developed countries. There is a limit to the extent of the use and citation of material from the various jurisdictions. In essence, I take the materials collected in this book to be the product of the reading of the two authors. And that is very wide indeed. But it may be hoped that in future editions in this burgeoning field of legal endeavour, there will be a wider range of case and other texts from other countries, including those of Europe and smaller jurisdictions of the common law.

There are various criticisms that could be mentioned of the work. I pass over typographical mistakes. The authors are aware of these. In such a large and diverse publication some are probably inescapable. Despite the mention of Rasmussen, the number and variety of materials on the new problem of AIDS is rather limited. Whole books are now being

written on the topic of AIDS and the law. It may be expected that in future editions the numerous sensitive problems presented to the law by the human immuno deficiency virus will attract much more reference. Reference, even in footnote form, to statutes of other jurisdictions equivalent to those of England which are dealt at length with would also be helpful. It would give the book a more a universal appeal. Finally, some thought could be given to the better presentation of extracted material. It is important to realise that the book is not an analytical text of the authors' opinions. Nor is it a conceptual analysis by them of the vast range of material which they extract and present. Rather, it is, as it describes itself, a book of texts and materials with copious citations from judgments, review articles, law reform reports and other texts. In this sense it is a teaching aid. It is likely to be of use not only in law schools and medical facilities but also in schools of public health and doubtless nursing and other disciplines. Sometimes, I found it confusing to find precisely the end of the quoted text and the beginning of the authors' linking commentary. Presentational means could be considered in this and like books to reduce this confusion. In particular, the citation of copious footnotes in the middle of the text at the end of a large section of quoted material could, with a little attention, be better presented in a more attractive way.

But these are carping comments in what is an impressive

compilation of material on a highly relevant and interesting pertinent group of subjects. The index is very detailed and quite analytical. This will make access to the diverse range of materials collected in the book relatively simple. As well, the presentation of the text headings is logical. The growing number of legal practitioners working in the field of malpractice and medical law generally can use the book with the knowledge that it is a form of encyclopaedia - not universal, but full of very useful material chosen by highly perceptive editors. Even allowing for the biases already mentioned, it should prove a useful text for university and college courses. And just for random reading, the range of subjects dealt with, their complexity and controversy make the work interesting, at least to this reviewer. Before long it will be necessary to update the collection, such is the pace of change in this area. It can be expected that the authors will then address some of the defects in this edition which I have mentioned.

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