

SS LEGAL MEDICINE & FORENSIC PATHOLOGY

2ND EDITION

BY V D PLEUCKHAHN & S M CORDNER

FOREWORD

ETHICS, LEGAL MEDICINE & FORENSIC PATHOLOGY
(2nd edition)

By V D Pleuckhahn & S M Cordner

FOREWORD

The Hon Justice Michael Kirby AC CMG*

Since the first edition of this book was published, community awareness of the limitations of legal medicine and of forensic pathology has heightened.

In Australia, the concern about the conviction of Mrs Lindy Chamberlain was not abated by the rejection of appeals to the Full Federal Court and the High Court of Australia. Ultimately, a Royal Commission was established under Justice T R Morling of the Federal Court. The report of that Commission¹ is a model of careful analysis of evidence and critical examination of the material upon which Mrs Chamberlain was convicted. Following the report of the Royal Commissioner, and the opinions expressed in it by Justice Morling, Mrs Chamberlain's conviction was set aside. But her sense of grievance remains. It has given rise to many books, tons of newsprint, endless television programmes and even an internationally distributed film with Meryl Streep, no less, in the starring rôle.

The Chamberlain case, and other leading cases reviewed

In this book illustrate the mistakes which can occur in the opinions given by experts at the edge of, or beyond, their field of expertise. They also illustrate how opinions can be undermined, however expert the witness is, if they are based upon false assumptions, incomplete facts or inadequate scientific analysis. Opinions which are based upon the results of scientific tests which are themselves at an experimental stage of development only will be no more reliable than those tests themselves prove to be.

Sadly, there is all too often a lack of communication between the expert and the tribunal of society which acts upon the expert evidence. In part, this lack of communication is the inevitable result of a clash of cultures. Expertise in medicine and surgery, and particularly in forensic pathology, will call upon years of study, experimentation and reading at the cutting edge of developments in science and technology. The law and its institutions serve the community to punish crimes, redress wrongs and generally to order society in a peaceful and just fashion. Lawyers making up most of the tribunals of society, and appearing before them, are generally anxious to secure a just result to the problem in hand; but to do so as quickly and efficiently as possible. In the wings lie many other cases awaiting determination. Generally there is little time to tarry. Lawyers often seek a yes or no answer where, if the truth is known, such certainties cannot be offered. Because it is not possible for the legal mind to enter instantaneously all of the subtleties of the mind of the forensic expert, there is an inevitable risk of error and

understanding. This can lead to injustice.

This risk of injustice is aggravated in the often confusing circumstances of trials where quick decisions must be made and where there is no time for exquisite exploration of each and every interesting byway. But the risks of injustice, though high with the decisions of lawyers, may increase still more where a lay jury decides the case. Despite its distinguished historical record and its general ability in defending our liberties, the jury faces a special problem when confronted with the expert forensic witness. More than the lawyer, the jury will tend to have a deep respect for the education and training of the expert. It may be even less inclined to question the expert opinion or to exhibit scepticism about the premises upon which that opinion is based.

We should not think that these are dangers only of the Australian legal scene. The Birmingham Six went through the whole majestic processes of the English criminal law. From the trial they went to the Court of Appeal. The challenges to the safety of their conviction (based largely on expert evidence) were repeatedly rejected. It was only the persistence of the six, a group of supporters and their lawyers which kept the battle going. Eventually, the case was referred back to the Court of Criminal Appeal. In March 1991 the convictions were set aside. The six were set free, uttering words of bitterness. The British Government announced a Royal Commission into criminal justice.

Miscarriages of justice, such as apparently happened in the cases of the Birmingham Six and the Mrs Chamberlain

and community and professional attention to some of the subjects of this book. Its special utility is to be found in the way in which it seeks to bridge the two cultures: linking the minds of medical practitioners and pathologists (on the one hand) and lawyers (on the other). I had the privilege of reviewing the first edition.² I am glad now to welcome the second.

The first edition was largely the collection of notes used by Professor Plueckhahn for his lectures on forensic medicine to medical students at the University of Melbourne. The new edition has been substantially rewritten with the active participation of Professor Cordner. As well, entirely new chapters have been added, many of them upon subjects which reflect significant advances in technology since the earlier edition was published in 1983. An entirely new chapter on the noxious land and marine animals of Australia (chapter 25) reminds us of the perils that await us amidst the beauties of the Australian bushlands and in the welcoming embrace of the harbours and seas which wash against our continental country. Ours may be indeed a land "girt by sea", to use the quaint language of our National Anthem. But in that sea lurk monsters dangerous to humanity. Yet we should not get carried away with this. For in another chapter on asphyxia (chapter 18) we are reminded that Bacchus has claimed more drownings than ever Neptune did.

One of the welcome features of this book is the way in which the authors have dealt with the never-ending variety of issues presented for legal and ethical judgments by advances in biotechnology. There is an interesting interaction

between the early chapters written at a high level upon grand topics and the later chapters with their hardnosed and highly practical words about an anatomical dissection and other means of detecting the ravages of death and injury caused by one human being to another.

An important feature of the earlier edition is still found in this. It is the distinctive Australian-ness of the approach of the authors. Whilst properly saluting, where necessary, developments in the United Kingdom and the United States, they find plenty to describe and analyse in the topics of their attention in Australia.³ Of course, this presents them with a particular difficulty, for there is no single Australian law on the topics of forensic science. Almost without exception, the statute law applicable varies among the States and Territories of Australia. The principles may not change much among the jurisdictions. In some areas of legislation (eg human tissue transplantation) substantial uniformity has been achieved, relying on a report of the Law Reform Commission. The common law remains largely uniform across Australia.⁴ But the differences in statute law make it essential to attend closely to the applicable legislation of each jurisdiction. Inevitably, in a general text it is not possible to cover every statutory provision. These are changing all the time, and sometimes rapidly.

Evidence of that rapid change can be found in new statutory provisions dealing with problems which were unknown, or did not loom large, when the first edition was published. One of these is the acquired immuno-deficiency syndrome (AIDS) caused by the human immuno-deficiency virus

(HIV). Legislation on AIDS and the cases arising from the spread of the virus are noted in several places throughout the book.⁵ In the face of this medical disaster, with important forensic consequences, we must be humbled. Who knows what problems await us and, which will need to be dealt with in the third edition?

I am sure that this work will be a useful manual for teachers and a handy text for legal and medical practitioners and police. It comes at a time when, both in Australia and Britain, the task of the forensic scientist is under the closest public scrutiny. If we can inculcate in scientific witnesses a breadth of knowledge, a depth of understanding, a high sensitivity to good ethics and a modest dedication to truthfulness and honesty, we will ensure that the forensic expert survives public scrutiny. Because this book furthers those objectives, I warmly welcome it.

MICHAEL KIRBY

FOOTNOTES

* President of the New South Wales Court of Appeal; Commissioner of the World Health Organisation Global Commission on AIDS; past-President of the Australian Academy of Forensic Sciences.

1. *Royal Commission of Inquiry into the Chamberlain Convictions.* Report of the Commissioner, the Hon Mr Justice T R Morling, AGPS, Canberra, 1987.

2. (1983) 57 *Aust Law J* 653.
3. J K Mason, Book Review (1985) 25 *J Forensic Sci Soc*
(UK) 86.
4. See Ellis v Wallsend District Hospital (1989) 17 NSWLR
553 (CA).
5. See eg Ferguson v Central Sydney Health Service & Anor
(1990) EOC 909-272; H v The Royal Alexandra Hospital
for Children & Ors (1990) Aust Torts Reps 81-000.