BOOK REVIEW

Kevin Nicholson*

INTERNATIONAL MEDICAL MALPRACTICE LAW by Dieter Giesen (JCB Mohr (Paul Siebeck) Tübingen and Martinus Nijhoff, Dordrecht, Boston, London, 1988) I-LVI, 1-724, 725-755 (Appendices) and 756-923 (Indices)

Professor Giesen commences the preface of this prodigious[1] work with the following statement of intention:

> This book is intended equally for lawyers, members of the health care professions, and health care administrators. Focussing on the problems of civil liability, it presents, within a context of comparative law, the development, points of contact and differences in the modern law of medical and hospital liability of selected countries of both the Common Law and the Civil Law traditions...

It is a serious understatement of Professor Giesen's magnificent achievement.

There are well known hazards associated with that area of the discipline known as Comparative Law. There is always the risk that an exponent of it simply will get the law of the less familiar jurisdictions wrong! It is exceedingly difficult to be systematic and, of course, the charge most commonly levelled is that of superficiality. Indeed, as that great comparative law scholar, FH Lawson, once observed:[2]

> For, however one tries to explain it away, the word 'comparative' suggests universality, and nowadays to be universal means to be superficial. Now, in a sense, a comparative lawyer is bound to be superficial: he would soon lose himself in the sands of scholarship. It is hard enough to comprehend even the master subjects of a single modern

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1 This qualifier is commonly seen and as such, unfortunately, has a trite air about it. I use it here in all of the senses recorded in *The Concise Oxford Dictionary of Current English* (1982 p81) 'marvellous, amazing; enormous; abnormal'.

2 'The Field of Comparative Law' (1949) LXI *The Juridical Review* 16-36. This volume is missing from the University of Adelaide Law Library (would someone out there in readerland like to donate it?) and so the precise page reference is unavailable to me. However, the essay is reproduced in chapter 1 of *The Comparison, Selected Essays* vol II by FH Lawson (North-Holland Publishing Co 1977) and the quotation appears at 2.

> system of private law...they seem unfathomable and in constant flux.

Lawson suggested as a possible antidote a willingness on the part of the comparative lawyer to set bounds to the field within which special knowledge and aptitude is professed. Giesen has set such bounds, as the title indicates, and it surely must be categorically affirmed by all who come into contact with this treatise that he has negotiated these and the other perils which constantly confront the comparative lawyer in a masterly fashion.

The author has given us a thoroughly systematic and comprehensive treatment of this area of the law. All the issues are raised and treated in great depth with copious reference to the case law and secondary literature to be found in all major Civil and Common Law jurisdictions. As far as those jurisdictions the case law of which this writer is familiar[3] are concerned, the treatment is accurate and precise. One can only assume that an equally good job is done for the Civil Law countries, with which, presumably, the author has an even greater familiarity. That this is so causes no surprise given the 'colleagues'[4] that the author has corresponded with from around the world for the purposes of keeping him informed of local developments, some of whom have read and commented upon earlier drafts of the manuscript. Those with expertise in the Australian law include Frank Bates, Don Chalmers, John Fleming, Harold Luntz and J Neville Turner.

How then is this treatise organised? The Table of Contents is detailed and the indices, as one would expect in a work of this size, are extensive and comprehensive. As a result, and notwithstanding its bulk and its comparative nature, a practitioner in any of the jurisdictions covered should have absolutely no qualms about his or her ability to profitably use this book as a research aid. There is a table of cases referred to from Common Law jurisdictions spanning some 54 pages, a table of authorities from Civil Jurisdictions (21 pages), a table of Persons and Authors referred to (14 pages) and a general subject index which includes a table of statutes and occupies a more than substantial 76 pages.

The body of the text is divided into Part 1, *Civil Liability of Physicians in General*; Part 2, *Civil Liability With Regard to New Methods of Treatment and Experiments*; and Part 3, *Conflicting Values Between the Law and Medical Ethics*. The treatment of the material within each part is well analysed and organised in a logical fashion. It would serve little purpose to laboriously detail the contents here. But by way of illustrating the extent of the coverage only, Part 1, which comprises approximately 75% of the substantive text, deals with 'The Possible Nature of Medical Liability', which itself is further divided into 25 topics and sub-topics and covers *inter alia* such areas as contractual liability, tortious liability, that vexing issue of concurrent liability, vicarious liability of physicians as well as hospitals, the emerging notion of direct hospital liability and the problem of concurrent hospital and physician liability. Part 1 then continues with a treatment of 'The Grounds of Medical Liability' including lengthy sections on Treatment Malpractice, Disclosure Malpractice, Substandard Patient-Physician Communication and Making Health Care Decisions. This Part then concludes with a chapter on 'The Medical Malpractice Crisis Revisited'.

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3 Australia, United Kingdom, New Zealand and to a lesser extent, Canada and the USA.
4 Preface pXVII.

Lengthy treatments dealing with the areas of consent, confidentiality, medical records, organ and tissue transplants, and artificial reproduction are offered throughout the work.

I have chosen just two of many areas of current interest to Australian practitioners which illustrate the book's accuracy, depth of treatment and usefulness from a domestic law perspective. A problem which has caused concern in most jurisdictions is whether the test for causation is to be objectively or subjectively based when the gravaman of the complaint is that, had the plaintiff been properly informed, he or she would not have undertaken the procedure. That is, is it a question of what decision a reasonable person would have made in the circumstances had there been full disclosure, or what decision this particular plaintiff would have made? There are problems with either approach. For example, the former does not sit well with 'the basic causation principle governing actions in negligence'[5] and arguably does not pay due 'deference to respect for the integrity of the patient as an individual, entitled to have command over his or her body'.[6] The latter arguably places too high a premium on the plaintiff's evidence which is bound to be self-serving and given after the outcome of the, now rejected, medical treatment has been fully realised. Giesen provides a comparative analysis of this problem at paras 670-693 and particularly 673-675. All the arguments on each side are meticulously explored and in so doing he clearly articulates the Australian position as represented, at the time of publication, by the judgment of Cox J in *Gover v State of South Australia*[7] where the subjective test was adopted. Giesen's discussion was referred to with approval by the New South Wales Court of Appeal in the very recent decision of *Ellis v Wallsend District Hospital*[8] where the same conclusion was reached without dissent. Special leave to appeal to the High Court has been refused.[9] It may be of interest to readers, as Giesen informs, that the courts in England and New Zealand probably will favour the subjective approach whereas, leading authorities in Canada and the United States suggest a preference for an objective basis and look to a prudent person in the position of the plaintiff suitably informed.[10] Indeed, there appears to be developing in Canada a 'combined test' involving 'considerations both of what this particular patient, and a reasonable patient in that patient's position, would have decided'. Apparently most civil law jurisdictions adopt the subjective test.[11]

Another recent development of interest, examined in detail by Giesen,[12] is the move towards finding a hospital authority directly liable to a patient within the hospital. This finding may be in addition to one of vicarious liability for its servants or even in circumstances where there is no such finding of vicarious liability. In our modern health care environment, the questions of when a hospital will be found vicariously liable for those who operate within its environs and when it will be found to owe an

5 *Gover v State of South Australia* (1985) 39 SASR 543 at 566 (Cox J).
6 *Smith v Auckland Hospital Board* [1965] NZLR 191 at 219.
7 Supra n 5.
8 (1989) 17 NSWLR 553 at 560 (Kirby P).
9 I am not aware of the precise grounds upon which special leave was sought and refused. However, this point was central to the decision of the Court of Appeal.
10 Para 675 and authorites there cited.
11 Para 686 and authorities there cited.
12 At paras 86-103.

independent and non-delegable duty[13] to a particular patient with respect to the treatment provided raise very difficult issues. This will be particularly so where specialist 'consultants' with varying types of relationships with the hospital authority, which are very ill defined in orthodox master and servant terms, are concerned. The problems are exacerbated by the mix within our system of private and public hospitals and the mix of private and public patients within the latter.

How useful will this book be and to whom? Members of the judiciary and academics working in this field will find it an extremely valuable resource. Those aspects of life that the content of this work touches on give rise to financial, social and political issues common to most civilised societies. This book provides an excellent introduction to the thinking and policies of other jurisdictions and serves as a resource to locate the primary and secondary materials in those other jurisdictions.

For the Australian practitioner in the field of medical malpractice it is useful on two counts. First, its comparative nature is helpful, even to the practitioner. No matter how tiresome this may be for the local practitioner, it is becoming clear (if it ever was not) that the law can no longer be competently practised from the isolation of one's home jurisdiction. This must be all the more so for those areas, such as medical malpractice law, where the underlying policy and social issues know no national boundaries. FW Maitland has written[14] 'that for the sake of English Law, foreign law must be studied, [and] that only by comparison of our law with her sisters will some of the remarkable traits of the former be adequately understood'. The Author himself goes on to repeat Maitland's telling observation[15] that it is still true that a legal system will never be known to those who will know nothing else.

The second way by which this book will be useful to Australian practitioners is simply as a valuable resource to the Australian and English law and thinking in this area. All the leading Australian authorities are frequently cited and discussed. For example, *Battersby v Tottman*[16] is, according to the index, referred to on no less than 53 occasions and *F v R*[17] is mentioned 91 times! And the author has not restricted his purview to medical law authorities in order to establish the Australian principles. Many highly relevant non-medical authorities including *Kondis v State Transport Authority*[18] *Australian Safeways Stores Pty Ltd v Zaluzna*[19] and *Cook v Cook*[20] are also dealt with. Of course, there will be work for an individual local practitioner to do concerning his or her own particular problem, this always will be so. But for medical malpractice law and related areas, this book will be as good a starting point as any and better than most.

Giesen has achieved much in combining one of the great examples of modern comparative legal scholarship with a most valuable practical work.

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13 See *Albrighton v Royal Prince Alfred Hospital* [1980] 2 NSWLR 542, *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553 and compare the High Court in *Kondis v State Transport Authority* (1984) 154 CLR 672.

14 Quoted by the author in the preface at pIX, citing *The Collected Papers of Frederick William Maitland*, 3 vols, ed HAL Fisher (Cambridge 1911) vol ii at 4.

15 *Collected Papers*, vol iii at 453.

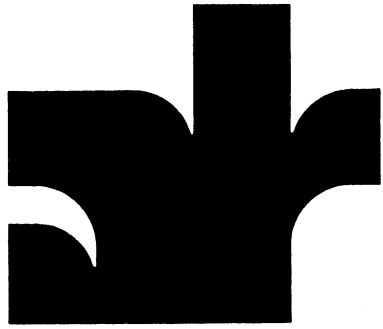
16 (1984) 35 SASR 577 (SC), (1985) 37 SASR 524 (FC).

17 (1982) 29 SASR 437 (SC), (1983) 33 SASR 189 (FC).

18 (1984) 154 CLR 672.

19 (1987) 69 ALR 615.

20 (1987) 61 ALJR 25.



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