

# BOOK REVIEW

TRACEY CARVER\*

***Bill Madden and Janine McIlwraith, Australian Medical Liability, (LexisNexis Butterworths 2008)***  
***325 pp***

In July 2002, in response to the perceived crisis in the insurance industry (particularly in the medical, public liability, and professional indemnity insurance sectors), a panel headed by Ipp JA was asked to inquire into the law of negligence and develop a series of proposals for reform. On 2 October 2002, the panel released the *Review of the Law of Negligence Final Report*<sup>1</sup> which has subsequently been implemented in whole, or in part, via civil liability legislation in each Australian jurisdiction. Consequently:

with the introduction of various civil liability legislation around the country (hereafter the Civil Liability Acts), tort law in Australia can no longer be regarded as largely a common law field. Tort law must now well and truly grapple with theoretical and practical issues of statutory scope and interpretation that have arisen in many other fields of law.<sup>2</sup>

In this context, *Australian Medical Liability*, whilst acknowledging the continued relevance of the common law, uses the Civil Liability Acts ‘as a foundation for its analysis of the Australian legal framework relevant to the civil liability of medical’<sup>3</sup> practitioners and health care professionals. In doing so it summarises key decisions and legislation, and provides an easy to read and authoritative commentary on the various areas of Australian medical liability in a post Civil Liability Act environment. Additionally, where interpretation of the legislation is unclear, uncertain, or without judicial interpretation, this is stated by the authors and predictions are often made based on recent case trends.

---

\* BBus(Accy) (Dist), LLB (Hons) (QUT), LLM (Cantab), Legal Practitioner (Supreme Court of Qld), Lecturer, Faculty of Law, Queensland University of Technology.

<sup>1</sup> *Review of the Law of Negligence Report* (2002) Australian Government, The Treasury <<http://revofneg.treasury.gov.au/content/review2.asp>> at 14 September 2009.

<sup>2</sup> B McDonald, ‘Legislative Intervention in the Law of Negligence: The Common Law, Statutory Interpretation and Tort Reform in Australia’ (2005) 27 *Sydney Law Review* 443, 443.

<sup>3</sup> B Madden and J McIlwraith, *Australian Medical Liability* (LexisNexis Butterworths, 2008) 3.

The book begins, in part A, chapter 1, with a brief discussion of the context in which the *Review of the Law of Negligence Final Report*,<sup>4</sup> and the Civil Liability Act reforms, occurred. It then considers the review's core recommendations, and the resulting legislative provisions, specifically concerning professional negligence and medical liability – namely, those regulating the standard of care expected in the provision of medical treatment.<sup>5</sup> Chapter 2<sup>6</sup> discusses the Civil Liability Act provisions, regarding a medical practitioner's proactive and reactive duties to inform, plus their interrelation with the legislation's obvious and inherent risk provisions. The authors then consider the review's more general recommendations and statutory reforms, concerning the law of negligence as a whole (for example, the negligence action's duty, breach and causation elements), sequentially throughout the remainder of the book where relevant to the subject matter under discussion. As such, the text adopts a well structured and principled approach to the law.

In relation to duty of care, part B includes an examination of the duties regarding: treatment (chapter 3); and informed consent, or a medical practitioner's failure to warn of the risks consequent upon undergoing or foregoing medical treatment (chapter 2). In these chapters, whilst the emphasis is upon negligence liability, similar duties arising under contract and statute (for example, the *Trade Practices Act 1974* (Cth) and related state and territory legislation); together with the tort of breach of statutory duty, are also briefly considered.

The discussion, in chapters 4 and 5 respectively, of the developing law in the areas of duties owed to third parties and duties to disclose medical error, or adverse events, to patients, is particularly interesting. Chapter 4 considers: claims by a child arising from the negligent treatment of its mother prior to the child's birth<sup>7</sup> or conception;<sup>8</sup> liability for the loss or injury caused to others by psychiatric patients;<sup>9</sup> and the duty of care owed to a patient's sexual partners.<sup>10</sup> The chapter also considers the impact of the Civil Liability Acts on causation and scope of liability in such claims.

Whilst the book, as its title suggests, focuses mainly on Australian case law, chapter 5 adopts a useful cross-jurisdictional perspective by considering cases from the USA, Canada and England, together with an especially detailed discussion and analysis of local jurisprudence in *Wighton v Arnot*.<sup>11</sup> The chapter also: compares the professional conduct codes in each state jurisdiction governing a medical practitioner's ethical obligations to disclose adverse events; and includes a consideration of the ability to recover exemplary damages, and the relevance of apologies, in light of the Civil Liability Act reforms.

---

<sup>4</sup> Referred to throughout the book as the 'Review Report'.

<sup>5</sup> This is also considered further in ch 8.

<sup>6</sup> This is also discussed further in ch 7.

<sup>7</sup> *X & Y v Pal* (1991) 23 NSWLR 26.

<sup>8</sup> *Kosky v Trustees of the Sisters of Charity* [1982] VR 961.

<sup>9</sup> *Hunter Area Health Service v Presland* (2005) 63 NSWLR 22.

<sup>10</sup> *BT v Oei* [1999] NSWSC 1082 (transmission of HIV); *McDonald v Sydney South West Area Health Service* [2005] NSWSC 924 (liability for the financial loss suffered by the father of a child born after the negligent sterilisation of an existing sexual partner).

<sup>11</sup> [2005] NSWSC 637.

The non-delegable duty of care owed by hospitals and others (such as medical centres and pathology services), and the Civil Liability Act provisions in New South Wales<sup>12</sup> and Victoria<sup>13</sup> that equate the extent of liability for breach of a non-delegable duty with vicarious liability, are considered in chapter 6.

Relevant to the element of breach, the commentary in part C is again conveniently divided between cases involving ‘informed consent’ (chapter 7) and ‘treatment’ (chapter 8). Chapter 8 provides a detailed and helpful analysis of the Civil Liability Act defence concerning the standard of care of professionals (including medical practitioners), with particular reference to its interpretation in *Dobler v Halverson*.<sup>14</sup> Whilst cautioning that ‘findings of breach of duty will vary over time as new information becomes available,’<sup>15</sup> Chapter 8 then goes on to provide examples, of where breach of duty, in the context of medical treatment, has, or has not, been found. These are usefully categorised to include, for example, instances of: delayed and incorrect diagnosis; surgical error; failures to refer or follow up; prescription errors; breaches by Emergency Services; and breaches in relation to neonatal, antenatal, mental, dental and cosmetic surgery, care.

Chapter 9 deals with a number of ‘special protections’ that may arise under the Civil Liability Acts in connection with medical liability relating to: the liability of public authorities (such as public hospitals); the proffering of apologies; the liability of ‘good Samaritans’ rendering emergency assistance without payment;<sup>16</sup> and the treatment of intoxicated persons. The chapter also examines the express protections available, under the mental health legislation in each jurisdiction, to medical practitioners and others involved in involuntary psychiatric treatment.

Part C considers causation in ‘informed consent’ (chapter 10) and ‘treatment’ (chapter 11) cases. It provides a detailed consideration of the pre and post Civil Liability Act cases on causation in connection with a failure to warn, and the relevance of subjective and objective factors to satisfying this element. This commentary is particularly helpful given that causation issues are often the most difficult to resolve in medical negligence cases. In this light, chapter 12 also provides a useful analysis of a plaintiff’s ability to recover damages for the loss of a chance of a better medical outcome, which covers both international and Australian jurisprudence leading up to and following recent topical cases such as: *Rufo v Hosking*<sup>17</sup> and *Gett v Tabet*.<sup>18</sup> Contributory negligence is considered in chapter 13.

Finally in part E, chapter 14, summarises the law in relation to both ‘wrongful life’ and ‘wrongful birth’ claims in Australia, whilst chapter 15 considers intentional torts. As mentioned above, the book as a whole focuses primarily on the law of negligence.

<sup>12</sup> *Civil Liability Act 2002* (NSW) s 5Q.

<sup>13</sup> *Wrongs Act 1958* (Vic) s 61.

<sup>14</sup> [2006] NSWSC 1307; [2007] NSWCA 335.

<sup>15</sup> Madden and McIlwraith, above n 3, 138.

<sup>16</sup> Legislative protection from liability in relation to medical practitioners and nurses, and ambulance personnel, is also discussed. See, for example, *Law Reform Act 1995* (Qld) s 16; *Ambulance Service Act 1991* (Qld) ss 38, 39.

<sup>17</sup> [2004] NSWCA 391.

<sup>18</sup> [2009] NSWCA 76. This case has been granted special leave to appeal to the High Court (*Tabet v Gett* [2009] HCA Trans 209) and is noted in the online materials accompanying the book: see Madden and McIlwraith, *Australian Medical Liability* (2009) below n 21 and accompanying text.

Nevertheless, chapter 15 considers liability for a direct and intentional trespass to the person of another ‘in the context of consent failures or wrong patient/wrong site surgical errors.’<sup>19</sup> In doing so, an analysis of Australian and overseas jurisprudence is again provided and the requirements for fully informed consent, necessary to negative a battery claim, are considered. A thoughtful analysis of the ‘advantages for plaintiffs in pleading trespass in medical cases’<sup>20</sup> is included, together with a brief consideration of the exemption of intentional torts from the operation of the Civil Liability Acts.

As illustrated above, the content of *Australian Medical Liability* is thorough and certainly covers a lot of ground in its elucidation of the general doctrine, principles, and key cases and legislation relevant to medical liability within the various Australian jurisdictions. As such it provides a useful, succinct, well written and very informative resource which highlights relevant material and issues to consider in this often complex area of law. The online materials accompanying the book<sup>21</sup> provide further commentary on recent cases and legislative change. This form of publication is a very positive development for the reader as it invites the provision of feedback to the authors on recent developments and means that the explanation of legal issues remains current.<sup>22</sup>

Both authors are experienced practitioners in the area of medical liability and as such this book is stated to be ‘intended as a practical reference, source book and commentary’.<sup>23</sup> Detailed critical analysis is therefore outside the book’s intended purpose. Additionally, as acknowledged by the authors, it does not cover some related issues.<sup>24</sup> For example, except for in the context of specific issues relating to wrongful birth claims, the law relating to the assessment of damages is largely not considered. However, given that the book concerns liability rather than remedies, a detailed analysis of the law relating to damages assessment may also be beyond its scope.

For legal practitioners, acting for both plaintiffs and defendants, and medical practitioners interested in the law relating to Australian medical liability, this book is a practical, useful and worthwhile reference. It is also to be recommended as a very useful introductory, or student, text.

---

<sup>19</sup> Madden and McIlwraith, above n 3, 311.

<sup>20</sup> Ibid 318.

<sup>21</sup> Available at: B Madden and J McIlwraith, *Australian Medical Liability* (2009) LexisNexis <[http://www.lexisnexis.com.au/aus/academic/text\\_updater/maddenandmcilwraith/default.asp](http://www.lexisnexis.com.au/aus/academic/text_updater/maddenandmcilwraith/default.asp)> at 14 September 2009.

<sup>22</sup> For example, at the time of writing this review on 14 September 2009, the online materials were stated as being updated as at September 2009.

<sup>23</sup> Madden and McIlwraith, above n 3, xiii, 3.

<sup>24</sup> Ibid 4.