LAW FOR THE MEDICAL PROFESSION, by Dix, Errington, Nicholson and Powe, Sydney, Butterworths, 1988. 356 pp. $39.

It is correctly stated by the authors that this book is not a legal text, and that detailed legal knowledge is not assumed. Whilst the title would tend to suggest that the book is primarily written for the benefit of the medical profession, nevertheless, it is a text that should be in the library of those lawyers whose practices embrace legal work involving dealings from time to time with the medical profession. Although the authors suggest in the preface that the book has been written primarily with eastern mainland practitioners in mind, and that the legislation referred to is the legislation of the eastern states jurisdictions, nevertheless the book will be of value to, and relevant to the work of practitioners of medicine, and indeed of lawyers working in the legal-medical fields of law throughout Australia.

The book is well structured, both in terms of selection of the chapter headings and subject matter therein. Indeed, the thirteen substantive chapters and appendices deal with topics likely to be encountered by any medical practitioner upon a regular basis. They deal with topics in a manner that is interesting and informative to medical practitioners, and indeed to legal practitioners. The authors have displayed a considerable talent for research. Their industry is revealed by reference also to cases that have not been reported in the authorised law reports. Further, the research has not been confined to case law in Australia, but includes cases decided not only in other parts of the British Commonwealth but also in the United States. One should bear in mind that whilst the authors have usefully referred to overseas decisions, some of these may not be followed, nor necessarily adopted as binding or conclusive by Australian courts. The choice of cases is, however, interesting and generally supportive of the principles sought to be discussed and analysed by the authors. The method of citation of cases in a scene setting context is helpful. The technique of setting forth extensive notes containing relevant references to not only the cases but also other source notes at the conclusion of each chapter will be appreciated by readers. It permits chapters to be read simply and with continuity.

Since it is contemplated that the book will also be widely read by lawyers, perhaps it is appropriate that I should briefly observe and comment upon some of the chapters and cases referred to and indeed add, where appropriate, some recent and additional case law references.

CHAPTER 1 is an introduction to the law. It explains in broad and simple terms the sources of law in Australia, the distinction between criminal and civil law, and the court system in Australia.

CHAPTER 2 concerns registration, discipline and fitness to practise. It discusses the relevant eastern states legislation. The discussion of the legal nature of "professional misconduct" would be of interest to those who read the book, be they professionals or otherwise. The authors when

discussing the general features of, for example, professional misconduct, have collected various decisions of the courts dealing with such subject. One might observe the decision of *ex parte Meehan: Re the Medical Practitioners Act* (1965) N.S.W.R. 30. This was a decision upon a statutory provision in the relevant New South Wales Legislation which contained words, " . . . infamous conduct in a professional respect". Since 1972 the pejorative adjective "infamous" has been omitted. Nevertheless, the test to determine whether there has been "misconduct in a professional respect" still involves that application of the *Meehan* test, for example in the case of procedure, whether there have been departures from accepted "procedure" and whether those departures have become the subject of professional reprobation by fellow practitioners of good repute and competence. The test is not rigid since it will also recognise in its application that a departure from accepted "procedures", whilst unusual and which even may be the subject of doubt or difference of opinion in the profession, will not necessarily amount to misconduct in a professional respect: *Qidwai* v. *Brown* (1984) 1 N.S.W.L.R. 100. For those who are particularly interested in the subject see also the discussion by the authors in Chapter 11, dealing with professional liability and the standard of care, and particularly para 1115, "Different accepted schools of thought".

CHAPTER 3 deals with commercial aspects of conducting a practice. What will be suitable for a particular medical practitioner will depend upon his individual requirements. The desirability of obtaining independent expert advice is properly emphasised.

I particularly enjoyed the discussion in CHAPTER 4 on the subject of confidentiality. This is a particularly important subject to be understood by professionals in a patient-doctor relationship. Indeed, there is a discussion of confidentiality which would be of interest to lawyers as well as to medical practitioners. Perhaps the interest in the subject of confidentiality has been further activated by such cases as *Attorney General (U.K.)* v. *Heinemann Publishers (No. 2)* (1988) 62 A.L.J.R. (*the "Spycatcher" case*).

CHAPTER 6 dealing with patient consent deserves careful reading. As the authors correctly acknowledge, although there is case law dealing with the issue of patient consent, the law has not been the subject of final determination by the High Court of Australia. It is important to observe that the precedents of other legal systems are not binding in Australia: *Cook* v. *Cook* (1986) 162 C.L.R. 376. There is a most interesting discussion of *Sidaway* v. *The Governors of Bethlem Royal Hospital* (1985) All E.R. (H.L.) where the House of Lords, when dealing with the standard of care of the medical practitioner, applied the principle in *Bolam* v. *Friern Hospital Management Committee* (1957) 1 W.L.R. 582 to the class of case involving the issue of the doctor's duty to warn his patient of the risks inherent in the treatment he recommended. The *Bolam* principle in terms is discussed by the authors in greater detail in Chapter 11 para 1115. However, *Sidaway's case supra* at least in the United Kingdom,

reiterates the principle in *Bolam's case*, namely, that a doctor is not generally negligent if he acts in accordance with a practice accepted at the time by a reasonable body of medical opinion even though other doctors adopt a different practice. Such principle is not merely applicable to cases of diagnosis and treatment: *Whitehouse* v. *Jordan* (1981) All E.R. 267; *Maynard* v. *West Midlands Regional Health Authority* (1985) 1 All E.R. 635, but is also applicable to the duty to warn class of case. The authors properly have spent time in discussing and analysing these decisions. Thus, in England, the standard of the responsible (competent) medical opinion will be the criterion in determining whether a doctor is under the relevant duty to warn his patient of the actual risks or inherent risks of recommended treatment. One should however note that the nature of duty to warn and informed consent have not yet been the subject of determination by the High Court of Australia. Indeed, the degree of disclosure of risk required of a medical practitioner prior to obtaining consent of a patient to surgery is not resolved by binding authority in Australia, and there is divergence of view as to the appropriate test within the House of Lords and in other authority.

Thus, whether *Sidaway* will be followed in Australia and to what extent remains to be finally decided. To the list of cases referred to by the authors dealing with the subject of the duty to warn and the doctrine of informed consent, I would note the recent decision of Cole J. in *Ellis* v. *Chambers and Anor.* (unreported 16/9/1988) presently on appeal to the New South Wales Court of Appeal.

The authors have recognised that even the decision in Sidaway's case acknowledges that there *may* be cases where proposed treatment involves such a substantial risk of grave consequence that, notwithstanding that responsible medical opinion is against warning, the Court may itself decide there was a duty to warn in any event. This is an area still to be explored by the courts, both overseas and in Australia.

CHAPTER 6 deals with the subject of certification. It is an important subject having regard to both the responsibilities of those giving certificates, and the use to which they may be relied upon by third persons.

In CHAPTER 7 there is a discussion of medical records. The rationalisation for the need for and creation of records is well explained, ethical and legal obligations apart, for the maintenance of adequate patient records covering history, diagnosis and treatment, is both necessary and desirable. There may be litigation or court proceedings involving the plaintiff, where the existence and accuracy of medical records will be in issue. What the patient said and what the doctor found on examination is the matter of everyday discussion and debate in personal injury cases involving claims for damages. The authors (paragraph 5) validly point to the doctor's interest in retention, and indeed, I would add accuracy, as being *inter alia* of a defensive nature. The accuracy and existence of records may further be important if the doctor is sued for professional negligence and, indeed, may be of greater significance, if his estate is

so sued. The records may be essential to a defence of such a class of action.

CHAPTER 8 deals with public health. It properly discusses relevant statutory obligations.

The matter of health insurance is properly the subject of a separate chapter. The system of Medicare, and the legal framework for it, is usefully explained by the authors.

CHAPTER 10 deals with the subject of medico-legal practice. It is correct to say that the medical practitioner will inevitably become involved in the course of litigation being conducted by his patient. The authors have discussed in a helpful way the role of the medical practitioner in the litigation context. They have properly emphasised certain types of matters with which the practitioner may be concerned in the litigation context.

CHAPTER 11 deals with professional liability and medical defence. As the authors have sought to make clear, whilst it is the law which imposes the duty of care upon the doctor, (see also *Cook* v. *Cook, supra* and the cases referred to therein as to when the duty arises) the standard of care of the doctor is in broad terms a matter of medical judgment, i.e. the standard of responsible-competent medical opinion at the relevant time.

The authors have therefore discussed the standard of care in some detail, correctly emphasising the test that where one has a situation which involves a claim of negligence, for example, on the part of a specialist, then the standard of care is to exercise the standard of skill expected from an ordinary competent specialist, having also regard to the experience and expertise that specialist holds himself out as possessing. Thus, if the specialist fails to measure up to the standard of the ordinary skilled person exercising or professing to have that special skill, it would be open to find such person negligent.

The authors (in paragraph 1115) recognise and discuss the English cases which make it clear that the law accommodates the fact that there may be different and accepted schools of medical thought. A judge's preference for one body of distinguished professional opinion to another also professionally distinguished is generally not sufficient to establish negligence of the practitioner whose actions have received the approval of those whose *contra* opinions are truthfully expressed.

I should here also comment that the decision in *Albrighton* v. *Royal Prince Alfred Hospital* (1980) 2 N.S.W.L.R. 542, carefully discussed by the authors, may in respect of some of the views expressed therein, be looked at in the context of the English cases of *Whitehouse, Sidaway* and *Maynard supra.*

Before concluding my remarks in relation to Chapter 11 I would here make several further observations. The question as to whether a doctor is or is not an employee may be of considerable importance, not

only in terms of the employer's liability to pay damages, but also in terms of the doctor's liability to indemnify or contribute to a liability to pay damages. The authors have acknowledged the need to discuss these matters. In relation to the matter of vicarious liability, one should add the reference to *Kondis* v. *State Transport Authority* 154 C.L.R. 672. As to the issue of whether a "doctor" is or is not an employee, one would also refer to the decision of the High Court in *Stevens* v. *Brodribb Sawmilling Co. Pty. Limited* 60 A.L.J.R. 194. The High Court has decided that the existence of control is but one of the *indicia* which must be considered in the determination of the question as to whether the relationship is one of employment.

The authors discuss the problems of causation and the need in an action for a plaintiff to prove that damage was caused by the defendant's breach of duty. The House of Lords in *Hotson* v. *East Berkshire Area Health Authority* 1987 3 W.L.R. 232 has recently discussed this subject in an interesting factual context. In *Hotson's case* the defendant was in breach of its duty to diagnose a hip fracture, but was able to show that the delay had no effect on the ultimate outcome of *avascular necrosis*, which on the trial judge's findings, would probably have occurred even if there had been no delay in diagnosis. The House of Lords held that as the case involved a problem of causation to be resolved on the balance of probabilities, the plaintiff had failed to establish a cause of action in respect of the avascular necrosis and its consequences. He could not recover damages for loss of the chance of recovery.

CHAPTERS 12 and 13 discuss the subject of bio-ethics and contraceptive advice. These subjects are properly included for discussion in a book of this nature. The decision of the House of Lords in *Gillick* v. *West Norfolk and Wisbeck Area Health Authority* 1985 3 All E.R. 402 is still to be fully considered in an Australian case. The writers also discussed *Gillick's case* in the context of patient consent—Chapter 5.

To conclude, it would be proper to observe that the authors have made a useful contribution to the limited literature available in this country, specially dealing with the subject of law in its special application to the Australian medical practitioner. It is a book that will prove of value to those readers, both interested in and practising in the medico-legal area.

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