BOOK REVIEW

PROFESSIONAL NEGLIGENCE. By Thomas G. Roady, Jr., and William R. Andersen, Editors. Nashville: Vanderbilt University Press, 1960. Pp. xii, 332. $10.00.

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Professional Negligence is unique in that it is the first published attempt to correlate the basic legal principles governing liability for negligence or "malpractice" in all of the professions. The book consists of a collection of articles, each prepared by a different writer, and in total reviews the professional responsibility of physicians, pharmacists, architects and engineers, teachers, lawyers, abstractors, public accountants, funeral directors, and insurance agents and brokers, as well as that of "artisans and tradesmen."

Judging from its foreword, it would seem that the book was intended to present a "unified treatment" of the liability rules pertaining to these various occupations, and to determine whether and to what extent common problems and common ways of treating them would be disclosed by such unified treatment. However, because of the use of separate writers for each chapter and because of the differences in the factual situations arising in each of the occupations, this reviewer noted very few significant common denominators which would help decide legal issues arising in one profession by resort to rules and concepts developed in another. True, there is an undercurrent of law common to all of these professions and, indeed, to negligence cases in general, such as standards of care, questions of causation, and the like. But it is doubtful that any generalizations developed from a reading of the articles concerning lawyers or accountants will resolve any critical, specific issues being litigated in connection with doctors, or vice versa.

Nonetheless, there is value in making available in one place all these excellent articles dealing with the various forms of malpractice in the professions. Each is well documented and amazingly broad in its coverage. Certainly this book will be a valuable asset to any lawyer who is prosecuting or defending a so-called "malpractice" case against any professional. Those chapters dealing with medical practitioners are particularly thorough and well done. Especially useful to the practicing lawyer is the chapter by Fitz-Gerald Ames, Sr., concerning modern techniques in the preparation and trial of a medical malpractice suit, which deals not so much with substantive law and legal theory as with "how to do it"—replete with practical suggestions to plaintiffs' attorneys, such as how and where to obtain

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medical evidence bearing on malpractice claims. Here is the sort of thing that one would expect to find in the American Law Institute's *The Practical Lawyer*. One might wish, however, that the documentation was not based almost exclusively on the law of California where Mr. Ames practices.

Perhaps the least valuable chapter to the practitioner is that on the liability of artisans and tradesmen, with which the book concludes. The preface (p. vi) apparently contemplated that chapter as a discussion of the liability of "barbers and beauticians, carpenters, cleaners and launderers, electricians, repairmen and plumbers." But, as even the preface recognizes, there are few reported cases on those occupations, and, as a result, this chapter of less than twelve pages contents itself with a very general consideration of such subjects as the requirement of privity, overthrown by *MacPherson v. Buick Motor Co.*,[1] but even there provides no discussion of recent landmark cases rejecting the requirement of privity in warranty cases.[2]

In dealing with malpractice by physicians, Professor Curran evidences a defense bias in advising against the "ordinary practice of paying some questionable claims in order to avoid suit," (p. 10) apparently on the ground that such payment is regarded by professional men as an admission of negligence. Similarly, Professor McCoid stresses—as a ground for limiting the standard of care required of physicians to "customary medical practice"—the notion that the mere bringing of suit for malpractice places the doctor under suspicion of being incompetent. (p. 73). Lawyers who have represented injured patients, however, can attest to the fact that deserving claimants have often been denied settlement or recovery because the man who injured them was practicing medicine rather than driving his car at the time of injury. The same lawyers can also affirm that the expert testimony necessary to prosecute an action for malpractice is almost impossible to obtain, because of a widespread solicitude for sparing doctors the stigma of incompetence. The word "malpractice" is, perhaps, unfortunate, but it is, after all, a mere collection of syllables which to an attorney mean simply that the physician acted in one isolated instance with less than the required care. To read into it an iota more is to conjure up a semantic bogey. Admittedly, the professional man's reputation is precious, but not even the most successful and highly regarded would insist that he had never made a mistake. Who can say that he has gone through life without once having had recourse to the eraser on the other end of his pencil? This reviewer questions the sense of proportion of those who would find a wound to the ego a greater harm than a wound to the eye. There is little in morals or sound reason which justifies denying to an otherwise deserving claimant settlement or recovery against a professional for a

[1] 217 N.Y. 382, 111 N.E. 1050 (1916).

[2] *E.g.*, Jarnot v. Ford Motor Co., 191 Pa. Super. 422, 156 A.2d 568 (1959). Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), reported since the publication of the book, rejected the requirement of privity even where the sale had not been induced by representations of the manufacturer.

mistake which would result in liability if made by a nonprofessional—as, for instance, an experienced truck driver who had never before been involved in an accident. If the semantics of the word "malpractice" do raise an inference of general incompetence, the better remedy is to educate doctors, judges, juries, and the public generally to the realization that a claim for malpractice does not usually involve any imputation of overall unfitness but is only a charge of carelessness in a particular act. It might be remarked parenthetically that the editors, in entitling this book *Professional Negligence*, have taken a commendable step in that educational program.

In speculating about the future development of professional negligence rules, Professor Curran states:

> The jury system has not proved very effective in these cases . . . . [T]he fault principle has the result of branding the defendant incompetent within his profession. This factor is largely responsible for the tenacious and emotional manner in which the defendant, his fellow professionals, and their professional societies fight malpractice claims.
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> Civil litigation of professional liability claims also necessitates the application of general damages with its high verdicts in personal injury cases. These professional people are not unaware of the verdict split in these cases (one-third to one-half of the recovery to the plaintiff's attorney).
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> . . . . Reforms, if they come, may well be generalized throughout Tort law or personal injury litigation. Any broad change which occurs is most apt to result in an insurance-based compensation system carried by the professions or by their clients and patients. (p. 12).

Much, of course, has been written as to Professor Curran's criticism of the jury system, for which he anticipates—if he does not recommend—the substitution of an insurance-based compensation system. Needless to say, his suggestion is highly controversial. This reviewer, for one, questions both the advisability and the imminence of a compensation system which would replace all jury trials.

Professor Curran's comments concerning "high verdicts in personal injury cases" and what he implies to be high contingent fees appear both out of place and irrelevant to the purpose of this book. His fear of high verdicts evidences a distrust not only of the jury system but also of the judges, trial and appellate, who are required to prevent excessive awards and to reduce them if need be, and who, in fact, often exercise such powers. In these days of inflated dollars, the compensation system which Professor Curran suggests can only result—judging from developments in other fields of compensation—in payments for injuries of less than their full fair value. In any case, Professor Curran has entered into a highly controversial field without setting forth adequate factual support for his conclusions.

As for excessive contingent fees, the fee arrangements between the plaintiff and his counsel are, and should be, of no concern whatever to the defendant. High fees paid to corporate lawyers are rarely the subject of scrutiny. In death and infant cases, courts uniformly must approve fees, and some jurisdictions already regulate and supervise all contingent fees in negligence cases. One wonders whether Professor Curran has weighed modern costs of maintaining offices, law libraries, clerical, professional and investigating staffs, and the expense involved in travel, depositions, photography, and general preparation and trial of a case. Besides, not all plaintiffs' litigation is successful—particularly in malpractice cases—and some provision must be made in the successful cases to enable the lawyer to cover his losses in the unsuccessful ones, in much the same way that doctors often charge to wealthier patients some of the overhead and losses incurred in treating indigent ones. And the fact remains that it is generally accepted that lawyers as a class—for all their contingent fees—are underpaid. In any event, Professor Curran has again asserted conclusions without factual support, and these gratuitous comments weaken an otherwise sound consideration of professional negligence.

The article by Professor McCoid is a thorough exposition of most of the basic substantive law governing medical negligence. It is admirably done and is documented with an extensive array of cases from all jurisdictions. His discussion centers around general topics, such as the standard of conduct, the physician's duty to keep abreast of new developments, the privilege to experiment, his duty to inform or disclose facts, his duty to refer to specialists, and the vicarious liability of physicians. Under these general headings, he discusses many cases useful to practicing attorneys faced with specific forms of alleged malpractice.

Professor McCoid states (p. 77) that, since doctors are not under an obligation to use "absolutely safe procedures as contrasted with reasonably safe procedures," the mere failure of the customary practice—whereby, for instance, surgeons relegate to nurses or assistants the duty of counting sponges or instruments after operations—to prevent loss of a sponge or instrument should not create liability. Even in the "sponge cases," Professor McCoid seems to equate "reasonable care" with "customary practice." He acknowledges, however, that the courts are divided in the sponge or instrument cases and that some do permit juries to determine whether adherence to custom in such cases constitutes reasonable care. While there is reason in limiting the doctor's obligation to "customary practice" in medical matters which are beyond the competence of average juries to understand, there seems to be no merit in extending to doctors any unnecessary immunity under the customary practice rule where the doctor's conduct falls within the obvious competence of any layman—such as where an instrument is left in the abdomen. As Professor Curran states (p. 4), the rule requiring doctors to adhere only to the "general average of professionally acceptable conduct" is a *"minimum"* standard:

> This is a rather questionable standard. As we have seen, in the "reasonable man" concept, the law requires more than average conduct, it requires average *prudent* conduct. This is "up the scale" from the average. Yet for professionals, we seem to be satisfied with average or minimum acceptable conduct. Just in case even this standard be considered too high, however, most states allow an adjustment on the basis of where the defendant practices. He is required to exercise only that skill and training ordinarily possessed in his or a similar community.

Certainly, such "minimum" standards should not be extended to cases within a jury's competence to evaluate.

It is, perhaps, a matter of regret that this otherwise complete book does not contain a chapter collecting malpractice cases according to the type of operation, disease, diagnostic procedure, and so on, or according to the type of misconduct which has been charged. For example, special problems arise with respect to the administration of anesthesia. Different misconduct is obviously involved in improper diagnosis and decisions as to the latter are of little use in determining liability in the former. Such a collection of authorities on a functional basis is presently lacking, and yet is a critical need of lawyers engaged in malpractice work.

Likewise, since some jurisdictions now allow recovery against hospitals and reject the defense of eleemosynary institution, it would be useful to have a chapter dealing with specific types of institutional negligence cases. The character of the negligence in such cases takes a different form from the negligence of individual practitioners and therefore poses different problems.

Since most professional negligence probably involves physicians, the other chapters of the book are necessarily less extensive because of the paucity of decisions. Nevertheless, the available material has been carefully scanned and well presented. While the chapter on the tort liability of teachers is chiefly concerned with the teacher's privilege to inflict punishment or discipline upon students, there is a useful collection of cases bearing on the responsibility of a teacher for injuries resulting from failure to exercise reasonable care to supervise pupils in class and on playgrounds, and for negligence in subjecting students to exertion beyond their physical capacity or to unreasonable hazards in vocational or chemistry classes. Such conduct is not normally regarded as encompassed within the sphere of malpractice, but certainly its inclusion in this book is unobjectionable.

No book with as extensive a coverage of legal material as this one is likely to meet with unqualified approval from any reviewer. Lest, however, such criticism as appears here be misunderstood, it should be reaffirmed that this work, in the main, is a thorough and scholarly treatise which should be in the library of every practicing lawyer who does any work in the field of professional malpractice.