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Waltz & Inbau: Medical Jurisprudence

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RECENT BOOKS

Book Reviews

Medical Jurisprudence. By *Jon R. Waltz* and *Fred E. Inbau.* New York: Macmillan. 1971. Pp. 398. $10.95

In the decades following World War II it became common practice in the large medical schools and centers of the United States to arrange some sort of course or educational process by which it was hoped to acquaint the embryonic physicians with legal concepts, ideas, procedures, and institutions. This was often done by a series of lectures presented to the senior class under the title of "medical jurisprudence" or "professional responsibility" or some other such designation. Generally speaking these efforts received the support of law school faculties and practicing lawyers; professors and practitioners donated their time to the preparation of syllabi, mimeographed materials, and the delivery of lectures presumably suitable for consumption and digestion by nonlawyers.

In recent years, however, there have been indications that this kind of program is falling into disfavor. In The University of Michigan School of Medicine, which has undergone far-reaching changes in its curricular arrangements, the lectures that were being delivered during the student's senior year were first shifted to the junior year and then for all practical purposes terminated. Their place has been taken by some sort of elective reading course or exercise that is quite different from the earlier, more formal arrangments. It is understood that similar developments have occurred at other medical-education centers.

The reason or reasons underlying this phenomenon are not readily apparent to one not privy to the inner sanctum of medical school planning committees. The crowded curriculum; the greater emphasis in these latter days upon clinical experience; perhaps a revulsion against so-called "didactic teaching" methods; all are said to have played a part in the reduction and abandonment of the program. Whatever the cause, there are some who regret that physicians are completing their medical education without much understanding of the legal system under which they live and with which they seem to have an increasing amount of trouble. It was often said that if the law discussions did nothing else, at least they dispelled some of the irrational fears of law from which physicians suffer and disabused them of much medical school superstition, illusion, and folklore concerning law. The writer of this review has a distinct impression, judging from the calls he receives from interns and residents at the Medical Center in Ann Arbor, that a great many young

physicians are coming to their profession profoundly ignorant of the nature of the real world, legally speaking.

Graduates of the Northwestern University Medical School, however, need not labor under this handicap if they take advantage of the good offices of Professors Waltz and Inbau. As manifested at the outset of the book here reviewed, the volume is designed for practitioners and students of medicine. It is intended to be read and studied by medical students and medical doctors, and the authors are quite emphatic that while they hope the book will be useful to lawyers it should not be regarded as a book intended primarily for lawyers. This injunction necessarily precludes certain criticisms that might be leveled against the book by a lawyer. On the other hand, the creation of a work on law intended to be read and taken seriously by nonlawyers casts certain special responsibilities upon the shoulders of the authors. More on this point later.

The book is divided into three parts: "The Physician and the Civil Law," "The Physician and the Criminal Law," and "The Physician in Court." The center of attention, however, is manifested by the number of pages devoted to the three areas. The first part involves 323 pages, the second 37 pages, and the third only 8 pages.

For purposes of this review I consider the three parts in reverse order of their appearance. The part on the physician as a witness includes an abbreviated description of the role of the witness at a trial and ten suggestions for physicians called to that role. Some of these suggestions have merit ("Confer with the Lawyer Calling you as a Witness"—p. 375); some are of less value ("Do Not Be Nervous or Frightened"—p. 373). Teachers who use the book and cover this subject ought to ask the student to reread pages 6 to 13 involving "The Litigation Process" and pages 34 to 37 covering "The Interprofessional Code for Physicians and Attorneys." The Code has been included in the chapter called "Private Canons of Professional and Interprofessional Conduct" (p. 29); it is a very bland statement but is mildly suggestive of some of the matters that really cause irritation between the professions. It might have been wiser to include a state code of interprofessional conduct comparable to Michigan's code[1] which gets closer to the nitty gritty of why physicians shy away from being a witness and why attorneys complain about the conduct of physicians who are called upon to help in the administration of justice. In summary, Part Three serves a function but is clearly a minor sideshow in the book.

Part Two, "The Physician and the Criminal Law," contains three chapters. One relates to the medical practitioner and physical evidence in criminal cases, another to the estimation of time of death and the interval between occurrence of injury and death, and the third to criminal laws of special importance to the physician. The

1. 60 J. of Mich. State Med. Society 649 (1961).

first of these chapters has a wealth of valuable suggestions concerning the identification and preservation in criminal cases of tangible evidence such as bullets, blood specimens, swabs, and so on; the handling of injured persons, dead bodies, and property in such a way as not to add to the difficulties of police investigators; and the proper documentation of external wounds. In the latter connection reference is made to the assassination of President Kennedy and the failure to document properly the exit bullet wound in the neck prior to the tracheotomy (p. 330). The discussion of the estimation of the time of death and the interval between injury and death occupies less than two pages. An extensive bibliography is attached. In the last chapter of this Part, only three crimes are listed as being of special importance to the physician: abortion, criminal homicide, and failure to report criminally inflicted injuries or habitual use of narcotic drugs.

It is clear from the foregoing that "forensic medicine" is not a subject of major importance in the book nor is the relationship of the physician to the criminal law.

The main focus of the work concerns the physician and the civil law with the bulk of the attention and space devoted to the professional liability of the physician. There is a ten-page chapter on "Licensing Laws" (pp. 17-28) but it consists largely of a summary of The Illinois Medical Practice Act.[2] Starting with Chapter 4, "Liability for Professional Negligence: Medical Malpractice," we find the *raison d'être* of the book.

The presentation of the basic elements of professional liability or negligence will be helpful to any interested lay reader. There are intelligible discussions of the nature of the various duties owed by the physician to his patient; the "school rule"; the "locality rule" and the modern tendency to limit its operation and change the standard to a national one; the requirement of expert testimony and the problems attendant upon its procurement; the various devices utilized by the courts and by some legislatures to overcome the difficulties of obtaining expert testimony; vicarious liability; emergency treatment; and the defenses to actions for negligent treatment. All bases are touched although one might not be entirely satisfied with the approach or depth of treatment in some areas. For example, in the subdivision relating to the use of impartial medical panels there is a discussion of the "Arizona Plan" and the "California Plan" of extrajudicial screening of medical malpractice cases. It would also have been worthwhile to mention the New Jersey Plan[3] which is based upon a court rule rather than local agreements between the professional societies. That system, once invoked, may result in an adverse decision binding upon the claimant if he has so agreed, and even without agreement such a decision precludes his

2. ILL. ANN. STAT. ch. 91 (Smith-Hurd 1966).

3. N.J. CIV. PRAC. RULE 4:21.

attorney from initiating any further proceedings in the case. It resembles a type of binding arbitration arrangement and the significance of this general kind of system is probably growing in the country. At any rate physicians ought to know of it. Apart from this and a few other minor deficiencies, the discussion of professional liability for negligence is commendable.

The question of "abandonment" is carefully analyzed and some needed distinctions are drawn, which, if observed, should have the effect of eliminating some of the confusion that has characterized this area of law. Other chapters that make worthwhile contributions to the literature of the field include those treating the problems of experimental and innovative therapy, homotransplantation of tissues and organs, the public health and child abuse reporting requirements, and the physician-patient and psychotherapist-patient testimonial privilege. All of these chapters will surely be helpful to the reader.

One of the most interesting discussions in the book is found in Chapter 11 which takes up that modern conundrum "Informed Consent." For more than a decade courts and commentators have been struggling with the conceptual and practical aspects of this phase of professional liability. The authors of this book, recognizing the confusion that has existed, undertake a valiant effort to clear the air by suggesting some new paths of analysis. At the outset they manifest an understanding of the distinction between the case in which plaintiff claims the physician proceeded, without any semblance of consent, to do something that the patient did not know he was going to do, and the case based on the theory that although the patient consented to the procedure he was not advised fully enough of the collateral risks attendant upon it. Regardless of whether one feels sympathetic toward this type of analytical reasoning, it is a satisfaction to this reviewer to find writers who commence their discussion of the subject cognizant of the classification; some courts and writers have either ignored it or failed to understand it. As to the first class of cases, there is little to be discussed; the courts have consistently held that there is liability on the part of a physician who performs a medical procedure without having procured the consent of the patient either through express articulation or proper inference from conduct. The authors commendably center their attention upon the second class of cases, namely those in which it is claimed that collateral risks were not sufficiently disclosed.

New lines of distinction are suggested which ought to prove fruitful. The first is the difference between furnishing information and procuring consent. As to furnishing information, risks that *could* be disclosed are separated from risks that *should* be disclosed. The

former category really raises the question to what extent the physician should have been aware of a risk of which he was in fact ignorant and which he therefore could not disclose. The second category raises the question, granting that the physician knew of the risk and did not disclose it, whether the circumstances were such that he ought to have warned of it. There follows a perceptive appraisal of the kind of factors that should be taken into account in determining the obligation of the physician to disclose collateral risks of which he is aware. The authors' suggestions are not likely to provide a simple touchstone that will satisfy all medical critics of the entire theory, but it is the belief of this reviewer that lawyers and courts confronting the problem in the future will be pointed in the proper direction by the suggestions made in this book.

One aspect of Chapter 11 merits adverse criticism in this reviewer's judgment. It is that portion headed "Extension of the Field of Operation" (pp. 174-77). Here it seems that the authors confuse their personal views as to what the rules ought to be with what the rules actually are. This is a not uncommon failing among law students and law teachers. After a somewhat disconcerting misinterpretation of an article written by this reviewer in 1968,[4] the authors purport to summarize the law relating to the extension of an operation by a surgeon. In this connection it is clear that they espouse the "more enlightened view [that] a surgeon is empowered by law to extend the operation to any abnormal condition discovered during the operation if doing so is advisable for the patient's welfare and comports with the accepted practice of surgeons generally" (pp. 175-76).

Four cases are used to support this general proposition. There is initial reliance on certain dicta in a 1943 opinion of the District of Columbia Municipal Court of Appeals.[5] The patient's husband was sued by the surgeon for his fee. The husband defended on the ground that there had been an unauthorized operation on the wife. Plaintiff had operated on her for what he diagnosed as a tubular pregnancy; he discovered that she had a normal pregnancy but acute appendicitis and proceeded to remove the diseased appendix. In disallowing the patient's claim that the removal of the appendix was unauthorized, the court uses some extremely broad language concerning the desirability of the physician doing what he did.[6] The case is a poor one, of course, in which to raise the consent issue because without having suffered any harm the patient was refusing to pay what was apparently an otherwise unobjectionable fee. The

4. Plant, *An Analysis of "Informed Consent"*, 36 FORDHAM L. REV. 639 (1968). *See* MEDICAL JURISPRUDENCE at 174 and nn.105-07.

5. Barnett v. Bachrach, 34 A.2d 626 (Mun. Ct. App. D.C. 1943).

6. 34 A.2d at 629, quoted on p. 176 of MEDICAL JURISPRUDENCE.

authors dismiss this feature as a "curious twist," but in the real world an intangible factor such as this one carries considerable weight in disposing a court to look with disfavor upon a defense that was obviously an afterthought. Furthermore, the holding of the case was expressly based on the "emergency" doctrine, as the authors indicate (p. 175). To this reviewer it seems unwise to leave the impression that the case is "typical" of the judicial approach.

The second case used to support the authors' preferred view is *Kennedy v. Parrott*,[7] a 1956 North Carolina decision in which the surgeon, while performing an authorized appendectomy, found cysts on the patient's ovaries and punctured them. The patient later developed a phlebitis and brought suit. The claim was somewhat ambiguous and the causal relation between the puncture and the phlebitis was not proved. In appealing from a judgment of involuntary nonsuit, plaintiff asserted that the puncturing of the cysts had been an unauthorized procedure. In affirming the judgment the North Carolina Supreme Court used some very broad language of which the authors approve. Similarly in the third case, a 1912 New Jersey opinion[8] relied on heavily by the North Carolina Court, some very broad dicta are found.

The poorest authority cited, however, is *King v. Carney*,[9] a 1922 Oklahoma case. This case is referred to by the authors as a "key" case and is represented as holding that a patient's request to a physician that she be "fixed up" so that she could have children could be interpreted as a general grant of authority to the surgeon to do whatever he deemed advisable, including removal of her Fallopian tubes and ovaries when he discovered they were in a diseased condition. The authors say:

> The Supreme Court of Oklahoma interpreted the plaintiff's request to be "fixed up" as authority for a diagnostic operation and such additional surgery as might be necessary to rectify her condition. Since her condition before the removal of the diseased organs already made it impossible for her to bear children, and this condition could not be reversed, the surgeon was free to act as he did. [P. 177.]

It is difficult to see how anyone who reads the *King* opinion carefully can cite it for the foregoing proposition. The case came to the supreme court on the specific question of the admissibility of the surgeon's testimony that "the fallopian tubes and ovaries and surrounding tissue were so badly diseased, that it was necessary to remove the diseased organs and affected parts in order to preserve the plaintiff's life and health, and that it would have been dangerous

7. 243 N.C. 355, 90 S.E.2d 754 (1956).

8. Bennan v. Parsonnet, 83 N.J.L. 20, 83 A. 948 (1912).

9. 85 Okla. 62, 204 P. 270 (1922).

to her life and health not to do so."[10] An objection to that testimony was sustained by the trial court and verdict and judgment were for plaintiff. The supreme court reversed saying:

> If, in the course of an operation to which the patient consented, the physician should discover conditions not anticipated before the operation was commenced, and which, if not removed, *would endanger the life or health of the patient*, he would, though no express consent was obtained or given, be justified in extending the operation to remove and overcome them.[11]

The foregoing is a statement of the conventional emergency doctrine. The court emphasized that point:

> Evidence tending to show that on account of conditions discovered by proper diagnosis the operation was necessary to save the life of the patient, tended to show that the operation was authorized under the foregoing principle.[12]

This reviewer does not know what a "key" case is in the context in which the authors use the term. However, even if the case stood for the general proposition that they espouse, it was decided in 1922 and in the almost fifty years that have followed has been cited only nine times in judicial opinions.[13] Each time, as I read those opinions, it has been cited for the emergency exception to the consent requirement; I find no instance in which it has been cited for the proposition the authors claim it exemplifies.

The foregoing criticism is not intended as mere nit-picking or caviling at the legal analysis displayed by the authors or their assistants. It is more serious. In a book intended for use by nonlawyers, a writer bears a serious responsibility to distinguish between his own views and the courts' holdings; that responsibility is greater than in a book intended to be read and analyzed by legally trained people. Law students, law professors, and practicing lawyers are competent to discriminate between what writers say the law ought to be and what the cases actually hold. Medical students and physicians cannot be counted upon to possess this ability. It would be fairly easy to imagine a case in which a surgeon who had imbibed the authors' suggestions in this subdivision, and who had not procured a broad,

10. 85 Okla. at 63, 204 P. at 271.

11. 85 Okla. at 64, 204 P. at 272.

12. 85 Okla. at 64, 204 P. at 272.

13. Gray v. Grunnagle, 433 Pa. 144, 152, 223 A.2d 663, 667 (1966); Chambers v. Nottebaum, 96 S.2d 716, 719 (Ct. App. Fla. 1957); Kennedy v. Parrott, 243 N.C. 355, 361, 90 S.E.2d 754, 758 (1956); Higley v. Jeffrey, 44 Wyo. 37, 43, 8 P.2d 96, 97 (1932); Baxter v. Snow, 78 Utah 217, 234, 2 P.2d 257, 263 (1931); Jackovach v. Yocom, 212 Iowa 914, 927, 237 N.W. 444, 450 (1931); McGuire v. Rix, 118 Neb. 434, 440, 225 N.W. 120, 123 (1929); Hively v. Higgs, 120 Ore. 588, 591, 253 P. 363, 364 (1927); Hershey v. Peake, 115 Kan. 563, 565, 223 P. 1113, 1114 (1924).

carefully worded consent, could get into serious difficulty by doing what he thought was the proper thing but which was clearly outside the limits of the emergency doctrine. A recent case in Michigan in which an opthamologist got into exactly this sort of trouble is *Shulman v. Lerner*,[14] a 1966 decision in which a judgment for $12,500 was affirmed. Fortunately such cases are unique; but that is because it is the general practice for surgeons to procure a written consent expressly authorizing procedures deemed advisable even in the absence of emergency. It is not because the principle propounded in this subdivision of the book has achieved general acceptance.

Despite the criticism suggested in the last preceding paragraphs, this reviewer wishes to make it clear that he considers the presentation of these authors in general to be a worthy and commendable work. The book is well suited for the use of medical students and physicians, at least those who are seriously interested in the subject matter. Such an appraisal assumes that it is desirable to acquaint members of the medical profession with the elements of the legal system. It is, of course, undesirable to leave them with the impression that they are competent to function as their own legal counsel or to make legal decisions without advice from professional sources. This book does not leave that impression nor could it properly be so read. It should make clear to those members of the beleaguered profession who read it that the law is not a mysterious or occult area; that the legal system has more merit than would appear from recent discussions of the subject in their professional magazines; and that many of their fears are without foundation. It is hoped that numerous medical students and physicians will read and study this book. They will be better informed and probably wiser for having done so.

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