

BOOK REVIEWS

Medical Law In New Zealand

(by PDG Skegg, Ron Paterson (general eds), Joanna Manning, John Dawson, Nicola Peart, Warren Brookbanks, Thomson Brookers, Wellington, 2006)

Medical law incorporates a wide variety of traditional areas of legal scholarship and often requires a basic understanding of other health related disciplines. The interaction of different legal regimes and the interdisciplinary nature of the field are precisely what fascinate many health law adepts, but it also creates particular challenges for those teaching it. They are torn between a desire to sufficiently cover the complexity of the legal issues and legal rules of specific cases and the need to avoid too detailed a discussion of all the legal disciplines involved and of all theoretical legal issues that arise. Health law teachers have to invoke and often explain in some detail the basic rules of tort law, property law, trusts, privacy law, family law, constitutional law, and so on, but cannot pretend to be experts in all of these areas. If this is already difficult in one's own legal system, it becomes an even greater challenge when teaching the law of a foreign jurisdiction. A common law jurisdiction has the added layer of complexity that common law cases from other jurisdictions such as England intermingle with New Zealand cases, local statutes, and so on. When I arrived in Dunedin in December 2006 to teach a course on *Privacy, Property and the Human Body*, I was therefore expecting days of intense library work, looking up various textbooks on property law, tort law, privacy law, family law, not so much to transfer the course into a course on New Zealand law, but to make useful comparisons and introduce basic concepts and cases of New Zealand law on the subject matter covered.

After several days of library research, which increased my anxiety levels about how to apply complex legal rules to specific health care problems in the New Zealand legal context, I was told in passing by one of my Otago colleagues that they had just recently published a book on medical law that could be "of some help" in my preparations. This was a colossal understatement. *Medical Law In New Zealand* edited by Professor Peter Skegg and Ron Paterson basically provided me with all the answers and necessary references I needed to bring myself up to date with all of New Zealand medical law that was relevant for this course.

The two editors to this book complement each other in an interesting and nice way. Peter Skegg is well-known for his work related to the status of the human body and has extensive experience in teaching and writing about medical law in general, while Ron Paterson is New Zealand's Health and Disability Commissioner. He is known as an ardent and international promoter of the opportunities created by New Zealand's Code of Patients' Rights. The book was in fact launched at the 10th anniversary of the Code and the Code clearly plays a central role in it, as it does in current New Zealand medical law. Colleagues John Dawson and Nicola Peart from Otago University, and Warren Brookbanks and Joanna Manning from the University of Auckland joined them as writers of specific chapters of the book.

The book focuses on a core set of issues in medical law, most of which fall

under the traditional umbrella of medical jurisprudence. In addition to an introductory section on the regulation of health care and on the Code of Patients' Rights, the book contains seven distinct parts: Standard of Care, Consent, Health Information, Mental Health and Intellectual Disability, The Beginning and End of Life, and Complaints, Investigations and Compensation. The strength of the book lies in its careful selection of a set of core topics in medical law, which are discussed in much detail. It can be characterized as a monumental source of information on these topics. The book aims primarily at providing detailed and accurate information on the state of the law in a readable and accessible style, and avoids to be an overly academically oriented theoretical treatise. It also does not pretend to provide an overly critical philosophical analysis of the ethical issues raised in the context of health care and the application of health law.

Every chapter discusses in much detail statutory provisions as well as leading New Zealand and other common law cases related to the subject matter. While several authors appropriately refer to doctrinal debates and some interesting international developments, it is clear that the authors wanted in the first place to provide a comprehensive overview of how New Zealand law deals with these core issues in the health care context. They succeeded in putting together a detailed, accessible and highly informative book that will be extremely useful for legal practitioners, legal academics, students, health practitioners, and other people confronted with specific questions related to health care law. While the focus is on New Zealand law, extensive references are also made in some of the chapters to interesting developments in other jurisdictions. Because of the complexity of the field, and the fact that so many different legal regimes touch on aspects of health care, this is a gigantic undertaking. The fact that the appendix contains more than 150 pieces of cited legislation and that the table of cases is spread out on more than 17 pages of small print is just an indication of the encyclopedic nature of this task.

The book starts appropriately with a short sketch of the "Regulation of Health Care". New Zealand as well as international readers are reminded in this chapter of some of the core characteristics of the New Zealand Health Care system, which includes the fact that it is a publicly funded system and that there is one comprehensive set of regulations related to health care professionals. Those who are looking for more than a short introduction to the implications of these aspects of the New Zealand health care system may find this chapter perhaps somewhat too sketchy. The second introductory chapter is much more substantial and focuses exclusively on one of the most significant initiatives in the organization and regulation of New Zealand health care in the last decades: the development of the Code of Patient's Rights. Written by Commissioner Ron Paterson and colleague Peter Skegg, it provides an excellent overview of the history of the development of the Code and a short overview of its core provisions, which are also extensively referred to and discussed in relevant chapters further in the book. The Code of Patients' Rights, which in its text uses the, in my view, regrettably popular term "consumer" when talking about patients and people receiving various disability services (including services to promote their independence and other support services), aims at expressing the core rights of patients and the duties of health care providers. It is fair to say that the Code of Patients' Rights has fundamentally altered health care law and practice in New Zealand and that

it also has been a source of inspiration around the world. The history of the Code confirms the unfortunate reality that significant improvements to the respect of patients' rights generally have their origin in controversy. In this case, it was the Cervical Cancer Screening controversy in New Zealand which spurred the development of a comprehensive code of patients' rights. The chapter points out well how several of the provisions of the Code really create an additional level of protection, and impose additional duties on health care providers. Several of these "rights", and how they have been interpreted in various opinions of the Health and Disability Commissioner, are noteworthy. For example, the Code seems to require a more risk-averse approach from health care providers than traditional common law. The Code also imposes a duty of appropriate coordination of health services and a more holistic approach to medical care. In the context of debates over wait times in many countries, it is also interesting to read that the Health and Disability Commissioner has interpreted the right to be informed as the right to receive clear information about the estimated waiting time. The protection offered through these rights is faced, however, with an inescapable limitation: individual health care providers can defend themselves against claims of violating the code by showing that they have taken all reasonable steps to ensure the exercise of these rights. Cost constraints are explicitly mentioned in the code as a legitimate factor that limits what patients can reasonably expect from their health care providers.

The relation between traditional common law and the new Code of Patients' Rights is not an easy one. Many, not to say most of the subsequent chapters refer extensively to the interpretation of the Code and to the relation with traditional common law. It is fair to say that the Code runs as a thread through the book.

Two crucial chapters by Joanna Manning on the standard of care and on the determination of a breach of the duty of care, for example, start off with a short discussion of the relevant provisions in the Code. The common law remains, however, very extensively discussed in these chapters, particularly in the chapter on the breach of a duty of care. The chapters provide a very detailed and clear discussion of common law developments that will also be of interest to common law scholars outside New Zealand.

The following chapters, dealing with informed consent and patient decision making in health care, also pay significant attention to the Code as well as to traditional common law developments. Four detailed chapters (chapters 5 to 8) written by Peter Skegg are devoted to various traditional components of informed consent: capacity to consent, the duty to inform, and justifications to treat without informed consent. The chapters, which contain extensive references to case law, statutory provisions, and the Code of Patients' Rights, reflect the same desire for accuracy and detail in the discussion of the common law developments in this area and are a formidable source of information on the law of informed consent.

Information law is in and of itself not a topic that is commonly included in traditional treatises on medical jurisprudence. If there is discussion of privacy issues in medical law textbooks, it is generally limited to questions of confidentiality of medical records. The editors are to be praised for giving the topic of health information privacy the space it deserves under the general heading of

Health Information. Four chapters, all written by John Dawson, are devoted to this topic as well. In an instructive first chapter, John Dawson briefly explains the difference between the often confused concepts of privacy, confidentiality, privilege and the patient's access to records. It is pointed out that in the health care context disclosure of health information by a physician without consent can constitute two different breaches: a breach of privacy and a breach of confidence. The co-existence of remedies based on privacy law, professional regulations, and traditional common law principles is reflected in the following chapters. Chapter 10 discusses in detail various relevant provisions of the New Zealand Health Information Privacy Code of 1994. A set of graphics in the middle of the chapter clarify the complex interrelations between different parties involved with health information and between different areas of rule making. The next chapter discusses again in much detail the common law developments related to confidentiality, privacy and disclosure of health information. The chapter contains a very interesting discussion, with reference to relevant international case-law, of the issue of the duty to warn. The last chapter on health information discusses how confidential health information is dealt with in court proceedings. The central questions are how confidential health information can be brought before a court and how privileges and confidentiality rules can limit the use of this information in court procedures.

In two chapters totalling more than 50 pages, Warren Bookbanks discusses New Zealand's mental health law system. In the first chapter (13), the history of mental health legislation and policy is discussed, as well as some distinct features of the current legislative regime. Extensive attention is paid, among other issues, to the use of community treatment orders, which are relatively controversial in many countries. New Zealand has developed expertise with the use of this liberty restricting measure, and it is interesting to read how New Zealand law applies in this context. The chapter discusses also extensively how the Code of Patients' Rights has impacted on the legislative regime surrounding mental disability. A separate chapter is devoted to the treatment of "special patients", which under New Zealand law encompasses all those mental health patients who entered the mental health system through the criminal justice system.

Nicola Peart is the author of three chapters on what we can refer to as legal issues "around the beginning of life." This encompasses the issue of assisted human reproduction, the legal status of life before birth, and issues surrounding contraception and abortion. The largest chapter is devoted to a detailed and clear discussion of New Zealand's Human Assisted Reproduction Act 2004, which appears quite similar to the Canadian Assisted Human Reproduction Act. But contrary to Canada, New Zealand has moved relatively quickly to establish immediately also an Advisory Committee on Assisted Human Reproductive Technology, which is mandated with developing policy surrounding some of the regulated activities under the Act, and an Ethics Committee, which is responsible for reviewing new procedures and research involving assisted human reproduction.

Whereas the chapter on Assisted Human Reproduction provides a detailed overview of the regulatory regime, the chapter on the "Legal Status of Life Before Birth" is primarily a detailed discussion of common law developments and contains also an interesting comparative perspective with a short overview

of English, Canadian and US developments. The chapter provides a wealth of information on new common law developments and more established cases related to the status of the foetus in utero, the legal status of the embryo and the status of the unborn child. The last chapter in this section discusses New Zealand law related to abortion and preventing life, the latter encompassing both contraception and sterilization. This chapter provides a clear and well-structured overview of the most important aspects of New Zealand's Contraception, Sterilization and Abortion Act 1977 and other relevant pieces of legislation and regulation.

New Zealand law as it relates to the end of life is discussed by Peter Skegg. Readers will first find in two short chapters a useful overview of the law as it relates to euthanasia, assisted suicide, and withholding treatment, which are referred to in the book as 'Medical Acts Hastening Death' and 'Omissions to Prolong Life.' The author points out in his conclusions to these chapters that prosecution on the basis of criminal law prohibitions for hastening death or omitting life-prolonging treatment is certainly possible under New Zealand law, but that this only happens in fairly extreme circumstances. The two subsequent chapters deal with the concept of death and the use of corpses for medical purposes. Particularly the latter chapter will be of interest in New Zealand, in the context of recent controversies surrounding the use of human remains in medical facilities in New Zealand. Peter Skegg points to some of the lacunae in the Human Tissue Act 1964, which seemed to provide much leeway to hospitals and institutions that are in possession of human corpses. They appear to be protected by the presumption that they are lawfully in possession of these corpses. The chapter risks being outdated, however, due to the fact that a new Coroners Act 2006 has been established and that the Human Tissue Act 1964 is being replaced. The chapter remains nevertheless a rich source of information on legal developments in this context.

Ron Paterson and Joanna Manning have taken the last part on their shoulders. Commissioner Paterson describes in detail the assessment and investigation procedures following a complaint to the Health and Disability Commissioner. The chapter specifies who may complain, what the basis of the complaint can be, and the various ways in which the Commissioner can deal with such complaints. The chapter further gives details about the investigations undertaken by the commissioner, his final reporting, and the potential for appeal.

Joanna Manning discusses in a lengthier chapter first the professional disciplinary procedures based on the Health Practitioners Competence Assurance Act 2003. This Act came into force in 2004, and provides remedies against health care providers who have breached their obligations under the Code of Patients' Rights or under the Nurses Act 1977. The Act establishes professional conduct committees and one Health Practitioners Disciplinary Tribunal, common to all 19 registered health professions. Considering the problems associated with alleged lack of impartiality of many professional disciplinary committees in other jurisdictions, this model is certainly interesting to look at for health law scholars and policy makers in other countries. The chapter details very well the administrative standards used, discusses the required standard of proof and the determination of accepted practice, and pays much attention to the various grounds for professional discipline and the possible sanctions.

The next chapter will also be of particular interest for comparative law scholars, since it discusses the unique system of no fault compensation under the various versions of New Zealand's Accident Compensation Acts. Joanna Manning reveals the history of the legislation and its various stages of development. The author discusses the various application criteria that have to be fulfilled in order to obtain compensation, with detailed discussion of the rich body of case law that developed under the Act. She emphasizes particularly how various courts have struggled with the often very difficult distinction between an injury resulting from treatment and injury related to the underlying health condition. Foreign scholars interested in looking at the value and limits of the New Zealand compensation model will get a good picture of the strengths and weaknesses of New Zealand's system. Attention is also paid to special cases of treatment injury, such as injury resulting from commercial clinical research.

A last chapter is devoted to the rare situations in which civil proceedings can be commenced in personal injury cases. The Accident Compensation Act has rendered this mechanism much less important under New Zealand law, but as is characteristic of the entire book, the author clearly strives to offer a complete picture. She discusses various exceptional situations that can still lead to personal injury cases, including civil damages proceedings for violations of the New Zealand Bill of Rights Act 1990, civil damages in specific cases of psychiatric injury, and civil proceedings under the Health and Disability Commissioner Act 1994. People interested in these less common proceedings in New Zealand will find there again a rich source of case law and some references to relevant doctrinal discussions.

It should be clear from this overview that the book provides a wealth of information on many of the crucial components of New Zealand health law. Anyone in New Zealand who is interested in health law will undoubtedly use this book as their primary source of information. The book is written in clear and accessible language, without compromising the quality of the writing and without ignoring the complexity of the issues. Students, legal practitioners, legal scholars, health administrators, health policy makers and people involved in government will find most of what they need in this book to have a solid understanding of the issues covered. Legal scholars who need to verify a specific point of law or who want to start studying a specific question related to health law, will take this book as their primary source from which to deepen their study. International scholars will find in this book an easily accessible yet in-depth analysis of many aspects of New Zealand medical law.

Although the book deals with most of the core issues in health law, one could comment that some other important health law areas are not covered. This should not be seen, however, as a serious shortcoming of the book, but rather as an inevitable limitation. Health law is an amorphous area, which continually expands. The book covers the most important areas and introduces most of the important concepts that can apply in other health law debates. Moreover, at least one of the important areas not addressed in the book, medical research, is the subject of another impressive publication involving several of the authors of this book. Indeed, John Dawson and Nicola Peart published in 2003 *The Law of Research: A Guide*, a very well-organized, exhaustive reference book, which covers extensively all the areas of law that are implicated in the context of medical

research. Since there is merit in having a core legal text on major aspects of health care law in one book, it may still be worth considering adding to a next edition a chapter on medical research and to use that also to have an update on the core legal developments since this 2003 publication. A stronger case is to be made for adding a chapter on the regulation of pharmaceuticals and medical devices. Pharmaceutical products in particular are increasingly an integrated part of health care, and their regulation and control raise major legal and policy issues. Finally, although there is a tendency to overstate the novelty of the issues raised by new technological developments in the context of health care, it may be worth it to contemplate adding a chapter on how New Zealand law deals with some of the most important new technological developments in the context of health care, such as those associated with genetic technology, nanotechnology, and applications of stem cell research.

All of these suggestions remain, however, friendly recommendations. The book really stands out as it currently is: a solid legal standard work on New Zealand health law. It will undoubtedly become for New Zealand what Ian Kennedy & Andrew Grub's *Principles of Medical Law* is for the UK, and Ellen I Picard and Gerald B Robertson's *Legal Liability of Doctors and Hospitals in Canada* is for that country: the standard work on health law for this generation.

Not surprisingly, in light of all the strengths mentioned, the book was awarded the Legal Research Foundation J F Northey Memorial Book Award for the best legal book published in New Zealand in 2006.

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