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Book Reviews

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BOOK REVIEWS

MEDICAL JURISPRUDENCE. By Jon R. Waltz and Fred E. Inbau. New York: The MacMillan Co., 1971. Pp. 398. $10.95.

The authors of *Medical Jurisprudence* do not tout the book as an exhaustive treatise on medical malpractice or questions of law unique to medical practice. Indeed, the authors candidly note that they have written the book primarily for doctors or medical students.

Certainly doctors or medical students, indeed any intelligent layman interested in medical malpractice or in medical-legal problems, will find the book interesting and informative. The book describes concisely and accurately the procedures and phases of a trial. It states briefly the types and the sources of law. It even describes such basic matters as how to locate reported decisions.

The practicing attorney can also find this book a useful one. The scope of this book is very broad. Annotations, while not extensive, are sufficient on most points to provide an introduction to primary source authority.

The authors discuss the general provisions and construction of typical licensing statutes including grounds and procedures for license suspension or revocation. The canons of medical ethics are set out verbatim followed by a discussion of the due process protection available to the doctor expelled by his medical association. Also included is a discussion of the inter-professional code for physicians and attorneys. A full understanding of this code, particularly the provisions for medical reports, court appearances and subpoenas, could avoid friction for lawyers as well as doctors.

Medical Jurisprudence treats in detail the physician-patient privilege. The authors note the substantial decline in significance of this privilege brought about not so much by the increasing depersonalization of the relationship as by the frustration of truth the privilege causes in the courtroom. The authors note the trend toward the position that the privilege is waived by the very act of commencing a lawsuit for personal injuries. In North Dakota, this trend is followed at least by the district judges in the First Judicial District, Cass County. The effect is to allow pre-trial discovery of all prior medical history in any way relating to the injuries for which the plaintiff claims damages.

Briefly mentioned is the doctor's role in the quest for an adequate award of damages to compensate his patient for injuries covered

by another's negligence. The authors note, however, the importance of limiting medical testimony to a description of physical impairment. The doctor should not be allowed to express the physical impairment in terms of a "degree of disability" because the latter is simply not a medical conclusion. This view is also endorsed by the American Medical Association,[1] but rarely appreciated or acknowledged by lawyers, doctors, or judges in this area.

A thorough and intelligent analysis of the *Uniform Anatomical Gift Act* is offered. Attorneys should be familiar with this act[2] in the event they are requested to advise on a decision that could determine whether a vital transplant can proceed. While the authors note the various technicalities of the Act, they avoid any discussion of the civil or criminal penalties that would result from its violation.

Primarily, however, this is a "hornbook" presentation of modern medical malpractice law. In this respect, the book could be helpful to law students and attorneys as well as medical students and doctors. The authors cover nearly every important phase of current modern malpractice trends. They state the law concisely and in most respects accurately.

The authors note that most malpractice actions sound in negligence and not breach of contract. The recent case of *Guilmet* v. *Campbell*,[3] not discussed in the book, could herald a change. This significant decision held that mere pre-operative assurances by the doctor raised a jury question of whether there was a "contract to cure."

A significant portion of the book discusses the necessary qualifications of an expert witness. The extreme limitations to which most courts confine chiropractic testimony are unfortunately not followed in North Dakota. Thus the statement that a chiropractor testifying in a personal injury case will be restricted to opinions regarding the nature and extent of physical conditions he has observed and prevented from stating a prognosis,[4] is not the rule in North Dakota. The North Dakota Supreme Court allows the chiropractor to testify to a medical certainty even as to a prognosis of future medical disability.[5] Indeed, even in a malpractice case against a physician and surgeon a chiropractor has been allowed to testify to the taking and reading of x-rays.[6] The medical, orthopedic and radiologic training of many chiropractors is sketchy

1. AMERICAN MEDICAL ASSOCIATION, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT iii (1971).
2. N.D. CENT. CODE ch. 23-06.1 (1969).
3. Guilmet v. Campbell, 385 Mich. 57, 188 N.W.2d 601 (1971).
4. J. WALTZ & F. INBAU, MEDICAL JURISPRUDENCE 62 (1971).
5. Klein v. Harper, 186 N.W.2d 426, 429-431 (N.D. 1971). *See also* Corbin v. Hettle, ——— Mich. App. ———, 192 N.W.2d 38 (1971) holding that a chiropractor could testify that the injuries were permanent and that the plaintiff would never be free from pain.
6. Ness v. Yeomans, 60 N.D. 368, 234 N.W. 75, 76 (1931).

at best and certainly not uniform as a whole. Hopefully, the position of the North Dakota court regarding chiropractic testimony will change.

The authors are unusually emphatic in proclaiming and hailing the passing of the locality rule. They ignore quite a number of recent cases from many jurisdictions, including North Dakota, that retain the rule.[7] Basically the only argument advanced for discarding the rule is that it does nothing to encourage the upgrading of medical practice in unspecified localities. It is not unrealistic to suggest that most small communities in less populated states would be happy to receive medical care from a general physician even though he may not be able to stock his clinic with the latest laboratory devices or follow the most recently cited techniques. The law already requires the local doctor to recognize cases beyond his capacity and to refer such cases to specialists or clinics competent to handle the case.[8] The law already allows the claimant to require the local doctor to testify as an expert witness even though such testimony creates a *prima facie* case against the local doctor.[9] The local doctor may also be cross-examined regarding treatises or recent articles in medical journals by authorities the doctor recognizes.[10] An unfortunate but probable result of discarding the locality rule is that the physician's conduct will be judged not by an expert familiar with the practice in his locality but by an expert whose chief speciality is nationwide courtroom testimony in medical malpractice cases.

The authors discuss the recent development of "informed consent." They approve the position that medical expert testimony is required in most cases to determine if sound medical judgment was exercised by the physician's disclosures to his patient prior to obtaining consent for the procedure.[11] Probably the most important aspect of this issue is the one least considered by the courts. What is the appropriate measure of damages? The fairer and more realistic measure suggested here is an award based upon the difference between the condition if untreated and the patient's condition following the procedure and occurrence of the undisclosed risk.[12]

This book is intelligently written. It is informative on the law

7. Myer v. Moell, 186 Neb. 397, 183 N.W.2d 480 (1971); Benzmiller v. Swanson, 117 N.W.2d 281 (N.D. 1962). *See* RESTATEMENT (SECOND) OF TORTS § 299A, at 73 (1965).
8. Tvedt v. Haugen, 70 N.D. 338, 294 N.W. 183 (1940).
9. Iverson v. Lancaster, 158 N.W.2d 507 (N.D. 1968).
10. *Id.* at 517-518.
11. J. WALTZ & F. INBAU, MEDICAL JURISPRUDENCE 164-166 (1971).
12. *Id.* at 168.

and provocative as to legal advances necessary. It should enjoy a wide audience.

CARLTON J. HUNKE*

KENNEDY JUSTICE. By Victor Navasky. New York: Atheneum, 1970. Pp. 455. $10.00.

John F. Kennedy's naming of Robert F. Kennedy as United States Attorney General caused a storm of criticism. Some of the outcry stemmed from the circumstance that the two men were brothers, in blood and in outlook; talk of political cronyism, as recurrent as it is meaningless, gave way to rumblings about a family dynasty, which might be something else again. Less emotional observers were concerned about 35-year-old Bobby Kennedy's lack of legal experience: Yale law professor Alexander Bickel was reported as having said, "On the record, [he] is not fit for the office." But Robert Kennedy accepted the appointment, despite his own misgivings, because his brother Jack had told him, "I've got to have you. I need the help of my brother more than I need anyone else."

In three years Robert F. Kennedy had resigned his Justice Department assignment to begin his doomed climb toward the office from which his brother, now dead, had appointed him. Since it is much easier to view with alarm than it is to weigh accumulated evidence, for some eight years—despite all the initial controversy—there has been no useful assessment of Robert Kennedy's tenure as Attorney General. There is one now and it will greatly interest lawyers.

Victor Navasky, a Yale Law School graduate who is best known as founder of the satirical political journal *Monocle* and as a frequent commentator in the *New York Times Magazine*, has written a serious, analytical, important, tantalizing book about the Kennedy years at Justice. It is a serious book in the sense that it is not a collection of reminiscences or of backstairs gossip—Navasky is sparing of anecdotal material—and it is not of the read-it-to-weep genre of Kennedy books. It is analytical in the sense that its author, not content simply to disgorge five years of research, has focused his considerable intelligence on the significance of his evidence and has tried to organize it and make some sense of it. It is an important book because Navasky, having worked so hard for so

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long, has produced a genuinely illuminating study that informs us, as in his early pages he promised to do, about the delicate, dangerous interplay between the short-term federal planner and the mammoth, entrenched bureaucracy with which he must work if his administration's policies are to draw a living breath. The book is tantalizing in the sense that, despite Navasky's admirable efforts, one remains irritatingly unclear as to the measure of credit Attorney General Kennedy could claim for the undeniable fact that new things got done, some of them quite satisfactorily, during his tenure. In a broader sense it is tantalizing in that, much as we may wish to, we cannot with any real assurance project its subject's interrupted course.

Navasky has discerned the primary codes by which Kennedy, willingly or unwillingly, had to live. In part because the Federal Bureau of Investigation accounts for 41 per cent of Justice's budget and 42 per cent of its manpower, but more subtly because the maximum cabinet officer ("My brother, the President . . .") was pitted against the ultimate bureaucrat ("Mr. Hoover became the Director of the Bureau in 1924, the year before the Attorney General was born"—the *FBI Tour Guide*), *Kennedy Justice* inevitably deals in one lengthy part with The Code of the FBI. Because Kennedy deliberately surrounded himself with a battery of lieutenants from elitist Eastern law schools ("A bunch of Yale Law types recruited by 'Whizzer' White," one Harvard man who did not make the team has said), Part II of *Kennedy Justice* is devoted to The Code of the Ivy League Gentleman. Finally, of course, there is, as there had to be, a section on The Code of the Kennedys.

It would be a disservice to Navasky's detailed treatment of complex topics to give compressed descriptions of his book's fascinating specifics. Those who wonder whether Kennedy authorized the FBI's tapping of Martin Luther King's telephone must read the book, not a precis of it, and the same holds true for those who want to know how and why Kennedy set out to destroy Jimmie Hoffa. A reviewer of this book should, I think, restrict himself to a few of the general conclusions that are justified by Navasky's careful dissection of a whole series of situations.

In any battle between charisma and a fully organized bureaucracy, charisma will lose. So it was with Kennedy and J. Edgar Hoover's FBI, and Kennedy seemed early to realize this. He who had the last clear chance to pry Hoover from his post not only did not do so but quickly adopted a policy of non-confrontation with the Bureau. More than that, in one Faustian bargain after another—mostly to gain a little Bureau support for his war on organized crime and, later, some minimal involvement in the civil

rights field[1]—Kennedy enlarged the Buraau's jurisdiction and its budget. Navasky, whose obvious desire to admire Robert Kennedy rarely overpowers his analytic faculties, is reduced to the humiliating conclusion that "Hoover was the jockey, and Kennedy was the horse." On the way to this determination Navasky provides a brilliant interpretation of the FBI as a full-fledged secret society possessing enormous, ominous power.

The Code of the Ivy League Gentleman committed Robert Kennedy to the faiths inculcated in young law students, mainly at the Yale Law School, during the 40's and early 50's. These faiths included a belief that patient, reasonable men can achieve desirable change through mediation rather than by crude confrontations. Nowhere was this attitude more evident than in Kennedy's ceaseless negotiations with Governor Ross Barnett of Mississippi, during which the Attorney General sought assurances that James Meredith could register as a student at "Ole Miss" without getting lynched. I think it must be concluded that Kennedy, at least in this notorious instance, was again outmaneuvered and ultimately captured, this time not by agile bureaucrats but by men who appreciated the tactical advantages of lying through one's teeth. A gentleman's code works only with gentlemen.

Although Navasky never makes it quite clear how Ivy League conventions contributed to the Kennedy administration's wretched record of Southern judicial appointments, he establishes that no aspect of Kennedy's attorney generalship is more vulnerable to criticism than his part in the selection of at least five racist federal judges who dealt crippling blows to the civil rights expectations that Kennedy had belatedly recognized. For Robert Kennedy, judge-picking became an extension of politics, an approach that, however much it might comport with James Eastland's conceptions of senatorial courtesy, flatly contradicted some of John Kennedy's loftier oratory. It is undeniable that Robert Kennedy abetted the appointment of judges who would call black litigants "chimpanzees."

The conflicting codes of bureaucracy and of Ivy League lawyering did not prevent Kennedy from adhering to his elaborate familial code. In describing the operation of Kennedy family strictures, Navasky comes closest to the man Robert Kennedy. His clan's code made Kennedy strive for excellence, to be brave, to try, where he could see it, to take the humane position. Navasky takes as an example Kennedy's reaction to the plight of James Landis,

1. Robert F. Kennedy's interest in civil rights, on any level other than the merely rhetorical, came late. I recall having been mildly surprised when, early in Kennedy's tenure as Attorney General, a career man at Justice remarked privately to me that "Bobby couldn't care less about civil rights. You just can't move him. He's too busy being a gangbuster." My friend might have added that Kennedy was then very busy trying, sometimes by extralegal means, to bring Hoffa to his knees.

a former dean of the Harvard Law School and a friend and adviser of the Kennedys who, having gotten eccentric if not psychotic, let five years go by without paying his taxes. Kennedy's role in the politically sensitive Landis case does him credit and suggests that everything about him was not tough and heartless.

The flaws of *Kennedy Justice* as a book are mostly inconsequential. Navasky engages too often in the annoying condescension of prefacing his points with a statement of what the point is not; here and there his book turns into an ode to the Yale Law School, which bothers even me, a graduate of the place; the book is overorganized in that portions of its text are only remotely related to Navasky's—or his editor's—numerous and ambitious section headings.

The only truly unsatisfying thing about *Kennedy Justice* was unavoidable. It is the most frustrating aspct of Navasky's study that his repeated efforts to convey Kennedy's "most significant achievements" culminate in anticlimax: he was stylish, he was tenacious; he could draw good people to him and he knew how to delegate responsibility; he was willing to tackle neglected problems; he was no yes-man to the President. (He was also partial, impulsive, an occasional believer in the end justifying the means, and he was morally chargeable with some of the FBI's grosser iniquities.) Navasky shows Kennedy's spirit enlarging; he cannot tell us how large it would have grown. But, because Robert Kennedy was not allowed to complete his own record, let alone his older brother's, we must be deeply grateful for this thoughtful, ambiguous book about the most demanding period of his short life.

JON R. WALTZ*

THE INJURY INDUSTRY AND THE REMEDY OF NO-FAULT INSURANCE. By Jeffrey O'Connell. Chicago: Commerce Clearing House, Inc., 1971. Pp. 253. $8.50.

Begin with the fact that 45 per cent of all those severely injured in auto accidents receive absolutely nothing in compensation from their automobile liability insurance while 85 per cent of those with $10,000 or more in economic loss are reimbursed less than half their loss. Add to this the fact that 56 cents of every insurance dollar is chewed up in insurance overhead and legal fees. Then consider the difficulty in ascertaining who was at fault in the

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auto accident and that 50 to 80 per cent of the civil litigation in our overcrowded courts are faced precisely with that problem. Finally, consider the skyrocketing cost of automobile insurance. The conclusion is always the same; something is seriously wrong with our automobile insurance system.

The myriad of inadequacies and shortcomings of the fault system of automobile liability insurance has produced an equal number of new proposals and suggestions for reform. At the forefront of these new ideas is the concept of no-fault insurance originally proposed by the author, Jeffrey O'Connell, in conjunction with Professor Robert E. Keeton of the Harvard Law School.

For the purposes of analysis, the book can be conveniently divided into two topics. Roughly speaking, the first half concerns serious criticisms of the present automobile insurance system while the second half is devoted to the panacea of no-fault insurance.

The author's major criticism of the present system is its requirement that one driver must be proven to have been entirely at fault. His view is that not only is it time consuming but highly conjectural. The procedure is inherently bad because it usually means forcing a witness to remember unrememberable details which are necessary to reach a final determination.

Another criticism of the present system is the practice of lump sum payments made upon final settlement of the case. Usually this payment is made months, even years, after the accident and in the meantime the victim is financially forced to forego necessary rehabilitative programs for his injury. The author notes the problem has been mitigated somewhat by the practice of some insurance companies making advance payments to claimants in situations where its liability is reasonably certain. This enables the claimant to partake in a rehabilitative program with the only condition being that the advance payment be deducted from the final settlement. However, advance payments are used much too infrequently with only 8 per cent of the seriously injured receiving them.[1] Consequently, the majority of victims must forego rehabilitation until the lump sum payment is received upon final settlement when the victim is often beyond the rehabilitative stage.

One of the reasons for insurance companies being hesitant to advance payments to victims where liability is certain is because of the adversary nature of the fault system. Under the adversary system, the insurance company owes no loyalty to the claimant. This is often manifested in hostile treatment on the part of he insurance company. For example, it will intentionally delay settle-

1. J. O'CONNELL, THE INJURY INDUSTRY AND THE REMEDY OF NO-FAULT INSURANCE 26 (1971).

ment knowing its bargaining power increases with the passage of time because the claimant needs the money quickly.

The author places much criticism on the fault system's practice of paying for pain and suffering and duplicating payments from other sources, both of which comprise a large portion of the compensation of the claimant. The author recommends their abolishment primarily on the basis of reducing the insurance premium. Further justification for the elimination of pain and suffering payments is found, not on the merits of such compensation, but simply because it is rather preposterous to place a dollar value on pain and suffering. On the other hand, a meritorious argument is used in concluding that duplicating payments should be abolished. The gist of the rationale is that the victim should only be compensated for genuine out-of-pocket losses. Consequently, automobile insurance should only indemnify after insurance from other sources, e.g., medical insurance and sick pay from unions, has run out.

The author concludes his criticism of the present system by focusing on the increasing difficulty of obtaining insurance. Costs are becoming so onerous that some companies are abandoning some markets entirely while others are increasing the number of persons in high-risk categories and refusing to sell them insurance. Consequently, many applicants are being arbitrarily rejected on questionable grounds and forced to seek coverage under "assigned risk" plans[2] or through sub-standard insurers. Both alternatives are costly and often the insured finds himself with inferior coverage. Because of this new practice of insurers towards high-risk applicants and also because of the generally high cost of insurance for everyone, the nation is confronted with the dangerous situation where 20 per cent of all motorists have no liability insurance whatsoever.[3]

Throughout the book the author is not hesitant to blast the legal profession. Indeed, it appears that every shortcoming of the present system is accentuated by rapacious attorneys. Lawyers are alleged to engage in prodding their clients to the brink of perjury in order to shift the blame for the accident on the defendant, for encouraging high medical bills to increase pain and suffering claims, and even for forcing their clients to accept a lump sum payment so the legal fees will be received in a more convenient

2. Assigned risk plans are programs set up in every state to handle those motorists rejected by standard companies in the voluntary market. These motorists are assigned to insurance companies for coverage on a rotating basis, dependent upon the amount of insurance written by the various companies in that state.

3. J. O'CONNELL, THE INJURY INDUSTRY AND THE REMEDY OF NO-FAULT INSURANCE 87 (1971).

form. The author condemns the lawyers' use of the contingent fee as the method of billing. His rationale is that the contingent fee is tantamount to making the lawyer co-owner of the claim which results in the lawyer using every conceivable means to increase the size of the claim. Finally, lurid examples are given of the lawyers' use of professional ambulance chasers. Lawyers in large cities are said to employ persons whose sole job is to watch for automobile accidents and then urge them to sign a retainer with the attorney, often while the victim is still in shock from the accident. Admittedly, the author places most of the blame on the system itself, but a lawyer might well question the alleged extent of the corruption.

The second portion of the book deals with the proposed advantages of no-fault insurance. While not an absolute talisman, the author believes it will cure many of the ills existent in the present system.

The greatest benefit of no-fault insurance is the reduction of insurance premiums. The reduction will be primarily due to the elimination of litigation to determine who was at fault, pain and suffering payments, and the duplication of payments when the victim has other types of insurance covering the same injury.

In addition to a reduction of cost, no-fault insurance will result in advantages in other areas which are often overlooked. For example, the author believes there will be a more intelligent and balanced weighing of the risks of potential insureds. This is because the fault system only takes into account the rather speculative consideration of whether you are likely to be involved in an accident. It does not take into account what you would be paid once an accident occurs. Consequently, those who are considered more likely to have accidents (for example, the young and the old) are charged very high rates, despite the fact that when they are in accidents their losses are comparatively smaller. Under no-fault the high risk motorist's insurance rates will be reduced and, more importantly, insurance will be available to many more people. The author suggests that no-fault insurance will also lead to safer cars. This is because the insurance company will be paying for the loss and therefore able to rate its customer's car according to its injury proof features.

The author admits that no-fault insurance is not without its critics. The principal argument appeals to one's sense of justice in that everyone should be responsible for his own wrong-doing. The author feels this is a weak argument because one's "wrong" in a traffic accident consists of a momentary motoring slip of the type that everyone is guilty of again and again. Furthermore,

he refers to recent studies which show that most accidents are caused by events beyond the driver's control such as environmental factors and defects in the automobile. Finally he points out that under the fault system the wrongdoer is not only allowed but required to pass the payment for his guilt to an insurance company and thus his only financial loss will be the possible increase in his insurance premium.

Much consideration is given to the provisions of the various no-fault proposals including the one the author and Robert E. Keeton submitted. Basically the various proposals differ in the areas of whether it should be compulsory or voluntary, the upper limit of no-fault, if anything should be paid for pain and suffering and, if so, to what degree, and whether or not tort claims should be allowed in addition to the no-fault coverage. It might be noted the author is generally in favor of tort claims above the limit of no-fault compensation. This is because the author feels that when there is great psychic loss suffered (for example, when a victim loses a limb) the individual is not fully compensated by merely being reimbursed for out-of-pocket losses.

The pros and cons of different elements of no-fault insurance are discussed in the first three appendices of the book. The consequences of the different elements when placed in different formulas illustrate the complexity of insurance.[4]

If you are a lawyer, do not expect this book to be entertaining. One might easily argue about the many advantages of the present fault system which the author scarcely takes note of. However, whether one is in favor of no-fault insurance or not, chances are that some form of no-fault will eventually be enacted either by the federal government or the states. The book will then serve as an excellent introduction into the field of no-fault insurance.

ROBERT E. ROSENVOLD*

4. The book also contains a fourth appendix which is an excerpt from a Congressional Report in March of 1971 by the Department of Transporation. The report represents an extensive study made of the present automobile insurance system and recognizes many of the same problems that the author mentions. Indeed, much of the author's material appears to be based on this study.

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