North Dakota Law Review

Volume 51 | Number 4 Article 12

1974

Book Reviews

W. Jeremy Davis

BOOK REVIEWS

MEDICAL MALPRACTICE LAW. By Angela Roddey Holder, J. D.; foreword by Milton Helpern, M. D. New York: John Wiley & Sons, 1975. Pp. 561 with index and tables of cases. $22.50.

In the foreword to the book, Dr. Helpern states:

> Whereas the advances in the science and practice of medicine have produced greater complexity and sophistication in the methods used in diagnostic and therapeutic procedures with life-saving and life-prolonging benefits for many patients they have also brought about an increase in claims of medical malpractice and litigation which have skyrocketed the cost of malpractice defense.[1]

A footnote to Dr. Helpern's statement is in order. Not only have the costs of malpractice defense skyrocketed, but increasingly, malpractice insurance, the physician's first line of defense, is being priced out of reach of the practicing doctor. Such a state of affairs poses a threat to the medical well-being of every American and prompted attention to the problem during the last session of the North Dakota legislature.[2]

To her great credit as an attorney, Ms. Holder does not present a "how to win a law suit" section or approach in her book. In fact for the attorney looking for material to prepare a plaintiff's brief in a malpractice suit, another reference source would be more valuable. There are more than 1,000 cases set forth in headnote form throughout the thirteen chapters of the book; the large majority of these cases indicate the probably little known fact among the general public that it is extremely difficult to win a law suit based on a theory of medical malpractice.

The style of the work more closely resembles a legal encyclopedia than a text. The author outlines the standard subject areas of a work of this sort, including the subjects of misdiagnosis, follow-up techniques, surgical negligence, foreign objects, x-rays, drugs, vicarious liability, consent to treatment and intentional torts. These subjects are by no means given exhaustive coverage, but the cases highlighted and the accompanying commentary provide the reader with what might be termed a working knowledge of

---

1. A. HOLDER, MEDICAL MALPRACTICE LAW vii (1975).
2. 1975 N.D. JOURNAL OF THE SENATE 1272, *as amended by* 1975 N.D. JOURNAL OF THE HOUSE 1222.

the subject matter. I found Chapter II outlining the duty of care standard to be of particular merit, being thorough and well footnoted by case law. Of interest also in Chapter II is the discussion of the breakdown of the locality rule.[3]

The "defenses to malpractice actions "set forth at Chapter X may be the only real shortcoming of the book. The author in listing some seven categories of defense, has conveyed the impression that malpractice units may be neatly classified as being those involving questions of contributory negligence, assumption of the risk, emergency, release, res judicata, statute of limitations or charitable or governmental immunity. By the non-legal trained reader, this may be taken as an authoritative statement on the subject of defense to the malpractice suit. As the practicing attorney knows, no such clear distinction exists between the case involving contributory nelgigence and assumption of the risk. The cases cited earlier in the book illustrate this fact and to a certain extent render Chapter X a contradiction of the material that has preceded it.

On the other hand, I found Chapter XI "Malpractice and Disciplinary Actions" to be particularly enlightening. Quite often the attorney, because of his closeness to one side of the medical malpractice debate, forgets that the medical profession is engaged in a serious effort to police its own profession and remove those not suited to the practice of medicine. The author has set forth a concise synopsis of the law on the internal policing of the profession, while maintaining the overall style of the book. For the lawyer unacquainted with the potential problems a doctor faces in the malpractice area in addition to the law suit, this section of the book is informative reading.

Probably the best portion of the book is Chapter XIII—"The Malpractice Case in the Legal Process." A thorough statistical analysis of the Department of Health, Education and Welfare Malpractice Commission is presented. The attorney searching for arguments countering a claim that malpractice suits are "everywhere", can find valuable information here. The survey results indicate that malpractice incidence in 1970 was about one claim in every 226,000 visits to a physician and fewer than one trial was held for every claim. Further, of the cases that went to trial, 20 per cent were won by plaintiffs and of payments received, about 3 per cent were in excess of $100,000. 49.4 per cent were $2,000 or less. The author points out that the Commission concluded that a malpractice case is still a relatively rare event:

3. The author cites the 1940 North Dakota decision of Tveldt v. Haugen, 294 N.W. 183 (N.D. 1940), as illustrative of the judicial modification of the applicaton of geographically local standards in determining duty of care.

> If the average person lives 70 years, he will have, based on 1970 data, approximately 400 contacts as a patient with doctors and dentists. The chances that he will assert a medical malpractice claim are 1 in 39,500.[4]

This is not to say, however, that the chapter supplies only ammunition for an attorney's argument. The author, again to her credit, recognizes that the medical profession is faced with a problem nonexistent forty years ago. Patients now expect to be returned to perfect health after treatment. If they are not, they sue. The author outlines the very real problems the doctor faces while practicing, e.g. the impersonal relationship between doctor and patient, the heavy patient load, the increasingly complex treatment alternatives available and the rapidly advancing technology. He also describes the impact these factors have had on the initiation of malpractice suits.

After pointing out that the practicing bar is not much happier with the current system than the medical practitioners, the author describes some of the "costs" of the system to the public, e. g. case backlog, unnecessary legal expenses, unnecessary medical expenses because of the practice of defensive medicine and the damage done to a physician whether or not a case is ever tried. In concluding the book, the author offers several alternatives to the present system for handling medical malpractice in our legal system. The book may be worth reading for these concluding pages alone. In a time when the legal profession and public, as well as the medical profession, recognize that the quality of our medical treatment may be in jeopardy because of increasing costs of "doing business", publication of Ms. Holder's book is indeed timely. Reading the book would certainly be advisable for the attorney who practices in the field. It may well be advisable for the lawyer who does not, but thinks he "knows all about it". There is also much to be learned by a doctor in this book. Two other groups stand to benefit from reading the book. Law and medical students often find themselves on opposite sides of the medical malpractice question merely because they feel they are professionally bound to their "side" of their profession. While reading the book will not solve the medical malpractice problem, it will supply insight into the questions involved because this question, like most, has two sides. Both are ably represented in this book.

DWIGHT F. KALASH*

---

4. U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, MEDICAL MALPRACTICE: REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE, (HEW Publication No. (OS) 73-88) at 12 *quoted in* A. HOLDER, *supra* note 1, at 406-07.

* Director, North Dakota Criminal Justice Commission J.D., 1971, University of North Dakota.

THE YOUNGEST MINORITY—LAWYERS IN DEFENSE OF CHILDREN. Edited by Sanford N. Katz. Chicago: ABA, Section of Family Law, 1974. Pp. 350. (paper back).

This volume is a compilation of thirteen articles selected by Professor Katz, who is Chairman of the Family Law Section of the American Bar Association, from recent editions of the Family Law Quarterly. The articles, in the editor's words, "deal with some of the ways in which children have been victimized by obsolete laws enacted for societies and times vastly different from ours. . . ."[1] It is not completely clear from the reading that vast temporal and societal differences are in fact the victimizers or whether the victimizing results from the composit biases and prejudices of the various functionairies or "helpers" who work within the juvenile system. The essays and articles in this volume are not limited to the specifics of children's legal rights, but go beyond that, and beyond the juvenile justice system, to discuss juvenile problems generally. In the strictly legal sense then, this book is not a guide for brief writing; rather, it deals with law related concepts of juveniles in some specific areas. Nevertheless, there is contained in the volume a healthy share of case citations and policy considerations of issues which are topical to both the practioner and student.

Because Professor Katz was limited in compiling this volume to articles first published in the Family Law Quarterly, he was not able to present the best work in each of the areas covered. There are some excellent pieces, however. "A Bill of Rights for Children", by Henry Foster and Doris Freed, which in spite of its position at the end of the book should be read first, it is a fine summary of children's problems and some suggested approaches to solutions. As Editor Katz states in his introduction, this article "spell[s] out, in direct and unjargonistic detail, what [the authors] believe children are entitled to in a modern and democratic society".[2] The article was a prelude to Professor Foster's recent *Bill of Rights for Children* (1974) which should be read in its entirety. Both Foster's book and this article provide excellent background for a study of the rights and expectations of rights of the youngest minority.

Child custody and the associated problems of natural parents' rights and the "best interests of the child" doctrine are considered in the first four works in The Youngest Minority. The lead-off piece is an analysis of *Painter v. Bannister*[3] and similar cases in which author David Levine considers the "best interests of the child" doctrine and the part that it plays. This short but astute article dis-

1. The Youngest Minority 1 (S Katz ed. 1974).
2. *Id.* at 22.
3. 140 N.W.2d 151 (Iowa 1966).

cusses the use of psychological testing of the child and the use of the results of such tests in the "best interests" formula and is especially enlightening in painting the *Bannister* case as a reasonable exercise in judicial integrity. Unfortunately, most digests of the *Bannister* case place too much emphasis on the controversial moral or value judgment aspect of that case and not the more credible basis of the holding—that based upon psychological evaluation the child's best interest is served by permitting him to remain with his grandfather who had become the stabilizing father figure essential to the child's development.

The "best interests of the child" test is also the basis of the article by Monroe Inker and Charlotte Peretta who argue for the child's right to be represented by counsel in custody cases. The authors assert that, rather than permitting the interests of the child to be determined by the imagination of counsel representing the parents, the parents should be forced to advocate their positions to the child. The child's right of representation in custody cases is not so removed from the mainstream of legal thinking as might be suggested. The authors carefully point out that there is little difference between the right of a child to be represented by counsel at a delinquency hearing and his right to have a friend in court at a hearing which will determine his future custody. Clearly the criminal-civil dichotomy cannot support the deprivation of representation any more in a custody hearing than in the delinquency process.

One of the best pieces in the book is Editor Katz's *Legal Aspects of Foster Care*. This work, which is essentially chapter four of Katz's excellent When Parents Fail (1971), discusses the "rights" of foster parents and the processes by which and the occasions in which these rights may be asserted. The relationship of child to foster parent begins as one of purely contractual nature evidenced by the rather impersonal legalistic language of a typical foster care contract cited by the author. Continuing his thesis that foster parents have more duties than rights, Katz presents two cases of homeless children who developed a strong emotional bond with their foster parents. In the first, *In re Jewish Child Care Association*,[4] the agency which had legal custody was permitted by the court to remove the child from its foster home because of the fact that the emotional bond between the child and the foster parents was too great. The child, in other words, was becoming too well adjusted to her environment. The agency then placed her with foster parents who would be known as "aunt" and "uncle" rather than "mother" and "dad". The key to the case, according to the New

4. 5 N.Y.2d 222, 185 N.Y.S.2d 65, 156 N.E.2d 700 (1959).

York Court of Appeals, was the "best interests of the child" appraisal. The intent of the agency and the natural mother was that someday the child would return to the mother and the court felt that it was therefore in the best interests of the child to preserve the continuity of the biological family. In indulging in the presumption that the natural family is the best place for a child, the court was acting consistently with prevailing contract and property law, which fact was not likely to have provided the child solace. In a second example presented by Katz, the contrary result was reached on essentially similar facts. In *In re Alexander*,[5] the foster parents also contracted that they weren't interested in adoption of the child, however adoption was allowed. Although the notoriety of the case may have had some effect upon the result, the major distinction between *Association* and *Alexander* was that in the latter the natural parent had waived parental rights and the battle was between the foster parents and the agency; in the first the rationale of the court was protection of the parental rights.

The main problem of the foster care custody cases is that, what are originally meant to be temporary placements in foster homes, become long-term, almost "permanent". Naturally, some affection and familial relationship will develop and it seems clearly to be in the best interests of the child that this occur. To permit and encourage that development, however, without protecting the child from the possibility of severe psychological readjustment problems, is not only doing a terrible injustice to the child and the foster parents, but is playing fast and loose with the best interests of the child doctrine.

The role of due process in juvenile proceedings is considered in an article by Alice Brandis Popkin, Fred Jane Lippert and Jeffrey A. Keiter. The authors review the constitutional requirements for juvenile proceedings and attempt to distinguish *juvenile* due process from due process. It is fairly clear that the United States Supreme Court has determined that there is a separate selective incorporation process for juveniles; the rationale for that is not so clear. In *McKeiver v. Pennsylvania*[6] the Court put the emphasis not on the child's right to a jury trial so much as the juvenile court system's "right" to have its hearings free from a full adversary process, presumably on the basis that the fact-finding process would be hindered by a jury determining the issues of fact! While the efficacy of the jury system continues to be questioned, if it does have value from the fact-finding standpoint, it seems that the same value would be present whether the defending party is a de-

5. 206 So. 2d 452 (Fla. 1968).
6. 403 U.S. 528 (1971).

fendant or an alleged delinquent. Procedural rules, including the right to a jury trial, *are* helpful in the "distillation and evaluation of essential facts".[7] Moreover, the primary reason for procedural rules in the adult system, the authors suggest, is not fact-finding but rather the protection of the defendant or child from the possibility of biased or prejudiced proceedings. Is there any reason to believe that there is less chance of bias or prejudice in the juvenile system, where proceedings are generally private, where counsel is often confused as to the role of a child's representative, and where "the best interests of the child" is likely to become a rationale for short-cutting the adjudicative process?

This article further discusses many of the due process protections afforded adult suspects and how these may affect the juvenile system. Most notably the right to, and role of, counsel, but also the search and seizure, bail, *Miranda*, notice and confrontation issues are considered. More than any other work in this volume, this article will provide a broad review and critical analysis of the issues with which practioners representing juveniles are concerned.

Another of the excellent works in this book is again written by Editor Katz, this time in conjunction with William Schroeder and Lawrence Disman. This article does an excellent job of treating the confusing subject of emancipation in a very articulate manner. The authors have surveyed the history of emancipation and break the subject down into the various areas in which it arises. After clarifying the fact that emancipation results from the act of the *parent*, and not the child, the authors discuss each of these areas to provide the reader with perspective on the subject.

Various other articles in *The Youngest Minority* deal with the "step-relationship", an area perhaps as misunderstood by lay-persons and lawyers alike as foster care; with the legal rights of the mentally retarded, a good discussion of an area which is more than marginally analogous to juvenile rights; with child abuse and reporting; and, with the child's right to receive treatment.

The Youngest Minority provides a good overview of many of the areas of concern to those dealing with juveniles and the juvenile justice system. It will provide to its readers a perspective of those problem areas. The book suffers from the variable quality of the articles selected because the editor was limited in his selections to those already published in the FAMILY LAW QUARTERLY, but it provides an excellent overview of children's problems in the legal system.

W. JEREMY DAVIS*

7. In re Gault, 387 U.S. 1, 21 (1967).

* Associate Professor of Law, University of North Dakota. J.D. (1970) University of Denver.