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ESSAY

A TRIBUTE TO THE HEALTH LAW JOURNAL*

*Dieter Giesen, Dr. iur. (Bonn), M.A.status (Oxon)***

Mr. Chairman, Dear Colleagues, Dear Students, Ladies and Gentlemen,

If someone from far away asked for whom, generally speaking, the *Journal of Contemporary Health Law and Policy* was written, one would perhaps—from one's own experience—answer that it is intended equally for lawyers, members of the health care professions, and health care administrators. And right this answer would be indeed. *The Journal*, however, does more for regular readers than that. Focusing on the problems of civil liability and policy, it presents, often within the context of *comparative* law, the developments, points of contact and differences in the modern law of medical and hospital liability of many countries of both the common and the civil law traditions: England, Scotland (including the lovely malt-producing isles off the Scottish mainland), Eire, New Zealand, Australia, Canada (including Quebec), the United States of America (including Louisiana), Zimbabwe, South Africa, France (including the French overseas territories), Belgium, Germany (including Bavaria), Switzerland and Austria—and far beyond. *The Journal* thus

* HUIUS EXCELLENTISSIMAE ALMAE MATRIS WASHINGTONIENSIS MAXIMA CUM REVERENTIA SALUTEM ET OMNIBUS IN FACULTATE IURISPRUDENTIAE IN SPIRITU FIDEI COOPERANTIBUS ET ILLUSTRISSIMIS ATQUE DOCTISSIMIS VIRIS QUI ME DIGNUM HABUERUNT HONORIS PUBLICI ET MAXIMA CUM AESTIMATIONE GRATIAS QUAM MAXIMAS AGO [I greet all of the members of the law school of this most outstanding almae matris in Washington, D.C. with the deepest respect. And I express my deepest thanks with profound admiration for all of those most distinguished and learned people who work together in a spirit of faith and have deemed me worthy of this public distinction]. Citations in this essay are in accordance with the author's original work.

** Full Professor of Private and Comparative Law; Director at the Institute for International, Foreign, and Comparative Law; Head, Working Centre for Studies in German and International Medical Malpractice Law, The Free University of Berlin. The author planned to deliver these remarks to *The Journal of Contemporary Health Law and Policy* Annual Banquet in the Spring of 1996, but because of illness was unable to be present. We are honored to present them here.

demonstrates the extent to which both the problems of medical law and the impulses within the law of civil liability towards their solution are now already familiar in the legal systems under *The Journal's* regular critical review. Throughout the years of its existence, *The Journal* covers years which have seen impressive challenges in medicine, and it is today a euphemism to speak of the law as "marching with medicine but in the rear and limping a little," as did *Windeyer J.* in an Australian case in 1970.¹ This judicial observation now "seems positively charitable"² indeed. In the words of Professor *John Fleming* of Berkeley, respectable research "must be sensitive to movement and direction. Rather than taking a snapshot in time, it should be concerned *whence, whither*, and most important, with *why*."³ Since its successful launching into a respectful and thought-provoking gold-mine of international professional learning, our *Journal* accordingly tries to describe principles and trends in the area of its general theme from classical school medicine to all the areas of health care law and policy, where values between the law and medical ethics are indeed conflicting.⁴ Admittedly, it is difficult for even the most experienced and knowledgeable editorial board to keep abreast of all the developments in science, whether in connection with sub-standard treatment, treatment with new methods or experiments,⁵ behind sealed doors in biomedical research⁶ or otherwise in studies where policy issues

1. *Mount Isa Mines v. Pusey* (1970) 125 CLR 383 (HC of A, per *Windeyer J.* at 395).

2. *Michael Kirby*, *Reform the Law. Essays on the Renewal of the Australian Legal System* (Melbourne 1983) 217.

3. *John G. Fleming*, *The Law of Torts* (9th ed. Sydney 1992) at v.

4. An almost eternal theme is the vindication of the *patient's right to know*, also discussed in our journal by your guest tonight: *D. Giesen*, "Vindicating the Patient's Rights: A Comparative Perspective," 9 *The Journal of Contemporary Health Law and Policy* 273-309 (1993); also cf. *D. Giesen*, "Medical Malpractice and the Judicial Function in Comparative Perspective," (1993) 1 *Medical Law International* 3-16; *D. Giesen*, "Legal accountability for the provision of medical care: a comparative view," (1993) 86 *Journal of the Royal Society of Medicine* 648-652; *D. Giesen & John Hayes*, "The Patient's Right to Know-A Comparative," (1992) 21 *Anglo-Am LR* 101-122.

5. *D. Giesen* "Civil Liability of Physicians for New Methods of Treatment and Experimentation: A Comparative Examination," [1995] *Medical Law Review* 22-52; for a comprehensive comparative law survey of liability arising from medical care, cf. *D. Giesen*, *International Medical Malpractice Law. A Comparative Law Study of Civil Liability arising Medical Care, With a Foreword by the Right Honourable Lord Kilbrandon, former Lord of Appeal in Ordinary, House of Lords* (Tubingen, Dordrecht, Boston and London 1988).

6. The Classic texts still are the *United State's President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research Reports: Whistleblowing in Biomedical Research* (Washington 1981); *Compensating for Research Injuries*, 2 vols. (Washington 1982); *Compensating for Research Injuries*, 2 vols. (Washing-

are thought out,⁷ with regard to the human genome project,⁸ or other worrisome areas.⁹ As was aptly said by professor *Ian Kennedy* of King's College London: "We are just about able to ask whether the possibilities created by In Vitro Fertilization [and other means of artificial insemination] should become practice. I say 'just about' because theory is rapidly becoming reality, and reality has the habit of becoming practice."¹⁰ Biotechnology is indeed

moving so rapidly that if we have a Royal Commission or introduce legislation now about recombinant DNA or in vitro fertilization . . . or anything else of this nature, the ground will have shifted before we have got through the mechanics; the action will have moved to the next level. . . . In any case, the genie is out of the bottle and cannot be put back.¹¹

In fact, the law is not only lagging behind badly and sadly,¹² it cannot keep abreast in very many instances with the legal problems medicine is creating.¹³ As Professor *Kennedy* has nicely put it:

ton 1982); Making Health Care Decisions, 3 vols. (Washington 1982); Splicing Life (Washington 1982); Screening and Counseling for Genetic Conditions (Washington 1983); Implementing Human Research Regulations (Washington 1983); Securing Access to Health Care (Washington 1983); Deciding to Forego Life-Sustaining Treatment (Washington 1983); Defining Death (Washington 1981).

7. *D. Giesen* "Developing Ethical Public Policy on Reproduction and Prenatal Research: Whose Interests Deserve What Protection?," Paper presented at the Second International Conference on Health Law and Ethics, London, 20th July 1989, in: (1989) 8 *Medicine & Law* 553-565; *D. Giesen*, "Ethische und rechtliche Grenzen biomedizinischer Verfahren," in: *Lebensbeginn und menschliche Würde*, ed. by *St. Wehowsky* (Munich 1987) 109-118; *D. Giesen*, "Health Care as a Right: Some Practical Implications," (1994) 13 *Medicine and Law* 285-296; *D. Giesen*, "A right to health care? A comparative perspective," in *Justice and Health Care: Comparative Perspectives*, ed. A. Grubb & M.J. Mehlman (London 1995) 287-304.

8. *Sheila McLean & Dieter Giesen*, "Legal and Ethical Considerations of the Human Genome Project," (1994) 1 *Medical Law International* 159-175.

9. *D. Giesen*, "Dilemmas at Life's End: A Comparative Legal Perspective," in: *John Keown* (Ed.), *Euthanasia Examined, Ethical, Clinical and Legal Perspectives* (Cambridge 1995) 200-224.

10. *Ian Kennedy*, "Let the Law Take on the Test-Tube," *The [London] Times*, 26th 1984 at 6.

11. *Michael Kirby*, *Reform the Law. Essays on the Renewal of the Australian Legal System* (Melborn 1983) 235-236 (quoting from a lecture to the Australian Academy of Science given by *Sir Gustav Nossal*).

12. *D. Giesen*, *International Medical Malpractice Law. A Comparative Law Study of Civil Liability Arising from Medical Care. With a Foreword by the Right Honorable Lord Kilbrandon, former Lord of Appeal in Ordinary, House of Lords* (Tubingen, Dordrecht, Boston and London 1988) 521.

13. *D. Giesen*, *International Medical Malpractice Law. A Comparative Law Study of Civil Liability Arising from Medical Care. With a Foreword by the Right Honourable*

One of the principle reasons is ignorance. We do not know, or find it hard to discover, what is happening. There is no conspiracy against us. It is merely that the more technical the exercise, the more it is presumed that it is a matter for technicians to decide upon. This is true as far as the observation of whether, for example, a frog which has been the object of an experiment has grown another leg. It is self-evidently not true as regards the more fundamental question, whether the researcher ought to be involved in making frogs with five legs.¹⁴

New techniques of genetic screening and counselling, genetic engineering, of fetal research and surgery, also in connection with undesired overstimulation of the ovaries resulting in multiple pregnancies, fetal monitoring and other procedures still unthinkable a decade ago, experimentation with human embryos, the use of fetuses and "fetal material" for research, or even commercial purposes, and a wide range of problems related to biomedical (especially gene) technology have now become the focus of international and interdisciplinary attention.¹⁵ Foreseeable developments in eugenics may soon cause us to ask whether the sanctity of creation and life is still more fundamental than the quality of life on our way towards Exploring the Ying and the Yang.¹⁶ Problems at the edges of life, too, require immensely important and difficult decisions,¹⁷ including problems such as the right to die, human cloning and more advanced sectors of genetic engineering, which all crowd upon us and demand clarification of acceptable conduct, including by new legal regulation set up to meet challenging principles of biomedical ethics¹⁸ and give guidelines in fields of a particularly troublesome nature.¹⁹

Lord Kilbrandon, former Lord of Appeal in Ordinary, House of Lords (Tubingen, Dordrecht, Boston and London 1988) § 52I.

14. *Ian Kennedy*, *The Unmasking of Medicine* (London 1981) 120-121.; *D. Giesen*, *International Medical Malpractice Law. A Comparative Law Study of Civil Liability Arising from Medical Care. With a Foreword by The Right Honourable Lord Kilbrandon, former Lord of Appeal in Ordinary, House of Lords (Tubingen, Dordrecht, Boston and London 1988) § 52II (on Progress, with Ethics "limping a little")*.

15. Cf. *D. Giesen*, *International Medical Malpractice Law. A Comparative Law Study of Civil Liability Arising from Medical Care. With a Foreword by The Honourable Lord Kilbrandon, former Lord of Appeal in Ordinary, House of Lords (Tubingen, Dordrecht, Boston and London 1988) § I margin number 1428*.

16. *G.P. Smith II*, "Eugenics and Family Planning: Exploring the Ying and the Yang," (1984) *Tas LR* 4-24 (24).

17. Cf. *Paul Ramsey*, *Ethics at the Edges of Life. Ethical and Legal Intersections* (New Haven 1978).

18. *Tom L. Beauchamp & James F. Childress*, *Principles of Biomedical Ethics* (4th ed. New York and Oxford 1994).

19. *D. Giesen*, *International Medical Malpractice Law. A Comparative Law Study of*

Nevertheless, biomedical scientists seem prepared to ignore much human misery for the prospect of either saving a few lives or artificially creating additional lives for the childless or for research purposes. Many ethical and legal questions have arisen, and yet medical researchers are anxious to get on with things, and to make theory reality, and reality practice in the vast grey zone between society's ignorance and the law's silence. The prowess of medical science has always had its price, and, as far as artificial reproduction techniques are concerned, the price has been very high indeed.²⁰ The issues are manifold and complex, but one thing is obvious: ethical, moral, and legal obligations are in conflict with some of the goals of research scientists, rendering restrictions necessary.²¹ In the words of Professor *Harry D. Krause* of the University of Illinois College of Law, "a child is not medication to be prescribed lightly to frustrated would-be parents [T]he greatest responsibility is owed directly to the child."²² This, then, is not only a question of ethical and moral values, but of the child's own legal rights as well, since the values applied are based on fundamental human rights, and, in some jurisdictions, constitutional law as well. Sometimes the law submits surprisingly fast to the demands of medical professionals who, by creating the supply of new techniques, provoke the demand for them. And this occurs at a time when it is still possible, if only just, to ask whether these theories should in fact become realities, simply because they are technically feasible. The pursuit of the fashionable goes on,²³ while the law, which is supposed to

Civil Liability Arising from Medical Care. With a Foreword by The Right Honourable Lord Kilbrandon, former Lord of Appeal in Ordinary, House of Lords (Tubingen, Dordrecht, Boston and London 1988) §§ 52-53, for a broad comparative survey, and *D. Giesen*, "Dilemmas at Life's End: A Comparative Legal Perspective," in: *John Keown* (Ed.), *Euthanasia Examined. Ethical, Clinical and Legal Perspectives* (Cambridge 1995) 200-224 (refs.).

20. Cf. *D. Giesen*, *International Medical Malpractice Law. A Comparative Law Study of Civil Liability arising from Medical Care. With a Foreword by the Right Honourable Lord Kilbrandon, former Lord of Appeal in Ordinary, House of Lords (Tubingen, Dordrecht, Boston and London 1988)* § 50I (margin number 1349).

21. *D. Giesen*, *International Medical Malpractice Law. A Comparative Law Study of Civil Liability Arising from Medical Care. With a Foreword by The Right Honourable Lord Kilbrandon, former Lord of Appeal in Ordinary, House of Lords (Tubingen, Dordrecht, Boston and London 1988)* § 50 I (margin number 1349).

22. *Harry D. Krause*, "Artificial Conception: Legislative Approached," 19 *Fam. L. Q.* 185-206, 206 (1985).

23. *D. Giesen*, *International Medical Malpractice Law. A Comparative Study of Civil Liability Arising from Medical Care. With a Foreword by The Right Honourable Lord Kilbrandon, former Lord of Appeal in Ordinary, House of Lords (Tubingen, Dordrecht, Boston and London 1988)* § 52 I (margin number 1430).

state society's standards,²⁴ has been left behind.²⁵ However, "[i]f the law does not answer the question, it will be answered by default," and Mr. Justice Kirby's "conclusions of despair" will be confirmed.²⁶ Interest has been aroused and will not lightly be extinguished.

There can be no doubt, however, that the many fields of health law and health policy covered by our *Journal* can today only be adequately understood through the increase of international and interdisciplinary efforts. In order to achieve this, cooperation is necessary between the professions involved in health care and policy. Ours, then, is a discipline which is enriched by the joint international contribution towards greater learning. The value of comparative law is that it takes a set of problems, not confined to one country but common to many, and offers a broad range of solutions to these problems. In turn, the flow of information between countries encourage critical reflection upon the state of the law in each country and provides positive arguments as to where and how the law should be developed. This again is the *whence*, the *whither* and the *why* Professor John Fleming writes about in his textbook on torts, requiring that respectable research be sensitive to movement and direction.²⁷ This is by no means a new demand in health care, nor is it new in other health care policy contexts. Prominent writers, members of the judiciary and academics, past and present, have written encouraging such an approach. The point was made eloquently by Dr. Samuel Johnson of Oxford (in fact my own College, Pembroke) who observed that: "A generous and elevated mind is distinguished by nothing more certainly than an eminent degree of curiosity; nor is that curiosity ever more agreeably or usefully employed, than in examining the laws and customs of foreign nations."²⁸ Professor Frederic William Maitland of Cambridge expressed similar sentiments, arguing that "for the sake of English law, foreign law must be studied, [since] only comparison of our law with her sisters will some of

24. As for the standard required by the law in relation to medical problems, cf. *H. Teff*, Reasonable Care, Legal Perspectives on the Doctor/Patient Relationship (Oxford 1994).

25. Cf. *Michael Kirby*, Reform the Law, Essays on the Renewal of the Australian Legal System (Melbourne 1983) 230; *D. Giesen*, International Medical Malpractice Law. A Comparative Law Study of Civil Liability Arising from Medical Care. With a Foreword by The Right Honourable Lord Kilbrandon, former Lord of Appeal in Ordinary, House of Lords (Tubingern, Dordrecht, Boston and London 1988) §§ 20-I-III, 23-25, for a broad comparative law perspective.

26. *Michael Kirby*, Reform the Law. Essays on the Renewal of the Australian Legal System (Melbourne 1983) 217 ff. (238).

27. *John G. Fleming*, The Law of Torts (9th ed. Sydney 1992) at v.

28. *James Boswell's Life of Samuel Johnson*. . . , ed. by George Birkbeck Hill . . . , revised by L.F. Powell, 6 vols. (Oxford 1934) i. 89.

the most remarkable traits of the former be adequately understood.”²⁹ More recently, Professor *Geoffrey Wilson* of Warwick University has written that “one of the reasons why it is difficult to take the claims of English legal scholarship to be scholarship in any real sense is its very Englishness;” he cites ignorance of foreign language as the reason why civil law [= the continental-European law tradition prevailing on the continent of Europe and growing influence as European law tends to be more and more influential in all the member-states of Europe but] is still largely ignored in the cross-comparison of the law of different countries, ignored, that is, at the peril of one member-state alone.³⁰ In Australia, The Honourable Mr. Justice *Michael Kirby*, the former President of the Supreme Court of New South Wales and now Justice of the High Court, has emphasized that with the termination of appeals to the Privy Council and the severance of the last formal Australian links with the English legal system “which for nearly 200 years provided authority, inspiration and stimulus to Australian law,” there is “a particular reason for revival of interest in comparative law.”³¹ This view is reflected by an increasing (and refreshing) willingness on the part of Australian and Canadian judges to look to each others’ or to Canadian, New Zealand, and United States authorities and beyond.³² So too, Professor *Basil Markesinis* now of the University of Oxford, has argued forcefully that comparative lawyers must attack the “insularity” of individual legal systems by working with case law from abroad. He concludes that “looking at foreign law can bring a deeper understanding of the problems they face—perhaps even

29. *Frederic William Maitland*, “The Materials for English Legal History” [1889, Cambridge 1911], in *F.W. Maitland*, *Collected Papers*, 3 vols. [Cambridge 1911], ed. and repr. by *H.A.L. Fisher* (Buffalo 1981) ii.4 - “for very true it is that England will never be known to those who will know nothing else.” *Frederic William Maitland*, “The Laws of the Anglo-Saxons” [1904, Cambridge 1911], in *F.W. Maitland*, *Collected Papers*, 3 vols. [Cambridge 1911], ed. and repr. by *H.A.L. Fisher* (Buffalo 1981) iii.453.

30. *G. Wilson*, “English Legal Scholarship,” (1987) 50 *MLR* 818-854.

31. *Michael Kirby*, (1990) 64 *ALJ* 372.

32. In *Daphne Castell v. Andrew De Greef* 1994 (4) SA 408 (C), the Supreme Court of South Africa (Cape Division) has recently adopted Australian and German case law into its own body of law, refusing the English *Bolman* test *Bolman v. Friern Hospital Management Committee* [1957] 1 *WLR* 582, [1957] 2 *A11ER* 118, 1 *BMLR* 1 (QBD, per *McNair J*) in favour of adopting medical negligence rules which include a subjective (individual) patient-based test as to what a doctor must tell an individual patient and a subjective (individual) patient-based causality test which requires that a causal link can only be established if it can be established (by the doctor) that the patient would have undergone the operation anyway; what is required then is that the causal link be established if the individual patient would have undergone the procedure; it is of no interest at all what a reasonable patient would have done.

unexpected ideas for solving them—but that will only happen when they sharpen their focus by narrowing it. When that is done, the student and the practitioner will become interested.”³³

It was hoped that tonight's banquet would bring together the two lawyers whom *The Journal* has elected for special editions this year which acknowledge their dedicated interest in the fields of their chosen subjects, subjects which transcend national borders and the small world of professional insularity. My friend *Harry Krause* and I would have enjoyed to be able to celebrate an event so beautifully organized like this one. There is no place anywhere tonight where I would prefer to be this evening. However, serious health reasons which Professor *Krause* knows enough about to be able to explain my absence to you further, keep me chained to a wheel-chair since about 3 weeks. I seriously hope that this banquet and the entire event will be, and remain in our recollections, a memorable evening indeed. A most beautifully produced dedicated issue—in my own language and that of learned members of academia—a *Festschrift* in my honour, with most stimulating contributions from various angles of the world including the United States, Australia, Scotland, and England, stand out as a really lasting token of tonight's celebration of true academic cooperation crowned, indeed, by a most welcome sign of stimulating cooperation between distinguished members of the bench and the international community of scholars of medical law mentioned before. I wish to gratefully appreciate the presence of so many distinguished guests, colleagues and members indeed of the Catholic University of America, Columbus School of Law and the various boards (Editorial and Professional Advisers) of our *Journal*. I am extremely pleased with the dedicatory issue of *The Journal of Contemporary Health Law and Policy* and with the tremendous and successful work of the Editorial Board, most importantly that of the Editor-in-Chief of volume 12, Mr. Joseph A. Gomes: he deserves much praise for the result, now before us, of his and his colleagues' efforts. My deeply felt gratitude is certainly also due to all contributors: *Harry Krause* first of all for a unique dedicatory essay which paints me, surely, with great warmth and sympathy, undeserved by me, and tells you much about *Dieter Giesen*, the others for their scholarly work which makes this *Festschrift* an important one worth possessing.

Mr. Chairman, I should not repeat myself. Rather, all I want to say though is GRATIAS VOBIS AGO for this great evening. May this Uni-

33. *B. Markesinis*, "Comparative Law — A Subject in Search of an Audience" (1990) 53 *MLR* 1-21 (21).

versity, its Law Faculty and this *Journal* stay successful and may you all prosper in your efforts to work towards sensitivity to movement and direction. We need institutions like yours.

