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**INTERNATIONAL MEDICAL MALPRACTICE LAW: A  
COMPARATIVE LAW STUDY OF CIVIL LIABILITY ARISING FROM  
MEDICAL CARE. By Dieter Giesen. Boston: Martinus Nijhoff  
(1988).**

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## BOOK REVIEWS

INTERNATIONAL MEDICAL MALPRACTICE LAW: A COMPARATIVE LAW STUDY OF CIVIL LIABILITY ARISING FROM MEDICAL CARE. By Dieter Giesen. Boston: Martinus Nijhoff. 1988. 923 Pp. \$225.00.

*Reviewed by George P. Smith, II\**

In considering what one *word* best describes my overall impression, evaluation and reaction to this new, second edition of Professor Dieter Giesen's treatise, *INTERNATIONAL MEDICAL MALPRACTICE LAW*, I have chosen a word that, prior to its codification in the second edition of *The Oxford English Dictionary*, was originally regarded as "slang."<sup>1</sup> Now that it has achieved "respectability" as a word of proper English parlance, I have no hesitancy in using it here in formal legal writing. It is defined officially as, "a sensational success," "exciting," "to impress or excite greatly," "expressing admiration."<sup>2</sup> Of course, the word is—simply—WOW! Now, let me elaborate on this exclamatory description and relate why I find this work not only elegant and meticulous, informed by intelligence and practicality, but above all, scholastically thorough and objective.

Knowledge, when shared by written dissemination, may be evaluated as: more or less scientific, complimentary to or integral with a search for truth, valued within the market place of ideas and/or useful.<sup>3</sup> My expectations were indeed great as I approached this book; and they were met and exceeded ten times over, not only as a readable medical-legal or scientific investigation, but as a forthright and objective study of inestimable value and practical use in the market place.

In an insightful Foreword to this book,<sup>4</sup> the former Lord of Appeal in the ordinary House of Lords, Lord Kilbrandon, notes the rather phenomenal

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1. *XX OXFORD ENGLISH DICTIONARY* 595 (2d ed. 1989).

2. *Id.*

3. Feldman, *The Nature of Legal Scholarship*, 52 *MOD. L. REV.* 498 (1989).

4. Kilbrandon, *Foreword* to D. GIESEN, *INTERNATIONAL MEDICAL MALPRACTICE: A COMPARATIVE LAW STUDY OF CIVIL LIABILITY ARISING FROM MEDICAL CARE* at V (1988).

revolution within the medical-legal field that recognizes an increasing standard of accountability for practising physicians.<sup>5</sup> Today, there is a widespread feeling of compassion for undeserved misfortune, much more so than what was the case in the 19th century.<sup>6</sup>

The victim will commonly cry for help in vain, unless he can find someone who was to blame for what has happened to him. Arguments about the burden of proof are irrelevant here. A villain has to be identified, and made answerable for his wrong. Then we look at the disaster from the point of view of the villain.<sup>7</sup>

Since the principles of comparative jurisprudence presented in this masterful treatise derive, in very large part, from "real life" decisional case law, their use, study and application should aid immeasurably in promoting a new reality for informed decision making.<sup>8</sup> Thus, physicians and lawyers alike will be educated to the pitfalls of actions that can lead to claims of malpractice.

Professor Giesen chronicles, with remarkable clarity and insight, the perceptible trend by activist courts to impose higher standards of care in all professional negligence cases. Viewed correctly as a trend toward professional accountability, these higher standards are imposed by courts forced into activism by lethargic legislatures.<sup>9</sup> Professor Giesen shows how, in the past, health care providers all too frequently considered themselves to be members of a class of privileged elite "operating in isolation from the common ethical perceptions of society as a whole and largely unanswerable for their actions outside the profession itself."<sup>10</sup>

The treatise, itself, is divided into three parts. Part One is entitled the *Civil Liability of Physicians in General*.<sup>11</sup> Of particular interest to me were the subsections dealing with substandard diagnosis,<sup>12</sup> treatment,<sup>13</sup> treatment

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5. See generally Smith, *The Province and Function of Law, Science and Medicine: Lee-ways of Choice and Patterns of Discourse*, 10 NEW SO. WALES L.J. 103 (1987).

6. Kilbrandon, *supra* note 4, at V. See generally Smith, Book Review, 25 J. FAM. L. 773 (1987) (reviewing J. BECKSTROM, *SOCIOBIOLOGY AND THE LAW* (1985)).

7. Kilbrandon, *supra* note 4, at V-VI. See also Gibbs, *Sick and Tired*, TIME, July 31, 1989, at 48 (detailing the growing distrust among patients with their physicians and the resulting era of defensive medicine). See generally Smith, Book Review, 38 THE JURIST 459 (1978) (reviewing P. REILLY, *GENETICS, ETHICS AND SOCIAL POLICY* (1977)).

8. Kilbrandon, *supra* note 4, at VI-VII.

9. D. GIESEN, *INTERNATIONAL MEDICAL MALPRACTICE: A COMPARATIVE LAW STUDY OF CIVIL LIABILITY ARISING FROM MEDICAL CARE XV* (1988).

10. *Id.* at XIV.

11. D. GIESEN, *supra* note 9, at 3-546.

12. *Id.* at 120-31.

13. *Id.* at 132-43.

omissions,<sup>14</sup> and disclosure malpractice.<sup>15</sup> Professor Giesen's insightful and thorough approach to the doctrine of informed consent,<sup>16</sup> complete with all of its comparative permutations, was especially strong and should provide a valuable framework for principled analysis by both the practising physician, the malpractice attorney and the probing scholar.

Part Two of the treatise is entitled, *Civil Liability with Regard to New Methods of Treatment and Experiments*,<sup>17</sup> and with painstaking scholastic precision evaluates, among other issues, liability for therapeutic<sup>18</sup> and research experiments,<sup>19</sup> organ and tissue transplants,<sup>20</sup> and artificial reproduction.<sup>21</sup> It is here that the excitement and the challenges of the New Biology are presented, set within the scope of the physician's duty of care *vis-a-vis* modern reproductive technologies.<sup>22</sup> The analysis of the responsibilities inherent in the use of surrogate mothers,<sup>23</sup> artificial insemination,<sup>24</sup> and *in vitro* and *in vivo* fertilization,<sup>25</sup> bring into clear focus the legal hazards that may result if untoward happenings occur.

Finally, in Part Three, *Conflicting Values between the Law and Medical Ethics*,<sup>26</sup> Professor Giesen waxes eloquently, in a philosophical/jurisprudential discourse, on such issues as legal perceptions of medical progress and conflicts in patient attitudes,<sup>27</sup> the professional insulation within the medical profession from outside scrutiny and its "community of silence,"<sup>28</sup> and the need for greater reciprocal trust between the professions of law and medicine.<sup>29</sup>

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14. *Id.* at 144-66.

15. *Id.* at 252-369.

16. *Id.* at 317-69. See also G. SMITH, GENETICS, ETHICS AND THE LAW, ch. 3 (1981).

17. D. GIESEN, *supra* note 9, at 547-668.

18. *Id.* at 552-63.

19. *Id.* at 564-88.

20. *Id.* at 604-27.

21. *Id.* at 628-68.

22. *Id.* at 656-68. See G. SMITH, THE NEW BIOLOGY: LAW, ETHICS, AND BIOTECHNOLOGY (1989); Smith, *Procreational Autonomy v. State Intervention: Opportunity or Crisis for a Brave New World?*, 2 NOTRE DAME J. L. ETHICS & PUB. POL'Y 635 (1986); Smith & Iraola, *Sexuality, Privacy and the New Biology*, 67 MARQ. L. REV. 263 (1984).

23. D. GIESEN, *supra* note 9, at 652-55, 664-68. See Smith, *The Baby M Decision: Love's Labor Lost*, 16 MED. & HEALTH CARE 121 (1988); Smith, *The Razor's Edge of Human Bonding: Artificial Fathers and Surrogate Mothers*, 5 W. NEW ENG. L. REV. 639 (1982).

24. D. GIESEN, *supra* note 9, at 656-60. See Smith, *Through a Test Tube Darkly: Artificial Insemination and The Law*, 67 MICH. L. REV. 127 (1968).

25. D. GIESEN, *supra* note 9, at 661-63. See Smith, *Intimations of Life: Extracorporeality and The Law*, 21 GONZ. L. REV. 395 (1986).

26. D. GIESEN, *supra* note 9, at 669-726.

27. *Id.* at 674-93.

28. *Id.* at 709-11.

29. *Id.* at 721-26. See Smith, *supra* note 5.

As a research scholar, I was overjoyed by the rich and comprehensive Tables of Common Law Jurisdictional Cases<sup>30</sup> and Civil Law Jurisdictions.<sup>31</sup> Comparative analysis is thus expedited greatly by these tables as well as an equally superb subject index.<sup>32</sup> A book without a good index and set of comparative cases and appendices<sup>33</sup> is only half a book for the conscientious scholar and even the casual reader.

In his Preface, the author states the simple goal of his book as being an opportunity "to furnish instances of cross-cultural enrichment in efforts to adapt yesterday's law to the requirements of today and tomorrow through both international and inter-disciplinary co-operation."<sup>34</sup> The key to achieving this goal is, as observed, through informed decisionmaking.<sup>35</sup> Without question, this goal is achieved admirably, with the treatise itself serving as a blueprint of education and hoped-for action in preventing medical malpractice.

**AIDS. Public Health and Legal Dimensions. By D. C. Jayasuriya. Dordrecht: Martinus Nijhoff. 1988. 145 Pp. \$57.00.**

*Reviewed by Kathleen Sazama, M.D.\**

Among the abundant literature arising from what has been arguably the worst pandemic in history, this small volume contributes little. The rapidity of crisis events renders most information outdated before it reaches publication. Even so, this book creates a hodge-podge of occasionally inaccurate data concerning some of the public health and legal measures that were in place by mid-1987, data that has been sporadically applied out-of-context or in a surprisingly disjointed manner. Unfortunately, the author overlooked

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30. D. GIESEN, *supra* note 9, at 756-810.

31. *Id.* at 810-31.

32. *Id.* at 847-923.

33. *Id.* at 727-55. The Appendices on the Resolutions of the German Legal Professions Congress on Artificial Technologies and The Council of Europe's Recommendations on Use of Human Embryos and Foetuses are especially useful.

34. D. GIESEN, *supra* note 9, at XVII.

35. Kilbrandon, *supra* note 4, at VI-VII.

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