Book Reviews

Legal Issues in Anesthesia Practice

W.H.L. Dornette. F.A. Davis Company 1991, pp. 388.
ISBN 0-8036-2721-1

and

Doctors and Hospitals: Legal Duties

A.J. Meagher, P.J. Marr, R.A. Meagher. Butterworths
Canada Ltd. 1991. pp. 403. \$79.00. ISBN 0-409-89767-1

The last decade has shown a move to a continent-wide market in North America. With this has come a trend to the assumption of certain aspects of American culture into Canada, not the least of which is an increasingly litigious society. The appearance of two more medico-legal textbooks is part of this trend, although whether foretelling or reflecting, we cannot say. As one of these books seems specifically written for anaesthetists and the other for physicians who work in hospitals, we had hoped that they would provide concise, practical and accurate information for their readers. Interestingly, the American text, despite the differences in law and culture, succeeds more than does the Canadian one.

Legal Issues in Anesthesia Practice is written by 14 authors, including anaesthetists, a nurse anaesthetist, a doctor of osteopathy, surgeons, and numerous legally qualified individuals. Four authors, including W.H.L. Dornette, the book's senior author/editor, are qualified in both medicine and the law. In the Preface, the editor states that one of the purposes of the book were "to afford health care professionals – in medicine, nursing, dentistry, and related fields – a comprehension of ... case law ... and a host of other laws and legal processes that impinge on healing arts practice." As well, "much more on medical jurisprudence ... (is) covered." The readership is determined to be "health care providers" as well as "attorneys representing clients involved in anesthesia-related problems."

In general the book has a style which is easy to follow and the authors do not fall into the common trap of patronizing their non-legal readers. Furthermore, case references are given in their proper citation form, such that a reader can access easily these authorities.

As with all American legal texts, statute law described is quite different from that in the Canadian provinces. The common law authorities for legal principles in Canada have developed through cases decided in our own jurisdictions and in England. However, Canadian common law has evolved in much the same fashion as that in the United States. Accordingly, the principles are, in

essence, the same. Similarly, the practice points set out in the text are, for the most part, parallel to those practice points which would be stressed by any Canadian litigation lawyer. Thus, the most valuable section of the book is Part 5, "Courts, Litigation and Expert Testimony," which provides an excellent summation of the trial process. Although it is not entirely referable to Canadian experience, it is sufficiently so as to be exceedingly useful for physicians to familiarize themselves with our legal procedure, Dornette also stresses the importance of physicians seeking guidance from their own lawyers when confronted with any legal document arising from their practice. This part of the text should be re-read if a physician is involved in any aspect of litigation. Indeed, lawyers would be well advised to read the same section to remind themselves of what individuals unfamiliar with court process should expect from counsel.

Part I is an introduction to the law. Canadian laws come from the same three sources as those found in the United States, that is, *The Constitution Act* (formerly the *B.N.A. Act*); Federal and Provincial Statutes, and Common Law. The actual substance and procedure under our laws often differ from those in the United States of America or any individual state. Indeed, it varies from province to province on some points. Accordingly, while the text provides useful information on general principles, that on specific points of law (individual or provincial) may not apply to Canada. For example, the authors state that the Statute of Limitations is shorter under a verbal contract than under a written one; this is certainly not true in Alberta. Further, in Chapter 3, Dornette states that general damages are calculated as a multiple of the special damages awarded. In Canada, the courts look to awards made in previously decided cases involving plaintiffs with similar injuries to determine what the appropriate general damages should be.

Part 2 is described as "minimizing exposure to liability." Chapter 7 provides a clear description of the American version of risk management. The outline of pre-anaesthetic evaluation given in Chapter 8 is sound but several details would be contradicted in Canada. e.g., preoperative chest x-rays for all those patients over forty. In addition, most Canadian specialists would not consider that there is a "correct anaesthetic" for a patient. The issue of consent is well covered in Chapter 9. Physicians in Canada, however, should be aware of the recent Ontario Court of Appeal decision stressing compliance with a patient's wishes to restrict treatment. If the patient has

a Jehovah Witness card expressly stating that no blood or blood products are to be given, then a physician ignoring that statement may well be found liable for battery. The next chapter, on record keeping, considers many important principles such as legibility and spoliation, but many of the suggestions are out of keeping with Canadian practice. Chapter 11 describes identifying, moving and positioning the patient, all three potential areas for legal suit. This chapter provides a more physiological than legal discussion but is flawed by (probably typesetting) mistakes in Table 11-1, e.g., radial nerve injury producing "foot drop." Monitoring is covered in Chapter 12 and the ASA, AANA and Harvard Standards are appended. The "Evolving Standard" makes no mention of oxygen saturation or end-tidal CO₂ yet lauds mass spectrometry "for assessing respired gas concentrations." The last chapter in this section deals with postoperative care rather crisply and incorporates the ASA Standards.

Part 3 is a melange of "special problem areas," Chapters cover "specific agents and techniques" (and mandate the use of steroids in cases of pulmonary aspiration of gastric contents), "outpatients" (with a common sense approach), "pregnancy, labour and delivery" (and providing the interesting concept of informed refusal), "blood products" (covering the legal ramifications from donation through transfusion, including the position that "use of paid donors could be considered by a jury as evidence of negligence"), and "HIV infections" (with Appendix 18-3 detailing the differing state positions on the right of physicians to refuse to treat HIV-infected persons).

Part 4 describes "ancillary activities," or those "in which not all anesthesia practitioners engage." Residency training programme directors would be advised to read Chapter 19. The general principles are the same in both countries and the concept of liability of the training director from actions of the trainee is worth considering. Chapter 20, or "practice in the federal sector," has no bearing on practice in Canada. Those anaesthetists who work in dental clinics would find Chapter 21, "anxiety and pain control in dentistry," of use, but should remember that statements made about skin testing for local anaesthetic allergy and preoperative fasting reflect the dental authorship. The editor notes that Chapter 22 is designed to cover the use of "experimental drugs and equipment" but in fact the chapter reviews overall "troublesome products liability problems such as possible litigation."

Part 6, covering "business and other relationships," is not particularly useful for Canadian physicians, although some may find it interesting reading. Chapter 25 concerns the legal status of nurse anaesthetists. Chapter 26 gives some guidelines on joining an established anaesthetic group practice in the United States. Chapter 27 addresses the issue of hospital clinical privileges and staff mem-

berships. Although some similarities exist between those described and Canadian practice, topics such as the "impact of price competition" have no relevance in this country. Chapter 28 addresses the issue of anti-trust problems in health care field, again not applicable. Chapter 29 deals with concerns about professional liability insurance. As over 95% of practising Canadian physicians belong to the Canadian Medical Protective Association, this chapter is only of academic interest. However, those few physicians who might be unhappy with the CMPA should study this chapter, and in particular, the section entitled "Data Bank Identifying Incompetent Practitioners." Apparently, the purpose of the Data Bank will be to "restrict the ability of physicians to relocate their practices from one state to another in an attempt to elude discovery of previous substandard professional behaviour."

In summary, this book is an interesting mix of useful information and that which should be ignored. Some of the problems stem from the backgrounds of the individual authors. For example, Chapter 16 is written by an obstetrician and contains the statement that "it is reasonably accepted" that the anaesthetic for Caesarean section before delivery of the infant consist only of "thiopental, nitrous oxide, and a paralysing agent." The author goes on to state that any legal claim for "failed or incomplete anesthesia during cesarean section" is "an issue of complete informed patient consent."

As a reference text, the book belongs in University Department libraries. For individual anaesthetists, those who have an interest in the law will find it of use, as will those who contemplate moving to the United States and those who wish to understand the differences between Canadian and American medico-legal cultures. For all, it is a predictive warning of what could be.

In contrast, the Canadian textbook, *Doctors and Hospitals: Legal Duties*, is neither so interesting, provocative or informative. This book is written by three legally qualified individuals who happen to be father and sons. One of the authors is also medically qualified. The book starts badly, with no stated premise and we had difficulty determining its purpose. Turning to the index, we sought "anaesthetist" and discovered the definition "surgical physiologist." However, the index is quite incomplete, with no listing for the section "Administration of anaesthetic" and the three important cited cases. The authors state that "before a surgical operation is carried out under either a general or local anaesthetic, the anaesthetist should inform the patient of the alternative and afford the opportunity of selecting the method to be followed." This statement is quite typical of many in the book, with the authors making blanket statements, giving no further explanation, and then seeking to support the statements with cited cases (which do not always apply). In a way,

the book is like a bestseller of aphorisms, in this case, medico-legal ones. For example, "a doctor, who has doubts about the soundness of his or her own advice, should consult or refer a patient to another doctor." (The legal reference for this statement is the American Medical Association Code of Ethics, which to date has not been adopted by the Canadian Medical Association.) Similar statements include "where it appears that the quality of medical care may be enhanced thereby, the opinion of another doctor should be sought" and "risk of complications may not require disclosure."

Some statements are made without any referenced legal authority, such as "when the knowledge or experience of a doctor is limited, there is a greater need to consult knowledgeable and available specialists without unreasonable delay." Other examples of this style concern the "litigious patient," and "duty to use screening tests in making diagnosis." Certain sections are also contradictory. For example, on Page 72, the authors state that "there is no duty on a surgeon to disclose minimal risks for purely elective surgery," yet on Page 134, they suggest that "cosmetic surgery involving the appearance of a patient imposes a higher duty of disclosure by the doctor in obtaining the consent of a patient."

In summary, the book sets out to be an authoritarian text, with legal principles and the authors' own guidelines interposed, but without differentiation between these. It is perhaps intended to be a ready reference for malpractice lawyers, yet it lacks legal reliability. For example, we would disagree with parts of the sections on "information privileged from disclosure," "disclosure of information about patient by doctor" and "medical negligence and error of judgement." Perhaps the most useful part of the book is the Table of Cases at the beginning, which may serve as a source of citations for malpractice cases. Some sections do appear to be written for physicians. For example, advice is given to a doctor to "consult his solicitor to ensure the (consent) forms comply with local customs and legislation." Anaesthetists will find the book confusing and annoying. It is not to be recommended.

L. Darlene Groh
Civil Law Section, Province of Alberta
Jan M. Davies MD
Calgary