

MERRY AND MCCALL SMITH'S ERRORS, MEDICINE AND THE LAW

SECOND EDITION

There is an understandable tendency or desire to attribute blame when patients are harmed by their own healthcare. However, many cases of iatrogenic harm involve little or no moral culpability. Even when blame is justified, an undue focus on one individual often deflects attention from other important factors within the inherent complexity of modern healthcare. This revised second edition advocates a rethinking of accountability in healthcare based on science, the principles of a just culture and novel therapeutic legal processes. Updated to include many recent relevant events, including the Keystone Project in the USA and the Mid Staffordshire scandal in the UK, this book considers how the concepts of a just culture have been successfully implemented so far and makes recommendations for best practice. This book will be of interest to anyone concerned with patient safety, medical law and the regulation of healthcare.

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CAMBRIDGE BIOETHICS AND LAW

This series of books was founded by Cambridge University Press with Alexander McCall Smith as its first editor in 2003. It focuses on the law's complex and troubled relationship with medicine across both the developed and the developing world. Since the early 1990s, we have seen in many countries increasing resort to the courts by dissatisfied patients and a growing use of the courts to attempt to resolve intractable ethical dilemmas. At the same time, legislatures across the world have struggled to address the questions posed by both the successes and the failures of modern medicine, while international organisations such as the WHO and UNESCO now regularly address issues of medical law.

It follows that we would expect ethical and policy questions to be integral to the analysis of the legal issues discussed in this series. The series responds to the high profile of medical law in universities, in legal and medical practice, as well as in public and political affairs. We seek to reflect the evidence that many major health-related policy debates in the UK, Europe and the international community involve a strong medical law dimension. With that in mind, we seek to address how legal analysis might have a trans-jurisdictional and international relevance. Organ retention, embryonic stem cell research, physician assisted suicide and the allocation of resources to fund health care are but a few examples among many. The emphasis of this series is thus on matters of public concern and/or practical significance. We look for books that could make a difference to the development of medical law and enhance the role of medico-legal debate in policy circles. That is not to say that we lack interest in the important theoretical dimensions of the subject, but we aim to ensure that theoretical debate is grounded in the realities of how the law does and should interact with medicine and healthcare.

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Alan Merry, Warren Brookbanks
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FOREWORD

Who amongst us has not made a mistake? Human error is ubiquitous and completely unavoidable; it is, quite simply, part of being human. Our response to error, though, does not always take this into account and this may result in our blaming people for things for which they do not deserve to be blamed. And with blame comes punishment. Yet, as a general rule, any punishment that carries moral opprobrium should only be imposed when there has been culpable wrongdoing – anything else is harsh and unjustifiable.

These fundamental notions lie at the heart of any sophisticated legal system, and yet there are occasions when a legal system might lose sight of them. This happens when society becomes unduly eager to blame people for adverse events – perhaps because it is felt that because something has gone wrong then somebody must be seen to account for it. That view ignores the fact that some mishaps are simply inevitable – given human limitations – and that accidents will happen.

Alan Merry and I became concerned about this issue some years ago when we were involved in a campaign to reform a particular provision of New Zealand criminal law relating to negligent manslaughter. What had happened in New Zealand was that some doctors involved in medical mishaps were being prosecuted for a serious criminal offence in circumstances where, in spite of doing their best for their patient, an error on their part had had disastrous results. The injustice of this situation was there for all to see, and it struck us as indefensible that morally innocent people could be convicted of manslaughter when they had made a mistake that did not in any way reflect recklessness or malign intention on their part.

The more we investigated the issue, the more it seemed to us that courts and legislators needed to clarify their approach to error. In particular, thought needed to be given to the question of which errors are culpable – and deserving of punishment – and which are simple accidents involving no reprehensible conduct on the part of the actor.

It also became apparent to us that the law needed to be more attentive to the causation issue and to recognise that mishaps often involve a complex chain of causative factors in which more than one person will be involved. An adverse event, then, may not be the work of just one person – the person who *appears* to be responsible – but may flow from the input of many others.

This new edition, based on our original work, is again the result of co-operation between medicine and the law. The medical side of the work remains in the hands of Alan Merry, while Warren Brookbanks, one of New Zealand's most distinguished legal academics, has brought his wide experience and understanding of criminal law to bear on the issue. Both of the authors have been long-standing friends of mine and it is with the greatest pleasure that I have seen the fruits of their collaboration. The issue is still a live one, and I hope that this book will help preserve awareness of just how vigilant we must be to ensure that punishment is reserved for those who really deserve it and not imposed on those who have not demonstrated any morally culpable state of mind. That the innocent should not be punished is something recognised a very long time ago by Greek philosophy; the truth of that proposition is as strong today as it was then.

Alexander McCall Smith

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