

BOOK REVIEWS / BOEKRESENSIES

Foundational Principles of South African Medical Law by Pieter Carstens and Debbie Pearmain. LexisNexis Durban 2007. xxvii and 1112 pp. ISBN: 9780409 020274. Price 764.81 (softcover)

The increased contact between law and medical science, as well as the new constitutional dispensation in South Africa influenced both the legal and medical profession to the extent that new research on the topic was desperately needed. This book by Carstens and Pearmain is therefore a well-timed endeavour. The preface of this voluminous work brings the following quote to mind:

“Medical Law used to be fun. All you had to do was read lots of strange American cases, the odd Commonwealth decision and maybe some English 19th century cases on crime. Then you could reflect that none of these was relevant and get on with the fun of inventing answers.” (Kennedy “The Patient on the Clapham Omnibus” 1984 (47) *MLR* 454)

As the authors clearly point out, this is no longer the case. Medical law and health care law – a valid distinction is drawn between these two concepts in chapter one – are definitely not a compendium of legal principles applied to a particular context. Rather, they have evolved into an independent body of law governing a specific area of legal interaction.

While very little regard was had to skill, knowledge and the education of physicians in ancient times, the medical profession today is a highly specialized discipline and the law has also developed to an extent where it provides for the current framework in which the medical science is to operate within the community and broader social arena (pages 611–619). The first reported incidence of the interaction between law and the medical profession was noted in England during the reign of Henry IV in 1374 (pages 617–619). This case confirmed that a surgeon would be liable for failure to treat a patient in a competent manner. From these early cases to the 21st century, the incidence of medical negligence cases and the interaction between law and medicine increased to the level at which we find it today. The very first medical negligence case in South Africa is the Cape decision of *Lee v Schönberg* (1877 Buch 136) followed by *Kovalsky v Krige* (1910 20 CTR 822). Thereafter, the incidence of local medical negligence cases increased rapidly, although not quite to the extent of American case law.

Despite the dynamic nature of this particular branch of the law, the increase in medical negligence litigation (also in South Africa), as well as increased research on medical law in other jurisdictions, relatively little research on medical law issues has actually been conducted in South Africa. And as the authors of this book rightly point out, relatively few academics and other researchers choose to write on and do research on matters with regard to medical law in South Africa (page 18). It is exactly for this reason that this timely work is so welcome.

The book attempts to provide the reader with an all-inclusive and detailed report on the basic principles underpinning medical law in South Africa. It

discusses a diverse range of topics as well as the interesting dynamic between the general field of medical law and the Constitution.

The impact of the new constitutional dispensation in South Africa on medical law principles, health law legislation, bio-ethics, and related fields has been tremendous. Chapter two situates South African medical law in its broader constitutional context, and is probably the greatest contribution of this volume. Apart from some journal articles, no comprehensive discussion on the reciprocation between the Constitution and the field of medical law currently exists. This chapter is an extensive study on the incorporation, interpretation and application of constitutional values and principles in the sphere of South African medical law, focusing on applicable legislation, case law, medical ethics and common law principles.

A very important topic raised by the authors is whether a general right to health exists in this new legal environment of constitutional supremacy (page 25). The authors are of the opinion that although the Constitution (particularly the Bill of Rights) does not include an express right to health, such a general right to health can still be read into the Bill of Rights. They opine that the synthesis of the rights contained in the Bill of Rights as well as the underlying values of the Constitution constitute a general right to health in South Africa (pages 25–26). (Although I do agree that it is possible to recognize the general characteristics of a right to health in the collective view of the constitutional values and principles, it is doubtful whether the drafters of the Constitution intended for a general right to health to exist.)

Chapter two of the book does not provide us with a clear definition on the right to health nor does it include a thorough discussion of constitutions and other policy documents which actually do have an express right to health, or at least a suggestion thereof, like, *inter alia*, the International Covenant on Economic, Social and Cultural Rights (article 12) and the African Charter on Human and Peoples Rights (articles 16(1) – (2)). Unfortunately, chapter two of this book also does not consider the exact wording of the Constitution, the intention of the drafters of the Constitution and the general rules with regard to the interpretation of statutes and the Constitution in this regard.

The authors conclude their discussion on this particular theme by stating that if a general right to health can be read into the Constitution it would be of little value, since it will be the synthesis of all the rights in the Bill of Rights and values underpinning the Constitution that will determine the outcome of a particular case. It is these individual elements and how the individual rights are interpreted, incorporated and developed in South African law that will determine how these rights (and a awareness of a general right to health) will be construed in the context of health care (pages 35–37, 227).

Other noteworthy discussions in this work include the concept of emergency medical treatment as defined by the Constitution in section 27(3) (pages 328–334), a complete discussion on professional medical negligence (pages 599–867), informed consent (pages 875–905) and privacy and confidentiality in a medical law context (pages 943–1016). In general, the authors attempted to provide a synopsis of medical law in South Africa, aiming to discuss all relevant aspects. Unfortunately, although the book includes references to

aspects of telemedicine and traditional medicine in the South African context, these two topics are not discussed in great depth. The book also does not deal with topics in legal medicine. The most recent work in this specialised area of medicine and law remains the book by Dada and McQuoid-Mason, *Introduction to Medico-Legal Practice* (2001).

The discussion of the diverse themes in this book illustrates the interesting dynamic between the general field of medical law, science and the Constitution. It reminds us of the unique character of medical law in its common law context and how developments in the various branches of the law, and in particular the Constitution, influence both medical law as well as health law in South Africa. For this reason the historical context of present day medical law is also highlighted.

A helpful feature of this book is that it provides the reader with a comprehensive bibliography, table of statutes, cases and other relevant and applicable annexures. The annexures include various examples of consent forms and guidelines and ethical rules from professional bodies. The inclusion of such annexures, as well as the comprehensive and well-planned index, bibliography and other reference sections, contribute to this volume as the ideal companion in any research project on medical law in South Africa. I agree with Dr Advocate AH van den Bout, the president of the South African Medico-Legal Society, that this is a monumental work which will certainly establish itself as the main reference work in all medico-legal practice and research in South Africa (see <http://www.saml.co.za/> accessed on 03-07-2007).

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Principles of Financial Law by Carl Wille (principal author); Solly Keetse; Joubert Matthee; Juanita Moolman; Pheona Muwanula. LexisNexis Durban 2007. xvi and 259 pp. ISBN 9780409018370. Price R385.49 (soft cover)

Financial institutions and financial services providers are obliged to comply with a number of regulatory measures affecting the way in which their business activities are conducted. *Principles of Financial Law* is user-friendly and was written with the aim of consolidating complex and interrelated legal principles pertaining to financial institutions and financial services providers. It examines key topics relating to integrated financial services and products.

Chapter one briefly examines some of the constitutional principles applicable to businesses operating in the financial services sector. Chapters two and three provide a broad overview of provisions applicable to consumers and financial advisors. Reference is made to the Financial Advisory and Intermediary Services Act (FAIS) and Codes of Conduct; the National Credit Act; the Consumer Affairs (Unfair Business Practices) Act; the Promotion