

exceptions to the limitation, applying the rule *expressio unius exclusio alterius* to the enumeration.<sup>50</sup> In Alabama, on the other hand, the general limitation begins: "All taxes levied on property . . .,"<sup>51</sup> and the exemptions are enumerated in an entirely different article.<sup>52</sup> Furthermore, the exemption provision is mandatory. No necessary inference flows from the mandatory exemption of some classes of property to the effect that the legislature may not make other classes exempt by statute.

In the nonproperty tax area, where not even units with surface plausibility can be designed, the book is a better book. The discussion of the history of the income tax under the state constitutions is a genuinely good one. This leads me to believe that the shortcomings of *Constitutional Uniformity and Equality in State Taxation* are principally the product of measurement-mindedness in legal research. I hasten to add that in spite of these shortcomings, the book has made a significant contribution.

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<sup>50</sup> See, e.g., *People ex rel. McCullough v. Deutsche Evangelisch Lutherische Jehovah Gemeinde Ungeaenderter Augsburgischer Confession*, 249 Ill. 132, 135, 94 N.E. 162, 164 (1911).

<sup>51</sup> ALA. CONST. art. XI, § 211.

<sup>52</sup> *Id.* art. IV, § 91.

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**Professional Negligence.** Edited by THOMAS G. ROADY, JR., and WILLIAM R. ANDERSON. Nashville: Vanderbilt University Press, 1960. Pp. 332. \$10.00.

The term "professional" is used in the title of the book in a broad sense and includes not only doctors, architects, engineers, teachers, and attorneys, but also pharmacists, abstracters, funeral directors, insurance agents and brokers, artisans and tradesmen. The book also includes articles on related subjects such as "Insurance Against Medical Professional Liability" and "Modern Techniques in the Preparation and Trial of a Medical Malpractice Suit." The styles of the writers usually are clear, their attitudes objective, and their reviews of the cases fair and comprehensive.

Each chapter spells out with precision the duty of certain professional groups to the public and to their clients or patients. Each chapter contains material so important to the members of each professional group under consideration, that the applicable article in this book ought to be prescribed as "must" reading for students preparing for a career in any of the professions and trades treated, as well as of practitioners in these professional groups. This material informs the prospective practitioner of his obligation to be well in-

formed in the field in which he practices and with reference to his duties of care, skill and diligence in rendering professional service to his client or patient. Schools could do worse than place a copy in the hands of each law or medical student before he is admitted to practice, and professional societies would do well to furnish a copy to each member of their association. Undoubtedly, despite cursory courses in school relating to their legal responsibility in the areas discussed, most professional men often have only a very vague or indifferent notion as to the extent and scope of their legal obligations to clients, or patients, and as to what conduct on the professional man's part may give rise to legal liability to pay for the damages a client or patient may suffer because of advice or actions or inaction of the practitioner. Unfortunately, practitioners usually get their true education in these areas only after some conduct on their part has given rise to claims or lawsuits for damages based upon alleged negligence or malpractice.

There is a brief and cogent introduction by Dean John W. Wade of the Vanderbilt University School of Law in which he attempts to set the social problems involved in proper perspective. He rightly notes that the "major special attribute of these cases involves the statement of the standard of care to which the defendant is held," but in attempting to express in concrete terms what that duty is, he encounters the same difficulties which have long confronted the courts. He points out that when the courts sometimes state that the care and competence the practitioner must measure up to is the skill and knowledge of the average member of the profession, it literally means that half of the members would fail to meet the standard. He believes that what is actually meant is that which is "normal" to a member of the profession in "good standing." In support of this he cites *Restatement (Second) of Torts*, which the reviewer has not had an opportunity to see. But this reviewer feels that the concept that the acceptable norm is that of doctors in "good standing" should be abandoned. The term "good standing" can have no useful meaning to a jury as a guide in determining whether the practitioner used reasonable care and diligence. The words might mean one thing to jurors, another to the courts, and still another to other members of the same profession. Whether the words refer to the fact that the person in question is licensed to practice his profession, or is admitted to membership in the usual professional societies, or is favorably regarded by his fellow practitioners is open to doubt. And whether it means any or all of these things, it nevertheless furnishes no useful criterion to a jury. A person might qualify in each respect mentioned and nevertheless, along with a large number of his colleagues similarly qualified, not use that care or skill that a reasonably well qualified and informed practitioner in the exercise of ordinary care ought to have used in the particular matter. Many practitioners can meet the test of "good standing," whatever meaning is ascribed to those words, and yet in the matter of competency and

care function at a level far below that which a reasonably well qualified practitioner, exercising ordinary care, would use. May the practitioner in "good standing" not at times be extremely careless? If so, the practitioner who happens to be careless on the occasion when harm is done by his carelessness, could defend on the proposition that there is no legal liability because other practitioners in good standing are careless at times.

Dean Wade wisely urges restraint on the part of lawyers in bringing malpractice actions or taking steps which may lead to publicity in such cases because of the harm that a judgment in such an action, or even the bringing of an action can cause to a practitioner's reputation where a physician or a lawyer is sued. He believes there is a regrettable evil connotation associated with the term "malpractice," suggesting intentional wrongdoing or utter incompetency. He recommends that eradication of the term "malpractice" might be helpful. While the rule as to duty of care, and responsibility for breach of the duty resulting in harm, are similar in the several professions and trades, the Dean concludes there are distinctions to be noted. With respect to the harm caused, it may be economic, or involve physical harm to person or property. The alleged wrongful conduct may involve a physical act negligently done, or giving erroneous information amounting to negligent misrepresentation. And finally, Dean Wade remarks upon the timeliness of this useful volume because of greatly increasing litigation involving questions of professional conduct, care and skill, particularly in the medical field.

The general subject of the duty owed by a professional person in the conduct of his calling is discussed by Professor William J. Curran, Professor of Law and Legal Medicine at Boston University. He reminds us that professional service is made up of learning and skill and that the standard of care for all professions appears to be basically the same, *i.e.* the general average of professionally acceptable conduct. He characterizes this as a minimum standard and compares it with the "reasonable man" concept which requires average *prudent* conduct of a layman, whereas in the case of the professional, merely average conduct appears acceptable. And this requirement is further diluted by limiting it to the care used by other practitioners in the "same" or "similar" localities. Illinois long ago, in a well reasoned opinion, rejected the "average" concept as unsound.<sup>1</sup> The court held that the care required was that of a "good" physician; and while the highest attainable degree of skill and proficiency is not required, the law does not contemplate "average" merit; that in determining who meets the legal standard, the court will not "aggregate into a common class quacks, the young men who have had no practice, the old ones who have dropped out of practice, the good, and the very best, and then strike an average between them."<sup>2</sup>

<sup>1</sup> *Holtzman v. Hoy*, 118 Ill. 534, 8 N.E. 832 (1886).

<sup>2</sup> *Id.* at 536, 8 N.E. at 836.

Professor Curran examines the interesting point that jurors, though the judges of the facts, must often rely on the opinion evidence of other members of the defendant's own profession for evidence as to what conduct is consistent with ordinary care. He asks: How well has the profession done in judging itself, and concludes it has not done well; that other practitioners are reluctant to testify against their fellow practitioners (as anyone who has tried a malpractice case knows only too well) and raises the point that in opinion evidence in this field, one only gets "opinions" of individuals, acting individually and in an uncontrolled way, giving opinions which may not be representative. He provocatively inquires whether any one practitioner knows the answer as to what is "professionally acceptable conduct." He has worthwhile observations with respect to problems of proof as well as other miscellaneous matters which he gathers under the general heading of "Some Questions of Ethics." Under this last section he considers the role and responsibility of attorneys for each side in this class of litigation, and of the expert witness.

In considering what "The Future" is likely to bring in the field of malpractice actions, Professor Curran reminds us that the law in the field of professional liability is almost totally common law. He believes that the use of negligence as a basis for liability with the resulting necessity for the establishment of a standard of care; use of the advocacy method of presenting evidence, finding facts, and producing witnesses, with the attendant difficulties in this class of litigation; and use of the jury system are all undesirable in this class of cases. In his opinion, the jury system has not proved effective in these cases, and the fault system brands the defendant as incompetent within his profession and results in a tenacious emotional fight by the defense as well as high verdicts in cases involving personal injury.

Professor Curran prophesies that the problems common to the field of tort law and civil litigation are most apt to result in an insurance-based compensation system carried by the professions or by their clients and patients, possibly as part of a government sponsored plan in the personal injury area, and he suggests that the medical societies are active in the field, have the necessary organization and political acumen, and may be the moving force which helps produce the change.

It is regrettable that Professor Curran lends support to those who would abolish use of the jury system in these cases. As one who has worked in the courtroom with judges and juries for many years, this reviewer cannot view lightly what he considers unconstructive criticism of the jury system by one in Professor Curran's position of responsibility. The criticism makes no reference to the many favorable aspects of the jury system, or to the toughness and vitality that have enabled it to survive through several hundred years, performing a useful part in the administration of justice. Nor is consideration given to the desirability and importance of having twelve impartial laymen

decide disputed fact issues. It is probably true that no system for the administration of justice yet devised by man is entirely satisfactory at all times in all classes of cases everywhere, but no system has yet been devised that has worked better in that respect or that has greater flexibility in adapting itself to changing social needs and conditions. We should not regard lightly or discard casually a system of administering justice that has so long proved honest, impartial, and reasonably successful, without very persuasive evidence that something better is being offered.

A most comprehensive, and valuable chapter in the book is entitled "The Care Required of Medical Practitioners," by Professor Allan H. McCoid of the Law School of the University of Minnesota. It is eighty-four pages long—one-fourth of the entire book. It alone is worth the price of the entire book. Professor McCoid briefly reviews the historical background of malpractice litigation, discusses the early cases stating the duty of the practitioner, and classifies the varying judicial expressions as to the practitioner's duty to use care. He discusses qualifying considerations which modify somewhat the practitioner's duty to use ordinary care, as in the "school of practice" or "specialties" rule, which has proved a great stumbling block to recovery in these cases, as has the "locality of practice" rule which Professor McCoid also carefully examines. The duty to use appropriate and available testing procedures is discussed, as is the question of liability for experimentation on the patient. Some interesting facets of the "Duty to Inform or Disclose Facts" are reviewed; the "Duty to Refer the Patient to a Specialist" is considered; and, under the heading "Vicarious Liability," the cases passing on the problem of liability for acts of others, such as nurses, X-ray technicians, and for acts or omissions of assistants of the practitioner are analyzed. He states the rule of care as one of "customary practice," considers the problem of "Proof of the Standard of Care and Breach," mentioning that to meet this burden the plaintiff generally must rely upon the testimony of medical experts. It is interesting to learn that to aid the plaintiff in meeting this burden, Alabama treats medical books as substantive evidence, and statutes were recently adopted in Massachusetts and Nevada which provide that "a statement of fact or opinion on a subject of science or art contained in a published treatise, periodical, book or pamphlet shall, in the discretion of the court, and if the court finds that it is relevant and that the writer of such statement is recognized in his profession or calling as an expert in the subject, be admissible . . . as evidence tending to prove said fact or as opinion evidence."<sup>3</sup>

*Res Ipsa Loquitur* is mentioned as having been held applicable in malpractice actions in some states, in such cases as the failure of the physician to use X-ray for diagnosis of a fracture or dislocation, and failure to remove foreign objects such as surgical sponges from a patient's body.

<sup>3</sup> PROFESSIONAL NEGLIGENCE at 84.

Professor John G. Fleming, of Canberra University, Australia, in a chapter entitled "Developments in the English Law of Medical Liability," briefly (thirteen pages) covers in a general way the same areas of the law in the British Commonwealth that Professor McCoid covered for the United States. His chapter includes the topics of "Liability of Hospitals" and "Standard of Professional Skill and Care." He concludes that the common law techniques offer sufficient elbow-room for constant adjustment and change, and that, basically, American and English law have approached these problems in a similar way and have found similar solutions.

Problems of assembling the evidence and trying cases involving claims of malpractice are discussed by Fitz-Gerald Ames, Sr., of the San Francisco Bar, in the chapter entitled "Modern Techniques in the Preparation and Trial of a Medical Malpractice Suit." He makes a number of very helpful practical suggestions with respect to searching out material from the physician and the hospital, pleading and trial preparation; and suggests specific questions for use during *voir dire* examination of the jury, questions which he has found particularly necessary in cases against physicians. How far such interrogation of the jury would be permitted in Illinois in view of present Illinois Supreme Court Rule 24.1 is not certain. He also discusses trial tactics which from experience he has found useful and effective.

The chapter on "Insuring Against Medical Professional Liability" is most illuminating. Bernard D. Hirsch, an attorney in the law division of the American Medical Association, has written an analysis of the principal insuring agreements, exclusions, and conditions in standard policies insuring physicians against "Medical Professional Liability," and then prepared an analysis of the answers to a questionnaire sent by the AMA to insurance companies. The questionnaire posed hypothetical factual situations and asked the insurance companies to express an opinion with reference to insurance coverage in each case. The association is to be commended for this imaginative and valuable undertaking, as are the insurance companies for their candid and helpful responses. Not infrequently, malpractice actions are brought on the theory that the physician orally guaranteed a cure or successful result. It is interesting to note that the insurance companies will defend such an action for their assured in some instances, particularly where that charge is coupled with other charges of malpractice, but that they take the position the insurance policy does not insure against this kind of a risk.

The authors of the material in the remaining chapters of the book discuss in the same general way the law and cases with respect to other professions and trades, the legal duty to have the knowledge of their trade possessed by other reasonably qualified persons in the trade, the duty to exercise care and skill in the use of that knowledge, and liability which may result from failure to comply with those legal requirements.

The assembly in one book of the law covering this broad area of professional responsibility provides a legal overview which should be helpful to the members of the professions and trades covered by these studies, helpful to the bench and bar, and, it is to be hoped, beneficial to the general public by creating a greater awareness in those professions and trades of the obligations resting upon them to the communities and the persons they serve.

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