

Washington University Law Review

Volume 1961 | Issue 1

January 1961

Review of “Professional Negligence,” Edited by Thomas G. Roady, Jr. and William R. Andersen

Orville W. Richardson

Follow this and additional works at: http://openscholarship.wustl.edu/law_lawreview



Part of the [Torts Commons](#)

Recommended Citation

Orville W. Richardson, *Review of “Professional Negligence,” Edited by Thomas G. Roady, Jr. and William R. Andersen*, 1961 WASH. U. L. Q. 86 (1961).

Available at: http://openscholarship.wustl.edu/law_lawreview/vol1961/iss1/11

This Book Review is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

BOOK REVIEWS

PROFESSIONAL NEGLIGENCE. Edited by Thomas G. Roady, Jr. and William R. Andersen. Nashville: Vanderbilt University Press, 1960. Pp. 332. \$10.00.

In his Foreword to this book, Dean Wade of Vanderbilt University points out that if the word "profession" could be limited, as Roscoe Pound would have it, to "a group of men pursuing a learned art as a common calling in the spirit of a public service," then by tradition the field is limited to the ministry, teaching, law and medicine. If, however, we enlarge the meaning of the word "profession" to include all who follow "a vocation in which they render a service to others," then architects, engineers, abstracters, accountants, insurance agents, pharmacists and even undertakers, artisans and tradesmen might qualify. With that widened definition of profession, this book treats in separate chapters the negligence law related to each of the above "professions" and the traditional ones of law, medicine and teaching as well.

The premise, well-supported by the text, is that different liability rules may apply to professional practice than to other conduct and activities of mankind. The reason might go along these lines: the service professions require special skills, knowledge, experience and care. Therefore, anyone who offers professional service to others represents that he has and will use skills, knowledge, experience and care which others outside of his profession do not possess. In contracting for his services the public relies upon this representation, and, having no adequate means of determining the truthfulness thereof, is not bound by the doctrine of caveat emptor applicable to the purchase of property.¹

This collection of essays proceeds, then, to search out the rules of negligence law applicable to these "professions," to compare them with rules relating to other "professions" and to non-professional activities generally, to ascertain whether specific duties have been so crystallized as to give courts control over the vagaries of juries, and to offer material for general conclusions about various factors influencing the present position and future trend of negligence law

1. There is also a "holding out" and certainly a reliance in the sale and purchase of vast amounts of property under circumstances forcing or at least strongly inducing the purchaser to forego inquiry into the fitness of the article. The potentiality of harm may also be great. And yet the battle to affix enforceable duties to the mass manufacturer, distributor and advertiser of goods meets stubborn resistance from every quarter.

governing these "professions" individually and collectively. Some of the articles do not attempt to go much beyond restating the law of the profession covered. Others give historical material and are more philosophical in treatment. Most of them are significant contributions to neglected areas of the law and contain excellent source material and references for practicing attorneys.² That is undoubtedly one reason that these articles, almost all of which first appeared as "A Symposium on Professional Negligence" in the June, 1959 issue of the *Vanderbilt Law Review*, found themselves between stiff binders in book form.

Contributors include two law school deans (Wade of Vanderbilt and Fleming of Canberra University in Australia), five law professors (Curran of Harvard, McCoid of Minnesota, King of South Carolina, Bell of Idaho, and Roady of Vanderbilt), one associate and one assistant professor (Proehl of Illinois and Hawkins of Minnesota), three practicing attorneys (Ames of San Francisco, Drinker of Philadelphia and Hirsch of Chicago), two recent law school graduates, formerly on the law review staff at Vanderbilt (Smith and McNeil), and one undergraduate, law review staff member (Moore).

The only Table of Contents is a list of the articles. A short Table of Cases merely lists those cited in the body of various articles and serves no useful purpose. The index is no better or worse than could be expected, and, with the stiff covers, merely marks the difference between a law review symposium (\$2.50 per copy) and a book (\$10.00). All of the rest—page size, type, footnotes, etc.—is typical law review material, that is to say, the most refined and dignified type of legal writing done today. Fortunately, however, the symposium became a book and, it is hoped, will find many readers among the bench and bar. The idea of converting symposia into books (and a profit) is an excellent one. It has undoubtedly been done before, but this effort should encourage more of the practice.

The book is noteworthy not only because of the eminence of most of the contributors but because it includes several articles by practicing attorneys on thoroughly practical subjects, such as techniques in the preparation and trial of medical malpractice cases (Ames) and problems of coverage in medical liability insurance policies (Hirsch). Dean Fleming's article on the English law of medical liability intro-

2. The active personal injury lawyer will regret the absence of any provision for pocket part supplements or loose-leaf additions. The rising tide of professional negligence claims, the rapidity of changes in some areas of the law, and the influx of newer types of injuries and claims arising from medical progress (new drugs, techniques and equipment) require the modern trial specialist to have immediate access to the most recent cases. A book such as this one may already be out-of-date.

duces an aspect of comparative law, aside from a charming style of expression. The chapters on "professional" negligence in fields of activity other than law, medicine and teaching are relatively new approaches to areas of neglected liability.³ All in all, the book is a creditable endeavor by an aggressive law review and faculty of a first-rate law school.

What is lacking in this rather unique unified treatment of "professional negligence" is a distillation of the isolated articles with some sort of a conclusion. The first chapter, written by Professor William Curran of Harvard, offers "General Comments" but it is more of an introduction than anything else. Throughout the book hints are dropped that the few changes in the law of "professional negligence" which have occurred have fallen far behind advances made in negligence law generally. The suggestion is that the reasons for retarded growth of professional negligence law are probably good ones, unless and until all negligence law is drawn into the vortex of strict liability, automatic compensation and socialized responsibility. Dean Wade does forecast the erosion and abolition of the fault doctrine in the professional negligence field in the not "too far remote future" and suggests that the medical profession itself will lead the way. But there are many practical difficulties to the adoption of a "full aid insurance" scheme in the field of professional activity, chief of which is the virtual impossibility of identifying and insuring against the *extra* risk and harm resulting from professional conduct as distinguished from the risk and harm arising from the initial condition requiring professional service. In addition, the professions themselves may see such plans as mere catalysts to a further deterioration of public relations, a wholesale invitation to the filing of all manner of claims, and final capitulation to the professions' most hated enemy, state control.

Still and all it is not without significance that in volume 12 of the Vanderbilt Law Review the "Symposium on Professional Negligence" was separated by only two pages from a book review by Professor Andersen of Vanderbilt of Green's "Traffic Victims, Tort Law and Insurance" (1958). Professor Andersen, who with Professor Roady edited the book now under review on "Professional Negligence," joins the overwhelming majority of tort law authorities today who believe that negligence law is inadequate to meet "the tragic automobile

3. Very few up-to-date books of any particular value or significance have been published on "professional negligence" or, for that matter, medical malpractice. The English have two: Eddy, *Professional Negligence* (1955) and Nathan, *Medical Negligence* (1957). We have only one: the recent fine volume by Louisell and Williams, *Trial of Medical Malpractice Cases* (1960). The American Law Reports, Annotated, is the best source of cases. It has many annotations of unusual value on medical malpractice.

problem," and that it will not "succumb to compromise" by such things as compulsory insurance or other remedies currently proposed.

It would be inappropriate to attempt a reply to Professors Andersen, Green, James, Elrenzweig, and the host of others who have been beating the drums against the fault doctrine and in favor of automatic compensation with increasing vigor in recent years. But if the medical profession becomes the bellwether to lead us to that slaughter house of individual right and responsibility, it will be impossible to stop short of a full-blown, all-out and comprehensive system of social insurance, far beyond that ever dreamed of even in England today. Whether that will be "good" or "bad" is not debatable in a book review. I only say that it will mark the end of professions, since the social service state will assume all of their functions, and they, in turn, will serve only the state.

A few things more remain to be said. This book does not touch upon the most sensitive area of all and probably one of the leading sources of professional malpractice claims: a vast number of claims and an even larger number of potential claims never brought forward by the public arise from lack of skill, knowledge and experience and not just lack of care. Science and knowledge have kept pace with the needs of human kind, but have out-run those licensed and privileged persons who *profess* or hold themselves out to the public to have the training, knowledge, skill and experience necessary to render the services which should really be performed by specialists. The general practitioner can handle the average problem; he often butchers highly complex ones requiring the knowledge, skill and experience of specialists. Some professional men are not even equipped or competent to deal with ordinary cases presented to them. A good measure of the "fault" lies with the school which gave them diplomas and the licensing laws and authorities which permit them to enter the profession.

But not even the top man in his class graduating from a professional school can hope to practice effectively in all branches of his profession. That is why medicine has sponsored specialty classifications and certifications. Even that will not remedy the situation so long as the general practitioner refuses, either because of greed or ignorance, to refer the client-patient-patron to the specialist when his services are required.

Nevertheless, in the past very few claims have been based upon lack of knowledge, training, skill or experience. However, a growing number will surely be brought because of the breach of the duty of the professional to refer to a specialist. The harms resulting from incompetence, failure to refer and lack of care are all avoidable. As in the case of "the tragic automobile problem," our chief interest should be

in reducing and preventing *injuries* and not just insurance claims and premiums. We should be interested in accident prevention and law enforcement, not just "loss-distribution." And yet, for obscure reasons, the tendency of the law is to place professional men in a "preferred position" and to treat them, as Dean Fleming says, with "singular tenderness." The inclination of the professional brotherhood is to resist cleaning its own house of the incompetents and bunglers, and even to support and defend them actively in court. One wonders how many do so with guilty knowledge of their own negligent action never brought to light. Those who protest an increase in their professional liability insurance rates might well reflect upon what those rates would be if all cases of malpractice were known and then adequately compensated.

A book review should not be ended on such a dour note, and it should contain some recommendation, express or implied. "Professional Negligence" as a book is written for thoughtful reading by trained legal minds and will be particularly useful to liability insurance companies and good trial lawyers. That may condemn it to a limited circulation, unless attorneys who do not fall within the above classification are led to believe that with this book they can try malpractice cases which should be referred to specialists.

ORVILLE W. RICHARDSON†

INSURANCE AND PUBLIC POLICY. By Spencer L. Kimball. Madison: The University of Wisconsin Press, 1960. Pp. 340. \$6.00.

If one likes to read the history of the insurance industry written from the viewpoint of the evolution of insurance regulation, then this book prepared by Mr. Kimball is a must. The author develops the history of insurance regulation in the state of Wisconsin by thoroughly examining the statutes having a bearing on insurance law, bills submitted but not enacted, legislative committee reports, and insurance cases decided by the Wisconsin Supreme Court or by federal courts involving Wisconsin litigation. The above statement might imply that this is a rather technical document which would be of interest only to lawyers or those involved with insurance law. Contrariwise, the book should have broad appeal to all persons interested in insurance because the author develops insurance law in terms of the social, political, and economic factors that have had a bearing upon the submission of insurance bills, the enactment of bills, and court decisions. The author accomplishes this with a minimum of bias. Only in a very few

† Member of the Missouri Bar; partner in the Firm of Hullverson, Richardson and Hullverson, St. Louis, Mo.