

**REVIEW OF 'MEDICAL LIABILITY AND HUMAN RIGHTS IN
ITALIAN PRIVATE LAW: LEGAL INTERPRETATION AS A VEHICLE
FOR SOCIAL JUSTICE' WRITTEN BY PASQUALE LAGHI AND
EDITED BY PAOLA B. HELZEL AND DAVID E. ZAMMIT
(PUBLISHED IN 2013 BY THE DEPARTMENT OF CIVIL LAW
AT THE UNIVERSITY OF MALTA; VOLUME I OF
MEDITERRANEAN LEGAL CULTURES RESEARCH ON CIVIL
LAW IN A MEDITERRANEAN CONTEXT)**

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ABSTRACT

Medical liability as a socio-economic issue has long been left to an uncontrolled evolution. One which caught a social snowball effect where the human right dimension is intruding into a civil law reality.

KEYWORDS: MEDICAL LIABILITY – FUNDAMENTAL HUMAN RIGHTS -
CIVIL LAW – LIABILITY

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Compelling, specialized, influential. This trio of adjectives expresses the profound effect this publication left on me as a law student during my fifth year of studies. The book is not aimed at transmitting information on how to achieve an immediate financial return but at describing a social reality evolving through the vehicle of human rights. Here human rights are described as catalysts in changing a civil law reality, specifically in the allocation of liability;

In recent years the field of medical liability has become distinct from the category of professional civil liability by assuming specific disciplinary aspects which have profoundly changed the pre-existing judicial regime.

In fact there has been a shift from a position whereby the doctor could hardly be challenged in relation to the damages suffered by the patient after therapeutic treatment, to an inverse system.⁵⁸⁰

A new understanding of the fundamental right to life and to health has led to a change in orientation of Italian law to an approach more focused on a conception of the person as possessing a core dignity. Thus this contemporary social evolution increased the value given to the person as a victim of an injury in a medical context.

The publication addresses the liability of the doctor via a bifurcated classification, according to whether the doctor is employed in an institutional structure or as a sole practitioner. The value of informed consent in the medical professions is underlined. The nature of medical liability is delved into even from a comparative perspective. This treatment contrasts the Italian legal system basing liability on contract, to an Austrian regime focusing on non-contractual

⁵⁸⁰ Pasquale Laghi, *Medical Liability and Human Rights in Italian Private Law: Legal Interpretation as a Vehicle for Social Justice* (University of Malta 2013) 25.

liability. Furthermore, it does not fail to mention the binary structure adopted in France with a purview to private and public law. The author also elucidates how the Maltese and Italian systems strive for compensatory justice through judicial litigation whilst Scandinavian states ground medical liability on an extrajudicial initiative.

As such the interests to be balanced out in this field affect society at large and target a subtle social reality which on one hand considers the patient in his interest to lead a healthy life and on the other the doctor who should be protected in the pursuance of his liberal profession.

In his effort to balance between these competing concerns, the author is led to target a reality, that known as defensive medicine, which may lead to a deadlock situation; whereby doctors refuse to provide treatment, especially in a state which offers gratuitous health care. The fears of imminent legal intervention overwhelming the medical profession could lead the doctor to shift from a position in which s/he places the patient's interests first to one which privileges the preservation of his or her personal patrimony. This social reality is accordingly tackled by the author in an articulate exposition of learned opinions which stresses the critical need to reform the system and which also highlights the importance of insurance companies in indemnifying the profession.

The intricacies surrounding the sensitive area of medical liability are realistically tackled even via a consideration of the present situation of implementation of the right to health in Italy. A satisfactory solution in this regard could only be reached if based on a state's national structures entrusted with implementing measures, accurately drafted public laws and with a population of citizens sustaining a system which is there to cater for them with the highest standards possible. Such standards would have to encompass international partnerships with foreign structures; a case in point being lung transplants which are being offered in foreign hospitals.

In his meticulous study of how the aggrieved patient suffers through deficiencies in the provision of medical care, the author arrives at a clear understanding of the basis of the doctor's liberal profession as he or she is afforded professional autonomy, which in turn brings with it the right to choose one's *modus operandi*. There is a crucial consideration on how to uphold the decorum of a classic profession by differentiating obligations which could be *de resultat* or *de moyens*, the latter focusing on the upholding of standards of diligence and competence in arriving at a decision which could be potentially life threatening or reinvigorating.

The book presents its audience with various intricate conundrums focused on legislation, which affects society at large in an array of ways, ranging from

economic perspectives which are largely beyond the ken of the legal profession; to a form of social contract between the liberal professions. The latter exist to serve the citizen in the best manner possible, to safeguard human dignity, and to keep in mind that in each decision documented through records such as medical ones, lives are being affected and that change must start from within.

Change occurs every day in a process of social evolution which promotes citizen empowerment. This is achieved via easily accessible information and human rights -which in Judge Giovanni Bonello's words ought never to be trivialized- as well as through rapid technological expansion; which in itself has changed the physiognomy of society. Human empowerment arising from technology has catalyzed social change and has led to legislative instruments at times lagging behind social developments. It is the granting of power to citizens which dethrones professions; for long seen as distant from society and leads their members towards more straightforward and grounded social endeavors.

In reading and critically evaluating this book, the words of Judge Giovanni Bonello claiming that; 'ma qisux kien hemm kuxjenza biżżejjed ta' kemm verament l-affarijiet kienu tbiddu legalment u jien kont għadni nilhaq avukat u sibt din iż-żona, mhux esplorata u deherli li kienet ecċitanti ħafna'⁵⁸¹ echoed through my mind.

In order to further their understanding of how human rights affect thought through a patchwork of human and legal considerations, I would humbly recommend the reader to access jurisprudence relating to medical liability decided by the Maltese Civil Courts. This would be helpful in forming an opinion as to whether the human rights philosophy is being successfully transferred, via an osmotic motion, from its original nucleus in legal and philosophical thinking through the metaphorical semi permeable membrane constituted by the Civil Courts to society at large where this philosophy can only so far be found in a rather diluted form.

From the first domestically known medical liability cases, namely those of Savona vs Asphar (1951, Court of Appeal) and D'Amato vs Camilleri (1958, Court of Appeal – Civil Superior) to other more recent cases such as Gauci vs Felice (2008, Court of Appeal – Civil Superior), Ellul vs Dr Astrid Camilleri (2008, First Hall Civil Court), Cachia vs Busuttill (2012, First Hall Civil Court), Gambina vs Golden Shephard (2013, First Hall Civil Court); have our Civil Courts converged upon or distanced themselves from this human rights based interpretation of the law? As law students and researchers we await a scholarly answer.

⁵⁸¹ Saviour Balzan (MaltaToday Reporter), Interview with Judge Giovanni Bonello, Former Judge of the European Court of Human Rights (28 March 2012).