

# JOURNAL OF LAW AND MEDICINE

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EDITORIAL – *Ian Freckelton*

## **Patients’ decisions to die: The emerging Australian jurisprudence**

A series of decisions by McDougall J in *Hunter and New England Area Health Service v A* (2009) 74 NSWLR 88; Martin CJ in *Brightwater Care Group (Inc) v Rossiter* (2009) 40 WAR 84; Higgins CJ in *Australian Capital Territory v JT* (2009) 232 FLR 322; and Kourakis J in *H Ltd v J* (2010) 240 FLR 402 has built upon prior decisions in New South Wales, Queensland and Victoria. The combination of authority has provided a reasonably homogeneous set of principles on the basis of which future decision-making can take place by clinicians, institutions and courts. It is apparent that, wherever possible, effect will be given to competent patients’ wishes in relation to cessation of treatment, nutrition and hydration. However, scrutiny will be applied to patients’ capacity in order to examine not the rationality or correctness of their decisions per se but their capacity to make them. It is probable that a rigorous approach will be taken both to whether patients’ mental ill health deprives them of capacity and to whether they are provided with sufficient information to understand the consequences and processes of deprivation of nutrition, hydration and medication. .... 427

LEGAL ISSUES – *Joanna Manning*

## **Priority-setting processes for medicines: The United Kingdom, Australia and New Zealand – *Joanna Manning***

The agencies involved in the assessment and prioritisation of medicines for public subsidy purposes in Australia, England and Wales, and New Zealand are compared in terms of their processes; ultimate decision-maker and political involvement in decisions; price-setting processes; decision criteria and inclusion of economic assessment of cost-effectiveness; provision for the rule of rescue and separate treatment of potentially life-saving medicines and cancer drugs; levels of access; extent of consumer participation in processes and decisions; and provision for appeal from decisions. All countries face the key challenge of expanding access to important new treatments, while maintaining cost-effectiveness as a key criterion for public funding and safeguarding the affordability and sustainability of their programs into the future. New Zealand’s model may have led to a greater focus on cost-containment and overall affordability than those of the other two agencies. Despite controversial decisions that have led on occasion to disappointment and challenge, the Australian and New Zealand agencies have survived and appear to have managed to date to maintain public and political support. By contrast, the United Kingdom’s National Institute for Healthcare and Clinical Excellence is facing major changes to its role that could see it become more of an advisory organisation. .... 439

MEDICAL ISSUES – *David Ranson*

## **Death from minor head trauma and alcohol – *David Ranson***

Sudden death in association with minor or otherwise insignificant head injury is increasingly being recognised in the forensic medical literature. While the exact mechanism of the cardiorespiratory arrest that appears to occur in these cases is unclear, a

number of mechanisms have been postulated. Animal studies have provided evidence that alcohol can be associated with an increased period of apnoea following minor physical brain injury and cardiac changes have also been identified. The limited information in the community about the risk of alcohol in association with minor head injury causing death may be relevant in homicide cases where this issue is raised. .... 453

BIOETHICAL ISSUES – *Malcolm Parker*

**Embracing the new professionalism: Self-regulation, mandatory reporting and their discontents** – *Malcolm Parker*

In response to perceived failures in medical self-regulation in Australia, first in two States (for doctors) and now under the National Registration and Accreditation Scheme (for all health practitioners), mandatory reporting of peer status or practice that poses risks to patients has been introduced. Yet now, in response to the lobbying of State and federal health ministers by the medical profession, mainly in relation to the impairment provisions, this is to be reviewed. This column argues that claims concerning the negative consequences for practitioners of mandatory reporting are illogical and lack supporting evidence. There is, however, evidence that the medical profession does not consistently act in accordance with its professed positions in the area of physician impairment and departure from accepted clinical standards. The call for a review of mandatory reporting reflects an outdated model of regulation that does not align with increasing calls for a "new professionalism". In its own interests, but primarily in the interests of patients, the medical profession should embrace new attitudes and practices that will at first appear to threaten the privilege of self-regulation, but on proper scrutiny will be seen as necessary to retain it. .... 456

COMPLEMENTARY HEALTH ISSUES – *Ian Freckelton*

**Psychotherapy, suicide and foreseeable risks of decompensation by the vulnerable** – *Ian Freckelton*

Utilising the findings and recommendations in a 2010 coronial inquest in New South Wales into the death of Rebekah Lawrence, a person who had recently completed a personal development course incorporating confronting techniques of regression, run by persons without formal psychotherapeutic skills, this column scrutinises issues arising in relation to unregistered therapies. The evidentiary bases upon which coronial findings of suicide can be made are also examined, along with the effects of the ancient presumption against findings of suicide. In addition, the existence of regulatory controls, as recommended by the New South Wales Deputy State Coroner, are discussed. The grim conclusion arrived at is that the potential exists for further deaths of vulnerable people in the aftermath of the wielding of powerful psychological techniques by persons ill equipped to do so and to identify and respond to the sequelae of their therapies. .... 467

MEDICAL LAW REPORTER – *Thomas Faunce*

**What makes a real man? Gender norms and Western Australia v AH [2010] WASCA 172** – *Ruth Townsend, Danielle Klar and Thomas Faunce*

In *Western Australia v AH* [2010] WASCA 172 the Western Australian Court of Appeal denied two female-to-male applicants for gender reassignment certificates the right to be legally recognised as men. In so doing, an opportunity was lost for Australia to be one of the first jurisdictions in the world to legally provide a reassignment of gender without requiring permanent sterilising surgery. This column examines not only the legal issues considered in the case but the broader ethical and human rights issues associated with

denying female-to-male gender reassignment applicants who have not undergone a permanent sterilisation or genitalia alteration procedure, the right to be identified as males. .... 478

ARTICLES

**The legal role of medical professionals in decisions to withhold or withdraw life-sustaining treatment: Part 1 (New South Wales)** – *Ben White, Lindy Willmott, Pip Trowse, Malcolm Parker and Colleen Cartwright*

This is the first article in a series of three that examines the legal role of medical professionals in decisions to withhold or withdraw life-sustaining treatment from adults who lack capacity. This article considers the position in New South Wales. A review of the law in this State reveals that medical professionals play significant legal roles in these decisions. However, the law is problematic in a number of respects and this is likely to impede medical professionals’ legal knowledge in this area. The article examines the level of training medical professionals receive on issues such as advance directives and substitute decision-making, and the available empirical evidence as to the state of medical professionals’ knowledge of the law at the end of life. It concludes that there are gaps in legal knowledge and that law reform is needed in New South Wales. .... 498

**The legal role of medical professionals in decisions to withhold or withdraw life-sustaining treatment: Part 2 (Queensland)** – *Lindy Willmott, Ben White, Malcolm Parker and Colleen Cartwright*

This is the second article in a series of three that examines the legal role of medical professionals in decisions to withhold or withdraw life-sustaining treatment from adults who lack capacity. This article considers the position in Queensland, including the *parens patriae* jurisdiction of the Supreme Court. A review of the law in this State reveals that medical professionals play significant legal roles in these decisions. However, the law is problematic in a number of respects and this is likely to impede medical professionals’ legal knowledge in this area. The article examines the level of training medical professionals receive on issues such as advance health directives and substitute decision-making, and the available empirical evidence as to the state of medical professionals’ knowledge of the law at the end of life. It concludes that there are gaps in legal knowledge and that law reform is needed in Queensland. .... 523

**Serving two masters? Recent legal developments regarding the professional obligations of medical administrators in Australia** – *Owen Bradfield*

Medical administration is a recognised medical specialty in Australia. Historically, medical administrators have rarely been subjected to litigation or disciplinary hearings relating specifically to their administrative functions. However, the legal landscape for medical administrators in Australia appears to be shifting. In 2009, the Queensland Health Practitioners Tribunal heard two separate cases involving the professional conduct of medical administrators who were implicated in the scandal surrounding Dr Jayant Patel at Bundaberg Hospital. In September 2010, judgment in one of those cases was delivered. This article reviews the tribunal’s decision through the lens of relevant United Kingdom authorities and recent legislative changes in Australia regulating the health professions. .... 545

**Who shall live when not all can live? Intellectual property in accessing and benefit-sharing influenza viruses through the World Health Organisation** – *Charles Lawson*

This article addresses the development of the World Health Organisation’s (WHO) arrangements for accessing viruses and the development of vaccines to respond to potential pandemics (and other lesser outbreaks). It examines the ongoing “conflict”

between the United Nations' *Convention on Biological Diversity* (CBD) and the World Trade Organisation's *Agreement on Trade Related Aspects of Intellectual Property Rights* (TRIPS) in the context of the debates about the paramountcy of intellectual property, and the potential for other (equity and development) imperatives to over-ride respect for intellectual property and TRIPS. The article concludes that the same intellectual property fault lines are evident in the WHO forum as those apparent at the CBD and the WTO fora, and an ongoing failure to properly address questions of equity and development. This poses a challenge for the Australian Government in guaranteeing a satisfactory pandemic influenza preparation and response. .... 554

**Access to medicine and the dangers of patent linkage: Lessons from Bayer Corp v Union of India – Mabel Tsui**

In February 2010, the Delhi High Court delivered its decision in *Bayer Corp v Union of India* in which Bayer had appealed against an August 2009 decision of the same court. Both decisions prevented Bayer from introducing the concept of patent linkage into India's drug regulatory regime. Bayer appealed to the Indian Supreme Court, the highest court in India, which agreed on 2 March 2010 to hear the appeal. Given that India is regarded as a global pharmaceutical manufacturer of generic medications, how its judiciary and government perceive their international obligations has a significant impact on the global access to medicines regime. In rejecting the application of patent linkage, the case provides an opportunity for India to further acknowledge its international human rights obligations. .... 577

**Police use of TASERs in the restraint and transport of persons with a mental illness – Jennifer Edinger and Sandra Boulter**

The mentally ill are overrepresented in the statistics of individuals killed or injured by police and it is understandable that police would seek a weapon, such as a TASER, that is less lethal than a firearm. However, it appears that use of TASERs is not without risk, especially in certain groups, including the mentally ill. The risk of injury to vulnerable people with a mental illness from TASER weapons must be weighed against the risk that escalation to lethal force may cause if a person with an acute mental illness requires restraint. When police officers are carrying out their duties under mental health legislation it is recommended that TASERs be used only when an individual is imminently likely to sustain or to cause grievous bodily harm. This article recommends changes to the Western Australian Police TASER training programs and proposes mandatory medical assessments after the use of TASER restraint. .... 589

**Abortion laws and medical developments: A medico-legal anomaly in Queensland – Kerry Petersen**

In October 2010 the District Court sitting in Cairns, Queensland, found Tegan Leach not guilty of attempting to procure her own abortion and Sergie Brennan not guilty of supplying Leach with the drugs Mifepristone and Misoprostol to procure an abortion. Brennan obtained the drugs from his sister in the Ukraine through the regular postal system. *R v Brennan and Leach* was the first case in Queensland's history where a woman was charged with procuring her own abortion. The drugs are accepted by the medical profession worldwide for medical abortions. A prosecution witness gave evidence that Mifepristone is not harmful or injurious to the health of a woman and it is listed as an essential medicine by the World Health Organisation and approved for use by the Australian Therapeutic Goods Administration. The jury found the defendants not guilty because they were not satisfied beyond reasonable doubt that the combination of the drugs Mifepristone and Misoprostol was a "noxious" substance under the *Criminal Code* (Qld). This article concludes that there is no regulatory miracle which will stop the traffic of Mifepristone and Misoprostol into Australia and therefore an intelligent regulatory

response is required which would make it unnecessary for women to seek Mifepristone and Misoprostol from overseas networks and the internet. Among other things, this would include the repeal of confusing, inappropriate and ineffective abortion laws. .... 594

**The criminal act of commercial surrogacy in Australia: A call for review – Anita Stuhmcke**

Australian surrogacy legislation punishes the pursuit of a commercial surrogacy arrangement as a criminal offence. Such legislation was first introduced in Victoria in 1986 and has since been applied in every Australian jurisdiction except for the Northern Territory. The current application of criminal law is based upon this 1980s policy which has never been subject to public debate. This article argues that the continued application of criminal penalties to commercial surrogacy requires review. .... 601

**Surrogacy: Is it harder to relinquish genes? – Pip Trowse**

Surrogacy has produced some positive outcomes by creating an opportunity for otherwise childless couples to realise their dream of parenthood. However, it has also been problematic, particularly where the surrogate mother fails to relinquish a child born as a result of the surrogacy arrangement. This article examines whether a surrogate mother who is genetically related to the child she delivers is less likely to relinquish the child than one who has no genetic ties. An examination of empirical evidence provides support for this argument. Legislation and case law in Australia, the United States and the United Kingdom are examined to determine which, if any, of these jurisdictions take into account the existence, or otherwise, of a genetic link between the surrogate mother and the child she bears. The article concludes that surrogacy legislation should, subject to exceptional circumstances, encourage surrogacy arrangements where the child and the surrogate are not genetically related. .... 614

**BOOK REVIEWS**

*Ethical Issues of Human Genetic Databases: A Challenge to Classical Health Research Ethics?* by Bernice Elger  
*Ethical Issues in Governing Biobanks: Global Perspectives* by Bernice Elger, Nikola Biller-Adorno, Alexandre Mauron and Alexander M Capron ..... 634  
*Terminal Decline* by Dr Mohamed Khadra ..... 636