JOURNAL OF LAW AND MEDICINE

Volume 25, Number 1

2017

EDITORIAL – *Editor: Ian Freckelton QC*

Futility of Treatment for Dying Children: Lessons from the Charlie Gard Case

Decision-making about seriously ill and dying children is fraught and distressing for all concerned. The United Kingdom saga involving Charlie Gard and the ruling by four courts that in his best interests he should not receive experimental therapy overseas provides many lessons for how such controversies should and should not be handled. This editorial places the case in historical and legal context and traces the evolution of the disputation about the treatment to be provided to Charlie, including through the courts and in the media. It argues that it is important for all concerned, including for confidence in clinical guidance and decision-making, that systems be generated which minimise the risk of cases such as that involving Charlie Gard being handled so publicly and in so adversarial a way. 7

LEGAL ISSUES – *Editor: Danuta Mendelson*

Voluntary Assisted Dying Legislation in Victoria: What Can We Learn from the Netherlands Experience? – *Danuta Mendelson*

The *Voluntary Assisted Dying Bill 2017* (Vic) (VAD Bill) was passed by the Legislative Assembly of the Victorian Parliament on 20 October 2017. The Bill is partly based on the Majority Report provided by the Legal and Social Issues Committee of the Victorian Legislative Council following its Inquiry into End of Life Choices (June 2016). The Majority Report recommended introduction of euthanasia and assisted suicide legislation. The Bill is modelled on the Ministerial Advisory Panel on Voluntary Assisted Dying Final Report, which drafted 66 recommendations on legalising administration and supply of substances for the purpose of causing the person's death. The Victorian government accepted the 66 recommendations, which the Chair of the Ministerial Advisory Panel, Professor Brian Owler, described as detailing "safe and compassionate framework for voluntary assisted dying in Victoria". This analysis will focus on matters of major concern relating to the VAD Bill, namely criteria for accessing "voluntary assisted dying" and in particular, the age threshold and decision-making capacity. The proposed legislation resembles the *Dutch Termination of Life on Request and Assisted Suicide (Review Procedures) Act* of April 2002 (the Netherlands); consequently, the discussion will draw on the Dutch experience over the past 15 years. 30

MEDICAL ISSUES – *Editor: Danny Sullivan*

Prioritising Patients' Preferences: Victoria's New Advance Planning and Medical Consent Legislation – *John Chesterman*

The introduction of the *Medical Treatment Planning and Decisions Act 2016* (Vic) signals a profound alteration in focus from "best interests" substitute decision making, and will result in increased opportunities for patients to control their treatment choices. This will apply for advance care directives, and will also more effectively guide decisions made by a proxy. There will be an increased ability for patients to refuse treatment, and an expansion

of the treatment choices covered by legislation. This column explores the impact of the legislation and reflects on its extension, and clinical challenges which may arise from the legislation. 46

MEDICAL LAW REPORTER – *Editor: Thomas Faunce*

High Court of Australia and HIV/AIDS Disease Criminalisation: Aubrey v The Queen and Zaburoni v The Queen – *Thomas Faunce and Brendan Siles*

In 2017, the High Court of Australia in *Aubrey v The Queen* (2017) 91 ALJR 601; [2017] HCA 18 considered the term "inflict" grievous bodily harm, under common law, and expanded its interpretation to incorporate nonviolent and non-immediate infection of a disease, overturning a 120 year authority in *R v Clarence* (1888) 22 QBD 23. In the previous case of *Zaburoni v The Queen* (2016) 256 CLR 482; [2016] HCA 12, the High Court allowed an appeal from the Qld Supreme Court finding that repeated acts of unprotected sexual intercourse by a man who knew he was infected with HIV/AIDS, though callous and reckless, did not constitute intention to infect his female partner; consequently, he could be found guilty of a lesser offence of inflicting grievous bodily harm which carried a maximum 14-year prison sentence rather than life imprisonment. These decisions illustrate a court intersecting with an emerging trend to use legislation creating criminal offences to deter those who intentionally or recklessly infect others with life-shortening diseases. 52

ARTICLES

Doctors with Conditions – Rehabilitation or Risk – *Helen Kiel*

This article reports and updates a study that analysed protective orders in medical disciplinary tribunals over a three-year period. It argues that the concept of the protection of the public has been undermined by protective orders that focus on the rehabilitation of problem and impaired doctors in the management of risk. The article posits a medical or psychiatric model of misconduct in which misconduct is seen in terms of illness, rather than attracting negative moral judgment and severe disciplinary sanctions. The findings in the study and cases since indicate that the most common form of risk management in medical tribunals is the imposition of conditions upon a doctor's registration, such as supervision or psychiatric treatment. The article concludes that, given the paucity of research on the rationale and utility of such protective orders, the faith of tribunals in their effectiveness is misplaced. 62

Commentary on Undue Influence Provisions under Oregon Death with Dignity Act and California's End of Life Option Act – *Michaela Estelle Okninski*

This article considers the requirements to assess for elements of undue influence under the *Oregon Death with Dignity Act* (2013) and California's recently assented to *End of Life Option Act* (2015). Acting voluntarily, that is free from undue influence, is critical to the operation of these statutes. Indeed, assisted dying largely draws its legitimacy from the requirement that voluntariness is well protected. However, this article argues that the requirements under these statutes fall short of adequately protecting a voluntary decision. This article discusses the provisions concerning voluntariness and undue influence under these two statutes, highlighting ostensible limitations therein. Basic recommendations for improvement are proffered. This article concludes by arguing that Australia should not draw inspiration from these statutory provisions because they fail to protect freedom of choice in a meaningful way. 77

Private Health Care in New Zealand: Five Policy Prescriptions – *Rachel Tompkins*

New Zealand's private healthcare sector has recently drawn political attention as policymakers consider how best to "shift the load" from the public health system. This article explains and evaluates five "policy prescriptions", drawn from experience in the United Kingdom and Australia, as candidates for achieving that broad aim: in brief, they are (1) financial incentives to purchase health insurance, (2) adoption of a lifetime community rating system of health insurance, (3) restrictions on selective contracting, (4) imposing information-sharing requirements on providers, and (5) restricting industry incentive schemes. It is concluded that several of these proposals are worthy of further research and analysis. 86

Jurors' and Judges' Evaluation of Defendants with Autism and the Impact on Sentencing: A Systematic Preferred Reporting Items for Systematic Reviews and Meta-analyses (PRISMA) Review of Autism Spectrum Disorder in the Courtroom – *Clare S Allely and Penny Cooper*

Concern has been highlighted in the literature regarding how juries and judges handle cases which involve a defendant with autism spectrum disorder (ASD). The relatively little research on judicial perceptions or decision-making regarding individuals with ASD indicates that judges have limited understanding and familiarity with high-functioning ASD (hfASD) and ASD. The present systematic review will identify studies which investigate jurors' (eg using mock jurors) and/or judges' evaluations of defendants with ASD and studies which investigate whether the defendant diagnosis of ASD impacts on sentencing. Only four studies were identified which investigated jurors' and/or judges' evaluations of a defendant with an ASD or investigated whether the defendant diagnosis of ASD impacts on sentencing. Further research is recommended which should include an evaluation of cases involving a defendant with an hfASD or ASD diagnosis comparing charges, pleas entered, procedural adjustments at court, evidence adduced about the defendant's condition, directions to juries, judicial remarks on the evidence (eg summing-up for the jury), verdicts and sentencing. This would enable the assessment of the specific offending behaviour and disorder of the defendant, and how these may be relevant to their mental capacity and culpability. 105

Let's Starve Down to the Bone: Pro-anorexia Websites and the Law – *Marilyn Bromberg and Tomas Fitzgerald*

Pro-anorexia websites promote anorexia as a positive lifestyle choice. They provide tips to become anorexic and maintain anorexia and diets that people who are anorexic can follow. France became the first country in the world to pass legislation that criminalises the publication of pro-anorexia websites. This article considers the ways that the civil and criminal law in Western Australia can deal with the publishers of pro-anorexia websites. It argues that the law in Western Australia would be unlikely to apply to publishers of pro-anorexia websites, except in the most extreme cases, and it generally cautions against legislative intervention in this area. 124

Legal and Ethical Issues Surrounding Advance Care Directives in Australia: Implications for the Advance Care Planning Document in the Australian My Health Record – *Shaun McCarthy, Jacqueline Meredith, Lucy Bryant and Bronwyn Hemsley*

This article reviews legal and scientific literature relating to Advance Care Planning (ACP) and Advance Care Directives (ACDs) in Australia, for information about (a) opportunities or benefits of ACP and ACDs and (b) risks, barriers or difficulties in relation to ACP and ACDs. These are discussed in relation to (c) the implications for uptake use and benefit of storage in the My Health Record's Advance Care Planning Document. 136

Criticising Current Causation Principles: Views from Victorian Lawyers on Medical Negligence Legislation – *Tina Popa*

Following medical negligence, plaintiffs can be left with devastating permanent injuries that warrant compensation. These plaintiffs might satisfy a breach of duty of care, yet the statutory test of causation presents a hurdle to successful recovery in meritorious negligence claims. In 2015 reforms, the Victorian government reduced injury thresholds and increased compensation caps but did not address the contentious issue of causation. In this article, drawing on interviews with 24 senior tort lawyers, the issue of causation is examined. The majority of participants in this study expressed the view that causation was one of the most significant issues for litigants in medical negligence proceedings. Analysis of the data shows that the participants believed that causation requirements unfairly prevent plaintiffs from succeeding in meritorious claims. The author argues that the recent legislative changes should have addressed causation and failure to do so represents a lost opportunity to provide litigants with just compensation. 150

The Murder Trial of Gerard Baden-Clay: Admissibility of Expert Opinion Evidence of Injuries and Cause of Death – *Russ Scott*

On 20 April 2012, Brisbane real estate agent Gerard Baden-Clay reported that his wife Allison was missing. Ten days later, her body was found under a bridge more than 10 kilometres from the family home. Although the body was badly decomposed, there was no evidence that she had died of a natural cause. Before his trial on the charge of murder, Baden-Clay made application to the Supreme Court to exclude considerable expert opinion evidence relating to the injuries and the possible causes of death of his wife and what had appeared to have been recent scratches on his face. During the subsequent trial, the jury heard extensive evidence from a number of expert witnesses including a forensic pathologist, three forensic medical specialists, a forensic scientist, a botanist, an entomologist, a pharmacologist, a toxicologist and a general psychiatrist. On 15 July 2014, a jury convicted Baden-Clay of murder. On 8 December 2015, after considering the expert evidence and the trial judge's summing up to the jury, the Queensland Court of Appeal set aside the verdict as "unreasonable" and substituted a verdict of manslaughter. On 31 August 2016, the High Court overturned the decision of the Court of Appeal. The case commentary considers the application of the principles of law relating to the admissibility of expert opinion evidence and the directions a trial judge may give to a jury. 166

Use of Coronial Post-mortem Tissue for Research in New Zealand – *Brandi L Bellissima, Fintan Garavan, Jonathan R Skinner and Malcolm D Tingle*

Forensic pathology is remarkably under-represented in research: considering the obstacles a researcher must overcome to obtain post-mortem tissue for research, it is perhaps not surprising. We are investigating whether there is any role for altered drug metabolism in potentially fatal clozapine-associated myocarditis and/or cardiomyopathy. As part of this research, the use of post-mortem tissue taken during a coronial autopsy from individuals who have died from, or with, these clozapine-associated cardiotoxicities was considered fundamental. Currently, there is no clear pathway for using coronial post-mortem tissue for research in New Zealand. We have worked through the *Coroners Act 2006* (NZ), the *Human Tissue Act 2008* (NZ) and the medico-legal death investigation process in New Zealand to use coronial post-mortem tissue for research. The process to obtaining tissue(s) in New Zealand is probably representative of pathways in other coronial systems. 205

Choosing Wisely: Law's Contribution as a Cause of and a Cure for Unwise Health Care Choices – *Nola M Ries*

The provision of unnecessary health care is a serious problem in Australia and involves two key legal issues. First, doctors' fear of litigation drives defensive practices – ordering

tests and procedures, making referrals, and prescribing drugs to reduce perceived legal risks, rather than to advance patient care. Second, suboptimal communication and decision-making processes undermine a patient's right to make informed health care choices. This article critically analyses these problems and proposes solutions. An extensive body of medico-legal literature is synthesised to highlight the gaps between legal requirements and what happens in practice. Negligence case law is discussed to clarify legal principles and shows that courts discourage defensive practice. Finally, the article presents practical strategies to enhance communication and shared decision-making in the clinical encounter. 210

Legal and Medical Aspects of Diverse Gender Identity in Childhood – *Felicity Bell and Anthony Bell*

Diagnosis of gender identity dysphoria among children and young people appears to be increasing around the developed world. For a small proportion of children, the mismatch between their natal physical characteristics and desired gender causes significant distress. Though there are now accepted medical interventions that can assist in these cases, there is a lack of congruence between clinical practice and legal regimes governing the treatment of children and young people in this area. This article seeks to demonstrate the difficulties that may arise by providing a detailed explanation of medical interventions, juxtaposed with a discussion of the legalities of children's consent in some overseas common law jurisdictions. 229

Obesity Prevention Laws and the Australian Constitution – *Jacqueline Lau, Elizabeth Handsley and Christopher Reynolds*

The idea of using law and regulation to prevent obesity in Australia is complicated by federalism. This article analyses in detail the powers of Commonwealth and State governments to determine which level(s) of government would be able to pass laws of the types recommended by the National Preventative Health Taskforce, namely marketing regulation, labelling regulation, content regulation, fiscal measures, built environment regulation and school regulation. The article considers the types of law that the Commonwealth could pass under the trade and commerce, taxation, communications and corporations powers, along with the power to make tied grants to the States. It then considers how the States could pass such laws but avoid levying any duty of excise, restricting freedom of interstate trade and passing any law that would be inconsistent with a Commonwealth law. 248

Capacity and Vulnerability: How Lawyers Assess the Legal Capacity of Older Clients – *Lise Barry*

This article presents the findings of a research project that examined the Capacity Complaints investigated at the New South Wales Office of the Legal Services Commissioner between 2011 and 2013. The article outlines a tripartite theory of vulnerability to demonstrate the potential for lawyers' capacity assessments to increase the vulnerability of older clients with a cognitive impairment. The Capacity Complaints are then analysed, highlighting where reported practice falls short of the prescribed guidelines. The article concludes with recommendations for more consistent and rigorous guidelines and improved legal education to protect the human rights of older people. 267

BOOK REVIEW

Merry and McCall Smith's Errors, Medicine and the Law by Alan Merry and Warren Brookbanks (eds) – *Reviewed by Ian Freckelton QC* 283