

JOURNAL OF LAW AND MEDICINE

Volume 28, Number 1

2020

EDITORIAL

The Rights to Life, Dignity and the Highest Attainable Standard of Health: Internationally Influential African Jurisprudence – Ian Freckelton QC

The right to the highest attainable standard of health, existing under a number of international human rights instruments, including Art 12 of the *International Covenant on Economic, Social and Cultural Rights*, has been incorporated in local law and in the constitutions of many countries. An important body of jurisprudence interpreting such rights and applying them in particular factual health scenarios is developing. Against the background of the South African Constitutional Court’s 2002 landmark decision in *Minister of Health v Treatment Action Campaign (No 2)* (2002) 5 SA 721 in relation to access to HIV medications, this editorial reviews significant decisions in 2012 by Ngugi J of the Kenya High Court in *PAO v Attorney General* [2012] eKLR and by the Uganda Constitutional Court in 2020 in *Center for Health, Human Rights and Development v Attorney General* [2020] UGCC 12. It contends that this combination of high-profile judgments has breathed substance and significance into the right to the highest attainable standard of health, the entitlement to be treated with dignity and the right to life at a time when these rights may assume additional importance in the context of the availability and accessibility of vaccines for the COVID-19 virus. 9

LEGAL ISSUES – Editor: Gabrielle Wolf

Embracing the Future: Using Artificial Intelligence in Australian Health Practitioner Regulation

Artificial intelligence (AI) – computerised technology that imitates aspects of human intelligence – is developing at a rapid pace. It is increasingly used to improve the efficiency and effectiveness of multifarious processes in private industry and public administration. Among the statutory authorities that have begun to explore the potential for AI to assist them are regulators of Australia’s health professions. Protection of the public is a chief objective of this area of administrative law. This section considers some possible uses of AI – and particularly its capacities to analyse and draw inferences from data, make predictions and decisions, and automate tasks – that might help regulators achieve this goal. The section also contemplates the implications of AI involvement in the regulation of health practitioners for the rule of law and human rights it protects and recommends measures that might be taken to mitigate risks of their infringement. 21

MEDICAL ISSUES – Editor: Danny Sullivan

Personality Disorder and Moral Culpability: *Brown v The Queen* – Danny Sullivan and Adam Deacon

The influential Victorian appellate judgment of *R v Verdins* [2007] VSCA 102 provided a sentencing framework for “impaired mental functioning” not only in Victoria but in other Australian jurisdictions. Following the judgment of *Director of Public Prosecutions (Vic) v O’Neill* (2015) 47 VR 395; [2015] VSCA 325, it appeared that personality disorders

were not considered within the scope of the Verdins principles. In *Brown v The Queen* [2020] VSCA 212, the decision of the Victorian Court of Appeal broadened the potential for impaired mental functioning to include personality disorders as relevant to moral culpability. However, it is also noted that there are several limits on this. 45

TECHNOLOGY HEALTH LAW ISSUES – *Editor: Bernadette Richards*

Consumer Law, Technology and Health Care: A Shift in Focus, a Panacea or a Confounder? – *Joel Grieger, Mark Giancaspro and Bernadette Richards*

With the increasing role of technology in health care the clinical environment is becoming more complex and it is important to recognise that there is now a significant commercial player on the clinical stage. The relationship between the patient and the manufacturers/distributors of this technology is not a clinical one, neither is it necessarily a traditional consumer one as there is an absence of direct interaction. When the patient suffers harm as a result of faulty technology, they understandably seek recompense for that harm; and while the traditional approach of negligence law is open to them, there is also a role for consumer law. This column explores three high-profile decisions in which consumer law was applied to instances of patient harm and asks the question whether, at the intersection of technology and health care, consumer law represents a shift in focus, a panacea or a confounder. 54

MENTAL HEALTH LAW ISSUES – *Editor: Bernadette McSherry*

Gender, Trauma and the Regulation of the Use of Restraint on Women in Australian Mental Health Services – *Yvette Maker*

The use of physical, mechanical and/or chemical restraint is authorised by mental health legislation in most Australian jurisdictions. Research indicates that women have different experiences and needs in relation to the use of restraint, but legislation does not mention sex or gender as relevant considerations in the authorisation, use or monitoring of these practices. This is especially problematic in light of the potential for restraint use to traumatise, or retraumatise, women service users. This section discusses the treatment of gender- and trauma-related considerations in Australian mental health legislation and supporting policy, pointing to several gaps and proposing appropriate changes to practice and regulation. 68

HEALTH LAW REPORTER – *Editor: Cameron Stewart*

Brain Death and Pregnancy: On the Legalities of Post-mortem Gestation – *Cameron Stewart, Ian Kerridge, Lisa O’Reilly, Linda Sheahan, George Tomossy and George Skowronski*

This column examines a 2020 decision of the Supreme Court of the Australian Capital Territory, *Millard v Australian Capital Territory* [2020] ACTSC 138, which dealt with a dispute concerning a brain dead pregnant woman and whether treatment to sustain her body should have been continued to save the life of her fetus. The column compares the case to other cases from overseas jurisdictions to examine the question of whether there is any jurisdiction which would authorise the continuation of care in such circumstances. 75

Clinical Research without Consent: Challenges for COVID-19 Research

The imperatives generated by the need for research into efficacious forms of treatment for COVID-19 have shone a fresh light upon the criteria for inclusion in clinical trials of persons unable to provide informed consent by reason of a number of factors including the seriousness of their illness symptomatology. This column identifies diversity in European, United States and Australian legislative and other guidance on the ethical issues that arise in respect of clinical research to which participants are not able to consent. It reviews the decision-making by the New South Wales Civil and Administrative Tribunal in a 2020 case in which permission was sought to conduct a clinical trial into a drug, STC 3141, designed by researchers as a potential treatment for patients with Adult Respiratory Distress Syndrome arising from COVID-19. It outlines the reasoning of the Tribunal in the context of debates about the balance to be struck between clinically useful medication trials and the need to avoid exploitation of vulnerable persons not able to provide their own consent, be that by virtue of disabilities such as acuteness of illness or dementia symptomatology. It contends that the decision illustrates the potential for research to be undertaken safely and ethically, utilising subjects in an intensive care unit who are unable to provide consent. 90

ARTICLES

COVID-19 and the Right to Support in New Zealand Hospitals – Sarah Gwynn

In New Zealand, a patient’s right to support is recognised as a legal right in Right 8 of the Code of Health and Disability Consumers’ Rights. Support-people, such as family members, friends even religious leaders, often play a vital part of the care team for patients. The presence of a support-person can bring relief and comfort to a patient. However, COVID-19, District Health Boards severely restricted visits to hospital patients, and one even excluded all support-people unless there were exceptional and compassionate circumstances. This article explores whether the limitations placed on support-people and visitors’ access to hospitals were proportionate and legally justifiable. 107

COVID-19 Curfews: Kenyan and Australian Litigation and Pandemic Protection – Ian Freckelton QC

Historically and etymologically, curfews are public health measures imposed to guard against risks to health and safety. On occasion they have been deployed oppressively, disproportionately and without proper regard to their ramifications. It is important that they not be used during a pandemic unless there is sufficient medico-scientific reason to conclude that they will serve a constructive purpose and that they are the least restrictive available governmental response. Inevitably, they impact adversely on a variety of human rights, particularly freedom of movement. They isolate and inhibit human connection. However, in the context of a worldwide pandemic causing terrible loss of life, there are occasions where they may be a necessary adjunct to these restrictions. This article identifies a variety of scenarios in which curfews have been imposed on different populations and identifies legal challenges that have been made to them. In the context of the COVID-19 pandemic it reviews the Kenyan judgment of *Law Society of Kenya v Mutyambai* [2020] eKLR and the Victorian Supreme Court judgment of *Loiello v Giles* [2020] VSC 722. It contends that the carefully reasoned decisions in each instance constitute an important reassurance that decision-making about a lengthy curfew in order to reduce the spread of the COVID-19 virus was reasoned, rights-aware and suitably responsive to the risks posed. 117

Clinical Decision Support Systems and Medico-Legal Liability in Recall and Treatment: A Fresh Examination – *Megan Prictor, Mark Taylor, Jane Kaye, Jon Emery, Craig Nelson and Jo-Anne Manski-Nankervis*

Clinical decision support systems (CDSSs) provide a valuable tool for clinicians to aid in the care of patients with chronic disease. Various questions have emerged about their implications for the doctor’s legal duty of care to their patients, in terms of recognition of risk, recall, testing and treatment. In this article, through an analysis of Australian legislation and international case law, we address these questions, considering the potential impact of CDSSs on doctors’ liability in negligence. We conclude that the appropriate use of a well-designed CDSS should minimise, rather than heighten, doctor’s potential liability. It should support optimal patient care without diminishing the capacity of the doctor to make individualised decisions about recall, testing and treatment for each patient. We foreshadow that in the future doctors in Australia may have a duty to use available well-established software systems in patient care.

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Navigating the Australian National Disability Insurance Scheme: A Scheme of Big Ideas and Big Challenges – *Allan Ardill and Brett Jenkins*

One of Australia’s biggest reforms – the National Disability Insurance Scheme (NDIS) – is intended to provide people with choice and certainty of access to disability supports. It replaced an underfunded, unfair, fragmented and inefficient “system”. However, recently, the NDIS has received criticism in regard to access and the provision of supports. These issues, addressed elsewhere, have arguably arisen due to concerns about cost. This article pre-empts these concerns by bridging a gap between the extra-legal academic literature concerning the NDIS and the sparse literature concerning NDIS law. It does so by providing a detailed exposition of the NDIS legal framework embedded in the relevant interdisciplinary extra-legal literature. It concludes that if the NDIS is to succeed it cannot be dominated by concern with the financial sustainability of the system.

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Fifteen Years On: What Patterns Continue to Emerge from New Zealand’s Health Practitioners Disciplinary Tribunal? – *Lois J Surgenor, Kate Diesfeld, Kate Kersey, Olivia Kelly and Marta Rychert*

Disciplinary tribunals are deserving of review, in the interests of fairness, transparency and educational value for key stakeholders. New Zealand’s Health Practitioners Disciplinary Tribunal (HPDT) determines whether registered health practitioners have engaged in misconduct that warrants discipline. The current study considers patterns regarding HPDT hearing processes and outcomes (2004–2020) (420 decisions), expanding knowledge from a previous analysis of HPDT decisions (2004–2014). The findings suggest that the HPDT has largely upheld its goal of consistency. However, shifts over time have included a reduced rate of appeals, and changing patterns for both the grounds for discipline and penalties applied. Differences in HPDT processes and penalties between medical practitioners, nurses and pharmacists were largely accounted for by the factors of practitioner attendance and legal representation at the hearing. This study contributes to understanding who transgresses, how they transgress and the penalties imposed. Such insights may be applied preventively for the benefit of all stakeholders.

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Maintaining Privacy in Artificial Intelligence-driven Bioinformatics: An Inquiry into the Suitability of Australia’s Laws – *Jade Luci Andrews*

Since its humble origins in 1950, artificial intelligence (AI) has experienced exponential growth. In 2020 it seems that there is an AI for just about every aspect of life – from targeted advertising to minimally invasive surgery. It is generally thought that advancements in AI lead to advancements in human life. However, AI is an unprecedented form of technology

with the ability to exceed human expectation and act in unexpected manners. This article considers the intersection between AI and bioinformatics with a particular focus on how artificial capabilities may affect the individual’s right to privacy. A further question is raised as to whether current Australian laws are equipped to protect the individual’s right to privacy, in light of artificial capabilities. 179

Transgender and Intersex Athletes in Single-sex Sports – Laura Johnston

Transgender and intersex athlete inclusion and exclusion from single-sex sports is an area of ongoing conversation and change. This article discusses the separation of male and female athletes, looking at the scientific reasoning, the Australian legislation, Australian case law and sport-specific policies. The role of sports’ policies and case examples for transgender and intersex athletes are investigated along with the concepts of discrimination and legality. The article concludes that policies and regulations can be discriminatory while still being lawful if they meet relevant exceptions – as outlined by legislation and set out by courts. More research is required in the area of the potential advantage that transgender and intersex athletes may have in both individual and team single-sex sports before definitive statements regarding inclusion or exclusion can be made. 197

The Right of the Child to Oral Health: The Role of Human Rights in Oral Health Policy Development in Australia – Gillian Jean, Estie Kruger, Vanessa Lok and Marc Tennant

Marginalised and vulnerable children bear the burden of untreated dental disease in Australia. The lack of progress in improving the oral health of these groups signifies a need to review the effectiveness of existing child oral health policy. The current approach to oral health policy design in Australia is inconsistent and discriminatory across States and Territories. This implies that the right to health does not have a major influence in policy drafting. This article seeks to develop a stronger understanding of the obligations pursuant to ratification of the Convention on the Rights of the Child in progressively realising the right to the highest attainable standard of health and to the benefits of redesigning child oral health policy to conform to a Human Rights-Based Approach to health system planning. Child oral health policy would be improved by the appointment of a Chief Dental Officer to coordinate oral health policy nationally. 214

(Re)Drawing the Line: Australian Regulation of Human–Animal Interspecies Embryos – Andrew Ng and Karinne Ludlow

The mixing of human and animal cellular and genetic material is a promising area of science, but inherent societal and safety concerns make such mixing in embryos particularly controversial. The sensitive nature of this research, coupled with science’s rapid development, creates problems for policymakers responsible for deciding what practices are and are not permitted in Australia. Australia’s regulation in this area, last significantly amended in 2006, is in urgent need of reform. This article investigates what is happening in this fast moving area and the regulatory reforms necessary for Australian scientists to participate. 229

In Whose Interest? Recent Developments in Regulatory Immediate Action against Medical Practitioners in Australia – Owen M Bradfield, Matthew J Spittal and Marie M Bismark

“Immediate action” is a powerful regulatory tool available to Medical Boards. It protects the public from harm by restricting a medical practitioner’s registration after allegations have been made, but before wrongdoing is proven. This article charts the development of these coercive powers in Australia and examines the legal, socio-political and ethical justification

for supplementing a well-defined “public risk” test with a broad and controversial “public interest” test that leaves medical practitioners vulnerable to inconsistent decision-making. Compared to overseas jurisdictions, immediate action powers in Australia offer fewer procedural protections. The regulatory response to perceived threats to public trust and confidence in the medical profession needs to be proportionate, transparent, effective, and consistent, to protect the public while also being fair to practitioners. 244

A Little Less Discrimination, a Little More International Legal Compliance: A Capacity-based Approach to Substitute Decision-Making for People with Mental Illness – *Seb Recordon*

In New Zealand it is currently lawful for a person who has a mental disorder to receive treatment without their consent at least in part because they are mentally disordered. The *Mental Health (Compulsory Assessment and Treatment) Act 1992 (NZ)* provides the power for such people to be detained and to receive compulsory treatment. This approach is inconsistent with international legal instruments to which New Zealand is signatory and, in particular, the Convention on the Rights of Persons with Disabilities. This article examines the purported justifications for the current New Zealand law, before rejecting them as indefensible. It then surveys the international legal framework pertaining to people with mental disabilities before considering possible options for New Zealand law reform. The article concludes that a “fusion” law, based on a patient’s capacity to consent to or refuse treatment, may be a viable option to consider. 270

Adolescent Drivers – Are We Doing Enough? – *Roy G Beran*

The minimum eligible driving age in Australia is 15 years 9 months, in the Australian Capital Territory, and 16 years elsewhere in the country. Approval to drive mandates: appropriate age; completing computer-generated testing; and monitored Graduated Licensing Schemes. The National Road Safety Strategy 2011–2020, released by the Australian Transport Council, either has been or is being implemented, including sponsorship of the Australasian College of Road Safety and establishing Cabinet representation for road safety. Factors include: driving ability; developmental factors; personality; demographics; general environment; and driving environment. The Graduated Licensing process has counted driver inexperience, but immaturity and peer pressure remain additional considerations. Complementing Graduated Licensing, parental and respected directives and guidance are essential to minimise negative peer pressure. Specific counselling and other targeted interventions may also assist. Attention Deficit Hyperactivity Disorder or adolescent epilepsy demand appropriate management to facilitate driving in accordance with the AUSTROADS Guidelines. A composite targeted approach is required to deal with adolescent road fatalities and injuries. 282

Don Chalmers: His Contributions to Legal Research and Education, Health Law, and Research Ethics, Locally and Globally – *Dianne Nicol, Yann Joly, Jane Kaye, Bartha Knoppers, Eric M Meslin, Jane Nielsen, Margaret Otlowski and Kate Warner*

Distinguished Professor Don Chalmers retired from the Law Faculty at the University of Tasmania on Friday 10 July 2020. This article is dedicated to Don, providing a brief account and acknowledgment of his fine contributions to legal research and education and law reform, particularly in the field of health and medical law, research ethics and policy reform. He has been an excellent colleague, mentor, leader, teacher, and researcher. He deserves to enjoy a long and rewarding retirement, though we, and many others, will not allow him to slip entirely out of the limelight. Don is still much needed, and still has so

much to give in our ongoing quest to ensure that legal, research ethics and policy responses are adequate in reaping the benefits and responding to the challenges of biomedical advances.	289
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