JOURNAL OF LAW AND MEDICINE

Volume 30, Number 1

2023

EDITORIAL – *Ian Freckelton AO KC*

Concussion and Chronic Traumatic Encephalopathy Deaths: Coroners' Inquests as a Catalyst for Public Health Reforms

Deaths of participants in sport from the effects of concussive injuries and from chronic traumatic encephalopathy (CTE) raise confronting social issues and challenges for tort law. An uncertainty that often needs to be addressed in such cases is proof of the causes of the former athlete's symptomatology, especially when they may be multifactorial, some or all of which were not directly related to sport. Accounts from the person prior to their death and from family members can be vital sources of such information. Coroners' analyses of evidence in concussion-related deaths constitute an important opportunity for perspectives which can form a sound empirical basis for changes to sporting practices, rules and administration. This editorial reviews a series of biographical and autobiographical accounts of sportspersons with concussion and CTE. It also identifies a corpus of coronial decisions from England, New Zealand, Canada and Australia which have addressed the risks posed to athletes from concussive injuries. It highlights recommendations made by coroners in relation to management of concussion in sport and argues that there is considerable scope for further valuable recommendations based upon their investigations during inquests. 7

LEGAL ISSUES – *Editor: Gabrielle Wolf*

How to Manage a Pandemic?: Decision-Making under the Public Health and Wellbeing Amendment (Pandemic Management) Act 2021 (Vic) – *Gabrielle Wolf*

Victoria is the first Australian jurisdiction to enact legislation establishing a regulatory framework specifically to guide government management of the COVID-19 pandemic and future pandemics. The *Public Health and Wellbeing Amendment (Pandemic Management) Act 2021* (Vic) inserts Pt 8A into the *Public Health and Wellbeing Act 2008* (Vic). The worthwhile stated objective of Pt 8A is to ensure that decision-making in response to an existing or emergent pandemic is "proactive and responsive", "informed by public health advice and other relevant information", and transparent and accountable. This column analyses sections of Pt 8A related to this aim, which grant decision-making powers, require various matters to inform this decision-making, and provide measures for oversight of decision-making. The column argues that Pt 8A constitutes a useful model on which Victoria and other jurisdictions could build and recommends further legislative amendments to help achieve its objective. 23

MEDICAL ISSUES – *Editor: Mike O'Connor*

Monstrous Mothering: Understanding the Causes of and Responses to Infanticide – *Arlie Loughnan and Mike O'Connor*

The deliberate killing of a child by its mother is abhorrent and is associated in the minds of many with mental illness and in particular with postnatal depression. However, at least 50% of perpetrators are neither "mad" nor "bad", and mothers who kill children are

not "unhinged" by pregnancy or childbirth. We propose a different explanation: "blind rage" or "overwhelmed syndrome", whereby parents, stressed to breaking point by sleep deprivation or incessant baby crying, respond by lethally harming their child contrary to previous behaviour. The roots of this blind rage may be found in psychosocial disturbances, including the mother's own unsatisfactory experience of parenting which has caused attachment disorders. The legal framework guiding decisions to prosecute and structuring sentencing decision-making following conviction should acknowledge the exceptional stress experienced by such mothers postnatally. Health professionals including midwives and obstetricians should increase their vigilance and arrange referrals for mothers at risk of causing harm or committing infanticide. 48

HEALTH LAW REPORTER – *Editor: Professor Cameron Stewart*

Expert Diagnostic Evidence By Psychologists: Disciplinary Tensions and Admissibility Issues – *Ian Freckelton AO KC*

Controversy has existed since the 1960s on the difficult issue of the subject matter upon which psychologists should be permitted to offer expert opinions to the courts. A particularly problematic aspect of the controversy has been evidence by psychologists about diagnoses which generally is given by reference to the two main taxonomies of diagnosis, the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* and the World Health Organization's *International Classification of Diseases*. This column reviews the leading decisions on the issue in the United States, the United Kingdom and Australia, including a 2021 Queensland Court of Appeal decision. It argues that the trend of recent case law is in favour of psychologists being permitted to give such evidence but only, on a case-by-case basis, when sufficient specialised knowledge is established in relation to the specific diagnosis proposed by a psychologist. 58

ARTICLES

From Guardianship to Supported Decision-Making: Still Searching for True North? – *Terry Carney AO*

This article argues that asking whether guardianship has changed is the wrong question. It is the wrong question because guardianship does not exist in isolation from other institutions and legal instruments, such as enduring powers and nominee powers, or informal community arrangements of support or substituted decision-making. It is the wrong question because archetypical purity of guardianship as substitution and support as autonomy does not reflect real world experience of it as it is always a mixture of both, changing over time and decision type; and because change is very hard to pin down. In place of arid debates about whether guardianship should be modified or abolished, the better question to ask is where guardianship and its associated institutions fit within an ideally configured holistic package of formal and informal measures, and whether there are any indications of progress towards its realisation, or how that might be achieved. 70

Your Organ Is Mine: Rethinking Ownership Issues in 3D Bioprinting – *Modupe Adewale*

This article discusses ownership and property issues in three-dimensional (3D) bioprinting from the perspective of the tangible aspect of the technology. Many scholars have examined property issues in the intangible aspect of the technology, namely, the intellectual property issue. Since a major component of 3D bioprinting is cells taken from patients and donors, it is important to explore the right of ownership over the physical product, including cells used in the 3D bioprinting process and the 3D bioprinted organ itself. What is the extent of the donor's right over his/her cells taken for use in 3D bioprinting and even the 3D bioprinted organ – the product of those cells? For example, can the cell donor determine

how his/her cells are used, or even who gets the 3D bioprinted organ? What rights does a person have over the commercial use of his/her cells or tissue for 3D bioprinting? 85

Forensic Assessments of Alcohol, Cannabis and Methamphetamine Intoxication in Cases of Violent Offending – *Stefan Goldfeder, Russ Scott and Joseph Briggs*

Whether a person was voluntarily or intentionally intoxicated at the time of commission of a violent offence is a common question in forensic contexts. While a person who was intoxicated may not be able to form the requisite specific intent to commit some offences, voluntary intoxication usually disentitles a person from an insanity or "mental impairment" defence. However, a person may also consume alcohol or use a substance without becoming intoxicated and the presence of alcohol, substances or metabolites of substances in a person's urine or blood is not conclusive when the question of intoxication is relevant. A jury (or a judge sitting without a jury) may require expert opinion evidence when cannabis or methamphetamine intoxication are implicated in the alleged offending. 99

"Pediatric" Drug Studies Might Be the Largest Abuse in Medical Research in History. It Is Time for Lawyers to Step In – *Klaus Rose, Jane M Grant-Kels, Pasquale Striano, Tanjinatus Oishi, David Neubauer, and Earl B Ettienne*

A new type of research has emerged with United States and European Union pediatric laws that request/demand separate clinical studies for vaccines and drugs in minors less than 18 years of age. Physiologically, minors mature before their 18th birthday. Medicine treats the body, not the administrative status. Many "pediatric" studies are performed in minors that bodily are no longer children, which makes them pointless. Traditional malpractice litigation in clinical research involves patients that were harmed in clinical studies. In the new type of "pediatric" studies, drugs known to work in humans are retested, pretending that "children" are uniquely different, which is incorrect. Minors are not another species. Patients are not treated at all (placebo group) or below standard-of-care (comparison to outdated treatment). Pediatric laws are the law, but not a free pass for harming patients. Where "pediatric" studies violate accepted norms of medical practice, lawyers should be aware of this challenge at the interface of medicine and law. 131

Can Doctors Be Compelled to Prolong the Life of a Dying Patient? The Ongoing Medical, Legal and Social Issues – *Margaret Brown*

The law does not require health professionals to provide medical treatment that is of no benefit to the patient. Despite this, medical staff who are caring for patients at the end of their lives frequently experience pressure from the patients' families to prolong their lives. This article considers the Australian law relating to the right to demand treatment when a loved one is dying, and whether an increasing emphasis on shared decision-making has introduced uncertainty. It discusses factors that affect the application of the law, including widespread ignorance of the law, the difficulty of deciding whether a treatment is futile and the need to ration scarce health care resources. It also introduces the perspectives of three senior medical practitioners on disputes with families of dying patients. The article concludes that community education is needed on legal and medical issues at the end of life, including conversations about advance care directives. 155

An Award of Damages for Commercial Surrogacy Overseas? – *Michelle de Souza*

This article examines the United Kingdom Supreme Court decision in *Whittington Hospital NHS Trust v XX* [2020] UKSC 14. The case centred on whether damages could be awarded for the cost of a commercial surrogacy arrangement in California, following clinical negligence by the hospital that left the plaintiff unable to carry her own children.

After examination of this case, the article outlines and compares the United Kingdom and Australian surrogacy laws. It then discusses how a similar case would be decided in Australia and argues that the result would be the same in some Australian States. It also discusses the concept of reproductive autonomy and the importance of this concept when considering cases involving the loss of fertility. 166

Personal Data for Public Benefit: The Regulatory Determinants of Social Licence for Technologically Enhanced Antimicrobial Resistance Surveillance – *David J Carter, Mitchell K Byrne, Steven P Djordjevic, Hamish Robertson, Maurizio Labbate, Branwen S Morgan and Lisa Billington*

Technologically enhanced surveillance systems have been proposed for the task of monitoring and responding to antimicrobial resistance (AMR) in both human, animal and environmental contexts. The use of these systems is in their infancy, although the advent of COVID-19 has progressed similar technologies in response to that pandemic. We conducted qualitative research to identify the Australian public's key concerns about the ethical, legal and social implications of an artificial intelligence (AI) and machine learning-enhanced One Health AMR surveillance system. Our study provides preliminary evidence of public support for AI/machine learning-enhanced One Health monitoring systems for AMR, provided that three main conditions are met: personal health care data must be deidentified; data use and access must be tightly regulated under strong governance; and the system must generate high-quality, reliable analyses to guide trusted health care decision-makers. 179

Access to Assisted Reproductive Technologies in Australia: Time for Legislative Change in Queensland and the Northern Territory to Remove the Ability to Discriminate Based on Relationship Status or Sexuality – *Alisha McGrady, Malcolm Smith and Sonia Allan*

This article examines legislative provisions in Queensland and the Northern Territory, which allow for assisted reproductive technology (ART) service providers to discriminate against people based on their relationship status and/or sexuality. We provide several arguments that add weight to the recent proposal of the Queensland Human Rights Commission that the relevant section of the *Anti-Discrimination Act 1991* (Qld) be repealed, and extend our arguments to the Northern Territory. The provisions in both jurisdictions are out of sync with key legal developments in the rest of Australia, do not accord with societal views, and are potentially invalid due to federal law. Further, the Queensland provision is potentially incompatible with the *Human Rights Act 2019* (Qld). Although currently ART service providers do not appear to discriminate based on relationship status or sexuality, the current legislative framework leaves open the potential to do so, without an avenue for those impacted to challenge it in law. We conclude such provisions should be repealed. 191

The Case for Voluntary-Assisted Dying in Prisoners Serving Sentences of Life without Parole – *George P Drewett*

Legislation supporting voluntary-assisted dying (VAD) is becoming more common globally, where it is used to promote an individual's autonomy in settings where they choose to alleviate their suffering by ending their life. This article examines and advocates for access to VAD in a new group – prisoners serving sentences of life imprisonment without parole. It addresses several morally important issues, and offers an ethical framework based on comparison to VAD in the setting of the terminally ill. 212

"Serious" Disability: A Medical Diagnosis or an Arbitrary Restriction of Reproductive Liberties? – *Chantel Leadbeater*

In Queensland, use of preimplantation genetic diagnosis (PGD) and prenatal diagnostic testing (PND)is limited to the detection of and abstention from embryos or foetuses afflicted with "serious" disabilities. In the absence of a legislative definition or widespread consensus among physicians regarding those disablements which are sufficiently "serious", it begs the question: is Queensland's current regulation of PND and PGD inconsistent with the rule of law because it lacks clarity, stability, and certainty and thus arbitrarily restricts reproductive liberties? This article will demonstrate that the detection of genetic abnormalities via PGD and PND will lead to differing clinical outcomes pre- and post-implantation. While their utilisation for the therapeutic prevention of "serious" harm is a justifiable intrusion on reproductive autonomy, the medical professions' and disabled community's conceptualisations of disability are maligned. Queensland's adoption of a permissive licensing regime for PGD and the interactional model of disability by physicians administering PND is considered. 223

Advancing the Rights of Patients in Nigeria: Analysing the Patients' Bill of Rights – *Olaitan O Olusegun and Babafemi Odunsi*

The rights of persons who seek medical attention have been enshrined in national and international legal instruments, notwithstanding their health status. However, these rights are not fully secured in Nigeria due to some factors affecting the health care system. Using the doctrinal method of study, this article examines the concept of the rights of patients in Nigeria. It discusses the nature of the health system in Nigeria and highlights the rights stated in the *Patients' Bill of Rights 2018* (Ng) (*PBoR*) as well as the corresponding duties of health care practitioners. The article shows that the rights of patients in Nigeria highlighted in the *PBoR*, have been continuously hindered by their weak enforcement, inadequate funding, insufficient health care providers, inadequate infrastructure, lack of awareness and illiteracy. It concludes that urgent steps need to be taken by the Nigerian government as well as other relevant stakeholders in addressing these issues. 235

LETTER TO THE EDITOR 250

BOOK REVIEW

Autopsies for the Armchair Enthusiast: My Strange Encounters with Death as a Country Medical Examiner, by Meryl Broughton 252