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EDITORIAL – *Ian Freckelton QC*

The medico-scientific marginalisation of homeopathy: International legal and regulatory developments – *Ian Freckelton QC*

The 2010 report of the United Kingdom Science and Technology Committee of the House of Commons and the 2015 report of the Australian National Health and Medical Research Council have overtaken in significance the uncritical Swiss report of 2012 and have gone a long way to changing the environment of tolerance toward proselytising claims of efficacy in respect of homeopathy. The inquiry being undertaken in the United States by the Food and Drug Administration during 2015 may accelerate this trend. An outcome of the reports and inquiries has been a series of decisions from advertising regulators and by courts rejecting medically unjustifiable claims in respect of the efficacy of homeopathy. Class actions have also been initiated in North America against manufacturers of homeopathic products. The changing legal and regulatory environment is generating an increasingly scientifically marginalised existence for homeopathy. That new environment is starting to provide effective inhibition of assertions on behalf of homeopathy and other health modalities whose claims to therapeutic efficacy cannot be justified by reference to the principles of evidence-based health care. This has the potential to reduce the financial support that is provided by insurers and governments toward homeopathy and to result in serious liability exposure for practitioners, manufacturers and those who purvey homeopathic products, potentially including pharmacists. In addition, it may give a fillip to a form of regulation of homeopaths if law reform to regulate unregistered health practitioners gathers momentum, as is taking place in Australia. 7

LEGAL ISSUES – *Danuta Mendelson*

Disciplinary proceedings against doctors who abuse controlled substances – *Danuta Mendelson*

This study examined 27 reports from disciplinary tribunals throughout Australia (save Tasmania where reports were not accessible) against medical practitioners who abused narcotic analgesics (often combined with other drugs of addiction) between 2010 and 2015. The reports revealed that 12 medical practitioners were in their 40s; five in their 30s; and one person still in their 20s. Although the majority were general practitioners (15 out of 27), other medical specialties were also represented. Self-administered pethidine was the most prevalent opioid (11 out of 27) and was the only drug used alone. Morphine was self-administered by six doctors; the same number used high doses of Panadeine Forte, codeine and codeine phosphate. Fentanyl was abused by five doctors. Surprisingly, fewer medical practitioners appear to use propofol, and similar opiates such as tramadol (Tramol) and/or oxycodone (Endone). The examination of cases suggests lack of consistency in the imposition of professional sanctions and penalties by the relevant tribunals. To remedy this problem, it is suggested that disciplinary tribunals should apply the test of proportionality in the form of "reasonable necessity" when deciding whether to remove or suspend the addicted medical practitioner from the Register. 24

MEDICAL ISSUES – *Danny Sullivan*

Methamphetamine: Where will the stampede take us? – *Danny Sullivan* and *Michael McDonough*

Methamphetamine, particularly "ice", currently preoccupies the media and there are a range of government initiatives which seem to follow media interest. We summarise the progress of government attention, briefly review health concerns associated with methamphetamine use, and summarise the evidence for treatments, including psychosocial interventions and medications. Amid concerns that governments will seek to fund any promising initiative in order to be perceived as responding to an epidemic, we caution that existing treatments should not be abandoned in favour of untested but potentially attractive treatments. Harm reduction and outpatient psychological treatments remain the mainstay of drug treatment programs and may be more cost-effective and broader-reaching than inpatient, medication-based detoxifications. 41

BIOETHICAL ISSUES – *Malcolm Parker*

"Never regard yourself as already so thoroughly informed": The withdrawal of its invitation to Rodney Syme to address its 2015 congress by the Royal Australasian College of Physicians – *Malcolm Parker*, *Ian Kerridge* and *Paul Komesaroff*

In 1628, William Harvey presented his revolutionary theory of the circulation to ears at the Royal College of Physicians that had been deafened by the unquestionable authority of Galen's teachings, from one and a half millennia in the past. Harvey's theory was initially rejected, despite his faith in his colleagues being eager for truth and knowledge, and never regarding themselves as so well informed that they would not welcome "further information". Recently Rodney Syme, the retired Melbourne urologist who for a long time has agitated for the legalisation of assisted dying, and also challenged the authorities to apply the current law in response to his admitted assistance to a number of individuals, was invited to address the 2015 Congress of the Royal Australasian College of Physicians. At the eleventh hour, the invitation to speak was withdrawn. In this column, we trace the course of events leading to this withdrawal of the invitation, and describe some of the correspondence to and from the College in response to the withdrawal. We draw parallels between the experiences of Harvey and Syme, and point to lessons to be learnt from the recent episode of apparent unwillingness, on the part of an institution that seeks to present itself as outward-looking, progressive and socially aware, to fulfil this promise in the increasingly important area of the end-of-life. 50

MEDICAL LAW REPORTER – *Thomas Faunce*

Australian Competition and Consumer Commission v ACN 117 372 915: Should consumer law regulate doctor-patient relations in a corporatised health care system? – *Jessica Wallace*, *Ella Pyman* and *Thomas Faunce*

In April 2015, North J of the Federal Court of Australia made a finding of unconscionable conduct against Advanced Medical Institute, a promoter and provider of erectile dysfunction treatment, in a case concerning unfair contract terms (*Australian Competition and Consumer Commission v ACN 117 372 915 Pty Ltd (in liq) (formerly Advanced Medical Institute Pty Ltd)* [2015] FCA 368). The contract required a minimum 12-month commitment, with costs exceeding treatments available from general practitioners, and made refunds available only after all possible treatment plans were exhausted which included penile injections. This column analyses that case, particularly in respect to the consumer law standards of practice under which it was litigated. Those standards refer to patients as "consumers" yet North J made extensive reference to the *Good Medical*

Practice: A Code of Conduct for Doctors in Australia, a text which refers to "patients", as evidence of what constitutes appropriate professional conduct or practice for the health profession. This column considers whether legislative and judicial categorisation of patients (a class of people presumptively suffering, sick and vulnerable) as "consumers" undermines the formal and informal protections accorded to patients under normative systems of medical ethics such as those represented by the Code. The case, it is argued, also illuminates the contemporary tensions between the ethical, legal and human rights standards required of doctors in their treatment of patients and the commercial interests of businesses. 55

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ARTICLES

Medical teams and the standard of care in negligence – *Carolyn Sappideen*

Medical teams are essential to the delivery of modern, patient-centred health care in hospitals. A collective model of responsibility envisaged by team care is inconsistent with common law tort liability which focuses on the individual rather than the team. There is no basis upon which a team can be liable as a collective at common law. Nor does the common law countenance liability for the conduct of other team members absent some form of agency, vicarious liability or non-delegable duty. Despite the barriers to the adoption of a team standard of care in negligence, there is scope for team factors to have a role in determining the standard of care so that being a team player is part and parcel of what it is to be a competent professional. If this is the case, the skill set, and the standard of care expected of the individual professional, includes skills based on team models of communication, cross-monitoring and trust. 69

Prevention of non-communicable diseases in Australia: What role should public health law play? – *Kate Mulvany*

This article explores the role of public health law in the prevention of non-communicable diseases in Australia. The growing urgency to address these diseases is acknowledged and the definition of public health law explored. It is argued that a broad definition of public health law would allow greater recognition of the numerous ways that law can positively influence health outcomes at the population level. Far from substantiating claims of over-reaching state intervention, public health law in the 21st century in Australia should be viewed as a more nuanced and protective strategy in promoting better public health. Adopting this approach offers a way forward towards addressing rising rates of non-communicable diseases, as well as significant health inequities, but it will require greater political will and leadership. 83

Personal responsibility or shared responsibility: What is the appropriate role of the law in obesity prevention? – *Benjamin Brooks*

Sensitive to allegations of "nanny state" paternalism, Australian governments support the doctrine that combating obesity is a matter of personal responsibility. Policy-makers endorse the "holistic" approach to obesity prevention, with a view to managing both sides of the nutritional energy equation. This paradigm allows the food and drinks industry to deflect its contributory responsibility for the epidemic and to avoid more stringent regulatory intervention beyond existing self-regulatory and corporate social responsibility regimes. This article argues that the industry must bear shared responsibility for the extent of the obesity crisis, although it cannot bear sole responsibility. It defends the public interest case for more invasive, government-led regulation, reframing the crisis as one of public not individual burdens. Mindful of the political risk associated with unfocused calls for regulatory intervention, it articulates a set of regulatory principles to ensure that the

interests of consumers and industry are properly acknowledged prior to further regulatory intervention. Finally, the article clarifies the subject, object and content of possible regulatory initiatives, offering an evaluation of their efficacy, practicality and fairness. 106

Assessing testamentary and decision-making capacity: Approaches and models – *Kelly Purser* and *Tuly Rosenfeld*

The need for better and more accurate assessments of testamentary and decision-making capacity grows as Australian society ages and incidences of mentally disabling conditions increase. Capacity is a legal determination, but one on which medical opinion is increasingly being sought. The difficulties inherent within capacity assessments are exacerbated by the ad hoc approaches adopted by legal and medical professionals based on individual knowledge and skill, as well as the numerous assessment paradigms that exist. This can negatively affect the quality of assessments, and results in confusion as to the best way to assess capacity. This article begins by assessing the nature of capacity. The most common general assessment models used in Australia are then discussed, as are the practical challenges associated with capacity assessment. The article concludes by suggesting a way forward to satisfactorily assess legal capacity given the significant ramifications of getting it wrong. 121

Slice them up or slice them out? Legal liability for operating on the troublesome patient in cosmetic surgery – *Aileen Kennedy*

The practice of cosmetic surgery is constructed as psychologically beneficial. This therapeutic promise transforms cosmetic surgery into proper medical treatment. However, there is emerging evidence that a significant percentage of cosmetic surgery patients suffer from the condition of Body Dysmorphic Disorder (BDD), which is characterised by excessive preoccupation with imagined or minor defects in appearance. BDD is uniformly identified as a strong contra-indication for cosmetic surgery. Articles in scholarly journals on cosmetic surgery identify the "red flag" indicators to assist in screening out problem patients. However, a close examination of the most common indicators reveals that most are ineffective in identifying BDD in prospective patients. This article also considers the legal liability of cosmetic surgeons who operate on patients with BDD, and concludes that there is little likelihood of liability in trespass or negligence under current Australia law. 137

State intervention in pregnancy: Should the law respond thus to the problem of Foetal Alcohol Spectrum Disorder? – *Emily Gordon*

Maternal consumption of alcohol during pregnancy poses a serious threat to the life and health of unborn children. A submission to the Queensland Child Protection Commission of Inquiry proposed that the State's *Child Protection Act* be extended to allow intervention to protect unborn children, with a court empowered to order that the mother be taken into care pending birth, or otherwise impose conditions upon conduct. This article considers whether or not the law in Australia should respond to the problem of Foetal Alcohol Spectrum Disorder by allowing the involuntary treatment and detention of pregnant women. The focus is upon intervention in response to existing pregnancies. Using a utilitarian critical framework, this article evaluates the merits of creating powers to compel treatment and detain in light of current legal principles relating to maternal autonomy and the legal position of the foetus. The common law position is considered, as well as current legislation allowing intervention in autonomous decision-making and whether or not these statutes may be enlivened to prevent foetal harm. This article suggests that permitting involuntary treatment and detention would be a significant policy change. It weighs up benefits and potential harms in considering whether or not such action would result in the most "good". 156

Criminal injuries compensation: Protecting vulnerable applicants – *Robert Guthrie*

Each year large numbers of persons sustain injury as a consequence of criminal behaviour. All Australian jurisdictions provide State-funded compensation to those harmed in this way. In the case of vulnerable applicants, the Assessor must consider not simply the appropriate and fair amount of compensation, but also how a person will be affected by the payment of compensation. Often a vulnerable applicant will apply through a guardian or a public trustee, although many apply in person. This article examines the use of legislative provisions, rules, regulations and practices in the various Australian jurisdictions in relation to how vulnerable applicants may be protected and supported once an award of compensation is made in their favour. Most jurisdictions provide for a mechanism by which compensation may be held in trust where the Assessor considers that the applicant may be unable to manage his or her financial affairs in his or her best interests. This article explores what factors are taken into account by Assessors in the absence of and pursuant to legislative directions. It considers how the approach may vary across jurisdictions and creative approaches to financial protection of vulnerable applicants. 189

Unwanted pregnancy: The outer boundary of "treatment injury" in the New Zealand accident compensation scheme – *Rosemary Tobin*

The New Zealand accident compensation scheme has undergone many changes over the years and these changes are reflected in the way unwanted pregnancy claims have been dealt with under the regime. The New Zealand Supreme Court has now confirmed that pregnancy as a result of medical misadventure can be classified as a personal injury under the scheme with the result that the woman patient is entitled to the benefits of the scheme and may not pursue a common law claim against the medical practitioner. This article analyses two recent decisions in the context of consideration of the changing fortunes of the unwanted pregnancy claims. 204

Patient's right to information under the New Zealand Code of Rights – *Kyla Mullen*

The *Code of Health and Disability Services Consumers' Rights* includes right 6: the "Right to be Fully Informed". Analysis of the Health and Disability Commissioners' opinions between 2008 and 2013 that have discussed right 6 shows that the duties on providers have increased in a number of areas: the need to inform of risks, including provider-inherent risks; open disclosure of adverse events; ongoing need to inform consumers throughout the therapeutic relationship; information of all available options; and provision of sufficient time between disclosure of information and obtaining informed consent for provision of health services. Following a breach opinion, the Human Rights Review Tribunal and the Health Practitioners Competency Tribunal, on occasion, have the opportunity to consider the case but their role in law development is limited compared with that of the Commissioner. The limitations of law development in this manner are discussed. 218

A way through the dark and thorny thickets? The adjudication of "serious injury" under the narrative tests in the Transport Accident Act 1986 (Vic) and the Workplace Injury Rehabilitation and Compensation Act 2013 (Vic) – *Jason Taliadoros*

The so-called "narrative" test provides the means by which injured persons who satisfy the statutory and common law definition of "serious injury" may bring proceedings for common law damages under s 93 of the *Transport Accident Act 1986* (Vic) and s 134AB of the *Accident Compensation Act 1985* (Vic) (or, for injuries after 1 July 2014, under ss 324-347 of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic)).

These are among the most litigated provisions in Australia. This article outlines the legislative and political background to these provisions, the provisions themselves, and an account of the statutory and common law requirements needed to satisfy the provisions. 243

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