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EDITORIAL – *Ian Freckelton*

Migration law, the Family Court and therapeutic jurisprudence 133

LEGAL ISSUES – *Danuta Mendelson*

Travels of a medical record and the myth of privacy 136

MEDICAL ISSUES – *David Ranson*

Medication errors: Inadvertent administration of potassium chloride 146

NURSING ISSUES – *Kim Forrester*

Nurses and liability – Uncertain times ahead 148

MEDICAL LAW REPORTER – *John Devereux*

Failure to advise (*Cattanach v Melchior*) 153

ARTICLES

The structure of medical malpractice decision-making in Japan – *Akihito Hagihara, Minako Nishi, Etsuko Abe and Koichi Nobutomo*

The article summarises the problems in the medical malpractice litigation systems in the United Kingdom and Japan, demonstrating the similarities and identifying the length of time between initiating an action and its decision and other factors responsible for lengthy litigation. Based on analysis of decisions of medical malpractice cases between 1986 and 1998 in Japan, the functioning of the Japanese medical malpractice litigation system is discussed. Lengthy litigation is shown to be correlated with outcome and implies that the Japanese medical dispute resolution mechanism favours those who can endure lengthy litigation, namely the defendants, who are physicians or hospitals. In view of the similarities between the two systems, it is likely that the same bias – that the wealthier party in the litigation is more likely to win the case – also occurs in medical malpractice litigation in the United Kingdom and Australia. 162

Gynaecological cytopathology and the search for perfection: Civil liability and regulatory ramifications – *Ian Freckelton*

The article analyses the potential for false negative and false positive results from Pap smear testing by gynaecological cytopathology laboratories. It also reviews case law in relation to the liability of general practitioners, gynaecologists, cytoscreeners and pathologists in respect of cervical cancer diagnoses. It argues that the concerns expressed in the 1990s about unfair findings of liability against cervical screeners have not been borne out, liability only having been found by the courts where culpable failure to adhere to the standards to be expected of professional behaviour has been established by probative evidence. It argues that the challenge for the future is for cytology screening to articulate definitively where the distinctions lie between acceptable

and unacceptable error and for the medical profession and the legal profession to accommodate to the limitations of gynaecological cytopathology. 185

The defence of therapeutic privilege in Australia – Rachael Mulheron

Therapeutic privilege is a defence that excuses a medical practitioner or other health professional from complying with the requirements of full disclosure to a patient in circumstances where it is reasonably considered that such disclosure would be harmful to that patient's health or welfare. Although the concept originated in the United States, the defence has been applied in Australia, and was specifically endorsed as part of Australian law by the High Court in *Rogers v Whitaker* (1992) 175 CLR 479. However, there has been negligible application of the defence since that endorsement. This article examines the doctrine of therapeutic privilege in the present Australian medico-legal environment. After an examination of the concept and its three constituent elements, the article canvasses the limited instances of judicial approval of the defence prior to *Rogers v Whitaker*. The author then analyses, by reference to reported and unreported case law, why the defence has been so narrowly interpreted since, such that it has come to occupy an almost untenable position in Australia's medical jurisprudence. 201

Transferring the burden of risk in private health care: Medical indemnity insurance reform – Rachael M Patterson

This article provides an overview and critique of the recent medical indemnity insurance reforms implemented by the Commonwealth Government. The first part of the article sets out a number of the practical difficulties associated with the reforms whilst in the second part an analysis is given of the social philosophies and economic approaches that underlie them. The weaknesses and strengths of shifting the medical indemnity insurance market from a free-market approach to be more in line with the liberal-welfarist approach are considered, as is the need for each approach to be supplemented with a more comprehensive understanding of the human good. 214

Why wrongful birth actions are right – Penny Dimopoulos and Mirko Bagaric

A wrongful birth action is a claim in negligence brought by parents of a child against a doctor who has "wrongfully" caused their child to be born. These claims can be divided into two categories: those where a doctor performs a failed sterilisation procedure that leads to a healthy child being born; and those where a doctor fails to provide sufficient information to allow parents to choose to abort a handicapped child. The recent decision of the High Court of Australia in *Cattanach v Melchior* (2003) 77 ALJR 1312 falls into the former category. The decision to allow the parents to receive damages for the costs of raising and maintaining their child has generated much public debate. Despite the endorsement of this "wrongful birth" action, there are indications that the legislature will overturn the decision. This article examines whether there is a sound doctrinal basis for recognising wrongful birth actions. 230

Importing and exporting gametes and embryos under the Infertility Treatment Act 1995 (Vic): An unconstitutional restraint on free trade? – Solomon Miller

Since the introduction of the *Infertility Treatment Act 1995* (Vic), it has been illegal to import into or export from Victoria a gamete or embryo outside the human body without the approval of the Infertility Treatment Authority. But is s 56 unconstitutional and therefore invalid by reason of contravening the freedom of interstate trade guarantee by s 92 of the Commonwealth *Constitution*? By exploring the nature and effect of s 56 this article demonstrates that s 56 may impose a "discriminatory" and "protectionist" burden that renders s 56 invalid. 239

BOOK REVIEW

Quacks: Fakers and Charlatans in English Medicine, by R Porter 257

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