

# JOURNAL OF LAW AND MEDICINE

Volume 11, Number 3

February 2004

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## ARTICLES

**The medical provision of hydration and nutrition: Two very different outcomes in Victoria and Florida – *Danuta Mendelson and Michael Ashby***

Decisions to withhold or withdraw medical hydration and nutrition are amongst the most difficult that confront patients and their families, as well as medical and other health professionals. This article discusses two cases relating to lawful withdrawal and withholding of a PEG from incompetent patients with no hope of recovery. Victoria and Florida have statutory frameworks that provide for advance directives. However, in both *Gardner; Re BWV* and *Schindler v Schiavo; Re Schiavo* the respective patients did not leave documented instructions. The article analyses the two cases and their outcomes from legal, medical and ethical perspectives. .... 282

**Gardner; Re BWV: Resolved and unresolved issues at end of life – *Alan Rothschild***

The *Medical Treatment Act 1988* (Vic) gives statutory recognition to a patient's right to refuse medical treatment. The case of *Gardner; Re BWV* confirmed that "medical treatment" included artificial nutrition and hydration and as such could be withdrawn, notwithstanding that this would result in the patient's death. This article analyses *Gardner; Re BWV* and argues that, by deliberately dealing narrowly with the issues at hand, both the Victorian Civil and Administrative Tribunal and the Victorian Supreme Court knowingly left BWV to die from dehydration over a period of weeks. By not addressing these issues, the tribunal, and more particularly the Supreme Court, lost an opportunity for a reform of the law, so urgently needed at end of life, which would have allowed for "mercy killing", thus sparing BWV and her family the lingering death she was given. .... 292

**The Dutch Euthanasia Act and related issues – *Johan Legemaate***

In 2002 the Dutch *Euthanasia Act* came into force, codifying the requirements that have evolved in case law and medical ethics since 1973. The focus is now on improving the quality of medical decision-making. Other countries and international organisations are considering euthanasia legislation as well and it remains to be seen how influential the Dutch model will prove to be. .... 312

**Reforming the relationship between medicine and the law of tort – *Natalie Gray***

The Australian Government's medical indemnity package is predicated on the belief that the current crisis is primarily one of insurance. However, an examination of the fault-based tort system illustrates that, irrespective of their insurance status, doctors are profoundly affected by the adversarial process and their response to it is

leading to sub-optimal patient care. This article argues that the adversarial system of medical negligence fails to satisfy the main aims of tort law, those being equitable compensation of plaintiffs, correction of mistakes and deterrence of negligence. Instead, doctors experience litigation as a punishment and, in order to avoid exposure to the system, have resorted not to corrective or educational measures but to defensive medicine. This is unacceptable and suggests that the package has missed the point. This article proposes an alternative medico-legal tort scheme which attempts to overcome some of these problems. .... 324

#### **Tissue donation: Ethical guidance and legal enforceability – Imogen Goold**

The legal and ethical framework regulating the use of tissue donated for medical research in Australia provides clear direction on the appropriate use of donated tissue. However, this article argues that the current framework may be inadequate to address some problems that may arise from misuse of such tissue. It argues that the Human Tissue Acts do not provide a sufficiently broad system of regulation and require updating. It also notes that as much of Australian research practice is regulated through ethics guidelines, which do not have the status of law, this approach may fail to provide remedies for those whose tissue is used inappropriately. .... 331

#### **Nursing culpability: A proposal for change in nursing regulation – Rosemary Bryant**

Nurses make mistakes. They work in a complex environment which can sometimes be a contributory factor to a mistake being made. At present, Nurses' Boards in Australia have no mandate to investigate the circumstances in which a mistake is made. Their jurisdiction is limited to investigation of the individual nurse. This article sets out the argument for change in nursing legislation to allow for a broadening of the role of Nurses' Boards. It argues that an extension of their jurisdiction explicitly to allow them to investigate inadequacies in the health system would be a constructive development. .... 341

#### **The inadequacies of absolute prohibition of reproductive cloning – Martin Lishexian Lee**

This study reviews debates on human cloning and its benefits, considers international and domestic laws, and argues that the choice of reproductive means is a human right. In exercising this right, a balanced approach should be adopted, in order to benefit human society while protecting human dignity. The immaturity of cloning techniques indicates that at present human reproductive cloning is too risky. Thus a temporary ban on such cloning is appropriate, but the ban on relevant scientific research and animal experimentation is inappropriate as it denies the freedom of scientific inquiry, and hinders making the benefits of scientific advancement available to society as a whole. .... 351

#### **“Sufficiency” for living organism inventions under the Patents Act 1990 (Cth) – Charles Lawson**

The *Patents Act 1990* (Cth) requires a complete specification to describe the invention. This description is central to the policy objective that the statutory rights under the *Patents Act 1990* (Cth) are exchanged for disclosure of the invention, including how to make the invention. In addressing these requirements for “micro-organisms”, the *Patents Act 1990* (Cth) adopted the Budapest Treaty recognising that the “invented” organism itself may be necessary to make and use the invention, and that a formal description may be of limited value or practicability. The scope of the Budapest Treaty does not, however, extend to a significant class of living organisms outside the class defined by the term “micro-organism”. This article reviews the application of the description requirements for living organism inventions under the *Patents Act 1990* (Cth) and concludes that some form of public availability or deposit requirements are necessary for invented living organisms that are outside the scope of the Budapest Treaty’s “micro-organisms”. .... 373

#### **The co-regulation of medical discipline: Challenging medical peer review – David Thomas**

The medical profession has always fiercely defended its right to self-regulation on the basis of peer review. However, in New South Wales, Australia, the profession has willingly surrendered these rights in favour of a disciplinary system known as co-regulation or collaborative regulation, under which disciplinary processes are shared with a “lay” body, the Health Care Complaints Commission. The system constitutes a unique situation in the history of medical regulation. This article examines the origin and operations of co-regulation and comes to the conclusion that its successful operation over the last decade raises questions about whether peer review is indispensable as the basis of medical regulation. .... 382

#### **BOOK REVIEW**

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ISSN 1320-159X

Typeset by Lawbook Co., Pyrmont, NSW  
Printed by Ligare Pty Ltd, Riverwood, NSW