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ARTICLES

Damages in medical litigation in New South Wales – *Harold Luntz*

In the period 2001 to 2003, the New South Wales legislature enacted four Acts that impinge on the assessment of damages in litigation against health professionals. They are the *Health Care Liability Act 2001* (NSW), the *Civil Liability Act 2002* (NSW) (as originally enacted), the *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW) and the *Civil Liability Amendment Act 2003* (NSW). This article considers the principles on which damages are assessed in medical litigation and how those principles have been affected by these four enactments. It points out that each piece of legislation was retrospective in applying to events that occurred both before and after its commencement. However, proceedings already issued before a particular date were excluded in each case from the retrospective operation of the legislation. The article provides details of the relevant dates of operation of each of the statutes. 280

Wrongful birth in New Zealand – *Rosemary Tobin*

Wrongful birth cases have been a feature of the common law. In this article the author examines wrongful birth cases against the background of the New Zealand accident compensation scheme. Initially cases were accepted under the scheme, but after major changes to the legislation in 1992, wrongful birth cases were declined cover. The author argues that this should continue to be the case, and that, as a result, New Zealand courts will have to make the same policy decisions in this area as those made by other Commonwealth courts. 294

Healthy law makes for healthy children: *Cattanach v Melchior* – *Owen M Bradfield*

When courts are forced to consider issues surrounding birth and the sanctity of life, it is inevitable that divergence of judicial, academic and public opinion will result. However, the issue of whether parents can recover the expenses of rearing a healthy child has long vexed judges and commentators of law, ethics and medicine both in Australia and globally. In the recent High Court of Australia decision in *Cattanach v Melchior* (2003) 215 CLR 1 the court split four to three and handed down no less than six individual judgments. By allowing parents to recover the reasonable expenses of rearing an unintended child until the age of 18 years, the decision has provided some limited and temporary legal clarity to the issue of wrongful pregnancy in Australia. It is seen by some as a victory for the reproductive freedom of women and the rights of the child. However, with uncertainty remaining on the issue of wrongful life claims in Australia and with legislative changes in Queensland and New South Wales that partly reverse the High Court's decision, there remains doubt about the future of such claims in Australia. 305

Fat and the law: Who should take the blame? – *Mirko Bagaric and Sharon Erbacher*

The incidence of obesity in both adults and children is rising in most developed countries, including in Australia. Some obese people are seeking to place the blame for their condition on the fast-food industry, as

demonstrated by the recent litigation in the United States brought by two obese plaintiffs against McDonald's. This litigation was unsuccessful, and on existing Australian negligence principles any similar litigation commenced here is likely to suffer the same fate. Principles of personal responsibility, autonomy and free will should prevail to deny a negligence claim. It is for the Australian Government, not the courts, to regulate the behaviour of the fast-food industry. 323

Risk reduction in general practice and the role of the receptionist – Elizabeth Patterson, Kim Forrester, Kay Price and Desley Hegney

Medical receptionists play a crucial role in any practice as they are usually the first points of contact for patients and the intermediaries through whom contacts with medical practitioners are made. This article reports the findings of a qualitative study of medical receptionists which explores their role in general practice, particularly involving direct patient assessment, monitoring, counselling and therapy. The findings highlight the potential liability of receptionists, medical practitioners, medical centre owners and insurers. 340

Pharmacist misconduct: The pitfalls of practice – Helen Kiel

This article identifies the changing role of pharmacists in the provision of health care and analyses 78 complaints against pharmacists over a recent 12-year period in New South Wales, finding that the majority of complaints were in relation to the oversupply of particular medications, from which some pharmacists made significant financial gains. Other areas of complaint included the recording and labelling of medications and the roles and responsibilities of pharmacists, dispensing errors, fraud and sexual misconduct. As the roles of pharmacists expand, with the growth of "compounding chemists", and the suggestion that pharmacists are now performing basic medical tasks which were once the domain of a general practitioner, it is increasingly important that pharmacy take its place in any debates about the provision and regulation of health services. . 348

Justice in Medicare: Recent changes to the public health care system – Rachael Patterson

This article sets out and examines a number of changes proposed by the Commonwealth Government to the Australian Medicare system as part of the 2003-2004 and 2004-2005 federal budgets, and the 2004 federal election campaign. In assessing the suitability of these reforms, the idea of justice is discussed. Health, as a basic good, is argued to be a matter of distributional and rectificatory justice. A number of popular material principles of justice are also examined and shown to be unsuited as sole determinants of health care resource allocation decisions. In light of this, various problems with the reforms are identified and improvements suggested. 354

Investigations of complaints and quality of health care – RF Henderson, N North and G Patterson

Malpractice law is frequently justified by the claim that it improves health care services but this belief remains untested. Using a multiple case study in 16 remote rural areas in New Zealand, this study examined the effects of formal quasi-judicial investigations on the quality of health care services. The study found that the fragile local health systems were damaged by the quasi-judicial investigations of the medical disciplinary body and became less efficient and less user-friendly. A few doctors left rural practice and remaining health workers responded to the investigations in a negative manner, losing confidence, enthusiasm and motivation for work. Complainants also appeared to have been disadvantaged as a consequence of having complained. 366

Assisted reproductive technologies: Professional and legal restrictions in Australian clinics – Kerry Petersen, HWG Baker, Marian Pitts and Rachel Thorpe

The professional and legal regulation of assisted reproductive technologies (ART) in Australia is a vast maze of intersecting laws and guidelines which place restrictions on the provision of services such as infertility treatment, surrogacy, sex selection for social reasons, donor insemination, pre-implantation diagnosis and human embryo research. This study investigated the application of these restrictions on clinical practice in New South Wales and Victoria. The results indicate that the range of ART services in Victorian clinics was far more limited than in New South Wales clinics. 373

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