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EDITORIAL – *Ian Freckelton*

Sterilisation of intellectually disabled minors

The complex issue of sterilisation of minors with intellectual disabilities has arisen again for Australia with proposals for a uniform approach by the Standing Committee of Attorneys-General under which the principal forum for decision-making about such matters will be State and Territory administrative tribunals. This provides an opportunity not just for scrutiny of the proposed legislation and model but evaluation of the role of decision-making bodies, their procedural supports and the criteria on the basis of which sterilisations of young people should be authorised by Australia's courts and tribunals. The opportunity exists for an approach to be forged on the basis of empirical assessment of the success of administrative tribunal involvement, understanding of the phenomenon of "therapeutic" and "non-therapeutic" sterilisation of minors in contemporary Australia and current medical and psychological awareness of ways to manage menstruation and the potential for pregnancy for vulnerable young people. 299

LEGAL ISSUES – *Bernadette McSherry*

Professional disciplinary proceedings against expert medical witnesses

Witnesses in legal proceedings are protected from civil liability based on their evidence. This immunity is founded on public policy considerations, particularly the belief that witnesses would be less willing to provide full and frank evidence if they were at the risk of civil proceedings based on their evidence. But witness immunity now appears to be subject to an important qualification. The English Court of Appeal has confirmed that witness immunity does not prevent the commencement of professional disciplinary proceedings against an expert witness. In *General Medical Council v Meadow* [2006] EWCA 1390 the court upheld a disciplinary complaint made against an expert medical witness, even though the complaint was based on that doctor's witness evidence. The Court of Appeal reasoned that the underlying purpose of professional disciplinary proceedings, which is to protect the public, could sit comfortably with witness immunity. The result seems to be that people unhappy with witness evidence cannot sue the witness but can make a professional disciplinary complaint. This apparent gap in witness immunity is important to all professionals who might give evidence. 306

MEDICAL ISSUES – *David Ranson*

Coroners' autopsies: Quality concerns in the United Kingdom

Safety in health care has increasingly become a key focus of health care providers. Data on "patient outcomes" and evidence-based clinical decision-making have led to real changes in health care policy and care provision. Specialist groups such as the National Patient Safety Agency which operates the National Confidential Enquiry into Patient Outcome and Death (NCEPOD) in the United Kingdom are reliant on good information in order to identify factors that lead to poor patient care. In a recent study the NCEPOD reviewed the quality of coroners' autopsy reports on which they rely for much of their core data. The study found that just over half of the reports (52%) were considered satisfactory

by the reviewers, 19% were good and 4% were excellent. However, over a quarter of autopsies were marked as poor or of an unacceptable standard. While analysing the factors associated with poor-quality autopsies, comments and recommendations were made with regard to the processes of death investigation and the degree to which the coroner's death investigation meets the needs of health care services 315

MEDICAL LAW REPORTER – *Ian Freckelton*

In vitro fertilisation and the limits of consent

In *Evans v United Kingdom* (2006) 43 EHRR 21; [2006] ECHR 200 the European Court of Human Rights was asked to overrule domestic legislation in the United Kingdom which stipulated that either the male or female provider of gametes could withdraw their consent to proceed at any time prior to implantation of embryos. The court held by a majority of five to two that such a legislative regime is compatible with current human rights instruments applicable in Europe. Ms Evans has appealed the European Court's decision to the Grand Chamber. However, compelling public policy arguments suggest that both parties to proposed in vitro fertilisation treatment should be permitted to withdraw their consent until the point of implantation. 319

ARTICLES

Towards a better consent form – *Richard Cavell*

The medical profession is in the habit of using a standard "consent form" to record a patient's consent to medical therapy, particularly for a surgical operation. This article explores how to design a consent form to avoid the many traps to be found in the law of consent. 326

Commercialisation of regenerative human tissue: Regulation and reform in Australia and England, Wales and Northern Ireland – *Sonja Brown* and *Shih-Ning Then*

The commercialisation of therapeutic products containing regenerative human tissue is regulated by the common law, statute and ethical guidelines in Australia and England, Wales and Northern Ireland. This article examines the regulatory regimes in these jurisdictions and considers whether reform is required to both support scientific research and ensure conformity with modern social views on medical research and the use of human tissue. The authors consider the crucial role of informed consent in striking the balance between the interests of researchers and the interests of the public. 339

Public education and organ donation: Untested assumptions and unexpected consequences – *Mitchell Lawlor*, *Ian Kerridge*, *Rachel Ankeny* and *Frank Billson*

While the number of individuals able to benefit from transplantation increases with technological developments, donation rates remain insufficient to cater for demand. A universal response to the insufficient number of donor organs has been public education to increase knowledge about donation and transplantation, and to encourage individuals to register their wishes about donation. Although education appears to have increased knowledge and encouraged individuals to register their wishes, it has not increased the number of organs available for transplantation. In fact, there is some evidence that encouraging people to register their wishes may be detrimental to increasing net donation rates. The failure of education programs to increase organ donation rates may be due in part to a failure to recognise that attitudes to donation are influenced by complex socio-cultural and personal beliefs, and not simply by knowledge. Research aiming to increase the rate at which organs are procured for donation must recognise that some individuals do not support transplantation and have their own personal reasons for

maintaining this position. Educational interventions should not assume that increasing knowledge or simply encouraging individuals to declare a decision about donation will increase consent to donation. 360

Investigating genetic discrimination in the Australian life insurance sector: The use of genetic test results in underwriting, 1999-2003 – *Margaret Otlowski*, *Kristine Barlow-Stewart*, *Sandra Taylor*, *Mark Stranger* and *Susan Treloar*

A major component of the Genetic Discrimination Project (GDP), an Australia-wide study to examine the advantages and disadvantages for individuals of having genetic information and cases of alleged genetic discrimination, is the analysis of insurers' use of genetic test results. The peak life insurance body, IFSA, had collected data through the Australian Institute of Actuaries (AIA) for the period June 1999-May 2003 from life insurance companies in Australia regarding their use of genetic test results in insurance underwriting. The GDP negotiated with IFSA and the AIA for access to this data for independent analysis. Applications from 288 individuals who had disclosed a genetic test result included products for cover for death, trauma/crisis, income protection/disability and total and permanent disablement. A total of 81% (234/288) contained usable data for analysis. These cases involved the genetic conditions haemochromatosis (71%), Huntington disease (12%) and breast/ovarian cancer (6%). In 49% of cases, the genetic test result was described as the only influencing factor and of these, 32% involved a "positive" genetic test result. Whilst underwriting in most cases appeared to be reasonable, the article highlights several cases involving disclosure of a positive predictive test result for breast/ovarian cancer that required further investigation. 367

Pharmacy practice developments: The potential impact on pharmacists' legal liability – *Laetitia Hattingh*, *Kim Forrester*, *Nerida Smith* and *Judy Searle*

The practice of pharmacy has changed over recent years with a greater emphasis on the patient and the provision of patient care services. This expanded role of pharmacists as medication managers has resulted in changes to their professional responsibility and potential legal liability. Recent international case law demonstrates an increased legal liability of pharmacists in certain instances. However, pharmacists' liability in this new context in Australia is yet to be clarified. 397

Capacity and medical self-determination in Australia – *Alan Rothschild*

The expansion of patients' rights and the increasing complexity of the science of medicine raises serious legal and social questions, particularly when they pertain to end-of-life decision-making. Medical science continues to find ways of maintaining or extending life in a body or mind affected by disease or trauma and regular advances in medical technology and practice mean that the natural course of illness or injury will rarely be uninterrupted by some form of medical intervention. This progressive "medicalisation" of death, together with enhanced patient autonomy, means that choices can increasingly be made regarding medical treatment which may ultimately influence both the time and the way in which a person dies. This article examines both legislation and the common law in Australia particularly as it pertains to medical decision-making at end-of-life and the patient's right of self-determination. 403

Mainstream medicine versus complementary and alternative medicine in the witness box: Resolving the clash of ideologies – *Randall Kune* and *Gabriel Kune*

Mainstream medical philosophy and practice differ in many respects from those of complementary and alternative medicine (CAM), differences which are explored in this article. Because of a resurgence of CAM therapies, courts and tribunals will scrutinise CAM in more and more contexts in the future. Such court cases may require the resolution of conflicts between opinions of CAM and medical experts. This article considers how

courts evaluate such opinions where experts hold conflicting ideologies or philosophical approaches, and addresses the following questions: Do the opinions of CAM practitioners qualify as "expert" opinions in court? How do the courts examine the basis of such opinions? Are they systematically given less weight than the opinions of mainstream medical practitioners? Will recent procedural reforms for hearing expert evidence make it easier for courts to resolve these issues? 425

BOOK REVIEW
Modern Dilemmas: Choosing Children by Sheila McLean 433

Corrigendum

Please note that a fault in printing software caused a significant error in the article by Robin Bell and Des Nicholls entitled "Sampling in a legislative framework for peer review of Medicare services" published in Volume 14 No 2 of this Journal. The first sentence following Formula 3 on page 215 of the article should read:

The absolute value of this is always ≤ 0.2 for all values of $s \geq 26$.