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EDITORIAL – *Editor: Ian Freckelton QC*

The 1628 Vasa Inquest in Sweden: Learning Contemporary Lessons for Effective Death Investigation

Much that is constructive can be achieved from analysis of death investigations that have failed to achieve desirable outcomes in terms of learning lessons about risks to health and safety and in terms of gaining an understanding as to how further tragedies can be avoided. This article reviews an “inquest” into the sinking in 1628 of the pride of the Swedish Navy, the Vasa, and the factors that led to the inquest failing to come to grips with the various design, building, oversight, subcontracting, communication, and co-ordination flaws that contributed to the vessel being foreseeably unstable and thus unseaworthy. It argues that Reason’s Swiss cheese analysis of systemic contributions to risk and modern principles of Anglo-Australasian-Canadian death investigation shed light on how a better investigation of the tragedy that cost 30 lives and a disastrous loss of a vessel of unparalleled cost to the Kingdom of Sweden could have led to more useful insights into the multifactorial causes of the sinking of the Vasa than were yielded by the inquest.

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LEGAL ISSUES – *Editor: Bernadette McSherry*

Alternatives to Compulsory Detention and Treatment and Coercive Practices in Mental Health Settings – *Piers Gooding and Bernadette McSherry*

Informed consent to medical treatment is generally presumed to be central to the provision of good quality health care. Despite this presumption, legislation exists in many countries that enables the compulsory detention and treatment of people with severe mental health conditions regardless of their wishes. This column discusses global efforts to reduce, prevent and end compulsory detention, treatment and coercive practices in mental health and community settings. It summarises the current state of research, identifying overarching themes in the search for effective non-coercive practices, before focusing on hospital and community-based initiatives.

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MEDICAL ISSUES – *Editor: David Ranson*

The Investigations into What Happened at the Gosport War Memorial Hospital – Did the Coroner’s Process Help?

The Gosport Independent Panel was established to review the care of older patients at the Gosport War Memorial Hospital in England over some 20 years. There had been a number of internal and external investigations that included police investigations, clinical care audits, GMC investigations and inquests. The Panel provided a means of public disclosure of much of the contents of the prior investigations and resulted in the creation of a catalogue of all relevant information. The report indicated that many of the investigative processes had failed to address the concerns of family and staff. In part this appears to have been the result of some investigations being limited in their ability to deal with social and community concerns and focusing on whether criminal prosecutions should be brought. Legislative restrictions regarding the nature and outcomes of the inquest process in the

United Kingdom compounded these concerns. It is interesting to speculate whether a more proactive inquest system brought into play earlier might have alleviated many of the community and professional concerns regarding patient care. 306

MEDICAL LAW REPORTER – *Editor: Thomas Faunce*

Legal Strategies to Cure the Plastic Planet: Corporate Marriage and Public Health Regulation of Single-Use Non-Biodegradable Plastics – *Angela Gock, Edward Dale, Lucina Ou-Yang, Sally Wheeler and Thomas Faunce*

The 2018 export ban of recyclables to China provides an additional important reason for Australia in particular to act internationally and domestically to reduce its plastic waste. The problems Australia faces from single-use non-biodegradable plastics are replicated in every nation on Earth. Focusing on the Australian context, this article examines regulatory approaches to the problem of plastic production, consumption and disposal and its negative impact on public and ecosystem health. It scrutinises the current legal framework for managing plastic waste at Commonwealth, State and international levels, advocating greater regulation. Its regulatory recommendations include a Pigouvian tax in the form of an excise on plastic production to alter consumer behaviour and raise revenue for further investment in reusable alternatives. They also involve mandatory corporate responsibility obligations, a concept we term “corporate marriage”. Other alternative and additional measures to combat single-use plastic waste as utilised in other jurisdictions are proposed for Australian implementation. 311

ARTICLES

The Impact of the Law in Helping or Hindering Fertility Preservation for Children with Cancer Facing Gonadotoxic Therapies – *Sonia Allan, Debra Gook and Yasmin Jayasinghe*

Children diagnosed with cancer who require treatment with chemotherapy and/or radiation therapy have ever-increasing survival rates. However, as a result of such treatment they face the added, and significant, burden of infertility into their futures. Options for fertility preservation and future reproduction for such children do exist, but some such options continue to be considered experimental. Collaborative multidisciplinary teams support children and their families to make decisions about such options in the treatment environment. When collection of gonadal tissue from children is consented to in such circumstances, it is subject to stringent institutional clinical and human research ethics review, often in both the pediatric oncology setting and the fertility setting in which it will be preserved, examined and, potentially, used. Laws and guidelines may support the collection and use of reproductive tissue from children for treatment and research, subject to meeting consent requirements concerning the child and/or their parent(s). This article examines such laws across Australia. It also examines the legal complexities found in some jurisdictions that may hinder research and practice, consequently having a negative impact on the prospects for children with cancer, in relation to their fertility preservation and possibilities for future reproduction. 322

To Mandate or Not to Mandate: A Review of Mandatory Reporting of Suspected Child Abuse and Neglect – *Natalie A MacCormick*

Mandatory reporting of child abuse and neglect was first introduced into Tasmania in 1974. Over the following years most of the other Australian States followed suit to varying degrees. Despite widespread introduction of mandatory reporting laws, concepts such as child protection, children’s rights and even childhood are relatively new. The first part of this article discusses the social evolution of the role of the child and the

concept of childhood throughout Western history. This gives historical context for the emergence of child protection as a public health concern and responsibility of the state and the subsequent introduction of mandatory reporting legislation. This article also discusses the spectrum of mandatory reporting legislation across Australian States as well as criticisms of mandatory reporting policy while exploring the pros and cons presented in the literature. 334

Domestic and Family Violence, Reproductive Coercion and the Role for Law – Heather Douglas and Katherine Kerr

While sexual abuse is increasingly well recognised as a form of domestic and family violence in Australian legal responses, the recognition and response to reproductive coercion is understudied and under-recognised. This article maps the behaviours and concepts associated with reproductive coercion. Focusing on civil protection orders and family law responses, two of the most commonly accessed responses to domestic and family violence, this article considers whether current legislative definitions and case law recognise reproductive coercion as a form of domestic and family violence. To understand better how reproductive coercion and sexual abuse are interrelated and how they manifest within violent relationships, the article draws on interviews with survivors of domestic and family violence. It concludes that while some legislative frameworks could potentially recognise and respond to reproductive coercion, there is an urgent need for improved understanding of reproductive coercion and the legal response particularly by those who work directly with battered women including police, lawyers and judicial officers. 341

Legality of Embryonic Gene Editing in Australia – Michelle Taylor-Sands and Christopher Gyngell

The CRISPR-cas9 genome editing system (CRISPR) has been used to make precise and heritable changes to a diverse range of animals. The use of CRISPR to edit embryonic cells initially raised widespread criticism and calls for an international ban. However, the rapid development of genome editing has prompted governments around the world to review the regulatory frameworks that oversee genetic technologies. In Australia, the *Prohibition of Human Cloning for Reproduction Act 2002* (Cth) and the *Research Involving Human Embryos Act 2002* (Cth) expressly regulate the use of genome editing in early human embryos. This article analyses how these two Acts regulate research involving CRISPR and the implications of this for research practices in Australia. We argue that, given the current regulatory uncertainty around the legality of genome editing research in Australia, legislative reform is needed and propose reforms to provide greater clarity in this area. 356

An Ethics of Care Approach to Regulating Surrogacy – James Cameron

Victorian laws limit who may be a surrogate in an arrangement that uses assisted reproductive treatment and so restrict infertile people’s ability to create a family. These restrictions arose because of concern about protecting surrogates from harm. The restrictions are inconsistent with other laws and with the principles on which a harm-based approach to regulation relies. The harm-based approach fails to describe surrogacy accurately because it fails to account for the interdependence of those involved. An ethics of care approach allows recognition of this interdependence and provides a more appropriate framework for regulation. An ethics of care approach to surrogacy would allow less prescriptive regulation, which focused on fostering caring relationships. This could be achieved by formally recognising the role of the surrogate in the formation of the family and by dispensing with attempts to replicate “traditional” heteronormative families. 374

Misconduct, Self-inflicted Injury, and Suicide in Workers Compensation: A Review of the Australian Legal Framework – *Victoria Lambropoulos and Robert Guthrie*

The no-fault principle is one of the pillars of workers' compensation schemes operating in the States, Territories and the Commonwealth in Australia. This article examines the strength of this principle having regard to provisions common to all jurisdictions which disentitle workers where there is evidence of serious and wilful misconduct or self-inflicted injury. It examines the legislative framework of these provisions in detail noting some differences in approach and effect. The article also traces the origins of these provisions and how they have been applied since enacted. We conclude that the no-fault principle remains robust and intact in Australian workers' compensation schemes. 389

Impostors and Impersonators: Fake Health Practitioners and the Law – *Ian Freckelton QC*

The phenomenon of unqualified persons dishonestly holding themselves out as registered health practitioners has a lengthy and colourful history. Many notorious examples of such conduct have been exposed only after significant periods of successful deception by the perpetrators. However, there is a very limited scholarly literature on the phenomenon. A number of explanations have been proffered for such examples of deceptive conduct, including the commercial, the pathological and even the socially and sexually opportunist. Pseudologia fantastica is a term coined by Delbrück in 1891 for compulsive lying and has been mooted as an explanation for at least some impersonators of health practitioners. It may be that in many scenarios the explanation lies more closely in personality disorders, especially those featuring grandiosity, including Antisocial Personality Disorder and Narcissistic Personality Disorder. This article instances a variety of current and historical examples of impostor health practitioners. It provides 12 recent Australian and New Zealand case studies across the broad spectrum of general medical practice, gynaecology and obstetrics, psychiatry, psychology, paramedics, orthodontics, and general dentistry. It identifies that it is persons coming from overseas who disproportionately have utilised the opportunity to engage in premeditatedly fabricating and misrepresenting their qualifications. Such conduct endangers the wellbeing of patients, undermines the health regulatory system and can have both criminal and disciplinary consequences. In spite of a general tightening of checking of asserted qualifications, persons determined to fake their credentials and to create fictional professional lives continue to make their way through the regulatory net. This article seeks to understand better the phenomenon of impostor health practitioners, to consider how the criminal and disciplinary law should respond to their conduct, and to emphasise the importance of regulatory processes that will reduce the prospects of success for persons minded to engage in such dangerous misrepresentations. 407

Data Custodians and the Decision-making Process: Releasing Data for Research – *Carolyn Adams, Judy Allen and Felicity Flack*

The empirical research presented in this article was prompted by concerns expressed by researchers about the decision-making processes of government data custodians. Data custodians are responsible for the collection, use and disclosure of vast collections of personal information, including the release of data from these collections for research. Researchers were concerned that the decision-making processes were time-consuming, complex and not transparent. The authors sought the views of data custodians in response, exploring the issues from the other side of the data divide. The majority of the 13 data custodians interviewed for this project were located in government sector agencies and their decision-making process was thus highly regulated and constrained by principles of administrative law. They did, however, have many thoughtful suggestions for change to improve the experience for all the stakeholders involved in the process of seeking and granting access to government-held data collections for research. 433

Discussing Voluntary Assisted Dying – *Carolyn Johnston and James Cameron*

One challenge for the legal provision of voluntary assisted dying is to ensure that the person requesting it is not coerced and has made the decision voluntarily. In the State of Victoria, Australia, s 8 of the *Voluntary Assisted Dying Act 2017* (Vic) provides that a health practitioner is prevented from initiating a discussion about voluntary assisted dying in the course of providing health services to a person. The aim of the provision was to avoid coercion or undue influence by a health practitioner. In this article we address the meaning and application of s 8 and consider whether in practice this provision might have the effect of excluding access for individuals who may have been interested in voluntary assisted dying but were never aware that this was an option for them. 454

The “Ice” Storm: Problems with Expert Evidence on the Effects of Methamphetamine – *Jacqueline Horan and Daniel Thomas*

There is growing community concern that methamphetamine (commonly known as Ice) is fuelling violent, erratic and criminal behaviour. Criminal prosecutions of Ice-fuelled defendants are on the rise. Scientific and medical expert evidence is being called upon in such criminal trials, to present the results of the defendant’s blood-drug concentration and provide an opinion as to the effects of Ice on the defendant at the time of the alleged crime. Based on an analysis of recent case law and a summary of what science knows about the issue, the authors contend that any expert opinion about an accused person’s likely behaviour, based on interpretations of blood-drug concentrations, are speculative and potentially prejudicial to the defendant. Such opinions should therefore be inadmissible. The authors argue for the introduction of a statutory reliability test as a way of ensuring that this unreliable expert evidence does not result in any miscarriages of justice. 464

Mercury Pollution from Coal-Fired Power Plants: A Critical Analysis of the Australian Regulatory Response to Public Health Risks – *Grace Bramwell, Felicity Wilson and Thomas Faunce*

This article explores the benefits likely to arise from Australia’s ratification of the Minamata Convention on Mercury with regard to reducing public health risks from mercury emissions from coal-fired power plants. The current legislative frameworks regulating mercury pollution are critiqued, an exploration of the international approaches is undertaken, and recommendations are made aiming to produce a stronger, more stringent and long-term mercury protection policy for Australian communities. 480

Transferring Health Big Data within the European Legal Framework: What Role for National Healthcare Services? – *Davide Golinelli, Fabrizio Toscano, Andrea Bucci and Gherardo Carullo*

The main objective of this article is to describe the legal principles governing the selection by European public authorities, such as National Health Services (NHS) of third parties, when entering into agreements for the transfer of health data. According to Directive 2003/98/EC, and in light of the provisions of the Treaties of the European Union, the choice as to how a public authority makes its data available to third parties needs to be transparent, non-discriminatory and may not in any case benefit a specific company at the expense of others. For this reason, we maintain that a hypothetical agreement by which a public authority grants exclusive access to a large amount of health data to a private company selected with non-transparent criteria appears highly questionable. We advocate that the NHS should adopt more appropriate data policies aimed at promoting the sustainability of the NHS, following the legal framework analysed in this article. 488

The Coroner’s Role in the Prevention of Elder Abuse: A Study of Australian Coroner’s Court Cases Involving Pressure Ulcers in Elders – *Catherine Anne Sharp, Jennifer Sarah Schulz Moore and Mary-Louise McLaws*

The prevention of elder abuse is a health priority around the globe. The Australian Law Reform Commission’s 2017 report on Australian residential aged care facilities found that neglect may constitute elder abuse and that painful pressure ulcers (PUs) fall into this category. The purpose of this article is to examine deaths from PUs in elders 65 years and older. A database search of Australian cases identified four coroner’s court cases. This article considers the role and potential of coroners’ recommendations to prevent PUs. The origin and site of PUs, prevention, wound and pain management, quality of care and coronial recommendations were examined. Coronial recommendations were made in two of the cases. As judicial officers with a statutory public health function, coroners have the potential to play an important role in the prevention of deaths attributable to PUs. This article makes recommendations to harness the potential of the coronial jurisdiction to prevent PUs. 494

BOOK REVIEW

The Arsonist: A Mind on Fire, by Chloe Hooper – *Reviewed by Ian Freckelton QC* 510