JOURNAL OF LAW AND MEDICINE

Volume 14, Number 4

May 2007

EDITORIAL – *Ian Freckelton*

Suing "the welfare": The diminishing immunity for child protection authorities

Until recently, child protection authorities enjoyed significant levels of immunity in respect of civil actions arising from their action or inaction. However, the tide has turned in Australia, New Zealand and the United Kingdom. The decision of Redlich J of the Victorian Supreme Court in the complex case of *SB v New South Wales* (2004) 13 VR 527; [2004] VSC 513 consolidates the trend in Australia with a further repudiation of the assertion that child welfare authorities should be specially advantaged. It appears that henceforth actions will regularly be able to be brought against the state by persons who have been harmed by the negligent discharge of child protection duties. In the future, plaintiffs' biggest impediment will lie in the evidentiary challenge of establishing the extent of the harm flowing from the breach of the state's duty as against the harm wrought by previous and supervening events. 443

LEGAL ISSUES – *Danuta Mendelson*

Substituted consent: From lunatics to corpses

This analysis traces the origins and evolution of the doctrine of surrogate or substituted judgment, especially its application to medical treatment, including non-therapeutic sterilisation, decisions regarding life and death choices, and more recently, removal of sperm or eggs from incompetent, dying or dead males and females. It argues that the doctrine, which has been acknowledged to be a legal fiction, has an effect of devolving legal and moral responsibility for life and death choices, as well as non-consensual, non-beneficial intrusive procedures, from the competent decision-makers to the incompetent patient. It focuses on the subjective nature of the substituted judgment standard; the problematic nature of evidence propounded to establish the putative choices of the incompetent person; lack of transparency relating to the conflict of interest in the process of substituted judgment decision-making; and the absence of voluntariness, which is an essential element of a valid consent. 449

MEDICAL ISSUES – *David Ranson*

Objections to medico-legal autopsy – Recent developments in case law

Medico-legal autopsies can be directed by coroners. However, in a number of jurisdictions family members can lodge objections with coroners against such procedures taking place. The authors analyse the objections, successful and unsuccessful, taken in Australia. Reviewing recent Victorian developments, they emphasise the public interest in autopsies which reveal medical causes of death. They identify the ongoing importance of coroners being able to exercise their statutory function to undertake death investigations effectively and to make informed recommendations to reduce the incidence of avoidable deaths. 463

MEDICAL LAW REPORTER – *Thomas Faunce*

Abandoning the common law: Medical negligence, genetic tests and wrongful life in the Australian High Court

The Australian High Court recently found that the common law could allow parents to claim tortious damages when medical negligence was proven to have led to the birth of an unplanned, but healthy, baby (*Cattanach v Melchior* (2003) 215 CLR 1). In *Harriton v Stephens* (2006) 80 ALJR 791; [2006] HCA 15 and *Waller v James; Waller v Hoolahan* (2006) 80 ALJR 846; [2006] HCA 16 the High Court in a six-to-one decision (Kirby J dissenting) decided that no such claim could be made by a child when medical negligence in failing to order an in utero genetic test caused the child severe disability. In an era when almost all pregnancies will soon require patented fetal genetic tests as part of the professional standard of care, the High Court, by barring so-called "wrongful life" (better termed "wrongful suffering") claims, may have created a partial immunity from suit for their corporate manufacturers and the doctors who administer them. What lessons can be learnt from this case about how the Australian High Court is, or should be, approaching medical negligence cases and its role as guardian of the Australian common law? 469

Recent developments 477

ARTICLES

Clinical practice guidelines in the witness box: Can they replace the medical expert? – *James Tibballs*

Clinical practice guidelines aim to synthesise a vast amount of information to assist the physician or surgeon to select the most appropriate patient management, reduce treatment variation, reduce medical error and contain costs. They help the legal practitioner and courts determine the standard of care in medical negligence cases. However, they have numerous limitations. Their quality is highly variable and acceptance among the medical and legal professions is not universal. Good guidelines should be widely sourced, validly based on outcomes, widely accepted, updated regularly and include clear practice recommendations. Whatever their quality, they are not self-evident and do not cover precisely each and every clinical situation. They have rarely been incorporated into legislation and cannot be used in any court as the sole arbiter of a standard of practice. They must be supported by expert evidence and are themselves open to challenge. Adherence does not guarantee tortfeasor protection nor lack of adherence culpability. 479

Bundaberg and beyond: Duty to disclose adverse events to patients – *Bill Madden* and *Tina Cockburn*

Although much excellent work has been done in Australia and elsewhere to improve the safety and quality of health care provision, the practice of medicine is inherently risky – adverse events sometimes occur. In Australia, practical guidelines for the open disclosure of adverse events to patients have been developed and are being implemented. State and Territory medical boards have recently adopted Codes of Conduct which include disclosure provisions, although the Australian Medical Association's Code of Ethics does not yet contain express patient disclosure provisions. There is a dearth of authority concerning legal obligations to disclose known or suspected adverse events. Although many Australian jurisdictions have introduced statutory protection for those who apologise or express regret to patients following an adverse event, there is no corresponding express statutory disclosure obligation, unlike in some parts of the United States. The Bundaberg experience illustrates the complex ethical, practical and legal issues which arise in this area. 501

The Australian legal framework for stress claims – *Robert Guthrie*

Work-related stress claims in all Australian jurisdictions are the most expensive form of workers compensation claim. This is due to the lengthy period of absence from work which is a feature of stress-related claims. In Australia, in the last decade, attempts have been made to reduce the costs of stress-related claims by imposing special legislative thresholds on such claims. This "back end" approach to cost reduction has resulted in an array of legislative formulae designed to reduce the number of stress claims. This article surveys the range of legislative approaches adopted in Australia to deal with the rise in stress claims. 528

Selecting "saviour siblings": Reconsidering the regulation in Australia of pre-implantation genetic diagnosis in conjunction with tissue typing – *Michelle Taylor-Sands*

In recent years, pre-implantation genetic diagnosis (PGD) has been developed to enable the selection of a tissue type matched "saviour sibling" for a sick child. This article examines the current regulatory framework governing PGD in Australia. The availability of PGD in Australia to create a saviour sibling depends on the regulation of ART services by each State and Territory. The limitations on the use of PGD vary throughout Australia, according to the level of regulation of ART in each jurisdiction. This article considers the limitations on the use of PGD for tissue typing in Australia and argues that some of these should be removed for a more consistent national approach. In particular, the focus in ART legislation on the "paramount interests" of the child to be born is inappropriate for the application of tissue typing, which necessarily involves the interests of other family members. 551

The unintended impact of the therapeutic intentions of the New Zealand Mental Health Review Tribunal? Therapeutic jurisprudence perspectives – *Kate Diesfeld* and *Brian McKenna*

Mental health review bodies engage in complex decision-making that may explicitly incorporate a therapeutic philosophy. Examination of select decisions of the New Zealand Mental Health Review Tribunal offers a foundation for understanding some implications of a pro-therapeutic approach. This analysis draws upon therapeutic jurisprudence scholarship in relation to three aspects of the hearings as documented in the written decisions: advocacy, therapeutic intervention, and the dignitary potential of the proceedings. The research explores the unintended consequences of a pro-therapeutic approach and evaluates the potential application of therapeutic jurisprudence within a mental health law context. 566

Comparing public discourses in stem cell policy debates – *Tamra Lysaght*

Public policy debates surrounding stem cell research are becoming increasingly more complex as governance considerations move beyond the moral status of human embryos. This complexity is evident in the public discourses surrounding these debates globally. This article draws on the results of an analysis conducted on the media coverage of a recent stem cell policy episode in the United States to demonstrate the complexity of public discourses surrounding stem cell research and to reflect upon similar debates in Australia. Observations made from the public discourses in California are reframed within the Australian context to discuss ways in which future public policy debates surrounding stem cell research may be enriched. 575

Deciding about life-support: A perspective on the ethical and legal framework in the United Kingdom and Australia – *Malar Thiagarajan*, *Julian Savulescu* and *Loane Skene*

This article is concerned with the legal right of health service providers to decide whether to provide life-prolonging treatment to patients. In particular, an examination of recent decisions by the English Court of Appeal in *R (Burke) v General Medical Council (Official Solicitor and Others Intervening)* [2005] EWCA Civ 1003 and the European Court of Human Rights in *Burke v United Kingdom* (unreported, ECHR, No 19807/06, 11 July 2006) is provided. An analysis of Australian case law is undertaken together with a consideration of the limits of a patient's legal right of autonomy in relation to choosing life-prolonging medical treatment; the basis upon which such treatment can be legally withdrawn or withheld from an incompetent patient against the patient's earlier expressed wishes that it should be continued or initiated; the concept in ethics and law of a patient's best interests; and the role of courts in adjudicating disputes about the continuation of treatment in light of the recent decisions. 583

BOOK REVIEWS

First Do No Harm: Law, Ethics and Healthcare by Sheila AM McLean 597
Disputes and Dilemmas in Health Law by I Freckelton and K Petersen 600
Regulating Health Practitioners by I Freckelton (Special Editor) 602

VOLUME 14 – 2006-2007

Table of Authors 609
Table of Editorials, Legal issues and Medical issues 611
Table of Medical law reporter and Book reviews 612
Table of Cases 613
Table of Statutes 627
Index 637