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EDITORIAL – *Ian Freckelton*

Safeguarding the vulnerable in custody – *Ian Freckelton*

2009 saw two deeply disturbing coronial decisions about the deaths of persons in custody in different parts of Australia. Coroner Jamieson in Victoria made telling criticisms of the quality of medical care provided to a prisoner at Port Phillip Prison who died because he was unable to summon help when the intercom system in his cell failed while he was dying of an asthma attack. State Coroner Hope in Western Australia castigated government and private facilities that played a role in causing the death by heatstroke of an indigenous man who was transported in appalling conditions to Kalgoorlie. The facts of each death raise fundamental questions about the quality of care provided to those in custody in contemporary Australia and about cultures of inadequate respect for the human rights of those in confinement. The development of a rights consciousness throughout the custodial community by charters of rights and freedoms may play a role in engendering greater respect for the imprisoned. The strengthening of coronial legislation to mandate accessibility to coronial decisions and responsiveness to them on the part of entities the subject of recommendations for improved health and safety may also play a constructive role in adding to the checks and balances against abuses of the rights of prisoners to life, humane treatment and receipt of adequate health services. 157

LEGAL ISSUES – *Danuta Mendelson*

Defendants' liability for pure mental harm to third parties in Australia: Still a work in progress – *Danuta Mendelson*

In Australia, both common and statutory law allows compensation for negligently occasioned recognised psychiatric injury, but distinguishes between pure mental harm and consequential mental harm. This column briefly discusses the concept of pure "mental harm" and the major Australian cases relating to defendants' liability to third parties for causing them pure mental harm (*Jaensch v Coffey* (1984) 155 CLR 549; *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317; *Sullivan v Moody* (2001) 207 CLR 562; and *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269). The analysis focuses on judicial approaches to determining liability in these cases, especially causation. Lack of guiding principles and precise tests for attribution of liability are illustrated by *Kemp v Lyell McEwin Health Service* (2006) 96 SASR 192. This case is analysed first in the context of common law, and then in the light of the reform legislation contained in the *Civil Liability Act 1936* (SA) and similar provisions in other jurisdictions. 165

MEDICAL ISSUES – *Ian Freckelton*

Disputed family claims to bury or cremate the dead – *Ian Freckelton*

A significant number of court decisions in Australia have wrestled with the issue of who among equally ranked next-of-kin should have priority in determining the timing and place of a loved one's burial or cremation. The first port of call for such decision-making can be the coroner who must determine to whom to release a body, where a death has been

reportable, but disputation occurs also in non-coronial contexts and has repeatedly fallen for resolution by Supreme Court judges. The decisions have identified a variety of practical considerations which have been taken into account. However, there remains considerable uncertainty about the significance of factors such as religious, spiritual and cultural values, as well as the nature and extent of the care-giving role, as influential considerations in respect of courts' decisions. While greater predictability of courts' decision-making might be therapeutic, it may be that the variability of factual situations precludes the construction of a hierarchy of relevant considerations. 178

BIOETHICAL ISSUES – *Grant Gillett*

When two are born as one: The ethics of separating conjoined twins – *Grant Gillett*

Conjoined twins pose a serious challenge to medical ethics because of the fact that most legally informed ethicists recognise the need to respect the sanctity of life principle for all children. This principle is not negated by impairments to a child nor by the fact that two children's fates may be so closely intertwined that what one does to one inevitably affects the other. Various mitigating factors enter clinical decisions such as the best interests of the child but these can appear rather strained in some of the more debated conjoined twins cases. We therefore need to evaluate the ethics of treatment for conjoined twins quite carefully so that significant ethical values and legal principles are not compromised or distorted beyond credibility. The idea of a potentiality principle that is close to but distinct from the substantial benefit principle as it is used in adult clinical decisions is mooted as one valuable tool in this area. 184

NURSING ISSUES – *Kim Forrester*

National regulation and accreditation of Australian health practitioners – *Cathie Nesvadba* and *Kim Forrester*

In 2010, nurses and midwives, together with a number of other identified health professionals, will come under the Australian National Registration and Accreditation Scheme for Health Professionals. The scheme is focused on the improvement of safety and quality of health care services through the independent accreditation of educational programs and the establishment and maintenance of a national public register. In this column the framework and legislative provisions supporting the scheme are discussed. 190

MEDICAL LAW REPORTER – *Thomas Faunce*

Constitutional limits on federal legislation practically compelling medical employment: Wong v Commonwealth; Selim v Professional Services Review Committee – *Thomas Faunce*

A recent decision by the High Court of Australia (W*ong v Commonwealth; Selim v Professional Services Review Committee* (2009) 236 CLR 573) (the *PSR case*) has not only clarified the scope of the Australian constitutional prohibition on "any form of civil conscription" in relation to federal legislation concerning medical or dental services (s 51xxiiiA), but has highlighted its importance as a great constitutional guarantee ensuring the mixed State-federal and public-private nature of medical service delivery in Australia. Previous decisions of the High Court have clarified that the prohibition does not prevent federal laws regulating the manner in which medical services are provided. The *PSR case* determined that the anti-overservicing provisions directed at bulk-billing general practitioners under Pt VAA of the *Health Insurance Act 1973* (Cth) did not offend the prohibition. Importantly, the High Court also indicated that the s 51(xxiiiA) civil conscription guarantee should be construed widely and that it would invalidate federal laws requiring providers of medical and dental services (either expressly or by practical

compulsion) to work for the federal government or any specified State, agency or private industrial employer. This decision is likely to restrict the capacity of any future federal government to restructure the Australian health care system, eg by implementing recommendations from the National Health and Hospitals Reform Commission for either federal government or private corporate control of presently State-run public hospitals. 196

ARTICLES

Science and judicial proceedings – Seventy-six years on – *Chief Justice Robert French*

The intersection of law and science, particularly in relation to causality and the legal concept of causation, were of considerable interest to Sir Owen Dixon. In this article, revisiting Dixon's 1933 lecture "Science and Judicial Proceedings", the Chief Justice refers to Dixon's deep interest in science and the issues to which it can give rise in legal proceedings. The 1933 lecture followed shortly after the judgment of the High Court in *Australian Knitting Mills Ltd v Grant* (1933) 50 CLR 387 which involved consideration of expert testimony and causal connections between product characteristics and personal injury to the consumer. 206

The influence of the pharmaceutical industry in medicine – *George A Jelinek* and *Sandra L Neate*

Pharmaceutical companies are known to be among the most profitable companies in the world. Proceedings of legal cases and published research provide insights into the nature of the influence of drug companies on research and publication practices relating to the drugs they manufacture, on marketing disguised as "education" and on doctors who prescribe their drugs. The influence of drug companies extends further to sponsorship of opinion leaders who promote their drugs and groups that produce clinical guidelines. More rigorous regulation of the relationship between the pharmaceutical industry and medicine is required. 216

Determining manner of death: Statistical modelling of coronial decisions – *R Robertson* and *T Crawley*

Lack of standardised procedures and the varied expertise of decision-makers can make manner of death determination in ambiguous cases equivocal in its own right. The aim of the present study was to identify factors influencing coronial manner of death determinations in cases of equivocal death. Twenty-nine equivocal cases were randomly selected from the files of an experienced British county coroner. The coroner had determined these cases to be accidental deaths (n = 10), open findings (n = 8) or suicides (n = 11). Case files were individually reviewed and the information contained within each was identified for subsequent analysis. The structure of the data was examined using multidimensional scalogram analysis (MSA). Overall, MSA conducted on the data revealed cases fell within three geometric regions (accidental death, open finding and suicide), thus indicating a moderate systematic basis for manner of death determinations by this coroner. However, within the three MSA regions seven cases were identified where the coroner's manner of death determination differed from MSA manner of death region suggested by the case data. These discrepant cases are discussed in detail, with specific reference to the influence of subjective case variables on manner of death determinations. 224

Defensive medicine in general practice: Recent trends and the impact of the Civil Liability Act 2002 (NSW) – *Omar Salem* and *Christine Forster*

This article presents the results of a survey conducted among New South Wales medical practitioners to assess the extent to which the enactment of the *Civil Liability Act 2002*

(NSW) has reduced the practice of defensive medicine. The new legislation was intended in part to reduce the practice of defensive medicine, both "assurance-type" measures, such as performing additional tests to assure patients they have received all possible care, and "avoidance-type" measures, such as avoiding the treatment of patients who may be at a higher risk for adverse outcomes and therefore at higher risk for filing lawsuits. However, the results of the survey reveal that many medical practitioners in New South Wales remain unaware of the legal reforms and the consequent reduction in their legal liability and continue to practise defensive medicine. This article argues therefore that while the ultimate aim of reducing litigation has been achieved in New South Wales through the introduction of the *Civil Liability Act*, the underlying and arguably more important aim of providing medical practitioners with a more secure environment in which to practise their profession effectively has not been achieved. The apparent failure to disseminate the legal changes to the medical profession illustrates the limitations of law reform to effectively engender social change without the active use of educative and other implementation initiatives. 235

Termination of a minor's pregnancy: Critical issues for consent and the criminal law – *Ben White* and *Lindy Willmott*

The recent Supreme Court decision of *Queensland v B* [2008] 2 Qd R 562 has significant implications for the law that governs consent and abortions. The judgment purports to extend the ratio of *Secretary, Department of Health and Community Services (NT) v JWB and SMB* (1992) 175 CLR 218 (*Marion's Case*) and impose a requirement of court approval for terminations of pregnancy for minors who are not *Gillick*-competent. This article argues against the imposition of this requirement on the ground that such an approach is an unjustifiable extension of the reasoning in *Marion's Case*. The decision, which is the first judicial consideration in Queensland of the position of medical terminations, also reveals systemic problems with the criminal law in that State. In concluding that the traditional legal excuse for abortions will not apply to those which are performed medically, *Queensland v B* provides further support for calls to reform this area of law. 249

Worth the wait? A critique of the Abortion Act 2008 (Vic) – *Naomi Oreb*

This article offers a critique of the likely impact of the *Abortion Act 2008* (Vic) in light of the fact that the Act was intended to reflect rather than alter current clinical practice surrounding abortion. The author traces the development of abortion law in Victoria and compares the two models for regulating abortion: the "common law model" and the "legislative model". The author argues in favour of legislative intervention. The author also discusses current uncertainties that exist due to the unclear effect of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) on abortion legislation, focusing on the intersection between women's rights to an abortion and doctors' rights to freedom of conscience. 261

Removing the "relative" uncertainty within the Australian donor insemination network – *Neroli Sawyer*

In Australia there is no federal legislation limiting the use of donor sperm. However, it is important to place limits on the multiple use of sperm donors to reduce the risk of inadvertent half-sibling mating between the offspring of anonymous donors and to control for the consequences of contact between identity-release donors and their donor-inseminated offspring. A nationally mandated donor registry should be established to enable, first, the calculation of updated variable values for use in the development and implementation of a predictive model to estimate the probability of half-siblings mating and provide policy-makers with empirical evidence to inform the setting of anonymous donor limits; and secondly, the linking of identity-release donors to their donor-

inseminated offspring and an investigation into the psychosocial consequences of that linking so as to be able to implement suitable donor limits as well as management strategies and support systems for these new "extended families" within the donor insemination network. 270

Why the "widespread agreement" is wrong: Contesting the non-harm arguments for the prohibition of full commercial surrogacy – *Peter Gaffney*

Entering a commercial surrogacy agreement is an offence in almost all Australian jurisdictions. A 2009 Consultation Paper produced by the Standing Committee of Attorneys-General suggested that there was "widespread agreement" that commercial surrogacy should remain prohibited. The arguments most commonly raised against legalising commercial surrogacy are not harm-based; that is, they do not purport to show that any party involved is tangibly, objectively and non-consensually worse off as a result of the transaction. This would be very difficult to show. Rather, the arguments against commercial surrogacy tend to focus on non-harm considerations, including principally concerns about the commodification of life and exploitation. This article argues that there are no sound non-harm reasons for banning one form of commercial surrogacy, namely full commercial surrogacy. 280

BOOK REVIEW
Speaking for the Dead: The Human Body in Biology and Medicine by DG Jones and MI Whitaker 297

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     [2] Hayton, n 1, p 286.
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