

# JOURNAL OF LAW AND MEDICINE

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EDITORIAL – *Ian Freckelton*

## **Plagiarism in law and medicine: Challenges for scholarship, academia, publishers and regulators**

The phenomenon of plagiarism has evolved as a major problem in many fields with the increasing accessibility of material on the internet. It poses dilemmas for those involved in secondary and tertiary education, as well as for book publishers and those who edit journals. This editorial reviews important recent decisions in the United Kingdom, Canada and Australia by courts and regulatory bodies in respect of doctors and lawyers who have engaged in plagiarism in various ways both while undergraduates and in the course of their professional careers. It reflects on the phenomenon of plagiarism, the challenges involved in its detection and the steps that can be taken to reduce its incidence. .... 645

**Update on doctor-patient privilege** ..... 659

LEGAL ISSUES – *Danuta Mendelson*

## **Healthcare Identifiers Legislation: A whiff of fourberie – *Danuta Mendelson***

The *Healthcare Identifiers Bill 2010* (Cth), which will establish “the national e-health Healthcare Identifiers Service to provide that patients, healthcare providers and provider organisations can be consistently identified”, is in the process of being enacted by the Australian Federal Parliament. The legislation will enable the government to assign to each “healthcare recipient” a 26-digit electronic “Healthcare Identifier”, which will be accessible, with or without the recipient’s consent, to a broad range of health care service providers as well as other entities. The individual Healthcare Identifier file will initially contain such identifying information as, where applicable, the Medicare number and/or the Veterans’ Affairs number; name; address; gender; date of birth; and “the date of birth accuracy indicator”, presumably birth certificate. However, since each “service” provided by a health care provider to a health care recipient will be automatically recorded on each individual’s Healthcare Identifier file, in time these electronic files should contain a full record of such services or contacts. Moreover, the Healthcare Identifiers are considered a “key” to, or a “foundation stone” for, the implementation of the shared electronic health records scheme, because they will enable linkage with and retrieval of each patient’s clinical records throughout the health care service system. However, there has been virtually no discussion about the legal, ethical and social implications of this legislation. .... 660

MEDICAL ISSUES – *Russ Scott*

## **Inquest into the death of Cameron Doomadgee – *Russ Scott***

Following the death in custody on Palm Island of an apparently healthy indigenous man, a coroner’s inquest heard one witness testify that he saw the arresting police officer repeatedly punch the deceased who was on the floor of the watch-house. The deceased died from a ruptured liver and portal vein. The inquest also heard expert evidence including reports from two autopsies and the opinion of two pathologists and a surgeon.

The coroner found that none of the medical evidence supported the finding that punches described by the witness were likely to have supplied the compressive force necessary to cause the deceased's catastrophic internal injuries. None of the parties during the inquest disputed the rejection by the expert forensic pathologist of the possibility that the punches described by the witness could have caused the fatal injuries. However, the coroner did not refer to the unequivocal expert evidence or to the circumstance that the expert opinion was undisputed. The coroner concluded that the police officer "lost his temper" and hit the deceased after falling to the floor, thereby "causing the fatal injuries". Section 50(5)(d) of the *Coroners Act 2003* (Qld) provides for an appeal from a coroner's findings "that could not reasonably be supported on the evidence". The inquest and subsequent appeal decisions highlight the importance of evidence-based expert opinion, procedural fairness and the potential for outcomes from Coroners Courts to be consistent with the principles of therapeutic jurisprudence. .... 677

#### BIOETHICAL ISSUES – *Grant Gillett*

##### **Regulation of biomedical products** – *Grant Gillett and Donald Saville-Cook*

Two recent decisions, one from Australia and one from Canada, should cause us to examine the ethical issues surrounding the regulation of biomedical products. The protection of vulnerable consumers from variable quality and poorly prepared drugs with uncertain parameters of safety and efficacy is a priority for any community and should not have to be weighed against possible costs based on restrictions of trade. However, the possibility of an environment in which the multinational biomedical industry edges out any other players in the treatment of various illnesses has its own dangers. Not least is the apparent collusion between regulators and industry that ramps up the costs and intensity of licensing and risk management so that only an industry-type budget can sustain the costs of compliance. This has the untoward effect of delivering contemporary health care into the hands of those who make immense fortunes out of it. An approach to regulation that tempers bureaucratic mechanisms with a dose of common sense and realistic evidence-based risk assessment could go a long way in avoiding the Scylla and Charybdis awaiting the clinical world in these troubled waters. .... 701

#### NURSING ISSUES – *Kim Forrester*

##### **Impairing the practice of nursing: Implications of mandatory notification on overseas-trained nurses in Australia** – *Myra Kochárdy*

From 1 July 2010, Australian health practitioners will be regulated under a single national registration and accreditation scheme implemented by the *Health Practitioner Regulation National Law 2009*. Designed to improve the quality and safety of health services, the National Law provides for, among other things, nationally uniform health, performance and conduct provisions for health practitioners. Mandatory notification has been introduced as a key measure for maintaining the highest standards of professional practice previously regulated by the individual health professions. This column considers the impact of mandatory notification on the nursing profession with particular emphasis on its overseas-trained members. .... 708

#### COMPLEMENTARY HEALTH ISSUES – *Ian Freckelton*

##### **Regulation of vitamin and mineral supplements: Lessons from the Truehope saga** – *Ian Freckelton*

A series of court and regulatory hearings has characterised the distribution and promotion in Canada of Empower Plus, a vitamin and mineral supplement promoted by its distributors as efficacious for a remarkable array of psychiatric conditions, including

bipolar disorder and schizophrenia. The column chronicles the saga and the multiple ethical and scientific concerns that arise from it. It argues that, given the risks posed to the vulnerable by supplements constituted by micronutrients that may uninformedly be seen as a viable alternative to orthodox pharmacotherapies, none of which are panaceas, supplements should be subjected to rigorous medico-scientific assessment and regulation. It laments the too rare institution of consumer protection actions brought in an effort to protect the public in such scenarios. .... 719

MEDICAL LAW REPORTER – *Thomas Faunce*

**Reducing injustice from recent legislation subsidising insurance and restricting civil liability?: *Baker-Morrison v NSW* [2009] Aust Torts Reports 81-999; *Amaca Pty Ltd v Novek* [2009] Aust Torts Reports 82-001** – *Thomas Faunce, Ruth Townsend and Konrad Reardon*

Shortly after the start of the new millennium, the Howard Federal Government in Australia was faced with a so-called “crisis” in medical indemnity insurance which may, in fact, have been due to corporate mismanagement. After a four-person review by a committee chaired by Justice Ipp (who currently serves as a justice on the New South Wales Court of Appeal), it agreed to subsidise the indemnity costs of Australian doctors but the quid pro quo was tort law reform legislation in Australian States. That raft of legislation significantly reduced the capacity of people (particularly patients) who were injured as a result of negligence to receive compensation. The new legislative scheme has been criticised as unjust in extra-curial speeches by senior judges involved in hearing civil litigation in Australia. A resulting hypothesis is that, in cases involving this legislative framework, judges might attempt to make it more just through interpretations enabling the recovery of reasonable damages by injured persons. In this column two such cases involving the *Civil Liability Act 2002* (NSW) are discussed. The cases in question (*Baker-Morrison v New South Wales* [2009] Aust Torts Reports 81-999; [2009] NSWCA 35 and *Amaca Pty Ltd v Novek* [2009] Aust Torts Reports 82-001; [2009] NSWCA 50), though not involving negligence by medical practitioners, are presented as possible examples of judges enhancing justice in the application of this legislation. The importance is emphasised of judges in medical and other civil liability cases highlighting the hardships and inequities this legislation is found to create for injured people, as a necessary precursor to abolition of this scheme and its eventual replacement with a presumptively more equitable no-fault scheme for compensation, particularly for medically-induced injury in Australia. .... 729

## ARTICLES

**Swine flu, doctors and pandemics: Is there a duty to treat during a pandemic?** – *Belinda Bennett, Terry Carney and Caroline Saint*

The swine influenza (H1N1) outbreak in 2009 highlighted the ethical and legal pressures facing general practitioners and health workers in emergency departments in determining the nature and limits of their obligations to their patients and the public. Health workers require guidance on the multiple, overlapping, and at times conflicting legal and ethical duties owed to patients and prospective patients, employers and fellow health workers, and their families. Existing sources of advice on these issues in Australia, by way of statements of medical ethics and other sources of advice, are shown to be in need of further amplification if health workers are to be provided with the certainty and guidance required. Given the complexity of the issues, Australia would therefore benefit from more extensive consultation with the variety of stakeholders involved in these questions if pandemic plans are to smoothly deal with future crises in an ethically and legally sound manner. .... 736

**Law in the time of anthrax: Biosecurity lessons from the United States** – *Christian Enemark*

In 2009, under the *National Health Security Act 2007* (Cth), the Australian Government began introducing biosecurity regulations for laboratory research and other work involving certain pathogenic micro-organisms. The Security-Sensitive Biological Agents (SSBA) scheme is virtually unprecedented in Australia but is similar to the Biological Select Agents and Toxins (BSATs) scheme which has existed in the United States since the mid-1990s. This article examines recent United States experience in using domestic law as a national security tool to address the problem of biological weapons. The two lessons that emerge for Australia regarding biosecurity regulation are, first, that security threats can emanate from trusted laboratory personnel, even those with high-level security clearances; and secondly, governments need to manage the risk of imposing too great a regulatory burden. A reduction in potentially life-saving research, precipitated by scientists opting out of laboratory work, could undermine capacity to resist both natural infectious disease outbreaks and biological attacks. .... 748

**The impact on community pharmacy of the changing generic medicine substitution landscape** – *H Laetitia Hattingh, Satish Maganlal and Michelle A King*

The Australian generic medicine substitution landscape has changed over recent years. The latest changes include the introduction of incentive payments by the government to community pharmacists to dispense generic medicines instead of more expensive brand equivalents. Generic dispensing imposes additional time constraints on pharmacists in terms of patient counselling requirements. Substitution also involves an increased need for professional judgment as pharmacists need to ensure the substitution is appropriate for the patient. It is therefore important that pharmacists develop processes and procedures that enable staff to follow good practice standards and guidelines during the dispensing of generic medicines in order to minimise patient risk. .... 761

**Greening Australia's public health system: The role of public hospitals in responding to climate change** – *Lauren Primozic*

Climate change is one of the most important social, economic, ecological and ethical issues of the 21st century. The effects of climate change on human health are now widely accepted as a genuine threat and the Australian Government has initiated policy and legislative responses. In addition, in the 2009-2010 budget the Australian Government has committed A\$64 billion to public health and hospital reform. But will this Commonwealth funding support – and should it support – the government's high-profile climate change policy? Does Commonwealth funding translate to an obligation to support Commonwealth policies? This article explores the role of public hospitals as champions and role models of the Australian Government's climate change policy and how this might be done without detracting from the primary purpose of public hospital funding: improving patient care. .... 772

**Sugar, ethics and legislation** – *Joseph Azize*

There are serious ethical and legal issues concerning the sale of sugar products, especially to children, yet one cannot address children's consumption without addressing consumption across society. The ethical principles are not even controversial. However, sugar has been insufficiently scrutinised, probably because sweetness is popular and plays a prominent, but dispensable, cultural role. Sugar is both addictive and toxic, although it is a very mild, very slow-working poison. Yet, over time, its effects can be quite serious. The social and health problems have proved grave and intractable. Given the nature of sugar, it should be regulated like alcohol and tobacco, if not more stringently, given its greater social and cultural penetration across all ages. That is, sales of sugar products at school

canteens should be banned, advertising severely limited, full disclosure of sugar content made mandatory, warnings placed on certain products, and sugar itself should be taxed. .... 784

**Patents to “treat me”, no patents to “test me”: An analysis of the 2009 Senate Inquiry into Gene Patents – *Damian Triffett***

This article critically analyses the submissions to the Senate Community Affairs Committee Inquiry into Gene Patents. It argues that gene patents are essential for attracting the investment required to ensure therapeutics based on gene technology reach the patient (patents to “treat me”). However, due to the lower costs of development, it argues that gene patent incentive is not required to ensure patient access to genetic testing services (no patents to “test me”). The article recommends that gene patents should not be prohibited by an amendment of the *Patents Act 1990* (Cth), rather that regulation should occur post-grant to ensure patented technology is broadly licensed. .... 800

**Regulating human enhancement technologies: The role of the law and human dignity – *Charlotte Cameron***

This article offers a critique on the potential role of the law in human enhancement technologies and its interaction with our perceived understandings of human dignity. The author outlines the initial hurdles of defining human enhancement and human dignity while maintaining that there is the necessity for a distinction to be established between enhancement and therapy. The author then discusses the role of regulation and outlines possible different approaches: self-regulation, “legislative pre-emption” or a balance. The author concludes by examining these issues in relation to parents and their rights to “design” their children through preimplantation genetic diagnosis. .... 807

**Sick leave and workers’ compensation for police officers in Australia – *Robert Guthrie***

In Australia it has been necessary to enact specific provisions into industrial and employment laws to ensure workplace protection and coverage of police officers because at common law police officers have not been regarded as employees. Police unions in Australia have emerged as strong industrial players and have secured a range of terms and conditions of employment which do not apply to the broader workforce. However, the battle in relation to workers’ compensation coverage and extended sick leave seems to be ongoing, particularly in Western Australia. The area of interaction between workers’ compensation laws and sick leave entitlements is often neglected against the background of other industrial matters concerning police. This article investigates the entitlements of Australian police officers to these benefits against the historical background of industrial laws. It concludes that there is no uniformity in coverage for workers’ compensation and sick leave and that the publicly available data in relation to absence from work of police officers due to sickness are generally incomplete and present challenges for cross-jurisdictional comparisons. The article points to future areas of research into police sick leave. .... 816

**Medico-legal interaction in disability and fatal claims – *Terence G Ison***

This article relates primarily to the causes of disability or death in the context of claims for damages, workers’ compensation, motor vehicle insurance benefits, disability insurance, claims under some other types of insurance, military pensions for disabilities and deaths resulting from military service, compensation for the victims of crime, and claims under some other social insurance or social security systems. The focus is on expert evidence in such cases, the demand for “scientific proof”, and related problems. The article is particularly relevant to disabilities or deaths that were caused by some event or exposure that occurred decades earlier. .... 833

**Withholding and withdrawing life-sustaining treatment: Criminal responsibility for established medical practice?** – Ben White, Lindy Willmott and John Allen

The law recognises the right of a competent adult to refuse medical treatment even if this will lead to death. Guardianship and other legislation also facilitates the making of decisions to withhold or withdraw life-sustaining treatment in certain circumstances. Despite this apparent endorsement that such decisions can be lawful, doubts have been raised in Queensland about whether decisions to withhold or withdraw life-sustaining treatment would contravene the criminal law, and particularly the duty imposed by the *Criminal Code* (Qld) to provide the “necessaries of life”. This article considers this tension in the law and examines various arguments that might allow for such decisions to be made lawfully. It ultimately concludes, however, that criminal responsibility may still arise and so reform is needed. .... 849

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    - <sup>1</sup> Hayton D, “Unique Rules for the Unique Institution, The Trust” in Degeling S and Edelman J (eds), *Equity in Commercial Law* (Lawbook Co, Sydney, 2005) p 284.
    - <sup>2</sup> Hayton, n 1, p 286.
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### **Head Office**

100 Harris Street PYRMONT NSW 2009

Tel: (02) 8587 7000 Fax: (02) 8587 7100



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