

# JOURNAL OF LAW AND MEDICINE

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EDITORIAL – *Ian Freckelton*

## **Huntington's disease and the law**

Huntington's disease (HD) is a relentlessly progressive and fatal neurological condition that is inherited. It has serious and disabling physical and mental components. As such, it impacts upon those who have HD, those with the potential to inherit it, and those who care for those with HD in a wide variety of ways. These can have many legal ramifications including in relation to evolving impairments of capacity which can have an outcome in terms of involuntary status as mental health patients, testamentary capacity and the need for guardianship and administration. It can have effects upon fitness for parenting, obligations for spousal maintenance, and the quantum of compensation from a tortious incident to which a person is entitled. It has repercussions for criminal liability and culpability. This article reviews case law from a number of countries in relation to such matters, noting the broader radiation to others of the effects of HD, and reflecting on the need for legal and medical professionals to be aware of the legal consequences of HD for them to be able to discharge their responsibilities holistically, sensitively and informedly. ....

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LEGAL ISSUES – *Bernadette McSherry*

## **Elder abuse and neglect: Challenges and directions for legal reform – *Laura Breedon***

The last two decades have heralded an increased community and professional awareness of the phenomenon of elder abuse and the challenges it poses to the enjoyment of the human rights of some older people. The contemporary Australian legal system provides many of the components of a framework required to assist in the promotion of the rights of the elderly and in the prevention and remedy of elder abuse. This framework acts in concert with health and community services dedicated to the advancement of health and wellbeing into old age. In the future, the acknowledgment and adoption of international legal principles which are directed to the needs of the elderly, the reform of existing domestic legislation and the development of new elder-specific statutes may all impact upon the incidence and consequences of elder abuse. To date, no Australian jurisdiction has adopted a legislative regime targeted specifically at the issues confronting older Australians who may be vulnerable to abuse and neglect. This column looks at some of the options for legal reform in this area. ....

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MEDICAL ISSUES – *David Ranson*

## **Drug screening in clinical or forensic toxicology: Are there differences? – *Dimitri Gerostamoulos and Jochen Beyer***

Legal and medical practitioners need to remember that, with respect to drug analysis, there are two distinct disciplines in analytical toxicology concerned with human biological matrices, namely clinical and forensic toxicology. Both fields use similar analytical techniques designed to detect and quantify drugs, chemicals and poisons in fluids or tissues. In clinical toxicology, analytical results help to specify the appropriate treatment of a poisoned or intoxicated patient. In forensic toxicology, the results often play a vital

role in determining the possible impairment or behavioural changes in an individual, or the contribution of drugs or poisons to death in a medico-legal investigation. This column provides an overview of the similarities and differences inherent in clinical and forensic toxicology. .... 25

#### **The “last vestiges of life” – Katrina Stuart**

On 4 June 2010, Deputy State Coroner Schapel of the Coroner’s Court of South Australia ruled that he had jurisdiction to conduct an inquest into the death of Tate Spencer-Koch, who was declared deceased following complications during her home-birth. Coroner Schapel considered he had jurisdiction on the basis that Tate was a “person in the eyes of the law” under the born alive rule, as she had completely left her mother’s body and she could be shown to have been alive after birth, evident from the PEA detected in her heart 10 minutes following her delivery. Close consideration of this ruling, however, reveals issues with the application of the born alive rule in the present case. .... 28

#### **BIOETHICAL ISSUES – Malcolm Parker**

##### **Futile choices: Wooing doctors to acknowledge the law in Queensland – Malcolm Parker**

End-of-life decision-making continues to challenge health care providers, patients, families, regulators and judges. The Queensland State Coroner’s findings in the 2009 inquest into the death of June Woo resulted in a submission from concerned clinicians to the Queensland Law Reform Commission’s review of the State’s guardianship regime, claiming that the judgment held problematic implications for future practice. This column summarises the State Coroner’s findings and recommendations, and critically analyses the clinical response, focusing on consent requirements that, while peculiar to Queensland, illustrate continuing tensions surrounding decision-making conflicts at the end of life. .... 32

#### **MEDICAL LAW REPORTER – Thomas Faunce**

##### **The Vioxx pharmaceutical scandal: Peterson v Merke Sharpe & Dohme (Aust) Pty Ltd (2010) 184 FCR 1 – Thomas Faunce, Ruth Townsend and Alexandra McEwan**

In early March 2010, Federal Court Justice Jessup in *Peterson v Merke Sharpe & Dohme (Aust) Pty Ltd* (2010) 184 FCR 1 ruled that Merke Sharpe & Dohme Pty Ltd had produced a defective product contrary to the *Trade Practices Act 1974* (Cth), the anti-arthritis drug Vioxx. Promoted as relieving arthritic pain without the side effect of gastric ulceration, the drug also doubled the risk of heart attack in those prescribed it. The court also heard that the manufacturing company had engaged in misleading practices to promote the prescription and usage of Vioxx, including “fake” journals and guidelines to “drug reps” that minimised the adverse cardiovascular risks. The manufacturer had already settled a class action in the United States for more than US\$7 billion for those harmed by the drug but this was the first such case to be decided in Australia. The court awarded the applicant, Graeme Peterson, A\$300,000 in damages. This column examines this judgment and analyses evidence there presented that Merck may have misled the scientific community, the medical profession and Australia’s drug regulation system to get Vioxx on the market and keep it there. It considers whether the case reveals the need for more rigorous post-marketing surveillance and other changes to Australia’s drug regulatory system, including a replacement of self-regulation in pharmaceutical promotion with a United States-style system of rewarded informant-led criminal penalties and civil damages claims. .... 38

## ARTICLES

### **Tabet v Gett: The end of loss of chance actions in Australia?** – Greg Walsh and Anna Walsh

This article critically analyses the recent High Court decision in *Tabet v Gett* (2010) 84 ALJR 292; [2010] HCA 12 which considered whether a person should be able to obtain compensation on the basis of a loss of a chance of a better medical outcome. The appellant argued that the High Court should regard a plaintiff as entitled to compensation when a breach by a defendant of their duty of care causes the plaintiff to lose a possibility, but not a probability, of a better medical outcome. The High Court held that it was not possible for a person in the position of the appellant to obtain compensation for the loss of a chance of a better medical outcome. ....

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### **Regulating for compassion?** – Ron Paterson

In 2009, the Health and Disability Commissioner considered whether a right to be treated with compassion should be added to New Zealand's *Code of Health and Disability Services Consumers' Rights*. Before making his recommendation, the Commissioner explored the nature of compassion, its place as a virtue in medicine, and the implications of the proposed law change. ....

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### **How do disciplinary tribunals evaluate the “gut feelings” of doctors? An analysis of Dutch tribunal decisions, 2000-2008** – Erik Stolper, Johan Legemaate and Geert Jan Dinant

A sense of alarm, which is a form of “gut feeling”, sometimes plays a part in the decisions of medical disciplinary tribunals in The Netherlands. Since these judgments are regarded as setting standards for professional attitudes in The Netherlands, the question arises how Dutch tribunals have evaluated gut feelings, and how tribunals in other European countries deal with them. An exploratory study searched two Dutch digital databases (2000-2008) and asked 26 national representatives of the European General Practice Research Network for information about the role of gut feelings in tribunals' decisions. A sense of alarm was mentioned in judgments in 34 Dutch cases. Defendants were hardly ever reproached for missing the correct diagnosis, but mostly for not acting in a professional manner. The sense of alarm was referred to as a diagnostic tool to assess a patient's situation, although the judgments indicate that it must be followed by further diagnostic steps. The role of gut feelings in decisions of disciplinary tribunals in Europe is unclear. The authors conclude that the sense of alarm as a diagnostic tool has been taken seriously by Dutch tribunals. Its timely development is considered to be an element of the professional standards for doctors. ....

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### **Another hospital saga: The chronicles of Professor Kossmann and Bayside Health** – Vanessa Taylor

There is almost a tradition in Australia for the suspect practices of hospitals to be exposed by whistleblowers rather than official governance or accreditation processes. The Bundaberg, King Edward, Canberra, Campbelltown and Camden hospitals have been investigated as a consequence of whistleblowing, but it seems the lessons learnt fail to travel beyond the subject institution. For five years, a number of senior surgeons at The Alfred Hospital in Melbourne complained about the clinical and billing practices of their colleague, Professor Thomas Kossmann, head of the trauma unit. Amid intense media interest, The Alfred eventually convened a peer review panel to investigate their concerns. Around the same time, two surgeons made disclosures to Ombudsman Victoria. The Ombudsman subsequently released two reports expanding on the findings of the peer

review panel. The situation at The Alfred was remarkable for the numerous and diverse issues raised and the involvement of several external agencies. This article provides an overview and analysis of the peer review panel and Ombudsman's reports and the outcomes of the referrals and recommendations. .... 76

**Codes of professional conduct for Australian Defence Force military physicians: Evenomating the serpent? – Mike O'Connor**

The scandal of health professionals' involvement in recent human rights abuses in United States military detention centres has prompted concern that Australian military physicians should be well protected against similar pressures to participate in harsh interrogations. A framework of military health ethics has been proposed. Would a code of professional conduct be a partial solution? This article examines the utility of professional codes: can they transform unethical behaviour or are they only of value to those who already behave ethically? How should such codes be designed, what support mechanisms should be in place and how should complaints be managed? A key recommendation is that codes of professional conduct should be accompanied by publicly transparent procedures for the investigation of serious infractions and appropriate disciplinary action when proven. The training of military physicians should also aim to develop a sound understanding of both humanitarian and human rights law. At present, both civil and military education of physicians generally lacks any component of human rights law. The Australian Defence Force (ADF) seems well placed to add codes of professional conduct to its existing ethical framework because of strong support at the highest executive levels. .... 103

**Assisted reproduction and mental illness: A human rights perspective from New Zealand – Nicholas Fancourt**

Developments in our ability to artificially assist reproduction have led to new and more social applications for medicine. Parallel to this has been an increasing acceptance and understanding of mental illness. Yet it may be argued that mental illness should preclude an ability to parent by means of state-involved artificial reproductive technologies. Through examination of current New Zealand human rights law, it is argued that such practice would be discriminatory. While there is some room to grant an exception to allow such discrimination, it is doubtful that such a decision would ever be made. Any reasons to justify an exception are unlikely to meet the high threshold demanded by current law. .... 124

**“Chartering” the limits of involuntary psychiatric treatment in Victoria: Interpreting the Mental Health Act 1986 (Vic) in the age of the Charter of Human Rights and Responsibilities Act 2006 (Vic) – Owen Bradfield**

The *Mental Health Act 1986* (Vic) allows for individuals with a serious mental illness to be treated on an involuntary basis either in a psychiatric hospital (on an involuntary treatment order) or in the community (on a community treatment order). The Act also establishes the Mental Health Review Board with the authority to review these orders within eight weeks of those orders being made and at least once every 12 months thereafter. This article analyses a recent decision of the board, *Re Appeal of 09-085* [2009] VMHRB 1, in which the appellant challenged a decision of a psychiatrist to extend his community treatment order for a further 12 months. The appellant argued that aspects of his involuntary treatment under the Act amounted to “cruel, inhuman or degrading” treatment and therefore breached his right to freedom from “cruel, inhuman or degrading” treatment under s 10(b) of Victoria's recently enacted *Charter of Human Rights and Responsibilities Act 2006* (Vic). Thus, the board was asked to consider whether the definition of “treatment” under the Act was compatible with the rights and freedoms enacted by the Charter. This was the first time that a Victorian court or tribunal had considered the impact of the Charter on involuntary psychiatric treatment. The decision was also a prelude to the Victorian Government's announcement that it would

comprehensively review its mental health legislation, now the oldest in Australia. As this case highlights, in determining the future direction of mental health legislation and policy in Victoria, the Charter has been crucial. .... 130

**Adult guardianship: Human rights or social justice? – Barbara Carter**

Adult guardianship in English-speaking countries has its roots firmly planted in the protective *parens patriae* principle. In the last 20 years, in response to societal changes and international developments, concerns about human rights have fundamentally challenged the historic basis of guardianship. This article argues that social justice offers a better framework than human rights for adult guardianship legislation. .... 143

**Rational rejection? The ethical complications of assessing organ transplant candidates in the United Kingdom and the United States – Lisa Cherkassky**

The practice of allocating scarce organs in medicine is an ethical minefield. Due to the organ shortage, organ procurement agencies in both the United Kingdom and the United States are placed in the unenviable position of having to choose a limited number of patients to compete equally for life-saving treatment. They do this by composing multidisciplinary transplant teams, which must evaluate transplant candidates and their complex range of personal, medical, environmental, psychiatric and financial characteristics. During the candidate assessment process, such teams may often be torn between their moral duty to save those who are most in need, considerations of efficiency, and the battle against forming moral judgments about particular candidates. Several ethical approaches can be adopted by transplant teams during the decision-making process, but do these ideologies provide adequate justification for their sometimes controversial decisions? This article provides a detailed examination of the ethical principles available to transplant teams in the United Kingdom and the United States, and the effect that these principles have on assessment procedures, organ allocation protocols, transplant candidates and their prospects. .... 156

**Directed embryo donation: Free choice or discrimination? – Sheryl de Lacey, Wendy Rogers and Bernadette Richards**

The issue of whether to allow or prohibit the directed anonymous donation of human embryos for reproductive use has been publicly contentious. The claims that directed donation are a donor's autonomous right contrast with claims that the practice is discriminatory. Recent legislation and legal recommendation on the issue has been inconsistent or contradictory. This article specifically addresses the question as to whether the directed donation of embryos is the exercise of free choice or an act of discrimination. This question is considered from both ethical and legal viewpoints. .... 169

**Access to justice for New Zealand health consumers – Joanna Manning**

New Zealand has evolved a just, sensible and balanced system for addressing adverse medical events. This article considers potential changes to enhance justice for health consumers after an adverse event. Patient motivations for claiming are described. Changes to the complaints regime are considered with the aim of opening up access to the Human Rights Review Tribunal. Modest change only is advocated, to avoid the potential for the tribunal to become a *de facto* appeal mechanism. The preferable solution is greater access to Health and Disability Commissioner investigations. The second part of the article considers changes, some implemented already, to the compensation regime to make it more affordable. These will compromise the ability of the scheme to address the remedial interest of injured patients in compensation. Undesirable consequences are likely to occur across the system. Policy-makers need to consider the ramifications of change for the system as a whole. .... 178

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