

# JOURNAL OF LAW AND MEDICINE

Volume 18, Number 4

June 2011

EDITORIAL – *Ian Freckelton*

## **Unscientific health practice and disciplinary and consumer protection litigation**

Evidence-based health care is expected of their practitioners by contemporary health professions. This requires health care to have a foundation in scholarly literature and to have a scientifically valid methodology. However, there are many instances of registered and unregistered practitioners either providing assessment and treatment that does not conform to such requirements or making representations about likely efficacy that are unjustifiable by reference to peer-reviewed clinical knowledge. Sometimes such conduct is predatory and deliberately exploitative; other times it is simply misconceived on the part of practitioners who regard themselves as medical pioneers. This editorial situates such conduct within unscientific and unorthodox health practice. It surveys recent consumer protection and disciplinary decisions to evaluate the role of the law in regulating such conduct. It argues in favour of an assertive legal response to protect vulnerable patients or potential patients against forms of treatment and promises of outcomes that are unscientific and deceptive. .... 645

LEGAL ISSUES – *Bernadette McSherry*

## **Who do I turn to? Resolving complaints by mental health consumers and carers – *Bernadette McSherry and Susan Klauber***

The current Australian system for handling complaints by mental health consumers and carers against service providers is complex and difficult to navigate. Complaints may be made to a range of people and organisations, including the relevant mental health service, community or official visitors, Health Services Commissioners, Chief Psychiatrists, Public Advocates, Ombudsmen and Members of Parliament. This Legal Issues column provides an overview of the law relating to complaints handling by community or official visitors, health service commissions and offices of the Chief Psychiatrist. It argues that while health service commissions may provide the best current avenue for complaints, there is a need for independent, centralised complaints bodies in Australian jurisdictions with similar powers to that of the Mental Welfare Commission for Scotland. .... 669

MEDICAL ISSUES – *Ian Freckelton SC*

## **Asperger's Disorder and the criminal law – *Ian Freckelton***

Asperger's Disorder has the potential to be relevant to many aspects of the functioning of the criminal justice system. However, its mere presence does not excuse or justify all offending. The inquiry into its potential relevance to criminal offending and sentencing must be both contextual and informed by suitably qualified expert evidence. This column reviews decisions in respect of offences of physical violence, sexual violence, arson, stalking/harassing and computer offences across a range of jurisdictions to evaluate how courts have latterly incorporated Asperger's Disorders into decisions about criminal responsibility and culpability. .... 677

BIOETHICAL ISSUES – *Grant Gillett*

**The death of a living soul** – *Grant Gillett*

We are bedevilled with varying definitions of death, ranging from higher brain death to cardiovascular or somatic death. They all try to capture what is essential to our reasoning about the importance of human death. This column argues that what they all neglect is the Aristotelian inspiration of many of the attempts at reformulation of the definition. Aristotle’s work on the soul focuses on the loving soul as the form of humanity that makes human living and dying the morally significant phenomenon that engages law-makers and ethicists alike. The form of humanity comprises a holistic package of properties which cannot be dealt with in a reductive manner and which our criteria for death must answer to. When that is clarified, the role of these criteria and their importance both become more transparent. .... 695

NURSING ISSUES – *Kim Forrester*

**“I want you to listen to my side of this”:** Is there a role for mediation early in the health care complaints process? – *Kim Forrester*

The resolution of disputes that arise out of the provision of health care services has historically taken place at an institutional level, with the hospital administrative unit conducting the process, or through the legal system with the parties traversing the relevant courts and tribunals. Increasingly, the wide range of decisions which must be made in relation to the delivery of patient and client care and the broad scope of variations in expectations as to what a health service is capable of delivering, are providing fertile ground for conflict. This column considers the potential role of mediation as an early intervention strategy to resolve health care disputes. .... 701

MEDICAL LAW REPORTER – *Thomas Faunce*

**Justins v the Queen: Assisted suicide, juries and the discretion to prosecute** – *Thomas Faunce and Ruth Townsend*

Juries are often a crucial protection for citizens against unjust or highly controversial laws. The decision whether to proceed with a prosecution rests on the discretionary powers of prosecutors. In cases where the community is deeply divided over right and wrong, it appears that there is, at times, a transference from the public of thwarted law reform aspirations which can create difficult tensions and expectations. This case commentary considers an appeal by Shirley Justins following her conviction for manslaughter by gross criminal negligence as a result of her involvement in the mercy killing of her partner, Mr Graeme Wylie. The morally unsettled nature of the charges brought against her, her own initial plea, the directions given to the jury by the trial judge and even the basis of her appeal resulted in a convoluted and complicated legal case. Spigelman CJ and Johnson J ordered a new trial, Spigelman CJ stating that it was open for a new jury to consider (a) if Mr Wylie lacked capacity; and (b) whether there was criminal involvement by one person in another’s death. Simpson J found that further prosecution on the count of manslaughter would amount to an abuse of process and that an acquittal should be entered. This case highlights how fundamentally unsettled are the publicly much debated and persistently contentious issues of euthanasia, assisted suicide, the right of a person to die a dignified death and the way their capacity in that respect should be assessed. It perhaps asks us to reconsider the role of juries and the exercise of discretion by Directors of Public Prosecutions in areas of law where the community and law-makers are deeply and intractably divided. .... 706

ARTICLES

**Barriers to the operation of mental health legislation in Australian emergency departments: A qualitative analysis** – *George Jelinek, Claire Mackinlay, Tracey Weiland, Nicole Hill and Marie Gerdtz*

This study aimed to describe the perceived barriers faced by emergency clinicians in utilising mental health legislation in Australian hospital emergency departments. A semi-structured interview methodology was used to assess what barriers emergency department doctors and nurses perceive in the operation of mental health legislation. Key findings from the interview data were drawn in accordance with the most commonly represented themes. A total of 36 interviews were conducted with 20 members of the Australasian College for Emergency Medicine and 16 members of the College for Emergency Nursing Australasia representing the various Australian jurisdictions. Most concerning to clinicians were the effects of access block and overcrowding on the appropriate use of mental health legislation, and the substandard medical care that mental health patients received as a result of long periods in the emergency department. Many respondents were concerned about the lack of applicability of mental health legislation to the emergency department environment, variation in legislation between States and Territories causing problems for clinicians working interstate, and a lack of knowledge and training in mental health legislation. Many felt that clarification of legislative issues around duty of care and intoxicated or violent patients was required. The authors conclude that access block has detrimental effects on emergency mental health care as it does in other areas of emergency medicine. Consideration should be given to uniform national mental health legislation to better serve the needs of people with mental health emergencies. ....

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**Where to now for health-related journal peer review?** – *Wendy Lipworth and Ian Kerridge*

Peer review of health-related manuscripts has enormous power in determining what is published in health-related journals, and what makes its way into health policy and clinical practice. However, peer review is at times ethically problematic and not always effective in achieving its goals. Over the past 25 years, a large number of debates about, and studies of, the peer review process has been published. Despite this, there is limited agreement about the strengths and weaknesses of peer review, and limited evidence about whether peer review achieves its goals and whether interventions to improve it have been successful. The authors argue that this state of affairs is not acceptable and that there is a need to systematise efforts to understand and improve the review process. ....

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**An ethical protocol for complementary and alternative medicine practitioners in an orthodox medicine regime** – *Michael Weir*

Concern that has been expressed about the provision of complementary and alternative medicine (CAM) in an orthodox medicine context with regard to the possibility of a client not being referred to the latter when the condition is readily dealt with by it. There have been some negative outcomes for clients when orthodox medicine has not been used when it was clearly indicated. Complementary and alternative medicine has many strengths for clients but it behoves a CAM practitioner to consider circumstances when it is appropriate to refer a client to orthodox medicine or to work in a complementary manner with orthodox medicine. This article suggests some guidelines that CAM practitioners should consider when assessing the circumstances when referral to orthodox medicine is indicated to support ethical practice for the benefit of the client. ....

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**Analysis of legal cases for prevention of elder abuse: Decisions from New Zealand** – *Kate Diesfeld*

Elder abuse is a universal concern and is gaining greater public and professional attention. This increased concern to protect elders is internationally evident in policy reform, multidisciplinary research and education. Yet neglect in care settings continues. This research responds by contributing to the international effort to promote humane care for elders who are in a position of dependence, particularly in residential facilities. The legal cases that result from some complaints by aggrieved elders and their advocates may offer insights that are relevant for prevention. While the law is often viewed merely as a system of control, it may also be a resource for learning, particularly in the context of abuse prevention. Although the analysis references New Zealand law, the discussion may have broader application by indicating factors that precede, or trigger, unacceptable conduct. By understanding what went wrong and why, we may decrease the likelihood of future incidents. Also, understanding the legal ramifications may have a deterrent effect. Many advocates and activists have asked how we can ensure that abuses do not recur; some answers may lie within the legal cases themselves. How may recent legal cases be used to prevent mistreatment of elders in residential facilities? This question is applied to select decisions of New Zealand's Health and Disability Commissioner, Human Rights Review Tribunal and Health Practitioners Disciplinary Tribunal. While each body has distinct functions, relevant factors identified within the cases may reveal information that is of interest to elderly people and their advocates, caregivers, health educators and professional registration bodies. The research is timely in light of New Zealand's Review of Elder Abuse and Neglect Prevention Services in New Zealand (Department of Child Youth and Family Services, 2004) and New Zealand's Positive Ageing Strategy (Office of Senior Citizens, 2001). This article incorporates current debates regarding the use and analysis of legal cases and suggests that such analyses offer learning opportunities. ....

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**Insanity, methamphetamine and psychiatric expertise in New Zealand courts** – *Katey Thom, Mary Finlayson and Brian McKenna*

The use of methamphetamine in New Zealand has increased significantly over the last decade. Due to the potential of methamphetamine to induce, exacerbate and precipitate psychotic symptoms, this drug has also taken centre stage in several criminal trials considering the sanity of defendants. Highly publicised and often involving contested expert evidence, these criminal trials have illustrated the limits of using psychiatric expertise to answer legal questions. This article considers the implications of such cases in light of material from a qualitative study that aimed to generate insights into the difficulties forensic psychiatrists and their instructing lawyers face when providing expert evidence on the relationship between methamphetamine, psychosis and insanity. It reports material from 31 in-depth interviews with lawyers and forensic psychiatrists and observation of one criminal trial that considered the relationship between methamphetamine and legal insanity. The findings are correlated with the clinical and medico-legal literature on the topic and subjected to scrutiny through the lens of "sanism". The article concludes that the continued use of forensic psychiatry to meet the legal objectives of insanity, where methamphetamine is involved, has the potential to reinforce sanist attitudes and practices. ....

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**Causation in negligence: From anti-jurisprudence to principle – Individual responsibility as the cornerstone for the attribution of liability** – *Mirko Bagaric and Sharon Erbacher*

Causation is one of the most esoteric and poorly defined legal principles. The common law standards of the "but for" test and common sense are, in reality, code for unconstrained judicial choice. This leads to a high degree of unpredictability in negligence cases.

Changes to the causation standard following the torts reforms have done nothing to inject principle into this area of law: the concept of “appropriateness” is no more illuminating than common sense. Despite this, the trend of recent High Court decisions offers some prospect of clarifying the test for causation. Key themes to emerge are an increased emphasis on individual responsibility and the associated concept of coherency with other legal standards. This article examines the doctrinal reasons underpinning the increasingly important role of these ideals and suggests how they can be accommodated into the test for causation to inject greater coherence and predictability into this area of law. .... 759

**The legal role of medical professionals in decisions to withhold or withdraw life-sustaining treatment: Part 3 (Victoria)** – *Lindy Willmott, Ben White, Malcolm Parker and Colleen Cartwright*

This is the final article in a series of three that examines the legal role of medical professionals in decisions to withhold or withdraw life-sustaining treatment from adults who lack capacity. This article considers the position in Victoria. A review of the law in this State reveals that medical professionals play significant legal roles in these decisions. However, the law is problematic in a number of respects and this is likely to impede medical professionals’ legal knowledge in this area. The article examines the level of training that medical professionals receive on issues such as refusal of treatment certificates and substitute decision-making, and the available empirical evidence as to the state of medical professionals’ knowledge of the law at the end of life. It concludes that there are gaps in legal knowledge and that law reform is needed in Victoria. The article also draws together themes from the series as a whole, including conclusions about the need for more and better medical education and about law reform generally. .... 773

**Fifty years on: Against the stigmatising myths, taboos and traditions embedded within the Suicide Act 1961 (UK)** – *Julia JA Shaw*

Although assisted suicide carries a maximum of 14 years imprisonment in England, courts and juries have historically demonstrated a reluctance to convict, most specifically in relation to those travelling abroad to accompany a terminally ill person seeking assisted dying. The possibility of prosecution is still present, however, and there have recently been a number of challenges to the law on assisted dying. During the consultation period of the *Coroners and Justice Act 2009* (UK) an amendment was proposed that would have legalised, among other things, assisting suicide overseas. However, it was voted down by peers who believed it to be dangerously radical. In 2008 a multiple sclerosis sufferer requested a clear policy statement, should her partner help her to seek assisted dying abroad in the future. After her application was initially rejected, Mrs Purdy was granted leave to appeal and following a favourable ruling by the House of Lords in 2009, the Director of Public Prosecutions clarified the law on assisted suicide, introducing a Full Code Test which includes the consideration of “public interest factors”. Although the new guidelines are not a direct threat to the 50-year-old *Suicide Act 1961* (UK), it is clearly an historic development: the latest in a series of high-profile cases and debates which have taken place over the last decade. It is suggested that English law on assisted dying continues to rely on a range of inappropriate concepts, taboos and superstitions, and it is from this perspective that the implications for future legislative reform are addressed. .... 798

**Refusing medical treatment after attempted suicide: Rethinking capacity and coercive treatment in light of the Kerrie Woollorton case** – *Sascha Callaghan and Christopher James Ryan*

The inquest into the death of Kerrie Woollorton in Norfolk, England, ignited extensive public debate on the scope of the common law right to refuse medical treatment where a patient is distressed, depressed or actively suicidal. In Australia, a patient’s wishes need not be honoured if the patient is not legally competent, if he or she falls within the ambit

of the compulsory treatment provisions in the mental health legislation, and possibly also if there is a recognised public interest in preventing suicide which is sufficient to override the patient's choice. This article argues that decisions about whether to give medical treatment despite an apparent refusal should be based solely on a determination of the patient's competence to make their own choice. However, the test for legal competence must take into account the person's agency in making the decision, and decisions which will effectively end the person's life must be shown to be thought through. .... 811

**Defending the sanctity of life principle: A reply to John Keown – Andrew McGee**

This article is a response to Professor John Keown's criticism of my article "Finding a Way Through the Ethical and Legal Maze: Withdrawal of Medical Treatment and Euthanasia" (2005) 13(3) *Medical Law Review* 357. The article takes up and responds to a number of criticisms raised by Keown in an attempt to further the debate concerning the moral and legal status of withdrawing life-sustaining measures, its distinction from euthanasia, and the implications of the lawfulness of withdrawal for the principle of the sanctity of life. .... 820

**New assisted reproductive technology laws in Victoria: A genuine overhaul or just cut and paste? – Rachel Thorpe, Kerry Petersen, Marian K Pitts and HWG Baker**

A new *Assisted Reproductive Treatment Act* was passed in Victoria on December 2008 and came into effect on 1 January 2010. The new legislation changed who was eligible for assisted reproductive technology (ART) and the types of services that clinics could provide. This article reports on interviews with service providers in Victoria who experience first hand the impact of legislation on clinical practice and patients, as well as regulators who are able to provide insight into the values underpinning the regulatory framework. The new legislation was viewed by all participants as an improvement on the old Act because of the removal of discriminatory and ambiguous aspects. The authors argue that while some of the details of the legislation have changed, the underlying principles and the framework have not. .... 835

**BOOK REVIEW**

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