

# JOURNAL OF LAW AND MEDICINE

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EDITORIAL – *Ian Freckelton SC*

## **Hoarding Disorder and the law**

While hoarding has been chronicled graphically by authors such as Dante, de Balzac, Dickens and Gogol, and has been the subject of sensationalist treatment by the media in respect of persons who are well known or who have become notorious, it has remained a subject of disparate clinical analysis, often subsumed under diagnoses of obsessive-compulsive conditions and concerns about old age squalor. It has been confused by ascriptions such as “Diogenes Syndrome”, “Miss Havisham Syndrome”, “Plyushkin Syndrome”, “Syllogomania” and “Senile Squalor Syndrome”, each of which is problematic or has significant limitations. Most commonly it has been correlated with both Obsessive Compulsive Disorder and schizophrenia but until the 2012 draft of DSM-V it has not been accorded the status of a disorder in its own right. However, with the likely elevation of its status by its inclusion as a stand-alone disorder in the DSM will come closer critical scrutiny, better clinical awareness, a fillip for further research, impetus for more effective treatment, and further exposure in the courts and tribunals. This editorial scrutinises the attention that hoarding of both articles and animals has already received in judicial and quasi-judicial decisions and identifies the many difficulties that it can pose for legal decision-making that is compassionate, rigorous and clinically informed. .... 225

LEGAL ISSUES – *Danuta Mendelson*

## **From expert witness to defendant: Abolition of expert witness protection and its implications – *Danuta Mendelson***

In *Jones v Kaney* [2011] 2 AC 398, the United Kingdom Supreme Court held that in England and Wales (but not in Scotland), clients can sue expert witnesses in negligence and/or contract for work performed under their retainer, whether in civil or criminal trials. The duties of expert witnesses in England are regulated by the *Civil Procedure Rules* and Protocols; the former also regulate the conduct of cases involving expert opinions. The legal context that led to the litigation is examined in the light of these rules, in particular, the nature of the allegations against Dr Kaney, a psychologist retained to provide psychiatric opinion. *Jones v Kaney*, as a decision of the United Kingdom Supreme Court, is not a binding precedent in Australia. However, unlike statutory enactments, common law judgments are retrospective in their operation, which means that health care practitioners who follow a generally accepted practice today may still be sued for damages by their patients or clients in the future. By definition, the future, including the refusal by the Australian High Court to follow *Kaney's* abolition of expert witnesses' immunity from suit for breach of duty to their clients, cannot be predicted with certainty. Consequently, health care practitioners in Australia and other countries should be aware of the case, its jurisprudential and practical ramifications. .... 250

MEDICAL ISSUES – *David Ranson*

**Age determination of asylum seekers and alleged people smugglers** – *Richard Bassed and David Ranson*

This column discusses the issues encountered when courts attempt to determine if an individual who has no reliable age at birth documentation has reached adulthood, or is still a legal minor. This issue has recently received a high level of public interest due to the wrongful imprisonment in Australian adult prisons of Indonesian minors accused of people smuggling following the determination, subsequently shown to be incorrect, that they were adults. The discussion explains current deficits existing in the science of age estimation with reference to the recent Australia Human Rights Commission *Inquiry into the Treatment of Individuals Suspected of People Smuggling Who Say That They are Children*. Future research possibilities in the science of age estimation which may help to resolve many of the issues are explored. .... 261

BIOETHICAL ISSUES – *Grant Gillett*

**Ethics committees in New Zealand** – *Grant Gillett and Alison Douglass*

The ethical review of research in New Zealand after the Cartwright Report of 1988 produced a major change in safeguards for and empowerment of participants in health care research. Several reforms since then have streamlined some processes but also seriously weakened some of the existing safeguards. The latest reforms, against the advice of various ethics bodies and the New Zealand Law Society, further reduced and attenuated the role of ethics committees so that New Zealand has moved from being a world leader in ethical review processes to there being serious doubt whether it is in conformity to international Conventions and codes. The latest round of reforms, seemingly driven by narrow economic aspirations, anecdote and innuendo, have occurred without any clear evidence of dysfunction in the system nor any plans for the resourcing required to improve quality of ethical review or to audit the process. It is of serious concern both to ethicists and medical lawyers in New Zealand that such hasty and poorly researched changes should have been made which threaten the hard-won gains of the Cartwright reforms. .... 266

NURSING ISSUES – *Kim Forrester*

**Notifications and mandatory reporting – Two years on** – *Kim Forrester*

It has been over two years in Australia since the adoption of the *Health Practitioner Regulation National Law Act 2009* (the *National Law*) and the implementation of the National Registration and Accreditation Scheme (the *National Scheme*). A significant element of the *National Scheme* was the legislative imposition of mandatory notification obligations on registered health practitioners, employers of health practitioners and education providers. Both the processes of voluntary notification and the imposition of mandatory reporting obligations under the *National Law* are aimed at protecting the public from the risk of harm. This column considers the operation of the mandatory and voluntary notification provisions in the current Australian health care context. .... 273

MEDICAL LAW REPORTER – *Thomas Faunce*

**Balancing public health, trade and intellectual monopoly privileges: Recent Australian IP legislation and the TPPA** – *Tim Vines, Kim Crow and Thomas Faunce*

Over the past year, several significant reforms to Australia's intellectual property regime have been proposed and passed by Parliament. The *Intellectual Property Laws Amendment*

*(Raising the Bar) Act 2012* (Cth) made various improvements to Australian patent law, including an improved threshold for patentability, greater clarity around “usefulness” requirements, and the introduction of an experimental use exemption from infringement. Another Bill, the *Intellectual Property Laws Amendment Bill 2012* (Cth), currently out for public consultation, would implement a 2003 decision of the World Trade Organisation (WTO) General Council and the 2005 *Doha Declaration on the TRIPS Agreement and Public Health* (Doha Declaration). If enacted, this Bill would facilitate equitable access to essential medicines by amending the compulsory licensing regime set out in the *Patents Act 1990* (Cth). The underlying intention of this Bill – meeting public health goals outlined in the 2005 Doha Declaration – stands in juxtaposition to proposed reforms to intellectual property standards pursuant to the *Trans-Pacific Partnership Trade and Investment Agreement* (TPPA) that Australia is involved in. Although at a preliminary stage, leaked drafts of relevant intellectual property provisions in the TPPA suggest a privileging of patent monopoly privileges over public health goals. This column weighs the sentiments of the proposed Bill against those of the proposed provisions in the TPPA. .... 280

## ARTICLES

**Who controls the uses of organs after death? Law in the books, law in practice and the view of the people** – *Ngairé Naffine, Bernadette Richards, Sheryl de Lacey, Annette Braunack-Mayer and Wendy Rogers*

The conventional wisdom is that we are free to dispose of our organs at death and that they will be employed according to our wishes. However, this reflects neither the formal law nor medical practice. This article explores the theory underlying the principle of self-determination after death. It presents an overview of Australian law and the way that the law is interpreted in clinical practice. It then presents the results of a community survey on organ disposition, and identifies a gap between community expectations and the current operation of Australian law. It concludes with some specific recommendations for development of the law to align it more closely with contemporary community views. .... 295

**Potential law reform for Australia’s organ donation system** – *Alexandra Halls*

Australia’s current organ donation rates are very low, particularly in comparison to several European countries such as Spain and Austria. Many Australians wait for many years to receive organs that they desperately need, and many die while waiting. Australia’s current organ donation system is based on express consent, with intending donors registering that intent at the Australian Organ Donation Registry. However, given that organs can only be donated in certain circumstances, this system is proving to be inadequate. This article compares the current express consent (or “opt-in”) system and the presumed consent (or “opt-out”) system used in the European countries that have significantly higher donation rates. It suggests reforms to Australian legislation to change the current system to that of presumed consent, and considers whether it is likely to work in Australian society. .... 306

**The sideshow or the circus? The role for public interest organisations at inquests** – *Megan Prictor*

Recent changes in coronial law in Australian jurisdictions have enabled inquests to adopt an expanded scope and have facilitated the participation of family members and other interested parties. Public interest bodies have increasingly sought to have input to coronial policy and practice. This article examines the involvement by public interest organisations in Australian inquests over recent years. These organisations adopt various roles in inquests, including the representation and support of family members of the deceased, and the pursuit of policy and legislative changes. A further role is that of participation in specific inquests as an “interested party”, in order to provide relevant expertise, shape the

scope of the inquiry, and illuminate systemic issues which may have contributed to a death. This article considers the legal framework for the involvement of public interest organisations, and critically reflects upon the main purposes and effects of such intervention. .... 320

**Application of the Mental Health (Compulsory Assessment and Treatment) Act 1992 (NZ) in recent New Zealand Coroners Court cases – Jennifer Moore**

This article discusses the issues raised by the Coroner’s findings about the deaths of Scott Chapman and Tony Rosimini, who were patients of New Zealand mental health services. Coroner Smith, who made recommendations in both cases, concluded that the patients were “placed in accommodation effectively without the necessities of life”. Chapman and Rosimini’s tragic stories are, unfortunately, common cases which illustrate that certain adverse social conditions may detrimentally affect people’s health and wellbeing. The Chapman case highlights the difficulties in treating the co-existing physical health conditions of patients subject to the *Mental Health (Compulsory Assessment and Treatment) Act 1992* (NZ) without their consent. What medico-legal tools can be applied to patients who live in “chaotic social circumstances”? How can a mental health patient’s physical health and general wellbeing be managed under this Act? This article combines traditional legal analysis with public health literature to explore these questions. .... 333

**Regulating bodily integrity: Cosmetic surgery and voluntary limb amputation – Aileen Kennedy**

Cosmetic surgery and voluntary limb amputation share a number of features. Both procedures are patient-driven forms of body shaping that can only be performed by surgeons, and therefore the procedures require the imprimatur of the medical profession to be lawful. Both invoke identity construction as a central legitimating factor that renders the procedures therapeutic. The legal regulation of surgery is subsumed within general principles regulating medical practice, where autonomy and consent are constituted as fundamental authorising principles. The legitimacy of consent to surgical intervention operates unevenly in relation to these two forms of surgery. Amputation of healthy limbs is presumed to be non-therapeutic. Capacity is closely interrogated and minutely scrutinised. Consent to cosmetic surgery, by contrast, is presumed to be a valid expression of autonomy and self-determination. .... 350

**Public authority responses to marine stinger public health risks: A scenario analysis of the Irukandji health threat in controlled spaces at public beaches in Australia – Lynda Crowley-Cyr**

This scenario analysis was undertaken to anticipate the likelihood of public authority liability for negligence arising from harm associated with the relatively new phenomenon of the Irukandji marine stinger health threat in Australia. The tort of negligence is about allocating liability for wrongs typically committed by one person or entity against another. The author questions whether a person who enters a marine stinger enclosure at one of Australia’s patrolled and flagged beaches and suffers serious injury from an Irukandji sting can seek compensation or damages in negligence against government. It is argued that as the law currently stands, an injured bather without adequate warning could successfully sue a local authority for creating a false perception of safety and therefore inducing risky behaviour. Changes in ecology and climate variability are relevant considerations. This is a novel issue not previously dealt with in Australian courts. .... 363

**How relevant is undergraduate medical law teaching to clinical practice? A graduates’ perspective – Nicole Koehler and Christine McMenamin**

The Monash University medical law tutorial program was implemented in 2002. A major aim of this program is to enable medical students to recognise and understand their legal

obligations in clinical practice, thereby improving clinical standards and contributing to better patient outcomes. The present study examined whether, from a graduate perspective, the medical law tutorial program provides adequate legal information of relevance for a clinical context. Monash University medical graduates from 2007 to 2009 who were working at a Victorian hospital or who were members of the Royal Australian College of General Practitioners were invited to participate in the study. Fifty-six participants completed the survey. Overall, participants had positive perceptions of the medical law program. The medical law program is an essential component of students' medical education and provides information relevant to future clinical practice. .... 380

**Psychiatric disability and the practising lawyer in Australia – Frances Gibson**

In recent years there has been significant recognition given to the extent of mental illness, particularly depression, in the legal profession. At the same time, international trends suggest that as more students with disabilities are given support to make it through school, more will become law students and enter the legal profession. International studies have already shown that law students and members of the legal profession exhibit higher levels of psychological distress and depression than do community members of a similar age and sex. In light of rights such as those in the *Convention on the Rights of Persons with Disabilities* for individuals with disabilities to pursue their chosen profession, this article examines whether people with mental illnesses should be admitted to or remain in the legal profession, the obligations on legal practitioners to report mental illness in other lawyers, and the types of matters brought before disciplinary bodies where mental health issues are raised. .... 391

**The experience of patients with advanced chronic obstructive pulmonary disease and advance care-planning: A South Australian perspective – Margaret Brown, Mary A Brooksbank, Teresa A Burgess, Mary Young and Gregory B Crawford**

Advance care-planning conversations with people who have chronic obstructive pulmonary disease (COPD) are important because of the severity of the disease and the unpredictable timing of death. Advance care-planning is a process involving conversations about future wishes, including end-of-life care and the appointment of a substitute decision-maker. This qualitative research explored issues relating to end-of-life decisions with 15 individuals and their carers living in the community who had severe COPD. Findings indicated that, although patients and carers would welcome the opportunity to discuss end-of-life decisions, almost no conversation about care-planning had been initiated by health professionals with any of the participants. It also demonstrated that professional support is required to assist with advance care-planning and the completion of the legal advance directive documents. .... 400

**How should Australia regulate voluntary euthanasia and assisted suicide? – Ben White and Lindy Willmott**

This article invites consideration of how Australia should regulate voluntary euthanasia and assisted suicide. It attempts to pose this question as neutrally as possible, acknowledging that both prohibition and legalisation of such conduct involve decisions about regulation. It begins by charting the wider field of law at the end of life, before considering the repeated, but ultimately unsuccessful, attempts at law reform in Australia. The situation in Australia is contrasted with permissive jurisdictions overseas where voluntary euthanasia and/or assisted suicide are lawful. The authors consider the arguments for and against legalisation of such conduct along with the available empirical evidence as to what happens in practice both in Australia and overseas. The article concludes by outlining a framework for deliberating on how Australia should regulate voluntary euthanasia and assisted suicide. It asks a threshold question of whether such conduct should be criminal acts (as they presently are), the answer to which then leads to

a range of possible regulatory options. .... 410

**Bottled babies and frozen hope: A review of three recent decisions on the property of cryopreserved sperm – Jesse Braid**

The English common law has taken a deliberate step away from the Australian High Court’s longstanding “work or skill” exception to the rule against proprietary claims over the human body. Now, at least in respect of cryopreserved sperm, the English Court of Appeal has recognised a proprietary interest arising from a principle of “subsisting right to use”. However, recent Australian decisions illustrate the ongoing role of the “work or skill” exception in circumstances where a widow seeks access to her deceased husband’s sperm to conceive a child. If such claims are to be made within a property law paradigm, as it appears they must, then Australian courts should supplement the all too easily satisfied “work or skill” exception with a clear and robust outline of discretionary considerations. .... 439

**When is the sterilisation of an intellectually disabled child “therapeutic”? A practical analysis of the legal requirement to seek court authorisation – Lesley Naik**

It is an established legal principle that certain sterilisation procedures fall outside parental power to consent to medical treatment and thus require court authorisation prior to their performance. The practical assessment of whether court authorisation is required has traditionally focused on determining whether the procedure is one which is “therapeutic”. However, the development of the legal meaning of a “therapeutic sterilisation” through judicial interpretation may have resulted in a divergence in the legal meaning of the term and its practical application. Cases involving sterilisation in the context of gender dysphoria have also raised some conceptual challenges to the previously utilised “therapeutic”/“non-therapeutic” distinction. This article advocates for the terminology “special medical procedure” to replace the words “therapeutic” and “non-therapeutic” and reintroduces the “but for” test as a potential practical tool to assist medical practitioners to negotiate this area of law successfully. .... 453

**Direct-to-consumer genetic testing: The double helix unleashed, problem or panacea? – Lynden Griggs**

Direct-to-consumer genetic testing: for some people it is to be discouraged, controlled, and in some jurisdictions even prohibited. For others, direct-to-consumer testing is merely the natural evolution of the human genome project. For them it represents the democratisation of medicine and patient care. This article, in making some brief recommendations that can be quickly implemented, seeks to draw a middle ground. The balance proposed aims not to smother what this writer sees as one of the most significant developments in health care in recent times, but to encourage the introduction of consumer-friendly measures that will allow the research community the time to explore the fundamental question posed by direct-to-consumer testing: does it actually do harm? .... 464

**BOOK REVIEWS**

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