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EDITORIAL – *Ian Freckelton QC*

Tourette’s disorder and the Criminal Law

Tourette’s disorder is a stigmatising developmental neuropsychiatric disorder usually commencing in early childhood and lasting for varying periods and intensities, with persistence into adulthood for about one-third of those affected as children. The potential forensic relevance of the disorder, in the context of its common comorbidities, is relatively little appreciated among forensic psychiatrists and psychologists, legal practitioners and judicial officers in spite of the fact that a significant number of young persons and adults with Tourette’s disorder are charged with criminal offences. This editorial reviews the clinical and forensic literature, about the disorder, as well as significant superior court and appellate judgments and argues for better education about the relevance of the disorder for assessments of criminal culpability, likelihood of recidivism and the consequences of custodial confinement for offenders with Tourette’s disorder. It identifies areas for constructive further research.

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LEGAL ISSUES – *Editor: Danuta Mendelson*

Medical Panels in Victoria, Australia and Alberta, Canada: Answering Medical Questions – Determining Matters of Fact and Law? – *Carol Newlands*

Medical Panels undertake assessments of injured workers under compensation legislation in both Victoria, Australia, and Alberta, Canada. However, the status afforded the medical answers provided differs markedly between the two jurisdictions. This column considers the nature and implications of these differences.

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MEDICAL ISSUES – *Editor: David Ranson*

Neglect in Aged Care – A Role for the Justice System? – *Joseph Ibrahim and David Ranson*

The Royal Commission into Aged Care Quality and Safety’s Interim Report entitled Neglect, identified multiple failings in meeting Australia’s care needs of older people. Many of these have been examined from both health and regulation-based perspectives. However, although some of the issues uncovered relate to potential criminal acts, relatively few prosecutions of individuals for abuse in aged care contexts take place. In addition to the social invisibility of the aged in our community investigators may experience considerable difficulties in utilising traditional processes for criminal investigation and prosecution in matters involving aged care institutions.

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PUBLIC HEALTH LAW ISSUES – *Editor: Paula O’Brien*

Warning Labels about Alcohol Consumption and Pregnancy: Moving from Industry Self-regulation to Law – *Paula O’Brien*

Alcohol consumption during pregnancy carries known risks to the foetus in the form of foetal alcohol spectrum disorder (FASD). One of the interventions for the prevention of FASD is the application of warning labels to packaged alcoholic beverages. Between 2011

and 2018, the Australian Government allowed the alcohol organisation, DrinkWise, to operate an industry self-regulatory scheme to provide alcohol producers with prototype warnings about drinking during pregnancy. In 2018, the government announced that it would be mandating alcohol and pregnancy warnings through Food Standards Australia New Zealand. This section argues that a proper appraisal of the DrinkWise Labelling Scheme at the outset would have demonstrated its inherent regulatory incapacity to operate as an effective health information policy. The DrinkWise Labelling Scheme is missing two essential elements of functional industry self-regulation: a strong normative framework and mechanisms for norm creation, implementation and enforcement. 259

GENOMIC LAW ISSUES – *Editor: Dianne Nicol*

Gene Editing Clinical Trials Could Slip through Australian Regulatory Cracks – *Lisa Eckstein and Dianne Nicol*

In this column we explore the regulatory environment within which clinical trials involving new genome editing techniques are undertaken. Ostensibly, there is regulatory congestion in this area, with overlapping obligations through the national scheme for regulating gene technology, the national scheme for regulating the supply of therapeutic goods, and the human research ethics system, predominantly administered at the institutional level. In practice, however, the oversight of gene editing clinical trials is left almost entirely to human research ethics committees. Given the uncertain risks associated with such novel technologies, we conclude that it is opportune to reconsider the rigour of current Australian processes for assessing clinical trials involving gene-editing technology. 274

HEALTH LAW REPORTER – *Guest Editor: Ian Freckelton*

Methamphetamine-induced Psychosis and Mental Impairment: A Challenge from New Zealand – *Ian Freckelton QC*

While knowledge about chronic amphetamine-induced psychosis and its similarity to schizophrenia is at an early stage, its incidence and ramifications are posing a serious issue for the criminal law. The condition has the potential in principle to result in findings of insanity/mental impairment and diminished responsibility, as well as to be significantly mitigating at the time of sentencing. However, difficult legal questions arise as to whether an ongoing (as against transient) chronic methamphetamine-induced psychosis constitutes a “disease of the mind” as well as complex public policy issues by reason of the condition being self-induced. This column reviews the law generally on the subject, as well as the ruling by Jagose J in *R v Brackenridge* [2019] NZHC 1004, and explores the ramifications of the reasoning in the ruling for decisions by courts outside New Zealand. It calls for further and more nuanced analysis of the ramifications of drug-induced psychoses being self-induced in the context of the law on criminal responsibility and culpability. 284

ARTICLES

Concussion, Chronic Traumatic Encephalopathy and Sport in a Legal Setting – *David Thorpe*

This article highlights aspects of the medical condition Chronic Traumatic Encephalopathy (CTE) relevant to legal claims in negligence threatened by players of collision and contact sports in Australia against their sporting organisations. CTE is characterised by cognitive dysfunction, irritability, aggression, depression, short-term memory loss, heightened suicidality and ultimately death, which may, in advanced forms, be preceded by dementia and parkinsonism. It is neither the purpose nor intention of this article to consider each element of a negligence claim, but rather to provide a means to understand the foundational

and factual basis for such a claim within a legal context. For the litigant the medical literature is foundational to establishing a legal connection between the playing of contact sport and cognitive dysfunction. As the High Court of Australia quoted with approval of a claim of negligent “failure to inform”: “the non-disclosed risk must manifest itself into actual injury in order for a plaintiff to establish proximate causation”. 294

Truth-telling or Not: A Dilemma for Health Care Providers Regarding Disclosure of Cancer in China – *Ting Yao, Ted Metzler and Betty Gorrell*

Truth-telling to cancer patients challenges health care providers in China. Providers confront a series of cultural, ethical, and legal dilemmas in terms of patients’ right to know and autonomy. Underlying reasons for truth-telling dilemmas include traditional culture, the role of family, and ambiguity about patients’ right to know in accordance with Chinese laws and regulations. These factors complicate ethical judgment by requiring interaction with traditional Chinese culture and laws before health care providers deliver bad news to patients with a range of conditions, including cancer. In this article ethical questions are raised, and strategies concerning breaking bad news are suggested for Chinese health care providers. 316

Abortion Decriminalisation in New South Wales: An Analysis of the Abortion Law Reform Act 2019 (NSW) – *Anna Walsh and Tiana Legge*

Abortion was decriminalised in New South Wales in October 2019. While New South Wales is the seventh jurisdiction in Australia to decriminalise abortion and regulate it under health legislation, the recent passage of the *Abortion Law Reform Act 2019 (NSW)* (the Act) saw the adoption of a number of principle-based amendments that distinguish it from abortion legislation in other Australian jurisdictions. This article critiques key sections of the Act regarding sex selection abortion, a doctor’s duties in relation to offering a woman counselling, the distinct crime of abortion coercion, and the protection of conscience for health professionals. It also identifies where future research may assist us in understanding both the application of these new legal requirements, and the community’s experiences with abortion. 325

Terms of Engagement: Transfer of Biological Materials for Research in Australia – *Tess Whitton, Jane Nielsen and Dianne Nicol*

The shift from basic science to potentially more lucrative applied science and commercialisation has had a profound impact on sharing biological materials for research purposes. Free exchanges of ideas and research materials have become cloaked in contractual obligations, driven by commercialisation and impact policies, particularly through material transfer agreements (MTAs). There has been no analysis of the terms included in MTAs routinely used by Australian universities and research institutes for the transfer of biological materials for research. This study analyses terms from 45 MTAs used by Australian universities and research organisations as well as common standard agreements. Our findings suggest that drafters need to refocus MTA terms to the purpose behind which materials are exchanged. Terms need to be directed primarily towards compatibility with the research effort rather than the remote possibility of future commercial and translational opportunities. This refocusing should simplify MTA terms, expediting materials transfer and supporting research. 338

The Donor-Linking Practices of Australian Fertility Clinics – *Fiona Kelly, Deborah Dempsey and Charlotte Frew*

While Australia is a world leader in providing statutory donor-linking services – the practice whereby individuals connected through donor conception seek access to information about

each other – there has been only limited exploration of how fertility clinics respond when approached with donor-linking requests. This article reports on 19 qualitative interviews conducted with Australian fertility clinic staff that explored how clinics manage requests to share identifying and non-identifying information about parties involved in donor conception. Our findings indicate that fertility clinics have experienced an increase in donor-linking requests in recent years, but that they are typically dealt with on an ad hoc basis. Two approaches to donor linking were identified: (1) an “active” approach where clinics supported donor linking and were willing to engage in outreach to see if the other party was open to information exchange; and (2) a “passive” approach whereby clinics were reluctant to facilitate linking and were unwilling to outreach to other parties. The variety of responses to donor-linking requests highlight the ways in which donor-conceived adults, parents and donors can have dramatically different access to information, depending on the clinic that provided treatment. 355

Parentage, Surrogacy and the Perplexing State of Australian Law: A Missed Opportunity – Ronli Sifris and Adiva Sifris

Following the decision of *Bernieres v Dhopal* (2017) 324 FLR 21; [2017] FamCAFC 180 it seems that intended parents of children born via overseas compensated surrogacy arrangements will not be recognised as legal parents in Australia. This decision results in harmful outcomes for children and represents a missed opportunity for the Full Court of the Australian Family Court to resolve this issue. Therefore, this article is intended to act as a plea for a review of the approach. Acknowledging the difficulties faced by the Family Court in attempting to resolve issues of parentage in compensated surrogacy cases within the parameters of the *Family Law Act 1975* (Cth), the authors suggest two possible alternative approaches. These approaches would enable the Court to stay true to the existing legislative framework while at the same time achieving what is clearly the desirable outcome for the children; that is: having their intended and functional parents recognised as their legal parents. 369

Sugar-Sweetened Beverages, Type 2 Diabetes and Factual Causation in Negligence – Zac Smithers and Jay Sanderson

In this article we consider whether sugar-sweetened beverages (SSBs) (factually) cause type 2 diabetes for the purposes of negligence. In so doing we demonstrate how factual causation is confounded by other contributing factors such as genetics, lack of physical activity and other diet behaviours (eg low-fibre and high-fat diets). That said, a plaintiff is not necessarily deprived of the opportunity to prove causation merely because there are multiple contributing factors to the harm. While difficult, it is possible for type 2 diabetes to be categorised as an “exceptional circumstance”, in which it must be shown that SSBs “materially contributed” to or were a “necessary element” of, the development of type 2 diabetes. 387

Community Knowledge of Law on End-of-life Decision-making: An Australian Telephone Survey – Cheryl Tilse, Jill Wilson, Ben White, Lindy Willmott, Deborah Lawson, Jeffrey Dunn, Joanne F. Aitken, Angela Pearce and Michele Ferguson

The law has a clear role to play in supporting patients and their substitute decision-makers (SDMs) to be involved in end-of-life (EOL) decision-making. Although existing literature suggests that knowledge of EOL law is variable among health professionals, there is little information about the extent and sources of such knowledge within the general community. A telephone survey of a representative sample of adults in three Australian States used six case scenarios to examine the extent to which adults know their legal duties, rights and powers as patients or SDMs; the sources from which people derive relevant legal knowledge; experiences of EOL decision-making; and individual characteristics

associated with levels of knowledge. The results show considerable variation in levels of legal knowledge dependent primarily of the area of decision-making presented, some sizeable gaps in people’s knowledge of EOL law, and varied awareness of how to access appropriate information on this subject. This study points to the need to increase community legal literacy around EOL decision-making, enhance awareness of the role of law in these circumstances and promote the availability of reliable and accessible information on the law at the time when it is needed. 399

Australian Policies on “Futile” or “Non-beneficial” Treatment at the End of Life: A Qualitative Content Analysis – *Eliana Close, Malcolm Parker, Lindy Willmott, Ben White and Andrew Crowden*

A challenge in end-of-life care is requests by patients or their substitute decision-makers for treatment that doctors consider is “futile” or “non-beneficial”. Concerns that these concepts are uncertain and subjective have led to calls for medical policies to clarify terminology and to provide procedural solutions to prevent and address disputes. This article provides a comprehensive analysis of how Australian medical guidelines and policies on withholding or withdrawing potentially life-sustaining treatment address futility. It demonstrates that while the concept is found throughout medical policies and guidelines, the terminology employed is inconsistent. There is also variability in the extent of guidance given about unilateral decision-making and mechanisms for dispute resolution. This is problematic, given that the question of further treatment can often only be determined in relation to the individual patient’s goals and values. We conclude by advocating for the development of a unified policy approach to futile or non-beneficial treatment in Australia. 415

Justice Is Blind but Expert Witnesses in Medical Imaging Are All Seeing: The Potential For “Blind Reads” to Mitigate Bias in Expert Evidence – *Nicole Woodrow*

Expert evidence in medical imaging claims has the potential for well-recognised biases. Informational biases occur from the distorted context when an expert witness knows which specific finding is present and the severity of the injury sustained as a result of the undiagnosed finding. Systemic litigation biases occur from the selection and under-sampling of opinions and issues with compensation and affiliation between the expert and parties to litigation. Blinding the expert witness to outcomes holds potential for mitigating these biases and may act as a screening tool to evaluate civil claims. The more complex strategies of blinding the expert to both the legal case and the commissioning legal party, by providing a “library of imaging” for review to imitate a normal day’s work, are unlikely to be practical for Australian legal practice. The persuasiveness of blinded expert evidence in mediation, concurrent evidence and court decisions in Australia is still uncertain. 440

Medical Experts and Evaluations of the Standard of Care in Medical Litigation – Strengths, Weaknesses and Potential Improvements – *Anne-Maree Kelly*

Medical experts play a central role in establishing the standard of care in medical litigation and whether the duty of care has been breached. There has long been criticism of them and their performance of this function. They are subject to biases including partisanship and cognitive biases. They may idealise the standard of care or fail to take adequately into account the context in which care was delivered. As a group, they are unrepresentative of the profession in age, gender, location and type of practice. Recent changes to how expert evidence is managed by courts is addressing some of these issues but may have raised other problems. This article discusses the strengths and weaknesses of medical expert evidence, both as delivered traditionally and in the recent innovations of expert conclaves and concurrent evidence, and discusses potential further improvements including increased accountability and refinements to the conclave processes. 455

The National Redress Scheme for Institutional Child Sexual Abuse – The Western Australian Response – Robert Guthrie and Amy Dickerson

The Royal Commission into Institutional Responses to Child Sexual Abuse estimated 60,000 people were sexually abused as children in Australian Institutions during the period it examined and recommended the Australian Government establish a single National Redress Scheme. The *National Redress for Institutional Child Sexual Abuse Act 2018*(the *NRS Act*) commenced on 1 July 2018 enacting some, but not all, of the recommendations of the Royal Commission, including the implementation of the three elements of redress, the use of a matrix to determine monetary payments, and the provision of an internal review scheme. Redress under the *NRS Act* includes a “direct personal response by the institution”, “counselling and psychological care” and “monetary payments”. All States and Territories were required to respond to the *NRS Act* by referring relevant powers to the Commonwealth in order to facilitate the operation of the national scheme. In addition each jurisdiction enacted particular responses to the NRS having regard to the existing victims of crime legislation in each State or Territory. This article surveys the *NRS Act* and the approach adopted by Western Australia and the other sub-national jurisdictions in responding to the *NRS Act*. 472

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