

Prescription for enlightenment

By David Hirsch

Medicine and law continue to reflect dynamic social norms. This edition of *Precedent* highlights some long overdue changes, and some challenges, too.

Few would have expected the demise of the *Bolam* test¹ but, as Bridie Walsh explains, the UK Supreme Court has now rejected that shibboleth of medical paternalism and embraced our High Court's approach to patient autonomy in *Rogers v Whitaker*.² But just how the breach of a duty to warn of material risks will impact on damages awaits to be seen.

The enthusiasm that greeted *Rogers* in Australia has been muted in subsequent cases restricting compensable damage in failure-to-warn actions on causation grounds. Wendy Nixon's article tracks this trend and considers how the UK Supreme Court in a recent wrongful birth case appeared to be following suit, restricting compensation on 'scope of duty' grounds. But for a doctor's failure to give proper genetic testing advice, a baby would not have been born with haemophilia. The baby also had autism, which made management of the haemophilia more challenging. Should those increased costs be compensable? The UK Supreme Court thought not.

Calling out the injustices faced by women engaging with the medical system is long overdue. Laura Nigro and her colleagues describe how women have been disadvantaged by implicit and explicit bias, from poor funding of research into women's health issues to male-centric design of clinical trials. Class actions involving breast implants, gynaecological mesh and the Essure contraceptive device have brought women's health issues into sharp focus, giving them a voice that has been suppressed for too long.

Justine Anderson discusses the inquiry into OBGYN Dr Gayed, who evaded reckoning for unsatisfactory professional conduct and poor clinical outcomes for two decades. Despite adverse findings and restrictions on his practice, Dr Gayed continued to work – and attract complaints – at many public and private hospitals. The regulators failed to inform employers of restrictions imposed on Dr Gayed's practice, and some hospitals resigned themselves to his poor performance, saying he was the regulators' responsibility, not theirs. The ultimate losers in Dr Gayed's long flight under the radar were women and it is naïve to ignore this when asking why the mechanisms of oversight designed to protect the public were for so long either not observed or not engaged.



Bill Madden unpacks the Commonwealth's COVID-19 Vaccine

Claims Scheme, designed to reduce the vaccine hesitancy of those who cite the rare risk of complications as a reason to refuse vaccination. But the Scheme raises many questions. How can you prove a 'likely relationship' between the vaccination and alleged harm? What costs are covered? Can the Scheme be applied to other vaccines? These unknowns may explain why the Scheme remains a 'work in progress', one with no progress in sight.

On the subject of political regulation of human behaviour, Katie Murphy takes us on an excursion through states' complicated rules on voluntary assisted dying (VAD). The safeguards said to be imposed to protect the vulnerable have, it seems, the practical effect of restricting access more broadly. Who would have thought, for example, that doctors would be prohibited from raising the issue of VAD with patients where the law at the same time requires doctors to advise of treatment options? Inevitably, some patients will die before satisfying the various procedural requirements for access to VAD. By accident, or by design?

And, as a further sign of changing times, Ngaire Watson and Dr Eli Kotler discuss regulatory reconsideration of psychedelic drugs to treat some mental illnesses. The Therapeutic Goods Administration seems prepared to entertain this, given strong evidence of efficacy, but state politicians have blocked their use as they remain fixated on the idea that psychedelics could lead to the disintegration of society as we know it. Interesting that these drugs can lead to 'ego-dissolution – the breakdown of the thought-filled, controlling and rigid aspect of our minds'. A prescription, perhaps, for more enlightened politicians?

I am sure you will enjoy this engaging issue of *Precedent* that covers these norm-busting issues, and more. ■

Notes: 1 *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582. 2 [1992] HCA 58 (*Rogers*).

David Hirsch is a barrister specialising in medical negligence litigation, and the former chair of the ALA Medical Law Special Interest Group. EMAIL dhirsch@selbornechambers.com.au. WEBSITE <https://www.2selborne.com.au/barrister/david-hirsch/>.