[1] INTRODUCTION TO HEALTH & MEDICAL LAW

End of life:

Messiha

- Resource allocation (hospital beds)
- Court not satisfied that the withdrawal of treatment by the hospital was not in the patient's best interests, died after respirator disconnected

Krommydas v Sydney West Area Health Service
K family resisting withdrawal of treatment

Difference in this case

- Clinical evidence pointed to the fact that K was dead (irreversible cessation of all functions of K's brain)
- Brain dead, even though attached to a respirator
- Qualified for being dead under *s 33 Human Tissue Act*

Assisted suicide/euthanasia:
Majority view does not translate into law reform (not reflected in Parliament)
Minority view matters – minority may change vote, making a difference to the likely re-election chance of the sitting member

Euthanasia Bill

Legal euthanasia in other nations

Carter (Canada)
Consent, and egregious/irremediable medical condition

Foetus:
Traditionally, not a person until live birth (cannot be represented, as not a person)
Unborn child has no legal personality

Crimes Amendment (GBH) Act
Defining foetal destruction as GBH (to the woman?)

Zoe's law
Bill

Would have recognised that a foetus of 20 weeks, 400 grams is a living person, offences of GBH could be brought against a person who harmed/killed a foetus (a foetus could be the victim of a crime, not just the case that foetal destruction was GBH against the mother, but rather that the unborn child could be the victim of a crime)

Did not disrupt abortion law (medical treatment, with consent of mother was fine)

Controversial – recognised foetal personhood for the first time

Some issues are seen to have moral colour by some sections of the community (e.g. Dr M H re abortion and sex selection)

s 27 Children and Young Persons Act
A child is at risk of significant harm – report this to authorities – on mainland (cf duties of health professionals re Asylum seekers)

Medical treatment of children:
Medical practices are regulated not only by the law, but also by professional standards that professional bodies impose on the medical professionals, albeit within a statutory context

Cosmetic procedures:
Whether the person who is performing it is a member of the Society

ARMAC National Framework on cosmetic surgery, 5 pillars

1. Regulation of practitioner registration (register those who perform the procedures)
2. Licensing of private health facilities where the procedures take place
3. Implementation effective? of control measures
4. Regulation of some substances and devices used in procedures
5. Consumer legislation, including specific legislative protection for children

Chronic non-communicable diseases

- Advise patients about lifestyle risks

Court stops payouts to obese man article in handout

- Medical negligence case
- Failing to refer patient to obesity centre for waist surgery
- If he had been referred to and had undergone the surgery, it is likely that he would have lost significant weight, halting the progression of his liver disease and liver cancer

PROFESSIONAL REGULATION OF THE MEDICAL PROFESSION

Health Practitioner National Regulation Law p.1-32
Establish a national registration and ***credit action scheme*** for the regulation of doctors and other health professionals

National scheme that applies to NSW via … Act (NSW)

Facilitates workforce mobility across Australia and overseas trained health professionals

s 3(2)(a)
Only health professionals that are …. are registered

s 23
Establishes Australian Health Practitioner Regulation Agency (AHPRA)

- …
- Investigates complaints…(in NSW, investigative function is carried out by a series of health councils)
- Conducts investigations into professional conduct performance…

Medical Profession in Australia regulated by Medical Board of Australia

Medical Board:
Register suitably qualified medical professionals
Registration standards
Develop codes of practice

s 39 – codes and guidelines

s 41 p.1-34
(b) State-based councils are established
Medical Council NSW gives complaints and notifications

Professional disciplinary complaints vs. medical negligence complaints

- Former – to protect the public, harm need not be suffered, sanctions (worst = struck off list, no damages)
- Damages – medical negligence complaint

s 144
Convicted of a crime
Unsatisfactory professional conduct/professional misconduct
Not competent to practice profession
Has an impairment
Not otherwise suitable to hold registration

Can also make complaints against medical students under *s 144(a)*
Any person can make a complaint

s 145(c), (b) p. 1-40
Sets out the actions that can be taken
Referred upwards (quasi-judicial body)

s 139 p.1-36
Competence to practice defined
Having sufficient physical, mental capacity, knowledge and skill, sufficient communication skills, knowledge of English

s 139B
Unsatisfactory professional conduct defined

s 139B

(1)(a)
Complaint about lack of skill in medicine can take the form of a law suit/professional disciplinary complaint

(f)-(i)
Inducements and conflicts of interests

(j)
Over servicing

s 139C
Additional matters re unsatisfactory conduct e.g.
(b) Assisting/enabling non-qualified person to engage in surgery/medical practice as if they were a medical practitioner
(c) Failing/refusing without reasonable cause to render ***reasonable help*** in an emergency

s 139E
Professional misconduct

- Unsatisfactory professional conduct that is sufficiently serious that in combination/alone would justify suspension/cancellation of practitioner's regulations

Distinguish:
Unsatisfactory professional misconduct and professional misconduct (grounds for complaint) vs. notifiable conduct under *s 140-143A* (positive obligation of medical practitioner to report their suspicions to NHPRA where they suspect another doctor has engaged in notifiable conduct as defined in *s 140*)

3 possible proceedings that can be brought against medical professionals:

- Criminal proceedings
- Civil proceedings (medical negligence)
- Professional disciplinary proceedings

Handout – starvation diet:
Criminal charges for failing to provide the necessaries of life under *Crimes Act s 44*

Case study – cosmetic surgery on minors p.14 reading guide:

Cosmetic surgery regulated by professional standards

Economic incentive to perform the procedure

Report

5 pillars for regulation of cosmetic procedures as a category of procedure

2.5
7 day cooling off period

3.4
If patient less than a teenager, 3 month cooling off period re major cosmetic procedures, referred to independent psychologist/GP/councillor

Procedure involves sedation

- MP must ensure there are trained staff, facilities, equipment to deal with emergencies, including resuscitation

2 areas untouched in guidelines

- Do not restrict major procedures to specialist surgeons (training etc.)
- Do not impose requirements re the facility in which the surgery has been performed

[2] CONSENT TO MEDICAL TREATMENT

MEDICAL TREATMENT & ASSAULT:

Re Marion

Basic principle:

- MT involves the **intentional infliction** of physical **force** upon the body
- MT is thus, ***prima facie***, an **assault**, **absent** a **valid consent** to that treatment

Underlying value:

- The law protects bodily integrity; human dignity; autonomy and dignity

Collins v Wilcox

- Every person's body is inviolate, it has long been established that any touching of another, however slight, may amount to a battery

Schloendorff v Society of NY Hospital

- Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits and assault

EXCEPTIONS TO GP THAT LAWFUL TOUCHING INVOLVES CONSENT

Re Marion

- Sometimes, physical contact with another will be **unlawful despite** their **consent**
- Sometimes, physical contact with another will be **lawful despite absence** of **consent**

[1] Unlawful despite consent:

Fights	• A*G's Reference [No 6]* • Fights/brawls vs. sport (physical suppression of opponent) • Public interest (physical contact in sport is an exception)
Euthanasia	• Unlawful [*Euthanasia Laws Act* (Cth) overturned *Rights of the Terminally Ill Act* (NT)]
Sado-masochism	• Not in the public interest (consent was no defence) [*R v Brown*]

[2] Lawful despite absence of consent:

Re Marion

- Lawful arrest
- Self-defence (if proportionate)
- Physical contact arising from the exigencies of everyday life (jostling in a street, social contact at parties)

EXCEPTIONS TO GP THAT SURGICAL INTERVENTION REQUIRES CONSENT

• No exception for MT of adults with full mental capacity (must give consent)

Re B

Facts	• Ventilator dependent woman • Went to court, sought a declaration that her ventilator be disconnected Less than 1% chance that she would be able to breath unassisted • Ventilator = medical procedure
Issue	Did she have the right to refuse the ventilator MT? Yes
Principle	• Doctors should not confuse the question of mental capacity with the nature of the decision made, however grave the consequences • Patient's **decision** reflects a **difference** in **values** (**not incompetence**) • Cannot define a patient as incompetent if he reaches a **different decision** re withdrawal of MT

Re Marion

• Although MT – to be lawful – requires consent, there are several categories of case where surgical intervention may be authorised without patient consent

MT upon persons who are incompetent to consent to it:

1	***Temporary incapacity (emergency)***	• Patient is usually competent, • But is incompetent at the relevant time *s 174 Children and Young Persons (Care and Protection) Act* • Authorises MT and DT upon a child without consent of parents, if doctor believes it is necessary as a matter of urgency to carry out treatment on child to save child's life/prevent serious damage to child's health • (Emergency principle, need not go to court) • CL authorises the same thing
2	***Children*** *(patients in process of 'developing' capacity)*	• Legal concept of guardianship (not parenthood) • Parents are usually the guardians of the child, and thus have the right to consent to MT in the best interests of the child
3	***Permanently incompetent*** *patients (mentally handicapped)*	• Never been competent/never again be competent [*Re Marion*]
4	*Patients who were* ***once competent but*** *are* ***no longer***	• End-of-life decision-making

CONSENT TO MEDICAL TREATMENT UPON CHILDREN

- Age of consent in Australia = 1**8 years**
- Powers of parents as guardians to consent to MT on behalf of child cease at age 18
- (If, after age 18, if the child is incompetent, the law will need to appoint the parents as guardian again of the children, if that right to give consent is to continue)
- Powers recognised at CL and in legislation [*ss 61B-61C Family Law Act*]

Nature of those powers at CL:

Re Marion

- The rights of parents as guardians are dwindling rights which exist only so long as they are needed for the protection of the person and property of the child

Gillick v West Norfolk

- A minor is capable of giving informed consent when he achieves a sufficient understanding and intelligence and enable him to understand fully what is proposed

The nature of these rights/powers/duties over children may be altered by legislation:

- In some States (including NSW), legislation regulates a minor's capacity to consent to MT (and may displace the CL, subject to a possible right in a guardian to obtain an injunction restraining a minor from exercising statutory rights to consent)
- But, where legislation does not exist/otherwise apply, the general principle applies

CRITERIA FOR REGULATING MEDICAL DECISIONS INVOLVING CHILDREN

Common law:
Assuming that the child is not competent to decide matters for himself – the principle which actually determines whether MT upon a child is legal is – *what is in the child's best interests?*

Re Marion

- Where a child is incapable of giving valid consent to MT, parents, as guardians, may consent to MT performed on the child in a wide range of circumstances
- However, in exercising their rights as guardians over children, parents must act in the best interests of the child
- The overriding criterion of the child's best interests is a limit on parental power

Are some kinds of MT so important that the power of the guardian does not extend to authorising such treatment without a court order?

Re Marion

- Guardian's authority over a child arises from CL and *Family Law Act*

s 61C Family Law Act

- Parents have parental responsibility for their children (defined in *s 61B*)

Re Mario

Majority	*Accepted 'dwindling rights' [Gillick]* • The rights of parents as guardians are **dwindling rights** • They exist only so long as they are needed for the protection of the person and property of the child • (Diminishes as the child's capacity and maturity develop) • Age, **individual level** of **development**, and the **nature** of the **MT** • A minor is capable of giving informed consent when he achieves a sufficient understanding and intelligence and enable him to understand fully what is proposed [*Gillick*] • (Sterilisation/sex change surgery requires greater maturity than stitches) *Shared period of time where parent + child have sufficient authority (Deane J)* • (Shared authority to make decisions for the child) • But, under dwindling rights view, if parent has authority, child does not *Accepted best interests of the child* • Determines whether MT on a child would be lawful • If the child is incapable (not *Gillick* competent, not yet reached the level of maturity to enable him to consent personally), the guardian would presumptively have the right to authorise treatment on the child's behalf • Criterion: whether the MT is in the child's best interests • **Rights** of **parents** as guardians (to give consent) **restricted** to what is in **child's best interests** • Usually, parent is in the position to assess what is in child's best interests o But, what is in the child's best interests is ultimately a question for the court if there is a dispute o (Parents do not have the last word) • Court authorisation is a safeguard o So parents do not cause non-therapeutic bodily injury/invade bodily privacy of their child simply for own best interests o Easy to mistake the best interests of the parent for the best interests of the child *Test* • If child is old enough to consent (*Gillick* competent) → child can consent • If not → the parent decides in accordance with the child's best interests

Re Marion

Brennan J	***Rejected** the **best interests** test* • Courts will bring their own subjective values to the legal decisions that they have no choice but to decide (courts must decide) • The best interests test is not really a test at all but a crude conclusion of social policy. It allows lawyers and courts to persuade themselves and others that theirs is a principled approach to the law. Meanwhile, they engage in what to others is clearly a form of 'ad hocery' [*Kennedy*]
	<u>*Proposes a new test by distinguishing between therapeutic vs. therapeutic MT*</u> • **Different distinction** to the distinction made by the majority (which is that non-therapeutic sterilisations require court authorisation) ***Therapeutic** treatment:* • Treatment administered for the chief purpose of preventing/removing/ameliorating a cosmetic deformity/a pathological condition/psychiatric disorder, • Provided the treatment is appropriate for + proportionate for the purpose for which it is administered ***Non-therapeutic** treatment:* 1. Treatment which is inappropriate/disproportionate to the cosmetic deformity/pathological condition/psychiatric disorder (for which the treatment is administered), and 2. Treatment which is administered chiefly for other purposes <u>*How to apply Brennan J's approach?*</u> 1. What is the **purpose** of the proposed MT? o What physical/mental condition is MT designed to impact upon (cosmetic deformity/pathological condition/psychiatric disorder)? 2. Is the proposed MT **proportionate** (to preventing/removing a cosmetic deformity/pathological condition/psychiatric disorder)?
	Test of therapeutic MT recognises the importance of personal integrity and the maintenance and enhancement of natural attributes to the welfare of the child • cf Best interest test (no guidance to what is in the welfare of the child) • Therapeutic MT is calculated to enhance/maintain as far as possible the physical/mental attributes which the patient naturally possesses