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LAWS2220; Birth, life, death, & medical law lecture notes.

Lecture One; Capacity, Consent, & theory

Law and regulation

Role of the law; one way to regulate conduct in society (it 'draws lines'). Defines & determines enforceable rights and obligations. Forces resolutions for disputes. It allocates responsibility for harms and addresses these through punishment or compensation (consider the roles of criminal law & civil law). Can be; Inflexible, slow, difficult to change, not always representative of societal views.

Professional codes & the law; prescribes codes to which health professionals must perform, clarify conduct which is unacceptable in the profession. A breach of these standards is not, in itself, a breach of the law. However, a failure to meet professional or industry standards is evidence that there may be a breach of a legal standard. E.g., the loss of a licence to practise medicine.

The law is not the only mechanism by which health & medicine is regulated

Ethical regulation; E.g., *National Statement on Ethical Conduct in Human Research* (NHMRC); *Ethical Guidelines for Organ Transplantation from Deceased Donors* (NHMRC).

Professional regulation; E.g., *Good Medical Practice: A Code of Conduct for Doctors* (Medical Board of Australia)

Hippocratic oath; "I make these promises solemnly, freely and upon my honour."

Moral and ethical principles

<i>Theory/principle</i>	<i>Defined</i>	<i>Difficulties</i>
T. Deontology	A deontological approach is to make a generalised, universal statement of what is right or wrong and apply that to the moral question. Historically rooted in religions. E.g., it is wrong to kill; it is right to respect personal autonomy; it is right to keep promises.	Clashes of principle – e.g., euthanasia involves questions of killing and autonomy Where do the statements of 'right' and 'wrong' get their legitimacy?
T. Consequentialism / unilateralism	Focus on the consequences of an act rather than on something intrinsic in the act itself. E.g., utilitarianism: an action is moral or good if it produces the greatest balance of utility for all concerned. So, the focus is maximising happiness and minimising suffering.	What counts as 'good', 'happiness', 'suffering' etc? Whose interests count? Often not possible to measure and predict consequences.
T. Libertarianism	Emphasis on the individual and autonomy. John Stuart Mill, 'On Liberty': <i>'the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others'</i> (the harm principle). E.g., respecting the autonomy of a person to refuse treatment.	Ignores collective interests and the integrated nature of communities. Arguably leads to under regulation ('small government'). Can permit practices that society finds morally repugnant.
P. Autonomy	Promotes self-determination: the ability to choose what happens to your own body. <i>Should the law permit you to do whatever you want to your body?</i> <i>Should the law permit you to refuse treatment under any circumstance?</i> <i>Should you be able to demand any treatment you like?</i>	
P. Beneficence	Doing and choosing the best for others. <i>Should the law play a role in enforcing the 'best' decision?</i>	

Health care issues

Self-determination: the law; The law protects self-determination with the **tort of battery (trespass to the person):** *'It is the central thesis of the common law doctrine of trespass of the person that the voluntary choices and decisions of an adult person of sound mind concerning what is or is not done to his or her body must be respected and accepted, irrespective of what others, including doctors, may think is in the best interests of that particular person.'* **Marion's Case (1992)** 175 CLR 218 (McHugh J)

Battery; Requires – A person + touches (or causes other interference to) + another person + without legal justification. *Note that battery is actionable 'per se' (just because it happened). There is no need to prove actual harm, damage or loss to obtain compensation.

VALID DECISIONS: REQUIREMENTS

(1) CAPACITY

- Age – 18+ (in which case capacity is presumed) or a 'mature minor'
 - *Gillick v West Norfolk & Wisbech Area Health Auth* [1986] 1 AC 112
- State of mind – But note that mental impairment does not always preclude capacity
 - *Re C (adult: refusal of medical treatment)* [1994] 1 All ER 819 (QBD)
- Consciousness

(2) VOLUNTARINESS

- Eg. undue influence (*Re T* [1992] 4 All ER 649) & phobias (*Re MB* [1997] EWCA Civ 3093)

(3) BROAD UNDERSTANDING OF BASIC NATURE OF THE TOUCHING

- Low threshold – Understanding of consequences or risks is not required
 - *Canduti v ACT Health* [2003] ACTSC 95; *Dean v Pheung* [2012] NSWCA 223

Relevant Cases

Age; Gillick v West Norfolk & Wisbech	Mrs Gillick was a mother of five underage daughters. She sought a declaration that the government could not give her children contraceptives because as minors they should be unable to make treatment decisions for themselves. The Court found: Parents and guardians are the 'default' decision makers for children (u 18), but... 'Mature minors'
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