



# Health Legal Report

August 2006

At Health Legal, we are keen to ensure that we address the specific needs of the health and aged care sector

We welcome your feedback and suggestions regarding particular issues and topics that you would like discussed in future issues

We can be contacted on (03) 9861 4001

Welcome to the August 2006 edition of the Health Legal Report. In this Report we discuss the new amendments to the *Guardianship and Administration Act* relating to medical research, misconceptions about the *Freedom of Information Act*, and decisions relating to the carrying out of an autopsy, an alleged breach of privacy and the circumstances in which an employer will be responsible for the actions of its employees.

We also inform our clients about 2 new products which we have developed in response to client demand and provide details of our new training courses.

## Ryan v Ann St Holdings Pty Ltd

### Supreme Court of Queensland – Court of Appeal

**By Kellie Dell’Oro**

*This case is interesting for its discussion on when an employer is and is not vicariously liable for the actions of its employees.*

Briefly, the facts were as follows:

Ryan sought damages from Ann St Holdings Pty Ltd (“the employer”) arising out of an incident at The Beat Night Club. It was alleged that an employed security guard, Aperu, punched Ryan.

Ryan succeeded at trial because it was held that the employer was vicariously liable for the conduct of Aperu. This was the finding notwithstanding it was held that Aperu had intentionally committed a criminal act.

It is relevant to point out that the role of Aperu was to protect the club, its staff and patrons. Further, that the employer conceded that Aperu was authorised or alternatively had implied or ostensible authority on its behalf to apply force during the course of his employment at the club. The evidence was that at 5 am the applicant was affected by alcohol but in control of himself and that he and his mate were well behaved. They exited the club and stood outside, talking. Aperu approached Ryan and asked if he could re-enter the club and assist his friend. When he did he was beaten by Aperu. At the time the manager of the club was informed that he had slipped over.



# Health Legal Report

The trial Judge affirmed that there was no doubt that the employer would be liable if its employee acted over zealously or over enthusiastically in applying force to a person. However, what was contended by the employer in this case was that as employee, in this case the security guard, would not be acting in the course of his employment if he gratuitously assaulted a person.

The Court of Appeal, referring to earlier High Court judgments which had said that the critical test, in broad terms, involves a comparison between the intentional wrongful conduct and the type of conduct the employee was engaged to perform. If there is a sufficient connection it will be open to the tribunal of fact to conclude that the wrongful act was done in the course of employment albeit in an improper mode. This will always be a question of fact. The Court said that where an employer clothes an employee with authority which, it abused, could lead to greater harm than the easier it will be for a Court to draw the conclusion that the wrongful act was done in the course of employment, because the risk was known to the employer.

Applying this reasoning Williams JA held the employer was vicariously liable for the action of its employees. This was because Ryan was acting in accordance with requests and directions from a security guard acting under ostensible, if not actual authority. That is what put Ryan in the presence of Aperu inside the club and which provided the situation in which Aperu could assault Ryan.

To this reasoning Jerrard J added that here, the guard had authority to invite Ryan to re-enter and that there was no direct evidence of any constraint placed on his instructions or purported authority, or when it could be used. This was the finding despite the counsel for the employer having submitted, in a written outline, that authorisation could only have been to use a level of force that was lawful. Jerrard J rejected the employer's submission that Aperu was doing something for his own benefit. Jerrard J said in conclusion that there was no apparent reason for the attack, is not tantamount to a finding that the act was for Aperu's personal benefit. In discussing these issues Jerrard J alluded to the uncertain state of the law but said this case was not the forum to resolve the issues arising from the High Court decisions.

#### **Comment:**

*This case does little to resolve the already uncertain boundaries of an occupier's responsibilities. Applying this decision we are left with the position that an employee, may nevertheless be found to be acting in the course of their employment even when they are found to have committed an intentionally criminal act. As best as can be stated the position appears to be that an employer will be vicariously liable for wrongful acts done for an employee's own benefit "where the ostensible performance of the employee's work gives occasion to these acts or where these acts are committed under the cover of the authority the employee is held out as possessing or of the position in which the employer is placed as a representative of the employer". If this decision is applied in the health and aged care context, the health service/aged care service could be liable for the acts of a nurse or doctor who for example, uses excessive and unlawful force in restraining a patient/resident or otherwise treating a*

*patient/resident. Such an act would, on this reasoning be sufficiently connected with their scope of work and authority that, despite it being an improper mode of performing the work the responsibility would in all likelihood, rest with the employer.*

*It remains to be seen whether the High Court decisions referred to in this judgment will be similarly applied by the Victorian Courts.*

## **Resetar v State Coroner of Victoria (Supreme Court of Victoria)**

**By Kellie Dell’Oro**

This was an application by the deceased person’s senior next of kin seeking an order from the Court to prevent an autopsy on the deceased. The Court had to determine whether it was desirable to make the order sought in circumstances where the Coroner believed that an autopsy was necessary to determine the cause of death.

On 31 May 2006, the Applicant’s 18 year old son died suddenly at home. The deceased suffered from autism and was unable to read or write and barely able to speak. He had been confined to the house environment nearly all his life. The Applicant loved her son very much and had devoted her life to his care.

The sketchy medical history of the deceased showed that in addition to being “severely globally delayed”, he might also have suffered from epilepsy, a heart murmur and autism. The Applicant was not a fan of conventional medicine and instead, believed in the powers of essential oils to help her son to cope with his disabilities.

Before the unexpected death occurred, the Applicant had noticed her son was having difficulty breathing and had applied oils and vanilla essence on him. She had also tried massage and resuscitation without success. Her son died before the ambulance arrived and his body was later taken to the Royal Melbourne Hospital. The medical staff was informed of the possibility of epilepsy, heart murmur and autism. After a visual inspection of the body and a CT examination, they were unable to determine the cause or the circumstances of the death. In these circumstances, Dr Burke formed the opinion that an autopsy was needed in order to exclude other causes of sudden death not associated with either epilepsy or heart murmur. He was of the view that autism was unlikely to have caused the deceased’s death.

### **Proceedings in the Supreme Court**

The Applicant objected to the autopsy on the basis of her belief that an autopsy was a brutal, inhumane and unnatural procedure and a desecration of her son’s body. The Applicant did not have any specific religious convictions but she believed in spiritual laws and “a greater being who oversees us all”. She argued that an autopsy would contravene the spiritual laws that she and her son believed in and would cause her shame, grief and anguish for not allowing her son to rest in peace. In summary, she argued that the public interest would not demand such a course.



# Health Legal Report

The State Coroner argued that the autopsy was an integral part of the coronial investigation process. Unless an autopsy was performed, the Coroner would not be able to comment on matters relating to public health and safety, and the administration of justice to the deceased. Further, without an autopsy being performed, the Coroner would not otherwise determine whether better care of the deceased would have altered the outcome of his case or whether more assistance could have been given to the Applicant and the deceased by those who had come into contact with them.

Both arguments were carefully considered by Williams J of the Supreme Court. Williams J stated that in deciding whether it was desirable that no autopsy should be performed, the Court must attempt to balance the public interest and the interests of the deceased person's family. His Honour noted that on some occasions the Court has permitted autopsies over the objection of family members, and on others has prevented autopsies from being performed for cultural or religious reasons and in the absence of evidence of suspicious circumstances.

Williams J then found this case was different from the cases where an autopsy had been prevented because of the presence of other evidence suggesting a probable cause of death. In this case, an autopsy should be permitted given the nature of the death and the unusual circumstances of deceased person's life, namely, that he had been living in the seclusion of his home without any support of medical or services other than the care from the Applicant.

Williams J further stated that the autopsy would not be carried out to "satisfy curiosity" as was alleged by the Applicant. Rather, it was a necessary step in the process of the Coroner carrying out her statutory functions. His Honour was satisfied that in this case, the public interest in enabling the Coroner to determine the cause and the circumstances of the death and to make comments as to what might prevent other such deaths would warrant the performance of an autopsy. The application was therefore dismissed.

**Comment:**

*In deciding whether to conduct an autopsy despite a carer's objection, a balance must be struck between the public interest and the interests of the deceased's family. Where there is no apparent cause of death and where the circumstances of the deceased's life are uncontroversial, an autopsy is unlikely to be prevented on application by a member of the deceased's family.*

**M v Health Service Provider (Office of the Privacy Commissioner)**

**By Simon Cooke**

The case concerned a complaint to the Privacy Commissioner following a disclosure of information to the complainant's partner regarding the type of medical tests undertaken by that complainant.

## The facts

M underwent a number of medical tests for sexually transmitted diseases at a health service provider. It was alleged that the health service provider later disclosed the types of tests to M's partner, thus causing M to suffer serious hurt and embarrassment.

The health service provider acknowledged the disclosure of the complainant's personal information. It also stated that the inappropriate disclosure was made by a new employee who understood that the results of tests should not be disclosed, but did not realize that the types of tests undertaken should also not be disclosed. The complainant was not happy with the health service provider's apologies and lodged the complaint with the Privacy Commissioner seeking compensation for loss, emotional distress and embarrassment.

## Resolution to the complaint

The Commissioner investigated M's allegations under section 40 of the *Privacy Act*. National Privacy Principle (NPP) 2.1 provides that personal information collected for a primary purpose may only be used or disclosed for a secondary purpose if one of the exceptions under NPP 2.1(a)-(h) applies. For example, information may be used or disclosed for a secondary purpose with the consent from the relevant individual (NPP2.1 (b)) or where the information is health information, the use or disclosure of such information is closely related to the primary purpose of collection and within the individual's reasonable expectations (NPP2.1(a)).

The Commissioner found that none of the exceptions under NPP 2.1 applied to this case. The disclosure of information was found to be improper and not permitted by NPP 2.1.

Section 27(1)(a) of the *Privacy Act* provides that Commissioner should endeavour, by conciliation, to effect a settlement of the matters that gave rise to the investigation. As the disclosure had caused disruption to the complainant's family life, the complainant did not consider an apology was adequate to resolve the complaint. The health service provider did not dispute the improper disclosure of the information and agreed to the Commissioner conciliating a settlement.

At the conciliation, the complainant attempted to demonstrate that the amount of compensation sought by them was commensurate with the loss or damage they had suffered. The parties later agreed on an amount different from that originally sought, recognizing the emotional distress and embarrassment suffered by M.

The Commissioner was satisfied that the matter had been adequately dealt with by the health service provider and therefore closed the investigation of the complaint.

## ***Guardianship and Administration (Further Amendment) Act 2006 (Vic)***

**By Simon Cooke and Susan Rawling**

The *Guardianship and Administration (Further Amendment) Act 2006* commenced on 15 July 2006. The objective of the Act is to establish a new regime to govern the carrying out of medical research procedures on an adult who is incapable of consenting to the procedure.

### **Medical Research Procedure**

A medical research procedure is defined as:

- a procedure carried out for the purposes of medical research, including as part of a clinical trial, the administration of medication or the use of equipment or a device; or
- a procedure that is prescribed by the regulations to be a medical research procedure for the purposes of the *Guardianship and Administration Act 1986*;

but does not include:

- any non-intrusive examination (including visual examination of the mouth, throat, nasal cavity, eyes or ears or the measuring of a person's height, weight or vision); or
- observing a person's activities; or
- undertaking a survey; or
- collecting or using information, including personal information (within the meaning of the *Information Privacy Act 2000*) or health information (within the meaning of the *Health Records Act 2001*); or
- any other procedure that is prescribed by the regulations not to be a medical research procedure for the purposes of the *Guardianship and Administration Act 1986*.

### **4 Step Process**

The Act provides a 4 step process for authorising the carrying out of a medical research procedure on a patient as follows;

- Step 1: Determine whether the relevant research project is approved by the relevant human research ethics committee –if not, go no further;
- Step 2: Determine whether the patient is likely to recover the capacity to consent to the procedure within a reasonable time–if not, go no further;
- Step 3: Seek the consent of the person responsible for the patient, which must not be contrary to the best interests of the patient;

- Step 4: Seek procedural authorisation which only applies when a patient is not likely to recover in a reasonable time and the person responsible cannot be ascertained or contacted.

### **Procedural Authorisation**

In broad terms, a medical research procedure may be authorised if:

- the inclusion of the patient in the medical research procedure would not be contrary to the patient's best interest;
- the carrying out of the procedure would not be against the patient's wishes;
- the relevant medical research ethics committee has approved the project in the knowledge that the patient is participating without consent; and
- the research procedure poses no additional risk to the patient and is based on valid scientific hypothesis.

### **Best Interests**

For the purposes of determining whether a medical research procedure would or would not be contrary to the best interests of a patient, the following matters must be taken into account:

- the wishes of the patient, so far as they can be ascertained;
- the wishes of any nearest relative or any other family members of the patient;
- the nature and degree of any benefits, discomforts and risks for the patient in having or not having the procedure;
- any other consequences to the patient if the procedure is or is not carried out; and
- any other prescribed matters.

### **Emergencies**

Only Step 1 is relevant to the carrying out of a medical research procedure in an emergency.

### **Refusal of Treatment**

A medical research procedure is prohibited if a refusal of that treatment is in force under the *Medical Treatment Act 1988*.

### **Protection of Registered Practitioners**

Registered practitioners are protected by the Act if they carry out a medical research procedure in good faith:

- in reliance on the consent given by another person or purported consent given by another person; and

- they believe on reasonable grounds that they have complied with the requirements of the Act.

In these circumstances the registered practitioner is not guilty of an offence or liable in any civil proceedings. However, the duty of care owed by a registered practitioner is not affected by the Act.

### Offences

In addition, the Act provides for contravention of these provisions. It is an offence to carry out an unauthorised medical research procedure on a patient with a maximum penalty of 2 years imprisonment and/or 240 penalty units (currently \$25,783).

The Act also makes a number of amendments to the *Mental Health Act 1986 (Vic)*. Specifically the Act provides that provisions relating to “non-psychiatric treatments” in that Act will no longer apply to medical research procedures, which will now fall under the *Guardianship and Administration Act 1986*.

### What impact will this have on your organisation?

The Act is prescriptive about the steps and parameters for carrying out a medical research procedures. This suggests that Hospitals will need to take particular care that they have systems and procedures in place to follow the guidelines outlined by the Act.

The following actions may assist to ensure compliance with the legislation:

- Implement a system to check that the procedure falls under the definition of a medical research procedure;
- Implement a process that allows for identification of the relevant human research ethics committee’s authorisation of the procedure;
- Establish the type of consent or authorisation required for the medical research procedure:
  - Consent of patient because the patient is likely to recover the capacity to consent to the procedure within a reasonable time ;
  - Consent from the responsible person because the patient is unable to give consent; otherwise
  - Procedural authorisation in accordance with the Act; and
- Create a policy and guidelines for obtaining consent for medical research procedures.

## **Staff Training**

Health Legal is running a number of training courses which have been designed specifically to meet the needs of staff working in public and private hospitals, aged care facilities, divisions of general practice and community health centres. The courses cover topics such as patient confidentiality, consent, duty of care, attending the Coroners Court, structuring private practice arrangements, handling FOI requests, and introduction to contract law.

The courses run from October through to June next year. We are happy to run the sessions at your premises if there is sufficient demand.

For further information about our training sessions or to request a copy of our training calendar please contact Samantha Pearce at Health Legal on (03) 9861 4077 or via email [samantha.pearce@healthlegal.com.au](mailto:samantha.pearce@healthlegal.com.au).

## **Misconceptions about the Freedom of Information Act**

It has recently come to our attention that several public sector clients are not aware that the *Freedom of Information Act* applies to all parts of their organization. In 1 instance a public hospital client mistakenly believed that the FOI Act did not apply to records kept by its human resources department. Specifically, the client was not aware that emails generated by its HR department were covered by the FOI Act. In another instance, staff of a public hospital believed that if a request for patient records was made to the health service, it was not necessary to provide copies of records held by each of the campuses of the health service. They also believed that if the campus records were to be provided an application fee for each campus could be charged.

We take this opportunity to remind our clients that: the FOI Act applies to all parts of a public hospital (including HR departments), the FOI Act covers emails, if a request is made to a health service, records held by the campuses of the health service must also be considered when processing the request and in those circumstances only 1 application fee can be charged.



# Health Legal Report

In response to client demand, Health Legal has 2 new products available for sale.

## **Standard form Agreements and Policies**

The first product is standard form Agreements and Policies. Health services undergoing ACHS accreditation have been recently criticised for not having all of their arrangements documented. Also, the use of standard form documents reduces organisational risk and legal expenditure.

In light of the above, we have developed a range of standard form Agreements and Policies for use by health and aged care services. The documents have been prepared in a template form so they can be completed by your staff.

## **Frequently Asked Medico-Legal Questions**

The second product is a handbook covering all of the medico-legal questions which are frequently asked by health service staff. The publication of this handbook is a joint project between Austin Health and Health Legal. Austin Health initially developed the handbook and Health Legal has recently reviewed and updated the publication.

The handbook focuses specifically on the needs of the health sector and covers a wide range of topics, including consent, refusal/withdrawal of treatment, patient privacy/confidentiality, and dealing with adverse events and patient complaints. The handbook covers more than 100 pages.

For further information about either of the above products please contact Natalie Franks at Health Legal on (03) 9861 4024 or via email [natalie.franks@healthlegal.com.au](mailto:natalie.franks@healthlegal.com.au).

## **Welcome to new Health Legal staff**

Health Legal initially started with a small team of 6 staff. 3 years on, we now have a team of 16 individuals. We welcome 3 new staff members: Susan Rawling, Katherine Stevens and Gwen Learey.

We also congratulate David Ruschena on his promotion to Senior Associate.

### **Susan Rawling, Solicitor**

Susan is a qualified nurse and a solicitor who has worked in the health sector across a range of services and areas for over 15 years. Since joining Health Legal in March of this year Susan has assisted on matters in both the commercial and litigation areas.

She has drafted contracts for goods and services, including multiple contracts for cleaning, linen, carpark management services. Susan has also recently drafted a request for tender for café services in one of the metropolitan health services. She has also assisted with drafting an expression of interest for pharmacy services for the private sector.



# Health Legal Report

Susan has assisted with negotiating and resolving disputes between health services and pathology providers and their employees and has assisted with the representation of health care providers at a coronial inquest where her clinical background gave her excellent insight into the circumstances facing clinicians. Susan can be contacted on **9861 4029** or by email [susan.rawling@healthlegal.com.au](mailto:susan.rawling@healthlegal.com.au)

## **Katherine Stevens, Law Clerk**

Katherine joined us in late July. Katherine is also a qualified nurse who is currently completing a Master of Laws. Apart from working in a high acuity area Katherine was fortunate enough to work at the Alfred Hospital in the Nursing Education Unit developing policies and guidelines throughout Bayside Health.

Katherine will assist us in preparing practical case summaries highlighting the “lessons” for health care providers arising from decisions of the courts. Katherine will also assist with preparing advice to health care providers on the practical effect of new legislation and with general research and litigation support.

## **Gwen Learey, Personal Assistant**

Gwen joined us at the beginning of August. Gwen has extensive experience as a legal assistant.

## **What is Health Legal?**

Health Legal was established as a result of the Victorian health sector indicating it wanted a quality and competitively priced legal service that understood their environment and was able to focus on their unique needs.

Health Legal is able to meet the health sector's daily legal needs. The team provides litigation, contracting, legislative compliance and medico-legal advisory services. We can be contacted by telephoning (03) 9861 4001. Our website is [www.healthlegal.com.au](http://www.healthlegal.com.au)

## **Your personal details**

Health Legal may use personal information we have collected about you to send you information about topics we think will be of interest. We may also send you information about Health Legal. If you do not want us to use your personal information for those purposes please contact our office via the details shown below.

## **Copyright**

If you would like to reproduce any part of this report please contact us on (03) 9861 4001 or email: [samantha.pearce@healthlegal.com.au](mailto:samantha.pearce@healthlegal.com.au)

© Health Legal 2006

This newsletter has been prepared by Health Legal. Professional advice should be sought before applying this information to particular circumstances. No liability will be accepted for any losses incurred by those relying solely on this publication.

