

Afterword

Angela M. Long*

One can scarcely open the newspaper or watch television these days without coming across a story that somehow relates to health law. The recent Supreme Court of Canada decision in *Starson v. Swayze*¹ comes to mind, as well as the constant updates on genetics and the current debates which have surrounded the release of the Romanow and Kirby reports, which encompass several pressing issues, including the privatization of health services.

The papers published in this special edition of the Health Law Journal certainly highlight this prevalence, with a wide and varied range of topics. Indeed, after spending many hours poring over these papers, reading, checking citations and re-reading, I was struck by two things about the issue as a whole.

First, many of these topics touch not only on various aspects of health law, but also on the more “traditional” areas of the law. Some examples are the link between health law and insurance law addressed by Trudo Lemmens in his paper, and the link between health law and intellectual property law made by Richard Gold. These links promote a shift in the ideology behind the traditional subjects of the law. Health law is becoming an intricate part of these subjects.

The move from health law being its own insular area of the law to it being more widely incorporated within the more traditional areas is significant. As students, scholars and lawyers are quickly learning, health law, in all its forms, is an incredibly important part of our legal system. Health is something that affects us all on a very personal level. It is something that we all have a stake in. There is room for varied perspectives from different subject areas, as we have seen in this edition. As students, scholars, lawyers, policy makers and others, we realize that we can all influence the path that health law, in all of its various incarnations, takes.

Second, it is also striking that topics that have not received a great deal of attention in the recent past are coming to the forefront of health law discourse. When one thinks about what has been happening lately in the realm of health law, the things that typically come to mind are topics like the regulation of stem cell research, health care reform, consent law and privacy issues which are expertly covered in this issue by Timothy Caulfield, Joan Gilmour, Gerald Robertson, Patricia Kosseim and Elaine Gibson. These areas have received a lion’s share of recent public and professional attention. While these topics are obviously very

* Angela Long, Research and Writing Belzberg Fellow, Faculty of Law, University of Alberta, and Associate Editor, Precedent & Innovation special edition, Health Law Journal. The author wishes to thank Tracey Bailey and Timothy Caulfield for their insightful comments and editing.

¹ 2003 SCC 32 [*Starson*].

important, other topics are equally important and deserving of equal attention. Three important topics, in my view, that have received such attention here are mental health law, research involving humans and disability.

Mental Health Law

Those with mental illnesses are often relegated to the fringes of society. It's something that no one ever wants to discuss, especially if they themselves, or someone in their family or one of their friends is afflicted. It's often easier to say nothing, avoid the stigma and appear "normal". People with mental illnesses are thus often misunderstood, labelled as "crazy" and are packed off to a facility where they are out of sight from the rest of society. As a result of these attitudes, it appears that the law relating to mental illness has lagged far behind the rest of health law.

The article written by Archie Kaiser addresses this issue squarely. He sheds some light on the dismal state of mental health law in Canada, and proposes some interesting and progressive changes that would shift the focus of mental health law in order to meet the actual needs of those with mental illnesses, instead of the needs perceived by our paternalistic society.

Patricia Peppin and Elaine Carty's article addressing the issue of advertising with respect to psychiatric drugs provides another perspective on the issue of mental health law. The idea promulgated by drug companies is that most, if not all, mental illness can be "fixed" by use of their products. This promotes the theory that mental illnesses are indeed "chemical imbalances" that can be cured by the use of drugs alone. This theory ignores many of the realities of those suffering from mental health problems. The continued unabated advertising of these drugs does not help their suffering. In addition, the advertisements often ignore the harmful side effects of the drugs they seek to sell, as well as harmful withdrawal symptoms that may occur when drug treatment ceases. The advertising laws with respect to these drugs in Canada need to be changed to reflect the problems addressed by Peppin and Carty.

Research Involving Humans

While this topic is not new, it is one, in my mind, that often receives a burst of attention when there is a particularly bad outcome that tapers off once all of the publicity dies down.² Without the public, or legal, outcry, nothing much is done to remedy the problems that caused the bad outcome in the first place, such as having stricter regulations on the testing of new drugs, or on the reporting of negative side effects. In addition, there are many other examples of bad outcomes on human

² An example of this would be the Nancy Olivieri case discussed by Jocelyn Downie in "Contemporary Health Research: a Cautionary Tale".

research subjects that are not widely reported to the public.³ How can we bring about change, and who should be responsible for bringing that change about?

Jocelyn Downie explored the first part of the question in depth and provided some practical guidelines for lawmakers and enforcers that would help eliminate these kinds of problems in the future. Now all that we need is for the government to take notice and action.

Jocelyn Downie, Jennifer Llewellyn and Robert Hughes have assisted in bringing this issue to the forefront by dealing with the second part of this question in their paper on the intricate jurisdictional issue surrounding research involving humans in Canada. They concluded that the Canadian government has the jurisdiction to legislate in this area, and should assert their jurisdiction, which would ensure consistent laws and regulations across Canada instead of the piecemeal approach that we have now.

Disability

Most of us assume that people with disabilities would want to “fix” them if they had the opportunity; hearing impaired people would all want cochlear implants, sight impaired people would all want corneal transplants and those with genetic conditions would choose to screen their eggs to prevent their offspring from contracting the same disability. What people do not assume is that for people with disabilities these solutions are often exactly what they do not want. As Catherine Frazee points out in her piece, disability is an “unexpected” but important guest in health law. Many of the pressing topics that health lawyers deal with, such as genetics, new reproductive technologies and euthanasia, she states, have a significant impact on the lives of those with disabilities. These issues also inform the way those without disabilities perceive disability generally. Yet the disabled point of view in dealing with these issues is not taken into account, but should be. Professor Frazee’s powerful presentation will hopefully make the “unexpected guest” a regular participant in health law discourse.

Conclusion

The papers published in this edition have provided much food for thought for those working in the health law field, and for those with an interest in getting more involved in health law. It is hoped that they can act as a starting point for further reflection, discussion and potential reform.

³Examples of such studies are also reported by Jocelyn Downie, *ibid.* The CBC show Marketplace also speaks of some of the risks to people in clinical trials that they were not warned about before entering the protocol. Marketplace, “Drug Trials” (18 March 2003), online: CBC Canada <http://www.cbc.ca/consumers/market/files/health/drug_trials/>.

