

## new developments

### *Bioethics and Health Law in New Zealand*

## law commentary

Warren Brookbanks

Faculty of Law, University of Auckland

During 2002 there were a number of developments in the areas of law and policy which have an important bearing on bioethics and health law. They exemplify the growing range of complex bioethical issues demanding responses from the courts, clinicians and policy makers. A theme, if one can be discerned, may be the importance of ensuring public protection from adventitious events that may accompany the advance of scientific knowledge.

#### **The Bottrill Case**

In the Law Commentary section of this journal in February 2002 Nicola Peart (Peart, 2002, p.13) outlined the legal processes against Dr Bottrill, up to, but not including the Privy Council decision, which was ultimately delivered on 29 May 2002. This note will be concerned only with the Privy Council decision, in particular the Judicial Committee's approach to the issue of exemplary damages.

The Plaintiff, Mrs A, appealed with leave from the judgment of the New Zealand Court of Appeal which had allowed an appeal by Dr Bottrill from a decision of the High Court. In that hearing Young J had ordered a new trial of the plaintiff's action against the defendant for exemplary damages for negligence having dismissed that claim on 19 March 1999. A new trial was ordered because a subsequent investigation into the reporting of cervical smear results by the defendant had revealed that his false reporting rate was very high. The judge considered that the new evidence undermined his reasoning at trial. However, the Court of Appeal by a majority reversed the High Court decision, holding that exemplary damages for negligence could only be awarded in cases in which the defendant was subjectively aware of the risk to which his conduct exposed the plaintiff and had acted deliberately or

recklessly in taking that risk. The Court of Appeal held that the new evidence could not establish that the defendant had a conscious disregard for the plaintiff's welfare and thus would not justify reconsideration by the judge of his original decision.

The question raised by the appeal for the consideration of the Privy Council was whether under the common law of New Zealand awards of exemplary damages for negligence are, or should be, restricted to cases of intentional wrongdoing or conscious recklessness.

Speaking for the majority of the Committee, Lord Nicholls commenced by reiterating the rationale for exemplary or punitive damages. Exceptionally, a defendant's conduct in committing a civil wrong is so outrageous that an order for payment of compensation is an inadequate response, and something more is needed to demonstrate that the conduct is altogether unacceptable to society. Thus further payment may be demanded from the wrongdoer by way of condemnation and punishment.<sup>1</sup>

Lord Nicholls emphasised that 'overwhelmingly', in those exceptional cases where exemplary damages is considered, the defendant's conduct will be of a subjectively *advertent* nature, and that 'overwhelmingly' in cases of negligence (objective liability – 'ought to have known') exemplary damages will be appropriate only where the defendant's wrongdoing was intentional or consciously reckless.<sup>2</sup>

However, to reason from this 'advertent conduct only' limitation upon exemplary damages, as was done by the Court of Appeal in the present case is, in Lord Nicholls' view, a rigid exclusion that does not line up with the rationale of the exemplary damages

jurisdiction and 'is at odds with the underlying principle'.<sup>3</sup> His Lordship noted that even the criminal law is not exclusively confined to cases of advertent conduct.

In the final analysis the majority agreed with the approach of Thomas J in his dissenting judgment in the Court of Appeal, to the effect that the necessity to observe the distinction between advertent and inadvertent conduct will distract courts from making a decision in accordance with the fundamental rationale of exemplary damages.<sup>4</sup> Lord Nicholls said:

If having heard all the evidence, a judge firmly believes the case is so truly exceptional and outrageous that an award of exemplary damages is called for, his power to make an award is not dependent upon his being able conscientiously to find that the defendant was subjectively reckless. The absence of intentional wrongdoing and conscious recklessness will always point strongly away from the case being apt for an award of exemplary damages. That is a very important factor to be taken into account by the judge. But if a judge decides that, although the case is not one of intentional wrongdoing or conscious recklessness, the defendant's conduct satisfies the outrageousness test and condemnation is called for, in principle the judge has the same power to award exemplary damages as in any other case satisfying this test.

In finding against restricting exemplary damages to cases of intentional or consciously reckless conduct, his Lordship took the view that such a rigid limitation had a fundamental flaw in that it fails to treat like cases alike. For the purposes of exemplary damages the basic question is always whether the defendant's conduct satisfies the outrageous conduct criterion.<sup>5</sup>

The minority, Lord Hutton and Lord Millett, while disagreeing with the majority in respect of the scope of the exemplary damages jurisdiction, agreed with the majority that a new trial should be ordered and allowed the appeal.

#### *Implications of the Decision*

It seems unlikely that this ruling will have a significant impact on this area of the law in New Zealand. While the decision has, in principle, expanded the scope of the exemplary damages jurisdiction, the majority decision was at pains to emphasise that cases in which it is appropriate to make an award of exemplary damages are 'exceptional' and 'rare indeed'.<sup>6</sup> A

perceived need for compensation, or more compensation, will never be a proper basis for making an award of exemplary damages. Because awards of compensatory damages are not made by New Zealand courts in cases of accidental personal injury, there can be no question of the need for punishment being satisfied by an award of compensatory damages. This feature of the law of New Zealand, as Lord Nicholls warns, does serve to emphasise the need for much restraint in the exercise of the jurisdiction in this country.<sup>7</sup>

#### **Removal of Baby Hearts**

It was revealed in February 2002 that Auckland's Greenlane Hospital held a collection of more than 1300 hearts, some dating back to 1950, that had been retained for medical education and research. Most of the hearts came from aborted fetuses, babies, children and a number of adults with congenital heart defects.

When the revelations were first made public it was suggested that the 'heart library' was historic and that consent had been obtained for hearts retained over the last decade. However, further enquiries revealed that, in addition to hearts, in some cases lungs, kidneys, spleen and liver had also been retained. As late as November 2000 a baby's heart was taken without consent (Cole, 2002, p.4).

Predictably, these disclosures rapidly developed into a major controversy as medical authorities went into 'damage control' mode in an effort to deal with the personal grief of affected families and a rising sense of public outrage. Green Lane Hospital soon began to offer hearts taken from babies and children back to families, many of whom were unaware that they had been removed.

This event has highlighted the difficulties that arise in trying to balance the demands of medical science, the good of the community and the need for sensitivity and trust to be established over access to body parts after death. It has also identified weaknesses in the current law that may need to be addressed as a matter of law reform.

#### *Consent*

An issue of concern was whether consent had been obtained for the removal of organs, or whether consent was even necessary for such procedures. The *Human Tissue Act 1964* provides that where a person, before their death, has *requested*

that their body be used after death for therapeutic purposes or for medical education and research, a person lawfully in possession of the body may 'unless he has reason to believe the *request* was ... withdrawn' authorize the removal and use of body parts for the use requested.<sup>8</sup> The Act also requires that before the person lawfully in possession of the body authorizes the removal of any part of the body, he or she must have made 'such reasonable inquiry as may be practicable' to ascertain whether any surviving relatives of the deceased objects to the proposed use of the body. It is not a requirement for relatives to *consent* to the proposed use but a negative obligation to ascertain whether they *object* to the body being dealt with in the manner proposed.

As Professor Skegg has noted (Skegg, 2002), there can be no actual ownership in the body of a dead person and as the law stands there is no actual requirement for consent for the removal and retention of such body parts. He considered that while the present law provided a 'complication' in terms of assisting good ethical practice in this area, he did not think it was essential for law change in order to ensure that consent from relatives was obtained.

While there are clearly practical advantages for clinicians in not having to obtain formal consent for the removal of body parts from dead bodies where such use has been requested by a health consumer while alive, it is surely a different matter where there has not been a living request for utilization of one's body after death and no attempt has been made to obtain authorization from family members for such use. It is an area which may need further clarification in order to avoid the stress to families.

#### *Commoditization of Body Parts*

A significant, albeit unrelated issue, is the broader ethical question concerning the commoditization of cadaveric human tissue generally. In a paper written over a decade ago, the Australian Institute of Criminology warned of dangers associated with the poor regulation of the international human organ industry, noting that market transactions involving human tissue have been prohibited in many countries because it was believed that the human body should not be allowed to become a commodity (see Halstead and Wilson, 1991, p.5).

The risk, it would seem, is that without proper statutory rules governing the regulation of the removal and retention of body parts from dead persons, there is a danger that, with the increasing

commoditization of the human body, an industry could develop in the sale or exchange of cadaveric body parts for research purposes between jurisdictions. The bad old days of the body-snatchers may not be that far behind us. Without any ethical or legal constraints appearing to limit the potential growth of such an industry, grieving families could become the unwitting victims of the most egregious and unseemly commercial transactions, in circumstances in which they are blinded to the true destination of their loved one's mortal remains.

#### *The Ethics of Trust*

The other victim when such dubious practices go unregulated is trust between health care experts and consumers of health care services. It has recently been suggested that there has been a revival of trust in discussions of medical ethics and that scholars from a range of disciplines are attempting to reconcile ethical theory and professional practice with the essential attributes of care-giving relationships (Hall, 2002, p.108; see also Lagana, 2000, p.12). Nothing could be better calculated to severely damage the re-emergence of trust in doctor-patient relationships than a widespread public perception that physicians were insensitive to the concerns of grieving families or that they practised a policy of deliberate deceit in failing to disclose the removal of body parts from beloved deceased relatives.

There is some support for the view that the law needs changing, given the fact that it is based on, arguably, outdated English legislation and that the Code of Health and Disability Services Consumers Rights does not cover the dead.<sup>9</sup> However, even if there proves ultimately to be resistance to legislative change, it would be useful if guidelines were formulated to assist professionals to define what is good ethical practice in this area. These should cover all issues around consent, specific protocols for managing the concerns of Maori, clarification of who controls a body after death, and what constitutes a 'reasonable inquiry as may be practicable' as to whether any surviving relative objects to the proposed use.

#### **Bioethics Council**

In October 2001 the New Zealand Government agreed to the establishment of Toi Te Taiao, the Bioethics Council – one of the recommendations of the Royal Commission on Genetic Modification. In recommending the establishment of the Council the Royal Commission had recognized the importance of the cultural, ethical and spiritual aspects of biotechnology,

especially to Maori. For this reason, former Governor general Sir Paul Reeves has been appointed as Chair of the Council,<sup>10</sup> the terms of reference of which were published on 16 January 2003.

The Council will also provide guidelines on biotechnology issues with a significant public impact, and ensure that the public is able to participate in the Council's activities, consistent with the Terms of Reference. Although the Bioethics Council arose out of the context of the genetic modification debate, its brief is likely to be significantly broader and to embrace ethical issues in biotechnology generally. These could include genetic and cell-based technologies such as genetic testing, cloning and xenotransplantation.

Because of the potential diversity of the issues that are likely to come before it, the Council will need to be well equipped in its understanding of the legal, ethical and policy issues that accompany pressing biotechnology concerns. For example, it will need to respond to the challenge that the biotechnology sector in New Zealand is being held back by an over-cautious regulatory environment, arguably a function of the Royal Commission's advice that the Government should 'proceed with caution' (Stevenson, 2002) while allowing opportunities to be carefully explored.

This cautionary approach has already opened the Government to the allegation that its proposal to legally ban the transplant of animal cells into people is 'unconstitutional', a matter that looks likely to proceed to litigation (see Collins, 2002).

The Council will also have to deal with the powerfully expressed concerns of the Maori community, which generally rejects the release of GMO technology into the environment (Burton, 2001). The prospect of crossing genes from one species to another is generally repugnant to many Maori, who regard it as disrespectful of life (Burton, 2001). Dealing with these concerns within a framework of the government's obligations under the Treaty of Waitangi, will be a major early challenge for the Bioethics Council and will be a test of the ethical, legal, cultural and spiritual insights of its appointed members. The Terms of Reference specifically require that the Council 'demonstrate its commitment to the Treaty of Waitangi including the responsibility to consult and engage with Maori in a manner that specifically provides for their needs'.

While it is anticipated that the Bioethics Council will be

instrumental in providing guidance on broad cultural and ethical issues, it now seems clear that the Council will be a policy advisor, not an ERMA-style decision-maker about particular cases. This is consistent with the expectations of the Chief Executive of the Environmental Risk Management Authority (ERMA), Dr Basil Walker (Walker, 2001).

### The Burton Report

The Health and Disability Commissioner, Ron Paterson, delivered his report (HDC Report, 2002) on *Southland District Health Board Mental Health Services February-March 2001* (The Burton Report) in October 2002. The Report is an exhaustive account of the events surrounding the death of Mrs Paddy Burton, murdered by her son following his release from compulsory care by Southland District Health Board's inpatient mental health services.

The Report is highly critical of Southland DHB citing, amongst other things, inadequacies in monitoring and control mechanisms to ensure that staff practised safely and generally substandard practice.

The Report analyses in some detail issues around the Commissioner's finding that Southland DHB failed to fulfill its organizational duty of care and skill, and breached Right 4 (1) of the Code of Health and Disability Services Consumers' Rights, including the issue of corporate responsibility. In this regard the Commissioner concluded that Southland DHB's inpatient mental health service was characterized by so many organizational shortcomings that the quality of care for mental health patients was 'inevitably' compromised (HDC Report, 2002).

Following on from this incisive and damning review, the Commissioner has made 50 far-reaching recommendations which, if they are implemented, will go some way towards reducing the risk environment which led to this tragedy occurring. However, it is as well to remind ourselves that no one can ever guarantee that such events will never be repeated, whether in Southland or in some other region. While there are important lessons to be learned from this event, the important issue is how do we move from here to ensure that the lessons learned are applied in all the other regions which offer mental health services. This will involve moving beyond individual blame to recognizing the sociological facts and economic realities which characterize corporate wrongdoing (Wells, 1993, cited in Merry and McCall Smith, 2001, p.242)

and putting in place strategies which are more consciously responsive to systemic dysfunction as and when it occurs.

#### Notes

1. *A v Bottrill* [2002], 3 WLR 1406, 1411. See also *Rookes v Barnard* [1964] AC 1129, 1228. Exemplary damages are to be awarded where compensation is 'inadequate to punish [the defendant] for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it ...'. Per Lord Devlin at 1228.
2. *A v Bottrill*, supra, at 1412.
3. *Ibid*, 1413.
4. See *Bottrill v A* [2001], 3 NZLR 622, at 657-658 per Thomas J.
5. *Ibid*, 1415.
6. *Ibid*, 1420.
7. *Ibid*.
8. *Human Tissue Act 1964*, 3.
9. This is the view of the Health and Disability Commissioner, Ron Paterson (Paterson, 2002).
10. The full Council has 11 members, including the Chair. They are: Sir Paul Reeves, Helen Bichan, Eamon Daly, Anne Dickenson, Professor Gary Hook, Waiora Port, Graham Robertson, Professor Ian Shirley, Cheryl Smith, Jill White and Dr Martin Wilkinson.

#### References

- Burton, B. (2001). Approval of GMO trials fuels Maori backlash @ <http://proutworld.org/news/en/2001/oct/20011031new.htm>, accessed 24 January 2003.
- Cole, S. (2002). Lessons from Green Lane Hospital. *The Nathaniel Report* 6, April, pp.4-5.
- Collins, S. (2002). Pig-cell ban unconstitutional. *New Zealand Herald*, 29 January.
- Hall, M. (2002). Law, Medicine and Trust. *Stanford Law Review* 55, pp.101-165.
- Halstead, B. and Wilson, P. (1991). 'Body crime': human organ procurement and alternatives to the international black market. *Trends and Issues* 30, March, Australian Institute of Criminology, pp.1-8.
- HDC Report (2002). *Southland District Health Board Mental Health Services February-March 2001*, Auckland, October.
- Lagana, K. (2000). The 'right' to a caring relationship: The law and ethic of care. *Journal of Perinatal and Neonatal Nursing* 14, pp.12-24.
- Merry, A. and McCall Smith, A. (2001). *Errors, Medicine and the Law*. Cambridge: Cambridge University Press.
- Paterson, R. (2002). Heart row fuels call for review. *New Zealand Herald*, 1 March.
- Peart, N. (2002). Bioethics and health law in New Zealand Law commentary. *New Zealand Bioethics Journal*, 3:1, pp.13-17
- Skegg, P. (2002). Hospitals legally entitled to keep hearts, says expert. *New Zealand Herald*, 28 February.
- Stevenson, P. (2002). Regulation 'holding biotech sector back'. *New Zealand Herald*, 13 February.
- Walker, B. (2001). The role of the regulator: implications of the Royal Commission Decisions for organisations involved in GMO research, importing or release. Presentation to Genetic Modification Summit, Duxton Hotel, Wellington, 26 and 27 November.
- Wells, C. (1993). *Corporations and Criminal Responsibility*. New York: Oxford University Press.