

NOT YOUR STANDARD SMOOTHIE: PLACENTOPHAGY, INFLUENCERS AND REGULATION

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Placentophagy, ie consumption of raw or processed human placenta, poses challenges for health law, consumer law, community education and health practitioner ethics. Is it a matter of personal autonomy? A social-media fueled practice akin to vaginal eggs and healing crystals that does not require regulation? Are potential harms sufficient to justify intervention through regulation by therapeutic goods regulators or consumer protection agencies? This article highlights legal concerns such as potentially misleading claims by providers of encapsulated placenta services in an era of ‘fake health news’. It discusses regulatory incoherence and suggests responses as part of broader educational measures to foster community health.

Introduction

The liberal democratic state’s abhorrence of eating humans, whether alive or dead, is evident in judgments such as *Dudley v Stephens*.¹ It is also evident in popular culture, including films such as *Silence of the Lambs*² and *The Cook, the Thief, His Wife and Her Lover*³ or in tabloid accounts of criminals such as Armin Meiwes and Jeffrey Dahmer.⁴ Australian instances might now be addressed as under criminal law provisions regarding interference with a corpse, as unnecessary given that an offender might be convicted of a more serious offence⁵ or as indicia of a psychiatric problem sufficient for involuntary confinement.⁶ Historically law accommodated the ingestion of *mumia*, that is therapeutic consumption of what was claimed to be remnants of Egyptian mummies.⁷ In Australia there is one exception to restrictions on eating

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¹ *R v Dudley and Stephens* (1884) 14 QBD 273 DC; and A W Brian Simpson, *Cannibalism and the Common Law: The story of the tragic last voyage of the Mignonette and the strange legal proceedings to which it gave rise* (University of Chicago Press, 1984).

² Ted Tally, ‘Silence of the Lambs’ in Syd Field, *Four Screenplays: Studies in the American Screenplay* (Dell, 1994) 209; and Thomas Harris, *The Silence of the Lambs* (Mandarin, 1990).

³ Tatjana Pavlov, ‘Consuming the Body: Literal and Metaphorical Cannibalism in Peter Greenaway’s Films’ in Konstanze Kutzbach and Monika Mueller (eds) *The Abject of Desire: The Aestheticization of the Unaesthetic in Contemporary Literature and Culture* (Rodopi, 2007) 129. Other works include *Soylent Green* (1973), *Raw* (2016), *Delicatessen* (1991), *American Psycho* (2000) and *Eat The Rich* (1987)

⁴ Charles J Reid Jr, ‘Eat What You Kill: Or, a Strange and Gothic Tale of Cannibalism by Consent’ (2013) 39 *North Carolina Journal of International Law & Commercial Regulation* 423; and Richard Tithecott, *Of men and monsters: Jeffrey Dahmer and the construction of the serial killer* (University of Wisconsin Press, 1997).

⁵ The offender in *Regina v Knight* [2001] NSWSC 1011 was for example convicted of killing the victim rather than preparing him as a meal intended for his children.

⁶ See for example *R v NQ* [2013] QCA 402, *Crimes Act 1958* (Vic) s 34B and *Criminal Code 1899* (Qld) s 236; and Imogen Jones, ‘A grave offence: corpse desecration and the criminal law’ (2017) 37(4) *Legal Studies* 599-620. See more broadly the discussion in Bruce Baer Arnold, ‘Thawing Out Personhood: Australian Law and Cryonics’ (2020) 17(1) *Canberra Law Review* 43.

⁷ Karl Dannenfeldt, ‘Egyptian Mumia: The Sixteenth Century Experience and Debate’ (1985) 16(2) *Sixteenth Century Journal* 163; Richard Sugg, ‘Corpse Medicine: Mummies, Cannibals, and Vampires’ (2008) 371(9630) *The Lancet* 2078; Karen Gordon-Grube, ‘Anthropology in Post-Renaissance Europe: The Tradition of Medicinal Cannibalism’ (1988) 90 *American Anthropologist* 405; Barbara Scholz-Böttcher, Arie Nissenbaum and Jurgen Rullkötter, ‘An 18th Century Medication ‘Mumia Vera Aegyptica’ – Fake or Authentic?’ (2013) 65 *Organic Geochemistry* 1.

human flesh. The exception is placentophagy, the ingestion of raw or processed human afterbirth in the form of drinks ('raw placenta smoothies'), capsules and other products. That consumption is claimed to have 'wellness' benefits for mothers and newborn infants, is propagated by New Age influencers and the mass media, and is attracting investment by commercial service providers. Irrespective on taboos about what law regards as waste, placentophagy raises questions about both health (infection affecting vulnerable people), consumer protection (misleading statements regarding goods and services) and the role of law in shaping community understanding of health in the latest era of 'fake news'.

This article begins by providing an overview of placentophagy, a practice that is evident in pre-modern cultures and has reappeared – and been commercialised – since the 1970s as an aspect of what is sometimes characterised as wellness or New Age thinking in which emotion and intuition are prized ahead of verifiable scientific data. Part Two highlighting issues that might justify regulatory intervention. Part Three considers placentophagy within Australian legal frameworks, noting the absence of references in statute and judgments alongside scope for action under Commonwealth and state/territory powers. Part Four contextualises the preceding discussion by considering belief, health and regulation within a broader framework of digital fake news.

I Consumption

Unconventional Intake

Consumption of the placenta, whether raw or in a prepared form (and by a mother or others) is a feature of many cultures. It was a folk practice in parts of pre-modern Eastern Europe and is discernible in other locations such as Melanesia and Central Africa, with ingestion by mothers and others within a ritual framework.⁸ It was not evident among colonists within the Australian settler state. Accounts of childbirth at home (predominant in the period before increasing medicalisation of birthing alongside easy access to medical practitioners and hospitals) thus often refer to disposal through burial or burning of the placenta, sheets and clothing.

In contemporary Australia, there appears to be a revival of placentophagy, sufficient for the provision of commercial services rather than merely breathless items in tabloids, magazines, womens' health sites and social media.⁹ The incidence and demographics of placentophagy practice are unclear. There has for example been no authoritative survey, comprehensive independent health study or specific report by a parliamentary committee or regulatory body. The Therapeutic Goods Administration (TGA), the arm of Australia's national Health Department that functions as the equivalent of the US Food & Drug Administration (FDA) has issued a general caution, discussed below, but there has been no concerted education or inspection campaign by public health bodies.¹⁰

⁸ Elaine Jones and Margarita Kay, 'The Cultural Anthropology of the Placenta' in Lauren Dundes (ed) *The Manner Born: Birth Rites in Cross-cultural Perspective* (Rowman Altamira, 2003) 99; and Sharon M Young, and Daniel C Benyshek, 'In search of human placentophagy: a cross-cultural survey of human placenta consumption, disposal practices, and cultural beliefs' (2010) 49(6) *Ecology of Food and Nutrition* 467.

⁹ For example Gina Escandon, 'Kailyn Lowry & 10 Other Celebs Who Ate Their Own Placentas After Giving Birth' *SheKnows* (5 August 2020); Alicia Vrajlal, 'Triple J Alum Veronica Milsom Cooked Her Placenta Into Sausage Rolls For A Dinner Party: Introducing the 'pla-sausage roll' *HuffingtonPost* (1 October 2020); 'Hilary Duff speaks out after drinking her placenta in a smoothie' *7News* (25 September 2020).

¹⁰ Therapeutic Goods Administration (19 January 2018) Human Placenta Ingestion, <https://www.tga.gov.au/human-placenta-ingestion>.

Postmodern placentophagy can be considered as a manifestation of what Hobsbawm dubbed the invention of tradition,¹¹ practice legitimised through claims of continuity with an idealised suppressed past.¹² It might more usefully be understood as a manifestation of the wellness movement over the past fifty years that features language about self-actualisation and mindfulness, disregard of (and at times express hostility to) ‘conventional medicine’, reference to a spiritual dimension of health, respect for celebrities as sources of expertise and legitimacy, ‘mcMindfulness’ and susceptibility to exploitation by vendors of ‘alternative medicine’ products and services that encompass jade vaginal eggs, magnetic beds, the palaeo diet, ‘energy medicine’ and denial that COVID-19 is viral.¹³

In commenting on wellness merchandising by celebrity Gwynneth Paltrow, Crockford thus comments

The message of Goop is that there is a way to perfect oneself. By using the right products, it is possible to curate the perfect neoliberal self: energized, tight, fashionable, radiant, glowing. It does, however, require plenty of money to access this route to perfection, as Goop sells primarily luxury fashion and accessories. ... Goop is not alone in offering a series of products, opaque in purpose and complexity, invoking grand visions of personal enhancement. The wellness industry both fuels and profits from the idea that physical beauty is proof of inner righteousness as well as health. Those perfect on the outside are assumed to be equally perfect inside. In a capitalist society, those that are able to afford this level of purchasable perfection are the wealthiest. There is, therefore, a strong vein of classism and elitism running through not only Goop but the ideology of wellness that informs the industry.

Wellness is an unregulated industry that capitalizes on people’s desperation and insecurities, offering them cures for all ills and imperfections at high prices.¹⁴

One route to wellness is placentophagy. That consumption has been valorised as a manifestation of personal authenticity, agency and discovery – by the astute – of unrecognised ‘treasure’.¹⁵ It is one mechanism for self-affirmation, virtue signalling and assertion of status or to ‘spiritualise’ the birth.¹⁶ It has also been valorised as mechanism for natural wellness or avoidance of ills such as postpartum depression,¹⁷ alongside the embrace of practices such as facilitation of childbirth by a doula.¹⁸ One Australian vendor offers to turn the dried umbilical cord into a ‘dream catcher’ and offers

¹¹ Eric Hobsbawm, ‘Inventing Traditions’ in Eric Hobsbawm and Terence Osborn Ranger (eds), *The Invention of Tradition* (Cambridge University Press, 1983) 1.

¹² Sharon M Young, and Daniel C Benyshek, ‘In search of human placentophagy: a cross-cultural survey of human placenta consumption, disposal practices, and cultural beliefs’ (2010) 49(6) *Ecology of Food and Nutrition* 467, 472 and 482.

¹³ James William Miller, ‘Wellness: The History and Development of a Concept’ (2005) 1 *Spektrum Freizeit* 84; and Carl Cederström and André Spicer, *The wellness syndrome* (John Wiley, 2015).

¹⁴ Susannah Crockford, ‘What Do Jade Eggs Tell Us about the Category “Esotericism”? Spirituality, Neoliberalism, Secrecy, and Commodities’ in Egil Asprem and Julian Strube (eds), *New Approaches to the Study of Esotericism* (Brill, 2020) 201, 203

¹⁵ Charlotte Kroløkke, Elizabeth Dickinson and Karen A Foss, ‘The placenta economy: From trashed to treasured bio-products’ (2018) 25(2) *European Journal of Women's Studies* 138.

¹⁶ Emily Burns, ‘More than clinical waste? Placenta rituals among Australian home-birthing women’ (2014) 23(1) *The Journal of perinatal education* 41 and ‘The blessingway ceremony: ritual, nostalgic imagination and feminist spirituality’ (2015) 54(2) *Journal of religion and health* 783.

¹⁷ Emily Hart Hayes, ‘Consumption of the Placenta in the Postpartum Period’ (2016) 45(1) *Principles and Practice* 78.

¹⁸ See for example Peta Rasdien (16 March 2018), ‘Eating placenta, capsules popular with Perth mums despite health questions’, <https://www.news.com.au/national/western-australia/eating-placenta-capsules-popular-with-perth-mums-despite-health-questions/news-story/44d050135303543ae7eb6819of5f2af6>

Placenta Tincture – \$40 ... Putting part of your placenta in tincture form is another way to stretch out its longevity. A small portion of placenta is added to alcohol and steeped for 6 weeks. Some of the benefits may include hormone stabilization in your postpartum cycles, less bleeding during those cycles, energy and for menopause years down the road. The female child may also benefit from placental tincture once she begins her menstruation cycles.

Placenta Cream – \$30 ... A skin cream of our placenta and a variety of healing herbs and oils may offer healing properties to c-section scars once they are healed, haemorrhoids, perineal tearing, cracked or blistered nipples, eczema, sun burn, nappy rash (can be made cloth nappy safe!), skin irritation and more.

Placentophagy has been promoted in cookbooks, alternative health websites, social network services such as Facebook or Twitter and in other media.¹⁹ It also appears to be espoused by some doulas²⁰ and ‘foodies’,²¹ with enthusiasts making various claims such as placentophagy will foster lactation and endow the consumer with nutrients such as iron and hormones such as progesterone, prostaglandin, oxytocin and estrogen.²² Use of placenta products is appearing in other contexts, with *The Guardian* for example in 2009 offering an irreverent view by an anonymous general practitioner – pseudonymised as Dr Crippen, Dr Lector presumably having negative connotations – regarding the use of ‘placenta fluid’ in treatment of an injured footballer.²³

Given the mixture of demand, low processing costs, light touch (or absent) regulation and novelty the emergence of a range of commercial placentophagy services that co-exist with the do-it-yourself preparation featured in some websites and magazines is discernible in Australia and other advanced economies.²⁴

Services will for example collect the placenta from a home or hospital, steam and dry it, and provide it to the mother intact or in capsule form. Those services do not appear to have encountered difficulty in dealing with hospitals,²⁵ including those affiliated with religious bodies, or questions about the status of the placenta as property,²⁶ something potentially addressed under regulatory frameworks such as the 15 February

¹⁹ See for example Katie DiBenedetto, *DIY Placenta Edibles: Smoothies + Tinctures + Chocolates*, (Createspace, 2014) and Annie Daly (27 January 2015), 4 Ways To Eat Your Placenta: Placenta ... It’s What’s For Dinner, *WomensHealth Magazine*, <https://www.womenshealthmag.com/life/a19894847/placenta-recipes/>

²⁰ Elizabeth C Rigg, Virginia Schmied, Kath Peters and Hannah G Dahlen, ‘The role, practice and training of unregulated birth workers in Australia: A mixed methods study’ (2019) 32(1) *Women and Birth* e77; and Amie Steel and Renee Adair, ‘The ghost in the room: the role of doulas in maternity care in Australia’ (2011) 24(1) *Women and Birth* s44.

²¹ Josée Johnston and Shyon Baumann, *Foodies: Democracy and distinction in the gourmet foodscape* (Routledge, 2014).

²² See Nick Baines (30 April 2014) I ate my wife’s placenta raw in a smoothie and cooked in a taco, *The Guardian*, <https://www.theguardian.com/lifeandstyle/2014/apr/30/i-ate-wifes-placenta-smoothie-taco-afterbirth>

²³ Dr Crippen, ‘Do placentas have healing powers?’ (18 November 2009) *The Guardian*, <https://www.theguardian.com/society/2009/nov/18/healing-power-placentas>. See more broadly Timothy Caulfield and Amy McGuire, ‘Athletes’ Use of Unproven Stem Cell Therapies: Adding to Inappropriate Media Hype?’ (2012) 20(9) *Molecular Therapy* 1656.

²⁴ See Rasdien at note 15 above.

²⁵ For a US discussion see Rebecca N Baergen, Harshwardhan M Thaker and Debra S Heller, ‘Placental release or disposal? Experiences of perinatal pathologists’ (2013) 16(5) *Pediatric and Developmental Pathology* 327.

²⁶ Wendy Bonython and Bruce Baer Arnold, ‘Beyond the corporeal: Extending propertisation of body parts to derivative information’ (2016) 23(3) *Journal of Law and Medicine* 688.

2016 NSW Policy Directive on Donation, Use and Retention of Tissue from Living Persons²⁷ and the 2016 South Australian Clinical Practice Directive.²⁸

Overall at least 100 Australian businesses, most small and typically emphasising alternative medicine, offer encapsulation of placentas at a cost of around \$300, with the processing apparently being done by a handful of larger businesses. There is no national register of placentophagy service providers and no statistics on the number of mothers who are engaging in DIY processing.

Service provision is not covered by the Commonwealth under the Pharmaceutical Benefit Scheme or under Medicare as a scheduled medical service. It does not appear to be covered by private health insurance. It thus lacks the perceived authority provided by inclusion in those schemes, with consumers having to pay out of their own pocket. However, as with complementary health products, the cost may function as a sign of status. The absence of official endorsement may be seen by consumers as validating their decision to trust in an unqualified influencer rather than 'big pharma' and 'big medicine'.²⁹ The salience of trust for public health is highlighted in the final part of this article.

II Harms

Hands off my body?

Placentophagy has not been specifically addressed in Australian law and has not attracted judicial attention. There are no express references in statute or contemporary judgments. Overall we can infer that individuals are engaging in consumption but that consumption is not apparent in official records. It is in essence an archival silence.

Some advocates appear to have taken the view that the state has no role: a consumers have a right to do what they wish with their bodies (or what was once part of the body) as long as there is no harm to anyone else. Others appear to emphasise self-help and by extension consider that commercial services are merely providing assistance for a legitimate aspect of self-expression, particularly one that has a spiritual value and contributes to the woman's wellbeing. In Europe there has been disagreement about calls to regulate commercially processed placentas as a novel food, with the European Food Safety Authority (and national food standards bodies such as the UK Food Standards Agency in implementing EU-wide standards) seeking to prevent harms through an accreditation process for foods that were not in use in Europe prior to 1997.³⁰ That proposal would not restrict entities that do not sell placenta products or engage in commercial processing.

Most criticisms of placentophagy have centred on the potential harm to the mother or other person who ingests a contaminated raw or processed placenta, for example eats an encapsulated placenta, placenta lasagna, roasted placenta or drinks an uncooked placenta smoothie (three minutes in the blender with a dollop of organic yogurt and

²⁷ NSW Health, Policy Directive on Donation, Use and Retention of Tissue from Living Persons (2016).

²⁸ SA Maternal & Neonatal Community of Practice, 'Management of the Release of a Placenta for Private Use Clinical Directive (Clinical Directive: compliance is mandatory) (South Australia Health Department, 2016).

²⁹ Katherine Cao, 'The Constructed Lifestyle Image: An Examination of Mass Media, Online Social Influencers, and the Commodification of the Self' (2020) 4 *Crossings* 137; Stephanie A Baker and Chris Rojek, *Lifestyle Gurus: Constructing Authority and Influence Online* (Wiley, 2020); and Rebecca Lewis, "'This Is What the News Won't Show You': YouTube Creators and the Reactionary Politics of Micro-celebrity' (2020) 21(2) *Television & New Media* 201.

³⁰ Daniele Pisanello and Giorgia Caruso, *Novel foods in the European Union* (Springer, 2018).

the inevitable turmeric).³¹ That other person would typically be the newborn and in contrast to pandemic diseases the harm will not be a matter of viral transmission across the population at large.

From the perspective of traditional consumer protection and fake health news, it may however be appropriate to look beyond injury attributable to infection or other contamination and instead ask whether products have the therapeutic properties espoused by champions such as the Kardashians and encapsulation service agents. In essence, are those products as described and thus addressable under both the advertising code and the Australian Consumer Law? If the marketing of products is deceptive there is scope for action by the ACCC. Consumer protection in the health space is not necessarily confined to regulation by the TGA.

There is disagreement about the psychological and physical benefits of placentophagy in human and non-human animals.³² Contrary to claims about beneficial hormones acquired through ingestion of prepared placenta products, in particular encapsulated placenta, there is little reason to believe that processing sufficient to alleviate concerns regarding potential infection will retain hormones or other therapeutic agents on a scale that would be efficacious for the consumer.³³ Freezing, steaming, drying, encapsulation or other processes either eliminate or fundamentally reduce the attributes that feature in claims by enthusiasts and some service providers.

There has not been a comprehensive testing of products from all Australian encapsulated placenta service providers, for example. In the absence of a strong evidence basis in favour of therapeutic efficacy, it would be wise for health professionals, including nurses rather than merely clinicians, to alert potential consumers to the likelihood that they will be paying several hundred dollars for what is in essence a 'feel good' or fashion statement rather than something with medicinal value.

That is a consumer issue, one properly addressable at an official level under consumer law and under practitioner self-regulation founded on the Health Practitioner Regulation National Law 2009 rather than narrowly under the TGA's biologicals framework or the historically weak market intervention by Food Standards Australia New Zealand (FSANZ)³⁴ under the *Food Standards Australia New Zealand Act 1991* (Cth) and state/territory food safety agencies.³⁵ Placentophagy does not fit neatly into regulatory boxes: not a medical device, not a recognised pharmaceutical, not a food – or not a food offered to the public at large.

Farr et al commented:

in response to a woman who expresses an interest in placentophagy, physicians should inform her about the reported risks and the absence of clinical benefits associated with the ingestion. In addition, clinicians should inquire regarding a history of placenta ingestion in cases of postpartum maternal or neonatal infections such as group B Streptococcus sepsis. In conclusion, there is no professional

³¹ Alex Farr, Frank A Chervenak, Laurence B McCullough, Rebecca N Baergen and Amos Grünebaum, 'Human placentophagy: a review' (2018) 218(4) *American Journal of Obstetrics and Gynecology* 401-e1; Wendy Lubell-Snyder and Tammi McKinley, 'Placentophagia: stir-fry, smoothie or raw?' (2011) 100 *Midwifery Today* 21.

³² Mark B Kristal, Jean M DiPirro and Alexis C Thompson, 'Placentophagia in humans and nonhuman mammals: causes and consequences' (2012) 51(3) *Ecology of Food & Nutrition* 177.

³³ Sophia K Johnson, Tanja Groten, Jana Pastuschek, Jürgen Rödel, Ulrike Sammer and Udo R Markert, 'Human Placentophagy: Effects of dehydration and steaming on hormones, metals and bacteria in placental tissue' (2018) 67 *Placenta* 8.

³⁴ Dilip Ghosh, 'Food safety regulations in Australia and New Zealand food standards' (2014) 94(10) *Journal of the Science of Food and Agriculture* 1970.

³⁵ See for example *Food Act 2003* (NSW), *Food Act 1984* (Vic) and *Food Production (Safety) Act 2000* (Qld).

responsibility on clinicians to offer placentophagy to pregnant women. Moreover, because placentophagy is potentially harmful with no documented benefit, counseling women should be directive: physicians should discourage this practice. Health care organizations should develop clear clinical guidelines to implement a scientific and professional approach to human placentophagy.³⁶

III Regulation

Representations of placentophagy in social media and works such as placenta recipe books are under-theorised, with no reference to harm, law or regulation. A rights advocate might however persuasively argue that a woman's self-ownership extends to all aspects of disposal of what was her body³⁷ and that now, in conventional medico-legal terms, would be characterised as 'waste'. Such an argument would be consistent with emerging concerns regarding property rights in surgically excised tissue as the basis for cell lines,³⁸ for example controversy over commodification over material removed from Henrietta Lacks,³⁹ and more generally in ownership of genomic data (discussed in a forthcoming monograph by Bruce Baer Arnold and Wendy Bonython).

Australian law's respect for individual autonomy does not require consumers to be especially astute in informing themselves about the lack of evidence for what appear to be claims regarding food and other products. Any 'right to health' is in practice restricted to remedies addressing arbitrary exclusion from health services.⁴⁰ There is no constitutional requirement for the national government or the state/territory governments to ensure health through community education programs and through initiatives that go beyond the Australian Consumer Law or other enactments such as the *Therapeutic Goods Act 1989* (Cth).

Soft regulation as a reflection of uncertain responsibility?

The preceding part argued that placentophagy does not fit neatly into conceptual and administrative boxes. It involves the consumption of what was once human flesh but there have been no Australian criminal prosecutions regarding what might be construed as cannibalism, particularly because it is not associated with violence and does not challenge the state's monopoly of the legitimate use of lethal force. It falls uncertainly within the ambit of regulatory agencies that do not regard it as having a high priority, given that there have been no placentophagy-based disasters (and

³⁶ Ibid, 401-e1.

³⁷ Carmen M Cusack, 'Placentophagy and Embryophagy: An Analysis of Social Deviance within Gender, Families, or the Home' (2011) 1 *Journal of Law & Social Deviance* 112; and Amber Goeden, 'Placentophagy: A Women's Right to Her Placenta' (2018) 3(1) *Concordia Law Review* 6.

³⁸ Wendy Bonython and Bruce Baer Arnold, 'Beyond the corporeal: extending propertisation of body parts to derivative information' (2016) 23(3) *Journal of Law & Medicine* 688; Wendy Bonython and Bruce Baer Arnold, 'Privacy, Personhood and Property in the Age of Genomics' (2015) 4(3) *Laws* 377; Muireann Quigley, 'Propertisation and Commercialisation: On Controlling the Use of Human Biomaterials' (2014) 77(5) *Modern Law Review* 677; and Andrew Grubb, "'I, Me, Mine": Bodies, Parts and Property' (1998) 3(4) *Medical Law International* 299.

³⁹ Rebecca Skloot, *The Immortal Life of Henrietta Lacks* (Crown, 2010); Margaret Lock, "The Alienation of Body Tissue and the Biopolitics of Immortalized Cell Lines" (2001) 7(2-3) *Body & Society* 63; and Catherine Waldby and Robert Mitchell, *Tissue Economies: Blood, Organs, and Cell Lines in Late Capitalism* (Duke University Press, 2006). See also *Moore v Regents of the University of California* 51 Cal 3d 120 (1990), cert denied 499 US 936 (1991); and *Greenberg v Miami Children's Hospital Research Institute* 264 F Supp 2d 1064 (SD Fla, 2003).

⁴⁰ John Tobin, *The Right To Health In International Law* (Oxford University Press, 2012); and Jennifer Ruger, 'Toward a theory of a right to health: capability and incompletely theorized agreements' (2006) 18(2) *Yale Journal of Law & the Humanities* 273.

subsequent class actions) akin to the Garibaldi smallgoods and Nippy's fruit juice food poisoning cases.⁴¹

The general caution issued by the TGA,⁴² noted above, advises that expectant mothers should be aware of the potential risks associated with placenta consumption. It indicates that claims regarding therapeutic benefits of prepared placenta products for mothers and/or children potentially brings those products under the biologicals facet of the *Therapeutic Goods Act 1989*.⁴³ The TGA Act prohibits the making of therapeutic biological products without a licence, alongside the TGA's approval of products classed as therapeutic goods.

In considering the role of education and health practitioners in offsetting fake news it is salient to note that some women are unlikely to encounter (and to heed) the TGA's brief statement. That meanings advice from general practitioners, obstetricians, hospital administrators, community nursing personnel and midwives is important. Fake news might be offset by counter narratives from other influencers. In the US, there have been calls for stronger and more comprehensive regulation by the FDA; those calls might be usefully heeded by both the TGA and Food Standards Australia New Zealand.⁴⁴

IV Consumption in the era of digital fake news

Contemporary placentophagy can be construed in relation to digital fake health news, where consumers are influenced by celebrity endorsements, novelty and resentment of authority rather than nuanced advice by medical practitioners and nutritionists based on empirical data.⁴⁵ Such behaviour is not new and not restricted to reliance on digital media; contemporary food and pharmaceutical regulators trace their origins to fin de siècle responses to 'snake oil' merchandising⁴⁶ and legal scholars might look to landmark judgments such as *Carbolic Smokeball*.⁴⁷

⁴¹ *Dowdell v Knispel Fruit Juices Pty Ltd* (trading as "Nippy's") [2007] FCA 650. See also Craig B Dalton and Robert M Douglas, 'Great expectations: the coroner's report on the South Australian haemolytic-uraemic syndrome outbreak' (1996) 164(3) *Medical Journal of Australia* 175.

⁴² Therapeutic Goods Administration (19 January 2018) Human Placenta Ingestion, <https://www.tga.gov.au/human-placenta-ingestion>

⁴³ *Therapeutic Goods Act 1989* (Cth) Part 3-2A. See also the Australian regulatory guidelines for biologicals at <https://www.tga.gov.au/publication/australian-regulatory-guidelines-biologicals-argb>

⁴⁴ In particular see Greer Donley, 'Regulation of Encapsulated Placenta' (2019) 86(2) *Tennessee Law Review*

⁴⁵ Carole A Bisogni, Margaret Connors, Carol M Devine and Jeffery Sobal, 'Who We Are and How We Eat: A Qualitative Study of Identities in Food Choice' (2002) 34(3) *Journal of Nutrition Education & Behavior* 128.

⁴⁶ Richard Curtis Litman and Donald Saunders Litman, 'Protection of the American consumer: the muckrakers and the enactment of the first federal food and drug law in the United States' (1981) 36 *Food, Drug & Cosmetics Law Journal* 647; and Daniel Carpenter, *Reputation and Power: Organizational Image and Pharmaceutical Regulation at the FDA* (Princeton University Press, 2010).

⁴⁷ *Carlill v Carbolic Smoke Ball Company* [1892] EWCA Civ 1; and A W B Simpson, 'Quackery and Contract Law: The Case of the Carbolic Smoke Ball' (1985) 14(2) *Journal of Legal Studies* 345.

As in the past, ‘influencers’⁴⁸ such as celebrity chef Pete Evans,⁴⁹ film star Gwyneth Paltrow,⁵⁰ supermodel Elle Macpherson,⁵¹ wellness guru Belle Gibson⁵² and the Kardashians and have shaped consumer perceptions, gaining international attention and on occasion accruing substantial financial benefits through the promotion of ‘wellness’ services and products.⁵³ These include ‘superfoods’ based on exotics herbs or fruit, ‘alkaline water’,⁵⁴ vaginal eggs and dietary lifestyle regimes that will supposedly defeat ailments such as cancer, dementia, attention deficit disorders or old age.⁵⁵ Overseas, some businesses have thrived by offering products such as ‘young plasma’, promoted on the basis that the blood of young people has uniquely health-giving or anti-ageing properties or is able to address ‘serious diseases like dementia, Parkinson’s disease, multiple sclerosis, Alzheimer’s disease, heart disease or post-traumatic stress disorder’.⁵⁶

The impact of such claims in part reflects a desire for simple solutions to complex problems and a reliance on a populist ‘folk wisdom’ that is contrary to the expertise and authority inherent in contemporary high-tech medicine, instead valorising ‘authenticity’, ‘nature’, the supposed ‘wisdom of the crowd’ and the ‘tradition’ that means homeopathy (despite a plethora of adverse reports) is a resilient social practice.⁵⁷

It also reflects deficiencies in primary/secondary education and a regulatory regime that tacitly encourages aggressive marketing by vendors of lifestyle supplements that few consumers need on an ongoing basis (and whose ostensible benefits might be more economically achieved through exercise, reduced alcohol consumption or sleep).⁵⁸

⁴⁸ Crystal Abidin, Jin Lee, Tommaso Barbetta and Wei Shan Miao, ‘Influencers and COVID-19: reviewing key issues in press coverage across Australia, China, Japan, and South Korea’ (2020) *Media International Australia* 1329878X20959838.

⁴⁹ Chris Johnson, ‘Paleo, pearl couscous and pertussis’ (2017) 29(6) *Australian Medicine* 11.

⁵⁰ Timothy Caulfield, *Is Gwyneth Paltrow wrong about everything?: How the famous sell us elixirs of health, beauty & happiness* (Beacon Press, 2015) and ‘From Kim Kardashian to Dr. Oz: The future relevance of popular culture to our health and health policy’ (2016) 47(2) *Ottawa Law Review* 369.

⁵¹ Timothy Caulfield, ‘Elle Macpherson, “anti-vaxx” nonsense, and the opportunity to engage’ (2018) 362 *BMJ* k3255. See also Brian Deer, *The doctor who fooled the World: Andrew Wakefield’s war on vaccines* (Scribe, 2020) 361-364.

⁵² Nick Toscano and Beau Donelly, *The Woman Who Fooled the World: Belle Gibson’s Cancer Con* (Scribe, 2017); Anita Lavorgna and Lisa Sugiura, ‘Caught in a lie: the rise and fall of a respectable deviant’ (2019) 40(9) *Deviant Behavior* 1043; and Stephanie A Baker and Chris Rojek, ‘The Belle Gibson scandal: The rise of lifestyle gurus as micro-celebrities in low-trust societies’ (2020) 56(3) *Journal of Sociology* 388.

⁵³ Edzard Ernst and Max H Pittler, ‘Celebrity-based medicine’ (2006) 185(11-12) *Medical Journal of Australia* 680; and Deepa Soni, ‘WWGD (What would Gwyneth do?)’ (2018) 20(6) *Canadian Journal of Emergency Medicine* 1.

⁵⁴ Tanis R Fenton and Tian Huang, ‘Systematic review of the association between dietary acid load, alkaline water and cancer’ (2016) 6(6) *BMJ Open* 1; and Shelley Young, *The pH miracle: balance your diet, reclaim your health* (Warner Books, 2002).

⁵⁵ For Gibson see *Director of Consumer Affairs Victoria v Gibson* [2017] FCA 240; *Director of Consumer Affairs Victoria v Gibson (No 3)* [2017] FCA 1148; and Nick Toscano and Beau Donelly, *The Woman Who Fooled the World: Belle Gibson’s Cancer Con* (Scribe, 2017).

⁵⁶ Catherine Oakley, ‘Towards cultural materialism in the medical humanities: the case of blood rejuvenation’ (2018) 44(1) *Medical Humanities* 5; and Food & Drug Administration (19 February 2019) ‘Statement from FDA Commissioner Scott Gottlieb, M.D., and Director of FDA’s Center for Biologics Evaluation and Research Peter Marks, M.D., Ph.D., cautioning consumers against receiving young donor plasma infusions that are promoted as unproven treatment for varying conditions’.

⁵⁷ See for example UK House of Commons Science and Technology Committee (2010) *Evidence Check: Homeopathy*; and National Health & Medical Research Council (2014) *Information Paper: Evidence on the effectiveness of homeopathy for treating health conditions*

⁵⁸ Ken Harvey, Viola Korczak, Loretta Marron and David Newgreen, ‘Commercialism, choice and consumer protection: regulation of complementary medicines in Australia’ (2008) 188(1)

COVID-19 has focused public attention on community understandings of disease and ‘wellness’, fake health news and faith-based consumption of products that are claimed to have therapeutic value. The pandemic is not unprecedented: epidemiologists have pointed to what has been characterized as ‘the Spanish Flu’⁵⁹ (echoed in contemporary tagging of COVID-19 as the ‘Chinese Virus’ or ‘Wuhan Flu’),⁶⁰ outbreaks of poliomyelitis,⁶¹ SARS⁶² and HIV.⁶³ The pandemic has featured attention-seeking by Australian politicians such as colourful entrepreneur Clive Palmer and Craig Kelly whose statements are scientifically unpersuasive but widely disseminated through digital platforms such as Facebook and Twitter alongside traditional media.⁶⁴ That populist attention-seeking, weakly condemned by the Prime Minister as a matter of ‘free speech’,⁶⁵ is a reprehensible local version of behaviour by US President Donald Trump⁶⁶ and Brazilian President Jair Bolsonaro.⁶⁷ Given the cultural, commercial and personal costs of COVID-19 – deaths, unemployment, health-based restrictions on civil liberties, erosion of trust in government, embrace of conspiracy theories about

Medical Journal of Australia 21; and Garry Egger, David Cameron-Smith and Rosemary Stanton, ‘The effectiveness of popular, non-prescription weight loss supplements’ (1999) 171(11) *Medical Journal of Australia* 604.

⁵⁹ Jeffery K Taubenberger and David M Morens, ‘The 1918 influenza pandemic and its legacy’ (2020) 10(10) *Cold Spring Harbor perspectives in medicine* a038695; Gina Kolata, *Flu: the story of the great influenza pandemic of 1918 and the search for the virus that caused it* (Simon and Schuster, 2001); and Robert J Barro, José F Ursúa and Joanna Weng, ‘The coronavirus and the great influenza pandemic: Lessons from the “spanish flu” for the coronavirus’s potential effects on mortality and economic activity (No. w26866)’ (National Bureau of Economic Research, 2020).

⁶⁰ Theodore C Masters-Waage, Nilotpal Jha and Jochen Reb, ‘COVID-19, Coronavirus, Wuhan Virus, or China Virus? Understanding How to “Do No Harm” When Naming an Infectious Disease’ (2020) 11 *Frontiers in Psychology* 561720.

⁶¹ Julie K Silver and Daniel J Wilson, *Polio voices: an oral history from the American polio epidemics and worldwide eradication efforts* (Praeger, 2007); Neal Nathanson and Olen M Kew, ‘From emergence to eradication: the epidemiology of poliomyelitis deconstructed’ 172(11) *American journal of epidemiology* 1213; and Barry Trevelyan, Matthew Smallman-Raynor and Andrew D Cliff, ‘The spatial dynamics of poliomyelitis in the United States: from epidemic emergence to vaccine-induced retreat, 1910–1971’ (2005) 95(2) *Annals of the Association of American Geographers* 269.

⁶² Martin Enserink, ‘SARS: chronology of the epidemic’ (2013) 339 (6125) *Science* 1266.

⁶³ Shilts Randy, *And the band played on: Politics, people, and the AIDS epidemic* (Souvenir Press, 2011); Anthony Fauci, ‘The AIDS epidemic—considerations for the 21st century’ (1999) 341(14) *New England Journal of Medicine* 1046; William W Darrow, ‘And the Band Played on: Before and After’ (2017) 21(10) *AIDS and Behavior* 2799.

⁶⁴ Harin Karunajeewa, ‘Hydroxychloroquine for coronavirus: how not to repurpose a drug during a pandemic’ (2020) 50(11) *Internal Medicine Journal* 1307.

⁶⁵ Bruce Baer Arnold and Wendy Bonython, ‘Some Are More Equal Than Others? Dignity, Difference and Vilification’ (2020) 18(2) *Griffith Journal of Law & Human Dignity*; and Wendy Bonython and Bruce Baer Arnold, ‘Freedom of Speech under the Southern Cross—It Arrived and Departed by Sea?’ (2018) 107(2) *The Round Table* 203.

⁶⁶ Gideon Lasco, ‘Medical populism and the COVID-19 pandemic’ (2020) 15(10) *Global Public Health* 1417; Joseph E Uscinski, Adam M Enders, Casey Klofstad, Michelle Seelig, John Funchion, Caleb Everett, Stefan Wuchty, Kamal Premaratne and Manohar Murthi, ‘Why do people believe COVID-19 conspiracy theories?’ (2020) 1(3) *Harvard Kennedy School Misinformation Review*; and H. Holden Thorp, ‘Trump lied about science’ (2020) 369(6510) *Science* 1409.

⁶⁷ Editors, ‘COVID-19 in Brazil: “So what?”’ (2020) 395(10235) *Lancet* 1461; and Julie Ricard and Juliano Medeiros, ‘Using misinformation as a political weapon: COVID-19 and Bolsonaro in Brazil’ (2020) 1(2) *The Harvard Kennedy School (HKS) Misinformation Review*.

microchipping⁶⁸ and 5G⁶⁹ – there is thus increasing interest in the regulation of ‘fake health news’ alongside fake political news.

Fake health news?

Fake news is a matter of uncritical reception and dissemination of harmful news, as distinct from advertising. There is disagreement about its characterization but it is often identified as ‘disinformation’ (false information created/disseminated with the intent of causing harm) and ‘misinformation’ (information that is inaccurate but not created with the intent of causing harm). Both disinformation and misinformation may result in harm, with political fake news for example serving as a potential mechanism for personal/state advantage through manipulation of political processes in order to influence an election and government policies or more subtly to erode the legitimacy of public administration and justice systems.⁷⁰

Fake news about health is arguably just as important but has received less attention by politicians and regulators. It can be construed as encompassing what is scientifically uninformed but essentially harmless (there will be no injury, other than to a consumer’s pocket, if advice is followed) and without a commercial motivation. It also can encompass communication where there is a direct financial benefit to the originator of the communication (in particular the vendor of particular goods or services that are claimed to have some preventative or curative properties), where the recipient of the communication is unable to verify the accuracy of claims or faces substantial difficulty with verification (so-called credence claims), and where the product or advice may cause harm.⁷¹

That harm might be attributable to use of a product such as black salve, a toxic nostrum that causes physical injury.⁷² The harm might instead be attributable to consumers’ reliance on advice and forgoing fact-based medicine (such as vaccination) and thereby

⁶⁸ See Bruce Baer Arnold, ‘More than a person? Duties, Robots and Cyborg Rights’ (2021) 18(1) *Canberra Law Review* (forthcoming).

⁶⁹ Axel Bruns, Stephen Harrington and Edward Hurcombe, ‘Corona? 5G? or both?’: the dynamics of COVID-19/5G conspiracy theories on Facebook’ (2020) 177(1) *Media International Australia* 12; Daniel Jolley and Jenny L Paterson, ‘Pylons ablaze: Examining the role of 5G COVID-19 conspiracy beliefs and support for violence’ (2020) 59(3) *British journal of social psychology* 628.

⁷⁰ Among work on fake political news see in particular European Commission High Level Expert Group on Fake News and Online Disinformation, *A multi-dimensional approach to disinformation: Final Report* (2018); the European Parliament 2018 ‘Computational propaganda techniques’ briefing; Sam Woolley and Phil Howard (eds) *Computational Propaganda: Political Parties, Politicians, and Political Manipulation on Social Media* (Oxford University Press, 2018); Carl Miller and Chloe Colliver, *Developing a Civil Society Response to Online Manipulation* (Institute for Strategic Dialogue, 2019); European Parliament ‘Foreign influence operations in the EU’ briefing (2018); Rose Marie Santini, Larissa Agostini, Carlos Eduardo Barros, Danilo Carvalho, Rafael Centeno de Rezende, Debora G. Salles, Kenzo Seto, Camyla Terra and Giulia Tucci, ‘Software Power as Soft Power. A Literature Review on Computational Propaganda Effects in Public Opinion and Political Process’ (2018) 11(2) *Partecipazione e Conflitto* 332; Anthony Nadler, Matthew Crain and Joan Donovan, *Weaponizing the Digital Influence Machine: The Political Perils of Online Ad Tech* (Data & Society Research Institute, 2018); and <https://comprop.oii.ox.ac.uk>. For antecedents see Jo Fox, ‘Fake news’ – the perfect storm: historical perspectives’ (2020) 93(259) *Historical Research* 172.

⁷¹ Sharn Hobill and Jay Sanderson, ‘Not free to roam: Misleading food credence claims, the ACCC and the need for corporate social responsibility’ (2017) 43(1) *Monash University Law Review* 113.

⁷² Kristin L Eastman, Lynne V McFarland and Gregory J Raugi, ‘Buyer beware: a black salve caution’ (2011) 65(5) *Journal of the American Academy of Dermatology* e154; *Zaphir v Health Ombudsman* [2017] QCAT 193 and *Kirby v Dental Council of New South Wales* [2017] NSWCATOD 64.

injuring other people, (a major concern with the 'anti-vax' movement) or denying themselves conventional therapies until treatment was too late.⁷³ Such communication has featured recently in Australian litigation involving the controversial guide Serge Benhayon and more broadly in the extensive litigation regarding representations by accredited health practitioners. Fake health news might however have a broader impact, salient for example in community responses to COVID-19, through disregard of legitimate rules regarding infection control.

Fake health news, just like fake political news, is not a new phenomenon. It is indeed distinctly traditional, with registered health practitioners over the past 130 years warning consumers about bogus practitioners/treatments, consumer advocates campaigning against the marketing of 'snake oil'⁷⁴ and publishers – the equivalent of global digital platforms such as Twitter and YouTube – on occasion pre-empting state intervention through a self-regulation that saw them refuse to disseminate health product advertisements that were deemed to be deliberately misleading, outright harmful or merely in bad taste. That self-regulation is reflected in the weak contemporary Australian advertising standards regime⁷⁵ and, more subtly, in scope for action by the ACCC, state/territory fair trading agencies, state health commissions and practitioner boards regarding statements that are deceptive/harmful.⁷⁶

Responses

'Fake news', in particular claims that governments have sought to subvert democratic processes in the United States of America and United Kingdom,⁷⁷ has resulted in proposals for greater regulation of digital platforms, such as Facebook and Google, through which people are increasingly gaining news and making sense of the world or claims about specific products and phenomena, including vaccination and stem cell therapies.⁷⁸

In Australia, those proposals are evident in submissions to the recent Digital Platforms inquiry by the ACCC,⁷⁹ the national consumer protection agency that co-exists with the TGA and FSANZ. From a consumer protection perspective, the ACCC has historically taken a more activist stance than the TGA in addressing misleading claims about health services/goods.

Conclusion

One conclusion might be that fake health news is inevitable: a function of regulatory incapacity, public naivety and commercial opportunity. A corollary is that it might be addressed through a mix of community education, greater responsibility on the part of

⁷³ *Australian Vaccination Network Inc v Department of Finance & Services* [2013] NSWADT 266; and *Australian Vaccination Network Inc v Health Care Complaints Commission* [2012] NSWSC 110.

⁷⁴ Sharon Batt, Judy Butler, Olivia Shannon and Adriane Fugh-Berman, 'Pharmaceutical Ethics and Grassroots Activism in the United States: A Social History Perspective' (2020) 17 *Journal of Bioethical Inquiry* 49

⁷⁵ Ken Harvey, Mal Vickers and Bruce Baer Arnold, 'Complementary medicines advertising policy Part II: unethical conduct in the Australian market after July 2018' (2020) *Australian Health Review*

⁷⁶ *Australian Competition and Consumer Commission v Homeopathy Plus! Australia Pty Limited (No 2)* [2015] 1090.

⁷⁷ Brian McNair, *Fake news: Falsehood, fabrication and fantasy in journalism* (Routledge, 2017)

⁷⁸ Alessandro R Marcon, Blake Murdoch, and Timothy Caulfield, 'Fake news portrayals of stem cells and stem cell research' (2017) 12(7) *Regenerative Medicine* 765.

⁷⁹ Australian Competition and Consumer Commission, *Digital Platforms Inquiry* (2019). See also the US House Judiciary Committee (Antitrust Subcommittee), *Investigation of Competition in the Digital Marketplace: Majority Staff Report and Recommendations* (2020).

journalists and media organisations, alongside a more activist approach by multiple regulators.⁸⁰ The ACCC cannot be expected to solve all problems. On occasion it, along with the TGA, has encountered difficulties with advertising by major complementary medicine vendors.⁸¹ As Harvey and Vickers have argued, that difficulty might be addressed through adequately funding the TGA and reshaping the legislation.⁸²

The susceptibility of consumers to problematical claims about health services and goods, including modes of diagnosis/therapy by registered or other practitioners and products that do not necessarily perform as described (and thus might generously be characterised as instances of ‘puffery’) is unsurprising given confusing messages by gatekeepers, Australia’s labelling of much practice as traditional or complementary medicine,⁸³ use of disclaimers⁸⁴ and the incapacity of regulators whom consumers might expect to intervene if there were substantive potential harms.

Consumption of prepared or raw placenta is a practice that is best addressed through action by a range of stakeholders (including public education). It involves a public recognition, fostered by midwives and journalists rather than merely by clinicians that the needs of some consumers would more appropriately be satisfied through conventional medicine. In particular, we should discourage perceptions that placentophagy is a substitute for a nuanced response to postpartum depression or other ills. It requires greater responsibility on the part of mainstream media organisations that echo problematical claims by enthusiasts. It also requires greater emphasis in primary/secondary school teaching regarding critical thinking about health, political and economic claims.

⁸⁰ Ian Freckelton, ‘COVID-19: Fear, quackery, false representations and the law’ (2020) 72 *International Journal of Law and Psychiatry* 101611.

⁸¹ *Swisse Vitamins Pty Ltd v The Complaints Resolution Panel* [2012] FCA 536 and *Nature’s Care Manufacture Pty Ltd v Australian Made Campaign Limited* [2018] FCA 1936.

⁸² Malcolm Vickers and Ken Harvey, ‘Complementary medicines advertising policy Part I: unethical conduct in the Australian market before July 2018’ (2020) *Australian Health Review*.

⁸³ R Barker Bausell, *Snake oil science: the truth about complementary and alternative medicine* (Oxford University Press, 2009).

⁸⁴ Goop for example promotes wellness products – apparently Elderberry chews are good for COVID-19 – with wording such as ‘These statements have not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure, or prevent any disease.’ No therapeutic value, just empties your wallet?