

## BOOK REVIEWS

*Taming Death By Law* by Professor David Lanham (Longman Professional Publishing, Melbourne, 1993) pages vii–xiii, 1–229, index 230–235. Price \$27.95 (soft cover). ISBN 0 582 80071 4.

People don't like talking about death. As Professor David Lanham observes in the preface to this book: 'Long after conversation about sex became mandatory rather than prohibited, death still presents itself as a distasteful subject, the dwelling on which is at least morbid and at worst macabre. Death . . . [is] the ultimate evil' (page ix).

Yet a primary purpose of this book is to invite readers to talk to their relatives and friends about their death, and to tell them how they wish to be treated when the time comes. As Professor Lanham says, the law gives people 'a fair measure of choice in relation to medical treatment during the dying process' and even if people lose the mental capacity to make their own decisions, they can still retain some control by planning in advance. In that way, he says, the law offers people an 'opportunity of removing some of death's sting and, to that extent, of taming death' (page viii).

The first part of the book explains the extent to which the law will support a person's directions about medical treatment. The right to self-determination enables a competent adult person to refuse treatment even if that choice is not rational and may hasten death. But patients are not entitled to demand or to authorise any life-shortening treatment (voluntary euthanasia) and even the right to refuse treatment may be limited in favour of sanctity of life.

The book then examines the formal legal mechanisms that some jurisdictions provide to reinforce patients' wishes, such as a 'refusal of treatment certificate' under the Victorian Medical Treatment Act.<sup>1</sup> Readers familiar with Professor Lanham's academic publications will recall that he has written extensively in this area,<sup>2</sup> but the discussion in this book has been deliberately simplified for a wider audience.

The next part of the book deals with techniques that enable patients, while they are competent, to give directions to limit the treatment that they may be given when they are no longer able to make their own decisions. The first method is a 'living will', which is allowed in South Australia and the Northern Territory. The second is by the appointment of an agent to make decisions when the person is no longer competent. This is allowed by the Victorian Medical Treatment Act.<sup>3</sup> In

<sup>1</sup> Similar legislation has been recommended in Western Australia: Law Reform Commission of Western Australia, *Report on Medical Treatment for the Dying*, Project No. 84, Feb. 1991, p.21, para. 3.2.

<sup>2</sup> For example, Lanham, D. 'The Right to Choose to Die with Dignity' (1990) 14 *Criminal Law Journal* 401; Lanham, D. and Fehlberg, B. 'Living Wills and the Right to Die with Dignity' (1991) 18 *M.U.L.R.* 329; Lanham, D. and Woodward, S., 'Refusal by Agents of Life-sustaining Medical Treatment' (1992) 18 *M.U.L.R.* 659.

<sup>3</sup> This has also been proposed in Western Australia: see n.1 *supra*.

the absence of such legislation, only informal directions are possible.

Whether a person's wishes are expressed formally or informally, however, it will be easier for relatives and carers to carry them out if they are fully informed not only of the patient's specific directions (for example, that the patient does not wish to be kept alive by 'artificial means'), but also of the patient's values that underlie those directions. For that purpose, the book encourages readers to complete a *Values Statement* of the type developed by the Center for Health Law and Ethics at the University of New Mexico. This *Values Statement* is reproduced in an Appendix to Professor Lanham's book (13 pages) and is in a format which can readily be completed by the reader.

The first section of the *Values Statement* covers specific procedures (Have you ever expressed your wishes concerning organ donation; kidney dialysis; cardio-pulmonary resuscitation; respirators; artificial nutrition; and, if so, to whom and how?).

The second section deals with more general issues, which I illustrate here by quoting some of the questions asked under the various headings: your overall attitude towards health (How do you feel about your current health status?); your perceptions of the role of your doctor and other health caregivers (Do you think your doctor should make the final decision concerning any treatment you might need?); your thoughts about independence and control (Are these important in your life?); your personal relationships (Do you expect your family and friends to support your medical decisions?); your overall attitude towards life (What activities do you enjoy? Do you feel life is worth living? What do you fear most?); your attitude towards illness, dying and death (How do you feel about the use of life-sustaining measures?); and your general background, living environment and attitudes towards finances. There is even an opportunity for people to comment on their preferred funeral arrangements and to write their own obituary and eulogy!

The purpose of preparing the *Values Statement* and discussing it with one's relatives is to inform them of one's wishes in the hope that those wishes will be implemented if one later loses the capacity to make decisions. But what support will the law give to people's wishes expressed in this way? Here, I think Professor Lanham might have argued even more persuasively the advantages of completing the *Values Statement* over relying on one's common law right to refuse treatment.

If there is any doubt about the 'rationality' of a person's decision about proposed, life-sustaining treatment (for example, if a patient refuses to consent to have a gangrenous limb amputated and the doctors believe that that is necessary to save the patient's life), there may be a debate about whether the patient is, in fact, competent to make that decision.<sup>4</sup> The legal requirements of competence have, to date, received little judicial attention but, with the growing emphasis on patient autonomy in the wake of the decision of the High Court of Australia in *Rogers v. Whitaker*,<sup>5</sup> there may be more examination of a patient's state of mind

<sup>4</sup> The notion of a 'risk-related' standard for determining competence is discussed by Wicclair, M., 'Patient Decision Making and Risk' (1991) 5 *Bioethics* 91; see too, Brock, D.W., 'Decision-making Competence and Risk — Comments on Wicclair' (1991) 5 *Bioethics* 105; Skene, L., 'Risk-related Standard Inevitable in Assessing Competence — Comments on Wicclair' (1991) 5 *Bioethics* 113.

<sup>5</sup> (1992) 109 A.L.R. 625

if the decision seems 'unreasonable'. A *Values Statement* completed by the patient at an earlier and healthier time would surely be useful in making this assessment. For example, a patient who had, throughout life, derived great pleasure from sporting activities and had no liking for books or music, might more readily be considered competent in rejecting life-sustaining treatment than one who preferred more sedentary or cerebral pursuits.

Professor Lanham's book is well presented and should interest both legal and general readers. Although there is no table of cases or bibliography, and the footnotes have been deliberately kept to a minimum, the standard of research and discussion certainly meets that which one would expect of a writer of Professor Lanham's reputation. One can imagine a group of law students being tantalised by the legal problems set out in the book. For example, is a doctor guilty of homicide if the doctor kills one of two patients who will die simultaneously, in order to transplant the heart of one to save the life of the other (page 160)? Can one extend the principle established in *R v. Adams*<sup>6</sup> (that it is lawful to administer whatever dose of pain relief is necessary to relieve pain, even if that hastens death) to excuse an act likely to cause *instant* death? A number of illustrations are given, such as the shooting during the Falklands War of a soldier trapped in a burning hut with no hope of escape (page 153).

There is, however, an occasional omission. I would have liked to see some discussion of the 'Baby M' inquest which attracted such publicity in Victoria in 1991,<sup>7</sup> but it is mentioned only in footnotes. The reason that this case has apparently been added after the text of the book is obvious. Firstly, Professor Lanham was in England during the final stages of preparation of the book; and secondly, there is always a period between completion of a manuscript and publication, when an author is overtaken by events. In the field of withdrawal of medical treatment, that is particularly so, as the decisions after publication of this book testify: *Airedale N.H.S. Trust v. Bland*,<sup>8</sup> *Auckland Area Health Board v. A.G.*;<sup>9</sup> *Rodriguez v. British Columbia*<sup>10</sup> etc! Nevertheless, this book is a well researched and provocative guide to the current law throughout the Western world, which provides a sound basis for analysing future developments.

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<sup>6</sup> [1957] *Crim.L.R.* 365.

<sup>7</sup> Discussed by Clark, K.S.M., 'The "Baby M" Inquest' (1992) 66 *Law Institute Journal* 394; and by Skene, L., 'The Quality of Life and Disabled Infants' (1992) 66 *Law Institute Journal* 998.

<sup>8</sup> [1993] 1 *All E.R.* 821.

<sup>9</sup> [1993] 1 *N.Z.L.R.* 235

<sup>10</sup> [1993] 7 *W.W.R.* 641 (Supreme Court of Canada).

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