

# TORT LAW REVIEW

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## ARTICLES

### **Deviation and the Ordinary Law of Torts** – *Dr Hamish Dempster*

The leading theory of deviation claims that deviation is peculiar to the law of bailment. This theory was developed to rationalise two incidents of deviation that cannot be reconciled with the ordinary laws of contract and torts. The bailment theory of deviation contributes to the notion there is a concept of breach of bailment that is independent of contract and torts. This article suggests that the bailment theory of deviation conflates deviation itself, a breach of a particular kind of covenant, with two ordinary torts, namely detinet and conversion. It also suggests that the anomalous incidents of deviation are derived from the special liability of the common callings not from the law of bailment. .... 39

### **Reinvigorating Non-delegable Duties in Australia?** – *Anthony Gray*

This article considers the recent recommendation of the Royal Commission into Institutional Child Sexual Abuse that Australia should legislate to recognise a non-delegable duty of care on some institutions in this context. At the current time, the precise status of non-delegable duties in the law of tort in Australia is somewhat uncertain, with some recent decisions appearing to cast doubt on the existence of such obligations. It is considered to be incumbent on those proposing a non-delegable duty of care to justify the circumstances in which it is or should be imposed. Notwithstanding such duties have been recognised for a long time, a satisfactory rationale for the creation of such special duties remains elusive. It will be submitted that, if ever in the law recognition of a non-delegable duty of care was necessary, developments elsewhere in the law of tort have rendered it superfluous. Thus, while it is very important that the pain caused to survivors of child sexual abuse be recognised, and compensation and reparation take place, the tragedy of child sexual abuse should not be the catalyst for the revitalisation of non-delegable duties in Australian tort law. .... 59

### **Doctor’s Duty of Disclosure and the Singapore Court of Appeal Decision in Hii Chii Kok: Montgomery Transformed** – *Low Kee Yang*

The subject of a doctor’s duty of care to his patient, especially as regards the giving of advice, is a controversial one. In recent times, the courts and the medical professions in several jurisdictions have given their varying responses. In the Hii Chii Kok case, the Singapore Court of Appeal was faced with the difficult challenge of whether to and, if so, how to change the law. The judgment is as complex as it is important. .... 79

### **Re-thinking the Requirement for a “Recognisable Psychiatric Illness” in the Law of Negligence** – *Mohammud Jaamae Hafeez-Baig and Jordan English*

In *Saadati v Moorhead* 2017 SCC 28, the Supreme Court of Canada removed the requirement, in cases of negligently-inflicted psychiatric injury, that the claimant prove a “recognisable psychiatric illness”. In so doing, the Supreme Court departed from the orthodox position, which is still good law in Australia, the United Kingdom and New Zealand. The critical issue with the approach in *Saadati* is that the Court did not substitute a workable test for

delineating the degree of distress that may or may not be the subject of a claim. So long as courts continue to insist that mere emotional distress does not sound in damages, a line must be drawn. Instead of jettisoning the “recognisable psychiatric illness” requirement, we argue that the better approach is to clarify the interpretation and application of the requirement, so that it captures a greater number of deserving claimants. This approach, which could be adopted in Australian and English law, would recognise that a “recognisable psychiatric illness” is not limited to mental disorders that are recognised in classificatory schemes such as the Diagnostic and Statistical Manual of Mental Disorders or the International Statistical Classification of Diseases and Related Health Problems. ....