TORT LAW REVIEW

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ARTICLES

Strict Liability in the Law of Defamation – *Anthony Gray*

The Standing Committee of Attorneys-General is currently considering substantial reform to Australia's existing defamation laws. In earlier articles, I have suggested reform is required in relation to the multiple publication rule, and in relation to the liability of tech companies in relation to defamation. In this article, a more radical change is suggested. Defamation is traditionally a tort of strict liability, not requiring proof of fault on the defendant's part. Strict liability has a rich history in the law of tort, but has progressively become more isolated, as fault-based negligence has become more dominant. While strict liability made sense historically, in terms of the goals of the law of tort, its rationales have weakened over time as the tort landscape has changed. Defamation law has sought to accommodate, to some extent, fault-based questions through the use of convoluted defences. It is argued here that it would be simpler to define the tort in terms of fault in a reformed law of defamation, rather than introduce it through the back door of defences to a tort of ostensible strictness. American law provides a partial, but not complete, guide in this process. 81

More Valuable Than Oil: The Application of Tort Law and Equity to Data Breach Cases – *Aiden Lerch and Sophie Whittaker*

As technology becomes indispensable to everyday life, instances of data breach are seemingly ubiquitous. While the Australian government has passed various legislative schemes within the *Privacy Act 1988 (Cth)* to regulate data misuse, extant literature has uniformly labelled such schemes as inadequate as they fail to provide appropriate redress for Australian data breach victims. In light of the exponential rate at which data is being stored and used online, this article considers whether Australia's common law should operate alongside the Privacy Act to effectively remedy and combat data misuse. The article adopts a comparative analysis and demonstrates how plaintiffs in the United States have, with scholarly support, successfully used the torts of negligence and breach of confidence to found liability against companies that have failed to securely store their data. In seeking to adopt a superior approach in which the common law complements the statutory intention of the Privacy Act, this article proposes that Australia's common law should be incrementally developed to hold companies liable where they have collected personal information and failed to store it securely. 100

Don't Look for Fault, Find a Remedy! Exploring Alternative Forms of Compensating Medical Injuries in Australia, New Zealand and Belgium – *Tina Popa*

Effective tort systems should enable access to compensation following medical injury. The existing Australian fault-based system presents barriers in accessing compensation in medical negligence claims, particularly in Victoria where claimants must satisfy permanent injury thresholds for pain and suffering damages. Proving negligence in fault systems can be lengthy, expensive and stressful. Litigation in fault-based systems embeds the dispute in an adversarial system, sidelining non-financial needs of disputants – such as voice or the desire for an explanation or an apology – which inhibits non-adversarial justice approaches.

Australian policy settings may be influenced by international jurisdictions which operate more effective no-fault medical compensation schemes. These include New Zealand's Accident Compensation Corporation, or Belgium's Fund for Medical Accidents which may act as models for Australia. These international systems may address shortcomings of the Australian system. This article undertakes a comparison of these three systems – Australia, NZ, and Belgium – arguing that the Belgian and NZ systems offer suitable models for adoption in Australia. The article critiques the present fault-based Australian system of compensation and argues for the need to focus less on proving fault, and more on procuring a remedy for injured individuals. Recommended reform would provide benefit through more efficient and effective systems to meet the needs of injured claimants. 120

Living Dangerously: Determining Liability for Obvious Risks in Professional Sport – *Ashleigh Giles and John O'Brien*

The civil liability legislation throughout New South Wales, Queensland, Tasmania and Western Australia provide for a complete defence to negligence if an injury occurs through the materialisation of an obvious risk of a "dangerous recreational activity" (DRA). Of these states, Queensland limits its coverage of recreational activities to those done for enjoyment, relaxation or leisure. The other three states offer an expanded meaning of recreational activity: encompassing "any sport". It is this inclusion of "sport" that has created confusion for professional sportspeople in determining whether they can succeed in a negligence action or not. The Supreme Court of Tasmania found that a professional jockey was not engaged in a recreational activity, whereas the Supreme Court of New South Wales, and more recently, the NSW Court of Appeal, found the opposite. This article seeks to hypothesise the precedential value of this appellate decision to a Western Australian court, which currently has no case law on the issue. It also argues how a professional athlete would likely be treated under Queensland's regime, and under those of the remaining four jurisdictions without a DRA defence. It finds that in all Australian jurisdictions, except for New South Wales and Western Australia, a professional athlete who is injured would likely have the ability to bring a negligence claim. Given this inconsistency, and the likelihood that a professional athlete might compete in multiple states, the article argues that "any sport" should be removed from the definition of "recreational activity" to ensure that sportspeople are not treated less favourably than other workers, for it appears professional athletes' legal rights in New South Wales and Western Australian have been unfairly abrogated. 137

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