

TORT LAW REVIEW

Volume 15, Number 2

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ARTICLES

Wednesbury unreasonableness as a limit on the civil liability of public authorities – *Elizabeth Carroll*

Subsequent to the Review of the Law of Negligence, legislation in most Australian States and Territories introduced limitations on public authority liability based on the public law concept of *Wednesbury* unreasonableness. Transposing public law concepts into the assessment of civil liability is an unsatisfactory approach to addressing the particular issues which arise in relation to public authority liability. *Wednesbury* unreasonableness is not a general standard capable of substituting for the standard of care concept in negligence. Further, it is not suitable to operate as a broad-based limitation on the tort of breach of statutory duty. Legislation which directs courts to consider specified factors is a more appropriate means of ensuring courts sufficiently take into account matters relevant to the liability of public authorities. 77

Decision-making in the tort of negligence in the House of Lords – *Keith Stanton*

This article considers the methodologies used by the House of Lords when deciding negligence cases. It considers the extent to which the House has abandoned the formal use of precedent in favour of policy-based decision-making. It also considers the policies which the House regards as important when it is making policy-based choices. The article concludes by considering whether it is still correct to regard negligence as a unified tort or whether it is now the case that policy-based reasoning and the abandonment of the use of general principles have produced a fragmentation of the duty of care into discrete pockets of liability. 93

Tort, democracy and environmental governance: The case of non-enforcement – *Lynda M Collins*

Despite Canada’s international reputation as a “green” nation, Canadian environmental legislation has, for the most part, failed to achieve adequate environmental protection. Moreover, key enforcement decisions that determine the level of environmental protection to be afforded to Canadians are being made outside the parliamentary process, by unaccountable bureaucracies. Empirical evidence demonstrates that these bureaucracies chronically err on the side of non-enforcement. In fact, systemic non-enforcement of environmental statutes and regulations is a widespread problem throughout Canada despite a well-documented public consensus in favour of environmental protection, and clear indications of increasing environmental harm. This article examines tort law’s response to harm caused by environmental non-enforcement, as an instantiation of Crown tort liability

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| more generally. The analysis focuses specifically on the deficiencies of the policy- operational distinction as touchstone for government liability, and an alternative approach is proposed. | 107 |
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