

TORT LAW REVIEW

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ARTICLES

Negligence law and judicial discretion: A response to Hutchinson and Morgan twenty-five years on – Richard Mullender

Twenty-five years ago, Allan Hutchinson and Derek Morgan (drawing on the resources of the Critical Legal Studies Movement) mounted a powerful assault on the common law of negligence. The essay in which they mounted this assault, “The Canengusian Connection: The Kaleidoscope of Tort Theory”, remains relevant to this body of law. Among other things, it still throws light on the strong discretion exercised by judges, the malleability of doctrinal language, and the wide variety of arguments that have persuasive force in negligence law. However, Hutchinson and Morgan are vulnerable to criticism on the ground that their analysis of negligence law exhibits a lack of charity: ie, they fail to present it in a light that points up its moral attractions. The purpose of this article is to respond to this deficiency by offering an account of negligence law that fits with doctrinal realities and that identifies the sources of its moral appeal.

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Pure economic loss and defects in the law of negligence – Po Jen Yap

This article argues for an expanded three-stage *Caparo* test to be applied when deciding whether an alleged tortfeasor owes a victim a duty of care in respect of the latter’s economic interests. However, in deciding whether the second criterion of the *Caparo* test is satisfied, it is submitted that the following general rule should be observed in deducing this proximity. The relationship between the claimant and the tortfeasor will be sufficiently proximate when the defendant knows (or has reason to know) the actual economic interest(s), of a particular class of person(s) of which the claimant is a member, that will be affected by the defendant’s failure to exercise due care. The presence of the *Hedley Byrne* configuration is a conclusive but not required means of ascertaining whether the defendant knows of the actual economic interest that is dependent on the defendant’s exercise of due care. However, an exception to this general rule exists: a claim for economic loss made by a plaintiff seeking to recover under the law of negligence for defects in the very property purchased through contract will be refused unless the claimant is seeking to avert imminent foreseeable physical injury to persons or property. Furthermore, the author argues that notwithstanding the proximity of relationship between the parties, and contrary to the views held by the House of Lords in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, a duty of care with respect to the economic loss should still be denied if there are countervailing policy considerations that will make the existence of a duty of care unfair, unjust or unreasonable.

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Privacy in pursuit of a purpose? – Patrick O’Callaghan

This article argues that the English law of privacy lacks a clear sense of purpose and this can partly be attributed to an overreliance on “Strasbourg-speak”. It examines the European Court of Human Rights’ confused and sometimes contradictory interpretation of the content of Art 8 of the *European Convention on Human Rights* and compares this to the German law on privacy, which is invested with a readily intelligible sense of purpose. The article argues that English courts should draw upon their rich common law culture and

comparative law, particularly German law, to identify a clearer set of relevant principles so that the law's addressees know how to "go on" (in Wittgenstein's sense).	100
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BOOK REVIEW

<i>Causing Psychiatric and Emotional Harm: Reshaping the Boundaries of Legal Liability</i> by Harvey Teff	114
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