

# TORT LAW REVIEW

Volume 17, Number 3

November 2009

## NOTES

**Loss of a chance in medical negligence: A lost cause** – *Meredith Blake* ..... 123

## ARTICLES

### **Apology legislation: Oiling the wheels of tort** – *Craig Brown*

Recently, Ontario joined several other Canadian jurisdictions, as well as some in the United States and Australia, in enacting legislation providing that an apology by the defendant in a tort action may not be used by the plaintiff as evidence of an express or implied admission of liability by the plaintiff or by the defendant's liability insurer as grounds for denying cover. In this article the author considers this legislation as it applies to negligence law. He argues that, by promoting conditions conducive to speedier, less expensive resolution of negligence claims, the legislation has the potential to advance significantly the putative goals of negligence law. To the extent that cases are settled more quickly, compensation is made available more promptly and at less expense in terms of legal fees. To the extent that the legislation encourages a genuine apology, it encourages acceptance of responsibility and a resolve not to repeat the mistake. This advances the goal of specific deterrence while publicity surrounding the matter promotes general deterrence. By its nature, an apology given and accepted amounts to appeasement and reflects aspects of both restorative and corrective justice. .... 127

### **The scope and rationale of the principle that the defendant "takes his victim as he finds him"** – *Mark Stiggelbout*

This article discusses the surprisingly neglected principle that the defendant "takes his victim as he finds him". After mapping out the scope of the principle, three main conclusions are drawn. First, the principle is not synonymous with the "eggshell skull" rule. The eggshell skull rule applies in one of several categories of case under the broader "take as one finds" principle. Secondly, the principle applies to contractual claims as well as those in tort, and to claims concerning property damage as well as those regarding personal injury. Thirdly, the principle corresponds to a familiar hierarchy of values within the common law, finding most favour in the personal injury context, slightly less in the context of property damage and considerably less in the pure economic loss context. It is argued that, even where its operation is most controversial, the principle is justifiable. English law is the primary focus. .... 140

### **The tort of torture** – *François Larocque*

This article proposes the judicial recognition of a new nominate tort of torture at common law. More specifically, it calls for the creation of a new cause of action in tort based in part on the internationally defined prohibition of torture and on a novel form of trespass or, alternatively, on the well-established tort of misfeasance in public office. Such a development would not only have the benefit of providing an analytical framework for civil actions with respect to torture, but would also allow litigants and courts to squarely address the normative specificities of torture on their own terms, rather than by forced analogy to existing categories, such as assault and battery. It is argued that the common

law's historical revulsion from torture as well as the peremptory prohibition of torture at international law compel the fashioning of a correspondingly distinct cause of action for the purpose of civil liability. It is also conceivable that a new misfeasance-inspired tort of torture might profitably recast the state immunity issue in more familiar terms for domestic courts, thereby perhaps allowing a fresh approach to the <i>State Immunity Act</i> in Canada. ....	158
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**Indeterminate causes of personal injuries and probabilistic risk-based assessments – *Po Jen Yap***

In this article, the author proposes the following doctrinal rule to explain those leading Commonwealth cases that involve issues of causal uncertainty arising from the limits of scientific knowledge: where it is scientifically impossible for causation to be proved on a balance of probability, causation should nonetheless be deemed established when the defendant's breach of duty has materially increased the risk of an injury that had transpired or where the statistical probability that the defendant caused the injury in question is material. ....	175
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    - <sup>2</sup> Hayton, n 1, p 286.
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