

# TORT LAW REVIEW

Volume 18, Number 1

March 2010

## NOTES

- Limiting liability for mental harm: Back to the future?** – *Peter Handford* ..... 5

## ARTICLES

**Is “nervous shock” still a feminist issue? The duty of care and psychiatric injury in Australia** – *Prue Vines, Mehera San Roque and Emily Rumble*

The traditional approach to duty in nervous shock cases required more hurdles to be met than in cases of ordinary physical injury. The feminist critique of these cases demonstrated that these hurdles were created by gendered stereotypes and patriarchal reasoning. The High Court’s changed requirements in *Tame v New South Wales*; *Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317 raise the question whether the feminist critique has been rendered obsolete. The article considers some of the previous feminist literature and a quantitative analysis of nervous shock cases in order to examine this question. While women continue to be the majority of claimants in this area, the article emphasises that this is less significant than the fact that the way psychiatric harm is regarded is affected by a gendered way of thinking which permeates our society. Noting that the changes to the requirements in *Tame*; *Annetts* and other recent cases still do not put psychiatric harm on exactly the same footing as other personal injury cases, and that the legislative changes created by the various Civil Liability Acts emphasise this and in many cases revert to the previous approach, the authors conclude that the feminist critique still has much to offer this area of law. ....

9

**Now you see it, now you don’t: Black letter reflections on the legacies of *White v Chief Constable of South Yorkshire Police*** – *Paula Case*

The House of Lords’ judgment in *White v Chief Constable of South Yorkshire* [1999] 2 AC 455 created a number of problematic legacies for the recovery of psychiatric damage in tort. It continued the English courts’ tradition of conceptualising psychiatric damage as a “rogue” area of liability in need of containment. To that end it promoted a binary approach to claims for psychiatric damage in negligence and adopted a restricted meaning of “primary victims”. In the past 10 years, judgments from the English courts have steadily undermined a number of *White*’s legacies. When viewed together, these judgments reveal a trend towards the steady assimilation of psychiatric damage into ordinary negligence principles. This article charts the destabilisation of *White* as the leading authority on liability for negligently caused psychiatric damage in England and Wales, and proposes a reconsideration of the designation of claimants as “primary” or “secondary” victims. ....

33

**Rethinking the illegality defence in tort law** – *Po Jen Yap*

Reform of the illegality defence in tort law was proposed by the Law Commission (England and Wales) in its 2009 Consultative Report on *The Illegality Defence* and more importantly, the House of Lords weighed in on this debate with its recent landmark rulings in *Gray v Thames Trains* [2009] 1 AC 1339 and *Moore Stephens v Stone Rolls Ltd (in liq)* [2009] 1 AC 1391. In this article, this author argues that the *ex turpi causa* defence should be only applicable in tort law when the plaintiff is claiming for losses that will allow the

plaintiff to (i) profit from the crime; (ii) evade criminal penalties; or (iii) avoid third-party civil liabilities that follow from the commission of the crime. This bar to recovery should apply regardless of whether the plaintiff is seeking recovery for pure economic losses or seeking compensation for personal injuries since in either instance, a specific head of damages may fall foul of the three above-mentioned prohibitions. An exception also exists for this rule. Notwithstanding any conflict with the three criteria, the *ex turpi causa* defence will fail if the plaintiff is not morally culpable for the illegality, either because the plaintiff was mentally unsound at the time the crime was committed as a result of the defendant's negligence or the plaintiff only committed a strict liability offence because of the defendant's negligence. .... 52

# Submission requirements

All contributions to the journal are welcome and should be emailed to the Production Editor, *The Tort Law Review*, at [LTA.tortlrev@thomsonreuters.com](mailto:LTA.tortlrev@thomsonreuters.com) for forwarding to the Editor.

## Licences

- It is a condition of publication in the journal that contributors complete a licence agreement. Licence agreements can be downloaded at [http://www.thomsonreuters.com.au/support/as\\_contributors.asp](http://www.thomsonreuters.com.au/support/as_contributors.asp) and emailed with the submission or mailed separately to the Production Editor, *The Tort Law Review*, Thomson Reuters (Professional) Australia Limited, PO Box 3502, Rozelle, NSW 2039.

## Letters to the Editor

- By submitting a letter to the Editor of this journal for publication, you agree that Thomson Reuters, trading as Lawbook Co, may edit and has the right to, and may license third parties to, reproduce in electronic form and communicate the letter.

## Manuscript

- Manuscript must be original, unpublished work that has not been submitted or accepted for publication elsewhere, including for online publication.
- Personal details (name, qualifications, position) for publication and a delivery address, email address and phone number must be included with the manuscript on a separate page.
- Manuscript must be submitted electronically via email in Microsoft Word format.
- Manuscript should not exceed 10,000 words for articles or 1,500-2,000 words for section commentary or book reviews.
- An abstract of 100-150 words must be included at the head of articles.
- Authors are responsible for the accuracy of case names, citations and other references. Proof pages will be emailed to contributors but excessive changes cannot be accommodated.
- **Graphics** (diagrams and graphs) to be grayscale; in .jpeg format; no more than 12 cm in width; within a box; of high resolution (at least 300 dpi); font is to be Times New Roman, no more than 10pt. The heading for a graphic should be placed outside the box.

## Peer review

- This journal complies with the Higher Education Research Data Collection (HERDC) Specifications for peer review. Each article is, prior to acceptance, reviewed in its entirety by a suitably qualified expert who is independent of the author.

## Style

1. **Levels of headings** must be clearly indicated (no more than four levels).
2. **Unpointed style** is to be used – there are no full stops after any abbreviation or contraction.
3. **Cases:**
  - Where a case is cited in the text, the citation follows immediately after the case name, not as a footnote.
  - Authorised reports must be cited where published, and one other reference can be used in addition.
  - For “at” references use media-neutral paragraph numbers within square brackets whenever available.
  - For international cases best references only should be used.
4. **Legislation** is cited as follows:
  - *Trade Practices Act 1974* (Cth), s 51AC (including in full within footnotes).
5. **Books** are cited as follows:
  - Ross D, *Ross on Crime* (3rd ed, Lawbook Co, Sydney, 2006) pp 100-101.
  - In footnotes do not use *ibid* or *op cit*. Repeat author surname and add footnote reference to first mention.
    - <sup>1</sup> Hayton D, “Unique Rules for the Unique Institution, The Trust” in Degeling S and Edelman J (eds), *Equity in Commercial Law* (Lawbook Co, Sydney, 2005) p 284.
    - <sup>2</sup> Hayton, n 1, p 286.
6. **Journals** are cited as follows:
  - Kirby M, “The Urgent Need for Forensic Excellence” (2008) 32 Crim LJ 205.
  - In footnotes do not use *ibid* or *op cit*. Repeat author surname and add footnote reference to first mention.
    - <sup>3</sup> Trindade R and Smith R, “Modernising Australian Merger Analysis” (2007) 35 ABLR 358.
    - <sup>4</sup> Trindade and Smith, n 3 at 358-359.
  - Wherever possible use official journal title abbreviations.
7. **Internet references** are cited as follows:
  - Ricketson S, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* (Lawbook Co, subscription service) at [16.340], <http://www.thomsonreuters.com.au/default.asp> viewed 25 June 2007. Underline the URL and include the date the document was viewed.

## SUBSCRIPTION INFORMATION

*The Tort Law Review* comprises three parts a year.

The journal is available for subscription via paper and/or online. An online subscription can include access to archived volumes of the journal dating back to 1993 and has the following benefits: all content is fully searchable; PDF versions are provided for easier reading; and users can subscribe to an RSS feed to be instantly informed of updates.

### **For further information on how to subscribe:**

Visit [www.thomsonreuters.com.au](http://www.thomsonreuters.com.au)

Tel: 1300 304 195

Email: [LTA.Service@thomsonreuters.com](mailto:LTA.Service@thomsonreuters.com)

### **Advertising inquiries:**

Contact Andrew Parsons on (02) 8587 7462 or email [a.parsons@thomsonreuters.com](mailto:a.parsons@thomsonreuters.com)

**Editorial inquiries:** Tel: (02) 8587 7000

### **Customer service and sales inquiries:**

Tel: 1300 304 195 Fax: 1300 304 196

Web: [www.thomsonreuters.com.au](http://www.thomsonreuters.com.au)

Email: [LTA.Service@thomsonreuters.com](mailto:LTA.Service@thomsonreuters.com)

### **Head Office**

100 Harris Street PYRMONT NSW 2009

Tel: (02) 8587 7000 Fax: (02) 8587 7100



**THOMSON REUTERS**

© 2010 Thomson Reuters (Professional) Australia Limited ABN 64 058 914 668

Lawbook Co.

Published in Sydney

ISSN 1039-3285

Typeset by Thomson Reuters (Professional) Australia Limited, Pyrmont, NSW

Printed by Ligare Pty Ltd, Riverwood, NSW