

TORT LAW REVIEW

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Liability in misfeasance and the doctrine of malice – Zia Akhtar

This article examines the cause of action in misfeasance by drawing out the scope of the breach of duty in public office under English law and certain Commonwealth countries. It sets out the various elements of the offence and the distinction between criminal and tortious liability. There is an exploration of the variations in approach in dealing with malice and a critical analysis of the underpinnings in law of when there is a breach of a duty of care in public office. There is consideration of the extent of malice that needs to be proven before it becomes an aggravated offence. The central argument concerns the definition of what constitutes malice and the difference between targeted malice, and reckless malice in the commission of misfeasance. This article argues that there is an emerging consensus among jurists in the common law jurisdictions that is leading to a uniform approach to situations where there is breach of duty by an office holder that results in civil or criminal liability. 51

Reconciling medical and legal conceptions of surgery – an exercise in futility? – Roy G Beran and John A Devereux

Medicine views the idea of futile surgery as uncertain. Law, by contrast, not only views the concept as certain, but is increasingly imposing liability on surgeons who conduct futile surgery. This article reviews medical conceptions of futile surgery, with a special focus on recent medical research into medical futility and surgical intervention. The article then reviews a recent High Court decision where the court, among other matters, considered the potential liability of a surgeon, in the event that that surgeon conducted futile surgery. The article argues there is a disconnect between medical and legal definitions of futility, and that there needs to be greater dialogue between medicine and the law. 68

The impact of the changes to the New South Wales workers compensation law: A betrayal of the compensation bargain? – Michael Peters

This article examines whether the recent changes to workers compensation law in New South Wales (NSW) is consistent with the social contract forged by workers who have bargained away their common law rights for the certainty of a statutory compensation scheme, which in recent times has given the injured worker very little in return. This article argues that the history of workers compensation is about the continuous erosion of common law rights, arguably to control and reduce the insurance premiums and to encourage injured workers to return to work. The greater regulation of the work injury experience, in addition to the restrictions imposed on injured workers' rights to common law action and lump-sum settlements, is a feature of these changes. This has transformed the injured workers' status from industrial citizens with common law rights, to clients of a bureaucratic rehabilitation management system overseen by the state, which is able to extinguish statutory and common law rights retrospectively. This trading of rights, sometimes referred to "the compensation bargain", is one of the foundations of workers compensation law in NSW. 75

Tortious liability of corporate groups: From control to coordination – Christian Witting and James Rankin

This article considers ways in which tort law can contribute to the extended liability of the corporate group, by creating liability beyond a wrongdoing but insolvent subsidiary. Current case law permits actions by claimants against the parent company where it owes them a duty of care separate from that owed by the subsidiary. The control exercised by the parent over the

circumstances in which injury occurs is an important factor in establishing the duty of care. This article recommends the development of the tort of unlawful means conspiracy in the corporate group context so that it can be pleaded in circumstances of the reckless infliction of harm. Development of the tort in this way would be especially attractive in creating “sideways” liability as between group subsidiaries, based on their coordinated behaviour in creating of risks of harm. 91