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.
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   - 2 Hayton, n 1, p 286.
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