

TORT LAW REVIEW

Volume 18, Number 2

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Surveyor’s duty of care to the buy-to-let purchaser – *Tina Hart* 72

ARTICLES

Wrongful birth and *Sullivan v Gordon* damages claims: An argument for consistency and reform in New South Wales – *Katie Talbot and Julia Werren*

This article critically analyses the relationship between wrongful birth and *Sullivan v Gordon* type claims in New South Wales. Although somewhat different in nature, both types of claims may relate to care expenses associated with children born as a result of another’s negligence. The authors explore the legal, ethical and social issues that have been discussed extensively in cases such as *Cattanach v Melchior* (2003) 215 CLR 1, *Sullivan v Gordon* (1999) 47 NSWLR 319 and *CSR Ltd v Eddy* (2005) 226 CLR 1. The legislative provisions in New South Wales are then considered and an assessment made whether the legislature contemplated all the relevant issues as discussed in such cases. The authors argue that both s 15B and s 71 of the *Civil Liability Act 2002* (NSW) should be reformulated to allow care expenses to be claimed for children who are born as a result of the negligence of another and that *Sullivan v Gordon* claims and wrongful birth claims should be treated consistently under the legislation. 76

Maternal liability for prenatal injury: The preferable approach for Australian law? – *Kate Wellington*

The question of whether a pregnant woman owes a universal duty of care to her unborn child is as yet unresolved in Australian law. The issue invokes complex policy considerations which have been tackled differently across various jurisdictions. In some jurisdictions, such as Canada, the courts have taken relevant policy factors into account to afford mothers a general immunity from liability in this area. In other jurisdictions, including various States in the United States, the courts have upheld actions brought by infant plaintiffs injured while en ventre sa mere. This article examines the current law across a number of jurisdictions, focusing in particular on several recent Canadian cases, in order to propose the preferable approach to be adopted in Australia. That approach, it is contended, is for the courts to uphold any action falling within the well-established principles of tort law and, if public opinion is contrary to the resulting position, for Parliament to legislate accordingly. 89

Causal responsibility for uncertainty and risk in toxic torts – *Per Laleng*

Despite the exceptional nature of *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32, its formulaic application in low exposure mesothelioma cases has ramifications for the coherence and scope of causal responsibility for harm in the English law of negligence. Existing threshold conditions for its application are either so fluid that the exception could become the norm in all competing cause cases, or they are unacceptably arbitrary. While the formulaic application of the exception in grave harm toxic tort cases can be understood

as a chemo-phobic over-reaction to risk, its application in low exposure cases – that is to say, where tortious exposures are less than unavoidable background environmental exposure – cannot be rationally justified. This article urges the Supreme Court of England in *Sienkiewicz v Greif (UK) Ltd* [2010] 2 WLR 951 and *Willmore v Knowsley Metropolitan Borough Council* [2009] EWCA 1211 Civ to adopt an overarching threshold condition delimiting the application of the exception to cases where, in reasonable likelihood, the claimant’s harm was caused by wrongful conduct. This approach will place reasonably intelligible limits on responsibility for uncertainty and risk in toxic torts and beyond. 102

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