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ARTICLES

The Slow Death of Past Damage as an Essential Element of Negligence – *Tim Baxter*

Since the recasting of negligence in Donoghue v Stevenson, high authority in Anglo-common law jurisdictions has described past damage as a fundamental requirement in a successful claim for negligence driven by the judgment in Wagon Mound (No 1). But the status of this once essential element is weaker than it has previously been understood. The recent judgment of the Federal Court in Plaintiff S99/2016 v Minister for Immigration and Border Protection has seen the proposition come undone. Negligence is realising its full potential, modelled here for the first time. The exceptions to the rule that a claim in negligence needs past damage are considered and consequences of the new pathway to a remedy through negligence are described. The advent of this new remedy for an old tort requires a rethinking of the tort. 123

Justification Defences under the Economic Torts – *David Goodwin*

The notion of justification has been central to the economic torts from their inception, but limited attention has been paid to the delineation of justification defences for the torts. This article aims to address this gap by reviewing the case law pertaining to justifications, identifying the judicial perspectives reflected in the English and Australian precedents and examining the place the defences occupy within the architecture of the economic torts. The potential avenues for future expansion of the justification defences are explored. The article also considers a number of constraints on the exercise of judicial initiative to expand justifications and analyses the considerations which need to be taken into account when weighing competing interests bearing on a justification defence under Australian law. Wellsprings of authority are identified which can enable an enlivening of the defences. A refocusing on notions of public interest in their future development is anticipated. 143

Ignoring the Call for Law Reform: Is It Time to Expand the Scope of Protection for Personal Images Uploaded on Social Networks? – *Dr Eugenia Georgiades*

Social networks have changed the way in which people communicate, in particular the way that images are uploaded and shared online. While there are many benefits for the use of social networks, uploading personal images online are prone to misuse. This is highlighted with the Facebook's Cambridge Analytica privacy breach, however the protection of personal images is limited and fragmented in Australia. There have been a number of calls for potential law reform for expanding the scope of legal protection under the common law however the law remains unchanged. This means that personal images that fall outside the scope of the current protection are bereft of protection and prone to misuse. This article examines whether the common law ought to be expanded to prevent the abuse of images that may not fall within the scope of a sensitive nature. 166

Hard Cases Making Bad Law: The Elusive Search for a Test for Duty of Care – *Andrew Clarke and John Devereux*

Establishing a duty of care is foundational to establishing liability in negligence. In the almost 100 years since the seminal case of Donoghue v Stevenson (Donoghue), courts

in Australia and the United Kingdom have struggled to discern a clear and workable test for establishing whether a duty of care exists in novel cases. This article outlines the different tests used in the Anglo-Australian world and contrasts their complexity with the elegant simpilicity offered in the United States. The article suggests that the High Court of Australia in the late 1980s and early 1990s over thought and over analysed the fulcrum test in negligence, that of duty of care. Given that negligence is the major tort used by plaintiffs seeking compensation, the High Court's failure to outline a simple test was both a practical and symbolic gap which could then be exploited by activist legislatures who reformed, not the test for duty of care, but other aspects of the law of negligence. The article argues that the centenary of Donoghue provides an ideal opportunity to ensure the lessons from that case are not shrouded in obscurity. 177