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INTENTION, NEGLIGENCE AND THE CIVIL LIABILITY ACTS

Peter Handford

The Ipp Report made recommendations designed to limit liability for personal injury resulting from negligence, but the Civil Liability Acts in some jurisdictions are wide enough to cover at least some cases of intentional wrongs. In New South Wales, Victoria and Tasmania, the legislation in the main adheres to the spirit of the Ipp Report's recommendations by being limited to harm resulting from negligence. In the Northern Territory, the Australian Capital Territory and Queensland, on the other hand, the legislation appears to cover at least some cases of intentional wrongs as well as negligence. South Australia and Western Australia are different again and cannot be placed in either of the main groups. Whether created as a matter of deliberate policy, or simply the product of drafting differences, the disunity produced by the Civil Liability Acts is a complication that the law of torts could well have done without. 100

INTERNATIONAL ARBITRATION IN AUSTRALIA: THE NEED TO CENTRALISE JUDICIAL POWER

Albert Monichino SC

The arbitral legislative regime in Australia has recently undergone substantial reform with a view to positioning Australia as a hub for dispute resolution in the Asia-Pacific region. Underlying both the domestic and international arbitration regimes is the UNCITRAL Model Law. It is universally accepted that the success of the new arbitration regime in Australia depends upon uniform interpretation of the Model Law by the various superior courts. The proposal raised during the reform process to confer exclusive jurisdiction under the International Arbitration Act 1974 (Cth) upon the Federal Court was not implemented. Instead, concurrent jurisdiction was conferred on the State and Territory Supreme Courts and the Federal Court. The opponents of this proposal argued that uniformity in judicial approach could be achieved by non-legislative means – in particular, by encouraging superior courts to establish panels of specialist arbitration judges. The author argues that timely, uniform interpretation of the Model Law will be difficult to achieve under the present arrangements. He advocates that more is required to establish truly specialist arbitration lists, and that the Federal Court should be established as the single intermediate appellate court to hear and determine international arbitration matters. 118

“ASSET LENDING” AND THE IMPROVIDENT BORROWER

Lee Aitken

The Court of Appeal recently confirmed in *Tonto Home Loans Australia v Tavares* [2011] NSWCA 389 at [3] per Allsop P: “such labels [as low doc loans and ‘asset lending’] should be eschewed as determinative of legal reasoning.” Nevertheless, the notion that the lender is looking by way of “asset lending” only to the potential realisation of security rather than the repayment of the loan amount by a borrower well able to service the borrowing, attracts a range of judicial disapprobation, even if it is not a normative category in itself. In particular, it may well provide a basis for relief either under the Contracts Review Act 1980 (NSW), or those federal statutory counterparts which strike down unconscionable transactions, or by the borrower invoking the assistance of broad doctrines of equity designed to prevent overreaching behaviour by a

lender. There can be nothing wrong with a lender seeking to obtain the benefit of security so long as it, or its agents, do not engage in a “catching bargain” with an improvident, or unsophisticated borrower. That said, there is no legal duty on the lender to “lend reasonably” – like the receiver, the ‘duties’ imposed arise as a matter of equity and statute, not the law of tort.” 134

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