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ARTICLES

Judicial strategies in recognising new areas for recovery in negligence – lessons learned from wrongful conception cases – *Swati Jhaveri*

The boundaries of recovery for personal injury, property damage, psychiatric damage and pure economic loss have been the subject of extensive judicial discussion. However, the courts are constantly asked to consider whether to expand recovery for such damage to novel situations. Wrongful conception is one such situation. In these cases parents claim, inter alia, the costs of raising a child conceived and born as a result of a negligent medical sterilisation procedure or negligent advice on this procedure. Decisions of the highest courts in common law jurisdictions reveal significant differences in judicial strategies deployed to consider whether to recognise recovery. Using wrongful conception as a case study, this article compares and analyses various aspects of the judicial strategies. Five main areas of concern are identified, including: problems with the conceptualisation of the harm claimed; insufficient attention to incrementalism and the pace and "quantum" of the development of the law; and the development of hard-edged and categorical "rules" leading to either anomalies or "injustice" in subsequent cases. The article evaluates these problems and offers some preliminary conclusions on what kind of overall judicial strategy may be best for handling novel situations. 63

The dust settles? Fairchild to Williams – *Charles Feeny*

This article considers the state of the law in relation to mesothelioma claims, now that a decade has passed since the decision of the House of Lords in *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22. It is considered that the Fairchild exception is not a principled rule of the common law but rather a formulaic response to the problem of causation in mesothelioma claims. This pragmatic approach has resulted in further litigation and the development of a rule that creates unjustifiable preference for victims of mesothelioma by contrast with victims of other types of carcinoma. This minimal level of proof of causation has, however, been mitigated from defendants' perspective by decisions that make breach of duty much harder to prove; that is, by requiring that exposure was unsafe by reference to standards contemporaneous with period of exposure. 87

The legal labyrinth of lost chances: Can a plaintiff recover for loss of a less than even chance in medical negligence cases after Tabet v Gett? – *Sarah Alexandra Holloway*

The elusive idea of "loss of chance" has been a persistent source of controversy in negligence law, particularly in medical malpractice cases. Courts and commentators have been divided as to whether a plaintiff should be able to recover for loss of less than even chances and, if so, the legal mechanism upon which to rely. This has created a labyrinthine legal landscape and hindered the potential effectiveness of "loss of chance". This article uses the recent High Court decision in *Tabet v Gett* (2010) 240 CLR 537 as a point of departure for re-examining and disentangling the multidimensional debate in this area. It undertakes a structured analysis of the main rationales for and objections to "loss of chance" and the legal mechanisms by which it could be recognised. The article concludes that "loss of chance" can achieve legitimacy as a valid extension of the principles of negligence law. 96