

TORT LAW REVIEW

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Child saviours: Reconceiving the ethical dimension – *Natalie Morrison and John Devereux*

In this article, the authors critically analyse the ethical issues surrounding the creation of a child for the express purpose of providing tissue or organs to an existing (but ailing) child. A child created in this way is often referred to as a “saviour sibling”. It is argued that parents are caught in a deontological ethical dilemma, which they can only resolve in two ways: sublimating the saviour sibling’s interests and having him or her donate; or sublimating the ill sibling’s interests and watching that child die. This article critically examines the arguments for and against saviour siblings, both in terms of pre-implantation genetic diagnosis and conception, as well as post birth donation. The article argues that ethical debates need to inform the development of the law in this area

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Child saviours: Reconceiving the legal dimension – *Natalie Morrison and John Devereux*

This article examines the law which governs the use of tissue or organs donated by one child (“the saviour sibling”) to another. The legislation governing child transplants was devised at a point in time when it was thought that no child could consent to medical treatment. The legislation is not uniform throughout Australia, with different regulatory regimes offering different protections. Since the legislation was introduced, developments in the common law and under the *Family Law Act 1975* (Cth) have meant that there is now a patchwork of differing regulations governing the issue. Of paramount importance, it is argued, is the establishment of a coherent set of rules governing child transplants from saviour siblings, which avoids the current conflict of interest issue facing parents.

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Facilitation or manipulation: What conduct gives rise to liability for inducing or procuring a breach of contract? – *Chris Bailey*

The tort of inducing or procuring a breach of contract has remained somewhat enigmatic in Australia. Whilst the “knowledge” element of the tort has been widely discussed, there has until recently been little discussion of what “inducement” and “procurement” precisely mean. Two recent Australian decisions take seemingly opposing views with potentially significant implications, one suggesting facilitation of a breach is enough to attract liability, the other requiring the alleged tortfeasor to actually bear on the will of the contracting party. This article argues that although the latter interpretation of the law is correct, the apparently divergent strands of case law can be reconciled on the basis that in many cases of “mere facilitation” there will be an implicit inducement which does bear on the will of the covenantor and provide a genuine incentive for the breach.

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Drafting a torts restatement: Of Swiss cheese, gravity, and process – *Michael D Green and William C Powers Jr*

On the occasion of the second John Fleming Lecture at the Berkeley School of Law, the authors, who were awarded the Fleming Prize in 2012, address their work in restating tort law that is reflected in the two volume *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* (2010 & 2012). The article begins by explaining the need for and formation of the American Law Institute, which was designed to tame the unruly morass that the common law of 48 states had become and which figured in Roscoe Pound’s famous speech from 1906, *The Causes of Popular Dissatisfaction with the Administration of Justice*. The seed sown by Pound emerged in 1923 with the founding of the American Law Institute (ALI) and its mission to “promote the clarification and simplification of the law and its better adaptation to social needs,

to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work.” This article then traces the development of the torts restatements from 1934 when the first one was completed through to today, explaining the intricate process developed by the ALI for its restatement projects. The article then turns to two of the most contentious and important issues involved in the third Restatement: duty and causation. In both cases, the challenge was modernising provisions in earlier Restatements to reflect the decline of formalism in the law, to confront and address the overuse of duty by courts that trespassed on the jury function, and to provide guidance to courts confronting new developments in existing tort law and new genres of tort claims, such as toxic torts. Resolving these matters proved a formidable challenge, yet the results will, in the finest ALI tradition, contribute to greater clarity and coherence in the torts world. 31