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FOREWORD

Special Issue: Tort Law Reform in Asia and Beyond 99

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Reforming Tort Law in Smaller Jurisdictions: Vicarious Liability as a Case Study – *Paula Giliker*

This article examines the challenges faced by smaller common law jurisdictions when engaging in tort law reform in the face of limited domestic case law and secondary literature. This question has received little academic attention and yet is a real issue in areas of private law such as tort that rely heavily on precedent. Drawing on insights gained from comparative analysis and a case study of vicarious liability, this study will examine how smaller jurisdictions such as Hong Kong, Singapore and Ireland have sought to modernise the law of vicarious liability by turning to larger jurisdictions such as the United Kingdom and Canada for inspiration. This study will provide a fresh insight into how smaller jurisdictions engage with law reform in the law of tort. 101

The Misunderstanding of Bolam and Its Impact on the Australian Civil Liability Reform – *Sirko Harder*

The civil liability statutes of New South Wales, Queensland, South Australia, Tasmania and Victoria generally preclude a finding of professional negligence where the defendant acted in a manner that was widely accepted by peer professional opinion "as competent professional practice". In Dean v Pope, a bench of five judges in the New South Wales Court of Appeal unanimously rejected the view, previously adopted by the Court, that the provision in New South Wales requires the defendant to follow an established practice. While one judge still required a previous application of the defendant's approach in practice, four judges regarded it as sufficient that expert witnesses characterise the defendant's conduct as competent. The interpretation rejected in Dean v Pope and the interpretation adopted by the majority in that case correspond to two principles in English law, emanating, respectively, from Bolam v Friern Hospital Management Committee and Maynard v West Midlands Regional Health Authority. This article traces the development of those principles and demonstrates their conflation in England and Australia. Against this background, this article reviews the language and legislative intention of the statutory provisions mentioned and suggests an interpretation that lies between the two principles. 119

Examining the New Standard of Care for Medical Advice and Patients with Mental Health Conditions – *Gary Kok Yew Chan*

In 2017, the Singapore Court of Appeal in *Hii Chii Kok v Oii Peng Jin London Lucien* (*Hii Chii Kok*) favoured a patient-centric approach towards issues of providing medical advice. Section 37 of the *Singapore Civil Law Act*, which took effect on 1 July 2022, stipulates that the standard of care in giving medical advice to patients is based on peer professional opinion. This article will analyse, with reference to other common law jurisdictions, how the new statutory provision applies to patients with mental disorders

under the *Singapore Mental Capacity Act 2008*. It will provide an interpretation of s 37 of the *Civil Law Act* taking into consideration the likely challenges encountered and issues raised by patients including those with mental health conditions, the value of protecting patient autonomy, their participation in decision-making, the quality of the doctor-patient communication and the scope of therapeutic privilege. 134

Artificial Intelligence Should Not Become a "Black Hole" for Human Agency in Tort Law – *Daria Kim*

This article analyses the implications of the tendency to anthropomorphise artificial intelligence (AI) systems for tort law. It shows that the view of AI technology as "autonomous", "unexplainable" and "unpredictable" can misguide the "fit-for-purpose" assessment of the existing liability regimes. The analysis points out that risks and harm associated with AI technology are not inflicted by AI systems as such but are mediated through AI applications, while the main challenge for the allocation of tortious liability lies in the highly distributed causation between human conduct and harm. Overall, it is argued that humans can and should retain agency over mitigating technological risks and internalising harmful effects, even when the sources of those risks and harms are highly distributed. 152

Liability of Internet Service Providers for Cyber Torts under Chinese Law – *Chunyan Ding*

This article examines the latest legal principles regarding the liability of internet service providers (ISPs) for cyber torts under Chinese law by analysing the written rules embodied in the *Civil Code*, the Supreme People's Court's judicial interpretations, and the law in action demonstrated by judicial decisions. It clarifies three legal issues: (1) the ISP's affirmative duty to protect the victim; (2) its secondary liability for the tort committed by the internet service user (ISU); and (3) its third-tier liability to the allegedly infringing ISU. It finds that Chinese courts have been cautious in establishing the ISP's duty of care in two types of cases: its primary liability for infringement by omission and its secondary liability for the tort committed by the ISU. It also finds that Chinese law has endeavoured to strike a balance between the competing interests of the right holder and the allegedly infringing ISU when designing the ISP's roles in abating infringement and handling cyber disputes. 169

Tort Choice-of-Law Rules in China: Implications of the Rome II Regulation – *Zhen Chen*

This article examines some difficulties that have emerged in the use of Art 44 of the *Chinese Private International Law Act*, under which the law applicable to tort liabilities shall be: first, the law chosen by the parties ex post; second, the law of the common habitual residence of the parties; and third, the law of the place of the wrong. Yet the application of such conflict rules may lead to no applicable law, as was found in *Shuying Yang v British Carnival PLC*. In comparison with tort choice-of-law rules in Art 4 of the Rome II Regulation, this article concludes that ex ante party autonomy in tort should be allowed in China, the habitual residence of a legal person needs to be clarified, the notion of "damage" in lex loci damni could be interpreted broadly and the closest connection principle may play a role in tort. 184

The Apology as a Remedy in Defamation in Malaysia and Hong Kong – *Abdul Majid, Ridoan Karim, Haemala Thanasegaran, Raymond Ho and Mei Yee Lee*

This article is about the apology as a remedy in defamation in Malaysia and Hong Kong. An apology order is a "specialised" mandatory injunction that directs the defendant to tender an apology to the plaintiff, either verbally in open court or by publishing it in writing or in electronic form in other specified media. Apart from the law in Malaysia and Hong Kong, the article considers the judicial treatment of apology orders in selected common law jurisdictions to gain a deeper understanding of the evolution and emergence of this remedy. Our article contributes to the literature on the apology in defamation by identifying, from the cases, the circumstances in which the apology order may be granted. We conclude that a court may consider an apology order only when the damages alone (compensatory and aggravated) are, in the opinion of the court, inadequate to vindicate the harm done by the defendant. 197

Tort Law Reform in Vietnam: Unveiling the Dialogue between the Courts and the Legislature – *Do Giang Nam and Dao Trong Khoi*

Traditionally, Vietnamese tort law was based on fault-based liability. However, in 2015 the Vietnamese Civil Code departed from its two precursors of 1995 and 2005 and unexpectedly excluded fault from tort liability. This article presents and evaluates the content and context of this reform. It explains the rationale and motivation for the reform and explores the intense academic debates that followed immediately after it. It also advocates for a model that rebuilds the concept of fault, moving from a subjective standard to an objective standard that gauges whether the tortfeasor breached a standard of reasonable care. Such a model would have the potential to enhance safety standards in modern Vietnamese society. 210

Companies, Groups and Supply Chains: Structures and Responsibility in Tort and Beyond – *Christian Witting*

The liability in tort of lead firms in global supply chains (GSCs) has become a battleground with recent debate concerning the proposed European Union Directive on Corporate Sustainability Due Diligence. The reasons for imposing responsibilities upon lead firms to ensure adherence to proper standards of conduct along supply chains sometimes involve comparison of the supply chain and the corporate group. This article refutes the idea that there is a relevant analogy. The core structural feature of companies and corporate groups is a managerial hierarchy that facilitates efficient co-ordination of activities. These business forms conform to the idea of the "system", having ascertainable boundaries and operating according to chosen purposes. Each is amenable to tort liability which is forward-looking and deterrence-based. As a general rule, GSCs do not have similar features so that lead firms have difficulty imposing standards. Other means of creating responsibility and internalising norms of conduct in GSCs are required. 224