ALTA 2005
The University of Waikato

Abstracts from the Tort and Contract Interest Group

Legal Act Economic Duress and the PHOs: An unhealthy aspect of New Zealand's health system

Darryl Saunders and Debbie Wilson
Assistant Lecturer, School of Accountancy and Business Law, Massey University

Abstract
Generally, when economic duress is argued to void obligations under a commercial contract, the duress involved is the threat of a legal wrong. The possibility exists that the threat could consist of something that the party is legally entitled to do. This is known as Legal Act Economic Duress (LAED).
In CNT v Gallagher, Lord Steyn accepted that there was a small window of opportunity for LAED to be argued, but stated that "in a purely commercial context it might be a relatively rare case in which legal act duress can be established."
The New Zealand Public Health and Disability Act 2000 initiates administrative trategies to create a holistic health service, via a complex contractual regime rather than through regulation. This has the unforeseen potential consequence of providing an example of LAED. The Court of Appeal in, Pharmacy Care Systems prima facie shuts the window on LAED in New Zealand. It is suggested, however, that the possibility still remains for a claim under this head and it is only the fact that the strategies implemented under the umbrella of the NZPHDA 2000 are not working in the way the Minister intended that has prevented this issue for arising thus far.

Advocates' Immunity: What Makes Lawyers So Special?

Julia Werren and Amanda Williamson
Associate Lecturer, School of Law, University of New England

Abstract
This paper will be directed to examine the nature of advocates' immunity in light of the recent High Court decision of D'Orta-Ekenaike v Victorian Legal Aid [2005]. This case upholds advocates' immunity from suit for work intimately connected with court proceedings. The proposed paper will explore the current extent of this immunity in Australia, canvassing the difficulties connected with ascertaining the extent of the immunity given that it is not a blanket immunity for lawyers in general. The paper will also take into account comparative perspectives from other professions, as well as considering advocates' immunity in overseas jurisdictions. Within this paper there will be a strong focus on the policy and social considerations relating to advocates' immunity that have been relied upon to justify the retention of this doctrine within Australia. The areas covered by this doctrine encompass topics such as professional negligence, social

justice and litigation, however, this paper will be concerned only with the issue of professional negligence.
The proposed paper will fit well within the ALTA Conference Theme 'One Law For All?', providing a timely consideration of whether there should be uniformity across professions as well as international jurisdictions with respect to advocates' immunity.

Eggshell Skulls, Brittle Bones and Sensitive Souls - and how the ACC scheme deals with them

Ken Mackinnon
Associate Professor, Law School, The University of Waikato

Abstract
With the removal of the need to prove fault in New Zealand's accident compensation scheme, entitlement for personal injury compensation focuses on showing causation. The situation is complicated by the statutory exclusion of injuries caused wholly or substantially by pre-existing gradual processes. Since apportionment is not available under the legislation, claimants either receive cover and entitlements or are left without compensation. Claimants have, therefore, attempted to borrow various common law concepts such as the "but for" test, the "eggshell skull" principle and the "acceleration rule" to argue that entitlements should granted even though the claimant has a pre-existing condition. Generally such arguments have failed in the courts. This paper attempts to clarify if and how these tort law concepts are best accommodated in the statutory accident compensation scheme.

BROADENING HORIZONS OF QUALIFIED PRIVILEGE: DESIRABILITY OF ONE LAW FOR ALL

Prof Dr Mohd Altaf Hussain Ahangar

Abstract
Qualified privilege as defence to defamation action is based on common law principles. This defence has, however been supplemented by statutory rules in many countries notably England, Australia, New Zealand and Malaysia. The judiciary in Malaysia has mostly decided the cases on common law principles which require, in addition to honest acting and absence of malice, a legal, moral or social duty / interest on the defendant to make the statement and the legal, moral or social duty / interest to receive the statement on the recipients. Recent Malaysian cases include *Puneet Kumar* [2004], *Abu Samah* [2004], *Mahadevi Devi* [2003], *Raphael Pura*[2003] and *Dato Seri Anwar Ibrahim*[2003]. Malaysia did, however, get the chance of broadening dimensions of qualified privilege in *Dato Seri Anwar Ibrahim* [1999] wherein, in the light of *Reynolds* [1998] and *Lange* [1997] it was observed that the defendant as chief executive of the government was under legal, moral and social duty to inform the nation matters pertaining to plaintiff's removal. Defamation is a secular matter devoid of, on the whole, religious, cultural, linguistic and other considerations. Then, why we have different laws on this matter within different units of the one country? What justifications are there for

eight states of Australia to have their own defamation regime prompting the Australian Attorney General Ruddock to tell these state s to adopt uniform law on defamation or he will pass his own laws. It is highly desirable that all nations adopt uniform law in relation to defamation through the aegis of United Nations.

Contract, Tort and Purely Economic Loss after "Woodcock"

Norman Katter
Senior Lecturer, Faculty of Law, Queensland University of Technology

Abstract
The decision in the High Court of Australia *Woolcock Street Investments Pty Ltd1* while per se of particular interest to the construction industry, raises more fundamental issues of the relationship between contract and tort where the claim is for purely economic loss. In essence the decision poses the question whether in certain circumstances, where a claim is for purely economic loss, our two great "branches of the law of obligations"2 are independent or is tort subservient to the law of contract?
1 [2004] HCA 16 (not available in authorised reports at time of writing) 2 Ibid at para 130

Civil Liability for Sexual Exploitation and Abuse: A Comparative Perspective

Penelope Watson
Lecturer, Division of Law, Macquarie University

Abstract
This paper explores the potential for tort and other civil redress for survivors of sexual injury including abuse, incest and exploitation. It adopts a comparative approach, drawing on material from Australia, New Zealand, Canada and the United Kingdom. Recent developments in sexual battery, negligence and breach of fiduciary duty are considered. In relation to sexual battery, the major problems of limitation periods, damages issues and consent are discussed. Recent Canadian developments treating sexual injury as a breach of fiduciary duty are contrasted with the law elsewhere, particularly Australia. The paper then deals more briefly with negligence of third parties such as family members, employers, schools and institutions, from the standpoint of vicarious liability and non delegable duty of care. Finally, duty issues arising from unsubstantiated accusations of abuse are considered. The author argues that tort litigation may offer plaintiffs some hope in resolving the complex emotional legacies which result from sexual injury, and act as a powerful educative and deterrent tool, notwithstanding the legal difficulties.

Policy, policing and the duty of care

Prue Vines
Associate Professor, Faculty of Law, The University of New South Wales

Abstract
The House of Lords recently considered another case about policing and the duty of care (Brooks v Commissioner of Police for the Metropolis). This raises the interesting question of how the legal system is to treat police who behave badly and to what extent victims of such behaviour should be able to use private law remedies rather than public law remedies to deal with the issue. Ultimately this has to be dealt with as a question of policy. Is a case like Brooks qualitatively different from a case like Hill where the police officers made mistakes but were not necessarily behaving badly? In Hill the House of Lords decided that no duty could arise in relation to the police. Is this decision justifiable and is there any scope for using other torts such as misfeasance in public office in relation to such matters.