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THE NEW LAW OF TORTS

CASE SUPPLEMENT

SECOND EDITION

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INTRODUCTION

The New Law of Torts Case Supplement is a collection of edited cases prepared in order to:

1 provide the reader with extracts of seminal judgments that have created and shaped the modern law of torts, thus supplying primary sources for the analysis undertaken in The New Law of Torts;
2 illustrate through judicial texts discussions in The New Law of Torts of the mainly incremental, but sometimes radical, changes to the law of torts;
3 provide examples of judicial reasoning, and hence, legal reasoning referred to in the book;
4 illustrate judicial sources of doctrines that govern the interpretation and construction of statutes.

The Supplement is not a comprehensive sourcebook of torts law; rather, the emphasis is on case excerpts containing passages which crystallise or define legal principles, tests, and rules. At the same time, several judgments have been selected because they illuminate the way judges interpret, 'find', or create the law by critically evaluating past approaches, competing legal norms, policies, and social values. While The New Law of Torts, naturally, expresses a particular point of view in its approach to torts jurisprudence, cases extracted in this volume enable readers to form their own opinions and perspectives on themes and issues presented in the book.

When read in a roughly chronological order (particularly in relation to the tort of negligence), the reader can trace step-by-intellectual step the conceptual transformation of such seminal notions as, for example, reasonable foreseeability and proximity; the nature of omission (nonfeasance), duty of care, breach, and causation. Several cases illustrate judicial efforts to conceptualise and reconceptualise tests for determining standards and causal responsibility in general, as well as liability in novel categories of case in negligence. They also reveal how the law of torts forms an interlocking fabric, and demonstrate the importance of the principle of the coherence of the law (relatively few among the selected judgments focus on a single aspect or element of the law). For example, a case like Hargrave v Goldman (1963) 110 CLR 40, which appears under Chapter 10 (Negligence: Duty of Care) is equally important to Chapter 18 (Nuisance) of The New Law of Torts.

Extracts from dissenting judgments have been included to illustrate the polemics about philosophy, values and policies that inform the law of torts. Whereas over the years some judgments, both leading and dissenting, have became the basis of statutory enactments, others were legislatively overcome. Consequently, to understand and properly construe statutory provisions, their text has to be examined in the light of the purpose of the legislation, including the elemental question, namely, which antecedent common law principles and tests the Parliament intended to

uphold, modify, or abolish. In order to answer this question, one needs to be familiar with the case law. Moreover, when all is said and done, statutory principles remain embedded within and form a vital part of the ever evolving judge-made common law of torts. The most recent cases (September 2009–June 2010) illustrate the High Court's approach to the construction of statutory principles of negligence, and their function as the foundation for the refashioning and re-orientation of the common law.

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CONTENTS

1 INTRODUCTION TO THE LAW OF TORTS AND HISTORICAL OVERVIEW

[redacted] Moody & Others; Thompson v Connon

(2001) 207 CLR 562

This case is also relevant to chapters 10, 12, 13, 15 and 16 and indeed, the law of torts in general.

The plaintiffs were fathers of children who had been examined by medical practitioners and social workers employed by the Department of Community Welfare for evidence of sexual abuse. They sued those persons and the State of South Australia for damages in negligence in the conduct of those examinations which resulted in reports that the children had been sexually abused. The plaintiffs alleged that as a result of the negligent examination, diagnosis and reporting they had suffered shock, distress, psychiatric injury and consequential personal and financial loss.

HIGH COURT OF AUSTRALIA
GLEESON CJ, GAUDRON, MCHUGH, HAYNE AND CALLINAN JJ:

[48] ***578** ... Professor Fleming *The Law of Torts*, 9th ed (1998), p 151 said, 'no one has ever succeeded in capturing in any precise formula' a comprehensive test for determining whether there exists, between two parties, a relationship sufficiently proximate to give rise to a duty of care of the kind necessary for actionable negligence. The formula is not 'proximity'. Notwithstanding the centrality of that concept, for more than a century, in this area of discourse, and despite some later decisions in this Court which emphasised that centrality [footnote omitted], it gives little practical guidance in determining whether a duty of care exists in cases that are not analogous to cases in which a duty has been established [footnote omitted]. It expresses the nature of what is in issue, and in that respect gives focus ***579** to the inquiry, but as an explanation of a process of reasoning leading to a conclusion its utility is limited. The present appeals provide an illustration of the problem. To ask whether there was a relationship of proximity between the medical practitioners who examined the children, and the fathers who were suspected of abusing the children, might be a

convenient short-hand method of formulating the ultimate question in the case, but it provides no assistance in deciding how to answer the question. That is so, whether it is expressed as the ultimate test of a duty of care, or as one of a number of stages in an approach towards a conclusion on that issue.

[49] What has been described as the three-stage approach of Lord Bridge of Harwich in *Caparo Industries Plc v Dickman* [1990] 2 AC 605 at 617–618 does not represent the law in Australia [footnote omitted]. Lord Bridge himself said that concepts of proximity and fairness lack the necessary precision to give them utility as practical tests, and 'amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope' *Caparo* [1990] 2 AC 605 at 617–618. There is a danger that judges and practitioners, confronted by a novel problem, will seek to give the *Caparo* approach a utility beyond that claimed for it by its original author. There is also a danger that, the matter of foreseeability (which is often incontestable) having been determined, the succeeding questions will be reduced to a discretionary judgment based upon a sense of what is fair, and just and reasonable as an outcome in the particular case. The proximity question has already been discussed. The question as to what is fair, and just and reasonable is capable of being misunderstood as an invitation to formulate policy rather than to search for principle. The concept of policy, in this context, is often ill-defined. There are policies at work in the law which can be identified and applied to novel problems, but the law of tort develops by reference to principles, which must be capable of general application, not discretionary decision-making in individual cases.

[50] Different classes of case give rise to different problems in determining the existence and nature or scope, of a duty of care. Sometimes the problems may be bound up with the harm suffered by the plaintiff, as, for example, where its direct cause is the criminal conduct of some third party eg, *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254. Sometimes they may arise because ***580** the defendant is the repository of a statutory power or discretion eg, *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1; *Brodie v Singleton Shire Council* (2001) 206 CLR 512. Sometimes they may reflect the difficulty of confining the class of persons to whom a duty may be owed within reasonable limits eg, *Perre v Apand Pty Ltd* (1999) 198 CLR 180. Sometimes they may concern the need to preserve the coherence of other legal principles, or of a statutory scheme which governs certain conduct or relationships eg, *Hill v Van Erp* (1997) 188 CLR 159 at 231, per Gummow J. The relevant problem will then become the focus of attention in a judicial evaluation of the factors which tend for or against a conclusion, to be arrived at as a matter of principle. In *Donoghue v Stevenson*, for example, Lord Buckmaster, in dissent, was concerned that, if the manufacturer in that case was liable, apart from contract or statute, to a consumer, then a person who negligently built a house might be liable, at any future time, to any person who suffered injury in consequence; a concern which later cases showed to have been far from fanciful *Donoghue* [1932] AC 562 at 577. The problem which has caused so much difficulty in relation to the extent of tortious liability in respect

of negligently constructed buildings was not only foreseeable, but foreseen, in the seminal case on the law of negligence [footnote omitted] ...

...

[53] Developments in the law of negligence over the last thirty or more years reveal the difficulty of identifying unifying principles that would allow ready solution of novel problems. Nonetheless, that does not mean that novel cases are to be decided by reference only to some intuitive sense of what is 'fair' or 'unfair'. There are cases, and this is one, where to find a duty of care would so cut across other legal principles as to impair their proper application and thus lead to the conclusion that there is no duty of care of the kind asserted.

[54] The present cases can be seen as focusing as much upon the ***581** communication of information by the respondents to the appellants and to third parties as upon the competence with which examinations or other procedures were conducted. The core of the complaint by each appellant is that he was injured as a result of what he, and others, were told. At once, then, it can be seen that there is an intersection with the law of defamation which resolves the competing interests of the parties through well-developed principles about privilege and the like. To apply the law of negligence in the present case would resolve that competition on an altogether different basis cf *Spring v Guardian Assurance Plc* [1995] 2 AC 296. It would allow recovery of damages for publishing statements to the discredit of a person where the law of defamation would not.

[55] More fundamentally, however, these cases present a question about coherence of the law. Considering whether the persons who reported their suspicions about each appellant owed that appellant a duty of care must begin from the recognition that those who made the report had other responsibilities. A duty of the kind alleged should not be found if that duty would not be compatible with other duties which the respondents owed ...

...

[60] ***582** The circumstance that a defendant owes a duty of care to a third party, or is subject to statutory obligations which constrain the manner in which powers or discretions may be exercised, does not of itself rule out the possibility that a duty of care is owed to a plaintiff. People may be subject to a number of duties, at least provided they are not irreconcilable. A medical practitioner who examines, and reports upon the condition of, an individual, might owe a duty of care to more than one person. But if a suggested duty of care would give rise to inconsistent obligations, that would ordinarily be a reason for denying that the duty exists. Similarly, when public authorities, or their officers, are charged with the responsibility of conducting investigations, or exercising powers, in the public interest, or in the interests of a specified class of persons, the law would not ordinarily subject them to a duty to have regard to the interests of another class of persons where that would impose upon them conflicting claims or obligations.

[61] There is also a question as to the extent, and potential indeterminacy, of liability. In the case of a medical practitioner, the range of people who might foreseeably (in the sense earlier mentioned) suffer some kind of harm, as a consequence of careless diagnosis or treatment of a patient, is extensive.

[62] The statutory scheme that formed the background to the activities of the present respondents was, relevantly, a scheme for the protection of children [*Community Welfare Act 1972* (SA), ss 10, 25, 91, 235a]. It required the respondents to treat the interests of the children as paramount. Their professional or statutory responsibilities involved investigating and reporting upon, allegations that the children had suffered, and were under threat of, serious harm. It would be inconsistent with the proper and effective discharge of those responsibilities that they should be subjected to a legal duty, breach of which would sound in damages, to take care to protect persons who were suspected of being the sources of that harm. The duty for which the appellants contend cannot be reconciled satisfactorily, either with the nature of the functions being exercised by the respondents, or with their statutory obligation to treat the interests of the children as paramount. As to the former, the functions of examination, and reporting, require, for their effective discharge, an investigation into the facts without apprehension as to possible adverse consequences for people in the position of the appellants or legal liability to such persons. As to the latter, the interests of the children, and those suspected of causing their harm, are diverse, and irreconcilable. That they are irreconcilable is evident when regard is had to the case in which examination of a child alleged to be a victim of abuse does not allow the examiner to form a definite opinion about whether the child has been abused, only a suspicion that it may have happened. The interests of the child, in such a case, would favour reporting that the suspicion of abuse has not been dispelled; the interests of a person suspected of the abuse would be to the opposite effect.

[63] Furthermore, the attempt by the appellants to avoid the problem of ***583** the extent of potential duty and liability is unconvincing. They sought to limit it to parents. But, if it exists, why should it be so limited? If the suspected child abuser were a relative other than a parent, or a schoolteacher, or a neighbour, or a total stranger, why should that person be in a position different from that of a parent? The logical consequence of the appellants' argument must be that a duty of care is owed to anyone who is, or who might become, a suspect.

[64] A final point should be noted. The appellants do not contend that any legal right was infringed. And, once one rejects the distinction between parents and everybody else, they can point to no relationship, association, or connection, between themselves and the respondents, other than that which arises from the fact that, if the children had been abused, the appellants were the prime suspects. But that is merely the particular circumstance that gave rise to the risk that carelessness on the part of the respondents might cause them harm. Ultimately, their case rests on foreseeability; and that is not sufficient.

Conclusion

[65] The duty of care for which the appellants contend does not exist.

[66] The appeals should be dismissed with costs.

John Pfeiffer Pty Ltd v Rogerson

(2000) 203 CLR 503

Mr Rogerson claimed damages in the Supreme Court of the Australian Capital Territory for personal injury he suffered in New South Wales. Gleeson CJ, Gaudron, McHugh, Gummow, and Hayne JJ (Kirby J concurring) determined that the principle of *lex loci delicti* governed all questions of substance in Australian torts involving an interstate element.

HIGH COURT OF AUSTRALIA
GLEESON CJ, GAUDRON, MCHUGH, GUMMOW AND HAYNE JJ:

The federal context

[2] ... it is important to note that the issue arises in a federal context, and not in an international context ... Because the issues are in the Australian federal context, several preliminary but basic points should be made at the outset. First, while the phrases 'law area' and '*lex fori*', adapted from the lexicon of private international law, may be used to identify each of the States and Territories which comprise the geographical area of Australia, these expressions are to be understood in the Australian federal context. Thus, each law area, if it be a State, is a component of the federation and, if it be a Territory, is a Territory of the federation. And with respect to matters that fall within federal jurisdiction, the Commonwealth of Australia is, itself, a law area. Across all these law areas there runs the common law of Australia, as modified from time to time and in various respects by the statute law of competent legislatures. Thus, 'law area' and '*lex fori*' are used in a sense which involves the application by particular courts of the laws of particular legislatures and, in the case of the States and ***515** Territories, those laws may reach beyond the geographical area of the State or Territory in question.

[3] Secondly, the common law of Australia includes the rules for choice of law, again subject to statutory modification. Thirdly, where those common law rules select the law of a law area other than that in which the court in question exercises jurisdiction as the law which determines the outcome of an action, generally they do so by applying the statute law of that other law area in preference to the common law. Sometimes, however, they may apply the common law in preference to statute law.[1] In the present case, the applicant contends that the statute law of the law area in which the events in question occurred should be applied in preference to the common law. Other and more difficult questions arise where, in the case of the States and Territories of Australia, the statute law of two law areas differs and it is sought to apply one rather than the other as the governing law. That is not this case ...

1 See, eg, *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20.

[21] It should be noted that the term 'tort' is used in this context to denote not merely civil wrongs known to the common law but also acts or omissions which by statute are rendered wrongful in the sense that a civil action lies to recover damages occasioned thereby. Thus, ***520** *Koop v Bebb* (1951) 84 CLR 629, which will be considered shortly, involved statutes of New South Wales and Victoria, both of which substantially reproduced *Lord Campbell's Act* and so gave an action in respect of wrongful death where the common law gave none ...

...

[62] In considering the rules which should apply with respect to Australian torts involving an interstate element but which are not litigated in federal jurisdiction, it is relevant to have regard to the requirement of s 118 of the *Constitution* that:

> Full faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State.

[63] In its terms, s 118 does not state any rule which dictates what choice is to be made if there is some relevant intersection between legislation enacted by different States. Nor does it, in terms, state a rule which would dictate what common law choice of law rule should be adopted. It may well be, however, that s 118 (and in some cases s 117, or even s 92 in its protection of individual intercourse: *AMS v AIF* (1999) 199 CLR 160) deals with questions of competition between public policy choices reflected in the legislation of different States—at least by denying resort to the contention that one State's courts may deny the application of the rules embodied in the statute law of another State on public policy grounds (cf *Loucks v Standard Oil Co of New York* (1918) 120 NE 198 at 202) ...

...

Lex fori v lex loci delicti

[81] Before turning to the question whether the common law choice of law rule should be the *lex fori* or *lex loci delicti*, it is necessary to recognise that the place of the tort may be ambiguous or diverse. Difficulty will arise in locating the tort when an action is brought, for example, for product liability and the product is made in State A, sold ***539** in State B and consumed or used by the plaintiff in State C.[2] And the tort of libel may be committed in many States when a national publication publishes an article that defames a person.[3] These difficulties may lead to litigants seeking to frame claims in contract rather than tort ... or for breach of s 52 of the *Trade Practices Act 1974* (Cth) or some similar provision. Characterising such actions may be difficult and may raise questions whether the private international law rules about tort or some other rules are to be applied.[4]

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2 cf *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458; *Buttigeig v Universal Terminal & Stevedoring Corporation* [1972] VR 626; *Macgregor v Application des Gaz* [1976] Qd R 175; *Jacobs v Australian Abrasives Pty Ltd* [1971] Tas SR 92.

3 *McLean v David Syme & Co Ltd* (1970) 72 SR (NSW) 513; *David Syme & Co Ltd v Grey* (1992) 38 FCR 303; *Berezovsky v Michaels* [2000] 1 WLR 1004; [2000] 2 All ER 986.

4 Collins, 'Interaction between Contract and Tort in the Conflict of Laws', *International and Comparative Law Quarterly*, vol 16 (1967) 103; Pryles, 'Tort and Related Obligations in Private International Law', *Recueil des Cours*, vol II (1991) 9, at pp 166–191.

[82] Moreover, even if the place of the tort can be located in a single jurisdiction, it will often enough be entirely fortuitous where the tort occurred. Why, so the argument goes, should the rights of Victorian residents injured when the car in which they are driven (by another Victorian) differ according to whether, if a driver falls asleep and the car runs off the road near the Victorian border, it does so south of Wodonga or north of Albury? But for every hard case that can be postulated if one form of universal rule is adopted, another equally hard case can be postulated if the opposite universal rule is adopted.

[83] It is as well then to compare the consequences of the application, in cases of intranational torts, of the *lex loci delicti* with the consequences of applying the *lex fori*. If the *lex loci delicti* is applied, subject to the possible difficulty of locating the tort, liability is fixed and certain; if the *lex fori* is applied, the existence, extent and enforceability of liability varies according to the number of forums to which the plaintiff may resort and according to the differences between the laws of those forums and, in cases in federal jurisdiction, according to where the court sits.

[84] From the perspective of the tortfeasor (or in many cases an insurer of the tortfeasor) application of the *lex loci delicti* fixes liability by reference to geography and it is, to that extent, easier to promote laws giving a favourable outcome by, for example, limiting liability. If the *lex fori* is applied, the tortfeasor is exposed to a spectrum of laws imposing liability.

[85] From the perspective of the victim (the plaintiff) application of the *lex loci delicti* can be said to make compensation depend upon the accident of where the tort was committed, whereas, if the *lex fori* is ***540** applied, the plaintiff can resort to whatever forum will give the greatest compensation.

[86] In Australia, in all its law areas, the same common law rules apply and any relevant difference in substantive law will stem from statute. Applying the *lex loci delicti* will apply a single choice of law rule consistently in both federal and non-federal jurisdiction in all courts and will recognise and give effect to the predominant territorial concern of the statutes of State and Territory legislatures. These factors favour giving controlling effect to the *lex loci delicti* rather than the *lex fori*.

[87] Application of the *lex loci delicti* as the governing law in Australian torts involving an interstate element is similar to the approach adopted in Canada following the decision of the Supreme Court of Canada in *Tolofson v Jensen* [1994] 3 SCR 1022. Moreover and so far as the subject matter permits, it gives effect to the reasonable expectations of parties. And it is a rule which reflects the fact that the torts with which it deals are torts committed within a federation. Accordingly, the common law should now be developed so that the *lex loci delicti* is the governing law with respect to torts committed in Australia but which have an...

[102] ... The *lex loci delicti* should be applied by courts in Australia as the law governing all questions of substance to be determined in a proceeding arising from an intranational tort. And laws that bear upon the existence, extent or enforceability of remedies, rights and obligations should be characterised as substantive and not as procedural laws.

[illegible] Direct Ltd v Director of Consumer

[2007] HCA 57; (2008) 234 CLR 96

In issue was construction of the credit provisions of the *Consumer Credit (Victoria) Act 1995* (Vic), and the Consumer Credit (Victoria) Code, and the Consumer Credit (Victoria) Code ss 14 and 15(B). Kirby J outlined the principles of purposive interpretation and construction of statutes.

HIGH COURT OF AUSTRALIA
GLEESON CJ, GUMMOW, KIRBY, HAYNE AND CRENNAN JR

KIRBY J:

Purposive interpretation

[32] Purposive construction: Isolating the point of difference as to the interpretative task requires an examination of what this Court has said about the proper approach to elucidating the meaning of contested legislative language, ... The correct approach demands ... an appreciation of relevant historical and other materials that cast light on the purpose of the Victorian Parliament in adopting, and giving effect to, the Code.

[33] When this purpose is understood, the resolution of the competing contentions in the appeal becomes relatively simple. Those of the Director are consonant with the statutory language and conform to the central objects of the Code, and should therefore be preferred. Those of AFD, even if arguably compatible with one reading of the words of the Code, would frustrate the attainment of those objects. They should be rejected.

[34] Starting with the text: The starting point for statutory interpretation is always the text of the written law.[5] It is in that text that the legislature expresses its purpose or 'intention'. It is a mistake for courts to begin their search for the meaning of the law with judicial elaborations, ministerial statements or historical considerations.[6] ***112** Moreover, in performing its functions, a court should never stray too far from the text, for it constitutes the authentic voice of the constitutionally legitimate lawmaker.[7]

[35] Reasons for purposive interpretation: Nevertheless, especially in recent decades, courts of high authority,[8] including in Australia,[9] have moved away from a

5 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518; *Chang* (2007) 234 CLR 1 at 20–21 [59].
6 See *Combet v The Commonwealth* (2005) 224 CLR 494 at 567 [135] where relevant authorities are collected.
7 cf *Trust Co of Australia Ltd v Commissioner of State Revenue* (Qld) (2003) 77 ALJR 1019 at 1029 [68]–[69]; 197 ALR 297 at 310–311.
8 See, eg, *the House of Lords in Fothergill v Monarch Airlines Ltd* [1981] AC 251 at 272, 275, 280, 291.
9 *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 423–424, approved *Bropho v Western Australia* (1990) 171 CLR 1 at 20; cf *Federal Commissioner of Taxation v Ryan* (2000) 201 CLR 109 at 144–146 [79]–[82].