Torts Law Journal (TLJ)
Volume 27 Part 2
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Articles

This article examines the 'course of employment' tests in vicarious liability and workers' compensation law. First, it highlights the current position that these areas of law are a source of difficulty because of their incoherence and unpredictability in application. It also outlines the current position of the High court that these two areas of law must be treated separately. Second, it analyses the current law of vicarious liability and the course or scope of employment tests, namely: the Salmond test, the tests in the High Court decision of *New South Wales v Lepore*, and the 'relevant approach' in the recent High Court decision of *Prince Alfred College Inc v ADC*. This part also outlines and assesses criticisms of these tests as incoherent. Third, it turns to analyse current understandings by the High Court of workers' compensation statutes that provide entitlement on the basis of injury 'in the course of' employment'. This analysis centres on the 'organising test' formulated by the High Court on the meaning of the phrase 'in the course of' employment'. This part then assesses criticisms of this organising test that have labelled it incoherent and difficult to apply. Fourth, the article points to conceptual similarities in the High Court's approach to dealing with these two areas of law. In the fifth part, it argues that, contrary to statements of the High Court, a convergence in approach to dealing with the two areas of law is nevertheless evident in their reasoning in recent case law and supported by normative and historical reasons.

This article examines gratuitous attendant care damages awards under the Civil Liability Act 2002 (NSW). It argues the conditions and thresholds imposed by the Civil Liability Act 2002 (NSW), and the interpretation of the law in the courts, reduce damages awards through the operation of gendered judicial narratives. The authors examined 51 negligence cases in NSW heard between 2013–20 in which damages for gratuitous attendant care were claimed. The authors identified assumptions in the judgments which reflected judges' gendered understandings of how women experience pain, injury and disability in relation to damages for gratuitous care, historically and currently. This included a failure to understand that women often persist with domestic and caring responsibilities regardless of pain, an assumption that injured female plaintiffs 'exaggerate' the seriousness of their injury and pain and, thus, the need for the gratuitous services and, finally, dismissing women's physical pain by psychologising it. The authors also identified assumptions reflecting judges' gendered understandings of the value of domestic work and caregiving, including that unpaid work in the home has no economic value, that it is 'women's work', and that claimants 'exaggerate' the amount of time it takes to do domestic tasks. These gendered assumptions resulted in either no damages being awarded or reduced damages.

In NSW, amongst the tort law reforms brought about by the Civil Liability (Personal Responsibility) Act 2002 (NSW) came amendments to the Limitation Act 1969 (NSW). Those amendments introduced new limitation provisions based on the 'date of discoverability' — essentially, the time when an injured party knows of the constituent elements of the claim so as to warrant bringing proceedings. The justifications for the reforms were at best doubtful; and in any event, rather than creating certainty, the reforms have had the opposite effect: they have made the limitation defence inutile for all but a rare and defined set of situations and in that way have encouraged, rather than curtailed, stale claims. The issues identified also exist in other jurisdictions and under the Competition and Consumer Act 2010 (Cth). It is argued that the NSW provisions should be reformed to redress the imbalance, to restore certainty and to conform with the underlying rationales for limitation periods.