

Torts Law Journal (TLJ)

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(articles and book review included in this part are linked to the LexisNexis platform)

CONTENTS

Articles

[Can patients rely on negligence to access research-generated raw genomic data?](#)

— *Dr Carolyn Johnston and Associate Professor Jane Nielsen*

71

This article explores a potential legal duty of clinicians to return raw genomic data, arising in a research study, in which their patients have participated. There is debate around the instrumental value such data has in identifying a genetic component of disease through further analysis, leading to treatment, yet raw data is not routinely returned to patients. The elements of a claim in negligence mounted by a patient who has not been provided with their raw data following a request are considered including: identifying an actionable head of damage, the scope of a clinician's duty to provide such information, current standards in this field and the causal link between non-provision of raw genomic data and harm. Although a claim in negligence is highly unlikely to be successful, ethical imperatives of reciprocity and respect for autonomy underscore the importance of a debate about whether return of raw genomic data is an interest deserving of protection.

[Irregular migration, false imprisonment and the total restraint of personal liberty](#)

— *Henry Palmerlee*

101

This article considers total restraint of liberty, the physical element of the tort of false imprisonment, in the context of irregular migration to Australia. It argues that this element remains problematically unclear because courts have not adopted a single, positive definition of liberty. In past cases, liberty has been taken to mean both freedom of movement, and freedom only of lawful movement. To resolve this ambiguity, the article considers these two different 'views' of liberty in Anglo-Australian case law, and argues that the broad view of liberty — that liberty includes freedom of unlawful movement — is preferable. This is because the broad view correctly applies the tort's physical element to irregular migration cases, by keeping it separate from the question of legal authority. Resolving this ambiguity will help protect irregular migrants from unlawful detention by the Commonwealth.

[Strict liability and the fault in Australian defamation law: Towards a fault-based tort of defamation](#)

— *Sebastian Candido*

118

Despite the Council of Attorneys-General review into the Model Defamation Provisions and recent changes to Australian defamation law, a central aspect of the law still requires fundamental review and reform — defamation's strict liability standard. While this standard was justified historically, there are two substantial issues with its operation today. First, the standard stacks the required balance between reputational protection and free expression in favour of the former, which overly inhibits the

latter. Second, defamation law has been so infiltrated by fault-based considerations despite its strict liability standard that the nature of the tort is now confused and its basis undermined. Consequently, this article supports a reformulation of Australian defamation law from strict liability to a fault-based system. Drawing on precedent from American defamation law and an analogous area of Australian tort law, it contends that the defamation cause of action should be enacted into statute with a new element inserted requiring the plaintiff to prove that the defendant's publication was not reasonable in the circumstances. This reform will add greater balance and doctrinal coherence to an area of law touching on intimately personal and socially-valuable interests.

Book Review

The Province and Politics of the Economic Torts, John Murphy
— *Christian Witting*

149