

# Torts Law Journal (TLJ)

## Volume 29 Part 2

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#### Articles

##### [The forgotten injured: Can tort compensate for public regulatory failure in residential aged and disability care?](#)

— *Kylie Burns*

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Older people and people with disability in residential care are amongst the most vulnerable to physical and psychological harm perpetrated by others and through neglect. The recent Royal Commission into Aged Care Quality and Safety (Aged Care Royal Commission) and the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Disability Royal Commission) found widespread preventable harm and injury to older people and people with disability. Harm to older people and people with disability was exacerbated during the COVID-19 pandemic. Given the failure of public regulation to prevent and compensate injuries to older people and people with disability in residential care, this article explores the promise of private law remedies, particularly in tort. Part A discusses the prevalence and nature of injuries to people in residential aged care and to people with disability in residential care. Part B discusses harm in aged care and disability care as systemic, structural, hybrid public/private harms and considers public regulatory failure. Part C addresses the potential for private law remedies, particularly in tort, in aged care and disability care injury cases. Finally, Part D discusses regulatory responses to compensation for injury proposed by the Aged Care Royal Commission and by the Disability Royal Commission and the Australian Government's response to date.

##### [The way to \*Chappel\*: Establishing liability for breach of duty to warn in delayed consent cases](#)

— *Dr Rajesh Gounder*

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Where a medical practitioner breaches their duty to warn prior to administering treatment, liability is readily found in favour of the patient if they would never have undergone treatment of and, in favour of the medical practitioner if the patient would have consented irrespective of the breach. However, establishing liability where the patient would have delayed treatment if the breach had not occurred presents a unique challenge for the law of negligence as evidenced by the divergent and divided opinions in *Chappel v Hart* and *Chester v Afshar*. This article examines each of the judgments in these cases as well as the seminal case of *Wallace v Kam* to distil three broad approaches to establishing liability in cases where consent would have been delayed but for the breach of the duty to warn. The article also proposes a fourth approach that overcomes some of the tensions that exists with established legal policies that operate to limit the scope of a defendant's liability.

## A defamation defence for scientific or academic peer review: The new s 30A

— *Sharon Rodrick*

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To assert that it is in the public interest that scientists and academics should be able to express themselves freely on matters within their areas of expertise would have been, until recently, an uncontentious proposition. While lip service is still paid to this assertion, the reality is that many scientists and academics do not feel at liberty to do so. One reason — though by no means the only one — is a fear of being sued for defamation. This article is concerned with a recent amendment to the Model Defamation Provisions, which provides scientists and academics with a defence to a defamation claim in certain limited situations.

## Conceptualising ‘reasonable belief’ in the public interest defence to defamation

— *Darsh Chauhan*

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Section 29A of the Defamation Act 2005 (NSW) provides a defence to an action in defamation if the impugned matter concerns an issue of public interest and if the defendant reasonably believes that its publication is in the public interest. *Russell v Australian Broadcasting Corp (No 3)* (*Russell*) marked the first occasion where the new public interest defence was pleaded at trial. It failed. This article first outlines the domestic development of the new defence and details the facts and findings in *Russell*. It is then dedicated to an analysis based on *Russell* of how courts deciding the defence in future cases might conceptualise the statutory requirement of ‘reasonable belief’. The article concludes that although the new public interest defence may not be revolutionary, its success will be dictated by the overriding paramountcy of the particular circumstances of each case in which it is pleaded.