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## Announcements

### Victoria University of Wellington Student and Alumni Sub-Series Issue 8: Tort Law (II)

Tort Law (II) is the eighth in 2020 of several issues of the Student/Alumni Sub-Series of the Victoria University of Wellington Legal Research Paper Series.

The Student/Alumni Sub-Series was launched in 2015. It distributes a selection of Honours and Postgraduate papers from Victoria University of Wellington Law School. The sub-series includes both general and thematic issues.

## Table of Contents

### **Fearn v Board of Trustees of the Tate Gallery: A Lost Opportunity for the UK's Protection of Physical Privacy?**

Aidan Economu, Victoria University of Wellington, Faculty of Law, Student/Alumni

### **A Moment's Inadvertence Should Not Bring Down the Heavens: Rethinking Proportionality in Negligence Law in New Zealand**

Karan Venter, Victoria University of Wellington, Faculty of Law, Student/Alumni

### **Nothing to See Here? The Extension of Parent Company Liability in James Hardie Industries Plc v White**

Tom White, Victoria University of Wellington, Faculty of Law, Student/Alumni

[^top](#)

## LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES

### VICTORIA UNIVERSITY OF WELLINGTON LEGAL RESEARCH PAPERS

### **"Fearn v Board of Trustees of the Tate Gallery: A Lost Opportunity for the UK's Protection of Physical Privacy?"**

*Victoria University of Wellington Legal Research Paper No. 23/2020*

**AIDAN ECONOMU**, Victoria University of Wellington, Faculty of Law, Student/Alumni  
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The inadequacies of English common and statutory law have left a noticeable gap in the UK's protection of physical privacy. Mann J's decision in *Fearn v Board of Trustees of the Tate Gallery* helped fill this gap as it acknowledged that overlooking between neighbours could constitute an actionable nuisance. However, the Court of Appeal reversed this development, reaffirming that private nuisance cannot be used to combat breaches of privacy. This paper evaluates the extent to which the High Court decision in *Fearn* was a useful and desirable tool for defending physical privacy, so as to assess the correctness of the appellate decision. It contends that Mann J's extension was a justified development as it conformed with precedent, the scheme and principles of private nuisance, the text and horizontal effect of art 8 of

the Convention for the Protection of Human Rights and Fundamental Freedoms, case law in the European Court of Human Rights and broader policy. However, the paper acknowledges that Fearn was also a problematic development with limited potential as a protection mechanism. This is due to the conflict between traditional understandings of the right to privacy and nuisance's association with property, the land-based rationale for compensation in nuisance, the standing restrictions retained from *Hunter v Canary Wharf Ltd*, irregularities with the common law's favourable attitude towards children's privacy, and Fearn's similarities to anti-harassment legislation. Overall, the paper concludes that although Fearn was not perfect in its treatment of physical privacy, it was a step in the right direction and contributed at least partially to filling the persistent lacuna in English privacy law.

### "A Moment's Inadvertence Should Not Bring Down the Heavens: Rethinking Proportionality in Negligence Law in New Zealand"

*Victoria University of Wellington Legal Research Paper No. 24/2020*

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True proportionality between the degree of a tortfeasor's fault and the extent of a plaintiff's loss is unachievable in negligence law in New Zealand. As Mallon J's judgment in *Strathboss Kiwifruit Ltd v Attorney-General* highlighted, the concept of proportionality can only be used to negate an alleged tortfeasor's duty of care, thereby eliminating the potential for liability. This approach does not accommodate differing levels of disproportionality. Moreover, relying on negligence law's liability limiting mechanisms to achieve proportionality, as Mallon J did in *Strathboss*, will not always be fruitful; there may still be a large gap between what a defendant has done and what the defendant is held accountable for. The extent of a tortfeasor's liability may depend on luck rather than principle. However, internationally, the wrongful conception and birth cases reveal a more nuanced use of proportionality: reducing the scope of a tortfeasor's duty of care. While this may be seen as inconsistent with negligence law's compensatory objective, I argue that a tortfeasor's interest in being free from undue burdens should constrain this objective, where necessary. This article develops on the reasoning in the wrongful conception and birth cases and borrows from the language of the Contributory Negligence Act 1947 to create a general mechanism for limiting a tortfeasor's liability in the interests of proportionality. The proposed mechanism aims to ensure that the law of negligence delivers more just results.

### "Nothing to See Here? The Extension of Parent Company Liability in *James Hardie Industries Plc v White*"

*Victoria University of Wellington Legal Research Paper No. 25/2020*

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In *James Hardie Industries plc v White* the New Zealand Court of Appeal looked to determine circumstances where a parent company could be directly liable for defective products produced by its subsidiary while upholding the principles behind separate corporate personality. The Court passed off the case as an unexceptional development in the law, based on an application of ordinary tort principles and supported by decisions from overseas jurisdictions. However, the Court neglected to consider the underlying policies of the cases it cited, ignored important distinctions between them and the present case and did not inquire into whether they were in fact relevantly applicable so that it in fact extended parent company liability for the acts and omissions of its subsidiary far beyond what overseas jurisdictions have held. In doing so, the Court implicitly lifted the corporate veil and failed to acknowledge the impact such a finding of liability would have on the corporate form.

[^top](#)

## About this eJournal

Victoria University of Wellington Legal Research Papers Series primarily contains scholarly papers by members of the **Faculty of Law at Victoria University of Wellington**. Some issues collect a number of papers on a similar theme to form a suite of papers on a single topic. Others issues are general or distribute mainly recent work.

The Student/Alumni Series is a subseries of the Victoria University of Wellington Legal Research Paper Series. The subseries started in 2015 and publishes papers by students and alumni of Victoria University of Wellington, comprising primarily work for honours and postgraduate courses. Papers are collected into thematic or general issues.

The Victoria University of Wellington was founded in 1899 to mark the Diamond Jubilee of the reign of Queen Victoria of Great Britain and of the then British Empire. Law teaching started in 1900. The Law Faculty was formally constituted in 1907. The first dean was Richard Maclaurin (1870-1920), an eminent scholar of both law and mathematics. Maclaurin went on to lead the Massachusetts Institute of Technology as President in its formative years. Early professors included Sir John Salmond (1862-1924), still one of the Common Law's leading scholars. His texts on jurisprudence and torts have gone through many editions and remain in print.

Alumni include Sir Robin Cooke (1926-2006), one of the leading judges of the British Commonwealth. As Baron Cooke of Thorndon, he sat on over 100 appeals to the Appellate Committee of the House of Lords, one of very few Commonwealth judges ever appointed to do so.

Since 1996 the Law School has occupied the Old Government Building in central Wellington. Designed by William Clayton and opened in 1876 to house New Zealand's then civil service, the building is a particularly fine example of Italianate neo-Renaissance style. Unusually among large colonial official buildings of the time it is constructed of wood, apart from chimneys and vaults.

The School is close to New Zealand's Parliament, courts, and the headquarters of government departments. Throughout Victoria's history, our law teachers have contributed actively to policy formation and to law reform. As a result, in addition to many scholarly articles and books, the Victoria SSRN pages include a number of official reports.

Victoria graduates approximately 230 LLB and LLB(Hons) students each year, and about 60 LLM students. The faculty has an increasing number of doctoral students. Ordinarily there are ten to twelve students engaged in PhD research.

Victoria University observes the British system of academic ranks. In North American terms, lecturers and senior lecturers are tenured doctrinal scholars, not legal writing teachers. A senior lecturer corresponds approximately to a North American associate professor in rank.

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[^top](#)

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[^top](#)

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