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## Announcements

### Victoria University of Wellington Student and Alumni Subseries Issue XV: Tort Law

'Tort Law' is the seventh issue in 2016 of the Student and Alumni sub-Series of the VUW Legal Research Papers. The Student and Alumni sub-Series was launched in 2015. It publishes a selection of honours and postgraduate papers from Victoria University of Wellington Law School. The sub-Series includes both general and thematic issues.

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## LEGAL SCHOLARSHIP NETWORK: LEGAL STUDIES RESEARCH PAPER SERIES VICTORIA UNIVERSITY OF WELLINGTON LEGAL RESEARCH PAPERS

### "'Who Are We Trying to Protect?' The Role of Vulnerability Analysis in New Zealand's Law of Negligence"

*Victoria University of Wellington Legal Research Paper, Student/Alumni Paper No. 34/2016*

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New Zealand has incorporated ideas of vulnerability within its law of negligence for some years. It has not, however, clarified what is meant by vulnerability or the role the concept plays within the broader duty of care framework. Several obiter comments in *Body Corporate No 207624 v. North Shore City Council* (Spencer on Byron) suggest the concept ought not to be part of the law due to its uncertain and confusing nature. Subsequent cases have, however, continued to use the concept, and continue to

use it despite both its historically ill-defined nature and the additional uncertainty added by Spencer on Byron. This essay argues that vulnerability can and ought to be a part of New Zealand negligence law. With a consistent adoption of a single test for vulnerability—that established in the High Court of Australia in *Woolcock Street Investments Pty. Ltd. v. CDG Pty. Ltd. (Woolcock)*—vulnerability can be a conceptually certain concept that provides useful insight into the issues posed by the law of negligence.

### "The Law of Private Nuisance Following *Wu: Emanation and Access*"

*Victoria University of Wellington Legal Research Paper, Student/Alumni Paper No. 35/2016*

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The boundaries of nuisance have traditionally been tightly guarded. However, the tort's underlying concern for the protection of property rights has provided it with sufficient flexibility to adapt to changing social and legal circumstances. The New Zealand Court of Appeal's decision in *Body Corporate 366611 v Wu* represents the extension of private nuisance to remedy gaps in the tort's application to the relationship between body corporates and individual proprietors under the Unit Titles Act 1972. The case concerned the defendant Body Corporate's denial of access to an individual proprietor with an interest in the common property from which the nuisance 'emanated'. Though the Court erred in its interpretation of existing nuisance principles relating to emanation, its decision can be rationalised on the basis that the plaintiff's lack of control and restricted access speak to the core interests protected by the tort. Given the Court's finding that access restrictions may be reasonably imposed upon occupiers under the Body Corporate's modified rules, the decision's limited effect is to provide an individual proprietor with a figurative right of access. Outside of clarifying these doctrinal uncertainties, the decision does not produce lasting ramifications for private nuisance.

### "The New Intrusion Tort: The News Media Exposed?"

*Victoria University of Wellington Legal Research Paper, Student/Alumni Paper No. 36/2016*

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In *C v Holland*, Whata J recognised that the tort of intrusion upon seclusion formed part of New Zealand's common law. The tort protects against intentional intrusions into a person's private space. This decision potentially exposes the news media to tortious liability when it engages in intrusive newsgathering practices. However, Whata J's decision provides little guidance as to how the tort should be applied in later cases. In order to ascertain the meaning of the tort's formulation, this essay draws upon the methods used, both in New Zealand and internationally, to prevent the news media from breaching individual privacy rights. It then suggests that the courts should replace the formulation with a one-step reasonable expectation of privacy test. It also argues that the legitimate public concern defence should be better tailored to the intrusion context. Finally, it briefly assesses how the intrusion tort should interact with the tort in *Hosking v Runting*. Ultimately, it concludes that, in future, the courts should reflect more carefully on the precise wording of the intrusion tort's formulation so that it best vindicates the interests that it was designed to protect.

### "Negligence on the Job: All Care and No Responsibility?"

*Victoria University of Wellington Legal Research Paper, Student/Alumni Paper No. 37/2016*

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In New Zealand the Employment Relations Authority has first instance jurisdiction to determine employment relationship problems involving breaches of employment agreements, including employer claims for damages arising out of employee breaches of express and implied terms of the employment contract. In recent years this has included a small but steady number of breaches of the implied contractual to exercise reasonable skill and care. This paper reviews the current law in respect of such claims along with the related issue of employee liability in tort to third parties such as customers. It shows that the current legal position means that workers with limited say over how when and where their work is done could end up bearing a significant part of the risk associated with that work. It concludes by considering whether it is reasonable for employees to be exposed to this level of risk and suggests that it is not, in fact, consistent with the protective objectives of labour law generally and the Employment Relations Act 2000 in particular. It is suggested that an appropriate response to this might be the introduction of an "indemnity regime" by which employers indemnify employees for losses associated with non-intentional breaches of duty.

### "Balancing the Right to Privacy and Freedom of Expression: Re-evaluating *Hosking v Runting*"

## **in the Light of Recent Developments in English Privacy Law"**

*Victoria University of Wellington Legal Research Paper, Student/Alumni Paper No. 38/2016*

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This paper examines the potential impact of recent English privacy jurisprudence on the New Zealand tort of privacy. The paper contrasts the New Zealand Court of Appeal's aversion towards an over-expansive privacy right expressed in *Hosking v Runting* with an increasing readiness to override freedom of expression in favour of privacy interests in the United Kingdom. Three central conflicts in the courts' reasoning are addressed in detail, namely privacy's relationship with public places, individuals with public profiles and mediums of publication. While developments in English privacy law highlight reasoning flaws and theoretical shortcomings in *Hosking*, the increasing influence European jurisprudence on English law may nevertheless justify some divergence in the two jurisdictions' balancing of privacy and freedom of expression.

## **"Local Authority Liability for Flooding: Where Should Loss Fall?"**

*Victoria University of Wellington Legal Research Paper, Student/Alumni Paper No. 39/2016*

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Flooding is New Zealand's most frequent natural hazard, the cost of which is outdone only by the recent Canterbury earthquakes. Local authorities are the bodies primarily tasked with protecting communities against flooding through a range of measures including physical works such as stopbanks. This article explores the extent to which a local authority can be liable in tort where those physical works fail, causing damage. Direct liability and non-delegable duties are discussed, the latter addressing whether a local authority can nevertheless be liable having outsourced the construction of flood works to independent contractors. Additionally, whether local authorities should be liable for such damage or whether individual property owners ought to protect their own interests through insurance is discussed. This article recommends that property owners should purchase private insurance, but that local authorities should remain liable at least for their own negligence.

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## **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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