

Prelim Qn 1: Identify type of harm + party permutations

Is there vicarious liability making employer liable for acts of employee?

- 1. Tort committed by employer (say 'this will be discussed below')**
- 2. An employer-employee relationship (Hollis):** Court disregards description of the relationship by the parties- employer-employee vs employer-indep contractor. Factors include (Wirth Bros): description of position in written/verbal contract, whether tools are supplied/maintained by employer, who controls whom, whether normal wage is paid, what forms of tax are paid/by whom they are paid. Also, whether things (e.g. uniforms) have to be returned after shift (Hollis), whether there is representation of employer's business interests.
- 3. The alleged tortious act is in 'the course of employment' (Lepore):** Broad meaning. As long as activity is undertaken as part of employment, it doesn't matter that the employer specifically authorised employee not to do the act (Bugg). Excludes acts of passion and resentment (Flew), unconnected acts/'frolics', employer prohibitions on scope (difficult), criminal acts of employees (Lepore) uncertainty.

Conclusion: Dependant on whether there is a tort committed, liability may shift onto the employer for the tort.

Is there a non-delegable duty? (Kondis)

- Renders employer liable in instances of independent contractor negligence (Lepore). Liability is determined as if it were vicarious liability (s 5Q CLA)- strict liability is imposed when that independent contractor does not take reasonable care (Gallea).
- Includes hospital-patient (Cassidy), schools-students (Introvigne) although not by intentional sexual assaults on pupils, occupiers of premises with dangerous goods to those injured (Burnie Port Authority), employer-employee (Kondis e.g. failure of indep contractor to adopt safe work system), not roads authorities to roads users (Montgomery).

Duty of Care

- DOC is question of law

- 1. Established duty categories:** Manufacturer- consumer (Donoghue), doctor-patient (Rogers), school-student (Introvigne), employer-employee (Braistina), drivers-other road users (Bourhill), professional-client, occupier-entrant (Zaluzna), builders-subseq purchaser (Bryan), solicitors drafting wills to intended beneficiaries (Van Erp).

If there is an established duty category, the injury must have occurred within the usual 'scope' of the category (Dederer)- not in abstract- duty not to prevent all harm or to protect individuals who don't take reasonable care for their own safety (road case).

With stat authorities, s 42 CLA will determine the scope.

NOTE: Pure mental harm/pure economic loss do not have established duty categories.

- 2. Novel duty categories (Chapman)**

- a) Reasonable foreseeability (Chapman): Would a reasonable person foresee that if reasonable care was not taken then a class to which P is a member would be harmed? Includes harm 'not unlikely' or 'by no means improbable' to occur.
- b) Salient features (Sullivan): Avoiding collisions betw/ areas of law or incompatible legal duties, degree/nature of control over risk of harm (Graham Barclay), degree of vulnerability of those that rely, D's knowledge of P's circs, physical nearness of parties, avoiding indeterminate liability, autonomy (Scott). Need to develop law incrementally and look to earlier cases.

Conclusion: A DOC does/does not exist.

Situations where the DOC changes:

i) Pure Mental harm (see s 27-33 CLA)- always treated under novel DOC.

- Happens where mental harm that is psychiatric or psychological is not caused by or related to a physical injury (Jaensch). Elements (**s 32 CLA**):

- a) Reasonable foreseeability of class (see Chapman above). Although s 31(2) CLA gives considerations:

Sudden shock(a)? (Annetts)- was sudden in Wicks. Direct perception (b)- uncertainty w/ 'bad news' (Quayle), c) and d) In Tame an assurance had a DOC.

- b) Recognised psychiatric illness (RPI- s 31 CLA)

- More than grief/sorrow (Jaensch), emotional distress (Tame) or mere 'distress, fear, anxiety, annoyance or despondency' (Tame).
- Exact nature of the RPI does not have to be foreseeable (Mount Isa Mines)- use expert medical evidence.

- c) Person of 'normal fortitude' (s 32 CLA)

- Does not apply where D knew or ought to have known of D's lack of fortitude (i.e. exploited it- s 32(4) CLA.

NOTE: s 30 (only applies when 3 people are involved- D, P (mental harm) and the victim of the original harm). CLA restrictions. 'Witnessed at the scene' broad meaning (Wicks)- they found survivors of rail accident in peril and accident occurred over extended period. 'Close family member' defined in s 30(5) CLA.

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Consequential mental harm (i.e. person suffering the mental harm also got physically injured)- see s 32 CLA- bodily injured is considered w/ DOC.

ii) Pure Economic Loss

- Occurs when there is financial loss but not physical damage to a person or their property (i.e. consequential economic loss).

1. Negligent acts/conduct (economic loss as a result of D's neg act/omission).

Consider:

- Reasonable foreseeability (Chapman)- if foreseen the person will suffer financial loss.
- SF1: Indeterminate liability (Perre): Did D know/had means of knowing members of the class, not merely b/c class is large?
- SF2: Burden on commercial activity (Woolcock Street Investments): As long as its legal, encouraging legitimate commercial competition/autonomy of indiv.

- SF3: Vulnerability of P (sophisticated commercial investors vs no knowledge of market)/ ability of business to protect itself (most key factor- Woolcock).
- SF4: D's Knowledge of risk and magnitude (Caltex Oil): Knowledge or means of knowledge about P suffering economic loss (e.g. associated risks of that business).
- SF5: Policy consid (coherency betw/ contract and tort)

2. Negligent misstatements (i.e. words)- factors:

- Knowledge of D (knew or ought to have known that P would rely on the words- Hedley Byrne).
- Reasonable reliance in all the circs (Evatt): a) Special skill (was D expert or perceived as such in the field to increase reasonableness of reliance?), b) if P requested info (San Sebastian), c) formality of situation (Shaddock- certificate vs phone conv), d) D having advisory role (Evatt).

NOTE: For disclaimers, they may discharge liability but not if it is not addressed to party to whom statement was made or if words aren't clear enough (BT Australia Ltd).

iii) Statutory authorities

- Is D a statutory authority? (s 41 CLA)- main ones are b), d) and e).
- Has there been mis-feasance (i.e. neg exercise of stat function) or non-feasance (failure to exercise function- note additional s 44 CLA req here).
- Statutory interpretation (complexity of regime etc).
- Duty of Care: Established duty categories + scope issues (Dederer)- s 42 CLA factors (and maybe CL) limit scope. CL factors (Crimmins): Reasonable foreseeability + 1) Control 2) Vulnerability/capacity to protect themselves 3) Knowledge/ought to know of existing risk of harm, policy decision vs operational decision. Control is important (Pyrenees).
- Breach stage: Use normal s 5B CLA tests + revisit s 42 CLA/CL factors. NOTE: s 43A CLA- high threshold (e.g. traffic authorities powers e.g. signs (Rickard), hospitals, not erecting screens on bridges (RR)).

NOTE: Roads authorities (also need s 45 CLA- actual knowledge- see Roman- person w/ power to repair, knowledge of defect before P suffered injury needed).

Other special duty areas include defective products (Donoghue), occupier liability (Neindorf), children (Swinton), duty to control 3rd parties (Modbury), criminal activity by P needs joint illegality for no duty (Henwood). No DOC w/ advocates immunity (Gianerrelia) or police (Hill).

Wrongful birth (action by parents-Veivers)- s 70-71 CLA- damages for economic loss for costs of raising healthy child cannot be awarded, may be possible to claim other damages such as physical pain and suffering or pregnancy and labour and costs associated w/ pregnancy (note: s 71(2) CLA 'disabled children').

Wrongful life (brought by child- Harrinton): DOC not owed to Ps by medical advisers of their parents other than not to harm the Ps (policy reasons e.g. value of human life). Medical practitioner owes DOC to unborn child, but does not extend to preventing birth through termination of the pregnancy or non-conception AND cannot quantify damages (Harrinton).