

Time Allocation:

30mins reading, 2hrs writing

READING TIME: (30mins)

EXTRACT RELEVANT FACTS FROM THE EXAM.

APPLY RELEVANT LAW TO RELEVANT FACTS.

THESE FACTS WILL GIVE RISE TO AN ARGUMENT.

FORMULATE ENTIRE STRUCTURE.

Intangible loss – Psychiatric Harm:

Time allocation: 30 minutes

Plaintiff v Defendant

1. Reasonable foreseeability:

RF Question: 'Was it reasonably foreseeable to a reasonable (defendant- describe defendant's position and knowledge) have foreseen (defendant's acts or omissions- describe them), might in the circumstances of the case (must bring all the circumstances in s 33(2)(a) here:

s 33(2)(a) CLA

- (i) Whether or not the mental harm was suffered as the result of a sudden shock
- (ii) Whether the plaintiff witnessed, at the scene, a person being killed, injured or put in peril,
- (iii) The nature of the relationship between the plaintiff and any person killed, injured or put in peril
- (iv) Whether or not there was a pre-existing relationship between plaintiff and defendant

cause a person of normal fortitude (*Anwar v Mondello Farms Pty Ltd*) (in plaintiff's position, describe position), to suffer a psychiatric illness (*Civil Liability Act 1936* (SA) CLA; *Donoghue v Stevenson*)?

RF Answer:

'The circumstances of the case are to be construed subjectively (*Wicks v State Authority*). It (is/is not) reasonably foreseeable that the plaintiff sustained (injury), which is not far-fetched or fanciful (*Wyong Shire Council v Shirt*).

Address circumstances identified above s 33(2)(a) CLA and comment whether they were reasonably foreseeable.

- (i) Whether or not the mental harm was suffered as the result of a sudden shock
Of sights and sounds (*Wicks v State Rail Authority*)
- (ii) Whether the plaintiff witnessed, at the scene, a person being killed, injured or put in peril,
At the scene at the time of injury, not after (*Anwar v Mondello Farms; Wicks v State Authority*)
- (iii) The nature of the relationship between the plaintiff and any person killed, injured or put in peril
Sibling relationship- uncommon for relative to encounter at the scene, their sibling being injured (*King v Philcox*).
Direct and close relationship between P and D (*King v Philcox*) –e.g. does P fully rely on D? suggestive a duty should be imposed.
- (iv) Whether or not there was a pre-existing relationship between plaintiff and defendant

Establishing a duty requires a foreseeable plaintiff (*Palsgraff v Long Island Railway Co*), and in this case, this applies to (specify class of plaintiffs). Furthermore, if reasonable foreseeability is recognised, then the court must also assess salient features (*Sullivan v Moody*).

2. Salient Features: Choose 3-4 which are controversial to the question

Vulnerability	Whether D has special knowledge (<i>King v Philcox</i>) D's control over P's actions (<i>Perre v Apand Pty Ltd; King v Philcox</i>) D's control over harm to P? E.g. D must take caution to guard against P's emotional disturbance (<i>Tame v NSW</i>) D was unable to act to minimise the harm to P (<i>Annetts</i>)
Autonomy	Individuals are autonomous and entitled to make/are responsible for their own choices (<i>Perre v Apand; Agar v Hyde</i>) Imposing a duty would not interfere with freedom and security of individuals (<i>Tame v NSW</i>)

Certainty/ Uncertainty	Whether class of plaintiffs are uncertain or certain. Certain → Although the class of plaintiffs is large, it is determinate and not uncertain (<i>Gifford v Strang Patrick Stevedoring Pty Ltd</i>) Would imposing a duty be a burden? E.g. extend to a larger class of plaintiffs (<i>Sullivan v Moody</i>) and increase insurance claims (<i>King v Philcox</i>)
Coherence	Whether imposing a duty would undermine any legislation e.g. D adhered to law, therefore imposing a duty would contradict statutory provisions (<i>Sullivan v Moody</i>)

3. **Duty:** Comment whether a duty exists

'It is within the courts discretion to impose a duty considering reasonable foreseeability and salient features. It is (likely/unlikely) that the court will find an existing duty.'

4. **Limitations on damages:** s 53 CLA

'Assuming a duty of care exists, it is within the court's discretion according to s 53(1) CLA to assess whether any limitations on the damages for pure mental harm (s 3 CLA) are imposed when awarded to (P). (P) suffered from (identify illness) a recognised psychiatric illness (s 53(2) CLA). (P) will be qualified damages for pure mental harm if he can prove (apply relevant provisions below- argument for presence at the scene OR parent, spouse, domestic partner or children of injured person).

s 53 CLA

(1) Damages are awarded for mental harm if the injured person-

(a) was physically injured in the accident or was present at the scene of the accident, when the accident occurred; or

Presence at the scene (witnessing) at the time of the accident (*King v Philcox*)

Exposure to sights and sounds may amount to presence at the scene (*King v Philcox*)

Attentive and alertness of P to the accident, not absent (*King v Philcox*)

Argument that s 53(1)(a) CLA does not state physical presence. Therefore argument where P is not physically present is valid and court should consider this (*King v Philcox*)

(b) is a parent, spouse, domestic partner or child of a person killed, injured or endangered in the accident.

Sibling, uncle, aunt, grandparent relationships are not recognised, unless an argument upon the facts arise (e.g. brother is sole guardian of P).

(2) Damages may only be awarded for pure mental harm if harm consists of a recognised psychiatric illness.

(3) Damages may only be awarded for economic loss resulting from consequential mental harm if the harm consists of a recognised psychiatric illness.

P (suffered/did not suffer) from consequential mental harm as (he/she) (sustained/did not sustain) physical injury, therefore damages under s 53(3) CLA (can/cannot) be awarded.

5. **Awarding damages:**

Non-economic loss: (damages for impairment of at least 7 days, or for medical expenses)

(Apply facts suggesting P's impairment)

assuming his ability to lead a normal life was significantly impaired for a period of at least 7 days (s 52(1)(a) CLA), then P is entitled to damages for non-economic loss.

(Or apply facts suggesting P's medical expenses)

P is entitled to damages for these medical expenses (s 5 CLA) that are at least the prescribed minimum specified under s 5 CLA.

Assuming incapacitation occurred for more than 7 days, P is entitled to damages for loss of earning capacity (s 54 CLA).

s 52(1)

(a) The injured person's ability to lead a normal life was significantly impaired by the injury for a period of at least 7 days; or

(b) Medical expenses (s 5 CLA) of at least the prescribed minimum (s 5 CLA) have been reasonably incurred in connection with the injury.

s 5 CLA meanings:

- 'medical expenses' includes (a) fees of medical practitioners and other professional medical advisers and therapists; (b) cost of hospitalisation; (c) cost of medicines and therapeutic appliances.

- 'prescribed minimum'

6. Did injury occur prior to 1 July 2013 or post 1 July 2013 otherwise than as a result of a MVA accident? (Not MVA)- less likely to apply.

If yes, assess damages as per s 52(2) and s 54.

7. Did injury occur post 1 July 2013 as result of an MVA accident? (s 56A and *Civil Liability Regulations (CLR) 2013*)

Economic loss:

"P suffers (identify illness and any other factors/behaviours that P experiences in relation to the illness). For these reasons, the court may assess (Name of injury) with a GEPIC rating (s 14 CLR) of Class (specify class), which is (identify ISV range and comment) (Sch 1 CLR)."

Comment whether ISV exceeds:

7 → recover future eco loss 'P is entitled to recover damages for future economic loss as the ISV exceeds 7 (s 56A(2) CLA).'

10 → recover loss of earning capacity 'P is entitled to damages for loss of earning capacity as the ISV exceeds 10 (s 56A(3)(c)(i)).'