

- (2) For the purposes of this Part it does not matter that a concurrent wrongdoer is insolvent, is being wound up, has ceased to exist or has died.

2 Duty of Care

2.1 Is there a duty of care?

- Established cases:
 - Doctor/patient
 - Lawyer/client
 - Teacher/student
 - Motor vehicle user
 - Parent/Child
 - Spouse
 - Demise of proximity—increasingly either an incremental approach or **multi-factorial/salient features** approach: (e.g. *Perre v Apand P/L* (1999)—listed in *Caltex Refineries (Qld) Pty Ltd v Stavara* (2009)¹
 - Proximity
 - Reasonable foreseeability
 - Knowledge
 - Resources
 - Vulnerability
 - Public policy
- * *D'Orta-Ekenaike v Victoria Legal Aid* (2005)² (see also 2.2.4)

¹Two stage test

²In 2001, Mr D'Orta-Ekenaike commenced proceedings in the County Court against the VLA and the barrister alleging that: he pleaded guilty at the committal because of the VLA solicitor and the barrister exerting 'undue pressure and influence' on him to do so; in so doing, the VLA solicitor and the barrister breached their duty of care to him; and as a result, he suffered loss and damage in the form of loss of liberty while incarcerated, loss of income, psychotic illness and legal costs. Mr D'Orta-Ekenaike applied to the High Court for special leave to appeal the decision of the Victorian Court of Appeal and asked the High Court to: reconsider its decision in *Giannarelli*; and determine whether advocates' immunity applies to the acts or omissions of a solicitor which, if committed by a barrister, would be immune from suit.

- * Indeterminacy
- * The extent of imposition on the autonomy or freedom of individuals
- * The degree of reliance by the plaintiff upon the defendant
- * Assumption of liability by defendant
- * Nature of degree of the hazard liable to be caused by the defendant's conduct or the activity or substance controlled by the defendant
- * The nature and consequences of any action that can be taken to avoid the harm to the plaintiff
- * The nature or the degree of the hazard or danger liable to be caused by the defendant's conduct or the activity or substance
- * Consistency with statute
- * The existence of conflicting duties arising from other principle of law or statute
- * Consistency with the terms, scope or purpose of any statute relevant to the existence of a duty
- * Desirability of, and in some circumstances, need for conformance and coherence in the structure and fabric of the common law

- Scope of duty of care is an additional consideration: *Cole v South Tweed Heads Rugby Club* (2004)—scope of duty of care to patrons is limited—also can be considered
- *Modbury Triangle Shopping Centre Pty Ltd v Anzil* [2000]³—unusual for law to impose duty to prevent harm to another from the criminal conduct of a third party

³Modbury was a claim by a plaintiff assaulted by 3 persons whilst crossing the unlit car park of the shopping centre he worked at during the evening. The shopping centre had turned off the car park lights, despite the centre still being utilised.

2.1.1 Reasonable Foreseeability

- Foreseeable—in the sense of being “not-far fetched or fanciful” *Wyong Shire Council v Shirt* (1980)⁴
- Reflected in *Wrongs Act* s 48(1)(b)⁵ ‘Foreseeable plaintiff’—not the unforeseeable plaintiff: *Palsgraf v Long Island Railway Co* (1928)
- The risk of injury of the same general class to P, or the class of persons of which P is a member, must be reasonably foreseeable as a result of D’s careless act or omission: *Chapman v Hearse* (1961)
- Harm may be reasonably foreseeable, but insufficient to establish duty of care: *Sullivan v Moody* (2001)

Workplace Injury Rehabilitation and Compensation Act 2013—s 5—Application of this Act to injuries

- (1) Except as otherwise expressly provided in this Act, this Act applies to the entitlement of a worker to compensation under this Act in respect of—
 - (a) an injury to the worker arising out of, or in the course of, or due to the nature of, employment on or after 1 July 2014; and
 - (b) an injury arising—
 - (i) out of, or in the course of, or due to the nature of, employment; and
 - (ii) by way of gradual process over a period beginning before, and continuing on or after 1 July 2014—but does not apply to or in relation to an injury arising out of, or in the course of, or due to the nature of, employment solely before 1 July 2014.
- (2) If a worker suffers an injury that—

⁴P was gravely injured after water skiing in a lake. The water was really shallow in some places, and that is why the Plaintiff was injured. The Defendant erected a ‘deep water’ sign close to where the Plaintiff was hurt, which meant to serve as a border - beyond it, the water starts getting shallower.

- (a) arises out of, or in the course of, or due to the nature of, employment; and
- (b) occurs by way of gradual process over a period beginning on or after 20 October 1999 and continuing on or after 1 July 2014—

the worker may rely on any part of the injury that occurred before 1 July 2014 for the purposes of establishing that the injury constitutes a serious injury for the purposes of Division 2 of Part 7.

- (3) Subsection (2) does not apply to any part of the injury that was the subject of an application made under section 134AB(4) of the Accident Compensation Act 1985 .
- (4) Division 5 of Part 7 applies in relation to an injury, disease or industrial deafness caused to or suffered by a worker before, on or after 1 July 2014 that has arisen out of, or in the course of, or due to the nature of, any employment in which the worker was employed at any time.

Psychiatric harm

- Two kinds:
 1. Relational psychiatric harm: Plaintiff suffers **both** physical and mental harm caused by negligent act of another—usual negligence principles apply—was the psychiatric harm **reasonably foreseeable**?
 2. Pure psychiatric harm: Plaintiff **only** suffers mental harm caused by the negligent act of another

Pure Psychiatric Harm

- Not barred by statute: *Wrongs Act* s 23
- Previous physical impact requirement: *Vic Railway Commissioners v Coultas* (1988)
- Previous direct sensory perception requirement *Chester v Waverley CC* (1939)
- Gradual move away from above former requirements—*Mt Isa Mines v Pusey* (1971)

- *Jaensch v Coffey* (1984)—wife did not witness husband's accident, but sued later for nervous when saw H's injuries in hospital—held plaintiff can still sue for nervous shock even *if* was not present at accident scene, *provided* Plaintiff experienced the immediate aftermath with unaided senses
- *Tame v NSW; Annetts v Aust Stations* (2002)—fundamental test for nervous shock is reasonable foreseeability
 - Plaintiff being a person of 'normal fortitude' was a *relevant* consideration—not a separate requirement—same for sudden shock and direct perception
- Grief/sorrow generally not compensable: *Tame v NSW; Annetts v Aust Stations* (2002) and *Mt Isa Mines v Pusey* (1971)
- Statutory considerations: *Wrongs Act* Part XI
 - s 72(1)—Narrows scope of DoC: Did D **foresee, or ought to have foreseen**, that a person of normal fortitude might, in the circumstances of the case, **suffer a recognised psychiatric illness** if reasonable care were not taken?
 - Restored 'normal fortitude' requirement: s 72(3)
 - In the absence of a family relationship, **also** requires plaintiff to witness the danger/death to a victim: *Wrongs Act* s 73(2)

Intentional Infliction of Psychiatric Harm

- *Wilkinson v Downton* [1897]—Plaintiff can recover for intentionally inflicted nervous/shock
 - Defendant made statement intended to cause nervous shock
 - Plaintiff suffered damage as a consequence
- *Bunyan v Jordan* (1937)
 - Intention to cause distress on its own is insufficient—words uttered must be either said to plaintiff or in plaintiff's presence

Abnormal Plaintiffs

- *Levi v Colgate-Palmolive Pty Ltd* (1941)—bath salts—rash widespread and lasting—P hypersensitive due to allergy—bath salts were safe for general population
 - Two issues **Jordan CJ**: "if there is a breach of an independently existing duty to be careful, and an abnormal person by reason of his injury, suffers special injury from the breach which would not be caused to a normal person"
 - "Does the fact that he is abnormal of itself and without more create **special duties** to be careful which do not exist in the case of normal persons"

2.2 Particular Situations

2.2.1 Pure Economic Loss

- Economic loss other than as a consequence of an injury of any other kind (property damage, personal injury);
- Test is as *Perre v Apand P/L* (1999)—listed in *Caltex Refineries (Qld) Pty Ltd v Stavar* (2009)⁶⁷
- P can suffer PEL as a result of:
 - Damage to another's property from which P would have derived a benefit;
 - * *Caltex Refineries (Qld) Pty Ltd v Stavar* (2009)—A pipeline owned by third party

⁶Two stage test of salient factors and reasonable foreseeability

⁷ **McHugh J** outlined a list of questions that should be asked—but note **Gillard J** in *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* [2003] VSC 27 warned against using 'a mechanical guide' such as above:

1. Would the imposition of a DOC impose indeterminate liability on D?
2. If no, Would the imposition of a DOC impose an unreasonable burden on the autonomy of D?
3. If no, Was P vulnerable to loss from D's conduct?
4. If yes, Did D actually know that its conduct could cause harm to individuals such as P? His Honour thought no other factors were relevant on the facts of the case.