

### **Non-economic loss**

Defined in Wrongs Act 1958 (Vic) at ss28B and 28LB:

- a. Pain and suffering;
- b. Loss of amenities of life;
- c. Loss of enjoyment of life;
  
- Must be assessed as 'degree of impairment' of whole person resulting from injury.
- Assessment must be by an approved medical practitioner or by a medical panel: s 28LF.
- Determined by red to AMA guides 4<sup>th</sup> ed: ss 28LH, 28LI
- Impairment must be a *permanent* impairment : s 28LB

**'Threshold level'. Defined in s 28LB as:**

- a. In the case of injury (other than psychiatric injury or spinal injury), 'impairment of MORE THAN 5 percent'
- b. In the case of psychiatric injury, impairment of '10 percent or more'.
- c. In the case of spinal injury, 'impairment of '5 per cent or more'

OTHER CONDITIONS THAT SATISFY 'significant injury' UNDER s 28LF?

- Loss of foetus
- Psychiatric injury arising from loss of child
- Loss of breast

Assessment of impairment is 'objective'.

### **Loss of amenities/enjoyment of life.**

Compensation for disability/impairment of p's ability to enjoy life.

### **Pain and suffering**

- Compensation for physical pain and psychological consequences (worry, frustration, anxiety ect.)
- Completely subjective
- *Skelton v Collins*

### **Loss of expectation of life**

- Consolation or solace for P for shortened life.
- Modest awards (\$10,000-15,000)

### **Claims upon death of a person**

- 2 claims available
  1. Claims by estate under the Administration and Probate Act, and;
  2. Claim by dependants for loss of financial support – Pt 3 Wrongs Act
  
- Estate claim relates to past economic losses, dependant's claim relates to future losses.
- *Barclay v Penberthy [2012]*

### **Survival of action claim**

- Estate may proceed with cause of action the deceased would have had had they lived: Administration and Probate Act 1958 (Vic), s 29.
- Where deceased died as a result of the tort, executor can only recover:
- Economic loss (medical expenses and loss of earning capacity) between date of injury and death, and  
(Includes gratuitous care, subject to thresholds and caps. Future economic losses are not recoverable, can only be recovered on a dependants claim)
- Funeral expenses
- Non-economic losses are not recoverable

### **Claims by dependants**

A. Loss of expectation of financial support	B. Loss of domestic services of spouse/parent
<ul style="list-style-type: none"> <li>○ What was the 'reasonable expectation' of financial support from deceased; 'loss of chance' of financial support recoverable.</li> <li>○ A vicissitudes of life analysis applied.</li> <li>○ No separate discount for prospects of remarriage: <i>De Sales v Ingrilli</i></li> <li>○ S 19(2) Wrongs Act</li> <li>○ Need to work out how much of that future loss of income would have benefitted the dependants and for what period of time – disregard amounts deceased would have spent on personal.</li> <li>○ <b>CAP IN s 28F.</b></li> </ul>	<ul style="list-style-type: none"> <li>○ Not relevant whether the widow/widower has spent money to replace the services: <i>Nguyen v Nguyen (1990)</i>.</li> <li>○ BUT deduction to be made by a new partner or carer.</li> <li>○ S 19A: care must have been provided for at least 6 hrs per week and for at least 6 consecutive before death (or injury that caused the death).</li> <li>○ S 19B: limitation to average weekly earnings</li> </ul>

### **Vicarious Liability**

#### **Employer**

Two prerequisites:

- A relationship of employer and employee, and
- The employee's actions were in the course of employment or reasonably incidental thereto

### **Indicia of a relationship of employer and employee**

- Current approach is a **multifactorial approach** designed to examine the totality of the relationship between the tortfeasor and the organisation and
  - Provision of skilled/specialised labour
  - Provision and maintenance of specialised equipment
  - T's freedom to work for others
  - Ability of T to delegate the work/does T's 'business' engage persons to perform its economic activities (*Quest*)
  - Does T promote the 'business' to the public?
  - Does T's 'business' have standard transactional facilities expected of that business (eg, insurance coverage) (*Quest*, *Tattsbet*)
  - Does T's 'business' meet regulatory requirements (eg, as to taxation) imposed on a business? (*Quest*, *Tattsbett*)
  - Does T's 'business' have tangible assets? (*Quest*)
  - Integration within the organisation
  - Was T representing the organisation?
  - Were T's activities central to the organisation's work, or merely incidental?
  - D's right to control the manner of the work
  - How and when the work is to be done
  - Requirement to wear a uniform
  - Mode of remuneration - by reference to personal labour? By reference to the value of the business transacted? (*Tattsbett*)
  - Intention of the parties and contractual documentation (*Tattsbett*)
  - Period of the work - fixed or indefinite
  - Income tax deductions
  - T's freedom to refuse work

**Example Stevens v Brodribb Sawmilling Co Pty Ltd**

<b><u>FACTS</u></b>	<b><u>HELD/RULE</u></b>
<ul style="list-style-type: none"> <li>➤ Stevens sued Brodribb for vicarious liability.</li> <li>➤ Stevens said he was an employee.</li> <li>➤ Brodribb said he was an independent contractor.</li> </ul>	<ul style="list-style-type: none"> <li>➤ Brodribb did not have any liability because both Stevens and Brodribb were determined to be independent contractors.</li> <li>➤ Consider, whether person was person was able to negotiate their level of pay, who provided equipment, who maintained, provision for holidays, who had the power to delegate tasks.</li> <li>➤ <b>RULE: Process is the act of balancing and weighing the factors to determine if person is employee or independent contractor.</b></li> </ul>

○ ***Hollis v Vabu (Austlii)* MOST IMPORTANT**

<b><u>FACTS</u></b>	<b><u>HELD/RULE</u></b>
<ul style="list-style-type: none"> <li>➤ Vabu had delivery service using bikes, vehicles ect. Couriers.</li> <li>➤ Hollis was struck on the footpath by a cyclist (Vabu worker).</li> <li>➤ Hollis sustained injury rendering him unable to work for period of time.</li> <li>➤ Hollis suing Vabu for vicarious liability.</li> </ul>	<ul style="list-style-type: none"> <li>➤ HC looked at totality of relationship.</li> <li>➤ Employees performing core activities of the business, in the manner in which Vabu directed them to.</li> <li>➤ Therefore, Vabu was vicariously liable.</li> </ul>

- ***Sweeney v Boylan Nominees Pty Ltd* (supplement)**
- ***Tattsbet Ltd v Morrow* [2015] FCAFC 62**
- Contrast the two stage test in ***Fair Work Ombudsman v Quest South Perth Holdings* [2015] FCAFC 37**

**2. In the course of employment or reasonably incidental thereto**

- Wrongful mode of performing an authorised act, vs an unauthorised act which the employee was not employed to perform
- Employer liable where employee performs an authorised act in an unauthorised way
- ***Canterbury Bankstown Rugby League Football Club v Rogers***