

Negligence

Duty of Care

1. Settled Law

- Duty of care **exists**: doctor/patient, road users
- Duty of care does **not** exist: advocates immunity, parents/children, police immunity
 - Immunity for **barristers and solicitors** for
 - Work done in court & work done out of court that is so intimately connected with the conduct of the case it can be said fairly to affect the way the case is conducted in court → ***D'Orta-Ekenaike***
 - Policy reasons: inconsistent with advocate's duty to the court; notion of finality
 - Immunity for **police & prosecutorial authorities**
 - No duty to those under investigation unless there is an implied or express assumption of responsibility – *Cran v State of NSW*
 - Policy reasons: risk of inconsistent duties, inhibiting effect upon the discharge by authorities of their functions/such as infringing upon decisions and allocations of resources

2. Reasonable Foreseeability

"You must take reasonable care to avoid acts/omission which you can *reasonably foresee* would likely to injure your neighbour... Neighbour is persons so closely and directly affected by my act that I ought reasonably have them in contemplation..." (***Donoghue***)

- P must show that D was negligent in some way with respect to [insert risk] and that it would cause *some kind of harm* to a fairly circumscribed class of persons (***Chapman***)
- Risk test is a low threshold; D must have foreseen a real, rather than **far-fetched or fanciful**, possibility of some harm to the P (***Sullivan v Moody***)
- The D need not foresee the precise sequence of events, (***Chapman***)

3. Salient Features

P must look to the SF of the case, no single feature is determinative, rather the "totality of the relationship" must be examined to decide if reasonable in the circumstances to impose a duty (***Graham***)
Sullivan v Moody

- **Conflict of Duties**: will the finding of a duty in this instance conflict with an already existing duty? (if so, no duty of care)
- **Conflict of Laws**: is there a better suited area of law under which the P's action should be brought? (if so, no duty of care)
- **Indeterminacy**: can the D predict in broad terms the nature of liability and to whom? (if indeterminate, no duty of care)
- **Floodgates**: would the finding of a duty of care risk flooding the courts with claims of liability (if so, no duty of care)

CAL (No 14) v Motor Accidents Insurance Board

- **Vulnerability**: Mr. Scott was not vulnerable (if vulnerable → duty of care)
- **Nature of Arrangement**: can it be inferred through the nature that a duty of care was required?
- **Autonomy**: if a duty would be inconsistent with a defendant's autonomy – less likely for duty
- **Coherence with other areas of law**: a duty would not cohere with other areas of tort law; bailment law; and statutory regimes

Pure Economic Loss

Economic loss that is not the result of personal injury to the P or damage to the P's property.

Two kinds of situations:

1. PEL caused by reliance on advice or information
2. PEL caused by an act or omission

Courts are reluctant to compensate due to competition and legitimate business activity, indeterminate liability, and extent of the harm.

1. Pure Economic Loss by Negligent Acts

- As a general rule, damages are **not** recoverable for economic loss which is not consequential upon injury to person or property
- One exception that arises is where the D knew or *ought to have* known that a particular person, not merely a member of an unascertainable class, will be likely to suffer economic loss as a consequence of D's carelessness
(*Caltex Oil v The Dredge*)

2. Salient Features

Perre v Apand

- **No indeterminate liability:** the class of persons affected was ascertainable: potato growers or processors located within 20km radius of affected land (shows DoC)
- **Control:** the D controlled, broadly, the activities that ultimately caused the PEL (shows DoC)
- **Vulnerability:** the P were vulnerable in that they couldn't be reasonably be expected to have guarded against the harm (shows DoC)
- **Interference with legitimate business activity:** a duty of care would simply be co-extensive to that already owed & hence no further burden on business activity (if it did interfere, shows no DoC)
- **Actual or constructive knowledge of risk of harm:** the D had knowledge of the risk of economic harm to the P (showing a DoC)

Johnson Tiles

- **Indeterminate Liability:** determinable with respect to business & domestic consumers of gas but *not* with respect to their employees stood down due to loss of gas supply
- **Vulnerability:** the P could have taken steps to protect themselves
- **Interference with legitimate business activity:** there was none as 1. The substantive activity giving rise to a duty would interfere and not promote the D's business; and 2. Co-extensive duty already owed to employees
- **Contractual regime:** court will be reluctant to impose a duty for PEL where doing so will interfere with a contractual regime
- **Statutory regime:** the existence of a statutory regime regulating the field points against a DoC in negligence
- **Reliance and assumption of responsibility:** where P relied & D assumed responsibility points towards a DoC

Pure Mental Harm

Policy reasons for reluctance: risk of fabrication, risk of indeterminate liability & floodgates, difficulty proving causation, the variability of mental constitutions. *CANNOT shoot the messenger* – (aka. news programs).

Wrongs Act s. 23: in any action for injury to the person, the plaintiff shall not be debarred from recovering damages merely because the injury complained of arose wholly or in part from mental or nervous shock.

1. Type of Mental Harm

Section 67 of WA

- **Mental harm**: psychological or psychiatric injury
- **Consequential mental harm**: mental harm that is a consequence of any other injury of any other kind
- **Pure mental harm**: mental harm other than consequential mental harm
- **Injury**: personal or bodily injury – including pre-natal injury; psychological or psychiatric injury; disease; aggravation, acceleration or recurrence of an injury or disease

S. 73 – mental harm resulting by witnessing/learning of harm to another

- (1) Where pure mental harm results – in whole or in part – due to another person being killed, injured, or put in danger by the defendant's negligence
- (2) The plaintiff is not entitled to recover damages for PMH unless
 - (a) The plaintiff **witnesses, at the scene**, the victim being killed, injured or put in danger;
- **Wicks v State Rail Authority**: being killed, injured or put in peril do not necessarily occupy a time measured in minutes. In some cases, death, injury or being put in peril. But, 'put in peril' meant 'put at risk' which in this case continued until taken to a place of safety
 - (b) **OR** the plaintiff is/was in a **close relationship** with the victim
- **Gifford v Strang Patrick Stevedoring**: it is the closeness and affection of a relationship – rather than the legal statute of the relationship – that is relevant in determining DoC; is it close & loving?

2. Reasonable Foreseeability

S. 72(1): A person (D) **does not** owe a duty of care to another person (P) to take care not to cause the P pure mental harm **unless** the defendant foresaw or ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognized psychiatric illness if reasonable care were not taken.

S. 72(3): the above section does not apply if the D knows or ought to know that the P is a person of less than normal fortitude

S. 72(2): the circumstances of the case include

- (a) Whether or not the mental harm was suffered as a result of **sudden shock**
- (b) Whether the plaintiff **witnessed**, at the scene, a person being killed, injured or put in danger
- (c) The **nature of the relationship** between the P & any person killed, injured or put in danger
- (d) Whether or not there was a **pre-existing relationship** between the P & D

Salient features on next page for PMH

Pure Mental Harm

3. Salient Features

Annets v Australian Station Pty Ltd

- **Assumption of responsibility:** evidenced by assurances given by the D to the P (shows DoC)
- **No Indeterminate Liability:** as the assumption of responsibility and pre-existing relationship defined to whom duty owed (shows DoC)
- **Vulnerable:** the P were vulnerable to the risk of harm the D exposed to them (and their son) shows DoC
- **Control:** the D controlled the circumstances giving rise to the risk to the P (& their son)
- **Interference with legitimate business activity:** it is not legitimate to expose employees to risk of harm (shows DoC – no interference here)
- **No conflict of duties:** the duty to the P would simply be co-extensive to settled duty to the employee

Gifford v Strang Patrick Stevedoring (witness):

No assumption of responsibility, but:

- **Relationship between victim & P:** close & loving relationship pointed heavily towards foreseeability & DoC
- **No indeterminate liability:** limited by nature of the relationship between the P & victim
- **Vulnerability:** the P had no way of protecting themselves
- **Control:** P had no way of protecting
- **No conflict of duties:** the duty to the P would simply be co-extensive to the settled duty to the employee

Tame v State of NSW

- Mental harm was not reasonably foreseeable
- **Conflict of duties:** to find a duty would conflict with police officer's statutory reporting duties
- **Conflict of laws:** there were other areas of law better suited

4. Messengers

Obiter from **Annets**

- No duty of care for mental harm caused by the manner in which bad news is communicated
- This is due to public policy reasons relating to the importance of open reporting and communication

Breach

P must prove on a BoP, assessing the D's conduct against the RP in the circumstances, using an objective test (*Vaughan*), and applying the WA.

1. Establish Breach of Standard of Care

S. 48(1)(c): standard of care expected of the D is that of a "reasonable person in the person's position"

It is an **objective standard** & RP is a prudent (careful) person (*Vaughan v Menlove*)

- Some characteristics of the specific D may modify the standard applied; most do not:

Minority: CHANGES STANDARD → child will be held to standard of care of an ordinary child of comparable age & is open as to whether the particular child's intelligence & experience further modifies the standard, but the better view is that it does not (*McHale v Watson*)

Physical disabilities: POSSIBLY → little authority as to whether this is taken into account for contributory negligence; & is likely that even if it were, the operative issue would be whether the person was negligent for having allowed themselves to be in the risk creating situation in the first place in light of their disability

Mental Incapacity: DOES NOT change the standard (*Carrier*) & **Inexperience**: DOES NOT change the standard – *Imbree v McNeilly* removed the exception

Special Skills

- A person with special skills will be held to the standard of care of a RP possessing those special skills (*Philips v Williams Whitely Ltd*) → also applies to persons holding themselves out as having certain special skills (**s. 58(a)**)

Time of Assessment of Standard

- The standard is assessed at the time of the negligence; not the judgment (*Roe*) & special skills codified in **s. 58(b)**

2. Reasonable Foreseeability

48(1)(a) person is not negligent unless risk of harm was foreseeable

- **Wyong**: was it reasonably foreseeable that the **kind of carelessness** (conduct) charged against the D might cause damage of **some kind** to the P's person or property, or to a class of persons the P belongs → Low threshold – not far-fetched or fanciful

Not Insignificant Risk

- **S. 48(1)(b)**: D not negligent in failing to take precautions against a risk of harm unless the risk was not insignificant
 - **S. 48(3)**: risks that are not far-fetched or fanciful & all risks other than insignificant risks & include but are not limited to significant risks

Negligence Calculous

- **S. 48(1)(c)**: person not negligent in failing to take precautions if a RP would have taken them
- **S. 48(2)**: look at the following to determine if a RP would have taken precautions:
 - (a) **Probability of harm** that would occur if care not taken

The greater the probability of harm, the greater degree of care a RP would take (*Bolton*)

- (b) The likely **seriousness** of harm

Re: what D knew or ought to have known (*Paris v Stepney*) incl. D knowledge of P susceptibility

- (c) The **burden** of taking precautions to avoid risk of harm (see s. 49 next page)
- (d) **Social utility** of the activity that creates the harm

The greater public benefit flowing from D's general activity, less likely a RP would have taken precautions that would undermine that public benefit

Breach

- **S. 49:**
 - The burden of a precaution is determined in light of the burden of avoiding similarly placed risks
 - The fact that harm could be avoided by doing something differently does not of itself evidence a breach
 - Subsequent taking of precautionary action (mitigation) does not of itself evidence breach
- **S. 14G:** relevance of P's illegality or voluntary intoxication relevant to determine breach

*Breach of Legislative standards it not conclusive of a breach of DoC, simply a piece of evidence to be weighted up (**Tucker v McCann**) should look at: nature of the precaution specified by the law & circumstances of the breach*

3. Common Practice

Has the D deviated so far from common practice that weight should be placed upon the deviation?

- **S. 57:** a professional means an individual practicing a profession
- **S. 59: professional not negligent** if established that the prof. acted in a manner that (at the time of the service provided) was widely accepted in Aus. by a significant # of respected practitioners in the field (peer professional opinion) as competent prof. practice
- **S. 59(2):** peer professional opinion cannot be relied on if court determines it **unreasonable**
- **S. 59(3): effect of divergent opinions** → the fact that there are different opinions that are widely accepted by a significant # of respected practitioners does **NOT** prevent any one of more (or all) of those opinions being relied on for the purposes of this section
- **S. 59(4):** peer professional opinion does not have to be universally accepted to be considered widely accepted
- **S. 60:** s. 59 does not apply re: failing to give a warning/risk

NON-PROFESSIONALS CL RULE: Conformity with common practice is not conclusive that a D has not breached their duty of care and it is only a factor – albeit a weighty factor – taken into account in determining what the reasonable person would have done: *Mercer v Commissioner for Road Transport & Tramways (NSW)*

4. Failure to Warn

Common practice does not apply to failure to warn. Arises mainly in medical care.

Mainly covered by common law but in **S. 50** it says: a D who owes a DoC to the P to give a warning or other information to the P in respect of a risk or other matter, **satisfies the DoC** if the D takes reasonable care in giving that warning or other information. High threshold.

In determining whether information should be disclosed, courts must consider (**F v R**):

1. Nature of the matter to be disclosed
2. Nature of the treatment
3. Patient's desire for information
4. Temperament and health of the patient
5. General surrounding circumstances

A doctor has a duty to warn of '**material risks**' inherent in the proposed treatment (**Rogers**). Risk is material if: a RP in the P's position would be likely to attach significance to it; or the doctor is aware, or should reasonably be aware, that the particular patient, if warned, would likely attach significance.

Causation

S. 51(1):

A determination that negligence caused a particular harm comprises the following elements –

- (a) that the negligence was a necessary condition of the occurrence of the harm (factual causation); **and**
- (b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (scope of liability).

S. 51(4):

For the purposes of determining scope of liability, the court is to consider (among other things) whether or not and why responsibility for the harm should be imposed on the negligent party

Factual Causation (Cause In Fact)

The 'But-For' Test

Would the plaintiff's specific injury have occurred **but for** the D's breach of duty of care?

- **Barnett v Chelsea & Kensington**
- **Strong v Woolworths**: the chip case/but for them not cleaning every 15 minutes/chip not there

May be relevant to look at what the **P would have done** in determining whether they would be harmed "but for" the D's conduct

- **S. 51(3)**: If it is relevant to the determination of factual causation to determine what the person who suffered harm (the injured person) would have done if the negligent person had not been negligent, the matter is to be determined subjectively in the light **of all relevant circumstances**.
 - **Chappel v Hart**
 - **Wallace v Kim**: three possibilities in medical failure to warn cases as to what the P would have done if advised of the risk:
 1. P would've chose not to undergo treatment, even if warned (no cause in fact)
 2. P would've chosen not to undergo treatment at all if warned (yes cause in fact)
 3. P would've chosen o undergo the treatment, but at a later time and therefore, in different circumstances (yes cause in fact)

Limitations of But-For Test

- Too broad, too narrow, too inconsistent

False Negative s. 51(2): if something is not found to be a necessary condition of the harm, consideration should be given as to whether or not and why responsibility should be imposed on the defendant

March v Stramare:

- The but-for test is not the conclusive determinant of causation – a useful filter, but alone is insufficient
- Various examples illustrate that the test, applied as an exclusive criterion of causation can sometimes yield unacceptable results
- The but-for test must therefore be tempered by the application of:
 - Common sense
 - Making of value judgments
 - Infusion of policy considerations

Cause in Law on next page

Cause in Law

Scope of Liability

S. 51(1)(b) it is **appropriate** for the scope of the negligent person's liability to extend to the harm so caused

S. 51(4): for the purposes of determining scope of liability, the court is to consider (among other things) whether or not and why responsibility for the harm should be imposed on the negligent party

Failure to Warn & Policy

- **Wallace v Kam**
 - In the ordinary case, applying precedent is the policy approach to determining 'scope of liability'
 - In novel cases like this one, need to be **explicit** regarding policy considerations
 - In this case, policy:
 - **In favour of liability**: to do so reinforces the content of the doctor's DoC
 - **Against liability**: the policy basis for the duty to warn of material risks is the patient's right to an informed choice. A P should not be compensated for the materialization of risks they would have been prepared to accept

Intervening Acts

- **Haber v Walker**: an intervening occurrence, to be sufficient to sever the causal connection, must ordinarily be either:
 - (a) **Human action** that is properly to be regarded as **voluntary**
 - Voluntary not in its wide sense (e.g. a reflex etc). → for it to be voluntary it is necessary that the human exercised **free choice**
 - Free choice is not choice made under **substantial pressure**
 - (b) **OR** A causally independent event the conjunction of which with the wrongful act or omission is by ordinary standards so **extremely unlikely and cannot be termed a coincidence**
- Subsequent Negligent Acts Does Not Break Chain (**Mahony v Kruschich**)
 - Provided a P acts reasonably in seeking or accepting subsequent medical treatment, negligence in the administration of that treatment does not break the chain of C
 - This is because an ordinary injury carries a risk that medical treatment might be negligently given – it may be the very kind of thing likely to happen as a result of the first tortfeasor's negligence
 - EXCEPT where the treatment/advice is **inexcusably bad/grossly negligent**
- **March v Stramore**: where the D's wrongful conduct has generated the **very risk** of injury resulting from the negligence of the P or 3rd party, & that injury occurs in the ordinary course of things, then such subsequent negligent act does not break causal chain (drunk driver/car in middle of road – being drunk did not break chain)
 - to find otherwise would effectively deprive the D's DoC in any content

Remoteness

A defendant will not be liable for a plaintiff's injury if that injury is too remote.

MetroLink: remoteness is a two-stage inquiry that requires you to:

1. Identify the particular kind of genus of harm, to which the loss belongs (categorization of harm)
2. Determine whether a reasonable person in the position of the D ought to foresee loss of that particular kind of genus (reasonable foreseeability)

1. Categorization of Harm

This is a contentious area of law. Case law supports the kind of harm interpreted both narrowly & broadly.

Broad Approach (APPLY WHEN CASE IS ORDINARY)

- **Mount Isa Mines**: see mental illness or disturbance generally; not specific kind of mental harm
- **Hughes v Lord Advocate**: burn injuries → injuries due to fire

Narrow Approach (APPLY WHEN CASE IS UNUSUAL)

- **Tremain v Pike**: disease contracted by contact from rat's urine too remote as kind of harm
- **Doughty v Turner**: injury caused by eruption too remote as kind of harm from eruption

MetroLink: regarding categorization of harm:

- It is a question of law and involves questions of policy, precedent and reasoning by analogy
- In the ordinary case, a broad categorization of the kind of loss is appropriate
- If unusual injury or injury arising from an unusual sequence of events, narrow approach may be more appropriate.

2. Reasonable Foreseeability

Wagamound #1: test for remoteness is reasonable foreseeability.

Was it reasonably foreseeable to a RP in the position of the D that the D's *kind of carelessness* may result in damage of the *same kind* as that suffered by the P or to a class of persons to which the P belongs?

- Damage to the wharf as a result of fouling by the oil was a foreseeable consequence of the defendant's negligence, the damage by fire was not

Wagamound #2: to be reasonably foreseeable at the remoteness stage, a risk must be real & not far-fetched or fanciful – if a D has special knowledge about a risk, it will be taken into account in determining reasonable foreseeability

- The risk of fire in this instance was small but not far-fetched or fanciful – it was a risk that may not have been expected to eventuate but was easy to eliminate in due care

3. The 'Thin Skull' Rule

- Defendant must take their victim as they find them & will be liable even where the extent of loss was not reasonably foreseeable, provided the initial kind of injury was foreseeable (**Stephenson v Waite Tileman**)
 - Arises when the defendant's negligence operates on a pre-existing susceptibility to injury; or when the defendant's negligence exposes the plaintiff to a new risk of harm

4. Exception for Consequential Mental Harm

S. 74: P not entitled to receive damages from D for consequential mental harm, unless:

- (a) D foresaw or ought to have foreseen that a person of normal fortitude might, in the circumstances, suffer a recognized psychiatric illness if reasonable care were not taken; **or**
 - (b) D knew/ought to know that P is of less than normal fortitude and D foresaw or ought to foresee, in the circumstances, P might suffer a recognized psychiatric illness if reasonable care not taken
- "Circumstances of the case" include injury to P out of which the mental harm arose

Defences

Contributory Negligence

- A partial defence – leading to a proportion of damages, although in theory can be 100% (**s. 63**)
- Occurs when a plaintiff's damage is partly due to their own failure to take reasonable care (**s. 26**)
- **S. 62:** determining the plaintiff's contributory negligence, the same principles are relevant as neg.
- P's contribution to their damage may be via contribution to the accident causing their injuries or to the extent and nature of their injuries (**Froom**)

Doctrine of Sudden Emergency

- Allows for some lenience in addressing the plaintiff's behavior – for example, if they had to respond to a situation of danger or inconvenience created by the D's breach (**Caterson**)

Apportioning Liability

- Involves a comparison of culpability – meaning, a comparison of each parties' *degree of departure* from their *respective* standards of care (**Pennington**)
- Relevant considerations might include
 - Obvious dangerousness of the risk creating behavior
 - Number of people put at risk

Volenti non fit Injuria

- Voluntary assumption of risk – no injury done to those who consent
- A question of what the P *subjectively knows*, appreciates, and freely consents to
- Must be proved that the plaintiff:
 1. **Knew** of the facts constituting the danger from which the risk arose;
 2. **Fully appreciated** the risk inherent in those facts; and
 3. **Freely and voluntarily accepted** the risk that caused the injury
- If P appreciates that a risk – though remote – might eventuate, then that is sufficient. The P does not need to believe it will materialize to have consented (**ICI v Shatwell**)
- The P must have voluntarily accepted the particular risk (narrowly construed that *in fact* caused their harm (**Kent v Scattini**))
- Acceptance of a risk must be voluntary & not a result of pressure (**ICI**)

S. 54: A plaintiff is presumed to know about any *obvious risks*, which mean the burden shifts to the plaintiff to disprove that they were aware of, and appreciated, that risk.

- Obvious risks would be obvious to a RP in the plaintiff's position (**s. 53**)

Good Samaritans and Volunteers

- Good Samaritans are not liable for any injury caused by them when they are providing assistance at an emergency or accident if a) they act in good faith and b) they expect no money or financial reward for providing assistance: **s 31B**
- Any liability of a volunteer for injuries caused when undertaking a community service is shifted to the organisation for which they are volunteering, provided they are a) acting in good faith and b) what they did is within the scope of their community service: **ss 34 – 40**

Illegality

- P's illegal actions at the time of their injury does not negate the obligation for D to take care (**Henwood**)
 - Henwood factors that may indicate there exists an intent to negate a DoC
 - Seriousness of the mischief being addressed (i.e. if crime is serious)
 - Whether the conduct places 3rd parties at risk
- Liable if you do not ask to withdraw from act (**Miller**) – not drunk driving / has to be stolen car or something similar/illegal act you consent to
- May preclude finding of DoC to them where purpose of law is intended to disqualify that duty & would be inconsistent with the law being contravened (**Miller**) – look at purpose of the law being contravened

Limitations of Actions

Limitation of Actions Act 1958 (Vic):

- Non-personal injury
 - s5(1): An action must be brought within 6 years of the cause of action accruing
- Personal injury
 - s27D: must be brought within whichever of the following periods is the first to expire:
 - (a) the period of 3 years from the date on which the cause of action is discoverable by the plaintiff
 - (b) the period of 12 years from the date of the act or omission alleged to have resulted in the death or personal injury with which the action is concerned
- Extensions of time are possible.

Damages

Compensatory damages: purpose to put the plaintiff – as nearly as possible – in the position they would have been in had there been no tort committed

Heads of Damages: itemized components of the overall award of damages

Once & For All Rule: once damages are assessed, that is the end of the matter

Lump Sum Rule: damages must be awarded as a lump sum and it is generally not permissible to order periodic sums

Special Damages: Awarded for loss that can be expressed and proven in precise monetary terms → medical (and other expenses) & loss of past earnings

General Damages: Awarded for loss that cannot be proven precisely → Future pecuniary losses & non-pecuniary losses

Heads of Damages

Pecuniary Loss:

- Financial losses resulting from the tort (loss of earning capacity, loss of past earnings, medical expenses)

Non-Pecuniary Loss:

- Non-financial losses resulting from the tort (pain & suffering, loss of amenities (cannot do things you ordinarily would do as enjoyment), loss of expectation of life)

Limitations on Damages

- S 28LE-LH:** damages for **non-economic loss** can only be awarded where the plaintiff has suffered a “significant injury”
 - S 28LF & LB:** Significant injury is:
 - an injury (other than a psychiatric or spinal injury) resulting in more than 5% whole person permanent impairment
 - a psychiatric injury resulting in 10% or more whole person permanent impairment
 - a spinal injury resulting in 5% or more whole person permanent impairment
- S. 28G-H:** where damages for **non-pecuniary loss** can be awarded, the maximum award is set at **\$575,050**
- S. 28F:** maximum award for each week of loss of earnings is to be calculated at **no more than 3x** average weekly earnings
- S. 28C and S. 28LC:** These limitations **do not apply** where the fault concerned is an intentional act done with intent to cause death or injury, is a sexual assault or other sexual misconduct

Concurrent Liability

Joint & Several Liability (Part IV)

- In cases where concurrent wrongdoers caused the P’s loss, the P can generally claim full compensation from any of the wrongdoers;
- Wrongdoers who pay more than ‘their share’ can claim contribution from the other wrongdoer(s) ‘having regard to the extent of that person’s liability for the damage: **s 24**

Proportionate Liability (Part IVAA)

- Replaces J&S L for most claims involving property damage and economic loss (apportionable claims)
- Wrongdoers are liable only to the extent to which they are responsible for the loss, apportioned against other concurrent wrongdoers;
 - The court may only consider apportionment against those concurrent wrongdoers who are a party to the litigation;
 - Therefore, a defendant should ensure all other concurrently wrongdoers are joined to the action.