

PURE ECONOMIC LOSS

The common law has reluctance in permitting recovery in tort for *reasonably foreseeable PURE economic* loss caused by negligence i.e. where the only loss suffered by the plaintiff as a result of the defendant's negligence is financial loss (e.g. repair costs of damages property) due to policy considerations of containing liability for negligence within reasonable limits ("the bounds of common sense & practicality") so that the consequences of negligent acts/omissions are not unduly oppressive

3RD PARTY DEATH/PERSONAL INJURY

A plaintiff may suffer economic loss as the result of D's negligent act/omission which causes the death of or personal injury to a 3rd party in whom P has a relational interest: In such a case, P's damages is a for of *pure economic loss*.

Under the rule in *Baker v Bolton*, economic loss consequential on the death of a 3rd party is not recoverable in proceedings founded on tort: This rule has been abrogated in part by the **Compensation to relatives Act 1897 (NSW)** which provides for a **statutory cause of action in tort for the recovery of economic loss suffered by the close family members** (but not the employee) of a fatal accident victim: Loss of a "reasonable expectation of benefit" (*Franklin v The South Eastern Railway Company* (1858))

- Reasonable foreseeability for the limits of duty of care: Nothing extra is required other than reasonable foreseeability to establish DoC these cases

Death of an employee

However, apart from the position of family members, an employer's reasonably foreseeable economic loss is still irrecoverable as the rule in *Baker v Bolton* precludes it.

Injury to an employee

- The **action for loss of services ("action per quod servitium amisit")** continues to allow an employer to recover damages for the loss of the services of an 'injured employee' (negligent/intentional) as ER still has proprietary interest over the employee (*Commissioner for Railways v Scott*)
 - As liability is for ER's loss of services, NOT ER's economic loss, D would be unable to rely on contributory negligence on part of ER
 - This sets it apart from breach of DoC
 - Not similar to action for breach of DoC except that negligence *could* be involved
- In exceptional cases, where the tortfeasor has 'knowledge' of an employer's vulnerability to loss of this kind, the employer may recover damages for breach of a common law duty of care
 - ❖ *Barclay v Benberthy* (2012): Emphasis on the knowledge of the pilot of the particular purpose & special nature of the flight & knowledge on pilot's part of the vulnerability to pure economic loss if pilot had failed to discharge his DoC
 - ❖ NB: Not many ERs would be able to establish that a DoC was owed to them by a tortfeasor

DAMAGE TO 3RD PARTY PROPERTY

In order to ascertain whether D is to be held liable for its negligence that has caused a 3rd party's economic loss, its existence will depend on whether or not a **duty of care exists**. This will depend on:

- 1) Reasonable foresight of the likelihood of harm
 - 2) D's knowledge/means of knowledge that P was a specific individual OR a member of a determinate class of persons who are at risk of foreseeable harm (*Caltex Oil (Aus) v The Dredge*, *Canadian National Railway v Norsk Pacific Steamship*)
 - 3) P's vulnerability from foreseeable harm (*Perre v Apand*)
 - 4) Whether damage flowed from the occurrence of activities within D's control
 - 5) Closeness of relationship between parties (e.g. P's physical propinquity to D's negligent act - *Caltex Oil (Aus) v The Dredge*)
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- ❖ Operators of *The Dredge* in *Caltex Oil (Aus) v The Dredge* (1976) did owe P a common law duty of care re P's economic loss as: [pre 1976 a loss of this kind was not recoverable as there was no liability in tort for financial loss consequential to damage to 3rd party]
 - 1) In the particular circumstances, D had a high level of knowledge of the precise purpose of the pipeline and that it was being used exclusively by P and the refinery for transporting oil → D would then be liable for economic damage due to his negligent conduct when he can reasonably foresee that a specific individual OR member of an ascertainable class of persons as distinct from a general class of persons will suffer financial loss as a consequence of his conduct (Mason J)
 - 2) P's property was in 'physical propinquity' to the negligent act of D (Jacobs J)
 - ❖ *Canadian National Railway v Norsk Pacific Steamship* (1992): Railway bridge owned by 3rd party but used under contract by P incurred economic loss in rerouting its rail traffic for several weeks whilst the bridge was being repaired due to D's negligence in damaging it. — Follows *Caltex Oil*
 - Duty of care was owed to P by D as: 1) D had a high level of knowledge that P had near exclusive use of the bridge, 2) P was a specific individual, distinct from a general class of persons reasonably foreseeable to suffer financial loss as a result of D's negligent conduct
 - ❖ *Christopher v MV 'Fiji Gas'* (1993): Judge drew a distinction between the direct consequence of economic loss from deprivation of use of a "profit earning chattel" & the possible loss of income of an employee paid by his/her ER who utilised the chattel.
 - Although the loss to the appellants was foreseeable, there was no special elements necessary to establish a relationship of proximity
 - Nil evidence that owner/master of *Fiji Gas* had special knowledge of the identity of members of a ship or to support a conclusion that he should have known who they were → P's were not known to the tortfeasors to be members of a class
 - Physical propinquity test would not suffice to enable D to succeed.
 - ❖ *Fortuna Seafoods v The 'External Wind'* (2008): Aus fishing trawler (3rd party) sunk in a collision as a result of neg navigation of a Panamanian bulk carrier. P tried to claim financial loss from inability to process/market fish that the trawler would have provided
 - From the evidence, D was within the means of knowledge of the way in which the fishing industry was structured & how close knit 3rd party and P were partnered commercially → it was within the means & knowledge of D that if its ship acted negligently towards & collided with 3rd party vessel, it was likely that it would be unable to operate as a commercial fishing trawler with resulting loss of profit to the

ship's owners and P as the marketer/processor of the commercial fishing catch, both of whom operated as a closely knit business → Thus, economic loss was recoverable as a DoC was owed by D towards P and its consequential economic loss as a result of D's negligence

- NB: Policy & floodgate issues not affected as the particular closeness of relationship between D and fishing trawler owner limits the type of class to which they belong
- ❖ *Perre v Apand* (1999): P could recover against D for pure economic loss as D owed P a duty of care in its supply of disease potato seeds
 - D had special knowledge that economic consequence of the kind suffered by P was reasonably foreseeable as P was known to be an ascertainable class of persons vulnerable to this kind of damage being commercial potato seed growers in the river land district with no means of protecting themselves from this type
 - NB: That there was a large group of persons in this ascertainable class affected (potato growers in the river land district) was irrelevant

"Bright Line" Exclusionary Rule (US Perspective)

- ❖ *Robins Dry Dock & Repair Co v Flint* (1927): Pure economic loss suffered by P through its inability to use the 3rd part's steamship for hire for 2 weeks until the propeller damaged by D's negligence was suspended was NOT RECOVERABLE IN TORT as "*the law does not spread its protection so far*"
- ❖ *East River Steamship Corp v Transamerica Delaval* (1986): Pure economic loss suffered by P as the result of D's negligent construction of turbines on 3rd party tanker, which had been leased to P for a period of 20 years, is NOT RECOVERABLE IN TORT as this places the case in the domain of contract law: "*Permitting recovery of all foreseeable claims for purely economic loss could make a manufacturer liable for vast sums.*"
- ❖ *People Express Airlines v Consolidated Rail Corp* (1985): As (a) there was close proximity between P's booking office & air terminal AND (b) P was a particular member of an identifiable class of persons known actually/constructively to D as a persons reasonably foreseeable to suffer from loss of as a result of an accident & evacuation, economic loss was recoverable in tort.

DEFECTIVE GOODS & STRUCTURES

Although a **manufacturer of goods** may be liable in tort for negligence if a defective product causes personal injury to a consumer or damage to other property causing consequential economic loss (e.g. diminution in value), **a manufacturer does not owe a duty of care to a consumer in respect of pure economic loss attributable to the defective/faulty quality of the goods** (*Minchillo v Ford Co of Aus* [1995]: Vibrations++): There is only liability in CONTRACT that can be relied upon.

EXCEPTION: The **builder/architect of a dwelling house/public building** may owe a duty of care to a purchaser & remote purchaser in respect of pure economic loss attributable to the defective quality of the building work/design (*Bryan v Maloney*, *Voli v Inglewood*)

- An architect/builder is bound to exercise due care, skill & diligence and must be competent in that is usual among architects practicing their profession with care (*Voli v Inglewood*)
- A relationship of proximity and a consequent DoC with respect to the building work exists: A subsequent purchaser is owed the same DoC from the builder as s/he would have owed the same duty in respect of pure economic loss to the original owner of the structure esp as a property signifies a significant investment which the subsequent owner will make during his lifetime → Therefore it would be foreseeable that economic loss would likely result from a negligent construction of the house even if liability arises after an extended period of time

- Liability can arise in either contract or tort (*Voli v Inglewood*)
- NB: However, unlike *Bryan v Maloney*, if the original owner asserted control over the investigations which an engineer/architect/builder relied upon for the purposes of performing its work (e.g. original owner refusing to pay for geotechnical investigations that D obtained quotes for), resulting in performance by engineer/builder of work that was more or different to how he executed his skill/expertise, it would be difficult to hold the builder/engineer accountable for a lack of duty of care in avoiding economic loss to a subsequent owner (*Woolcock Investments v CDG* (2004))

LEGAL PROFESSIONAL PRIVILEGE

Negligence in a legal professional context may cause liability in tort for pure economic loss as under the *Hedley Byrne* principle where:

- There has been negligent advice has been given to a client who relies on that advice to his/her financial loss
- Solicitor not taking reasonable steps to perform their duty as a legal professional (e.g. *Hawkins v Clayton*)
- Situations where there has been no relevant reliance by P or a relevant contractual relationship between P and the legal practitioner: Duty of care may be owed by a legal professional to a 3rd party in tort even if the contractual duty is owed solely to the client as the undertaking of a specialist task pursuant to a contract between A and B may give rise to an occasion where DoC is owed to a 3rd party if the task was carelessly performed (e.g. an intended beneficiary as in *Hill v Van Erp*)

Duty of care imposed by tort law on legal practitioner fills a gap in tort law especially as there is a public interest in the promotion of professional competence and the avoidance of disappointment of wishes & expectations of testators & beneficiaries by the negligent actions of solicitors to ensure compliance to their statutory & professional obligations

- ❖ *Hill v Van Erp* (1997): There was a DoC by solicitor to the intended beneficiary who was i) not a party to the contract, ii) did not assert identification of known reliance/dependence on solicitor's obligations in executing the will and iii) solicitor had not disclosed an assumption of responsibility other than to her client as:
 - The legal profession has an important undertaking in the exercise of testation & preparation of wills within the legal framework
 - The solicitor voluntarily assumed responsibility in executing a valid will & had lent herself as a professional for that purpose
 - A solicitor owes a duty of care to his client who intended to confer a benefit onto a 3rd party
- ➔ Therefore, a DoC may be implicit as the solicitor has assumed a legal responsibility specific to whom or for whose benefit the client had intended for in the execution of the contract
- ➔ Legal professional would, thus, be liable for significant pure economic loss caused by breach of that duty if the will/contract was designed to enhance P's economic position (e.g. loss of rental income, deterioration of client's estate, fees/fines)

