1. Is there any precedent for the current case?

P in Fear for Own Safety: DOC owed for those in ***physical zone of danger***, so as to be placed in *reasonable fear for their own safety*. ***Dulieu v White & Sons [1900-1903]:*** P was narrowly missed by a coach and horses being negligently driven; she sustained a 'severe shock', became ill and consequently suffered a miscarriage.
P in Fear for Family Members: DOC is owed to those who witness (or reasonable think so) an injury being caused to a close family member, provided that they witness the accident with their own eyes/ears. ***Hambrook v Stokes Brothers [1925]:*** P reasonably thought she had witnessed her children being injured by a runaway lorry, when this was not in fact the case → DOC owed.
P in Fear for Co-Workers: DOC can be owed by employers to employees who witness (or reasonably believe they have witnessed) the injury or death of a co-worker due to employer's negligence. ***Dooley v Campbell Laird and Co* [1951] (English)**: P (a crane operator) successfully recovered when his employer's negligence in failing properly to maintain a crane caused him to think that a load from the crane had dropped onto a co-worker. ***Mount Isa Mines v Pusey (*1970) (Aus) rescuer's principle:** P heard 2 co-workers being electrocuted and then saw 1 of them in a horribly burned condition when assisting; they both later died. P recovered damages for later developing unusual symptoms of schizophrenia. P was owed a DOC by his employer.
Rescuers: DOC could be owed to rescuers assisting at the scene of an accident site, even where they have no relationship to anyone injured in the accident. ***Chadwick v British Railways Board [1967]***: P suffered anxiety neurosis ('psychoneurosis') as a result of assisting at the scene of a horrific railway accident in London. *Waller J*: the duty to rescuers being based on the principle that 'danger invites rescue', so that a D who causes an accident can reasonably foresee that persons may try to assist victims and then themselves be injured (either physically or mentally) in the process. ***Mount Isa Mines v Pusey (*1970) (Aus); *Wicks v NSW***
P Witnessing the Immediate Aftermath of the Accident: a close family member of an injured person may be owed a duty even when they do not actually witness the accident contemporaneously at the accident scene, but witness the accident's 'immediate aftermath', for example in ambulance or at a hospital to which their husband or wife has been taken – the mental injury may be foreseeable even when there is some delay in witnessing the injuries caused by D's negligence. ***McLoughlin v O'Brian [1983] (English)*** ***Jaensch v Coffey (1984) 155 CLR 549 (HCA)*** There was a very close relationship, both legal and actual, between P and her husband. P was, in my opinion, **a "neighbour"** of the appellant (D) within Lord Atkin's principle; it was foreseeable that a person in her position would suffer nervous shock, and there is no reason of policy why her claim should not succeed. P's psychiatric injuries were the result of the impact upon her of the facts of the accident itself and its aftermath while she was present at the aftermath of the accident.
*Step 6: Witnessing Damage to Property (*scant authority in Australia*):* ***Attia v British Gas plc* [1988] QB 3 All ER 455 at 318-21 (English Court of Appeal)** DOC owed for a psychiatric illness suffered as result of witnessing the fire to P's home against D → her condition was a reasonably foreseeable consequence of D's conduct.

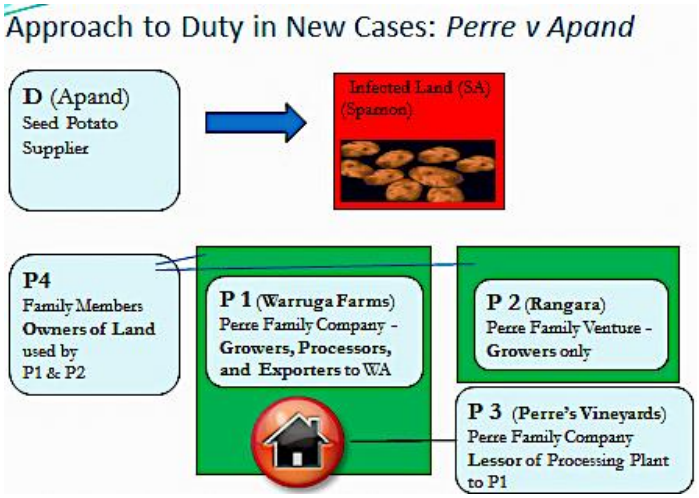
WEEK 4 – ECONOMIC LOSS 1 – POLICY CONCERNS AND NEW CASES

Policy Concerns	Critique
(4) Economic interests are *less important than physical welfare or property interests?* "an individual's personality is partly constituted by the property…individuals define themselves, which gives it greater value than mere money" (Hayne J)	In this modern world, economic interests are central given the role they play as investment vehicles. People by property investments as instantiations of wealth, not because the property has any real meaning or represent who they are.
Absence of *Social Loss?* ***Perre v Apand*** at [72], *per* McHugh: "Pure economic losses frequently result in mere transfers of wealth. P's loss is D's or a 3rd party's gain. Harm to person or property, on the other hand, ordinarily involves a net loss to social wealth"	Tort law is generally unconcerned with aggregate *social* harm. It focuses on damage done to individual interests, and exists precisely to protect them against the potential tyranny of collective calculus. Exactly the same 'wealth transfer' occurs when P loses production as a result of damage to his property/person anyways.
(1) A Duty to Protect P's Pure Economic Interests would unduly *Restrict D's Commercial Freedom* (Autonomy)? ***Perre*** at [33], *per* Gaudron J; at [115] *per* McHugh J	The potential burden of preventive precautions to D is just 1 consideration, which will be weighed and balanced in the breach inquiry, but they do not rule out the obligation to take care.
(3) A Duty of Care could result in '*Indeterminate Liability*'? → the administrative argument: Too much litigation for courts to handle → the 'disproportionate liability' argument: D's liability would be unfairly large – a single inaccurate financial information can be transmitted to a wide audience, sending ripples down the financial chain → the slippery slope' argument: It would be impossible to stop the 'claims bus' → Large liability would have harmful social effects: driving D's out of business, or raised prices for services and the economy as a whole → Liability would be too uncertain for D's to realistically calculate (not size of liability) or insure against (McHugh J in ***Perre*** [107]-[8]; Hayne J at [336]) – the ability to plan one's future is an important aspect of personal choice (D's autonomy)	→ To achieve proportionality essentially rules out a DOC where loss is large; the more harm D did, the less likely he would be liable for *any* of it. → Harmful social effects concerns are speculative, requiring knowledge of insurance markets and accurate prediction of effect of liability on insurance premiums, market prices & service provisions. → High Court of Australia currently bluntly denies that the respective insurance positions of the parties are relevant to liability. → The question remains whether the mere incalculability of a foreseeable loss is a good enough moral reason for denying a person's responsibility to pay for it, when it has been carelessly caused.
(5) A Duty to Protect P's Pure Economic Interests may Conflict with Contractual Risk-Allocation or Statutory Regulations. *Acknowledged in ***Perre v Apand*** at [5] per Gleeson CJ; Rejected in ***Brookfield Multiplex v Owners Corporation* [2014] HCA 36**	All versions of the argument require detailed consideration of individual facts to determine whether potential conflict is present. They are not unique to cases involving economic loss, or the law of tort. But, this seems a perfectly sound and increasingly relevant concern in a system seeking to navigate its way through other systems and norms
(2) P has *Alternative Means of Protection?* ***Perre v Apand*** [1999] HCA 3 at [118-121] *per* McHugh J: "No reason to impose a duty on D to protect the P from economic loss where it was reasonably open to P to take steps to protect itself. The vulnerability of P to harm from the D's conduct is therefore ordinarily a prerequisite to imposing a duty."	An unreasonable failure to protect oneself is a well-established basis for reducing the damages of P on grounds of contributory negligence (defence), or failure to mitigate loss (causation issue). It is unusual for such failure to relieve D for his negligence. This concern may embody a broader judicial strategy for

	distributing the burden of precaution between different social groups (so D does not carry the whole burden).

***Perre v Apand* (1999) 198 CLR 180; [1999] HCA 36**

- ★ D (Apand) carelessly supplied bacterial infected seed potatoes to a farm in SA owned by Sparnon
- ★ Government banned all exports of potatoes from farms within 20k radius of Sparnon's farm
- ★ The physical attributes of the potatoes were not affected in any way whatever. The case is one of pure economic loss.



The value of P4's land was diminished by the ban because it could no longer be used for growing potatoes.

(P2 sold the potatoes they grew to P1. When the ban came into place, its market disappeared.)

When P1 ceased to process potatoes, P3 lost money.

The High Court held by a significant majority that a **DOC was owed to all the plaintiffs**.

- ⇒ Gleeson CJ, Gaudron, Gummow, Kirby and Callinan JJ thought that P1 to P4 were all owed a duty.
- ⇒ McHugh J thought that a duty was owed to P1, P2 and P4, but not to P3.
- ⇒ Hayne J thought a duty was only owed to P1 and P2, but not to either P3 or P4.

McHugh J:

The incremental approach is the most satisfactory approach [94]

- ➢ The law should be developed incrementally by reference to the reasons why the material facts in analogous cases did or did not found a duty and by reference to the few principles of general application that can be found in the duty cases.
- ➢ The reasons for upholding or denying a duty will reflect policies that the courts have recognised as relevant in determining the duty issue.

'Applying McHugh J's and Gleeson CJ's reasoning in *Perre v Apand*, the following factors may be relevant:'

0. Does the case come within an established category? → No
1. **Was the loss suffered by P reasonably foreseeable from D's acts/omissions?**
2. **If yes to question 1, would the imposition of a duty of care impose indeterminate liability on the defendant?**

- ★ Liability is indeterminate only when claims cannot be realistically calculated.
- ★ Arises when D could not determine the who claimants might sue him, or what the general nature of their claims might be

a) Indeterminate class: If D knows or has the means to know the members of an ascertainable class, and the nature of the likely losses, its liability is not indeterminate (***Perre; Johnson Tiles***)

b) Indeterminate amount: the likely number of claimants, and a rough & ready estimate of the likely quantum of damage

E.g. ***Perre***: Imposing the duty on Apand does not expose it to indeterminate liability although its liability may be large (size) (same in ***Johnson***)
E.g. ***Johnson Tiles***: Esso knew the respective numbers of industrial & commercial gas users, and what the gas was used for, it was open to them to obtain legal advice as to its potential liability, and to investigate the nature of the claims; however the stood down employees were an unascertainable class and indeterminate amount
E.g. ***Barclay v Pemberthy***: D knew that Nautronix (P) was a member of an ascertainable class of commercial users of the aircraft

Cures (helps get past this stage – 'no' for indeterminate liability is any can be established)

(1) Knowledge of P as a member of an ascertainable and specific class (McHugh J in ***Perre***); harm has to be foreseeable to P as an identifiable *individual (Gibbs & Mason JJ in **Caltex**)*

(2) First-line claimant – P is more likely to be ascertainable by D if 'primarily' affected (McHugh J in ***Perre,*** & ***Fortuna***)

⇒ ***Johnson Tiles***: the stood down workers were 'ripple effect' victims, the first line being their employer

(3) Transferred Loss – P suffered loss because he agreed to bear the risk of damage to someone else's property (***McMullin v ICI***)

(4) Joint Venture – there would a limited number of persons (P) in a 'joint'/'common adventure' with the person whose property was damaged, so as to enable D to calculate potential liability

⇒ ***Fortuna Seafoods***: closeness of relationship between Fortuna Fishing & Seafoods greatly limits the size of the class D should have in contemplation when navigating its vessel – small and ascertainable determinate group – 'vertically integrated' family-operated

(5) **P's Property within area of physical risk (?)** - the group of those whose property was placed at risk by D's conduct is likely to be reasonably restricted, and more likely to be ascertainable by D (Jacobs J in ***Caltex*** & Callinan J in ***Perre***)

3. If no to question 2, would the imposition of a duty of care impose an unreasonable burden on the autonomy of the defendant?

★ As long as D is *legitimately* protecting/pursuing his social/business interests (like in ***Reynolds***),
★ the common law will not require D to be concerned with the effect of his (not illegal) conduct on the economic interests of P, even if D intends to cause economic loss to P (McHugh J in ***Hill v Van Erp***).
★ Courts will approve of commercial competition,
★ and will not impose a DOC if it is an unreasonable burden on D's commercial freedom.

E.g. ***Perre***: Imposing the duty does not unreasonably interfere with D's commercial freedom because it was already under a duty to the Sparnons to take reasonable care; D was not pursuing his business interests - Apand was not competing with the Perres.

4. If no to question 3, was the plaintiff vulnerable to loss from the conduct of the defendant?

★ P is vulnerable if he was unable to take reasonable steps to protect himself from D's negligence,
★ Or was induced by D against taking such steps
★ P is also vulnerable if he was subject to D's control, or when there was a reasonable reliance/assumption of responsibility placed on D's information
★ Need to assess if insurance was common practice in that specific industry (***Johnson v Esso***)
★ **The common law also respects P's autonomy.**
★ If not vulnerable, the law expects people to look after their own economic interests to a greater extent than it requires them to take steps to protect their person or tangible property
★ ***Agar v Hyde (at 563 [18])***: "*The only way to avoid risk of injury is not to play*"

★ P must accept responsibility for his own actions.

E.g. ***Perre***: Ps were not in a position to protect themselves against the effect of D's negligence apart from insurance (which is not a relevant factor as per McHugh J)
NOT E.g. ***Reynolds v Katoomba [2001]***: P could have resigned from the club himself → **P had autonomy over his own actions** and is not open to the club's control; the law should not recognise a DOC to protect persons from self-inflicted economic loss that only occurs following a deliberate and voluntary act by P (e.g gambling – s16 CLA)
NOT E.g. ***Leigh & Sillican v Aliakman:*** P should have obtained better protection in its contract with the seller (Lord Brandon)
NOT E.g. ***Johnson Tiles v Esso***: Giving consideration to distributive justice, existence of insurance negates P's (domestic & commercial) vulnerability
E.g. ***Fortuna Seafoods***: Fortuna Seafoods was vulnerable if *Melina T* was negligently damaged by *Eternal Wind* as it could do little to realistically protect itself
E.g. ***Barclay v Pemberthy***: Nautronix was vulnerable in the sense that they were unable to protect themselves from the foreseeable harm of an economic nature caused
E.g. ***Caltex v Willemstad***: It is just and fair that D, who is able to reasonably foresee that their conduct will occasion economic loss to the ascertainable class, should be found liable to compensate the sufferer of the loss rather than that the victim should bear it himself through insurance

5. **Did the defendant know that its conduct could cause harm to individuals such as the plaintiffs (knowledge of an 'ascertainable class')?** – *an argument that is in relation to indeterminacy (cure above)*

★ D must have knowledge that its actions are likely to harm the interests of an ascertainable class (actual or constructive?)

E.g. ***Perre***: D knew of the risks associated with bacterial wilt
E.g. ***Reynolds v Katoomba***: D knew of P's gambling problem, furthermore there were express requests made to the club not to permit him to cash cheques → was aware of his vulnerability
E.g. ***Caltex v Willemstad***:

- "*the grossness of the wrongdoer's want of care*" (recklessness) was a relevant matter in determining the duty issue.
- D knew P individually, not a member of an unascertained class, will suffer loss – D was supplied a drawing for the very purpose of enabling them to avoid the pipe (Gibbs J)
- Ds had a duty to take reasonable care to avoid damage from navigating the dredge in the vicinity of the pipeline (Mason J)
- D1 & D2 should have had Caltex in contemplation as persons who would 'extremely likely' suffer economic loss; it was reasonably foreseeable (Stephen J)

E.g. ***Barclay v Pemberthy***: Given the highly specialised nature of the flight-testing program, D knew of the risk that P would suffer economic loss if its employees were injured by a crash due to its pilot's negligence

6. **Would a DOC conflict with the way in which risk has been allocated in a contract, or the terms of a statute?** (Gleeson CJ at [5] in ***Perre v Apand***)

E.g. ***Johnson Tiles v Esso***: Contract between Esso & Gascor and between Gascor & gas customers excluded liability for indirect economic losses consequential upon interruption of supply; finding a DOC would be inconsistent with the contractual obligation. + Parliament had in the past provided for limitation on liability of retailers to customers.
E.g. ***Leigh & Sillican v Aliakman***: same re previously established contractual duty – courts are unwilling to create such conflict

7. **Control of D over the risk (for cases of omission only)**

E.g. ***Reynolds v Katoomba***: no sufficient control from D

WEEK 7 – ECONOMIC LOSS 4 – DEFECTIVE PREMISES

1. **Foreseeability of harm**
2. **Nature of harm** (pure economic loss – a stronger case is required to establish a DOC)
3. **The degree & nature of control exercised by D**
   - ★ There was power to deny approval, which would have prevented harm
   - ★ However, Council did not design the building?
4. **The degree of vulnerability of P to the harm from D's conduct**
   - ★ Were problems likely to be picked up in ordinary inspection by P?
   - ★ Or is P unable to protect herself from consequences of D's want of reasonable care? (***Woolcock***)
   - ★ P being an investor (/not domestic purchaser) does not weaken her case
   - ★ Detailed contract = ability to protect oneself = not vulnerable (***Brookfield***)
5. **Foreseeability of reasonable reliance**
   - ★ *Specific* (fatal to ***Sutherland's*** claim) – P specifically relying on D's words or conduct in making the purchase/obtaining certificate (***Woollahra***); or
   - ★ *General* – usually not reasonable, unless ***Bryan*** (which only applies to domestic)
6. **Any assumption of responsibility by D** (D required by statutory provisions to do so or not?)
7. **The proximity or nearness in a physical, temporal or relational sense of P to D** (did they have a contract?)

WEEK 9 – DEFAMATION

The tort consists in the ***publication*** **by D** of ***defamatory matter*** that ***refers*** **to P**. It therefore has **3 main elements**:

1) **Defamatory Matter**

Schedule 5 (pg42): ***matter*** ='*anything by means of which something may be communicated to a person*'

A plaintiff must:

(a) Plead the particular meaning(s) he or she says the words have their '**imputation**(s) – *i.e. accusation'*; and

- ➢ Judge first decides if the matter is '***capable'*** **of being defamatory** → Question of law

The **tests** used by courts are still determined at common law - 3 difference tests:

(i) Words that **tend to** expose P to **hatred, contempt, or ridicule** - ***Parmiter v Coupland*** **1840) 6 M&W 108, per ParkeB**

(ii) Words that **tend to lower P in the estimation of ordinary decent persons** ("*right thinking members of society*") - ***Sim v Stretch*** **[1936] per Lord Atkin**, extended in ***Radio 2 UE Sydney v Chesterton*** **(2009) ALR**)

- ***Radio 2 UE***: insisted on traditional ***Sim*** test, although **the test could now apply equally to cases involving a person's business and personal reputation**
  - → Reputation = injured when esteem in community = diminished (P being a *"bombastic buffoon, a creep, ungrateful", etc.*)
  - → **Spencer Bower**: ordinary reasonable/decent people = "*of ordinary intelligence, experience, and education*", "*not avid for scandal*" and "*fair minded*"
  - → This case shows that business reputations can be lowered without any imputation of moral blame being cast (i.e. not P's fault).

- ***Boyd v Mirror News***: rugby player said to be '*so fat as to appear ridiculous'* – imputation capable of being defamatory even accepting that it did not cast criticism on his professionalism, or that he was morally to be blame for his condition (Hunt J).

(iii) Words that **tend to** cause P to be **shunned or avoided** - ***Yousoupoff v MGM* [1934] TLR** (princess shown to be raped on film - *suffered in social reputation & in opportunities of receiving respectable consideration from the world*)

2) Publication

- ♥ Statements must have been intentionally communicated to people other than P
- ♥ Each publication = a separate cause of action (re repetition)

For initial publication:

(a) D must have intention to publish (not defame) the relevant imputation

- ➢ ***Huth v Huth* [1915] (Eng)**: No publication of defamatory material contained in an unsealed letter (sent from husband to wife) when it was opened out of curiosity and read by P's (wife) butler → **no intention to publish to third person**; intention can be inferred from knowledge that 3rd party will become aware

- ➢ *Publication by Non-removal of Matter (from D's property, even if created + put there by 3rd party, X)*
  - ○ ***Bryne v Dean 1937 (Eng)***: the poem (and its imputation that P had informed the police of illegal activity at the club) was not capable of being defamatory according to general community standard, but → **the club had published it**
    - → by not removing the defamatory matter, D really made himself responsible for its continued presence
    - → D was consenting to its continued presence on the noticeboard, thereby **consenting to its publication** to each member who saw it
  - ○ ***Urbanchich v Drummoyne Council* (1991) Aus Reps**: Poster with photo of Hitler at rally, circles P's face glued to bus shelters under D council's control
    - → as *Bryne*, notice of the existence of the defamatory statement **+** an ability to remove it **+** failure to comply within a reasonable period with a request to do so **= D had in fact accepted responsibility for the continued publication**.
    - → this can be established by inference through express knowledge that a 3rd party will see it

- ➢ ***Visscher v Maritime Union of Aus [2014] NSWSC***: D's articles contained a hyperlink to a more detailed article on newspaper website which was clearly defamatory of P in suggesting his irresponsibility and lack of care for the safety of his crew → **D had indeed published the third-party material**
  - → by the **inclusion of the hyperlink**, D **accepted responsibility** for the publication of the hyperlinked material (esp. when there **was an approval, adoption or promotion** of the hyperlinked article)
  - → D's article invited a viewing of the "full story" by having the reader click on the hyperlink

- ➢ ***Google v Trkula [2018] HCA***: Google returned P's photo when searched "*Melbourne criminal underworld photos*" & search results had auto-complete predictions when inputting P's name
  - → **HC → Google was a publisher of the search results** because of its **intentional participation in the production of the search results**
  - → **CA →** Defence of innocent dissemination (***s32***) is available to secondary publishers (e.g. newsagents library selling/ lending out defamatory newspaper/books) but not primary (including accepted responsibility: ***Byrne*** & ***Urbanchich***)
    - ⇒ Search engines = secondary publisher (plays no role in selection of search terms)
    - ⇒ Internet service providers & telephone companies = secondary publisher (passive role in facilitating postings)
    - ⇒ Forum hosts (blogs, FB, Bulletin board, Ytube) = When notice is given to take post down and D secondary publisher (who, up to this point, can rely on the defence) does not → D becomes a primary publisher

⇒ The **secondary publisher/innocent dissemination defence analysis** appears to be both the preferable outcome in point of principle, and to be a rational way of dealing with the problem of results produced by a search engine

3) Reference to Plaintiff

♥ The defamatory material must have been published "**of and concerning" the plaintiff (*Kasic v Australian Broadcasting Corp [1964] VR*)**

(a) A **reasonable reader must identify P as the person referred to** – D need not intend to refer to P

- ***Hulton v Jones [1910] (Eng)***: D wrote an article about fictional churchwarden Artemus Jones; P of that name existed in real life → claim for defamation was successful, the jury finding that the **D's article could reasonably be understood as referring to P** (even when D did not intend to defame P)
- *P may be identifiable only by innuendo:* ***Steele v Mirror Group Newspapers* [1974] (NSWCA)**: D published article that 50k tons of wheat was stolen in Sydney; P who had been convicted and engaged on a large scale in carting and cleaning wheat, sued D
  - → Mr Keogh gave evidence that he understood the article as referring to P
  - → Defamatory matter which does not name P is actionable if there are **special/extrinsic facts** known to readers (about P), which **properly lead them to infer** that the defamatory matter refers to P, even where the publisher is not aware of P's existence

(b) Defaming a Class not normally enough to refer to P

- ***Knuppfer v Express News [1944] (Eng)***: D defamed thousands of people in international society by accusing that they profess fascist ideology; P was leader of English brand of that society
  - → **HL** → The **article was incapable of being understood by the ordinary reasonable reader to refer to the P individually**
  - → there is no specific mention of P from beginning to end
- **EXCEPTION:** ***Bjelke-Peterson v Warburton* [1987] (QSC)**: P was the then-time premier of Qld. D1, leader of the opposition, said: '*just as the tide turned against the dictator Marcos so too can Bjelke-Petersen and his corrupt Government be swept from offi*ce'. D2, referred to The Government as '*corrupt*' and to Ministers as '*blokes with their hands in the till*'.
  - → **Court** held that **the words were capable of referring to the Premier and (all 18) Ministers of the cabinet (including one who was female) individually**.
  - → "*Government*", "*these blokes*" and "*Ministers*" all mean the same thing, and the allegation of corruption is thus reasonably referable to a class consisting of the Ministers
  - → **this class is sufficiently narrow for each member of the class to complain that the words complained of may reasonably be taken to refer to him or her**
  - → In deciding whether D's words referred to P, the size of the class, the generality of the charge and the extravagance of the accusation may all be elements to be taken into consideration

WEEK 11 – INVASION OF PRIVACY

THE GAP IN AUSTRALIA:

♥ ***Victoria Park Racing (1937) HCA***: Australia does not recognise an action for breach of privacy. Ds have not interfered with the use and enjoyment of P's land by overlooking neighbour's private land

My critique* this case is old therefore technology was still in its infancy at the time; the new status quo calls for reform; new cases that the existing torts cannot cater for

♥ ***ABC v Lenah (2001) HCA***: HC indicated a willingness to be open to the development invasion of privacy law (to protect individuals only)

→ **Gleeson CJ**: no relationship of trust and confidence between parties; information was not confidential in nature; act occurring on private property ≠ private act

→ **Gummow & Hayne JJ**: The better course… is to look **to the development and adaptation of recognised forms of action to meet new situations and circumstances**

Routes to Reform:

1. **To follow the UK approach (preferred by Australia - Gleeson CJ in *Lenah*) is to expand law of breach of confidence to protect privacy rights in wrongful disclosure**
   - ♥ ***Coco (Eng)***: **Traditional Action (Secrets)**
     1. **Confidential information**
     2. **Imparted in an relationship (obligation) of confidence**
     3. **Unauthorised use -** D releases that info causing damage to P

   Adaption Actions in AUS *in the context of a relationship where info was understood to be kept secret*:
   - ♥ ***Giller v Procopets* [2008] VSCA**: damages for **breach of confidence allowed for pure emotional distress** for D distributing sex tapes in prior relationship
   - ♥ ***Wilson v Ferguson [2015] WASC***: **breach of confidence successfully sued** – injunction prohibited further publication on Facebook where P and D formerly in relationship

   Extension of Rule in Australia - No prior relationship 'of confidence':
   - ★ ***Lenah***: **Gleeson CJ →**
     1. Private information that is **highly offensive** *[lower bar than 'confidential']*
     2. **Illegally obtained**
     3. **Publication**

   UK adopting 'Private Information' approach
   - ★ ***Campbell v MGN* [2004] (UK HL)**: **'Misuse of private information':**
     1. P had a reasonable expectation of privacy
     2. There must be an unauthorised use of information by D
     3. The P's interest in privacy must > D's interest in freedom of speech

2. **For courts to develop a separate tort/torts of invasion of privacy at common law (NZ Approach - *Hosking*)**

   (a) Tort of Wrongful Disclosure of Private information
   - ♥ ***Doe v ABC* [2007] VCC (Hampel J)**: ABC disclosed P, rape victim's identity
     1. **Personal/private** info where P had a '**reasonable expectation that it would remain private' +**
     2. **Publication must be unjustified**
        (a) Fault – **negligent/illegal +**
        (b) **There is no public interest** in its disclosure)

3. **For legislatures to enact specific causes of action under statute (Canadian Approach)**

Should we recognise a tort of privacy?

- ♥ **Pressure for change** in laws started in the US due to
  - advancements of technology causing more intrusion upon privacy
  - increase in power of the press
- ♥ "*If the mere fact that a court has not yet applied the developing jurisprudence to the facts of a particular case operates as a bar to its recognition, the capacity of the common law to develop new causes of action, or to adapt existing ones to contemporary values or circumstances is stultified*." ***Doe v ABC***
- ♥ **Common law:** Common law is problematic because it must follow precedent
- ♥ **Statutory reform at federal level:** Better to enact through legislation with clear/concise requirements as a foundation for case law to develop + statute is democratic + accessible
- ♥ **AGAINST**: lack of precision of the concept of privacy is a reason for caution in declaring a new tort of the kind

Should we have a tort of breach of confidence?

- ∞ We should have separate tort for invasion of privacy because expanding an area of law that is not specifically catered for the purpose of that is inconsistent with the standards/aims of protection for that tort, and thereby distort the overall effect of that law.
- ∞ *"Privacy and confidence are different concepts. To press every case calling for a remedy for unwarranted exposure of information about the private lives of individuals into a cause of action having as its foundation trust and confidence will be to confuse those concepts".* ***Hosking v Runting***

WEEK 12 – VICARIOUS LIABILITY

1. D1 and D2 are **jointly liable**
2. P may sue D2 for 100% of his or her loss
3. D2 may have the right to **claim contribution** or indemnity from D1, but in practice rarely does so. D1 may also be impecunious, dead or untraceable.
4. D2 usually claims a **contractual indemnity against its liability from its liability insurer**. The costs of the tort are thus spread first to the employer, then to the insurer and thence to insurance premium payers (the public).

WEEK 13 – TORT COMPENSATION SCHEMES

Criticisms of the Tort System as a compensation system:

Cost	45% costs – leading to inefficiency
Delay	Cases can take years to settle or come to a satisfactory conclusion - inefficiency
Coverage	Requires fault on D's part to recover – hard to prove due to evidential reasons - narrow
Inadequate Compensation	Difficult to estimate victim's future prognosis in awarding damages according to the lump sum system – care costs > inflation – lawyers take significant 'cut' of any damages
Adverse Health Effects	The adversarial nature of litigation process produce stress – can affect victim's recovery from psychological & physical injury and add new forms of psych/emotional harm
No Deterrent Advantages	No deterrent effect in cases of one-off, accidental injury, especially where the liability of the tortfeasor is covered by insurance
Social Injustice	Socially unjust that those who can prove fault can recover when others with exactly the same injuries cannot. + It indirectly discriminates in favour of the better off: by awarding *full* compensation of P's losses, the tort systems inevitably pay more to high earners than low earners. Fair social solution → provide equally for all suffering injury, tailoring compensation to their injury and future physical/financial needs, not to the replacement of all lost wealth
'Blame/ Compensation Culture'	Encourages individuals to search for persons to blame for their misfortune – increase antagonism between those responsible for harm and those suffering it. 'Blame culture' - harmful by increasing the prospect of vexatious litigation and by undermining individual responsibility for (and acceptance of) misfortune. A litigation-free solution → more likely to result in repair of relations between injurer and injured, and a greater policy of honesty and openness regarding the causes of an accident.

KITT's personal view: keep **Social Security System**, **Workers Compensation staying** (governments are pushing no-fault schemes by **making access to tort law conditional upon victims going through no-fault compensation** schemed beforehand), having tort law in the background