

TORTS II NOTES

ECONOMIC LOSS	2
Background	3
Pure v Consequential Economic Loss	3
Policy Concerns	3
Academic Critique: Barker	3
Approach To Novel Cases	4
<i>Perre v Apand: Multifactorial Approach</i>	4
Academic Critique: Cane	5
RELATIONAL ECONOMIC LOSS	6
Definitions and Background	6
Common Categories	6
Policy Concerns	6
Suggested Modern Law Approach	7
Case Illustrations and Modern Applications	9
NEGLIGENT MISSTATEMENTS OR ADVICE	11
Common Categories	11
Policy Concerns	11
Modern Law Approach: Two Party Cases	12
Origins of Liability in England: <i>Hedley Byrne</i>	12
<i>The Barwick Test</i>	13
Three Party Cases	15
Alternative Cause of Action: Australian Consumer Law	16
DEFAMATION	17
Liability for Defamation	18
History and Modern Landscape	18
Test for Liability	19
Defences: Background	27
Defences	28
PRIVACY	35
Background	36
The Historic Privacy Gap	37
Routes to Reform	38
VICARIOUS LIABILITY	44
Background	45
Operation of Vicarious Liability	46
Elements of Vicarious Liability	46
Liability for Breach of Non-Delegable Duties	51
Direct Liability for the Wrong	53
ALTERNATIVE COMPENSATION SCHEMES	54
Purpose of Tort Law	55
Compensation Systems	56
Criticisms and Reform Proposals	57

Background

PURE v CONSEQUENTIAL ECONOMIC LOSS

CONSEQUENTIAL ECONOMIC LOSS	PURE ECONOMIC LOSS
Consequential on personal injury or property damage.	Not caused by physical injury or property damage.
Economic loss foreseeable: sufficient to establish duty.	Difficult to establish duty.

Spartan Steel & Alloys v Martin & Co

Plaintiff owned a factory producing metal; defendant contractor was outside doing roadworks and carelessly severed a power cable, cutting electricity and preventing the plaintiff's furnaces from working. Power was only restored 14.5 hours later. Three different losses were caused:

- (1) metal being processed in furnaces solidified and depreciated in value (**foreseeable**);
- (2) plaintiff suffered loss of profit on batch of metal intended to sell in the market (**foreseeable**);
- (3) plaintiff's factory was unable to operate for 14.5 hours resulting in loss of production (**pure economic loss, not recoverable**).

POLICY CONCERNS

ECONOMIC INTERESTS LESS IMPORTANT THAN PHYSICAL OR PROPERTY INTERESTS	An individual's personality is partly constituted by their property, giving it greater value than money (<i>Witting</i>).
ECONOMIC LOSSES NOT 'REALLY' HARMFUL, NO OVERALL SOCIAL LOSS	Economic losses result in transfers of wealth, harm to a person or property is net loss to social wealth (<i>Perre v Apand</i>).
WOULD UNDULY RESTRICT COMMERCIAL FREEDOM AND AUTONOMY	Legitimately pursuing interests will not require concern for the effect economic interests of other persons (<i>Perre v Apand</i>).
MAY CONFLICT WITH CONTRACTUAL RISK-ALLOCATION OR STATUTORY REGULATION	Financial interests already protected by contract or statute; courts reluctant to impose additional duties (<i>Brookfield Multiplex</i>).
PLAINTIFF HAS ALTERNATIVE MEANS OF PROTECTION	Defendant owes plaintiff no duty when they can reasonably protect themselves against financial loss (<i>Spartan Steel</i> ; <i>Perre</i>).
RISK OF INDETERMINATE LIABILITY	(a) liability extends for too long (temporal argument); (b) administrative/floodgates argument; (c) disproportionate liability; (d) harmful social effects; (e) slippery slope; and (f) too uncertain for defendants to predict and insure against. <i>Perre, McHugh J</i>

ACADEMIC CRITIQUE: BARKER

Barker challenges the restrictive approach courts take towards negligently inflicted pure economic loss, which, from a corrective justice perspectives, deserves redress similar to personal or property damages, due to its important in modern economies.

ABSENCE OF SOCIAL LOSS	Tort is concerned with protecting individual, not societal, interests.
COMMERCIAL FREEDOM/AUTONOMY	While narrow interpretations of competition may justify limiting liability, broad interpretations do not have a strong case.
INDETERMINATE LIABILITY	An ill-defined concept where incalculability weighs more than size.
COHERENCE AND CONFLICT	Not unique to economic loss cases, requiring case-by-case analysis.
VULNERABILITY	A claimant's own failings do not make the defendant's actions right.

Case Illustrations and Modern Applications

JOHNSON TILES V ESSO AUSTRALIA

Defendant operated gas production facility in Victoria, supplying gas to a statutory distributor, which sold it to retailers, which supplied it to commercial and domestic consumers. Gascor excluded any liability for indirect economic losses in its contract with the defendant, and retailers' contracts with customers excluded liability for interruption to supply that was not their fault. A negligence fire caused by the defendant left Victoria without gas for two weeks. No duty was owed for pure economic loss, but duty was found for property damage.

PLAINTIFF 1	5 of 43,000 businesses using gas who alleged property damage and economic loss.
PLAINTIFF 2	Households who were left without supply and had to purchase alternative cookers.
PLAINTIFF 3	Workers at the above businesses who were stood down and lost wages.

GILLARD J

1 INDETERMINACY

Esso knew the class Plaintiff 1 and their potential economic losses and could ascertain the number and type of customers comprising Plaintiff 2, even if this was a large group. Plaintiff 3 was indeterminate as they were second-line claimants impacted by the 'ripple effect'.

2 AUTONOMY

Esso had a duty to operate the gas plant safely and the duty of care recognised did not hinder this in terms of their negligent explosion of the power plant.

3 VULNERABILITY

Not satisfied that customers were vulnerable; they could have taken steps to protect themselves by installing backup power sources or obtaining insurance.

4 KNOWLEDGE

Answered in the context of indeterminacy.

5 CONFLICT

Imposing a duty of care would conflict with the statutory regime governing the distribution of gas in Victoria and the terms of the defendant's contract with Gascor.

BARCLAY V PENBERTHY

The plaintiff specialised in marine detection and communications systems including buoys. A number of the plaintiff's highly-skilled employees were killed and injured in a flying accident caused by the negligence of the pilot, Penberthy and the plane engine's designer, Barclay. The plaintiff sustained economic loss as a result of the deaths as it could not immediately replace the highly skilled employees. The defendants were liable for the three injured employees but not the two deceased employees.

1 KNOWLEDGE

Actual, constructive knowledge of the risk to the plaintiff individually, through knowledge of the special nature of the charter services, requirement for pilot to attend training and receive security clearance, and need to modify the plane [43], [44], [48].

2 VULNERABILITY

Absence of evidence that plaintiff could have negotiated a term requiring the pilot to accept liability into the contract [44], [47].

MCMULLIN V ICI

Decided before *Perre*, therefore not applying McHugh J's approach, but analogous. Defendant carelessly produced pesticide resulting in chemicals getting ingested by cattle. Government issued broad-ranging measures to prevent spread of contaminated meat, including ban on the sale of meat and movement of animals.

PLAINTIFF 1	Owners of contaminated cattle.	Not a case of pure economic loss.
PLAINTIFF 2	Purchasers of contaminated cattle who paid too much for worthless animals.	Analogous to first plaintiff as contamination discovered while owning the purchased cattle ('transferred loss'). Number of plaintiffs finite and ascertainable.
PLAINTIFF 3	Meat processors and exporters who bought meat that had to be thrown away.	Only differs from second plaintiff in terms of 'live' and 'dead' meat – if the second plaintiff has a duty owed the third does as well due to a 'connecting link'.
PLAINTIFF 4	Feed lot operators who had to detain and continue to care for contaminated cattle.	The 'connecting link' both limits and identifies potential claimants, simply by following the 'cattle trail'. The 'incremental step' makes little difference.
PLAINTIFF 5	Owners of non-contaminated cattle who were unable to sell.	No duty as the connecting link of contaminated cattle or mean is severed.
PLAINTIFF 6	Transporters and suppliers of cattle feed who lost business because of band.	Both plaintiffs considered together. All were 'involved in converting the cattle into processed meat'. Their losses were therefore foreseeable, but did not have sufficient proximity. No duty was therefore established.
PLAINTIFF 7	Exporters who lost business due to bans by government or foreign governments.	

FORTUNA SEAFOODS

The defendant, the owner of a foreign registered vessel, negligently damaged Fortuna Fishing's vessel, resulting in loss of supply and profits to Fortuna Seafoods (owned and operated by same people as Fortuna Fishing). Fortuna Fishing settled a claim against the defendant for property damage to the ship and consequential profit loss, and Fortuna Seafoods was also able to claim for pure economic loss.

1 KNOWLEDGE

Defendant could have known about the commercial structure of the Fortuna group, where multiple companies were integrated, with different functions (fishing and processing).

2 INDETERMINACY

Though separate legal entities, Fortuna Fishing and Fortuna Seafoods were closely related in terms of shareholders, directors, and operations, limiting the class of claimants.

3 AUTONOMY

Duty would not interfere with autonomous commercial interests, it is reasonable to not negligently destroy the vessels of competitors.

4 VULNERABILITY

Fortuna Seafoods was vulnerable to economic loss as it relied on Fortuna Fishing for supply, and had little means to protect itself.

5 FORESEEABILITY

Loss was a direct result of the negligence, so Fortuna Seafoods was a first-line victim.

The Historic Privacy Gap

VICTORIA PARK RACING V TAYLOR (1937)

The neighbour to a racecourse erected a platform on its own land overlooking the course, and permitted a broadcasting company to view the races and broadcast the details and results as they happened, causing significant losses to the plaintiff's business. The plaintiff brought actions in private nuisance for unreasonable interference with use and enjoyment of land; and breach of copyright information.

Both actions were dismissed by the majority (3-2):

- (a) no general right of privacy was known to Australian law (Latham CJ citing *Chandler v Thompson* and *Turner v Spooner*); and
- (b) there was a possible action in nuisance if the defendant 'watches and besets' the land (*Lyons v Wilkins*; *Gee v Burger*).

ABC V LENA H GAME MEATS

The plaintiff ran an abattoir in Tasmania in which possums were killed and skinned. Anonymous animal rights activists trespassed and took video footage, which they passed to the ABC. The plaintiff sought an injunction to prevent the ABC from broadcasting the footage, which was granted on trial but refused by the High Court (5-1):

- (a) there is no general right to privacy in Australia law;
- (b) however, *Victoria Park v Taylor* is no obstacle to the development of privacy rights to natural persons.

The judges each posited a way forward.

GLEESON CJ (224)	Adapt the law of breach of confidence.
GUMMOW, HAYNE, GAUDRON JJ (250-258)	Piecemealism.
KIRBY J (278)	Postpone the question.
CALLINAN J (DISSENTING) (328)	Privacy tort either at common law or via legislation ('the time is ripe').

SMETHURST V COMMISSIONER OF POLICE

A journalist wrote an article warning of amendments expanding the Australian Signals Directorate's power to covertly access data from both foreign nationals and Australian citizens, based on leaked documents. Police searched the plaintiff's premises, seizing data from her phone under an invalid warrant, and no charges were made against her. The plaintiff sought an injunction to have the data destroyed or prevent its transfer to prosecuting authorities.

The High Court held (4-3) that no injunction was available as:

- (a) there was no ongoing wrong or 'legal right' [70], [76]-[77], [85];
- (b) no injunction to restrain use of information obtained by a past wrong unless the damage was 'extreme or very serious' [71]-[73];
- (c) injunction denied on policy grounds in any event.

Gageler and Gordon JJ dissenting argued an injunction was available under s 75(5) of the Constitution. Edelman J also dissenting argued an injunction was available in equity to capture the consequences of trespass as damages were an *inadequate* remedy.