

1. Exclusions

“If any statutory immunities apply to P, then they may not be liable to D in negligence.”

WA Pt XI s69

a) Transport accident c) Workers compensation schemes e) Dust-related condition f) Tobacco

^Outside of Pt X; common law applies

Immunities

Advocate *D’Orta*

Food donor WA31F

Volunteer WA37

Good Samaritan WA31B(2)

- Aggravation of injury 31A(d) Definition of good Samaritan s31B(1): no expectation of reward

2. Legally Compensable Harm

“Not all forms of harm are compensable. On the facts, P is most likely to claim compensation for [...]”

Econ Loss

If consequence of physical injury -> go straight to 3 DOC.

Econ Loss due to mental harm; must be RPI: if so, go to mental harm

WA s 75: Need to have RPI to recover anything at all, but possible to recover consequential econ loss

PEL: Generally Cts reluctant to find D owes DOC where P suffers only econ loss; exceptions:
D negligent & P highly vulnerable; D had ctrl of situation; attributing DOC wouldn’t be indeterminate

- BUT where P is a commercial entity, there’s a higher burden of reasonableness on them: they’re expected to take higher degree of caution to protect their own interest, e.g. by engaging experts or seeking contractual assurances to protect their interests - *Woolcock* (insufficient steps taken):
 - D didn’t give assurance. Buyer, a commercial party, didn’t look after own interests, act reasonably to have building inspected, or get warranty
 - No vulnerability, no ctrl of engineer over the situation once the building changes hands, greater degree of reliance expected of commercial parties

D relied on info fm a 3rd party, was induced to rely on the info, & this caused them harm *Esanda*

- BUT a disclaimer can prevent there being a DOC (*Hedley*), & where the party doesn’t take care of its own interests (e.g. by verifying info), ct will be reluctant to find a DOC for PEL *Esanda*

Mental Harm WA Pt XI - S75: needs to be RPI for any compensation

"X suffered mental harm. Cts are generally reluctant to recog a DOC for mental harm."

Pure Mental Harm s72

Reqs (RF)

1) (Ought to) foresee ppl of normal fortitude would, in circumstances of the case, would suffer RPI if reasonable care not taken (*Tame*: irrational & obsessive fear re pty delay = far-fetched & fanciful)

2) Circumstances of the case include:

- a) Sudden shock b) Witnessed, at the scene, person killed/injured/endangered
- c) Nature of r/s b/w P & any victim d) Pre-existing r/s b/w P & D

3) DOC unaffected if D (ought to) knows P has less than normal fortitude

Salient features (*Annetts*):

- Ctrl: employer had ctrl of risk of harm to kid & hence his parents
- Assumption of responsibility: parents entrusted kid to his care
- Vulnerability: 16 yr old stuck in outback; parents could do nothing to protect themselves

Consequential mental harm s74 (occurs b/c of another type of harm, e.g. physical harm)

P not entitled to recover dmgs for CMH unless:

a) (Ought to) foresee ppl of normal fortitude, in circumstances of the case, would suffer RPI if reasonable care not taken; OR

b) D (ought to) knew P has < normal fortitude & (ought to) foresaw that, in the circumstances, P might suffer RPI

2ndary victims s73 - Extra Prereq

(1) In connection w/ another person (victim) being killed/injured/endangered by P's actions

(2) P not entitled to recover for PMH unless:

a) witnessed at the scene the victim being hurt/killed/endangered (*Wicks*: extends to witnessing ongoing carnage after accident); OR

b) P is/was in a close r/s w/ victim

3. DOC

A. Reasonably Foreseeable Plaintiff (*Donoghue*)?

"At the duty stage, the threshold of RF is pitched very generally (*San Seb*). The ct will consider whether the r/s b/w the parties was such that any careless conduct by D could foreseeably result in some kind of harm to P; the chain of events need not be foreseeable (*Chapman*). This possibility must be real & not far-fetched (*Sullivan*). ... RF is a necessary but not sufficient criterion for establishing a DOC."

Unforeseeable P (*Seltsam*): contemporary scientific literature didn't indicate that someone w/ the limited lvl of exposure to asbestos would've been harmed

B. R/s = Est'd Cat? If so, does scope extend? If yes, go to Breach. If no, go to D.

"The cts have previously det'd that certain est'd r/ss give rise to a DOC. Here, P is a ... & D is a ..."

Est'd Cats

Mfg'ers/consumers *Donoghue* Rd users v driver/passenger/pedestrian *Chapman* Dr/patient *Rogers*

Employer/employee *Paris* School/Pupil *Geyer* (primary) Prison/prisoner *Bujdoso*

Occupiers owe a DOC over the physical state of their premises to entrants (WA)

Most important = ctrl over premises; S 14A: Occupier = those under an ob to repair the premises or have capacity to access the premises to carry out repairs

S 14B(3): Occupier owes a DOC to entrants for the 'state of the premises'

If not physical state of premises -> go to salient features.

- *Modbury*:
 - No ctrl over muggers
 - No knowledge: crime was unpredictable & there was no history of crime
 - Indeterminacy: can't define class to whom DOC would be owed
 - No reliance, or assumption of responsibility

Public Authorities as Ds; Analyse, ack difficulty, move on

General

PA definition (s 79): crown, public service body, local council

Mason J in *Sutherland*: can't find a policy to be negligent, only actions pursuant to a policy

Generally no duty on PA to exercise their powers: just b/c they have a power, doesn't mean they're under a DOC to do so (*Graham*); reiterated by s 85: 'exercise of function doesn't create a duty'; in gen, can only sue if there's irrational non-exercise of power when there's a pub duty to act *Stovin*

S83: consider (a) financial responsibilities (b) other responsibilities

Policy: *Graham* (No DOC - push for self-regulation in oyster industry; also lack of ctrl (as part of self-reg), referencing *Agar*; no knowledge (of risk of harm))

Omissions: reqs reliance for DOC (*Heyman* (P didn't seek cert fm council or enquire re building's conditions, *Stovin*: no reliance was induced upon the claimant by the local auth)

Other:

- Ctrl of risk (tell him to work here/there); Knowledge of risk; P's vulnerability *Crimmins* (asbestos)
- Autonomy (to suicide) *Stuart*

Statutory power: no duty to exercise statutory power unless it imposes a duty *Stuart* (not triggered)

Cops owe no specific DOC to a member of the general public: public policy being a reason *Hill* UNLESS spec distinctive vulnerability (*Jane Doe* woman in apartment w/ rapist activity)

C. No R/S -> Salient Features

"Per Allsop (*Caltex*), the ct would examine the salient features of the r/s to determine if it's appropriate to impute legal responsibility. This is an evaluative exercise that includes normative considerations & features a multi-factorial balancing act."

Factual

Vulnerability: McHugh in *Perre* described vulnerability as an important feature of duty r/ss: where the P is unable to protect themselves fm the negligence of the D.

- *Geyer* (immaturity of pupils cf *Agar*: players are adults); *Miller* (can't let self out of car); *Pyrenees* (vulnerable to council b/c couldn't protect self fm risk); *Crimmins* (employee vulnerable re work conditions; ct unwilling to say he could've done diff job);
- Not in *Heyman* (could've investigated building's conditions); *Stuart* (had ctrl over own life/death)

Reliance: a feature that can be demo'd in a r/s that's not so broad as to make the D potentially liable to the world at large who come in contact w/ their area of ctrl; often w/ **Assumption of Responsibility**

- *Geyer*: special r/s = school/pupil *Bujdoso*: special r/s = prison/prisoner
- *Nagle*: put in other measures to stop ppl jumping
- Not in *Modbury*: in the carpark after hours, he was in no spec r/s of relying on D for his safety.

Ctrl over risk of harm:

- *Crimmins* (govt had complete ctrl: work here, work there); *Pyrenees* (council has power to fix fire hazard); *Dorset* (officers had ctrl over youth b/c in immediate vicinity)
- Not in *Agar* (too many lvls of decision making fm board to clubs (*Graham*: council-supplier-distributor-consumer): intervening actors -> fragmented ctrl); *Godfrey* (prison had no ctrl over escapee beyond immediate vicinity; also temporary only); *Stuart* (cops couldn't stop him suiciding at home later); *Modbury* (criminal behaviour is unpredictable)

Knowledge/awareness of risk/likelihood of harm

- *Crimmins* (know asbestos risk); *Pyrenees* (know fire risk); *Perre* (know potato disease)
- Not in *Modbury* (no know criminal activity); *Graham* (no know specific risk of Hep C)
- "Knowledge of the risks may find a duty towards persons in the immediate vicinity (*Goldman*)"

Proximity of space & time:

- Not in *Godfrey* (100s of kms away & mths later)

Policy

Autonomy

- *Cole* (autonomy to binge drink); *Agar* (autonomy to play rugby); *Stuart* (autonomy to suicide)

Indeterminacy

- *Sullivan* (where does liability to fam investigated for molesting end? Uncles, grandparents, etc); *Agar* (anyone who plays rugby under the federation's rules all over the world); *Esanda* (indeterminate liability to auditor)
- Not in *Perre* (despite being large, class of ppl affected by spud disease not indeterminate)

Defensive practices

- D'Orta (potential liability for advocates = waste of time & ct system resources); *Hill*, *Cran* (inhibit cops fm investigating thoroughly); *Sullivan* (health pros won't investigate thoroughly enough)