

TALBOT SAYER NOTEPOOL

LAWS2703 – Torts 2 (Final Exam)



Negligence

Pure Economic Loss

Spartan Steel & Alloys: Lost profits resulting from loss of power not recoverable as not consequential on property damage

Indeterminate liability: Liability is indeterminate when it cannot be realistically determined.

(Perre v Apand: McHugh)

Test:

1. Reasonably foreseeable? (Perre – McHugh)
2. Indeterminate liability (Perre – McHugh)
3. Unreasonable burden of autonomy (Perre – McHugh)
4. Vulnerability (Perre – McHugh)
5. Knowledge (McHugh)

Perre v Apand: (DOC)

- 4 plaintiffs: Warruga (grower and processor), Rangara (grower), vineyard (lessor), family (owned land)
- All recovered. Hayne argued against 2, 3 and 4. McHugh argued against 3.
- McHugh: Need to find a distinguishing characteristic to distinguish that class from others. He said that was the geographical exporting restrictions. The lessor of the processing plant not in this class as that could occur anywhere.
- McHugh: The reasons of Caltex apply to Perre (reasonable foreseeability, vulnerability, autonomy, indeterminacy). There is no longer an exclusionary rule. Only criticism is that test for DOC too narrow.

Reynolds v Katoomba RSL: (No DOC)

- Omissions case
- Perre: they were vulnerable as couldn't do anything about the spoiled seed
- Not vulnerable: could have stopped/self-protected
- Legitimate/legal business

Relational Economic Loss

Economic loss that is suffered as a result of damage to someone else's property

6 Factors (Perre v Apand):

- Foreseeability
- Indeterminacy
- Autonomy
- Vulnerability
- Knowledge
- Conflict

Caltex Oil:

- Step away from exclusionary rule against recovery for pure economic loss
- Russell: easy to take this step. No issue of indeterminate liability.
- Gibbs: leaves open the possibility of DOC being wider, duty to a wider class than just an individual
- Mason: narrow
- Stephen: salient features
- Jacobs: closer
- Murphy: public policy

Indeterminacy Cures:

- Knowledge (McHugh)
- First line claimants (McHugh and Fortuna Seafoods)
- Transferred loss (ICI v McMullin)
- Joint venture (Fortuna Seafoods)
- P's property within area of physical risk (Jacobs – Caltex, Callinan – Perre)

Leigh & Sullivan

- Goods damaged during transport to buyer. No DOC as the buyer should have sought better contractual terms by not assuming the risk of damage.

McMullin v ICI Australia:

- Cattle become infected.
- Plaintiffs with now damaged worthless cattle and meat can recover
- Plaintiffs with good cattle that is now banned, and engaged businesses cannot recover

Johnson Tiles:

- Electricity supplier negligently causes Victoria to lose power
- Business and household plaintiffs could not recover for pure economic loss because they were not vulnerable and it would conflict with contract of sale and with a statutory regime
- Employees were an indeterminate group

Fortuna Seafoods:

- Vertically integrated P suffers economic loss due to other company's property damage
- Court allows them to recover because they are of a small, determinate class that D should have been aware of

Barclay v Penberthy:

- Company suffers loss due to harm to their employees
- Entitled to recover due to the knowledge by D of the situation

Negligent Misstatement:

2 Party Cases:

Hedley Byrne: (English approach)

- Liability may arise in a relationship of trust (knowing that his skills and judgment are being relied on)
- Disclaimer of responsibility sufficient to negate liability

Shaddock:

- Unreasonable to rely on the assurance of an unidentified person

Mutual Life & Citizens v Evatt:

- P receives false information on the financial position of a company and invests
- **Barwick test:**
 1. Speaker must realise that he is being trusted to give information he has the capacity for judgment, the information being of a serious or business nature
 2. Speaker must realise that the recipient intends to act upon the information with some matter of business or serious consequence
 3. Reasonable for the recipient to rely on the utterance of the speaker
 - Nature of subject matter
 - Occasion of the interchange
 - Identity and relative position of the parties

Tepko:

- Court agrees that the Barwick Test to be used
- Majority: unreasonable to rely on the ball park figure
- Dissent: reasonable to rely as they had a monopoly over the information

Unrequested statements and to the world at large:

Sans Sebastian:

1. Alleged representation was made
 2. Made the representation with the intention of inducing members of the class to act in reliance on the statement
- Development proposals were published regarding the area of Woolloomooloo. The representation was not sufficiently firm

3 Party Cases

Two examples:

- D makes statement to 3rd party who passes it on to P (careless audit report)
- D makes statement to 3rd party, and their reliance affects P (bad advice to testator affects beneficiary)

Esanda Finance:

- P relies on false audit report produced for a company in which it invests
- Brennan CJ: Knowledge of and reasonable reliance. Auditors didn't know that the opinion would be brought to the group to get finance (this is the Barwick test)
- McHugh J: Intention test.
- Dawson J: Proximate relationship, reasonable reliance.

- Toohey and Gaudron JJ: Proximate relationship, reasonable reliance and assumption of responsibility.
- No DOC

Charben Haulage:

- Applied Brennan's reasoning from Esanda and found that there had been knowledge of reliance.
- However, did not owe a duty of care as found that the other members of the Court may not have found the circumstances sufficient to find a duty of care

ABN Amro v Bathurst Regional Council:

1. Speaker must realise that the recipient intends to act in reliance on the information
2. Reasonable for the recipient to act in reliance on the information

Woollahra: asked for certificate of compliance from the council and received name of the person spoke to. DOC owed

Beneficiaries:

Hill v Van Erp:

Defective Structures:

Builder Liability

- Vulnerability and inspection
- Conflict with contractual risk allocation

Bryan v Maloney:

- DOC owed because of the relationship of proximity and the importance of the investment in a person's life (assumption of responsibility and known reliance)

Woolcock Street Investments: (agreed case stated)

- Joint majority: No DOC. Refused to develop the law to cover commercial premises on an agreed case stated.
- Didn't say P not vulnerable
- Statement of claim didn't illustrate P as vulnerable
- No clarification on vulnerability and DOC in a commercial building
- McHugh:
 - o existence nor content of the contract of B v M precluded a DOC. Test of foreseeability as ratio of B v M.
 - o indeterminacy/autonomy not important
 - o vulnerability a key factor
- Joint majority: (Gleeson, Gummow, Hayne, Heydon)
 - o Disconformity between duty owed to original owner and duty to subsequent owner may be an issue (first owner denied soil testing)
 - o Did not show they were vulnerable

Brookfield:

- D builds defective structure for developer who sells the apartments on to another group.
- No DOC:
 - P not vulnerable (all judges)
 - Duty would conflict with original terms of contract excluding liability to developers (French; Crennan, Bell and Keane)
 - Owners corporation suffered no loss as it was a statutory agent of the investors (Crennan, Bell and Keane; Hayne and Kiefel; Gageler).
- Crennan, Bell and Keane:
 - In Bryan, the contract was underpinned by assumptions of responsibility and known reliance. No disconformity between duties to the first owner and the subsequent owner.
 - Conflicts with original contract of no liability and subsequent contract of limited liability. Could have found a contract with better conditions.
 - Introducing DOC would be altering the assumptions of risk outlined in the original contract
 - **Vulnerability important**
 - **Tort should not interfere with contract**
 - **Unstable distinction between domestic and commercial**
 - **Distinguished protections given in contracts in this case with B v M**
 - **No equivalence between duty to developer and duty to P**
- Hayne v Kiefel:
 - **Do not define vulnerability**
 - **The making of the detailed contracts with quality of work indicates the absence of vulnerability**
- Russel's comments:
 - Detailed contracts underpinned the reasoning of the Court
 - Brookfield shifts responsibility back to subsequent purchasers to protect themselves
 - Brookfield has not clarified the circumstances when DOC owed to subsequent owners (e.g. when commercial owners vulnerable, except, no DOC when detailed contracts in place)

Russell:

- Residential building (joint majority in W on Maloney useful)
- Detailed contracts (Brookfield)
- [125] Crennan (unstable distinction, maybe shouldn't exist)

Council Liability

Sutherland Shire Council v Heyman:

- No DOC as did not act in reliance on the council. Did not seek a certificate or made any inquiry of the council in relation to the condition of the building.

Makawe:

- The council fails to report that an underground carpark is at risk of flooding
- No DOC: (Hodgeson JA) control, vulnerability and reasonably foreseeable reliance are factors to be taken into account but are not decisive. Actual knowledge may indicate a duty of care.
- Did not have knowledge. Must decide based on the cumulative effect of the salient features. Did not have complete control. Unclear if there would actually be reliance given that it is not that important.
- Statutory requirements not applicable

Questions:

- Do you need insurance? Prevent you being vulnerable?
- Rule to follow for 3 party cases? Essanda or Tepko
- McMullin – why did P5 not recover?
- What do we get from Caltex?
- Do we need to talk about proximity regarding defective structures?

Defamation

Defamation Basics

1. Defamatory matter
2. Publication
3. Reference to the plaintiff

Defamatory Matter

- words that tend to expose P to hatred, contempt, or ridicule - *Parmiter v Coupland*
- **words that tend to lower P in the estimation of ordinary decent persons - *Sim v Stretch* and *Radio 2 UE Sydney Ltd v Chesterton***
- words that tend to cause P to be shunned or avoided - *Yousouppoff v MGM*
- Whether the imputation is likely to injure P in the P's office, profession or trade (*Sungravure v Middle Eastern Airlines*)
- If words expose P to more than a trivial degree of ridicule (*Boyd v Mirror News*)

Yousouppoff v MGM:

- D publishes a film showing the princess being raped or seduced by Rasputin
- Defamatory: capable of causing the plaintiff to be shunned or avoided

Radio 2 UE:

- Plaintiff, reporter, is insulted over the radio
- Test whether ordinary members of the community would think less of the plaintiff

Boyd v Mirror News:

- Article published saying that the P rugby player is too fat to play
- Ordinary members of the community to think less of him
- Imputation of him appearing ridiculous was capable of being defamatory, without moral blame on P

Judged against ordinary community standards (*Loukas v Young*; *Lane and Hurley*; *Reader's Digest*)

Hepburn:

- Calling someone an 'abortionist' was capable of being defamatory because a lot of the population think of it as wicked, regardless of it being performed lawfully

Importance of Context

Charleston v News Group:

- A photograph of two actors shows them in a sexual act, but the following words contrastingly indicate that the photograph was not true
- Not defamatory as a reasonable reader would read the whole article not just the photograph and headline, photograph not defamatory when read in context

Hockey v Fairfax Media:

- Links to articles contain imputations that the Treasurer is being bribed and corrupt.
- Defamatory, as many reasonable readers would not read the linked article as you have to have a subscription to the newspaper

Reading between the lines

Favell v Qld Newspapers:

- Newspapers make suggestions that the development company burnt down an old building for a development
- None of the statements were capable of being defamatory, however, a reasonable reader would draw defamatory imputations from them collectively. Suggests they were guilty of arson and the police suspected them of being guilty to help their development plan

Tolley v Fry & Sons

- Capable of bearing the defamatory meaning that the plaintiff took money for the use of advertising the plaintiff's image

Publication

Intention to Publish:

Huth v Huth:

- The letter was not published as the defendant could not have known that the butler would decide to read the letter, even though it was not sealed.

Theaker v Richardson:

- The letter was published because it was opened by the plaintiff's husband

Byrne v Dean:

- Leaving the poem on the noticeboard amounted to publication because of the low burden of removing it from the noticeboard

Urbanchich v Drummoyne Council:

- Posters identifying the plaintiff as a fascist supporter were posted at bus stops. Council removed them after a month. Issue whether that amounted to defamation.
- Must show an acceptance of responsibility for the continued publication of the statement
- The notice of the defamation, ability to remove it and reasonable time to remove it suggest that the council had accepted responsibility over the continued publication of it

Visscher:

- There will be republication via a hyperlink to another defamation article if the link indicates approval for the article
- The facts indicated that the defendant's article was background to a full story from the hyperlinked article
- The defendant subsequent publisher republished the original publication (article) because he had a link to it in his subsequent publication (article)

Google v Trkula:

- Search engine may be liable as a secondary publisher, subject to innocent dissemination defence
- If it does not take down the defamatory matter it will lose the dissemination protection (follows the omissions principle)

Duke of Brunswick v Harmer

- Subsequent republications gave rise to new causes of action against the defendant.

Section 32 DA – defence of innocent dissemination

Williams v Fairfax Group:

- (1) where the defendant authorized the repetition of the original publication
 - (2) where the defendant intended that the repetition should take place;
 - (3) where the repetition was the natural consequence of the original publication; and
 - (4) where there was a moral obligation upon the person to whom the original publication was made to repeat it.
- It was foreseeable that the republication of the restaurant review would occur (especially notoriety as a food critic)

Reference to the Plaintiff: (Kasic)

Hulton v Jones:

- Fictitious story of a character refers to a real barrister.
- An intention to refer to the plaintiff is not necessary. D can innocently refer to the P.

Steele v Mirror Group Newspapers:

- Witnesses were able to show that they could reasonably identify the plaintiff as doing the illegal acts even though it didn't refer to her.

Knuppfer v Express News:

- Defamation of a large class. Not normally enough to refer to a plaintiff.
- Article incapable of being understood by the reasonable reader to refer to the plaintiff individually

Bjelke-Peterson v Warburton & Burns:

- The class would include ministers and members of parliament, which is sufficiently small for individual members to say that reasonable people would think it referring to them individually.

Defamation Defences:

No right to sue:

- Political parties (Goldsmith)
- Public bodies (Derbyshire Council)
- Some corporations (Section 9 DA)

Defence 1: Truth

Substantial truth (s 25 DA, defined s 4):

Habib v Nationwide News:

- Defendant published an article saying that 'some of the claims' of the plaintiff were 'knowingly false'
- This was substantially true as 3/7 of the claims were knowingly false

Partial truth:

Reduction in damages only, not full defence (Plato Films v Speidel)

Contextual truth (s 26 DA):

No further damage to the plaintiff's reputation when the substantially true statements are taken into account.

Trad v Harbour Radio:

- Statements about the plaintiff stirring up violence and being racist were substantially true and the false statements did no further damage to the plaintiff's reputation

Weatherup:

- Made a true statement about damaging a car. Made defamatory statements about being habitually drunk and incurring the wrath of judges.
- Further harm was done to the plaintiff's reputation and therefore contextual truth did not apply.

Defence 2: Fair comment or honest opinion (s 31 DA)

Definition of Facts vs. Opinion

John Fairfax Publications (definition of opinion/fact)

- More likely to be an opinion if it is concluded after a discussion of facts, rather than a bold statement (likely to be fact)

Channel 7 Adelaide v Manock:

- Did not make reference to the facts at all. Not any deduction from the facts.

Based on Proper Material

1. Facts must be substantially true: s 31(5) DA
2. The comment must be based on those facts

Macquarie Radio v Arthur Dent:

- Parachuting when receiving a disability pension indicated that he had feigned injury and was well enough to work
- Statement that he had fraudulently obtained the pension was illogical. Parachuting did not necessarily mean that he was fraudulent when he obtained the pension.

Public interest

London Artists v Littler:

- Matter of 'public interest' occurs 'whenever a matter is such as to affect people at large, so that they may legitimately be interested in, or concerned at, what is going on; or what may happen to them or to others'.

Honestly Held

- Definition as malice below
- Onus on P to show not honestly held

Absolute Privilege (s 27 DA)

Qualified Privilege

Common Law:

This requires a mutual duty or interest in exchanging the information, provided that the D acts without malice.

Stuart v Bell:

- Defence applies when a person makes a statement that is in the recipient's interest, in the discharge of duty, without malice.
- Due to the friendship between them, and that the D was the host, there was a moral duty on him to reveal the P's suspected crime

Harbour Radio v Trad:

- Defamatory imputations were published on occasion of qualified privilege, because relevant and proportionate responses to attacks, D's interest in own reputation justified the broadcast, listeners had an interest in hearing the broadcast

Roberts v Bass:

- Defamatory statements protected by qualified privilege must be made without malice.
- In this case there was insufficient evidence before the High Court to say that there had been no malice by Roberts when he was producing the leaflets about the politician plaintiff so it was ordered for retrial

Fraser v Holmes:

- Politician defames opponent at election by spreading word that he has been using funds from the Nursing Association to further own political career.
- He received information from colleague and was reckless in believing it, but as he was not wilfully blind to its falsity and did not know it was false, and honestly believed it to be true, it was made without malice and he was protected by qualified privilege.

The Lange Defence

Lange v Australian Broadcasting Corporation:

- Defence can arise for matters of political speech when the publication of the defamatory material was reasonable

Statutory defences: s 30 DA

Hockey v Fairfax Media Publications

- The publishing was unreasonable as they did not give the plaintiff the opportunity to respond to the allegations

S 33 – defence of triviality

Privacy

1. Intrusion into seclusion
2. Wrongful disclosure

Right to Privacy

Victoria Park Racing and Recreation Grounds:

- No right to privacy

Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd

- Being done on private property is not sufficient to make it private
- Not all acts observed by a trespasser are private
- Gleeson: Need necessary degree of privacy/confidentiality to warrant breach of confidence

Breach of Confidence (Coco v AN Clarke Engineers)

1. Information sought to be protected must have the necessary quality of confidence
2. Information imparted by P in circumstances importing confidence
3. Unauthorised use of the information to the detriment of P

Giller v Procopets:

- D distributes sex tapes depicting P
- A claim founded in breach of confidence was available, following the English approach

Wilson v Ferguson:

- The D posted photos of the P naked or semi-naked to Facebook. P had requested that the photos not be shown to anyone else.
- Confidential nature of the images: explicit and intimate nature taken in private between two lovers would usually have that nature of confidence. Confirmed by the discussions between the P and D
- Circumstances in which images obtained: emailing without knowledge usually sufficient. Confirmed by P's reaction.
- Misuse of the images: posting on Facebook for friends to view was for embarrassment to P

Harder Cases (no pre-existing relationship)

Campbell v MGN (UK)

- Supermodel has information and photos of her attending drug treatment released by D
- Breach of confidence = arising out of a confidential relationship
- Test: whether the person had a reasonable expectation of privacy
- Actionable breaches of confidence
- No basis in Australian law

Wrongful Disclosure of Private Information

Doe v ABC (Victoria)

- Journalists disclose identity of rape victim
- Breach of privacy an actionable wrong (based on invitation offered in Lenah Meats)
- Information was private. Lack of public interest and prohibition on publication also point to this.
- Unjustified publication of personal information

Wrongful Intrusion

Grosse v Purvis:

- P stalked by D
- actionable right of an individual person to privacy
- (a) a willed act by the defendant,
- (b) which intrudes upon the privacy or seclusion of the plaintiff,
- (c) in a manner which would be considered highly offensive to a reasonable person of ordinary sensibilities,
- (d) and which causes the plaintiff detriment in the form of mental psychological or emotional harm or distress or which prevents or hinders the plaintiff from doing an act which she is lawfully entitled to do.

Vicarious Liability

1. D1 committed a tort
2. D1 employee of D2
3. D1 must have been acting in the course of his employment at the time the tort was committed

Employment Relationship: The Modern Approach – Multiple Factors

Stevens v Brodribb Sawmilling Co Ltd:

- Factors: right of the employer to exercise control of the employee, mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax and the delegation of work by the putative employee.
- Set own hours, maintained own equipment, could choose work, didn't have income tax subtracted, paid by amount of timber.
- Employer directed the operations. Little to do with how the fellers carried out the operations.
- Not an employee of Brodribb

Hollis v Vabu:

- P injured by a courier undertaking work for a courier business. The couriers used their own bikes and maintained them themselves.
- Couriers had little control over their work; they were assigned a roster and weren't able to refuse work
- Couriers were required to meet certain appearance standards and uniform requirements of the company
- Limits to annual leave over Christmas period
- Couriers had to replace equipment and uniform owned by the business
- Business had control over the allocation and direction of the deliveries
- Held to be an employee

Churches, Bishops and Priests

Ellis: the church was not held liable as it was an unincorporated association.

English approach:

Various Claimants v Catholic Child Welfare Society:

- At a school, any students were abused by lay brothers who lived and worked at the school which was managed by the second defendant

In the course of employment:

A basic distinction is drawn between the situation where the employee does an act which is not one which he or she was employed to do (and which therefore falls outside the scope of the job) and where he or she simply performs her work in an improper and unauthorised manner. In the latter case, the employer remains vicariously liable (*Century Insurance*)

A petrol tanker driver was filling an underground fuel tank at a service station. He struck a match to light a cigarette. The resulting explosion and fire destroyed the service station. The HL held that he was still acting in the course of his employment at the time of the accident. He was still doing an authorised act (delivering fuel for the employer) just doing it in a very careless and improper way (*Phoenix Society Inc v Cavenagh*)

A prohibition on the activity by an employer will not always take the employee outside the course of his or her employment. If the prohibition limits the job a worker is employed to do,

ignoring it may take the employee outside the scope of his or her employment. If, on the other hand, the prohibition merely limits the way in which an employee is to conduct him/herself within the scope of that job, the employee may still be acting within the course of employment even though he or she ignores the prohibition.

Limpus v London General Omnibus:

- Defendant company prohibited drivers from racing and obstructing buses of another company. When P was injured this was still in the course of employment.

Joel v Morison:

- If he was going out of his way, against his master's implied commands when he was driving on his master's business, he will make his master liable, but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable

Intentional and Criminal Acts

Traditional approach: express or implied authorisation/action in furtherance of the employer's interests

Deaton v Flew: (High Court)

- Throwing the glass was an independent personal act not authorised by the employer or in the furtherance of the employer's interests

Various Claimants v Catholic Child Welfare Society: (United Kingdom)

- There was a close connection between their employment and the abuse as they lived on campus and because of the proximity, influence and vulnerability.

Prince Alfred College: (High Court)

- Claim barred by time
- the appropriate enquiry is whether Bain's role as housemaster placed him in a position of power and intimacy vis-à-vis the respondent, such that Bain's apparent performance of his role as housemaster gave the occasion for the wrongful acts, and that because he misused or took advantage of his position, the wrongful acts could be regarded as having been committed in the course or scope of his employment. T

Non-Delegable Duties:

Approach taken by McHugh J in *Lepore*

Which test should we use for defamatory matter?

When can you sue original publisher? Can you sue both? Use the test of reasonable foreseeability or natural consequence? Both of these are discussed in the case of *Williams v Fairfax Group*)