

LAW OF TORTS

NEGLIGENCE

Defences

DEFENCES TO ACTIONS IN NEGLIGENCE

COMMON LAW

- ⦿ Contributory negligence
- ⦿ Voluntary assumption of risk
- ⦿ Illegality

CIVIL LIABILITY ACT

- ⦿ Pt 1A - ss5F to I: Assumption of Risk
- ss5R to T: Contributory Negligence
- ⦿ Pt 5- s45 “Highway Immunity” restored
- ⦿ Pt 6- Intoxication
- ⦿ Pt 7- Self-Defence & Recovery by Criminals

Australian Approaches to the Liability of Public Authorities (Defences)

⊙ *Sutherland Shire Council v Heyman*:

Majority: Mason, Brennan & Deane JJ

- in general no duty to exercise statutory powers
- duty will arise where authority by its conduct places itself in a position where others rely on it to take care for their safety.
- duty arises where D ought to foresee a) Pl. reasonably relies on D to perform function AND b) P will suffer damage if D fails.

Australian Approaches to the Liability of Public Authorities

- ***Parramatta City Council v. Lutz*: Maj of NSW Court of Appeal: Kirby P & McHugh JA**
 - D held liable P because P had “generally relied” on council to exercise its statutory powers.
 - “I think... that this Court should adopt as a general rule of the common law the concept of general reliance

Australian Approaches to the Liability of Public Authorities

- ◎ *Pyrenees Shire Council v. Day Maj*: Brennan, CJ, Gummow, Kirby, JJ
 - -rejected concept of General Reliance (too vague, uncertain, relies on “general expectations of community”)
 - (Only McHugh, Toohey, JJ approved and applied concept of General Reliance)
 - Brennan, CJ: No specific reliance by P here Duty arises where “Authority is empowered to control circumstances give rise to a risk and where a decision not to exercise power to avoid a risk would be irrational in that it would be against the purpose of the statute.

Australian Approaches to the Liability of Public Authorities

- **Crimmins v. Stevedoring Industry Finance Committee (1999) 167 ALR 1: McHugh J, Gleeson CJ agreeing**
 - was it RF that Ds act or omission incl failure to exercise stat power would cause injury?
 - Did D have power to protect a specific class incl PI (rather than Public at large)
 - Was PI vulnerable
 - Did D know of risk to specific class incl P if D did not exercise power
 - Would duty impose liability for “core policy making” or “quasi-legislative” functions.
 - Are there Policy reasons to deny duty

Australian Approaches to the Liability of Public Authorities

- ◎ **Ryan v. Great Lakes Council Federal Court of Australia 9 August, 2000**
- ◎ **-In a novel case involving a statutory authority the issue of duty should be determined by the following questions:**
 - **1. was it RF that act or omission would cause injury**
 - **2. Did D have power to protect a specific class including P (rather than public at large)**
 - **3. Was P vulnerable**
 - **4. Did D know (or ought D have known) of risk**
 - **5. Would duty impose liability for “core policy making” or “quasi legislative” functions> if so then NO duty**
 - **6. Are there Policy reasons to deny duty?**

Mis-feasance and None-Feasance: Highway Authorities

- ◎ The traditional position in Common Law:
 - Highway authorities owe no duty to road users to repair or keep in repair highways under their control and management.
 - Highway authorities owe no duty to road users to take positive steps to ensure that highways are safe for normal use.
 - It is well settled that no civil liability is incurred by a road authority by reason of any neglect on its part to construct, repair or maintain a road or other highway. Such a liability may, of course, be imposed by statute. But to do so a legislative intention must appear to impose an absolute, as distinguished from a discretionary, duty of repair and to confer a correlative private right. (per Dixon J in *Buckle v Bayswater Road Board*): See also *Gorringe v. Transport Comm.*

Misfeasance and non-Feasance: Common Law Developments

- ⦿ **Brodie v. Singleton Shire Council**
- ⦿ **Ghantous v. Hawkesbury City Council**

The Civil Liability Act (NSW) and Public Authorities

Part 5 of the Civil Liability Act (Sections 40 to 46)

- ◎ Section 42 sets out the principles to determine duty of care exists or has been breached (ie. financial and other resources reasonably available, allocation of resources, broad range of its activities, and compliance with the general procedures and applicable standards)
- ◎ Section 43: act or omission not a breach of duty, unless it so was unreasonable that no authority having the functions in question could properly consider it as reasonable.

The Civil Liability Act (NSW) and Public Authorities

- ◎ Section 44: Removes the liability of public authorities for failure to exercise a regulatory function if the authority could not have been compelled to exercise the function under proceedings instituted by the Plaintiff.
- ◎ Section 45: Restores the non-feasance protection for highway authorities taken away by the High Court in *Brodie v Singleton Shire Council*; *Ghantous v Hawkesbury City Council*

Contributory Negligence

- ⦿ Earlier approaches in Common Law:
 - The last opportunity rule
 - The complete defence
- ⦿ The development of apportionment legislation
 - Wynbergen -v- Hoyts Corporation P/L (1997) per Hayne J (Gaudron, McHugh, Gummow & Kirby JJ agreeing)

Contributory Negligence: The nature of the P's conduct

- To plead the defence D bears the onus of proof and must prove the requisite standard of care that has been breached by P.
- It would seem that courts apply the standard leniently to P, and whether P's action by reason of D's negligent conduct constitutes an unreasonable risk to him/herself will depend on the circumstances of each case

The Substance of Apportionment Legislation

- Where any person suffers damage as the result partly of his/her own fault and partly of the fault of any other persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage (*Law Reform (Miscellaneous) Act 1965 (NSW) s10*)

Joslyn v Berryman; Wentworth Shire Council v Berryman [2003] HCA 34 (18 June 2003)

- **Facts** - Mr Berryman drank enough alcohol in the company of Ms Joslyn on Friday evening, 25 October 1996, to be so intoxicated as to feel "fairly crook" on the following morning.
 - He worked during the day on Saturday, rested for a time, and then, at about 9pm went to a party at a property near Dareton in south-western New South Wales. With one interruption, at about 11.30pm, Mr Berryman spent his time at the party, until about 4am, drinking alcohol. By that hour he admitted that he was beyond doubt, quite drunk. He went to sleep on the front seat of his utility motor vehicle. In his evidence he claimed to have no further recollection until he heard a scream, and realized that he was a passenger in his vehicle which was turning over.
 - Mr Berryman had been friendly with Ms Joslyn before the Friday night preceding the accident. He was aware that she had lost her driving licence on her conviction for driving a motor vehicle with a blood alcohol content of 0.15g/100ml.

Joslyn v Berryman

- Early in the morning of the Sunday Ms Joslyn had placed her swag on the ground beside Mr Berryman's vehicle and had gone to sleep. Ms Joslyn woke not long after daylight, having heard Mr Berryman moving about in his vehicle. No one else was up at that time.
- Mr Berryman then drove, Ms Joslyn as a passenger into Mildura, along the road upon which the vehicle was later to overturn. The journey took some 15 to 20 minutes. When they arrived at a McDonald's café, Mr Berryman entered, ordered food, paid, drove towards the river, stopped and ate the food. He did not drink alcohol in that time.
- Ms Joslyn said Mr Berryman had commenced the drive back to Dareton, but, at some time after they entered Hollands Lake Road she noticed he was dozing off. She must have reproached him for doing so for he said, "Well, you drive the car then."
- He stopped the vehicle and exchanged places with Ms Joslyn. She then commenced to drive it and did so to the point of the accident.

Joslyn v Berryman

- Ms Joslyn said that she and Mr Berryman spent the Friday evening drinking together until after midnight at hotels in Wentworth. Afterwards they returned to Ms Joslyn's residence where they continued drinking.

- Ms Joslyn took a bottle of whisky with her to the party on the following Saturday evening. She travelled as a passenger in a car with three other women. Ms Joslyn drank from the bottle at the party. She too was seriously affected by alcohol, and the blood alcohol reading, some hours later, was 0.102g/100ml. Indeed Ms Joslyn was observed by others at the party to be "quite drunk and staggering about" at 4.30am.

Joslyn v Berryman

- Ms Joslyn had last driven a vehicle three years earlier. She had at some time previously told Mr Berryman of that. She did not see the curve until the last minute. "It was just there all of a sudden and it turned really sharply and the car wouldn't go round the bend."
 - By the time the vehicle entered the curve Ms Joslyn had been driving, she estimated, for a couple of minutes at most. She could not say at what speed she travelled as the speedometer of the vehicle was broken.
 - Describing the curve where the vehicle left the road and overturned, she said that it looked as if it were just a simple curve "and then it goes right back around sharply". That was something she realized when she was already in the curve. Mr Berryman suffered serious injuries in the accident.
- Trial – Boyd-Boland ADCJ found for Mr Berryman but reduced damages by 25% for contributory negligence.

Joslyn v Berryman

- **NSWCA** - Priestley JA, Meagher JA and Ipp AJA upheld Mr Berryman's appeal by holding that he was not guilty of any contributory negligence at all. The leading judgment was given by Meagher JA with whom the other members of the Court agreed.
- "His Honour, as I have said, made a finding of 25% contributory negligence against the plaintiff. The only action of his which could possibly have amounted to contributory negligence was permitting Miss Joslyn to drive instead of him. In this regard, one must view matters as they stood at the time of handing over control of the car, (not as they were in the previous 24 hours), a task which his Honour did not really undertake. One must also, if one concludes that at the time of handing over Mr Berryman was too drunk to appreciate what was happening, a situation as to which there is no evidence in the present case, judge the question of contributory negligence on the hypothesis that the plaintiff did have sufficient foresight to make reasonable judgments. But, although at the time of the accident the blood alcohol levels of Miss Joslyn and Mr Berryman were estimated as being 0.138g/100ml and 0.19g/100ml respectively, there is no evidence that either of them were drunk at the time, and certainly no evidence that at the time Mr Berryman had any reason to think that Miss Joslyn was affected by intoxication. Indeed, quite to the contrary. Of the people who were present who gave evidence, all said that Miss Joslyn showed no signs of intoxication. His Honour so found. Despite, therefore, one's reluctance to overrule a trial judge's finding on apportionment (*Podrebersek v Australian Iron and Steel Pty Ltd*), it seems quite impossible to justify his Honour's conclusion on contributory negligence. I would be in favour of reducing it from 25% to 0%."

Joslyn v Berryman

- HC – McHugh, Gummow, Callinan, Kirby & Hayne JJ allowed the appeal (ie. Overturned the decision of the NSWCA)
- Besides criticism of the NSWCA for not referring to s.74 MAA 1988 (ie. contrib neg shall be made unless found not to have contributed), Gummow and Callinan JJ found the NSWCA erred in fact.

Joslyn v Berryman

◎ Gummow & Callinan JJ –

“A person in the position of Mr Berryman ought to have known, and in fact would have known (if he had not precluded himself from knowing by his own conduct) that Ms Joslyn's capacity must have been impaired, and probably grossly so, by the amount of alcohol she had drunk, not only during the immediately preceding evening, but also on the night before that. Furthermore Mr Berryman either knew, or ought to have known that the effects of two consecutive evenings of immoderate consumption would have had a compounding effect of tiredness and reduced attentiveness upon both of them... Factually the Court of Appeal erred in not finding that Mr Berryman's and Ms Joslyn's faculties, and accordingly their capacities to observe, react, assimilate, and deal with information and to drive a motor vehicle must have been seriously impaired by the consumption of alcohol”.

Motor Accidents Compensation Act 1999 s 138

- ⦿ A finding of contributory negligence must be made in the following cases:
 - where the injured person or deceased person has been convicted of an alcohol or other drug-related offence in relation to the motor accident...
 - Where the driver's ability to control vehicle was impaired by alcohol and the P as an adult voluntary passenger was/ought to have been aware of this...
 - Where the injured party was not wearing set belt/protective helmet, and was required by law to wear such belt/helmet

Civil Liability Act 2002

- ⦿ s5S – a court may determine a reduction of 100% if it is just and equitable to do so
: *compare Wynbergen –v- Hoyts Corp (1997) 149 ALR 25*
- ⦿ s5T – a court may reduce a claim for damages under the Compensation to Relatives Act 1897 for contributory negligence of the deceased
- ⦿ S50(4) – a presumption of contributory negligence of 25% if the plaintiff was intoxicated at the time of injury

Contributory Negligence of Rescuers

- ◉ *Azzopardi v Constable; Azzopardi v Thompson* [2006] NSWCA 319
- ◉ The NSW Court of Appeal has found that two rescuers hit by a motor vehicle contributed to their injury by not taking due care when assisting another motorist. The two rescuers were dressed in dark clothing, neglected to turn on their vehicles' hazard lights and were not alert to oncoming traffic. Hodgson JA and McColl JA both reduced the damages payable to the rescuers from 75% to 50%. Ipp JA dissented, finding that the rescuers ought to have been more careful when in a position of such obvious danger, and would have reduced the damages to 25%.

Voluntary Assumption of Risk

- ⦿ In general where P voluntarily assumes the risk of a particular situation, she/he may not be able to maintain an action against D for negligence in relation to that situation
- ⦿ The elements
 - P must have perceived the danger
 - P must have fully appreciated the danger
 - P must have voluntarily accepted the risk

Voluntary Assumption of Risk

- ◉ *Scanlon v American Cigarette Company Overseas Pty Ltd (No 3) [1987] VR 289* (P contracted lung cancer by allegedly smoking D's cigarettes, D sued for negligently and misleadingly advertising cigarettes)
 - If it is to be the case that the smoking of the said cigarettes involved risk of injury as alleged... the P knew or ought to have known that the smoking of the said cigarettes involved such risk and the P accepted, consented to and voluntarily assumed the same (extract from D's statement of defence)

VAR in the Work Place

- *Smith v Baker & Sons P* (injured by falling rock while working a drill, fellow workers had complained of the danger previously, issue whether P voluntarily accepted the risk, held defence not applicable)
- The defence is not constituted by knowledge of the danger and acquiescence, but by an agreement to run the risk and to waive your rights to compensation

Physical and Legal Risk

- By engaging in a sport or pastime the participants may be held to have accepted the risk which are inherent in the sport... but this does not eliminate all duty of care of the one participant to the other

Civil Liability Act 2002

Assumption of Risk

- ⦿ s5F – “obvious risk” defined
- ⦿ s5G – injured person presumed to be aware of obvious risk unless proven otherwise
- ⦿ s5H – no proactive duty to warn of obvious risk in certain circumstances
- ⦿ s5I – no liability for materialisation of “inherent risk” (as defined)

Swain – Insight to how the HC may view “recreational activity”

- **MR MENZIES QC:** ... obviously the defendant, in considering its duty, has to take into account that sometimes people do do risky manoeuvres and that may be the simple explanation for it. Of course, so far as closing every beach in Australia, that is of historical interest, certainly in New South Wales, because as a result of the *Civil Liability Act* the chances of this plaintiff, were he to proceed now and succeed in tort against the defendant, are nil.
- **KIRBY J:** It cuts a little both ways, that it is Parliament saying that the approach of the courts in the past has been too generous or as Justice Thomas said “too Santa Claus”.
- **MR MENZIES QC:** Your Honour, what it demonstrates, in our respectful submission, is the legislature doing its job as it perceives it to be and that is, there is a policy decision made, policy decisions generally speaking are for the legislature, not for courts. The legislature has decided as a matter of policy that these torts are no longer sound in damages in New South Wales for whatever reason. It is not a bad example of the separation of powers and the appropriate organ of Government.
- **KIRBY J:** How is that done? Have you the section of the civil liability? Has that passed into law in New South Wales?
- **MR MENZIES QC:** It is now, your Honour, yes. It was not relevant at the time. I did not include it on our list or provide copies, but it is the [Civil Liability Act 2002](#) and it Division 5 “Recreational Activities” - - -

Swain – Insight to how the HC may view “recreational activity”

- ◉ **GUMMOW J:** *What does it say? What is the critical provision?*
 - ◉ **MR MENZIES QC:** *Well, 5J applies only in respect of liability in negligence for harm to a person (“the plaintiff”) resulting from a recreational activity engaged in by the plaintiff.
Recreational activity is divided into two kinds. There is;*
 - ◉ *“dangerous recreational activity” means a recreational activity that involves a significant risk of physical harm.
That is in the definition section 5K, and:*
 - ◉ *“recreational activity” includes:*
 - (a) any sport . . .*
 - (b) any pursuit or activity engaged in for enjoyment, relaxation or leisure, and*
 - (c) any pursuit or activity engaged in at a place (such as a beach . . .*
- 5L No liability for harm suffered from obvious risks of dangerous recreational activities . . .*
- 5M No duty of care for recreational activity where risk warning – so that liability would seem to be excluded if a risk warning is put up, assuming this is a recreational activity. If, on the other hand, as Chief Justice Gleeson points out, this might well be regarded as a dangerous recreational activity, you do not even have to put a sign up, that is the end of it.*

Swain – Insight to how the HC may view “recreational activity”

- **KIRBY J:** *It does not sound as though this is categorised. That is paragliding and things of that kind, I would have thought, because they say, “such as on a beach” in the definition of “recreational activity”.*
- **MR MENZIES QC:** *True.*
- **GLEESON CJ:** *What about recreational activities that are dangerous for some people, like people who cannot swim, and not dangerous for others?*
- **MR MENZIES QC:** *I have no doubt that at some point that is going to entertain your Honours.*
- **GUMMOW J:** *Here we are again, more imperfect law reform.*

Illegality

- ⦿ There is no general principle of law that a person who is engaged in some unlawful act is to be disabled from complaining of injury done to him by other persons, either deliberately or accidentally he does not become a *caput lupinum* (an outlaw) (per Latham CJ: *Henwood v Municipal Tramsways Trust*

The Test to Disentitle the Defence

- In each case the question must be whether it is part of the purpose of the law against which the the P has offended to disentitle a person doing the prohibited act from complaining of the other party's act or default
- *Gala v Preston* (no proximity)
- *Italiano v Barbaro* (1993) 114 ALR 21 (injury sustained while parties were in the process of looking for a spot to stage accident; Neaves & Whitlam JJ not "appropriate" to fix a standard of care in the circumstances)

Civil Liability Act 2002

Illegality

- S54 – criminals not to be awarded damages if:
 - (a) on the balance of probabilities, the conduct constitutes a “serious offence”, and
 - (b) that conduct contributed materially to the risk of death, injury or damage.