



GREENWAY CHAMBERS

Pure Economic Loss – From Caltex to Mallonland and beyond

Wednesday, 18 March | 5:30 pm

SESSION SPEAKERS



Richard Cheney SC
Barrister 1995 / Silk 2011



Ian Roberts SC
Barrister 1996 / Silk 2011



Caltex Oil v the Dredge Willemstad

50 years on.

The search for a duty of a care to avoid pure economic loss



The general rule:

Damages are not recoverable in negligence for pure economic loss
(*Mallonland* at [30])

What do we mean by pure economic loss?

Gibbs J:

Loss that is not consequential upon injury to person or property



Caltex v the Dredge Willemstad

- Gibbs J: it is still right to say that as a general rule **damages are not recoverable for economic loss**
- Stephens J: *There has long existed a line of authority in English law said to establish the proposition that **damages may not be recovered in negligence for purely economic loss.***
- Mason J: *The common law has exhibited **a marked reluctance to allow recovery of pure economic damage** sustained as a result of negligence.*
- Jacobs J: *The risk of causing a loss to another which arises solely from a relationship of that other with a third party **does not generally give rise to a duty of care to avoid the risk to the other of that loss.***



Murphy J:

There is no satisfactory general principle governing recovery of economic loss caused by negligence. The difficulties in this branch of the law arise mainly from the doctrine of foreseeability but also from unresolved questions of public policy.



Caltex v the Dredge Willemstad

Stephen J:

... the potential injured party is easier to identify when there is damage to person or property by reference to the plaintiff whose person or property was injured.

But if economic loss is to be compensated its inherent capacity to manifest itself at several removes from the direct detriment inflicted by the defendant's carelessness makes reasonable foreseeability an inadequate control mechanism.



Policy consideration:

The need to avoid imposing on an individual defendant a liability in an indeterminate amount, for an indeterminate time, to an indeterminate class



***Sutherland Shire Council v Heyman* (1985) 157 CLR 424**

Damage caused by defectively constructed footings

Sutherland Shire Council v Heyman (1985) 157 CLR 424

The building itself could not be said to have been subjected to "material, physical damage" by reason merely of the inadequacy of its foundations since **the building never existed otherwise than with its foundations in that state.**

The alternative, and in my view preferable, approach is that any loss or injury involved in the actual inadequacy of the foundations is sustained only **at the time when that inadequacy is first known or manifest.** It is only then that the actual diminution in the market value of the premises occurs.

... any loss involved in the actual inadequacy of the foundations by a person who acquires an interest in the premises after the building has been completed **is merely economic in its nature.**



***Bryan v Maloney* (1995) 182 CLR 609**



Bryan v Maloney (1995) 182 CLR 609

In more settled areas of the law of negligence concerned with ordinary physical injury to the person or property of a plaintiff caused by some act of the defendant, **reasonable foreseeability** of such injury will commonly suffice

In contrast, the field of liability for mere economic loss is a comparatively new and developing area of the law of negligence. In that area, the question whether the requisite relationship of proximity exists in a particular category of case is more likely to be unresolved by previous binding authority **with the consequence that the "notion of proximity ... is of vital importance"**



Bryan v Maloney (1995) 182 CLR 609

the law's concern to avoid the imposition of liability "in an indeterminate amount for an indeterminate time to an indeterminate class"

in a competitive world where one person's economic gain is commonly another's loss, a duty to take reasonable care to avoid causing mere economic loss to another ... may be inconsistent with community standards in relation to what is ordinarily legitimate in the pursuit of personal advantage

- Connecting link was the house.
- A permanent structure.
- A significant investment.
- Foreseeable that negligently built footings would cause economic loss to whoever owned it when discovered.



Hill v Van Erp (1997) 188 CLR 159

HcHugh J:

I expressed my scepticism about the usefulness of proximity as a principle or a guide for determining the existence of a duty of care.

But the present case has reinforced my scepticism as to whether the concept of proximity gives any real guidance in determining the existence of a duty of care in difficult and novel cases



Perre v Apand Pty Ltd (1999) 198 CLR 180



Gaudron J:

*The law as to liability for economic loss is a “comparatively new and developing area of the law of negligence”. It has not yet developed to a stage where there has been enunciated a governing principle applicable in all cases. **Perhaps it never will.***

Proximity has been criticised as being incapable of constituting a universal criterion of liability and, also, as having only limited utility in determining whether there exists a duty of care in a particular case.

McHugh J:

How vulnerable was the plaintiff to incurring loss by reason of the defendant's conduct?



McHugh J:

The vulnerability of the plaintiff to harm from the defendant's conduct is therefore ordinarily a prerequisite to imposing a duty. If the plaintiff has taken, or could have taken steps to protect itself from the defendant's conduct and was not induced by the defendant's conduct from taking such steps, there is no reason why the law should step in and impose a duty on the defendant to protect the plaintiff from the risk of pure economic loss



Woolcock Street Investments Pty Ltd v CDG Pty Ltd (2004) **216 CLR 515**

Gleeson CJ, Gummow, Hayne and Heydon JJ:

The facts in the stated case do not show that the appellant could not have protected itself against the economic loss it alleges it has suffered.

It may be accepted that the appellant bought the building not knowing that the foundations were inadequate. It is not alleged or agreed, however, that the defects of which complaint now is made could not have been discovered.

McHugh J:

But the most powerful reason for rejecting the proposed duty is that the first owners and purchasers of commercial buildings are ordinarily in a position to protect themselves from most losses that are likely to occur from defects in the construction of such buildings



***Brookfield Multiplex Ltd v Owner Corporation Strata Plan
61288 (2014) 254 CLR 185***

Hayne and Kiefel JJ:

The making of contracts which expressly provided for what quality of work was promised demonstrates the ability of the parties to protect against, and denies their vulnerability to, any lack of care by the builder in performance of its contractual obligations

Crennan, Bell and Keane JJ:

Concept of vulnerability described in *Perre v Apand* and *Brookfield Multiplex* accords with the **primacy of contract in protecting unintentional harm to economic interests**



***Mallonland Pty Ltd v Advanta Seeds Pty Ltd [2024] HCA
25 (2024) 418 ALR 639***

Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ
[1] – [57]

Edelman J separate, concurring judgment [58] – [111]

Sorghum growers suffer financial loss (lost profits / unproductive fallow land / land remediation costs) when they planted the defendant-supplied contaminated seed.

Defendant producer of the grain had no contractual relationship with the growers who had purchased the grain from a distributor.

The producer of the grain accepted that the growers' losses were reasonably foreseeable in the absence of due care by the producer in the production of the seed.

Trial judge found producer failed to meet the standard of care that a reasonable producer would have exercised in the circumstances by failing to conduct a grow-out of the contaminated seed in the relevant season, and that the producer's failure to exercise reasonable care caused the growers' losses.

Held: no duty

“The sole issue in this Court is whether the respondent (“the producer”) owed the appellants (“the growers”) a duty to take reasonable care in its production process to avoid the risk that the growers would sustain purely economic losses by reason of a hidden defect in the bags of seed (namely, the presence of shattercane seed).”

Answer: no

7 'takeouts' from HCA decision in Mallonland

- (i) As a general rule, damages are not recoverable in negligence for pure economic loss. Ordinarily, a person does not owe a duty to take reasonable care to avoid causing reasonably foreseeable pure economic loss to another

- (ii) The general rule reflects policy concerns about the potentially excessive scope of liability for financial loss as liability "in an indeterminate amount for an indeterminate time to an indeterminate class" a concern intended to avoid infringing upon the legitimate pursuit of personal advantage.



Indeterminacy of liability, in the sense that the defendant's liability cannot be realistically calculated, will ordinarily deny the existence of such a duty of care.

(iii) Reasonable foreseeability is a necessary but not sufficient criterion for the existence of a duty of care to avoid causing pure economic loss.

(iv) A duty of care may well be established where a person has assumed a responsibility towards the plaintiff to take reasonable care to avoid economic loss to the plaintiff

An assumption of responsibility is best understood as an undertaking (whether express or implied) by a person to take on a task or job for another person or class of persons, from which it can be inferred that the first person accepted that he or she would take reasonable care when engaging in that task or job.

(v) Such a duty arising from an assumption of responsibility by a defendant to a particular person or class of persons, can be negated or limited by words or conduct directed to that person or class. The effect of those words or conduct would remove or deny the assumption

(vi) Actual knowledge of the risk to a person or class of persons of the particular type of economic loss that eventuated, and of the magnitude of the economic loss that risk entails, strengthens a case for finding a duty of care. Recklessness or gross carelessness in a defendant's actions resulting in economic loss may be relevant to the existence of any novel duty of care enabling recovery for such loss

(vii) Another matter relevant to the existence of a duty of care is a plaintiff's "vulnerability" to the particular type of economic loss that eventuated. Vulnerability in this sense is an inability of the plaintiff to protect him or herself from the economic loss that eventuated as a consequence of a defendant's carelessness, either entirely or in a way that would cast the consequence of loss on the defendant.

Edleman J's separate reasons.

Focus on 2 matters:

the absence of any assumption of responsibility by the seed producer;

secondly, how the recognition of a duty of care to avoid exposing another to "pure" economic loss in circumstances of "salient features" has given rise to the highly unsatisfactory state of the present law with the effect that until *Caltex* and its progeny are challenged or rationalised, a duty of care based upon "salient features" must be confined as narrowly as possible.

Deep dive into Caltex decision

4 recent cases that have considered
Mallonland:

McDougall v JSA Consulting Engineers Pty Ltd [2025] TASSC 41

Valleve Holdings Pty Ltd v Shepperd [2025] TASSC 28

Chohan v Commonwealth of Australia [2025] FCA 437

AA v The Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle [2026] HCA 2



McDougall v JSA Consulting Engineers Pty Ltd [2025] TASSC 41

The court held the engineer owed a duty to exercise the care of a reasonably competent structural engineer in relation to the entire renovation, including assessing whether the existing footings could support the new loads.



***McDougall v JSA Consulting Engineers Pty Ltd* [2025] TASSC 41**

Cited Mallonland’s salient features analysis, emphasising assumption of responsibility by engineer and vulnerability of plaintiff home owners.

Engineer assumed responsibility for the structural adequacy of the whole project (“to put together a set of working drawings from which the project could be built”) – cited Mallonland analysis



McDougall v JSA Consulting Engineers Pty Ltd [2025] TASSC 41

The plaintiffs were vulnerable: they relied on the engineer and could not protect themselves.

The risk of economic loss from inadequate footings was foreseeable and significant.



McDougall v JSA Consulting Engineers Pty Ltd [2025] TASSC 41

Foreseeability of economic loss from inadequate footings.

Knowledge (actual or constructive) of the risk of overloading old footings.

Vulnerability: the plaintiffs could not protect themselves and relied on the engineer's expertise.



McDougall v JSA Consulting Engineers Pty Ltd [2025] TASSC 41

Control: the engineer controlled the structural design.

Magnitude of potential loss: very high (>\$1m).

Reliance - although Mallonland notes reliance is not always essential, the court found reliance by the plaintiffs.



Valleve Holdings Pty Ltd v Shepperd **[2025] TASSC 28**

Only issue was whether plumbing subcontractor owed tenant plaintiff a duty of care



Valleve Holdings Pty Ltd v Shepperd **[2025] TASSC 28**

The plaintiff expressly disclaimed any claim for pure economic loss; it sued only for property damage and consequential loss.

The defendants argued the loss was pure economic loss, and that a subcontractor owes no duty to a principal/tenant in such circumstances



Valleve Holdings Pty Ltd v Shepperd **[2025] TASSC 28**

Court held that the loss was property damage, not pure economic loss, and that the duty was not novel.

Mallonland applied to confirm the orthodox distinction between pure economic loss and loss consequential upon property damage.



Valleve Holdings Pty Ltd v Shepperd **[2025] TASSC 28**

The defendants relied on the pure economic loss cases (*Woolcock*, *Brookfield*, *Bryan v Maloney*), which treat latent building defects discovered by subsequent purchasers as pure economic loss.

The Court rejected that analogy for 3 reasons



Valleve Holdings Pty Ltd v Shepperd **[2025] TASSC 28**

The plaintiff was not a subsequent purchaser.

The damage was not a latent defect discovered before harm occurred; it was actual physical damage caused while the plaintiff was in possession.

The fit out was the plaintiff's own property, not part of the landlord's building.



Valleve Holdings Pty Ltd v Shepperd **[2025] TASSC 28**

The Court saw *Mallonland* as reaffirming that where there is physical damage to property, the claim is not pure economic loss. This placed the plaintiff's claim squarely within the established categories of negligence.

***Chohan v Commonwealth of Australia* [2025] FCA 437 per
Owens J**



Chohan v Commonwealth of Australia

[2025] FCA 437 per Owens J

Chohan applied in 2015 for a short term business visa; the Department received adverse information from the UK (and the US), including a false allegation that he had been arrested in Manchester; the Department put that information to him under s 57 of the Migration Act; his employer accessed his email account, saw the letter, and terminated his employment; and he sued the Commonwealth in negligence.

Chohan v Commonwealth of Australia [2025] FCA 437 per Owens J

Summary judgment and alternatively strikeout sought by respondent, the Commonwealth.

Owens J accepted that the information was false and that the applicant suffered real financial loss, but held that the negligence claim had no reasonable prospects of success

Chohan v Commonwealth of Australia [2025] FCA 437 per Owens J

The loss was pure economic loss

The applicant's loss—loss of employment and wages—was pure economic loss.

Under *Mallonland*, foreseeability alone is insufficient; additional factors must justify imposing a duty.

Chohan v Commonwealth of Australia [2025] FCA 437 per Owens J

Owens J quoted Mallonland at [30]:

“Ordinarily, a person does not owe a duty to take reasonable care to avoid causing reasonably foreseeable pure economic loss...”

Chohan v Commonwealth of Australia

[2025] FCA 437 per Owens J

Mallonland emphasises that a duty may arise where the defendant assumes responsibility for protecting the plaintiff from economic loss.

Owens J held there was no such assumption



Chohan v Commonwealth of Australia

[2025] FCA 437 per Owens J

- The Commonwealth was not performing a task “for” the applicant.
- It was acting to protect Australia’s own interests in visa integrity.
- There was no express or implied undertaking to safeguard the applicant from economic consequences of the visa assessment process.

Chohan v Commonwealth of Australia [2025] FCA 437 per Owens J

Mallonland makes clear that knowledge of the risk of the particular economic loss is “virtually a prerequisite”. (per McHugh J in *Perre v Appand*)

Owens J held the Commonwealth lacked that knowledge.



Chohan v Commonwealth of Australia

[2025] FCA 437 per Owens J

Owens J held Commonwealth could not reasonably have known:

- that the applicant's employer was monitoring his private Yahoo account;
- that the employer would see the letter;
- that the employer would act on unverified allegations contrary to the applicant's denial.

The Department had no reason to foresee that a procedural fairness letter would be accessed by a third party or relied upon to the applicant's detriment.

Chohan v Commonwealth of Australia

[2025] FCA 437 per Owens J

Owens J held the applicant was not vulnerable in the relevant sense:

- He controlled access to his email account / could deny the allegations (and did).
- Could seek correction from the UK (and did).

Not dependent on the Commonwealth to protect him from the risk of employer action.

Chohan v Commonwealth of Australia **[2025] FCA 437 per Owens J**

Mallonland confirms postulated duty must not be inconsistent with statutory schemes

Statutory incoherence here with Migration Act requiring Minister to disclose information to the applicant



AA v The Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle [2026] HCA 2

The High Court used *Mallonland* to clarify the conceptual foundations of “assumption of responsibility” and “non-delegable duties”, and then extended those principles to hold that a non-delegable duty can be breached by intentional criminal acts of a delegate.



AA v The Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle [2026] HCA 2

institutions caring for children undertake:

- a positive responsibility to ensure reasonable care is taken
- a relationship of dependence and vulnerability
- a role that places the child under the institution's control



AA v The Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle [2026] HCA 2

HCA embraced the *Mallonland* structure: a duty arises where one party undertakes responsibility for protecting another from risk. This warranted imposing a strict, non-delegable duty on institutions responsible for children





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