



KING & WOOD  
MALLESONS

**2017 KING & WOOD MALLESONS  
MOOTING COMPETITION  
ROUND THREE**

**Bench Notes**

## Brief Guide to Issues and Some Authorities (proper citations have not been used)

### 1. Duty issue

Victorian Police Department is a statutory / public authority.

Use of *Wrongs Act 1958* (Vic) Pt XII, especially s 83.

Need common law to assist as s 83 doesn't get one very far.

- Use of Mason J in *Sutherland*: was this a policy or planning function? Or operational?
- Also Gleeson CJ in *Graham*; McHugh J in *Crimmins*; criticised by Gummow J.
- If former, no duty.
- If latter, may be a duty.
- If latter, then must use salient features approach: *Graham*; *Stuart*; *Sovar*; *Miller*.
- Difficulty of dividing line: *Cran*.

Police context specifically:

- Analogy to *Hill* and subsequent UK cases.
- Public policy considerations from *Hill* endorsed in *Sullivan*; *Hunter* applied *Sullivan*.  
But note: these not police cases.
- See also *Tame*.
- *Zalewski*: important Victorian case where the characterisation was 'operational'.

Salient features:

- Control by defendant? see *Agar*; *Graham*; *Stuart*; contra *Crimmins*.
- Knowledge of defendant? *Graham*; contra *Crimmins*; *Pyrenees*.
- Vulnerability of plaintiff?: ie inability to protect self? *Crimmins*; *Perre*; contra *Esanda*.
- Specific reliance?
- Assumption of responsibility?

Public policy considerations as salient features:

- Diversion of resources: *Cran*.
- Defensive practices.
- Coherence of the law: *Sullivan*; *Hunter*; *Miller*.

While it may be difficult finding a duty in this context as it involves police carelessness, doing so is not impossible. *Zalewski* is of particular interest. So too are public policy arguments and whether or not they are convincing/persuasive on these facts.

## 2. Causation issue

Are there different and alternative arguments depending on the harm that is focussed upon?

- (i) Amputation;
- (ii) Addiction;
- (iii) HIV.

Need to focus carefully on the alleged breach, which has been left vague, deliberately, to see how mooters address this aspect of causation. What is the wrongful act?

- Not using appropriate personnel?
- Acting on unreliable sources?
- Poor system in place?

Factual causation: use of s 51(1)(a):

- Use of *Adeels Palace*.
- Also use *Strong*.
- Satisfied on a balance of probabilities?

Scope of liability: use of s 51(1)(b), 51(4)

- Even if police carelessness is a factual cause of the harm as a necessary condition or but-for cause (going as far as the HIV), is it *appropriate* to find causal responsibility?
- Whether or not and why: a normative or policy-oriented question; note *Wallace*.
- NAI?
  - Did Giorgio's own conduct relieve the Police Department of its causal responsibility for the addiction and HIV?
    - Volitional, understanding the consequences of his act of using the needle?
    - Use cases like *Haber; Yates; Wiegold*.
  - Was the hospital's alleged carelessness a NAI, in that unclean needles and medication were readily accessible?
- Was the harm too remote?
  - Foreseeable kind of harm? *Wagon Mound 1*.
  - Or different kind of harm that was unforeseeable?
  - Use of cases like *Hughes; Smith v Leech Brain; Metrolink*.

Note: arguments based on NAI and Remoteness should be subsumed within 'scope of liability' under the Act.

While causal responsibility for the amputation would probably be satisfied, there would be difficulty doing so with respect to his addiction and HIV, due to scope of liability considerations. Ultimately this assessment involves normative questions in which the 'appropriateness' of imposing responsibility is the ultimate test: 'whether or not and why responsibility for the harm should be imposed on the negligent party'.