IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
MAJOR TORTS LIST

Not Restricted

S ECI 2020 03402

5 BOROUGHS NY PTY LTD (ACN 632 508 304) Plaintiff

-and-

STATE OF VICTORIA & ORS Defendant
(according to the attached schedule)

S ECI 2020 03598

JORDAN ROBERTS Plaintiff

-and-

STATE OF VICTORIA & ORS Defendants
(according to the attached Schedule)

JUDGE:	John Dixon J
WHERE HELD:	Melbourne
DATE OF HEARING:	31 May – 1 June 2021
DATE OF JUDGMENT:	2 December 2021
CASE MAY BE CITED AS:	5 Boroughs NY Pty Ltd v State of Victoria; Roberts v State of Victoria
MEDIUM NEUTRAL CITATION:	[2021] VSC 785

PRACTICE and PROCEDURE – Application for summary dismissal – Negligent conduct alleged against State of Victoria in implementing hotel quarantine – whether no real prospect of success – *Civil Procedure Act 2010* (Vic) ss 62, 63.

PRACTICE and PROCEDURE – Application to strike out statement of claim – Negligent conduct alleged against State of Victoria in implementing hotel quarantine – whether pleading or any part thereof fails to disclose cause of action or may prejudice, embarrass or delay the fair trial of the proceeding, or is otherwise an abuse of the process of the Court –

Supreme Court (General Civil Procedure) Rules 2015 (Vic) r 23.02(a), (c), (d).

NEGLIGENCE – Duty of care – Novel duty – Whether State of Victoria owed duty to Victorian retailers affected by COVID-19 lockdown restrictions to avoid economic harm to them when implementing hotel quarantine – Pure economic loss and indeterminacy – Policy and operational divide – Incoherence in the law – *Novus actus interveniens* – Posited duty not 'fanciful' for purposes of summary judgment.

NEGLIGENCE – Duty of care – Novel duty – Whether State of Victoria owed duty to owners, operators, controllers, alternatively employees of businesses affected by COVID-19 lockdown restrictions, to avoid economic harm to them, or psychiatric harm consequent upon economic harm, when implementing hotel quarantine – Plaintiff is 'ripple effect' victim of pure economic loss which risks indeterminacy – Posited duty to use Australian Defence Force or Victoria Police instead of private security companies to staff hotel quarantine a policy or governmental choice – Proceeding summarily dismissed.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff 5 Boroughs NY Pty Ltd	Ms W Harris QC with Mr A Hochroth and Mr H Whitwell	Quinn Emanuel Urquhart & Sullivan
For the Plaintiff Jordan Roberts	Mr J Richards QC with Mr G Jegatheesan	Carbone Lawyers
For the Defendants	Ms R Doyle SC with Mr L Brown and Ms R Amamoo	Herbert Smith Freehills

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HIS HONOUR:

5 Boroughs NY Pty Ltd S ECI 2020 03402

Introduction

1 The plaintiff, 5 Boroughs NY Pty Ltd ('**5 Boroughs**') claims, from the defendants, the State of Victoria and others ('**the State**')[1] damages for economic loss suffered as a result of the stage 3 and 4 lockdown restrictions on economic activity imposed during the second wave of the COVID-19 virus. 5 Boroughs is a representative plaintiff and the proceeding is a group proceeding under Part 4A of the *Supreme Court Act 1968* (Vic). It contends that these restrictions were the inevitable result of COVID-19 transmission events at two hotel quarantine sites caused by the negligent failure of the State to implement effective infection prevention and control measures at the sites.

2 The defendants apply for summary judgment pursuant to ss 62 and 63 of the *Civil Procedure Act 2010* (Vic) contending that the plaintiff's claim has no real prospect of success. Alternatively, the defendants seek an order pursuant to r 23.02(a) of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) ('**Rules**') striking out the whole of the statement of claim on the ground it does not disclose a cause of action.

3 The application for summary judgment will be refused. I will strike out the whole of the statement of claim with leave to the plaintiff to replead.

Applicable principles

4 The principles applicable to an application by a plaintiff for summary judgment were not in contention. I have previously addressed them. They were more recently restated by the Court of Appeal in *Gu v Tampi.*[2] I begin with the legislation.

5 Section 62 of the *Civil Procedure Act* permits a defendant to apply for summary judgment on the ground that the plaintiff's claim or part of it has no real prospect of

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1 The defendants are the State of Victoria; the Minister for Health and Minister for the Coordination of Health and Human Services: COVID-19; the Minister for the Coordination of Jobs, Precincts and Regions: COVID-19; Secretary, Department of Health and Human Services; and Secretary, Department of Jobs, Precincts and Regions.

2 [2020] VSCA 61. See also *Bodycorp Repairers Pty Ltd v Australian Associated Motor Insurers Ltd* [2018] VSCA 174.

success. Section 63 of the *Civil Procedure Act* provides that, subject to s 64, the Court may give summary judgment in a civil proceeding 'if satisfied' that a claim has 'no real prospect of success'.

6 In *Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd*,[3] the Court of Appeal set out the relevant test to be applied in determining an application for summary judgment made under Part 4.4 of the *Civil Procedure Act*. It is whether the respondent to the application for summary judgment has a 'real' as opposed to a 'fanciful' chance of success. The test is to be applied by reference to its own language[4] and without paraphrase or comparison with the 'hopeless' or 'bound to fail test' essayed in *General Steel Industries Inc v Commissioner for Railways (NSW)* ('***General Steel***').[5]

7 The test is to some degree a more liberal test than the 'hopeless' or 'bound to fail' test in *General Steel*,[6] admitting the possibility that there might be cases, yet to be identified, in which it appears that, although the respondent's case is not hopeless or bound to fail, it does not have a real prospect of success.

8 It remains important to exercise the power to terminate proceedings summarily with caution and it should not be exercised unless it is clear that there is no real question to be tried; and that is so regardless of whether the application for summary judgment is made on the basis that the pleadings fail to disclose a reasonable cause of action (and the defect cannot be cured by amendment) or on the basis that the action is frivolous or vexatious or an abuse of process or where the application is supported by evidence.[7]

9 Even though a claim has no real prospect of success, a court may still permit a trial under certain circumstances. Section 64 of the *Civil Procedure Act* provides that:

> Despite anything to the contrary in this Part or any rules of court, a court may

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3 (2013) 42 VR 27, 40 [35] ('***Lysaght***').

4 *Trkulja v Google LLC* (2018) 263 CLR 149, 158 [23] ('***Trkulja***'); *CA & CA Ballan v Oliver Hume Australia Pty Ltd* (2017) 55 VR 62, 72 [24] ('***CA & CA Ballan***').

5 (1964) 112 CLR 125.

6 Ibid.

7 *Block v Powercor Australia Ltd* (2019) 57 VR 459, 484 [86] ('***Block***') referring to *Lysaght* (2013) 42 VR 27, 40 [35]. See also *CA & CA Ballan* (2017) 55 VR 62, 72 [24].

> order that a civil proceeding proceed to trial if the court is satisfied that, despite there being no real prospect of success the civil proceeding should not be disposed of summarily because—
>
> (a) it is not in the interests of justice to do so; or
>
> (b) the dispute is of such a nature that only a full hearing on the merits is appropriate.

10 The focus of a strike out application is on the sufficiency of a pleading and the principles that apply are well established.[8] Where, as here, the defendants submitted that the statement of claim should be struck out because it does not disclose a cause of action, the relevant considerations overlap considerably with those applicable in an application for summary dismissal. The Court of Appeal has recently said that in such circumstances the defendant must 'establish that it would be futile to allow the statement of claim to go forward, because it raises a claim that has no real prospect of success in the sense of being "fanciful"'.[9]

11 Other provisions of the *Civil Procedure Act* are relevant. Section 7(1) of the *Civil Procedure Act* sets out the overarching purpose to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute. Section 8 of the *Civil Procedure Act* requires that the court must 'seek to give effect to the overarching purpose in the exercise of any of its powers' and s 9 provides that when making any order or giving any direction in a civil proceeding, the court is to further the overarching purpose by having regard to the objects specified in subsection (1).

12 A defendant's application for summary judgment under s 62 is made in accordance with Part 3 of Order 22 of the Rules.

13 Rule 23.02 provides that where an indorsement of claim on a writ or originating motion or a pleading or any part of an indorsement of claim or pleading does not disclose a cause of action the court may order that the whole or part of the indorsement

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8 See *Wheelahan v City of Casey (No 12)* [2013] VSC 316, [25] ('***Wheelahan***') and the principles set out therein. See, also, *Babcock & Brown DIF III Global Co-Investment Fund, LP v Babcock & Brown International Pty Ltd (No 2)* [2017] VSC 556, [14]–[15] ('***Babcock***'); *Uber Australia Pty Ltd v Andrianakis* (2020) 61 VR 580, 599–600 [50] ('***Uber***').

9 *Uber* (2020) 61 VR 580, 594 [35].

or pleading be struck out or amended. In *Wheelahan v City of Casey (No 12)*,[10] I reviewed some of the authorities on the sufficiency of pleadings when challenged under this rule. The Court of Appeal described that summary as 'exhaustive',[11] but endorsed Hargrave J's further observation in *Babcock & Brown DIF III Global Co-Investment Fund, LP v Babcock & Brown International Pty Ltd (No 2)*[12] about my summary, with which, with respect, I agree.

> To this summary, I would add that the Court should consider the pleading under a challenge as a whole and adopt a practical case management approach to pleading objections, rather than accepting technical objections when the true nature of the case to be met is clear from reading the pleading as a whole and there is no embarrassment to filing a responsive pleading. Such an approach accords with the discretionary nature of the power to strike out and with the overarching purpose under the Civil Procedure Act. However, in cases alleging dishonesty or fraud, precise pleadings with full particulars are required.[13]

Although I don't propose to burden this judgment by reciting these principles again, I have taken them into account.

14 I proceed on the assumption that the plaintiff can prove its pleaded case at trial. Although some limited evidence was led on the application, it went to explaining matters pleaded, such as the precise wording of health directions. The State accepted that for the purposes of this application, I take the allegations in the statement of claim at their highest. For example, no evidence is required at this stage to establish that the alleged breach of the posited standard of care caused the loss suffered by the plaintiff and group members, or that almost all COVID-19 cases in Victoria as at 4 August 2020 can be 'traced to' the transmission events at hotel quarantine. Accepting this well-established principle does not involve any admissions by the State.

The plaintiff's pleaded claim

15 The plaintiff sues the defendants in negligence for economic loss caused by the defendants' conduct in implementing hotel quarantine for returning travellers. The

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10 [2013] VSC 316, [25].
11 *Uber* (2020) 61 VR 580, 599 [50].
12 *Babcock* [2017] VSC 556, [15].
13 *Uber* (2020) 61 VR 580, 599 [52].

relevant elements of the claim are as follows:

(a) The defendants: the Minister for Health and Minister for the Coordination of Health and Human Services: COVID-19 ('**Minister for Health**'), the Minister for the Coordination of Jobs, Precincts and Regions: COVID-19 ('**Minister for Jobs**'), the Secretary, Department of Health and Human Services ('**DHHS**') and the Secretary, Department of Jobs, Precincts and Regions ('**DJPR**').

(b) The group: the plaintiff, and the group members it represents, carried on a retail business as at 1 July 2020, which involved the supply of goods or services in Victoria to members of the public in attendance at their premises ('**Victorian retailers**').[14]

(c) The loss claim: The plaintiff and group members claim to have suffered economic loss sustained because they were prevented from supplying goods or services as a result of the imposition of stage 3 and 4 restrictions, including workplace closures.[15]

(d) The duty of care: The duty of care alleged to be owed by the defendants is a duty to take reasonable care to ensure that 'effective infection prevention and control measures' were implemented in respect of hotel quarantine.

(e) The breach of duty: the defendants' negligent failure to procure the implementation of effective prevention and control measures at the Rydges and Stamford Plaza hotels, including:

    (i) To identify whether or not any oversight or supervision of infection prevention and control practices at quarantine hotels was being carried out and, if not, to procure that supervision or oversight;

    (ii) To identify whether or not any audits of infection prevention and control practices at quarantine hotels were being conducted and, if not, to

[14] Persons listed in the *Supreme Court Act 1986* (Vic) s 33E(2) are excluded from the group.

[15] Restrictions imposed by means of various directions issued under *Public Health and Wellbeing Act 2008* (Vic) s 200.

procure such audits; and/or

(iii) To identify whether or not organisations whose staff worked at quarantine hotels had the expertise or capability to implement the infection prevention and control measures pleaded in the statement of claim, including as to the provision of training in infection prevention and control and personal protective equipment ('**PPE**'), and, if not, to procure advice and assistance to those organisations and to procure monitoring of whether that advice and assistance was being implemented.

(f) Causation:

(i) The plaintiff and group members allege that the breach of duty of care for which they contend, was a necessary condition of, or materially contributed to, or materially increased the risk of 'transmission events' at each of the Rydges and Stamford hotels.

(ii) Those transmission events caused a significant second wave of increased new daily COVID-19 cases in Victoria.

(iii) The Chief Health Officer and persons authorised by the Chief Health Officer ('**authorised officers**')[16] exercised emergency powers under s 200 of the *Public Health and Wellbeing Act 2008* (Vic) ('***Public Health Act***'), in response to the outbreak of COVID-19,[17] resulting in the issuing of various directions that restricted movement and activity in Victoria. The second wave 'substantially caused' the imposition of these stage 3

16 Authorised pursuant to the *Public Health and Wellbeing Act 2008* (Vic) s 199.

17 In particular, National Cabinet determined that each State would implement quarantine for returning travellers; Victoria decided this would take the form of detention in hotel quarantine; authorised officers issued directions and detention notices requiring returning travellers to be detained for 14 days in specified hotels; on 16 March 2020 Victoria declared a state of emergency under s 198 of the *Public Health and Wellbeing Act 2008* (Vic) (*Victorian Government Gazette*, Special Gazette No S 129, 16 March 2020) that was extended; on 2 August 2020, it declared a state of disaster under s 23(1) of the *Emergency Management Act 1986* (Vic) (*Victorian Government Gazette*, Special Gazette No S 383, 2 August 2020); authorised officers made a suite of decisions and directions to address public health risks under s 200 of the *Public Health and Wellbeing Act 2008* (Vic) between 1 July 2020 and 26 October 2020.

and 4 restrictions.

(iv) These restrictions led to the closure of the group members' businesses or a decrease in demand for their goods and services which caused them economic loss.

(v) If the defendants had not breached their duty, effective (or more effective) infection prevention and control measures would have been taken and the 'state of affairs' at the hotels, which obtained before the transmission events, would not have occurred.

Defendants' four grounds of objection

16 The defendants submitted that, taking the plaintiff's pleaded case at its highest, no duty of care of the novel type contended for is owed by the State. As the plaintiff has no real prospect of establishing a common law duty of care, it could not be in the interests of justice for the court to conduct a full hearing.[18] The proceedings would be futile and their continuance would be contrary to the observation that the 'discretion is to be exercised to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute between the parties'.[19] Alternatively, the statement of claim should be struck out in its entirety on the basis that the pleading does not disclose a cause of action. The claim is not tenable as a matter of law.[20]

17 The defendants rely on four main grounds of objection. If any one of these grounds is accepted by the court, then – so they contend – the proceeding has no real prospect of success, and ought be dismissed or, alternatively, struck out. In summary, those grounds are

(a) Policy making functions of government: The defendants submitted that the features of any hotel quarantine program established by the State amount to government policy involving the weighing up of financial, economic, social

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18 *Deputy Commissioner of Taxation v Buzadzic* (2019) 348 FLR 213, 240 [119], concluding that an exercise of the discretion in s 64 of the *Civil Procedure Act 2010* (Vic) by the trial judge miscarried because legislation precluded the defences relied upon.

19 *Ottedin Investments Pty Ltd v Portbury Developments Co Pty Ltd* (2011) 35 VR 1, 8 [18(3)].

20 *A S v Minister for Immigration and Border Protection* [2014] VSC 593, [12]–[13].

and political factors. These decisions are not justiciable in negligence. The defendants reject the plaintiff's attempt to distinguish the State's conduct in this case from policy-making by framing the duty as one which relates to the 'implementation' of hotel quarantine, on the basis that the two are inextricably intertwined.

(b) Incoherence in the law: the defendants submitted that there is incoherence at three levels. First, there is an inconsistency between one of the objects of implementing hotel quarantine, namely not to impose unreasonable restrictions on detained persons' rights, and the duty to avoid commercial harm to business owners. Second, there is inconsistency between the objects of limiting loss of life and negative impacts on the health of Victorians, with the duty to take steps to prevent economic loss to the plaintiff and group members. Third, the posited duty is incompatible with the decisions made by authorised officers under the *Public Health Act* and the statutory scheme for compensation in Part 10, Division 3 of the *Public Health Act*.

(c) Economic loss and indeterminacy: The court must take a particularly cautious approach to recognising novel duties of care in pure economic loss cases.[21] Recognising a duty of care in this case may lead to countless claims for loss from businesses and individuals affected by the alleged breach of duty.

(d) Fatal causal disconnect in the plaintiff's case: The defendants submitted that there is a disconnect between the breach of duty (negligence in implementing hotel quarantine) and the economic loss suffered by the plaintiff and group members, because the proximate cause of the loss was the imposition of restrictions in a suite of directions made by authorised officers under the *Public Health Act*, independently exercising discretionary powers conferred on them by the Act.

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21 *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 216–17 [93], 264 [232], 325–6 [405] ('***Perre***'); *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515, 529–30 [21]–[22], 537 [46]–[47] ('***Woolcock***').

Novel duty

18 The defendants emphasise that a duty cannot be owed in a vacuum.[22] The posited duty is not merely not to be negligent in implementing hotel quarantine, it is the duty to take reasonable care to avoid a particular type of loss (economic) to a particular class of person[23] (the plaintiff and group members, Victorian retailers).

Understanding the pleading

19 The defendants submitted that the statement of claim does not coherently articulate the novel duty, the scope and content of that duty, the applicable standard of care in respect of the provision of mandatory hotel quarantine, and does not particularise the alleged breaches of that standard.

20 5 Boroughs pleaded the duty of care as follows:

> By reason of the matters pleaded in paragraphs 39 to 44 above, each of the Minister for Health, the Minister for Jobs, the Secretary of DHHS, and the Secretary of DJPR owed the plaintiff and Group Members a duty to take reasonable care to ensure that effective infection prevention and control measures were implemented in respect of quarantine detention at quarantine hotels.

Nature of foreseeable harm

21 The defendants submitted that drafting the duty in such terms omitted from the description of the duty of care, reference to economic loss. This form of drafting, they submitted, obscured a 'fundamental problem' in the pleading: that the breaches that occurred were in the running of hotel quarantine, but that the economic loss was incurred by the restrictions operating in Victoria imposed by other decision makers, who are not defendants and whose decisions are not challenged.

22 The plaintiff contended that the pleading read as a whole made it clear that the duty of care is to prevent such economic loss to the plaintiff and group members as was reasonably foreseeable to the defendants. It was reasonably foreseeable that, unless

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22 *Roads and Traffic Authority (NSW) v Dederer* (2007) 234 CLR 330, 346 [46], where, by analogy, it was said that 'A road authority such as the RTA is not obliged to exercise reasonable care in the abstract; still less is it obliged to ensure that a road be safe in all the circumstances.'

23 *Donoghue v Stevenson* [1932] AC 562, 580: 'Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.'

effective measures were implemented, it was likely, or there was a substantial risk, that COVID-19 would spread, and if that occurred, at least stage 3 restrictions would be imposed. Such restrictions would restrict retail business in Victoria and impede the public's ability to attend retail premises, which would cause group members economic loss.

23 That the reader must infer the nature of the harm or loss sought to be recovered because the duty is pleaded in a truncated way to exclude reference to economic loss, is a defect in the pleading, which has highlighted the questions of incoherence and indeterminacy. The pleaded duty must identify the risk to the plaintiff and group members. As currently formulated, the duty refers to effectively implementing infection prevention and control measures in hotel quarantine, and not to a duty to avoid causing economic loss to the plaintiff and group members. This omission produces a want of proper focus throughout the pleading in respect of the other elements of the cause of action alleged. I accept, as did the defendants, that read as a whole, the inference is that economic loss is the focus of the claim. For that reason I accept that the pleading can be rectified by careful amendment, concentrating in particular on paragraphs 39-49 of the statement of claim.

24 While argument proceeded on the basis that the plaintiff accepted this criticism, the precise form of the amendment to the duty is a matter for the plaintiff, as it be advised. In argument, this form of words was proposed:

> a duty to take reasonable care to ensure that effective infection prevention and control measures were implemented in respect of quarantine detention at hotel quarantine, so that the plaintiff and group members did not suffer economic loss by reason of the imposition of restrictions on their ability to supply goods and services.

Content of the duty

25 The duty of care, the defendants contended, was 'formulated retrospectively as an obligation purely to … avert the particular harm that in fact eventuated', distorting the proper approach to principles of negligence.[24] When pleading a novel duty of care,

[24] *Graham Barclay Oysters Pty Ltd v Ryan* (2003) 211 CLR 540, 611–12 [192] ('***Graham Barclay Oysters***')

a plaintiff must not conflate the allegation of whether a duty exists (a legal question) with allegations of its breach (a factual question), such as what a reasonable person in the position of the defendant would have done in response to a reasonably foreseeable risk.[25] It is impermissible to determine the existence of a duty, its scope and content, by reasoning backwards from the loss that occurred, to a counterfactual of what could have been done differently to avoid the loss. 'To take this approach risks simply assuming that because the defendant could have avoided the [harm] by taking certain precautions, there must have been a duty to take those precautions.'[26] While causation may be reasoned backwards, foreseeability and duty must be forward-looking.

26 To posit a duty to take 'effective' action is unacceptable. The plaintiff is reasoning from concluding that because what was actually done was ineffective in preventing community transmission, as there were outbreaks caused by a transmission event in quarantine, the defendants owed the posited duty. A duty to implement 'effective' measures relies on retrospective reasoning, from the fact that harm occurred, to the existence of a duty to prevent it. The mere fact that there was an outbreak cannot be sufficient to give rise to a duty of care in negligence. Outbreaks can arise from a variety of non-negligent sources. It is critical to understand precisely what standard of care the plaintiff regards as acceptable to discharge the posited duty of care.

27 The plaintiff did not contend that the defendants were strictly liable to absolutely prevent the spread of COVID-19 from hotel quarantine, such that the relevant duty of care is only satisfied if there is no transmission. Once that is accepted it must follow that a particular level or standard of conduct is required, rather than one problematically described as 'effective measures'. If that standard was met and a transmission event occurred, there is no liability in negligence. In turn, once this is understood, the need for the plaintiff to identify the particular circumstances of transmission from quarantine emerges. Of such circumstances, no material facts,

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(warning against that approach to the formulation of a duty of care). See also *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390, 418 [68] ('***CAL No 14***').

25 *Graham Barclay Oysters* (2003) 211 CLR 540, 585 [106], 611-12 [192].

26 *Hoffmann v Boland* [2013] NSWCA 158, [113].

properly particularised, are pleaded.

28 It is no answer to this vague standard, to substitute the word 'effective' with equally unhelpful descriptors like 'adequate', 'relevant', 'appropriate', sufficient', 'regular' and 'necessary'. The proper limits of the factual enquiry at trial must be established. For example, what does it mean for personnel to be adequately trained, what is the 'proper' use of PPE, what is 'relevant' expertise or 'appropriately qualified' persons, and how often do these audits need to occur? How will a court find that a virus transmission was occasioned by an alleged breach of the posited standard?

Standard of care

29 Related to this concern, the defendants submitted that there was an intractable problem with identification of the standard of care required of the State actors in these novel circumstances. The standard of care required of a competent surgeon, for example, developed over many years. Who is to say what novel hotel quarantine operating standards should look like? The state of knowledge about the virus changes each week. The standard of care applicable for the first quarantine hotel may change over time.

30 The plaintiff maintained that the standard of care is clearly articulated. The statement of claim sets out what the duty of care requires, and the detail of what implementation of 'effective' infection prevention and control measures required, and how that duty was breached.

(a) The statement of claim alleged what the implementation of 'effective' infection prevention and control measures means. It required personnel to be 'adequately trained' in infection prevention and control and proper use of PPE; regular reinforcement of training; trainers with relevant expertise; all personnel having appropriate and sufficient PPE; regular cleaning and disinfection; ongoing on-site supervision by appropriately qualified persons; and regular audits of infection prevention and control practices.

(b) Each of the Minister for Health and Secretary of DHHS was required to procure

that DHHS identify (through its representatives) that ongoing supervision was conducted by qualified persons and that regular audits were being conducted, and if not, to procure that this occurred. Alternatively, that they identify whether or not organisations whose staff worked in quarantine had expertise to effectively implement the required measures. Further, the Minister for Jobs and the Secretary of DJPR was required to procure that DJPR in contracting private security companies, identify whether they had expertise to effectively implement these measures.

(c) The Secretary of DHHS breached the duty by failing to procure that DHHS identify that any person with expertise supervised practices at Rydges or Stamford, regularly or at all, or that audits were carried out, when such enquiry would have revealed no such person was stationed at the hotel and no audits had ever been carried out. If the Secretary had done so, these measures could have been implemented. The Secretary also failed to procure DHHS to identify whether the private security companies, Unified Security Group (Australia) Pty Ltd and MSS Security Pty Ltd, or the hotel operators, had expertise, adequate training and sufficient PPE. The enquiry would have revealed a lack of experience and equipment which could have been remedied.

(d) The Minister for Health breached the duty because, prior to 26 May 2020, when the outbreak at Rydges began, she did not know private security companies were used in hotel quarantine and so did not know what measures were being implemented and therefore breached the duty of care. She also failed to make any inquiries of DHHS in this regard and therefore to remedy the shortcomings.

(e) The Secretary of DJPR breached the duty by failing to procure that DJPR identify whether the security companies had expertise and would give adequate training and PPE, and that they implemented the required practices, when enquiry would reveal they did not, and contracted with them anyway, and then failed to give them required advice to reach the required level of

implementation.

(f) The Minister for Jobs breached the duty by failing to make any inquiry of the Secretary of DJPR or DJPR whether they had identified whether the hotel operators had expertise to effectively implement the required measures, and therefore did not enquire whether DJPR should have taken steps to remedy the shortcomings in the implementation, and also failed to ensure the contractual terms in place with the operators required the appropriate level of expertise and implementation of required measures. He also did not know DJPR contracted with private security companies and so failed to make relevant enquiries about the contractual terms, or whether their implementation was effective.

31 Pausing here, I do not agree. These paragraphs do not sufficiently articulate the relevant standard of care, because the content sits at an abstract level. The origin of this difficulty lies in the plaintiff's failure to allege any mechanism of transmission, whether by allegations of incidents, or by express identification of a path of inferential reasoning, hence, the use of vague descriptors. Then when alleging the standard of care, without understanding what precisely the plaintiff alleges was required of a reasonable official in the position of the defendants, it is not possible to determine the consequences from the proper performance of those duties on the second wave of community COVID-19 spread or in whatever counterfactual the plaintiff alleges. It is also necessary to understand the standard of care required in order to ascertain the impact of imposing such a standard on officials, its impact on policy decisions or the manner in which hotel quarantine was implemented, and the impact on detainees including their Charter rights.

32 Amendment, and supplementation, of the pleading in this respect is necessary for the defendants to know what case they have to meet and for the court to identify accurately the issues for its determination and to facilitate the overarching purpose in civil litigation.

33 I accept there is this problem, identified by the defendants, but not that it is intractable. The implications for the standard of care that may follow because knowledge about COVID-19 is rapidly developing in the context of an unprecedented public health crisis, is neither an impediment to accurately articulating the existence of a duty of care nor to identification of the applicable standard of care needed to discharge that duty, at the relevant time. But close and careful consideration of the material facts being alleged and the particulars that will limit the generality of the pleading and thereby limit and define the issues to be tried is necessary. That is particularly so in respect of the content of the duty and the standard of care required in the changing and uncertain landscape of a pandemic.

34 I accept the defendants' criticism that the relevant duty, its content, and the standard of care are not adequately pleaded. For this and reasons set out later, I will strike out the statement of claim. The defendants' submission went further, contending that this failing has consequential implications, such as concerns as to incoherence of the law and causation, because it is not clear exactly what the defendants had to do (and whether that had the capacity to distort independent exercises of discretion or policy decisions), and whether a failure to do it caused the transmission events at the hotels (the counterfactual). Before turning to the defendants' contentions that it would be futile to grant leave to replead, I will set out the principles being applied.

Principles to identify a novel duty of care

35 In *Roo Roofing Pty Ltd v Commonwealth* ('***Roo Roofing***'),[27] I set out the approach to be followed for identifying the existence of a novel duty of care and the parties did not take issue with my reasoning. There is no general test to be applied in every case in the law of negligence.[28] Instead, the court must take a principled approach depending on the particular circumstances that arise in determining the nature or scope of the duty of care in difference classes of case. Factors such as the harm suffered by the plaintiff, whether the defendant was exercising a statutory power, concerns about indeterminacy, or the need to preserve coherence give focus to the judicial evaluation

27 [2019] VSC 331, [455]-[464] ('***Roo Roofing***').
28 Ibid [456], referring to *Sullivan v Moody* (2001) 207 CLR 562 ('***Sullivan***').

of factors that militate for or against recognition of the duty of care posited by the plaintiff.[29]

36 The High Court established in *Crimmins v Stevedoring Industry Finance Committee* (*'**Crimmins**'*),[30] that this judicial evaluation is undertaken by applying the six factors, known as the salient features, that it identified. *Crimmins* involved a claim that the defendant was negligent in exercising (or failing to exercise) a statutory power. The High Court held that in determining whether the authority had a common law duty of care to the plaintiff, a court must consider the following questions:

> 1. Was it reasonably foreseeable that an act or omission of the defendant, including a failure to exercise its statutory powers, would result in injury to the plaintiff or his or her interests? If no, then there is no duty.
>
> 2. By reason of the defendant's statutory or assumed obligations or control, did the defendant have the power to protect a specific class including the plaintiff (rather than the public at large) from a risk of harm? If no, then there is no duty.
>
> 3. Was the plaintiff or were the plaintiff's interests vulnerable in the sense that the plaintiff could not reasonably be expected to adequately safeguard himself or herself or those interests from harm? If no, then there is no duty.
>
> 4. Did the defendant know, or ought the defendant to have known, of the risk of harm to the specific class including the plaintiff if it did not exercise its powers? If no, then there is no duty.
>
> 5. Would such a duty impose liability with respect to the defendant's exercise of 'core policy-making' or 'quasi-legislative' functions? If yes, then there is no duty.
>
> 6. Are there any other supervening reasons in policy to deny the existence of a duty of care (eg, the imposition of a duty is inconsistent with the statutory scheme, or the case is concerned with pure economic loss and the application of principles in that field deny the existence of a duty)? If yes, then there is no duty.
>
> If the first four questions are answered in the affirmative, and the last two in the negative, it would ordinarily be correct in principle to impose a duty of care on the statutory authority.[31]

37 While all these salient features must be considered, their relative significance will

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29 *Sullivan* (2001) 207 CLR 562, 579-80 [50].

30 (1999) 200 CLR 1 ('***Crimmins***'). See *Roo Roofing* [2019] VSC 331, [458] and the authorities cited therein.

31 *Crimmins* (1999) 200 CLR 1, 39 [93]-[94].

change depending on the case. The initial focus of analysis will be the relevant legislation and whether the asserted duty of care is consistent with its terms, scope and purpose, as well as the positions of the parties to each other – the defendant's control and the plaintiff's vulnerability.[32] In most cases, a public authority will not be in breach of a common law duty by failing to exercise a discretionary power vested in it for the benefit of the general public. But if that authority uses its powers to intervene in a field of activity and increased the risk of harm to persons, it will ordinarily come under a duty of care.[33]

38 In the oft-cited decision of *Caltex Refineries (QLD) Pty Ltd v Stavar*, Allsop P, following his analysis of the authorities, listed seventeen non-exhaustive salient features and other relevant considerations for the judicial evaluation of the scope and content of a novel duty of care.[34]

39 The defendants in this case rely, in particular, on three factors, contending that each of them, whether considered alone or collectively, if accepted, will preclude recognition of the posited duty of care:

(a) To recognise a duty of care in this case would require the court to assess the reasonableness of decisions that are essentially political, policy-based or quasi-legislative[35] or 'decisions which involve or are dictated by financial, economic, social or political factors or constraints';[36]

(b) The posited duty would be in conflict or would be in tension with other duties or obligations to which a public authority is subject, resulting in incoherence in the law;[37] and

(c) There is indeterminate liability, in respect of the imposition of a duty to take

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32 *Graham Barclay Oysters* (2002) 211 CLR 540, 597-8 [149].

33 *Roo Roofing* [2019] VSC 331, [462], explaining the findings of *Graham Barclay Oysters* (2002) 211 CLR 540.

34 (2009) 75 NSWLR 649, 676 [103], 678–9 [112] ('***Stavar***').

35 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 469 ('***Heyman***'); *Crimmins* (2000) 200 CLR 1, 20–1 [32], 34 [79], 37–8 [87], 62 [170]; *Graham Barclay Oysters* (2002) 211 CLR 540, 553–4 [6], 561 [26]–[28], 606–7 [175]–[176].

36 *Heyman* (1985) 157 CLR 424, 469; *Roo Roofing* [2019] VSC 331, [477].

37 *Sullivan* (2001) 207 CLR 562, 582 [62].

reasonable care to prevent another from suffering economic loss.[38]

40 Finally, aside from the recognition of a novel duty of care, the defendants submitted that the plaintiff faces a fundamental causation problem, in that the economic loss was not caused by the breach of the duty of care, but by another independent exercise of a statutory power.

Policy making functions of government

41 The defendants submitted that courts cannot regulate the exercise of powers involving matters of government policy,[39] particularly not by the norms of negligence in tort,[40] because they are usually constrained by financial, economic, social and political factors[41] and require the balancing of competing public interests.[42] The law can, avoiding this constraint, impose a duty of care on 'operational' matters.[43] The plaintiff's posited duty to avoid economic loss necessarily impacts decisions to implement hotel quarantine and decisions to impose the relevant lock-down restrictions, both of which involve 'core policy decision making'.

42 Quarantine for returning travellers to Australia at 'designated facilities' was a policy determined by the National Cabinet. I will take judicial notice of two facts that contribute to placing these policy issues in proper context.

(a) Mandatory quarantine was but one aspect of National Cabinet's policy response to the pandemic and its response included other policies implemented across the Federation. For example, financial compensation and income support policies that likely benefitted Victorian retailers were implemented by the Commonwealth. Victoria implemented the quarantine policy by directing individuals who had returned to Victoria from overseas to undertake their mandatory 14-day self-isolation at designated hotels, pursuant

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38 *Woolcock* (2004) 216 CLR 515, 529–30 [21].
39 *Crimmins* (1999) 200 CLR 1, 37–8 [87], 39 [93]. See also *Roo Roofing* [2019] VSC 331, [473].
40 *Crimmins* (1999) 200 CLR 1, 20–1 [32], 37–8 [87], 50 [131], 101 [292], 102 [294]–[295].
41 *Heyman* (1985) 157 CLR 424, 469, 442, 500. See also *San Sebastian Pty Ltd v Minister Administering the Environmental Planning and Assessment Act 1979 (NSW)* (1986) 162 CLR 340, 374.
42 *Roo Roofing* [2019] VSC 331, [490].
43 *Heyman* (1985) 157 CLR 424, 438–9, 468–9.

to its emergency powers under s 200 of the *Public Health Act*.

(b) The National Cabinet's response to the global pandemic differed from the response of some other national governments. It involved a policy decision whether to seek to achieve elimination, to flatten the curve to preserve hospital capacity, or to embrace herd immunity.

43 The reasonableness of both the decision to implement National Cabinet's policy through hotel quarantine, and the exercise of statutory power to impose the relevant lock-down restrictions, are not justiciable in negligence.[44] The plaintiff does not contend otherwise. Its claim focusses on the effectiveness of the operation of hotel quarantine.

44 The defendants submitted that the detailed process by which hotel quarantine was implemented also falls into the 'policy' category and not the 'operations' category, or is too intermingled to be distinguishable.

45 This, they contended, can be shown by the fact that the choice to implement hotel quarantine in the first place (which is clearly policy), as compared to more severe methods of quarantine, led to the increased risk of COVID-19 transmission. If the State implemented quarantine in detention centres staffed by correctional officers, for example, rather than allocating resources to contracted security firms at hotels, there may not have been spread at all. Conversely, had the policy been to allow the disease to spread in order to achieve herd immunity, the plaintiff and group members could not have sought compensation for economic loss on the basis that the policy of herd immunity was negligently implemented. Also, after the outbreak progressed to community transmission, authorised officers under the *Public Health Act* may instead have determined not to ease restrictions at all or to impose harsher restrictions for a longer period, causing greater economic loss.

46 In other words, the decisions the State made about the measures for infection prevention and control as part of the hotel quarantine program were part of the state-

44 *Graham Barclay Oysters* (2002) 211 CLR 540, 553–4 [6].

wide policy response, firmly rooted in a national policy response, concerning resource allocation to the pandemic. This was a wholesale and coordinated response, incapable of division between what the State did in enforcing compulsory quarantine, what the defendant Ministers and Secretaries did in implementing that decision in practical terms, and how the Chief Health Officer and other State officials then reacted when any infection spread from quarantine.

47 The notice of detention given to travellers put in quarantine contemplated the exceptions that would be applied, including compassionate exemptions, medical appointments, or excursions necessary for physical or mental health. Clearly, the unchallenged policy decision to impose hotel quarantine involved operational contours that affected its implementation, further demonstrating the close connection between 'policy' and 'operations' in the factual matrix of this case.

48 The defendants also argued that the exercise of public powers in favour of the community as a whole is fatal to the recognition of a duty of care owed to one segment of the public.[45] Recognition of the duty in this case would influence executive decision making about imposing responsibilities for infection protection and control (and whether/how to involve the private sector) and resource allocation and use in hotel quarantine, as well as resource prioritisation between different interests groups or facilities. Accordingly, whether to use private security, the nature of training required, the equipment supplied and the nature of oversight or auditing are all policy, not operational, decisions.[46]

49 The defendants sought to draw an analogy between the global pandemic emergency that triggered the Minister's power under s 198(1) of the *Public Health Act*, to declare a state of emergency, and the emergency or war time circumstances that enliven the doctrine of executive necessity.[47] This doctrine grants immunity of suit to executive government in responding to large-scale emergency situations,[48] allows the

45 *Graham Barclay Oysters* (2002) 211 CLR 540, 553–4 [6], 555 [9], 556–7 [12], 562 [32].
46 *Roo Roofing* [2019] VSC 331, [493].
47 *Palmer v Western Australia* (2021) 388 ALR 180, 216-17 [155] ('***Palmer***'), referring to *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 89 [233].
48 See, eg, *Verwayen v Commonwealth (No 2)* (1989) VR 712, 724–5.

subordination of individual rights (including property rights) to the necessities of the State,[49] and precludes actions for negligence in the course of operations of war.[50] By analogy, the plaintiff should not be able to recover economic loss as a consequence of restrictions imposed to arrest the spread of the virus.

50 The plaintiff conceded the distinction between core government policy and operational matters, but contended that 'core policy making functions' are narrowly defined in the law.[51] The plaintiff contended that operational matters are amenable to the imposition of a duty of care and submitted that its claim did not challenge any of the core policy decisions to implement hotel quarantine, to use hotels for that purpose, to issue detention notices or the health directions imposing lockdowns. It submitted that the pleaded duty of care, breached by failure to provide adequate supervision, conduct audits of infection prevention and control practices, and ensure staff had the expertise, capacity, training and protective equipment to perform their roles, was 'pitched squarely at the operational level.'

51 The plaintiff invited me to reject the application of the doctrine of executive necessity in this case because the relevant impugned negligent conduct was operational in nature and was not an instance of emergency statutory powers.

52 I reviewed the authorities touching on the distinction between policy and operational matters, and the justiciability of the latter, in *Roo Roofing*.[52] The critical factors that emerged from that review relevant to this proceeding are:

(a) The distinction between policy and operational factors, is not easy to

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49 *Shaw Savill and Albion Co Ltd* v *Commonwealth* (1940) 66 CLR 344, 361–2 ('***Shaw***'); *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* (1965) AC 75, 110, 162.

50 *Parker v Commonwealth* (1965) 112 CLR 295, 301. See also *CPCF v Minister for Immigration* (2015) 255 CLR 514, 622–3 [368] ('***CPCF***'), citing *Sullivan* (2001) 207 CLR 562, 582 [60]; *Shaw* (1940) 66 CLR 344, 361, in the context of a finding that obligations of procedural fairness did not apply to maritime officers.

51 *Roo Roofing* [2019] VSC 331, [473]–[475]: 'The plaintiffs submitted that any governmental immunity in negligence ought be limited to "core policy making functions", a submission that finds support in the authorities. I agree. … "core policy-making functions" appear on the facts of most of the authorities to be narrowly defined'.

52 Ibid [468]-[502].

formulate[53] and the division has never been rigorous.[54]

(b) A duty will generally not extend to decisions dictated by financial, economic or political constraints, such as the allocation of budgetary resources, and may extend to 'action or inaction that is merely the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.'[55]

(c) Where a public authority's impugned conduct is the exercise of a non-statutory power, as was the case in *Roo Roofing*,[56] and in this case, then any governmental immunity in negligence ought to be limited to 'core policy making functions', or quasi-legislative or regulatory functions.[57]

(d) In *Graham Barclay Oysters Pty Ltd v Ryan* ('***Graham Barclay Oysters***'), Gleeson CJ explained that at 'the centre of the law of negligence is the concept of reasonableness. When courts are invited to pass judgment on the reasonableness of governmental action or inaction, they may be confronted with issues that are inappropriate for judicial resolution, and that, in a representative democracy, are ordinarily decided through the political process.'[58] One reason for this is that policy matters involve competing public interests where there is no criterion by which a court can assess where the balance lies between the weight to be given to each interest. There can be no duty of care if in a given case there is no criterion the court can use to determine whether the conduct was reasonable.[59]

(e) Where a posited duty of care would require the public authority to act in favour of the economic interests of one sector of the community, rather than in the national interests or the interests of the community as a whole, and would

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53 Ibid [470], quoting *Heyman* (1985) 157 CLR 424, 469.
54 *Graham Barclay Oysters* (2002) 211 CLR 540, 556 [12].
55 *Roo Roofing* [2019] VSC 331, [470], quoting *Heyman* (1985) 157 CLR 424, 469.
56 Ibid [471].
57 Ibid [473]-[474], considering *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 393-4 [182] ('***Pyrenees***') and other authorities.
58 *Graham Barclay Oysters* (2002) 211 CLR 540, 553 [6].
59 *Roo Roofing* [2019] VSC 331, [490], relying on *Graham Barclay Oysters* (2002) 211 CLR 540, 557 [15].

constrain its ability to protect the economic interest of the nation as a whole, it cannot be recognised.[60]

(f) In *Graham Barclay Oysters*, Gleeson CJ found that the impugned action, the oyster quality control process, was policy.[61] It received attention at the highest level of government, had substantial budgetary implications, and involved government concern to encourage an important primary industry.[62] In *Roo Roofing*, the plaintiffs had not challenged the Commonwealth's policy decisions but targeted the steps taken by public servants in designing, implementing and administering the policy measure.[63] This strategy failed on the facts of that case, because the plaintiffs could not establish that the posited duty of care was known to the law. I observed that the impugned features of the program were a 'fundamental governmental choice as to the nature and extent of regulation'.[64] I stated:

> The evidence showed the [stimulus program] was designed by a Cabinet sub-committee as part of an overall fiscal stimulus program implemented in response to the [global financial crisis], with significant budgetary, financial and economic implications. Further this examination showed a considerable blurring of the line between policy and operational function in those features of design, implementation and administration identified from the plaintiffs' particulars of breach. Those features of implementation and administration alleged to be negligently performed identify features of design that were the qualities of the [program] that attracted the defendant to it as a policy response by a fiscal stimulus program.[65]

(g) That said, in *Roo Roofing* I noted that the plaintiff's posited duty 'squarely raised fact-sensitive questions about whether such steps involved or were dictated by financial, economic, social or political factors or constraints and the related question of identification of the boundaries of "core policy-making" functions.'[66] I reiterated that the 'issue is complex and fact sensitive. It will not

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60 *Roo Roofing* [2019] VSC 331, [486].
61 *Graham Barclay Oysters* (2002) 211 CLR 540.
62 *Roo Roofing* [2019] VSC 331, [497], citing *Graham Barclay Oysters* (2002) 211 CLR 540, 561 [26].
63 *Roo Roofing* [2019] VSC 331, [476], [479].
64 Ibid [499], relying on *Graham Barclay Oysters* (2002) 211 CLR 540, 606 [175] (Gummow and Hayne JJ in the minority).
65 *Roo Roofing* [2019] VSC 331, [498].
66 Ibid [477].

always be the case that decisions at an operational level do not involve, at least in part, policy or public interest considerations. Conversely, decisions at a policy level, at least in this case, involved the national interest which could be inconsistent with the interests of sections of the community.'[67]

53 The plaintiff's posited duty in this case, at least in the context of the breaches alleged, targets particular failures on the part of the relevant Ministers and Secretaries who implemented hotel quarantine. These failures in 'effective infection prevention and control measures' essentially involved lack of adequate supervision, training, audits and the supply of protective equipment.

54 While these factors will affect the allocation of resources, in that more supervision or training, or more protective equipment might require more resources, it is difficult to see at this early stage in the proceedings, and without any evidence about the significance of resources required to meet the posited standard, how such impact is any different from any duty of care recognised against the State in negligence. If there is ever any required level of conduct that the State should achieve, meeting that standard will be easier to achieve with more resources.

55 At face value, exercising more precise care over safety measures in an existing program may lie outside of core policy-making functions or quasi-legislative functions, and fall within the operational category. Notionally, even given an existing set of resource constraints, it does not seem fanciful that the defendants' conduct in implementing infection control measures could be subject to curial assessment on reasonableness criteria. What a reasonable functionary might do in such circumstances may not rely only on the political balancing of competing interests, or on the issue of resources. These are factual inquiries.

56 The detention notice, it would appear, already determined exceptions that would apply to returning travellers in quarantine, and the policy decision about sequestering travellers in hotels as opposed to purpose-built detention centres or prisons had

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67 Ibid [495], citing *Pyrenees* (1998) 192 CLR 330, 393-4 [181]-[182]; *Crimmins* (1999) 200 CLR 1, 101 [292]; *Vairy v Wyong Shire Council* (2005) 223 CLR 422, 451 [86].

already been made. Those interests had been balanced. Given that policy framework, how rigorously each hotel was supervised, regulated, or audited may, on careful analysis, involve administrative or operational decisions capable of assessment to an objective standard.

57 Whether the imposition of the posited duty would distort the policy framework in which the operational decisions were taken, is a question I will address later under the incoherence ground.

58 Recognising a duty of care when implementing effective infection control measures in hotel quarantine, in order to avoid economic harm to Victorian retailers through lockdown restrictions, does not appear – at this stage – to necessarily elevate the interests of the plaintiff and group members above other sectors of the public. If the posited duty, as pleaded, were fulfilled, the defendants would have supervised and audited Rydges and Stamford hotel's infection control practices. This aligns with the greater public interest to prevent the transmission of infection from persons in quarantine into the community, which is the aim of hotel quarantine.

59 In *Roo Roofing*, the evidence at trial illuminated the policy aspects of the relevant operational conduct and exposed the blurred distinction between the implementation and policy design features of the program. In this proceeding I am presently not in a position to say that the content of the posited duty involved a fundamental government policy choice which is not amenable to objective evaluation at law and that it is fanciful to contend that the posited duty of care is known to the law.

60 Bearing in mind that the power of summary dismissal must always be exercised with caution, the issue of whether policy considerations are involved in, or cannot be separated from, operational matters, is fact sensitive and cannot be justly determined on an interlocutory basis.[68]

61 I am not persuaded to the opposite conclusion by the defendants' invocation of the doctrine of executive necessity. Any immunities to civil suit afforded to the state in

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68 *Roo Roofing Pty Ltd v Commonwealth* [2017] VSC 31, [114], [116], [119]; *Roo Roofing* [2019] VSC 331, [495].

exercising emergency powers are based on policy considerations. For example, 'that it would be "opposed alike to reason and to policy" for the common law to impose a duty of care in the conduct by military personnel of warlike operations'.[69] The military could not do their job properly in urgent, emergency situations during wartime, if under a duty to take care to avoid damage to civilian property.[70]

62 The application of analogous reasoning to the State's response to the pandemic must be nuanced. It would be a novel occasion. The application and the ambit of reach of the doctrine would need to be carefully assessed in light of all the relevant facts. If the doctrine applies at all, it could not be that any decision the State makes in respect of a pandemic, and any facet of that decision or its implementation, in any circumstances, is immune from negligence claims.

63 Further, the application of the doctrine in wartime is circumscribed. The relevant officer must be in active engagement with the enemy, or in the 'theatre of operations' or the 'theatre of war'. In such a case, the courts would be incapable of applying an objective criterion for reasonableness. 'It would mean that the Courts could be called upon to say whether the soldier on the field of battle or the sailor fighting on his ship might reasonably have been more careful to avoid causing civil loss or damage. No-one can imagine a court undertaking the trial of such an issue, either during or after a war.'[71]

64 Outside of active engagement but still in wartime, a want of care may still expose a military officer to civil liability. The content of the duty and the standard of care will be informed by factual inquiry.

> [A] real distinction does exist between actual operations against the enemy and other activities of the combatant services in time of war. For instance, a warship proceeding to her anchorage or manoeuvring among other ships in a harbour, or acting as a patrol or even as a convoy must be navigated with due regard to the safety of other shipping and no reason is apparent for treating her officers as under no civil duty of care, remembering always that the standard of care is

69 *CPCF* (2015) 255 CLR 514, 622-3 [368].
70 *Shaw* (1940) 66 CLR 344, 362.
71 Ibid 361-2.

that which is reasonable under the circumstances.[72]

65 The doctrine of executive necessity has parallels with incoherence as a limiting factor on the existence of a duty. The implications for the feasibility of the posited duty of care cannot be assessed in the abstract. Suffice it to say, at this stage, that the posited duty of care in this case does not necessarily attract the same policy concerns as those attaching civil liability to soldiers in or about active engagement with the enemy. The claim cannot be summarily disposed of on this basis.

Incoherence in the law

66 Examination of this issue commences with the relevant statutory context in which the defendants acted, because the existence and scope of the posited duty must be consistent with the exercise of both statutory and non-statutory executive powers.[73]

The legislative scheme

67 The objective of the *Public Health Act* is to achieve the highest attainable standard of public health and wellbeing by protecting public health and preventing disease, illness, injury, disability or premature death.[74] In seeking to achieve these objectives, in the administration of the Act, regard should be had to certain guiding principles,[75] including that full scientific certainty should not be used as a reason to postpone measures to prevent or control public health risk (precautionary principle)[76] and that the prevention of disease and illness is preferable to remedial measures (primacy of prevention principle).[77]

68 The Minister for Health[78] is empowered to declare a state of emergency arising from

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72 Ibid 362.

73 *Hunter and New England Local Health District v McKenna* (2014) 253 CLR 270, 280 [22] (‘***Hunter***’).

74 *Public Health and Wellbeing Act 2008* (Vic) s 4(2)(a).

75 Ibid s 4(3).

76 Ibid s 6.

77 Ibid s 7.

78 The Minister administering the *Public Health and Wellbeing Act 2008* (Vic) is the Minister for Health, except that from 8 July 2020 to 27 November 2020 the Minister administering specified provisions of the Act, which includes Part 10, is the Attorney-General (in so far as those provisions relate to the exercise of functions and powers relating to the detention of people arriving in Victoria from overseas in quarantine, in a hotel or similar accommodation, for the purpose of eliminating or reducing the serious risk to public health posed by the COVID-19 pandemic): Administration of Acts, 22 June 2020, Supplement to the General Order effective 8 July 2020.

a serious risk to public health.[79] The Chief Health Officer is empowered to protect and enforce the provisions of the Act,[80] and to exercise certain public health risk and emergency powers once a state of emergency has been declared, or authorise others to do so.[81] These emergency powers, set out in s 200, include power to detain any person or group of persons for a period reasonably necessary to eliminate or reduce a serious risk to public health, restrict movement of persons in an emergency area, or from entering that area, and any other direction the authorised officer considers reasonably necessary to protect public health.[82]

69 The relevant statutory context also includes the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('**Charter**'). Section 38(1) of the Charter provides that it is unlawful for a public authority to act in a way that is incompatible with a human right, or, in making a decision, to fail to give proper consideration to a relevant human right. The authorised officers exercising emergency powers under the *Public Health Act* are public authorities for this purpose.[83]

70 In exercising these emergency powers, an authorised officer makes an independent decision that must fall within the range of reasonably available options to achieve the purpose of protecting public health, but need not be the least restrictive means available.[84] In making directions, authorised officers must have regard to public health and wellbeing, efficient resource allocation, proportionality, and give proper consideration to human rights.[85]

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79 The Minister may, on the advice of the Chief Health Officer and after consultation with the Emergency Management Commissioner, declare a state of emergency arising out of any circumstances causing a serious risk to public health. This is defined as 'a material risk that substantial injury or prejudice to the health of human beings has or may occur having regard to' certain matters including the number of persons likely to be affected and the immediacy and seriousness of the risk: *Public Health and Wellbeing Act 2008* (Vic) s 198 read with s 3.

80 *Public Health and Wellbeing Act 2008* (Vic) ss 21-22, read with pt 10, div 3.

81 Ibid s 199(1). The Chief Health Officer may exercise these powers if he believes that it is reasonably necessary to grant an authorisation under this section to eliminate or reduce a serious risk to public health: s 199(1)(b). The Chief Health Officer may also, for this purpose, authorise certain authorised officers to exercise any of the public health risk and emergency powers.

82 Ibid s 200(1)(a)-(d).

83 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 4(a),(f).

84 *Loielo v Giles* (2020) 63 VR 1, 7-8 [8]-[10], 65 [241], 67 [251] ('***Loielo***').

85 *Public Health and Wellbeing Act 2008* (Vic) ss 1, 5-10, 200; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38.

Defendants' submission

71 The defendants submitted that the posited duty of care would give rise to inconsistent or incompatible obligations in the performance of the authorised officers' functions, or conflicting claims on the exercise of those powers,[86] and would therefore not be recognised at common law.[87] A lack of coherence in the law[88] is a supervening policy reason to deny the existence of the posited duty – the sixth salient feature in *Crimmins*.[89] Incoherence arises in two ways in this case: it may be a distorting effect on either the exercise of detention powers or the decision to impose lockdown restrictions. That submission was developed as follows.

72 First, the posited duty would undermine the paramountcy of public health in the imposition and scope of detention powers. This consequence must follow because emergency powers under the *Public Health Act* must be exercised with the object of eliminating or reducing serious risk to public health. In particular, the discretion to exercise emergency powers to detain persons is confined to the objective of reducing a serious risk to public health.[90]

73 The defendants relied on the New South Wales Court of Appeal's decision in *Dansar Pty Ltd v Byron Shire Council* ('***Dansar***').[91] The Court of Appeal considered whether a local council owed a property developer a duty to protect it from harm that might flow from a failure to take reasonable care in the making of its decision concerning sewerage capacity, which delayed approval of the plaintiff's development application. The Court held by majority that the defendant did not owe the alleged duty, as such a duty would be inconsistent with the unimpeded performance of the council's statutory functions. Meagher JA observed that:

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86 *Roo Roofing* [2019] VSC 331, [465]; *Sullivan* (2001) 207 CLR 562, 582 [60].

87 *Sullivan* (2001) 207 CLR 562, 581 [55]. See also *Regent Holdings Pty Ltd v Victoria* [2013] VSC 601, [223] where Beach JA found the duty of care contended for would give rise to inconsistent duties. See further, *Roo Roofing* [2019] VSC 331, [505]–[506], where matters including the inconsistency between the pleaded duty in that case and the obligation on public servants to give frank and fearless advice in accordance with public sector values were noted.

88 *Sullivan* (2001) 207 CLR 562, 581 [55].

89 *Crimmins* (1999) 200 CLR 1, 39 [93.6].

90 *Public Health and Wellbeing Act 2008* (Vic) ss 199(2), 200(1)(a). See, similarly, *Palmer* (2021) 388 ALR 180, 198 [74], 218 [164]-[165], 230 [207], 253 [285].

91 (2014) 89 NSWLR 1 ('***Dansar***').

> The council was required to give paramount consideration to the safety and continued operation of the treatment facilities, maintaining public health and protecting the environment. That obligation and the interests to which the council was to have regard are incompatible with the existence of a private law duty to take reasonable care to avoid economic loss to a developer resulting from refusal of or delay in its development approval.[92]

Leeming JA said that, where policies to be put in place were 'contestable and liable to change at any time and without notice, it is difficult to see how there could be a duty to take reasonable care in the implementation of those policies so as to avoid pure economic loss'.[93]

74 In addition, any measures limiting human rights (like quarantine) must be reasonable and demonstrably justifiable.[94] A private law duty in negligence to protect the commercial interests of a particular cohort (Victorian retailers) would distort that focus[95] and impose conflicting obligations.[96] For example, the private law duty might incentivise or require more stringent infection prevention methods like blanket prohibitions on overseas arrivals, or detention in facilities and not hotels, instead of reasonably and demonstrably justifiable limits to reduce serious risk to public health. The more stringent the process of quarantine is, the less likely that other public health measures such as contact tracing and lockdown orders may be needed. From another perspective, the economic interests of Victorian retailers may conflict with measures such as exercise or fresh air breaks or compassionate exemptions for quarantine detainees.[97]

75 The defendants emphasised that the incoherence they identify as fatal to the recognition of the posited duty is not just a direct clash or incompatibility between the

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92 Ibid 36 [161]. See also the discussion on conflicting claims: at 39-40 [181].

93 Ibid 41–2 [191]. The High Court refused an application for special leave to appeal from the decision of the New South Wales Court of Appeal: Transcript of Proceedings, *Dansar Pty Ltd v Byron Shire Council* [2015] HCATrans 93, 457.

94 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2); *Public Health and Wellbeing Act 2008* (Vic) s 200(6).

95 *Crimmins* (1999) 200 CLR 1, 101 [292].

96 *Sullivan* (2001) 207 CLR 562, 582 [60].

97 See *Hunter* (2014) 253 CLR 270, 281–2 [27]–[31], which also concerned an alleged common law duty found to be inconsistent with a statutory regime on the basis that the statute required the minimum interference with the liberty of a mentally ill person in circumstances where the posited duty would have required continued detention. See similarly, *Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management* (2012) 42 WAR 287, 308 [102]–[104].

posited duty and legislative powers. A more general incoherence emerges from the focus of the duty on a particular sector of the population and type of harm. When implementing hotel quarantine, the State would owe the posited duty of care in respect of the economic interests of Victorian retailers, when the primary purpose of hotel quarantine should be furthering public health goals for the benefit of all Victorians. In real terms, the posited duty could force a different balance between the purposes of quarantine and the health interests of detainees – including more harsh restrictions, cutting off all contact with detainees for the duration of the quarantine – which could have resulted in adverse health outcomes for detainees and disproportionate interference with their rights, potentially in breach of the Charter. In other words, if the posited duty were imposed on the defendants, it would inevitably affect the policy decisions of the actors exercising statutory power motivated to achieve public health objectives – decreasing the risk of COVID-19 transmission – leading to a different balance of interests than would otherwise result.

76 Second, the decisions taken by authorised officers to impose lockdown restrictions under s 200 of the *Public Health Act*, must be independent responses to increasing rates of community transmission of the virus. This independence will likely be compromised by the imposition of a private law duty, because it will elevate the economic interests of Victorian retailers over the lives or health of other sectors of the community, including vulnerable groups, and over the allocation of public resources. The recognition of the posited duty carries the danger of discouraging authorised officers from unfettered exercise of their emergency powers for fear of liability for economic loss,[98] even though that loss may arise from the negligent conduct of other public officials. This is because the lockdown restrictions are always a necessary requirement for the loss.

77 The defendants also submitted that the duty would be inconsistent with the review regime under the *Public Health Act*. It is through this opportunity for review, they contended, that the legislature provided for claims of compensation arising out of

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98 *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 739 (***'Bedfordshire County Council'***); *Crimmins* (1999) 200 CLR 1, 101 [292] (Hayne J, dissenting).

exercises of power under that Act. Section 204 provides that a person can seek compensation if they suffer loss as a result of a decision by the Chief Health Officer to give an authorisation to an authorised officer under Division 3, if the person considers that there were insufficient grounds for the giving of that authorisation. The person may apply to the Secretary for compensation.[99] The payment of any compensation is a matter required to be determined administratively by the Secretary, and is subject to review by the Victorian Civil and Administrative Tribunal.[100] This narrow and confined right to challenge these emergency decisions would be inconsistent with a free-standing capacity to sue for negligence for pure economic loss.

Plaintiff's response

78 The plaintiff submitted that these objections missed the plaintiff's real case, which is limited to a duty to take care in undertaking particular operational steps. The plaintiff reframed the defendants' submission as alleging that the plaintiff's case was something it had not pleaded, namely, 'that the defendants owed a duty to take reasonable care to prevent a second wave', and that this duty (that is not pleaded) would create two layers of incoherence in the law. The plaintiff's response was that it does not attack any decision made under the *Public Health Act*, either to impose detention in hotel quarantine, or to impose lockdown restrictions. Instead, the plaintiff impugns the defendants' conduct 'in the exercise of a non-statutory executive power' in the implementation of the decision to employ hotel quarantine as a public health response.[101] This duty is consonant with the objective of the emergency powers identified, and could only encourage the diligent exercise of those powers consistent with that objective.[102]

79 *Dansar*,[103] for example, involved a duty inconsistent with the unimpeded performance of a statutory function, whereas no statutory function or power is impugned in this

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99 *Public Health and Wellbeing Act 2008* (Vic) s 204(1). The 'Secretary' is defined as the Department Head (within the meaning of the *Public Administration Act 2004* (Vic)) of the Department of Health and Human Services.

100 *Public Health and Wellbeing Act 2008* (Vic) s 204(7).

101 See *Heyman* (1985) 157 CLR 424, 457-8; *Pyrenees* (1998) 192 CLR 330, 361 [77], albeit in the context of proximity as an element of duty of care.

102 See *Crimmins* (1999) 200 CLR 1, 16 [17], 19-20 [28]; 49-50 [127], 50-1 [132], 86 [234].

103 *Dansar* (2014) 89 NSWLR 1.

case. No distortion or conflicting duties arise and public health remains paramount. In other words, avoiding negligent implementation of hotel quarantine benefits the public and Victorian retailers. Their interests are aligned.

80 Similarly, there is no inconsistency between the posited duty, and the authorised officers' duty not to limit Charter rights, unless such limitations were reasonable, proportionate, and justifiable. The submission was that the duty only concerned supervision and oversight of infection prevention and control practices, auditing, training and control over quarantine staff – not imposing harsher burdens on detainees in hotel quarantine. There is no basis to find that other decision makers who are not party to these proceedings, and are not targeted by the posited duty, would exercise their statutory discretion any differently were the Ministers and Secretaries who are defendants subjected to the duty.

81 Pausing here, I am not persuaded that the plaintiff's submission will ultimately withstand critical analysis, but that is not the test.

82 The plaintiff claimed that the second species of incoherence identified by the defendants was a restatement of the first, adding nothing to the submission. It too should fail on the grounds that the posited duty in this case is not an exercise of an authorised officer's emergency powers under s 200, but an exercise of operational executive power in practically implementing this independent decision.

83 Finally, the plaintiff contended that s 204 of the *Public Health Act* concerns only compensation about authorisations given by the Chief Health Officer to authorised officers, which is not this claim. The Act does not disclose a legislative intent to limit compensation to this narrow instance.

The applicable principle

84 Liability in negligence may arise on the exercise of statutory powers.[104]

85 In *Caledonian Collieries Ltd v Speirs*[105] the plaintiff contended a railway operator owed

104 *Heyman* (1985) 157 CLR 424.
105 (1957) 97 CLR 202.

her a duty of care for her husband's death from a collision between his vehicle and a runaway train. The railway line was constructed under statutory authority. The High Court held that where statutory powers are conferred they must be exercised with reasonable care, so that if those who exercise them could by reasonable precaution have prevented an injury which has been occasioned, and was likely to be occasioned, by their exercise, damages for negligence may be recovered.[106] A duty of care was recognised to avoid personal injuries caused by an event that was under the control of the authority and from which the deceased could not adequately protect himself.[107]

86 In *Pyrenees Shire Council v Day* (***'Pyrenees'***) the relevant statute empowered the Council to take any measures for the prevention of fires.[108] For that purpose, the Council could direct an owner of land to alter a chimney so as to make it safe. A fire caused by a latent defect in a chimney destroyed premises and damaged an adjoining shop. The Council had two years earlier inspected the premises and identified the defect. The Council gave notice to the former tenants of the adjoining premises warning of the defect but took no further steps and did not exercise its statutory powers to enforce compliance with its notice. The Council was sued in negligence for damages by the tenant and the shop owner.

87 The High Court held the Council liable to pay damages to the tenants; by Brennan CJ on the basis that the Council was under a public law duty to exercise its statutory powers and by Gummow and Kirby JJ on the basis that the Council owed a tortious duty of care to exercise its powers to prevent a known risk of fire causing personal or property damage. Gummow J held that a public authority which enters upon the exercise of statutory powers with respect to a particular subject matter may place itself in a relationship to others which imports a common law duty to take care which is to be discharged by the continuation or additional exercise of those powers.

88 Noting that *Heyman* established that the application of the ordinary principles of negligence is not prevented because a public authority is the repository of a statutory

106 Ibid 220.
107 Ibid 221.
108 *Pyrenees* (1998) 192 CLR 330.

discretion,[109] Gummow J described the key aspects of the Council's duty to be its control of the risk including its knowledge, not shared by the property occupiers.[110]

89 Gummow J rejected notions of incoherence in a duty to take care, discharged by the continuation or additional exercise of statutory powers to take further fire prevention measures, as it would not have interfered with the budgetary priorities of the authority nor distorted its priorities in the discharge of its statutory functions. The imposition of liability in negligence was consistent with the obvious statutory purpose of the scheme which conferred the power, i.e. to prevent fire.[111]

90 In *Crimmins*, the Australian Stevedoring Industry Authority was required by statute to perform its functions with a view to securing the safe and efficient performance of stevedoring operations. One function was to ensure sufficient workers were available at each port. In performing that function it allocated casual workers.[112] One registered worker developed mesothelioma from exposure to asbestos in the course of employment. The High Court, in holding that the Authority owed Crimmins a duty of care, observed that the statute was not inconsistent with the recognition of such a duty as both the statute and the law of negligence were driven by a concern that reasonable care should be taken to avoid waterside workers being injured.

91 In each of *Pyrenees* and *Crimmins*, the defendant had, by the exercise of their functions, created or contributed to a danger to the safety of people or property they had been charged with protecting.

92 In *Brodie v Singleton Shire Council*, the Court said:

> The decisions of this Court in *Sutherland Shire Council v Heyman*, *Pyrenees Shire Council v Day*, *Romeo v Conservation Commission (NT)* and *Crimmins v Stevedoring Industry Finance Committee* are important for this litigation. Whatever may be the general significance today in tort law of the distinction between misfeasance and non-feasance, it has become more clearly understood that, on occasions, the powers vested by statute in a public authority may give it such a significant and special measure of control over the safety of the person or property of citizens as to impose upon the authority a duty of care. This may

109 Ibid 376 [124], citing *Heyman* (1985) 157 CLR 424.
110 *Pyrenees* (1998) 192 CLR 330, 389 [168].
111 Ibid 392 [179].
112 *Crimmins* (1999) 200 CLR 1, 22 [36].

> oblige the particular authority to exercise those powers to avert a danger to safety or to bring the danger to the knowledge of citizens otherwise at hazard from the danger. In this regard, the factor of control is of fundamental importance.[113]

93 The key feature of cases where a statutory authority is found to owe a private law duty is that the duty must have coherence with both the statutory purpose and the statutory function.

94 Coherence-based reasoning is a policy consideration by which the common law ensures that in its development different principles are consistent within the overall body of the common law and in its interaction with statute law.[114] In the former context, the principles applied in relation to the tort of negligence must be congruent with those applied in other areas of the civil law (most notably contract and trusts). In the latter context, the enquiry is broader than determining whether Parliament's intention was to exclude common law from the statute's field of operation, and may extend to whether it is appropriate for common law to enter a particular field. Would a novel principle substantially interfere with the purpose, policy and operation of statute law already in place?

95 In *Miller v Miller*, the plurality observed:

> Incongruity (whether described by that word or as 'contrariety' or 'lack of coherence') will not be demonstrated or denied by bare assertion of the answer. More analysis is required. If a statute has been contravened, careful attention must be paid to the purposes of that statute. It will be by reference to the relevant statute, and identification of its purposes, that any incongruity, contrariety or lack of coherence denying the existence of a duty of care will be found. That is the path that was taken in *Henwood*. It is the same as the path that has been taken in relation to illegality in contract and trusts. The same path should be taken in cases where the plaintiff sues the defendant for damages for the negligent infliction of injury suffered in the course of, or as a result of, the pursuit of a joint illegal enterprise.[115]

96 In *Sullivan v Moody* ('***Sullivan***'), the High Court found that investigators inquiring into allegations of sexual abuse against children, did not have a duty of care towards the

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113 (2001) 206 CLR 512, 558-9 [102] (citations omitted).

114 *Miller v Miller* (2011) 242 CLR 446, 454 [15]; *Sullivan* (2001) 207 CLR 562, 576 [42], 580-1; *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570, 602 [100]; *CAL No 14* (2009) 239 CLR 390, 406-10 [39]-[42].

115 (2011) 242 CLR 446, 473 [74].

suspects in those investigations.[116] The applicable statutory scheme (that 'formed the background to the activities')[117] provided that the interests of the children were paramount. This objective was inconsistent with the posited duty. When an investigator had a suspicion that a person (suspect) may have perpetrated abuse, the paramount duty to the child required pursuit of the investigation, but the posited duty to the suspect could require that a mere suspicion not be further investigated. The two duties are irreconcilable because of the inconsistency between the requirements to discharge the posited duty of care and the proper and effective discharge of the statutory and professional responsibilities of the repository of the statutory power, the foundation of which was identified in 'the nature of the functions being exercised' and the 'statutory obligation to treat the interests of the children as paramount'.[118]

97 As to the extent of inconsistency, the Court stated that inconsistency will be significant when features of the statutory power cannot be reconciled with features of the posited duty of care. Consequently, a duty of care will not exist when to find such a duty 'would so cut across other legal principles as to impair their proper application', or is incompatible with other duties owed by the respondent, creating inconsistent obligations.[119] That said, the High Court added that the fact that a repository of a statutory duty was constrained by the manner in which powers and discretions may be exercised does not of itself rule out the possibility that a duty of care is also owed, at least where those duties were not 'irreconcilable'. The law would not ordinarily subject a public authority to a duty to have regard to the interests of another class of persons where that would impose on the authority conflicting claims or obligations.[120]

98 The operation of the principle is seen in other cases.

99 In *MM Constructions (Aust) Pty Ltd v Port Stephens Council (No 7)*,[121] Allsop P considered whether a Council owed a duty to avoid foreseeable economic loss to

116 (2001) 207 CLR 562.
117 Ibid 582 [62].
118 Ibid.
119 Ibid 580-2 [53] – [60].
120 Ibid 582 [60].
121 [2012] NSWCA 417.

applicants when considering applications for development approval. In concluding that the asserted duty was not to be imposed, the President found this duty would be inconsistent with the balancing exercise required of the Council under the relevant legislation for approving development proposals. The statutory discretion was exercised in the 'milieu' of a broad range of public and private interests set out in the Act. Recognising a private right of action through the posited duty of care would tend to skew the balance required by the Act between such interests for the proper exercise of the statutory power for public benefit. In this way incoherence with administrative law was demonstrated.[122]

100 Further, if the applicant's economic interests were to be protected, why not anyone whose economic interests may be affected? The statutory balance, intended to be reached by the bona fide decisions of the Council, may be affected by the consideration of private litigation by those who wish to threaten it. Allsop P concluded that these considerations pointed to a degree of lack of conformance, indeed potential conflict, between the public duty of the Council in making the relevant decision, and considering the application therefor, and a private duty to act with reasonable care to avoid causing economic loss to the applicant.[123] Indeterminacy is considered later in these reasons.

101 In *Precision Products (NSW) Pty Ltd v Hawkesbury City Council*,[124] the Court considered whether the Council owed a duty of care to avoid economic loss, to those issued with clean-up notices after a site-inspection. Allsop P found that the duty would 'infuse into the statutory process considerations that may have a tendency to discourage the due performance of the principal statutory duty. It might well lead to a defensive or overly cautious approach or a hesitancy in ensuring that all steps are taken to protect the environment.'[125]

102 In *X v South Australia (No 3)*,[126] the issue was whether the Parole Board, when it

122 Ibid [98].
123 Ibid.
124 (2008) 74 NSWLR 102.
125 Ibid 127 [112].
126 (2007) 97 SASR 180 ('***X***').

released a convicted paedophile who then sexually abused the appellant, owed a duty of care to the appellant. An important consideration was the consistency or otherwise of the asserted duty of care with the terms, scope and purpose of the *Criminal Law (Sentencing) Act 1988* (SA); the coherence between the law of tort and the statutory scheme. Debelle J (with the other members of the Full Court in agreement) identified a number of factors that may be relevant to the resolution of the question whether there is consistency between a common law duty of care and the scope and purpose of a statute. They included the fact that a common law duty of care may:

(a) cause decisions to be made in a 'detrimentally defensive frame of mind';

(b) 'have a tendency to discourage the due performance of statutory duties';

(c) distort the performance of functions by a statutory body to attempt to avoid private actions,

and indeterminacy of liability as identified in *Sullivan*[127] may be a further consequence.[128]

103 The Court found that if subject to the posited duty of care 'there is a real likelihood [the Parole Board] will act defensively and be prone to cancel the release on licence, even for relatively minor infringements of conditions which have not caused harm … Shortly put, the imposition of a duty of care would discourage the proper performance by the Board of the statutory functions committed to it.'[129]

104 In *Sharma v Minister for the Environment*,[130] Bromberg J observed that the—

> search for inconsistency or incoherence ought not be overly compartmentalised. In some cases it will be revealed by focusing on the process required to perform the statutory task. In others the nature of the statutory power itself may reveal an inconsistency. In each case, however, the statutory purpose will be relevant. The characterisation process is not technical or formalistic, nor is it confined to legal effects. The presence of incoherence may be revealed by assessing the practical application and effect of the statutory power in question. In that respect, it seems to me that, ordinarily, whether there

127 *Sullivan* (2001) 207 CLR 562.
128 *X* (2007) 97 SASR 180, 227 [178].
129 Ibid 228 [180].
130 (2021) 391 ALR 1 (currently under appeal).

> is a 'a real likelihood' … of incoherence is an appropriate question when the performance of a statutory duty is being assessed.[131]

105 In this proceeding, the defendants contended that incoherence implicated different decisions and decision makers. First, the defendants maintained that the different exercises of statutory functions under the *Public Health Act* would be distorted or skewed. Second, they contended that the posited duty must distort or skew the exercise of non-statutory executive power by the Ministers and departmental Secretaries in the operation of hotel quarantine.

106 The posited duty is owed only by the Ministers and Secretaries responsible for implementing hotel quarantine. It is not imposed on the Chief Health Officer who issued detention notices placing returning travellers in hotel quarantine. It is also not to be imposed on the authorised officers who made the independent decision to impose stage 3 or 4 lockdown restrictions ('**public health decision makers**'). The plaintiff does not challenge such decisions by this claim. Thus, the posited duty is not imposed on those who are exercising independent, multifactorial, policy-based discretions under the *Public Health Act.*

107 That said, the impact of the posited duty on other decision makers is not irrelevant.

108 It is evident that the sixth salient feature in *Crimmins*, is broad enough to encompass all policy-based considerations in imposing a duty – even if the duty is imposed on a different functionary to the one making the decision at risk of distortion. Evidence may demonstrate that the responses of the public health decision makers are interrelated or even coordinated with those of the defendants. However, it is necessary to focus on the primary question, which is the effect of the posited duty on the decisions of the defendants.

109 I pause to observe, as already noted, that the plaintiff's use of the adjective 'effective' is problematical. It does not identify the scope of the dispute to be resolved at trial and it seeks to identify the duty of care by reference to an ill-defined standard to be met. As I have noted in the context of COVID-19, effective is a highly contentious standard.

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131 Ibid 86 [356].

I do not understand what it means. This ambiguity contributes unnecessary complexity to consideration of incoherence.

110 A very high degree of 'effectiveness' (to use the plaintiff's concept) in hotel quarantine is needed to avoid reliance on the suite of responses available to public health decision makers. Assume there are 1000 detainees per week in quarantine. If transmission of the virus in quarantine is not completely prevented, the risk of imposition of lockdown measures exists, because a public health response beyond quarantine will be needed to minimise a transmission event starting an outbreak, leading to widespread community exposure. The plaintiff contended that the level of this risk was directly relevant to the posited duty of care. If quarantine is 99% effective, a public health response will follow in respect of 10 transmission incidents per week. At 99.9% effectiveness, there is only one transmission event per week.

111 The posited duty of taking care to avoid inflicting economic loss on Victorian retailers would dictate achieving the greatest effectiveness possible in quarantine. No breach of that duty occurs if there are no transmission events (the Howard Springs model). However, the policy decision to use a less effective form of quarantine (hotel quarantine) is not in contention.

112 The plaintiff's case assumes some transmission of COVID-19 in quarantine leading to a community outbreak that must trigger a public health response, which may include lockdown. Victorian retailers are unaffected by quarantine measures in themselves. Economic loss is presumed to be inflicted by the later response to a community outbreak through the exercise of the independent statutory powers under the *Public Health Act* to lockdown economic activity.

113 The Ministers and Secretaries administer hotel quarantine to achieve the objectives of the *Public Health Act*. The posited duty would require the Ministers and Secretaries to strive towards perfection or maximum effectiveness, in order to avoid the need for responses by other public health decision makers, with adverse consequences, notably excessive calls, beyond capacity, on contact tracing and on hospitals and the health

system more generally or restrictions on social interaction. For Victorian retailers, in particular, lockdown of commercial activity would be an adverse consequence, inconsistent with the posited duty, that may be thought appropriate for ensuring these other measures achieved public health objectives. Other legitimate responses to an outbreak available to public health decision makers are relevant considerations in the exercise of the non-statutory executive power to operate hotel quarantine.

114 The defendants submitted that it would be artificial to disregard the existence of those statutory powers when imposing the posited duty on the Ministers and Secretaries responsible for implementing hotel quarantine. The practical implementation decisions function against the 'milieu' of these statutory powers, and are taken in furtherance of the objectives of the legislation. The defendants submitted the indirect or discouraging effect that the posited duty may have on operational decisions, that must follow on from both unchallengeable policy decisions and the independent exercise of other statutory power by public health decision makers, demonstrated certain inconsistency, citing the observations of Lord Browne-Wilkinson in *X (Minors) v Bedfordshire County Council,* who said:

> However the question whether there is such a common law duty and if so its ambit, must be profoundly influenced by the statutory framework within which the acts complained of were done. The position is directly analogous to that in which a tortious duty of care owed by A to C can arise out of the performance by A of a contract between A and B. In *Henderson v. Merrett Syndicates Ltd* [1995) 2 A.C. 145 your Lordships held that A (the managing agent) who had contracted with B (the members' agent) to render certain services for C (the Names) came under a duty of care to C in the performance of those services. It is clear that any tortious duty of care owed to C in those circumstances could not be inconsistent with the duty owed in contract by A to B. Similarly, in my judgment a common law duty of care cannot be imposed on a statutory duty if the observance of such common law duty of care would be inconsistent with, or have a tendency to discourage, the due performance by the local authority of its statutory duties.[132]

115 In *Crimmins,* Hayne J (in dissent) said:

> Put at its most general and abstract level, the fundamental reason for not imposing a duty in negligence in relation to the quasi-legislative functions of a public body is that the function is one that must have a public rather than a private or individual focus. To impose a private law duty will (or at least will

132 *Bedfordshire County Council* [1995] 2 AC 633, 739 (emphasis added).

> often) distort that focus. This kind of distinction might be said to find reflection in the dichotomy that has been drawn between the operational and the policy decisions or functions of public bodies. And a quasi-legislative function can be seen as lying at or near the centre of policy functions if policy and operational functions are to be distinguished. But as more recent authority suggests, that distinction may not always be useful and I do not need to apply it in deciding the present matter.
>
> I have referred to a 'distortion' of what should be the public focus of the performance of a quasi-legislative function. I turn to explain what I mean and do so by reference to the position if, contrary to the position in this case, the Authority had made an order under s 18.
>
> An order, when made, had the force of law. An order could not lawfully be directed to a particular person or to a particular stevedoring operation; it had to have more general application. No doubt the class of persons affected by an order could be identified and in many (perhaps all) cases the class of persons for whose benefit the order was made could also be determined. It might be said that if those affected by the order and those for whose benefit the order is made can be identified, imposing a duty on a public authority to take reasonable care not to injure those persons would not distort the proper performance of that quasi-legislative function. I do not accept that this is so. Important as the interests of those two classes may be in deciding what order should be made, there will often be other important considerations that affect that question. To give only one example, the Authority may well have had to consider maintaining industrial peace as part of its obligation of securing expeditious, safe and efficient performance of stevedoring operations (s 8). Thus, questions of industrial relations may well have loomed very large in the waterside industry of the 1960s. How would those questions find reflection in the decision to make an order if regard is had only to the interests of those for whose benefit the order is made and those who are affected by it?
>
> Imposing a common law duty of care on the Authority would have affected the way in which it went about its task. It would have shifted the Authority's attention from what the general good of the industry required (which, of course, included but was not limited to workplace safety) to what should be done to avoid the Authority being held responsible for particular breaches of workplace safety by those having primary responsibility for the task — the employers of waterside labour. Whatever may have been the social benefits of having the Authority fulfil that kind of role (and they may now be thought to have been large) it is essential not to lose sight of the fact that this is not the role that the Parliament gave it. That being so, the courts should not, indeed cannot, do so.[133]

116 In the present claim, one example of an important consideration of the kind to which Hayne J referred, may be the balance between the strictures of quarantine required in a commercial hotel venue, at least in part an operational matter for the Ministers and Secretaries, and the rights and interests of detainees in quarantine, a relevant

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133 *Crimmins* (1999) 200 CLR 1, 101-2 [292]-[295] (citations omitted).

consideration in the exercise of the *Public Health Act* powers.

117 Whether this balance will necessarily be distorted, in the context of the policy choice of hotel quarantine and the standard of care to be met should the posited duty be recognised, in the complex circumstances of this proceeding, is fact sensitive. In other words, whether the attention of the Ministers and Secretaries would shift away from the legitimate interests of the detainees towards the economic interests of Victorian retailers if subjected to the posited duty, will be informed by the evidence led at trial.

118 While the defendants framed the incoherence question by analysis of the inconsistency or conflict facing different decision makers in a way that appears to be capable of resolution at a high level, I was not persuaded that the issue of incoherence is properly divorced from factual inquiry in this case.

119 The plaintiff frequently pressed, in response to contentions put at a high level by the defendants, that it is important to focus on the precise ambit of the posited duty in this case. The plaintiff submitted that the duty as currently narrowly formulated would encourage greater rigour in protecting public health, and would not skew the decision as to the manner of imposing hotel quarantine. The plaintiff submitted that public health interests of good governance for the interests of all Victorians, sat comfortably with the economic interests of Victorian retailers in the context of the operational conduct of hotel quarantine by the Ministers and Secretaries. In other words, the interests of the public at large aligned with the interests of the plaintiff and group members in this regard – they both seek 'effective' measures to prevent an outbreak from hotel quarantine. Whether this submission ultimately prevails does seem to involve factual issues around the decision-making processes.

120 The analysis of the exercise of a non-statutory executive power for the purpose of identifying incoherence with the posited duty of care requires evidence, because it is not simply a comparison of the approach of a single decision maker exercising powers in the context of the posited duty of care. The arguments presently appear to be discrete as if the decision-making processes are in 'silos' with the 'defendant'

constituted by a number of independent silos. The public health decision makers exercise statutory authority, also in pursuance of the executive function of the State. The question cannot be resolved by an analysis of the statutory purposes and context, because different statutory powers are exercised by different decision makers who all fall under the auspices of the State. While these decision-making functions may be interrelated, the question is not primarily whether the public health decision makers would exercise statutory power differently but whether the relevant defendants would exercise non-statutory executive power differently, because of the posited duty. The posited duty to the extent that it may affect a different exercise of either statutory or non-statutory powers may result in incoherence in the law in the sense discussed.

121 Just as I considered that the policy/operational dichotomy would be best evaluated by reference to evidence, I have come to a like conclusion on the question of coherence. The defendants presented powerful arguments that the posited duty if imposed would produce incoherence in the law. However, the assumptions underlying the implications of imposing the posited duty on the conduct of decision makers, in the counterfactual of prudent discharge of that duty, cannot presently be satisfactorily resolved absent a factual inquiry. There is a level at which these two salient features interact.

122 I cannot say, or presume, that the exercise of these powers is not interrelated in a broader sense that would be revealed by close examination of the decision-making processes at a trial. The decisions made by the Ministers and Secretaries about the operation of quarantine may change the basis on which public health responses are determined, particularly a decision to lockdown economic activity, or the resourcing of contact tracing, or of financial assistance packages to be offered to those to whom the posited duty of care is owed. Equally, an appreciation of the likely exercise of the public health statutory powers may influence the decisions made about the operation of quarantine. Should the resultant public health responses differ, which is a question for evidence at trial, depending on the decisions made about the practical operation

of quarantine, in the sense of the desired or expected effectiveness level, incoherence in the sense identified in *Dansar* may be inevitable.

123 To meet the proposition that the posited duty may not affect decisions by authorised officers under the *Public Health Act* to impose lockdown restrictions, or be indirectly relevant to the primary issue of the conduct of those in operational control of quarantine, the defendants contended the risk of liability to the State from the negligent implementation of hotel quarantine, combined with the risk following on the consequent lockdown, would discourage public health decision makers from imposing lockdown restrictions. If the authorised officer owed a private law duty to avoid economic loss to Victorian retailers, the conflict would distort the decision to impose lockdown and be a clear case of incoherence. However, the defendants' submission misrepresented the presently pleaded case, which imposes the duty on the Ministers and Secretaries and not on the authorised officer under the *Public Health Act*.

124 Even so, it is not so obvious that the posited duty would necessarily affect either a *Public Health Act* decision or a quarantine administration decision, and dispose the decision maker to 'act defensively', as would warrant summary dismissal. 'Discouragement' of a decision maker would be a factual question. Whether there is 'a real likelihood' of incoherence in the performance of the quarantine administration duties will more readily be apparent at a trial in which the decision-making processes adopted by the Ministers and Secretaries will be the central consideration.

125 The final aspect of 'indirect' incoherence is the concern the posited duty may skew the balancing exercise by the Chief Health Officer in determining the contours of the hotel quarantine/returning traveller quarantine directive. Currently, the decision requires a proportionate approach, based on the early precautionary principle, and that has due regard to the Charter rights of detained travellers. Should the Chief Health Officer fear that the State may face liability because of the impact of outbreaks from hotel quarantine on the economic interests of Victorian retailers, this may skew the balance in favour of harsher restrictions with less regard to the rights of individual returning travellers and more severe conditions.

126 Once again, the pleaded content of the posited duty is confined to taking reasonable care in the implementation of 'effective' infection prevention and control measures. The uncertainty in the content of this pleaded duty may be avoided by a proper pleading. It is not contended that the duty as currently formulated may result in a breach of Charter rights for returning travellers. It would not require eating frozen meals for 14 days while living in a locked room. Apparently it would require audits, supervision and training about infection control measures, without articulating how the posited duty with that content might work. At this stage again, it is not yet evident whether, and to what extent, imposing the posited duty is going to have a factual impact on the decision to impose detention or whether this consideration is warranted as a matter of policy, given the remoteness of this decision from the impugned risk of economic loss. It is not clear there is a 'real risk' of incoherence, such as would require the summary dismissal of the claim.

127 It is not appropriate to summarily dismiss the claim, because, without the detail of evidence, it is inappropriate to attempt as a theoretical exercise to reconcile the posited duty either with the exercise of non-statutory executive power by the named defendants (other than the first defendant) or with the exercise of statutory power by other decision makers. The observations of Kirby P in *Wickstead v Browne* are apposite:

> Common experience teaches that it is usually more efficient and just to consider the viability of a cause of action when the facts said to support it are adduced and the suggested action can be judged with a full understanding of all relevant evidence. Testimony gives colour and content to the application and development of legal principle. That is why leave is usually required for an appeal from interlocutory orders. Appellate courts, including this court, will usually require evidence to be adduced and a trial concluded before considering the application of the law to that evidence. Out of the detail of the evidence ultimately proved, affecting the relationship of the respondent and the appellant, may arise a finding of a duty of care which the common law of negligence would uphold.[134]

128 In *Victoria v Richards*, the primary judge refused to strike out a cause of action alleging that police officers deploying capsicum spray owed a duty of care to a bystander.[135]

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134 (1992) 30 NSWLR 1, 5-6 ('***Wickstead***'). Affirmed by the High Court of Australia in *Trkulja* (2018) 263 CLR 149, 169-70 [55].

135 (2010) 27 VR 343, 345 ('***Richards***').

The Court of Appeal, dismissing the appeal, followed *Wickstead v Browne*,[136] considering that the pleading presented the plainest case for deferring any answer to the question of whether the appellants owed the plaintiff the duty of care which she alleged until after the facts of the matter had been established at trial.[137]

129 Alternatively, if I am wrong in my assessment of the prospect of incoherence, in exercise of the discretion under s 64 of the *Civil Procedure Act* and bearing Part 2.1 of the Act in mind, I consider the dispute to be of such a nature that only a full hearing on the merits is appropriate for its resolution. If there is not to be success for the plaintiff in the proceeding, it is in the interests of justice that such incoherence as the defendants identify be exposed on the evidence.

130 Finally I do not find that the entitlement to compensation contemplated in s 204 the *Public Health Act* is incoherent with a common law duty to avoid negligently causing retailers economic loss through inadequate infection control measures in hotel quarantine.

131 Section 204(1) provides that a 'person who suffers loss as a result of a decision by the Chief Health Officer to given an authorisation to an authorised officer under this Division may apply to the Secretary for compensation if the person considers that there were insufficient grounds for giving of that authorisation'. There is a conspicuous absence of liability as a result of giving a direction relating to or exercising emergency powers. Compensation may be sought in quite limited circumstances. It is payable for loss suffered as a result of an inadequate basis for an authorisation by the Chief Health Officer to an authorised officer to exercise emergency powers.

132 No legislative intent is evident to deny a plaintiff asserting the posited duty against the Ministers and Secretaries and seeking compensation for its breach. Just as liability in negligence may arise on the exercise of statutory power, it may also arise on the exercise of non-statutory executive power. The ambit of the section is limited and does

136 (1992) 30 NSWLR 1
137 *Richards* (2010) 27 VR 343, 345, 351-2.

not go further to speak to the duty of the defendants in considering the practical matters of hotel quarantine orders. The legislature does not appear to be attempting to 'cover the field' of liability for those types of matters.

Economic loss and indeterminacy

Parties' submissions

133 The defendants submitted that courts are particularly cautious in recognising a novel duty to avoid causing economic loss for which liability is indeterminate.[138] Damages cannot be recovered for pure economic loss if all that is shown is that the defendant's negligence was a cause of the loss which was reasonably foreseeable,[139] because this would risk indeterminate liability.[140] '[E]conomic loss, unlike physical damage, is capable of 'rippling', conceivably indefinitely, from the individuals immediately affected to others'.[141] So as a 'general rule, no duty will be owed to those who suffer loss as part of a ripple effect.'[142]

134 The defendants contended that the scale of the affected group members in this case, an 'unknowable' quantum of damages, and no way to limit liability other than foreseeability, will necessarily mean indeterminate liability. The group members are at least two or three steps removed from the loss-causing conduct, and were affected only by the intervening step of the State's implementation of lock down restrictions. Accepting the posited duty of care, there is no principled basis to deny the existence of the duty of care to avoid economic loss owed to the endless 'ripples' of persons beyond Victorian retailers, who assert economic loss. For example, it may extend to owner operators and employees of the Victorian businesses represented in this proceeding. It could also extend to businesses who supplied group members,

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138 *Roo Roofing* [2019] VSC 331, [448], referring to *Perre* (1999) 198 CLR 180; *Woolcock* (2004) 216 CLR 515, 529–30 [21]–[22], 537–8 [46]–[47].

139 *Woolcock* (2004) 216 CLR 515, 529–30 [21]. See also, *Regent Holdings Pty Ltd v Victoria* [2013] VSC 601, [219]–[221]; *Block* (2019) 57 VR 459, 485 [92].

140 It would expose defendants to potential liability 'in an indeterminate amount for an indeterminate time to an indeterminate class': *Bryan v Maloney* (1995) 182 CLR 609, 632, referring to the well-known dictum of Chief Judge Cardozo in *Ultramares Corporation v Touche*, 255 NY 170, 179 (1931).

141 *Waller v James* (2006) 226 CLR 136, 149–50 [37].

142 *Perre* (1999) 198 CLR 180, 222–3 [112]. See also, *Woolcock* (2004) 216 CLR 515, 537 [47].

landlords who lost rent, those affected generally by economic downturn.

135 The pleaded causal chain involves numerous links and actors, with the ultimate cause of the loss flowing directly from the conduct of parties other than the defendants. Accordingly, the plaintiff and group members cannot be the 'first line victims' contemplated in *Perre v Apand Pty Ltd* (***Perre***').[143]

136 The defendants used the example of a negligent driver who crashes into a pedestrian that owns a business with employees. The injuries forced a shutdown of the business causing economic loss to her and her former employees. The employees' loss would be foreseeable but would be too remote to recover. Recognising a duty of care to avoid the employees' economic loss would also fail to prevent the employees' landlord, or suppliers, from claiming for knock-on effects. These are all foreseeable 'dominos' that may fall. The court will not recognise a duty in that case for other policy reasons too, including that there may have been various measures these parties could have taken to guard against the loss.

137 The plaintiff submitted that this analysis is incorrect. The first line of victims are those who suffer pure economic loss as a direct result of negligence, which is the plaintiff and group members. There is a principled basis to deny the duty beyond this 'first line' and prevent a ripple effect, through the indeterminacy 'control factor'.[144] This is a policy reason or criterion the court uses to draw a line and define the class of person to whom the duty is owed.[145] It could be foreseeability and responsibility, for example.[146] The number or size of claims do not raise any issue of indeterminacy, as long as the class is ascertainable (the members are readily identifiable), meaning the defendant knew or ought to have known of the number of claimants and the nature of their claims.[147] The plaintiff contended the relevant class in this case is readily ascertainable.

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143 (1999) 198 CLR 180.

144 *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (2003) Aust Torts Reports ¶81-692, 63,668 [856] ('***Johnson Tiles***').

145 *Perre* (1999) 198 CLR 180, 305 [343].

146 Ibid.

147 Ibid 221-2, [108]-[109].

138 The plaintiff noted generally that where a novel duty is alleged in class action proceedings, the court should be slow to terminate the proceeding on a summary basis.[148]

The applicable principle

139 In *Perre*, the High Court determined the circumstances in which a defendant owed a duty of care to avoid economic loss to the plaintiff. The test is 'whether the defendants, in pursuing the course of conduct that caused injury to the plaintiff or failing to pursue a course of conduct which would have prevented injury to the plaintiff, should have had the interest or interests of the plaintiff in contemplation before he or she pursued or failed to pursue that course of conduct.'[149]

140 On the facts of that case, indeterminate liability was a particular concern. Economic loss was consequent on the operation of regulations in Western Australia that prohibited the importation of potatoes into that state, which were grown on land known to be affected by bacterial wilt, or on land within a certain distance of affected land. The respondent negligently introduced bacterial wilt onto farm land by selling contaminated seeds to that farmer. The appellants, who farmed within the relevant distance from the affected farm, suffered economic loss by operation of the Western Australian regulation. The wilt did not spread to their farm.[150] The majority of the High Court nevertheless found the respondent owed a duty of care to prevent the class of affected farmers from suffering economic loss as a result of the operation of the regulations, triggered by their negligent conduct.[151]

141 The High Court considered that concerns about indeterminacy arise most frequently when the defendant cannot determine how many claims might be brought against it or what the general nature of them might be.[152] For present purposes, I accept the plaintiff's contention that if it can be shown that, should infection control measures

148 *Agar v Hyde* (2000) 201 CLR 552, 577-8 [64]; *New South Wales v Spearpoint* [2009] NSWCA 233, [21]–[26]; *Apache Energy Ltd v Alcoa of Australia Ltd (No 2)* (2013) 45 WAR 379, 420 [205]–[206], 427 [261]–[262].
149 *Perre* (1999) 198 CLR 180, 218 [100] (citations and emphasis omitted).
150 Ibid 191-2 [2]-[3], 256-7 [211].
151 Ibid 181.
152 Ibid 220-1 [106].

fail in quarantine, causing transmission events and outbreaks, lockdown restrictions impacting commercial retail activity and causing economic loss were foreseeable by the defendants as a consequence of the spread of the virus outside hotel quarantine.

142 The High Court noted that one feature that is more likely to be present in economic loss cases than physical damage cases is the 'ripple effect' from careless conduct by which economic loss 'ripples' down a chain of parties; for example, the loss of profits suffered by the plaintiff may in turn cause loss of profits to the plaintiff's supplier and in turn to that supplier's supplier, etc.[153] McHugh J said:

> Liability is indeterminate only when it cannot be realistically calculated. If both the likely number of claims and the nature of them can be reasonably calculated, it cannot be said that imposing a duty on the defendant will render that person liable 'in an indeterminate amount for an indeterminate time to an indeterminate class.'
>
> …
>
> Indeterminacy depends upon what the defendant knew or ought to have known of the number of claimants and the nature of their likely claims, not the number or size of those claims.
>
> …
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> The problem of the 'ripple effect' means that the courts must be careful in using constructive knowledge to extend the class to whom a duty is owed. It would not be wise, or perhaps even possible, to set out exhaustively when it would be permissible to rely on constructive knowledge. Speaking generally, however, it may be necessary to draw a distinction between using constructive knowledge to identify those within a class who are primarily affected by the defendant's negligence (the first line victims) and using constructive knowledge to identify those who have suffered economic loss purely as the result of economic loss to the first line victims. That is, as a general rule, no duty will be owed to those who suffer loss as part of a ripple effect. Ordinarily, it will be an artificial exercise to conclude that, before acting or failing to act, the defendant should have contemplated the interests of those persons who suffer loss because of the ripple effect of economic loss on the first line victims. While the defendant might reasonably foresee that the first line victims might have contractual and similar relationships with others, it would usually be stretching the concept of determinacy to hold that the defendant could have realistically calculated its liability to second line victims.[154]

143 The defendants cited *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* ('***Johnson Tiles***'),[155]

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153 Ibid.

154 Ibid 221-2 [107]-[108], 222-3 [112].

155 (2003) Aust Torts Reports ¶81-692.

as further illustrating the notion of 'front line' and 'ripple' victims of a want of care. The primary question was whether Esso Australia Pty Ltd, a gas supplier, owed a duty of care to Johnson Tiles Pty Ltd for a gas supply interruption. Johnson's employees also claimed for the economic loss they suffered in being stood down as a result of the interruption. Gillard J held that a continuing supply relationship to a customer demonstrated proximity between Esso and Johnson.[156] However, the employees were one step removed from that relationship and their loss came about because their employer was deprived of gas.[157] The employees were not 'first line victims' being one removed from the customers who directly suffered injury. Gillard J noted the law's aversion to compensating for pure economic loss those who are once removed from the direct victim of the negligent conduct.[158]

144 The point of distinction between the parties was whether the plaintiff and group members are first line victims. The defendants submitted they are akin to the employees in counsel's car accident analogy or in the *Johnson Tiles* sense. The person suffering loss was the employer who was injured in the car accident or whose kiln suddenly lost gas supply, not the employee who suffered pure economic loss as a result of the immediate loss suffered by the employer. The plaintiff and group members, the defendants say, only suffered loss as a result of the loss suffered by the community at large, which was subjected to the spread of the virus through the alleged negligent failures in hotel quarantine. The impugned conduct (the negligent failure to implement effective infection control measures) is a number of steps removed from the ultimate harm suffered by the plaintiff.

145 The plaintiff contended that *Perre* requires the 'first line' to be those who directly suffered economic harm as a result of the breach of the posited duty, and excludes those who suffered consequential economic harm as a result of the direct loss suffered by a first line victim. In its claim, the chain of causation from the posited negligent conduct to the plaintiff's loss did not involve ripples outward from any other parties'

156 Ibid 63,667 [846].
157 Ibid 63,667 [847].
158 Ibid 63,667 [848].

physical or economic loss. The proximate cause of the economic loss of the plaintiff and group members was the lockdown restrictions. The defendants' contention was misconceived in characterising spread of the virus to the community as causing a loss which in turn caused the plaintiff loss. The plaintiff's loss was consequent on the response to an outbreak and not consequent on any other loss. The lock down restrictions were imposed for public health reasons to mitigate the further spread of the virus.

146 I prefer the plaintiff's argument.

147 There may be scope to debate the distinction between the definitive prohibition in the Western Australian regulations (and foreseeability of the consequences for the appellant farmers) and the independent statutory discretion exercised under the *Public Health Act* to impose lockdown restrictions. However, for purposes of identifying front line victims of economic loss, the plaintiff and group members are sufficiently analogous to the farmer such that the concern of indeterminacy does not render as fanciful the recognition of the duty of care. It is arguable that the plaintiff and group members did not suffer economic loss from ripples caused by a first line loss and that the likely number of claims and the nature of them can be reasonably calculated, albeit that a substantial and complex calculation is required. The limiting or constraining factor that prevents indeterminate liability is conceptually different from the complexity of that calculation.

148 The defendants also argued that a factor suggesting an indeterminate class of group members is that the defendants might have foreseen other groups who would suffer loss as a result of breach of the posited duty. This would include any other group who lost social interaction by the imposition of lockdown restrictions, those who suffered generally from the depressed economy or supply chain restrictions, those who could not fly around or out of the country. Recognition of the posited duty of care may lead to a duty owed to an indeterminate class of people able to identify in some way harm flowing from the lockdown restrictions.

149 The plaintiff countered that it was not its responsibility to exhaustively define the duties arising from the recognition of the posited duty of care or to describe the outer limits of the duty and whether it may extend to such people. However, in my view, if there is no principled basis for distinguishing the losses suffered by the plaintiff and group members from the losses falling into these other unknown categories, then the duty ought not be recognised. That said, the defendants' argument, if at all meritorious, is insufficiently compelling to permit the conclusion that the posited duty is fanciful by reference to the indeterminacy control factor. It is vague and undeveloped, illustrated either by 'ripple' losses or non-economic loss and in either case there is, for the reasons identified in *Perre*, a principled basis to exclude such losses from consideration as quite distinct from the economic loss suffered by Victorian retailers. Attempting to bring such conceptually different, and remote, losses into the calculation is simply inappropriate.

150 If I am wrong about that, it is not possible to ascertain without any recourse to evidence what loss these other affected groups may have suffered, whether the type of harm is materially different, or whether there is any other factor or basis to distinguish those categories of loss from the present case, such as would present an insurmountable indeterminacy problem for the plaintiff on this application.

151 For present purposes, I am not persuaded that the defendants could not determine in advance that the group members were an identifiable class of persons who would suffer a determinable economic loss as a result of an outbreak into the community, caused by a transmission event from hotel quarantine, as a result of negligent infection control practices for so long as such health controls were necessary.

Causation

152 The defendants' primary objection is that there is a causal disconnect between the alleged negligent conduct and the harm in this case, which is a reason to conclude that the claim has no real prospect of success. The defendants further objected to the manner in which causation is pleaded in the statement of claim, taking issue with each link in the posited causal chain.

Causal disconnect

Parties' submissions

153 The defendants submitted that the proximate cause of the plaintiff's loss was the imposition of stage 3 and 4 restrictions. These restrictions could not be said to be automatically 'caused' by the 'second wave'. They were the result of the independent exercise of statutory powers under the *Public Health Act*, made in the public interest by non-parties to these proceedings.[159]

154 The restrictions were required to 'fall within the range of reasonably available options' to protect public health.[160] The emergency powers are broadly described in order to be responsive to a variety of unpredictable circumstances.[161] The restrictions were therefore not 'inevitable'. They were informed by various factors including allocation of resources and the principle of proportionality.[162] They could have been more or less severe.

155 There are accordingly 'too many intervening levels of decision making' between the impugned conduct and the subsequent loss for the court to find an unbroken causal chain. The plaintiff's pleaded claim constitutes a de facto attack on these independent decisions. The 'but for' causation test is inadequate in these circumstances.

156 The defendants contended further that the plaintiff's claim fails to meet the causation requirements under s 51 of the *Wrongs Act 1958* (Vic) ('***Wrongs Act***'), which requires:

(a) Factual causation: the negligent conduct was a necessary condition for the economic loss,[163] which captures the common law 'but for' test; [164] and

(b) Normative causation/scope of liability: that it is appropriate for the scope of the defendants' liability to extend to the harm so caused. This involves an

159 *Loielo* (2020) 63 VR 1, 45-6 [149]–[152].
160 Ibid 65 [241].
161 *Palmer* (2021) 388 ALR 180, 218 [163].
162 See *Public Health and Wellbeing Act 2008* (Vic) ss 1, 4, 5-10, 200.
163 See *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420, 442 [53].
164 *Strong v Woolworths Ltd* (2012) 246 CLR 182, 190–1 [18] ('***Strong***'); *Wallace v Kam* (2013) 250 CLR 375, 383 [16] ('***Wallace***'); *Badenach v Calvert* (2016) 257 CLR 440, 454 [36]; *Davies v Nilsen* (2017) 81 MVR 75, 89 [53]; *Riverman Orchards Pty Ltd v Hayden* [2017] VSC 379, [219]; *Kambouris v Tahmazis (No 2)* [2015] VSC 174, [70]–[76], [89]–[98].

'evaluative judgment' by reference to the purpose and policy of the relevant part of the law.[165]

157 The defendants submitted the plaintiff cannot show factual causation because the only necessary cause of the economic loss was an independent exercise of discretion that could have been made at any time 'in an infinite variety of forms', regardless of the second wave that actually occurred. The pleaded case does not recognise a direct duty of care owed by the defendants to those who contracted COVID-19 in the second wave as a result of the alleged negligent breach of that duty, linked to the economic loss claimed by the plaintiff and group members. It cannot do so because it would encounter insurmountable problems of remoteness of economic loss. It seeks to skip over the difficulties in doing so, by positing a direct duty to retailers. There is no general direct duty to Victorians to prevent them from contracting COVID-19 and the link to the economic loss from any such duty, would be a 'ripple'. The problem cannot be solved by side-stepping this link in the causal chain.

158 Section 51(2) of the *Wrongs Act*, the defendants said, cannot assist the plaintiff. It is not to be used as a general fallback where a tortious act cannot be proved to cause the harm.[166] The section has no application in this case. The posited causal chain does not involve the cumulation of factors, where the contribution of each factor to the harm is unascertainable (which has been established to be the circumstance in which the subsection applies), but rather involves successive acts by different actors; nor does it involve negligent conduct that materially increases risk of harm, in circumstances where the state of scientific or medical knowledge makes it impossible to prove the cause of the plaintiff's harm (the other circumstance in which the subsection has been found applicable).[167] There was, the defendants contended, a conceptual gap in causation, not an evidentiary gap in medical science.

159 The defendants contended that normative causation also could not be shown, because public health decisions cannot be second guessed by regard to the commercial

165 *Wallace* (2013) 250 CLR 375, 385–7 [23]–[27].
166 *Powney v Kerang and District Health* (2014) 43 VR 506, 523 [83], 525-6 [96]-[99] ('***Powney***').
167 *Strong* (2012) 246 CLR 182, 193–4 [25]; *Powney* (2014) 43 VR 506, 523 [82].

interests of retail business owners.

160 The plaintiff invited me to reject these contentions for the following reasons.

161 Factual causation is met where the impugned conduct was a condition that must have been present for the occurrence of the harm. This can include where the act was necessary to complete a set of conditions that are jointly sufficient to account for the harm.[168] Negligence does not need to be the sole cause of the harm.[169] Accordingly, just because the imposition of lock down restrictions was always necessary to cause the relevant harm, an outbreak in the community was also necessary to trigger the restrictions, and in this case transmission events at the Rydges and Stamford hotels caused the 'second wave' outbreak.

162 The health directions were not a *novus actus interveniens* or 'fatal causal break', because there is a 'direct and inexorable connection between the second wave outbreak' and the restrictions. This is a matter for evidence at trial.[170] A deliberate and voluntary act will not break the causal chain where it is the very thing likely to occur as a result of the defendant's negligence.[171] The directions were responsive to the second wave and were the reasonably foreseeable and obvious (likely inevitable) consequence of negligence in implementing hotel quarantine. In any event, s 51(2) of the *Wrongs Act* permits factual causation to be taken to have been established, where negligence cannot be established as a necessary condition of the harm, in an appropriate case,[172] which cannot be determined at this summary stage.[173]

163 The plaintiff also maintained that normative causation is met. The lockdown

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168 *Strong* (2012) 246 CLR 182, 191 [20].

169 *Sàrl v Gill* (2021) 387 ALR 494, 546 [297].

170 *Wallace* (2013) 250 CLR 375, 383 [14], where the court held that a 'determination in accordance with [the equivalent of s 51(1)(a) of the *Wrongs Act 1958* (Vic)] that negligence was a necessary condition of the occurrence of harm is entirely factual'.

171 *March v Stramare (E & M H) Pty Ltd* (1991) 171 CLR 506, 517–18 ('***March***'). See also *Medlin v State Government Insurance Commission* (1995) 182 CLR 1, in which a university professor who, following an accident, chose to take early retirement because he felt he did not have the intellectual energy to sustain his position to his own complete satisfaction. That voluntary decision was held not to break the causal chain. See also *Dorset Yacht Co v Home Office* [1970] AC 1004, 1030 ('***Dorset***').

172 *Powney* (2014) 43 VR 506, 513-16 [43]-[51], this includes cases where there was 'material contribution to harm' and 'material increase in risk'.

173 Ibid 525 [95].

restrictions are not challenged and do not give rise to a duty of care. Accordingly, the duty posited in this case cannot cause the authorised officers to 'second guess' their public health decisions. In any event, the scope of liability, too, cannot be determined at this stage because it requires a value judgment in light of all the facts and circumstances, to be assessed at trial.

The applicable principle

164 Causation is a question of fact.[174] The High Court in *Wallace v Kam* explained that causation involves two questions: 'a question of historical fact as to how particular harm occurred; and a normative question as to whether legal responsibility for that particular harm occurring in that way should be attributed to a particular person.'[175]

165 The 'but for test' is generally sufficient for establishing factual causation but is not a comprehensive and exclusive criterion. The results of the test may be tempered with policy considerations.[176] These are necessary because the test does not demonstrate the degree of connection or the quality of causal connection between the impugned act or omission and the plaintiff's harm.[177] The relevant test is then whether the act or omission can fairly and properly be considered a cause of the loss, taking into account value judgments, policy and human experience.[178]

166 In *Lewis v Australian Capital Territory* ('***Lewis***'), in the context of assessment of compensation for an intentional tort, Edelman J stated:

> Causation is a concept that establishes a link between a physical event and a physical outcome. Where a claim is brought for compensation for loss, the causal question asks whether the defendant's wrongful act was necessary for the loss: 'did the defendant's act make a difference' to that outcome? That question is posed as a counterfactual: would the loss have lawfully occurred without the defendant's wrongful act? In other words, would the plaintiff have suffered the same loss but without a violation of their rights? If the loss would not otherwise have occurred then, subject to other legal issues including remoteness of damage, it is easy to see why the defendant should be responsible for the loss. Conversely, if the defendant's act made no difference to the outcome, because 'but for' the act of the defendant the loss would have

174 *March* (1991) 171 CLR 506, 515, 524; *Lithgow City Council v Jackson* (2011) 244 CLR 352, 385 [92].
175 (2013) 250 CLR 375, 381 [11].
176 *Chappel v Hart* (1998) 195 CLR 232, 255 [62] ('***Chappel***').
177 Ibid 283 [117].
178 Ibid 243 [24].

occurred lawfully, then the defendant's act was not a cause of the loss and the defendant's responsibility for that loss becomes more difficult to justify.

Causation of loss, in this strict sense, is not always required for a defendant to be responsible for losses arising from a wrongful act. In exceptional cases, a defendant can be held responsible for a loss if their actions materially contributed to a loss which would have occurred in any event. A well-established example is where a defendant's fraudulent misrepresentation is a factor that induces an adverse decision resulting in loss even if that decision would have been made in any event. In order to include these exceptional cases within the test for the required link this Court has sometimes described the link required for imposition of responsibility as requiring the act to have 'caused or materially contributed' to the loss. The extension of responsibility in exceptional cases based on material contribution was traced by four members of this Court in *Strong v Woolworths Ltd* to a Scottish decision in which several factories had contributed to the polluted state of a river. In that case, liability for nuisance did not require the act of any single factory to have been necessary for the nuisance. As French CJ, Hayne and Kiefel JJ said in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd*, a material contribution has been said to 'require only that the act or omission of a wrongdoer play some part in contributing to the loss'.[179]

167 Section 51 of the *Wrongs Act* provides:

> (1) A determination that negligence caused particular harm comprises the following elements—
>
> (a) that the negligence was a necessary condition of the occurrence of the harm (factual causation); and
>
> (b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (scope of liability).
>
> (2) In determining in an appropriate case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be taken to establish factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.
>
> (3) If it is relevant to the determination of factual causation to determine what the person who suffered harm (the injured person) would have done if the negligent person had not been negligent, the matter is to be determined subjectively in the light of all relevant circumstances.
>
> (4) For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

168 Section 51(1)(a) of the *Wrongs Act* is a statutory statement of the 'but for' test.[180] Section

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179 (2020) 94 ALJR 740, 775 [151]-[152] ('***Lewis***') (citations omitted).

180 *Strong* (2012) 246 CLR 182, 190–1 [18].

51(1)(b), normative causation or scope of liability, incorporates the policy aspects of the causation test to address the anomalies that can result from the application of the 'but for' test, particularly where there is more than one necessary condition for the harm that arose.[181]

169 As to factual causation under s 51(1)(a), the defendant's negligence must be a necessary condition of the harm but it could be that there are multiple necessary conditions, that are jointly sufficient to account for the harm. In that case the defendants' conduct 'contributes' to the occurrence of the harm.[182]

170 In order for the defendants to be liable for that harm in tort, the plaintiff is required to show that the defendant's conduct 'materially contributed' to the plaintiff's loss.[183] Material contribution has two meanings.

(a) The first is that 'a person whose negligent conduct was a necessary condition of harm may be held liable for that harm even though some other person's conduct was also a necessary condition of that harm.' This type of material contribution would be a necessary condition and therefore satisfy the 'but for' test under s 51(1)(a). An example repeated by the High Court in *Woolworths v Strong* ('***Strong***') is two negligent drivers involved in a collision that is the result of the conduct of the first driver, who drives through a red light, and of the second, who is not paying attention.[184] Both were necessary conditions, without which the collision would not have occurred.

(b) The second is where the contribution may be material but it does not meet the strict 'but for' test. An example is *Bonnington Castings Ltd v Wardlaw* ('***Bonnington***'),[185] where a disease was caused by the gradual accumulation of silica in the lung through several sources of exposure. These material contributions have been taken to be 'causes' in negligence, notwithstanding

181 Ibid 190-1 [18]-[19].
182 Ibid 191-2 [20].
183 *Chappel* (1998) 195 CLR 232, 244 [27], 273-4 [93].
184 *Strong* (2012) 246 CLR 182, 193 [24].
185 [1956] AC 613 ('***Bonnington***').

failure to pass the 'but for' test. It is this type of case where s 51(2) of the *Wrongs Act* applies. This is the 'appropriate case', to be assessed 'in accordance with established principle.'[186]

171 Therefore, in respect of s 51(1)(a) there may be multiple causes of loss, and it is sufficient that the defendant's act or omission materially contributed to the loss, among other causes,[187] provided it was a necessary condition of the loss.

172 Where the causal chain involves a complex chain of interlinking or associated events, it must be established as a matter of common sense that one event materially contributed to the occurrence of the next. The plaintiff must show that, hypothetically, had the defendants taken the prudent precautions they negligently failed to take, the risk of economic loss to the plaintiff would have been eliminated or mitigated and they would have avoided the economic loss.[188]

173 Taking the plaintiff's pleadings at their highest, its case involves the following links in a causal chain:

(a) The impugned conduct: failure to meet a certain standard of supervision, training, auditing and use of PPE (infection control measures);

(b) This conduct caused a 'transmission event', whereby returning travellers at two hotels transmitted COVID-19 to staff at the hotels;

(c) Family/close contacts of infected staff became infected through contact and spread the virus further causing an outbreak in the community – the 'second wave';

(d) The second wave caused authorised officers to exercise statutory *Public Health Act* powers to quell the spread of the virus;

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186 *Strong* (2012) 246 CLR 182, 193 [24], referring to *Zanner v Zanner* [2010] NSWCA 343, [11] with respect to an equivalent provision. In that provision, the term is 'exceptional case', not 'appropriate case'.

187 Cf *I & L Securities Pty Ltd v HWT Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109; *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613; *Roo Roofing* [2019] VSC 331, [1293].

188 *Roo Roofing* [2019] VSC 331, [1296].

(e) Those authorised officers imposed stage 3 and 4 restrictions;

(f) The restrictions caused the plaintiff and group members economic loss.

174 The defendants say that only link (e) was a necessary condition for loss. Those restrictions may have been triggered by a variety of circumstances: an outbreak from a different source, a smaller, different outbreak, no outbreak at all and as a preventative precaution. The outbreak itself could have been caused by a transmission event that occurred outside of hotel quarantine, or from non-negligent conduct within hotel quarantine.

175 By the application of the principles discussed, it does not matter, for present purposes, whether link (e) could, hypothetically, have been triggered by other factors. The question is, rather, whether it was triggered by the relevant causal chain of events in this case. It is an investigation into what actually happened, as a matter of fact.

176 It is not presently to the point that one or more of the links in the causation pleading, for example, the link between the negligent conduct (a) and the transmission event (b) is contestable. I have not been persuaded that the causation chain is fanciful, with no real prospect of being proved. While lockdown could have been imposed for various reasons, it was actually imposed because of the second wave, which the plaintiff pleads was comprised of strains of COVID-19 that originated only from outbreaks at the Stamford and Rydges hotels. It is a question for evidence at trial whether link (e) would still have occurred absent the pleaded negligent conduct, in which case it would not be a necessary condition.

177 Because I am not persuaded that factual causation under section s 51(1)(a) is fanciful on the current pleadings, it is not necessary to determine whether s 51(2) may also be enlivened to establish this aspect of causation. However, I will say more on this in due course, when addressing the defendants' further complaints on the issue of causation. For present purposes, addressing the defendants' contention of 'causal disconnect' by the intervening act of imposition of the stage 3 and 4 restrictions, and assuming that the plaintiff cannot demonstrate factual causation under section s 51(1)(a), it is not

possible at this juncture to say the plaintiff could not show that the alleged negligent conduct made a material contribution to the lockdown or increased the risk of the harm occurring. This is so regardless of the causal chain being sequential rather than cumulative, or not involving multiple exposure transmission sites for contracting COVID-19. Whether this can be established will depend on the nature of the evidence led at trial and the types of evidentiary gaps that arise.

178 Whether link (e) - the imposition of the lockdown restrictions – broke the causal chain, as a superseding cause, is a different question. It is a normative question about the scope of liability under s 51(1)(b).

179 The application of s 51(1)(b) requires a court to make a value judgment based on precedent and policy considerations, which may limit the liability of a person responsible under the factual causation test.[189] In making this value judgment, the court should articulate and identify the purposes and policy of the relevant law in question.[190] The section does not, however, displace common law methodology.[191]

180 During the hearing the plaintiff, when I asked whether it was its case that the lockdown restrictions were a neutral operating event – like an automated consequence, if certain conditions exist, restrictions are imposed – responded that it is something that followed 'inexorably' from the transmission of COVID-19 into the community. Once the hotel bubble fails, the next domino to fall, almost inevitably, is that the Chief Health Officer or their delegate will impose restrictions. The plaintiff submitted that the defendants knew this was the case from overseas and local experience.

181 I agree with the defendants' response that this reasoning cannot be correct. There were a variety of responses available to the authorised officers in response to an outbreak. There was, for example, contact-tracing without resort to a lockdown, lockdowns that are more or less targeted, more or less severe, that differ in duration and location, or

189 *Powney* (2014) 43 VR 506, 521-2 [79].
190 *Walace* (2013) 250 CLR 375, 385 [22]-[23].
191 Ibid.

specific recipes of the available public health responses in combination. This was an independent discretion that involved various policy and budgetary allocation choice points. It was not inevitable.

182 The defendants can argue, with some force, that economic loss caused by stage 3 and 4 lockdowns could never have been the 'very thing' the hotel quarantine infection control measures were aimed at preventing. This is because the purpose for the exercise of emergency powers under the *Public Health Act* is to achieve the highest attainable standard of public health and wellbeing by protecting public health and preventing disease, illness, injury, disability or premature death. The value judgment enquiry is wider. The foreseeability of the risk of economic loss and it being the kind of risk that would very likely be realised if there were a failure to control the outbreak from quarantine will remain relevant.

183 That said, the defendants' contention cannot establish that the plaintiff's domino causation reasoning is fanciful. Whether the outbreak inevitably materially contributed to the lock down restrictions as part of a foreseeable co-ordinated response is a matter for trial. It cannot be determined at this stage that the domino reasoning is untenable *a priori* from the broad legislative powers available to the authorised officers.

184 In *March v Stramare (E & M H) Pty Ltd ('**March**')*, Mason CJ said the following about the operation of a *novus actus interveniens*:

> In similar fashion, the 'but for' test does not provide a satisfactory answer in those cases in which a superseding cause, described as a novus actus interveniens, is said to break the chain of causation which would otherwise have resulted from an earlier wrongful act. Many examples may be given of a negligent act by A which sets the scene for a deliberate wrongful act by B who, fortuitously and on the spur of the moment, irresponsibly does something which transforms the outcome of A's conduct into something of far greater consequence, a consequence not readily foreseeable by A. In such a situation, A's act is not a cause of that consequence, though it was an essential condition of it. No doubt the explanation is that the voluntary intervention of B is, in the ultimate analysis, the true cause, A's act being no more than an antecedent condition not amounting to a cause.[192]

192 (1991) 171 CLR 506, 517.

185 In the present case, assuming negligent conduct causing an outbreak from hotel quarantine, it cannot be that such conduct must be merely an antecedent condition and not a cause of the plaintiff's loss. The stage 3 and 4 restrictions and hotel quarantine are closely connected, and not just as a matter of common sense. They form part of a comprehensive public health strategy to prevent the spread of COVID-19. If quarantine is breached, contact tracing and social isolation measures form the next barriers. Lockdown is a policy response to assist the containment strategy at many different levels of that public health strategy. To what extent the two are connected remains to be established on the evidence. The court, in all the circumstances, may ultimately make a value judgment that it would be unfair or inappropriate to hold the defendants 'legally responsible for an injury which, though it could be traced back to the defendant's wrongful conduct, was the immediate result of'[193] the exercise of an independent statutory discretion.

186 How Mason CJ reasoned through finding that intervening negligent conduct was not a *novus actus* in *March*, is instructive:

> The fact that the intervening action is deliberate or voluntary does not necessarily mean that the plaintiff's injuries are not a consequence of the defendant's negligent conduct. In some situations a defendant may come under a duty of care not to expose the plaintiff to a risk of injury arising from deliberate or voluntary conduct or even to guard against that risk … To deny recovery in these situations because the intervening action is deliberate or voluntary would be to deprive the duty of any content.
>
> It has been said that the fact that the intervening action was foreseeable does not mean that the negligent defendant is liable for damage which results from the intervening action … But it is otherwise if the intervening action was in the ordinary course of things the very kind of thing likely to happen as a result of the defendant's negligence. In *Dorset Yacht*, Lord Reid observed:
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> > But if the intervening action was likely to happen I do not think that it can matter whether that action was innocent or tortious or criminal. Unfortunately, tortious or criminal action by a third party is often the 'very kind of thing' which is likely to happen as a result of the wrongful or careless act of the defendant.
>
> Much the same approach was adopted by this Court in *Caterson* where Gibbs J. (with whom Barwick C.J., Menzies and Stephen JJ. agreed) pointed out that, if the plaintiff's action in jumping from the train was, in the ordinary course of things, the very kind of thing likely to happen as a result of the defendant's

193 Ibid (citations omitted).

> negligence and was not unreasonable, the jury was entitled to find that the plaintiff's injuries were caused by the defendant's negligence. The finding that the plaintiff's action was not unreasonable was then essential to that conclusion because contributory negligence was a defence in New South Wales at the relevant time. … if a pedestrian were run over by two drivers consecutively and both were negligent, the injuries caused by the second driver would be damage for which both drivers were liable if those injuries were also the foreseeable consequence of the first driver's negligence.
>
> As a matter of both logic and common sense, it makes no sense to regard the negligence of the plaintiff or a third party as a superseding cause or novus actus interveniens when the defendant's wrongful conduct has generated the very risk of injury resulting from the negligence of the plaintiff or a third party and that injury occurs in the ordinary course of things. In such a situation, the defendant's negligence satisfies the 'but for' test and is properly to be regarded as a cause of the consequence because there is no reason in common sense, logic or policy for refusing to so regard it.
>
> …
>
> Viewed in this light, the respondents' negligence was a cause of the accident and of the appellant's injuries. The second respondent's wrongful act in parking the truck in the middle of the road created a situation of danger, the risk being that a careless driver would act in the way that the appellant acted. The purpose of imposing the common law duty on the second respondent was to protect motorists from the very risk of injury that befell the appellant. In these circumstances, the respondents' negligence was a continuing cause of the accident. The chain of causation was not broken by a novus actus. Nor was it terminated because the risk of injury was not foreseeable; on the contrary, it was plainly foreseeable.[194]

187 Another important consideration identified in the cases is the 'reasonableness' of an intervening voluntary decision. Whether the authorised officer acted reasonably in imposing the lockdown may also be relevant to the overall enquiry. The defendants claimed this would be an 'effective challenge' to the authorised officer's exercise of statutory discretion. It is quite the opposite because the plaintiff claims that the imposition of the restrictions was not only reasonable but inevitable. The court in determining causation is not supplanting its own judgment about whether to impose lockdown, it will be assessing the relationship between the outbreak and the decision to lock down in a manner that restricted retail activity.

188 Whether it would be incongruous to recognise a duty to prevent economic loss to the plaintiff and group members, and not to recognise a like duty owed to members of the

194 Ibid 517-9 (citations omitted).

public generally to prevent them from suffering physical injury in contracting the virus, or whether in fact there could also be a duty in both cases, and the implications for causation issues, are not issues I need now decide. It is not part of the alleged causal chain.

189 The defendants raised another challenge to normative causation in respect of the intervening act of imposing lockdown restrictions, aside from whether the restrictions broke the causal chain. This was the concern that the authorised officer's exercise of discretion under the *Public Health Act* would be compromised or distorted by having regard to the commercial interests of Victorian retailers. I addressed this contention earlier in the context of recognising the posited duty of care.

Causation more generally

190 The defendants contended, more generally, that the pleaded claim fails at each step in the causal chain. I am not persuaded that these submissions can demonstrate that the plaintiff's claim is fanciful with no real prospect of success at trial, absent factual inquiry. However, these submissions remain relevant to assessing the adequacy of the pleading and warrant careful consideration by the plaintiff when repleading its claim. A number of topics were challenged.

(a) The spread from infected travellers to the wider community: The statement of claim makes no attempt to plead the mode by which the alleged breach of standard of care in implementing hotel quarantine caused either the 'transmission event' at the hotels, or the second wave. Evidence about the attribution of strains of the virus via genomic sequencing confuses correlation with legal causation.[195] Epidemiology, used to show causation in an individual case, can only provide evidence of possibility and is only part of a larger circumstantial case.[196] In any event, this evidence speaks to the origins of a strain of virus, not how particular conduct (breaches) led to its spread.

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195 *Amaca Pty Ltd v Booth* (2011) 246 CLR 36, 53–4 [43].

196 *Seltsam Pty Ltd v McGuiness* (2000) 49 NSWLR 262, 274 [78]-[79], 278 [98]-[101], 291 [183] ('***Seltsam***').

(b) The relevant counterfactual:

(i) The plaintiff does not say what would happen if the defendants discharged their duty – would there be zero or fewer cases? A duty to eliminate entirely any risk of spread of COVID-19, is far-fetched and may be not just unreasonable but impossible given the virulent nature of COVID-19. However, a duty to only have prevented fewer outbreaks from quarantine, means the ultimate harm would likely still have occurred because even one case can spread exponentially. The latter counterfactual exposes issues such as the remoteness of the defendants' impugned conduct (and their power to control the risk of its spread) from the ultimate harm.[197]

(ii) Should the plaintiff accept that a non-negligent instance of transmission could cause the second wave, difficulties with the 'fewer cases' counterfactual must be confronted. If the plaintiff agrees that the risk of transmission cannot be reduced to zero, then it must explain to what level it says the risk may, and ought, be reduced, and why that is a plausible counterfactual given the nature of the spread of the virus.

(iii) If the duty extends to eliminating all risk, is the duty always breached by any transmission of the virus? If not, the duty is, in effect, to keep the transmission rates below a particular but unstated threshold, over which authorised officers would impose restrictions impacting businesses.

(iv) The plaintiff must identify its counterfactual in sufficient detail to provide a meaningful basis for the parties and the court to precisely understand the allegations, the issues raised and what must be done to prove or defend the claim.

(c) Other material contributions and intervening factors: Any particular positive case may be caused by a series of unknowable events, including intervening

197 *Graham Barclay Oysters* (2002) 211 CLR 540, 563 [35].

failures by any number of parties to observe restrictions. The spread may be stopped at any point by taking appropriate measures. This may affect the causal chain, with its many links from the first infected returning travellers, to the imposition of restrictions. Proper and detailed articulation of the material facts with particularisation is necessary.

(d) Confounding causal factors with economic loss: The causal link between stage 3 and 4 lockdown restrictions and the plaintiff and group members' economic loss may not be established if, in the counterfactual, this causal link does not enable consideration of the loss caused by other consequences of the pandemic and not these particular restrictions, such as a depressed global and local economy and interruptions in the supply chain.

191 The plaintiff submitted that causation is pleaded on the basis that almost all COVID-19 cases in Victoria in the second wave can be traced epidemiologically and by genomic data to the (non-specific) transmission events, which in this case is a sufficient basis to imply causation.[198] The pleading puts the defendants on notice of the case they are required to meet. The plaintiff submitted that the court is invited to draw the inference, from the sequence of events (a detainee tests positive, security guards and staff working at the hotel test positive, the virus spreads to the community through contact with those persons) that the security guards and staff contracted the virus from the COVID-19-positive returning travellers in hotel quarantine because of failures in implementing the required level of infection control measures. This is arguably 'material contribution to harm' or 'material contribution to risk'.

192 The plaintiff contended that the statement of claim does address the relevant counterfactual: it says, if the duty were met, then effective infection prevention and control measures would have been in place. It was not necessary to complete the causal chain by pleading that, had effective measures been in place, there would have been no infected persons in the community, or less than a certain threshold, because the lack of effective measures was the necessary condition for the transmission events,

198 *Seltsam* (2000) 49 NSWLR 262, 274-8 [78]–[98]. See specifically [89].

which is the relevant causal link or the first domino to fall.

The original transmission event

193 The defendants are correct that the statement of claim, as currently formulated, provides no factual analysis of the mechanism by which a hotel quarantine resident actually transmitted the virus to infect a staff member. There is no event or incident pleaded regarding a specific instance where contact or something else resulted in this transmission. The defendants complain that it is not clear which aspect of the negligent 'state of affairs' at the hotels, or which aspect of negligent infection prevention and control measures, caused the transmission event.

194 The defendants contended that what was pleaded was insufficient to permit the court to draw the necessary inferences. If, for example, there were four transmission events, three of which were negligent and one non-negligent, then it would be necessary to establish exactly which one actually caused the outbreak. Otherwise, 'but for' causation is not established.

195 The plaintiff argued that this is properly a matter for evidence led at trial. Epidemiological evidence may show that the second wave was sourced exclusively from outbreaks from transmission events that are sourced to detainees at the quarantine hotels. Other evidence may show that there were sub-standard infection prevention and control measures at those hotels.

196 That submission fails to answer the criticisms of the form of the pleading. The defendants and the court are entitled to know how inferences should be drawn from precisely what material facts. I consider it necessary that the plaintiff identify how transmission occurred, whether by identifying the material facts of transmission to outbreak or the inferential path for such a finding.

197 While the plaintiff must replead, the defendant maintained that causation could not be shown by epidemiological evidence and summary dismissal was warranted.

198 It is not clear whether the plaintiff is able to plead the material facts of the transmission event(s), but unless the plaintiff pleads some facts to establish 'but for' causation in

respect of this first causal link, it will need to rely on s 51(2) of the *Wrongs Act*.

199 Section 51(2) provides that in 'determining in an appropriate case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be taken to establish factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.'

200 The defendants contended that this is neither such an appropriate case, nor do established principles apply the section to this type of chain of causation. This subsection is not a catch-all backup provision for when 'but for' causation fails. They submitted that s 51(2) cases fall into two categories only.

(a) First, cases where there is a cumulative operation of factors in the occurrence of the total harm in circumstances where the contribution of each factor to that harm is unascertainable.[199] This is exemplified by the *Bonnington* type case, where a disease was caused by the gradual accumulation of silica in the lungs through several sources of exposure.[200] The court held that the real question was whether the dust from a particular source 'materially contributed' to the disease.[201] The effect of the rule is that the defendant may be liable for the total harm suffered by a plaintiff even though it cannot be said that, but for the conduct of the defendant, the plaintiff would not have suffered the total harm, and that it can only be said that, but for the conduct, the plaintiff would not have suffered some of that harm.[202]

(b) Second, cases where negligent conduct materially increases the risk of harm in circumstances where the state of scientific or medical knowledge makes it impossible to prove the cause of the harm.[203] Thus in *Fairchild v Glenhaven Funeral Services Ltd* ('***Fairchild***'),[204] which involved harm caused by multiple

199 *Strong* (2012) 246 CLR 182, 193-4 [25].
200 *Bonnington* [1956] AC 613.
201 *Strong* (2012) 246 CLR 182, 193 [23].
202 *Powney* (2014) 43 VR 506, 514 [46].
203 *Strong* (2012) 246 CLR 182, 193-4 [25].
204 [2003] 1 AC 32.

> instances of exposure to asbestos while working for more than one employer, where there was no means of determining which exposure had caused the disease, it was held that proof, on the balance of probabilities, that the wrongdoing of each employer had materially increased the risk to the employee that he might contract the disease, was to be taken as proof that each employer had materially contributed to it.

201 These cases identify what has been described as the 'material contribution to harm' and 'material contribution to risk' principles. In certain circumstances, it may be appropriate to 'bridge the evidentiary gap' by allowing proof that negligent conduct materially contributed to harm or the risk of harm to satisfy the requirement of proof of factual causation.[205] As the Ipp Report[206] explained, this is fair and reasonable and, in dealing with dust disease cases, for example, tribunals have been assisted where the scientific evidence about causation has not provided a solid basis for finding that the 'but for' test has been satisfied.[207]

202 The defendants submitted that the plaintiff's case is not a cumulative causation case, where the harm was caused by multiple but indivisible sources, in that it is not possible to determine the relative contribution of the various factors to the total harm suffered.[208] These are, instead, successive events; 'dominos' that fell one after the other. In addition, there is no 'evidentiary gap',[209] where there were multiple possible causes but science cannot untangle which one caused the harm. Here there is no mix of disparate possible causes. There is just a causal disconnect between the alleged negligent conduct and the harm suffered.

203 The Ipp Report said:

> The major difficulty with the 'material contribution to harm' and 'material contribution to risk' approaches is to define those cases in which the normal requirements of proof of causation should be relaxed. It is extremely important to note that this is a normative issue that depends ultimately on a value

205 *Powney* (2014) 43 VR 506, 514 [48].
206 *Review of the Law of Negligence* (Final Report, September 2002). See *Powney* (2014) 43 VR 506, 513 [42].
207 *Powney* (2014) 43 VR 506, 514 [48].
208 Ibid 514 [46].
209 *Strong* (2012) 246 CLR 182, 193-4 [25].

> judgment about how the costs of injuries and death should be allocated. The Panel believes that the detailed criteria for determining this issue should be left for common law development. Nevertheless, we consider that it would be useful to make explicit the normative character of the issue by including in the Proposed Act a provision that, in deciding whether (and why) responsibility for the harm should be imposed on the negligent party, and whether (and why) the harms should be left to lie where it fell (that is, on the plaintiff) …[210]

204 In *Powney v Kerang and District Health* (‘***Powney***’), the Court of Appeal considered the Explanatory Memorandum to the Wrongs and Others Act (Law of Negligence) Bill, which provided insight into the intention underlying s 51(2) of the *Wrongs Act*.[211] The Memorandum said an ‘evidentiary gap arises in two types of cases’, where there is the cumulative operation of two or more factors that are indivisible (material contribution to harm) and where the defendant’s negligent conduct materially increased the risk to the plaintiff. However, it added that the latter category ‘includes’ cases where there have been successive periods of exposure to dangerous substances. It clarified:

> In these cases, it cannot be said that a specific factor or set of factors, for which the defendant(s) is (are) responsible, is the factual cause of the harm to the defendant (ie the negligence was not a necessary condition of the occurrence of the harm). Despite this, in **appropriate cases** the court has considered that bridging the evidentiary gap is fair and reasonable (*Bonnington Castings v Wardlaw* [1956] AC 613; *Fairchild v Glenhaven* [2002] 1 WLR 1052; *McDonald v State Rail Authority* (1998) 16 NSWCCR 695). It is not intended to limit the circumstances of where the court will consider it appropriate to bridge the evidentiary gap.
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> Where it is being considered whether or not to ‘bridge the evidentiary gap’, the court is to consider, amongst other relevant things, the value judgment of, whether or not and why responsibility for the harm should be imposed on the negligent party.[212]

205 The Court pointed out that despite the origins of s 51(2), it does not apply to dust disease related conditions.[213] The Court concluded that it ‘would be inappropriate in the context of this case for us to consider the types of cases which may fall within the purview if s 51(2).’[214]

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210 *Review of the Law of Negligence* (Final Report, September 2002) 111 [7.33]. See also *Powney* (2014) 43 VR 506, 515-16 [50].

211 *Powney* (2014) 43 VR 506, 517 [56], citing Explanatory Memorandum, Wrongs and Other Acts (Law of Negligence) Bill 2003 (Vic), 4-5.

212 Ibid (underlining emphasis added, other emphasis in original).

213 *Wrongs Act 1958* (Vic) s 45(1). See *Powney* (2014) 43 VR 506, 518 [63].

214 *Powney* (2014) 43 VR 506, 526 [99].

206 I do not accept the defendants' contention that the cases recognised under s 51(2) are confined to the two narrow categories of cases, or the examples given in respect of each. These types of cases are indicative but not exhaustive. That conclusion does not distract from the defendants' contention that the subsection is not always available as a 'fallback' when causation is not established. It is intended to accommodate cases out of the ordinary and not just simple cases where a plaintiff failed to make out their case on factual causation.[215] As the Court of Appeal held in *Powney,* where the single tortious act was a pethidine injection with an uncapped and unsterile needle that the appellant claimed resulted in an infection in his arm:

> It suffices to say that a case such as this – where there is one alleged tortious act and no question of multiple causes or unknown aetiology of the alleged damage – does not seem to us to be the sort of case that would be regarded as 'appropriate' for the normative attribution of responsibility to a defendant.[216]

207 Ultimately, whether there is an 'appropriate case' and a relevant need to 'bridge the evidentiary gap' will be a value judgment, taking into account whether or not and why responsibility for the harm should be imposed on the negligent party, and classically a matter for trial. It does not seem to be the plaintiff's case that COVID-19 is a disease that is transmitted through cumulative exposure to infection. It does not get worse through gradual accumulation of dangerous exposures, for example. The question is whether it is fanciful that the plaintiff could establish that the negligent failure to meet postulated standards in hotel quarantine materially increased the risk of a transmission event, which ultimately caused the second wave, in circumstances where the state of scientific or medical knowledge makes it impossible to prove the cause of the harm.

208 The defendants say this is not such a case. This is not like the *Fairchild* case where the harm was caused by exposure to asbestos but it is not clear, given current science, which particular exposure caused the disease.

209 It is not evident to me why this could not be an analogous case. If there were multiple

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215 Ibid 525 [96].
216 Ibid 526 [99].

possible instances where staff were exposed to transmission as a result of sub-standard infection control measures, each of which could have been responsible for a or the transmission event, but science cannot pinpoint precisely which one was responsible, this may be an 'appropriate case' for s 51(2).

210 The defendants responded that there is not an absence of 'science'; rather there are no pleaded material facts about transmission. The statement of claim does not list multiple possible 'exposure' events or means by which there could have been exposure, as a result of a failure to meet the pleaded duty of care. If part of the impugned conduct involved a lack of supervision, training and auditing, and therefore an absence of proper infection control protocols and processes, it may be that this negligent conduct itself resulted in a lack of records to pinpoint when exposure might have occurred. It would be unfair to a plaintiff in such circumstances to preclude the possibility of utilising s 51(2) in such a case. However, my earlier expressed concern about how defects in the plaintiff's pleading obfuscate what may be the real issues in dispute seems apposite in this context. The plaintiff must put forward their best case setting out the material facts of the transmission events that are a core issue in their claim.

211 Assessing whether this is an 'appropriate case' in terms of s 51(2) is not something that can be done in a vacuum. It will be a value judgment in the light of the relevant evidence and all the circumstances of the case. It is not a basis to summarily dismiss the plaintiff's action, but it lends further weight to the defendants' contention that the statement of claim must be more comprehensively pleaded.

212 Related to this issue is the plaintiff's use of epidemiological evidence linking the second wave to the outbreaks at Rydges and Stamford hotels. The defendants submitted that genomic sequencing evidence linking the strain of the virus that infected the returning travellers to the second wave outbreak does not establish causation, and that epidemiology cannot establish that an individual case or particular conduct caused an outbreak.

213 The New South Wales Court of Appeal considered the relationship between epidemiological evidence of a relationship between a source and an illness, and legal causation in tort, in *Seltsam Pty Ltd v McGuiness* ('***Seltsam***').[217] The court explained that epidemiology identifies associations between specific forms of exposure and the risk of disease in groups of individuals.[218] However, it does not make judgments about whether a statistical association represents a cause-effect relationship. It can show 'general causation' but not whether a particular factor caused the disease in an individual case.[219]

214 In *Amaca Pty Ltd v Booth*, French CJ said:

> The existence of an association or a positive statistical correlation between the occurrence of one event and the subsequent occurrence of another may be expressed as a possibility, which may be no greater than a 'real chance' that, if the first event occurs, the second event will also occur. The mere existence of such an association or correlation does not justify a statement, relevant to factual causation in law, that the first event 'creates' or 'gives rise to' or 'increases' the probability that the second event will occur. Such a statement contains an assumption that if the second event occurs it will have some causal connection to the first. However, if the association between two events is shown to have a causal explanation, then the conclusion may be open, if the second event should occur, that the first event has been at least a contributing cause of that occurrence. An after-the-event inference of causal connection may be reached on the civil standard of proof, namely, balance of probabilities, notwithstanding that the statistical correlation between the first event and the second event indicated, prospectively, no more than a 'mere possibility' or 'real chance' that the second event would occur given the first event. There may of course be cases in which the strength of the association, as measured by relative risk ratios,[220] itself supports an inference of a causal connection to the first.[221]

215 These cases were dealing with 'toxic torts' where the issue was whether exposure to a dangerous substance caused a disease. In particular, whether exposure to asbestos caused renal cell carcinoma or mesothelioma, respectively. This is distinct from genomic sequencing pinpointing the strain of the virus present in the second wave, and linking to particular returning travellers a cluster of infected people in the

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217 *Seltsam* (2000) 49 NSWLR 262.
218 Ibid 271 [59].
219 Ibid 271 [60].
220 This is a measure of the strength of an association. 'RR is defined as the ratio of the incidence of disease in exposed individuals compared to the incidence of unexposed individuals': *Seltsam* (2000) 49 NSWLR 262, 61 [67].
221 (2011) 246 CLR 36, 53-4 [43].

community.

216 The defendants may be correct when they submit that epidemiological evidence cannot show precisely which negligent breach of the posited duty led to the outbreak and whether it would not have happened due to a non-negligent source of exposure.

217 Nevertheless, epidemiological evidence 'may, alone or in combination with other evidence, establish causation in a specific case.'[222] There is nothing to suggest in this case that the relevant epidemiological and genomic sequencing evidence cannot, in conjunction with other evidence to be led in this case, demonstrate a causal link between the negligent omissions and the second wave. However, the defendants are entitled to particulars of the other material facts to be considered in combination with epidemiological evidence.

Counterfactual

218 Next, the defendants submitted that the plaintiff's statement of claim does not plead what would have occurred if the defendants had discharged the posited duty of care by meeting the posited standard of care. The plaintiff says it did not need to do so. If the negligent failure to implement effective infection control measures was pleaded as a necessary condition of the event of transmission to quarantine staff, and then of the outbreak into the community, leading to a second wave, that is sufficient.

219 The High Court held in *Strong* that '[p]roof of the causal link between an omission and an occurrence requires consideration of the probable course of events had the omission not occurred.'[223] In that case, the appellant had claimed that Woolworth's negligence in failing to employ a system for periodic inspection and cleaning of a sidewalk sales area, was a necessary condition of her harm in falling on foodstuff left on the floor. The Court held that 'the appellant was required to prove that, had a system of periodic inspection and cleaning of the sidewalk sales area been employed on the day of her fall, it is likely that the chip would have been detected and removed

222 *Seltsam* (2000) 49 NSWLR 262, 276 [89].
223 *Strong* (2012) 246 CLR 182, 196 [32].

before she approached the entrance'.[224]

220 As Edelman J noted in *Lewis* in the passage cited earlier,[225] the causal question asks whether the defendant's wrongful act was necessary for the loss: 'did the defendant's act make a difference' to that outcome? That question is posed as a counterfactual: would the loss have lawfully occurred without the defendant's wrongful act?

221 It is not enough for the plaintiff to plead no more than that the breach of duty was a necessary condition of the loss. The plaintiff must prove at trial, and therefore plead now the material facts giving rise to the conclusion that, had the relevant supervision, training, and audits occurred, it is likely that the poor infection control measures would have been rectified and addressed in such a way that the transmission events complained of would not have occurred, and ultimately that the harm (economic loss to Victorian retailers) would likely not have occurred.

222 What the plaintiff needs to identify is whether it alleges the likely outcome is that there would have been zero transmission events, no second wave, and therefore no restrictions. This may be difficult, possibly fanciful, with COVID-19, but that, if raised, will be an issue for trial. Alternatively, as noted above in other contexts, the plaintiff must explain if it contends some transmission events may have occurred from prudently operated hotel quarantine but would not have led to economic loss for Victorian retailers. If there would still have been some harm if the standard of care were met, the plaintiff must explain how a material causation or material risk case could be run in circumstances where only one case can lead to exponential growth in cases and an outbreak, which triggers a lockdown.

223 Despite the plaintiff's submission, I do not think the counterfactual is evident from the statement of claim as presently pleaded. It must be reconsidered and made explicit.

Other intervening negligent conduct

224 As set out above, where there is a pleaded causal chain of events, the plaintiff must

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224 Ibid.

225 *Lewis* (2020) 94 ALJR 740, 775 [151]-[152].

demonstrate that as a matter of common sense, one event materially contributed to the next. Whether any other intervening negligent or voluntary conduct acted as a break in the causal chain will need to be addressed in evidence.

Causal link to economic loss

225 Similarly, it is not possible at this stage to conclude that other factors for which the defendants are not responsible caused the plaintiff's loss, to what extent these other economic factors affected the severity and duration of that loss, and to what extent the lockdown restrictions were actually to blame for the loss. The test is whether the restrictions materially contributed to the loss. This is all a matter for evidence, properly delimited by the pleading and its particulars.

Other issues with the pleadings

226 The defendants raised a number of other issues with the pleadings.

Parliamentary privilege

227 The statement of claim refers in the particulars to the Hotel Quarantine Inquiry Final Report and Recommendations,[226] and the defendants claim that parliamentary privilege applies to that report.[227] Therefore, its findings cannot be relied on in these proceedings.[228] In addition, as a matter of form, various of these references are not particulars, but sources of evidence.

228 The plaintiff contended it will not rely on the findings in the report but only set out those matters, and made those references, as a convenient way to identify relevant

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226 Justice Jennifer Coate AO, Board of Inquiry, *COVID-19 Hotel Quarantine Inquiry* (Final Report and Recommendations, December 2020) vol 1.

227 *Inquiries Act 2014* (Vic) ss 77(4), (5); *Evidence Act 2008* (Vic) s 10; *Bruton v Estate Agents Licensing Authority* [1996] 2 VR 274, 284. Relevantly, the privileges of Parliament include that expressed in art 9 of England's *Bill of Rights* 1689 (Imp). This Article applies to the Victorian Houses of Parliament by force of s 19(1) of the *Constitution Act 1975* (Vic) and as a transcribed enactment under s 8 of the *Imperial Acts Application Act 1980* (Vic). Article 9 provides that the freedom of speech, and debates or proceedings in Parliament, ought not be impeached or questioned in any court or place out of Parliament. It is generally accepted that 'proceedings of the Parliament' for the purposes of art 9, includes documents ordered to be published by a House of Parliament. See, for example, *Parliamentary Privileges Act 1987* (Cth) s 16(3) which has been said to be declaratory of the meaning of art 9: *Prebble v New Zealand Television Ltd* [1995] 1 AC 321, 333. See also, *Rann v Olsen* (2000) 76 SASR 450, 468–9 [95]–[98]; *Leyonhjelm v Hanson-Young* (2021) 282 FCR 341, 359-61 [31]–[39].

228 *New South Wales Branch of the Australian Medical Association v Minister for Health and Community Services* (1992) 26 NSWLR 114, 120-1, 126G–127A ('***NSW AMA***').

facts, showing their operational nature. These references are not intended as evidence. The plaintiff therefore did not address the question of privilege because it maintained that the issue did not arise.

229 The plaintiff refers to the report in approximately 16 places in the statement of claim.[229] Portions of the report are referred to as particulars in support of material facts pleaded about the presence of DHHS at hotel quarantine; the fact that the hotels were designated as 'hot hotels' to where confirmed COVID-19 cases were sent; what was required in terms of effective infection prevention and control measures at quarantine hotels; that staff at the hotels did not have adequate training and that audits of effective controls were not conducted; that security staff at the hotels did not have adequate expertise to conduct the required training or supply sufficient PPE; that returning travellers with COVID-19 were at the hotels; that workers at the hotels were diagnosed with COVID-19; that household contacts of those workers contracted COVID-19; that there was an outbreak of COVID-19 cases in Victoria that were epidemiologically linked to the COVID-19 patients at the hotels; and that security guards were engaging in behaviour in breach of what was required for effective infection prevention and control.

230 The primary reason for the removal of these references is that the court cannot understand the 'convenient way to identify relevant facts' adopted by the plaintiff when considering the statement of claim because it refers to an extraneous document to which it does not have access. That problem is exacerbated by the issue of privilege. No impediment was identified to setting out the material allegations that may be drawn from the report as particulars, and that must now be done. How they may later be proved is not presently an issue.

231 The second reason for striking out these references is the defendants' submission that the Final Report, being a publication of a Board of Inquiry, is privileged was not disputed.[230] Its admission into evidence would breach parliamentary privilege where

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229 Statement of claim paras 34(ii), 36(ii), 46(g)(ii), 50(b)(iii), 51(b)(ii), 52(b)(i), 53(b)(i), 54(b)(i), 55(b)(i), 81(b)(ii), 87(ii), 89(b)(ii), 94(ii), 100(iii), 140(g)(ii), 141(h)(iv).

230 *Inquiries Act 2014* (Vic) s 77(5).

the intention or result of the tender would be to impeach or question the contents of the report. This would include examination of the report for the purpose of supporting a cause of action where the cause arose out of something done outside of the House.[231] The report cannot be tendered as evidence for the facts and opinions contained in it,[232] or used in such a way as to enable inferences to be drawn from it to establish facts and opinions, such that an examination would have to be made of its contents and conclusions. This would be particularly so should the defendants intend to lead evidence to found a submission critical of the reasoning, opinions, findings and conclusions of the report.[233]

232 Although a defendant does not plead to particulars,[234] in responding to these allegations as they are pleaded and particularised, the defendants would effectively have to confirm or deny findings of a parliamentary report. Irrespective of whether the report is later admitted into evidence, the pleading would require the court to 'examine, discuss and adjudge'[235] a privileged matter.

233 All references to the Report will be struck out from the statement of claim.

References to extraneous sources

234 Similarly, the defendants note that the statement of claim refers to oral evidence and witness statements provided to the Board of Inquiry that cannot be used against any person in any proceeding.[236] Again, the plaintiff responded that the witness statements themselves are not to be tendered in evidence and are merely a 'shorthand' communication of the facts contained in them, to better particularise their case so the defendants can meet it.

235 If the references to the evidence are just 'shorthand' to identify various facts, and are

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231 *NSW AMA* (1992) 26 NSWLR 114, 120-1. 'Proceedings' of Parliament extend to Reports of Inquiries: at 123-4; *Inquiries Act 2014* (Vic) ss 77(4), (5).

232 *NSW AMA* (1992) 26 NSWLR 114, 126.

233 Ibid 126-7.

234 *Pinson v Lloyds and National Foreign Bank Ltd* [1941] 2 KB 72, 75.

235 *NSW AMA* (1992) 26 NSWLR 114, 125.

236 *Inquiries Act 2014* (Vic) s 80(1) provides that 'any answer, information, document or other thing given or produced' to the Board of Inquiry by a person cannot be 'used against the person' in any proceeding. *Interpretation of Legislation Act 1984* (Vic) s 38 provides that '***person*** includes a body politic or corporate as well as an individual'.

not intended as evidence, or a document to be relied on in trial, the same antecedent issue arises. The court does not have the document and cannot understand the allegations being made without reference to a source extraneous to the pleading.

236 A question would otherwise arise whether particularising this material in the statement of claim is using that oral evidence or witness statement against the defendants, as contemplated in s 80(1) of the *Inquiries Act 2014* (Vic), or whether the material has to be adduced in evidence to trigger the prohibition, as contended by the plaintiff.

237 Section 80 is headed 'Admissibility of answers, information, documents and other things'. Section 80(1) provides:

> Any answer, information, document or other thing given or produced to a Board of Inquiry by a person and the fact that an answer, information, document or other thing was given or produced, is not admissible in evidence, or otherwise able to be used, against the person in any other proceedings.

'Other proceedings' is defined to include criminal, civil or administrative proceedings before a variety of tribunals, including disciplinary proceedings.[237]

238 The provision is widely framed. Unlike similar provisions in other legislation,[238] the use immunity is not confined just to admissibility of evidence but expressly goes wider than that: 'or otherwise able to be used, against the person in any other proceedings'. The use immunity is not only to protect witnesses against self-incrimination but also against civil liability and even disciplinary measures.

239 The evident purpose of this provision is to ensure that witnesses at inquiries are at liberty to give full and complete evidence without any fear of self-incrimination or prejudice to their legal interests in any civil matter. Therefore the provision ought to be given a broad meaning. Using this material in a statement of claim, as a source for a material fact that the witness (or his principal)[239] has to answer, is using that

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237 *Inquiries Act 2014* (Vic) s 80(3).

238 See, eg, the *Trade Practices Act 1974* (Cth) s 155(7) which provided that the answer by a person to any question or document produced, 'is not admissible in evidence against the person'.

239 *Interpretation of Legislation Act 1984* (Vic) s 38.

evidence against the witness, in the broad sense. The use immunity cannot refer only to the use of the document or testimony in evidence, otherwise the additional words 'or otherwise able to be used' would be rendered meaningless.

240 There are approximately 73 references to witness statements in the statement of claim.[240] These references will be struck out and the pleading may be amended appropriately.

Vicarious liability

241 The defendants contended that the statement of claim assumes the knowledge and conduct of various public servants may be attributed to the defendants, giving rise to liability of the Crown. In order for s 23(1)(b) of the *Crown Proceedings Act 1958* (Vic) ('***Crown Proceedings Act***') to be engaged to attach vicarious liability, the pleadings must identify the individual persons who are the servants of the defendants (servants of either the Ministers or Secretaries or other servants of the State) and particularise their alleged negligent conduct. The general conduct of everyone in the department cannot be aggregated for this purpose.[241] This approach conflates attribution of tortious liability to the Secretary or Minister, as opposed to holding them politically, administratively or constitutionally responsible for such conduct.

242 The plaintiff submitted that it has pleaded a case of negligence against each of the Minister for Health, the Minister for Jobs, the Secretary of DHHS, and the Secretary of DJPR, and in full, as set out above. The statement of claim does not aggregate the knowledge of unknown officers, but of these four defendants in particular.

243 Section 23(1)(b) of the *Crown Proceedings Act* provides:

> [T]he Crown shall be liable for the torts of any servant or agent of the Crown or independent contractor employed by the Crown as nearly as possible in the same manner as a subject is liable for the torts of his servant or agent or of an independent contractor employed by him.

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240 Statement of claim paras 8(b), 10(e), 30(i)-(iii), 31(i)-(iii), 32(i)-(iii), 33(i)-(ii), 35, 36(i), 37, 38, 39(ii)(3), 40(i)-(ii), 42(i), 46(g)(i) and (iii), 50(b)(iv), 51(b)(iii), 53(b)(ii), 56(i)-(ii), 57(b)(i), 57(c)(i)-(ii), 58(b)(i)-(ii), 61(b)(i), 62(b)(i), 69(e)(i), 71; 72(d), 73, 74(c), 81(b)(i), 82, 83, 84, 85, 86, 87(i), 89(b)(i), (iv)-(v), 91, 92(b), 93, 94(i), (iii), 95, 96, 97(i)-(ii), 98, 99(ii), 100(b)(i), 102, 137(i), 138(b)(i), 141(c), 141(e), 141(f), 141(g), 141(h)(i)-(ii), 141(i)(vi).

241 *MacKenzie-Kennedy v Air Control* [1927] 2 KB 517, 522, 529.

244 While the duty of care, as presently pleaded, suffers from deficiencies in clarity, I agree with the plaintiff that the relevant knowledge and conduct is pitched at the level of the defendants themselves and what they 'procured' or failed to procure their department and other officials to do. It may be that when the plaintiff amends the statement of claim to provide the precise content of the duty of care, the defendants' concerns over what conduct is being attributed to the defendants or vicariously to the State will be more particularly addressed. It is not, however, appropriate to determine this challenge on the statement of claim as currently pleaded.

Conclusion - 5 Boroughs

245 The defendants' application for summary dismissal is refused.

246 I will order that the statement of claim be struck out pursuant to r 23.02, with leave to the plaintiff to replead its claim. Technically, it can be said that many parts of the statement of claim are properly pleaded and will not prejudice, embarrass or delay the fair trial of the proceeding or otherwise fail to disclose a cause of action or abuse the processes of the court. That said, the pleading is infected by the initial failure to properly identify the posited duty of care, which has a flow-through effect. Throughout these reasons I have identified some issues that the plaintiff should reconsider. It is not the function of the court to settle a party's pleading and the form of any amended pleading shall be as the plaintiff may be advised but so as to comply with these reasons.

247 Unless the defendants require compliance with r 36.03(2), I direct that the plaintiff file and serve a 'Substitute Statement of Claim' pursuant to the leave that I am granting, which should not be marked up to identify changes from prior pleadings.

248 Subject to any further submission from the parties, I propose to order that the plaintiff pay the defendants' costs of and incidental to the application by summons dated 12 April 2021.

249 I will invite the parties to address the form of appropriate directions.

Jordan Roberts S ECI 2020 03598

Introduction

250 There is significant overlap between the 5 Boroughs claim and a second group proceeding before the court brought by Mr Jordan Roberts against the same defendants. The applications were heard together.

251 Mr Roberts, acting as representative plaintiff on behalf of group members, sues the defendants in negligence for, among other things, economic loss caused by the defendants' conduct in implementing hotel quarantine for returning travellers. However, the Roberts claim differs in significant respects that I will shortly identify including, in particular, in the group definition.

252 The defendants seek summary judgment dismissing the Roberts claim pursuant to ss 62 and 63 of the *Civil Procedure Act* and r 22.16 of the *Rules* on the ground that it has no real prospect of success, alternatively, they seek to strike out the plaintiff's amended statement of claim pursuant to r 23.02(a) of the *Rules*, on the ground that it does not disclose a cause of action.

253 The proceeding will be summarily dismissed.

Summary of the pleaded claim

254 The relevant elements of the Roberts claim are as follows:

(a) The plaintiff: The plaintiff is a person who alleges his employment was terminated by reason of redundancy consequent on the imposition of restrictions which adversely affected the business by which he was employed. This redundancy may also have caused him psychiatric injury, at least so much is pleaded.

(b) The group and the loss: The group is confined to residents of Victoria. It is divided into two sub-groups in two ways. First, those persons, as at 1 July 2020, who owned, controlled or operated businesses of a defined type ('**affected**

businesses'),[242] second, persons who were employees of those businesses ('**affected employees**'), who were, by the imposition of stage 3 and 4 restrictions and regional stage 3 restrictions between 9 July 2020 and 31 October 2020, adversely affected in one or both of the following ways, creating the two sub-groups:

(i) 'Psychiatric injury sub-group': the plaintiff and group members who have suffered psychological or psychiatric injury because the affected businesses from which they drew income or wages were adversely affected by the restrictions; and

(ii) 'Income loss sub-group': the plaintiff and group members who have suffered economic loss by way of loss of income, or wages, whose inability to earn income or wages arose because the affected businesses were adversely affected by the restrictions.[243]

(c) The duty of care is pleaded by reference to the nature of the alleged breach:

(iii) The 'procurement duty': The duty to take reasonable care in the procurement and supervision of the provision of the guarding services at the Rydges and Stamford hotels, to avoid foreseeable loss.

(iv) The 'training duty': The duty to take reasonable care in the provision of infection-control training to, and supervision of, personnel providing the guarding service, to avoid foreseeable loss.

(d) Breach of the duty:

(v) The Minister for Jobs and the Secretary of the DJPR breached the procurement duty by failing to use the Victoria Police or Australian Defence Force ('***ADF***') personnel to provide guarding services at the

242 Affected businesses are those expressly defined as being subject to the directions issued under s 200 of the *Public Health and Wellbeing Act 2008* (Vic).

243 Amended Statement of Claim para 1AB(a).

quarantine hotels, instead of private security companies.

(vi) The Minister for Health and the Secretary of DHSS breached the training duty by failing to ensure that the Departments for which they were responsible took all reasonable steps to ensure that personnel procured to provide the guarding services were provided with appropriate PPE; were adequately trained in, and complied with, infection control techniques; and were capable of providing guarding services in a manner that would adequately protect against the risk of community transmission.

(e) Causation: The conduct in breach of the posited duties materially contributed to, or materially increased the risk of, the second wave, which substantially caused or materially increased the risk of the imposition of stage 3 and 4 restrictions, which caused the plaintiff and psychiatric injury sub-group to suffer injury, loss and damage, and caused the plaintiff and income loss sub-group members loss and damage. I am invited to proceed on the basis that the parties have clarified through correspondence that the alleged psychiatric injuries were caused by the group members suffering unemployment and lost wages/income from the lockdown restrictions, although this ought to be specifically alleged. Accordingly, at least in some respects the alleged psychiatric injuries were consequent on economic loss. It is not clear whether the injuries were caused by virtue of learning of their unemployment or by dint of the loss of income itself. Roberts alleges that he suffered depression, anxiety and nervous shock.

The defendants' grounds of objection

255 As with 5 Boroughs, the defendants submitted that, taking the plaintiff's pleaded case at its highest, the novel duties of care contended for by the plaintiff are not known to the law. The proceeding has no real prospect of success, and ought be dismissed or, alternatively, struck out. The defendants' main grounds of objection are:

(a) Policy making functions of government: The defendants raise the same

objection as to the 5 Boroughs claim, namely that the decisions the defendants made in implementing hotel quarantine were policy decisions in response to the global pandemic and were not therefore justiciable in tort. The problem, they say, is even more acute in Roberts' case because the duty to procure ADF or police instead of a private security firm is clearly a policy question.

(b) Incoherence in the law: The defendants submitted, as with the 5 Boroughs claim, that the posited duties in the amended statement of claim create incoherence in the law. The object of exercising executive power implementing hotel quarantine that avoids imposing unreasonable restrictions on detained persons' rights is inconsistent with duties to avoid commercial harm to business owners and their employees. The objective of exercising statutory and non-statutory power to limit loss of life and negative impact on the health of Victorians is incongruent with a duty to take care owed to the plaintiff and group members to prevent economic loss and consequent psychiatric injury. They also contended that the posited duties are incompatible with the decisions made by authorised officers under the *Public Health Act* and the statutory scheme for compensation in Part 10, Division 3 of that Act.

(c) Economic loss, psychiatric injury and indeterminacy: The income loss sub-group's claim for pure economic loss, would permit recovery of such loss by countless individuals who could claim to have suffered economic loss as part of a ripple effect flowing from the alleged breaches. This is particularly so with employees of affected businesses who are another step removed from the negligent conduct. The psychiatric injury sub-group's claimed injury flows from the (already remote) economic loss claim and therefore presents an even greater indeterminacy problem.

(d) Fatal causal disconnect in the plaintiff's case: The pleaded income loss and the consequential psychiatric injuries allegedly suffered by the plaintiff and the group members is alleged to have been caused by the imposition of the restrictions as part of a suite of Directions made by officers authorised under

the *Public Health Act*,[244] independently exercising discretionary powers conferred on them by that Act. This serves to break the causal chain.

256 In many respects the defendants' submissions were presented as applicable to both proceedings and I have set out above in respect of the 5 Boroughs claim much of the content of those submissions and my reasoning that I will not repeat. Rather I will focus on the points of distinction between the two proceedings.

General issues with the pleading

What is the novel duty?

257 For the purpose of considering the defendants' summary judgment application, it is necessary to identify from the pleading read as a whole, what the plaintiff might allege by a properly framed duty. This exercise also illuminates pleading deficiencies. Currently the pleading is:

> In the premises, and having regard to the matters set out in this indorsement of claim paragraphs 64, 65, 65A, 65B, 65C, and 66 of this Statement of Claim:
>
> (a) the Minister for Jobs and the Secretary of DJPR owed the Plaintiff and Group Members a duty to take reasonable care in the procurement and supervision of the provision of the guarding service to avoid foreseeable loss (**Procurement Duty)**; and
>
> (b) the Minister for Health and the Secretary of DHSS owed the Plaintiff and Group Members a duty to take reasonable care in the provision of infection-control training to, and supervision of, personnel providing the guarding service to avoid foreseeable loss (**Training Duty)**.

258 For reasons set out in the 5 Boroughs section, the bare assertion of a duty to 'avoid foreseeable loss' is embarrassing. By attempting an assessment of the plaintiff's imperfect allegations of the salient features relied on, the court may presume what is actually intended that the defendants had a duty to take care to avoid and thus identify how the pleading might be amended.

259 Paragraph 64 alleges, without particulars,[245] what the defendants knew, or ought to

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244 Those persons, relevantly, were each of the Chief Health Officer (Adjunct Clinical Professor Brett Sutton, 8 Directions), Deputy Chief Health Officer (Dr Annaliese Van Diemen, 13 Directions), Deputy Public Health Commander (Dr Finn Romanes, 30 Directions) and Deputy Public Health Commander (Associate Professor Michelle Giles, 4 Directions).

245 As required by r 13.10(3)(b) of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic).

have known –

(a) first, that 'ineffective' implementation of hotel quarantine would detrimentally impact –

(i) the plaintiff's and psychiatric injury sub-group members' quality and enjoyment of life and their psychiatric and psychological health by reason of the suspension or closure of one or more of the Affected Businesses which were owned, controlled or operated by sub-group members, or alternatively the suspension or termination of sub-group members' employment in one or more of the Affected Businesses, and

(ii) the plaintiff's and economic loss sub-group members' ability to earn wages or income from owning, controlling or operating, or being employees of one or more of the Affected Businesses.

(b) Second, that by imposing COVID-19 restrictions, presumably a reference to restrictions imposed by one or more directions given pursuant to s 200 of the *Public Health Act*,[246] –

(i) the plaintiff and psychiatric injury sub-group members were likely to suffer damage, loss and injury to their psychiatric and psychological health; and

(ii) the plaintiff and economic loss sub-group members were likely to suffer economic loss by way of loss of wages or income.

260 Paragraph 65 alleges what was reasonably foreseeable by the defendants, namely that if they breached their respective duties, group members would be likely to 'suffer harm' because quarantine would not be 'effective' and community transmission would lead to the imposition of COVID-19 restrictions which would adversely affect the operation of some or all of the Affected Businesses.

246 It should not be necessary for the court to presume what is alleged.

261 Paragraph 65A alleges that the defendants were each able to exercise control over the avoidance of 'foreseeable loss', because they 'asserted control' over guarding services and infection-control training to, and supervision of, guards. Pausing here, this paragraph is embarrassing by reason of the absence of an allegation of control over the risk of loss.

262 Paragraph 65B alleges that the defendants assumed responsibility for the procurement and supervision of the guards and the provision of infection-control training to, and supervision of, guards. Pausing here, this paragraph is embarrassing by reason of the absence of an allegation of assumption of responsibility for the risk of loss.

263 Paragraph 65C alleges that the plaintiff and group members were reliant on each of the defendants to take reasonable care in the procurement and supervision of the guards and the provision of infection-control training to, and supervision of, guards. Pausing again, this paragraph is embarrassing by reason of the absence of an allegation of reliance on the defendants to take reasonable care not to inflict loss, which must be more precisely categorised, on the plaintiff and group members.

264 Paragraph 66 alleges that the plaintiff and group members were vulnerable to the consequences of the imposition of COVID-19 restrictions and thus vulnerable to 'any want of care leading to the continued imposition or re-imposition of COVID-19 Restrictions'.

265 Notwithstanding that before hearing the application I gave the plaintiff the opportunity to consider, and amend, his pleading to properly plead his best case, I am prepared to proceed on the basis that the plaintiff could amend the pleading not only to correctly identify the salient features on which he relies but also to plead the posited duty to identify the risk to the plaintiff and group members.

266 How this is achieved is a matter for the plaintiff's advisers. They might start by reflecting on the form of a further aspect of the alleged duty, to the effect that the posited duty was to exercise reasonable care so that the plaintiff and psychiatric injury sub-group members did not suffer damage, loss and injury to their psychiatric and

psychological health by reason of the imposition of restrictions on the Affected Businesses, and to exercise reasonable care so that the plaintiff and economic loss sub-group members did not suffer economic loss by way of loss of wages or income by reason of the imposition of restrictions on the Affected Businesses.

Roberts and the sub-groups

267 Roberts was a roadside crash barrier installer employed by Australian Barriers who was made redundant in unexplained circumstances. Roberts has not pleaded that Australian Barriers is an Affected Business as defined by the pleading. Nothing can be presumed about Australian Barriers because no material facts are alleged about it or its business or the circumstances that led to Roberts being made redundant. For the purposes of the present application, it is not an Affected Business. This may be inferred from the allegations in the amended statement of claim considered as a whole.

268 The particulars of loss under paragraph 75 ('The plaintiff's employment was terminated by Australian Barriers … by reason of redundancy as a consequence of the imposition of COVID-19 Restrictions') cannot support an allegation that Australian Barriers is within any of the categories of business identified under paragraph 1A(b) of the pleading. How it was affected, if at all, by lockdown restrictions is not the subject of any allegation. It would also not appear to be a group member in the 5 Boroughs proceeding as it does not appear that it carried on a retail business as at 1 July 2020 that involved the supply of goods or services in Victoria to members of the public in attendance at their premises.

269 It must follow that Roberts is not a member of, or representative of, either of the defined groups, which are limited by the reference in paragraph 1A(c) of the pleading to Affected Businesses as defined.

Policy making functions of government

270 The defendants' submissions in respect of this salient feature are substantially the same as in 5 Boroughs and need not be repeated. With one exception, I have reached the same conclusion in respect of this particular objection, that I will not summarily dismiss the claim, but would strike out the statement of claim with leave to replead.

271 Roberts' case departs from 5 Boroughs in the allegation of the 'procurement duty'. Part of this duty, though it is not pleaded clearly, involved appointing the ADF and/or Victoria Police to staff the quarantine hotels, as opposed to contracting with private security companies.

272 The plaintiff pitched his response to this challenge at a very general level. He submitted, adopting the historical language, that the court is generally ill-placed at this stage of the proceedings to reach a finding that the claim is so manifestly hopeless that a trial would be a futility. This is because conclusive determination of these matters ultimately requires careful factual analysis.[247] He added that when a case involves a novel cause of action, a measure of caution must be exercised in entering summary judgment, especially if the facts, adduced at trial, might cast 'light and colour upon the resolution of the legal questions'.[248]

273 The plaintiff cited the cases of *Alcoa of Australia Ltd v Apache Energy Ltd*[249] (***'Alcoa'***) and *Mills v Sheahan*[250] (***'Mills'***), submitting that those courts reiterated that a novel duty of care will often be inappropriate for summary determination because it requires a close analysis of the facts at trial,[251] and that there is a heavy onus on a defendant in seeking summary judgment to establish that the plaintiff's case is so untenable that it cannot succeed.[252]

274 Broadly, I accept these contentions and I have set out above the law as I will apply it on this application. The defendants must clear a high bar to show that no duty of care could arise on the assumed facts.[253] However, it is not the case that any novel duty pleaded must be immune from summary dismissal.

275 An initial difficulty is that it is not clear from the amended statement of claim precisely what the content of the 'procurement' and 'training' duties is alleged to be. On

247 *Wickstead* (1992) 30 NSWLR 1, 5-6; *Richards* (2010) 27 VR 343, 345 [8]; *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30, 70-1 [103] (***'British American Tobacco'***).
248 *British American Tobacco* (2003) 217 CLR 30, 70-1 [103].
249 [2012] WASC 209 (***'Alcoa'***).
250 (2007) 99 SASR 357 (***'Mills'***).
251 *Alcoa* [2012] WASC 209, [64].
252 *Mills* (2007) 99 SASR 357, 379-81 [101]-[111].
253 *Smith v State of Victoria* [2018] VSC 475, [171].

analysis, 5 Boroughs has pleaded its claim with considerably more attention to the policy/operational dichotomy than Roberts has. One example can illustrate the issue. Assuming that these duties could be adequately re-pleaded, with guidance from what is set out above in respect of the 5 Boroughs claim, the decision to supply hotel quarantine services using private contractors rather than the ADF and/or Victoria Police, could not be an 'operational' decision.

276 The plaintiff uncontentiously submitted that decisions called into question in relation to the pandemic may fall on a spectrum from operational to 'core policy' decisions. It is tenable to contend that the manner in which hotel quarantine was implemented in terms of audits performed and specific practices deployed for infection control measures may sit in the 'operations' category on that spectrum, but on any view the same cannot be said for the procurement decision in the sense pleaded, namely that the defendants were negligent by failing to engage the ADF and/or Victoria Police and instead engaging private contractors.

277 Whether to privatise the delivery of a public service lies at the heart of policy decision-making. It requires balancing many considerations that are not amenable to a clear metric or criterion for assessment including, in this particular instance, access by a State government to resources maintained by the Federal government. The exercise is inapposite for a court.[254] It involves clear budgetary and resource allocation considerations, and ideological or political choices ('financial, economic, social or political factors or constraints').[255]

278 I appreciate that there is not a bright line between the decision to privatise the guarding services in hotel quarantine and the decision to audit or supervise the quarantine sites more or less regularly, but there is a qualitative difference between the two. The former is unarguably part of the design and policy architecture or framework of hotel quarantine, the latter is arguably an administrative decision about the manner in which quarantine is to operate, within the determined policy

254 *Dorset* [1970] AC 1004, 1067, cited in *Graham Barclay Oysters* (2002) 211 CLR 540, 557 [13].
255 *Roo Roofing* [2019] VSC 331, [470], quoting *Heyman* (1985) 157 CLR 424, 469.

framework.

279 Operational questions about hotel quarantine may not differ conceptually from the decisions involved in operating any public facility, say a hospital, and may be questions amenable to an assessment of reasonableness. Put differently, the use of private contractors may have been one of the 'features of design that were the qualities of the [program] that attracted the defendant[s] to it as a policy response' to the pandemic.[256] It is a 'fundamental government choice about the nature' of the quarantine program that was adopted.[257] Policy choices determine whether quarantine is delivered in hotels, purpose built facilities, correctional facilities, or other buildings specially adapted by reference to purpose specific design criteria, and whether these facilities are publicly or privately staffed.

280 Dissatisfaction with government decisions to outsource to contractors is addressed through democratic processes; it is not, generally speaking, justiciable in tort. Roberts has been unable to demonstrate why on the pleaded facts of this case, the decision is exceptionable and should be characterised as operational. No evidence that could be led at trial could change this.

281 This aspect of the pleadings, in particular as reflected at paragraph 67(a) of the amended statement of claim in the pleading of the procurement duty, and all parts of the amended statement of claim that advance this aspect of a 'procurement duty', is not a sustainable component of an actionable duty of care.

Incoherence

282 The defendants' submissions as to incoherence do not differ materially between 5 Boroughs and Roberts, and in response, the latter adopted the former's submissions. For the reasons set out above, it is not appropriate in the present circumstances to determine summarily whether incoherence in the law is a fatal impediment to Roberts positing a duty of care to avoid 'foreseeable loss' by a proper pleading.

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256 *Roo Roofing* [2019] VSC 331, [498].
257 *Graham Barclay Oysters* (2002) 211 CLR 540, 606-7 [175].

Indeterminacy

283 The defendants submitted that the danger of indeterminacy in recognising the duty of care posited by Roberts is more pronounced than with 5 Boroughs. Indeterminacy is of particular concern in recognising a novel duty of care where the loss is purely economic or is psychiatric injury, without physical injury. Where the injury or loss is not tethered at all to physical injury or property damage, there is a risk of a ripple effect.[258] The courts will generally find that no duty is owed to those who suffer loss as part of a ripple from the original injury.[259]

284 For this objection, it is pertinent to focus on the sub-groups. The whole group comprises not just business owners/operators but also their employees. The sub-group members are those alleged to have suffered from the lockdown restrictions either psychiatric injury consequent upon the loss of employment or to have suffered economic loss, or both.

285 The defendants submitted that the plaintiff's case is brought on behalf of persons who are not 'first line' or even 'second line' persons suffering economic loss.[260] They say that the first line victims were the staff operating in hotel quarantine who contracted COVID-19 through the negligent operation of the programs, which caused a ripple effect. The second line were community members who contracted COVID-19 during the second wave, the third line were the 'affected businesses', and the fourth line were the owners, operators and employees of the affected businesses who suffered from lost income or wages from the restrictions on those businesses. There is no way of confining liability to that fourth line's economic loss. Fifth and sixth lines of economic loss sufferers can be imagined.

286 As already noted, indeterminacy is a policy consideration and not a rule of law,[261] and one of a number of considerations that are relevant to whether the common law recognises a novel duty of care.[262] It is to be assessed prospectively by asking whether

258 *Waller v James* (2006) 226 CLR 136, 149–50 [37].
259 *Perre* (1999) 198 CLR 180, 222–3 [112]. See also *Woolcock* (2004) 216 CLR 515, 537 [47].
260 Ibid.
261 *Johnson Tiles* (2003) Aust Torts Reports ¶81-692, 63,672 [900].
262 Ibid 63,672 [901].

the duty would be owed to an indeterminate class. The members of a class do not have to be identified with complete accuracy and the size and number of claims is not decisive. The defendants' knowledge may pertain to a particular class, as opposed to specific individuals. Liability is indeterminate when it cannot be realistically or reasonably calculated. As a general rule those who suffer loss as a consequence of the prime victim suffering loss are not owed any duty.[263] Indeterminacy is of concern in recognising any novel duty, regardless of the nature of the loss.[264]

287 The defendants contended that the psychiatric injury sub-group is comprised of persons alleged to have suffered psychological or psychiatric injury because of the restrictions on the Affected Businesses and their impact on the income/employment of those group members, the 'fourth line' of victims. The class constituted in this sub-group by employees of Affected Businesses is further removed from the prime victim than the Affected Businesses and their operators and controllers. The extent of this class and the loss claimed as suffered is indeterminate.

288 The plaintiff sought to shift focus from the indeterminacy concern by emphasising the fact that the foundation of his posited duty goes beyond foreseeability. His posited duty arises because group members were vulnerable and the defendants had assumed responsibility to protect the Victorian community from widespread COVID-19 and the lockdown consequences that may flow from that, and the defendants had control to prevent the harm from materialising. I pause to note that the imprecision in the definition of the posited duty led the plaintiff to switch, in his submissions, between health risks and financial risks as if there was no relevant distinction. Of itself, that demonstrated that the contention was misconceived. It is also misconceived because indeterminacy cannot be overlooked because other 'salient features' of a posited novel duty have been established. Indeterminacy is a control factor and, of itself, can be fatal to recognition of a posited duty.[265]

289 Focussing on the indeterminacy consideration, the plaintiff contended that 'second

263 Ibid 63,672 [904].
264 *Stavar* (2009) 75 NSWLR 649, 676 [103(l)].
265 *Johnson Tiles* (2003) Aust Torts Reports ¶81-692, 63,676 [948].

line victims' are those who have suffered economic loss purely as a result of economic loss to the first line victims.[266] The plaintiff and group members in the Roberts claim are not ripple effect victims, they are first line victims that have been primarily affected by the defendants' negligence. Their loss does not flow from the loss suffered by others.

290 I explained above, in respect of the 5 Boroughs claim, that it was tenable to argue that the first line of victims were the businesses directly targeted by the stage 3 and 4 restrictions because their economic loss was not contingent on any economic loss or injury suffered by members of the community who contracted COVID-19 during the second wave. The proximate cause of their loss was the lockdown restrictions. The new question that arises in Roberts' case is whether the owners, operators, controllers and employees of these businesses, who suffered injury through losing income as a result of the restrictions placed on the affected business's trading, are first line victims or part of a ripple effect.

291 *Johnson Tiles* illustrates the application of the principle.[267] As already noted, an issue Gillard J considered was whether a gas company owed a duty of care to prevent pure economic loss to its customers' employees. His Honour found as follows:

> The stood down workers were not gas customers. They are one step removed from the gas customer. Their loss comes about because their employer, being a gas user, was deprived of the gas in the course of the business and under the relevant awards, the employer was permitted to stand down the workers without pay.
>
> The claims by the stood down workers and the question of duty of care to avoid purely economic loss, raise questions of policy and the courts have adopted, as a general rule, that those beyond the first line victim are not compensated for purely economic loss. I will consider this question under salient features. At present, I am concerned whether there was the necessary relationship of proximity in the narrow sense laid down by Lord Atkin.
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> …
>
> [T]hey are a true 'ripple effect' victim. The first line victim is the employer. The general rule is against recognising a duty of care to ripple effect victims.

266 *Perre* (1999) 198 CLR 180, 222–3 [112].
267 *Johnson Tiles* (2003) Aust Torts Reports ¶81-692.

…

> In my opinion, the indeterminacy control factor is fatal to the finding of a duty of care by Esso to the stood down workers. Esso did not owe a duty of care at the relevant time to the stood down workers to avoid causing them purely economic loss, as a result of any negligent interruption to the gas supply.[268]

292 In that case, the gas customers had a sufficiently direct relationship with the gas supplier to be the prime victims of the negligent conduct who claimed economic loss flowing from the interruption to the gas supply. The Johnson Tiles employees were stood down because there was no work to do because there was no gas supply. They were not stood down because the gas customers lost money and that loss caused them to downsize and terminate the employees' employment, for example. Therefore, in that narrow sense, the employees' loss did not flow from the loss to the businesses. It resulted from the work stoppage that was caused by the interruption of gas supply. They were held to be 'ripple effect' victims.

293 The workers that were stood down, were in the same proximate relationship with the gas supplier as the employees of the Affected Businesses in Roberts are, on the best assumptions, with the defendants. It is necessary to proceed by reference to best assumptions because Roberts does not allege any relationship, whether proximate or otherwise, between the defendants and his employer.

294 At this point the allegations become confusing. The group members are defined as persons and the definition does not extend to other legal entities.

295 What is alleged is that Affected Businesses were targeted by the lockdown restrictions as part of a public health response. They had to cease or restrict their trading. This, it is presumed, led to the persons who are owners/operators of the businesses losing income. While it is tenable to contend, contrary to the defendants' submission, that the loss suffered by the Affected Businesses themselves represents the prime loss, any loss that was suffered derivatively from that, by persons who are controllers, operators and employees, is at least one step removed. The plaintiff has not identified any other salient feature that would control the indeterminate spread of liability. To

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268 Ibid 63,667 [847]-[848], 63,676 [939], [948].

controllers, operators and employees might be added other categories like the suppliers to the businesses. The posited duties would inevitably lead to indeterminate liability.

296 The plaintiff was unable to be clear on the extent of the membership of the Affected Businesses group. The plaintiff accepted during the hearing that there would be some overlap between the group members in each proceeding, although Roberts and Australian Barriers are not part of that overlap. The 5 Boroughs' group members are 'persons who carried on a retail business'. The group members in Roberts are persons who 'owned, controlled, operated or, alternatively, were employees of' an Affected Business.

297 I am satisfied that the plaintiff cannot realistically contend that the posited duty of care is owed to persons who are merely employed by an Affected Business. Roberts, the sole representative plaintiff, is an employee, although he was not employed by an Affected Business. If employed by an Affected Business, such persons are second line victims, or true ripple effect victims. The law does not recognise the posited duty of care as owed to them. To contend that the law recognises the posited duty (in or to the effect that I have suggested it should be amended) as owed to the plaintiff Roberts, or any employee group member, is a claim with 'no real prospect of success'.

298 There are further problems with the pleading because other group members may be in no different position. Dealing first with the income loss sub-group members, the pleading also fails to establish that persons who control, own or operate Affected Businesses are first line loss sufferers.

299 The Affected Businesses are likely to range, structurally, from sole traders to corporations and, depending on that status – focussing on the legal entity through which the business is operated being the entity that suffers loss as a result of business closure – those who own, control, or operate an affected business may be, but more likely are not, the first line victim. Leaving sole traders to one side, the loss suffered by shareholder/owners, controllers or operators is not conceptually different to that

of employees. It is likely that such persons will be true ripple effect victims of any assumed breach of the posited duty, who have no real prospect of successfully establishing that they are owed the posited duty. In this respect the pleading is embarrassing. Whether a duty of care can be posited for a redefined income loss sub-group, so as to identify a real basis for a claim, cannot presently be assessed.

300 The allegation of psychological or psychiatric injury to the plaintiff and group members, as currently pleaded, is also embarrassing. It is not clear whether the closure of Australian Barriers or the plaintiff's redundancy, whatever be the case, itself somehow caused the injury, or whether the loss of income flowing from that event caused the alleged psychological harm. The defendants and the court cannot assess how far removed the harm is from the alleged negligent conduct and therefore whether recognising the duty to this group risks indeterminate liability.

301 As with pure economic loss, psychiatric injury also carries the risk of indeterminate liability. As Gaudron J explained in *Tame v New South Wales*:

> The three 'rules' in issue may conveniently be described as the 'sudden shock rule', the 'normal fortitude rule' and the 'direct perception rule'. Whatever purpose those 'rules' might hitherto have served in the development of the law relating to pure psychiatric injury, they now serve to emphasise that, as with pure economic loss, something more than foreseeability of the likelihood of harm of the kind in issue is necessary before a defendant will be held to owe a duty of care to take reasonable steps to avoid a risk of that kind.
>
> …
>
> Rather, a duty is only owed to those whom Lord Atkin famously described as 'so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question'.[269]

302 On the interpretation of his pleading most favourable to him, Roberts' psychological injuries are said to be caused by the pure economic loss suffered by him through redundancy from an Affected Business, assuming that Australian Barriers is an Affected Business. There are no particulars that might suggest that any other psychiatric injury sub-group member is in a more proximate relationship. It must

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269 (2002) 211 CLR 317, 339 [45]-[46] (citations omitted).

follow that such sub-group members are very much 'second line' or true ripple effect victims. The injuries may be psychological or psychiatric in nature and not economic loss, but are dependent on and follow from an economic loss.

303 It is not reasonable to expect the defendants to be capable of appreciating in advance who, of those who would lose income consequent on the COVID-19 restrictions, would be susceptible to actionable emotional distress (reaching the level of compensable psychiatric injury) and to what extent. Recognising the posited duty would effectively allow experiencing any type of monetary loss to be coupled with a claim for consequent emotional shock. This type of loss would be futile to pursue to trial in the circumstances of this case. Such claims are fanciful.

304 The proceeding will be summarily dismissed.

305 For completeness and in case other plaintiffs issue a similar proceeding, I will briefly address some remaining arguments.

Other problems with pleading the duty

306 There are a number of problems with how the duty is pleaded. For example:

(a) It is not sufficiently clear what each duty of care (procurement duty and training duty) entailed. The content of the duty of care regarding hotel quarantine requires detailed exposition and the standard of care is not particularised so the defendants cannot ascertain by reference to the alleged standard of care what is alleged to be the content of the procurement and training duties.

(b) It is not sufficiently clearly alleged how the posited duties were breached.

(c) There are facts pleaded that appear to be irrelevant to the causes of action, such as paragraphs 22-23 and 25-27. These allegations are embarrassing.

(d) There are various allegations in the amended statement of claim of publications in media articles, including at paragraphs 26-27, 34-35, and 43-45. These are not allegations of material facts supporting the pleaded cause of action. These

allegations are embarrassing.

(e) No particulars are given of the defendants' alleged knowledge about deficiencies in hotel quarantine at paragraph 36.

(f) Witness statements and evidence from the Board of Inquiry have been cited as particulars in paragraphs 37, 39, 40, 46 and 71 of the amended statement of claim, which would be struck out for the reasons stated earlier in 5 Boroughs.

(g) The deficiencies in paragraph 65 have been discussed.

(h) As with 5 Boroughs, the amended statement of claim uses the term 'effective' and, by doing so, fails to identify a counterfactual allegation as to what level of risk of transmission from hotel quarantine occurs when hotel quarantine is prudently operated and administered.

307 It is not the court's function to settle a party's pleadings. Had I been persuaded that Roberts could tenably allege a duty of care recognised at law, I would have struck out the pleading in its entirety, with leave to replead. It is well recognised that where the objectionable part of a pleading is so intertwined with the rest of the pleading so as to make separation difficult, the appropriate course is to strike out the whole pleading.[270] The amended statement of claim does not properly reveal the case the defendants have to meet.

Causation

Causal disconnect

308 The intervening event of the imposition of the stage 3 and 4 restrictions has already been considered in the context of the 5 Boroughs case, above. I do not conclude, at this stage, that it is fanciful to dispute the defendants' contention that this event served to break the causal chain between the alleged breach of the duty of care in hotel quarantine, and the ultimate loss suffered by Affected Businesses.

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270 *Wheelahan* [2013] VSC 316, [25].

Causation more generally

309 The pleaded causal chain in Roberts is as follows:

(a) the breach of the procurement duty and the training duty substantially caused or materially increased the risk of the 'breaches of the Hotel Quarantine Program' (which consisted of matters reported in the media, including concerns raised by 'frontline health workers' with the Australian Medical Association, certain knowledge on the part of the Minister for Health, the fact that staff members of the Rydges and the Stamford hotels and security guards tested positive for COVID-19, media reports of alleged breaches of physical distancing measures, some instances of community transmission, and the withdrawal of a request for ADF support);

(b) the 'breaches of the Hotel Quarantine Program' by some means (although the mode or mechanism by which this occurred is not identified) caused or materially increased the risk of the second wave;

(c) the second wave itself substantially caused or materially increased the risk of the imposition of the stage 3 and 4 restrictions (including workplace closures) and the regional stage 3 restrictions.

310 This causal chain has missing links. The amended statement of claim does not plead which breach of the duty of care caused the initial transmission event from the returning travellers to staff members in the Rydges and Stamford hotels, and no particulars are given in respect of the transmission events within the hotels; what caused the community outbreak; what the relevant counterfactual would be if the duty had been met.

311 The failure to properly articulate the duties of care for which Roberts contends, infected the pleading more generally, particularly in respect of causation. The causal link needs to be established between the transmission of COVID-19 from an overseas traveller in quarantine, in breach of the duty, and the ultimate harm suffered by the plaintiff and group members, whatever that might be alleged to be.

Conclusion - Roberts

312 The Roberts proceeding is summarily dismissed.

313 Subject to any further submission from the parties, I propose to order that the plaintiff pay the defendants' costs of the proceeding including the defendants' costs of and incidental to the application by summons dated 12 April 2021.

CERTIFICATE

I certify that this and the 105 preceding pages are a true copy of the reasons for judgment of the Honourable Justice John Dixon of the Supreme Court of Victoria delivered on 2 December 2021.

DATED this 2nd day of December 2021.

Associate

SCHEDULE OF PARTIES

S ECI 2020 03402

BETWEEN:

5 BOROUGHS NY PTY LTD (ACN 632 508 304)	Plaintiff
-and-	
STATE OF VICTORIA	First Defendant
MINISTER FOR HEALTH AND MINISTER FOR THE COORDINATION OF HEALTH AND HUMAN SERVICES: COVID-19	Second Defendant
MINISTER FOR THE COORDINATION OF JOBS, PRECINCTS AND REGIONS: COVID-19	Third Defendant
SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES	Fourth Defendant
SECRETARY, DEPARTMENT OF JOBS, PRECINCTS AND REGIONS	Fifth Defendant

S ECI 2020 03598

BETWEEN:

JORDAN ROBERTS	Plaintiff
-and-	
STATE OF VICTORIA	First Defendant
MINISTER FOR HEALTH AND MINISTER FOR THE COORDINATION OF HEALTH AND HUMAN SERVICES: COVID-19	Second Defendant
MINISTER FOR THE COORDINATION OF JOBS, PRECINCTS AND REGIONS: COVID-19	Third Defendant
SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES	Fourth Defendant
SECRETARY, DEPARTMENT OF JOBS, PRECINCTS AND REGIONS	Fifth Defendant