

CORONAVIRUS AND THE LAW OF OBLIGATIONS

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*COVID-19 has touched every aspect of Australian society, including the law of obligations. This comment considers how the pandemic could affect contracts – a topic which is already a very popular subject of law firms’ client updates. After discussing frustration and force majeure, it addresses a few relevant torts, including trespass to the person, the tort recognised in *Wilkinson v Downton*, and negligence. The comment is intended to provoke further dialogue on how COVID-19 is affecting Australian law, including in the forthcoming thematic issue of the *University of New South Wales Law Journal* on ‘Rights Protection amidst COVID-19’.*

I INTRODUCTION

On 11 March 2020, the World Health Organisation characterised COVID-19 as a pandemic.¹ At the time of writing, the situation is developing rapidly. There is still great uncertainty surrounding this virus and the impact it will have.

Australian law is undergirded by the *Commonwealth Constitution*. This basic law provides the legal framework within which civil rights and duties are created, recognised and enforced.² This pandemic will damage every aspect of Australian

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1 Tedros Adhanom Ghebreyesus, ‘WHO Director-General’s Opening Remarks at the Media Briefing on COVID-19 – 11 March 2020’ (Media Briefing, World Health Organisation, 11 March 2020).

2 Although it is not the focus of the present discussion, the COVID-19 pandemic may also test the boundaries of Australian constitutional law. There is, for instance, some scope for an argument that the need for a coordinated national response to the pandemic engages the ‘nationhood power’. For a detailed discussion, see Peter Gerangelos, ‘Sir Owen Dixon and the Concept of “Nationhood” as a Source of Commonwealth Power’ in John Eldridge and Timothy Pilkington (eds), *Sir Owen Dixon’s Legacy* (The Federation Press, 2019) 56. At the time of editing, constitutional challenges to state border closures are pending; they are not considered in this piece: see generally Transcript of Proceedings, *Palmer v Western Australia* [2020] HCA Trans 62; Tony Zhang, ‘Clive Palmer Launches High Court Challenge to Queensland Coronavirus Border Closure’, *LawyersWeekly* (online, 31 May 2020) <<https://www.lawyersweekly.com.au/biglaw/28463-clive-palmer-launches-high-court-challenge-to-queensland-coronavirus-border-closure>>.

society, and our branches of government are no exception. As the work of Ministers and employees of their departments is disrupted, important executive action may be delayed. As the priorities of governments change, law reform initiatives may be delayed indefinitely.

COVID-19 is already having an impact on the civil litigation by which obligations disputes are adjudicated. Some superior courts are moving all directions hearings to telephone; civil trials are being truncated to be comprised only of evidence, with legal issues determined on the papers.³ While the judiciary has slowed down, so too are the firms that bring the cases: many closed their offices and transitioned to a new work-from-home reality. Unfortunately, the pandemic may spawn a wave of potentially litigious disputes while simultaneously undermining the institutional infrastructure on which clients depend for dispute resolution. Law students of generations to come may look back on this period through a lens of weird COVID-19 cases, just as we look back on the post-war years through the likes of the *Australian Communist Party v Commonwealth* ('*Communist Party Case*').⁴

There is plainly much which might be said respecting the impact of COVID-19 on the law and legal system. This brief comment considers how this event could engage and impact the law of obligations.⁵

II CONTRACT

The impact of COVID-19 on contracts is already a popular topic for commercial firms' client updates.⁶ The social and economic disruption wrought by the virus will plainly have a significant impact on contractual relations in a range of settings. In some cases, commercial contracting parties may seek to escape loss-making projects by purporting to exercise express termination rights. In other cases, disputes will arise as to the scope of coverage provided in contracts of insurance. Further still, litigation may ensue when consumers seek compensation for holidays and trips which were ruined by the outbreak of the virus.⁷

3 See generally Jerome Doraisamy, 'How Our Nation's Courts Are Responding to COVID-19', *Lawyers Weekly* (online, 16 March 2020) <<https://www.lawyersweekly.com.au/biglaw/27727-how-our-nation-s-courts-are-responding-to-covid-19>>.

4 (1951) 83 CLR 1.

5 There are, of course, many other areas of law that will be forced to grapple with the COVID-19 pandemic. Indeed, the law is no stranger to the difficulties which can be occasioned by a dangerous and contagious virus. The most familiar example is HIV, which has occasioned difficulties for the criminal law as a result of (rare) instances of deliberate transmission: see, eg, David J Carter, 'Transmission of HIV and the Criminal Law: Examining the Impact of Pre-exposure Prophylaxis and Treatment-as-Prevention' (2020) 43(3) *Melbourne University Law Review* (forthcoming).

6 See, eg, Shane Ogden and Oliver Collins, 'The Impact of Coronavirus on Your Contract: Remediating Where the "Frustration" Lies', *King & Wood Mallesons* (Web Page, 25 February 2020) <<https://www.kwm.com/en/au/knowledge/insights/the-frustrating-impact-of-the-coronavirus-20200226>>.

7 See, eg, Mark Giancaspro and John Eldridge, 'Memories Overboard! What the Law Says about Claiming Compensation for a Holiday Gone Wrong', *The Conversation* (online, 21 February 2020)

This is not the place to canvass in detail the full range of contractual disputes which may be fomented by the outbreak of COVID-19.⁸ It is, however, worth considering those doctrines which may become especially significant in contractual disputes connected with the virus and its effects.

A Frustration

The doctrine of frustration has now been recognised for well over a century.⁹ The outbreak of COVID-19 has seen a surge in interest in the nature and scope of the doctrine, which, as will be seen, may be of considerable significance in some disputes.¹⁰

The seminal statement of the doctrine of frustration was provided by Lord Radcliffe in *Davis Contractors Ltd v Fareham Urban District Council* as follows:

[F]rustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni*. It was not this that I promised to do.¹¹

Although this formulation has been approved by the High Court,¹² it omits an aspect of the doctrine which, while controversial, is often cited as one of the key requirements for its engagement – namely the requirement that the frustrating event was not foreseen by the parties at the time of the contract’s formation.¹³

Where the elements of frustration are established, the result is that the parties’ contract is automatically discharged.¹⁴ There is, in other words, no room for choice on the part of the parties – the effect of the frustrating event is that the contract comes to an end, irrespective of the parties’ wishes.¹⁵ Rights which have

<<http://theconversation.com/memories-overboard-what-the-law-says-about-claiming-compensation-for-a-holiday-gone-wrong-132012>>.

8 In addition to the matters discussed below, there is good reason to suppose that litigation sparked by the pandemic will prompt a re-examination of the principles respecting economic duress, implied terms, and the construction of exclusion clauses. Although each of these subjects is of considerable importance, they can be set to one side here in favour of a discussion of those doctrines which are likely to be of principal significance in the litigation prompted by the pandemic.

9 The modern doctrine has its origins in *Taylor v Caldwell* (1863) 3 B & S 826; 122 ER 309.

10 For a general discussion of topical questions in respect of frustration (and force majeure, discussed below), see Howard Hunter, ‘From Coronations to Sand Bans: Frustration and Force Majeure in the Twenty-First Century’ (2011) 28(1) *Journal of Contract Law* 61.

11 [1956] AC 696, 729. Prior to the development of the modern law of frustration, the difficulties posed by supervening events were sometimes addressed by the equitable doctrine of ‘accident’: see John Zerilli, ‘Accident in the Equitable Jurisdiction’ (2008) 24(2) *Journal of Contract Law* 112.

12 See *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337, 357 (Mason J), 408 (Brennan J).

13 See, eg, JW Carter, *Contract Law in Australia* (LexisNexis, 7th ed, 2018) 761.

14 *Hirji Mulji v Cheong Yue Steamship Co Ltd* [1926] AC 497, 505 (Lord Sumner).

15 This aspect of the doctrine has provoked considerable consternation in some quarters, and has been the subject of much analysis: see, eg, Ewan McKendrick, ‘Frustration: Automatic Discharge of Both Parties?’ in Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith (eds), *Defences in Contract* (Hart Publishing, 2017) 141, 155.

unconditionally accrued prior to the frustrating event will survive discharge,¹⁶ but in many cases it will be necessary for parties to avail themselves of restitutionary remedies to avoid injustice which would otherwise result from discharge. In New South Wales, Victoria and South Australia, the legislature has intervened to remedy what was perceived to be the inadequacy of the common law response in this setting.¹⁷

The classic case in which the doctrine of frustration will be engaged is that in which the subject matter of the contract is destroyed (without any fault on the part of the parties) after formation.¹⁸ The COVID-19 outbreak is unlikely to cause a surge in cases of this type. The doctrine is, however, also capable of applying in other scenarios which may arise with some regularity in the coming months. There is authority, for instance, which holds that the doctrine may be engaged where, as a result of changed circumstances, the ‘foundation’ of a contract has disappeared.¹⁹ Thus, in *Krell v Henry*, when the coronation procession of King Edward VII was cancelled as a result of the monarch’s illness, it was held that a contract for the use of rooms on Pall Mall (from which the party hiring the rooms intended to view the procession) was frustrated.²⁰ This decision will doubtless attract renewed attention as the community grapples with an unprecedented spate of event cancellations. Many in the business community will also be driven to re-examine authorities which suggest that the doctrine may be engaged where changes to the commercial practicability of the contract would render performance of the contract radically different from that agreed.²¹

Of perhaps even greater significance is the question of the application of the doctrine to contracts of employment. Here, it is important to distinguish between two different paradigm scenarios. First, there will be many employees who remain able in principle to perform their ordinary employment duties without contravening any statutory or regulatory rule, but who, as a result of the downturn in economic activity, have suddenly become surplus to their employers’ needs.²² Second, there will be other employees who will be unable to perform their ordinary

16 *Hirji Mulji v Cheong Yue Steamship Co Ltd* [1926] AC 497, 510 (Lord Sumner).

17 *Frustrated Contracts Act 1978* (NSW); *Frustrated Contracts Act 1988* (SA); *Australian Consumer Law and Fair Trading Act 2012* (Vic) pt 3.2. The various statutory regimes have been the subject of criticism. See also Andrew Stewart and JW Carter, ‘Frustrated Contracts and Statutory Adjustment: The Case for a Reappraisal’ (1992) 51(1) *Cambridge Law Journal* 66.

18 See, eg, *Taylor v Caldwell* (1863) 3 B & S 826; 122 ER 309. Where, unbeknownst to the contracting parties, the relevant subject matter has perished *prior* to formation, the case falls within the ambit of the doctrine of common mistake.

19 See, eg, *Krell v Henry* [1903] 2 KB 740, 749 (Vaughan Williams LJ).

20 *Ibid* 754 (Vaughan Williams LJ).

21 See, eg, *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337. At the same time, it must be stressed that where changed circumstances merely render performance more costly for one of the parties, there will be no frustration: see the discussion in Jack Beatson, ‘Increased Expense and Frustration’ in F D Rose (ed), *Consensus ad Idem: Essays in the Law of Contract in Honour of Guenter Treitel* (Sweet & Maxwell, 1996) 121.

22 Many examples might be instanced here. Airline baggage handlers, for instance, will doubtless have little work to do in the present climate.

employment duties without engaging in conduct which would contravene a statutory or regulatory provision.

There is good reason to doubt whether the doctrine of frustration has scope to operate in respect of scenarios of the first type. Although the sudden deterioration in economic conditions will doubtless have severe impacts on many employers, the first paradigm scenario described above nonetheless remains in substance a scenario in which employees have become redundant as a result of changes in their employer's needs. The circumstances in which an employment contract can be discharged on the basis of an employee's redundancy is the subject of detailed regulation.²³ There also exist statutory provisions which govern the circumstances in which an employee can be temporarily stood down in response to a 'stoppage' of work.²⁴ It is doubtful whether this statutory regime leaves room for the operation of the doctrine of frustration.²⁵

The second paradigm scenario is rather different. In a case of this type, it would appear that performance of the contract would necessarily involve the doing of an illegal act. Such a scenario might thus – at least where the illegality can be expected to subsist for an indefinite period of time – be thought to amount to a case of 'supervening illegality', such that the doctrine of frustration is engaged.²⁶ Yet even in a case such as this, it is far from clear whether the doctrine has scope to operate. The proper place of the doctrine of frustration in modern Australian labour law may eventually be clarified in the courts as the economic consequences of the pandemic worsen.

B Force Majeure

Given the nature of the doctrine of frustration – which can operate quite harshly in some circumstances – it is common for parties to make express contractual provision for supervening events. By doing so, parties can work around some of the limitations of the common law – such as its blunt-instrument response to a frustrating event, and its failure to recognise 'partial impossibility' as a ground of frustration.²⁷

Where parties have included a clause of this type in their contract, the impact of a supervening event will largely become a question of the interpretation and

23 See, eg, *Fair Work Act 2009* (Cth) ss 119–22. Provisions in respect of redundancy may, of course, also be found in Enterprise Agreements or in individual contracts of employment.

24 See the default statutory provision in *Fair Work Act 2009* (Cth) s 524. Provisions of this type may also be found in Enterprise Agreements or individual contracts of employment.

25 Such a conclusion is consistent with a body of Australian authority which casts doubt on the scope for the operation of the doctrine of frustration in respect of contracts of employment: see, eg, the discussion in Andrew Stewart et al, *Creighton and Stewart's Labour Law* (Federation Press, 6th ed, 2016) 739 [22.48]–[22.49].

26 See, eg, *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, 41 (Viscount Simon LC).

27 The lack of recognition of 'partial impossibility' at common law has been the subject of criticism: see, eg, Michael Bridge, 'Exceptions Clauses and Contractual Frustration Clauses' (2020) 136 (January) *Law Quarterly Review* 1, 5.

application of the relevant term of the parties' contract.²⁸ Where parties have, by their contract, dealt with the impact of a particular event, there will typically be no room left for the operation of the doctrine of frustration.²⁹

The impact of COVID-19 has sparked considerable interest in the question of whether the pandemic is capable of triggering contractual force majeure clauses.³⁰ Although this question is plainly of great practical importance, there is little that can be said definitively at a general level. The question of whether a particular force majeure clause has been enlivened by the COVID-19 pandemic will always turn upon the proper construction of the particular clause in issue. Major firms' client updates on the topic of force majeure clauses have for the most part acknowledged this difficulty, and have sought to circumvent it by considering cases which have dealt with expressions – such as 'act of God' – which are commonly included in force majeure provisions.³¹

Although it may be profitable to consider such authorities, it must be remembered that there is a limit to the utility of this approach. While it is certainly true that force majeure provisions tend to share common features,³² it is nonetheless imperative not to lose sight of the context in which relevant contractual language is used. While the pandemic is in principle capable of enlivening a force majeure provision, it is unsafe to arrive at a conclusion in respect of a particular contract until close attention has been given to the proper construction of the clause in question.

III TORT

This crisis has the potential to test the boundaries of the law of tort on several fronts. Whether any cases of the types discussed below actually arise will depend on the behaviour of would-be parties. As a deteriorating economy begins to make its impact felt, litigation for smaller sums of money may become less frequent.

28 The task of construing a force majeure clause is for the most part governed by the general principles relevant to contractual interpretation. Although these principles are largely settled in Australian law, considerable doubt remains in respect of some questions. The most intractable difficulty relates to the question of when evidence of 'surrounding circumstances' may be used for the purpose of construing a contract: see John Eldridge, "'Surrounding Circumstances'" in *Contractual Interpretation: Where are We Now?* (2018) 32(3) *Commercial Law Quarterly* 3.

29 While the event may be dealt with expressly, it is important to note that there also exists the possibility that the parties' contract contains an implied term that deals with the difficulty in question. The law respecting implied terms has been the cause of some difficulty in recent years, and to a certain extent continues to pose challenges: see, eg, Timothy Pilkington and John Eldridge, 'Implied Terms and Contract Formation' (2019) 135 (October) *Law Quarterly Review* 526.

30 See, eg, Emma Schaafsma et al, 'COVID-19: Pressure Points: Force Majeure Considerations in a Potential "Second Wave" of COVID-19 (UK)', *Herbert Smith Freehills* (Web Page, 27 April 2020) <<https://www.herbertsmithfreehills.com/latest-thinking/covid-19-pressure-points-force-majeure-considerations-in-a-potential-%E2%80%9Csecond-wave%E2%80%9D>>.

31 See, eg, 'COVID-19: Does It Fall within Your Force Majeure Clause?', *Ashurst* (Web Page, 25 March 2020) <<https://www.ashurst.com/en/news-and-insights/legal-updates/covid-19-act-of-god/>>.

32 It is common, for instance, for a clause of this type to impose notice requirements on the parties.

Accordingly, the following section may be little more than a series of thought experiments.

A Trespass to the person

The virus affects the human body, so we shall start with the torts that protect bodily integrity. The advent of a pandemic does not alter ‘[t]he fundamental principle, plain and incontestable, ... that every person’s body is inviolate’.³³ The three varieties of trespass to the person, each descended from the writ of trespass – assault, battery and false imprisonment³⁴ – may each have relevance in the months to come.

Could a cough deliberately directed into another person’s face constitute an assault? That is: would it be an act which ‘causes another person to apprehend the infliction of immediate, unlawful, force on his person’?³⁵ It depends. Whether the person contracts COVID-19 does not matter, as trespass is actionable per se. It might be questioned whether a cough is ‘force’, but with respect to assault, that is not the correct question. Force is the subject of the apprehension – so here, the issue for consideration is whether infection by a virus would constitute sufficient force. You can see a punch to the face; you cannot see the virus with a naked eye.³⁶ There is no physical contact between the skin of the victim and that of the cougher.³⁷ Yet if you threaten to throw a brick at a person, that could constitute an assault;³⁸ it would not matter that there would be a moment in time when the brick was flying through the air and you were not physically holding it any longer. The virus may be too small to see, and it may need to be outside of your body in order to infect another person. Yet it may leave your body and then hit another like a brick – or like a smaller dangerous object, a bullet. There seems to be no principled reason to deny that the apprehended interference in such a case would be actionable. Indeed, this conclusion might be thought to derive further support from the acceptance (albeit in dicta) by Glidewell LJ in *Kaye v Robertson* that the flashing of a bright light into another person’s eyes may amount to a battery.³⁹

The fact that the victim’s ‘damage’, at least in the form of physical suffering, may not manifest until later would not preclude liability, as a threat of impending

33 *Collins v Wilcock* [1984] 1 WLR 1172, 1177 (Robert Goff LJ).

34 Michael A Jones (ed), *Clerk & Lindsell on Torts* (Sweet & Maxwell, 22nd ed, 2017) [15-01].

35 *Collins v Wilcock* [1984] 1 WLR 1172, 1177 (Robert Goff LJ).

36 To express the same point slightly differently, one might contend that the apprehended interference with the plaintiff’s person would not be sufficiently ‘direct’: see *Reynolds v Clarke* (1795) 1 St 634; 93 ER 747, 636 (Fortescue CJ); *Bird v Holbrook* (1828) 4 Bing 628; 130 ER 911.

37 Cf *Stephen v Myers* (1830) 4 Car & P 349; 172 ER 735.

38 See also *Pursell v Horn* (1838) 8 Ad & E 602; 112 ER 966, below.

39 [1991] FSR 62, 68 [3]:

‘Mr. Caldecott, for Mr. Kaye, could not refer us to any authority in which the taking of a photograph or indeed the flashing of a light had been held to be a battery. Nevertheless I am prepared to accept that it may well be the case that if a bright light is deliberately shone into another person’s eyes and injures his sight, or damages him in some other way, this may be in law a battery’.

Bingham LJ expressed some doubt in this regard: at 70. See further *Walker v Hamm* [2008] VSC 596, [307] (Smith J).

force may be actionable.⁴⁰ Pointing a gun at someone might be enough for an apprehension of force;⁴¹ once shot, you may or may not be injured. In the current environment, having someone deliberately cough in your face might be as confronting as facing the barrel of a gun, depending on your constitution. Yet if the victim knew that the cougher was not infected (knowledge that is hard to come by at the time of writing), then the cougher would not be liable.⁴² All of that said: the ancient pedigree of the trespass torts may discourage development of the tort to relatively novel cases.⁴³ If a cough in the face were actionable at all, it would likely be through means of a different cause of action.

Battery is a far more likely to be relevant in this pandemic. ‘The least touching of another in anger’⁴⁴ would be actionable. Hostility is probably unnecessary; lack of consent would be enough.⁴⁵ Tearing a packet of toilet paper from your neighbour’s hands in Coles would be actionable.⁴⁶ Licking a stranger on the bus would be actionable. Would the deliberate cough, considered above, be actionable? In *Pursell v Horn*,⁴⁷ throwing water on a person was a battery, despite the lack of physical contact between the parties. In *R v Cotesworth*,⁴⁸ it was held that spitting in a person’s face could constitute a battery; *Majindi v The Northern Territory of Australia*⁴⁹ held the same. So yes, deliberately coughing in a person’s face could amount to a battery.

Many of us are about to be ‘imprisoned’ in one way or another in the months ahead, but it is unlikely to constitute actionable false imprisonment. At common law, imprisonment for the sake of public safety would be defensible via necessity.⁵⁰ The defence would be unnecessary, however, in that any imprisonment to come will be carried out pursuant to statutory authorisation. Difficult questions, which are beyond the scope of this comment, will arise in those Australian jurisdictions which have enacted human rights statutes. As our needs for personal security continue to grow, our individual liberties will continue to be challenged.

B *Wilkinson v Downton*

The coughing hypothetical might be more naturally accommodated within the principle in *Wilkinson v Downton*.⁵¹ According to this principle, a deliberate act

40 *Barton v Armstrong* [1969] 2 NSW 451.

41 *McClelland v Symons* [1951] VLR 157, 163–4 (Sholl J).

42 Cf a situation where a gun is pointed at a person who knows it is unloaded or a toy: *Logdon v DPP* [1976] Crim LR 12.

43 See *Stingel v Clark* (2006) 226 CLR 442, 475–6 [97] (Kirby J).

44 *Cole v Turner* (1704) 6 Mod 149; 90 ER 958 (Holt CJ).

45 *Boughey v R* (1986) 161 CLR 10, 25 (Mason, Wilson and Deane JJ); *Secretary, Department of Health and Community Services (NT) v JWB* (1992) 175 CLR 218, 310 (McHugh J).

46 See ‘Video Captures Women’s Brawl over Toilet Paper at Woolworths’ (YouTube, 6 March 2020) <<https://www.youtube.com/watch?v=DQv5PwMzI-w>>.

47 (1838) 8 Ad & E 602; 112 ER 966.

48 (1704) 6 Mod 180; 87 ER 928.

49 (2012) 31 NTLR 150.

50 *Southwark London Borough Council v Williams* [1971] 1 Ch 734, 746 (Edmund Davis LJ).

51 [1897] 2 QB 57, 58–9 (Wright J).

calculated to cause physical harm, including psychiatric injury,⁵² is actionable.⁵³ However, the coughing victim may not have a cause of action if they suffer no more than emotional distress.⁵⁴ Yet the application of this relatively unusual tort to a case of ‘mere’ emotional distress would vindicate the intuition that being deliberately coughed on amidst a pandemic is wrong enough to be actionable.

C Negligence

Of the torts considered here, negligence has the greatest potential to be utilised in litigation in response to damage suffered in coming months.

Case studies are not in short supply. On 16 March 2020, ABC’s 7:30 program relayed the story of a young man in self-isolation, trapped in his bedroom within an Australian share house, having his housemates leave him bowls of pasta at his bedroom door.⁵⁵ The bartender and student attended drinks with colleagues a week or so earlier, including with one friend who, unbeknownst to the group, had recently been tested for COVID-19 and failed to self-isolate. The young man had shaken hands and hugged his friend, and even finished one of his beers. When the friend tested positive not long after the gathering, the young man was informed, then had himself tested and went into isolation. Against the backdrop of explicit government advice to self-isolate, the failure to warn the group – and a fortiori the decision to attend the event – is a clear breach of duty of care on the part of this friend.⁵⁶

The content of one’s duty of care is a question which ought to be on the minds of every business owner. At the time of writing, a business offering hand sanitiser to customers at reception is not an uncommon sight, while supermarkets are offering disinfectant wipes for shoppers to clean their trolleys before entering a Mad Max-esque quest for toilet paper. Many businesses that depend on large crowds – like promoters of concerts⁵⁷ – have been forced to cancel events to comply with government policy.⁵⁸ Even ANZAC Day commemorations have been

52 See *Stingel v Clark* (2006) 226 CLR 442.

53 Barbara McDonald, Ross Anderson and David Rolph, *Cases on Torts* (Federation Press, 6th ed, 2017) 37.

54 *Giller v Procopets* (2008) 24 VR 1, cf the dissent of Maxwell P; *Habib v Commonwealth [No 2]* (2009) 175 FCR 350.

55 See ABC, ‘Coronavirus is Changing the Way We Live and Work’, 7:30 with Leigh Sales (Web Page, 16 March 2020) <<https://www.abc.net.au/7.30/coronavirus-is-changing-the-way-we-live-and-work/12061306>>.

56 Applying the statutory ‘Shirt calculus’ enacted in each of the Civil Liability Acts: see, eg, *Civil Liability Act 2002* (NSW) s 5B(2); *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 47 (Mason J).

57 For example, Bluesfest Services Pty Ltd, behind the cancelled Byron Bay music festival: see ‘Bluesfest Has Been Cancelled Due to Coronavirus, but Will Proceed in 2021’, *Double J* (online, 16 March 2020) <<https://www.abc.net.au/doublej/music-reads/music-news/bluesfest-2020-cancelled-coronavirus-covid-19/12059026>>.

58 Brett Worthington, ‘Gatherings of More than 500 People to be Cancelled, Australians Urged Not to Travel Overseas Amid Coronavirus Fears’, *ABC News* (online, 13 March 2020) <<https://www.abc.net.au/news/2020-03-13/coronavirus-scott-morrison-coag-premiers-cancelling-events/12053382>>.

cancelled.⁵⁹ For the foreseeable future, every time a business encourages a group of people to come into close proximity with one another, they will be flirting with a foreseeable risk of harm to their customers. Although there is social utility in keeping many businesses open, at some point, the probability and likely seriousness of harm underlying many forms of trading will outweigh that utility.⁶⁰ Apart from risk to customers, risk to employees – who may be required to stay in close contact with colleagues for extended periods of time – is pronounced.

We should also consider those institutions who could adapt to the new reality relatively easily, but for reasons of cost or convenience, have failed to do so. At the time of writing, for example, against a backdrop of conflicting expert advice, many schools and universities are still open and delivering face-to-face instruction. Those with the power to close these institutions or alter the way in which instruction is delivered, who have so far failed to exercise that power, may soon be asked whether continuing in this way is consistent with their duties of care to students and staff. Higher education is one of the few sectors of our economy that might survive an immediate transition to a 100% virtual workplace; the relatively less severe burden of taking precautions to avoid the risk of harm means that failure to take those precautions has graver consequences at law.⁶¹

Certain jurisdictions contain provisions within the Civil Liability Acts regarding liability for harm from obvious risks of dangerous recreational activities.⁶² Those provisions historically had application to things like bungee jumping or contact sport, yet may find new application in this pandemic. If a person attends a small bar and is infected, would the proprietor of the bar have a statutory defence?⁶³ Even in the absence of statutory protection, the proprietor may have a defence at common law via *volenti non fit injuria*.⁶⁴ The law of torts will tacitly encourage each of us to be vigilant, and to take personal responsibility for avoiding transmission of the virus.

Unlike trespass to the person, damage is the gist of negligence; it is not actionable unless the negligent conduct factually caused damage.⁶⁵ The need for a plaintiff to demonstrate factual causation on the balance of probabilities may preclude many actions in negligence: there will be a point at which there are so many vectors surrounding each of us that it would be almost impossible to identify the source of transmission. The forensic task will be much easier in the early days, for cases like that of the poor young man at the pub, considered above.

Putting aside the causation problem, what heads of damage would be compensable for COVID-19 negligence? An infected person would have suffered

59 'Coronavirus Forces Cancellation of Anzac Day Services in Victoria, NSW, Tasmania, Queensland and Western Australia', *ABC News* (Online, 16 March 2020) <<https://www.abc.net.au/news/2020-03-16/anzac-day-services-cancelled-due-to-coronavirus/12060466>>.

60 See, eg, *Civil Liability Act 2002* (NSW) ss 5B(2)(a)–(c).

61 See, eg, *ibid* s 5B(2)(c).

62 See, eg, *ibid* pt 1A div 5.

63 See *ibid* s 5L.

64 See *South Tweed Heads Rugby League Football Club Ltd v Cole* (2002) 55 NSWLR 113.

65 See, eg, *Civil Liability Act 2002* (NSW) s 5D(1)(a).

compensable ‘personal injury’, a term which includes disease.⁶⁶ That head of damage captures three kinds of loss: non-pecuniary loss for (inter alia) pain and suffering; loss of earning capacity; and actual financial loss, including for example, medical expenses.⁶⁷ Consequential economic loss would be compensable, although economic loss for personal injury remains limited by the Civil Liability Acts.⁶⁸

IV CONCLUSION

Casebooks on obligations recount disputes: stories of conflict, loss and human suffering. In the months ahead, Australia will see more conflict, loss and human suffering than we authors have seen in our lifetimes. A morbid silver lining to this tragedy is that it may give rise to interesting cases for future casebooks. We sincerely hope that it does not, and that families, businesses and societies around the world recover as quickly and painlessly as possible.

There are so many issues that this comment has left untouched, and so we conclude by encouraging colleagues in the legal academy to spend some time in self-isolation investigating the implications of COVID-19 for other areas of law. A glaring omission from this piece is the impact of the crisis on property and equity. For example, when thousands of millennial casual workers lose their jobs and stop paying rent, what will that mean for landlords? This crisis will pose countless further questions of law and policy worth considering in the months ahead.

66 See, eg, *ibid* s 11(c). See also, as noted above, cases of criminal liability for infecting a victim with a serious disease like HIV, for example *Zaburoni v The Queen* (2016) 256 CLR 482.

67 *CSR Ltd v Eddy* (2005) 226 CLR 1, 15–16 [28]–[31] (Gleeson CJ, Gummow and Heydon JJ).

68 See, eg, *Civil Liability Act 2002* (NSW) pt 2 div 2.