**[IS THERE A DUTY OF CARE TO PROTECT VULNERABLE PEOPLE FROM HARM?](https://blogs.griffith.edu.au/law-futures-centre/2022/07/18/is-there-a-duty-of-care-to-protect-vulnerable-people-from-harm%EF%BF%BC/)**

* by Melanie Davies  posted July 18, 2022 – Griffith University, Qld.

This post is contributed by [*Associate Professor Kylie Burns*](https://experts.griffith.edu.au/7249-kylie-burns), a member of the Griffith Law School and Law Futures Centre.

It might be thought that, as good citizens, we all have a duty of care to protect vulnerable people amongst us- those who cannot self-protect- from injuries we could reasonably prevent. The law does recognise a duty of care in negligence in a range of defined relationships where a person may be vulnerable to harm and someone else is in a position to protect them by taking reasonable care to avoid that harm. For example, drivers owe a duty to their passengers and to pedestrians; doctors owe a duty to patients; and schools owe a duty to students. However, it is also clear that negligence law does not require us in general to prevent harm to others, just because they are vulnerable. If we see a small child in a park about to have an accident, we have no legal duty to rush to rescue that child from potential injury if we are not their carer and we have not created the danger. Of course we might have a moral duty to rescue them. Even parents owe no general legal duty of care in negligence law to prevent injury to their own children.

In October 2003, at the Centenary Conference of the High Court of Australia, Professor Jane Stapleton argued that the High Court had identified the [**‘protection of the vulnerable as a core moral concern of tort law: its golden thread**.’](https://openresearch-repository.anu.edu.au/handle/1885/87445)  Her hope was that Australian courts, recognising the protection of the vulnerable as a key concern, could develop negligence law in a way which might right the ‘most grievous wrongs in Australia’s history’ particularly those wrongs suffered by First Peoples. How has ‘vulnerability’ been used by Australian courts in developing negligence law during the last two decades and have vulnerable people in fact been protected by Australian negligence law?

In the last two decades, it cannot be said that ‘vulnerability’ has emerged in the Australian High Court as an expansionary force in negligence cases introducing new categories of duty to protect vulnerable people. Recognition of ‘vulnerability’ has not played a dominant role in righting public wrongs and recognising new duties of care. There has been no significant case before the High Court which has resulted in compensation for First Peoples for public wrongs such as wrongful removal from family as children.  The High Court of the last two decades has remained an essentially conservative court. ‘Vulnerability’ has remained a ‘salient feature’  considered by the High Court when determining novel and new duty of care cases, but rarely (if ever ) has it been a positive determinative factor in recognising new categories of liability or expanding liability. It has most often emerged as a key limiting duty factor, particularly in economic loss cases where commercial parties who had an ability to self- protect from financial loss (for example through contract) have been found not vulnerable  and hence have been owed no duty of care.

Plaintiffs who may have been thought to have been especially ‘vulnerable’ or especially dependent on the defendant to prevent harm have been unsuccessful. For example, in [Stuart v Kirkland Veenstra](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2009/15.html?context=1;query=Stuart%20v%20Kirkland-Veenstra;mask_path=),  a case concerning whether police officers owed a duty to take reasonable steps to prevent a person committing suicide, the High Court noted that vulnerability may be one relevant factor in determining the duty of public authorities such as police, although ‘it has not been universally accepted as a useful analytical tool.’   The court found that the plaintiff’s ‘autonomy of action’ may be inconsistent with a finding of vulnerability, and ultimately coherence with any relevant legislation (and the way the legislation defined the powers of the public authority) were key factors in determining whether a duty of care was owed.  Liability was refused in cases concerning an array of plaintiffs who may be thought to be factually immensely vulnerable such as [plaintiffs affected by alcohol including where the alcohol was provided by the defendant](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2009/47.html?context=1;query=CAL;mask_path=);  [employees especially vulnerable to vicarious trauma](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2007/20.html?context=1;query=Fahy%20;mask_path=au/cases/cth/HCA);  [pedestrians injured by the negligence of council subcontractors working on a road](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2007/6.html?context=1;query=negligence%20road%20;mask_path=au/cases/cth/HCA);   [unborn plaintiffs in wrongful life cases](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2006/15.html?context=1;query=wrongful%20life%20;mask_path=au/cases/cth/HCA); and [a person killed by a mentally ill friend after he was discharged from hospital](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2014/44.html?context=1;query=Hunter;mask_path=au/cases/cth/HCA).  In public authority cases (and more broadly) it has been clear that even where a plaintiff may be considered to be immensely ‘vulnerable’ to injury, legal liability will be constrained by tightly identifying relationships of existing special dependence.  ‘Coherence’ has emerged as the ‘trump’ factor in negligence cases. The High Court will not find a duty of care exists (despite the presence of vulnerability) where such a duty would be inconsistent with legislation.  Tort reform civil liability legislation in all Australian states and territories has also restricted the ability of ‘vulnerable’ plaintiffs to bring actions for their injuries, particularly against public and government bodies.   In addition, [civil liability legislation](https://www.legislation.qld.gov.au/view/html/inforce/current/act-2003-016) heavily impacts actions by parties who suffer injury while in a vulnerable position, such as those who are alcohol or drug impacted or prisoners.

Vulnerability has not been an expansionary influence on Australian negligence law, protecting new categories of vulnerable people. The [Trevorrow Stolen Generations case](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/sa/SASC/2010/56.html?context=1;query=Lampard%20trevorrow;mask_path=) in South Australia showed the promise of the law to respond to victims of public wrongs like Bruce Trevorrow wrongfully removed from his family as a small child.  However, his case has not given rise to further successful Stolen Generation cases, and compensation has been provided to members of the Stolen Generation by capped statutory reparation schemes which were a long time coming. For example, the [South Australian scheme](https://www.agd.sa.gov.au/aboriginal-affairs-and-reconciliation/reconciliation/stolen-generations-reparations-scheme) was not established until 2015, and the [Commonwealth scheme](https://www.indigenous.gov.au/news-and-media/announcements/stolen-generations-redress-scheme) for members of the Stolen Generations removed from their families in the Territories was not introduced until 2021 and commences in 2022. Public interest litigation based on breach of duty by the Government towards vulnerable people such as those injured in immigration detention has [met with some success](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2016/483.html?context=1;query=S99;mask_path=). However, recent unsuccessful cases, such as the [Sharma climate change litigation](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2022/35.html?context=1;query=Sharma%20and%20Minister;mask_path=) brought by a representative group of children, demonstrate that the legal concept of vulnerability is confined to especially close and defined protective type relationships. Even where plaintiffs are vulnerable to harm if the defendant does not act to protect them, this can be outweighed by other duty factors particularly lack of coherence with legislative framework and concerns that any liability may be too indeterminate and broad. Despite signs that protection of the vulnerable is a concern that has the potential to influence the development of Australian negligence law into new categories of duty of care, the promise of the golden thread has not (yet) been fully fulfilled.

This post is a short version of a paper given by Associate Professor Kylie Burns at the ‘Reflecting on Tort Law: Celebrating Jane Stapleton’ Symposium  on 29 July 2022 at Wadham College Oxford.