

1. **'Secondary victim' cases:** P perceives, or is told about, another person being injured by D. The psychiatric effect on P is a secondary effect of the perception of a physical injury to the 'primary victim' actually involved in the accident. Difficult to recover but not impossible.
Annetts (son) and *Wicks* (rescuers)
2. P sustains psychiatric illness as a result of D making a false accusation about him, or as a result of D providing him, or others, with false information. These cases are rare.
Tame v New South Wales (2001) 211 CLR 317
Sullivan v Moody
Thompson v Cannon (2001) 207 CLR 562, [2001] HCA 59

1. Is there any precedent for the current case?

<p><u><i>P in Fear for Own Safety:</i></u> DOC owed for those in physical zone of danger, so as to be placed in <i>reasonable fear for their own safety</i>. <i>Dulieu v White & Sons [1900-1903]</i>: P was narrowly missed by a coach and horses being negligently driven; she sustained a 'severe shock', became ill and consequently suffered a miscarriage.</p>
<p><u><i>P in Fear for Family Members:</i></u> DOC is owed to those who witness (or reasonable think so) an injury being caused to a close family member, provided that they witness the accident with their own eyes/ears. <i>Hambrook v Stokes Brothers [1925]</i>: P reasonably thought she had witnessed her children being injured by a runaway lorry, when this was not in fact the case → DOC owed.</p>
<p><u><i>P in Fear for Co-Workers:</i></u> DOC can be owed by employers to employees who witness (or reasonably believe they have witnessed) the injury or death of a co-worker due to employer's negligence. <i>Dooley v Campbell Laird and Co [1951] (English)</i>: P (a crane operator) successfully recovered when his employer's negligence in failing properly to maintain a crane caused him to think that a load from the crane had dropped onto a co-worker. <i>Mount Isa Mines v Pusey (1970) (Aus)</i> rescuer's principle: P heard 2 co-workers being electrocuted and then saw 1 of them in a horribly burned condition when assisting; they both later died. P recovered damages for later developing unusual symptoms of schizophrenia. P was owed a DOC by his employer.</p>
<p><u><i>Rescuers:</i></u> DOC could be owed to rescuers assisting at the scene of an accident site, even where they have no relationship to anyone injured in the accident. <i>Chadwick v British Railways Board [1967]</i>: P suffered anxiety neurosis ('psychoneurosis') as a result of assisting at the scene of a horrific railway accident in London. <i>Waller J</i>: the duty to rescuers being based on the principle that 'danger invites rescue', so that a D who causes an accident can reasonably foresee that persons may try to assist victims and then themselves be injured (either physically or mentally) in the process. <i>Mount Isa Mines v Pusey (1970) (Aus); Wicks v NSW</i></p>
<p><u><i>P Witnessing the Immediate Aftermath of the Accident:</i></u> a close family member of an injured person may be owed a duty even when they do not actually witness the accident contemporaneously at the accident scene, but witness the accident's 'immediate aftermath', for example in ambulance or at a hospital to which their husband or wife has been taken – the mental injury may be foreseeable even when there is some delay in witnessing the injuries caused by D's negligence. <i>McLoughlin v O'Brian [1983] (English)</i> <i>Jaensch v Coffey (1984) 155 CLR 549 (HCA)</i> There was a very close relationship, both legal and actual, between P and her husband. P was, in my opinion, a "neighbour" of the appellant (D) within Lord Atkin's principle; it was foreseeable that a person in her position would suffer nervous shock, and there is no reason of policy why her claim should not succeed. P's</p>

psychiatric injuries were the result of the impact upon her of the facts of the accident itself and its aftermath while she was present at the aftermath of the accident.

Step 6: Witnessing Damage to Property (scant authority in Australia):

Attia v British Gas plc [1988] QB 3 All ER 455 at 318-21 (English Court of Appeal)

DOC owed for a psychiatric illness suffered as result of witnessing the fire to P's home against D → her condition was a reasonably foreseeable consequence of D's conduct.

At common law:

(1) P has to prove that she suffered a recognisable psychiatric injury

Lord Denning in Hinz v Berry [1970]; Windeyer J in Mount Isa Mines v Pusey (1970) (grief does not sound in damages)

(2) That psychiatric harm was reasonably foreseeable to the D at the time of his negligence

Tame v NSW; Annetts v Australian Stations Pty Ltd (2001) 211 CLR 317 (HCA).

In secondary victim cases, the following, 6 factors are taken into account in determining whether psychiatric harm was reasonably foreseeable:

(i) The Relationship between P and the Primary Victim (Gifford)

Established relationships in which love and affection is presumed:

1. Parents and Children
2. Husband and wife
3. Sibling and sibling
4. De facto partners
5. Engaged couples

Otherwise, apply the neighbour test: *Would a reasonable person in the D's position, who knew or ought to know of that particular relationship, consider that the third party was so closely and directly affected by the conduct that it was reasonable to have that person in contemplation as being affected by that conduct?" (Gifford)*

- the neighbour of a wrongdoer = all those who have a close and loving relationship with the victim
- It is the closeness and affection of the relationship - rather than the legal status of the relationship - which is relevant in determining whether a duty is owed to P (Alcock)
- Rescuer principle: *Chadwick, Mount Isa, Wicks v NSW*

(ii) P's Proximity in time and Space to the accident (direct perception of accident or immediate aftermath, but both no longer a precondition - Annetts)

- Learning of the incident by phone was a sufficiently direct perception (Annetts; Gifford).
- Rescuer principle: *Chadwick, Mount Isa, Wicks v NSW*

(iii) The existence of a 'Sudden Shock'? (Annetts)

A time element: P needs to prove not much time has lapsed since the accident for his psychiatric harm to occur

- Abandoned the need for sudden shock limitation (assault upon the senses).
- Parents in *Annetts* did not suffer a sudden shock, but D could reasonably foresee that parents would suffer psychiatric harm even when that realisation dawns on them over a long period of time.

(iv) Whether P was of Normal Fortitude (Tame)

To establish this factor:

- ⇒ If D had knowledge that P is particularly susceptible to injury of that kind,
 - ⇒ or is a member of a class known to be particularly sensitive to the events in question (Tame).
- BUT, D does not have to foresee psychiatric harm to a person of normal fortitude (Tame, Jaensch).

(v) The Relationship between P and D (Annetts)

D should have had P in his contemplation as persons who would be closely and directly affected in the event that victim was injured as a result of D's negligence.

- Employer assured parents that son would be looked after and safe, parents relied upon employers (**Annetts**)
- Contractual relationship
- (vi) **The Relationship between D and the Primry Victim (Annetts; Gifford)**
 - **Annetts**: Employment relationship meant that employer had full control over the risk to the victim; and that employer who owes a DOC to employees also owe a DOC to employees' parents with regards to their psychiatric welfare in terms of injuring the employee – it is a duty to take reasonable care to eliminate all risks of injury that can be reasonable
 - Existing relationship as fellow road users, then D would also owe a DOC to those who are emotionally attached to the injured road user.
 - **Gifford**: D **controlled conditions** under which victim worked (no way of protecting themselves against the risk), D held a significant, perhaps exclusive, degree of **control over the risk of harm** (direct not remote in both legal and practical sense) to victim and hence the risk of consequent mental harm to P

Gifford v Strang Patrick Stevedoring Pty Ltd (2003)

- **Relationship between P and D**: Not unreasonable to require that an employer, whose acts or omissions place an employee at risk of physical injury (crushed by forklift), should also have in contemplation the risk of consequent psychiatric injury to P (3 kids)
- **Relationship between P and V**: who are so closely and directly affected by D's conduct that makes P a neighbour of D in Lord Atkin's sense.
- **Relationship between D and V**: employer and employee; **D's control over working conditions made the risk of harm reasonably foreseeable**
- **Sudden shock**: suffered nervous shock even without seeing their dad's body
- **Normal fortitude**: no issue

Annetts

- **Proximity & Sudden Shock**: The lack of the sudden shock factor was more than made up for by the existence of other factors, so it did not matter that this factor was absent (as well as factor 2)
- **Normal fortitude**: Reasonably foreseeable that a person of reasonable or ordinary fortitude would suffer psychiatric harm at the loss of a child (an **established relationship** as per **Gifford**).
- **Relationship between D and victim**: Employment relationship between D and victim meant that the employer (D) had full control over the risk to the victim;
- **Relationship between D and P**: and that employer who owes a DOC to employees also owe a duty to the employees' parents with regards to their psychiatric welfare in terms of injuring the employee

Tame v NSW

Duty of Police Officer: primary duty = make a police report, not to ensure a person does not suffer mental harm (otherwise there would be a **conflict of duties** and his main duty would prevail in such circumstances)

Failed at **normal fortitude** factor as a reasonable person would simply get over it after a while; however, P does not have to be a person of normal fortitude to recover.

BUT, Mrs. Tame was so far off the chart (overly susceptible) that the police would not be able to foresee psychiatric harm to P by filling out the forms wrongly.

- **Not reasonably foreseeable** that a person of reasonable/ordinary fortitude would suffer distress
- Nervous shock + depression = not a reasonable general consequence of filling out a form erroneously

New South Wales: Civil Liability Act 2002 (NSW) s 31, 32, 30, 33

s31: No liability to pay damages unless the harm consists of a **recognised** psychiatric illness.

s32(1): No DOC unless D ought to have foreseen that a person of **normal fortitude** might, in the circumstances of the case, suffer a recognised psychiatric illness.

s32(2): the circumstances include:

Factors 3,2,1 and 5 (no need to satisfy all, just factors)

s32(3): and the personal injury suffered by P

s32(4): this section allows the court to have regard to **what D knew/ought to have known about P's (specific) fortitude**.

Damages:

s30(1): this section applies to the liability of D for pure mental harm to P arising **wholly or partly from mental or nervous shock** in connection with victim (can be multiple) **being killed/injured/put in peril by D**.

s30(2): P cannot recover *unless*

(a) **P witnessed at the scene**, the victim being killed/injured/put in peril, or

(b) **P is a close member of the family** of the victim

s30(5): 'close member' = (a) parent/parental responsibility, (b) spouse/partner (including de facto), (c) child/stepchild, (d) sibling (half & step)

Wicks v State Rail Authority (NSW) – only decided the damage question (**s30(1) & (2)**)

"Shock"?

- The sudden and disturbing impressions on the minds or feelings of the rescuers necessarily continued as each took in more of the scene, and set about his tasks
- the consequences, which each P suffered was a result of what happened on that day, followed from some or all of the series of shocking experiences to which he was exposed at the scene.

"Being killed, injured or put in peril"

- death, or injury, or being put in peril can take place over an extended period
- the perils of the passenger did not end when the carriages came to rest.
- P's witnessed, at the scene, victims of the accident "being injured".

South Australia: Civil Liability Act 1936 (SA)

The rules regarding whether DOC is owed (s 33) are identical to those in NSW under s 32 of the NSW Act.

s33: No DOC unless D would have **foreseen P of normal fortitude** might suffer a psychiatric illness.

s53:

(1) **Damages** may only be awarded for mental harm if the injured person --

- (a) **was physically injured** in the accident or **was present at the scene of the accident** when the accident occurred; or
- (b) is a **parent, spouse or child of a person** killed, injured or endangered in the accident.

(2) Damages may only be awarded if the harm consists of a **recognised psychiatric illness**.

Philcox v King [2015] HCA 19

Yes DOC: under [s 33](#) of the *CLA 1936 (SA)*, D owed a DOC to P on the basis that it was **reasonably foreseeable** that a sibling coming upon the scene or aftermath of the accident would, on hearing of the death, suffer mental harm.

No damages because s53(1)(a): P was present at the scene, but **was not present at the time the accident occurred** - it is not good enough to be present at the accident's aftermath; nor is it good enough to be present at a time later than the time the accident actually occurred (more restrictive than NSW). P also not a parent, spouse, domestic partner or child.

Pure Omissions

State the presumption: There is no general duty to take positive action to prevent the physical injury, or death of another, even where this is a foreseeable consequence of the omission. (*Stovin v Wise*)

Unless in Exceptional Duty Situations:

- 1) 'special', pre-existing relationship', such as a contract or 'assumption of responsibility by the D to P.
 - a) Council to injured P from motor accident (*Stovin v Wise [1996] AC*) – no duty – Council did not create the source of risk
 - b) Police to informant (*Swinney v Chief Constable [1996] (English CA)*) – duty - police assumed responsibility to preserve the confidentiality of the information P had supplied, otherwise would expose P to risk greater than the general public was exposed
 - c) School and pupil – duty arises from school's assumption of responsibility to the pupil, its authority and control over the pupil and the pupil's vulnerability and reliance upon the school
 - d) Jailer to prisoner – duty to take positive actions to protect them against their own suicidal tendencies (*Reeves, Stuart v Tania*) and violence by other prisoners (*Bujduso*), arising from D's high degree of control that D exercises over the prisoner's welfare & the prisoner's vulnerability
 - e) Doctor to patient – duty arises from the voluntary assumption of responsibility by the doctor and the patient's reliance; duty to warn of risks (*Rogers v Whittaker*)
 - f) Employer to employee - duty arises from the employer's control over both the risks of the workplace and over the employee (*Czatytko v Edith Cowan University*)
- 2) D has control over a third party's actions
 - a) Parental control over child – owe a DOC to take reasonable care to prevent children under their authority and control from foreseeably injuring others (*Hogan, c.f. Smith v Leurs*)
 - b) Licensee Control Over Patron – DOC to protect patrons against violence by others and provide reasonable level of security (*Adeels Palace*)
- 3) Occupational control of Land
Occupiers of land need to take positive actions to prevent hazards that he did not cause to his neighbours because he has exclusive control over it (*Goldman v Hargrave [1967] 1 AC*)
- 4) **Public body liability**
Public authorities generally owe no duty to use their statutory powers to protect unless those powers
 - ⇒ give them control over the risk of injury to P; or
 - ⇒ they have specifically assumed responsibility to P to protect him (*Barclays Oysters, Stuart*).
 - ⇒ created a danger (Mason J in *Sutherland v Heyman*)

Is there existing precedent that is binding?

- If it is not distinguishable by some 'material fact' (as per McHugh J in *Crimmins*) → apply the precedent.
- If material facts are distinguishable from precedent, apply salient features approach in novel cases (as per McHugh J in *Crimmins*)

- (1) Was it **reasonably foreseeable** that an act or omission of D, including a failure to exercise its statutory powers, would **result in injury** to P?
- (2) By reason of the D's statutory or assumed obligations or control (the degree and nature of the control over the risk of harm that eventuated), **did the D have the power to protect a specific class** including the P (rather than the public at large) from a risk of harm?
 - a. **Control:**
 - ⇒ Control will be satisfied if D assumed responsibility for P
 - ⇒ Presence of direction/control pretty much = DOC
 - ⇒ NOT control: If P created the risk of harm that eventuated (*Stuart v Tania*)
 - ⇒ The power to exercise various powers does not necessarily constitute control over the (industry) (*Graham Barclay Oysters*)

b. Specific Class:

- ⇒ cannot be a general power conferred for the benefit of the public generally, should be protection of a specific class of persons (*Graham Barclay Oysters*)
- ⇒ Where powers are given for the removal of risks to person or property, the nature of the power will define the class
 - *E.g.** air traffic control (body) duty to protect air travellers (class)
 - *Note** If the body has such powers = no core policy choice or truly quasi-legislative function is involved (*Stuart v Tania*)

(3) Was P **vulnerable** in the sense that P could not reasonably be expected to adequately safeguard himself from harm?

- ⇒ If D has control/assumed responsibility for P = P is automatically vulnerable
- ⇒ If D has a statutory power to protect P = DOC

(4) Did D **know**, or **ought D to have known, of the risk of harm** to the specific class including P if it did not exercise its powers?

- ⇒ Sole knowledge: no one else knew of the risk except for D

*Note** Unlikely for P to succeed just because of D's constructive knowledge of an area of risk, unless it can be said that the D authority had an obligation to seek out the requisite knowledge in all the circumstances, including cases where the D authority already possesses certain actual knowledge but fails to look further (McHugh J).

(5) **Justiciability** Would such a duty impose liability with respect to the defendant's exercise of "core policy-making" or "quasi-legislative" functions?

- ⇒ Policy = policy which the public authority set after considering its budgetary constraints (decisions which involve or are dictated by financial, economic, social or political factors or constraints)
- ⇒ Quasi-legislative = capacity to make rules and regulations
- ⇒ **s35(b) CLA** "General allocation of resources" are not justiciable (*NSW v Ball; Graham Barclay Oysters*)
- ⇒ Courts can apply a standard of care to action/inaction that is merely the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness (Mason J in *Sutherland*) – 'operational negligence' – matters of 'operation'

(6) **Other policy concerns** Are there any **other** supervening reasons **in policy to deny** the existence of a duty of care?

a. **Pure Omission concerns** as per Lord Hoffman in *Stone v Wise*:

- i. **Political** (Liberty of the D)
- ii. **Moral** (Fairness of picking on the D)
- iii. **Economic** (Not economical to require the D who has done nothing, to pay for someone else's wrongdoing)

b. **Incompatibility/inconsistent** with the intentions and purposes of the statute

c. **'Defensive practices'**: overly defensive decisions in fear of litigation

d. **Conflict** or incoherence between competing responsibilities (duties given by the statutes)

e. **Pure economic loss case** and the application of principles in that field deny the existence of a duty

→ McHugh J states that **all criterion must be satisfied or else no DOC exists** *Crimmins v Stevedoring (HCA)*

<i>Crimmins v Stevedoring</i>	◆ P worked as stevedore for D	<u>Salient features (McHugh)</u>
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<p>Industry Finance Committee (1999) 200 CLR 1(HCA)</p>	<p>(successor of public body) daily</p> <ul style="list-style-type: none"> ◆ P exposed to asbestos while working + contracted a disease + died ◆ Estate sued D for omission - failure to ensure P's safety (under s17 of the <i>Stevedoring Industry Act</i>). 	<p>Harm was foreseeable, authority possessed the necessary powers to protect the specific class of waterside workers, P was vulnerable due to direction/control of D employer, D had knowledge of risk of harm, imposing a DOC wouldn't interfere with core policy-making functions (powers were operational), no other reasons (e.g. no inconsistency between duty and statutory scheme) to deny DOC.</p> <p>A successor (agent) of a public body/public body that has statutory powers to regulate the safety of a P's workplace, and created the risk of danger, has a duty to protect P by exercise their statutory powers with reasonable care or to give a warning.</p> <p>Cited Mason J in <i>Sutherland</i>: authorities owe a DOC for the safety of others to positively act when the authority has created the danger; and breaches such duty by either failing to exercise their statutory powers <u>or</u> give a warning.</p>
<p>Graham Barclay Oysters Pty Ltd v Ryan (2002) 211 CLR 540 (HCA)</p>	<ul style="list-style-type: none"> ◆ Flooding polluted lake in which P grew Oysters ◆ 185 consumers contracted Hepatitis A ◆ P attempted to sue NSW state for <ul style="list-style-type: none"> (1) failing to regulate the oyster industry more closely (2) failing to carry out sanitary surveys (3) failing to exercise its powers to ban fishing ◆ P sued the Council for negligent failure to exercise its public health powers to monitor, control and mitigate pollution 	<p>No DOC for the State because:</p> <ul style="list-style-type: none"> ⇒ The matter was not justiciable by the courts because it concerned policy decisions of the amount of "self-regulation" given for the industry (1) ⇒ The State did not know of the risk of contamination, so there is no 'failure' in carrying out surveys (2) ⇒ Insufficient managerial control over the contamination (3) ⇒ The purpose of the powers was conferred not to protect a specific group but the general public, so it did not subject the State to a DOC owed to P (3) ⇒ Plus, power without a statutory direction does not impose a duty <p>No DOC for the Council because:</p> <ul style="list-style-type: none"> ⇒ the powers conferred upon the Council, were conferred for the benefit of the public generally, not for the protection of a specific class of persons (such as oyster consumers) ⇒ The Council did not have 'control' over the lake/oysters, its monitoring of lake created no relationship with oyster customers such that the failure to continue monitoring was a breach of a common law DOC ⇒ The Council did not know of a risk of harm to certain individuals from a specific problem
<p>Stuart v Tania Kirkland-Veenstra & Anor [2009] HCA 15</p>	<ul style="list-style-type: none"> ◆ V wanted to commit suicide but changed his mind when found by officers who questioned him ◆ Officers D concluded V appeared rational, responsible, co-operate and hence 	<p>s10(1) of MHA: power to apprehend victim if they had reasonable grounds for believing that V either <i>(1) attempted suicide or</i> <i>(2) was likely to do so</i></p> <p>s10(1A) MHA: officer was not required to exercise any clinical judgment as to whether a person was mentally ill, just that they may exercise their powers if person appeared mentally ill</p> <p>Gummow, Hayne and Heydon JJ:</p>

<p>no signs of mental illness</p> <p>◆ V committed suicide so P widow sued D for psychiatric harm due to D's failure comply with s10(1) of MHA</p>	<p>⇒ Officers did not control the source of risk of harm to V (V alone was the source of that risk)</p> <p>⇒ Even if there was a power to intervene, there still wouldn't have been a DOC</p> <p>Crennan and Kiefel JJ (and French CJ):</p> <p>⇒ absent the belief that P was mentally ill, <i>and reasonable grounds (a subjective matter: French CJ)</i> that he had either attempted to or is likely to commit suicide the DOC was not enlivened, and hence no power to apprehend them → no DOC</p>
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Statutory Interventions: Civil Liability Act 2003 (Qld), sections 34-37

Statutory provisions designed to restrict the civil liability of public authorities for negligence:

<p>35 Principles concerning resources, responsibilities etc. of public or other authorities</p> <p>(b) the general allocation of financial or other resources by the authority is not open to challenge.</p>
<p>37 Restriction on liability of public or other authorities with functions of road authorities</p> <p>(1) A public or other authority is not liable in any legal proceeding for any failure by the authority in relation to any function it has as a road authority--</p> <p>(a) to repair a road or to keep a road in repair; or</p> <p>(b) to inspect a road for the purpose of deciding the need to repair the road or to keep the road in repair.</p> <p>(2) Subsection (1) does not apply if at the time of the alleged failure the authority had actual knowledge of the particular risk the materialisation of which resulted in the harm.</p>

WEEK 4 – ECONOMIC LOSS 1 – POLICY CONCERNS AND NEW CASES

★ The mere foreseeability of harm to the plaintiff is insufficient to give rise to any duty of care (reaffirmed in *Perre*)

Spartan Steel v Martin & Co [1973] (Eng CA)

- Loss 1 (metal damaged and depreciated in value) was **foreseeable property damage** → recoverable under precedent (like P1 in *McMullin v ICI*)
- Loss 2 (loss of profit on metal) was **economic loss consequential on property damage** → recoverable
- Loss 3 (loss of production of further metal) was 'pure' economic loss (flowed from the disruption of power supply, not from any property damage owned by P) → irrecoverable

Policy Concerns	Critique
<p>(4) Economic interests are less important than physical welfare or property interests?</p> <p>"an individual's personality is partly constituted by the property...individuals define themselves, which gives it greater value than mere money" (Hayne J)</p>	<p>In this modern world, economic interests are central given the role they play as investment vehicles.</p> <p>People by property investments as instantiations of wealth, not because the property has any real meaning or represent who they are.</p>
<p>Absence of Social Loss?</p> <p><i>Perre v Apand</i> at [72], per McHugh: "Pure economic losses frequently result in mere transfers of wealth. P's loss is D's or a 3rd party's gain. Harm to person or</p>	<p>Tort law is generally unconcerned with aggregate <i>social</i> harm. It focuses on damage done to individual interests, and exists precisely to protect them against the potential tyranny of collective calculus. Exactly the same 'wealth</p>