# Tame v New South Wales - [2002] HCA 35

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# HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

CLARE JANET TAME APPELLANT

AND

THE STATE OF NEW SOUTH WALES RESPONDENT

*Tame v New South Wales* [2002] HCA 35
*5 September 2002*
S83/2001

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**ORDER**

*Appeal dismissed with costs.*

On appeal from the Supreme Court of New South Wales

**Representation:**

P C B Semmler QC and N J Mullany for the appellant (instructed by Herbert Weller)

B H K Donovan QC with S C Finnane for the respondent (instructed by I V Knight, Crown Solicitor for New South Wales)

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# HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

LESLIE ANNETTS & ANOR APPLICANTS

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AND

AUSTRALIAN STATIONS PTY LIMITED RESPONDENT

*Annetts v Australian Stations Pty Limited*
*5 September 2002*
P97/2000

**ORDER**

*1. Application for special leave granted.*

*2. Appeal allowed.*

*3. Set aside the order of the Full Court of the Supreme Court of Western Australia dated 21 November 2000 and, in its place, order that the appeal to that Court be allowed and the question posed by Heenan J in his order dated 5 May 1999, for the trial of a preliminary issue, be answered "Yes".*

*4. Respondent to pay the applicants' costs at first instance, in the Full Court and in this Court.*

On appeal from the Supreme Court of Western Australia

**Representation:**

B W Walker QC with G M Watson for the applicants (instructed by Brezniak Neil-Smith & Co)

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D F Jackson QC with S C Finnane for the respondent (instructed by Deacons)

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**CATCHWORDS**

**Tame v New South Wales**

Negligence – Duty of care – Psychiatric injury – Motor accident – Clerical error by police constable in recording driver's blood alcohol content – Psychotic depressive illness caused by driver learning of mistake – Whether duty of care owed by police constable to driver – Whether psychiatric injury reasonably foreseeable – Whether sole determinant of duty – Other control mechanisms for imposition of duty – Normal fortitude – Sudden shock – Direct perception – Immediate aftermath.

**Annetts v Australian Stations Pty Limited**

Negligence – Duty of care – Psychiatric injury – Death of child – Assurances of constant supervision of child made by employer to parents – Whether duty of care owed by employer of child to parents – Whether psychiatric injury reasonably foreseeable – Whether sole determinant of duty – Other control mechanisms for imposition of duty – Normal fortitude – Sudden shock – Direct perception – Immediate aftermath.

1. GLEESON CJ. These two matters (the first, an appeal from the Court of Appeal of New South Wales [1] ; the second, an application for special leave to appeal against a decision of the Full Court of the Supreme Court of Western Australia [2] ) were heard together. The

elements common to both are that they concern the tort of negligence, and the harm suffered by the plaintiffs was psychiatric injury unassociated with any other form of injury to person or property resulting from the allegedly tortious conduct. To describe them as cases about psychiatric injury directs attention to the kind of harm suffered by the injured plaintiffs, and the interests of the plaintiffs which the law might protect. However, the law of tort concerns duties as well as rights, and responsibilities of defendants as well as entitlements of plaintiffs. If attention is directed to the conduct of the alleged tortfeasors, and the responsibilities attributed to them, the two cases are quite different.

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[1] *Morgan v Tame* (2000) 49 NSWLR 21.

[2] *Annetts v Australian Stations Pty Ltd* (2000) 23 WAR 35.

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2. In the first case, the respondent is sought to be made vicariously liable for the conduct of a police officer who made a clerical error in filling out a report about a traffic accident. The circumstances in which that error became a cause of psychiatric injury to the appellant will be examined below. The allegedly tortious act is that of the police officer in erroneously completing the accident report. He had no contact with the appellant, and made no communication to her. He entered some information about her in a routine form. That information was incorrect. The error was obvious. It was soon corrected; and it was never acted upon by anybody. The police officer's conduct consisted in recording and communicating to third parties incorrect information about the appellant. He made a careless misstatement; but nobody relied upon it. The appellant's reputation was not affected. There was no claim in defamation.

3. **Following paragraph cited by:**

   Tanious v South Eastern Sydney Local Health District (19 November 2015) (Basten, Meagher and Ward JJA)
   Lane v Northern NSW Local Health District (No 3) (22 July 2014) (Basten and Meagher JJA, Simpson J)

In the second case, at one level, the conduct of the respondent was of a kind that commonly forms the basis of tortious liability; it was the alleged failure of an employer to provide an employee with a safe system of work. But there is more to it than that. The employee was a minor. His parents, the applicants, had agreed to permit him to work for the respondent, in a remote part of outback Australia, on the faith of assurances that he would be well cared for. It is alleged that he was not well cared for. He died. The parents suffered psychiatric injury.

4. In both cases, the central question is whether the alleged tortfeasors were under a legal duty to take reasonable care to avoid psychiatric injury to the victims. In each case, the answer to that question depends as much upon the nature of the activity in which the alleged tortfeasor was engaged as upon the nature of the harm suffered by the victim or victims.

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5. **Following paragraph cited by:**

    Minister for the Environment v Sharma (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)

Much was said in argument about the caution with which the common law has approached claims for damages for psychiatric injury. It was observed that many medical practitioners would regard it as unscientific to distinguish psychiatric injury from any other form of personal injury. It may equally be said that economists would regard it as unscientific to distinguish between damage to property and other forms of economic harm. That does not mean that there is no legally relevant difference. There is a tendency to assume that physical injury to person or property is the paradigm case for the application of the law of negligence, and that, in the case of any other kind of harm, the application of the same general principles ought to produce the same practical results. This overlooks the concern of the law, not only with the compensation of injured plaintiffs, but also with the imposition of liability upon defendants, and the effect of such liability upon the freedom and security with which people may conduct their ordinary affairs.

6. **Following paragraph cited by:**

    Jennings v Police (30 July 2019) (Kourakis CJ; Stanley and Parker JJ)
    Ku-ring-gai Council v Chan (07 September 2017) (McColl and Meagher JJA, Sackville AJA)
    Goulding v Kirby (09 December 2002) (Heydon, Hodgson and Santow JJA)

One of the reasons for the rejection of a general rule that one person owes to another a duty to take care not to cause reasonably foreseeable financial harm is that the practical consequence of such a rule would be to impose an intolerable burden upon business and private activity. Furthermore, such a rule would interfere with freedoms, controls and limitations established by common law and statute in various contexts [3] . Unscientific as may be the distinction between "pure" economic loss, "parasitic" economic loss, and damage to property, the care which the law requires people to show for the person or property of others is not matched by a corresponding requirement to have regard to their financial interests. The distinction is not based on science or logic; it is pragmatic, and none the worse for that.

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[3] *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 192 [4]-[5] .

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7. **Following paragraph cited by:**

AAI Limited v Caffrey (10 December 2019) (Sofronoff P and Philippides and McMurdo JJA)

> 12. The appellant does not question any of the authorities that have established the principles governing liability for causing psychiatric harm to rescuers. In summary, as Mr Grant-Taylor QC and Mr Murphy for the respondent correctly submitted, they are:
>
> (a) Damages are recoverable only for injury constituted by a recognisable psychiatric condition and not for emotional distress, alarm, fear, anxiety, annoyance or upset. [5]
>
> (b) It is not necessary to prove that the plaintiff was of "normal fortitude".[6]
>
> (c) It is not necessary to prove that the injury was the result of a "sudden shock". [7]
>
> (d) The ordinary principles of negligence apply to cases of pure psychiatric injury. [8] These principles take into account issues about "normal fortitude"[9] and "sudden shock".[10]

*via*

[5] *Tame v New South Wales* (2002) 211 CLR 317, at [7] , [44] , [194] .

Maritime Union of Australia v Fair Work Ombudsman (11 August 2016) (Tracey, Buchanan and Bromberg JJ)
Sheehan v SRA; Wicks v SRA (31 August 2009) (Beazley JA at 1; Giles JA at 81; McColl JA at 82)
Monie v Commonwealth of Australia (03 September 2007) (Mason P; Beazley JA; Campbell JA)

The case of Mrs Tame provides a good example of the practical consequences of recognition of a general duty to take care not to cause emotional disturbance to other people. It was common ground in argument that, save in exceptional circumstances, a person is not liable, in negligence, for being a cause of distress, alarm, fear, anxiety, annoyance, or despondency, without any resulting recognised psychiatric illness [4] . Bearing in mind that the requirement of causation is satisfied if a defendant's conduct is *a cause* of the damage complained of, and the manifold circumstances in which one person's conduct may be a factor in inducing an emotional response in another, the consequence of imposition of such responsibility would be to impose an unacceptable burden on ordinary behaviour. Even accepting that recognisable psychiatric illness is a necessary condition of a plaintiff's claim, the development by Mrs Tame of a condition that was diagnosed in 1995 as psychotic depressive illness, in consequence of being informed by her solicitor, in 1992, that a police officer, in 1991, had made a clerical error in filling out an accident report form, suggests the implications of the imposition of a duty of the kind in question. It came to the notice of Mrs Tame, in circumstances that most people would find harmless, or at worst mildly annoying, that some mistaken information to her discredit had been communicated by one person to

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another. Communication of information, whether in the form of official reports, news, business dealings, or private conversation or correspondence, will often distress a person to whom such information is communicated, or some other person who later becomes aware of the communication. Mrs Tame's case shows how such distress may develop into psychiatric illness. How are people to guard against such a possibility? What does the law require by way of care to avoid it? In what circumstances will the law impose damages for lack of care?

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[4] See, eg, *Frost v Chief Constable of South Yorkshire Police* [1999] 2 AC 455 at 469 per Lord Goff of Chieveley.

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8. **Following paragraph cited by:**

Woolworths Ltd v Ryder (16 July 2014) (Basten and Ward JJA, Sackville AJA)
Cheng Fung Pty Ltd v Heloui (15 July 2005)
Proprietors of Strata Plan 17226 v Drakulic (27 November 2002) (Mason P, Heydon and Hodgson JJA)
Rundle v State Rail Authority of New South Wales (23 October 2002) (Heydon JA, Young CJ in Eq and Foster AJA)

The concepts of care and carelessness themselves require closer definition. The police officer in the case of Mrs Tame made a mistake. In that sense, he was careless. He made a slip; he noticed the error within a fairly short time, and corrected it. His error was the consequence of a lack of care. However, in the context of the law of negligence, carelessness involves a failure to conform to a legal obligation. It does not necessarily involve a mistake. It involves a failure to protect the interests of someone with whose interests a defendant ought to be concerned. A definition of the ambit of a person's proper concern for others is necessary for a decision about whether a defendant's conduct amounts to actionable negligence. The essential concept in the process of definition is reasonableness. What is the extent of concern for the interests of others which it is reasonable to require as a matter of legal obligation, breach of which will sound in damages?

9. **Following paragraph cited by:**

Drexel London (a firm) v Gove (Blackman) (21 October 2009) (McLure JA; Le Miere and Kenneth Martin JJ)
SNF (Australia) Pty Ltd v Jones (10 June 2008) (McLure JA)
Kirkland-Veenstra v Stuart (29 February 2008) (Warren CJ, Maxwell P and Chernov JA)
Valleyfield Pty Ltd v Primac Ltd (08 August 2003) (Williams and Jerrard JJA and Mackenzie J,)

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

Daly v D a Manufacturing Co P/L (04 July 2003) (Williams and Jerrard JJA and Fryberg J,)

Lord Atkin, in *Donoghue v Stevenson* [5] , spoke of the effect of acts or omissions on "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." It is the reasonableness of a requirement that a defendant should have certain persons, and certain interests, in contemplation, that determines the existence of a duty of care.

[5] [1932] AC 562 at 580.

10. In the same case, Lord Macmillan said [6] :

> "The law takes no cognizance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage. In such circumstances carelessness assumes the legal quality of negligence and entails the consequences in law of negligence. What, then, are the circumstances which give rise to this duty to take care? In the daily contacts of social and business life human beings are thrown into, or place themselves in, an infinite variety of relations with their fellows; and the law can refer only to the standards of the reasonable man in order to determine whether any particular relation gives rise to a duty to take care as between those who stand in that relation to each other."

[6] [1932] AC 562 at 618-619 .

11. *Donoghue v Stevenson* was what would now be called a product liability case. By majority, the House of Lords held that it was reasonable to require the manufacturer of a product, intended for human consumption, without the possibility of any intermediate quality control, to have in contemplation the safety of consumers of the product. To a modern lawyer that does not sound revolutionary, but it was the principle upon which the decision rested that represented a major legal development.

12. **Following paragraph cited by:**

Karpik v Carnival plc (The Ruby Princess) (29 July 2025) (Markovic, Sarah C Derrington and Jackson JJ)
Orr v Hunter Quarries Pty Ltd (02 March 2022) (Beech-Jones CJ, Cl, Walton and Price JJ)

South West Helicopters Pty Ltd v Stephenson (07 December 2017) (Basten, Leeming and Payne JJA)
South West Helicopters Pty Ltd v Stephenson (07 December 2017) (Basten, Leeming and Payne JJA)
Waller v James (13 August 2015) (Beazley P, McColl and Ward JJA)
Waller v James (13 August 2015) (Beazley P, McColl and Ward JJA)
Shoalhaven City Council v Pender (10 July 2013) (McColl, Barrett and Ward JJA)
Amaca Pty Ltd v King (22 December 2011) (Nettle, Ashley and Redlich JJA)
Fugro Spatial Solutions Pty Ltd v Cifuentes (20 April 2011) (Martin CJ; McLure P; Mazza J)
CSR Ltd v Amaca Pty Ltd (19 October 2009) (Allsop P, Hodgson and Basten JJA)
CSR Ltd v Amaca Pty Ltd (19 October 2009) (Allsop P, Hodgson and Basten JJA)
Caltex Refineries (Qld) Pty Ltd v Stavar (31 August 2009) (Allsop P at 1; Basten JA at 149; Simpson J at 242)
Lyle v Soc (12 January 2009) (Steytler P; Buss JA; Miller JA)
The State of South Australia v Ellis (26 September 2008) (Martin CJ; Steytler P; McLure JA)
Amaca Pty Ltd v Hannell (02 August 2007) (Martin CJ Steytler P McLure JA)
Di Vincenzo v McKrill (22 November 2005) (Steytler P; Roberts-Smith JA; Miller AJA)
Wynne v Pilbeam (21 October 2005) (Steytler P, Wheeler JA, Pullin JA)
Moore v Woodforth (06 February 2003) (Mason P, Meagher and Heydon JJA)
State of New South Wales v Napier (13 December 2002)

A necessary, although not sufficient, condition of the existence of a legal duty of care is reasonable foreseeability of the kind of injury that has been suffered by the person to whom the duty is owed. More than 150 years ago Pollock CB [7] said that a person "is not … expected to anticipate and guard against that which no reasonable man would expect to occur." Foreseeability may be relevant to questions of the existence and scope of a duty of care, breach of duty, or remoteness of damage. The present cases are concerned with the first topic. The subject of foreseeability was discussed by this Court in *Wyong Shire Council v Shirt* [8] , which was concerned with the second topic. (The duty of care was conceded [9] .) Reference was there made to the rather tendentious description of the requirement of foreseeability as "undemanding" [10] ; a description that may be more or less accurate depending upon the context. It is important that "reasonable foreseeability" should be understood and applied with due regard to the consideration that, in the context of an issue as to duty of care, it is bound up with the question whether it is reasonable to require a person to have in contemplation the risk of injury that has eventuated.

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[7] *Greenland v Chaplin* (1850) 5 Ex 243 at 248 [155 ER 104 at 106 ].

[8] (1980) 146 CLR 40 .

[9] (1980) 146 CLR 40 at 42.

[10] (1980) 146 CLR 40 at 44.

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

13. **Following paragraph cited by:**

Victoria v Richards (12 May 2010) (Nettle and Redlich JJA and Hansen AJA)

In *Jaensch v Coffey* [11] , Deane J emphasised that the concepts of reasonable foreseeability, and what he called "proximity of relationship", are related. What a person is capable of foreseeing, what it is reasonable to require a person to have in contemplation, and what kinds of relationship attract a legal obligation to act with reasonable care for the interests of another, are related aspects of the one problem. The concept of reasonable foreseeability of harm, and the nature of the relationship between the parties, are both relevant as criteria of responsibility.

[11] (1984) 155 CLR 549 at 579.

14. **Following paragraph cited by:**

SNF (Australia) Pty Ltd v Jones (10 June 2008) (McLure JA)

Requiring a person, when engaged in a certain kind of activity, to have in contemplation a certain kind of risk to others, may be extremely onerous, especially if predictability of harm were the only basis upon which such a requirement is imposed. Consider, for example, an occupier of land on which there is a dwelling house. It is clear that there is a duty of care to people who enter lawfully upon the land. But the content of the duty is not such as to require the occupier to compile a list of every potential source of danger in and around the house, and post the list at every possible point of entry to the land. People do not conduct their lives in that way, and it would not be reasonable to require them to do so. When regard is had to forms of possible harm other than physical injury to person or property, the consequences of a general requirement to be concerned about the welfare of others can become even more extreme. A case such as that of Mrs Tame explains the increasing awareness, both in the medical profession and in the community generally, of the emotional fragility of some people, and the incidence of clinical depression resulting from emotional disturbance. What would be the consequence, for the way in which people conduct their lives, of imposing upon them a legal responsibility to have in contemplation, and guard against, emotional disturbance to others? Considerations of that kind are not "floodgates arguments". They go directly to the question of reasonableness, which is at the heart of the law of negligence. Reasonableness is judged in the light of current community standards. As Lord Macmillan said in *Donoghue v Stevenson* [12] , "conception[s] of legal responsibility … adap[t] to … social conditions and standards."

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

[12] [1932] AC 562 at 619.

15. In the case of physical injury to person or property, arising out of commonplace relationships such as employer and employee, or bailor and bailee, or resulting from commonplace activities such as driving a motor vehicle, the requirements as to legal responsibility are well settled, often against a background of insurance practice [13] . But defining the circumstances in which it is reasonable to require a person to have in contemplation, and take steps to guard against, financial harm to another person, or emotional disturbance that may result in clinical depression, requires the caution which courts have displayed.

[13] *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 262 [13] .

16. **Following paragraph cited by:**

Tsiragakis v Mallet (17 June 2025) (Beach, Kennedy and Kaye JJA)
Anwar v Mondello Farms Pty Ltd (10 August 2015) (Kourakis CJ; Gray and Stanley JJ)
Anwar v Mondello Farms Pty Ltd (10 August 2015) (Kourakis CJ; Gray and Stanley JJ)
Wolters v The University of the Sunshine Coast (20 August 2013) (Margaret McMurdo P and Gotterson JA and A Lyons J)

> 12. Informed by decisions of high authority [11] his Honour stated the law to be that the relevant duty of care of an employer is engaged if psychiatric injury to the particular employee is reasonably foreseeable. That principle, he observed, invites attention to the nature and extent of work being done by the particular employee and signs given by the employee concerned. [12] He saw the "central issue" to the existence of a duty of care in this context as being "whether the employer knew or ought to have known of conduct which was likely to give rise to a risk of psychiatric injury to the plaintiff". [13] Neither party to the appeal takes issue with this statement of legal principle or the observations made by his Honour.

*via*
[11] *Tame v New South Wales* (2002) 211 CLR 317 at [16] , [61]-[62] , [201] ; *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 at [33], [35] .

Nationwide News Pty Ltd v Naidu (21 December 2007) (Spigelman CJ at 1; Beazley JA; Basten JA)

13. Their Honours referred to *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* [2002] HCA 35; (2002) 211 CLR 317 at [16] , [61]-[62] and [201] . In those paragraphs a majority of the court rejected "normal fortitude" as a test of foreseeability, whilst accepting the relevance of the underlying idea. (See *Gifford v Strang Patrick Stevedoring Pty Ltd* [2003] HCA 33; (2003) 214 CLR 269 at [98] and [119].) Adams J erred at [185] in referring to "normal fortitude" as a test, but nothing turned on this reference on the appeal.

Panagiotopoulos v Rajendram (28 September 2007) (Tobias JA at 1; McColl JA at 2; Basten JA at 3)

15 As noted by Spigelman CJ in *O'Leary v Oolong Aboriginal Corporation Inc* [2004] NSWCA 7 at [17] , the characteristics of the hypothetical victim have been variously described, but there is a broadly accepted test that, absent knowledge of a particular susceptibility, foreseeability may be judged according to the person of normal, reasonable or ordinary fortitude. Nevertheless, the test is that of reasonable foreseeability, rejecting fanciful or far-fetched possibilities: see *Tame v New South Wales* , 211 CLR 317 at [16] (Gleeson CJ); [59] (Gaudron J); [199]-[201] (Gummow and Kirby JJ) ; see also *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 at [10-[12] (Gleeson CJ), [52] (McHugh J), [89]-[93] (Gummow and Kirby JJ); [100]-[103] (Hayne J) and [118]-[120] (Callinan J). There is also the need to identify the nature of the foresight of psychiatric injury expected of a person, who in the case of this defendant, was a medical practitioner. The question of reasonable foreseeability "involves an assessment respecting the foresight of a reasonable person in the defendant's position": *Tame v New South Wales* , 211 CLR 317 at [234] (Gummow and Kirby JJ). Although, as their Honours further noted, expert evidence as to what might reasonably be foreseen in such circumstances is not decisive, it may nevertheless be of assistance in a case such as this.

**Assessment of treatment of Appellant's wife**

O'Leary v Oolong Aboriginal Corporation Inc (14 May 2004)

17. The significance of particular susceptibility of a person to psychiatric injury is variously expressed in the judgments in *Tame* at [16] , [61]-[62] , [95] , [110] , [113] , [118] , [199] , [201] , [273] , [331] and [366] . For present purposes it is sufficient to act on what appears to be a broadly accepted test that 'normal fortitude' is a relevant consideration, but not an independent test or precondition of liability. (See *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 77 ALJR 1205 at [98] and [119] .)

Furthermore, there may be something about the vulnerability or susceptibility of a particular plaintiff that makes it unreasonable to require a person to have in contemplation the kind, or perhaps the degree, of injury suffered [14] . In the context of remoteness of damage, it is established that a tortfeasor must take a victim as the victim is found; but we are presently concerned with whether there is a duty of care, and whether a tort has been committed. Putting to one side cases where a defendant knows, or ought to know, of the

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peculiar susceptibility of a plaintiff, the law has established what Brennan J described in *Jaens ch v Coffey* [15] as "an objective criterion of duty". The variety of degrees of susceptibility to emotional disturbance and psychiatric illness has led courts to refer to "a normal standard of susceptibility" as one of a number of "general guidelines" in judging reasonable foreseeability. This does not mean that judges suffer from the delusion that there is a "normal" person with whose emotional and psychological qualities those of any other person may readily be compared. It is a way of expressing the idea that there are some people with such a degree of susceptibility to psychiatric injury that it is ordinarily unreasonable to require strangers to have in contemplation the possibility of harm to them, or to expect strangers to take care to avoid such harm. Such people might include those who, unknown to a defendant, are already psychologically disturbed. That idea is valid and remains relevant, even though "normal fortitude" cannot be regarded as a separate and definitive test of liability.

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[14] I say "perhaps the degree" to cover the issue raised by Murphy J in *Jaensch v Coffey* (1984) 155 CLR 549 at 557, which does not arise in these cases.

[15] (1984) 155 CLR 549 at 568.

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17. **Following paragraph cited by:**

Kirkland-Veenstra v Stuart (29 February 2008) (Warren CJ, Maxwell P and Chernov JA)

82. The High Court ruled that it was not a pre-condition to the imposition of a duty of care in such a case that –

- the foreseeability of the risk of harm be established by reference to a hypothetical person of 'normal fortitude';
- the psychiatric injury be shown to have been caused by a 'sudden shock'; [80] or
- the plaintiff have 'directly perceived' the death or injury, or its 'immediate aftermath'. [81]

As Gleeson CJ pointed out, however, it may still be relevant to consider whether the injury was caused by a sudden shock or whether the plaintiff directly perceived the distressing event or its immediate aftermath. Such factual considerations may be relevant, his Honour said:

> to the nature of the relationship between plaintiff and defendant, and to the making of a judgment as to whether the relationship is such as to import such a requirement [to have in contemplation injury of the kind that has been suffered by the plaintiff and to take reasonable care to guard against such injury.] [82]

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

*via*

[81] *Tame* and *Annetts* (2002) 211 CLR 317 , [17] (Gleeson CJ); [51] (Gaudron J); 380 (Gummow and Kirby JJ) .

Kirkland-Veenstra v Stuart (29 February 2008) (Warren CJ, Maxwell P and Chernov JA)

In neither of the cases presented before the Court does the outcome turn upon the application of what are sometimes described as the "control mechanisms" of "sudden shock" and "direct perception or immediate aftermath". In fact, to some extent both cases demonstrate that those concepts cannot serve as definitive tests of liability. Mrs Tame's illness did not result from any "event" which itself, or in its aftermath, might have caused her a "shock". It resulted from the communication to her by her solicitor of the information that, in the past, a police officer had made an error about her in an accident report, which was soon corrected. In the case of Mr and Mrs Annetts, they reacted to distressing news of the disappearance, and death, of their son, such news being conveyed to them at a distance, and over a period of time.

18. **Following paragraph cited by:**

Trustees of the Sydney Grammar School v Winch (27 February 2013) (Bathurst CJ, Allsop P, Beazley, McColl and Meagher JJA)
Sheehan v SRA; Wicks v SRA (31 August 2009) (Beazley JA at 1; Giles JA at 81; McColl JA at 82)
Kirkland-Veenstra v Stuart (29 February 2008) (Warren CJ, Maxwell P and Chernov JA)
Dorothy Vesna Skea v NRMA Insurance Limited ABN 11 000 016 722 (24 March 2005)
Dorothy Vesna Skea v NRMA Insurance Limited ABN 11 000 016 722 (24 March 2005)

I agree with Gummow and Kirby JJ that the common law of Australia should not, and does not, limit liability for damages for psychiatric injury to cases where the injury is caused by a sudden shock, or to cases where a plaintiff has directly perceived a distressing phenomenon or its immediate aftermath. It does not follow, however, that such factual considerations are never relevant to the question whether it is reasonable to require one person to have in contemplation injury of the kind that has been suffered by another and to take reasonable care to guard against such injury. In particular, they may be relevant to the nature of the relationship between plaintiff and defendant, and to the making of a judgment as to whether the relationship is such as to import such a requirement.

19. I would respectfully adopt the observation of Brennan J in *Jaensch v Coffey* [16] :

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

"In my opinion, the exigencies of proof of the elements of the cause of action impose the appropriate limits upon the scope of the remedy. Those limits are likely to be at once more flexible and more stringent than limits imposed by legal rules which might be devised to give effect to a judicial policy of restraining the remedy within what are thought to be acceptable bounds."

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[16] (1984) 155 CLR 549 at 571.

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20. I turn now to the individual cases. The detailed facts are set out by Gummow and Kirby JJ. I will refer to them only as necessary to explain my reasons.

Tame v The State of New South Wales

21. The alleged tortfeasor is Acting Sergeant Beardsley. In February 1991, he completed a report concerning a motor traffic accident which took place in January 1991. Mrs Tame was the driver of a car involved in a collision with a car driven by Mr Lavender. The accident was clearly the fault of Mr Lavender. Both drivers were subjected to blood testing. Mr Lavender's blood alcohol level was 0.14. Mrs Tame's was nil. Mr Lavender was charged with an offence; and Mrs Tame later sued for, and obtained, damages for physical injury. When Acting Sergeant Beardsley filled in the report form in February 1991, he erroneously attributed to both Mrs Tame and Mr Lavender a blood alcohol reading of 0.14. (It would have been a surprising coincidence if they both had precisely the same level.) He noted the mistake later in February or March 1991, and corrected it. In the meantime, however, a copy in the uncorrected form had been obtained by an insurer. Neither the police nor anybody else acted on the erroneous information. The insurer admitted liability in June 1991. During 1992, Mrs Tame heard of the mistake from her solicitor. Mrs Tame became obsessed about the error. She was also emotionally disturbed about other matters. Ultimately, in 1995, her condition was diagnosed as psychotic depression.

22. Mrs Tame had a history which predisposed her to such illness. That history included mistreatment in early childhood, the recent loss of a parent and marital difficulties. Recovery from the physical injuries she suffered in the accident was slow and frustrating. Her husband attempted suicide in December 1992, and was subsequently treated for psychiatric illness.

23. There are, in my view, two reasons why Acting Sergeant Beardsley was not under a duty of care to Mrs Tame which required him to take reasonable care to avoid causing her injury of the kind she suffered. The first reason relates to the nature of the activity in which Acting Sergeant Beardsley was involved when he performed the act of completing the accident report and filling in, incorrectly, information about the results of Mrs Tame's blood test, and the relationship that existed between him and Mrs Tame. The second reason, which is essentially the basis upon which the Court of Appeal found against Mrs Tame, relates to reasonable foreseeability.

24. As to the first reason, the case seems to me to be governed by the same principles as resulted in the denial by this Court of the existence of a duty of care in *Sullivan v Moody* [17].

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

[17] (2001) 75 ALJR 1570; 183 ALR 404.

25. In the performance of his duties, Acting Sergeant Beardsley was completing an official report into the circumstances of a motor traffic accident. In the ordinary course, the report would be used in making a decision as to whether charges should be laid against anybody involved in the accident. The two people involved were Mr Lavender and Mrs Tame. Copies of the report would also be available, on request, and for a fee, to third parties, such as litigants, their solicitors and insurers. Primarily, however, this was an official police report of the incident, and of the result of police observations, inquiries and tests.

26. **Following paragraph cited by:**

Minister for the Environment v Sharma (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)
Australian Capital Territory v Crowley (17 December 2012) (Lander, Besanko and Katzmann JJ)
Kirkland-Veenstra v Stuart (29 February 2008) (Warren CJ, Maxwell P and Chernov JA)

The primary duty of a police officer filling out such a report is to make available to his or her superiors, honestly and frankly, the results of the observations, inquiries and tests that were made. It would be inconsistent with such a duty to require the police officer to take care to protect from emotional disturbance and possible psychiatric illness a person whose conduct was the subject of investigation and report [18] .

[18] See *Sullivan v Moody* (2001) 75 ALJR 1570 at 1580 [60]; 183 ALR 404 at 417.

27. Not only was there no such relationship between Acting Sergeant Beardsley and Mrs Tame as would make it reasonable to require that he should act in contemplation of the danger of psychiatric injury to her; the relationship between them was inconsistent with such a requirement.

28. **Following paragraph cited by:**

Mohareb v State of New South Wales (18 November 2021) (Meagher and Leeming JJA)

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

Perera v Genworth Financial Mortgage Insurance Pty Ltd (16 February 2017) (Macfarlan, Leeming and Simpson JJA)
Perera v Genworth Financial Mortgage Insurance Pty Ltd (16 February 2017) (Macfarlan, Leeming and Simpson JJA)
Edwards v Attorney General (06 August 2004) (Spigelman CJ, Mason P and Young CJ in Eq)
Newcastle City Council v Shortland Management Services (18 June 2003) (Spigelman CJ, Mason P and Sheller JA)

> 88 Coherence was also emphasised in several judgments in *Tame v New South Wales* (2002) 76 ALJR 1348 where liability in negligence would "intersect" with the law of defamation, which resolves the competing interests of the parties in a different manner and according to a coherent body of doctrine. (See at [28] , [58] , [123] and [323] .)

Furthermore, as in *Sullivan v Moody* , this is a case where the appellant claims to have been injured in consequence of what others were told about her. There is the same intersection with the law of defamation, and the same need to preserve legal coherence [19] . In the events that occurred, Mrs Tame's reputation was not harmed. But suppose it had been. Then the law would have engaged in an exercise of balancing the rights and responsibilities of Mrs Tame and Acting Sergeant Beardsley by reference to considerations many of which would be rendered irrelevant by the application of the law of negligence.

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[19] See *Sullivan v Moody* (2001) 75 ALJR 1570 at 1579-1580 [54]-[55]; 183 ALR 404 at 416.

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29. **Following paragraph cited by:**

SNF (Australia) Pty Ltd v Jones (10 June 2008) (McLure JA)

In any event, the Court of Appeal was right to conclude that the psychiatric injury suffered by Mrs Tame, to which the error of Acting Sergeant Beardsley made a material contribution, was not reasonably foreseeable. This conclusion does not depend upon the application, as an inflexible test of liability, of a standard of normal fortitude; but the particular susceptibility of Mrs Tame to psychiatric illness is a factor to be taken into account. As was explained above, we are not concerned only, or even primarily, with scientific predictability. If the requirement of foreseeability were truly and generally as undemanding as is sometimes claimed, then it might take Mrs Tame some distance to say that, this result having occurred, any psychiatrist would say that it would have been foreseen. But that is not the question. The question concerns the reasonableness of requiring Acting Sergeant Beardsley to have this possibility in contemplation when he completed the report. He could not reasonably have been expected to foresee that his mistake carried a risk of harm to Mrs Tame of the kind that resulted. It was

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

not reasonable to require him to have her mental health in contemplation when he recorded the results of the blood tests.

30. The appeal should be dismissed with costs.

Annetts v Australian Stations Pty Ltd

31. This case was decided in the Supreme Court of Western Australia on the trial of a separate issue, to be determined on the pleadings and certain admissions, as to whether the assumed facts were "sufficient, at law, to give rise to an independent … duty of care owed by [the respondent] to [the applicants] to exercise reasonable care and skill to avoid causing them psychiatric injury." As Ipp J pointed out in the Full Court, there are some unsatisfactory features of the way in which the pleadings were framed, especially in relation to allegations concerning injury and foreseeability.

32. Two matters are critical to the resolution of the separate issue: the relationship between the parties; and the reasonable foreseeability of the kind of injury that was suffered. As was noted above, these matters are related.

33. As to the question whether the relationship between the parties was such as to make it reasonable to require that the respondent should have in contemplation the danger of psychiatric injury to the applicants, the Full Court sought the answer by reference to the rubrics of "sudden shock" and "direct perception".

34. The applicants' son, aged 16, had gone to work for the respondent as a jackaroo in August 1986. Seven weeks later, allegedly contrary to assurances that had earlier been given to the applicants, he was sent to work alone as caretaker of a remote property. In December 1986, he went missing in circumstances where it was clear that he was in grave danger. When Mr Annetts was informed of this by the police, over the telephone, he collapsed. There was a prolonged search for the boy, in which the applicants took some part. His bloodstained hat was found in January 1987. In April 1987 the body of the boy was found in the desert. He had died of dehydration, exhaustion and hypothermia. The applicants were informed by telephone. Subsequently Mr Annetts was shown a photograph of the skeleton which he identified as that of his son.

35. **Following paragraph cited by:**

Minister for the Environment v Sharma (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)
Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright (17 February 2017) (Basten, Hoeben and Gleeson JJA)
Woolworths Limited v Perrins (27 October 2015) (Fraser and Gotterson JJA and McMeekin J,)
Fugro Spatial Solutions Pty Ltd v Cifuentes (20 April 2011) (Martin CJ; McLure P; Mazza J)
SNF (Australia) Pty Ltd v Jones (10 June 2008) (McLure JA)
Amaca Pty Ltd v Hannell (02 August 2007) (Martin CJ Steytler P McLure JA)

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

Dowthwaite Holdings Pty Ltd v Saliba (03 May 2006) (McLure JA)

52. Reasonableness is the test for the imposition of a duty of care: ***Tame v New South Wales*** (2002) 211 CLR 317 at [35] per Gleeson CJ ; at [109] per McHugh J; at [185] per Gummow and Kirby JJ; at [272] per Hayne J; and at [331] per Callinan J. There has been a return to the words of Lord Atkin in ***Donohue v Stevenson*** [1932] AC 562 at 580 that a duty is only owed to those:

> " … 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."

Upon those facts, which left unclear a number of questions as to the aetiology of the psychiatric injury sustained by the applicants, the Full Court concluded that there was no satisfaction of the requirements of sudden shock or direct perception, even as relaxed in *Jaensch v Coffey* [20] . It may be observed, however, that the (assumed) facts of the case demonstrate the danger in treating what are often factual indicators of the presence or absence of proximity of relationship (to use Deane J's expression [21] ) as inflexible and indispensable conditions of such a relationship. Categorisation is a useful means of formulating legal principle, and of giving necessary guidance to trial courts, but sooner or later a case is bound to arise that will expose the dangers of inflexibility, especially in an area of the law which has reasonableness as its central concept. Ultimately, reasonableness defies rigorous categorisation of its elements.

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[20] (1984) 155 CLR 549 .

[21] (1984) 155 CLR 549 at 583.

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36. The process by which the applicants became aware of their son's disappearance, and then his death, was agonizingly protracted, rather than sudden. And the death by exhaustion and starvation of someone lost in the desert is not an "event" or "phenomenon" likely to have many witnesses. But a rigid distinction between psychiatric injury suffered by parents in those circumstances, and similar injury suffered by parents who see their son being run down by a motor car, is indefensible.

37. **Following paragraph cited by:**

Kirkland-Veenstra v Stuart (29 February 2008) (Warren CJ, Maxwell P and Chernov JA)
Pickering v McArthur (16 August 2005) (McMurdo P, Keane JA and Dutney J,)

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

Here there was a relationship between the applicants and the respondent sufficient, in combination with reasonable foreseeability of harm, to give rise to a duty of care, though the applicants did not directly witness their son's death, and suffer a sudden shock in consequence. The applicants, on the assumed facts, who themselves had responsibilities for the care of their son, only agreed to permit him to go to work for the respondent after having made inquiries of the respondent as to the arrangements that would be made for his safety and, in particular, after being assured that he would be under constant supervision. Contrary to those assurances, he was sent to work, alone, in a remote location. In those circumstances there was a relationship between the applicants and the respondent of such a nature that it was reasonable to require the respondent to have in contemplation the kind of injury to the applicants that they suffered.

38. As to the related question of reasonable foreseeability of that kind of injury, the Full Court, reversing the decision of Heenan J at first instance, found against the applicants. Ipp J, with whom the other members of the Full Court agreed, referred to "normal fortitude", and said that while deep anxiety and grief were foreseeable, psychiatric injury was not. It is to be noted, however, that there was nothing to suggest that the applicants were persons of peculiar susceptibility or vulnerability. Unlike Mrs Tame, the applicants in this case had no background or history that predisposed them to the injury they suffered. The Full Court was not justified in overruling the finding of Heenan J on this point. No one would doubt the foreseeability of psychiatric injury to the applicants if they had seen their son being run over by a car, or trampled by a stock horse. The circumstances of his disappearance and death were such that injury of that kind was more, rather than less, foreseeable.

39. Ipp J said:

> "The essential question, however, is whether (to paraphrase Brennan J in *Jaensch v Coffey* [22] ) the respondent should have foreseen that the breach of duty on its part might result in a sudden sensory perception on the part of the appellants of a phenomenon so distressing that a recognisable psychiatric illness would be caused thereby."

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[22] (1984) 155 CLR 549 at 567.

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40. Brennan J, in *Jaensch v Coffey* [23] , was dealing with the concept of sudden shock that is often involved in psychiatric injury cases. He went on to say that the categories of claimants are not closed [24] .

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[23] (1984) 155 CLR 549 at 567.

[24] (1984) 155 CLR 549 at 571.

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**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

41. **Following paragraph cited by:**

Govier v The Uniting Church in Australia Property Trust (Q) (10 February 2017) (Fraser and Gotterson JJA and North J,)

> 4. Because the appellant claimed damages for negligently inflicted psychiatric injury, a central enquiry at trial about liability was "whether, in all the circumstances, the risk of [the appellant] sustaining a recognisable psychiatric illness was reasonably foreseeable, in the sense that the risk was not far-fetched or fanciful." [1] Whilst any sufficiently vulnerable employee might suffer injury as a result of emotionally challenging conduct of a co-worker it does not necessarily follow that it would be reasonably foreseeable for the employer to conclude that such conduct by the co-worker created a reasonably foreseeable risk that the co-worker's conduct would result "in mental anguish of a kind that could give rise to a recognised psychiatric illness." [2]

*via*

[2] *Tame v New South Wales* (2002) 211 CLR 317 at [41] , quoted and applied by McMeekin J (with whose reasons Gotterson JA and I agreed) in *Wool worths Ltd v Perrins* [2016] 2 Qd R 276 at [67]-[68] .

The respondent's breach of duty consisted in failing properly to care for and supervise the applicants' son, by sending him to work alone, in a remote area. He left his post, became lost in the desert, and died. For reasons already mentioned, this may not have been likely to result in a sudden sensory perception of anything by the applicants. But it was clearly likely to result in mental anguish of a kind that could give rise to a recognised psychiatric illness.

42. Special leave to appeal should be granted and the appeal allowed. I agree with the orders proposed by Gummow and Kirby JJ.

43. GAUDRON J. The facts of the first matter, being an appeal from the Court of Appeal of the Supreme Court of New South Wales, and the assumed facts of the second matter, being an application for special leave to appeal from a decision of the Full Court of the Supreme Court of Western Australia, are set out in other judgments. I shall repeat them only to the extent necessary to make clear my reasons for concluding that, in the first matter, the appeal should be dismissed and, in the second, special leave to appeal should be granted and the appeal allowed.

44. The first question that arises in relation to these matters is whether, in either case, liability is to be denied by reason of one or other of three "rules" which have developed in relation to

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

liability in negligence for pure psychiatric injury[25]. It may at once be stated that I agree with Gummow and Kirby JJ, for the reasons their Honours give, that damages are recoverable in negligence only for a recognisable psychiatric injury and not for emotional distress.

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[25] The expression "'pure' psychiatric or psychological injury" is intended to refer to a recognisable psychiatric illness which is neither caused by nor related to a physical injury sustained by the person concerned.

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45. **Following paragraph cited by:**

R v Moore (15 December 2015) (Bathurst CJ, Simpson JA and Bellew J)
R v Moore (15 December 2015) (Bathurst CJ, Simpson JA and Bellew J)

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.

46. Strictly speaking, even in the case of injury to the person or property, the foreseeability of physical harm is not sufficient to impose an obligation on a person to take reasonable steps to avoid a risk of that harm. 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" [26] . However, in the case of physical injury, the law has long recognised that those who are close enough in time and space to be at risk of injury from the actions of another are persons whom the latter should have in contemplation and, thus, are persons to whom a duty of care is owed.

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[26] *Donoghue v Stevenson* [1932] AC 562 at 580.

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47. **Following paragraph cited by:**

Kirkland-Veenstra v Stuart (29 February 2008) (Warren CJ, Maxwell P and Chernov JA)

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

In the field of pure psychiatric injury, the "direct perception rule", as it was originally formulated, is explicable on the basis that it serves to identify persons who, because of their closeness in time and space, should be in the contemplation of the person whose acts or omissions are called into question as persons closely and directly affected and, thus, persons to whom a duty of care is owed. So much is apparent from the seminal dissenting judgment of Evatt J in *Chester v Waverley Corporation* [27] .

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[27] (1939) 62 CLR 1 .

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48. In *Chester* , Evatt J identified those to whom a duty of care is owed in terms which reflect the "direct perception rule". In his Honour's view, a person who owed a duty of care to take reasonable steps to avoid the risk of physical injury also owed a duty of care to those "already present at or in the immediate vicinity of the scene of the actual or apprehended casualty, and ... those who will also be brought to the scene for the purpose either of preventing the casualty altogether, or of minimizing its injurious consequences, or in the course of a search to discover and rescue or aid any person who is feared on reasonable grounds to have been injured in the casualty" [28] .

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[28] (1939) 62 CLR 1 at 44.

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49. The class of persons to whom a duty of care is owed to avoid a foreseeable risk of psychiatric injury was extended in *Jaensch v Coffey* to persons in a "close and intimate" relationship [29] with another who has been negligently injured or killed and who, although not present at the scene of an accident, personally perceive its direct and immediate aftermath [30] . In that case, the plaintiff perceived the direct and immediate aftermath when she visited her injured husband in hospital.

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[29] (1984) 155 CLR 549 at 555 per Gibbs CJ.

[30] (1984) 155 CLR 549 at 555 per Gibbs CJ. See also *McLoughlin v O'Brian* [1983] 1 AC 410 at 422 per Lord Wilberforce; *Pham v Lawson* (1997) 68 SASR 124; Mullany and Handford, *Tort Liability for Psychiatric Damage*, (1993) at 136-152.

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50. Although in *Jaensch v Coffey* , extension of the categories to whom a duty is owed was expressed in terms requiring direct perception, that extension went beyond those who might be said to be close in time and space to those who, because of their relationship with the person killed or injured, ought to be in the contemplation of the person whose acts or omissions are in question as persons closely and directly affected by his or her acts. Much of

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

the reasoning in *Jaensch v Coffey* pointed to the illogicality of excluding claims by those in a close and personal relationship with the person killed or injured [31] , but the actual decision serves to signify, in the words of Brennan J in that case, that "the categories of claimants [who suffer pure psychiatric injury] are not closed" [32] .

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[31] (1984) 155 CLR 549 at 552 per Gibbs CJ, 578 per Brennan J, 590-591 per Deane J.

[32] (1984) 155 CLR 549 at 571.

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51. To treat those who directly perceive some distressing phenomenon or its aftermath and those identified in *Jaensch v Coffey* as the only persons who may recover for negligently caused psychiatric harm is, as Gummow and Kirby JJ point out, productive of anomalous and illogical consequences. More fundamentally, it is to limit the categories of possible claimants other than in conformity with the principle recognised in *Donoghue v Stevenson* , namely, that a duty of care is owed to those who should be in the contemplation of the person whose acts or omissions are in question as persons closely and directly affected by his or her acts. Accordingly, the "direct perception rule" is not and cannot be determinative of those who may claim in negligence for pure psychiatric injury.

52. **Following paragraph cited by:**

Kirkland-Veenstra v Stuart (29 February 2008) (Warren CJ, Maxwell P and Chernov JA)

To identify those who may claim for pure psychiatric injury as those who should be in the contemplation of the person whose acts or omissions are in question as persons closely and directly affected is not to say that the categories of persons who may recover damages for pure psychiatric injury are open-ended. Save for those who fall within the "direct perception rule", as extended by *Jaensch v Coffey* , a person will be able to recover for psychiatric injury only if there is some special feature of the relationship between that person and the person whose acts or omissions are in question such that it can be said that the latter should have the former in contemplation as a person closely and directly affected by his or her acts.

53. **Following paragraph cited by:**

ACQ Pty Ltd v Cook (16 July 2008) (Beazley JA at 1; Giles JA at 2; Campbell JA at 3)

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

Leaving aside cases of physical injury to persons or property, the law has not yet developed to the point where it is possible to identify precisely the relationships that serve to identify persons who should be in another's contemplation as persons closely and directly affected by his or her acts or the features of those relationships [33] . Unfortunately, the notion of "proximity" has not served as a unifying doctrine in this regard [34] . However, that is not to say that those relationships or their special features cannot be identified when new cases present themselves for decision.

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[33] So far as concerns pure economic loss, see *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 197-198 [26]-[30], 200-201 [34]-[38], 202 [41]-[42] per Gaudron J, 209-210 [74]-[75], 216-218 [93]-[99] per McHugh J, 254 [200] per Gummow J, 263 [231], 270 [248] per Kirby J, 304 [341], 305 [343], 306 [346]-[347], 307 [350] per Hayne J, 325-326 [404]-[406] per Callinan J.

[34] See *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 193-194 [7]-[10] per Gleeson CJ, 197-198 [25]-[27] per Gaudron J, 208-212 [70]-[82] per McHugh J, 251 [191] per Gummow J, 268-270 [245]-[247], 273 [255], 275 [259], 277 [267], 283-286 [279]-[287], 288-289 [292]-[296] per Kirby J, 300-303 [330]-[335] per Hayne J, 318-319 [389], 321-322 [393], 323-324 [398]-[400], 326 [406] per Callinan J.

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54. On the assumed facts of the second case, it is possible to identify special features of the relationship between Mr and Mrs Annetts and Australian Stations Pty Limited such that the latter should have had them in contemplation as persons closely and directly affected by its acts and omissions in relation to their son. Mr and Mrs Annetts had entrusted the care of their son, who had not reached adulthood, to Australian Stations Pty Limited to work as a jackaroo in a remote part of Australia. Moreover, they had expressly inquired of its servants and agents as to the arrangements to be made for his care and had made known their concern for his welfare. The features of the relationship were, thus, such that the company should have had them in contemplation as persons who would be closely and directly affected in the event that their son was injured or killed in consequence of its negligent acts or omissions. Accordingly, in my view, it is irrelevant to the question of the company's liability in negligence that neither Mr nor Mrs Annetts directly perceived any of the distressing events which must have befallen their son or their immediate aftermath.

55. **Following paragraph cited by:**

Fuller-Wilson v State of New South Wales (03 October 2018) (Basten and White JJA, Emmett AJA)

On the other hand, it is possible to say of the first matter that there was no relationship between Mrs Tame and Acting Sergeant Beardsley, for whose acts the State of New South Wales is said to be vicariously liable, which could give rise to a duty of care to Mrs Tame. There is no evidence that Acting Sergeant Beardsley either attended the scene of

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

the accident in which Mrs Tame was involved or had any relevant dealings with her prior to his completing the accident report which incorrectly recorded against her name the blood alcohol reading of the other driver involved in the accident.

56. Doubtless, it was part of the general duties of Acting Sergeant Beardsley, as Traffic Sergeant, Windsor, to accurately record details of blood alcohol readings in relation to traffic accidents. But that is not to say that he was under a duty of care to take reasonable steps to avoid a risk of psychiatric injury to Mrs Tame, assuming an injury of that kind to have been foreseeable.

57. **Following paragraph cited by:**

State of New South Wales v Cullen (20 December 2024) (Gleeson, White and Kirk JJA)
Jennings v Police (30 July 2019) (Kourakis CJ; Stanley and Parker JJ)

Apart from the absence of any special relationship or any special feature of the relationship between Acting Sergeant Beardsley and Mrs Tame, two matters tell against his owing a duty of care to her. The first is that it is to be assumed that the exercise upon which Acting Sergeant Beardsley was engaged was the investigation of the question whether either Mrs Tame or the driver of the other vehicle involved in the accident which led to the making of the traffic accident report had committed a traffic offence. It would be incongruous and, perhaps, give rise to incompatible duties [35] if a person charged with the investigation of a possible offence were to owe a duty of care to the person whose conduct is the subject of that investigation.

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[35] See with respect to incompatible duties, *Sullivan v Moody* (2001) 75 ALJR 1570; 183 ALR 404.

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58. **Following paragraph cited by:**

Victoria v Richards (12 May 2010) (Nettle and Redlich JJA and Hansen AJA)
Victoria v Richards (12 May 2010) (Nettle and Redlich JJA and Hansen AJA)
Victoria v Richards (12 May 2010) (Nettle and Redlich JJA and Hansen AJA)

The second matter which indicates that Acting Sergeant Beardsley did not owe a duty of care to Mrs Tame is the fact that the direct cause of her psychiatric illness was not the inaccurate recording of her blood alcohol level, but its communication to others. Thus, in this case as in *Sullivan v Moody* , "there is an intersection with the law of defamation which resolves the competing interests of the parties through well-developed principles about privilege and the

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

like" [36] . And as in *Sullivan v Moody* , "[t]o apply the law of negligence in the present case would resolve that competition on an altogether different basis" [37] . At the very least, the law of negligence with respect to psychiatric injury ought not be extended in a disconformity with other areas of the law.

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[36] (2001) 75 ALJR 1570 at 1579 [54] per Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ; 183 ALR 404 at 416.

[37] (2001) 75 ALJR 1570 at 1579 [54] per Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ; 183 ALR 404 at 416.

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59. Although, in my view, it is not necessary to consider the question of foreseeability in relation to the first matter, it is necessary to do so in the second. It is in the context of foreseeability that the "sudden shock" and "normal fortitude" rules fall for consideration. When the law limited claimants to those who, by reason of their closeness in time or space, directly perceived distressing phenomena or their aftermath, as was implicit in the categories of persons identified by Evatt J in *Chester* [38] , it was inevitable that the law should select sudden shock as that which rendered foreseeable the risk of psychiatric injury. So, too, because "reasonable foreseeability is an objective criterion of duty" [39] , it is understandable that the law selected "a normal person of ordinary firmness and mental stability" [40] as a general test of foreseeability of the risk of psychiatric injury in the case of those who directly perceived distressing events or their aftermath.

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[38] (1939) 62 CLR 1 at 44.

[39] *Jaensch v Coffey* (1984) 155 CLR 549 at 568 per Brennan J.

[40] *Chester v Waverley Corporation* (1939) 62 CLR 1 at 28 per Evatt J.

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60. In *Jaensch v Coffey* , Brennan J pointed out that the "normal fortitude rule" was not a universal rule determinative of foreseeability but that, where the question is whether it is foreseeable that members of the general public might suffer psychological or psychiatric injury, the answer "must generally depend on a normal standard of susceptibility" [41] . His Honour expressly acknowledged that the "normal fortitude rule" does not apply when "a plaintiff's extraordinary susceptibility to psychiatric illness ... is known to the defendant" [42] . Further, his Honour allowed a qualification to the rule in the case of persons for whom the phenomenon in question has special significance. Thus, in his Honour's view:

> "if it is reasonably foreseeable that the phenomenon might be perceived by a person or class of persons for whom it has a special significance – for example, the parent of a child injured in a road accident who comes upon the scene – the question whether it is reasonably foreseeable that the perception of the

phenomenon by that person or a member of that class might induce a psychiatric illness must be decided in the light of the heightened susceptibility which the special significance of the phenomenon would be expected to produce." [43]

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[41] (1984) 155 CLR 549 at 568. See also *Bourhill v Young* [1943] AC 92 at 109-110 per Lord Wright; *Bunyan v Jordan* (1937) 57 CLR 1; Mullany and Handford, *Tort Liability for Psychiatric Damage*, (1993) at 224-226.

[42] *Jaensch v Coffey* (1984) 155 CLR 549 at 568 per Brennan J.

[43] (1984) 155 CLR 549 at 568-569 .

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61. **Following paragraph cited by:**

Tsiragakis v Mallet (17 June 2025) (Beach, Kennedy and Kaye JJA)

The observations of Brennan J in *Jaensch v Coffey* deny that "normal fortitude" is or could be the sole criterion of foreseeability of the risk of psychiatric injury. That it is not and cannot be the sole criterion is even more readily apparent once it is accepted, as it must be, that there may be special relationships or special features of relationships, including knowledge of the particular susceptibility of the plaintiff, that render the risk of psychiatric injury to the plaintiff foreseeable, even though it would not be foreseeable in the case of other persons.

62. **Following paragraph cited by:**

Lederer Group Pty Ltd v Hodson (18 December 2024) (Ward P, Leeming JA and Basten AJA)

To say that "normal fortitude" is not and cannot be the sole criterion of foreseeability, is not to deny that, ordinarily, "normal fortitude" will be a convenient means of determining whether a risk of psychiatric injury is foreseeable. However, it will be otherwise if the defendant has knowledge that the plaintiff 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.

63. At this point it is convenient to note that there is nothing to indicate knowledge by Acting Sergeant Beardsley of particular susceptibility or particular sensitivity on the part of Mrs Tame. Thus, in the first case, were it necessary to determine foreseeability, that question would fall for determination by reference to a person of normal fortitude. And although I need not decide that question, it is convenient to record that I agree with Gummow and Kirby JJ, for the reasons their Honours give, that it was not reasonably foreseeable that a

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

person in the position of Mrs Tame would suffer a recognisable psychiatric injury as a result of the inaccurate recording of her blood alcohol level in a traffic accident report.

64. Conversely, on the assumed facts of the second matter, it was readily foreseeable that persons of normal fortitude in the position of Mr and Mrs Annetts might suffer a recognisable psychiatric injury if their son came to harm as a result of the negligence of the company to whom they had entrusted his care.

65. Once it is accepted that, on the assumed facts, Mr and Mrs Annetts were persons whom Australian Stations Pty Limited should have had in contemplation as persons who would be closely and directly affected if, through its negligence, harm should befall their son and that it was readily foreseeable that, in that event, persons of normal fortitude in their position might suffer a recognisable psychiatric injury, there is no principled reason why liability should be denied because, instead of experiencing sudden shock, they suffered psychiatric injury as a result of uncertainty and anxiety culminating in the news of their son's death.

66. **Following paragraph cited by:**

Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright (17 February 2017) (Basten, Hoeben and Gleeson JJA)

"Sudden shock" may be a convenient description of the impact of distressing events which, or the aftermath of which, are directly perceived or experienced. And it may be that, in many cases, the risk of psychological or psychiatric injury will not be foreseeable in the absence of a sudden shock. However, no aspect of the law of negligence renders "sudden shock" critical either to the existence of a duty of care or to the foreseeability of a risk of psychiatric injury. So much should now be acknowledged.

67. Orders should be made in each case as proposed by Gummow and Kirby JJ.

McHUGH J.

**CLARE JANET TAME v THE STATE OF NEW SOUTH WALES**

68. In this appeal, the appellant argues that this Court should alter the principles and rules that determine when the common law will compensate a person who has suffered nervous shock as the result of the conduct of another person.

69. Mrs Clare Janet Tame appeals against an order of the Court of Appeal of New South Wales setting aside a judgment for damages for nervous shock that she had obtained in the District Court of that State. Constable John Morgan and the State of New South Wales were the defendants in the action. The District Court held that Mrs Tame had suffered nervous shock

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

after being told that a police accident report contained an entry that falsely asserted that she had had a blood alcohol reading of 0.14 at the time of an accident. The District Court also held that the police officer making the entry ought to have reasonably foreseen that Mrs Tame might suffer nervous shock on learning of the false entry and that he was guilty of negligence. The Court of Appeal (Spigelman CJ, Mason P and Handley JA) set aside the judgment upon the ground that a person of "normal fortitude" would not suffer nervous shock on learning of the false entry and therefore it was not reasonably foreseeable that Mrs Tame would suffer nervous shock. Mason P further held that, absent a pre-existing relationship, an action for nervous shock could only succeed if the plaintiff had suffered a "sudden shock" and that Mrs Tame had not suffered a sudden shock.

The issues

70. **Following paragraph cited by:**

Aslett & Coren (10 June 2025) (Jarrett and Strum JJ; McClelland DCJ)

43. The appellant's amended Notice of Appeal reduced his grounds of appeal from 61 grounds and sub-grounds, to 25 grounds and sub-grounds. Even with those amendments, it is apt to observe that, in *Scrymegeour & Scrymegeour* (2014) FLC 93-600 at [24] , Ryan and Austin JJ cited with approval McHugh J in *Tame v New South Wales* (2002) 211 CLR 317 at [70] where his Honour said (citing Ruggero Aldisert J, *Opinion Writing* (West Publishing, 1990, p.89) that, where there is "an appellant's brief containing seven to ten points or more, a presumption arises that there is no merit to *any* of them" (emphasis in original). In *Scrymegeour* at [25] , their Honours also referred to the decision of Campbell JA in the NSW Court of Appeal in *Durham v Durham* (2011) 80 NSWLR 335 at 353, with whom Tobias and Young JJA both agreed at 341 and 353, to similar effect. See also *Sieger & Department of Communities and Justice* [2020] FamCAFC 172 at [19]–[22] ).

Sofia & Treacy (No 2) (05 February 2025) (Austin, Harper and Strum JJ)
Ming & Leong (20 January 2025) (McClelland DCJ)
Rex & Arata (13 December 2024) (Aldridge J)
Medical Council of New South Wales v Mooney (30 July 2024) (Leeming and Kirk JJA, Price AJA)
Keighley & Keighley (01 September 2023) (Austin, Kari and Strum JJ)
Bachman & Self (21 April 2023) (Aldridge and Tree & Brasch JJ)
Maidment & Insley (07 April 2022) (Tree & Gill J; McClelland DCJ)
Superannuation & Corporate Services Pty Ltd v Turner (02 October 2020) (Basten, Gleeson and Leeming JJA)
Smith v Coles Supermarkets Australia Pty Ltd t/as Coles Distribution Centre; Ready Workforce (A Division of Chandler Macleod) Pty Ltd v Coles Supermarkets Australia Pty Ltd (04 September 2020) (Leeming JA, Emmett AJA and Adamson J)
Sieger & Department of Communities and Justice (20 July 2020) (Ainslie-Wallace and Austin & Tree JJ)

20. When an appeal asserts many different errors in a relatively short first-instance judgment, as this one is, the Court is entitled to be circumspect about the merit of *all* the grounds ( *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317 at [70] ; *Stoltenberg v Bolton; Loder v Bolton* [2020] NSWCA 45 at [52] ; *Penrith Whitewater Stadium Ltd v Lesvos Pty Ltd* [2007] NSWCA 103 at [8] ). Even if appealable error does exist, an unnecessary multiplication of grounds tends to conceal it ( *Thorne v Kennedy* (2017) 263 CLR 85 at [49] ).

Stoltenberg v Bolton (20 March 2020) (Macfarlan, Gleeson and Brereton JJA)
Valder v Fabrizi (16 May 2014) (Basten, Macfarlan and Emmett JJA)
Penrith Whitewater Stadium Ltd v Lesvos Pty Ltd (19 July 2007) (Ipp JA; McColl JA; Campbell JA)

70 On 23 April 2007 in an interlocutory judgment ( *Penrith Whitewater Stadium Ltd & Anor v Lesvos Pty Ltd & Anor* [2007] NSWCA 103) relating to an application by the appellants for a stay of the orders made by Grove J, McColl JA said (at [8] ):

> "The claimants have filed an Amended Notice of Appeal with Appointment which identifies 14 grounds of appeal, almost all of which are the subject of sub-issues. That document does not appear to comply with the requirement that a notice of appeal state the grounds briefly, but specifically, and should not descend to a detailed statement of the reasons supporting the appeal: *SCR* Pt 51 r 11 . Drafters of such notices should be alert to what McHugh J said in *Tame v State of New South Wales* ; *Annetts v Australian Stations Pty Ltd* [2002] HCA 35; (2002) 211 CLR 317 (at [70] ) (citing Aldisert J, *Opinion Writing* , (1990) at (89) that where there is:
>
> > 'an appellant's brief containing seven to ten points or more, a presumption arises that there is no merit to any of them'."

Penrith Whitewater Stadium Ltd v Lesvos Pty Ltd (23 April 2007) (McColl JA)
Cadwallader v Bajco Pty Ltd (26 September 2002) (Heydon and Santow JJA, Gzell J)

27 It follows that in theory there are seven main areas of dispute on the appeal.

> (a) Was the trial judge right to reject the evidence of the four witnesses? Even if he was right in that course, in the alternative, was he right to reject the evidence of the directors that their purpose was to avoid insolvent trading? This was a contest in which Mr David Cadwallader and Mrs Marilyn Wintzloff attacked the trial judge and Mr Alan

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

Cadwallader defended him. The administrators said nothing either way. Success for Mr David Cadwallader and Mrs Marilyn Wintzloff would result in the Further Amended Statement of Claim being dismissed, and the administrators remaining in place as administrators under the deed of company arrangement, subject to arguments which they advanced in support of the proposition that they should continue as liquidators.

(b) Should the trial judge have upheld the waiver defence? Mr David Cadwallader and Mrs Marilyn Wintzloff contended that he should have. So did the administrators. Mr Alan Cadwallader contended that the trial judge was correct in not upholding it. Success for the critics would result in dismissal of the Further Amended Statement of Claim, and would leave the administrators in place as above, subject to their argument that they should continue as liquidators (in which they were briefly supported by the directors).

(c) Should the trial judge have upheld the unclean hands defence? Mr David Cadwallader and Mrs Marilyn Wintzloff contended that the trial judge should have. Mr Alan Cadwallader contended that he was right not to. The administrators said nothing on this issue. Success for the critics would result in dismissal of the Further Amended Statement of Claim, and would leave the administrators in place as above, subject to their argument that they should continue as liquidators (in which they were briefly supported by the directors).

(d) Were the trial judge's findings that Mr Cardwell at least ought to have known of the directors' improper purpose correct? Even if correct, were the findings sufficient to make the resolutions of 27 November 1997 invalid against the administrators? Here the critics were the administrators, while Mr Alan Cadwallader contended that the findings were irrelevant, but that if they were relevant, they were correct and sufficient. Mr David Cadwallader and Mrs Marilyn Wintzloff were silent on this issue.

(e) Was the administrators' Report enclosed with the notice of the second creditors' meeting deficient as the trial judge found? The administrators said it was not; Mr Alan Cadwallader said it was. Mr David Cadwallader and Mrs Marilyn Wintzloff were silent on this issue. Success for the administrators would improve their position in contending for more favourable orders in relation to expenses and costs, but would undercut the parts of the trial judge's reasoning which resulted in their appointment as liquidators, and

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

hence was adverse to what was apparently perceived by the administrators as an important aspect of their self-interest.

(f) Was the trial judge right to make orders having the effect of putting Bajco Pty Ltd into liquidation, or should he have set aside the 27 November 1997 resolutions ab initio? The administrators defended him while Mr Alan Cadwallader attacked him. Mr David Cadwallader and Mrs Marilyn Wintzloff were silent on this issue, apart from a very brief indication of support for the administrators in consequence of their waiver and unclean hands defences.

(g) Were the trial judge's orders in relation to remuneration and costs as they affected the administrators correct? The administrators said they were not, Mr Alan Cadwallader said they were, and Mr David Cadwallader and Mrs Marilyn Wintzloff were silent.

Where an Equity Division judge experienced in the field to which the litigation relates delivers a long, detailed and careful judgment which attracts so much hostile fire from so many quarters, it may be inferred that it is probably correct in every respect: cf *Tame v New South Wales; Annets v Australian Stations Pty Ltd* [2002] HCA 35 at [70] per McHugh J . While in fact there are a few errors in the reasoning of the trial judge in this case, most of them induced by one or other of the parties, it has not in fact been shown that it was incorrect in any material respect except one.

**The position of the administrators on the appeal**

The written submissions filed on behalf of Mrs Tame identified no less than 14 issues in the appeal, one of which was divided into three sub-issues. In contrast, the respondents identified only five issues, and an additional issue if the Court permitted them to amend their Notice of Contention. It is inherently unlikely that any personal-injuries action would give rise to 14 issues or that any intermediate appellate court in this country would make so many errors. Australian, as well as United States, counsel would be well advised to heed Judge Aldisert's statement that when he sees "an appellant's brief containing seven to ten points or more, a presumption arises that there is no merit to *any* of them"[44]. In my opinion, only three issues arise in the appeal:

(1) Upon the above statement of the case, was the police officer making the entry under a duty to take reasonable care to protect Mrs Tame from nervous shock?

(2) In a "nervous shock" action, is the reasonable foresight of the defendant confined to the reaction of a person of normal mental fortitude?

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

(3) In a "nervous shock" action, must the plaintiff prove that he or she suffered a "sudden shock"?

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[44] Aldisert, *Opinion Writing*, (1990) at 89.

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71. In my opinion, the Court of Appeal did not err in upholding the present respondent's appeal to that Court. Absent a pre-existing relationship or knowledge of a plaintiff's susceptibility to suffering nervous shock, a defendant owes a duty of care to the plaintiff in a "pure" nervous shock action only when:

- the defendant ought reasonably to have had the plaintiff or persons in his or her position in mind when contemplating acting or failing to act;
- the defendant's conduct would have caused a person of normal fortitude to suffer nervous shock; and
- the defendant ought to have reasonably foreseen that his or her act or omission might cause nervous shock to a person of normal mental fortitude.

72. For the purposes of this appeal, it is not necessary to decide whether the plaintiff in a nervous shock action must also prove that he or she suffered a "sudden shock".

Proper parties

73. Although Constable Morgan and the State of New South Wales were parties to the proceedings in the lower courts, the parties now agree that Constable Morgan's name should be removed from the record. He was not the officer who made the false entry. The orders Mrs Tame seeks from this Court are against the State of New South Wales.

The material facts

74. In January 1991, Mrs Tame was involved in a motor vehicle accident. She was taken to hospital for treatment where police took a blood sample for the purpose of a blood alcohol reading. The sample confirmed that she had not been drinking. The other driver had a blood alcohol reading of 0.14. There is not and never has been any doubt that the other driver was solely responsible for the accident.

75. Subsequently, Constable Morgan visited Mrs Tame at her home where he took particulars of the accident and her injuries. On a second visit, he helped her complete a claim form under the *Motor Accidents Act* 1988 (NSW) . During the second visit, Constable Morgan informed Mrs Tame that the other driver was responsible for the accident and that he would be charged with a number of offences, including drink driving. In February 1991, Mrs Tame submitted the claim form to the other driver's insurer.

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

76. Because the other vehicle was uninsured, Mrs Tame's solicitor, Mr Weller, commenced proceedings against the Nominal Defendant. NZI Insurance ("NZI") handled the claim for the Nominal Defendant. In June 1991, NZI admitted liability. In August 1994, the claim was settled.

77. Before it was settled, a dispute arose between Mrs Tame and NZI concerning the payment of treatment for physiotherapy. As a result, Mrs Tame suffered a great deal of stress. In April 1992, she was referred for crisis counselling. She raised her concerns about the non-payment by NZI with her solicitor who telephoned NZI's solicitors to inquire about the matter.

An error in the police report

78. Some time before 18 June 1992, NZI told Mr Weller that the Police Accident Report (P4) showed that at the time of the accident Mrs Tame had a blood alcohol reading of 0.14. After receiving this information, Mr Weller asked Mrs Tame whether she had been drinking on the day of the accident. She told him that the report was wrong. She said that she had hardly touched alcohol in the previous 20 years. She said she was upset and was worried that people would find out about the entry and that it would tarnish her good name.

79. Immediately after the conversation with Mr Weller, Mrs Tame rang Constable Morgan who told her that a mistake had been made and that her blood alcohol reading was nil. Mrs Tame reported this conversation back to Mr Weller.

80. After learning of the false entry, Mrs Tame assumed that NZI was not meeting her physiotherapy costs because of that entry. However, NZI had not paid the physiotherapy accounts because it believed that the treatment was unnecessary. On 29 July 1992, NZI's solicitors confirmed that liability for the accident was admitted and that NZI would continue to meet all reasonable expenses arising from the accident.

81. In early 1993, Mr Weller sought and received from the New South Wales Police Service a formal assurance that the error in the P4 report had been corrected. The Service also apologised to Mrs Tame for making the false entry.

82. The correction and apology did not overcome Mrs Tame's concerns. She worried about other people seeing the incorrect P4 report, what they might be thinking about her and whether they thought that she caused the accident because she was intoxicated. She became obsessed with the mistake and feared that such an error could re-occur. Irrationally, she believed that she was being punished for some past misconduct. This brought on feelings of guilt. For a period of two to three years, she constantly referred to the mistake when speaking with her friends and family. Her obsession with the false entry affected her sleeping habits. The stress led to depression. Although she undertook counselling, matters "seemed to get worse, out of proportion".

83. **Following paragraph cited by:**

Jennings v Police (30 July 2019) (Kourakis CJ; Stanley and Parker JJ)

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

Police officers use P4 reports to record the details of accidents, including the particulars of the drivers involved. Because Constable Morgan did not have the results of the blood samples when he compiled the P4 report, he left blank the sections of the report that related to them. A month after the accident, an Acting Sergeant Beardsley purported to enter the sample results, but his entry erroneously stated that Mrs Tame had a blood sample result of 0.14. In fact, her blood-testing certificate showed that she had no alcohol in her blood. By late March 1991, he had discovered the error and corrected the original report. However, on 15 April 1991, NZI received an uncorrected copy of the P4 report showing Mrs Tame as having a blood alcohol reading of 0.14.

Proceedings in the District Court

84. Subsequently, Mrs Tame commenced proceedings against Constable Morgan and the State of New South Wales as joint defendants. Mrs Tame joined the State as a party on the ground that, under s 8 of the *Law Reform (Vicarious Liability) Act* 1983 (NSW) , it was vicariously liable for the negligent conduct of a police officer.

85. The trial judge, Garling DCJ, held that, as a result of the mistake in the P4 report, Mrs Tame had suffered a psychotic depressive illness and a post-traumatic stress disorder. His Honour found that Constable Morgan and Acting Sergeant Beardsley were aware of the need for accuracy in the P4 report because insurance companies and solicitors as well as the people involved in the accident relied on P4 reports. The trial judge found that Acting Sergeant Beardsley knew or should have known that an incorrect entry of Mrs Tame's blood alcohol reading could cause damage to her and that he was careless in the way he filled out the P4 report. His Honour held that it was reasonably foreseeable that:

> "a person of good character who was careful not to drink and drive, who had a *vuln erable personality*, may suffer a psychological injury by being told that the form recorded that she had a high blood alcohol reading and further, that that information had gone to other people and that such a reaction to this careless act could have been foreseen by the officer at or about the time he was filling in this form". (emphasis added)

86. His Honour held that it was within the knowledge of the community and specifically police officers that psychiatric injury could arise from the making of an error of the kind that occurred in this case.

Acting Sergeant Beardsley did not owe a duty of care to Mrs Tame

87. The Court of Appeal correctly held that Australian case law holds that the principles governing claims for the negligent infliction of pure psychiatric injury (nervous shock) are different from those governing claims for physical injury. The Court of Appeal held that, in nervous shock cases, unless the defendant knows that a plaintiff is peculiarly susceptible to psychiatric damage, the defendant is entitled to assume that the plaintiff is a person of normal fortitude. Counsel for Mrs Tame challenged the authority of the cases that support that proposition. He asserted that it is inherently difficult and probably impossible to determine what is a "normal standard of susceptibility". Counsel for Mrs Tame also challenged the conventional view that the common law treats negligent infliction of pure psychiatric injury differently from the way that it treats the negligent infliction of physical injury. In my opinion, these challenges to conventional doctrine should be rejected.

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

88. **Following paragraph cited by:**

Golden v Howard (29 May 2025) (Ward P, Payne and Ball JJA)
Aerospace Engineering Services Pty Ltd v Ibrahim (12 February 2007) (Roberts-Smith JA)
Martin v Clarke (05 April 2005) (Malcolm CJ, Steytler P, McLure JA)

The common law of negligence has three elements – a duty of care owed to the plaintiff, a breach of that duty and a causal connection between the damage sustained and the breach of duty. Furthermore, the damage must not be too remote from the breach.

89. **Following paragraph cited by:**

Aerospace Engineering Services Pty Ltd v Ibrahim (12 February 2007) (Roberts-Smith JA)

Central to the elements of breach of duty and remoteness is the concept of reasonable foreseeability. In the absence of a pre-existing duty of care owed by the defendant to the plaintiff, the concept of reasonable foreseeability also plays a vital role in determining whether the defendant owed a duty of care to the plaintiff. Because Acting Sergeant Beardsley had no pre-existing relationship with Mrs Tame, the issue of reasonable foreseeability is central to the issue of duty in this appeal.

90. **Following paragraph cited by:**

Panagiotopoulos v Rajendram (28 September 2007) (Tobias JA at 1; McColl JA at 2; Basten JA at 3)
McPherson's Ltd v Eaton (16 December 2005) (Mason P, Hodgson and Ipp JJA)

Although it is usually convenient to discuss negligence law in terms of its three elements, "each element can be defined only in terms of the others" [45] . In the law of nervous shock, the duty requirement has been conditioned by the nature of the damage that the plaintiff has suffered. In a well-known passage in *King v Phillips* [46] , Denning LJ said "the test of liability for shock is foreseeability of injury by shock". But the common law adds two conditions to this statement concerning foreseeability. First, the shock must be reasonably foreseeable by a person in the defendant's position. Second, the reasonable foresight of the defendant is evaluated by reference to the effect that the defendant's conduct would have on a person of normal fortitude. In *Bunyan v Jordan* [47] , where the Supreme Court of New South Wales rejected a claim for nervous shock, Jordan CJ said that the standard of the reasonable and prudent man determined the existence of the duty of care as well as the

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

standard of care that the duty calls into existence. His Honour went on to say that, in the absence of special circumstances, proof of duty in a nervous shock case required a finding that the act complained of was "one reasonably likely to cause injurious terror or shock to an ordinary normal human being". Special circumstances would include "knowledge of the presence of specially susceptible persons whom a reasonable man would take care not to startle". On appeal, a majority of this Court affirmed the decision [48] .

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[45] *John Pfeiffer Pty Ltd v Canny* (1981) 148 CLR 218 at 241-242 per Brennan J cited in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 487 per Brennan J.

[46] [1953] 1 QB 429 at 441. The Judicial Committee endorsed this statement of the law in *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)* [1961] AC 388 at 426.

[47] (1936) 36 SR (NSW) 350 at 355.

[48] See *Bunyan v Jordan* (1937) 57 CLR 1 at 14 per Latham CJ, 16-17 per Dixon J, 18 per McTiernan J.

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91. Subsequently, a number of the Justices in *Jaensch v Coffey* [49] , expressly or impliedly, approved the principle that, in determining the question of reasonable foreseeability, the court looks to a person of normal fortitude. Brennan J said [50] :

> "Unless a plaintiff's extraordinary susceptibility to psychiatric illness induced by shock is known to the defendant, the existence of a duty of care owed to the plaintiff is to be determined upon the assumption that he is of a normal standard of susceptibility."

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[49] (1984) 155 CLR 549 at 556 per Gibbs CJ, 557 per Murphy J referring to a "'normal' person", 610 per Deane J referring to the fact that Mrs Coffey's life and dependence on her husband were not such as to make her not a "person of normal fortitude".

[50] (1984) 155 CLR 549 at 568.

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92. Until recently, the law of England also tested reasonable foreseeability in nervous shock cases by the effect that the defendant's conduct would have on persons of normal fortitude. In *Bourhill v Young* [51] , Lord Wright said, "whether there is duty owing to members of the public who come within the ambit of the act, must generally depend on a normal standard of susceptibility". In the same case, Lord Porter said [52] that a driver was entitled to assume

that the ordinary road user has "sufficient fortitude to endure such incidents as may from time to time be expected to occur". He also referred to a person in the position of the plaintiff as taken to possess the "customary phlegm".

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[51] [1943] AC 92 at 110.

[52] [1943] AC 92 at 117.

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93. Lord Bridge of Harwich cited these statements of Lord Porter with approval in *McLoughlin v O'Brian* [53] . In the same case, Lord Wilberforce referred to the ordinary bystander being assumed to possess normal fortitude [54] . In *Page v Smith* [55] , however, a majority of the House of Lords drew a distinction between primary and secondary sufferers of nervous shock. Lords Ackner, Browne-Wilkinson and Lloyd of Berwick held that, where the defendant was under a duty to avoid personal injury to the plaintiff, the plaintiff did not have to prove that the defendant should have reasonably foreseen that a person of normal fortitude might suffer nervous shock. But the distinction between primary and secondary victims is not one that the Australian common law has recognised. Whether it will survive in England is doubtful. Recently, in *W v Essex County Council* [56] members of the House of Lords questioned the validity of the distinction. Earlier, in *White v Chief Constable of South Yorkshire Police* [57] , Lord Griffiths and Lord Goff of Chieveley noted that *Page v Smith* [58] had changed the common law of England. They accepted that before that case the foresight of the defendant in a nervous shock action was conditioned by the assumption that the plaintiff was a person of reasonable fortitude.

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[53] [1983] 1 AC 410 at 436.

[54] [1983] 1 AC 410 at 422.

[55] [1996] AC 155 at 170 per Lord Ackner, 182 per Lord Browne-Wilkinson, 190 per Lord Lloyd of Berwick.

[56] [2001] 2 AC 592 at 600-601 per Lord Slynn of Hadley, Lords Steyn, Hope of Craighead, Hobhouse of Woodborough and Millett agreeing.

[57] [1999] 2 AC 455 at 463 per Lord Griffiths, 473 per Lord Goff of Chieveley.

[58] [1996] AC 155 .

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94. **Following paragraph cited by:**

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

Lederer Group Pty Ltd v Hodson (18 December 2024) (Ward P, Leeming JA and Basten AJA)

Counsel for Mrs Tame criticised the use of the normal fortitude test. Although he did not say so, his argument regarded it as a category of indeterminate reference that courts use as a means of confining liability for nervous shock. Eminent judges have questioned the usefulness of the normal fortitude test. In *Mount Isa Mines Ltd v Pusey* [59] , Windeyer J expressed reservations about its validity as a criterion of liability. His Honour said "[t]he idea of a man of normal emotional fibre, as distinct from a man sensitive, susceptible and more easily disturbed emotionally and mentally, is I think imprecise and scientifically inexact". In support of this view, Windeyer J cited a statement of Waller J in *Chadwick v British Railways Board* [60] where his Lordship said:

> "The community is not formed of normal citizens, with all those who are less susceptible or more susceptible to stress to be regarded as extraordinary. There is an infinite variety of creatures, all with varying susceptibilities."

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[59] (1970) 125 CLR 383 at 405-406 .

[60] [1967] 1 WLR 912 at 922; [1967] 2 All ER 945 at 952.

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95. The evidence in the present case demonstrated that some members of the community are much more vulnerable to psychiatric illness than others. But the existence of such people is not itself a valid ground for rejecting the normal fortitude test. As Lord Wright pointed out in *Bourhill* [61] , "[a] blind or deaf man who crosses the traffic on a busy street cannot complain if he is run over by a careful driver who does not know of and could not be expected to observe and guard against the man's infirmity". The common law judges the conduct of a defendant by its effect on people of ordinary health and susceptibility unless the defendant is aware of an abnormal weakness or susceptibility of the plaintiff. Similarly, the standard for evaluating the reasonableness of the defendant's conduct is an objective standard. The skills, standards and experience of drivers, employers and professional persons vary enormously. Yet every day, tribunals of fact, applying the common law, hold defendants liable or not liable by reference to what an ordinary-reasonable driver, employer or professional person would have done in the same circumstances as the defendant encountered. Absent special knowledge, a defendant is only liable for what an ordinary person in his or her position ought to reasonably foresee.

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[61] [1943] AC 92 at 109.

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Foreseeability of damage

96. **Following paragraph cited by:**

State of New South Wales v Napier (13 December 2002)

Under the current law, the test of reasonable foreseeability of damage occurring is an undemanding one [62] . In *Wyong Shire Council v Shirt* [63] , Mason J said:

> "[A] risk of injury which is remote in the sense that it is extremely unlikely to occur may nevertheless constitute a foreseeable risk. A risk which is not far-fetched or fanciful is real and therefore foreseeable."

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[62] *Shirt v Wyong Shire Council* [1978] 1 NSWLR 631 at 641 per Glass JA.

[63] (1980) 146 CLR 40 at 48 (Stephen and Aickin JJ agreeing); see also at 53 per Wilson J.

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97. But the test of reasonable foreseeability was not always so undemanding. Nor was the content of reasonable care anywhere near as high as it has become in recent years [64] . Until comparatively recently, courts tended to ask whether the defendant had created an unreasonable risk of harm to others that he or she knew or ought to have recognised. A risk was regarded as unreasonable and one to be prevented only if reasonable members of the community would think it sufficiently great to require preventative action. In each case, foreseeability of risk and preventability of harm were defined and applied by reference to each other. Writing in 1957, Professor Fleming said[65]:

> "What are the considerations upon which the law supposes the reasonable man will guide his conduct? Negligence … consists in conduct involving an *unreasona ble* risk of harm. Almost any activity is fraught with some degree of danger to others but, if the existence of a remote possibility of harm were sufficient to attract the quality of negligence, most human action would be inhibited. Inevitably, therefore, a person is only required to guard against those risks which society recognizes as sufficiently great to demand precaution. The risk must be unreasonable, before he can be expected to subordinate his own ends to the interests of other."

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[64] This has been particularly so in actions by employees against employers: cf *Smith v The Broken Hill Pty Co Ltd* (1957) 97 CLR 337; *Rae v The Broken Hill Pty Co Ltd* (1957) 97 CLR 419; *Commissioner for Railways (NSW) v O'Brien* (1958) 100 CLR 211; *O'Connor v Commissioner*

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

*for Government Transport* (1954) 100 CLR 225; *Skinner & Johns & Waygood Ltd v Barac* (1961) 35 ALJR 124 with *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301.

[65] *The Law of Torts*, (1957) at 131-132.

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98. Many of the problems that now beset negligence law and extend the liability of defendants to unreal levels stem from weakening the test of reasonable foreseeability. But courts have exacerbated the impact of this weakening of the foreseeability standard by treating foreseeability and preventability as independent elements. Courts tend to ask whether the risk of damage was reasonably foreseeable and, if so, whether it was reasonably preventable. Breaking breach of duty into elements that are independent of each other has expanded the reach of negligence law.

99. **Following paragraph cited by:**

Jennings v George Harcourt Management Pty Ltd (20 November 2018) (Murrell CJ; Burns and Loukas-Karlsson JJ)
BHP Billiton Ltd v Dunning (11 March 2015) (Basten, Macfarlan and Meagher JJA)
Stewart v Ackland (12 February 2015) (Penfold J; Walmsley and Robinson AJJ)
Stewart v Ackland (12 February 2015) (Penfold J; Walmsley and Robinson AJJ)
Drexel London (a firm) v Gove (Blackman) (21 October 2009) (McLure JA; Le Miere and Kenneth Martin JJ)
New South Wales Department of Housing v Hume (28 March 2007) (Beazley JA ; McColl JA Basten JA)
Drinkwater v Howarth (03 August 2006) (Hodgson JA at 24; Tobias JA at 26; Basten JA at 1)
Wynne v Pilbeam (21 October 2005) (Steytler P, Wheeler JA, Pullin JA)
Owners of Strata Plan 63477 v Ross (18 May 2005)
Sutherland Shire Council v Henshaw (10 December 2004) (Sheller, Hodgson and Bryson JJA)
Temora Shire Council v Stein (21 July 2004) (Giles and Hodgson JJA, Pearlman AJA)

Given the undemanding nature of the current foreseeability standard, an affirmative answer to the question whether damage was reasonably foreseeable is usually a near certainty. And a plaintiff usually has little trouble in showing that the risk was reasonably preventable and receiving an affirmative answer to the second question. This is especially so since Lord Reid said that a reasonable person would only neglect a very small risk of injury if there was "some valid reason" for disregarding it [66] , a proposition that effectively puts the onus on the defendant to show why the risk could not have been avoided. Once these two questions are answered favourably to the plaintiff, there is a slide – virtually automatic – into a finding of negligence. Sometimes [67] , courts do not even ask the decisive question in a negligence case: did the defendant's failure to eliminate this risk show a want of reasonable care for the

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

safety of the plaintiff? They overlook that it does not follow that the failure to eliminate a risk that was reasonably foreseeable and preventable is not necessarily negligence. As Mason J pointed out in *Shirt* [68] in a passage that is too often overlooked:

> "The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. *It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position*." (emphasis added)

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[66] *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty* [1967] 1 AC 617 at 642.

[67] See, for example, *Liftronic Pty Ltd v Unver* (2001) 75 ALJR 867 at 871-872 [25]-[26] per McHugh J; 179 ALR 321 at 326-327 .

[68] (1980) 146 CLR 40 at 47-48 .

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100. The problems that now beset negligence law began with the Judicial Committee's Advice in *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty* ("*The Wagon Mound (No 2)*")[69] . At first instance, Walsh J found [70] that, if the officers of the defendant "had given attention to the risk of fire from the spillage, they would have regarded it as a possibility, but one which could become an actuality only in very exceptional circumstances". Based on this finding, Walsh J held that the risk of fire was not reasonably foreseeable. But Lord Reid, giving the Advice of the Board, emphatically rejected the conclusion that Walsh J had derived from his finding of preliminary fact. Lord Reid recognised that the case law left open whether "if a real risk can properly be described as remote it must then be held to be not reasonably foreseeable" [71] . But he rejected that proposition as too narrow. Instead, his Lordship said [72] :

> "If a real risk is one which would occur to the mind of a reasonable man in the position of the defendant's servant and which he would not brush aside as far-fetched, and if the criterion is to be what that reasonable man would have done in the circumstances, then surely he would not neglect such a risk if action to eliminate it presented no difficulty, involved no disadvantage, and required no expense."

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[69] [1967] 1 AC 617 .

[70] *Miller Steamship Co Pty Ltd v Overseas Tankship (UK) Ltd* [1963] SR (NSW) 948 at 977.

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

[71] [1967] 1 AC 617 at 643.

[72] [1967] 1 AC 617 at 643-644 .

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101. Applied to the facts of *The Wagon Mound (No 2)* – a case concerned with the risk of furnace oil being ignited by welding sparks – this statement seems reasonable. But later judges have read it, as their Lordships probably intended it to be read, as laying down a universal proposition. It was read that way by a majority of this Court in *Shirt.* But in the light of 35 years experience, the decision in *The Wagon Mound (No 2)* and the above passage in particular appear to me to have been an unfortunate development in the law of negligence. I think that the time has come when this Court should retrace its steps so that the law of negligence accords with what people really do, or can be expected to do, in real life situations. Negligence law will fall – perhaps it already has fallen – into public disrepute if it produces results that ordinary members of the public regard as unreasonable. Lord Reid himself once said [73] "[t]he common law ought never to produce a wholly unreasonable result". And probably only some plaintiffs and their lawyers would now assert that the law of negligence in its present state does not produce unreasonable results.

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[73] *Cartledge v E Jopling & Sons Ltd* [1963] AC 758 at 772.

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102. **Following paragraph cited by:**

Shellharbour City Council v Rigby (27 November 2006) (Beazley JA; Ipp JA; Basten JA)

> 100 The Club further contended that even if a duty was owed in the circumstances, it did not follow that the failure to eliminate the risk of a person in the plaintiff's position riding down the starting ramp was negligent on the basis that the risk was reasonably foreseeable and preventable: see *Tame v New South Wales* (2002) 211 CLR 317; [2002] HCA 35, where McHugh J said at [102]:
>
> > "Whether the creation of the risk was unreasonable must depend on whether reasonable members of the community in the defendant's position would think the risk sufficiently great to require preventative action. This is a matter for judgment after taking into account the probability of the risk occurring, the gravity of the damage that might arise if the risk occurs, the expense, difficulty and inconvenience of avoiding the risk and any other responsibilities that the defendant must discharge."

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

Green v WA Access Pty Ltd (27 June 2006) (Martin CJ)

> 26 This is not a case in which the existence of a duty of care was at issue. It was common ground between the parties that the respondent owed a duty of care to persons in the category of the appellant. Accordingly, it is not a case in which we need to consider the foreseeability of risk, or the question of whether it is necessary, as a matter of law, to categorise the degree of risk as far-fetched or fanciful in order to conclude that no duty was owed. Rather, this is a case which is concerned entirely with the question of the standard of care owed by the
>
> (Page 12)
>
> respondent to the appellant. At that point of inquiry, the question essentially becomes whether the respondent's conduct was such as to create an unreasonable risk of harm to persons in the category of the appellant. In ***Tame v New South Wales*** (2002) 211 CLR 317 at [102] , McHugh J stated:

Valleyfield Pty Ltd v Primac Ltd (08 August 2003) (Williams and Jerrard JJA and Mackenzie J,)

> 115. Those decisions include *Bryan v Maloney* [37] , *Perre v Apand Pty Ltd* [38] , *Modbury Triangle Shopping Centre Pty Ltd v Anzil & Anor* [39] , *Sullivan v Moody* [40] , *Tame v New South Wales* [41] , and *Graham Barclay v Ryan* [42] . These judgments identify as important criteria identifying the existence or non existence of a duty of care:
>
> - actual foresight of the likelihood or possibility of harm of the kind suffered [43] ;
> - or, absent actual foresight, reasonable foreseeability of that harm to the extent of recognition of it being an unreasonable risk created for others [44] ;
> - who are either known to the person causing damage, or members of an ascertainable group or class reasonably foreseen as subject to that risk [45] ;
> - where there is known or reasonably foreseen vulnerability of the person suffering damage to harm of that type, (often arising from their relying on the person causing harm to take care) and against which harm the person injured could not otherwise take steps adequately to protect themselves [46] ;
> - in the absence of preventative action by reasonable care taken to avoid causing that damage [47] ;
> - because of the degree of control exercised by the person causing the damage in or over the activity which causes it [48] ;

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

- and often relevant is the physical, geographic, or commercial propinquity of the parties, in the activities of each in which one suffered and the other caused the harm [49] .

*via*

[44] *Tame v New South Wales* at [102] judgment of McHugh J

Valleyfield Pty Ltd v Primac Ltd (08 August 2003) (Williams and Jerrard JJA and Mackenzie J,)
Daly v D a Manufacturing Co P/L (04 July 2003) (Williams and Jerrard JJA and Fryberg J,)

So far as possible, the issue of reasonable foreseeability of risk in breach of duty situations should no longer be determined in isolation from the issue of reasonable preventability and the ultimate issue of what reasonable care requires. Indeed at the breach stage, it is better to avoid the question of reasonable foreseeability. Instead, courts should see their task as that of deciding whether the defendant knew or ought to have recognised that he or she had created an unreasonable risk of harm to others. Whether the creation of the risk was unreasonable must depend on whether reasonable members of the community in the defendant's position would think the risk sufficiently great to require preventative action. This is a matter for judgment after taking into account the probability of the risk occurring, the gravity of the damage that might arise if the risk occurs, the expense, difficulty and inconvenience of avoiding the risk and any other responsibilities that the defendant must discharge.

103. **Following paragraph cited by:**

Minister for the Environment v Sharma (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)
McPherson's Ltd v Eaton (16 December 2005) (Mason P, Hodgson and Ipp JJA)

In dealing with the duty issue, however, it is often necessary to consider the issue of reasonable foresight as a separate issue. In the duty situation, the issue is whether the law imposes or ought to impose an obligation on the defendant to avoid conduct that exposes persons in the position of the plaintiff to unreasonable risks of harm. Absent a pre-existing relationship or circumstances that automatically give rise to a duty – such as lawful entry onto land – reasonable foreseeability of harm to others is a necessary condition of duty. In some areas of law – negligently inflicted economic loss cases, for example – reasonable foreseeability of harm to others is a necessary but not a sufficient condition of duty.

104. When it is necessary to determine foreseeability in the duty context, the development of the law of negligence as a socially useful instrument now requires the rejection of the attenuated test of foreseeability propounded in *The Wagon Mound (No 2)* and adopted by this Court in *Shi rt*. We should return to Lord Atkin's test [74] that:

"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour."

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[74] *Donoghue v Stevenson* [1932] AC 562 at 580.

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105. **Following paragraph cited by:**

Francis v Lewis (19 June 2003)

This statement should not be seen as laying down a simple factual issue, as it often is. Lord Wilberforce in *Anns v Merton London Borough Council* [75] and Deane J in *Jaensch* [76] , for example, seem to have regarded reasonable foreseeability as raising a mere factual issue. Lord Wilberforce thought that reasonable foreseeability was the equivalent of proximity and would create a duty unless negatived by policy factors. That proposition assumes that policy factors have no part to play in reasonable foreseeability. Deane J thought that both reasonable foreseeability and proximity were necessary to establish a duty of care. But I think it is arguable that the notion of reasonable foresight in Lord Atkin's speech in *Donoghue v Stevenson* [77] is, and was intended to be, a compound conception of fact and value. What is foreseeable is a question of fact – prediction, if you like. But reasonableness is a value. At least in some situations, policy issues may be relevant to the issue of reasonable foresight because reasonableness requires a value judgment.

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[75] [1978] AC 728 at 751-752 .

[76] (1984) 155 CLR 549 at 582.

[77] [1932] AC 562 .

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106. I find it difficult to believe that Lord Atkin was simply declaring that the first step in determining duty was a factual question of foreseeability or that it was independent of the concept that he called proximity. I think Lord Atkin saw the concept of proximity as equivalent to the concept of "neighbourhood", a term that he had already defined. Shortly before the passage that I have set out above, Lord Atkin had said [78] that the definition of duty formulated by Brett MR in *Heaven v Pender* [79] "was demonstrably too wide, though it appears to me, if properly limited, to be capable of affording a valuable practical guide". Imm ediately after the passage I have quoted, Lord Atkin defined "neighbour" as meaning:

"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".

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

Lord Atkin then said that this appears to be the doctrine of *Heaven* "when it is limited by the notion of proximity" introduced in *Le Lievre v Gould* [80] . Lord Atkin then cited passages from that case, including a passage where A L Smith LJ had mentioned proximity, and went on to say [81] :

> "I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used … to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act."

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[78] *Donoghue v Stevenson* [1932] AC 562 at 580.

[79] (1883) 11 QBD 503 at 509.

[80] [1893] 1 QB 491 at 497 per Lord Esher MR, 504 per A L Smith LJ.

[81] *Donoghue v Stevenson* [1932] AC 562 at 581.

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107. Thus neighbour = person closely and directly affected = proximity. In my opinion, Deane J arguably erred in *Jaensch* when he said [82] that the neighbour requirement was "a substantive and *independent* one which was deliberately and expressly introduced to limit or control the test of reasonable foreseeability" (emphasis added). It is true that reasonable foreseeability is not at large. You come under a duty only in respect of acts and omissions that you can reasonably foresee may affect your neighbours – persons who are directly and closely affected by your acts. But that is not a ground for regarding proximity as a factor that is independent of reasonable foreseeability.

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[82] (1984) 155 CLR 549 at 580.

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108. Because reasonable foreseeability is a compound conception of fact and value, policy considerations affecting the defendant or persons in similar situations arguably enter into the determination of whether the defendant ought reasonably to have foreseen that his or her acts or omissions were "likely to injure your neighbour". It is unnecessary in this case to determine whether that is so. But whether or not such policy matters are a factor in the foresight issue, the concept of "likelihood" in Lord Atkin's formulation does not require the defendant to take into account remote possibilities of harm. The defendant is no more bound to take them into account than he or she is entitled to take into account only those risks whose chance of occurring is more probable than not. Rather as Walsh J said in *Miller Steamship Co Pty Ltd v Overseas Tankship (UK) Ltd* [83] , the defendant must consider "whether [a] risk exists, and if any such risk exists at all, whether it may reasonably be disregarded". To go

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

further and divide risks that must be avoided into those that are far-fetched or fanciful and those that are not is to attempt to give the subject of negligence a degree of definition that it cannot carry.

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[83] [1963] SR (NSW) 948 at 960.

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The normal fortitude test should be maintained

109. Once it is accepted that a risk is not necessarily reasonably foreseeable because it is not far-fetched or fanciful, criticism of the "normal fortitude" test wears a different complexion. Once the notion of reasonableness regains its rightful place at the front of the negligence inquiry, it must follow that a defendant is entitled to act on the basis that there will be a normal reaction to his or her conduct. The position is different if the defendant knows that the plaintiff is in a special position. But otherwise the defendant should not be penalised for abnormal reactions to his or her conduct.

110. **Following paragraph cited by:**

Anwar v Mondello Farms Pty Ltd (10 August 2015) (Kourakis CJ; Gray and Stanley JJ)

To insist that the duty of reasonable care in pure psychiatric illness cases be anchored by reference to the most vulnerable person in the community – by reference to the most fragile psyche in the community – would place an undue burden on social action and communication. To require each actor in Australian society to examine whether his or her actions or statements might damage the most psychiatrically vulnerable person within the zone of action or communication would seriously interfere with the individual's freedom of action and communication. To go further and require the actor to take steps to avoid potential damage to the peculiarly vulnerable would impose an intolerable burden on the autonomy of individuals. Ordinary people are entitled to act on the basis that there will be a normal reaction to their conduct. It is no answer to say that the defendant ought to be liable to peculiarly vulnerable persons because the defendant is guilty of careless conduct. The common law of negligence does not brand a person as careless unless the law has imposed a duty on that person to avoid carelessly injuring others.

111. Moreover, I doubt that the application of the law relating to nervous shock would become easier by requiring the defendant to consider whether his or her conduct might cause nervous shock to the most psychiatrically vulnerable member of society. The law of negligence applies to ordinary persons as well as to great corporations and wealthy individuals who have access to the most recent psychiatric insights concerning the effect of stress on the human psyche. Negligence law acts on the assumption that persons are or ought to be aware of the risks that flow from their conduct and can take reasonable steps to avoid the consequences of

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

those risks of which they knew or ought to know. It would be contrary to principle to hold defendants liable in negligence for risks of injury of which they neither knew nor ought to have known.

112. **Following paragraph cited by:**

Anwar v Mondello Farms Pty Ltd (10 August 2015) (Kourakis CJ; Gray and Stanley JJ)

Anwar v Mondello Farms Pty Ltd (10 August 2015) (Kourakis CJ; Gray and Stanley JJ)

Ordinary persons have a broad understanding of the effect of stress on ordinary individuals in the community. They know that even persons of normal fortitude are likely to suffer psychiatric illness from all sorts of stresses. Given the wide publicity in books, newspapers, films and television and the extent of psychiatric illness in communities, it could hardly be otherwise. It would be going a long way, however, to conclude that ordinary persons are conversant with the more extreme reactions to shock unfortunately suffered by abnormally susceptible people. Given the community's understanding of the effect of stress, the normal fortitude test strikes a reasonable compromise between victims and actors. It strikes a fair balance between the need for compensation for victims of shock and the right of the individual to avoid liability for actions that ordinary persons would not see as likely to give rise to psychiatric illness.

113. To repudiate the normal fortitude test then is to repudiate the touchstone of the common law doctrine of negligence – reasonable conduct. To repudiate it also ignores the right of citizens in a free society not to have their freedom of action and communication unreasonably burdened. Most motor vehicle accidents could be avoided if cars were driven at a speed less than 10 kilometres per hour. But to impose such a standard of care on drivers would unreasonably hamper the speed of travel, increase congestion on the roads and burden the economy with unnecessary increases in the cost of transporting goods and persons. In the law of nervous shock, as in other areas of negligence law, the notion of reasonableness should condition the duty to exercise reasonable care for the safety of others.

114. Ordinarily, as I have indicated, the law imposes a duty of care only when an actor knows or ought to know that the probability of his or her causing damage multiplied by the gravity of its occurrence is high enough for a reasonable person to contemplate eliminating or reducing the risk. Even then, the law will impose no liability – will find no breach of duty – unless it is reasonable to incur the cost and inconvenience of eliminating or reducing the risk of damage. It is in accord with principle, therefore, to hold that, in the absence of a pre-existing duty-relationship, a person has a duty to take care in a nervous shock case only when a reasonable person in the defendant's situation would realise that his or her conduct might cause psychiatric illness. What is reasonable is to be judged by reference to the community's general knowledge of the effect of stressors on ordinary persons of normal fortitude.

115. **Following paragraph cited by:**

Panagiotopoulos v Rajendram (28 September 2007) (Tobias JA at 1; McColl JA at 2; Basten JA at 3)

Panagiotopoulos v Rajendram (28 September 2007) (Tobias JA at 1; McColl JA at 2; Basten JA at 3)

It is for the tribunal of fact – be it judge or jury – to determine whether the defendant ought to have reasonably foreseen that his or her conduct might cause a person of normal fortitude to suffer psychiatric injury. It is not a matter for expert evidence [84] . In *Page v Smith* [85] , Hoffmann LJ said that "[n]ormal fortitude is a matter of judicial notice and does not require medical evidence or statistical inquiry".

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[84] *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 390 per Barwick CJ; *Attia v British Gas Plc* [1988] QB 304 at 312-313 per Dillon LJ; *Page v Smith* [1994] 4 All ER 522 at 549-550 per Hoffmann LJ.

[85] [1994] 4 All ER 522 at 549.

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116. Counsel for Mrs Tame submitted that to say that the question of whether a person of normal fortitude would suffer psychiatric injury is a matter for judicial notice is inconsistent with the way in which Isaacs J in *Holland v Jones* [86] explained what could be the subject of judicial notice. His Honour explained the concept of judicial notice as being an ability on the part of a court to take account of a fact either *simpliciter* if immediately satisfied or after such investigation as it considers reliable and necessary in order to eliminate any reasonable doubt. The fact must be "of a class that is so generally known as to give rise to the presumption that all persons are aware of it" [87] . This argument of the appellant is misconceived. Determining the range of reasonable foreseeability by reference to the effect of the stressor on a person of normal fortitude has nothing to do with judicial notice or evidence. It requires the application by the jury of a standard – a community standard – that the law imposes. It is part of the compound conception that determines the issue of reasonable foreseeability and consequently the liability of the defendant. It is no different from requiring a tribunal of fact to decide any issue of civil or criminal liability by reference to community standards.

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[86] (1917) 23 CLR 149 at 153-154 .

[87] (1917) 23 CLR 149 at 153.

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117. **Following paragraph cited by:**

Capar v SPG Investments Pty Ltd t/as Lidcombe Power Centre (22 December 2020) (Basten and McCallum JJA, Emmett AJA)

Counsel for Mrs Tame also submitted that injecting the normal fortitude test into the question of foreseeability conflicts with the accepted principle in negligence of *talem qualem* – the "egg-shell skull" rule. That submission cannot be accepted. The normal fortitude test is an issue going to liability; the egg-shell skull rule goes to quantification of damages once duty, breach and some damage are established. In *White v Chief Constable of South Yorkshire Police* [88] , Lord Goff of Chieveley pointed out that the egg-shell skull rule "is a principle of compensation, not of liability". It operates in the field of nervous shock in the same way that it operates in other areas of the law. Once the plaintiff establishes that a person of normal fortitude would have suffered psychiatric illness as the result of the defendant's action, the defendant must take the plaintiff as he or she is. The defendant's liability extends to all the psychiatric damage suffered by the plaintiff even though its extent is greater than that which would be sustained by a person of normal fortitude [89] .

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[88] [1999] 2 AC 455 at 470.

[89] See *Bourhill v Young* [1943] AC 92 at 109-110 per Lord Wright; *Beavis v Apthorpe* (1962) 80 WN (NSW) 852 at 857 per Herron CJ; *Havenaar v Havenaar* [1982] 1 NSWLR 626 at 631 per Glass JA.

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118. Accordingly, where the existence of a duty in a nervous shock action turns on reasonable foreseeability, the plaintiff must prove that the defendant should reasonably have foreseen that his or her conduct might cause nervous shock to a person of normal fortitude. If a person of normal fortitude would not suffer nervous shock by reason of the defendant's conduct, the plaintiff's injury was not reasonably foreseeable and the defendant was under no duty to take care to avoid causing the injury that the plaintiff suffered.

119. It follows that the Court of Appeal correctly set aside the finding of Garling DCJ on the foreseeability issue. In finding that psychological injury to Mrs Tame was reasonably foreseeable, the learned trial judge applied the wrong standard. His Honour asked whether the defendant should reasonably have foreseen that the incorrect entry might cause psychiatric illness to a person with a "vulnerable personality". That was to impose too low a standard in determining the duty of care. In the context of this case, the correct question on the foreseeability issue was whether, in completing the P4 report, Acting Sergeant Beardsley should reasonably have contemplated that a false entry concerning Mrs Tame's blood alcohol level might cause psychiatric injury to a person of normal fortitude.

Mrs Tame's illness was not reasonably foreseeable

120. The Court of Appeal was right to conclude that a person of normal fortitude would not suffer psychiatric illness upon learning that a P4 report had attributed to that person a wrong blood alcohol reading. No doubt many ordinary persons of normal fortitude would be angry and resentful at having falsely attributed to them a blood alcohol reading of 0.14. But I agree with

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

the Court of Appeal that a person such as Acting Sergeant Beardsley would not reasonably contemplate that an ordinary person of normal fortitude would suffer a psychiatric illness after learning of such an entry. That is so, even if the relevant person of normal fortitude is deemed to be a non-drinker. Even if Acting Sergeant Beardsley might have thought that there was some risk of a normal person becoming mentally ill after reading an incorrect entry concerning blood alcohol levels, he was entitled to conclude that it was so small that it could reasonably be disregarded.

121. Accordingly, the Court of Appeal was correct to hold that the defendants owed no duty of care to Mrs Tame to avoid inflicting nervous shock upon her.

Coherence in the law

122. Mrs Tame's psychiatric illness is the product of her concern for her reputation. There is no doubt that the publication of the P4 report to the insurer defamed her. She could have sued for damages for defamation. If successful, she could have recovered all the damages in that action that she sought in the present action including damages for her psychiatric illness [90] .

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[90] See *Rigby v Mirror Newspapers Ltd* (1963) 64 SR (NSW) 34 to which I referred with approval in *Campbelltown City Council v Mackay* (1989) 15 NSWLR 501 at 511.

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123. In determining whether Acting Sergeant Beardsley owed a duty of care to Mrs Tame, it is proper to take into account – quite apart from the issue of reasonable foreseeability – that the law of defamation appears a more appropriate medium for dealing with the facts of her case than the law of negligently inflicted nervous shock. Her action arises out of a communication to a third party, her concern is with her reputation and the law of defamation has various defences that reconcile the competing interests of the parties more appropriately than the law of negligence. This Court has already taken the view that, independently of policy issues relevant to the interests of the parties and persons like them, the need for the law to be coherent is a relevant factor in determining whether a duty exists. In *Sullivan v Moody* [91] , the Court said that coherence in the law was a relevant factor in determining whether a duty of care existed. In *Sullivan* , the Court held that officers of the Department of Community Welfare owed no duty of care to a person affected by a communication made as the result of investigating, under a statutory power, a sexual assault allegation.

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[91] (2001) 75 ALJR 1570 at 1580 [55]; 183 ALR 404 at 416.

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124. In the present case, Constable Morgan and Acting Sergeant Beardsley had a duty to prepare the P4 report for purposes relevant to the administration of justice. If other considerations pointed to a duty of care, it might be thought that nothing about preparing a P4 report was of

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

sufficient public importance to negate that duty of care. But it would be a mistake to treat the preparation of a P4 report in isolation from other recording duties imposed on police officers in investigating criminal activity.

125. Police officers are frequently obliged to record and use statements from witnesses and informants, statements that frequently damage the reputation of others. It seems preposterous to suggest that an officer has a duty of care in respect of such statements. Gathering and recording intelligence concerning the activities, potential activities and character of members of the criminal class is also central to the efficient functioning of a modern police force. Recording hearsay, opinions, gossip, suspicions and speculations as well as incontestable factual material is a vital aspect of police intelligence gathering. To impose a duty to take reasonable care to see that such information, recorded by police officers, is correct would impose on them either an intolerable burden or a meaningless ritual. It would often – perhaps usually – defeat the whole purpose of intelligence recording if the officer were required to check the accuracy of the material recorded. Often enough, checking the accuracy of the material would require contacting the very person who was the subject of an adverse recording.

126. It is unnecessary to decide in this case whether the administrative obligations of Constable Morgan and Acting Sergeant Beardsley negated the existence of a duty of care. My strong inclination is that police officers recording material relating to the administration of criminal justice have no duty to be careful to those affected by the material recorded. They should not have the burden of determining whether they have a duty of care in respect of every recording they make in the course of their duties. A blanket rule of no duty of care seems more in accord with the efficient administration of criminal justice than a case by case examination of each recording. If material is recorded honestly but carelessly, no action for defamation will lie, and I see no reason why the law of negligence should alter that balance.

Orders

127. The appeal should be dismissed with costs.

**LESLIE ANNETTS & ANOR v AUSTRALIAN STATIONS PTY LTD**

128. Mr and Mrs Annetts seek special leave to appeal against an order of the Full Court of the Supreme Court of Western Australia. The Full Court upheld a finding by Heenan J in the Supreme Court that the facts pleaded in a Statement of Claim, filed by Mr and Mrs Annetts, against the respondent, Australian Stations Pty Ltd, did not disclose a cause of action. Their pleading claimed that they had suffered nervous shock after learning of the disappearance and death of their son during his employment with the respondent and that they were entitled to damages for the consequences of that nervous shock. Heenan J found that there was no cause of action because the respondent did not owe any duty to Mr and Mrs Annetts to protect them from suffering nervous shock. The Full Court agreed with his conclusion.

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

129. The question in this application – which was argued as if it was an appeal – is whether on the facts pleaded the respondent owed a duty of care to Mr and Mrs Annetts. In my opinion, it did.

The material facts as pleaded

130. In August 1986, Mr and Mrs Annetts agreed to their son, James, then aged 16, being employed by Australian Stations ("the employer") as a jackeroo at Flora Valley, a cattle station that it owned. Flora Valley is about 40km south east of Halls Creek in the Kimberley district of Western Australia. Mr and Mrs Annetts agreed to James' employment after being assured by the management that he would be working under constant supervision, that he would be sharing a room with one to four other men, that all his meals would be provided and that generally he would be well cared for. When the assurance was given, James was living with his parents at Binya in New South Wales.

131. The employer did not give effect to its assurance. In October 1986, the employer's manager sent James to work alone as a caretaker at Nicholson Station, about 100km east of Flora Valley and about 270km north of Balgo. Early in December 1986, the manager learnt that James had disappeared and suspected that he was in grave danger of injury or death. Three days later, a police officer telephoned Mr Annetts and told him that James was missing. It was believed that he had run away. Mr Annetts collapsed on being told of the news. An intensive search was commenced for James and another teenager, Simon James Amos, who had been employed by the respondent as a jackeroo on another station.

132. On several occasions, Mr and Mrs Annetts telephoned persons in the Halls Creek area seeking information as to their son's whereabouts. In January 1987, they went to Halls Creek where they were shown belongings of their son that had been found. Among the belongings was a hat covered in blood. Mr Annetts made nine more, and Mrs Annetts two or three more, trips to Halls Creek.

133. On 26 April 1987, Mr Annetts was informed by telephone that the vehicle James had been using had been found in the desert but there were no signs of any people around it. Later that day he was informed that two sets of human remains had been found nearby. On 28 or 29 April 1987, Mr Annetts returned to Halls Creek where he was shown a photograph of the remains of a person. He identified them as being the remains of James.

134. The parties also agreed, based on the findings of the Coroner, that James died on or about 4 December 1986 in the Gibson Desert some 133km south of Balgo as a result of dehydration, exhaustion and hypothermia.

Proceedings in the Supreme Court of Western Australia

135. Heenan J found that, as the employer knew of James' youth and inexperience as a jackeroo and the concerns of his parents for his well-being, it was reasonably foreseeable by the employer that they would suffer psychiatric injury if he was harmed as a consequence of the employer's negligence. However, his Honour held that the employer did not owe a duty of care to them in respect of nervous shock because the psychiatric injury they suffered was not the result of a sudden sensory perception arising from them being directly involved in the harm-causing events. This was because Mr and Mrs Annetts were "separated in time as well

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

as in space from the distressing events" and because they learnt of his death and disappearance by telephone.

Decision of the Full Court of the Supreme Court of Western Australia

136. In the Full Court of the Supreme Court of Western Australia, Ipp J held that reasonable foreseeability of psychiatric harm is determined by reference to a person of normal fortitude. Applying this test, his Honour found that, while the employer might possibly have foreseen that Mr and Mrs Annetts would suffer deep anxiety and grief on learning of their son's disappearance and death, it could not reasonably foresee that they might suffer psychiatric injury. His Honour said:

> "I have difficulty in accepting that it is reasonably foreseeable that a parent of normal fortitude might sustain psychiatric injury upon being informed of the death of a 16-year-old child."

137. His Honour also held that the claim failed because on 6 December 1986, there was no perception by the parents of a distressing phenomenon. Furthermore, the confirmation of James' death at the end of April 1987 could not be regarded as a sudden sensory perception of a distressing event.

138. Malcolm CJ and Pidgeon J agreed with the judgment of Ipp J. Malcolm CJ said expressly that no action for damages for nervous shock would lie unless there was a "sudden shock" and a person of "normal fortitude" would have suffered nervous shock in the circumstances.

Relationship giving rise to a duty of care

139. As these judgments indicate, the case was argued and decided in the Western Australian courts on the basis that the employer's liability was governed by the special rules that usually determine whether a person is liable for the negligent infliction of pure nervous shock [92] . B ut those rules do not apply to and do not govern this case. They are concerned with situations where the parties have no pre-existing relationship and where, before the suffering of nervous shock, there was no duty on the defendant to take care to avoid injury to the plaintiff. They are concerned with the issue whether the plaintiff was the defendant's "neighbour" [93] in Lord Atkin's sense and whether the defendant owed a duty of care to the plaintiff. In the paradigm case of their application, the duty to take care to avoid inflicting nervous shock on the plaintiff coincides with the breach of a duty owed to a third party. In most cases calling for the application of the special rules, the third party will also suffer injury. But it is not necessary that a third party be in danger or suffer injury [94] . On the current state of authority, it is enough that, although there is no pre-existing duty or relationship, the defendant ought reasonably to have foreseen that his or her conduct might cause nervous shock to the plaintiff. In cases where there is no existing relationship between the defendant and the person sustaining nervous shock, however, English [95] and Australian [96] authority requires the plaintiff to prove more than the reasonable foreseeability of nervous shock to the plaintiff. It is unnecessary in this case to examine those additional requirements or the special rules or to determine whether and, if so, to what extent, they represent the current law. They do not apply where the defendant is already under a duty to take reasonable care to avoid injury to the plaintiff.

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

[92] See *Bourhill v Young* [1943] AC 92 at 103 per Lord Macmillan; *McLoughlin v O'Brian* [1983] 1 AC 410 at 418-419 per Lord Wilberforce; *Jaensch v Coffey* (1984) 155 CLR 549.

[93] *Donoghue v Stevenson* [1932] AC 562 at 580.

[94] cf *Bourhill v Young* [1943] AC 92.

[95] *Bourhill v Young* [1943] AC 92 at 103 per Lord Macmillan; *McLoughlin v O'Brian* [1983] 1 AC 410 at 418-419 per Lord Wilberforce; *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 at 361-363 per Parker LJ, 379-380 per Stocker LJ, 385-387 per Nolan LJ, 398 per Lord Keith of Kinkel, 400-405 per Lord Ackner, 416-418 per Lord Oliver of Aylmerton, 423 per Lord Jauncey of Tullichettle; *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455 at 462-463 per Lord Griffiths, 491, 493-497 per Lord Steyn, 501-504 per Lord Hoffmann.

[96] *Jaensch v Coffey* (1984) 155 CLR 549.

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140. **Following paragraph cited by:**

Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright (17 February 2017) (Basten, Hoeben and Gleeson JJA)

Tame v State of New South Wales; Annetts v Australian Stations Pty Ltd (2002) 211 CLR 317; [2002] HCA 35 at [140] (McHugh J) .

Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright (17 February 2017) (Basten, Hoeben and Gleeson JJA)

The relationship of employee and employer, for example, requires the employer to take reasonable care to avoid injury to the employee. The duty is governed by the same rules and has the same content, irrespective of the kind of injury or damage that can reasonably be foreseen. In so far as *White v Chief Constable of South Yorkshire Police* [97] decides the contrary, it does not represent the law of Australia [98] . In *White*, the House of Lords appears to have overlooked that the employer's duty of care arises from an implied term of the contract as well as from the general law of negligence. The law of contract does not imply two terms of reasonable care; it does not imply a duty to protect against physical harm and a separate duty to protect against psychiatric injury. It simply implies a general duty to take reasonable care for the safety of the employee [99] and, it might be added, for the employee's property. Similarly under the general law, the duty of the employer is to take reasonable care for the safety of the employee in all the circumstances of the case [100] . It is a duty to take reasonable care to eliminate all risks of injury that can be reasonably foreseen and avoided – whether they are risks to the employee's psyche, person or property. The general law, like the law of contract, does not impose two duties on the employer – one to avoid physical injury and one to avoid nervous shock to the employee. "The ruling principle", said Lord Keith of

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

Avonholm [101] , "is that an employer is bound to take reasonable care for the safety of his workmen, and all other rules or formulas must be taken subject to this principle."

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[97] [1999] 2 AC 455 .

[98] cf *New South Wales v Seedsman* [2000] NSWCA 119.

[99] *Jury v Commissioner for Railways (NSW)* (1935) 53 CLR 273 at 290 per Starke J; *Wilsons and Clyde Coal Co v English* [1938] AC 57 at 78-84 per Lord Wright; *Davie v New Merton Board Mills Ltd* [1959] AC 604 at 620 per Viscount Simonds, 628 per Lord Morton of Henryton; *Cavanagh v Ulster Weaving Co Ltd* [1960] AC 145 at 165 per Lord Keith of Avonholm; *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 400 per Windeyer J.

[100] *Paris v Stepney Borough Council* [1951] AC 367 at 375 per Lord Simonds, 382-384 per Lord Normand, 384 per Lord Oaksey; *Hamilton v Nuroof (WA) Pty Ltd* (1956) 96 CLR 18 at 25 per Dixon CJ and Kitto J; *Cavanagh v Ulster Weaving Co Ltd* [1960] AC 145 at 165-166 per Lord Keith of Avonholm, 167 per Lord Somervell of Harrow; *Vozza v Tooth & Co Ltd* (1964) 112 CLR 316 at 318-319 per Windeyer J.

[101] *Cavanagh v Ulster Weaving Co Ltd* [1960] AC 145 at 165. See also *Brown v Rolls Royce Ltd* [1960] 1 WLR 210 at 213 per Lord Cohen; [1960] 1 All ER 577 at 579, and *Vozza v Tooth & Co Ltd* (1964) 112 CLR 316 at 318 per Windeyer J where this statement is cited with approval.

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141. Nothing in this Court's decision in *Mount Isa Mines Ltd v Pusey* [102] decides the contrary. In *Pusey* , the plaintiff, while working in the defendant's powerhouse, suffered nervous shock when he saw the "horribly burnt" body of a fellow employee. This Court upheld the finding of the trial judge that the defendant was in breach of the duty of care owed by an employer to an employee. As the arguments of counsel show [103] , the case turned in this Court on the question of breach of duty and whether the injury was of a kind that was "reasonably foreseeable". Menzies J said [104] :

> "The [defendant's] case, therefore, involved a major and a minor premise. The major premise was that the duty of an employer to an employee does not go beyond the taking of reasonable steps to protect the employee from the risk of injury of a kind which a reasonable employer would have foreseen. The minor premise was that the risk of the injury which here eventuated, ie the plaintiff's schizophrenia, was not of a kind which a reasonable employer would have foreseen.
>
> > I propose to decide this case upon the minor premise without considering whether the limited statement of the duty which was, it was argued, supported by observations in *The 'Wagon Mound' Case [No 2] (Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd)* [105] , is sufficiently comprehensive."

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

[102] (1970) 125 CLR 383 .

[103] (1970) 125 CLR 383 at 385-386 .

[104] (1970) 125 CLR 383 at 392-393 .

[105] [1967] 1 AC 617 .

142. Menzies J said that there was no sufficient ground for differing from the trial judge's finding that "the shock injury and the kind of illness that followed was of a kind or type which was reasonably foreseeable by the defendant in a general way". Barwick CJ said [106] that he found "no need to discuss the development of the law with respect to the award of damages for what is called 'nervous shock'". In the judgments of McTiernan, Windeyer and Walsh JJ, however, there are passages that indicate that, in determining whether there was a *breach* of duty, the test that they applied was whether the defendant should have reasonably foreseen that the plaintiff would suffer nervous shock. However, Walsh J recognised that the duty of the employer might have been a more general one. His Honour said [107] that it was not necessary "to discuss the question whether or not the duty of the appellant as the employer of the respondent imposed any greater obligation upon it than to take reasonable care to protect him from the risk of foreseeable injury".

[106] (1970) 125 CLR 383 at 389.

[107] (1970) 125 CLR 383 at 412.

143. *Pusey* is not an authority for the proposition that the special rules concerning the existence of a duty of care in nervous shock govern all cases of nervous shock. All the Justices in that case accepted that the duty of care in that case arose out of the employer-employee relationship. Certainly, a majority of the Court used reasonable foreseeability of shock, and not reasonable foreseeability of injury, as the test for *breach* of duty. But the Court did not decide whether that was the exclusive test of breach, as the judgments of Barwick CJ, Menzies and Walsh JJ make clear.

144. In the present case, the assurance of the employer gave rise to a duty on its part to supervise and take care of James so as to avoid inflicting harm on Mr and Mrs Annetts. The consideration for their consent to his going to Flora Valley and working for the employer was the assurance that the employer would supervise and take good care of him. They could have sued in contract, but they elected to sue in negligence under the general law. The result is the same. The assurance of the employer gave rise to a duty, the breach of which entitled Mr and Mrs Annetts to sue for any damage suffered that was reasonably foreseeable in a general

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

way. It might be expenditure incurred in paying for medical treatment for their son or in searching for him if he became lost. Or it might be injury – personal or psychiatric – suffered by themselves.

145. The facts pleaded show that under the general law the employer owed a duty to take reasonable care to avoid harm to Mr and Mrs Annetts. They also show that the employer breached that duty and that the harm suffered was not too remote from the employer's breach. Even if, for policy reasons, the common law continues to maintain a distinction between actions for the negligent infliction of physical harm and actions for the negligent infliction of nervous shock, psychiatric illness is not damage different in kind from physical injury.

146. Arguably, the employer also owed a fiduciary duty to Mr and Mrs Annetts as well as to their son. But that duty, like the contractual duty, was not pleaded. Nevertheless, the facts pleaded were "sufficient, at law, to give rise to an independent tortious duty of care owed by [the respondent] to [the applicants] to exercise reasonable care and skill to avoid causing them psychiatric injury".

Orders

147. Accordingly, special leave to appeal should be granted and the appeal should be allowed. The question formulated by Heenan J should be answered "Yes".

148. GUMMOW AND KIRBY JJ. These two proceedings, an appeal from a decision of the New South Wales Court of Appeal [108] and an application for special leave to appeal against a decision of the Full Court of the Supreme Court of Western Australia [109] , concern liability for negligently inflicted psychiatric harm.

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[108] *Morgan v Tame* (2000) 49 NSWLR 21.

[109] *Annetts v Australian Stations Pty Ltd* (2000) 23 WAR 35.

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149. In the first proceeding, *Tame v New South Wales*, the appellant seeks to restore an award at trial of damages for psychiatric harm consequent on being told that a police Traffic Collision Report had erroneously recorded that she had been driving while intoxicated; the Court of Appeal set aside that award. The issue in the second, *Annetts v Australian Stations Pty Ltd* , is whether the Full Court erred in dismissing an appeal against an adverse determination on a preliminary issue that certain assumed facts did not give rise to a duty of care on the part of the respondent to exercise reasonable care and skill to avoid causing foreseeable psychiatric injury to the applicants. The applicants had pleaded that they sustained "nervous shock" when their adolescent son disappeared and subsequently died in the Western Australian desert as a result of the alleged negligence of his employer, the respondent.

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

150. The appeal in *Tame* should be dismissed and the decision of the Court of Appeal affirmed; the question posed in *Annetts* should have been answered favourably to the applicants; special leave should be granted and the appeal allowed.

*Tame v New South Wales*

151. On 11 January 1991, the appellant, Mrs Tame, was involved in a motor vehicle collision at Richmond, outside the Sydney area. The driver of the other vehicle, Mr Terence Lavender, was clearly at fault. He had a blood alcohol reading of 0.14 and was driving on the wrong side of the road. A blood sample taken from Mrs Tame shortly after the accident yielded a nil blood alcohol reading.

152. Constable Morgan of the Windsor Police Station completed a Traffic Collision Report on the accident, but left blank those portions of the report relating to the blood alcohol content of the drivers. Subsequently, in February 1991, Senior Constable Beardsley, the acting traffic sergeant at Windsor Police Station, completed those portions of the form. However, he mistakenly recorded the blood alcohol content of both drivers as 0.14. Acting Sergeant Beardsley detected the error on the form some time between February and late March 1991, at which point he corrected the original report. Both officers were no doubt acting in the exercise of powers and performance of duties sourced, at least in part, in the statute law of New South Wales, but nothing has turned upon the further identification of the statutory source.

153. Mr Lavender had been driving an uninsured vehicle and Mrs Tame sued the Nominal Defendant. The claim was handled by NZI Insurance ("NZI"), which admitted liability on 11 June 1991. The claim against the Nominal Defendant was ultimately settled in August 1994 with a substantial sum being paid to Mrs Tame. By May 1992, NZI became reluctant to continue paying for physiotherapy treatment undertaken by Mrs Tame for significant leg and back injuries she sustained in the collision. This became a source of anxiety for Mrs Tame, who spoke with her solicitor, Mr Weller, about NZI's apparent refusal to meet the ongoing costs of the physiotherapy. Mr Weller contacted NZI's solicitor about the matter.

154. **Following paragraph cited by:**

South West Helicopters Pty Ltd v Stephenson (07 December 2017) (Basten, Leeming and Payne JJA)

During a conversation in June 1992, Mr Weller asked Mrs Tame whether she had been drinking prior to the accident. She had consumed very little alcohol in the previous 20 years and she was horrified at the suggestion. Mr Weller told her that NZI's copy of the Traffic Collision Report (which bore the error that Acting Sergeant Beardsley had corrected on the original report) indicated that her blood alcohol content at the time of the accident was three times the lawful limit. Mrs Tame was alarmed by this information, and began to worry about how many people would be told of it and the detrimental effect she considered this would have on her reputation.

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

155. Immediately after speaking with Mr Weller, Mrs Tame telephoned the Windsor Police Station and was told that her blood alcohol reading at the time of the collision had been nil and that the information on the form was a mistake. NZI's solicitor reconfirmed the admission of liability on 29 July 1992. In early 1993, Mr Weller obtained from the Police Service a formal apology and an assurance that the mistake on the Traffic Collision Report had been rectified. However, Mrs Tame continued to believe that NZI's reluctance to pay for her physiotherapy was connected with the false information on the Traffic Collision Report. In fact, NZI believed the treatment was unnecessary. Mrs Tame became obsessed with the mistake on the form. She feared she was being punished for something she had done in the past, and spoke repeatedly about the mistake with her husband and friends. She found it difficult to sleep and experienced shame, guilt, stress and depression, for which she sought counselling. Her psychiatrist, Dr Mitchell, diagnosed Mrs Tame's condition in 1995 as psychotic depressive illness. Dr Mitchell prescribed drugs including anti-depressant medication (Prothiaden) and anti-psychotic medication (Stelazine). Together with extensive counselling, this treatment brought significant improvement by late 1997, but the illness and its effects appear to be continuing indefinitely.

156. Mrs Tame brought proceedings in negligence against Constable Morgan and the State of New South Wales in the District Court. During the trial (before Garling DCJ, without a jury) it became apparent that the mistake had been made by Acting Sergeant Beardsley and not Constable Morgan. The Court held that the State was vicariously liable for Acting Sergeant Beardsley's negligence in completing the Traffic Collision Report. Mrs Tame was awarded $115,692 in damages [110] .

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[110] *Tame v Morgan* [1998] Aust Torts Rep ¶81-483.

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157. An appeal by the State to the New South Wales Court of Appeal (Spigelman CJ, Mason P and Handley JA) was allowed unanimously. The Court held that, in the absence of actual knowledge of a particular susceptibility, the law imposes only a duty to take reasonable care to avoid psychiatric injury to a person of "normal fortitude" [111] . Their Honours considered that it was not reasonably foreseeable that a person of normal fortitude might sustain psychiatric injury from a clerical mistake of the type that occurred here. Further, Mason P expressly held that, whether or not one assumed a potential victim of normal fortitude, the risk of psychiatric injury was not reasonably foreseeable [112] . Mason P and Handley JA also allowed the appeal on the additional basis that Mrs Tame did not suffer a sudden affront or assault on her psyche from the perception of a horrifying event, which their Honours considered a necessary precondition to recovery in negligence for psychiatric harm [113] . Alt hough, as a matter of law, Spigelman CJ accepted this precondition to recovery, he declined to allow the appeal on this ground because there were insufficient findings of fact [114] .

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[111] (2000) 49 NSWLR 21 at 25-29, 41-42, 45-46, 50.

[112] (2000) 49 NSWLR 21 at 46, 50.

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

[113] (2000) 49 NSWLR 21 at 46-49, 50.

[114] (2000) 49 NSWLR 21 at 32.

158. By special leave, Mrs Tame appeals to this Court on several grounds[115]. In particular, she contends that the Court of Appeal erred in applying the "normal fortitude" and "sudden shock" requirements. Counsel for Mrs Tame submit that neither of these "requirements" were necessary elements in her cause of action in negligence for pure psychiatric injury.

[115] Constable Morgan was named as an appellant in the Court of Appeal and a respondent in this Court, notwithstanding that he was not responsible for the error in the Traffic Collision Report. By consent, he has been dismissed from the proceedings in this Court.

*Annetts v Australian Stations Pty Ltd*

159. This application for special leave falls to be decided on a somewhat artificial factual substratum. The case is yet to go to trial. The applicants brought their action in the Supreme Court of New South Wales. Upon the motion of the respondent and with the consent of the applicants, the action was transferred to the Supreme Court of Western Australia [116]. By order dated 5 May 1999, Heenan J of the Supreme Court of Western Australia directed that a preliminary issue be tried separately from and prior to the trial of any other issues. The preliminary issue was whether, on the assumption that the facts pleaded in specified paragraphs in the applicants' Amended Statement of Claim were true, those assumed facts were "sufficient, at law, to give rise to an independent tortious duty of care owed by [the respondent] to [the applicants] to exercise reasonable care and skill to avoid causing them psychiatric injury". The specified paragraphs of the Amended Statement of Claim contain both assertions of fact and assertions of law. Nonetheless, it is possible to state in a general way the assumed facts upon which the application now before this Court proceeds.

[116] By order pursuant to s 5(2)(b)(iii) of the *Jurisdiction of Courts (Cross-vesting) Act 1987 (NSW)*.

160. In August 1986, James Annetts, the son of the applicants, left the family home in Binya, New South Wales, to work for the respondent as a jackaroo at Flora Valley, a cattle station situated about 40 kilometres south-east of Halls Creek in the Kimberley district of Western Australia. James was then 16 years of age. Before he left home, his mother telephoned Mrs Loder, the wife of the respondent's station manager, and inquired about the conditions under which James would be working. Mrs Loder told Mrs Annetts that James would be working at Flora Valley under constant supervision, that he would share a room with several

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

other men and that he would be well looked after. The respondent admits generally that the applicants made inquiries of its servants or agents in relation to the arrangements that would be made for James' safety and that the applicants were provided with assurances thereof.

161. Notwithstanding these assurances, on 13 October 1986 Mr Loder assigned James to work alone as caretaker at Nicholson Station, about 100 kilometres east of Flora Valley. James had worked at Flora Valley for only seven weeks. On 3 December 1986, the respondent learned that James was missing and had reason to suspect that he was in grave danger of injury or death. The applicants were not informed that their son was missing until 6 December, when a police officer at Griffith, New South Wales, telephoned Mr Annetts and told him that apparently James had run away. Mr Annetts collapsed and Mrs Annetts took over the conversation.

162. Subsequent events were summarised by Ipp J in the Full Court as follows [117] :

> "At some time, not revealed by the facts before the court, an intensive search was begun for James and another teenager, Simon James Amos, who had been employed by the respondent as a jackaroo on another station. Thereafter, [the applicants] had a number of telephone conversations with police officers at Halls Creek police station, Mr Loder, and numerous other persons in the Halls Creek area concerning the whereabouts of their son. In January 1987, [the applicants] went to Halls Creek where they remained for some four to five days. They were then shown some of their son's belongings, including a hat covered in blood. Thereafter, on several occasions until the end of April 1987, [the applicants] went to the Halls Creek area in attempts to obtain information about James.
>
> On 26 April 1987, Mr Annetts was informed by telephone that the vehicle driven by James had been found bogged in the desert but there were no signs of any people around it. Later that day, he was told that two sets of remains had been found nearby. On 28 or 29 April 1987, Mr Annetts, alone, returned to Halls Creek. At the police station, he was shown a photograph of a skeleton and he identified it as being that of James.
>
> The parties accept that, in fact, James 'died on or about 4 December 1986 in the Gibson Desert some 133 kilometres south of Balgo as a result of dehydration, exhaustion and hypothermia'. Thus, [the applicants] learned of his death almost five months after it occurred. They were far away from James when he died."

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[117] (2000) 23 WAR 35 at 44.

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163. By their Amended Statement of Claim, the applicants pleaded that James died as a result of the respondent's negligence. The negligence is identified as the placement of James on his own as caretaker of an isolated property, the provision of a defective and unsuitable vehicle,

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

the failure to train James in the skills necessary for survival in such isolation, and the failures to implement or maintain effective radio communication with James and promptly to notify the police of his disappearance.

164. Although not formulated with specificity, the assumed facts apparently include that the applicants suffered not only a grief reaction, but an "entrenched psychiatric condition". However, as Ipp J explained in the Full Court [118] , the assumed facts did not specify precisely when the applicants sustained this condition. The Full Court postulated two alternative situations. The first was that Mr and Mrs Annetts sustained psychiatric injury on 6 December 1986, when they were told that James was missing from his place of employment and was believed to have run away. The second was that they sustained psychiatric injury upon ultimately learning of James' death in late April 1987, the injury being caused by that development coupled with the accumulated effect of the earlier events.

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[118] (2000) 23 WAR 35 at 46-47 .

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165. Heenan J resolved the preliminary issue adversely to Mr and Mrs Annetts [119] . He found that the respondent owed Mr and Mrs Annetts no relevant duty of care, because they did not "directly" perceive their son's death or its aftermath and their psychiatric injury was not the result of a "sudden sensory perception".

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[119] *Annetts v Australian Stations Pty Ltd* [2000] Aust Torts Rep ¶81564.

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166. The Full Court of the Supreme Court of Western Australia (Malcolm CJ, Pidgeon and Ipp JJ) unanimously dismissed an appeal by the applicants. Ipp J, with whom Malcolm CJ and Pidgeon J agreed, held that the respondent did not owe Mr and Mrs Annetts a duty of care to exercise reasonable care and skill to avoid causing them psychiatric injury. Regardless of which of the two alternative situations described above applied, the psychiatric injuries sustained by the applicants were not reasonably foreseeable and the applicants were not in a sufficiently proximate relationship with the respondent to found a duty of care. Ipp J favoured the view that persons of "normal fortitude" in the position of the applicants would not have sustained a psychiatric illness, as opposed to deep anxiety and grief, either upon being informed that their son had run away or upon receiving confirmation of his death [120] . In any event, Ipp J held that, in neither of the postulated situations should the respondent have foreseen that its conduct might result in a "sudden sensory perception" on the part of the applicants of a phenomenon so distressing that a recognisable psychiatric illness would be caused thereby [121] . His Honour further held that the applicants had not established the requisite degree of proximity as they did not directly perceive the consequences of the respondent's conduct [122] .

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**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

[120] (2000) 23 WAR 35 at 55-56 .

[121] (2000) 23 WAR 35 at 55-56 .

[122] (2000) 23 WAR 35 at 61, 63.

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167. In seeking special leave to appeal against the decision of the Full Court, Mr and Mrs Annetts submit that the common law of Australia does not and should not recognise the "sudden shock" or "direct perception" rules as preconditions of liability. Further, they submit that the "normal fortitude" stipulation is no more than an aspect of the conventional requirement of reasonable foreseeability, and does not operate as a free-standing control mechanism in cases of negligently inflicted psychiatric harm.

Negligence and "nervous shock"

168. In *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [123] , some consideration was given to the conflicting interests of individuals in the privacy of their personal affairs and the "public interest" in information, candour and "freedom of speech", in the context of any development in Australia of a tort concerned with invasions of privacy. The various intentional economic torts strike a balance between the common law value which favours competition and the protection of the goodwill built up by the efforts of individual traders [124] . On the other hand, decisions such as *Perre v Apand Pty Ltd* [125] sh ow that the law with respect to recovery of economic loss for negligently inflicted commercial harm is in a state of development.

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[123] (2001) 76 ALJR 1; 185 ALR 1.

[124] *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 200 [34], 224225 [115]-[117], 244 245 [176]-[178], 306307 [347]-[348] .

[125] (1999) 198 CLR 180 .

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169. In *Brodie v Singleton Shire Council* [126] , approving reference was made in the joint judgment to a suggestion by Mahoney AP [127] that the "highway rule", while not formulated as such, had been a mechanism seeking to accommodate competing interests. It is likewise with respect to the treatment in the authorities of "nervous shock".

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[126] (2001) 75 ALJR 992 at 1003 [59]; 180 ALR 145 at 160.

[127] In *Hughes v Hunters Hill Municipal Council* (1992) 29 NSWLR 232 at 236.

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**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

170. The authorities respecting recovery for what has been called "nervous shock" disclose a series of adjustments in the accommodation of conflicting interests which have struggled for legal protection. Writing in 1946, Professor Stone observed that[128]:

> "The apparent anomalies and illogicalities of this subject are overt signs of a substantial clash of interests. Full support of the claim to nervous integrity might not only subject defendants to being mulcted in damages on false claims, thus infringing their interests of substance. It would also tend to inhibit freedom of action generally, thus prejudicing claims to free motion and locomotion."

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[128] *The Province and Function of Law*, (1946) at 512.

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171. Of course, much depends upon the nature and scope of the identified interests. In *Bourhill v Young* [129] , Lord Wright spoke of the interest of the plaintiff in that case as "in her own bodily security". The identification by Professor Stone of the interest in "nervous integrity" was intended, as appears from the passages in the text that follow, to identify an interest in the avoidance of "nervous disorders" and "nervous injury". In *Mount Isa Mines Ltd v Pusey* , Windeyer J observed [130] :

> "Sorrow does not sound in damages. A plaintiff in an action of negligence cannot recover damages for a 'shock', however grievous, which was no more than an immediate emotional response to a distressing experience sudden, severe and saddening. It is, however, today a known medical fact that severe emotional distress can be the starting point of a lasting disorder of mind or body, some form of psychoneurosis or a psychosomatic illness. For that, if it be the result of a tortious act, damages may be had."

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[129] [1943] AC 92 at 108.

[130] (1970) 125 CLR 383 at 394.

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172. On the other hand, in the United States it has been held that it is "peace of mind" which is the relevant interest that warrants legal protection [131] . The Supreme Court of the United States recently observed [132] that "[n]early all of the States have recognized a right to recover for negligent infliction of emotional distress" which is "mental or emotional harm (such as fright or anxiety) that is caused by the negligence of another and that is not directly brought about by a physical injury, but that may manifest itself in physical symptoms".

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[131] *Thing v La Chusa* 771 P 2d 814 at 816 (1989).

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

[132] *Consolidated Rail Corporation v Gottshall* 512 US 532 at 544 (1994).

173. Accordingly, in California [133] :

> "The range of mental or emotional injury subsumed within the rubric 'emotional distress' and for which damages are presently recoverable 'includes fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation and indignity, as well as physical pain.' [134] "

[133] *Thing v La Chusa* 771 P 2d 814 at 816 (1989).

[134] *Deevy v Tassi* (1942) 21 Cal 2d 109 at 120; 130 P 2 d 389.

174. One result of this identification in broader terms of the interest of plaintiffs has been the countervailing development of rules or "tests" which limit that right to recovery. In *Consolidated Rail Corporation v Gottshall* [135] , the Supreme Court favoured, for federal law[136], the "zone of danger test" followed in the common law of 14 State jurisdictions. This "limits recovery for emotional injury to those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct" [137] .

[135] 512 US 532 at 554 (1994).

[136] The *Federal Employers' Liability Act*, 35 Stat 65, 45 USC §§5160.

[137] 512 US 532 at 547548 (1994).

175. On the other hand, in this country, England and other common law jurisdictions, the starting point, as exemplified by the statement by Windeyer J in *Pusey* , has been the recognition in plaintiffs of a more narrowly defined interest. Hence, perhaps, the absence in those jurisdictions of occasion for countervailing unprincipled limitations.

176. The pattern that emerged from the English cases decided before the last decade was the repeated adoption and disavowal of progressively less stringent limitations on liability. In 1982, Lord Wilberforce said that he regarded the cases as developing the common law "upon a basis of logical necessity" [138] , but that may be doubted. Rather, the shifting scope of liability, including recent reversals of direction in England, has reflected changing perceptions of the capacity of tort law to adjust to and accommodate the countervailing interests identified by Professor Stone.

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

[138] *McLoughlin v O'Brian* [1983] 1 AC 410 at 419.

177. The term "shock" first was used in this universe of discourse over a century ago to emphasise the need for accompanying physical injury. More recently, it has been used to indicate another restriction, the need for a "sudden perception" by the plaintiffs as is illustrated by the judgments now under appeal.

178. Initially, in 1888, the Judicial Committee of the Privy Council in *Victorian Railways Commissioners v Coultas* [139] held that nervous shock, unaccompanied by physical injury, was too remote a consequence of a negligent accident to sound in damages. To permit recovery, their Lordships said [140] , would have the result that "[t]he difficulty which now often exists in case of alleged physical injuries of determining whether they were caused by the negligent act would be greatly increased, and a wide field opened for imaginary claims."

[139] (1888) 13 App Cas 222 at 225-226 .

[140] (1888) 13 App Cas 222 at 226.

179. This was said at a time when it was thought that the tort of negligence was confined to deeds and did not extend to careless words, and *Derry v Peek* [141] decided that in an action in deceit the plaintiff must prove "actual fraud". Earlier, in 1885, the New South Wales Full Court, in denying liability for the misdelivery of a telegram which caused "nervous shock", had said that "no erroneous statement is actionable unless it be intentionally false. … For mere negligence no action will lie." [142] This foreshadowed the decision in *Wilkinson v Downton* [143] , which permitted recovery in respect of "nervous shock" deliberately inflicted by a false statement made with intent that it be believed. The subsequent development of the modern tort of negligence saw the extraction of this rule from what today would be identified as a species of malicious falsehood and its application by incremental steps to the field of nonintentional harm. At each step, attempts were made to posit limitations which it was expected would minimise false claims and avoid indeterminate liability.

[141] (1889) 14 App Cas 337 at 373374 .

[142] *Blakeney v Pegus (No 2)* (1885) 6 NSWR 223 at 231232 .

[143] [1897] 2 QB 57 . See also *Janvier v Sweeney* [1919] 2 KB 316; *Wainwright v Home Office* [2002] 3 WLR 405.

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

180. In *Dulieu v White & Sons* [144] , the King's Bench Divisional Court was dealing with a procedure in the nature of a demurrer. Their Lordships referred to the criticism of *Coultas* by Palles CB in *Bell v Great Northern Railway Co* [145], and permitted recovery in negligence for "nervous shock" occasioned by an apprehension of physical injury to the plaintiff herself, at least where the consequences of the shock were partly physical. Subsequently, in 1924, the English Court of Appeal ordered a new trial where an action under Lord Campbell's Act had been dismissed. The plaintiff in *Hambrook v Stokes Brothers* [146] sued in respect of the death of his wife. Thus, he had to show that, if death had not ensued, his wife would have been entitled to maintain an action in respect of the wrongful act, neglect or default of the defendant. The defendant's lorry had seriously injured her child within her hearing. Atkin LJ spoke in general terms of a "duty to take care to avoid threatening personal injury to a child in such circumstances as to cause damage by shock to a parent or guardian then present" [147] . This later was transmuted into an apparent rule that only relatives could recover for "nervous shock" caused by perception of physical injury to another. As Windeyer J put it in *Pusey* [148] , this supposed rule was:

> "apparently a transposition of what was originally a humane and ameliorating exception to the general denial that damages could be had for nervous shock. Close relatives were put in an exceptional class. This allowed compassion and human sympathy to override the older doctrine, draconic and arbitrary, which recognized only bodily ills as compensable by damages and made a rigid difference between ills of the mind and hurts to the body."

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[144] [1901] 2 KB 669 .

[145] (1890) 26 LR Ir 428.

[146] [1925] 1 KB 141 .

[147] [1925] 1 KB 141 at 158.

[148] (1970) 125 CLR 383 at 404.

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181. The reference by Atkin LJ in *Hambrook* to those "present" also proved to be significant. In 1938, the Court of Appeal in *Owens v Liverpool Corporation* [149] upheld an appeal against the dismissal of an action by four family mourners at a funeral for distress caused by witnessing a collision between a negligently driven tramcar and the hearse. The incident involved no apprehension, or sight, or sound of physical injury to a human being. However, the decision in *Owens* was doubted by the House of Lords in *Bourhill v Young* [150] . In that case, it was held that the defendant motorcyclist owed no duty of care to avoid causing nervous shock to the plaintiff, who was not herself in danger of physical impact, nor related to such person, nor within the defendant's line of vision at the time of the accident. Matters did not end there.

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**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

[149] [1939] 1 KB 394 .

[150] [1943] AC 92 .

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182. *Pusey* , decided by this Court in 1970, upheld an award of damages for mental disorder occasioned by "nervous shock" at the sight of an injured coworker unknown to the plaintiff. By 1984, both the House of Lords and this Court had permitted recovery for "nervous shock" where the plaintiff was not present at the scene of the accident caused by the defendant's negligent driving. In *McLoughlin v O'Brian* [151] and *Jaensch v Coffey* [152] , the shock resulted from what each plaintiff saw and was told at the hospital shortly after motor vehicle accidents which killed or seriously injured members of their respective families. However, recent authorities in the House of Lords dealing with "nervous shock" [153] , to which further reference will be made, have specified a number of "control mechanisms" which are "additional" or "special", adjectives used by Hale LJ in her summary of the English law in *Hatton v Sutherland* [154] . One such "mechanism" requires "secondary victims" (those who witness injury caused to others) to demonstrate close ties of love and affection with the "primary victim" and propinquity in time and space to the relevant accident or its immediate aftermath.

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[151] [1983] 1 AC 410 .

[152] (1984) 155 CLR 549 .

[153] *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310; *Page v Smith* [1996] AC 155; *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455.

[154] [2002] 2 All ER 1 at 1113 .

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183. Advances in the capacity of medicine objectively to distinguish the genuine from the spurious, and renewed attention to the need to establish breach, causation and a recognisable psychiatric illness that is not too remote, indicate the need for reaccommodation of the competing interests which are in play in "nervous shock" cases. But that accommodation is better achieved by direct attention to, rather than attempts to ignore, the conflict of interests involved. This reflects the preferred approach to defining the limits of liability in negligence, which takes as its starting point, not merely the actions of the defendant, but the interests which are sufficient to attract the protection of the law in this field [155] . The recognition of those interests and the preferred resolution of conflicts between them assist in the formulation of the appropriate duty of care.

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[155] See *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 251 [191] .

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**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

184. Of course, a finding that a duty of care operates in a particular situation may advance interests in deterring wrongdoing or spreading loss, but the recognition that those interests exist does not dictate any particular holding with respect to the existence of a duty of care. In *Perre v Apand Pty Ltd* , Hayne J explained [156] :

> "It is not enough to say that compensating those who are injured, deterring wrongdoing or spreading loss are values that are reflected in the law of negligence. They may be. But these do not assist in deciding whether a duty of care exists. They do not assist because each of them is a corollary of a finding that a duty does exist and none, therefore, helps to say whether a duty *should* be found to exist. Equally, references to the possibility that there are many persons in the same position as a particular plaintiff, or that the losses sustained by a plaintiff and others in like case are very large, do not help any more than do references to floodgates or the like". (original emphasis)

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[156] (1999) 198 CLR 180 at 302 [334] .

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185. **Following paragraph cited by:**

Kirkland-Veenstra v Stuart (29 February 2008) (Warren CJ, Maxwell P and Chernov JA)
Valleyfield Pty Ltd v Primac Ltd (08 August 2003) (Williams and Jerrard JJA and Mackenzie J,)
State of New South Wales v Napier (13 December 2002)

A fundamental objective of the law of negligence is the promotion of reasonable conduct that averts foreseeable harm. In part, this explains why a significant measure of control in the legal or practical sense over the relevant risk is important in identifying cases where a duty of care arises. Further, it is the assessment, necessarily fluid, respecting reasonableness of conduct that reconciles the plaintiff's interest in protection from harm with the defendant's interest in freedom of action. So it is that the plaintiff's integrity of person is denied protection if the defendant has acted reasonably. However, protection of that integrity expands commensurately with medical understanding of the threats to it. Protection of mental integrity from the unreasonable infliction of serious harm, unlike protection from transient distress, answers the "general public sentiment" underlying the tort of negligence that, in the particular case, there has been a wrongdoing for which, in justice, the offender must pay [157] . Moreover, the assessment of reasonableness, which informs each element of the cause of action, is inherently adapted to the vindication of meritorious claims in a tort whose hallmark is flexibility of application. Artificial constrictions on the assessment of reasonableness tend, over time, to have the opposite effect.

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**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

[157] See *Donoghue v Stevenson* [1932] AC 562 at 580 ; *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529 at 575 ; *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 242-243 [171] .

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Control mechanisms

186. It was observed in *Pyrenees Shire Council v Day* [158] :

> "The broad concepts which found the modern law of negligence reflect its development from the action on the case. Windeyer J explained this in *Hargrave v Goldman* [159] . These concepts are expressed in major premises which, if unqualified, may extend liability beyond the bounds of social utility and economic sustainability."

So, as in cases respecting the liability in negligence of public authorities [160] , the recovery of damages for economic losses resulting from negligent misstatement [161] , and the recovery of economic loss in the absence of physical injury to person or property [162] , various "control mechanisms" have been postulated to restrict liability in negligence for psychiatric illness not consequent upon physical harm. The control mechanisms reflect a perceived need to keep liability within practicable bounds.

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[158] (1998) 192 CLR 330 at 376 [125] .

[159] (1963) 110 CLR 40 at 64.

[160] *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 376377 [125], 391395 [174 ]-[184] .

[161] *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241 at 302304 .

[162] *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 231 [133], 254 [201], 299300 [329] , 303 [335], 324 [402] .

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187. This Court is presently concerned with three control mechanisms which influenced the intermediate appellate courts. They are (i) the requirement that liability for psychiatric harm be assessed by reference to a hypothetical person of "normal fortitude", (ii) the requirement that the psychiatric injury be caused by a "sudden shock", and (iii) the requirement that a plaintiff "directly perceive" a distressing phenomenon or its "immediate aftermath". It is an objection to the adoption of these rules that this would substitute for the consideration in the particular case of the general requirements of duty of care, reasonable foreseeability, causation and remoteness of damage, notions which would foreshorten inquiry into those matters by the imposition of absolutes with no necessary relation to basic principles. It will be necessary to refer again to that objection at several stages later in these reasons, under the

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

headings "Psychiatric harm", "Sudden shock" and "Direct perception and immediate aftermath".

188. It should be decided here that the three control mechanisms listed above are unsound. The need for this Court to grapple with the issues involved in reaching that conclusion (or indeed the contrary conclusion) is not satisfied by an acceptance of the existence of the mechanisms, but softened by their benevolent application to accommodate a hard case.

189. None of the three control mechanisms has been accepted by this Court as a precondition to liability for negligently inflicted psychiatric harm. The first of the mechanisms, the standard of "normal fortitude", is not a free-standing criterion of liability, but a postulate which assists in the assessment, at the stage of breach, of the reasonable foreseeability of the risk of psychiatric harm. Further, for the reasons that follow, the common law of Australia recognises neither the second nor third, "sudden shock" and "direct perception", as preconditions to the recovery of damages for negligently inflicted psychiatric harm.

190. As will become apparent, the requirements of "sudden shock" and "direct perception" of a distressing phenomenon or its "immediate aftermath" have operated in an arbitrary and capricious manner. Unprincipled distinctions and artificial mechanisms of this type bring the law into disrepute. In a similar manner to the law respecting the "immunity" from liability in negligence of "highway authorities" prior to this Court's decision in *Brodie v Singleton Shire Council* , the "nervous shock" cases predicate elusive distinctions with no root in principle and which are foreign to the merits of the litigation.

191. **Following paragraph cited by:**

Harris v Digital Pulse Pty Ltd (07 February 2003) (Spigelman CJ Mason P Heydon JA)

Moreover, the emergence of a coherent body of case law is impeded, not assisted, by such a fixed system of categories. Rigid distinctions of the type required by the "direct perception" rule inevitably generate exceptions and new categories, like the "immediate aftermath" qualification, as the inadequacies of the recognised categories become apparent and "hard cases" are accommodated. The old rule that "nervous shock" sounded in damages only where it arose from a reasonable fear of immediate personal injury to oneself [163] , and its subsequent relaxation to permit recovery where the plaintiff feared for the safety of another [164] , illustrates the point. As the categories and exceptions proliferate, the reasoning and outcomes in the cases become increasingly detached from the rationale supporting the cause of action.

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[163] *Dulieu v White & Sons* [1901] 2 KB 669 at 675.

[164] *Hambrook v Stokes Brothers* [1925] 1 KB 141.

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**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

192. **Following paragraph cited by:**

Minister for the Environment v Sharma (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)

Before turning to consider each of the postulated control mechanisms, it is appropriate to identify the justification that is said to support them. At base, the justification lies in a perceived distinction between psychiatric and physical harm. Authorities [165] have isolated four principal reasons said to warrant different treatment of the two categories of case. These are (i) that psychiatric harm is less objectively observable than physical injury and is therefore more likely to be trivial or fabricated and is more captive to shifting medical theories and conflicting expert evidence, (ii) that litigation in respect of purely psychiatric harm is likely to operate as an unconscious disincentive to rehabilitation, (iii) that permitting full recovery for purely psychiatric harm risks indeterminate liability and greatly increases the class of persons who may recover, and (iv) that liability for purely psychiatric harm may impose an unreasonable or disproportionate burden on defendants. This final concern is reflected in the statement that[166]:

> "[i]t would be an entirely unreasonable burden on all human activity if the defendant who has endangered one person were to be compelled to pay for the lacerated feelings of every other person disturbed by reason of it, including every bystander shocked at an accident, and every distant relative of the person injured, as well as all his friends."

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[165] *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455 at 493-494 ; *Consolidated Rail Corporation v Gottshall* 512 US 532 at 545-546, 551-552 (1994). See also, in England, The Law Commission, *Liability for Psychiatric Illness*, Law Com No 249, (1998) at 8182.

[166] *Prosser and Keeton on the Law of Torts*, 5th ed (1984) at 366.

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193. **Following paragraph cited by:**

Commonwealth of Australia v Smith (23 December 2005)

Several points may be made here. First, the concerns underlying propositions (i), (ii) and (iv) apply, to varying degrees, in cases of purely physical injury, yet it is not suggested that they justify denying a duty of care in that category of case. Secondly, many of these concerns recede if full force is given to the distinction between emotional distress and a recognisable

psychiatric illness. In the judgment of four members of the New Zealand Court of Appeal in *van Soest v Residual Health Management Unit* [167] , it was seen as significant that psychiatry distinguished between mere mental distress and psychiatric illness, albeit the distinction was one of degree rather than kind and might change with advances in medical knowledge. It has been noted earlier in these reasons that the common law in many United States jurisdictions has developed differently. In Australia, as in England, Canada and New Zealand, a plaintiff who is unable affirmatively to establish the existence of a recognisable psychiatric illness is not entitled to recover [168] . Grief and sorrow are among the "ordinary and inevitable incidents of life" [169] ; the very universality of those emotions denies to them the character of compensable loss under the tort of negligence [170] . Fright, distress or embarrassment, without more, will not ground an action in negligence. Emotional harm of that nature may be evanescent or trivial.

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[167] [2000] 1 NZLR 179 at 197.

[168] *Jaensch v Coffey* (1984) 155 CLR 549 at 587 ; *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 at 416 ; *Page v Smith* [1996] AC 155 at 167, 171, 189 ; *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455 at 469, 491 ; *van Soest v Residual Health Management Unit* [2000] 1 NZLR 179 at 187188, 195, 197199 .

[169] *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 at 416.

[170] cf *Thing v La Chusa* 771 P 2d 814 at 835 (1989).

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194. The apparent disregard of the distinction between emotional distress and a recognisable psychiatric illness in some United States jurisdictions [171] is significant in appreciating the restrictive common law rules that have there applied. Properly understood, the requirement to establish a recognisable psychiatric illness reduces the scope for indeterminate liability or increased litigation. It restricts recovery to those disorders which are capable of objective determination. To permit recovery for recognisable psychiatric illnesses, but not for other forms of emotional disturbance, is to posit a distinction grounded in principle rather than pragmatism, and one that is illuminated by professional medical opinion rather than fixed purely by idiosyncratic judicial perception. Doubts as to adequacy of proof (which are particularly acute in jurisdictions where civil juries are retained) are to be answered not by the denial of a remedy in all cases of mental harm because some claims may be false, but by the insistence of appellate courts upon the observance at trial of principles and rules which control adjudication of disputed issues[172].

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[171] See the discussion in *Consolidated Rail Corporation v Gottshall* 512 US 532 at 544-549 (1994).

[172] See Goodhart, "The Shock Cases and Area of Risk", (1953) 16 *The Modern Law Review* 14 at 25; *Prosser and Keeton on the Law of Torts*, 5th ed (1984) at 361.

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**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

195. Thirdly, the law of negligence already supplies its own limiting devices. In *Bourhill v Young* [173] , Lord Wright said that in cases of "nervous shock" a crucial point was that the plaintiff cannot build on a wrong to someone else, such as the victim of the accident observed by the plaintiff. This suggests caution in the use of the terms "primary" and "secondary" victim. It has been observed earlier in these reasons under the heading "Control mechanisms" that, in requiring a plaintiff to establish fault, causation and a lack of remoteness of damage, the ordinary principles of negligence circumscribe recovery. Further, the tort of negligence requires no more than reasonable care to avert reasonably foreseeable risks. Breach will not be established if a reasonable person in the defendant's position would not have acted differently. The touchstone of liability remains reasonableness of conduct.

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[173] [1943] AC 92 at 107108 .

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196. The asserted grounds for treating psychiatric harm as distinctly different from physical injury do not provide a cogent basis for the erection of exclusionary rules that operate in respect of the former but not the latter. To the extent that any of these concerns are not adequately met in particular categories of case by the operation of the ordinary principles of negligence, they may be accommodated, in the manner explained later in these reasons, by defining the scope of the duty of care with reference to values which the law protects.

Normal fortitude

197. The attention given to this notion by both the Court of Appeal in *Tame* and the Full Court in *A nnetts* may suggest that a plaintiff has no action unless he or she be an individual of "normal fortitude". The concept is said to derive from a passage in the speech of Lord Wright in *Bourh ill v Young* [174] . However, it is made plain in that passage that the attention to the notional person of "normal fortitude" is the application of a hypothetical standard that assists the assessment of the reasonable foreseeability of harm, not an independent precondition or bar to recovery. His Lordship said [175] :

> "It is here, as elsewhere, a question of what the hypothetical reasonable man, viewing the position, I suppose ex post facto, would say it was proper to foresee. What danger of particular infirmity that would include must depend on all the circumstances, but generally, I think, a reasonably normal condition, if medical evidence is capable of defining it, would be the standard. The test of the plaintiff's extraordinary susceptibility, if unknown to the defendant, would in effect make him an insurer."

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[174] [1943] AC 92 at 109-110 .

[175] [1943] AC 92 at 110.

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**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

198. **Following paragraph cited by:**

Panagiotopoulos v Rajendram (28 September 2007) (Tobias JA at 1; McColl JA at 2; Basten JA at 3)

Panagiotopoulos v Rajendram (28 September 2007) (Tobias JA at 1; McColl JA at 2; Basten JA at 3)

Thus recovery in negligence for "nervous shock" was denied by the Supreme Court of Illinois where the response of a plaintiff of a "peculiar sensibility", unknown to the defendant, to remonstrations by the defendant could not have been reasonably anticipated[176]. Similarly, recovery has been denied to a plaintiff, involved in a motor vehicle collision, who developed neurosis based on a false belief that she had struck a child on a bicycle; drivers are not obliged to take precautions against the possibility that the plaintiff might unreasonably imagine a state of affairs that does not exist[177].

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[176] *Braun v Craven* 51 NE 657 at 664 (1898); cf *Cook v Village of Mohawk* 100 NE 815 (1913) which analyses the issue as one of causation.

[177] *Williamson v Bennett* 112 SE 2d 48 at 54-55 (1960).

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199. However, it does not follow that it is a precondition to recovery in any action for negligently inflicted psychiatric harm that the plaintiff be a person of "normal" emotional or psychological fortitude or, if peculiarly susceptible, that the defendant know or ought to have known of that susceptibility. The statement by Spigelman CJ in the Court of Appeal in *Tame* [178] that a plaintiff "cannot recover for 'pure' psychiatric damage unless a person of 'normal fortitude' would suffer psychiatric damage by the negligent act or omission" should not be accepted. Windeyer J observed in *Pusey* [179] that the notion of a "normal" emotional susceptibility, in a population of diverse susceptibilities, is imprecise and artificial. The imprecision in the concept renders it inappropriate as an absolute bar to recovery. Windeyer J also pointed out that the contrary view, with its attention to "normal fortitude" as a condition of liability, did not stand well with the socalled "eggshell skull" rule in relation to the assessment of damages for physical harm [180].

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[178] (2000) 49 NSWLR 21 at 25.

[179] (1970) 125 CLR 383 at 405-406.

[180] *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 406.

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**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

200. Analysis by the courts may assist in assessing the reasonable foreseeability of the relevant risk. The criterion is one of *reasonable* foreseeability. Liability is imposed for consequences which the defendant, judged by the standard of the reasonable person, ought to have foreseen [181] . Of course, this can sometimes lead to sharply divided views in assessing the evidence. The application of that criterion by this Court in *Bunyan v Jordan* [182] and *Chester v Waverley Corporation* [183] led in each case to a denial of recovery for "nervous shock". The result in *Chester* , looked at today, perhaps shows that the determination of what ought reasonably to have been foreseen may differ from one age to the next. However, because the criterion is an objective one [184] , what is postulated is a general (and contemporary) standard of susceptibility. It is in that context that references in judgments of this Court [185] to hypothetical "ordinary" or "reasonable" standards of susceptibility to psychiatric harm are to be understood.

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[181] *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)* [1961] AC 388 at 423.

[182] (1937) 57 CLR 1 at 14, 15, 17, 18.

[183] (1939) 62 CLR 1 at 10, 11, 1314 .

[184] A point made by Brennan J in *Jaensch v Coffey* (1984) 155 CLR 549 at 568.

[185] See, eg, *Bunyan v Jordan* (1937) 57 CLR 1 at 14, 15, 17 ; *Jaensch v Coffey* (1984) 155 CLR 549 at 568.

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201. However, the concept of "normal fortitude" should not distract attention from the central inquiry, which is whether, in all the circumstances, the risk of the plaintiff sustaining a recognisable psychiatric illness was reasonably foreseeable, in the sense that the risk was not far-fetched or fanciful [186] . It may be that, in some circumstances, the risk of a recognisable psychiatric illness to a person who falls outside the notion of "normal fortitude" is nonetheless not farfetched or fanciful. If that is so, it is then for the tribunal of fact to determine what a reasonable person would do by way of response to the risk, in the manner indicated in *Wyong Shire Council v Shirt* [187] . Where the plaintiff's response to the defendant's conduct is so extreme or idiosyncratic as to render the risk of that response farfetched or fanciful, the law does not require the defendant to guard against it. Thus, as Pound observed in 1915, where a putative tortfeasor "so far as he could *reasonably* foresee, does nothing that would work an injury, the individual interest of the unduly sensitive or abnormally nervous must give way"[188].

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[186] See *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 48.

[187] (1980) 146 CLR 40 at 47-48 .

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

[188] Pound, "Interests of Personality", (1915) 28 *Harvard Law Review* 343 at 362 (emphasis added).

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202. In *Pusey* , Windeyer J explained that the reasonable hypothetical observer, with reference to whom reasonable foreseeability is assessed [189] ,

> "is not a seer who can foretell future occurrences that are quite unlikely according to the natural and ordinary course of events. Happenings that were fortuitous, in the sense that no reasonable man would have thought of them as within the range of possible consequences, cannot be said to have been reasonably foreseeable. And knowledge after the event, when it is easy to be wise, cannot shew that the event was foreseeable."

Later, in *McLoughlin v O'Brian* [190] , Lord Bridge of Harwich made the point that, in cases of psychiatric injury, the question of reasonable foreseeability "depends on what knowledge is to be attributed to the hypothetical reasonable man of the operation of cause and effect in psychiatric medicine" [191] .

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[189] (1970) 125 CLR 383 at 398.

[190] [1983] 1 AC 410 .

[191] [1983] 1 AC 410 at 432.

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203. **Following paragraph cited by:**

State of New South Wales v Napier (13 December 2002)
State of New South Wales v Napier (13 December 2002)

Nonetheless, questions of reasonable foreseeability are not purely factual. Expert evidence about the foreseeability of psychiatric harm is not decisive. Such evidence cannot usurp the judgment that is required of the decision-maker. Further, it is not necessary that the particular type of disorder that eventuated be reasonably foreseeable; it is sufficient that the class of injury, psychiatric illness, was foreseeable as a possible consequence of the defendant's conduct [192] . So much follows from the proposition that liability does not depend upon "the capacity of a reasonable man to foresee damage of a precise and particular character or upon his capacity to foresee the precise events leading to the damage complained of" [193] . If liability be established by application of these criteria, then, consistently with the approach tentatively favoured by Windeyer J in *Pusey* [194] , the "eggshell skull" rule applies to the assessment of damages.

[192] *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 390, 402403, 413-414 .

[193] *Chapman v Hearse* (1961) 106 CLR 112 at 121.

[194] (1970) 125 CLR 383 at 406.

Sudden shock

204. **Following paragraph cited by:**

Trustees of the Sydney Grammar School v Winch (27 February 2013) (Bathurst CJ, Allsop P, Beazley, McColl and Meagher JJA)

Windeyer J observed in *Pusey* that the term "nervous shock" is apt to mislead [195] . Thereafter, in *McLoughlin v O'Brian* [196] , Lord Bridge of Harwich said its use was a quaint persistence by lawyers. The repetition of such terminology in the authorities, and the ingrained habits of thought to which it has led, indicates the need for care "lest words used in one case become tyrants over the facts of another" [197] . "Nervous shock" operates as a common lawyer's shorthand for the categories of psychiatric harm which are compensable under the tort of negligence. The content of those categories alters with the development of psychiatric knowledge. Terminology should not impede appreciation of the nature and scope of psychiatric harm which may be proved by appropriate evidence and against which the tort offers protection.

[195] (1970) 125 CLR 383 at 394.

[196] [1983] 1 AC 410 at 432.

[197] *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 400.

205. In *Jaensch v Coffey* , Brennan J stated that [198] :

> "[a] plaintiff may recover only if the psychiatric illness is the result of physical injury negligently inflicted on him by the defendant or if it is induced by 'shock'. Psychiatric illness caused in other ways attracts no damages, though it is reasonably foreseeable that psychiatric illness might be a consequence of the defendant's carelessness. The spouse who has been worn down by caring for a tortiously injured husband or wife and who suffers psychiatric illness as a result

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

> goes without compensation; a parent made distraught by the wayward conduct of a brain-damaged child and who suffers psychiatric illness as a result has no claim against the tortfeasor liable to the child."

Mrs Coffey's psychiatric illness was in fact sustained through the "shock" of seeing her severely injured husband at the hospital shortly after his motor vehicle accident. Accordingly, in a sense, his Honour's remarks were not essential for the decision. Brennan J explained that he understood "shock" in this context to mean [199] :

> "the sudden sensory perception – that is, by seeing, hearing or touching – of a person, thing or event, which is so distressing that the perception of the phenomenon affronts or insults the plaintiff's mind and causes a recognizable psychiatric illness. A psychiatric illness induced by mere knowledge of a distressing fact is not compensable; perception by the plaintiff of the distressing phenomenon is essential. If mere knowledge of a distressing phenomenon sufficed, the bearers of sad tidings, able to foresee the depressing effect of what they have to impart, might be held liable as tortfeasors."

The last sentence of this passage suggests that a desire to avoid imposing liability on the "bearers of sad tidings" justified, at least in part, the requirements of "sudden shock" and "direct perception" which his Honour identified. As will appear, the approach we favour denies, for policy reasons, liability on the part of bearers of bad news without invoking requirements or distinctions which appear to have an insecure basis in contemporary psychiatry.

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[198] (1984) 155 CLR 549 at 565.

[199] (1984) 155 CLR 549 at 567.

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206. No other member of the Court in *Jaensch v Coffey* expressly adopted the requirement of "sudden shock". The remarks of Deane J [200] (with whom Gibbs CJ agreed generally) are inconclusive and neither Murphy J nor Dawson J directly considered the issue. Subsequent authority in the House of Lords has identified "sudden shock" as a distinct and necessary element of liability [201] . So too trial and intermediate appellate courts in Australia have treated the remarks of Brennan J as authoritative [202] . However, in the absence of acceptance by a majority of this Court of the need to establish "sudden shock", it is not a settled requirement of the common law of Australia.

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[200] (1984) 155 CLR 549 at 601.

[201] *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 at 400, 401, 417.

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

[202] See *Reeve v Brisbane City Council* [1995] 2 Qd R 661 at 675677 ; *Pham v Lawson* (1997) 68 SASR 124 at 149.

207. With respect to those who espouse it, a "sudden shock" requirement would have no root in principle and therefore would be arbitrary and inconsistent in application. As a growing body of criticism has pointed out [203] , individuals may sustain recognisable psychiatric illnesses without any particular "sudden shock". So much is apparent from the uncontradicted evidence of Dr Phillips at trial in *Tame*. The pragmatic justifications for the rule are unconvincing, for the reasons given earlier at [192] to [196]. The harsh and arbitrary operation of the rule has

[203] See *Gifford v Strang Patrick Stevedoring Pty Ltd* (2001) 51 NSWLR 606 at 616 ; Trindade, "The Principles Governing the Recovery of Damages for Negligently Caused Nervous Shock", (1986) 45 *Cambridge Law Journal* 476 at 478-480; Teff, "Liability for Psychiatric Illness after Hillsborough", (1992) 12 *Oxford Journal of Legal Studies* 440 at 447-451.

[204] *Campbelltown City Council v Mackay* (1989) 15 NSWLR 501 at 503-504 per Kirby P; *van Soest v Residual Health Management Unit* [2000] 1 NZLR 179 at 208 per Thomas J; *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455 at 489 per Lord Goff of Chieveley (dissenting); *Barnard v Santam Bpk* 1999 (1) SA 202.

[205] The Law Commission, *Liability for Psychiatric Illness*, Law Com No 249, (1998) at 72.

attracted judicial criticism in various jurisdictions [204] . The Law Commission of England and Wales has recommended its abolition in that jurisdiction[205].

208. Assuming that the other elements of the cause of action have been made out, liability in negligence, for which damage is the gist of the action, should turn on proof of a recognisable psychiatric disorder, not on the aetiology of that disorder. Yet, on the present state of authority in the English Court of Appeal, a parent who observed an adult child deteriorate over 14 days whilst being negligently treated in the defendant hospital, and then die, must be denied recovery in respect of the negligence of the hospital because the parent's psychiatric harm was not induced by "shock" and the death when it came was "expected" [206] . Again, parents who stayed in hospital with their 14 year old son for two days and until his life support was switched off were denied recovery because their psychiatric illness was not caused by "shock" but from grief at his death[207]. The English Court of Appeal, in reaching the conclusion, distinguished *Jaensch v Coffey* [208].

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

[206] *Sion v Hampstead Health Authority* [1994] 5 Med LR 170 at 174, 176.

[207] *Taylorson v Shieldness Produce Ltd* [1994] Personal Injuries and Quantum Reports P329.

[208] [1994] Personal Injuries and Quantum Reports P329 at P334P335.

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209. An indication of the unsatisfactory foundation of the supposed rule in legal principle is a qualification which may have emerged in favour of employees who sue in respect of the failure of their employer to take reasonable steps to provide a safe system of work. In England, and it has been said in Australia, they may recover for psychiatric injury caused by the accumulation over time of occupational stress, and without the need to establish exposure to isolated trauma sustained in the workplace [209] .

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[209] See the judgment of Mason P in *New South Wales v Seedsman* [2000] NSWCA 119 at [157]-[159] ; *Walker v Northumberland County Council* [1995] 1 All ER 737; *Hatton v Sutherland* [2002] 2 All ER 1 at 1220 ; cf *Gillespie v The Commonwealth* (1991) 104 ACTR 1.

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210. Cases of protracted suffering, as opposed to "sudden shock", may raise difficult issues of causation and remoteness of damage. Difficulties of that kind are more appropriately analysed with reference to the principles of causation and remoteness, not through an absolute denial of duty.

211. The "but for" test is neither a comprehensive nor exclusive test of causation in tort; value judgments and policy considerations necessarily intrude [210] . A plaintiff who cannot establish that the defendant's negligence was an effective cause in law of his or her psychiatric illness will not succeed. An example is the failure of the plaintiff in *Calascione v Dixon* [211] to satisfy the trial judge and the English Court of Appeal that her illness was attributable to her coming upon the scene of her son's fatal accident rather than to her subsequent experience at the funeral, coronial inquest and trial of the driver responsible for the accident.

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[210] *Bennett v Minister of Community Welfare* (1992) 176 CLR 408 at 412413 ; *Chapple v Hart* (1998) 195 CLR 232 at 238 [7], 243 [24], 255 [62], 269270 [93], 281282 [111] ; *Fairchild v Glenhaven Funeral Services Ltd* [2002] 3 WLR 89 at 9698, 121123, 124127, 164; [2002] 3 All ER 305 at 312314, 336337, 338341, 377.

[211] (1993) 19 Butterworths Medico-Legal Reports 97 at 105106.

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**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

212. The "sudden shock" rule has some affinity with the requirement in several United States jurisdictions that the psychiatric harm be accompanied by some physical "impact", that is, bodily contact with the plaintiff as a result of the defendant's conduct [212] . This has produced a line of authority in which liability turns upon the artificial identification of some trivial impact on the plaintiff[213]. To require proof of "sudden shock" is often to mandate a similarly contrived search for an identifiable "triggering event". This is because the distinction upon which the "sudden shock" rule pivots is often illusory. On one view, both Mrs Tame and Mr and Mrs Annetts sustained, or may have sustained, a "sudden shock" when they were told respectively of the erroneous Traffic Collision Report and the disappearance or death of their son. Indeed, Spigelman CJ disagreed with the other members of the Court of Appeal on this point in *Tame* [214] . Moreover, does satisfaction of the requirement of "sudden shock" depend on self-serving evidence by the plaintiff or on expert evidence? If it be the latter, liability may turn on the colloquial description of a state of mind that has no recognised medical meaning.

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[212] See, eg, *Deutsch v Shein* 597 SW 2d 141 at 146 (1980); *Anderson v Scheffler* 752 P 2d 667 (1988); *OB-GYN Associates of Albany v Littleton* 386 SE 2d 146 at 148-149 (1989); *Shuamber v Henderson* 579 NE 2d 452 at 454455 (1991); *Hammond v Central Lane Communications Center* 816 P 2d 593 at 597598 (1991).

[213] See Harper, James and Gray, *The Law of Torts*, 2nd ed (1986), vol 3 at 686.

[214] (2000) 49 NSWLR 21 at 32.

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213. The requirement to establish "sudden shock" should not be accepted as a precondition for recovery in cases of negligently inflicted psychiatric illness [215] .

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[215] cf *Campbelltown City Council v Mackay* (1989) 15 NSWLR 501 at 503504 per Kirby P; Tennant, "Liability for Psychiatric Injury: an Evidence-based Appraisal", (2002) 76 *Australian Law Journal* 73 at 75, 79.

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Direct perception and immediate aftermath

214. This related "requirement" has not been authoritatively adopted by this Court as an essential ingredient in an action for negligence for psychiatric harm.

215. In *Pusey* , Windeyer J said [216] :

> "I do not question decisions that nervous shock resulting simply from hearing distressing news does not sound in damages in the same way as does nervous shock from witnessing distressing events. If the sole cause of shock be what is

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

> told or read of some happening then I think it is correctly said that, unless there be an intention to cause a nervous shock, no action lies against either the bearer of the bad tidings or the person who caused the event of which they tell. There is no duty in law to break bad news gently or to do nothing which creates bad news."

It will be necessary to return to this passage later in these reasons under the heading "Bearers of bad tidings". As will appear, bearers of bad news may be shielded from liability in negligence without a rule that the direct witnessing of distressing events is a necessary precondition to recovery.

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[216] (1970) 125 CLR 383 at 407.

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216. In *Jaensch v Coffey* , Brennan J expressed the view, referred to above, that perception "by seeing, hearing or touching" a sufficiently distressing person, thing or event is a prerequisite to recovery for negligently inflicted psychiatric harm. His Honour said that a psychiatric illness induced by "mere knowledge of a distressing fact is not compensable; perception by the plaintiff of the distressing phenomenon is essential" [217] . On this question, Gibbs CJ expressly reserved his position [218] . Murphy J appeared to be of the view that "learning of", rather than witnessing, a spouse's injuries or treatment would be sufficient to found liability [219] . Deane J doubted the need for direct perception, saying [220] :

> "It is somewhat difficult to discern an acceptable reason why a rule based on public policy should preclude recovery for psychiatric injury sustained by a wife and mother who is so devastated by being told on the telephone that her husband and children have all just been killed that she is unable to attend at the scene while permitting recovery for the reasonably, but perhaps less readily, foreseeable psychiatric injury sustained by a wife who attends at the scene of the accident or at its aftermath at the hospital when her husband has suffered serious but not fatal injuries."

Dawson J did not conclusively accept that there can be no liability for "shock" brought about by third party communication rather than by the sight or sound of an accident or its consequences [221] . Indeed, *Jaensch v Coffey* did not directly raise the issue; it was accepted that Mrs Coffey directly perceived the aftermath of her husband's accident.

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[217] (1984) 155 CLR 549 at 567.

[218] (1984) 155 CLR 549 at 555.

[219] (1984) 155 CLR 549 at 556.

[220] (1984) 155 CLR 549 at 608-609 .

[221] (1984) 155 CLR 549 at 612-613 .

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

217. Nonetheless, intermediate appellate courts in Australia have denied liability in the absence of direct perception. In *Gifford v Strang Patrick Stevedoring Pty Ltd* [222] , the New South Wales Court of Appeal followed the decision of the Full Court in *Annetts*. Yet this approach had attracted strong criticism by the courts of New South Wales, Queensland and South Australia [223] . At least one plaintiff (that in *Petrie v Dowling* [224] ) who was told of the death of a child, but did not witness the accident or its immediate aftermath, has recovered damages in negligence for psychiatric harm. In *Andrews v Williams* [225] and *Tsanaktsidis v Oulianoff* [226] , the plaintiff who did not witness the death of one or more close relatives, by reason of the plaintiff's own injury or lack of consciousness caused by the same accident, nonetheless was entitled to recover upon learning of that death.

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[222] (2001) 51 NSWLR 606 at 616-617 .

[223] See *Coates v Government Insurance Office of New South Wales* (1995) 36 NSWLR 1 at 8-11 ; *Reeve v Brisbane City Council* [1995] 2 Qd R 661 at 671-675 ; *Pham v Lawson* (1997) 68 SASR 124 at 148.

[224] [1992] 1 Qd R 284 .

[225] [1967] VR 831 .

[226] (1980) 24 SASR 500 .

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218. Direct perception of a distressing phenomenon or its immediate aftermath appears to be a settled requirement of English law [227] . The "immediate aftermath" includes the journey by ambulance to the hospital and the scene at the hospital itself. It was the lack of direct perception that precluded recovery in *Alcock v Chief Constable of South Yorkshire Police* [228] by plaintiffs who watched live television footage of the overcrowding at the football stadium at Hillsborough where their loved ones were crushed to death, or who heard of the events from friends or radio reports and only later saw recorded footage. Plaintiffs in that category could not establish the requisite propinquity in time and space to the incident or its immediate aftermath [229] . This outcome was one of the reasons for the recommendation by the Law Commission for England and Wales that, in cases of psychiatric illness resulting from "the death, injury or imperilment" of a person with whom the plaintiff has a close tie of love and affection, the plaintiff's physical and temporal proximity to the accident or its aftermath, or the means by which the plaintiff learns of it, should be irrelevant[230].

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[227] *King v Phillips* [1953] 1 KB 429 at 441 ; *Hambrook v Stokes Brothers* [1925] 1 KB 141 at 152 ; *McLoughlin v O'Brian* [1983] 1 AC 410 at 422-423 ; *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310.

[228] [1992] 1 AC 310 .

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

[229] [1992] 1 AC 310 at 397-398, 404-405, 416-418, 423-424 .

[230] The Law Commission, *Liability for Psychiatric Illness*, Law Com No 249, (1998) at 88.

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219. In *Dillon v Legg* [231] , the majority of the Supreme Court of California described the distance of the plaintiff from the scene of the accident, and the absence or lack of contemporaneous perception by the plaintiff, as *factors to be taken into account* in determining whether a duty of care arises. In its subsequent and more restrictive decision in *Thing v La Chusa* [232] , the same court held that presence at the scene of the injury-producing event at the time of its occurrence and awareness that the event is causing injury to the victim are *essential prerequisites* to recovery for emotional distress. However, as was pointed out by Wallace JA in *Rhodes v Canadian National Railway* [233] , those restrictions are predicated on a broad definition of "emotional distress" which encompasses fright, nervousness, grief, anxiety and humiliation.

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[231] 441 P 2d 912 at 920-921 (1968).

[232] 771 P 2d 814 at 829 (1989).

[233] (1990) 50 BCLR (2d) 273 at 285, citing *Thing v La Chusa* 771 P 2d 814 at 816 (1989).

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220. Other courts in the United States have denied recovery to plaintiffs who did not witness first-hand the relevant tragedy[234]. This restriction finds its counterpart in the rule, to which reference has been made earlier in these reasons, that, to recover for mental distress, plaintiffs must personally have been within the "zone of physical danger". That common law rule has been adopted by the Supreme Court of the United States in *Consolidated Rail Corporation v Gottshall* [235] with respect to recovery under the *Federal Employers' Liability Act*. Canadian courts too have refused recovery to parents who have sustained psychiatric harm on being told that their child had been killed by the negligent act of the defendant where they themselves did not witness the accident or its aftermath; but the reasoning at least to some degree depended upon absence of foreseeability and lack of legally sufficient causation [236] .

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[234] The authorities are collected by Harper, James and Gray, *The Law of Torts*, 2nd ed (1986), vol 3 at 695, 702.

[235] 512 US 532 (1994) .

[236] *Abramzik v Brenner* (1967) 65 DLR (2d) 651 (Saskatchewan); *Rhodes v Canadian National Railway* (1990) 50 BCLR (2d) 273 (British Columbia).

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**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

221. A rule that renders liability in negligence for psychiatric harm conditional on the geographic or temporal distance of the plaintiff from the distressing phenomenon, or on the means by which the plaintiff acquires knowledge of that phenomenon, is apt to produce arbitrary outcomes and to exclude meritorious claims. Examples were given by Lord Bridge of Harwich in *McLoughlin v O'Brian* [237] . The rule is also disjoined from the realities of modern telecommunications which have developed greatly since this control factor was propounded. This was a point made by Kirby P in *Coates v Government Insurance Office of New South Wales* [238] . It was picked up by the Supreme Court of Appeal of South Africa in its unanimous decision in *Barnard v Santam Bpk* [239]. In that decision, the South African court reversed previous authority and rejected the requirement of direct perception of the source of the subsequent psychiatric illness.

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[237] [1983] 1 AC 410 at 442.

[238] (1995) 36 NSWLR 1 at 11.

[239] 1999 (1) SA 202; cf Handford, "When the Telephone Rings: Restating Negligence Liability for Psychiatric Illness", (2001) 23 *Sydney Law Review* 597 at 613.

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222. It has been said that the more significant causal factor in cases of psychiatric illness is not the "direct perception" of the event, or the precise manner in which the horror of the event is conveyed, but the relationship between the plaintiff and the accident victim[240]. Yet the case law now under consideration produces the result that a plaintiff who did not view her daughter's abduction or murder, or view her mutilated body until six to seven days after her death, is outside the "immediate aftermath" and is unable, on that basis alone, to bring a claim in negligence against the defendant health authority for its alleged failure adequately to diagnose and treat the sexual offender who committed the crimes. The English Court of Appeal so decided in *Palmer v Tees Health Authority* [241]. Assuming that otherwise liability could be established, this exclusion of recovery is obviously arbitrary. It lacks apparent logic or legal merit.

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[240] Teff, "Liability for Psychiatric Illness after Hillsborough", (1992) 12 *Oxford Journal of Legal Studies* 440 at 442; Markesinis and Deakin, *Tort Law*, 4th ed (1999) at 130.

[241] [1999] Lloyd's Rep Med 351.

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223. Similarly, in *Duncan v British Coal Corporation* [242] , recovery was denied by that Court to a plaintiff pit deputy at the defendant's colliery who suffered psychiatric disorder when one of the workers for whom he was responsible was crushed to death at the coalface at a distance of 275 metres from the plaintiff; this was held notwithstanding that, having been informed by

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

telephone of the accident (admittedly caused by the defendant's negligence), the plaintiff arrived at the scene within four minutes and had attempted to resuscitate the deceased. It is apparent that, because the supposed rule lacks any principled foundation, it mandates differential treatment of plaintiffs in substantially the same position.

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[242] [1997] 1 All ER 540 .

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224. In some instances, the development of the common law may proceed by analogy with what legislatures have determined to be the appropriate balance between competing interests in a given field [243] . It is significant that legislation in New South Wales [244] , the Australian Capital Territory [245] and the Northern Territory [246] permits the spouse or parent (as defined) of a person killed, injured or imperilled by the defendant's wrongful act to recover damages for consequent mental or nervous shock, regardless of whether they saw or heard the relevant incident.

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[243] *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 6063 [19]-[28] ; cf at 86 [97].

[244] *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW), s 4 .

[245] *Law Reform (Miscellaneous Provisions) Act* 1955 (ACT), s 24 .

[246] *Law Reform (Miscellaneous Provisions) Act* 1956 (NT), s 25 .

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225. Distance in time and space from a distressing phenomenon, and means of communication or acquisition of knowledge concerning that phenomenon, may be relevant to assessing reasonable foreseeability, causation and remoteness of damage in a common law action for negligently inflicted psychiatric illness. But they are not themselves decisive of liability. To reason otherwise is to transform a factor that favours finding a duty of care in some cases into a general pre-requisite for a duty in all cases. This carries with it the risk of attribution of disproportionate significance to what may be no more than inconsequential circumstances.

Bearers of bad tidings

226. In *AB v Tameside & Glossop Health Authority* [247] , Brooke LJ said [248] that there appeared to be no previous reported English case in which liability in negligence had been imposed for communicating accurate but distressing news in a careless manner. That subject was not fully explored in *Tameside* because it was conceded by the defendant health authority that it had had a duty to take reasonable care in selecting the manner in which it conveyed information to patients and former patients in receipt of obstetric treatment that there was a

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

remote risk of infection from a healthworker who was HIV positive. In the event, the Court of Appeal decided that there had been no negligence in the method adopted to convey that information.

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[247] [1997] 8 Med LR 91 .

[248] [1997] 8 Med LR 91 at 93.

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227. The rejection earlier in these reasons of the criterion of "direct perception" makes it appropriate to identify some qualifications to the passage from the judgment of Windeyer J in *Pusey* [249] which has been set out. His Honour expressed the view, albeit in passing, that, where "shock" is caused purely by the communication of some happening, in the absence of an intention to cause "nervous shock", no action lies against either the bearer of bad tidings or the person who caused the event of which they tell. His Honour remarked that "[t]here is no duty in law to break bad news gently or to do nothing which creates bad news." The first proposition may be accepted without acceding to the second.

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[249] (1970) 125 CLR 383 at 407.

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228. **Following paragraph cited by:**

State of New South Wales v Napier (13 December 2002)

The content of a putative duty of care in novel categories of case accommodates itself to basic values which the corpus of the law promotes or protects. One relevant interest is that of the individual in the privacy of personal affairs [250] . On the other hand, the loved ones of a person who has been killed, injured or put in peril ordinarily have an interest in being told promptly of that circumstance and the law encourages the free and prompt supply of the relevant information to those persons. It is for this reason that, in the absence of a malign intention, no action lies against the bearer of bad news for psychiatric harm caused by the manner in which the news is conveyed or, if the news be true, for psychiatric harm caused by the fact of its conveyance [251] . The discharge of the responsibility to impart bad news fully and frankly would be inhibited by the imposition in those circumstances of a duty of care to avoid causing distress to the recipient of the news. There can be no legal duty to break bad news gently. This is so even if degrees of tact and diplomacy were capable of objective identification and assessment, which manifestly they are not. Neither carelessness nor insensitivity in presentation will found an action in negligence against the messenger.

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**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

[250] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 76 ALJR 1; 185 ALR 1.

[251] cf *Furniss v Fitchett* [1958] NZLR 396 at 401-404 .

229. It is unnecessary here to consider in any detail two further questions. The first is whether carelessness in the accuracy of a message conveyed, as opposed to the manner or fact of its conveyance, may attract liability for negligently inflicted psychiatric illness. *Barnes v The Commonwealth* [252] , decided by the New South Wales Full Court as long ago as 1937, indicates that at least in some situations there may be liability even where the defendant does not know the information is incorrect. In *Barnes* , the Full Court overruled a demurrer to a declaration by the plaintiff that she had suffered "nervous shock" upon being incorrectly informed, by memorandum sent by an officer of the Commonwealth Invalid and Old-Age Pensions Office, that her husband had been admitted to a mental hospital.

[252] (1937) 37 SR (NSW) 511 .

230. The second matter is whether, where the tortious conduct may be identified independently from the communication of its consequences, liability attaches to the former but not to the latter. This will be most apparent when the tortfeasor and the messenger are different parties. Why should a separately identifiable tortfeasor be sheltered from liability in the same manner as one who conveys information about the distressing consequences of the tortfeasor's conduct? Thus it may be necessary on an appropriate occasion to reconsider the suggestion by Windeyer J in *Pusey* [253] that, "[i]f the sole cause of shock be what is told or read of some happening" then, in the absence of intention to cause "nervous shock" no action lies against *the person who caused the event* which the bearer of bad news relates. A proposition of that breadth appears to import a requirement of "direct perception" which, for the reasons given earlier, is an unsound criterion of liability for negligently inflicted psychiatric harm.

[253] (1970) 125 CLR 383 at 407.

The outcome in *Tame v New South Wales*

231. **Following paragraph cited by:**

Jennings v Police (30 July 2019) (Kourakis CJ; Stanley and Parker JJ)
Australian Capital Territory v Crowley (17 December 2012) (Lander, Besanko and Katzmann JJ)

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

Kirkland-Veenstra v Stuart (29 February 2008) (Warren CJ, Maxwell P and Chernov JA)

Kirkland-Veenstra v Stuart (29 February 2008) (Warren CJ, Maxwell P and Chernov JA)

Cran v State of New South Wales (29 March 2004) (Santow, Ipp and McColl JJA)

It is unlikely that an investigating police officer owes a duty of care to a person whose conduct is under investigation. Such a duty would appear to be inconsistent with the police officer's duty, ultimately based in the statutory framework and anterior common law by which the relevant police service is established and maintained [254] , fully to investigate the conduct in question [255] . Counsel for Mrs Tame submitted that Mrs Tame's conduct was not under investigation at the time the Traffic Collision Report was completed. It was said that Mrs Tame was an accident victim in respect of whom there was no suspicion of any criminal offence. However, it is unnecessary to pursue that question, because, for the reasons that follow, Mrs Tame's action fails at the outset.

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[254] *Attorney-General for New South Wales v Perpetual Trustee Company (Ltd)* (1955 ) 92 CLR 113 at 118121; [1955] AC 457 at 477481 .

[255] *Hill v Chief Constable of West Yorkshire* [1989] AC 53 at 6364, 65 ; *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 739 ; *Sullivan v Moody* (2001) 75 ALJR 1570 at 1580 [60]; 183 ALR 404 at 417.

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232. No case in negligence can be made out against the respondent in respect of the conduct of Acting Sergeant Beardsley. This is because a reasonable person in Acting Sergeant Beardsley's position would not have foreseen that his conduct in carelessly completing the Traffic Collision Report involved a risk of causing a recognisable psychiatric illness to the appellant. It may be conceded that it was reasonably foreseeable that such carelessness may cause surprise, distress or anger, particularly as the report was likely to be distributed to the appellant's insurer and could be accessed, for a fee, by members of the public. However, it also was reasonably foreseeable (a) that an erroneous recording of the appellant's blood alcohol level, once detected, would promptly be rectified, given the obvious nature of an error which attributed to both drivers precisely the same blood alcohol content and (b) that, if pressed, the Police Service would offer a formal apology in respect of any such error, as subsequently occurred here.

233. But it was not reasonably foreseeable that a person in the position of Mrs Tame would sustain a recognisable psychiatric illness from a clerical error which she was told was a mistake that had been rectified and in respect of which she received a formal apology. The appellant's reaction was extreme and idiosyncratic. The risk of such a reaction was farfetched or fanciful and, in the manner indicated in *Wyong Shire Council v Shirt* [256] , was not one which the law of negligence required a reasonable person to avoid.

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**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

[256] (1980) 146 CLR 40 at 47-48 .

234. **Following paragraph cited by:**

Panagiotopoulos v Rajendram (28 September 2007) (Tobias JA at 1; McColl JA at 2; Basten JA at 3)

Counsel for Mrs Tame emphasised the evidence put by psychiatrists at trial that a person of normal fortitude could suffer psychiatric injury on being told of the error on the report. In particular, it was said that a person in a delusional state of mind would not be mollified by explicit confirmation that the blood alcohol reading was a mistake that had been rectified. However, as indicated earlier in these reasons, expert evidence about the foreseeability of a risk of psychiatric injury is not decisive. The question of reasonable foreseeability involves an assessment respecting the foresight of a reasonable person in the defendant's position; that foresight may differ from the foresight of qualified psychiatrists. The judgment belongs, ultimately, to a court, not to an expert witness. In making that judgment, a court will draw upon its reserves of common sense and reasonableness.

235. The appeal in *Tame* should be dismissed with costs.

The outcome in *Annetts v Australian Stations Pty Ltd*

236. The Full Court erred in failing to apply the ordinary principles of the tort of negligence, unhindered by artificial constrictions based on the circumstance that the illness for which redress was sought was purely psychiatric. In particular, neither the lack of the applicants' direct perception of their son's death or its immediate aftermath, nor the circumstance that the applicants may not have sustained a "sudden shock", is fatal to the applicants' claims. In accordance with the ordinary principles of negligence applied to the assumed facts, the respondent owed the applicants a duty of care. The preliminary issue formulated by Heenan J should be resolved in the affirmative.

237. The connections between the parties indicate the existence of a duty of care. An antecedent relationship between the plaintiff and the defendant, especially where the latter has assumed some responsibility to the former to avoid exposing him or her to a risk of psychiatric harm, may supply the basis for importing a duty of care[257]. In *White v Chief Constable of South Yorkshire Police* [258] , the House of Lords held that the rules restricting recovery for pure psychiatric harm controlled the ambit of the duty of care owed by a Chief Constable to police under his command. More recently, in *W v Essex County Council* [259] , the House of Lords, dealing with an appeal respecting a strikeout application, held that it was arguable that a local authority owed a duty of care to foster parents who claimed to have suffered psychiatric illness upon discovering that a foster child placed with them by the authority had sexually abused their children. The foster parents had told the authority that they were not willing to

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

accept a foster child who was a known or suspected sexual abuser and had received general assurances from the authority that no sexual abuser would be placed with them. Notwithstanding those assurances, the authority placed with the family a child whom it knew had committed an indecent assault on his sister. So too in Australia courts have been more willing to permit recovery for psychiatric harm where the plaintiff and defendant were in a preexisting relationship of employer and employee [260] .

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[257] See Markesinis and Deakin, *Tort Law*, 4th ed (1999) at 133-134.

[258] [1999] 2 AC 455 .

[259] [2001] 2 AC 592 .

[260] *New South Wales v Seedsman* [2000] NSWCA 119.

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238. **Following paragraph cited by:**

Kestrel Holdings Pty Ltd v APF Properties Pty Ltd (15 October 2009) (Gray, Mansfield & Tracey JJ)

A duty to avert psychiatric harm in these circumstances finds some, necessarily imperfect, analogy in cases of negligent misstatement causing pure economic loss, where a duty of care may arise with an assumption of responsibility by the defendant and reasonable reliance by the plaintiff [261] .

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[261] *Tepko Pty Ltd v Water Board* (2001) 206 CLR 1 at 1617 [47], 2324 [76] .

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239. **Following paragraph cited by:**

New South Wales v Godfrey (07 April 2004) (Spigelman CJ, Sheller and McColl JJA)

In the present case, the applicants sought and obtained from the respondent assurances that James would be appropriately supervised. The respondent undertook specifically to act to minimise the risk of harm to James and, by inference, to minimise the risk of psychiatric injury to the applicants. In those circumstances, the recognition of a duty of care does not raise the prospect of an intolerably large or indeterminate class of potential plaintiffs.

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

240. The applicants had no way of protecting themselves against the risk of psychiatric harm that eventuated. In that regard, nothing turns upon which of the situations postulated by Ipp J in the Full Court as to the time that harm was sustained may be established at trial of the remaining issues in the action. The control over the risk of harm to James, and the risk of consequent psychiatric harm to the applicants, was held to a significant, perhaps exclusive, degree by the respondent. It controlled the conditions under which James worked.

241. Is there, to adapt what was put and rejected on the facts in *Bryan v Maloney* [262] , any real question of inconsistency between the existence of a duty of care to the parents of James and the legitimate pursuit by the respondent of its business interests? The answer is in the negative. It is likely that the respondent's duty of care to the applicants to exercise reasonable care to avoid causing them psychiatric injury with respect to James' death in the course of his employment by it was, at most, coextensive with the tortious and express or implied contractual duties that it had owed to James directly as his employer.

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[262] (1995) 182 CLR 609 at 623624 . See also *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 235 [147] per McHugh J.

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242. The application for special leave in *Annetts* should be granted and the appeal allowed. The orders of the Full Court dated 21 November 2000 should be set aside. In their place it should be ordered that the appeal to that Court be allowed, that the question posed by Heenan J in the schedule to his order for the trial of a preliminary issue dated 5 May 1999 be answered "Yes" and that the respondent pay the applicants' costs in the Full Court and of the trial of the preliminary issue in the Supreme Court. The respondent also should pay the applicants' costs in this Court.

243. **Following paragraph cited by:**

McKenna v Hunter & New England Local Health District (23 December 2013) (Beazley P, Macfarlan JA and Garling J)

HAYNE J. The common law has long shown a marked reluctance to allow damages for psychiatric as distinct from physical injury. Most often this reluctance is seen to be based in fears that exaggerated or false claims will be allowed: that judges or juries will be unable to discern error in diagnosing psychiatric injury or to distinguish between the injured and the malingerer. Sometimes the reluctance is seen to be based in the difficulty of distinguishing between emotional consequences, for which it has been held damages will not lie, and psychiatric consequences for which damages will be allowed [263] . Developments in psychiatry are said now to have much reduced, if not altogether eliminated, these problems [264] .

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**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

[263] See, for example, *Bunyan v Jordan* (1937) 57 CLR 1 at 16 per Dixon J; *Chester v Waverley Corporation* (1939) 62 CLR 1 at 89 per Latham CJ, 11 per Rich J, 13 per Starke J, 21 per Evatt J; *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 394 per Windeyer J.

[264] See, for example, *Campbelltown City Council v Mackay* (1989) 15 NSWLR 501 at 503.

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244. Sometimes, those fears have been expressed in different terms. "Floodgates" arguments have been advanced [265] . More recently, these floodgates arguments are based in what are asserted to be the possible consequences of wide media dissemination of tragic events, often dissemination by broadcasting those events as they are occurring. Television broadcasts of the destruction of the World Trade Centre buildings in New York on 11 September 2001 provide an obvious example of an horrific event broadcast to an immense audience as it was happening. Again, however, floodgates arguments can be understood as being based in fears about the capacity of the courts to distinguish between cases of real and feigned injury. It may be suggested that references to indeterminate liability, and to imposing unreasonable burdens on defendants, serve only to mask fears of the kind described. If concerns about indeterminate liability or the burden on defendants are not based in those fears, it is said, or at least implied, that there is no reason to distinguish between a negligently caused event leading to widespread physical injury (such as a release of poisonous fumes from a factory) and a negligently caused event which leads to numerous cases of psychiatric injury. Especially is that so when it is recognised that the line between physical and psychiatric injury may not be clear and bright [266] .

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[265] See, for example, *Chester v Waverley Corporation* (1939) 62 CLR 1 at 78 per Latham CJ, 11 per Rich J.

[266] *Morris v KLM Royal Dutch Airlines* [2002] 2 WLR 578 at 596597 [47]-[49] per Lord Hope of Craighead; [2002] 2 All ER 565 at 583584 ; *Weaver v Delta Airlines Inc* 56 F Supp 2d 1190 (1999).

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245. A third reason which has been proffered by Professor Atiyah[267] for limiting claims for psychiatric injury is that the claims of those who suffer distress or shock as a result of witnessing an accident should have "a low priority when it is remembered that thousands of victims with physical injury go uncompensated every year because they are injured in accidents not caused by negligence". This is, however, not a reason which finds reflection in the decided cases. Moreover, once it is accepted, as it must be, that the common law rules governing allowance of damages for personal injury are faultbased, it is not right to distinguish between those who suffer injury as a result of fault because others, equally injured, but not as a result of intentional or negligent conduct of another, have no redress at law.

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**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

[267] Atiyah, *Accidents, Compensation and the Law*, 3rd ed (1980) at 80.

246. Much, therefore, turns on whether it is right to say that developments in psychiatry have greatly reduced, if not altogether eliminated, any sound basis for the fears that I have mentioned. But important as these fears may have been in the development of this area of the law, it is not only fear that can be seen to be at work. It is, therefore, wrong to concentrate only on these fears. There are other, very important, aspects of the problem.

Duty of care

247. The way in which the law relating to what has come to be called "nervous shock" has developed reflects the difficulty that the law has had, and still has, in defining the circumstances in which a duty to take reasonable care will be found to exist. Whether or not it is right to put aside the fears that have been mentioned, and it will be necessary to consider whether it is, it is obviously necessary to examine the questions of principle that now arise. Is a duty of care to avoid psychiatric injury owed to *everyone* who it is reasonably foreseeable may suffer that kind of injury if reasonable care is not taken, or, is the duty of care to be owed to some more limited class of persons? The choice thus presented is not easy. In its most unattractive form it may be described as a choice between abandoning any significant control of the circumstances in which a plaintiff may recover damages for negligently inflicted psychiatric injury, and recognising, in Professor Stapleton's words[268], that "this is an area [of the law] where it seems that all that can be done with commonlaw techniques to restrain the tort within acceptable limits is to adopt the sort of artificial and incoherent boundary rules which currently exist, and which are a sore humiliation to the law".

[268] Stapleton, "Duty of Care Factors: a Selection from the Judicial Menus", in Cane and Stapleton (eds), *The Law of Obligations*, (1998) 59 at 88.

248. If the former choice is made, and the duty is found to be owed to all who it is reasonably foreseeable may be injured in this way, it will represent a radical change in the law of negligence by abandoning altogether the search for a principled basis for confining those to whom a duty of care is owed to those who are identified as "neighbours". It will mean that rarely will a plaintiff who has suffered psychiatric injury fail to recover from the person whose negligence was a cause of that injury. As Dixon CJ pointed out in argument in *Chapman v Hearse* [269] , the difficulty in using reasonable foresight of harm as the criterion for ascertaining duty is that "reasonably foreseeable" carries with it no idea of likelihood. If an event has happened, it is very hard indeed to say that its happening was not foreseeable "by a person of sufficient imagination and intelligence" [270] . Especially is that so if the test is understood, as now it must be, as encompassing all outcomes, save those that are farfetched or fanciful [271] . By contrast, if the latter choice is made and some rule adopted which limits the cases in which the duty of care is found to exist, the limitation on duty which is adopted will inevitably lead to difficulties at the boundary of the field thus identified.

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

[269] (1961) 106 CLR 112 at 115.

[270] *Chapman v Hearse* (1961) 106 CLR 112 at 115.

[271] *Wyong Shire Council v Shirt* (1980) 146 CLR 40.

The place of duty of care

249. **Following paragraph cited by:**

R v Moore (15 December 2015) (Bathurst CJ, Simpson JA and Bellew J)
R v Moore (15 December 2015) (Bathurst CJ, Simpson JA and Bellew J)
Talbot & Olivier (A Firm) v Witcombe (26 May 2006) (Steytler P)

The common law of negligence does not provide for recovery by all who suffer negligently inflicted harm. Nor is reasonable foreseeability the only limit upon recovery. As I have pointed out before [272] , the concept of duty of care has a fundamentally important role to play. "[A]s a prerequisite of liability in negligence, [it] is embedded in our law by compulsive pronouncements of the highest authority." [273] Foresight of harm, even foresight of harm of a particular kind, has not hitherto been found sufficient to warrant finding a duty of care. As Brennan J said in *Sutherland Shire Council v Heyman* [274] , "a postulated duty of care must be stated in reference to the kind of damage that a plaintiff has suffered *and in reference to the plaintiff or a class of which the plaintiff is a member*" (emphasis added). (Even that double specification may not suffice in some cases.)

[272] *Modbury Triangle v Anzil* (2000) 205 CLR 254 at 288 [99] .

[273] *Hargrave v Goldman* (1963) 110 CLR 40 at 63 per Windeyer J.

[274] (1985) 157 CLR 424 at 487.

250. **Following paragraph cited by:**

Wynne v Pilbeam (21 October 2005) (Steytler P, Wheeler JA, Pullin JA)

"Neighbourhood" [275] , "proximity" [276] , the socalled "tripartite" test said to be derived from Lord Bridge's speech in *Caparo Industries Plc v Dickman* [277] , "vulnerability" [278] , "general reliance" [279] are all different attempts that have been made to identify a

satisfactory means of describing or defining the circumstances in which a duty of care should be found to exist. At least some of these tests have now been rejected [280] as either being insufficiently informative or being inadequate to provide coherence in this area of the law. None has proved to be an allembracing explanation for the way in which the law has developed and is developing. But despite these difficulties, what has not been rejected is a more fundamental proposition. As five members of the Court have recently held [281] , foresight of harm does *not* suffice to establish the existence of a duty of care. Or, to put the same proposition in another way, the common law does *not* provide a remedy for all who suffer negligently inflicted harm, even if the actor could reasonably foresee that carelessness may cause harm of the kind which in fact is suffered. The common law confines recovery to those to whom a duty of care is owed. That is why "the major problem for any general statement of a negligence principle [is] … that there are large areas in which careless conduct causing injury to innocent parties is not actionable."[282]

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[275] *Donoghue v Stevenson* [1932] AC 562 at 580 per Lord Atkin.

[276] *Jaensch v Coffey* (1984) 155 CLR 549 at 606607 per Deane J.

[277] [1990] 2 AC 605 at 617618 .

[278] *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 551 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ; *Hill v Van Erp* (1997) 188 CLR 159 at 186 per Dawson J, 216 per McHugh J; *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 372373 [116] per McHugh J, 421 [247] per Kirby J; *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 194195 [13] per Gleeson CJ, 202 [42] per Gaudron J, 236 [149]-[151] per Kirby J, 328 [416] per Callinan J; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 24 [43] per Gaudron J.

[279] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 464 per Mason J; *Cri mmins* (1999) 200 CLR 1 at 2324 [42] per Gaudron J.

[280] For example, the tripartite test based on what was said in *Caparo Industries Plc v Dickman* was rejected in *Sullivan v Moody* (2001) 75 ALJR 1570; 183 ALR 404.

[281] *Sullivan v Moody* (2001) 75 ALJR 1570 at 1577 [42] per Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ; 183 ALR 404 at 412.

[282] Stapleton, "In Restraint of Tort", in Birks (ed), *The Frontiers of Liability*, (1994), vol 2, 83 at 86.

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A common problem

251. As the reasons of Gummow and Kirby JJ demonstrate, common law systems in Australia, England and America have sought to deal with cases of negligently inflicted "nervous shock", or psychiatric injury, in various ways. But the problems are not confined to common law jurisdictions. In Germany, s 823 I of the *Bürgerliches Gesetzbuch* (the "BGB" or German Civil Code) can be invoked if one of the interests enumerated in it is violated, intentionally or

negligently, and damage results. Those interests are life, body, health, freedom, property, or any other right. Although it is clear that psychiatric injury is an injury to health, Professor Markesinis, writing in 1994, recorded[283] that the German courts placed strong emphasis on "the seriousness and extraordinary nature of the shock before they treat it as compensatable … The expression often used is that the shock must be an 'appropriate' and 'understandable' (*verständliche*) consequence of witnessing *or being told* of the accident." Echoes of "the plaintiff of normal fortitude" can be heard in this proposition but it can also be seen that the inclusion of those who are told of an accident extends the classes of those able to recover beyond those who were close to the accident. Claims for psychiatric injury have often been held to fail in the German courts on the basis that the necessary causal link between fault and injury was not demonstrated [284] but, as in the common law [285] , the policy basis of such decisions is increasingly being recognised[286]. As Lord Hoffmann said in *Fairchild v Glenhaven Funeral Services Ltd* [287] :

> "The question of fact is whether the causal requirements which the law lays down for that particular liability have been satisfied. But those requirements exist by virtue of rules of law. *Before one can answer the question of fact, one must first formulate the question. This involves deciding what, in the circumstances of the particular case, the law's requirements are.* …
>
> [T]he essential point is that the causal requirements are just as much part of the legal conditions for liability as the rules which prescribe the kind of conduct which attracts liability or the rules which limit the scope of that liability. If I may repeat what I have said on another occasion, one is never simply liable, one is always liable *for* something – to make compensation for damage, the nature and extent of which is delimited by the law." (emphasis added)

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[283] Markesinis, *A Comparative Introduction to the German Law of Torts*, 3rd ed (1994) at 38.

[284] cf *Victorian Railways Commissioners v Coultas* (1888) 13 App Cas 222.

[285] *Chappel v Hart* (1998) 195 CLR 232 at 256 [63] per Gummow J; *Environment Agency v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22 at 30 per Lord Hoffmann; *Fairchild v Glenhaven Funeral Services Ltd* [2002] 3 WLR 89 at 124126 [50][58] per Lord Hoffmann; [2002] 3 All ER 305 at 339 340 .

[286] Markesinis, *A Comparative Introduction to the German Law of Torts*, 3rd ed (1994) at 39; cf Markesinis and Unberath, *The German Law of Torts A Comparative Treatise*, 4th ed (2002) at 138.

[287] [2002] 3 WLR 89 at 124125 [52], [54]; [2002] 3 All ER 305 at 339.

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**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

252. For present purposes, it is important to recognise that the struggle to articulate satisfactory rules regulating recovery for negligently inflicted psychiatric injury is not unique to the common law. No less significantly, the solutions adopted in one civil law system have borne some striking similarities to those that have been tried at various times in Australia, England and America.

253. Several distinct threads may be recognised in the treatment by common law systems of claims for negligently inflicted psychiatric injury. First, there have been various attempts to limit the class of persons to whom a duty of care is owed. Secondly, there has been the attempt to limit the kinds of circumstance which will give rise to compensable harm by requiring "shock" or sudden sensory perception and by requiring that the event would cause injury to a person of normal fortitude. Thirdly, there has been the drawing of the distinction between psychiatric injury and mere emotional distress.

254. These three, distinct, limiting techniques can themselves be seen as being bound together by a concern to limit recovery for psychiatric injury to only the clearest of cases. That concern has found manifestation in many ways but two may be mentioned here. Because a plaintiff can succeed in negligence if the defendant's negligence was no more than *a cause* of injury, the more remote and difficult cases of psychiatric injury may present difficult questions of causation. But more than that, they may also present more fundamental questions about why the defendant should be held responsible for consequences to which so many other experiences of the plaintiff could be said to have contributed. Further, as the causal connection between negligent conduct and psychiatric injury becomes more attenuated, or at least less obvious to a lay observer, what is the point of holding the defendant liable for those consequences? Does holding the defendant liable truly promote reasonable conduct?

255. Again, however, while the concern to limit recovery to the clearest cases has been an important factor influencing the development of the law in this area, it is not the only force at work. The law has also been concerned to limit the class of persons to whom a duty is owed. And unless duty of care is to be abandoned altogether as a separate element of the tort of negligence, the task for this Court remains the task of identifying what, *in addition to foresight of harm*, must be shown to establish a duty of care.

Rules limiting the class to whom a duty is owed

256. At first, the rule limiting those to whom a duty of care to avoid psychiatric injury is owed was based on "nearness", that is, physical propinquity to the accident. Section 313 of the *Restatem ent of Torts*, 2d, (1965), required that the plaintiff be in the "danger zone" before the plaintiff could recover for psychiatric injury[288] and that rule has been adopted in the United States federal jurisdiction [289] . Sometimes the rule has been extended to "hearness" and required that the injury has resulted from the direct emotional impact upon the plaintiff from the sensory and contemporaneous observance of the accident [290] , as contrasted with learning of the accident from others after its occurrence [291] . Sometimes tests of "dearness" have been imposed [292] in which the plaintiff must demonstrate a close emotional relationship with the person whose injury has given rise to the plaintiff's psychiatric injury [293] . Someti mes these tests have been reflected in rules distinguishing between primary and secondary victims [294] .

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

[288] See, for example, *Rickey v Chicago Transit Authority* 457 NE 2d 1 (1983).

[289] *Consolidated Rail Corporation v Gottshall* 512 US 532 at 555 (1994).

[290] *Hay or Bourhill v Young* [1943] AC 92.

[291] See also *Dillon v Legg* 441 P 2d 912 at 920 (1968).

[292] *McLoughlin v O'Brian* [1983] 1 AC 410; cf *Jaensch v Coffey* (1984) 155 CLR 549.

[293] See also *Dillon v Legg* 441 P 2d 912 at 920 (1968).

[294] *Chester v Waverley Corporation* (1939) 62 CLR 1 at 44 per Evatt J; *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310; *Page v Smith* [1996] AC 155 ; *Frost v Chief Constable of South Yorkshire Police* [1999] 2 AC 455.

257. **Following paragraph cited by:**

ACQ Pty Ltd v Cook (16 July 2008) (Beazley JA at 1; Giles JA at 2; Campbell JA at 3)

> 100 In deciding whether Mr Stubbs owed a duty of care to Mr Cook, it is necessary to bear in mind that all of the cases on which Aircair relies come from times when the understanding of the circumstances in which a duty of care rises was not quite the same as it is today. In particular, it is to be observed that in ***Dal ey*** their Honours explicitly relied on *"the principle of proximity"* (though with an explicit statement of what they understood by it). Direct application of the notion of *"proximity"* can no longer be seen as a safe guide to when a duty of care exists: ***Perre v Apand Pty Ltd*** [1999] HCA 36; (1999) 198 CLR 180 at [7] -[10] 193-194 per Gleeson CJ, [25]-[27] 197-198 per Gaudron J, [70]-[82] 208-212 per McHugh J, [191] 251 per Gummow J, [245]-[247] 268-270, [255] 273, [ 259] 275, [267] 277-278, [279]-[287] 283-286, [292]-[296] 288-289 per Kirby J, [330]-[335] 300-303 per Hayne J, [389] 318-319, [393] 321-322, [398]-[400] 323 -324, [406] 326 per Callinan J. More recent High Court authority has referred to proximity as a doctrine that is *"rejected"* ( ***Joslyn v Berryman*** [2003] HCA 34; (2003) 214 CLR 552 at [29]-[30], 563-564 per McHugh J; ***Graham Barclay Oysters Pty Ltd v Ryan*** [2002] HCA 54; (2002) 211 CLR 540 at [236], 624-625 per Kirby J) *"no longer … the criterion of a duty of care"* ( ***Graham Barclay Oysters Pty Ltd v Ryan*** at [99], 583 per McHugh J), *"one that has not served as a unifying doctrine"* ( ***Tame v New South Wales*** [2002] HCA 35; (2002) 211 CLR 317 at [53], 341 per Gaudron J), and *"not only difficult to define but difficult to apply"* ( ***Tame*** at [257] , 405 per Hayne J ). In ***Prestige Property Services Pty Ltd v Choi*** [2007] NSWCA 363 Mason P (with whom Hodgson JA and Handley AJA agreed) said at [36] that a submission that a duty of care was

based on proximity *"had an old-fashioned and unhelpful ring about it."* In my view, it is necessary to decide whether a duty of care was owed by looking in a more particular fashion at facts relating to the particular relationship in which Mr Stubbs and Mr Cook stood.

These requirements of nearness, hearness and dearness, or, as they have also been called, physical proximity, temporal proximity and relational proximity, have proved not only difficult to define but difficult to apply. They have led to the drawing of boundaries which it is said have insufficient basis in logic, or in a priori notions of justice, to command intellectual assent [295] . What is it about these boundary lines that warrants this criticism?

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[295] See, for example, *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 at 418 per Lord Oliver of Aylmerton; *Frost v Chief Constable of South Yorkshire Police* [1999] 2 AC 455 at 500 per Lord Steyn.

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258. Physical boundary lines (like the zone of impact or danger zone) are flawed because they treat the infliction of psychiatric injury as if it were no more than another form of insult to physical integrity no different in any relevant way from the bodily injury suffered by a person struck by a motor car. Temporal and relational boundary lines confine the class of those to whom a duty is owed in different ways but each seems unrelated to the nature of the injury suffered or to the way in which it may be brought about. Yet on further analysis, all three forms of boundary line (place, time, relationship) can be seen to find their roots in the common considerations mentioned earlier: the concern to limit recovery to the clearest cases, and the need to identify the class to whom a duty is owed.

259. Preservation of the physical integrity of the individual has long been of central concern to this and all other developed legal systems. Pursuit of that concern has been assisted by the capacity to observe and assess objectively the physical consequences of an intrusion on the physical integrity of an individual. By contrast, as noted at the outset of these reasons, the common law has long feared dealing with assaults upon mental integrity, for fear of being unable to distinguish between the real and the feigned consequences of such an assault. But even if it is now to be assumed that this difficulty has largely been overcome, there remains a considerable difficulty in identifying how and why particular psychiatric consequences come about. That is not to say that experts cannot say that a particular event did, or did not, play *a part* in bringing on the observed psychiatric illness, but what role did other events play in that onset? Were those other events just as important as the event which came about because of the defendant's negligence?

260. Death, disaster, shock and disappointment are an inevitable part of life. Everyone encounters such events throughout life. Each will have its effect on the individual. Should a defendant bear entire responsibility, then, for a psychiatric injury of which the defendant's negligent conduct may have been only one cause among many others encountered by the plaintiff in life? Should the defendant bear entire responsibility for all the consequences of which a negligent act was a cause, but which have seen many subsequent disturbing events of a kind to

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which all in society are exposed all too often in life? It is in these difficulties that the explanation for the law's focus on a singular "shocking" event to which the plaintiff was close in space or time are to be found.

261. Next, what are the consequences of a negligent act or omission that are to be held to be reasonably foreseeable? Is it likely that those consequences will ensue? What, if any, assumptions are to be made about the reactions of others to tragic or stressful events? If emotional distress is not to be compensable, but psychiatric injury is, what kinds of event can reasonably be foreseen to bring on psychiatric injury? Again, the explanation for the law's focus upon the person of ordinary fortitude as well as its concern for those related by close ties to the object of the shocking event may be found in considerations of this kind. Moreover, these considerations also play an important part in the decision to seek to deal with the matter at the level of duty of care and not at the level of breach of duty.

262. To deal with such considerations as posing questions about breach of duty or as questions of causation may not be easy. If reasonable foresight encompasses all that is not farfetched or fanciful [296] , the difficulties of predicting the likelihood of a person sustaining psychiatric injury present obvious difficulties at least at the level of considering breach of duty. The magnitude of risk in question (serious psychiatric injury) may be very large. Orthodox principle would then require consideration of breach of duty by reference to the degree of probability of occurrence of the risk, taken with the expense, difficulty and inconvenience of taking alleviating action and any conflicting responsibilities of the defendant [297] . How is that to be done? What knowledge of psychiatry is to be imputed to the reasonable person required to make some assessment of how probable it was that driving a motorbike carelessly will cause psychiatric injury to a pregnant woman unknown to the driver but "standing about 45 feet from the point of impact on the far side of a stationary tramwaycar from the platform of which she was unloading her basket" [298] ? What knowledge of psychiatry is to be imputed to the person who, in jest, threatens suicide and is overheard by a fellow employee [299] ? Is it sufficient to answer these questions by saying "act carefully and you will not be liable"? Is the law to provide a remedy for all but the farfetched or fanciful consequences of all careless conduct? Hitherto it has not.

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[296] *Wyong* (1980) 146 CLR 40 at 47 per Mason J.

[297] *Wyong* (1980) 146 CLR 40 at 47 per Mason J; *Nagle v Rottnest Island Authority* ( 1993) 177 CLR 423 at 431 per Mason CJ, Deane, Dawson and Gaudron JJ.

[298] *Hay or Bourhill v Young* [1943] AC 92.

[299] cf *Bunyan v Jordan* (1937) 57 CLR 1.

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*Jaensch v Coffey*

263. The way in which some of these matters have been reflected in decided cases may be illustrated by reference to *Jaensch v Coffey* [300] and, in particular, the reasons of Deane J. *Jaensch v Coffey* decided that a road user owed a duty of care to avoid psychiatric injury to the

wife of another road user where the psychiatric injury was sustained as a result of the plaintiff seeing her physically injured husband in hospital. Several features of those facts are notable. First, behind the event found to have brought on the plaintiff's psychiatric injury was an event, the road accident, brought about by the defendant's breach of a duty of care owed to another. Secondly, the plaintiff and the injured road user were related. Thirdly, the event found to trigger the plaintiff's injury (seeing her husband in hospital) was an event closely related in time (but not place) to the road accident of which the defendant's negligence was a cause. Various features of those facts were fastened upon as sufficiently establishing a relationship warranting a finding of the existence of a duty of care.

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[300] (1984) 155 CLR 549 .

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264. In his reasons for judgment [301] , Deane J founded a distinction between those who suffered psychiatric injury as a result of seeing an accident, or its aftermath, and those who suffered such an injury as a result of some more remote connection with the accident, upon considerations of what his Honour referred to as *causal* proximity as distinct from considerations of *physical* proximity to the accident.

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[301] (1984) 155 CLR 549 at 606607 .

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265. **Following paragraph cited by:**

Minister for the Environment v Sharma (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)

The distinction thus drawn is important for what it reveals about a deepseated, but often unremarked, difference between the paradigm case of physical injury and what are feared to be the more difficult and remote examples of psychiatric injury. Cases of physical injury often contain within their facts limiting features readily identified as providing a closeness of connection, an element of "proximity", between the negligent actor and the injured plaintiff. In such cases injury often results from direct physical contact between an item under the control of the actor and the injured plaintiff. This being so, scant attention need be, or ever has been, paid to "proximity" or some other feature intended to limit the class to whom the duty is owed. The class is limited by the nature of the harm inflicted and the mechanics of its infliction. And any difficult case is resolved by giving controlling significance to the importance of preserving bodily integrity.

266. By contrast, in the more difficult and remote examples of psychiatric injury, there is no evident *physical* connection between negligent act and resulting psychiatric injury. Rules

confining recovery for psychiatric injury to those within the area of impact or area of physical risk can be understood as seeking to deal with psychiatric injury by analogy with physical injury. But doing that seems to assume, wrongly, that the causes of psychiatric injury are not different in any relevant way from the causes of physical injury. Whether or not based in such a false assumption, it is an approach which gives primacy to what Deane J referred to as [302] "mechanical considerations of geographical or temporal proximity". This, as Deane J rightly concluded, should be rejected. Rather, having regard to considerations of what he described as "causal proximity", his Honour concluded [303] that Mrs Coffey was entitled to recover because her psychiatric injury resulted from "the impact of matters which themselves formed part of the accident and its aftermath" not "more remote consequences such as the subsequent effect of the accident upon an injured person". Mrs Coffey having sustained her injuries as a result of what she saw and heard at the hospital while her husband was undergoing immediate postaccident treatment there was, in his Honour's view, sufficient causal relationship between the negligent act which brought about the road accident and the psychiatric injury sustained as a result of Mrs Coffey's observation of its immediate aftermath.

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[302] *Jaensch v Coffey* (1984) 155 CLR 549 at 607.

[303] (1984) 155 CLR 549 at 606-608 .

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267. If mechanical considerations of geographical or temporal proximity are rejected, and I consider that they should be, rules of propinquity like the "danger zone", and rules requiring direct impact of events upon the senses of the plaintiff, must likewise be discarded. Indeed, the actual decision in *Jaensch v Coffey* , that Mrs Coffey could recover, denies the continued application of any such rules. Yet a distinction was drawn in that case between events forming part of the aftermath of the accident, and more remote events [304] . The drawing of that kind of distinction may suggest that the place and time at which the injury is said to have its origin is not irrelevant, but Deane J described its relevance as being found in considerations of *logical* or *causal* proximity [305] , not *physical* proximity.

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[304] (1984) 155 CLR 549 at 606 per Deane J.

[305] (1984) 155 CLR 549 at 607.

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268. The notion of "causal proximity" is not without its difficulty. Given that "proximity" is no longer seen as being a useful tool of analysis or even as a useful description of a mode of reasoning, it may be thought unproductive to seek to analyse what is meant by "causal proximity". But if the common law is to find a sure foundation upon which to rest the adoption of some test for the imposition of a duty of care in addition to foreseeability of the risk of injury of the relevant kind, it is necessary to try to understand what lies behind the adoption of concepts like causal proximity.

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269. One important thread in the reasons of Deane J in *Jaensch v Coffey* is the recognition that, in earlier decisions [306] , it had been suggested that liability for psychiatric injury would be denied if events or causes other than the defendant's negligent act had, or might have had, some causative effect in the onset of the plaintiff's injury. As Deane J said [307] :

> "It is somewhat difficult to discern an acceptable reason why a rule based on public policy should preclude recovery for psychiatric injury sustained by a wife and mother who is so devastated by being told on the telephone that her husband and children have all just been killed that she is unable to attend at the scene while permitting recovery for the reasonably, but perhaps less readily, foreseeable psychiatric injury sustained by a wife who attends at the scene of the accident or at its aftermath at the hospital when her husband has suffered serious but not fatal injuries."

Because Mrs Coffey's injury was found to have been brought about by matters said to be part of the accident and its aftermath, the causal link between the events which were found to have caused the injury and the negligent act was held to be sufficiently close to warrant recovery.

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[306] For example, *Hambrook v Stokes Bros* [1925] 1 KB 141 at 159 per Atkin LJ; *Bens on v Lee* [1972] VR 879; *Storm v Geeves* [1965] Tas SR 252.

[307] (1984) 155 CLR 549 at 608-609 .

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270. "Aftermath" is, of course, not a term of art and I would not understand it to have been used in *J aensch v Coffey* in a sense which sought to mark out an identified outer limit to recovery whether by marking some limit of time or circumstances. Rather, it was used to describe a conclusion that, in the facts of that case, the link between negligent act and psychiatric injury was clear and unaffected by other intervening causes or events. It is in that sense that aftermath should be understood.

271. In that respect, *Jaensch v Coffey* stands as but one case in a stream of cases underpinned by that idea. Requiring that there be a single "shocking" event, and that only a limited class of persons may recover from any psychiatric consequences of its occurrence, were thought to provide the necessary demonstration of clear and unclouded connection between negligent act and psychiatric harm. Excluding liability in cases where the plaintiff learned of the consequences of the defendant's negligence only some time after it had happened, and then only through the intermediation of another's account of the event or its consequences, avoided having to consider difficult questions of what causal significance should be attributed to the defendant's negligence and what causal significance should be attributed to the intermediary's manner of communicating the news. Confining liability to cases where a person of normal (or, as I later describe it, "reasonable or ordinary") fortitude would have suffered psychiatric injury gave content to a test of reasonable foreseeability by requiring consideration of how likely it was that the injury suffered would have followed from the defendant's negligence.

272. Underlying all three of these propositions (shocking event, directness of connection and reasonable or ordinary fortitude) can be seen the concern of the common law to confine

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recovery to only the clearest of cases. These mechanisms of control all have obvious connection with issues of causation and might, therefore, have been located in that aspect of the law of negligence, but hitherto they have found their principal expression in this area as propositions relevant to duty of care. They may therefore be said to reflect the fact that how and why psychiatric injury is suffered has, in the past, been very poorly understood. If that now can be shown to have changed, and if, as I have mentioned earlier, suitable criteria can be formulated for distinguishing between compensable harm (psychiatric injury) and noncompensable consequences (mere emotional distress) there may be force in saying that recovery should be extended beyond those cases which are identified in the ways I have mentioned. Even then proper regard must be paid to the need for the law of negligence to reflect community standards and understandings of what is meant by "reasonable". Only if that is done will the law effectively work its purpose of promoting socially responsible behaviour. To go beyond accepted standards and understandings of what is "reasonable" extends the law of negligence too far. It is for that reason that some control mechanism, beyond foreseeability of psychiatric harm, must be identified.

Control mechanisms – reasonable or ordinary fortitude

273. Reference to the person of reasonable or ordinary fortitude provides a very important limit to the duty of care to prevent psychiatric injury. It is a limit that should not be abandoned. Unless the defendant knew or ought reasonably to have known that want of reasonable care may injuriously affect a person whom the defendant knew or ought reasonably to have known was abnormally sensitive to the risk of psychiatric injury, the duty which the defendant owes should be held to be a duty to act with reasonable care not to cause psychiatric injury to a person of reasonable or ordinary fortitude.

274. In describing the duty in these terms, I use the words "reasonable or ordinary" as a portmanteau expression in which no distinction is to be drawn between the two epithets. Even so it must be recognised that requiring reference to the person of reasonable or ordinary fortitude may not be without difficulty. As Windeyer J pointed out in *Mount Isa Mines Ltd v Pusey* [308] , "the line of distinction postulated is not in any particular case easily drawn". But that will always be the case where a boundary must be identified between what is reasonable and what is not. Reasonable or ordinary fortitude is, and should be recognised to be, a control mechanism the application of which will require consideration of what, as a matter of general community expectation, could reasonably be foreseen to be the reaction of the reasonable or ordinary person to a particular kind of stressful event. Although expert psychiatric evidence may be relevant to the inquiry about how a reasonable or ordinary person might react, it is important to recognise that the test requires reference ultimately to what the lay member of the community may be expected to foresee.

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[308] (1970) 125 CLR 383 at 405.

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275. Reference to the person of reasonable or ordinary fortitude will, at least usually, be the only relevant control mechanism that will fall for consideration. The other matters that I have earlier identified as means adopted to confine recovery to cases in which the connection

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

between negligent event and psychiatric injury is clear and uncluttered by other considerations (shocking event and closeness of connection) are not ordinarily to be regarded as additional elements confining the class of persons to whom a duty of care to avoid psychiatric injury is owed. Like the duty of care with respect to *physical* injury, the duty of care with respect to *psy chiatric* injury framed, as I have said, by reference to the person of reasonable or ordinary fortitude, should then be held to be owed to *all* others to whom injury of that kind is reasonably foreseeable. To find that the duty is not otherwise limited (whether by considerations of nearness, hearness or dearness or by some other limiting mechanism) would treat the individual's interest in psychiatric integrity as being no less valuable, and no less worthy of protection, than that person's interest in physical integrity. It is a step that is consistent with what was decided in *Jaensch v Coffey* and the extension of the duty of care to those encountering the "aftermath" of an event. Stating the duty in the way I have does not mean, however, that the emphasis given in *Jaensch v Coffey* to causal connection, and the emphasis given in that and in earlier cases to a "shocking" event are considerations which are now to be discarded or ignored. But, so long as general community understandings of the way in which psychiatric injury comes about remain as they are, questions of shocking event and closeness of causal connection will most readily find reflection by reference to the person of reasonable or ordinary fortitude in the definition of duty of care.

276. **Following paragraph cited by:**

Minister for the Environment v Sharma (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)
State of New South Wales v Briggs (09 December 2016) (McColl, Ward and Leeming JJA)
Woolworths Limited v Perrins (27 October 2015) (Fraser and Gotterson JJA and McMeekin J,)
Panagiotopoulos v Rajendram (28 September 2007) (Tobias JA at 1; McColl JA at 2; Basten JA at 3)

In order to explain why that is so, it is necessary to remember that the order in which the constituent elements of the tort of negligence are considered at the level of theoretical analysis (first duty, then breach, and only then, damage) is often better inverted when considering a particular claim. As I said in *Modbury Triangle v Anzil* [309] :

> "Because the extent of a duty falls for decision in relation to 'concrete facts arising from real life activities' [310] it will not always be useful to begin by examining the extent of a defendant's duty of care separately from the facts which give rise to a claim."

As was the case in *Modbury Triangle* , in cases of psychiatric injury:

> "it is useful to begin by considering the damage which the plaintiff suffered, and the particular want of care which is alleged against the defendant. Asking then whether that damage, caused by that want of care, resulted from the breach of a

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

duty which the defendant owed the plaintiff, may reveal more readily the scope of the duty upon which the plaintiff's allegations of breach and damage must depend." [311]

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[309] (2000) 205 CLR 254 at 289-290 [103] .

[310] *Perre v Apand* (1999) 198 CLR 180 at 211 [80] per McHugh J.

[311] *Modbury Triangle* (2000) 205 CLR 254 at 290 [105] .

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277. If, then, a plaintiff alleges that psychiatric injury was suffered immediately upon the happening of a particular shocking event, the conclusion that the defendant breached a duty to take reasonable care not to cause psychiatric injury to a person of reasonable or ordinary fortitude may well be open. By contrast, the less evidently shocking the event caused by the defendant's negligence, and the longer the intervening chain of causation linking the event and the onset of psychiatric injury, the harder it will be for the plaintiff to establish that the defendant's breach of a duty to take reasonable care to avoid psychiatric injury to a person of reasonable or ordinary fortitude was a cause of the injury for which the plaintiff seeks damages. Even if it is established, by expert evidence, that the defendant's negligent act was a cause of the plaintiff's injury, the longer and the less obvious that this chain of causation is, the harder it is for the plaintiff to show that the duty which was breached was a duty to take reasonable care to avoid acts or omissions which could reasonably be foreseen to be likely to injure a person of reasonable or ordinary fortitude.

278. To adopt, and adapt, what I said in *Modbury Triangle* [312] , asking whether the damage suffered by the plaintiff in such a case, caused, as it was, by a want of care of the defendant, resulted from the breach of a duty to act with reasonable care to avoid psychiatric injury to a person of reasonable or ordinary fortitude is more likely to require a negative answer the longer and the less obvious the claim of causation.

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[312] (2000) 205 CLR 254 .

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279. This is not to deny the operation, in the realm of psychiatric injury, of a rule analogous to the "eggshell" skull principle. If the defendant was in breach of a duty to take reasonable care not to cause psychiatric injury to a person of reasonable or ordinary fortitude, the defendant must take the victim as found and will be responsible for all the consequences for the plaintiff that follow from the defendant's breach.

280. Questions of identifying a duty of care in relation to psychiatric injury are most difficult where there is no connection between plaintiff and defendant other than whatever connection is provided by the defendant's negligent conduct being said to be a cause of the plaintiff's psychiatric injury. It is in these kinds of case that it has been thought necessary to find

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

something more than foreseeability of the chain of events and consequences that has in fact occurred. That should not be permitted to obscure the fact that there will be cases in which there is a connection between the parties over and above that provided by the causal link between negligent conduct and psychiatric injury. It is as well to say something briefly about one aspect of such cases.

281. Where there is a relationship between plaintiff and defendant, such as that of employee and employer, and psychiatric injury is suffered in consequence of that relationship, it may readily be concluded that the relationship is such that the duties of care owed one to the other include a duty to take reasonable care to avoid inflicting psychiatric injury. Exactly the same considerations of the control that an employer has over the place and system of work which require finding that an employer owes a duty of care with respect to physical injury support a conclusion that a duty is owed to take reasonable care about the place and system of work so as to avoid psychiatric injury.

282. Cases where there is a relationship between the parties, like that of employee and employer, may, therefore, be thought to present separate questions about the application of a test of reasonable or ordinary fortitude [313] . Even in such cases, I tend to the view that the test of reasonable or ordinary fortitude should still be applied at least in the absence of the employer having particular knowledge of the employee's vulnerability. No doubt, the employee's safety is in the hands of the employer [314] . And it is because the employee's safety is in the employer's hands that the employer's duty is to take reasonable care to avoid exposing employees to unnecessary risks of injury [315] .

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[313] cf *Hatton v Sutherland* [2002] 2 All ER 1 at 1920 [43] per Hale LJ.

[314] *Kondis v State Transport Authority* (1984) 154 CLR 672 at 678 per Mason J.

[315] *Hamilton v Nuroof (WA) Pty Ltd* (1956) 96 CLR 18 at 25 per Dixon CJ and Kitto J; *Vozza v Tooth & Co Ltd* (1964) 112 CLR 316 at 319 per Windeyer J; *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301 at 307308 per Mason, Wilson and Dawson JJ, 313 per Brennan and Deane JJ.

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283. In any particular case, there may be real and lively debate about whether an employer ought reasonably to have been aware of the particular fragility of an employee, but, assuming that there is no reason for the employer to have been aware of that fact, there seems much force in the view that the employer's duty is then to be stated as a duty to take reasonable care to avoid psychiatric injury to an employee of reasonable or ordinary fortitude. It is, however, not necessary to decide that issue in these cases.

284. The two matters that are now before the Court require consideration of the principles with which I have dealt so far. Before doing that, however, it is as well to return to the second of the principal problems identified at the start of these reasons – the distinction between psychiatric injury and emotional distress. It is necessary to deal with that distinction because

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

its existence and its basis are fundamentally important to both the formation and the application of the principles which govern duty of care. In particular, the distinction provides important reasons for maintaining the test of reasonable or ordinary fortitude.

Psychiatric injury and emotional distress

285. In Australia and some other jurisdictions, but not in America [316] , the law has set its face against providing compensation for emotional distress as distinct from psychiatric injury. Those who are frightened by an event, but suffer no consequence beyond experiencing fear at the time, are to have no claim. Those who mourn the death of another and suffer grief at their loss, but no longterm consequence, again are to have no claim. How is the distinction to be made between compensable injury and noncompensable "ordinary" or "normal" emotional consequences?

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[316] See, for example, definition of emotional distress in *Restatement of Torts*, 2d, s 46 , Comment j, (1965).

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286. That psychiatry and psychology advanced great distances during the twentieth century may readily be accepted. It may also be accepted, with equal readiness, that there may be a radical difference between emotional responses to untoward events that are properly regarded as falling within the range of normal responses to the event, and a psychiatric illness that is brought on by that event. But if there is a difficulty it does not lie in distinguishing between cases at opposite edges of the field that is being considered. The important question is whether a satisfactory criterion can be identified which will distinguish cases that lie in the middle of that field.

287. The fact that psychiatry distinguishes between mere mental distress and psychiatric illness is an important first step in the inquiry. Recognising [317] that psychiatry sees that distinction as being one of degree, not kind, and accepts that the distinction may change as medical knowledge expands, presents difficulty.

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[317] *van Soest v Residual Health Management Unit* [2000] 1 NZLR 179 at 197.

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288. First, there is the fundamental problem of identifying the basis on which the distinction is to be made. If mental distress and psychiatric illness are the opposite ends of a continuous spectrum of consequences of an untoward event that are consequences not having an identifiable physical manifestation, how big is the middle band of that spectrum? How is that middle band to be divided?

289. Is it to be divided according to psychiatric opinion? That is, is the law to provide a remedy for any injury which prevailing psychiatric opinion would classify as a psychiatric illness? Or is the law to prescribe the criteria by which the distinction is to be made (no doubt leaving it

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

to the expert evidence of psychiatrists or other suitably qualified witnesses to reveal whether those criteria are met in a particular case)? Psychiatric illness cannot yet be correlated, in every case, with abnormality of physiological or biochemical brain function. Objectively verifiable proof of a psychiatric illness is not, or at least is not always, possible. Often, the patient's reporting of subjective matters such as thought processes and the like is critical to diagnosis.

290. What significance should be given to the effect of the relevant event on the plaintiff? Is the magnitude of that effect important? If, as seems to be the case, it is open to a psychiatrist to regard the patient's capacity to function in daily activities as an important, even perhaps determinative, feature distinguishing distress from illness, then should the law overtly recognise that it is the plaintiff's ability to continue to participate in (some?) (many?) (substantially all?) of that person's preaccident activities which will govern recovery? If it is thought that a test of this kind would be inappropriate, it would be wrong to adopt it in fact, but not in form, by deferring to a body of psychiatric opinion which used it. Much therefore turns on identifying the basis upon which the distinction between (compensable) psychiatric injury and (noncompensable) mental distress is to be made.

291. In undertaking that task, it is necessary to recall that the fact that there will be cases close to a boundary that is drawn between compensable and noncompensable events or conditions is an inevitable consequence of marking that boundary. To point to cases on either side of the line and remark on how close they are to the boundary, and thus to each other, is seldom a valid criticism of the boundary that is drawn. But if what I have called the middle band in the spectrum is large, it is evident that the application of the chosen criterion will be difficult and uncertain, and that there can be many cases close to each other, and to the boundary, which will attract conflicting outcomes.

292. Little explicit attention has been given to identifying the basis upon which the distinction between psychiatric injury and mental distress is to be made, beyond noting that it is only the former which is to be compensable. So far, the courts appear to have been content to defer to the way in which psychiatrists distinguish between the two [318] . That may not be surprising when it is recalled that decisions have focused upon the application of other limiting factors such as the requirement for something in the nature of a shocking event but its importance should not be ignored.

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[318] *Frost v Chief Constable of South Yorkshire Police* [1999] 2 AC 455 at 491 per Lord Steyn.

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293. That importance can be illustrated by considering posttraumatic stress disorder [319] . The revised fourth edition of the *Diagnostic and Statistical Manual of Mental Disorders* [320] (commonly referred to as "DSMIVTR") gives six diagnostic criteria for identifying posttraumatic stress disorder. Of those, the last is that "[t]he disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning". The diagnostic criteria also include criteria whose application depends upon the patient's report of subjective feelings of helplessness, fear, horror and the like. It is at these

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

points, of capacity to participate in ordinary activities, and reports of subjective feelings, that the intersection between law and medicine may be thought to present difficulties. No doubt it is the difficulty of identifying that intersection which explains why the introduction to DSM-IVTR says[321] that: "[W]hen the DSM-IV categories, criteria, and textual descriptions are employed for forensic purposes, *there are significant risks that diagnostic information will be misused or misunderstood*. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis." (emphasis added)

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[319] cf *Morris v KLM Royal Dutch Airlines* [2002] 2 WLR 578; [2002] 2 All ER 565.

[320] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 4th ed, Text Revision (2000) at 468.

[321] *Diagnostic and Statistical Manual of Mental Disorders*, 4th ed, Text Revision (2000) at xxxiixxxiii.

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294. The problem is not just a problem of articulating appropriate and relevant criteria for distinguishing compensable conditions from the noncompensable. Once it is recognised that capacity to participate in ordinary activities is, not surprisingly, an important consideration for a psychiatrist treating a patient, and that the psychiatrist, again not surprisingly, is concerned to deal with the patient according to that patient's history and presentation rather than by reference to some objective inquiry into the truth of that history and presentation, it is clear that there truly is an "imperfect fit" between the questions of ultimate concern to the law and those of concern to the clinician. The psychiatrist treating a patient is concerned to look backwards only for the purpose of identifying present and future treatment. In particular, determining the cause of an existing condition is important to the discipline of psychiatry only for the light it sheds on future treatment. But for a legal system which assigns responsibility *o nly* if there is fault, the focus on cause is critical to that task of assigning responsibility.

295. Those problems are further complicated by the law's need to treat like cases alike. If, as now appears to be the case, symptoms similar to, if not identical with, those of posttraumatic stress disorder can be brought on by exposure to a succession of traumatic events, as may be the case with a police officer, firefighter, or other emergency worker, how is the law to deal with such a case? Is there to be a distinction drawn between the worker whose job inevitably requires repeated contact with distressing events and the individual who suffers like consequences as the result of a singular event? What of the individual whose loved one, critically injured in an accident, is reduced to a persistent vegetative state and who then reaps the consequences of the resulting stress and strain only long after the original accident? Is the law to have any regard to the circumstances that led to the plaintiff's condition beyond the fact that the negligence of the defendant was *a cause* of that condition?

296. **Following paragraph cited by:**

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

Nationwide News Pty Ltd v Naidu (21 December 2007) (Spigelman CJ at 1; Beazley JA; Basten JA)

Hitherto, the law has responded to these questions by confining recovery to cases in which psychiatric consequences could be foreseen as occurring to a person of reasonable or ordinary fortitude. That response shifts the focus from the psychiatrist's understanding of what has brought about the particular condition of the patient (an understanding based in critically important respects on what the *patient* reports of his or her symptoms) to a qualitative, and necessarily inexact, but nonetheless objective standard of reference (the person of reasonable or ordinary fortitude). That shift of focus reflects a conclusion that to permit recovery for whatever prevailing psychiatric opinion recognises as a form of psychiatric injury in every case where negligent conduct of the defendant can be causally related to its onset would allow recovery in circumstances that stretch the bounds of recovery beyond what is socially useful. Any decision about what is, or is not, socially useful is, by its very nature, contestable. In particular, deciding the kinds of circumstances in which the tort of negligence should allow recovery for psychiatric injury requires the identification of the preferred rule rather than the identification of a single correct answer to a logical puzzle. In choosing the rule that is to be preferred, this Court should, in my view, be slow to disturb what, until now, has been a generally accepted understanding of the relevant principles. Of course, achieving a coherent and logical development of the common law is a very important consideration. But, when it is recognised that duty of care is the means by which the common law has developed to restrain the tort of negligence within acceptable limits, there is no lack of logic or disconformity with other aspects of the law of negligence in recognising that a plaintiff will *not* recover damages for an injury which psychiatric opinion recognises as a psychiatric injury by demonstrating only that such an injury was reasonably foreseeable and that the defendant's negligence was a cause of the injury which the plaintiff sustained.

297. The facts and circumstances which give rise to the two particular matters before the Court are sufficiently described in the reasons of other members of the Court. I do not repeat them except to the extent necessary to explain my reasons.

Clare Janet Tame v The State of New South Wales

298. **Following paragraph cited by:**

State of New South Wales v Cullen (20 December 2024) (Gleeson, White and Kirk JJA)

Police officers investigating possible contravention of the law do not owe a common law duty to take reasonable care to prevent psychiatric injury to those whose conduct they are investigating. Their duties lie elsewhere and to find a duty of care to those whom they investigate would conflict with those other duties [322] .

[322] *Sullivan v Moody* (2001) 75 ALJR 1570; 183 ALR 404.

299. Mrs Tame committed no offence but, having been the driver of a motor car involved in an accident, police were doing no more than their duty in investigating whether there had been a breach of the law. In undertaking that task they were bound by numerous obligations and restraints, both statutory and common law. To impose upon them a further duty to take reasonable care to avoid psychiatric injury to a person whose conduct was being investigated would constrain their proper performance of those other duties.

300. Moreover, although this is reason enough to conclude that Mrs Tame's claim must fail, I agree with McHugh J that, for the reasons he gives, it was not reasonably foreseeable in this case that a person of reasonable or ordinary fortitude would suffer psychiatric injury. I agree that the appeal should be dismissed.

Leslie Annetts & Anor v Australian Stations Pty Limited

301. The issue tried separately in this matter was tried on some admitted facts and on the assumption that some further facts, pleaded in the statement of claim, were true. Those facts included that the plaintiffs were the parents of James Annetts, a 16 year old boy who had been employed by the defendant as a jackeroo at the time of his death in the Gibson Desert as a result of dehydration, exhaustion and hypothermia. The plaintiffs were told, in December 1986, that their son was missing and, on being told this, the first plaintiff collapsed. Despite search and inquiry James was not found until, in April 1987, his remains, and the remains of another boy, were found in the Gibson Desert.

302. James was not of full age. For the purposes of the separate trial of an issue it was to be assumed that the plaintiffs "had made inquiries of the servants or agents of the Defendant in relation to the arrangements for the safety of [James] and had received assurances in relation to his safety". And, of course, those assurances were sought and obtained in circumstances where the child was not only to be employed by the defendant but was to live away from home and at his place of work.

303. On the exiguous facts which found the question presented for separate decision, I would hold that the defendant did owe each plaintiff a duty to act with reasonable care not to cause psychiatric injury to a parent of reasonable or ordinary fortitude. It must now be accepted that there are circumstances in which a parent, of reasonable or ordinary fortitude, may suffer psychiatric injury on account of the death of a child. The treatment of *Chester v Waverley Corporation* [323] in *Jaensch v Coffey* requires that conclusion. As Deane J said in *Jaensch v Coffey* [324] :

> "It must now be accepted that the conclusion of Evatt J is, on the facts in *Chester* , plainly to be preferred to that of the majority."[325]

Further, the same conclusion can be reached by another path.

[323] (1939) 62 CLR 1 .

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

[324] (1984) 155 CLR 549 at 590591 .

[325] See also per Gibbs CJ at 551, Brennan J at 565.

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304. The relationship which existed, between the parents of a child and the defendant for whom and at whose premises the child was to work and to live, may readily be seen to be a relationship in which the defendant may owe the parent a duty to take reasonable care not to cause psychiatric harm to parents of reasonable or ordinary fortitude by reason of the negligent causing of injury or death to the child. It is a relationship not different in any relevant way from the relationship considered in *Pusey* [326] . There, an employer was found liable to an employee for psychiatric injury caused by the negligent infliction of injury to another employee. Although the relationship between plaintiffs and defendant in this case was not that of employees and employer, the position of the plaintiffs as parents of an employee who was not of full age and who was committed by them to the care and control of the defendant both during and outside working hours should not be considered to be different in any relevant respect from the relationship between employee and employer which founded the duty held to exist in *Pusey* . They, as parents, owed duties to James. These they sought to fulfil by committing him to the care of the defendant. They, like an employee, gave his safety into the hands of the employer. For these reasons, the defendant owed the plaintiffs a duty to take reasonable care to avoid psychiatric injury to parents of reasonable or ordinary fortitude in consequence of the defendant negligently causing death or injury to their son.

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[326] (1970) 125 CLR 383 .

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305. What, then, of considerations of "shocking" event and closeness of connection? For the reasons given earlier, I do not consider that either of those matters affects the finding of a duty of care in the terms I have described. They may, however, take on considerable significance in deciding whether the duty described was breached. What would be the reaction of a parent of reasonable or ordinary fortitude? That is not a question which must be answered now.

306. It follows that the issue tried separately should have been resolved in the plaintiffs' favour. I agree with the orders proposed by Gummow and Kirby JJ.

307. CALLINAN J. The question which these cases, which were heard together, raise, is what conditions must be satisfied for the recovery of damages for nervous shock.

308. Psychiatric illness is different from physical injury in one respect at least. Usually, that traumatic physical injury has occurred, and the effect of it, except perhaps for some soft tissue injuries, can be objectively verified and measured by skilled physical examination, modern pathology and radiology. Despite many advances in the diagnosis of psychiatric illness, whether, and the extent to which it exists in a particular patient will almost invariably depend, in some measure at least, upon the reliability of the patient's own utterances. Some time ago now civil courts took the view that a defendant was bound to take his victim as he found

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

him. This was no doubt a pragmatic decision dictated by the undesirability of a defendant's being able to escape liability, no matter how culpable his behaviour might have been, on the basis that he was unaware of the plaintiff's special susceptibility. There is no doubt that physical insult will cause injury to tissue or bone or both. Ordinary experience tells however that not all people will react in the same way to a harrowing event, although some predictions can fairly readily be made: the closer the relationship between the victim, the primary sufferer, and the secondary victim, the person affected by the spectacle of the injury to the primary victim, the greater will be the chance of psychiatric or psychological injury to the secondary victim; secondly, the shorter the period between the infliction of the injury to the primary sufferer, and the observation or awareness of the causative event and its immediate aftermath, the less reluctant courts have been to allow a claim by a secondary sufferer, again on the pragmatic basis that the law prefers a case in which cause and effect are direct, proximate and discernible. There may be some events, which, if sufficiently graphically described, or reproduced electronically, are so catastrophic and distressing that practically everyone hearing of, or seeing them reproduced with a degree of contemporaneity to their occurrence, will be affected mentally in greater or lesser degree. Such events are highly newsworthy and the media are fully entitled, indeed, in a practical sense, obliged to report them. So too, the unenviable duty of informing relatives and others of personal tragedy lies upon police, ambulance officers, military personnel and other officials from time to time. As with some claims for pure economic loss and negligent misstatement, there is potential, if they were to be admitted, for indeterminate loss to an indeterminate number of people. The matters to which I have referred have all influenced, and have operated as constraints upon the development of a principled, expansive set of rules to compensate sufferers of psychiatric injury, or, as it has been called in the cases and the texts, nervous shock. To call it nervous shock is more than a mere matter of convenient shorthand. The term "nervous shock" well conveys the idea of an extremely sudden, unexpected, highly disturbing, or nerve racking event of the kind for which the courts have generally consistently looked as a precondition to the recovery of damages.

309. These two cases raise for consideration the questions: first, as to which conditions the law has, until now, in this country, required to be satisfied for the admission of a claim for damages for nervous shock; and secondly, whether the conditions should be softened or reduced, or reformulated, and whether clear, expansive principles to govern these and future cases should be stated. Those questions are better answered by reference to the particular facts of the cases.

**TAME v THE STATE OF NEW SOUTH WALES**

310. The appellant was physically injured in a collision between motor vehicles, of one of which she was the driver, that occurred on 11 January 1991. The accident was caused by the negligence of the driver of the other vehicle, Mr Lavender. It was the practice for a report in a standard form of such an accident to be prepared by a police officer or officers. One purpose of such a report was to enable consideration to be given to the bringing of a prosecution for either a traffic or a criminal offence. The appellant accepts that a police officer would ordinarily have authority to initiate a prosecution of either kind. Another purpose was to enable statistics relating to motor vehicle accidents to be kept and used to devise means for the prevention of motor accidents in the future.

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

311. This accident was investigated by Constable Morgan. On his arrival at the scene of it, the appellant was trapped in her vehicle. She was freed from the vehicle and a sample of her blood was obtained at a hospital and analysed. That analysis indicated that there was no alcohol in her bloodstream. Mr Lavender's blood was also analysed and alcohol was there detected. Constable Morgan, who prepared much of the standard form of report, did not complete the section of it in which the blood alcohol content of the appellant and Mr Lavender should have been recorded. Subsequently, by mistake, another police officer, Acting Sergeant Beardsley, attributed Mr Lavender's blood alcohol content to the appellant[327]. Later the erroneous entry in the form was corrected to indicate the absence of any alcohol from the appellant's bloodstream.

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[327] By consent in this Court, Constable Morgan has been dismissed from the proceedings. It is accepted that the remaining respondent should be liable, if liability be established, for Acting Sergeant Beardsley's negligence.

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312. The appellant claimed damages in respect of her physical injuries, which in turn had produced a psychological condition which also became the subject of her claim. That claim was settled. A problem arose however over the payment of a physiotherapist's accounts. The appellant spoke to her solicitor, Mr Weller, about the accounts. In the course of a later conversation, in June 1992, the solicitor asked her whether she had been drinking alcohol at the time of the accident. He told her that the police report indicated that she had been. The appellant said that she was horrified, because she had a particular aversion to drink driving: she had previously worked as a nurse and had seen its effects in hospitals. Mr Weller told her that the police report showed that she had a blood alcohol reading more than three times the permissible content shortly after the accident. She said that she was very shocked: it was like a blow. She was worried about how many people would be told or otherwise might come to know of the contents of the report.

313. After speaking to her solicitor the appellant telephoned the relevant police station. The officer to whom she spoke there asked what she expected him to do about the matter as the papers were with the Penrith Court. He said to her, "You know it's a mistake." The appellant then made the irrational assumption that her physiotherapy bills were not being paid because of the blood alcohol entry in the report. She became obsessed about the matter, and talked about it all the time.

314. The appellant then sued the respondent in the District Court of New South Wales for negligence. The claim was that, on learning of the error in the report, she suffered pain, injury, loss, and damage: "a severe shock [nervous shock] ... so traumatic and distressing as to affront or insult her mind"; a post-traumatic stress disorder, depression, adjustment disorder, anxiety states, and exacerbation of the physical injuries she had suffered in the collision.

315. The action was tried by Garling DCJ. His Honour made these findings about foreseeability [328] :

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

[328] (1998) Aust Torts Reports ¶81-483 at 65,203.

> "I believe it is reasonable to say in 1991 that the [respondent] knew, or should have known, the importance attached to a P4 police report. They were used constantly by the courts, by legal practitioners, by insurance companies and other bodies and everyone relied on their accuracy, and particularly relied on their accuracy as to factual matters such as the recording of a blood alcohol reading.
>
> I am satisfied it was foreseeable that an injured driver who was not at fault in the accident would, or could, seek compensation and that the insurance company would, or could, rely to an extent and indeed to a great extent on the information contained in the police report and it was important for that reason to be accurate when filling it in. It is also in my opinion foreseeable that a person of good character who was careful not to drink and drive, who had a vulnerable personality, may suffer a psychological injury by being told that the form recorded that she had a high blood alcohol reading and further, that that information had gone to other people and that such a reaction to this careless act could have been foreseen by the officer at or about the time he was filling in this form."

His Honour then said [329] :

> "I am of the opinion that the [appellant] has established foreseeability and proximity. The [respondent] knew, or should have known, that one of the drivers would or could have been affected by the mistake and the [appellant] has established negligence."

He later made these findings about causation [330] :

> "I am satisfied and find that as a result of being told and as a result of the mistake being made on the P4 police report as to the blood alcohol reading the [appellant] suffered a psychotic depressive illness and a post-traumatic stress disorder. I find that they are injuries."

[329] (1998) Aust Torts Reports ¶81-483 at 65,203.

[330] (1998) Aust Torts Reports ¶81-483 at 65,206.

316. In the result, Garling DCJ gave judgment for the appellant in the sum of $115,692.

317. The respondent appealed against this judgment to the Court of Appeal of New South Wales [331] . The appellant cross-appealed with respect to the trial judge's order for costs seeking them on an indemnity and not the usual party and party basis.

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

[331] (2000) 49 NSWLR 21 .

318. **Following paragraph cited by:**

State Transit Authority of New South Wales v Fritzi Chemler (18 September 2007) (Spigelman CJ ; Basten JA ; Bryson AJA)

In the Court of Appeal, Spigelman CJ and Mason P (Handley JA agreeing) held that causes of action for pure psychiatric illness were distinct from claims based upon physical injury; that no duty of care was owed to a plaintiff unless a person of normal fortitude would suffer psychiatric injury by the negligent act or omission of the defendant, subject to an exception in the case of a defendant with knowledge of a particular susceptibility of the plaintiff; that the "eggshell psyche" rule applied after a determination had been made that a person of normal fortitude would suffer some injury; that the psychiatric injury suffered by the appellant would not have been suffered by a person of normal fortitude; and, that a necessary element of a cause of action for pure psychiatric injury was that it be occasioned by a shock in the sense of a sudden sensory perception.

319. Mason P (with whom Handley JA agreed) decided that no duty of care was owed to the appellant as the risk of psychiatric illness which she suffered was not reasonably foreseeable. His Honour was also of the opinion that the appellant did not suffer psychiatric injury by shock. All members of the Court agreed that the damages were too remote. The respondent's appeal was therefore upheld.

320. As will appear, I am in agreement with the decision of the Court of Appeal, and in general with their Honours' reasoning.

The appeal to this Court

321. The appellant appeals to this Court on the following grounds:

"… that the New South Wales Court of Appeal erred in holding that:

(a) Causes of action for pure psychiatric illness are distinct from claims based on physical injury;

(b) No duty of care is owed to a plaintiff unless a person of normal fortitude would suffer psychiatric injury by the negligent act or omission of the defendant unless the defendant has knowledge of any particular susceptibility of the plaintiff;

(c) The 'eggshell psyche' rule applies after a determination has been made that a person of normal fortitude would suffer some injury.

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

(d) The psychiatric injury suffered by the Appellant would not have been suffered by a person of normal fortitude;

(e) No duty of care was owed to the Appellant as the risk of psychiatric illness which she suffered was not reasonably foreseeable;

(f) A necessary element in a cause of action for pure psychiatric injury is that it must be occasioned by a shock in the sense of a sudden sensory perception;

(g) The Appellant did not suffer injury by shock;

(h) The damages suffered by the Appellant were too remote to be recoverable."

322. The respondent has filed a notice of contention that the respondent was entitled to succeed on the following additional grounds:

"1. The risk of any psychiatric injury to the Appellant was not foreseeable.

2. The foreseeability of psychiatric injury to a person is an objective test and a reasonable person could not have foreseen the extraordinary reaction the [appellant] was found to have suffered by the trial judge.

3. The risk of any psychiatric injury was far-fetched and fanciful on the evidence and findings in this case.

4. There was no proximity between the [appellant] and the [respondent] in time and space, or by way of special relationship or otherwise, and that the document containing the error (P4) was a private document although available generally to members of the public on payment of a fee.

5. The method of communication (namely through a third person and by telephone at a time well after the error) was such that a claim for nervous shock should not be available in law.

6. There was no sudden shock to the senses of the [appellant].

7. The mistaken entry itself did not cause or materially contribute to the condition of the [appellant].

8. The [appellant's] belief (if such it was) that the error affected the attitude of the insurer to payment of expenses and other matters under the motor accidents claim which contributed to her psychiatric condition was not caused or materially contributed to by the erroneous entry. The error was irrelevant to the causation of the psychiatric condition.

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

9. The Court of Appeal was correct in interpreting the eggshell skull principle to apply as to amount of injury suffered and not as to whether psychiatric injury was likely to be suffered or was a foreseeable risk.

10. The [appellant] was not a reliable witness nor a witness of truth."

323. Whilst it may be accepted that a plaintiff is entitled to avail herself of whatever remedies are available to her, it is important that a decision and the reasoning leading to it, in an unusual case, which this one is, be in harmony with, so far as is possible, available related causes of action, and the common law as a whole or, as it was put by this Court in *Sullivan v Moody* [332] , that they not offend the "coherence of the law." The facts of this case might conceivably have given rise to actions in negligent misstatement (if that action is not confined to claims for economic loss) and defamation. That these causes of action may also be available on the facts of the case, and would then be governed by special rules affected by policy considerations, is relevant to the question whether the appellant should recover damages for "nervous shock" on the basis of those facts. As to the former cause of action, Barwick CJ in *Mutual Life & Citizens' Assurance Co Ltd v Evatt* said [333] :

> "But I think it is quite clear that the relationship of proximity, adequate for compensation of injury caused by physical acts or omissions, would be inappropriate in the case of utterance by way of information or advice which causes loss or damage. The necessary relationship in that connexion must needs be more specific."

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[332] (2001) 75 ALJR 1570 at 1580 [55]; 183 ALR 404 at 416.

[333] (1968) 122 CLR 556 at 566.

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324. Later his Honour emphasised the necessity for a relationship between the parties [334] :

> "However, in the case of utterance, though the duty will arise out of circumstances which create the requisite relationship, there is one distinguishing feature to which I ought to advert, a feature which is not present or rather certainly not universally present in the case of the relationships which give rise to a duty of care in the case of physical acts or omissions. The information or advice will be sought or accepted by a person on his own behalf or on behalf of another identified or identifiable person or on behalf of an identified or identifiable class of persons. The person giving the information or advice must do so willingly and knowingly in the sense that he is aware of the circumstances which create the relevant relationship. He must give the information or advice to some identified or identifiable person in the given circumstances of the implications of which he is, or ought to be, aware. The identity and position of the recipient of the utterance form part of the relevant circumstances. It is this seemingly 'bilateral' aspect of the necessary relationship which, it seems to me, inclines the mind to the use of the expression 'assumption of responsibility' to describe the source of the duty of care and to the employment of concepts of consensus and contract, in the

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

explanation of the emergence of the duty of care in utterance. But, though the willingness of the speaker to give or the giving of the information or advice can be described as an acceptance of the duty to be careful in the sense that having in the circumstances a choice to speak or to remain silent, or perhaps to speak with reservation (a matter to which I will later revert), the speaker elects to speak and thus by his voluntary act attracts the duty to be careful both in preparing himself for what he says and in the manner of saying it, yet, in my opinion, the resulting cause of action is tortious and in no sense arises ex contractu, or by reason of any consensus, or any assumption of responsibility by the speaker. The duty of care, in my opinion, is imposed by law in the circumstances."

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[334] (1968) 122 CLR 556 at 569-570 .

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325. Many controls and special defences, both statutory and at common law, ordinarily operate to restrict claims in defamation; for example, defences of qualified and absolute privilege, and the need for a plaintiff to prove absence of good faith on the part of the defendant.

326. The first case in this Court in which a claim for damages for purely psychological or psychiatric harm arising from a plaintiff's observation of an horrific injury to another was allowed was *Mount Isa Mines Ltd v Pusey* [335] . Barwick CJ thought it a special and distinguishing feature of that case that the observer and the observed were co-employees [336] . Windeyer J was similarly careful to confine the decision to its own special facts [337] . His Honour acknowledged that the attitude of the common law courts to cases of nervous shock had been pragmatic rather than principled [338] :

"The ways in which the law of liability for nervous shock has been developed by courts in England and here, and extended to new situations, have been empirical, with results and limitations that appear as pragmatical rather than as logical applications of principle. That does not mean that I think that cases are to be decided by a matching in detail of the facts of one case against those of another. But it does mean that in this field it is peculiarly true that circumstances alter cases. In the United States too similar questions have arisen. The answers there have varied in different courts and at different times; and the topic has produced much academic commentary."

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[335] (1970) 125 CLR 383 .

[336] (1970) 125 CLR 383 at 389.

[337] (1970) 125 CLR 383 at 407.

[338] (1970) 125 CLR 383 at 407.

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327. Later his Honour said this [339] :

> "… I do not question decisions that nervous shock resulting simply from hearing distressing news does not sound in damages in the same way as does nervous shock from witnessing distressing events. If the sole cause of shock be what is told or read of some happening then I think it is correctly said that, unless there be an intention to cause a nervous shock, no action lies against either the bearer of the bad tidings *or the person who caused the event of which they tell*. There is no duty in law to break bad news gently or to do nothing which creates bad news." (emphasis added)

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[339] (1970) 125 CLR 383 at 407.

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328. I do not think that anything turns in this case upon whether the appellant would seek to identify the injury as nervous shock, or a psychiatric or psychological injury. Unless the latter actually follows, damage will not have been suffered or will only have been nominal in impact. Nervous shock is, as I have indicated, a convenient term which well expresses necessary elements of the cause of action.

329. From time to time, various tests of liability have been proposed, and, as here in the Court of Appeal, adopted, that liability should only exist if these conditions are satisfied: that it was foreseeable that the "event" would cause psychiatric injury to a person of normal fortitude; additionally, that there has been a close physical or temporal connexion with the event; or, that there existed, to use the language of Barwick CJ in *Mutual Life & Citizens' Assurance*, an identified "bilateral" relationship between the parties [340] .

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[340] (1968) 122 CLR 556 at 569-570 .

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330. The imposition of special rules or hurdles for plaintiffs who have suffered nervous shock to surmount has been criticised. A particularly vociferous one was recently made by Thomas J in *van Soest v Residual Health Management Unit* [341] in describing the current state of the law on this topic as indefensible. His Honour, after reviewing the cases and referring to various academic texts, said this [342] :

> "… I contend for a more principled approach. Liability should simply be founded on the foreseeability of psychiatric injury. Reasonable foreseeability would be the sole test of liability for nervous shock. Such factors as the relationship between the parties, the claimant's location at the time of the trauma, the means of knowledge of it and other issues will be relevant to establish the causative link between the tortious conduct and the plaintiff's mental condition."

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

In this country, however, it is well established that foreseeability alone will not suffice to give rise to a duty of care. In *Jaensch v Coffey* [343] , a nervous shock case, Gibbs CJ and Deane J made this clear. Deane J explained why this was so in this way [344] :

> "It is not and never has been the common law that the reasonable foreseeability of risk of injury to another automatically means that there is a duty to take reasonable care with regard to that risk of injury: cf per du Parcq LJ, *Deyong v Shenburn* [345] ; *Edwards v West Herts Group Hospital Management Committee* [346] ; and per Lord Reid, *McKew v Holland and Hannen and Cubitts (Scotland) Ltd* [347] . Reas onable foreseeability on its own indicates no more than that such a duty of care will exist if, and to the extent that, it is not precluded or modified by some applicable overriding requirement or limitation. It is to do little more than to state a truism to say that the essential function of such requirements or limitations is to confine the existence of a duty to take reasonable care to avoid reasonably foreseeable injury to the circumstances or classes of case in which it is the policy of the law to admit it. Such overriding requirements or limitations shape the frontiers of the common law of negligence. They may apply to preclude altogether the existence of a duty of care in particular circumstances (see, eg, *Rond el v Worsley* [348] ) or to limit the content of any duty of care or the class of persons to whom it is owed (see, eg, *Hedley Byrne & Co Ltd v Heller and Partners Ltd* [349] ) or the type of injury to which it extends: see, eg, *Best v Samuel Fox & Co Ltd* [350] and, generally, the discussions in the judgments in *The Dredge 'Willemstad' Case* [351] and *L Shaddock & Associates Pty Ltd v Parramatta City Council* [352] ."

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[341] [2000] 1 NZLR 179 at 200 [78] .

[342] [2000] 1 NZLR 179 at 202 [86] .

[343] (1984) 155 CLR 549 .

[344] (1984) 155 CLR 549 at 583.

[345] [1946] KB 227 at 233.

[346] [1957] 1 WLR 415 at 420, 422; [1957] 1 All ER 541 at 545, 547.

[347] [1969] 3 All ER 1621 at 1623.

[348] [1969] 1 AC 191 .

[349] [1964] AC 465 .

[350] [1952] AC 716 .

[351] (1976) 136 CLR 529 .

[352] (1981) 150 CLR 225 .

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

331. Of course, unless injury is foreseeable, there can be no liability. I agree with the holding of the Court of Appeal as to this aspect of the case. This appeal must fail at that threshold. This is so despite the psychiatric evidence before the Court that a psychiatrist might well have foreseen that a normal person might suffer the psychiatric injury that the appellant alleged she suffered. It is one thing for a psychiatrist to know and understand that events of the kind which occurred here, the entry, and its communication, were capable of causing a psychiatric injury to either a vulnerable or a phlegmatic person. It is an entirely different thing to attribute that knowledge, indeed even a suspicion of it, to a police officer carrying out a duty of completing a standard form of report. This is an entirely different case from either *Pusey* or *Jaensch* , cases in which a traumatic event or its horrific aftermath (as opposed to the making of a patent clerical error and its communication) was witnessed by, or the fact of it was communicated to, a person or persons in a close, temporal and personal relationship with the immediate victim of the event. To say all of this is not merely to recognise, or prescribe special rules to apply to cases of nervous shock. It is also to give effect to the sometimes overlooked touchstone, of reasonableness, in examining and judging a defendant's notional or actual expectations, knowledge and conduct. The criticisms so persuasively made in this case by McHugh J[353] of the departures, in recent years by courts from the touchstone of reasonableness, and the realities of ordinary life, should in future be heeded by all courts.

[353] At [101], [113].

332. There are other reasons why this appeal should fail. This is a case in which the injury was caused by the communication of the fact of an event, the making of an erroneous entry by a person who had no intention to cause nervous shock. It is therefore a case within the exception stated by Windeyer J in *Pusey* [354] to which I have referred and which, in my opinion, with one qualification that I will discuss in *Annetts*, expresses the current law on this topic.

[354] (1970) 125 CLR 383 at 407.

333. I am also of the opinion that this appellant was especially vulnerable. Indeed, the accident itself had caused her to suffer a psychiatric condition as well as physical injury. Dr Helen Mitchell, a psychiatrist called on her behalf, wrote this of her on 26 April 1996:

> "[I]t seemed pretty clear to me that immediately after the accident [the appellant] was in a state of shock. From this, not surprisingly, she developed the characteristic signs and symptoms of a Post-Traumatic Stress Disorder with attendant nightmares, flashbacks and generalised anxiety ... [T]here seems to have been a chain of traumatic incidences streaming from this."

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

Another psychiatrist, Dr Phillips, on 9 April 1997, recorded that the appellant had told him that she had been rendered psychologically vulnerable by adverse events in her early life of which she gave details which need not be repeated here.

334. Nervous shock cases, as with economic torts, do stand in a separate category from cases of torts involving physical injury. They have stood apart for a long time. Courts should be slow to do what legislators have abstained from doing. Nervous shock and its psychiatric consequences stand apart from physical injury because, although susceptibility to psychiatric injury may vary from person to person, everyone knows, and can foresee, that physical trauma will inevitably cause physical injury. Everyone is susceptible to all forms of physical injury, although the impact of its consequences may vary from person to person. On the other hand, not everyone would react and suffer psychiatrically as this appellant did. Accordingly, except for cases of bilateral relations of the kind discussed by Barwick CJ in *Mutual Life & Citizens' Assurance*, the duty to act or abstain from acting so as not to cause nervous shock can be no more than the duty not to do acts which will foreseeably cause nervous shock to a person of ordinary fortitude [355] . The evidence here was very clearly to the effect that the appellant was not a person of ordinary fortitude.

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[355] *Jaensch v Coffey* (1984) 155 CLR 549 at 556 per Gibbs CJ.

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335. In *Sullivan* , the Court referred to *Hill v Chief Constable of West Yorkshire* [356] in this way [357] :

> "In *Hill v Chief Constable of West Yorkshire* ,[358] the House of Lords held that police officers did not owe a duty to individual members of the public who might suffer injury through their careless failure to apprehend a dangerous criminal. Lord Keith of Kinkel pointed out [359] that the conduct of a police investigation involves a variety of decisions on matters of policy and discretion, including decisions as to priorities in the deployment of resources. To subject those decisions to a common law duty of care, and to the kind of judicial scrutiny involved in an action in tort, was inappropriate."

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[356] [1989] AC 53 .

[357] (2001) 75 ALJR 1570 at 1580 [57]; 183 ALR 404 at 416.

[358] [1989] AC 53 .

[359] [1989] AC 53 at 63.

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336. **Following paragraph cited by:**

In *Sullivan* , reference was made to the statutory scheme which the defendants there were implementing, a scheme relevantly for the protection of children [360] . The administrative scheme here has a number of purposes: to provide statistical information with a view, presumably, to exploring means for the prevention of accidents; to facilitate the investigation of accidents; to assist in the bringing of criminal or quasi-criminal proceedings in respect of them; and, perhaps other administrative purposes. There is a question here of the kind which was answered in the negative in *Sullivan* : whether the lawful administrative purposes of the scheme and its implementation are reconcilable with the imposition of a duty not to cause psychiatric injury to persons the subject of a relevant report. The other reasons which I have given for the denial of this appeal make it unnecessary to pursue that question here.

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[360] (2001) 75 ALJR 1570 at 1580 [62]; 183 ALR 404 at 417.

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337. For the reasons given, the appeal should be dismissed with costs.

**ANNETTS & ANOR v AUSTRALIAN STATIONS PTY LTD**

338. The following are the facts upon which the Court has to make its determination at this interlocutory stage of the proceedings.

339. The respondent is the owner and operator of large and remote cattle stations in Western Australia. Mr Loder was a manager employed by the respondent. James Annetts was only 16 years old in August 1986 when he went to work for the respondent as a jackaroo on Flora Valley, one of the respondent's stations. The respondent knew that the applicants, James' parents, relied on it to supervise their son "as a 16-year-old child" and that they "entrusted" it with his care and welfare.

340. Before James left home Mrs Annetts telephoned Mrs Loder to inquire about the conditions in which James would be living and the supervision that would be provided. Mrs Loder told Mrs Annetts that James would be working at Flora Valley under constant supervision and would be sharing a room with one to four other men, that all of his meals would be supplied for him, and that he would be well looked after. On the day after James arrived at Flora Valley, Mrs Annetts telephoned Mrs Loder to check that he had arrived safely.

341. James spent only seven weeks at Flora Valley. On 13 October 1986, Mr Loder sent him to work alone as caretaker at Nicholson Station, about 100 kilometres east of Flora Valley and about 270 kilometres north of Balgo. On 3 December 1986 the respondent learned that James was missing. On that date Mr Loder had reason to suspect that James was in grave danger of injury or death. The applicants were not informed that James was missing until three days later.

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

342. On 6 December 1986, a police officer at Griffith, New South Wales, telephoned Mr Annetts and told him that James was missing from his place of employment and was believed to have run away. Mr Annetts collapsed and Mrs Annetts continued the telephone conversation.

343. An intensive search was undertaken for James and another teenager, Simon James Amos who had been employed by the respondent as a jackaroo at a different station. Thereafter, the applicants had a number of telephone conversations with police officers at Halls Creek police station, Mr Loder, and other people in the Halls Creek area about the search for their son. In January 1987, the applicants went to Halls Creek where they remained for four to five days. They were then shown some of their son's belongings, including a hat covered in blood. Thereafter, several times until the end of April 1987, the applicants went to the Halls Creek area to attempt to obtain information about James.

344. On 26 April 1987, Mr Annetts was informed by telephone that the vehicle driven by James had been found bogged in the desert but that there were no signs of any people around it. Later that day, he was told that two sets of remains had been found nearby. On 28 or 29 April 1987, Mr Annetts, alone, returned to Halls Creek. At the police station, he was shown a photograph of a skeleton which he identified as being that of James.

345. **Following paragraph cited by:**

Cosio & Cosio (No 4) (06 September 2024) (Schonell J)

> 20. As referred to earlier, the Further Amended Notice of Appeal comprised more than 120 contentions as to error. In the course of oral argument, two sub-grounds of Ground 2 were abandoned. Such an extensive miscellany of asserted error may, contrary to the appellant's propositions, demonstrate that in fact no ground has merit ( *Thorne v Kennedy* (2017) 263 CLR 85 at [49] ; *Tame v New South Wales* (2002) 211 CLR 317 at [345] ; *Penrith Whitewater Stadium Ltd v Lesvos Pty Ltd* [2007] NSWCA 103 at [8] ).

The parties accept that James "died on or about 4 December 1986 in the Gibson Desert some 133 kilometres south of Balgo as a result of dehydration, exhaustion and hypothermia". The applicants knew therefore, with certainty, of his death almost five months after it occurred. They were far away from him when he died.

The proceedings at first instance

346. Mr and Mrs Annetts sued the respondent for damages for psychiatric injury in the Supreme Court of Western Australia on the basis that the respondent's negligence caused the death of James and that the same negligence caused them that injury. To have sent James, an inexperienced 16 years old boy, a virtual child, to live alone at Nicholson Station, where it could be expected that the isolation might drive him to a desperate or reckless act, was, it was

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

alleged, negligent. Other allegations of negligence included, providing James with a defective and unsuitable motor car, and failing to establish proper lines of radio communications between James and Flora Valley Station.

347. On the application of the respondent the Supreme Court of Western Australia ordered that a preliminary issue be decided: in substance, assuming the facts set out above, did the respondent owe the applicants a duty of care? The question was tried and answered adversely to Mr and Mrs Annetts by Heenan J.

348. Heenan J accepted that the possibility of psychiatric injury to the applicants was foreseeable but said that by reason of "a combination of principle, policy and common sense" the courts had applied concepts of "proximity" and an "aftermath" test to decide an issue of the kind that arose here [361] . Neither of the applicants was entitled to recover damages because, his Honour said, "they were separated in time as well as in space from the distressing events" and their only knowledge of the death of James was gained by "communication by telephone" [362] . His Honour concluded by saying [363] :

> "But [the applicants'] involvement in and perception of the events which led to their son's death were remote. In my opinion, they were not sufficiently close to give rise to a duty of care owed to the [applicants] by the [respondent]."

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[361] (2000) Aust Torts Reports ¶81-564 at 63,803.

[362] (2000) Aust Torts Reports ¶81-564 at 63,810.

[363] (2000) Aust Torts Reports ¶81-564 at 63,810-63,811 .

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The appeal to the Full Court of Western Australia

349. In the Full Court [364] , Ipp J, who gave the principal judgment (with which Malcolm CJ and Pidgeon J agreed) took a different view of foreseeability of psychiatric injury by the respondent from Heenan J who had adopted some observations of Lord Oliver of Aylmerton in *Alcock v Chief Constable of South Yorkshire Police* [365] :

> "The traumatic effect on, for instance, a mother on the death of her child is as readily foreseeable in a case where the circumstances are described to her by an eye witness at the inquest as it is in a case where she learns of it at a hospital immediately after the event. Nor can it be the mere suddenness or unexpectedness of the event, for the news brought by a policeman hours after the event may be as sudden and unexpected to the recipient as the occurrence of the event is to the spectator present at the scene."

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[364] (2000) 23 WAR 35 .

[365] [1992] 1 AC 310 at 411.

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

350. Even assuming however, contrary to his own opinion, that psychiatric injury was foreseeable, his Honour was of the view that another necessary element, "of harm caused by a sudden shock to the senses" was absent. As to that, Ipp J said [366] :

> "After 6 December 1986, the [applicants] must gradually have come to realise that, in the harsh, desert-like area where James was missing, the probabilities were that he would have died. As the weeks and months went by, those probabilities must have strengthened. In the circumstances, the final confirmation of James' death that the [applicants] received at the end of April 1987, when Mr Annetts identified the remains from the photograph, cannot be regarded as a sudden sensory perception of a distressing phenomenon."

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[366] (2000) 23 WAR 35 at 56.

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351. Ipp J dealt separately with proximity, beginning with a reference to the speech of Lord Goff of Chieveley in *White v Chief Constable of South Yorkshire Police* [367] to the effect that the plaintiff must, in a case of psychiatric injury, establish three matters: "(1) a close tie of love and affection to the immediate victim; (2) closeness in time and space to the incident or its aftermath; and (3) perception by sight or hearing, or its equivalent, of the event or its aftermath." Proximity, in the opinion of Ipp J, was still a necessary element in cases of tort, especially of a tort alleged to have caused psychiatric injury. After copious reference to *Jaens ch v Coffey* [368] in this Court, and other domestic and international authority, his Honour concluded on this issue as follows [369] :

> "On the basis of the material to which I have referred, the overwhelming weight of authority is to the effect that the [applicants] are required to show that they were in a relationship of proximity to the respondent as explained by Deane J in *Jaensch v Coffey* . This approach satisfies the policy considerations that I earlier identified, allows the law in this area to proceed casuistically, and enables the legal position to be established without undue uncertainty. I propose to follow it."

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[367] [1999] 2 AC 455 at 472.

[368] (1984) 155 CLR 549 .

[369] (2000) 23 WAR 35 at 60.

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352. The next matter with which his Honour dealt was the need for direct perception. This, Ipp J said, was a settled requirement of the law of England and of Canada at an intermediate

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

appellate level[370], although the Australian position remained uncertain. However, there were dicta, of Windeyer J in *Mount Isa Mines Ltd v Pusey* [371] and Brennan J in *Jaensch* [372] , which required, on balance, that there be direct perception of a relevant shocking event. This led his Honour to say [373] :

> "On the basis of the direct perception requirement, the [applicants] have not established the requisite degree of proximity under either of the scenarios I have postulated. Apart from the occasion (in January 1987) when Mr Annetts saw a blood covered hat belonging to James, and when he identified James' remains (from a photograph seen some five months after his death), they did not directly perceive the consequences of the respondent's breach of duty. I do not consider the two instances I have mentioned as satisfying the requirement."

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[370] There is an aspect of proximity, however, that requires additional elaboration, namely, the question whether a plaintiff has directly to perceive the phenomenon or its aftermath, or whether it is sufficient if the plaintiff is informed of the consequences of the phenomenon.

[371] (1970) 125 CLR 383 at 407.

[372] (1984) 155 CLR 549 at 567.

[373] (2000) 23 WAR 35 at 61.

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353. Ipp J did however go on to discuss the position on the basis that direct perception of the "phenomenon" was not an absolute requirement. His Honour said [374] :

> "But the telephone call [on 6 December 1986] involved merely a statement by the police officer that James had run away and was missing. On the admitted and assumed facts, nothing was said as to when he had run away and for how long he had been missing. Nothing was said about his condition. No facts were given that made the situation particularly horrifying. I realise that some of these matters concern the requirement of sudden shock, but they also bear on causal proximity. I would add that nothing in the admitted and assumed facts indicates that there were other circumstances, bearing upon the information conveyed by the telephone call, that were capable of reinforcing the element of causal proximity. Importantly, the [applicants] were not present to perceive the actual circumstances under which James was missing. The [applicants] were far away from the relevant events. There was a complete absence of geographic proximity."

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[374] (2000) 23 WAR 35 at 62.

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**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

354. Ipp J also thought it desirable to deal with a submission that the applicants had relied on the respondent. His Honour said [375] :

> "I think it desirable that I should comment on the 'reliance' placed by the [applicants] on the respondent to 'supervise' James, and the respondent's knowledge that the [applicants] would suffer 'particular distress' should it fail properly to do so, and thereby cause James to die in the desert. I accept that these facts assist the [applicants] to some relatively minor degree in establishing the requisite proximity, but I do not regard them as being otherwise of particular significance. On the admitted and assumed facts, the [applicants] did not alter their position or take or refrain from taking steps because of their reliance on the respondent. There was no contractual or other relationship known to the law between the respondent and the [applicants]. The reliance so placed by the [applicants] on the respondent was not akin to that placed by parents, say, on a nurse whom they employ to care for their child, where a direct relationship arises. The reliance was similar to that placed by all caring parents on employers of their adolescent children. In my view, such reliance is a relevant but incidental aspect of the proximity inquiry."

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[375] (2000) 23 WAR 35 at 62-63 .

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355. The appeal to the Full Court was therefore dismissed.

The appeal to this Court

356. At the outset it is important to point out that it was the applicants' case that the breach of duty relied on was a breach of the duty of care owed to the applicants by the respondent as an employer of the applicants' child. The way in which the applicants alleged a relationship of proximity is important.

> "The Plaintiffs and the Defendant were at all material times in a relationship of proximity arising from the following facts and matters:
>
> (a) the Defendant knew the Plaintiffs were the parents of the Deceased;
>
> (b) the Plaintiffs had made inquiries of the servants or agents of the Defendant in relation to the arrangements for the safety of the Deceased and received assurances in relation to his safety;
>
> (c) the Defendant knew that if there was a breach of the duty of care owed to the Deceased, that he may die in circumstances of particular distress to his parents having regard to his manner of death namely perishing in the desert;
>
> (d) the Defendant knew of the ongoing concern of the Plaintiffs in relation to the supervision of the Deceased and were on notice by

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

reason of their earlier and ongoing inquiries that if there was a breach of the duty of care owed by the Defendant as the employer of the Deceased to the Deceased that there was a foreseeable risk that the parents would suffer not only a grief reaction but in addition a reaction extending beyond grief to an entrenched psychiatric condition of the type which has since developed;

(e) the Plaintiffs also allege that as parents of the Deceased they were within the range of persons who an employer owed a duty of care to and that breach of the employer's duty of care resulting in death to a young employee such as the Deceased, would be likely to cause psychiatric injury to near relatives;

(f) the Plaintiffs relied upon the Defendant to supervise the Deceased as a 16 year old child and entrusted [it] with his care and welfare, a matter about which the Defendant knew or ought to have known."

357. I endorse the applicants' submission that by reason of the relationship of proximity identified in the paragraphs above, the respondent owed a duty of care to the applicants as the parents of the deceased, and that as his employer it would exercise reasonable care in the supervision of him, and otherwise in the system of work that was put in place, so as to not be in breach of its obligation to him in circumstances which could and did cause his death. By reason of the facts and matters set out above the respondent acted in breach of the duty of care it owed to the deceased thereby causing psychiatric harm to his parents, the applicants.

358. There were, in this case, three bilateral relationships of the parties of the kind to which Barwick CJ referred in the context of negligent misstatement in *Mutual Life & Citizens' Assurance Co Ltd v Evatt* [376] : employer (the respondent) and employee and person whose safety was the subject of a special assurance (James); parents (the applicants) and child (James); and the assured of James' safety and welfare (the applicants) and assurer (the respondent). There may even have been a fourth, arising out of the other three, and the child's youth, a relationship which placed the respondent *in loco parentis* to the child, but this was not pleaded.

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[376] (1968) 122 CLR 556 at 570.

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359. I should state at the outset, that I find myself in disagreement with a number of the ultimate findings of the Full Court. It is open for me to do so as the findings relate to matters of inference. I will start by stating what those matters are, and my reasons for disagreeing with them.

360. That psychiatric injury might be suffered by his parents, upon communication: of the news that James was missing; was still the subject of a search in the desert; or that his vehicle had been found bogged in a remote place; or that remains and objects likely to be his had been found; or that his skeleton had been found: or on the viewing of the photograph of his skeleton: was each, or in combination foreseeable. Whether this is so does not depend upon

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

any special psychiatric training or knowledge. The loss of a young child in a parent's lifetime is one of the saddest events that a parent can suffer. That it occurred in harsh, lonely conditions in the circumstances of one or other of the "bilateral relationships" which existed here leads inevitably to a conclusion that psychiatric harm might foreseeably be suffered.

361. Furthermore, the circumstances of James' disappearance and death, and their necessary, entirely proper communication to his parents could well, and reasonably foreseeably inflict psychiatric harm upon stoic parents, let alone parents of only ordinary fortitude. Deprivation of a loved one through misfortune may be one thing, the death of a 16 years old boy in respect of whom solemn assurances were given and broken by his employer, and the breaking of which led to an horrific death is an entirely different matter.

362. Ipp J was of the opinion that to ground liability there must be a sudden shock. The modern basis for this is to be found, in this country, in the judgment of Brennan J in *Jaensch* [377] :

> "A plaintiff may recover only if the psychiatric illness is the result of physical injury negligently inflicted on him by the defendant or if it is induced by 'shock'. Psychiatric illness caused in other ways attracts no damages, though it is reasonably foreseeable that psychiatric illness might be a consequence of the defendant's carelessness."

Brennan J said [378] :

> "I understand 'shock' in this context to mean the sudden sensory perception – that is, by seeing, hearing or touching – of a person, thing or event, which is so distressing that the perception of the phenomenon affronts or insults the plaintiff's mind and causes a recognizable psychiatric illness. A psychiatric illness induced by mere knowledge of a distressing fact is not compensable; perception by the plaintiff of the distressing phenomenon is essential. If mere knowledge of a distressing phenomenon sufficed, the bearers of sad tidings, able to foresee the depressing effect of what they have to impart, might be held liable as tortfeasors."

What his Honour says in that passage is consistent with the approach of Windeyer J in *Pusey* [379] . Ipp J pointed out, that the same or a similar view had been adopted in England in *White v Chief Constable of South Yorkshire Police* [380] , *Alcock v Chief Constable of South Yorkshire Police* [381] and in Canada in *Rhodes v Canadian National Railway* [382] .

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[377] (1984) 155 CLR 549 at 565.

[378] (1984) 155 CLR 549 at 567.

[379] In *Jaensch v Coffey* (1984) 155 CLR 549 at 609, Deane J also refers to *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 407 per Windeyer J.

[380] [1999] 2 AC 455 .

[381] [1992] 1 AC 310 .

[382] (1990) 75 DLR (4th) 248 .

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

363. I would, with respect, adopt the definition of Brennan J in *Jaensch* of "shock" as a "sudden sensory perception … by seeing, hearing or touching … of a person, thing or event". As always however some questions of degree will be involved. As Windeyer J said in *Pusey* [383] , circumstances alter cases. I would therefore read the dictum of Windeyer J that I have quoted as being subject to a qualification that an intention to cause nervous shock, will not be a necessary requirement in a communication case, when the "bad news" is especially horrific, and it is conveyed to, and in respect of persons in a special "bilateral" relationship or relationships as here existed. For the purposes of this case it is not necessary to seek to define which relationships will suffice. As has often been said, particularly in this field of tort law, and other similarly exceptional fields, of pure economic loss and negligent misstatement, the common law should only proceed incrementally.

[383] (1970) 125 CLR 383 at 407.

364. Here the condition posited by Brennan J in *Jaensch* is in my opinion satisfied. There was a perception. The news of it came, as it were, "out of the blue". The contents of the first telephone call must have come as a thunderclap to the applicants. It was perceived by hearing. It was a communication of an horrific event. Every subsequent communication and viewing were successive thunderclaps, perceived by hearing and seeing, and separately and cumulatively were capable of causing nervous shock.

365. The next question is of the need or otherwise, for direct perception, which Ipp J regarded as synonymous with an actual observation of an event, or of its relatively immediate aftermath. For reasons which will appear, I think that this requirement also, which however I would express in a slightly qualified and different form from Ipp J, was satisfied. I would regard a requirement of direct perception as being no more than a requirement that, by one or other of the senses, a "bilaterally related person" perceive, or come to know of, or realise, at the time of, or as soon as is practicable after its occurrence, a shocking event or its shocking aftermath. So long as, in the case of non-contemporaneity, the lapse of time would not have caused a person of normal fortitude to have reached a settled state of mind about the event, the temporal connexion will be capable of existing. What happened here is capable of satisfying that requirement. That is so whether the "event" is to be regarded as communication by the first telephone call, or the subsequent calls, the viewing of James' effects, the sighting of the photograph, or a combination of one or more of these.

366. In my opinion, the reasons for judicial caution in cases of nervous shock remain valid, as do the principles formulated by the courts in this country to give effect to that caution. The principles may need to be refined as new situations, and improvements in the professional understanding, diagnosis and identification of psychiatric illness occur. Those principles are currently in summary these. There must have occurred a shocking event. The claimant must have actually witnessed it, or observed its immediate aftermath or have had the fact of it communicated to him or her, as soon as reasonably practicable, and before he or she has or should reasonably have reached a settled state of mind about it. The communicator will not

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

be liable unless he or she had the intention to cause psychiatric injury, and was not otherwise legally liable for the shocking event. A person making the communication in the performance of a legal or moral duty will not be liable for making the communication. The event must be such as to be likely to cause psychiatric injury to a person of normal fortitude. The likelihood of psychiatric injury to a person of normal fortitude must be foreseeable. There need to exist special or close relationships between the tortfeasor, the claimant and the primary victim. Those relationships may exist between employer and employee and co-employees and relationships of the kind here in which an assurance was sought, and given, and dependence and reliance accordingly ensued. Other relationships may give rise to liability in future cases. A true psychiatric injury directly attributable to the nervous shock must have been suffered. The evidence in this case, if accepted could satisfy all of those conditions.

367. I would therefore grant special leave, uphold the appeal, and order that the question posed by the Supreme Court of Western Australia be answered "yes". The respondent should pay the appellants' costs at first instance, in the Full Court and in this Court.

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## Cited by:

Vaughan [2025] FedCFamC1A 155 (28 August 2025) (Schonell J)

8. The applicant's Draft Notice of Appeal comprises some 40 grounds. As Austin J observed in *G arside* [2024] FedCFamC 1A 250:

> 35. While such an expansive catalogue of alleged errors might tend to conceal an essential ground ( *Thorne v Kennedy* (2017) 263 CLR 85 at [49] ), it is more likely none of the grounds are meritorious when they are pleaded with such prolixity and repetition ( *Tame v NSW* (2002) 211 CLR 317 at 345 ; *Penrith Whitewater Stadium Ltd v Lesvos Pty Ltd* [2007] NSWCA 103 at [8] ).

Karpik v Carnival plc (The Ruby Princess) [2025] FCAFC 96 -
Tsiragakis v Mallet [2025] VSCA 134 -
Tsiragakis v Mallet [2025] VSCA 134 -
Tsiragakis v Mallet [2025] VSCA 134 -
Tsiragakis v Mallet [2025] VSCA 134 -
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Tsiragakis v Mallet [2025] VSCA 134 -

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

Tsiragakis v Mallet [2025] VSCA 134 -
Tsiragakis v Mallet [2025] VSCA 134 -
Tsiragakis v Mallet [2025] VSCA 134 -
Tsiragakis v Mallet [2025] VSCA 134 -
Tsiragakis v Mallet [2025] VSCA 134 -
Tsiragakis v Mallet [2025] VSCA 134 -
Tsiragakis v Mallet [2025] VSCA 134 -
Tsiragakis v Mallet [2025] VSCA 134 -
Aslett & Coren [2025] FedCFamC1A 92 (10 June 2025) (Jarrett and Strum JJ; McClelland DCJ)

43. The appellant's amended Notice of Appeal reduced his grounds of appeal from 61 grounds and sub-grounds, to 25 grounds and sub-grounds. Even with those amendments, it is apt to observe that, in *Scrymegeour & Scrymegeour* (2014) FLC 93-600 at [24] , Ryan and Austin JJ cited with approval McHugh J in *Tame v New South Wales* (2002) 211 CLR 317 at [70] where his Honour said (citing Ruggero Aldisert J, *Opinion Writing* (West Publishing, 1990, p.89) that, where there is "an appellant's brief containing seven to ten points or more, a presumption arises that there is no merit to *any* of them" (emphasis in original). In *Scrymegeour* at [25] , their Honours also referred to the decision of Campbell JA in the NSW Court of Appeal in *Du rham v Durham* (2011) 80 NSWLR 335 at 353, with whom Tobias and Young JJA both agreed at 341 and 353, to similar effect. See also *Sieger & Department of Communities and Justice* [2020] FamCAFC 172 at [19]–[22] ).

Golden v Howard [2025] NSWCA 117 -
Beckford [2025] FedCFamC1A 84 -
Sofia & Treacy (No 2) [2025] FedCFamC1A 10 -
Zyma & Begum [2025] FedCFamC1A 11 -
Ming & Leong [2025] FedCFamC1A 3 -
Garside [2024] FedCFamC1A 250 -
State of New South Wales v Cullen [2024] NSWCA 310 -
State of New South Wales v Cullen [2024] NSWCA 310 -
State of New South Wales v Cullen [2024] NSWCA 310 -
Lederer Group Pty Ltd v Hodson [2024] NSWCA 303 -
Lederer Group Pty Ltd v Hodson [2024] NSWCA 303 -
Lederer Group Pty Ltd v Hodson [2024] NSWCA 303 -
Lederer Group Pty Ltd v Hodson [2024] NSWCA 303 -
Lederer Group Pty Ltd v Hodson [2024] NSWCA 303 -
Lederer Group Pty Ltd v Hodson [2024] NSWCA 303 -
Lederer Group Pty Ltd v Hodson [2024] NSWCA 303 -
Rex & Arata [2024] FedCFamC1A 242 -
Elisha v Vision Australia Limited [2024] HCA 50 -
Bird v DP (a pseudonym) [2024] HCA 41 -
Carusi v St Mary's Anglican Girls School Inc [2024] WASCA 137 -
Carusi v St Mary's Anglican Girls School Inc [2024] WASCA 137 -
Ridge & Hurley [2024] FedCFamC1A 206 -
Cosio & Cosio (No 4) [2024] FedCFamC1A 149 (06 September 2024) (Schonell J)

20. As referred to earlier, the Further Amended Notice of Appeal comprised more than 120 contentions as to error. In the course of oral argument, two sub-grounds of Ground 2 were abandoned. Such an extensive miscellany of asserted error may, contrary to the appellant's propositions, demonstrate that in fact no ground has merit ( *Thorne v Kennedy* (2017) 263 CLR 85 at [49] ; *Tame v New South Wales* (2002) 211 CLR 317 at [345] ; *Penrith Whitewater Stadium Ltd v Lesvos Pty Ltd* [2007] NSWCA 103 at [8] ).

Krupin & Krupin (No 2) [2024] FedCFamC1A 146 (28 August 2024) (Aldridge, Jarrett and Campton JJ)

11. Each ground then goes on to refer to a number of identified paragraphs of the reasons. In total, 102 paragraphs out of the 194 paragraphs of the judgment are said to be affected by

error. It does not specify the nexus between each identified paragraph of the reasons and the ground under which the paragraph number is recorded. As recently observed by this Court in *Jess & Jess (No 5)* (2024) FLC 94-190 (Alstergren CJ, Austin & Williams JJ):

> 44. It is timely to recite the tenet that multiple grounds of appeal can conceal an essential ground ( *Thorne v Kennedy* (2017) 263 CLR 85 at [49] ). Indeed, we are entitled to be circumspect about the merit of all grounds when they are pleaded in such a loquacious and confounding way ( *Tame v NSW* (2002) 211 CLR 317 at 345 ; *Penrith Whitewater Stadium Ltd v Lesvos Pty Ltd* [2007] NSWCA 103 at [8] ).

Griffin v Brisbane City Council [2024] QCA 157 -
Griffin v Brisbane City Council [2024] QCA 157 -
Griffin v Brisbane City Council [2024] QCA 157 -
Medical Council of New South Wales v Mooney [2024] NSWCA 180 -
Lietzau & Lietzau [2024] FedCFamC1A 94 -
Cavar v Campbelltown Catholic Club Ltd [2024] NSWCA 126 -
Jess & Jess (No 5) [2024] FedCFamC1A 85 -
Lestari & Hidayat [2023] FedCFamC1A 213 -
Austen v Tran [2023] ACTCA 44 -
Keighley & Keighley [2023] FedCFamC1A 146 -
Bachman & Self [2023] FedCFamC1A 50 -
Bersee v State of Victoria [2022] VSCA 231 (26 October 2022) (Beach, Niall and Macaulay JJA)

98. As Gleeson CJ said in *Tame* the issue is bound up with the question of whether it is reasonable to require a person to have in contemplation the risk of injury that has eventuated. [55] For that reason it is not the same as predictable. As Spiegelman CJ observed in *Nationwide News Pty Ltd v Naidu*:

> The reasoning and result in *Koehler* confirms this analysis. It may well be the case that it is now well established that workplace stress, and specifically bullying, can lead to recognised psychiatric injury. That does not, however, lead to the conclusion that the risk of such injury always requires a response for the purpose of attributing legal responsibility. Predictability is not enough. [56]

Bersee v State of Victoria [2022] VSCA 231 -
Bersee v State of Victoria [2022] VSCA 231 -
Bersee v State of Victoria [2022] VSCA 231 -
Bersee v State of Victoria [2022] VSCA 231 -
Kozarov v Victoria [2022] HCA 12 -
Maidment & Insley [2022] FedCFamC1A 48 -
Minister for the Environment v Sharma [2022] FCAFC 35 (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)

774. Any liability of the Minister in negligence is created by the common law: *Lipohar v The Queen* [1999] HCA 65; 200 CLR 485 at [52] (Gaudron, Gummow and Hayne JJ). Common law damages claims for mental injury suffered as the result of the perception of physical injury to or the death of others are leading illustrations of the need to examine the circumstances in which an injury is alleged to have been suffered, and to examine the precise nature of the injury, in order to determine whether a duty of care is to be recognised at common law in respect of an individual claimant. So much is clear from the leading cases on these questions, including: *Jaensch v Coffey* [1984] HCA 52; 155 CLR 549; *Tame* ; *Gifford v Strang Patrick Stevedoring Pty Ltd* [2003] HCA 33; 214 CLR 269; and *King v Philcox* [2015] HCA 19; 255 CLR 304. No party argued that any provisions of the State and Territory legislation introduced following the *Review of the Law of Negligence* conducted by the panel chaired by the Hon Justice Ipp, that impose control mechanisms on liability in tort such as s 34 and s 45 of the *Civil Law (Wrongs) Act 2002* (ACT) were picked up by s 79 of the *Judiciary Act 1903* (Cth) , or via

any common law choice of law rules picked up by s 80 . In relation to the Australian Capital Territory legislation it is to be noted that an enactment of the Territory Assembly does not bind the Crown in right of the Commonwealth except as provided by regulation: *Australian Capital Territory (Self-Government) Act 1988* (Cth), s 27 ; and see, *Australian Capital Territory (Self-Government) Regulations 2021* (Cth), s 5 .

Cavanagh v Manning Valley Race Club Ltd [2022] NSWCA 36 (15 March 2022) (Leeming JA, Simpson AJA and N Adams J)

22. In [15] and [16], the primary judge reproduced a passage from *Tame v New South Wales* (2002) 211 CLR 317; [2002] HCA 35 and a passage from *Seltsam Pty Ltd v McNeil* [2006] NSWCA 158; 4 DDCR 1 at [36] , both dealing with the class of risks against which a defendant is required to take steps. The judgment then continued at [17]-[19] as follows:

> "[17] There is no evidence that it was well known in industry that a movement repeated once every minute created a foreseeable risk of musculoskeletal injury.
>
> [18] Ms Weigal [sic] cites the results of studies undertaken between 2000 and 2011 by experts from the University of New South Wales to the effect that repetitive work in which the neck is flexed more than 20° for more than two thirds of working time is significantly associated with the development of rotator cuff syndrome. This does not assist the plaintiff.
>
> [19] I am unable to find that Mr Cavanagh's work created a foreseeable risk of injury sufficient to impose a duty upon his employer to take precautions against that risk. There must be judgement for the defendant." (emphasis in original)

Minister for the Environment v Sharma [2022] FCAFC 35 -
Minister for the Environment v Sharma [2022] FCAFC 35 -
Minister for the Environment v Sharma [2022] FCAFC 35 -
Minister for the Environment v Sharma [2022] FCAFC 35 -
Minister for the Environment v Sharma [2022] FCAFC 35 -
Minister for the Environment v Sharma [2022] FCAFC 35 -
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Minister for the Environment v Sharma [2022] FCAFC 35 -
Minister for the Environment v Sharma [2022] FCAFC 35 -
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Minister for the Environment v Sharma [2022] FCAFC 35 -
Minister for the Environment v Sharma [2022] FCAFC 35 -
Minister for the Environment v Sharma [2022] FCAFC 35 -
Khan v R [2022] NSWCCA 47 -
Khan v R [2022] NSWCCA 47 -
Orr v Hunter Quarries Pty Ltd [2022] NSWCCA 39 -
Dhupar v Lee [2022] NSWCA 15 -
Dhupar v Lee [2022] NSWCA 15 -
Emson & Makin [2022] FedCFamC1A 5 -
Cheng v Lam [No 2] [2021] WASCA 196 (25 November 2021) (Murphy JA, Beech JA, Vaughan JA)

76. Regrettably, Mary advances 12 grounds of appeal, some with subgrounds. The assertion that the primary judge made 12 appellable errors in 10 pages of reasoning to his Honour's conclusions calls to mind what McHugh J said in ***Tame v New South Wales*** [43] as to the unlikelihood of a judge making so many errors.

*via*

[43] ***Tame v New South Wales*** [2002] HCA 35; ( 2002) 211 CLR 317 [70].

Cheng v Lam [No 2] [2021] WASCA 196 -
Cheng v Lam [No 2] [2021] WASCA 196 -
Mohareb v State of New South Wales [2021] NSWCA 278 -
GR Engineering Services Ltd v Investmet Ltd [2021] WASCA 136 -
GR Engineering Services Ltd v Investmet Ltd [2021] WASCA 136 -
Zaghloul v Bayly [2021] WASCA 125 (19 July 2021) (Murphy, Mitchell and Vaughan JJA)

Tame v New South Wales [2002] HCA 35 ; (2002) 211 CLR 317

Zaghloul v Bayly [2021] WASCA 125 -
Robertson v State of Queensland & Anor [2021] QCA 92 -
Robertson v State of Queensland & Anor [2021] QCA 92 -
Capar v SPG Investments Pty Ltd t/as Lidcombe Power Centre [2020] NSWCA 354 -
Superannuation & Corporate Services Pty Ltd v Turner [2020] NSWCA 246 -
East Metropolitan Health Service v Ellis (by his next friend Christopher Graham Ellis) [2020] WASCA 147 -
East Metropolitan Health Service v Ellis (by his next friend Christopher Graham Ellis) [2020] WASCA 147 -
East Metropolitan Health Service v Ellis (by his next friend Christopher Graham Ellis) [2020] WASCA 147 -
Smith v Coles Supermarkets Australia Pty Ltd t/as Coles Distribution Centre; Ready Workforce (A Division of Chandler Macleod) Pty Ltd v Coles Supermarkets Australia Pty Ltd [2020] NSWCA 206 -
Sieger & Department of Communities and Justice [2020] FamCAFC 172 (20 July 2020) (Ainslie-Wallace and Austin & Tree JJ)

20. When an appeal asserts many different errors in a relatively short first-instance judgment, as this one is, the Court is entitled to be circumspect about the merit of *all* the grounds ( *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317 at [70] ; *Stoltenberg v Bolton; Loder v Bolton* [2020] NSWCA 45 at [52] ; *Penrith Whitewater Stadium Ltd v Lesvos Pty Ltd* [2007] NSWCA 103 at [8] ). Even if appealable error does exist, an unnecessary multiplication of grounds tends to conceal it ( *Thorne v Kennedy* (2017) 263 CLR 85 at [49] ).

Sieger & Department of Communities and Justice [2020] FamCAFC 172 -
Moore v Scenic Tours Pty Ltd [2020] HCA 17 -
Moore v Scenic Tours Pty Ltd [2020] HCA 17 -
Stoltenberg v Bolton [2020] NSWCA 45 -
AAI Limited v Caffrey [2019] QCA 293 (10 December 2019) (Sofronoff P and Philippides and McMurdo JJA)

12. The appellant does not question any of the authorities that have established the principles governing liability for causing psychiatric harm to rescuers. In summary, as Mr Grant-Taylor QC and Mr Murphy for the respondent correctly submitted, they are:

    (a) Damages are recoverable only for injury constituted by a recognisable psychiatric condition and not for emotional distress, alarm, fear, anxiety, annoyance or upset. [5]

    (b) It is not necessary to prove that the plaintiff was of "normal fortitude".[6]

    (c) It is not necessary to prove that the injury was the result of a "sudden shock". [7]

    (d) The ordinary principles of negligence apply to cases of pure psychiatric injury. [8] These principles take into account issues about "normal fortitude"[9] and "sudden shock".[10]

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*via*

[5] *Tame v New South Wales* (2002) 211 CLR 317, at [7] , [44] , [194] .

AAI Limited v Caffrey [2019] QCA 293 -
AAI Limited v Caffrey [2019] QCA 293 -
CAQ17 v Minister for Immigration and Border Protection [2019] FCAFC 203 -
CAQ17 v Minister for Immigration and Border Protection [2019] FCAFC 203 -
Jennings v Police [2019] SASCFC 93 -
Jennings v Police [2019] SASCFC 93 -
Jennings v Police [2019] SASCFC 93 -
Jennings v Police [2019] SASCFC 93 -
Jennings v Police [2019] SASCFC 93 -
Jennings v Police [2019] SASCFC 93 -
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Jennings v Police [2019] SASCFC 93 -
Jennings v Police [2019] SASCFC 93 -
Jennings v Police [2019] SASCFC 93 -
Parkes Shire Council v South West Helicopters Pty Ltd [2019] HCA 14 -
Parkes Shire Council v South West Helicopters Pty Ltd [2019] HCA 14 -
David Hingst v Construction Engineering (Aust) Pty Ltd (ABN 62 392 781 199) [2019] VSCA 67 -
David Hingst v Construction Engineering (Aust) Pty Ltd (ABN 62 392 781 199) [2019] VSCA 67 -
Osborne Park Commercial Pty Ltd v Miloradovic [2019] WASCA 17 -
Osborne Park Commercial Pty Ltd v Miloradovic [2019] WASCA 17 -
Jennings v George Harcourt Management Pty Ltd [2018] ACTCA 50 -
Fuller-Wilson v State of New South Wales [2018] NSWCA 218 -
Fuller-Wilson v State of New South Wales [2018] NSWCA 218 -
Verma v Minister for Immigration and Border Protection [2018] FCAFC 87 (07 June 2018) (North, Farrell and Davies JJ)

34. *R v Criminal Injuries Compensation Board* also does not assist the appellant. In that case, the House of Lords held that judicial review of a Board decision was available because, objectively, the result was "unfair". The "unfairness" was that the Board had made a decision which was correct on the information before it but there was a report in existence which, if it had been put before the Board, may well have led to a different result. Australian courts have not followed the approach in *R v Criminal Injuries Compensation Board* and there is substantial doubt over whether it represents the law in Australia: see *Re Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 211 CLR 438 ; *Minister for Immigration and Multicultural and Indigenous Affairs v SCAR* (2003) 128 FCR 553 at [27] . The case is also distinguishable on the facts. In the present case, the Tribunal, consistently with the requirements of s 359A of the Migration Act , gave the appellant particulars of the information received from the British Council and invited his comment. The question for the Tribunal was whether PIC 4020 applied in light of the advice that the Department received from the British Council that the appellant had used an imposter to sit the IELTS test.

South West Helicopters Pty Ltd v Stephenson [2017] NSWCA 312 -
South West Helicopters Pty Ltd v Stephenson [2017] NSWCA 312 -
South West Helicopters Pty Ltd v Stephenson [2017] NSWCA 312 -
South West Helicopters Pty Ltd v Stephenson [2017] NSWCA 312 -
Brisbane Youth Service Inc v Beven [2017] QCA 211 -
Brisbane Youth Service Inc v Beven [2017] QCA 211 -
Brisbane Youth Service Inc v Beven [2017] QCA 211 -
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Ku-ring-gai Council v Chan [2017] NSWCA 226 -
Aubrey v The Queen [2017] HCA 18 -
Groom v State of SA [2017] SASCFC 35 -
Groom v State of SA [2017] SASCFC 35 -
Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright [2017] NSWCA 21 (17 February 2017) (Basten, Hoeben and Gleeson JJA)

> Tame v State of New South Wales; Annetts v Australian Stations Pty Ltd (2002) 211 CLR 317; [2002] HCA 35 at [140] (McHugh J) .

Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright [2017] NSWCA 21 (17 February 2017) (Basten, Hoeben and Gleeson JJA)

> 206. The operation of s 32 and the extent to which it reflected the common law in *Tame v State of New South Wales*; *Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317; [2002] HCA 35 ( ***Tame*** ), was discussed by the High Court in *Wicks v State Rail Authority (NSW)* (2010) 241 CLR 60; [2010] HCA 22 ( ***Wicks*** ) at [16]-[30] , and again in *King v Philcox* (2015) 320 ALR 398; [2015] HCA 19 at [75]-[85] , in relation to s 33 of the *Civil Liability Act* 1936 (SA) . Surprisingly, the parties did not refer to *Wicks* either at trial or in this Court. The following propositions, which can be taken from *Wicks* , have relevance to the present case.

Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright [2017] NSWCA 21 -
Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright [2017] NSWCA 21 -
Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright [2017] NSWCA 21 -
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Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright [2017] NSWCA 21 -
Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright [2017] NSWCA 21 -
Perera v Genworth Financial Mortgage Insurance Pty Ltd [2017] NSWCA 19 -
Perera v Genworth Financial Mortgage Insurance Pty Ltd [2017] NSWCA 19 -
Perera v Genworth Financial Mortgage Insurance Pty Ltd [2017] NSWCA 19 -
Govier v The Uniting Church in Australia Property Trust (Q) [2017] QCA 12 (10 February 2017) (Fraser and Gotterson JJA and North J,)

> 19. There are many descriptions in the letter of conduct by MD which harassed, disturbed, or frightened the appellant, but the appellant also characterised MD's conduct as "petty and unprofessional". Contrary to the appellant's argument that the letter suggested that the appellant foresaw a risk, or even predicted, that she would suffer a physical assault or a psychiatric injury if she continued to have contact with MD in the workplace, the primary judge accurately described the letter as making accusations almost exclusively of emotional aggression. Putting aside the benefit of hindsight, and notwithstanding the strength and number of the appellant's concerns expressed in the letter, the letter does not convey anything which should reasonably have put the respondent on notice that the appellant's own mental health was at risk from interactions with MD. As the primary judge observed, the only physical aggression expressly mentioned in that letter was finger pointing, accompanied by a raised, angry voice, during a meeting where Mr Blackett was present; the letter is "full of detail about fear and concern felt by the plaintiff" but contains "almost no allegation of physical, as opposed to emotional, aggression by MD"; the letter does not allege past violence, that the appellant feared violence, that MD had a propensity for violence, that the appellant's mental health was "even remotely in jeopardy as a result of MD's aggression", or that the appellant herself thought that MD had mental health issues (instead quoting

what Mr Blackett said about that). [12] I accept the respondent's submission that the respondent was not fixed with liability merely upon proof that the respondent should have appreciated that the appellant was annoyed or distressed by MD's conduct towards her, or even that the appellant was in fear of MD: *Tame v New South Wales* . [13] That would be a relevant, but not determinative finding, which would need to be considered in the context of the other relevant findings.

*via*

[13] (2002) 211 CLR 317 at 329 [7] (Gleeson CJ) .

Govier v The Uniting Church in Australia Property Trust (Q) [2017] QCA 12 (10 February 2017) (Fraser and Gotterson JJA and North J,)

4. Because the appellant claimed damages for negligently inflicted psychiatric injury, a central enquiry at trial about liability was "whether, in all the circumstances, the risk of [the appellant] sustaining a recognisable psychiatric illness was reasonably foreseeable, in the sense that the risk was not far-fetched or fanciful." [1] Whilst any sufficiently vulnerable employee might suffer injury as a result of emotionally challenging conduct of a co-worker it does not necessarily follow that it would be reasonably foreseeable for the employer to conclude that such conduct by the co-worker created a reasonably foreseeable risk that the co-worker's conduct would result "in mental anguish of a kind that could give rise to a recognised psychiatric illness." [2]

*via*

[2] *Tame v New South Wales* (2002) 211 CLR 317 at [41] , quoted and applied by McMeekin J (with whose reasons Gotterson JA and I agreed) in *Woolworths Ltd v Perrins* [2016] 2 Qd R 276 at [67] -[68] .

Govier v The Uniting Church in Australia Property Trust (Q) [2017] QCA 12 -
Govier v The Uniting Church in Australia Property Trust (Q) [2017] QCA 12 -
State of New South Wales v Briggs [2016] NSWCA 344 (09 December 2016) (McColl, Ward and Leeming JJA)

11. Such recognition was not always the case. This is not the occasion to undertake a comprehensive review of the common law's approach to claims for damages for psychiatric injury. As Gummow and Kirby JJ explained in *Tame* , "[t]he authorities respecting recovery for 'nervous shock' disclose a series of adjustments in the accommodation of conflicting interests which have struggled for legal protection." [15]

State of New South Wales v Briggs [2016] NSWCA 344 -
State of New South Wales v Briggs [2016] NSWCA 344 -
State of New South Wales v Briggs [2016] NSWCA 344 -
Maritime Union of Australia v Fair Work Ombudsman [2016] FCAFC 102 -
Prasad v Ingham's Enterprises Pty Ltd [2016] QCA 147 (07 June 2016) (Fraser and Philip McMurdo JJA and Boddice J,)
*Tame v New South Wales* (2011) 211 CLR 317; [2002] HCA 35 , cited

Prasad v Ingham's Enterprises Pty Ltd [2016] QCA 147 -
Eaton v TriCare (Country) Pty Ltd [2016] QCA 139 -
Eaton v TriCare (Country) Pty Ltd [2016] QCA 139 -
Eaton v TriCare (Country) Pty Ltd [2016] QCA 139 -

Eaton v TriCare (Country) Pty Ltd [2016] QCA 139 -
Eaton v TriCare (Country) Pty Ltd [2016] QCA 139 -
Eaton v TriCare (Country) Pty Ltd [2016] QCA 139 -
R v Moore [2015] NSWCCA 316 (15 December 2015) (Bathurst CJ, Simpson JA and Bellew J)

Allina Pty Ltd v Commissioner of Taxation (1991) 28 FCR 203 Andar Transport Pty Ltd v Brambles Ltd (2004) 217 CLR 424 ; [2004] HCA 28 Anns v Merton London Borough Council (1978) AC 728 Ano nity, The [1961] 2 Lloyd's Rep 117 Australian Iron and Steel Ltd v Ryan (1957) 97 CLR 89 ; [1957] HCA 25 Barton v The Queen (1980) 147 CLR 75 ; [1980] HCA 48 Berger v Willowdale AMC (1983) 145 DLR (3d) 247 Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 (2014) 254 CLR 185 ; [2014] HCA 36 Burns v The Queen (2012) 246 CLR 334 ; [2012] HCA 35 Callaghan v The Queen (1952) 87 CLR 115 ; [1952] HCA 55 Caltex Refineries (Qld) Pty Ltd v Stavar (2009) 75 NSWLR 649 ; [2009] NSWCA 258 Council of the Shire of Sutherland v Heyman (1985) 157 CLR 424 ; [1985] HCA 41 Crimm ins v Stevedoring Industry Finance Committee (1999) 200 CLR 1 ; [1999] HCA 59 CSR Ltd v Wren (19 97) 44 NSWLR 463 Deputy Federal Commissioner of Taxes (South Australia) v Elder's Trustee and Executor Company Ltd (1936) 57 CLR 610 ; [1936] HCA 64 Donoghue v Stevenson [1932] AC 562 Dupa s v The Queen (2010) 241 CLR 237 ; [2010] HCA 20 English v Rogers [2005] Aust Torts Reports 81800 ; [2005] NSWCA 327 General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125 ; [1964] HCA 69 Grain Elevators Board (Victoria) v President, Councillors and Ratepayers of the Shire of Dunmunkle (1946) 73 CLR 70 ; [1946] HCA 13 Hamilton v Whitehead (1988) 166 CLR 121 ; [198 8] HCA 65 Heaton v Western Australia (2013) 234 A Crim R 409 ; [2013] WASCA 207 Hunter Resources Ltd v Melville (1988) 164 CLR 234 ; [1988] HCA 5 Island Maritime Ltd v Filipowski (2006) 226 CLR 328 ; [2006] HCA 30 Jago v District Court of New South Wales (1989) 168 CLR 23 ; [1989] HCA 46 Jones v United States of America 308 F 2d 307 (1962) Kalwy v Secretary, Department of Social Security (1992) 38 FCR 295 King v The Queen (2012) 245 CLR 588 ; [2012] HCA 24 Kondis v State Transport Authority (1984) 154 CLR 672 ; [1984] HCA 61 Leighton Contractors Pty Ltd v Fox (20 09) 240 CLR 1 ; [2009] HCA 35 Likiardopoulos v The Queen (2012) 247 CLR 265 ; [2012] HCA 37 Macar ee v State of Western Australia [2011] WASCA 207 Maxwell v The Queen (1996) 184 CLR 501 ; [1996] HCA 46 Metropolitan Bank Ltd v Pooley (1885) 10 App Cas 210 Mitchell v Glasgow City Council [200 9] 1 AC 874 ; [2009] UKHL 11 Nationwide News Pty Ltd v Naidu (2007) 71 NSWLR 471 ; [2007] NSWCA 377 Nelson v Director of Public Prosecutions (Cth) (2014) 294 FLR 347 ; [2014] VSCA 217 Nic ol v Allyacht Spars Pty Ltd (1987) 163 CLR 611 ; [1987] HCA 68 Nydam v R [1977] VR 430 O'Brien v Dawson (1942) 66 CLR 18 ; [1942] HCA 8 Perre v Apand Pty Ltd (1999) 198 CLR 180 ; [1999] HCA 36 R v Cameron (Court of Criminal Appeal (NSW), 27 September 1994, unrep) R v Evans (Gemma) [2009] 1 WLR 1999 ; [2009] EWCA Crim 650 R v Glennon (1992) 173 CLR 592 ; [1992] HCA 16 R v Lavender (2 005) 222 CLR 67 ; [2005] HCA 37 R v McGee (2008) 102 SASR 318 ; [2008] SASC 328 R v Miller [1983] 2 AC 161 R v Moore (District Court (NSW), Whitford DCJ, 8 August 2014, unrep) R v Peters (1995) 83 A Crim R 142 R v Petroulias (No 1) (2006) 177 A Crim R 153 ; [2006] NSWSC 788 R v Rimmington [2006] 1 AC 459 ; [2005] UKHL 63 R v Sieders (2008) 72 NSWLR 417 ; [2008] NSWCCA 187 R v Smith [1995] 1 VR 10 R v Taktak (1988) 14 NSWLR 226 RJP v The Queen [2014] VSCA 290 Roads and Traffic Authority of New South Wales v Dederer (2007) 234 CLR 330 ; [2007] HCA 42 Smith v The Queen (19 94) 181 CLR 338 ; [1994] HCA 60 Stevens v Brodribb Sawmilling Company Pty Ltd (1986) 160 CLR 16 ; [1986] HCA 1 Sullivan v Moody (2001) 207 CLR 562 ; [2001] HCA 59 Sydney Water Corporation v Turano (2009) 239 CLR 51 ; [2009] HCA 42 Tame v New South Wales (2002) 211 CLR 317 ; [2002] HCA 35 TNT Australia Pty Ltd v Christie (2003) 65 NSWLR 1 ; [2003] NSWCA 47 Vairy v Wyong Shire Council (2005) 223 CLR 422 ; [2005] HCA 62 Walton v Gardiner (1993) 177 CLR 378 ; [1993] HCA 77 Wilson v The Queen (1992) 174 CLR 313 ; [1992] HCA 31 Yuille v B&B Fisheries (Leigh) Ltd [1958] 2 Lloyd's Rep 596

R v Moore [2015] NSWCCA 316 -
R v Moore [2015] NSWCCA 316 -
R v Moore [2015] NSWCCA 316 -
R v Moore [2015] NSWCCA 316 -
R v Moore [2015] NSWCCA 316 -
R v Moore [2015] NSWCCA 316 -
R v Moore [2015] NSWCCA 316 -
Tanious v South Eastern Sydney Local Health District [2015] NSWCA 356 -

Woolworths Limited v Perrins [2015] QCA 207 (27 October 2015) (Fraser and Gotterson JJA and McMeekin J,)

62. As Gleeson CJ said in *Tame v New South Wales* ; *Annetts v Australian Stations Pty Ltd* (2000) 211 CLR 317, [35] reasonable foreseeability of the kind of injury suffered impacts, inter alia, on the scope of the duty of care and on breach of duty. As his Honour there pointed out it is as true today as it was more than 150 years ago to assert that a person "is not ... expected to anticipate and guard against that which no reasonable man would expect to occur." [36] I have set out the essential background facts. I will return in more detail to the evidence later.

Woolworths Limited v Perrins [2015] QCA 207 -
Woolworths Limited v Perrins [2015] QCA 207 -
Woolworths Limited v Perrins [2015] QCA 207 -
Woolworths Limited v Perrins [2015] QCA 207 -
Woolworths Limited v Perrins [2015] QCA 207 -
Alcan Gove Pty Ltd v Zabic [2015] HCA 33 -
Alcan Gove Pty Ltd v Zabic [2015] HCA 33 -
Box Hill Institute of TAFE v Johnson [2015] VSCA 245 -
Marsh v Baxter [2015] WASCA 169 -
Marsh v Baxter [2015] WASCA 169 -
Marsh v Baxter [2015] WASCA 169 -
Waller v James [2015] NSWCA 232 -
Waller v James [2015] NSWCA 232 -
Waller v James [2015] NSWCA 232 -
Waller v James [2015] NSWCA 232 -
Anwar v Mondello Farms Pty Ltd [2015] SASCFC 109 (10 August 2015) (Kourakis CJ; Gray and Stanley JJ)

85. Section 33 must be understood against the background provided by the common law of negligence in relation to psychiatric injury as stated by the High Court in *Tame v New South Wales.* [40]

Anwar v Mondello Farms Pty Ltd [2015] SASCFC 109 -
Anwar v Mondello Farms Pty Ltd [2015] SASCFC 109 -
Anwar v Mondello Farms Pty Ltd [2015] SASCFC 109 -
Anwar v Mondello Farms Pty Ltd [2015] SASCFC 109 -
Anwar v Mondello Farms Pty Ltd [2015] SASCFC 109 -
Anwar v Mondello Farms Pty Ltd [2015] SASCFC 109 -
Anwar v Mondello Farms Pty Ltd [2015] SASCFC 109 -
Anwar v Mondello Farms Pty Ltd [2015] SASCFC 109 -
Anwar v Mondello Farms Pty Ltd [2015] SASCFC 109 -
Anwar v Mondello Farms Pty Ltd [2015] SASCFC 109 -
Anwar v Mondello Farms Pty Ltd [2015] SASCFC 109 -
Anwar v Mondello Farms Pty Ltd [2015] SASCFC 109 -
Anwar v Mondello Farms Pty Ltd [2015] SASCFC 109 -
Anwar v Mondello Farms Pty Ltd [2015] SASCFC 109 -
Anwar v Mondello Farms Pty Ltd [2015] SASCFC 109 -
Anwar v Mondello Farms Pty Ltd [2015] SASCFC 109 -
Gramotnev v Queensland University of Technology [2015] QCA 127 (10 July 2015) (Margaret McMurdo P and Holmes JA and Jackson J,)

174. This was an aspect of the appeal where the appellant's lack of understanding of relevant laws and legal principle caused him to elide distinct legal rights and principles. Although sometimes overlooked because there is a corresponding duty of care in tort, it is uncontentious that an employer owes a contractual duty to take reasonable care for the safety of an employee. The question was settled before 1959 when *Davie v New Merton Board*

*Mills Ltd* [110] was decided. Keane JA referred to it in *Wylie v The ANI Corporation Ltd* [111] as a duty "which may properly regarded as a contractual duty" [112] and McHugh J, who was a recognised expert in this field of discourse,[113] said in *Tame v New South Wales* : [114]

> "... the employer's duty of care arises from an implied term of the contract as well as from the general law of negligence... It simply implies a general duty to take reasonable care for the safety of the employee and, it might be added, for the employee's property."

*via*

[114] (2002) 211 CLR 317 , 365 [140] .

Gramotnev v Queensland University of Technology [2015] QCA 127 -
Gramotnev v Queensland University of Technology [2015] QCA 127 -
King v Philcox [2015] HCA 19 (10 June 2015) (French CJ, Kiefel, Gageler, Keane and Nettle JJ)

49. The requirement of presence at the scene is not, as the respondent argued, an arbitrary limit upon the recovery of damages to be strictly confined in its effect. Rather, it is a limitation upon the recovery of damages which reflects an intelligible legislative choice to limit the extent of liability for the consequences of a defendant's negligence. The exclusion of liability effected by s 53(1)(a) of the Act is an informed and rational response to issues thrown up by the case law [86] as to where the law should best draw the line to limit indeterminate liability and unreasonable or disproportionate burdens upon defendants and those who are obliged, under private or public insurance arrangements, to defray the cost of meeting those burdens. The exclusion reflects a balancing of interests [87] , the rationale of which is readily intelligible. Arguments as to whether the line drawn by the legislation accords with the latest stage in the ongoing development [88] of the common law by the courts are beside the point; it is wrong to characterise the exclusionary line drawn by the legislation as arbitrary, so as to justify reading the expression "present at the scene" as meaning no more than in the same place as the accident.

*via*

[88] *Tame v New South Wales* (2002) 211 CLR 317 at 390394 [214][225] ; *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 at 275276 [7] .

King v Philcox [2015] HCA 19 (10 June 2015) (French CJ, Kiefel, Gageler, Keane and Nettle JJ)

98. Fifthly, in seeking to distinguish this case from previous cases in which a duty of care has been found to be owed to the relatives of a victim, counsel for the appellant submitted that in *Gifford* and *Annetts v Australian Stations Pty Ltd* [142] a duty of care arose because the defendant in each case was the victim's employer, and there was no such employment relationship in this case. That submission overlooks that the duty of care owed by a driver to a passenger is an established category of duty that arises from the relationship between the parties, just as does the duty owed by an employer to an employee. In point of principle, there is no relevant distinction between cases in which a duty of care arises because of an employment relationship between the defendant and the victim and a case like this where the duty arises because of a relationship of driver and passenger between the defendant and the victim.

Angeleska (known as Slaveska) v State of Victoria [2015] VSCA 140 -
King v Philcox [2015] HCA 19 -
King v Philcox [2015] HCA 19 -
King v Philcox [2015] HCA 19 -

King v Philcox [2015] HCA 19 -
King v Philcox [2015] HCA 19 -
King v Philcox [2015] HCA 19 -
King v Philcox [2015] HCA 19 -
King v Philcox [2015] HCA 19 -
King v Philcox [2015] HCA 19 -
Angeleska (known as Slaveska) v State of Victoria [2015] VSCA 140 -
King v Philcox [2015] HCA 19 -
King v Philcox [2015] HCA 19 -
King v Philcox [2015] HCA 19 -
King v Philcox [2015] HCA 19 -
King v Philcox [2015] HCA 19 -
King v Philcox [2015] HCA 19 -
Angeleska (known as Slaveska) v State of Victoria [2015] VSCA 140 -
King v Philcox [2015] HCA 19 -
Angeleska (known as Slaveska) v State of Victoria [2015] VSCA 140 -
King v Philcox [2015] HCA 19 -
King v Philcox [2015] HCA 19 -
King v Philcox [2015] HCA 19 -
King v Philcox [2015] HCA 19 -
King v Philcox [2015] HCA 19 -
King v Philcox [2015] HCA 19 -
King v Philcox [2015] HCA 19 -
BHP Billiton Ltd v Dunning [2015] NSWCA 55 -
BHP Billiton Ltd v Dunning [2015] NSWCA 55 -
Stewart v Ackland [2015] ACTCA 1 (12 February 2015) (Penfold J; Walmsley and Robinson AJJ)
*Tame v NSW* (2002) 211 CLR 317
*Vairy v Wyong Shire Council*

Stewart v Ackland [2015] ACTCA 1 -
Stewart v Ackland [2015] ACTCA 1 -
Insurance Australia Limited t/as NRMA Insurance v Iuli [2014] ACTCA 50 -
Insurance Australia Limited t/as NRMA Insurance v Iuli [2014] ACTCA 50 -
Insurance Australia Limited t/as NRMA Insurance v Iuli [2014] ACTCA 50 -
Hunter and New England Local Health District v McKenna [2014] HCA 44 -
Electro Optic Systems Pty Ltd v State of New South Wales [2014] ACTCA 45 -
Electro Optic Systems Pty Ltd v State of New South Wales [2014] ACTCA 45 -
Electro Optic Systems Pty Ltd v State of New South Wales [2014] ACTCA 45 -
Mason v Transport Accident Commission [2014] VSCA 267 (24 October 2014) (Warren CJ, Ashley and Whelan JJA)

105. In the particular context of PTSD and the application of DSM-IV, many of these considerations were brought together by Hayne J in *Tame v New South Wales* [44]. After addressing the importance given to the distinction between psychiatric injury and mental distress, in the context of the approach taken by treating psychiatrists, he said:

> That importance can be illustrated by considering post-traumatic stress disorder. The revised fourth edition of the *Diagnostic and Statistical Manual of Mental Disorders* (commonly referred to as "DSM-IV-TR") gives six diagnostic criteria for identifying post-traumatic stress disorder. Of those, the last is that "[t]he disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning". The diagnostic criteria also include criteria whose application depends upon the patient's report of subjective feelings of helplessness, fear, horror and the like. It is at these points, of capacity to participate in ordinary activities, and reports of subjective feelings, that the intersection between law and medicine may be thought to present difficulties. No doubt it is the difficulty of identifying that intersection which explains why the introduction to DSM-IV-TR says that: "[W]hen the

DSM-IV categories, criteria, and textual descriptions are employed for forensic purposes, *there are significant risks that diagnostic information will be misused or misunderstood*. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis." (Emphasis added).

The problem is not just a problem of articulating appropriate and relevant criteria for distinguishing compensable conditions from the non-compensable. Once it is recognised that capacity to participate in ordinary activities is, not surprisingly, an important consideration for a psychiatrist treating a patient, and that the psychiatrist, again not surprisingly, is concerned to deal with the patient according to that patient's history and presentation rather than by reference to some objective inquiry into the truth of that history and presentation, it is clear that there truly is an "imperfect fit" between the questions of ultimate concern to the law and those of concern to the clinician. The psychiatrist treating a patient is concerned to look backwards only for the purpose of identifying present and future treatment. In particular, determining the cause of an existing condition is important to the discipline of psychiatry only for the light it sheds on future treatment. But for a legal system which assigns responsibility *only* if there is fault, the focus on cause is critical to that task of assigning responsibility. [45]

*via*

[44] (2002) 211 CLR 317 .

Mason v Transport Accident Commission [2014] VSCA 267 -
Mason v Transport Accident Commission [2014] VSCA 267 -
Mason v Transport Accident Commission [2014] VSCA 267 -
Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 [2014] HCA 36 -
Scrymegeour & Scrymegeour [2014] FamCAFC 130 -
Lane v Northern NSW Local Health District (No 3) [2014] NSWCA 233 -
Woolworths Ltd v Ryder [2014] NSWCA 223 -
Woolworths Ltd v Ryder [2014] NSWCA 223 -
McColley v Commonwealth of Australia [2014] ACTCA 21 (20 June 2014) (Murrell CJ, Refshauge, Penfold JJ)

41. It is clear from the "immunity" cases that police rarely owe a duty of care to a suspect because such a duty would fundamentally conflict with their duty to investigate but not that, in an appropriate case, they can never do so: *Tame* per Gleeson CJ at [26]–[27] , Gaudron J at [57] , Gummow and Kirby JJ at [231] , Hayne J at [298] .

McColley v Commonwealth of Australia [2014] ACTCA 21 (20 June 2014) (Murrell CJ, Refshauge, Penfold JJ)

39. In *Hill* , the House of Lords rejected the proposition that police officers owe a duty of care to members of the public who may suffer injury through police carelessness in failing to apprehend a dangerous criminal, and noted that the conduct of a police investigation involves numerous policy and discretionary considerations, including decisions about the deployment of resources. In *Tame* , the plaintiff had claimed damages for a psychological condition that she developed some time after a motor vehicle accident when she learned that the police who had completed the accident report had negligently misstated that, at the time of the accident, her blood alcohol level exceeded the prescribed concentration. The High Court determined that the duties of the investigating police were inconsistent with a duty of care to avoid psychiatric injury to the plaintiff, who was a person whose conduct was under investigation.

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

McColley v Commonwealth of Australia [2014] ACTCA 21 -
McColley v Commonwealth of Australia [2014] ACTCA 21 -
McColley v Commonwealth of Australia [2014] ACTCA 21 -
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McColley v Commonwealth of Australia [2014] ACTCA 21 -
McColley v Commonwealth of Australia [2014] ACTCA 21 -
ABN AMRO Bank NV v Bathurst Regional Council [2014] FCAFC 65 -
ABN AMRO Bank NV v Bathurst Regional Council [2014] FCAFC 65 -
Valder v Fabrizi [2014] NSWCA 152 -
McKenna v Hunter & New England Local Health District [2013] NSWCA 476 -
Wolters v The University of the Sunshine Coast [2013] QCA 228 (20 August 2013) (Margaret McMurdo P and Gotterson JA and A Lyons J)

12. Informed by decisions of high authority [11] his Honour stated the law to be that the relevant duty of care of an employer is engaged if psychiatric injury to the particular employee is reasonably foreseeable. That principle, he observed, invites attention to the nature and extent of work being done by the particular employee and signs given by the employee concerned. [12] He saw the "central issue" to the existence of a duty of care in this context as being "whether the employer knew or ought to have known of conduct which was likely to give rise to a risk of psychiatric injury to the plaintiff". [13] Neither party to the appeal takes issue with this statement of legal principle or the observations made by his Honour.

*via*

[11] *Tame v New South Wales* (2002) 211 CLR 317 at [16] , [61]-[62] , [201] ; *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 at [33], [35] .

Shoalhaven City Council v Pender [2013] NSWCA 210 -
Brown v Maurice Blackburn Cashman [2013] VSCA 122 -
Brown v Maurice Blackburn Cashman [2013] VSCA 122 -
Brown v Maurice Blackburn Cashman [2013] VSCA 122 -
Brown v Maurice Blackburn Cashman [2013] VSCA 122 -
Brown v Maurice Blackburn Cashman [2013] VSCA 122 -
Brown v Maurice Blackburn Cashman [2013] VSCA 122 -
Brown v Maurice Blackburn Cashman [2013] VSCA 122 -
Trustees of the Sydney Grammar School v Winch [2013] NSWCA 37 -
Monis v The Queen [2013] HCA 4 -
Trustees of the Sydney Grammar School v Winch [2013] NSWCA 37 -
Trustees of the Sydney Grammar School v Winch [2013] NSWCA 37 -
Trustees of the Sydney Grammar School v Winch [2013] NSWCA 37 -
Monis v The Queen [2013] HCA 4 -
MM Constructions (Aust) Pty Ltd v Port Stephens Council [2012] NSWCA 417 -
Australian Capital Territory v Crowley [2012] ACTCA 52 -
Australian Capital Territory v Crowley [2012] ACTCA 52 -
Australian Capital Territory v Crowley [2012] ACTCA 52 -
Asuzu v Council of the New South Wales Bar Association [2012] NSWCA 406 -
Keddie v Stacks/Goudkamp Pty Ltd [2012] NSWCA 254 (17 August 2012) (Beazley and Barrett JJA, Sackville AJA)
Tame v New South Wales [2002] HCA 35 ; 211 CLR 317

Keddie v Stacks/Goudkamp Pty Ltd [2012] NSWCA 254 -
Wilkinson v Perisher Blue Pty Ltd [2012] NSWCA 250 -

JS v Graveur [2012] QCA 196 -
Hetherington-Gregory v All Vehicle Services [2012] NSWCA 232 -
Leonard v Pollock [2012] WASCA 108 -
Leonard v Pollock [2012] WASCA 108 -
Leonard v Pollock [2012] WASCA 108 -
Leonard v Pollock [2012] WASCA 108 -
Leonard v Pollock [2012] WASCA 108 -
Aytugrul v The Queen [2012] HCA 15 -
Aytugrul v The Queen [2012] HCA 15 -
Wallace v Kam [2012] NSWCA 82 -
Wallace v Kam [2012] NSWCA 82 -
Wallace v Kam [2012] NSWCA 82 -
Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management [2012] WASCA 79 -
Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management [2012] WASCA 79 -
Karatjas v Deakin University [2012] VSCA 53 -
Amaca Pty Ltd v King [2011] VSCA 447 -
Amaca Pty Ltd v King [2011] VSCA 447 -
Fugro Spatial Solutions Pty Ltd v Cifuentes [2011] WASCA 102 -
Fugro Spatial Solutions Pty Ltd v Cifuentes [2011] WASCA 102 -
Fugro Spatial Solutions Pty Ltd v Cifuentes [2011] WASCA 102 -
Fugro Spatial Solutions Pty Ltd v Cifuentes [2011] WASCA 102 -
Miller v Miller [2011] HCA 9 -
Carter v Walker [2010] VSCA 340 -
Carter v Walker [2010] VSCA 340 -
Carter v Walker [2010] VSCA 340 -
Carter v Walker [2010] VSCA 340 -
Carter v Walker [2010] VSCA 340 -
New South Wales v Radford [2010] NSWCA 276 -
New South Wales v Radford [2010] NSWCA 276 -
The State of Western Australia v AH [2010] WASCA 172 -
The State of Western Australia v AH [2010] WASCA 172 -
Wang v State of New South Wales [2010] NSWCA 209 -
Wang v State of New South Wales [2010] NSWCA 209 -
Wang v State of New South Wales [2010] NSWCA 209 -
Placer (Granny Smith) Pty Ltd v Specialised Reline Services Pty Ltd [2010] WASCA 148 -
Placer (Granny Smith) Pty Ltd v Specialised Reline Services Pty Ltd [2010] WASCA 148 -
Wensink v Marshall [2010] WASCA 117 -
Wensink v Marshall [2010] WASCA 117 -
Wicks v State Rail Authority (NSW) [2010] HCA 22 (16 June 2010) (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ)

25. *Tame* held [9] that in deciding whether, for the purposes of the tort of negligence, a defendant owed a plaintiff a duty to take reasonable care to avoid recognisable psychiatric injury, the central question is whether, in all the circumstances, the risk of the plaintiff sustaining such an injury was reasonably foreseeable. A majority of the Court in *Tame* reject ed [10] the propositions that concepts of "reasonable or ordinary fortitude", "shocking event" or "directness of connection" were additional preconditions to liability.

Wicks v State Rail Authority (NSW) [2010] HCA 22 (16 June 2010) (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ)

26. In part, s 32 of the Civil Liability Act reflects the state of the common law identified in *Tame* . Consistent with what was decided in *Tame* , s 32 assumes that foreseeability is the central determinant of duty of care. Consistent with *Tame* [11] , "shocking event", and the existence and nature of any connection between plaintiff and victim and between plaintiff and

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

defendant, are considerations relevant to foreseeability, but none is to be treated as a condition necessary to finding a duty of care. But contrary to what was decided in *Tame* , s 32 provides that a duty of care is not to be found unless the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness.

Wicks v State Rail Authority (NSW) [2010] HCA 22 -
Wicks v State Rail Authority (NSW) [2010] HCA 22 -
Wicks v State Rail Authority (NSW) [2010] HCA 22 -
Wicks v State Rail Authority (NSW) [2010] HCA 22 -
Wicks v State Rail Authority (NSW) [2010] HCA 22 -
Wicks v State Rail Authority (NSW) [2010] HCA 22 -
Wicks v State Rail Authority (NSW) [2010] HCA 22 -
Wicks v State Rail Authority (NSW) [2010] HCA 22 -
Wicks v State Rail Authority (NSW) [2010] HCA 22 -
Wicks v State Rail Authority (NSW) [2010] HCA 22 -
Victoria v Richards [2010] VSCA 113 (12 May 2010) (Nettle and Redlich JJA and Hansen AJA)

12. In *Tame v New South Wales* no duty of care was found to be owed to a plaintiff who alleged that she had suffered psychiatric injury as a consequence of an error made by a police officer in creating a record of a traffic accident. The officer had incorrectly noted that the plaintiff had been affected by alcohol at the time of the accident. The majority of the court considered the duties of an investigating officer were potentially inconsistent with the existence of a duty to take reasonable care to avoid psychiatric injury to a person whose conduct is under investigation and who claimed her reputation had been harmed. [8] McHugh J observed:

> Recording hearsay, opinions, gossip, suspicions and speculations as well as incontestable factual material is a vital aspect of police intelligence gathering. To impose a duty to take reasonable care to see that such information, recorded by police officers, is correct would impose on them either an intolerable burden or a meaningless ritual. *It would often — perhaps usually — defeat the whole purpose of intelligence recording if the officer were required to check the accuracy of the material recorded*. Often enough, checking the accuracy of the material would require contacting the very person who was the subject of an adverse recording. [9]

Victoria v Richards [2010] VSCA 113 (12 May 2010) (Nettle and Redlich JJA and Hansen AJA)

19. Contrary to the appellants' contention, the common law is not insensitive to the circumstances of innocent members of the public who may be affected by the actions of law enforcement officers. The duty in the law of negligence is intended to reflect values held within the community. [27] Hence Gleeson CJ in *Tame* referred to reasonableness as the essential concept in the process of defining the ambit of a person's proper concern for others. [28] Those who seek immunity from negligence liability for direct physical injury have to overcome a heavy burden of justification for such dispensation. [29]

Victoria v Richards [2010] VSCA 113 (12 May 2010) (Nettle and Redlich JJA and Hansen AJA)

TORT – Negligence – Police officer deploying capsicum spray to restrain offender –Whether duty of care owed to bystander – *Sullivan v Moody* (2001) 207 CLR 562, *Tame v New South Wales* (2002) 211 CLR 317 and *Zalewski v Turcarolo* [1995] 2 VR 562 considered – Appeal against refusal to strike out cause of action – Appeal dismissed.

Victoria v Richards [2010] VSCA 113 -
Victoria v Richards [2010] VSCA 113 -

Victoria v Richards [2010] VSCA 113 -
Victoria v Richards [2010] VSCA 113 -
Victoria v Richards [2010] VSCA 113 -
Victoria v Richards [2010] VSCA 113 -
Victoria v Richards [2010] VSCA 113 -
Victoria v Richards [2010] VSCA 113 -
Victoria v Richards [2010] VSCA 113 -
Victoria v Richards [2010] VSCA 113 -
Victoria v Richards [2010] VSCA 113 -
Commissioner of Police v Mohamed [2009] NSWCA 432 -
Commissioner of Police v Mohamed [2009] NSWCA 432 -
Commissioner of Police v Mohamed [2009] NSWCA 432 -
Commissioner of Police v Mohamed [2009] NSWCA 432 -
Drexel London (a firm) v Gove (Blackman) [2009] WASCA 181 -
Drexel London (a firm) v Gove (Blackman) [2009] WASCA 181 -
Drexel London (a firm) v Gove (Blackman) [2009] WASCA 181 -
Drexel London (a firm) v Gove (Blackman) [2009] WASCA 181 -
Drexel London (a firm) v Gove (Blackman) [2009] WASCA 181 -
CSR Ltd v Amaca Pty Ltd [2009] NSWCA 338 (19 October 2009) (Allsop P, Hodgson and Basten JJA)

91. In *Tame v State of New South Wales* [2002] HCA 35; (2002) 211 CLR 317 , Gleeson CJ, referring to *W yong Shire Council v Shirt* said at [12] :

CSR Ltd v Amaca Pty Ltd [2009] NSWCA 338 -
CSR Ltd v Amaca Pty Ltd [2009] NSWCA 338 -
CSR Ltd v Amaca Pty Ltd [2009] NSWCA 338 -
CSR Ltd v Amaca Pty Ltd [2009] NSWCA 338 -
Kestrel Holdings Pty Ltd v APF Properties Pty Ltd [2009] FCAFC 144 -
Kestrel Holdings Pty Ltd v APF Properties Pty Ltd [2009] FCAFC 144 -
Wang v State of New South Wales [2009] NSWCA 340 (14 October 2009) (Basten and Macfarlan JJA)

[Tame v New South Wales] [2002] HCA 35 ; 211 CLR 317
[Wilson v State of New South Wales]

Wang v State of New South Wales [2009] NSWCA 340 (14 October 2009) (Basten and Macfarlan JJA)

> 15. Nevertheless, the statement of claim does not appear to have been limited to a cause of action for breach of the statutory provisions. Although it followed the form of proceedings originally commenced in the District Court by solicitors then acting for the plaintiff, it is appropriate, as the State accepts, to read the document as a set of factual allegations which could give rise to alternative causes of action. That his Honour so treated the matter is implicit in his reliance upon three decisions which relate to whether or not an action for negligence can arise under the general law in respect of the exercise by police of their investigative functions: see *Tame v New South Wales* [2002] HCA 35; 211 CLR 317 ; *Wilson v State of New South Wales* [2001] NSWSC 869; 53 NSWLR 407; *Cran v State of New South Wales* [2004] NSWCA 92; 62 NSWLR 95. His Honour noted that the plaintiff's case "is not in its terms confined to an action for negligence" accepting, by implication that those cases were so confined. The alternative approach which his Honour then considered was the claim based on breach of statutory duty.

Sydney Water Corporation v Turano [2009] HCA 42 -
Sydney Water Corporation v Turano [2009] HCA 42 -
Metrolink Victoria Pty Ltd v Inglis [2009] VSCA 227 -
Metrolink Victoria Pty Ltd v Inglis [2009] VSCA 227 -
Metrolink Victoria Pty Ltd v Inglis [2009] VSCA 227 -
Sheehan v SRA; Wicks v SRA [2009] NSWCA 261 (31 August 2009) (Beazley JA at 1; Giles JA at 81; McColl JA at 82)

> 121 Counsels' researches did not identify any case in which the provision in other jurisdictions comparable to s 32(2)(b) has been considered, nor one in which the concept of "immediate aftermath" in s 32(2)(a) of the Tasmanian Act has been considered, although that concept was, of course, discussed in *Tame* (at [17] – [18] ) per Gleeson CJ, (at [49]) per Gaudron J, (at [182], [187] – [191], [214] – [225]) per Gummow and Kirby JJ, (at [308], [365]) per Callinan J.

**Section 4 of the 1944 Act**

Sheehan v SRA; Wicks v SRA [2009] NSWCA 261 -
Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 -
Sheehan v SRA; Wicks v SRA [2009] NSWCA 261 -
Sheehan v SRA; Wicks v SRA [2009] NSWCA 261 -
Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 -
Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 -
Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 -
Sheehan v SRA; Wicks v SRA [2009] NSWCA 261 -
Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 -
Sheehan v SRA; Wicks v SRA [2009] NSWCA 261 -
Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 -
Sheehan v SRA; Wicks v SRA [2009] NSWCA 261 -
Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 -
Sheehan v SRA; Wicks v SRA [2009] NSWCA 261 -
Sheehan v SRA; Wicks v SRA [2009] NSWCA 261 -
Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 -
Sheehan v SRA; Wicks v SRA [2009] NSWCA 261 -
Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 -
Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 -
Sheehan v SRA; Wicks v SRA [2009] NSWCA 261 -
Sheehan v SRA; Wicks v SRA [2009] NSWCA 261 -
Caltex Refineries (Qld) Pty Ltd v Stavar [2009] NSWCA 258 -
Sheehan v SRA; Wicks v SRA [2009] NSWCA 261 -
Sheehan v SRA; Wicks v SRA [2009] NSWCA 261 -
Juengling v Wells [2009] WASCA 125 -
Juengling v Wells [2009] WASCA 125 -
Shire of Gingin v Coombe [2009] WASCA 92 (25 May 2009) (Martin CJ)

118. The reversal was effected by the High Court reemphasising a number of settled principles. First, that reasonable foreseeability of harm of the kind suffered is a necessary, although insufficient, condition for the existence of a duty of care. That is, there is no general duty to avoid injury to everyone whom it is reasonably foreseeable may suffer that kind of injury if reasonable care is not taken: ***Tame v The State of New South Wales*** (2002) 211 CLR 317 [247] [248]. Secondly, the failure to eliminate a risk that is reasonably foreseeable and preventable does not itself establish breach; it is necessary to ask the further question whether a defendant's failure to eliminate the risk showed a want of reasonable care: ***Tame*** [98] [99] . Thirdly, the inquiry as to whether a putative tortfeasor has responded reasonably to a foreseeable risk of injury is prospective not retrospective and thus it is wrong to focus exclusively upon the way in which the accident in question happened: ***Vairy*** [160] [161] .

Shire of Gingin v Coombe [2009] WASCA 92 -
Shire of Gingin v Coombe [2009] WASCA 92 -
Lyle v Soc [2009] WASCA 3 -
Lyle v Soc [2009] WASCA 3 -
Lyle v Soc [2009] WASCA 3 -
Giller v Procopets [2008] VSCA 236 (10 December 2008) (Maxwell P, Ashley and Neave JJA)

462. In the area of negligence, there is a need to ensure that socially desirable activities are not unduly hindered by the risk of incurring liability. For that reason, negligence law contains a number of 'control devices' [481] which limit liability for negligent words or acts. These include the principle that damages are not payable for 'distress, alarm, fear, anxiety, annoyance, or despondency, without any resulting recognised psychiatric illness'. [482] It is arguable that this 'control device' is unnecessary in the case of the tort of intentionally causing harm, because intentional words or acts which cause mental distress typically lack

the social justification of business or private activities which can give rise to liability for negligent injury.

*via*

[482] Ibid 329 (Gleeson CJ).

Giller v Procopets [2008] VSCA 236 -
Giller v Procopets [2008] VSCA 236 -
Giller v Procopets [2008] VSCA 236 -
Giller v Procopets [2008] VSCA 236 -
The State of South Australia v Ellis [2008] WASCA 200 -
The State of South Australia v Ellis [2008] WASCA 200 -
The State of South Australia v Ellis [2008] WASCA 200 -
ACQ Pty Ltd v Cook [2008] NSWCA 161 (16 July 2008) (Beazley JA at 1; Giles JA at 2; Campbell JA at 3)

100 In deciding whether Mr Stubbs owed a duty of care to Mr Cook, it is necessary to bear in mind that all of the cases on which Aircair relies come from times when the understanding of the circumstances in which a duty of care rises was not quite the same as it is today. In particular, it is to be observed that in ***Daley*** their Honours explicitly relied on *"the principle of proximity"* (though with an explicit statement of what they understood by it). Direct application of the notion of *"proxim ity"* can no longer be seen as a safe guide to when a duty of care exists: ***Perre v Apand Pty Ltd*** [1999] HCA 36; (1999) 198 CLR 180 at [7]-[10] 193-194 per Gleeson CJ, [25]-[27] 197-198 per Gaudron J, [70]-[82] 208-212 per McHugh J, [191] 251 per Gummow J, [245]-[247] 268-270, [255] 273, [259] 275, [267] 277-278, [2 79]-[287] 283-286, [292]-[296] 288-289 per Kirby J, [330]-[335] 300-303 per Hayne J, [389] 318-319, [393] 32 1-322, [398]-[400] 323-324, [406] 326 per Callinan J. More recent High Court authority has referred to proximity as a doctrine that is *"rejected"* ( ***Joslyn v Berryman*** [2003] HCA 34; (2003) 214 CLR 552 at [29] -[30], 563-564 per McHugh J; ***Graham Barclay Oysters Pty Ltd v Ryan*** [2002] HCA 54; (2002) 211 CLR 540 at [236], 624-625 per Kirby J) *"no longer ... the criterion of a duty of care"* ( ***Graham Barclay Oysters Pty Ltd v Ryan*** at [99], 583 per McHugh J), *"one that has not served as a unifying doctrine"* ( ***Tame v New South Wales*** [2002] HCA 35; (2002) 211 CLR 317 at [53], 341 per Gaudron J), and *"not only difficult to define but difficult to apply"* ( ***Tame*** at [257] , 405 per Hayne J ). In ***Prestige Property Services Pty Ltd v Choi*** [2007] NSWCA 363 Mason P (with whom Hodgson JA and Handley AJA agreed) said at [36] tha t a submission that a duty of care was based on proximity *"had an old-fashioned and unhelpful ring about it."* In my view, it is necessary to decide whether a duty of care was owed by looking in a more particular fashion at facts relating to the particular relationship in which Mr Stubbs and Mr Cook stood.

ACQ Pty Ltd v Cook [2008] NSWCA 161 -
ACQ Pty Ltd v Cook [2008] NSWCA 161 -
SNF (Australia) Pty Ltd v Jones [2008] WASCA 121 -
SNF (Australia) Pty Ltd v Jones [2008] WASCA 121 -
SNF (Australia) Pty Ltd v Jones [2008] WASCA 121 -
SNF (Australia) Pty Ltd v Jones [2008] WASCA 121 -
SNF (Australia) Pty Ltd v Jones [2008] WASCA 121 -
SNF (Australia) Pty Ltd v Jones [2008] WASCA 121 -
SNF (Australia) Pty Ltd v Jones [2008] WASCA 121 -
Kirkland-Veenstra v Stuart [2008] VSCA 32 (29 February 2008) (Warren CJ, Maxwell P and Chernov JA)

82. The High Court ruled that it was not a pre-condition to the imposition of a duty of care in such a case that –

- the foreseeability of the risk of harm be established by reference to a hypothetical person of 'normal fortitude';

· the psychiatric injury be shown to have been caused by a 'sudden shock'; [80] or

· the plaintiff have 'directly perceived' the death or injury, or its 'immediate aftermath'. [81]

As Gleeson CJ pointed out, however, it may still be relevant to consider whether the injury was caused by a sudden shock or whether the plaintiff directly perceived the distressing event or its immediate aftermath. Such factual considerations may be relevant, his Honour said:

> to the nature of the relationship between plaintiff and defendant, and to the making of a judgment as to whether the relationship is such as to import such a requirement [to have in contemplation injury of the kind that has been suffered by the plaintiff and to take reasonable care to guard against such injury.] [82]

*via*

[81] *Tame* and *Annetts* (2002) 211 CLR 317 , [17] (Gleeson CJ); [51] (Gaudron J); 380 (Gummow and Kirby JJ) .

Kirkland-Veenstra v Stuart [2008] VSCA 32 -
Kirkland-Veenstra v Stuart [2008] VSCA 32 -
Kirkland-Veenstra v Stuart [2008] VSCA 32 -

TCN Channel Nine Pty Ltd v Ilvariy Pty Ltd [2008] NSWCA 9 -
TCN Channel Nine Pty Ltd v Ilvariy Pty Ltd [2008] NSWCA 9 -
Nationwide News Pty Ltd v Naidu [2007] NSWCA 377 (21 December 2007) (Spigelman CJ at 1; Beazley JA; Basten JA)

> 13. Their Honours referred to *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* [2002] HCA 35; (2002) 211 CLR 317 at [16] , [61]-[62] and [201] . In those paragraphs a majority of the court rejected "normal fortitude" as a test of foreseeability, whilst accepting the relevance of the underlying idea. (See *Gifford v Strang Patrick Stevedoring Pty Ltd* [2003] HCA 33; (2003) 214 CLR 269 at [98] and [119].) Adams J erred at [185] in referring to "normal fortitude" as a test, but nothing turned on this reference on the appeal.

Nationwide News Pty Ltd v Naidu [2007] NSWCA 377 -
Nationwide News Pty Ltd v Naidu [2007] NSWCA 377 -
Nationwide News Pty Ltd v Naidu [2007] NSWCA 377 -
Nationwide News Pty Ltd v Naidu [2007] NSWCA 377 -
Nationwide News Pty Ltd v Naidu [2007] NSWCA 377 -
Nationwide News Pty Ltd v Naidu [2007] NSWCA 377 -
Nationwide News Pty Ltd v Naidu [2007] NSWCA 377 -
Nationwide News Pty Ltd v Naidu [2007] NSWCA 377 -
Nationwide News Pty Ltd v Naidu [2007] NSWCA 377 -
Nationwide News Pty Ltd v Naidu [2007] NSWCA 377 -
Nationwide News Pty Ltd v Naidu [2007] NSWCA 377 -
Nationwide News Pty Ltd v Naidu [2007] NSWCA 377 -
Gittani Stone Pty Ltd v Pavkovic [2007] NSWCA 355 -
Gittani Stone Pty Ltd v Pavkovic [2007] NSWCA 355 -
Panagiotopoulos v Rajendram [2007] NSWCA 265 (28 September 2007) (Tobias JA at 1; McColl JA at 2; Basten JA at 3)

> 56 As noted in *Tame v New South Wales* (2002) 211 CLR 317 , difficult issues can arise as to whether a reasonable person in the position of the defendant would foresee the risk of psychiatric injury in particular circumstances. If the foreseeability test is to maintain a factual link with the conduct of people in every day life, its application will usually not depend upon expert psychiatric evidence, or statistical evidence as to what should be expected in particular circumstances: see *Tame* , 211 CLR 317 at [115] (McHugh J). Nevertheless, in the case of a defendant with medical knowledge, such evidence may be relevant and admissible. It could have been significant in the present case that no such evidence was called for the plaintiff, and no question was asked of Dr Rajendram, directed to his own understanding of the risk of psychiatric injury in the case of the Appellant, who was known to him, both as the husband of his patient and as a patient in his own right.

Panagiotopoulos v Rajendram [2007] NSWCA 265 (28 September 2007) (Tobias JA at 1; McColl JA at 2; Basten JA at 3)

> 15 As noted by Spigelman CJ in *O'Leary v Oolong Aboriginal Corporation Inc* [2004] NSWCA 7 at [17] , the characteristics of the hypothetical victim have been variously described, but there is a broadly accepted test that, absent knowledge of a particular susceptibility, foreseeability may be judged according to the person of normal, reasonable or ordinary fortitude. Nevertheless, the test is that of reasonable foreseeability, rejecting fanciful or far-fetched possibilities: see *Tame v New South Wales* , 211 CLR 317 at [16] (Gleeson CJ); [59] (Gaudron J); [199]-[201] (Gummow and Kirby JJ) ; see also *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 at [10-[12] (Gleeson CJ), [52] (McHugh J), [89]-[93] (Gummow and Kirby JJ); [100]-[103] (Hayne J) and [118]-[120] (Callinan J). There is also the need to identify the nature of the foresight of psychiatric injury expected of a person, who in the case of this defendant, was a medical practitioner. The question of reasonable foreseeability "involves an assessment respecting the foresight of a reasonable person in the defendant's position": *Tame v New South Wales* , 211 CLR 317 at [234] (Gummow and Kirby JJ). Although, as their Honours further noted, expert evidence as to what might reasonably be foreseen in such circumstances is not decisive, it may nevertheless be of assistance in a case such as this.

**Assessment of treatment of Appellant's wife**

Panagiotopoulos v Rajendram [2007] NSWCA 265 -
Panagiotopoulos v Rajendram [2007] NSWCA 265 -
Panagiotopoulos v Rajendram [2007] NSWCA 265 -
Panagiotopoulos v Rajendram [2007] NSWCA 265 -
Panagiotopoulos v Rajendram [2007] NSWCA 265 -
Panagiotopoulos v Rajendram [2007] NSWCA 265 -
Panagiotopoulos v Rajendram [2007] NSWCA 265 -
Panagiotopoulos v Rajendram [2007] NSWCA 265 -
Panagiotopoulos v Rajendram [2007] NSWCA 265 -
Panagiotopoulos v Rajendram [2007] NSWCA 265 -
Panagiotopoulos v Rajendram [2007] NSWCA 265 -
State Transit Authority of New South Wales v Fritzi Chemler [2007] NSWCA 249 -
State Transit Authority of New South Wales v Fritzi Chemler [2007] NSWCA 249 -
Sydney Water Corporation v Abramovic [2007] NSWCA 248 (14 September 2007) (Mason P; Santow JA ; Basten JA)

Tame v New South Wales (2002) 211 CLR 317

Caftor Pty Ltd (ACN 008 598 089) t/as Mooseheads Bar and Cafe v Matthew Brenden Kook [2007] ACTCA 19 -
Sydney Water Corporation v Abramovic [2007] NSWCA 248 -
Monie v Commonwealth of Australia [2007] NSWCA 230 -
Monie v Commonwealth of Australia [2007] NSWCA 230 -
Monie v Commonwealth of Australia [2007] NSWCA 230 -
Monie v Commonwealth of Australia [2007] NSWCA 230 -
CGU Workers Compensation (NSW) Ltd v Garcia [2007] NSWCA 193 -
CGU Workers Compensation (NSW) Ltd v Garcia [2007] NSWCA 193 -
Amaca Pty Ltd v Hannell [2007] WASCA 158 -
Amaca Pty Ltd v Hannell [2007] WASCA 158 -
Amaca Pty Ltd v Hannell [2007] WASCA 158 -
Amaca Pty Ltd v Hannell [2007] WASCA 158 -
Penrith Whitewater Stadium Ltd v Lesvos Pty Ltd [2007] NSWCA 176 (19 July 2007) (Ipp JA; McColl JA; Campbell JA)

70 On 23 April 2007 in an interlocutory judgment ( *Penrith Whitewater Stadium Ltd & Anor v Lesvos Pty Ltd & Anor* [2007] NSWCA 103) relating to an application by the appellants for a stay of the orders made by Grove J, McColl JA said (at [8] ):

> "The claimants have filed an Amended Notice of Appeal with Appointment which identifies 14 grounds of appeal, almost all of which are the subject of sub-issues. That document does not appear to comply with the requirement that a notice of appeal state the grounds briefly, but specifically, and should not descend to a detailed statement of the reasons supporting the appeal: *SCR* Pt 51 r 11 . Drafters of such notices should be alert to what McHugh J said in *Tame v State of New South Wales* ; *Annetts v Australian Stations Pty Ltd* [2002] HCA 35; (2002) 211 CLR 317 (at [70] ) (citing Aldisert J, *Opinion Writing* , (1990) at (89) that where there is:
>
> > 'an appellant's brief containing seven to ten points or more, a presumption arises that there is no merit to any of them'."

Penrith Whitewater Stadium Ltd v Lesvos Pty Ltd [2007] NSWCA 176 -
New South Wales v Fahy [2007] HCA 20 (22 May 2007) (Gleeson CJ; Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ)

122. *Shirt has been misapplied*: If there has been an incorrect application by trial courts of the full force of the formulation expressed by Mason J in *Shirt* , that is not a weakness in this Court's formulation. It simply shows that the "calculus" has not been given its full operation and perhaps, as McHugh J observed in *Tame* [152] , those courts have been overly transfixed by reference to the "undemanding" test of foreseeability and insufficiently mindful of the second question to be asked and of the specific criteria which give that question a practical operation.

*via*

[152] (2002) 211 CLR 317 at 353 [99] .

New South Wales v Fahy [2007] HCA 20 (22 May 2007) (Gleeson CJ; Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ)

108. *The Shirt calculus*: Because it is central to the resolution of the issues argued in this appeal, it is necessary to remember that the critical passage in the reasons of Mason J in *Shirt* [126] direc ts the decision-maker to ask two questions, viz (1) would a reasonable person in the defendant's position have foreseen that the conduct postulated involved a risk of injury to the plaintiff or a class of persons including the plaintiff; and (2) if so, what would a reasonable person do by way of response to such risk. However, there then immediately follows a passage which, as McHugh J remarked in *Tame v New South Wales* [127] , has sometimes been overlooked, namely [128] :

> "The perception of [that] response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position."

New South Wales v Fahy [2007] HCA 20 (22 May 2007) (Gleeson CJ; Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ)

246. To discourage claims which were spurious, or claims which would unduly burden human activity, courts developed and applied a number of "control mechanisms" [240] , "more or less arbitrary conditions" [241] which plaintiffs needed to satisfy in addition to the requirement of reasonable foreseeability of psychiatric injury. It is unnecessary to say more here because these developments are traced in the joint judgment of Gummow and Kirby JJ in *Tame v New South Wales* (" *Tame*"), which was heard together with *Annetts v Australian Stations Pty Ltd* [242] . The same developments, and the fact that English courts came within a "hair's breadth" of some retreat from established control mechanisms, are considered by Lord Hoffmann in *White v Chief Constable of South Yorkshire Police* [243] .

New South Wales v Fahy [2007] HCA 20 (22 May 2007) (Gleeson CJ; Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ)

241. Since the existence of the risk was incontestable, this case does not provide an opportunity to consider whether the test in *Wyong Shire Council v Shirt* [227] , that a reasonable risk is one which is not "farfetched or fanciful" [228] , is too "undemanding" [229] .

*via*

[229] *Tame v New South Wales* (2002) 211 CLR 317 at 352-353 [97]-[99] per McHugh J .

New South Wales v Fahy [2007] HCA 20 -
New South Wales v Fahy [2007] HCA 20 -
New South Wales v Fahy [2007] HCA 20 -
New South Wales v Fahy [2007] HCA 20 -
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New South Wales v Fahy [2007] HCA 20 -
New South Wales v Fahy [2007] HCA 20 -
New South Wales v Fahy [2007] HCA 20 -
Cavenett v Commonwealth [2007] VSCA 88 -
Penrith Whitewater Stadium Ltd v Lesvos Pty Ltd [2007] NSWCA 103 (23 April 2007) (McColl JA)

Tame v State of New South Wales; Annetts v Australian Stations Pty Ltd [2002] HCA 35 ; (2002) 211 CLR 317
TCN Channel 9 Pty Limited v Antoniadis No. 2

Penrith Whitewater Stadium Ltd v Lesvos Pty Ltd [2007] NSWCA 103 -
New South Wales Department of Housing v Hume [2007] NSWCA 69 -
New South Wales Department of Housing v Hume [2007] NSWCA 69 -
Metron Medical Australia Pty Ltd v Windahl [2007] VSCA 40 -
Metron Medical Australia Pty Ltd v Windahl [2007] VSCA 40 -
Aerospace Engineering Services Pty Ltd v Ibrahim [2007] WASCA 33 -
Aerospace Engineering Services Pty Ltd v Ibrahim [2007] WASCA 33 -
Aerospace Engineering Services Pty Ltd v Ibrahim [2007] WASCA 33 -
Aerospace Engineering Services Pty Ltd v Ibrahim [2007] WASCA 33 -
Avsar v Westland Healthcare Ltd [2007] WASCA 28 -
Ohlstein v E & T Lloyd [2006] NSWCA 226 -
Sarkis v Summitt Broadway Pty Ltd trading as Sydney City Mitsubishi [2006] NSWCA 358 (14 December 2006) (Handley JA; Ipp JA; Bryson JA)

32 These references are not evidence of a diagnosis of clinical depression by the worker or the occupational therapist. They are only complaints by the worker that he was worried or feeling down. "[A] person is not liable, in negligence, for being a cause of distress ... fear, anxiety ... [or] despondency, without any resulting psychiatric illness": *Tame v New South Wales* (2002) 211 CLR 317, 329 per Gleeson CJ .

Sarkis v Summitt Broadway Pty Ltd trading as Sydney City Mitsubishi [2006] NSWCA 358 -
Shellharbour City Council v Rigby [2006] NSWCA 308 (27 November 2006) (Beazley JA; Ipp JA; Basten JA)

100 The Club further contended that even if a duty was owed in the circumstances, it did not follow that the failure to eliminate the risk of a person in the plaintiff's position riding down the starting ramp was negligent on the basis that the risk was reasonably foreseeable and preventable: see *Tame v New South Wales* (2002) 211 CLR 317; [2002] HCA 35, where McHugh J said at [102] :

> "Whether the creation of the risk was unreasonable must depend on whether reasonable members of the community in the defendant's position would think the risk sufficiently great to require preventative action. This is a matter for judgment after taking into account the probability of the risk occurring, the gravity of the damage that might arise if the risk occurs, the expense, difficulty and inconvenience of avoiding the risk and any other responsibilities that the defendant must discharge."

Shellharbour City Council v Rigby [2006] NSWCA 308 -
Shellharbour City Council v Rigby [2006] NSWCA 308 -
Magill v Magill [2006] HCA 51 -
Magill v Magill [2006] HCA 51 -
Magill v Magill [2006] HCA 51 -
Magill v Magill [2006] HCA 51 -
Magill v Magill [2006] HCA 51 -
Magill v Magill [2006] HCA 51 -
State of New South Wales v Klein [2006] NSWCA 295 (03 November 2006) (Beazley JA; Santow JA; Young CJ in Eq)

> 28 In Tame v New South Wales (2002) 211 CLR 317 , a motorist sued the State because of a mistake by police which had recorded that her blood alcohol level which in fact was nil, was 0.14 which was the blood reading of the other driver involved in the relevant accident. He claimed damages for psychiatric injury. All seven judges found no duty of care. Although the judges expressed themselves in different words, most focused on the inconsistency between the asserted duty of care and the police officer's duty under the relevant statute.

Westland Healthcare Ltd v Avsar [2006] WASCA 230 (03 November 2006) (Pullin JA)

> 20 I will refer first to the application for leave to appeal concerning the refusal to allow the joinder of the four grandchildren. His Honour dealt separately with each of the proposed plaintiffs as follows:
>
> (a) Sean Avsar
>
> Mrs Avsar argued that Sean Avsar was "insane", and that by reason of s 40 of the *Limitation Act 1935* (WA) the limitation period for a claim by him had not expired. His Honour accepted that that may be so. However, his Honour set out the part of the proposed statement of claim concerning Sean and noted in effect that it did not plead material facts to support the existence of a duty of care or that Sean's mental condition was caused by the death of the deceased. Further, he held that there had been non-compliance with O 70 r 3(8) of the *Rules of the Supreme Court* and, as a result, Sean should not be joined as a plaintiff. In my opinion, these reasons reveal no error.
>
> (b) Selim Avsar
>
> Selim was 17 years old at the date of death of the deceased and turned 18 on 28 December 1996. His Honour noted that the limitation period for any cause of action in tort therefore expired on 28 December 2002. His Honour held that to permit a claim in those circumstances would amount to an abuse of process. In my opinion, this reveals no error.
>
> (c) Yasmin Avsar
>
> Yasmin was 13 years old at the time of the death of the deceased. She turned 18 on 6 December 2000 and therefore the limitation period had not expired when his Honour heard the application. His Honour said, however, that the proposed claim as pleaded had a

number of difficulties. His Honour noted that the claim for personal injuries was for "chronic shock, stress and trauma and ongoing inconvenient stress and trauma after the death of the deceased" but that no medical evidence had been lodged in support of the application and therefore no medical evidence that Yasmin suffered a recognised psychiatric illness. His Honour referred to ***Tame v New South Wales*** ( *supra* ) (Gleeson CJ at [7], Gaudron J at [44] and Gummow and Kirby JJ at [193] - [197]) where it was made plain that to recover damages for mental injury, the plaintiff must have suffered a recognised psychiatric illness,

(Page 11)

and that a person is not liable for distress, alarm, fear, anxiety, annoyance or despondency. His Honour also noted that there was no proper pleading of duty of care, breach of duty or causation. His Honour said that, as the action had been in process since 1997, it would be inappropriate to join an additional plaintiff unless there was evidence before the court by affidavit material and an appropriate draft pleading to establish that the proposed plaintiff's claim had some merit. His Honour held that in view of the deficiencies in the proposed claim and the lack of evidence, he was not prepared to allow her to be joined as a plaintiff. In my opinion, this reveals no error.

(d) Yusuf Avsar

Yusuf was still an infant at the time Judge Sleight dealt with the application. He repeated his observations concerning the claim by Yasmin Avsar that on the face of it the pleading did not disclose a cause of action for personal injury. His Honour also recorded the fact that there had been a failure to comply with O 70 . His Honour said that he was of the view that the appointment of a solicitor for an infant plaintiff in the proceedings was an important safeguard which must be insisted upon. His Honour also noted that a Judge had a discretion to exclude the requirement of the appointment of a next friend for an infant under O 70 r 2 (4) of the *Rules of the Supreme Court* but that this was not the sort of case where such a discretion should be exercised and, as a result, his Honour held that he would not allow the application to join Yusuf Avsar. In my opinion this reveals no error.

State of New South Wales v Klein [2006] NSWCA 295 (03 November 2006) (Beazley JA; Santow JA; Young CJ in Eq)

Tame v New South Wales (2002) 211 CLR 317
Thompson v Vincent

Westland Healthcare Ltd v Avsar [2006] WASCA 230 -
Westland Healthcare Ltd v Avsar [2006] WASCA 230 -
State of New South Wales v Klein [2006] NSWCA 295 -
Westland Healthcare Ltd v Avsar [2006] WASCA 230 -
Kimberly-Clark Australia Pty Ltd v Thompson [2006] NSWCA 264 -
Kimberly-Clark Australia Pty Ltd v Thompson [2006] NSWCA 264 -
Drinkwater v Howarth [2006] NSWCA 222 -
Green v WA Access Pty Ltd [2006] WASCA 119 (27 June 2006) (Martin CJ)

26 This is not a case in which the existence of a duty of care was at issue. It was common ground between the parties that the respondent owed a duty of care to persons in the category of the appellant. Accordingly, it is not a case in which we need to consider the foreseeability of risk, or the question of whether it is necessary, as a matter of law, to categorise the degree of risk as far-fetched or fanciful in order to conclude that no duty was owed. Rather, this is a case which is concerned entirely with the question of the standard of care owed by the

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respondent to the appellant. At that point of inquiry, the question essentially becomes whether the respondent's conduct was such as to create an unreasonable risk of harm to persons in the category of the appellant. In ***Tame v New South Wales*** (2002) 211 CLR 317 at [102] , McHugh J stated:

Green v WA Access Pty Ltd [2006] WASCA 119 -
Green v WA Access Pty Ltd [2006] WASCA 119 -
Seltsam Pty Ltd v Mcneill [2006] NSWCA 158 -
Seltsam Pty Ltd v Mcneill [2006] NSWCA 158 -
Ducker v The State of Western Australia [2006] WASCA 93 -
Ducker v The State of Western Australia [2006] WASCA 93 -
Ducker v The State of Western Australia [2006] WASCA 93 -
Ducker v The State of Western Australia [2006] WASCA 93 -
Ducker v The State of Western Australia [2006] WASCA 93 -
Ducker v The State of Western Australia [2006] WASCA 93 -
Talbot & Olivier (A Firm) v Witcombe [2006] WASCA 87 -
Talbot & Olivier (A Firm) v Witcombe [2006] WASCA 87 -
Talbot & Olivier (A Firm) v Witcombe [2006] WASCA 87 -
Talbot & Olivier (A Firm) v Witcombe [2006] WASCA 87 -
Talbot & Olivier (A Firm) v Witcombe [2006] WASCA 87 -
Harriton v Stephens [2006] HCA 15 (09 May 2006) (Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ)

78. *Unquantifiability of damage?* The principal argument of the respondent for rejecting this appeal was that it was impossible to quantify the appellant's loss according to the compensatory principle. This, so it was said, was because one cannot compare existence with non-existence because no one has any experience with non-existence. In the words of the philosopher Ludwig Wittgenstein, "[d]eath is not an event of life. Death is not lived through."[155] Accordingly, the respondent submitted that because damage is the gist of the tort of negligence [156] , the appellant's action must fail.

*via*

[156] *Cox Bros (Australia) Ltd v Commissioner of Waterworks* (1933) 50 CLR 108 at 119 ; *John Pfeiffer Pty Ltd v Canny* (1981) 148 CLR 218 at 241-242 ; *Tame* (2002) 211 CLR 317 at 388 [208] .

Harriton v Stephens [2006] HCA 15 -
Dowthwaite Holdings Pty Ltd v Saliba [2006] WASCA 72 (03 May 2006) (McLure JA)

52. Reasonableness is the test for the imposition of a duty of care: ***Tame v New South Wales*** (2002) 211 CLR 317 at [35] per Gleeson CJ ; at [109] per McHugh J; at [185] per Gummow and Kirby JJ; at [272] per Hayne J; and at [331] per Callinan J. There has been a return to the words of Lord Atkin in ***Donohue v Stevenson*** [1932] AC 562 at 580 that a duty is only owed to those:

> " ... 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."

Dowthwaite Holdings Pty Ltd v Saliba [2006] WASCA 72 -
Marshall v Lockyer [2006] WASCA 58 (06 April 2006) (Roberts-Smith Ja McLure Ja Murray AJA)

Tame v State of New South Wales (2002) 211 CLR 317

Marshall v Lockyer [2006] WASCA 58 -
Kirkby v Coote [2006] QCA 61 -
CSR Ltd v Della Maddalena [2006] HCA 1 -
CSR Ltd v Della Maddalena [2006] HCA 1 -
CSR Ltd v Della Maddalena [2006] HCA 1 -
Commonwealth of Australia v Smith [2005] NSWCA 478 -
Commonwealth of Australia v Smith [2005] NSWCA 478 -
Commonwealth of Australia v Smith [2005] NSWCA 478 -
Commonwealth of Australia v Smith [2005] NSWCA 478 -
McPherson's Ltd v Eaton [2005] NSWCA 435 -
McPherson's Ltd v Eaton [2005] NSWCA 435 -
McPherson's Ltd v Eaton [2005] NSWCA 435 -
State of New South Wales v Ibbett [2005] NSWCA 445 -
State of New South Wales v Ibbett [2005] NSWCA 445 -
Neindorf v Junkovic [2005] HCA 75 -
Neindorf v Junkovic [2005] HCA 75 -
Neindorf v Junkovic [2005] HCA 75 -
Waverley Council v Ferreira [2005] NSWCA 418 -
Waverley Council v Ferreira [2005] NSWCA 418 -
Di Vincenzo v McKrill [2005] WASCA 222 -
Di Vincenzo v McKrill [2005] WASCA 222 -
Di Vincenzo v McKrill [2005] WASCA 222 -
Suleski v Sons of Gwalia Ltd [2005] WASCA 220 -
Suleski v Sons of Gwalia Ltd [2005] WASCA 220 -
Fortuna Seafoods Pty Ltd v The Ship "Eternal Wind" [2005] QCA 405 (04 November 2005) (McMurdo P, Jerrard JA and Dutney J,)

58. The concepts central to the judgment of McLachlin J were quoted and relied upon by the learned trial judge in this matter. McLachlin J analysed English, American, Australian, and Canadian civil and common law authorities, to arrive at the conclusion[66] that the common law authorities suggested that pure economic loss was *prima facie* recoverable where, in addition to negligence and foreseeable loss, there was sufficient proximity between the negligent act and the loss; proximity was the controlling concept which avoided the spectre of unlimited liability.[67] As Gleeson CJ said in *Woolcock v CDG* , in Australia proximity is no longer seen as the conceptual determinant permitting and requiring the existence of a duty to take reasonable care to avoid a reasonably foreseeable risk of injury to another. [68] McLachlin J, when considering proximity further, looked at the close assimilation between the position of the plaintiff railway company and Public Works Canada (a successful plaintiff), and endorsed the trial judge's view that those two plaintiffs were so closely assimilated that the railway company was very much within the reasonable ambit of risk of the defendants at the time of the accident; and that was sufficient proximity.

*via*

[68] In *Woolcock v CDG* at [18] , citing *Hill v Van Erp* (1997) 188 CLR 159; *Pyrenees Shire Council v Day* (1998) 192 CLR 330; *Perre v Apand* ; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1; *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254; *Brodie v Singleton Shire Council* (2001) 206 CLR 512; *Sullivan v Moody* (2001) 207 CLR 562; *Tame v New South Wales* (2002) 211 CLR 317 ; and *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540

Fortuna Seafoods Pty Ltd v The Ship "Eternal Wind" [2005] QCA 405 (04 November 2005) (McMurdo P, Jerrard JA and Dutney J,)

75. Those High Court decisions include *Bryan v Maloney* ,[89] *Perre v Apand* ,[90] *Modbury Triangle Shopping Centre Pty Ltd v Anzil & Anor* ,[91] *Sullivan v Moody* ,[92] *Tame v New South Wales* , [93] *Graham Barclay Oysters Pty Ltd v Ryan* ,[94] and *Woolcock v CDG* . [95] The

judgments in those describe as important criteria identifying the existence or non-existence of a duty of care:

· actual foresight of the likelihood or possibility of harm of the kind suffered; [96]

· or, absent actual foresight, reasonable foreseeability of that harm to the extent of recognition of it being an unreasonable risk created for others; [97]

· who are either known to the person causing damage, or members of an ascertainable group or class reasonably foreseen as subject to that risk; [98]

· in respect of whom there is known or reasonably foreseen vulnerability of those others suffering damage to harm of that type (often arising from those others relying on the person causing harm to take care) and against which harm the person injured could not otherwise take steps adequately to protect themselves; [99]

· in the absence of preventative action by reasonable care taken to avoid causing that damage; [100]

· because of the degree of control exercised by the person causing the damage in or over the activity which causes it; [101]

· and often relevant is the physical, geographic, or commercial propinquity of the parties, in the activities of each in which one suffered and the other caused the harm. [102]

Fortuna Seafoods Pty Ltd v The Ship "Eternal Wind" [2005] QCA 405 (04 November 2005) (McMurdo P, Jerrard JA and Dutney J,)

75. Those High Court decisions include *Bryan v Maloney* ,[89] *Perre v Apand* ,[90] *Modbury Triangle Shopping Centre Pty Ltd v Anzil & Anor* ,[91] *Sullivan v Moody* ,[92] *Tame v New South Wales* , [93] *Graham Barclay Oysters Pty Ltd v Ryan* ,[94] and *Woolcock v CDG* . [95] The judgments in those describe as important criteria identifying the existence or non-existence of a duty of care:

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· who are either known to the person causing damage, or members of an ascertainable group or class reasonably foreseen as subject to that risk; [98]

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· because of the degree of control exercised by the person causing the damage in or over the activity which causes it; [101]

· and often relevant is the physical, geographic, or commercial propinquity of the parties, in the activities of each in which one suffered and the other caused the harm. [102]

*via*

[93] (2002) 211 CLR 317

Fortuna Seafoods Pty Ltd v The Ship "Eternal Wind" [2005] QCA 405 (04 November 2005) (McMurdo P, Jerrard JA and Dutney J,)

78. In *Tame v New South Wales,* a number of the judgments dealt with both the general principles in which a duty of care would be imposed, as well as those applicable to cases in which the claimant had suffered "nervous shock". Gleeson CJ, when writing of the wider issue and Lord Atkin's descriptions in *Donoghue v Stevenson* [108] of to whom a duty is owed, described the need to ask whether it was reasonable to require a defendant to have certain persons and certain interests in contemplation, and likewise in contemplation the risk of injury that had eventuated. [109] The recent judgments in the High Court identify vulnerability to the injury caused as one way of supplying an answer to that question, and the judgments in *Tame* and *Graham Barclay v Ryan* stress that a significant measure of control of the relevant activity causing risk is important to the answer. [110] The joint judgment of Gummow and Hayne JJ in *Graham Barclay v Ryan* also requires a court to consider the totality of the relationship between the claimant and the defendant and not simply the knowledge of a risk of harm and a power to avert or minimise that harm.[111]

*via*

[109] *Tame v New South Wales* at [9] and [12]

Fortuna Seafoods Pty Ltd v The Ship "Eternal Wind" [2005] QCA 405 -
Fortuna Seafoods Pty Ltd v The Ship "Eternal Wind" [2005] QCA 405 -
Fortuna Seafoods Pty Ltd v The Ship "Eternal Wind" [2005] QCA 405 -
Fortuna Seafoods Pty Ltd v The Ship "Eternal Wind" [2005] QCA 405 -
New South Wales v Mannall [2005] NSWCA 367 (28 October 2005) (Mason P, Giles and Tobias JJA)

114 It is a question of fact, not expert evidence, whether a defendant ought to have reasonably foreseen that his or her conduct might cause a person of normal fortitude to suffer psychiatric injury ( ***Tame v New South Wales*** (2002) 211 CLR 317 at 358 [115] , 386 [203] , 437 [360] ). Here there was a finding in the present case that Mr Singh was actually aware of the risk.

New South Wales v Mannall [2005] NSWCA 367 -
New South Wales v Mannall [2005] NSWCA 367 -
Wynne v Pilbeam [2005] WASCA 200 -
Wynne v Pilbeam [2005] WASCA 200 -
Vairy v Wyong Shire Council [2005] HCA 62 -
Wynne v Pilbeam [2005] WASCA 200 -
Wynne v Pilbeam [2005] WASCA 200 -
Vairy v Wyong Shire Council [2005] HCA 62 -
State of New South Wales v Watzinger [2005] NSWCA 329 -
Syd Matthews & Co Pty Ltd v Cavanagh [2005] WASCA 178 (19 September 2005) (Wheeler and Roberts-Smith JJA; Miller AJA)

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

Tame v The State of New South Wales (2002) 211 CLR 317
Van Der Sluice v Display Craft Pty Ltd

Syd Matthews & Co Pty Ltd v Cavanagh [2005] WASCA 178 -
Pickering v McArthur [2005] QCA 294 (16 August 2005) (McMurdo P, Keane JA and Dutney J,)

16. In the circumstances of the relationship between the applicant and respondent alleged by the respondent, it would not matter to the respondent's entitlement to recover damages that the respondent was particularly susceptible to psychiatric injury. That is also apparent from the decision of the High Court in *Tame v New South Wales; Annetts & Anor v Australian Stations Pty Ltd.* [12]

Pickering v McArthur [2005] QCA 294 -
Pickering v McArthur [2005] QCA 294 -
Pickering v McArthur [2005] QCA 294 -
Pickering v McArthur [2005] QCA 294 -
Ridis v Strata Plan 10308 [2005] NSWCA 246 (01 August 2005) (Hodgson, Tobias and McColl JJA)

33 The primary judge then referred to the well-known passage in the judgment of Mason J in *Council of the Shire of Wyong v Shirt* (1980) 146 CLR 40 at 47 where his Honour states what is now known as the *Shirt calculus*. He then added that remarks by the High Court in *Tame v New South Wales* (2002) 211 CLR 317 tended to take a different approach to that adopted in *Shirt*. He referred to comments by McHugh J in *Tame* at 352 [98]. The primary judge then observed that those comments:

> "... would focus the enquiry on whether the defendant knew or ought to have known that it had created an unreasonable risk of harm to others.

Ridis v Strata Plan 10308 [2005] NSWCA 246 -
Ridis v Strata Plan 10308 [2005] NSWCA 246 -
South Pacific Resort Hotels Pty Ltd v Trainor [2005] FCAFC 130 (15 July 2005) (Black CJ, Tamberlin and Kiefel JJ)

50. *Tame v New South Wales* provides no support for the appellant's argument. That case was about the existence or otherwise of a duty of care to avoid psychiatric injury. It was in that context and in that context only that the members of the High Court considered the place of '*normal fortitude*' in the law of negligence. McHugh J, who was in the minority on that question, emphasised the distinction between the issue of normal fortitude and the issue of damages. He said (at 359, [117]):

> *"Counsel for Mrs Tame also submitted that injecting the normal fortitude test into the question of foreseeability conflicts with the accepted principle in negligence of talem qualem — the "egg-shell skull" rule. That submission cannot be accepted. The normal fortitude test is an issue going to liability; the egg-shell skull rule goes to quantification of damages once duty, breach and some damage are established. In White v Chief Constable of South Yorkshire Police, Lord Goff of Chieveley pointed out that the egg-shell skull rule "is a principle of compensation, not of liability". It operates in the field of nervous shock in the same way that it operates in other areas of the law. Once the plaintiff establishes that a person of normal fortitude would have suffered psychiatric illness as the result of the defendant's action, the defendant must take the plaintiff as he or she is. The defendant's liability extends to all the psychiatric damage suffered by the plaintiff even though its extent is greater than that which would be sustained by a person of normal fortitude."* (Footnotes omitted.)

Cheng Fung Pty Ltd v Heloui [2005] NSWCA 222 -
Cheng Fung Pty Ltd v Heloui [2005] NSWCA 222 -
South Pacific Resort Hotels Pty Ltd v Trainor [2005] FCAFC 130 -

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

South Pacific Resort Hotels Pty Ltd v Trainor [2005] FCAFC 130 -
Cheng Fung Pty Ltd v Heloui [2005] NSWCA 222 -
Town of Mosman Park v Tait [2005] WASCA 124 -
Town of Mosman Park v Tait [2005] WASCA 124 -
Thorley v GIO Australia Ltd and AMP Services Ltd [2005] NSWCA 209 -
Thorley v GIO Australia Ltd and AMP Services Ltd [2005] NSWCA 209 -
Berrigan Shire Council v Ballerini [2005] VSCA 159 -
Berrigan Shire Council v Ballerini [2005] VSCA 159 -
Berrigan Shire Council v Ballerini [2005] VSCA 159 -
State of New South Wales v Zerafa [2005] NSWCA 187 -
State of New South Wales v Zerafa [2005] NSWCA 187 -
Tomisevic v Menzies Wagga Southern Pty Ltd [2005] NSWCA 178 -
Tomisevic v Menzies Wagga Southern Pty Ltd [2005] NSWCA 178 -
Tomisevic v Menzies Wagga Southern Pty Ltd [2005] NSWCA 178 -
Owners of Strata Plan 63477 v Ross [2005] NSWCA 162 -
Owners of Strata Plan 63477 v Ross [2005] NSWCA 162 -
Neighbourhood Association DP295386 v Forgeron [2005] NSWCA 150 -
Neighbourhood Association DP295386 v Forgeron [2005] NSWCA 150 -
Lemoto v Able Technical Pty Ltd [2005] NSWCA 153 -
CFMEU v State of Qld and Anglo Coal [2005] QCA 127 -
CFMEU v State of Qld and Anglo Coal [2005] QCA 127 -
CFMEU v State of Qld and Anglo Coal [2005] QCA 127 -
CFMEU v State of Qld and Anglo Coal [2005] QCA 127 -
CFMEU v State of Qld and Anglo Coal [2005] QCA 127 -
Hunter Area Health Service v Presland [2005] NSWCA 33 -
Hunter Area Health Service v Presland [2005] NSWCA 33 -
Hunter Area Health Service v Presland [2005] NSWCA 33 -
Monie v the Commonwealth [2005] NSWCA 25 -
Monie v the Commonwealth [2005] NSWCA 25 -
Koehler v Cerebos (Australia) Ltd [2005] HCA 15 (06 April 2005) (McHugh, Gummow, Hayne, Callinan and Heydon JJ)

55. Even on the application of it however, the appellant must fail at the threshold, that is on the issue of foreseeability. In my opinion, it was far-fetched and not foreseeable that the appellant, a competent, seemingly well woman[26] would suffer within six months of taking up a part-time position, a disabling psychiatric injury, or indeed, any psychiatric injury by reason of the work that the position entailed. As I pointed out in *Tame v State of New South Wales* [27] psychiatric illness or injury is in some important respects a different kind of illness or injury than physical injury. The difference is one of the reasons why its development is less readily foreseeable than traumatically caused injury. That is not to say of course that it is a condition of liability that a particular kind of psychiatric injury must be foreseeable. And, as the majority of the judgments in *Tame* [28] also make clear, foreseeability is not to be assessed by reference to a notional person of normal fortitude, but on the basis of the impression created by, and the other overt or foreseeable sensitivities of the actual person affected. The fact however that a psychiatrist placed in the same position as an employer might have foreseen a risk of psychiatric injury, does not mean that a reasonable employer should be regarded as likely to form the same view.

*via*

[28] (2002) 211 CLR 317 at 333 [16] per Gleeson CJ, 384 [199] per Gummow and Kirby JJ .

Koehler v Cerebos (Australia) Ltd [2005] HCA 15 -
Koehler v Cerebos (Australia) Ltd [2005] HCA 15 -
Koehler v Cerebos (Australia) Ltd [2005] HCA 15 -
Koehler v Cerebos (Australia) Ltd [2005] HCA 15 -

Koehler v Cerebos (Australia) Ltd [2005] HCA 15 -
Koehler v Cerebos (Australia) Ltd [2005] HCA 15 -
Martin v Clarke [2005] WASCA 66 (05 April 2005) (Malcolm CJ, Steytler P, McLure JA)

> 67 Reasonableness is the test for the imposition of a duty of care; in particular, it is the reasonableness of a requirement that a person should have certain persons or interests in contemplation that determines the existence of a duty of care: ***Tame*** ( *supra* ) at [9] per Gleeson CJ.

Martin v Clarke [2005] WASCA 66 (05 April 2005) (Malcolm CJ, Steytler P, McLure JA)

> 66 Reasonable foreseeability of damage of the kind suffered is an element in establishing both the duty of care and its breach: ***Tame v State***

> (Page 23)
>
> > ***of New South Wales*** ( *supra* ); ***Wyong Shire Council v Shirt*** ( *supra* ) at 47; ***Dovuro Pty Ltd v Wilkins*** (2003) 215 CLR 317. That requirement is satisfied if the risk of harm is not far-fetched or fanciful but real: ***Dovuro Pty Ltd v Wilkins*** ( *supra* ) at [60] per Gummow J.

Martin v Clarke [2005] WASCA 66 -
Martin v Clarke [2005] WASCA 66 -
Martin v Clarke [2005] WASCA 66 -
Martin v Clarke [2005] WASCA 66 -
Dorothy Vesna Skea v NRMA Insurance Limited ABN 11 000 016 722 [2005] ACTCA 9 -
Dorothy Vesna Skea v NRMA Insurance Limited ABN 11 000 016 722 [2005] ACTCA 9 -
State of Victoria v McIver [2005] VSCA 50 -
Swain v Waverley Municipal Council [2005] HCA 4 -
Swain v Waverley Municipal Council [2005] HCA 4 -
Baresic v Slingshot Holdings Pty Limited [2004] NSWCA 464 -
Baresic v Slingshot Holdings Pty Limited [2004] NSWCA 464 -
Baresic v Slingshot Holdings Pty Limited [2004] NSWCA 464 -
Baresic v Slingshot Holdings Pty Limited [2004] NSWCA 464 -
Sutherland Shire Council v Henshaw [2004] NSWCA 386 -
Sutherland Shire Council v Henshaw [2004] NSWCA 386 -
Sutherland Shire Council v Henshaw [2004] NSWCA 386 -
Sutherland Shire Council v Henshaw [2004] NSWCA 386 -
Liverpool City Council v Millett & Anor; Liverpool City Council v WadeLiverpool City Council v Millett & Anor [2004] NSWCA 340 (09 December 2004) (Mason P, Sheller and Tobias JJA)

> *Greater Shepparton City Council v Davis* [2004] VSCA 140; *Smith v The Broken Hill Pty Co Ltd* [19 57] 97 CLR 337; *Temora Shire Council v Stein* [2004] NSWCA 236; *Boroondara City Council v Cattench* [2004] VSCA 139; *Junkoric v Neindorf* [2004] SASC 325; *Byrnes v Burwood Council* [2003 ] HCA Trans 462; *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004; *Annetts v Australian Stations Pty Ltd* (2000) 23 WAR 35; *Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317 ; *Wyo ng Shire Council v Shirt* (1980) 146 CLR 40; *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431; *Ghantous v Hawkesbury Shire Council* (2001) 206 CLR 512, referred to.

Liverpool City Council v Millett & Anor; Liverpool City Council v WadeLiverpool City Council v Millett & Anor [2004] NSWCA 340 -
Liverpool City Council v Millett & Anor; Liverpool City Council v WadeLiverpool City Council v Millett & Anor [2004] NSWCA 340 -
Tobin v Dodd [2004] WASCA 288 -
Tobin v Dodd [2004] WASCA 288 -

Tobin v Dodd [2004] WASCA 288 -
Tobin v Dodd [2004] WASCA 288 -
Tobin v Dodd [2004] WASCA 288 -
Tobin v Dodd [2004] WASCA 288 -
Parissis v Bourke [2004] NSWCA 373 -
TAB Limited v Atlis [2004] NSWCA 322 -
TAB Limited v Atlis [2004] NSWCA 322 -
Maddalena v CSR Ltd [2004] WASCA 231 -
Maddalena v CSR Ltd [2004] WASCA 231 -
Maddalena v CSR Ltd [2004] WASCA 231 -
Miller v Paua Nominees Pty Ltd [2004] WASCA 220 -
Miller v Paua Nominees Pty Ltd [2004] WASCA 220 -
Miller v Paua Nominees Pty Ltd [2004] WASCA 220 -
Miller v Paua Nominees Pty Ltd [2004] WASCA 220 -
Miller v Paua Nominees Pty Ltd [2004] WASCA 220 -
Cubbon, Cubbon and Bates v Roads and Traffic Authority of NSW [2004] NSWCA 326 (23 September 2004) (Handley, Sheller and Tobias JJA)

> Notably, the trial Judge handed down her decisions in the three proceedings before the publication of the High Court decision in *Tame v New South Wales* and *Annetts v Australian Stations Pty Ltd* (2002 ) 211 CLR 317 and *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 77 ALJR 1205.

Cubbon, Cubbon and Bates v Roads and Traffic Authority of NSW [2004] NSWCA 326 -
Cubbon, Cubbon and Bates v Roads and Traffic Authority of NSW [2004] NSWCA 326 -
Cubbon, Cubbon and Bates v Roads and Traffic Authority of NSW [2004] NSWCA 326 -
Cook v R and M Reurich Holdings Pty. Ltd [2004] NSWCA 268 -
Cook v R and M Reurich Holdings Pty. Ltd [2004] NSWCA 268 -
Cook v R and M Reurich Holdings Pty. Ltd [2004] NSWCA 268 -
Cubbon, Cubbon and Bates v Roads and Traffic Authority of NSW [2004] NSWCA 326 -
Cook v R and M Reurich Holdings Pty. Ltd [2004] NSWCA 268 -
Sheppard v Swan [2004] WASCA 215 -
Geroheev Pty Ltd v Wheare [2004] WASCA 206 -
Geroheev Pty Ltd v Wheare [2004] WASCA 206 -
Turnbull v Alm [2004] NSWCA 173 -
Turnbull v Alm [2004] NSWCA 173 -
SJSB v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 225 -
Edwards v Attorney General [2004] NSWCA 272 -
Edwards v Attorney General [2004] NSWCA 272 -
Wyong Shire Council v Vairy [2004] NSWCA 247 -
Wyong Shire Council v Vairy [2004] NSWCA 247 -
Temora Shire Council v Stein [2004] NSWCA 236 -
Temora Shire Council v Stein [2004] NSWCA 236 -
Temora Shire Council v Stein [2004] NSWCA 236 -
Australian Traineeship System and Colchester GR Pty Ltd trading as Shell Service Station Waverley v Wafta [2004] NSWCA 230 -
Australian Traineeship System and Colchester GR Pty Ltd trading as Shell Service Station Waverley v Wafta [2004] NSWCA 230 -
Australian Traineeship System and Colchester GR Pty Ltd trading as Shell Service Station Waverley v Wafta [2004] NSWCA 230 -
O'Leary v Oolong Aboriginal Corporation Inc [2004] NSWCA 7 (14 May 2004)

17. The significance of particular susceptibility of a person to psychiatric injury is variously expressed in the judgments in *Tame* at [16] , [61]-[62] , [95] , [110] , [113] , [118] , [199] , [201] , [273] , [331] and [366] . For present purposes it is sufficient to act on what appears to be a broadly accepted test that 'normal fortitude' is a relevant consideration, but not an independent test or precondition of liability. (See *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 77 ALJR 1205 at [98] and [119] .)

O'Leary v Oolong Aboriginal Corporation Inc [2004] NSWCA 7 -
O'Leary v Oolong Aboriginal Corporation Inc [2004] NSWCA 7 -
O'Leary v Oolong Aboriginal Corporation Inc [2004] NSWCA 7 -
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O'Leary v Oolong Aboriginal Corporation Inc [2004] NSWCA 7 -
O'Leary v Oolong Aboriginal Corporation Inc [2004] NSWCA 7 -
O'Leary v Oolong Aboriginal Corporation Inc [2004] NSWCA 7 -
O'Leary v Oolong Aboriginal Corporation Inc [2004] NSWCA 7 -
O'Leary v Oolong Aboriginal Corporation Inc [2004] NSWCA 7 -
O'Leary v Oolong Aboriginal Corporation Inc [2004] NSWCA 7 -
O'Leary v Oolong Aboriginal Corporation Inc [2004] NSWCA 7 -
O'Leary v Oolong Aboriginal Corporation Inc [2004] NSWCA 7 -
Harriton v Stephens [2004] NSWCA 93 -
Harriton v Stephens [2004] NSWCA 93 -
New South Wales v Godfrey [2004] NSWCA 113 -
New South Wales v Godfrey [2004] NSWCA 113 -
New South Wales v Godfrey [2004] NSWCA 113 -
New South Wales v Godfrey [2004] NSWCA 113 -
Woolcock Street Investments Pty Ltd v CDG Pty Ltd [2004] HCA 16 -
Woolcock Street Investments Pty Ltd v CDG Pty Ltd [2004] HCA 16 -
Cran v State of New South Wales [2004] NSWCA 92 (29 March 2004) (Santow, Ipp and McColl JJA)

> 74 Finally, as regards the police, what was said in ***Tame v New South Wales*** (2002) 191 ALR 449 concerning a duty of care owed by police officers militates against the recognition of a duty of care in the circumstances obtaining in this case.

Cran v State of New South Wales [2004] NSWCA 92 -
Cran v State of New South Wales [2004] NSWCA 92 -
Cran v State of New South Wales [2004] NSWCA 92 -
Cran v State of New South Wales [2004] NSWCA 92 -
Cran v State of New South Wales [2004] NSWCA 92 -
Local Spiritual Assembly of the Baha'Is of Parramatta Ltd & v Babak Haghighat [2004] NSWCA 21 -
Local Spiritual Assembly of the Baha'Is of Parramatta Ltd & v Babak Haghighat [2004] NSWCA 21 -
Alexander v Perpetual Trustees WA Ltd [2004] HCA 7 -
Zavitsanou v McDonalds Australia Ltd [2004] NSWCA 10 -
Zavitsanou v McDonalds Australia Ltd [2004] NSWCA 10 -
Ah Tong v Wingecarribee Council [2003] NSWCA 381 (19 December 2003) (Giles, Ipp and Tobias JJA)

> 2 The claimants' proceedings rested on a duty to take reasonable care to avoid psychiatric injury to them, see for example *Tame v New South Wales*; *Annetts v Australian Stations Pty Ltd* (2002) 191 ALR 449 . The judge recorded that it was assumed in their favour that the opponent owed a duty to take reasonable care to avoid foreseeable risk of injury to persons using the Mt Gibraltar Reserve, citing in particular *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479. The injury to which that case referred was not psychiatric injury where, as *Tame* and *Annetts* show, special considerations apply in determining the existence of the duty of care. However, the opponent properly acknowledged that the duty of care assumed in favour of the claimants was taken at the trial to have extended to a duty to take reasonable care to avoid psychiatric injury to them, and it did not depart from that stance in the applications.

Ah Tong v Wingecarribee Council [2003] NSWCA 381 -
Ah Tong v Wingecarribee Council [2003] NSWCA 381 -
Ah Tong v Wingecarribee Council [2003] NSWCA 381 -
Cerebos (Australia) Ltd v Koehler [2003] WASCA 322 -
Crook v Consumer, Trader & Tenancy Tribunal of NSW [2003] NSWCA 370 -
Cerebos (Australia) Ltd v Koehler [2003] WASCA 322 -
Cerebos (Australia) Ltd v Koehler [2003] WASCA 322 -
Crook v Consumer, Trader & Tenancy Tribunal of NSW [2003] NSWCA 370 -

Cerebos (Australia) Ltd v Koehler [2003] WASCA 322 -
Cerebos (Australia) Ltd v Koehler [2003] WASCA 322 -
Crook v Consumer, Trader & Tenancy Tribunal of NSW [2003] NSWCA 370 -
Crook v Consumer, Trader & Tenancy Tribunal of NSW [2003] NSWCA 370 -
Cerebos (Australia) Ltd v Koehler [2003] WASCA 322 -
Southern Area Health Service v Brown [2003] NSWCA 369 -
Crook v Consumer, Trader & Tenancy Tribunal of NSW [2003] NSWCA 370 -
Cerebos (Australia) Ltd v Koehler [2003] WASCA 322 -
Southern Area Health Service v Brown [2003] NSWCA 369 -
O'Meara v Dominican Fathers [2003] ACTCA 24 -
O'Meara v Dominican Fathers [2003] ACTCA 24 -
O'Meara v Dominican Fathers [2003] ACTCA 24 -
CSR Limited v Thompson; Thompson v CSR Limited [2003] NSWCA 329 -
CSR Limited v Thompson; Thompson v CSR Limited [2003] NSWCA 329 -
CSR Limited v Thompson; Thompson v CSR Limited [2003] NSWCA 329 -
CSR Limited v Thompson; Thompson v CSR Limited [2003] NSWCA 329 -
CSR Limited v Thompson; Thompson v CSR Limited [2003] NSWCA 329 -
Shire of Brookton v Water Corporation [2003] WASCA 240 (10 October 2003) (Anderson J, Steytler J, McLure J)

> 43 However, the question whether a defendant was negligent is not answered solely by an affirmative answer to the questions whether damage was reasonably foreseeable and whether the risk was reasonably preventable. The failure to eliminate a risk that was reasonably foreseeable and preventable is not necessarily negligence. It is necessary to ask the further question of whether a defendant's failure to eliminate the relevant risk showed a want of reasonable care for the safety of the plaintiff's property: ***Tame v New South Wales*** [2002] HCA 35; (2002) 191 ALR 449 at 472 , 473 per McHugh J ; ***Woods v Multi-Sport Holdings Pty Ltd*** (2002) 208 CLR 460 at 472, 502 ; ***Graham Barclay Oysters Pty Ltd v Ryan*** ( *supra* ) at 367. It is in this context that McHugh J in ***Tame*** ( *supra* ) says (at 473) that the law of negligence should accord with what people really do, or can be expected to do, in real life situations.
>
> (Page 19)

Shire of Brookton v Water Corporation [2003] WASCA 240 -
Shire of Brookton v Water Corporation [2003] WASCA 240 -
Shire of Brookton v Water Corporation [2003] WASCA 240 -
Victims Compensation Fund Corporation v Brown [2003] HCA 54 -
Hood v State of Queensland [2003] QCA 408 -
Dovuro Pty Ltd v Wilkins [2003] HCA 51 -
Dovuro Pty Ltd v Wilkins [2003] HCA 51 -
Dovuro Pty Ltd v Wilkins [2003] HCA 51 -
Dovuro Pty Ltd v Wilkins [2003] HCA 51 -
Sekhon v Secretary, Department of Family and Community Services [2003] FCAFC 190 (03 September 2003) (Heerey, R D Nicholson and Selway JJ)

> 43. Further, it is inappropriate to use a 'but for' test to determine a sole cause. A 'but for' test is a test to determine **a** cause – it is not a test for determining the **sole** cause: see the comparison drawn by Callinan J between the 'but for' test and 'solely caused' in *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 192 ALR 1 at 51-52 [210] . Indeed, even as a test to determine **a** cause, it is too broad for some purposes such as to establish causation in tort: see Gummow and Kirby JJ in *Tame v New South Wales* (2002) 191 ALR 449 at 501 [211] .

Sekhon v Secretary, Department of Family and Community Services [2003] FCAFC 190 -
Sekhon v Secretary, Department of Family and Community Services [2003] FCAFC 190 -
Vukelic v Glad Cleaning Service [2003] NSWCA 253 -

NCS Australasia Pty. Limited v Hindi [2003] NSWCA 233 (21 August 2003) (Meagher and Beazley JJA, Santow J)

40 It is not readily apparent upon what basis his Honour concluded that the appellant had breached its non-delegable duty of care. It seems however that having found that the injury was foreseeable his Honour assumed that the place where she slipped was unsafe. The conclusion is curious in itself given that his Honour had earlier said that he could not find that the condition of the ramp, with sand on it, was dangerous, in the absence of expert evidence. But leaving that to one side for the moment, foreseeability of injury is not sufficient of itself to found negligence: see ***Sullivan v Moody*** (2001) 183 ALR 404. In ***Tame v. NSW*** (2002) 191 ALR 449 Hayne J at 512 re-emphasised the point:

> "As five members of the court have recently held [in ***Sullivan v. Moody*** ] foresight of harm does *not* suffice to establish the existence of a duty of care"

Not only is foreseeability of itself not sufficient, this is not a case of strict liability. As Gaudron J said in *NSW v Lepore* [2003] 195 ALR 412 at 439 :

> "To say that, where there in a non-delegable duty of care, there is, in effect, a strict liability is not to say that liability is established simply by proof of injury. ... there must first be a duty of care on the part of the person against whom liability is asserted. And, obviously, there must also have been a breach of that duty and resulting injury ."

Valleyfield Pty Ltd v Primac Ltd [2003] QCA 339 (08 August 2003) (Williams and Jerrard JJA and Mackenzie J,)

115. Those decisions include *Bryan v Maloney* [37] , *Perre v Apand Pty Ltd* [38] , *Modbury Triangle Shopping Centre Pty Ltd v Anzil & Anor* [39] , *Sullivan v Moody* [40] , *Tame v New South Wales* [41] , and *Graham Barclay v Ryan* [42] . These judgments identify as important criteria identifying the existence or non existence of a duty of care:

- actual foresight of the likelihood or possibility of harm of the kind suffered [43] ;
- or, absent actual foresight, reasonable foreseeability of that harm to the extent of recognition of it being an unreasonable risk created for others [44] ;
- who are either known to the person causing damage, or members of an ascertainable group or class reasonably foreseen as subject to that risk [45] ;
- where there is known or reasonably foreseen vulnerability of the person suffering damage to harm of that type, (often arising from their relying on the person causing harm to take care) and against which harm the person injured could not otherwise take steps adequately to protect themselves [46] ;
- in the absence of preventative action by reasonable care taken to avoid causing that damage [47] ;
- because of the degree of control exercised by the person causing the damage in or over the activity which causes it [48] ;
- and often relevant is the physical, geographic, or commercial propinquity of the parties, in the activities of each in which one suffered and the other caused the harm [49] .

*via*

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[44] *Tame v New South Wales* at [102] judgment of McHugh J

Valleyfield Pty Ltd v Primac Ltd [2003] QCA 339 -
Valleyfield Pty Ltd v Primac Ltd [2003] QCA 339 -
Valleyfield Pty Ltd v Primac Ltd [2003] QCA 339 -
Valleyfield Pty Ltd v Primac Ltd [2003] QCA 339 -
Valleyfield Pty Ltd v Primac Ltd [2003] QCA 339 -
Valleyfield Pty Ltd v Primac Ltd [2003] QCA 339 -
Valleyfield Pty Ltd v Primac Ltd [2003] QCA 339 -
Cafest v Tombleson [2003] NSWCA 210 -
Cafest v Tombleson [2003] NSWCA 210 -
Cafest v Tombleson [2003] NSWCA 210 -
Cattanach v Melchior [2003] HCA 38 -
Cattanach v Melchior [2003] HCA 38 -
Cattanach v Melchior [2003] HCA 38 -
Cattanach v Melchior [2003] HCA 38 -
Cattanach v Melchior [2003] HCA 38 -
Cattanach v Melchior [2003] HCA 38 -
Cattanach v Melchior [2003] HCA 38 -
Daly v D a Manufacturing Co P/L [2003] QCA 274 -
Daly v D a Manufacturing Co P/L [2003] QCA 274 -
Daly v D a Manufacturing Co P/L [2003] QCA 274 -
Daly v D a Manufacturing Co P/L [2003] QCA 274 -
Fairfield City Council v Petro [2003] NSWCA 150 (19 June 2003)

> 30. This Court has on numerous occasions pointed out that stairs are inherently, but obviously, dangerous and that many measures might be taken to make them safe. This notwithstanding, it is well recognised that the duty is only to take such care which is reasonable under the circumstances: see, for example, *Wilkinson v Law Courts Ltd* (2001) NSWCA 196 at [32] ; *Owner Strata Plan 30889 v Perrine* (2002) NSWCA 324 at [31 and 54]; *Franci s v Lewis* (2003) NSWCA 152 at [41] ; *Campbelltown City Council v Frew* (2003) NSWCA 154 at [25] . So much is consistent with the 'decisive question' referred to in by McHugh J in *Tame.*

Fairfield City Council v Petro [2003] NSWCA 150 -
Francis v Lewis [2003] NSWCA 152 -
Francis v Lewis [2003] NSWCA 152 -
Fairfield City Council v Petro [2003] NSWCA 150 -
Fairfield City Council v Petro [2003] NSWCA 150 -
Newcastle City Council v Shortland Management Services [2003] NSWCA 156 (18 June 2003) (Spigelman CJ, Mason P and Sheller JA)

> 88 Coherence was also emphasised in several judgments in *Tame v New South Wales* (2002) 76 ALJR 1348 where liability in negligence would "intersect" with the law of defamation, which resolves the competing interests of the parties in a different manner and according to a coherent body of doctrine. (See at [28] , [58] , [123] and [323] .)

Gifford v Strang Patrick Stevedoring Pty Ltd [2003] HCA 33 (18 June 2003) (Gleeson CJ,McHugh, Gummow, Kirby, Hayne and Callinan JJ)

> 117. In this Court the appellants contend that at common law direct visual perception of a relevant event or its immediate aftermath is not necessary. They argue that statements made by this Court in *Tame v New South Wales* ; *Annetts v Australian Stations Pty Ltd* [123] which were decided after the decision of the Court of Appeal in this case make that clear. In substance that submission is correct.

Newcastle City Council v Shortland Management Services [2003] NSWCA 156 (18 June 2003) (Spigelman CJ, Mason P and Sheller JA)

Tame v New South Wales (2002) 76 ALJR 1348
Victoria Park Racing and Recreation Grounds Co Ltd v Taylor

Gifford v Strang Patrick Stevedoring Pty Ltd [2003] HCA 33 (18 June 2003) (Gleeson CJ,McHugh, Gummow, Kirby, Hayne and Callinan JJ)

119. Subject to some qualifications I do not understand a majority of the other members of the Court to have stated a, or any very different view from the one that I did as to the various criteria. A particular qualification relates to "normal fortitude" which only McHugh J [126] an d I [127] thought to be an indispensable element of a cause of action for nervous shock. None of the other members of the Court however thought absence of normal fortitude irrelevant [1 28] . The balance of their opinion was that it could be of significance on the issue of foreseeability. No clear consensus emerged however as to how "perception" was to be defined or treated, or as to the classes of persons to whom a tortfeasor should be regarded as owing a duty of care not to cause nervous shock [129] because no doubt the unique features of *Tame* made it unnecessary to decide those matters conclusively.

*via*

[127] (2002) 76 ALJR 1348 at 1415 [366] ; 191 ALR 449 at 541.

Gifford v Strang Patrick Stevedoring Pty Ltd [2003] HCA 33 (18 June 2003) (Gleeson CJ,McHugh, Gummow, Kirby, Hayne and Callinan JJ)

46. The question then is, whether the relevant principles of the law of negligence required a finding that the respondent owed the children a duty of care to prevent psychiatric injury. That depends on whether the children were "neighbours" in Lord Atkin's sense of that term [48] . Were they so closely and directly affected by Strang's relationship with their father that Strang ought reasonably to have had them in contemplation when it directed its mind to the risk of injury to which it was exposing their father? That Strang negligently caused the death of their father is conceded. So it is unnecessary in this case to determine whether a risk of physical harm to the father existed and, if so, whether it could reasonably be disregarded. It is necessary, however, to determine whether exposing the father to that risk gave rise to a risk that the children would suffer nervous shock and whether *that* risk to the children could reasonably be disregarded [49] .

*via*

[49] *Tame v New South Wales* (2002) 76 ALJR 1348 at 1367 [108] ; 191 ALR 449 at 475.

Gifford v Strang Patrick Stevedoring Pty Ltd [2003] HCA 33 (18 June 2003) (Gleeson CJ,McHugh, Gummow, Kirby, Hayne and Callinan JJ)

88. Moreover, in attempting to define the scope of liability in negligence, it is useful to identify those interests which are sufficient to attract the protection of the law in any given field [96] . It was said in *Tame* that the interest which the law seeks to protect in actions such as the present is more narrowly defined than the interest in "peace of mind" which has been held in the United States to warrant legal protection [97] . Australian law seeks to protect, in an appropriate case, the plaintiff's freedom from serious mental harm which manifests itself in a recognisable psychiatric illness.

*via*

[97] (2002) 76 ALJR 1348 at 13771378 [171]-[175] ; 191 ALR 449 at 489490 .

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Gifford v Strang Patrick Stevedoring Pty Ltd [2003] HCA 33 (18 June 2003) (Gleeson CJ,McHugh, Gummow, Kirby, Hayne and Callinan JJ)

69. The respondent further submits that, even if s 4(1)(b) does not have the effect for which it contends, no duty of care arose in the present circumstances. The respondent points in particular to the significance to the finding of a duty of care in *Annetts* of the reliance by Mr and Mrs Annetts on the assurances given by the respondent in that case as to the care that would be taken in its employment of their adolescent son on its isolated cattle station; an antecedent relationship therefore existed between Mr and Mrs Annetts and their son's employer [65] . It is said that the respondent in the present case provided no similar assurances upon which the appellants relied respecting their father's safety from harm during the course of his employment.

Gifford v Strang Patrick Stevedoring Pty Ltd [2003] HCA 33 (18 June 2003) (Gleeson CJ,McHugh, Gummow, Kirby, Hayne and Callinan JJ)

97. The Court of Appeal of New South Wales held that the appellants could not recover for psychiatric injury allegedly suffered as a result of their hearing that their father had been run over and killed at work, because they did not perceive the incident or its aftermath [108] . In *Tame v New South Wales* and *Annetts v Australian Stations Pty Ltd* [109] (judgment in which was given after the Court of Appeal's decision in the present matters), this Court held that the lack of direct perception of a traumatic incident is not fatal to a claim for damages for psychiatric injury [110] . It follows that the Court of Appeal erred.

*via*

[110] *Tame v New South Wales* ; *Annetts v Australian Stations Pty Ltd* (2002) 76 ALJR 1348 at 1353 [18] per Gleeson CJ, 13571358 [51][52] per Gaudron J, 13881389 [221][222], [225] per Gummow and Kirby JJ, 1395 [257], 1397 [266][267] per Hayne J, 14131415 [360][361], [365][366] per Callinan J; 191 ALR 449 at 456, 461462, 504505, 514, 516517, 539540, 541542 .

Gifford v Strang Patrick Stevedoring Pty Ltd [2003] HCA 33 (18 June 2003) (Gleeson CJ,McHugh, Gummow, Kirby, Hayne and Callinan JJ)

52. In other cases, an association with the primary victim or being in their presence may be sufficient to give rise to a duty to take reasonable care to protect a person from suffering psychiatric harm. This will often be the case where the person suffering psychiatric harm saw or heard the harm-causing incident or its aftermath. As members of this Court pointed out in *Tame* , in determining whether the psychiatric injury suffered was reasonably foreseeable, relevant considerations may include whether the person who suffers that injury directly perceived the distressing incident or its immediate aftermath or suffered a sudden shock. If so, a duty to take care may exist even though the primary victim and the person suffering psychiatric harm had no pre-existing relationship. In *Tame* [52] , Gleeson CJ said that such matters are relevant where the nature of the relationship is not that of parent and a child. They are relevant because they go to the issue whether it was reasonable to require the defendant to have in contemplation injury of the kind suffered by the plaintiff and to take steps to guard against such injury. Gaudron J [53] said that, absent circumstances giving rise to a sudden shock, the risk of psychiatric injury will not be reasonably foreseeable in many cases. Gummow and Kirby JJ said [54] :

> "Distance in time and space from a distressing phenomenon, and means of communication or acquisition of knowledge concerning that phenomenon, may be relevant to assessing reasonable foreseeability, causation and remoteness of damage in a common law action for negligently inflicted psychiatric illness. But they are not themselves decisive of liability."

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*via*

[52] (2002) 76 ALJR 1348 at 1353 [18] ; 191 ALR 449 at 456.

Gifford v Strang Patrick Stevedoring Pty Ltd [2003] HCA 33 (18 June 2003) (Gleeson CJ,McHugh, Gummow, Kirby, Hayne and Callinan JJ)

8. For the reasons I gave in *Tame* and *Annetts* , I consider that the central issue is whether it was reasonable to require the respondent to have in contemplation the risk of psychiatric injury to the appellants, and to take reasonable care to guard against such injury [7] . Relevant to that issue is the burden that would be placed upon those in the position of the respondent by requiring them to anticipate and guard against harm of the kind allegedly suffered by the appellants.

*via*

[7] (2002) 76 ALJR 1348 at 1351-1352 [9]-[10] , 1353 [18] ; 191 ALR 449 at 453-454 , 456.

Gifford v Strang Patrick Stevedoring Pty Ltd [2003] HCA 33 -

Gifford v Strang Patrick Stevedoring Pty Ltd [2003] HCA 33 -

> "To repudiate it also ignores the right of citizens in a free society not to have their freedom of action and communication unreasonably burdened. Most motor vehicle accidents could be avoided if cars were driving at a speed less than 10 km per hour. But to impose such a standard of care on drivers would unreasonably hamper the speed of travel, increase the congestion on the roads and burden the economy with unnecessary increases in the cost of transporting goods and persons."

Roads and Traffic Authority of NSW v Jackson [2003] NSWCA 40 -
Roads and Traffic Authority of NSW v Jackson [2003] NSWCA 40 -
Roads and Traffic Authority of NSW v Jackson [2003] NSWCA 40 -
Harris v Digital Pulse Pty Ltd [2003] NSWCA 10 -
Harris v Digital Pulse Pty Ltd [2003] NSWCA 10 -
Harris v Digital Pulse Pty Ltd [2003] NSWCA 10 -
Harris v Digital Pulse Pty Ltd [2003] NSWCA 10 -
Harris v Digital Pulse Pty Ltd [2003] NSWCA 10 -
New South Wales v Lepore [2003] HCA 4 (06 February 2003) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

295. This being the case, there was no issue in the litigation (such as arose in the peculiar circumstances of *Introvigne* ) that necessitated consideration of the non-delegable duty principle in order to bring home liability (so far as it existed) from the teacher, or from some other independent authority or body, to the State concerned. Because each teacher was an employee, the applicable category for determining both the identification of the relevant superior and the scope of that superior's duty, was the common law principle of vicarious liability. Employers, including employers such as a State of the Commonwealth, are vicariously liable for specified torts on the part of their employees. Special rules, such as the principle of non-delegable duty, developed over time to deal with specific circumstances, should not be applied when the broader basis of vicarious liability applies to the circumstances, as it does here. Such an approach is consistent with the recent decision of this Court in *Tame v New South Wales* [330] , where it was held that the specific rules relating to nervous shock must not distract attention from the underlying principle, that liability in negligence is imposed where it is reasonable to find that a duty of care exists.

New South Wales v Lepore [2003] HCA 4 -
Moore v Woodforth [2003] NSWCA 9 -
New South Wales v Lepore [2003] HCA 4 -
Moore v Woodforth [2003] NSWCA 9 -
New South Wales v Lepore [2003] HCA 4 -
Campbelltown City Council v Bussell by his next friend Kay Bussell [2002] NSWCA 410 -
Campbelltown City Council v Bussell by his next friend Kay Bussell [2002] NSWCA 410 -
State of New South Wales v Napier [2002] NSWCA 402 (13 December 2002)

58. This appeal was argued while the High Court judgment in ***Tame v New South Wales*** [2002] HCA 35, 76 ALJR 1348 stood reserved. It was therefore agreed at the hearing that judgment in the appeal would stand reserved until the High Court judgment was delivered and that the parties could file supplementary written submissions addressing any issue affected by the High Court's reasons.

State of New South Wales v Napier [2002] NSWCA 402 -
State of New South Wales v Napier [2002] NSWCA 402 -
State of New South Wales v Napier [2002] NSWCA 402 -
State of New South Wales v Napier [2002] NSWCA 402 -
State of New South Wales v Napier [2002] NSWCA 402 -
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State of New South Wales v Napier [2002] NSWCA 402 -
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State of New South Wales v Napier [2002] NSWCA 402 -
State of New South Wales v Napier [2002] NSWCA 402 -
State of New South Wales v Napier [2002] NSWCA 402 -
Goulding v Kirby [2002] NSWCA 393 -
Goulding v Kirby [2002] NSWCA 393 -
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 (05 December 2002) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

244. Perhaps this is the ultimate lesson for legal theory in the attempted conceptualisation of the law of negligence and the expression of a universal formula for the existence, or absence, of a legal duty of care on the part of one person to another. The search for such a simple formula may indeed be a "will-o'-the wisp" [213] . It may send those who pursue it around in never-ending circles that ultimately bring the traveller back to the very point at which the journey began. Thus we seem to have returned to the fundamental test for imposing a duty of care, which arguably explains all the attempts made so far. That is, a duty of care will be imposed when it is reasonable in all the circumstances to do so. That is the test that Gummow J and I adopted in our joint reasons in the recent decision in *Tame v New South Wales* [214] , decided after *Sullivan* . Even if the approach of the other members of the Court in that case does not do so explicitly, it is obvious that the "touchstone" [215] of reasonableness is fundamental to the way in which they determined the existence or otherwise of a duty of care [216] . So after 70 years the judicial wheel has, it seems, come full circle. In this way only is Ajax's prayer answered [217] .

*via*

[215] (2002) 76 ALJR 1348 at 1382 [195], see also at 1409 [331] per Callinan J; 191 ALR 449 at 496 , 533.

Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 (05 December 2002) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

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*via*

[216] *Tame v New South Wales* (2002) 76 ALJR 1348 at 1355 [35] per Gleeson CJ, 1367 [109] per McHugh J, 1398 [272] per Hayne J, 1409 [331] per Callinan J ; 191 ALR 449 at 459, 475, 518, 533.

Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 -
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 -
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Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 -
Proprietors of Strata Plan 17226 v Drakulic [2002] NSWCA 381 -
Proprietors of Strata Plan 17226 v Drakulic [2002] NSWCA 381 -
De Sales v Ingrilli [2002] HCA 52 -
Rundle v State Rail Authority of New South Wales [2002] NSWCA 354 -
Rundle v State Rail Authority of New South Wales [2002] NSWCA 354 -
Rundle v State Rail Authority of New South Wales [2002] NSWCA 354 -
Cadwallader v Bajco Pty Ltd [2002] NSWCA 328 (26 September 2002) (Heydon and Santow JJA, Gzell J)

27 It follows that in theory there are seven main areas of dispute on the appeal.

(a) Was the trial judge right to reject the evidence of the four witnesses? Even if he was right in that course, in the alternative, was he right to reject the evidence of the directors that their purpose was to avoid insolvent trading? This was a contest in which Mr David Cadwallader and Mrs Marilyn Wintzloff attacked the trial judge and Mr Alan Cadwallader defended him. The administrators said nothing either way. Success for Mr David Cadwallader and Mrs Marilyn Wintzloff would result in the Further Amended Statement of Claim being dismissed, and the administrators remaining in place as administrators under the deed of company arrangement, subject to arguments which they advanced in support of the proposition that they should continue as liquidators.

(b) Should the trial judge have upheld the waiver defence? Mr David Cadwallader and Mrs Marilyn Wintzloff contended that he should have. So did the administrators. Mr Alan Cadwallader contended that the trial judge was correct in not upholding it. Success for the critics would result in dismissal of the Further Amended Statement of Claim, and would leave the administrators in place as above, subject to their argument that they should continue as liquidators (in which they were briefly supported by the directors).

(c) Should the trial judge have upheld the unclean hands defence? Mr David Cadwallader and Mrs Marilyn Wintzloff contended that the trial judge should have. Mr Alan Cadwallader contended that he was right not to. The administrators said nothing on this issue. Success for the critics would result in dismissal of the Further Amended Statement of Claim, and would leave the administrators in place as above, subject to their argument that they should continue as liquidators (in which they were briefly supported by the directors).

(d) Were the trial judge's findings that Mr Cardwell at least ought to have known of the directors' improper purpose correct? Even if correct, were the findings sufficient to make the resolutions of 27 November 1997 invalid against the administrators? Here the critics were the administrators, while

**BarNet publication information** - Date: Sunday, 28.09.2025 - Publication number: 00038 - User: jayspudvilas@gmail.com

Mr Alan Cadwallader contended that the findings were irrelevant, but that if they were relevant, they were correct and sufficient. Mr David Cadwallader and Mrs Marilyn Wintzloff were silent on this issue.

(e) Was the administrators' Report enclosed with the notice of the second creditors' meeting deficient as the trial judge found? The administrators said it was not; Mr Alan Cadwallader said it was. Mr David Cadwallader and Mrs Marilyn Wintzloff were silent on this issue. Success for the administrators would improve their position in contending for more favourable orders in relation to expenses and costs, but would undercut the parts of the trial judge's reasoning which resulted in their appointment as liquidators, and hence was adverse to what was apparently perceived by the administrators as an important aspect of their self-interest.

(f) Was the trial judge right to make orders having the effect of putting Bajco Pty Ltd into liquidation, or should he have set aside the 27 November 1997 resolutions ab initio? The administrators defended him while Mr Alan Cadwallader attacked him. Mr David Cadwallader and Mrs Marilyn Wintzloff were silent on this issue, apart from a very brief indication of support for the administrators in consequence of their waiver and unclean hands defences.

(g) Were the trial judge's orders in relation to remuneration and costs as they affected the administrators correct? The administrators said they were not, Mr Alan Cadwallader said they were, and Mr David Cadwallader and Mrs Marilyn Wintzloff were silent.

Where an Equity Division judge experienced in the field to which the litigation relates delivers a long, detailed and careful judgment which attracts so much hostile fire from so many quarters, it may be inferred that it is probably correct in every respect: cf *Tame v New South Wales; Annets v Australian Stations Pty Ltd* [2002] HCA 35 at [70] per McHugh J . While in fact there are a few errors in the reasoning of the trial judge in this case, most of them induced by one or other of the parties, it has not in fact been shown that it was incorrect in any material respect except one.

**The position of the administrators on the appeal**

Cadwallader v Bajco Pty Ltd [2002] NSWCA 328 -