Gifford v Strang Patrick Stevedoring Pty Ltd - [2003] HCA 33

HIGH COURT OF AUSTRALIA

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

Matter No S111/2002

DARREN GIFFORD APPELLANT

AND

STRANG PATRICK STEVEDORING RESPONDENT

PTY LIMITED

Matter No S112/2002

KELLY GIFFORD APPELLANT

AND

STRANG PATRICK STEVEDORING RESPONDENT

PTY LIMITED

Matter No S113/2002

MATTHEW GIFFORD APPELLANT

AND

STRANG PATRICK STEVEDORING RESPONDENT

PTY LIMITED

Gifford v Strang Patrick Stevedoring Pty Ltd

[2003] HCA 33
18 June 2003
S111/2002, S112/2002 and S113/2002

ORDER IN EACH MATTER

1. Appeal allowed.

2. Set aside the orders of the New South Wales Court of Appeal dated 14 June 2001 and, in lieu thereof, order that:

(a) appeal to the Court of Appeal is allowed;

(b) the orders of the District Court of New South Wales dated 24 August 1999 are set aside; and

(c) the matter be remitted to the District Court for determination of all outstanding issues.

3. The respondent to pay the costs of the appellant in this Court and in the Court of Appeal.

4. Costs of each party in the District Court to abide the outcome of proceedings in that Court.

On appeal from the Supreme Court of New South Wales

Representation:

B J Gross QC with D E Baran for the appellants (instructed by G H Healey & Co with Graeme R Jensen & Co)

J D Hislop QC with T F McKenzie for the respondent (instructed by Gillis Delaney Brown)

CATCHWORDS

Gifford v Strang Patrick Stevedoring Pty Ltd

Torts – Negligence – Psychiatric injury – Employee killed in workplace accident – Whether employer owed duty of care to children of deceased employee – Whether reasonable care required to guard against the risk of psychiatric injury – Whether duty existed at common law – Whether the existence of duty was negated by s 4(1)(b) of *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) .

Law Reform (Miscellaneous Provisions) Act 1944 (NSW), s 4(1)(b) .
Workers Compensation Act 1987 (NSW), s 151P .

1. GLEESON CJ. These three appeals, which were heard together, arise out of claims for damages for negligently inflicted psychiatric injury brought by the children of a man who was killed in an accident at work. The issue is whether the man's employer owed a duty of care to the children.

2. The respondent to each appeal, a stevedoring company, employed the late Mr Barry Gifford, who was crushed to death by a forklift vehicle. Negligence on the part of the driver of the vehicle, who was also an employee of the respondent, and on the part of the respondent itself, was alleged, and was admitted. At the time, the appellants were aged 19, 17 and 14 respectively. They did not witness the accident. They were all informed of what had occurred later on the same day.

3. The appellants claim to have suffered psychiatric injury in consequence of learning of what had happened to their father. This aspect of their claims has not yet been determined. A similar claim by the mother of the appellants failed upon the ground that she had suffered no psychiatric injury, but had merely been affected by normal grief of a kind that did not give rise to an entitlement to damages. Her appeal against that decision was dismissed [1] .

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[1] *Gifford v Strang Patrick Stevedoring Pty Ltd* (2001) 51 NSWLR 606.

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4. In the District Court of New South Wales, the claims of the appellants were dismissed upon the ground that, by reason of s 4(1)(b) of the *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) ("the Act"), the respondent was under no liability for the "nervous shock" allegedly suffered by the appellants, because their father had not been killed, injured, or put in peril within their sight or hearing [2] . The New South Wales Court of Appeal (Handley and Hodgson JJA, Ipp AJA) considered that the respondent's reliance upon s 4(1)(b) was misplaced. However the Court of Appeal reached the same ultimate conclusion as the primary judge upon the ground that, because the appellants had merely been told about the incident, and did not directly perceive either the event that resulted in the death of their father or its aftermath, then there was no duty of care at common law. [3]

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[2] At the time to which these appeals relate, s 4(1)(b) was in force. It has subsequently been overtaken by the *Civil Liability (Personal Responsibility) Act* 2002 (NSW), s 32, but that provision is presently irrelevant.

[3] *Gifford v Strang Patrick Stevedoring Pty Ltd* (2001) 51 NSWLR 606 at 617.

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5. **Following paragraph cited by:**

Sheehan v SRA; Wicks v SRA (31 August 2009) (Beazley JA at 1; Giles JA at 81; McColl JA at 82)
Kemp v Lyell McEwin Health Service (01 December 2006) (Debelle J)
Perham v Connolly (10 November 2003) (Atkinson J)

Since the decision of the Court of Appeal, this Court has held, in *Tame v New South Wales* and *Annetts v Australian Stations Pty Ltd* [4] , that direct perception of an incident or its aftermath is not in all cases a necessary aspect of a claim for damages for negligently inflicted psychiatric injury. Accordingly, it will be necessary to reconsider the claims of the appellants in the light of that decision. If it is concluded that the Court of Appeal was in error in deciding that the respondent owed no duty of care to the appellants at common law, it will then be necessary to deal with the respondent's Notice of Contention, which seeks to support the dismissal of the appeals upon the ground favoured by the trial judge, that is to say, s 4(1)(b) of the Act . In that connection, the appellants rely upon an argument, rejected both at first instance and in the Court of Appeal, to the effect that the operation of s 4(1)(b) of the Act is displaced by s 151P of the *Workers Compensation Act* 1987 (NSW) ("the Workers Compensation Act").

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[4] (2002) 76 ALJR 1348; 191 ALR 449.

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6. In the event that the appellants succeed, the matter will have to be remitted to the District Court for the determination of the outstanding issues, including the issue that was fatal to the claim of the appellants' mother.

The common law duty of care

7. **Following paragraph cited by:**

Wicks v State Rail Authority of New South Wales known as State Rail (13 April 2010) (French CJ; Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ)

Your Honours, could we just go then to the case of *Gifford* , where I can just make some brief references. Your Honours, *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269. Your Honours, once again we find in this judgment the reference to "a distressing incident or its aftermath" and I would just like to focus upon those aspects. At page 275, at paragraph 7 :

The Court of Appeal decided against the appellants on the ground that there can be no liability at common law for damages for mental injury to a person who is told about an horrific accident or injury to a loved one but does not actually perceive the incident or its aftermath [5] . That proposition is inconsistent with the reasoning of this Court in *Tame* and *Annetts* , and cannot stand with the actual decision in *Annetts* [6] . It does not follow, however, that the circumstance that the appellants were not present when their father suffered his fatal injury, and did not observe its aftermath, is irrelevant to the question whether the respondent owed them, as well as their father, a duty to take reasonable care to prevent injury of the kind they allegedly suffered.

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[5] (2001) 51 NSWLR 606 at 616-618 per Hodgson JA; Handley JA agreeing at 608; Ipp AJA agreeing at 623.

[6] (2002) 76 ALJR 1348 at 1353 [18], 1357 [51], 1380-1381 [187]-[191], 1386-1387 [214]-[216], 1388-1389 [225], 1395 [256], 1398 [271]-[272], 1415 [366]; 191 ALR 449 at 456, 461-462, 494-495, 502-503, 505, 514, 518, 541-542 .

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8. **Following paragraph cited by:**

Kemp v Lyell McEwin Health Service (01 December 2006) (Debelle J)

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.

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[7] (2002) 76 ALJR 1348 at 1351-1352 [9]-[10], 1353 [18]; 191 ALR 449 at 453-454, 456.

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9. **Following paragraph cited by:**

Minister for the Environment v Sharma (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)
Potter v Gympie Regional Council (10 February 2022) (Brown J)
Kemp v Lyell McEwin Health Service (01 December 2006) (Debelle J)
Pickering v McArthur (20 April 2005) (McGill DCJ)
Pickering v McArthur (20 April 2005) (McGill DCJ)

As the facts in *Tame* illustrated so vividly, just as it would place an unreasonable burden upon human activity to require people to anticipate and guard against all kinds of foreseeable financial harm to others that might be a consequence of their acts or omissions, so also it would be unreasonable to require people to anticipate and guard against all kinds of foreseeable psychiatric injury to others that might be a consequence of their acts or omissions. In the case of Mrs Tame, her personal susceptibility raised an additional problem of foreseeability. However, just as advances in medical knowledge have made us aware of the variety of circumstances in which emotional disturbance can trigger, or develop into, recognisable psychiatric injury, so they also make us aware of the implications, for freedom of action and personal security, of subjecting people to a legal requirement to anticipate and guard against any risk to others of psychiatric injury so long as it is not far-fetched or fanciful. In the context of a question of duty of care, reasonable foreseeability involves more than mere predictability. And advances in the predictability of harm to others, whether in the form of economic loss, or psychiatric injury, or in some other form, do not necessarily result in a co-extensive expansion of the legal obligations imposed on those whose conduct might be a cause of such harm. The limiting consideration is reasonableness, which requires that account be taken both of interests of plaintiffs and of burdens on defendants. Rejection of a "control mechanism", such as the need for direct perception of an incident or its aftermath, originally devised as a means of giving practical content to that consideration, does not involve rejection of the consideration itself.

10. **Following paragraph cited by:**

Fuller-Wilson v State of New South Wales (03 October 2018) (Basten and White JJA, Emmett AJA)
Kemp v Lyell McEwin Health Service (01 December 2006) (Debelle J)

In its capacity as an employer, the respondent was under a duty of care towards the father of the appellants. The question is whether, additionally, it was under a duty of care which required it to have in contemplation psychiatric injury to the children of its employee, and to guard against such injury. The relationship of parent and child is important in two respects. First, it goes to the foreseeability of injury. That a child of the age of the various appellants might suffer psychiatric injury in consequence of learning, on the day, of a terrible and fatal injury to his or her father, is not beyond the "common experience of mankind" [8] . (The fact that all three of the victim's children are said to have suffered psychiatric injury might give rise to some questions for the experts on a new trial, but is not presently relevant). Secondly, it bears upon the reasonableness of recognising a duty on the part of the respondent. If it is reasonable to require any person to have in contemplation the risk of psychiatric injury to another, then it is reasonable to require an employer to have in contemplation the children of an employee.

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[8] cf *Chester v Waverley Corporation* (1939) 62 CLR 1 at 10 per Latham CJ.

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11. In *Jaensch v Coffey* [9] , Gibbs CJ said:

> "Where the relationship between the person killed or physically injured and the person who suffers nervous shock is close and intimate, not only is there the requisite proximity in that respect, but it is readily defensible on grounds of policy to allow recovery."

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[9] (1984) 155 CLR 549 at 555.

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12. Not all children have a close and intimate relationship with their parents; and it may be that, even when parents are killed in sudden and tragic circumstances, most grieving children do not suffer psychiatric injury. However, as a class, children form an obvious category of people who might be expected to be at risk of the kind of injury in question. Where there is a class of person, such as children, who are recognised, by the law, and by society, as being ordinarily in a relationship of natural love and affection with another class, their parents, then it is not unreasonable to require that an employer of a person in the second class, whose acts or omissions place an employee at risk of physical injury, should also have in contemplation the risk of consequent psychiatric injury to a member of the first class.

13. Subject to the matter next to be considered, I would conclude that the respondent owed a duty of care to the appellants.

Section 4(1)(b)

14. **Following paragraph cited by:**

Sheehan v SRA; Wicks v SRA (31 August 2009) (Beazley JA at 1; Giles JA at 81; McColl JA at 82)

Section 4 of the Act is set out in the reasons for judgment of Callinan J. The legislative history is described in an article written by Mr D Butler and published in 1996 in the *Torts Law Journal* [10].

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[10] Butler, "Nervous shock at common law", (1996) 4 *Torts Law Journal* 120.

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15. **Following paragraph cited by:**

Sheehan v SRA; Wicks v SRA (31 August 2009) (Beazley JA at 1; Giles JA at 81; McColl JA at 82)

The provision was a response by the New South Wales legislature to the decision of this Court in *Chester v Waverley Corporation* [11] . In considering the nature of that response, it is important to note some features of the existing state of the common law, as exemplified in *Chester* . In *Chester* , the majority ruled against the claim of a mother who suffered "nervous shock" following the drowning of her child in a trench excavated by the local council and left unguarded. The mother did not witness the drowning, but participated in a search for the child, and was present when the child's body was recovered. Evatt J, in dissent, considered that the case fell within the principles relating to search and rescue, and that the council's duty of care to the mother was owed because, although she was not at the scene of the accident when the child was drowned, she came there soon afterwards in search of the child and might have been a participant in a possible rescue [12] . As Deane J pointed out in *Jaensch v Coffey* [13] , in terms of modern law, the conclusion of Evatt J is to be preferred to that of the majority. However, the reasoning of Evatt J was put on a limited basis, and his analysis in terms of primary and secondary liabilities was criticised by Professor Fleming[14] in the first edition of his work on the law of torts.

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[11] (1939) 62 CLR 1 .

[12] (1939) 62 CLR 1 at 37-39 .

[13] (1984) 155 CLR 549 at 591.

[14] Fleming, *The Law of Torts*, (1957) at 180.

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16. While the reasoning of all the members of the Court in *Chester* has since been overtaken by developments in the common law of Australia, that of Evatt J demonstrates a point that is significant in considering the legislative purpose behind s 4 of the Act . Section 4 deals with psychiatric injury to members of the family of a victim. Section 3 provides that in an action for injury caused after the commencement of the Act , "the plaintiff shall not be debarred from recovering damages merely because the injury complained of arose wholly or in part from mental or nervous shock". Section 4 goes on to provide that the liability of any person in respect of injury caused by the act, neglect or default by which any other person is killed, injured or put in peril, shall "extend to include liability" for injury arising from mental or nervous shock sustained by family members in certain circumstances. In the case of a parent, or husband or wife, of the victim, it is not stipulated that the victim must be killed, injured or put in peril in the sight or hearing of the plaintiff. In the case of other family members, there is such a stipulation. The expression "member of the family" is defined (s 4(4)). Relevantly, it includes children. Hence, if s 4(1)(b) were definitive of the potential liability of the respondent to the appellants, the appellants would fail, because the father was not killed, injured or put in peril within their sight or hearing.

17. As the reasoning of Evatt J in *Chester* shows, s 4 does not cover the entire range of persons who, as the common law stood in 1944, might have sued for "nervous shock". In particular, it does not cover rescuers who are not family members. The English decision of *Chadwick v British Railways Board* [15] , in 1967, which concerned nervous shock suffered by a man who had participated in emergency services following a collision between two railway trains, did not represent a development in the common law. The principles upon which it was decided were the same as those which Evatt J said should have been applied in *Chester* [16] . If s 4 of the Act amounted to a definitive statement of the circumstances in which a claim for mental or nervous shock of the kind referred to in s 3 might succeed, then it did not "extend" the liability of defendants; in certain respects it narrowed that liability, even by reference to the state of the common law in 1944.

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[15] [1967] 1 WLR 912; [1967] 2 All ER 945.

[16] See also *Haynes v Harwood* [1935] 1 KB 146.

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18. In *Coates v Government Insurance Office of New South Wales* [17] , on the view I took of other issues in the case, it was unnecessary (and therefore, I thought, inappropriate) for me to decide whether s 4(1)(b) operated to limit rights that would otherwise have been given by the common law. It appeared to me then, and appears to me now, that the question is whether the statute evinces an intention that it is to be definitive of rights and liabilities in the case of all claims for damages for nervous shock, or whether the statute is to be regarded as supplementary to, and not derogating from, the rights of persons at common law [18] . In *Coat es* , Kirby P, who found it necessary to decide the point, preferred the second construction. The same view was taken by Mason P in *FAI General Insurance Co Ltd v Lucre* [19] , and by the Court of Appeal in this case.

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[17] (1995) 36 NSWLR 1 .

[18] See *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 505-506 per Mason CJ and Toohey J.

[19] (2000) 50 NSWLR 261 at 263-264 .

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19. In the present case, Hodgson JA, with whom Handley JA and Ipp AJA agreed, pointed out that s 4 does not expressly state that there shall be no liability in respect of mental or nervous shock sustained by persons other than the immediate victim, unless the conditions laid down by the section are satisfied. That is correct, and significant.

20. Hodgson JA went on to say [20] :

> "One other consideration which persuades me that the common law is not displaced is that s 4 starts with a breach of duty of care to one person, and then extends liability for that breach to include a liability to certain other persons: it does not provide that there is any duty of care to those other persons. In so far as the common law provides for liability to persons other than the immediate victim, it does so by means of a duty of care owed directly to those persons, rather than a liability built upon a breach of duty to the primary victim."

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[20] (2001) 51 NSWLR 606 at 615.

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21. The second sentence is accurate, but the explanation of the form of s 4 , referred to in the first sentence, might possibly be found in the view of the common law taken by Evatt J in *Chester* , which was rather different from the modern view. Indeed, that was the basis of Professor Fleming's criticism of the reasoning of Evatt J noted earlier [21] .

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[21] Above at [15].

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22. Whether or not it owes its origin to an outmoded or unorthodox view of the common law as involving primary and secondary liability, the scheme of s 4 , including the expression "shall extend to include liability" of a certain kind in certain circumstances, is difficult to reconcile with a legislative intention comprehensively to define liability. Furthermore, the legislative history shows that, although s 4 represented a parliamentary compromise as to the desirable extent of reform, it was intended to confer, rather than take away, rights.

23. **Following paragraph cited by:**

Sheehan v SRA; Wicks v SRA (31 August 2009) (Beazley JA at 1; Giles JA at 81; McColl JA at 82)

The Court of Appeal was right to conclude that s 4 of the Act does not have the effect of excluding the liability of the respondent to the appellants if such liability otherwise exists at common law.

24. As to the argument, advanced on behalf of the appellants, to the effect that s 151P of the Workers Compensation Act , in cases such as the present, displaces s 4 , I agree with what has been said by Gummow and Kirby JJ.

Conclusion

25. The appeals should be allowed. I agree with the consequential orders proposed by Gummow and Kirby JJ.

26. **Following paragraph cited by:**

Hicks v The Minister for Justice & A-G (11 March 2005) (Byrne J)

McHUGH J. Section 4 of the *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) [22] enacted that a member of the family of a person killed by the negligence of another may bring an action for nervous shock[23] if the person was killed "within the sight or hearing of such member of the family." The children of an employee claim that they suffered nervous shock when they were told that their father had been killed at work. His death was caused by the negligence of his employer. The children were not present when he was killed, nor did they see his dead body. They learnt of his death some hours after it occurred. Accordingly, they cannot bring an action under s 4 . But does s 4 abolish the common law right of a family member to bring an action for nervous shock suffered as the result of the wrongful death of the relative? If not, did the employer's duty to take reasonable care for the safety of their father during the course of his employment include a separate duty to the children to protect them from suffering nervous shock by reason of a breach of the duty owed to their father? These are the principal issues in these appeals from a decision of the Court of Appeal of New South Wales holding that the common law action is not abolished, but that the employer owed no such duty to the children.

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[22] Sections 3 and 4 of the *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) were repealed by the *Civil Liability Amendment (Personal Responsibility) Act* 2002 (NSW) and have now been replaced by Pt 3 of the *Civil Liability Act* 2002 (NSW) .

[23] "Nervous shock" is an outdated term that nowadays is taken to mean a recognisable psychiatric injury.

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27. **Following paragraph cited by:**

Puleio v Olam Orchards Pty Ltd (21 March 2018) (Zammit J)

In my opinion, the Court of Appeal was correct in holding that the *Law Reform (Miscellaneous Provisions) Act* does not abolish the common law right of a family member to bring an action for nervous shock. But it erred in holding that the employer owed no duty to the children. An employer owes a duty to take care to protect from psychiatric harm all those persons that it knows or ought to know are in a close and loving relationship with its employee. It is not a condition of that duty that such persons should be present when the employee suffers harm or that they should see the injury to the employee. That is the logical consequence of the reasoning in *Tame v New South Wales* [24] – a decision of this Court delivered after the decision of the Court of Appeal in the present case.

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[24] (2002) 76 ALJR 1348; 191 ALR 449.

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28. An issue also arises in these appeals as to whether s 151P of the *Workers Compensation Act* 1987 (NSW) provides an independent cause of action for nervous shock. In my opinion, it does not do so.

Statement of the case

The District Court

29. Darren Gifford, Kelly Gifford and Matthew Gifford sued Strang Patrick Stevedoring Pty Ltd ("Strang") in the District Court of New South Wales for damages for nervous shock suffered when they were told of the death of their father as a result of a workplace accident. Strang admitted that its negligence caused the death of their father, however the District Court dismissed their actions[25]. Naughton DCJ, who heard the actions, held that in New South Wales s 4(1)(b) of the *Law Reform (Miscellaneous Provisions) Act* covered the field of nervous shock actions, and that it replaced the common law action with a statutory cause of action. Accordingly, his Honour held that, as the deceased was not killed, injured or put in peril within the sight or hearing of any of the children, s 4(1)(b) prevented them from recovering damages for nervous shock. His Honour made no finding as to whether any of the children had suffered nervous shock [26].

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[25] *Gifford v Strang Patrick Stevedoring Pty Limited* unreported, District Court of New South Wales, 24 August 1999.

[26] The wife of the deceased also claimed damages for nervous shock. Naughton DCJ dismissed her action on the basis that she had not suffered any demonstrable psychological or psychiatric illness caused by mental reaction to news of the deceased's accidental death. Subsequently, the Court of Appeal affirmed this finding [*Gifford v Strang Patrick Stevedoring Pty Ltd* (2001) 51 NSWLR 606 at 621 [66]]. This Court rejected her application for special leave to appeal to this Court.

The Court of Appeal

30. The Court of Appeal (Handley and Hodgson JJA and Ipp AJA [27]) dismissed appeals by the children [28] . Their Honours held that s 4(1)(b) of the *Law Reform (Miscellaneous Provisions) Act* did not cover the field of nervous shock and did not affect a person's right to bring an action for nervous shock at common law. But they held that the common law actions must fail. They applied the reasoning in cases decided before *Tame* [29] . Those decisions severely restricted the grounds upon which an action for nervous shock could be brought at common law. They held that a person was not entitled to damages if no more appeared than that a person had suffered psychiatric injury on being told of the death of, or injury to, a loved one. To bring such an action, the defendant must have breached its duty to the loved one and the plaintiff must have seen the incident or been present at its immediate aftermath [30] .

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[27] Handley JA and Ipp AJA agreed with Hodgson JA on all issues except for his Honour's discussion of s 4(1)(a) of the *Law Reform (Miscellaneous Provisions) Act* on which their Honours chose not to express an opinion and which is not relevant for the purposes of this appeal.

[28] *Gifford v Strang Patrick Stevedoring Pty Ltd* (2001) 51 NSWLR 606.

[29] (2002) 76 ALJR 1348; 191 ALR 449.

[30] *Gifford v Strang Patrick Stevedoring Pty Ltd* (2001) 51 NSWLR 606 at 616-617 [40]-[44] .

The material facts

31. Strang employed Mr Barry Gifford as a wharf labourer and wharf clerk. On 14 June 1990, he was killed by what the trial judge described as an "horrific" accident when a large forklift vehicle reversed over him, crushing him to death immediately. Soon after the accident, Mrs Kristine Gifford, his estranged wife, was informed that he had been killed. Darren Gifford, Kelly Gifford and Matthew Gifford are Barry and Kristine Gifford's children. They learnt of their father's death later that same day. At the time they were aged 19, 17 and 14. While the children did not live with the deceased, they maintained a close and loving

relationship with him. Their father visited them almost daily. The children claim that they were shocked and distressed at the news. None of them saw the deceased's body after the accident; they were apparently discouraged from doing so because of the horrific injuries that he suffered.

Section 4 of the *Law Reform (Miscellaneous Provisions) Act*

32. Strang has filed a notice of contention that seeks to support the decision of the Court of Appeal by contending that in New South Wales s 4 of the *Law Reform (Miscellaneous Provisions) Act* has abolished a family member's right to bring a common law action for nervous shock. The notice contends that, so far as family members are concerned, actions for nervous shock can be brought only in accordance with the conditions specified in s 4 . If this contention were upheld, questions of common law duty would be irrelevant.

33. In my opinion, both the wording of s 4 and its history demonstrate that the section does not exhaust the rights of a family member to bring an action for nervous shock resulting from the death or injury of a relative. Section 4 confers rights; it does not abolish them. The right of action that it confers on parents and spouses is superior to the right that it confers on other family members. But nothing in the section or its history suggests that the right of either group to bring an action for nervous shock is confined to the statutory right that s 4 confers. Section 4 relevantly provides:

> "(1) The liability of any person in respect of injury caused after the commencement of this Act by an act, neglect or default by which any other person is killed, injured or put in peril, shall extend to include liability for injury arising wholly or in part from mental or nervous shock sustained by:
>
> (a) a parent or the husband or wife of the person so killed, injured or put in peril; or
>
> (b) any other member of the family of the person so killed, injured or put in peril where such person was killed, injured or put in peril within the sight or hearing of such member of the family."

34. **Following paragraph cited by:**

Sheehan v SRA; Wicks v SRA (31 August 2009) (Beazley JA at 1; Giles JA at 81; McColl JA at 82)

> 124 In *Chester* , as McHugh J explained in *Gifford* (at [34]), the High Court held that a mother who had suffered shock after seeing the dead body of her missing son in a trench under the control of the Council could not bring an action for nervous shock. In *Bourhill* , the House of Lords reached the same conclusion in relation to a woman who, while unloading a basket from a platform on the other side of a nearby stationary tram, suffered nervous shock after hearing a motorcyclist collide with a motor vehicle.

Sheehan v SRA; Wicks v SRA (31 August 2009) (Beazley JA at 1; Giles JA at 81; McColl JA at 82)

> 127 According to McHugh J (*Gifford* (at [34])), "in the Second Reading Speech on the Law Reform (Miscellaneous Provisions) Bill in the Legislative Council, the Minister for Justice said that s 4 was 'a statutory extension of liability to meet the position created by the decision in *[Bourhill] v Young* ... It creates no new substantive right of action.' " As Gummow and Kirby JJ (*Gifford* (at [76] - [77])) explained, at this stage, "[c]lause 4 … drew no distinction between a parent or spouse of a person killed, injured or put in peril and any other family member". It was then amended to the form in which it was passed under which "the liability of a defendant would 'extend to include' liability for 'nervous shock' sustained by a relevant family member where the initial victim 'was killed, injured or put in peril within the sight or hearing of such member of the family'". According to the parliamentary record, (*Gifford* (at [78])):
>
> > "…[T]he amendment embodied a compromise between the interests of family members who sustain 'nervous shock' and the community which ultimately would bear the obligation that any extension of liability was thought to entail. The compromise was said to be that, in order to recover under the statute, 'farther removed relatives' would be subject to the additional requirement, not imposed on a parent or spouse, of *proving that the relevant death, injury or imperilment occurred within their sight or hearing* …." (Emphasis added)

Sheehan v SRA; Wicks v SRA (31 August 2009) (Beazley JA at 1; Giles JA at 81; McColl JA at 82)

Section 4 was a statutory response to the decision of this Court in *Chester v Waverley Corporation* [31] and the decision of the House of Lords in *Bourhill v Young* [32] . In *Chester* , this Court held that no action for nervous shock could be brought by a mother who had suffered shock after seeing the dead body of her missing son in a trench under the control of the council. In *Bourhill* , the House of Lords denied a right of action to a woman who suffered nervous shock after hearing a motor cyclist collide with a motor vehicle. At the time she was unloading a basket from a platform on the other side of a nearby stationary tram. In the Second Reading Speech on the Law Reform (Miscellaneous Provisions) Bill in the Legislative Council, the Minister for Justice said[33] that s 4 was "a statutory extension of liability to meet the position created by the decision in [Bourhill] v Young … It creates no new substantive right of action."

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[31] (1939) 62 CLR 1 .

[32] [1943] AC 92 .

[33] New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 8 November 1944 at 830.

35. **Following paragraph cited by:**

State of New South Wales v McMaster (10 August 2015) (Beazley P, McColl and Meagher JJA)

When s 4 was enacted, it was seen as a beneficial provision that expanded the ability of close family members to recover for nervous shock. It was a legislative response to the perceived inadequacies in the common law, as then understood, to provide compensation to family members for nervous shock suffered as the result of injury to their relatives [34] . It removed the need for a family member to show the existence of a duty to the family member or that psychiatric injury to that person was reasonably foreseeable. The Minister said[35] that the bill would "provide a considerable advance on the present law". Nothing in s 4 or its history supports Strang's submission that the section was intended to operate to the exclusion of the common law and cover the field in relation to claims for nervous shock by family members.

[34] See *Jaensch v Coffey* (1984) 155 CLR 549 at 601-602 per Deane J.

[35] New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 5 December 1944 at 1491.

36. **Following paragraph cited by:**

WHITE and COMMISSIONER OF POLICE (25 August 2025)
Medical Board of Australia v Kok (Review & Regulation) (22 July 2025) (N Campbell, Presiding Member; Dr A Sungaila, Practitioner Member; Dr S Shedda, Practitioner Member; N Campbell, Member)

48. McHugh J in *Gifford v Strang Patrick Stevedoring Pty Ltd* [2003] HCA 33, (2003) 214 CLR 269 at [36] , has described the presumption as 'admittedly weak these days that a statute is not intended to alter or abolish common law rights unless the statute evinces a clear intention to do so' and stated:

> … In *Malika Holdings Pty Ltd v Stretton*, however, I warned of the need for caution in applying this presumption: nowadays legislatures regularly enact laws that infringe the common law rights of individuals. The presumption of non-interference is strong when the

> right is a fundamental right of our legal system; it is weak when the right is merely one to take or not take a particular course of action. Courts should not cut down the natural and ordinary meaning of legislation evincing an intention to interfere with these lesser rights by relying on a presumption that the legislature did not intend to interfere with them. Given the frequency with which legislatures now abolish or amend "ordinary" common law rights, the "presumption" of non-interference with those rights is inconsistent with modern experience and borders on fiction. If the presumption still exists in such cases, its effect must be so negligible that it can only have weight when all other factors are evenly balanced.
>
> (footnote omitted)

Blo v CMA (22 July 2024)
Bro v CRG (19 July 2024)
CDLC Pty Ltd v Capital Estate Developments Pty Ltd (12 October 2023) (McWilliam J)

> 83 If it be the case that the available grounds for withholding consent are broader at common law, for assignments to which the *Leases Act* applies, that principle has been impliedly modified, noting that no special clarity is required in the statute to alter general common law principles: *Gifford v Strang Patrick Stevedoring Pty Limited* [2003] HCA 233; 214 CLR 269 at [36] . The principles that the parties each sought to draw upon and apply from the cases are not ones that would be categorised as fundamental common law rights or freedoms, such that the principle of legality needs to be considered.

BFH v Allianz Australia Insurance Limited (12 January 2023)
BHD v QBE Insurance (Australia) Limited (16 December 2022) (Katherine Ruschen)
BIJ v QBE Insurance (Australia) Limited (16 December 2022)
Kassam v Hazzard (08 December 2021) (Bell P, Meagher and Leeming JJA)
Burrows v Macpherson & Kelley Lawyers (Sydney) Pty Ltd (16 July 2021) (Meagher, Leeming and White JJA)
Mannall v Howard (No 2) (21 June 2019) (Mossop J)
Nationwide News Pty Ltd v Vass (08 November 2018) (McColl, Basten and Leeming JJA)

> 51. However, “the reach of the regulatory state [is such] that it is now difficult to assume that the legislature would not infringe rights or interfere with the general system of law”. [17] Accordingly, “a much surer guide to the legislative intention in areas of legislation dealing with ordinary rights or the general system of law is to construe the language of the enactment in its natural and ordinary meaning, having regard to its context – which will include other provisions of the enactment, its history and the state of the law – as well as the purpose which the enactment seeks to achieve.” [18] In the final analysis, “[t]he assistance to be gained from a presumption will vary with the context in which it is applied.” [19]

via

18. Ibid at [30] ; see also Gifford v Strang Patrick Stevedoring Pty Ltd (2003) 214 CLR 269; [2003] HCA 33 (Gifford) at [36] .

Shalhoub v State of New South Wales (14 December 2017) (P Taylor SC DCJ)

154. The precise ambit of "*intent to injure*" is not clear. In some contexts, including in the criminal sphere, intent has commonly included the concept of recklessness. It may be thought that if s 3B(1)(a) was to adopt a narrower concept of intent so as to exclude recklessness, it could easily have been expressed in the legislation. It might be thought that the limitation of common law rights in the absence of an intent to injure should not be enlarged beyond what is required by clear words or necessary intendment (*Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 at [36] ; [2003] HCA 33 , *Konneh v State of New South Wales (No.3)* [2013] NSWSC 1424 [27]-[32]). If that is so, any ambiguity about whether intent to injure includes recklessness should be resolved in favour of the broader meaning of intent.

Lightning Ridge Miners' Association Limited v Hall; Lightning Ridge Miners' Association Limited v Hall; O'Brien v Newton (23 December 2016) (Dixon C)
Wickes v Al-Mofathel (04 September 2015) (Refshauge J)

64. Mr Rewell SC referred in particular to the following principles set out by his Honour:

(g) Legislation must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears between provisions, it must be alleviated, as far as possible, by adjusting the meaning of the competing provisions to achieve a result. This adjustment may require a Court to determine a hierarchy of provisions: *Project Blue Sky* at [70] per McHugh, Gummow, Kirby and Hayne JJ; *Ross v The Queen* (1979) 141 CLR 432 at 440 per Gibbs J; *Wilson* at [13] per Allsop P;

(h) It is both permissible and appropriate to have regard to contextual material without a need for ambiguity to be established: *Caterpillar of Australia Pty Ltd v Industrial Court of NSW* [2009] NSWCA 83 at [86] ;

(i) The contextual material, to which reference may be made, includes the history of the particular enactment, and the state of the law when it was enacted, namely, the legal and historical context of the legislation. This may include an examination of reports of law reform bodies (or the like): *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 341 per Mason ACJ, Wilson and Dawson JJ; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ; *Wilson* at [12] per Allsop P;

(j) It is an established principle that a statute should not be presumed to abrogate existing fundamental or common law rights in the absence of clear language. The nature of the right being abrogated will determine whether the principle is strong or weak: *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 at [36] per McHugh J ; *Electrol*

ux Home Products Pty Ltd v Australian Workers' Union (2004) 221 CLR 309 at [19] per Gleeson CJ; *Harrison* at [209]-[221] per Basten JA, Spigelman CJ agreeing at [2].

Raymond Steve Woods by his tutor June Marie Woods v Abdul Latif Abdulrahman and Or (03 July 2015) (Mahony SC DCJ)
Agricultural Equity Investments Pty Limited v The Hon Chris Hatcher MP, Minister for Resources and Energy, Special Minister (20 February 2015) (Pepper J)
Clarke (as Trustee of the Clarke Family Trust) v Great Southern Finance Pty Ltd (Receivers and Managers Appointed) (in liquidation) (11 December 2014) (Croft J)
Clarke (as Trustee of the Clarke Family Trust) v Great Southern Finance Pty Ltd (Receivers and Managers Appointed) (in liquidation) (11 December 2014) (Croft J)
Regional Express Holdings Limited v Dubbo City Council (No 3) (26 June 2014) (Pain J)

126. Rex's desire to continue with its business model of using smaller aircraft, which charging for the screening service potentially impinges on, is not a fundamental right to which this principle of statutory construction applies in my view. This approach would appear to be more characterised as a desire to take a particular course of action per McHugh J in *Gifford* at [36] cited above in par 121. As the Council submitted Rex is not compelled to use the airport. I do not consider a common law right of Rex is infringed by the Council's decision to charge it a fee.

Regional Express Holdings Limited v Dubbo City Council (No 3) (26 June 2014) (Pain J)
Cruse v Lifetime Care and Support Authority (25 October 2013) (Harrison J)
Konneh v State of NSW (No.3) (27 September 2013) (Garling J)

27. Because the answers to the separate questions involve understanding and interpreting some of the provisions of the *Bail Act* , which is now a code, it is convenient to re-state the central principles of statutory interpretation which are engaged in this case:

(a) the starting point for statutory interpretation is to engage in a purposive construction, that is, to prefer a construction which promotes the purpose and/or object underlying an Act: s 33 *Interpretation Act* 1987 ; *Carr v Western Australia* [2007] HCA 47*;* (2007) 232 CLR 138 at [5]-[6] per Gleeson CJ;

(b) the primary object of legislative interpretation is to construe the relevant provision so that it is consistent with the language and purpose of all of the provisions of the statute: *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at [69] and [71] per McHugh, Gummow, Kirby and Hayne JJ; *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, Mason and Wilson JJ at 320 ; and

(c) the heading of a part of an Act is taken to be a part of the Act: s 35(1) of the *I nterpretation Act* . A heading may be referred to, in order to assist in resolving any uncertainty about the meaning of the language used: *Director-General*

Department of Corrective Services v Mickelson (1992) 26 NSWLR 648 at 654D per Kirby P;

(d) it is well established that a statute should not be assumed to abrogate existing fundamental rights in the absence of clear language: *Gifford v Strang Patrick Stevedoring Pty Ltd* [2003] HCA 33; (2003) 214 CLR 269 at [36] per McHugh J .

Lawson v Dunlevy (10 February 2012) (Garling J)

16. Before identifying the relevant provision of the *Bail Act* , it is appropriate to restate the central principles of statutory interpretation which are engaged in this case:

(a) the starting point for statutory interpretation is to engage in a purposive construction, that is, to prefer a construction which promotes the purpose and/or object underlying an Act: *Carr v Western Australia* [2007] HCA 47; 232 CLR 138 at [5]-[6] per Gleeson CJ;

(b) the primary object of legislative interpretation is to construe the relevant provision so that it is consistent with the language and purpose of all of the provisions of the statute: *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 at [69] and [71] per McHugh, Gummow, Kirby and Hayne JJ; and

(c) it is well established that a statute should not be assumed to abrogate existing fundamental rights in the absence of clear language: *Gifford v Strang Patrick Stevedoring Pty Ltd* [2003] HCA 33; 214 CLR 269 at [36] per McHugh J ; *Harrison v Melhem* [2008] 72 NSWLR 380 at [209]-[221] per Basten JA, Spigelman CJ agreeing at [2] .

HSH Hotels (Australia) Ltd v State of Queensland (18 November 2011) (Fraser JA and McMurdo and Boddice JJ,)

32. The appellant submitted that a narrow construction of s 297 should be adopted because that provision might interfere substantially with contracting parties' rights and with the conditions of grant of legal estates. The primary judge regarded that as a relevant consideration, [12] but as his Honour pointed out, it is clear that s 297 intended some interference with contractual arrangements. The primary judge considered whether s 297(1) should be narrowly construed as applying only where a lease includes the precise expression "unimproved value" and an express reference to the 1944 Act, but ultimately rejected that construction. His Honour referred to the explanatory notes for the *Land Valuation Bill* 2010 (Qld), which in due course became the 2010 Act, and in particular the reference in the note to cl 297 to decisions of the New South Wales Supreme Court that there was no longer an "unimproved value" for land when the statutory provision for such valuations had been replaced by provisions for a "land value". The explanatory note continued:

> "There are a number of leases in Queensland that calculate rent, or other charges, by reference to the unimproved value of the land the subject of the lease. This clause is designed to ensure that valuations under the lease will continue to be made under Queensland valuation legislation."

The primary judge considered that this note and the language of s 297 identifie d its purpose, and that s 14A of the *Acts Interpretation Act* required the adoption of the interpretation which best achieved that purpose.

via

[12] His Honour cited *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 at [36] per McHugh J .

Thiering v Daly (11 November 2011) (Garling J)
HSH Hotels (Australia) Ltd v State of Queensland (11 March 2011) (Peter Lyons J)
Con Ange v Fairfax Media Publications Pty Ltd (09 December 2010) (Garling J)
Sheehan v SRA; Wicks v SRA (31 August 2009) (Beazley JA at 1; Giles JA at 81; McColl JA at 82)

> 37 It is also convenient, before considering the provisions of the *Civil Liability Act* , to refer to relevant principles of statutory construction. This need only be done in brief terms, as neither party invoked any particular principle of statutory construction in aid of their respective arguments. As I understand the approach of each, it was that the express words of the section bore their ordinary meaning. They differed, however, as to what that ordinary meaning was. Neither party suggested that the provision should be construed on the basis that Parliament does not intend to alter or restrict fundamental rights, freedoms and immunities: *Malika Holdings Pty Ltd v Stretton* [2001] HCA 14; (2001) 204 CLR 290; *Gifford v Strang Patrick Stevedoring Pty Ltd* [2003] HCA 33; (2003) 214 CLR 269 at [36] per McHugh J ; and *Harrison v Melhem* [2008] NSWCA 67; (2008) 72 NSWLR 380.

Edwards v Edwards (21 May 2009) (Forrest J)
NSW Food Authority v Nutricia Australia Pty Ltd (06 November 2008) (Spigelman CJ ; Hidden J ; Latham J)
Harrison v Melhem (29 May 2008) (Spigelman CJ; Mason P; Beazley JA ; Giles JA ; Basten JA)

> 6 McHugh J did not expressly distinguish in this respect between the presumption against altering common law doctrines and the presumption against invading common law rights. His Honour did, however, identify circumstances in which the presumption would operate more strongly, describing that category as "fundamental legal principles" (*Malika Holdings* supra at [28]) or as "a fundamental right of our legal system" (*Gifford* supra at [36]). He distinguished "fundamental rights" which are "corollaries of fundamental principles" from "infringements of rights and departures from the general system of law" (*Malika Holdings* supra at [28]) and "a fundamental right" from a right "to take or not to take a particular course of action" (*Gifford* supra at [36]).

Harrison v Melhem (29 May 2008) (Spigelman CJ; Mason P; Beazley JA ; Giles JA ; Basten JA)
Harrison v Melhem (29 May 2008) (Spigelman CJ; Mason P; Beazley JA ; Giles JA ; Basten JA)
Harrison v Melhem (29 May 2008) (Spigelman CJ; Mason P; Beazley JA ; Giles JA ; Basten JA)
Hadjigeorgiou v New South Wales Crime Commission (29 August 2007) (Giles JA ; Santow JA ; Basten JA)

> 95. It used to be an unchallenged approach to statutory construction that legislation does not "overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness": see *Potter v Minahan* (1908) 7 CLR 277 at 304 (O'Conner J). However, as noted by McHugh J in *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290 at [28]-[30] , that principle may be overstated in modern terms. It has its strongest application in what may be described as "fundamental principles" and in particular fundamental human rights: any general presumption against interference with common law rights is relatively far weaker: see also *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 at [36] (McHugh J) . Furthermore, as McHugh J noted in *Malika* at [28] , "care needs to be taken in declaring a principle to be fundamental". Different considerations may arise where the intrusion on general law protections appears to come about incidentally to the main purpose of the legislation: *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625, 635-6 .

Mathew Chaina v The Presbyterian Church (NSW) Property Trust and 15 Ors (19 April 2007) (Howie J)
R v Janceski (18 August 2005) (Spigelman CJ at 1; Wood CJ at CL at 175; Hunt AJA at 212; Howie J at 213; Johnson J at 287)

> 65 Kirby J has often emphasised the duty of courts to obey a legislative text and has indicated that it is not permissible to adhere to pre-existing common law doctrines in the face of a statute. (See e.g. *Regie Nationale des Usines Renaud SA v Zhang* (2002) 210 CLR 491 at [143]-[147] .) McHugh J has stated that the presumption that a statute is not intended to alter or abolish common law rights must now be regarded as weak. (See *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290 at [28]-[30] ; *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 at [36] .) His Honour has, however, said that the presumption continues to operate with some strength when fundamental legal principles or fundamental rights are involved. (See *Gifford* supra at [36] ; *Malika Holdings* sup ra at [28] and see also at [29]-[30] and Gleeson CJ in *Electrolux Home Products Pty Ltd v Australian Workers Union* [2004] HCA 40; 78 ALJR 1232 at [19] .)

R v Janceski (18 August 2005) (Spigelman CJ at 1; Wood CJ at CL at 175; Hunt AJA at 212; Howie J at 213; Johnson J at 287)
Beech v Building Appeals Board (30 June 2005) (Hargrave J)
Honeywood v Munnings (02 June 2005) (Master Harrison)

There is a presumption – admittedly weak these days – that a statute is not intended to alter or abolish common law rights unless the statute evinces a clear intention to do so [36] . In *Malik a Holdings Pty Ltd v Stretton* [37] , however, I warned of the need for caution in applying this presumption: nowadays legislatures regularly enact laws that infringe the common law rights of individuals. The presumption of non-interference is strong when the right is a fundamental right of our legal system; it is weak when the right is merely one to take or not take a particular course of action. Courts should not cut down the natural and ordinary meaning of legislation evincing an intention to interfere with these lesser rights by relying on a presumption that the legislature did not intend to interfere with them. Given the frequency with which legislatures now abolish or amend "ordinary" common law rights, the "presumption" of non-interference with those rights is inconsistent with modern experience and borders on fiction. If the presumption still exists in such cases, its effect must be so negligible that it can only have weight when all other factors are evenly balanced.

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[36] *Potter v Minahan* (1908) 7 CLR 277 at 304. See also *Sargood Bros v The Commonwealth* (1910) 11 CLR 258 at 279 per O'Connor J; *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 341 per Mason ACJ, Wilson and Dawson JJ; *Bropho v Western Australia* (1990) 171 CLR 1 at 18 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ and myself; *Coco v The Queen* (1994) 179 CLR 427 at 437-438 per Mason CJ, Brennan and Gaudron JJ and myself.

[37] (2001) 204 CLR 290 at 298-299 [28]-[30] .

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37. The right to bring an action for psychiatric injury is an ordinary legal right. It is not a fundamental right of our society or legal system similar to the right to have a fair trial or to have a criminal charge proved beyond a reasonable doubt. Nor is the presumption against interfering with ordinary common law rights of the same strength as the presumption that laws do not operate retrospectively. Whether or not the *Law Reform (Miscellaneous Provisions) Act* excludes the common law has to be determined by construing the legislation in its natural and ordinary meaning, having regard to its context and the purpose of the enactment. The context and purpose of a law includes the history of the enactment and the state of the law when it was enacted [38] .

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[38] *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 341 per Mason ACJ, Wilson and Dawson JJ; *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290 at 299 [30] .

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38. Section 4(1) says that liability in respect of a negligently inflicted injury shall "extend to include" liability for nervous shock. The words "extend to include" indicate that the New South Wales legislature sought to alter the common law in that State, as understood at the

time, for the benefit of certain family members. The words of s 4(1), and in particular the words "extend to include", indicate that the section expanded the scope of the common law so far as family members were concerned, but otherwise maintained the existence of a common law action for nervous shock for those persons.

39. **Following paragraph cited by:**

> Naw Eh Soe v Alberto Carapella; Saw Rain Bow v Alberto Carapella; Naw Su Su Bow v Alberto Carapella; Moe Moe Aye v Alberto Carapella (20 November 2014) (Hamill J)
>
> > 5. A good deal of time was taken up in the course of the day during which counsel attempted to advance that submission. In particular he sought to place reliance on the following cases and passages from those cases: *Emad Trolleys Pty Limited v Shigar* [2003] NSWCA 231 at [82] ; *Wicks v State Rail Authority of New South Wales* [2010] HCA 22; 241 CLR 60 at [37] and [44] ; *Gifford v Strang Patrick Stevedoring* [2003] HCA 33; 214 CLR 269 at [39] and [44] . After the luncheon adjournment, counsel for the plaintiffs indicated that he no longer pressed the submission that the case was not governed by the *Motor Accidents Compensation Act* . Accordingly, it is not necessary to deal with that rather adventurous, novel and (adopting the words of counsel for the defendant) self-destructive submission.

There is not a word in the *Law Reform (Miscellaneous Provisions) Act* that suggests that its purpose was to abolish generally the common law right to bring an action for damages for nervous shock. Nothing in the legislation itself or the Second Reading Speech indicates that the legislature intended that only those family members included in the definition in s 4(5) of the *Law Reform (Miscellaneous Provisions) Act* could bring an action for nervous shock. The fact that the legislature did not seek to exclude the common law is evident from a statement in the Second Reading Speech where the Minister said that s 4 would not affect the liability of newspaper publications who would continue to be governed by the common law[39]. Against that background, it would be surprising if s 4 had the purpose – *sub silentio* – of abolishing the common law rights of the family members of an injured or deceased person and confining their rights to those conferred by the section. This is particularly so, given that the evident purpose of the legislation was to give family members rights of action denied to other persons who suffer nervous shock as the result of the careless conduct of wrongdoers.

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[39] New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 8 November 1944 at 830.

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40. Because the present issue has not previously arisen for determination, judicial utterances concerning the issue have been limited. But on two occasions, members of this Court have

expressed the view that s 4 was an extension and not an abolition of the common law right to bring an action for nervous shock. In *Scala v Mammolitti* [40] , Taylor J said that, although s 4 extended the field in which persons standing in a special relationship to a person killed, injured or put in peril might recover for nervous shock, "it otherwise leaves the earlier law untouched." In *Mount Isa Mines Ltd v Pusey* [41] , Windeyer J said that New South Wales had modified the common law by enacting the *Law Reform (Miscellaneous Provisions) Act* an d that the common law concerning nervous shock continued to develop.

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[40] (1965) 114 CLR 153 at 159-160, Barwick CJ and Windeyer J agreeing.

[41] (1970) 125 CLR 383 at 408.

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41. Statements in the New South Wales Supreme Court are also consistent with the view that s 4 d oes not exclude the operation of the common law in New South Wales. In *Anderson v Liddy* [4 2] , Jordan CJ referred to s 4 as extending "in certain respects the common law liability of wrongdoers" in relation to nervous shock. His Honour referred to actions by family members brought under s 4 as "special cases". In *Coates v Government Insurance Office of New South Wales* [43] , Kirby P held that s 4(1) does not exhaustively define the rights of persons to recover for nervous shock. His Honour said that, on its proper construction, the section provided a right for certain persons to bring proceedings for nervous shock in addition to common law rights that remained unaffected. Clark JA tentatively agreed with Kirby P on this issue [44] . Similarly in *FAI General Insurance Co Ltd v Lucre* [45] , Mason P, with whose judgment Meagher and Giles JJA agreed, said that the "section does not purport to restrict the continuing development of the common law of Australia".

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[42] (1949) 49 SR(NSW) 320 at 323.

[43] (1995) 36 NSWLR 1 at 7-8 .

[44] (1995) 36 NSWLR 1 at 22.

[45] (2000) 50 NSWLR 261 at 263-264 .

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42. Accordingly, it was not the purpose of s 4 of the *Law Reform (Miscellaneous Provisions) Act* to abolish the rights of the persons identified in that section to bring common law actions for nervous shock suffered as the result of harm to, or the putting in peril of, a relative. Nor is the position changed because in 1944 lawyers and the legislature of New South Wales understood the common law to be more restricted than this Court has now declared it to be.

Is s 151P of the *Workers Compensation Act* an independent source of rights?

43. Counsel for the children submitted that s 151P of the *Workers Compensation Act* should be given a purposive construction – one providing an independent right to sue for nervous shock – even though it is expressed in the negative language of restriction, rather than the positive language of entitlement. Section 151P is in Pt 5 of the Act which is entitled "Common law remedies". Relevantly, Pt 5 provides:

> "**151 Common law and other liability preserved**
>
> This Act does not affect any liability in respect of an injury to a worker that exists independently of this Act, except to the extent that this Act otherwise expressly provides.
>
> ...
>
> **151E Application – modified common law damages**
>
> (1) This Division applies to an award of damages in respect of:
>
> (a) an injury to a worker, or
>
> (b) the death of a worker resulting from or caused by an injury,
>
> being an injury caused by the negligence or other tort of the worker's employer.
>
> ...
>
> **151P Damages for psychological or psychiatric injury**
>
> No damages for psychological or psychiatric injury are to be awarded in respect of an injury except in favour of:
>
> (a) the injured worker, or
>
> (b) a parent, spouse, brother, sister or child of the injured or deceased person who, as a consequence of the injury to the injured person or the death of the deceased person, has suffered a demonstrable psychological or psychiatric illness and not merely a normal emotional or cultural grief reaction."

44. **Following paragraph cited by:**

> WorkPac Pty Ltd v Thearle (04 November 2016) (McColl and Ward JJA, Adamson J)
>
> 31. Gifford v Strang Patrick Stevedoring Pty Ltd (2003) 214 CLR 269; [2003] HCA 33 (Gifford HC) (at [44]) per McHugh J, approving Hodgson JA's

construction of s 151P in Gifford CA; see also [62] and [93] – [94] per Gummow and Kirby JJ (Gleeson CJ agreeing (at [24]); Hayne J to like effect (at [105]); Callinan J also (at [123])).

The Court of Appeal correctly concluded that s 151P was a limitation on awards of damages rather than the source of an independent right to damages. The relevant parts of the legislation assume the existence of rights of action for nervous shock arising out of workplace injuries and confine the right to claim damages in such actions to injured workers and their immediate family members. The heading "Common law remedies" in the relevant part of the *Workers Compensation Act* reflects this fact, as does the heading "Modified common law damages" in Div 3 which contains s 151P . Thus, s 151P does not give plaintiffs a right to recover damages. On the contrary, it takes away the right to recover damages in an action for nervous shock for workplace injuries but makes an exception in favour of injured workers and members of their close families.

The common law action for nervous shock

45. The Court of Appeal held that the children could not maintain a common law claim for damages for nervous shock because they did not see the accident that caused their father's death or its aftermath. Hodgson JA said [46] "authority is strongly against the view that there can be liability at common law for damages for mental injury to a person who is told about even an horrific accident or injury to a loved one but does not at any time actually perceive the incident or its aftermath." However, this Court held in *Tame* [47] that the common law does not limit liability for nervous shock to injuries brought about by a sudden shock in circumstances where the plaintiff has directly perceived a distressing event or its immediate aftermath. Accordingly, the Court of Appeal erred in dismissing the claim on the ground that the children were not present at the accident or its aftermath.

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[46] *Gifford v Strang Patrick Stevedoring Pty Ltd* (2001) 51 NSWLR 606 at 616 [40] .

[47] (2002) 76 ALJR 1348 at 1353 [18] per Gleeson CJ, 1357 [51], 1360 [66] per Gaudron J, 1380-1381 [189], 1386 [213], 1386 [214], 1388-1389 [225] per Gummow and Kirby JJ, 1397 [267] per Hayne J; 191 ALR 449 at 456, 461-462, 465, 494, 502, 505 and 517.

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46. **Following paragraph cited by:**

ABC v State of Queensland (11 December 2015) (Harrison DCJ)
SB v State of New South Wales (14 December 2004) (Redlich J)

190. It may be that in search of a unifying concept the High Court returned to the “neighbourhood” principle encapsulated by Lord Atkin in *Donoghue v Stevenson* [223] in the judgments delivered in *Gifford v Strang Patricks Stevedoring Pty Ltd*. [224] The Plaintiffs were the children of a man

killed in an industrial accident who brought a claim for damages for negligently inflicting psychiatric injury as a consequence of being informed of their father's death. Members of the High Court, as some of them did in *Graham Barclay Oysters*, returned to Lord Atkin's "neighbourhood" principle for guidance. [225]

via

[225] Ibid per McHugh J at [46] and [51] ; per Gummow and Kirby JJ at [86] and per Callinan at [118].

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] .

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

[49] *Tame v New South Wales* (2002) 76 ALJR 1348 at 1367 [108]; 191 ALR 449 at 475.

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47. The answer to these questions lies in the nature of the relationship between the children and their father. The collective experience of the common law judiciary is that those who have a close and loving relationship with a person who is killed or injured often suffer psychiatric injury on learning of the injury or death, or on observing the suffering of that person. Actions for nervous shock by such persons are common. So common and so widely known is the phenomenon that a wrongdoer must be taken to have it in mind when contemplating a course of action affecting others. Accordingly, for the purpose of a nervous shock action, the neighbour of a wrongdoer in Lord Atkin's sense includes all those who have a close and loving relationship with the person harmed. They are among the persons who are likely to be so closely and directly affected by the wrongdoer's conduct that that person ought reasonably to have them in mind when considering if it is exposing the victim to a risk of harm. In *Alcock v Chief Constable of South Yorkshire Police* , Lord Keith of Kinkel pointed out [50] :

> "The kinds of relationship which may involve close ties of love and affection are numerous, and it is the existence of such ties which leads to mental disturbance when the loved one suffers a catastrophe. They may be present in family relationships or those of close friendship … It is common knowledge that such ties

exist, and reasonably foreseeable that those bound by them may in certain circumstances be at real risk of psychiatric illness if the loved one is injured or put in peril. The closeness of the tie would, however, require to be proved by a plaintiff, though no doubt being capable of being presumed in appropriate cases."

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[50] [1992] 1 AC 310 at 397. See also at 403 per Lord Ackner, 415-416 per Lord Oliver of Aylmerton, 422 per Lord Jauncey of Tullichettle.

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48. It is the closeness and affection of the relationship – rather than the legal status of the relationship – which is relevant in determining whether a duty is owed to the person suffering psychiatric harm. The relationship between two friends who have lived together for many years may be closer and more loving than that of two siblings. There is no policy justification for preventing a claim for nervous shock by a person who is not a family member but who has a close and loving relationship with the person harmed or put in peril. In a claim for nervous shock at common law, the reasonable foresight of the defendant extends to all those with whom the victim has or had a close and loving relationship.

49. Whether such a relationship exists in a particular case will often be a matter for evidence although, as Lord Keith pointed out in the above passage, in some cases the nature of the relationship may be such that it may be presumed. Among such relationships are those of parent and child. As s 4 of the *Law Reform (Miscellaneous Provisions) Act* recognises, the children of a person who is killed, injured or put in peril are especially likely to suffer nervous shock upon learning that their parent has suffered harm. Ordinarily, the love and affection between a parent and child is such that there is a real risk that the child may suffer mental injury on being informed of the harm to, or of observing the suffering of, the parent. The ordinary relationship between parent and child is so close and loving that a wrongdoer cannot reasonably disregard the risk that the child will suffer mental injury on being informed that his or her parent has been harmed or put in peril as a result of the wrongdoer's negligence.

50. Nor can the wrongdoer reasonably disregard some other close and loving relationships. Husband and wife, sibling and sibling, de facto partners and engaged couples, for example, almost invariably have close and loving relationships. No doubt the parties to such relationships may sometimes be estranged. Despite this possibility, however, so commonly are these relationships close and loving that a wrongdoer must *always* have such persons in mind as neighbours in Lord Atkin's sense whenever the person harmed is a neighbour in that sense. To require persons in such relationships to prove the closeness and loving nature of the relationship would be a waste of curial resources in the vast majority of cases. The administration of justice is better served by a fixed rule that persons in such relationships are "neighbours" for the purposes of the law of nervous shock and the defendant must always have them in mind. Similarly, the wrongdoer must *always* have in mind any person who can establish a close and loving relationship with the person harmed.

51. **Following paragraph cited by:**

Sheehan v SRA; Wicks v SRA (31 August 2009) (Beazley JA at 1; Giles JA at 81; McColl JA at 82)
Talbot & Olivier (A Firm) v Witcombe (26 May 2006) (Steytler P)

Although a close and loving relationship with the person harmed brings a person within the neighbour concept, it is not a necessary condition of that concept. In some cases, a relationship, short of being close and loving, may give rise to a duty to avoid inflicting psychiatric harm. A person is a neighbour in Lord Atkin's sense if he or she is one of those persons who "are so closely and directly affected by my act that I ought *reasonably* to have them in contemplation as being so affected" [51] . If the defendant ought reasonably foresee that its conduct may affect persons who have a relationship with the primary victim, a duty will arise in respect of those persons. The test is, would a reasonable person in the defendant's position, who knew or ought to know of that particular relationship, consider that the third party was so closely and directly affected by the conduct that it was reasonable to have that person in contemplation as being affected by that conduct?

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[51] *Donoghue v Stevenson* [1932] AC 562 at 580 (emphasis added).

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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 *T ame* , 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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[52] (2002) 76 ALJR 1348 at 1353 [18]; 191 ALR 449 at 456.

[53] (2002) 76 ALJR 1348 at 1360 [66]; 191 ALR 449 at 465.

[54] (2002) 76 ALJR 1348 at 1388 [225]; 191 ALR 449 at 505.

The employer owed a duty of care to the children

53. In the present case, the relationship between the children and their father made them a neighbour of Strang for duty purposes, and Strang owed the father a duty of care to provide a safe place of employment. The father was killed in the course of his employment by reason of the negligence of Strang. A reasonable employer in the position of Strang was bound to have in mind that any harm caused to its employee carried the risk that it would cause psychiatric harm to any children that he might have when they learned of his death. Because that is so, Strang owed a duty to the children to take reasonable care in its relationship with their father to protect them from psychiatric harm. And the admission that Strang negligently caused the death of their father means that Strang breached its duty to the children. However, the trial judge made no finding as to whether any of the children suffered a recognisable psychiatric injury upon being told of their father's death. Accordingly, it is not possible to enter verdicts in favour of the children. The proceedings must be remitted to the District Court for further hearing.

Orders

54. The appeals should be allowed. The orders of the Court of Appeal should be set aside. In place thereof, it should be ordered that the appeals to that Court be allowed, that the orders of the District Court be set aside and the matters be remitted to that Court for further hearing. The respondent should pay the costs in this Court and in the Court of Appeal. The costs in the District Court should follow the outcome of the further hearing.

55. GUMMOW AND KIRBY JJ. These three appeals against a decision of the New South Wales Court of Appeal (Handley and Hodgson JJA, Ipp AJA) [55] concern the liability of an employer for "nervous shock" allegedly suffered by the children of an employee upon learning that their father had been killed in the course of his employment.

[55] *Gifford v Strang Patrick Stevedoring Pty Ltd* (2001) 51 NSWLR 606.

56. On 14 June 1990, the appellants' father, Mr Barry Gifford was killed in a forklift accident which occurred during the course of his employment by Strang Patrick Stevedoring Pty Limited ("the respondent"), as a wharf labourer and container location clerk at Darling Harbour in Sydney. The appellants, who were then aged 19, 17 and 14 respectively, were informed of their father's death at their home in Woolloomooloo later that day. They were shocked and distressed at the news. None of the appellants saw the deceased's body after the accident; it appears they were discouraged from doing so because of its damaged condition.

57. The appellants and their mother, the deceased's widow, Mrs Kristine Gifford, each commenced proceedings against the respondent in the Supreme Court of New South Wales seeking damages in negligence for "nervous shock". Each action was, by order of that Court, transferred to the District Court and each was heard on 11 May 1998 as a civil arbitration under the *Arbitration (Civil Actions) Act* 1983 (NSW) ("the Arbitration Act"). Section 18 of that statute provided, in certain circumstances, for the District Court, upon application by a person aggrieved by the arbitral award, to order a rehearing of the action as if the action had never been referred to arbitration. Upon applications made under s 18 of the Arbitration Act , the District Court (Naughton DCJ) conducted a rehearing of each action, uninformed as to the content of the arbitrator's award in each case. On 24 August 1999, the District Court gave judgment for the respondent in each proceeding. The appellants and their mother each appealed unsuccessfully to the Court of Appeal. The leading judgment was delivered by Hodgson JA.

58. Special leave to appeal to this Court was granted to the appellants but refused to Mrs Gifford. The Court of Appeal upheld the trial judge's finding that, although Mr Gifford's death caused Mrs Gifford to experience shock, distress and an extended grief reaction, it did not cause her to develop a recognisable psychiatric illness. In this country, emotional distress or grief not amounting to a recognisable psychiatric illness does not found a common law action in negligence [56] .

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[56] *Tame v New South Wales* (2002) 76 ALJR 1348 at 1356 [44], 13811382 [193], 1400 [285]; 191 ALR 449 at 460, 495496, 522.

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59. Mrs Gifford also brought a claim on behalf of the three children under the *Compensation to Relatives Act* 1897 (NSW) ("the Compensation to Relatives Act"), the respondent having admitted that its negligence caused the death of the deceased. The claim was heard by Naughton DCJ together with the negligence actions but was the subject of a separate judgment, from which no appeal was brought. Section 4(1) of the Compensation to Relatives Act provides for the recovery, by specified relatives of a person killed by a wrongful act, neglect or default, of damages "proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action is brought". As the recent discussion in *De Sales v Ingrilli* [57] indicates, there is a long history of judicial interpretation of similar language in cognate legislation and its antecedents which restricts the damages recoverable in such actions to pecuniary loss and forbids any consideration of mental suffering or loss of society.

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[57] (2002) 77 ALJR 99 at 109111 [54]-[58], 122 [119]; 193 ALR 130 at 143144, 160.

The District Court

60. In the negligence actions, Naughton DCJ made no findings as to whether the appellants suffered a recognisable psychiatric illness consequent upon being informed of the death of their father. One result is that, even if the appellants otherwise are successful in this Court, their actions must be returned to the District Court for determination of outstanding issues.

61. Naughton DCJ entered verdicts for the respondent because he decided that in any event s 4(1)(b) of the *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) ("the 1944 Act") operated to exclude the children's common law claims to damages for "nervous shock"; the deceased was not killed, injured or put in peril within the sight or hearing of any of the children. Section 4(1) states:

> "The liability of any person in respect of injury caused after the commencement of this Act by an act, neglect or default by which any other person is killed, injured or put in peril, shall extend to include liability for injury arising wholly or in part from mental or nervous shock sustained by:
>
> (a) a parent or the husband or wife of the person so killed, injured or put in peril; or
>
> (b) any other member of the family of the person so killed, injured or put in peril where such person was killed, injured or put in peril within the sight or hearing of such member of the family."

"Member of the family" is defined in s 4(5) to mean "the husband, wife, parent, child, brother, sister, halfbrother or halfsister of the person in relation to whom the expression is used"; "child" is defined to include "son, daughter, grandson, granddaughter, stepson, stepdaughter and any person to whom another stands in loco parentis".

62. In the course of his reasons, Naughton DCJ referred also to Pt 5 (ss 149-151AC) of the *Worker s Compensation Act* 1987 (NSW) ("the Workers Compensation Act"), which is headed "Common law remedies". In particular, his Honour rejected a submission, put by counsel for the appellants, respecting s 151P of that statute. This provides:

> "No damages for psychological or psychiatric injury are to be awarded in respect of an injury except in favour of:
>
> (a) the injured worker, or
>
> (b) a parent, spouse, brother, sister or child of the injured or deceased person who, as a consequence of the injury to the injured person or the death of the deceased person, has suffered a demonstrable psychological or psychiatric illness and not merely a normal emotional or cultural grief reaction."

Section 151P does not assist the appellants by conferring a private right of action for breach of statutory duty[58]. Rather, the appellants submitted that s 151P excludes what otherwise would be any application to them of s 4(1)(b) of the 1944 Act.

[58] *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397 at 405 ; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 459461 .

The Court of Appeal

63. The Court of Appeal agreed with the trial judge's conclusion that s 151P of the Workers Compensation Act does not displace the operation of s 4(1)(b) of the 1944 Act [59] . However, their Honours disagreed with the primary judge as to the effect of s 4(1)(b) . The Court of Appeal held that that provision does not exclude any liability that may otherwise exist at common law [60] .

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[59] (2001) 51 NSWLR 606 at 608, 614, 623.

[60] (2001) 51 NSWLR 606 at 608, 615, 623.

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64. The Court of Appeal nonetheless held that the appellants could not recover; this was because no liability was said to arise at common law for damages for mental injury to a person who is told about an horrific injury to a loved one but does not actually perceive the incident or its aftermath [61] .

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[61] (2001) 51 NSWLR 606 at 608, 616617, 623.

In this Court

65. *Tame v New South Wales* and *Annetts v Australian Stations Pty Ltd* [62] , which were heard and decided by this Court after judgment was delivered by the Court of Appeal in the present case, determined that liability in negligence for "nervous shock" does not depend upon satisfaction of an absolute requirement that a plaintiff "directly perceive" the relevant distressing incident or its "immediate aftermath". The lack of direct perception by the appellants of the death of their father is not itself fatal to their action in negligence for "nervous shock". It follows that the Court of Appeal erred in dismissing the appeals on that basis.

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[62] (2002) 76 ALJR 1348 at 1353 [18], 1357 [51], 13801381 [189], 13881389 [225]; 191 ALR 449 at 456, 461462, 494, 505.

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66. The identification of that error, however, does not establish that the respondent owed the appellants a duty to take reasonable care to avoid causing them psychiatric harm. A consequence of the rejection of an absolute requirement of "direct perception" is the need for consideration in the particular case of the ordinary principles of the law of negligence in accordance with which a duty of care either is established or denied. This reflects the process of reasoning which followed in *Brodie v Singleton Shire Council* [63] from the removal from the corpus of the common law of the "immunity" of "highway authorities"; the removal of that restriction provided occasion for what otherwise would have been the ordinary operation of the elements of the tort of negligence.

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[63] (2001) 206 CLR 512 at 539-540 [54]-[55], 604 [238]-[239] .

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67. A duty of care in cases involving psychiatric injury is not defeated at the outset by the absence of "direct perception"; but it does not follow that a duty arises in all circumstances to which the control mechanism previously has been said to attach. Indeed, it would be quite wrong to take it from *Tame* and *Annetts* that reasonable foreseeability of mental harm is the only condition of the existence of a duty of care[64]. This aspect of the present appeals is considered further below under the heading "Duty of care".

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[64] cf *Review of the Law of Negligence*, Final Report, September 2002, §9.13.

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68. By its Amended Notice of Contention, the respondent submits that the decision of the Court of Appeal should be affirmed on the basis that the trial judge was correct to conclude that s 4(1)(b) of the 1944 Act operated to prevent the appellants' claim for damages for "nervous shock". If accepted, that contention would foreclose any occasion for the application to the present case of the ordinary principles governing the existence of a common law duty of care.

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.

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[65] (2002) 76 ALJR 1348 at 13551356 [37], 1373 [144], 1391 [239], 1403 [302] -[303], 1415 [366]; 191 ALR 449 at 459, 483484, 508509, 525526, 541542 .

Section 4(1) of the 1944 Act

70. The terms of s 4(1) are set out earlier in these reasons. Legislation in the same terms has been enacted in the Australian Capital Territory and the Northern Territory [66] . It is to be noted at the outset that, as indicated by s 12 of the *Interpretation Act* 1987 (NSW) , the reference in s 4 (1) of the 1944 Act to a person being "killed, injured or put in peril" is taken to be a reference to a "matter or thing" occurring in New South Wales. The respondent's Amended Notice of Contention thus raises directly a question concerning the construction of s 4 which Windeyer J in *Mount Isa Mines Ltd v Pusey* [67] found unnecessary to resolve and which could not have arisen in *Annetts* even if the law of New South Wales otherwise had applied as the *lex loci delicti* (the law of the place of the wrong) in that case. The injury and death of the respondent's coworker in *Pusey* occurred in Queensland; the imperilment and death of the appellants' son in *Annetts* occurred in Western Australia.

[66] *Law Reform (Miscellaneous Provisions) Act* 1955 (ACT), s 24(1) ; *Law Reform (Miscellaneous Provisions) Act* 1956 (NT), s 25(1) .

[67] (1970) 125 CLR 383 at 408.

71. **Following paragraph cited by:**

Sheehan v SRA; Wicks v SRA (31 August 2009) (Beazley JA at 1; Giles JA at 81; McColl JA at 82)

Section 4(1) of the 1944 Act confers or contemplates a cause of action on the part of each of the persons described in par (a) and, in the circumstances specified, on the part of each of those described in par (b) against a person who, by an act, neglect or default causes the death, injury or imperilment of another. As the decision of this Court in *Scala v Mammolitti* [68] indi cates, the cause of action is not dependent upon proof of the existence of liability in that person to the person killed, injured or put in peril.

[68] (1965) 114 CLR 153 .

72. In *Scala* , Kitto J summarised the effect of s 4(1) as follows [69] :

> "It lays down a general rule of liability as an addition to existing rules of liability, implying, of course, that the act, neglect or default was wrongful because in breach of a duty that was owed to the person killed, injured or put in peril, whether the duty arose from 'neighbourhood', from contract, or from statute."

His Honour continued that the provision extended "the range of the claims to the possibility of which the general principles of the law" exposed a defendant in respect of injury caused by conduct of the specified character [70] . A new ground thus was added to the grounds already existing upon which damages could be recovered against the defendant in respect of injury caused by the wrongful act, neglect or omission; the category of persons entitled to recover was correspondingly enlarged and the common law "alter[ed]" to that extent [71] . Taylor J said that the subsection operated "to extend the field in which persons standing in a special relationship to a person killed, injured or put in peril may recover for nervous or mental shock" [72] .

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[69] (1965) 114 CLR 153 at 157.

[70] (1965) 114 CLR 153 at 157.

[71] (1965) 114 CLR 153 at 157158 .

[72] (1965) 114 CLR 153 at 159.

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73. An understanding of the nature of the alteration or extension which s 4(1) effected, and the mischief it was intended to remedy, is assisted by reference to the historical context of its enactment [73] . A construction that would promote the statutory purpose or object thus disclosed is to be preferred to a construction that would not promote that purpose or object [74] .

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[73] See, eg, the approach adopted by Latham CJ in *Woolworths Ltd v Crotty* (1942) 66 CLR 603 at 612619 .

[74] *Interpretation Act* 1987 (NSW), s 33 , rendered applicable by the combined operation of s 5(1) and s 5(3).

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74. On 5 August 1942, the House of Lords in *Bourhill v Young* [75] held that the defendant motorcyclist owed no duty of care to avoid causing "nervous shock" to the plaintiff, who heard (but did not see) a collision caused by the defendant's negligence. The plaintiff 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. The House of Lords therefore held that the plaintiff was not in the area of potential danger which the defendant reasonably should have had in view [76]

. In the course of their speeches, Lord Thankerton, Lord Wright and Lord Porter [77] each doubted the correctness of the earlier decision of the English Court of Appeal in *Owens v Liverpool Corporation* [78] . The Court of Appeal had 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 had involved no apprehension, or sight, or sound of physical injury to a human being.

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[75] [1943] AC 92 .

[76] [1943] AC 92 at 99, 102, 105, 111, 119.

[77] [1943] AC 92 at 100, 110 and 116 respectively.

[78] [1939] 1 KB 394 .

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75. In his second reading speech on the Bill for what became the 1944 Act, the responsible Minister told the Legislative Council of the Parliament of New South Wales on 8 November 1944 that cl 4 of the Bill was "a statutory extension of liability to meet the position created by the decision in [*Bourhill*] *v Young*"[79]. Implicit in this was the understanding that the House of Lords decision stated the common law for New South Wales as much as for the United Kingdom [80] . The Minister referred[81] also to the decision of this Court in *Chester v Waverley Corporation* [82] and indicated that the Bill was intended to provide for plaintiffs in the position of Mrs Chester. The majority in *Chester* had held that a local council was not liable for the "nervous shock" Mrs Chester sustained upon seeing her deceased child's body recovered from a water-filled trench left inadequately protected by the council.

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[79] New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 8 November 1944 at 830.

[80] cf *Parker v The Queen* (1963) 111 CLR 610 at 632633 .

[81] New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 8 November 1944 at 830831.

[82] (1939) 62 CLR 1 .

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76. Clause 4 as it stood at the time of the second reading speech drew no distinction between a parent or spouse of a person killed, injured or put in peril and any other family member. At that point in its evolution, cl 4(1) provided:

> "The liability of any person in respect of injury caused after the commencement of this Act by an act, neglect or default by which any other person is killed, injured or put in peril, shall extend to include liability for injury arising wholly or in part

from mental or nervous shock sustained *by any member of the family* of the person so killed, injured or put in peril." (emphasis added)

77. This subclause subsequently was amended on 5 December 1944 to bring it into the form in which it now appears in the 1944 Act[83]. The amendment introduced a distinction between a parent or spouse of a person killed, injured or put in peril and any other family member. In respect of the latter, the amended clause provided that the liability of a defendant would "extend to include" liability for "nervous shock" sustained by a relevant family member where the initial victim "was killed, injured or put in peril within the sight or hearing of such member of the family".

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[83] New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 5 December 1944 at 1489, 1491.

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78. **Following paragraph cited by:**

Sheehan v SRA; Wicks v SRA (31 August 2009) (Beazley JA at 1; Giles JA at 81; McColl JA at 82)

The parliamentary record discloses that the amendment embodied a compromise between the interests of family members who sustain "nervous shock" and the community which ultimately would bear the obligation that any extension of liability was thought to entail[84]. The compromise was said to be[85] that, in order to recover under the statute, "farther removed relatives" would be subject to the additional requirement, not imposed on a parent or spouse, of proving that the relevant death, injury or imperilment occurred within their sight or hearing. However, one result of the amendment, not specifically adverted to by the Minister, was that, whilst the parent who sustained "nervous shock" upon learning of the death, injury or imperilment of a child occurring otherwise than within the parent's sight or hearing would be entitled to recover under the provision, the child who suffered "nervous shock" upon learning of (but not witnessing) the death, injury or imperilment of a parent would not, by force of the 1944 Act, be so entitled.

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[84] New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 5 December 1944 at 1490.

[85] New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 5 December 1944 at 1490.

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79. The amendment of cl 4(1) thus curtailed or restricted the extension of liability which originally had been proposed; the ordinary meaning of the provision as enacted nonetheless

was to extend rather than to restrict liability [86] . The declaration in s 4(1) that the liability there referred to "shall extend to include" liability for injury arising from "nervous shock" sustained in the circumstances specified in pars (a) and (b) is not to be read as though it contained the unexpressed qualification that liability was to extend only so far and no further.

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[86] *Anderson v Liddy* (1949) 49 SR (NSW) 320 at 323 ; *Coates v GIO of NSW* (1995) 36 NSWLR 1 at 78, 22.

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80. The adoption by the Parliament of New South Wales in 1944 of a particular understanding of the common law as it then existed does not itself control the further development of the common law of Australia. In *Environment Protection Authority v Caltex Refining Co Pty Ltd* , Mason CJ and Toohey J observed that [87] :

> "[t]he circumstance that Parliament (or a drafter) assumed that the antecedent law differed from the law as the Court finds it to be is not a reason for the Court refusing to give effect to its view of the law."

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[87] (1993) 178 CLR 477 at 505506 .

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81. **Following paragraph cited by:**

Sheehan v SRA; Wicks v SRA (31 August 2009) (Beazley JA at 1; Giles JA at 81; McColl JA at 82)

Moreover, a statutory extension of, and attempt to remedy a perceived deficiency in, the common law is not readily to be construed as restricting further development in common law principle as new deficiencies are disclosed. The mischief at which s 4(1) was directed was the apparent rigidity, or incomplete development, in the common law which was seen as unjustly disfavouring the position of plaintiff family members in "nervous shock" actions. Remedial legislation of this nature is not to be construed as frustrating the further development of common law principle and any corresponding expansion of common law rights which that development may involve. Some analogy is provided by the requirement of legislation for clear terms to abolish or modify fundamental common law principles or rights or to depart from the general system of law [88] .

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[88] *Potter v Minahan* (1908) 7 CLR 277 at 304 ; *Bropho v Western Australia* (1990) 171 CLR 1 at 18 ; *Coco v The Queen* (1994) 179 CLR 427 at 437 ; *R v Carroll* (2002) 77 ALJR 157 at 170171 [81]; 194 ALR 1 at 20.

82. **Following paragraph cited by:**

IWC Industries Pty Ltd v Sergienko (01 December 2021) (Bathurst CJ, Ward and Gleeson JJA)
Commissioner of State Revenue v TEC Desert Pty Ltd (23 July 2009) (Wheeler JA, McLure JA, Newnes JA)
Mansfield v The Director of Public Prosecutions for Western Australia (29 April 2005) (Steytler P, Wheeler JA, Pullin JA)

> 87 Lord Diplock said [at 364] that in "law enforcement actions" the undertaking should not be required "as a matter of course". Lord Reid also did not rule out the possibility that in an appropriate case an undertaking would be required. Lord Wilberforce dissented and said that he considered that an undertaking should have been required. In ***Kirklees Metropolitan Borough Council v Wickes Building Supplies Ltd*** [1993] AC 227 the House of Lords held that local authorities who were bringing a "law enforcement action" should in the exercise of the Court's discretion also usually be exempt from a requirement to give an undertaking. These English decisions are not binding on this Court. They are useful only to their degree of the persuasiveness of their reasoning: ***Cook v Cook*** (1986)
>
> (Page 31)
> 162 CLR 376 at 390 ; ***Gifford v Strang Patrick Stevedoring Pty Ltd*** (2003) 214 CLR 269 at [82] .

It is apparent from this Court's decision in *Annetts* , if it was not apparent before, that a defendant in an appropriate case may be liable in negligence for a recognisable psychiatric illness sustained by a plaintiff upon the death, injury or imperilment of a family member killed, injured or imperilled otherwise than within the plaintiff's sight or hearing. The common law of Australia as now understood has to that extent superseded the assumption as to the reach of the common law (then generally seen as the English common law declared by the House of Lords and Privy Council) upon which s 4(1)(b) of the 1944 Act was framed [89] . Although great assistance continues to be derived by this Court from the learning and reasoning of United Kingdom courts, the precedents of other legal systems, save for those of the Privy Council in Australian appeals, are not binding. They are now useful only to the degree of the persuasiveness of their reasoning [90] . The provision in s 4(1)(b) , expressed in the language of extension rather than restriction, neither inhibits that advancement nor displaces what otherwise would be its application in New South Wales. Section 4(1) expands the scope of a liability as formerly perceived, but it does not purport prospectively to fix its outer bounds.

[89] cf *Skelton v Collins* (1966) 115 CLR 94 at 104, 112113, 123124, 133134, 138139 .

[90] *Cook v Cook* (1986) 162 CLR 376 at 390.

83. *Esso Australia Resources Ltd v Federal Commissioner of Taxation* [91] indicates that the common law may in some instances proceed by analogy with what legislatures previously have determined to be the appropriate balance between competing interests in the relevant field. The respondent relies upon s 4(1) of the 1944 Act as an illustration of the converse process; that legislative development may have proceeded by way of extension of the common law, but, it is said, it thereby also foreclosed further development of the common law. That submission respecting the 1944 Act should not be accepted.

[91] (1999) 201 CLR 49 at 6063 [19]-[28] ; cf at 86 [97]. See also *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 1213 [33], 27 [83], 4547 [128][130] , referring to *Lamb v Cotogno* (1987) 164 CLR 1 at 11.

84. Section 4(1)(b) is not an answer to any action which the appellants may otherwise be entitled to bring.

Duty of care

85. In order to make good their cause of action in negligence, the appellants first must identify a duty owed to them by the respondent which is distinct from any obligation which subsisted between the respondent and their father. For the reasons that follow, a duty of that kind emerges by application of the ordinary principles of the law of negligence.

86. The respective positions of the child of an employee and his or her employer may readily be seen to attract the "neighbourhood" principle encapsulated by Lord Atkin in *Donoghue v Stevenson* . From the point of view of the employer, children of an employee are "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" [92] .

[92] [1932] AC 562 at 580.

87. Several considerations here combine to enliven what Stephen J in *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* identified [93] , with reference to the speech of Lord Atkin in *Donoghue v Stevenson* [94] , as a broad principle underlying liability in negligence, being the "general public sentiment" that, in the case at bar, there has been wrongdoing for which, in justice, the offender must pay. The considerations here include: (i) the advancement by the

labour of an employee of the employer's commercial interests; (ii) the employee's exposure to risk of death by carelessness on the part of the employer; and (iii) the reasonable foreseeability of psychiatric injury to children of an employee in the event of the employee's death. Psychiatric injury to children of the employee is a consequence which the respondent, judged by the standard of the reasonable person, ought to have foreseen [95] .

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[93] (1976) 136 CLR 529 at 575. See also *Tame v New South Wales* (2002) 76 ALJR 1348 at 13511352 [9]-[11], 13561357 [46], 13661367 [105]-[108], 1380 [185], 1393 [250] ; 191 ALR 449 at 453454, 460461, 474475, 493, 511512 .

[94] [1932] AC 562 at 580.

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

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88. **Following paragraph cited by:**

Kemp v Lyell McEwin Health Service (01 December 2006) (Debelle J)
Kemp v Lyell McEwin Health Service (01 December 2006) (Debelle J)

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.

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

[97] (2002) 76 ALJR 1348 at 13771378 [171]-[175]; 191 ALR 449 at 489490 .

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89. **Following paragraph cited by:**

Campbell v Northern Territory of Australia (No 3) (09 September 2021) (White J)
Cattanach v Melchior (16 July 2003) (Gleeson CJ,McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ)

More specifically, the law has long placed particular value on the protection of the young from serious harm. The *parens patriae* jurisdiction referred to in *Marion's Case* [98] provides one illustration. The entitlement of parents of a child to be heard in child welfare proceedings concerning a child provides another illustration [99] . Further, through the imposition of obligations and the conferral of rights, both the general law and contemporary statute law have treated the relationship of parent and child as a primary means by which to secure the public interest in the nurturing of the young [100] . It was not disputed in *Annetts* that, if the ordinary principles of negligence otherwise applied, the relationship of parent and child would be sufficient to import a duty of care on the part of the respondent to avoid causing psychiatric illness to the appellants as a consequence of the wrongful death of their child. In *Hancock v Nominal Defendant* [101] , the Queensland Court of Appeal dismissed an appeal against an award of damages for psychiatric illness sustained by the respondent upon learning of the death of his adult son caused by the negligent driving of the appellant.

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[98] *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218 at 258259 .

[99] *J v Lieschke* (1987) 162 CLR 447 at 462, 463464 ; cf *In re Gault* 387 US 1 (1967) .

[100] cf *Russell v Russell* (1976) 134 CLR 495 at 549.

[101] [2002] 1 Qd R 578 .

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90. **Following paragraph cited by:**

Attorney General of New South Wales v Bar-Mordecai (30 July 2008) (McCallum J)

> 39 Mr Bar-Mordecai submitted that his vulnerability and the fact that the Commission controlled the risk of harm were factors relevant to the existence of a duty of care, relying on *Gifford v Strang Patrick Stevedoring Pty Limited* (2003) 214 CLR 269 at [90] and [102] . The point of the reference to [102] is unclear to me and appears to be a mistake. The decision in *Gifford* turned on the fact that the respondent was the employer of a stevedore who was crushed to death by a forklift vehicle driven negligently by another employee. Gummow and Kirby JJ noted at [90] that the respondent had a significant, perhaps exclusive degree of control over the risk of physical harm to the employee and the risk of consequent psychiatric harm to his children when they learned of the accident.

Attorney General of New South Wales v Bar-Mordecai (30 July 2008) (McCallum J)
Kemp v Lyell McEwin Health Service (01 December 2006) (Debelle J)

Although the appellants here did not claim to have relied upon any specific assurances by the respondent as to their father's safety from harm, the relationship between the parties to this

litigation otherwise shares important characteristics with the relationship at issue in *Annetts* [102] . The appellants here had no way of protecting themselves against the risk of psychiatric harm which eventuated. The respondent controlled the conditions under which Mr Gifford worked and held a significant, perhaps exclusive, degree of control over the risk of harm to him and the risk of consequent psychiatric harm to the appellants. The respondent's control over the risk of harm was, in a legal and practical sense, direct rather than remote [103] . More over, there is no inconsistency between the existence of a duty of care to the appellants and the legitimate pursuit by the respondent of its business interests [104] . The respondent's duty of care to the appellants to exercise reasonable care to avoid causing them psychiatric injury as a consequence of their father's death in the course of his employment would be, at most, coextensive with the tortious and express or implied contractual duties that it owed Mr Gifford directly as his employer. The law requires an employer in the position of the respondent so to order its affairs as to avoid causing injury or death to its employees.

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[102] (2002) 76 ALJR 1348 at 1391 [240]-[241]; 191 ALR 449 at 509.

[103] cf *Agar v Hyde* (2000) 201 CLR 552 at 562 [16], 564 [21], 581582 [81]-[83] ; *Bro die v Singleton Shire Council* (2001) 206 CLR 512 at 558559 [102] .

[104] cf *Bryan v Maloney* (1995) 182 CLR 609 at 623-624 ; *Perre v Apand Pty Ltd* (199 9) 198 CLR 180 at 235 [147] .

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91. In *Hawkins v Clayton* [105] , Gaudron J observed that, in attempting to ascertain the existence of a duty of care to avoid causing economic loss, "somewhat different" factors may arise where "the act or omission complained of amounts to an interference with or impairment of an existing right which is known or ought to be known to the person whose acts or omissions are called into question" than where the loss "is occasioned without infringement or impairment of an otherwise recognized right". We agree with that statement. By analogical extension, the common law will more readily impose a duty of care to avoid causing psychiatric harm to the child of an initial victim where the conduct of the defendant which is sought to be impugned constituted an infringement of otherwise recognised rights in the initial victim.

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[105] (1988) 164 CLR 539 at 594. See also *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 251 [191] .

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92. The respondent owed the appellants a duty of care to take reasonable care to avoid causing them a recognisable psychiatric illness as a consequence of their father's death in the course of his employment. Especially in circumstances where negligence by the respondent to the father is admitted, it is clearly arguable that the respondent breached these separate duties of care it owed to the appellants.

Section 151P of the Workers Compensation Act

93. It may be added that s 151P of the Workers Compensation Act , the text of which has been reproduced earlier in these reasons, does not operate upon the common law to produce any different result. The provision precludes the recovery of damages for psychological or psychiatric injury except in the circumstances specified in pars (a) and (b) thereof. Paragraph (b) relevantly permits the award of damages in favour of a child of an injured or deceased worker who, as a consequence of the injury or death, has suffered a demonstrable psychological or psychiatric illness and not merely a normal emotional or cultural grief reaction. It may thus be said that the New South Wales legislature has specifically turned its mind to the issue that arises in the present appeals and has accepted that damages may be awarded to the child of a deceased employee who, as a consequence of the death, has suffered a "demonstrable psychological or psychiatric illness". The appellants claim that they have suffered such an illness. There is an arguable evidentiary foundation for that claim. It should therefore be determined, in each case, at trial.

94. The other State legislatures appear not to have passed legislation in equivalent terms to s 151P of the Workers Compensation Act . There is therefore lacking that consistent pattern of State legislation which may in an appropriate case, and in the manner indicated in *Esso Australia Resources Ltd v Federal Commissioner of Taxation* [106] , influence by analogy the development of the common law. It is sufficient here to say that s 151P of the Workers Compensation Act envisages rather than denies the existence of a duty of care on the part of the respondent to take reasonable care to avoid causing the appellants a recognisable psychiatric illness.

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[106] (1999) 201 CLR 49 at 6063 [19]-[28] .

Orders

95. Each appeal should be allowed. The orders of the Court of Appeal dated 14 June 2001 should be set aside. In their place it should be ordered that each appeal to that Court be allowed, that the orders of the District Court dated 24 August 1999 be set aside, and that each matter be remitted to that Court for determination of the outstanding issues. The respondent in this Court should pay the costs of the appellants in this Court and in the Court of Appeal. The costs of each party in the District Court are to abide the outcome of the proceedings in that Court.

96. HAYNE J. I agree that, for the reasons given by Gummow and Kirby JJ, s 4(1)(b) of the *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) [107] should not be construed as confining a defendant's liability to a child for damages for injury "arising wholly or in part from mental or nervous shock", allegedly suffered as a result of the killing, injuring or putting in peril of that child's parent, to cases where the parent was killed, injured or put in peril "within the sight or hearing" of the child. The question which then arises in these appeals is whether the respondent owed the appellants a duty to take reasonable care to avoid inflicting psychiatric injury on them.

[107] Sections 3 and 4 of the *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) h ave now been repealed by the *Civil Liability Amendment (Personal Responsibility) Act* 20 02 (NSW) but that repeal does not affect this case.

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 *T ame 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.

[108] *Gifford v Strang Patrick Stevedoring Pty Ltd* (2001) 51 NSWLR 606 at 608 [1] per Handley JA, 617 [44][45] per Hodgson JA, 623 [76] per Ipp AJA.

[109] (2002) 76 ALJR 1348; 191 ALR 449.

[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 [3 60][361], [365][366] per Callinan J; 191 ALR 449 at 456, 461462, 504505, 514, 516517, 539540, 541542 .

98. **Following paragraph cited by:**

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.

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

It may readily be accepted that an employer may reasonably foresee that, if an employee is killed or seriously injured at work, others who have close ties of affection for the employee may suffer psychiatric injury on learning of the death or injury. Reasonable foreseeability of psychiatric injury is a necessary condition for finding a duty of care to avoid injury of that kind, but it alone is not a sufficient condition. In *Tame* and *Annetts* , the Court held that some forms of control mechanism, which it has been suggested should be applied to limit recovery for psychiatric injury, should not be adopted. "Normal fortitude" was held not to be a precondition to liability [111] . "Sudden shock" was held not to be a necessary requirement for such a claim [112] . "Direct perception" was, as I have said, also rejected.

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[111] (2002) 76 ALJR 1348 at 1353 [16] per Gleeson CJ, 1359 [61][62] per Gaudron J, 13821384 [197], [199][203] per Gummow and Kirby JJ; 191 ALR 449 at 455456, 464, 49 7499 .

[112] (2002) 76 ALJR 1348 at 1353 [18] per Gleeson CJ, 13571358 [51][52] per Gaudron J, 1388 [221][222] per Gummow and Kirby JJ, 1397 [266][267] per Hayne J; 19 1 ALR 449 at 456, 461462, 504505, 516517 .

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99. The rejection of these tests may, or may not, be consistent with developing other control mechanisms in the future. For my own part, I remain of the view [113] that if psychiatric injury extends to all the conditions which psychiatric medicine would classify as a form of "psychiatric injury", it will be necessary to develop one or more control devices in substitution for those which have now been rejected. It may be that the control mechanisms which are developed will emerge from further developments in the law of negligence and, in particular, consideration of the place to be given to the duty of care as a prerequisite of liability [114] . C ontrol mechanisms developed in this way may have wider applications than just cases of psychiatric injury. But it may also be that, as knowledge about the causes of psychiatric injury and the effects of traumatic events increases, control mechanisms based on that knowledge may become evident and could be applied to claims for damages for psychiatric injury.

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[113] *Tame* and *Annetts* (2002) 76 ALJR 1348 at 14001402 [285][294]; 191 ALR 449 at 522524 .

[114] *Tame* and *Annetts* (2002) 76 ALJR 1348 at 1393 [249]; 191 ALR 449 at 511.

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100. Following *Tame* and *Annetts* , however, I consider that I am now bound to conclude that an employer owes a duty to take reasonable care to avoid psychiatric injury to an employee's children. (It may be that the duty is wider than that but it is not necessary, in this case, to decide whether it is.)

101. The employer owes that duty of care to those family members because not only is it foreseeable that they may suffer psychiatric injury on learning of the employee's accidental death or serious injury at work, the relationships between employer and employee and between employee and children are so close as to require the conclusion that the duty is owed. I consider that this follows from the Court's holding in *Annetts* that an employer owes a duty of care to the parents of an employee who is a minor. I recognise that there are some differences between *Annetts* and the present cases. In the present cases, there is not that element, found in *Annetts* , of parents entrusting the welfare of their child to an employer. Further, it might be said that there may be differences between the reaction that a child may have to the untimely death of a parent and the reaction that a parent may have to the death of a child. But for present purposes such differences are not material. The preexisting relationships between the three parties – employee, employer and children – coupled with reasonable foresight of the particular kind of harm suffered, require the conclusion that a duty to take reasonable care to avoid psychiatric injury is owed by the employer to the employee's children.

102. At the time of their father's death the appellants did not live with him. Two of the appellants were then in the workforce, and the oldest of the three, Darren, was an adult. The deceased had maintained a close and loving relationship with his children.

103. The conclusion that the respondent owed the appellants a duty to take reasonable care to avoid causing them psychiatric injury follows from the combination of two matters. First, the respondent, as employer of the appellants' father, controlled the work which he did, and how, and where, he did it. Because, as employer, it controlled those matters, the respondent was bound to take reasonable care, and ensure that reasonable care was taken, to avoid harm to the employee [115] . Secondly, the employer can reasonably foresee that children of the employee may suffer psychiatric injury if the employee is killed or seriously injured at work. If, as was held in *Annetts* , the employer owes that duty to the parents of an infant employee, there is no sound basis for concluding that the same kind of duty is not owed to the infant children of the employee. Nor is there any sound basis for concluding that the duty extends only to the *infant* children and not to the oldest child, Darren, who was 19 at the time of the accident. The fact that the father lived apart from his children does not require or permit a different conclusion.

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[115] *Kondis v State Transport Authority* (1984) 154 CLR 672 at 687688 per Mason J.

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104. Whether the respondent breached the duty it owed to the appellants has not yet been determined. The respondent's admission that it breached its duty of care to the appellants' father may well be thought to have an important bearing on that issue. Nor has it been determined whether, as a result of the respondent's negligence, the appellants suffered psychiatric injury as distinct from emotional distress. Those issues will have to be determined.

105. I agree with Gummow and Kirby JJ that, for the reasons they give, s 151P of the *Workers Compensation Act* 1987 (NSW) requires no different conclusion. I agree in the orders their Honours propose.

106. CALLINAN J. These appeals raise questions with respect to the interaction between state (New South Wales) ameliorative legislation, the contemporary operation of which has since been outstripped by developments in the common law of Australia, and that common law.

Facts

107. Barry Gifford was employed by the respondent stevedoring company at Darling Harbour in Sydney, New South Wales. On 14 June 1990 he was married to, but separated from Kristine Gifford ("Mrs Gifford"), who was then 43 years old. She was permanently employed by the South Sydney Council and had entered into a relationship with another man. There were three children of the marriage: a son, Darren Gifford ("Darren") aged 19; a daughter, Kelly Gifford ("Kelly") aged 17; and a younger son, Matthew Gifford ("Matthew") a schoolboy of 14 years ("the appellants").

108. From the time of his separation from Mrs Gifford in 1984 to the time of his death in 1990, Mr Gifford and his three children were in a close and loving relationship. He regularly visited his former residence where the appellants lived and engaged in various activities with them. His relationship with Mrs Gifford was without rancour.

109. On 14 June 1990 Mr Gifford, in the course of his employment, was walking along a wharf when a negligently operated, heavy forklift truck reversed over him. He was crushed to death immediately. The accident was an horrific one.

110. Mrs Gifford was very soon informed of the death. Later, but on the same day, the appellants were told of it by friends of the family. Neither the appellants nor Mrs Gifford saw Mr Gifford's corpse.

Proceedings at first instance

111. Mrs Gifford brought proceedings against the respondent under the *Compensation to Relatives Act* (1897) (NSW) on behalf of the appellants. She and they also sued for damages for nervous shock.

112. After some arbitration proceedings (of no relevance to this appeal) the actions were heard together in the District Court of New South Wales (Naughton DCJ) in July and August 1999. His Honour gave judgment on 24 August 1999 in favour of the respondent in the actions for nervous shock, and a separate judgment, with which this Court is not concerned, in the action under the *Compensation to Relatives Act* . Nor is the Court concerned with the judgment against Mrs Gifford in favour of the respondent on her claim for damages for nervous shock. Because of the view that his Honour took of the effect of relevant legislation he did not make findings with respect to causation, and the nature and extent of any damage suffered by the appellants.

113. His Honour held, after reviewing a number of cases, that the appellants could not recover damages for nervous shock because s 4 of the *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) ("the Act")[116] displaced the common law by substituting a statutory test which they were unable to satisfy, it being clear that the "deceased was not killed, injured or put in peril within the sight or hearing of any of the children".

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[116] Sections 3 and 4 of the *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) were repealed by the *Civil Liability Amendment (Personal Responsibility) Act* 2002 (NSW) but that repeal does not affect this case.

The appeal to the Court of Appeal

114. The appellants appealed to the Court of Appeal of New South Wales (Hodgson and Handley JJA and Ipp AJA)[117]. Hodgson JA found that Naughton DCJ had erred in holding that s 4 of the Act excluded any liability at common law that might otherwise have existed, arising out of a duty of care owed to persons other than the immediate victims of negligent acts [118] .

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[117] *Gifford v Strang Patrick Stevedoring Pty Ltd* (2001) 51 NSWLR 606.

[118] *Gifford v Strang Patrick Stevedoring Pty Ltd* (2001) 51 NSWLR 606 at 615.

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115. Handley JA and Ipp AJA relevantly agreed with Hodgson JA with respect to the operation of s 4 of the Act [119] . The Court of Appeal nonetheless dismissed the appellants' appeals on the basis that a necessary element of a claim for nervous shock was absent, of direct visual perception of the event, or perhaps its immediate aftermath [120] . Hodgson JA made these remarks [121] :

> "It is not possible to compensate everyone who is injured, and the law must draw lines. It should be kept in mind that the civil standard of proof on the balance of probabilities necessarily means that damages may sometimes be awarded for injuries which did not occur or have been exaggerated, and/or against persons whose actions did not cause them. It is difficult enough for courts to resolve conflicting evidence in relation to claimed physical injuries, and harder still to do so in relation to claimed mental injuries to persons actually perceiving a horrific event. It is or would be much harder again to resolve conflicting evidence in relation to mental injuries claimed to arise from merely hearing about horrific events. Floodgates arguments are often criticised, but there are limits to the compensation that the community can afford to pay, particularly in relation to claimed injuries the existence and causation of which are so difficult to determine with assurance. In my opinion, it is reasonable to maintain the line that has been drawn in the cases.

There may be some room for development in relation to what amounts to perception of an incident, just as there has been some development so as to include perception of the close aftermath of an incident and not merely perception of the incident itself. Some cases have required direct unaided perception; but there may be a question as to how far liability extends, for example, where sound is amplified or events are seen by those present portrayed live on a large television screen, and so on. It is not necessary to consider that question in this case."

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[119] *Gifford v Strang Patrick Stevedoring Pty Ltd* (2001) 51 NSWLR 606 at 608 per Handley JA, 623 per Ipp AJA.

[120] *Gifford v Strang Patrick Stevedoring Pty Ltd* (2001) 51 NSWLR 606 at 622-623 .

[121] *Gifford v Strang Patrick Stevedoring Pty Ltd* (2001) 51 NSWLR 606 at 617.

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116. The Court of Appeal was pressed by the appellants with an argument that ss 151, 151E, 151F, and particularly 151P of the *Workers Compensation Act* 1987 (NSW) ("the Compensation Act") re-established the right to a common law action, effectively therefore conferred an independent cause of action, and prescribed *all* of the relevant criteria for it in circumstances of the kind which existed here. The argument was rejected on the basis that s 151P operates as a limiting mechanism and not so as to provide a new and distinct statutory cause of action [122] .

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[122] *Gifford v Strang Patrick Stevedoring Pty Ltd* (2001) 51 NSWLR 606 at 614 per Hodgson JA.

The appeal to this Court

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.

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[123] (2002) 76 ALJR 1348 at 1353 [17]-[18], 1355 [36] per Gleeson CJ, 1357-1358 [51]-[52], 1360 [65] per Gaudron J, 1388-1391 [221], [225], [236], [238] per Gummow and Kirby JJ, 1414-1415 [365], [366] per Callinan J; 191 ALR 449 at 456, 459, 461-462, 465, 504-505, 508, 541-542 .

118. In *Tame* I attempted to state some bright line rules distilled from the cases and elsewhere for the prosecution of what, for convenience and other reasons, I there called, and I would continue to call claims for damages for nervous shock, as does s 4 of the Act itself. In doing so I sought to identify and define the classes of persons in cases of nervous shock capable of being so closely and directly affected by a tortfeasor's negligence that the tortfeasor ought reasonably to have had them in contemplation in acting or omitting to act in the way in which he or she did, within the classic formulation of Lord Atkin in *Donoghue v Stevenson* [124] . I said [125] :

> "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 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."

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[124] [1932] AC 562 at 580.

[125] (2002) 76 ALJR 1348 at 1415 [366]; 191 ALR 449 at 541-542 .

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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 [128] . 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.

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[126] (2002) 76 ALJR 1348 at 1360-1361 [71], 1367-1369 [109]-[119]; 191 ALR 449 at 466, 475-478 .

[127] (2002) 76 ALJR 1348 at 1415 [366]; 191 ALR 449 at 541.

[128] (2002) 76 ALJR 1348 at 1353 [16], 1355-1356 [29], [38] per Gleeson CJ, 1356 [45], 1359-1360 [59]-[65] per Gaudron J, 1380-1381 [187], [189], 1382-1384 [197]-[203] per Gummow and Kirby JJ, 1393-1394 [251], [253] per Hayne J; 191 ALR 449 at 455-456, 458460, 463-465, 494, 497-499, 512-513 .

[129] See however Gummow and Kirby JJ at (2002) 76 ALJR 1348 at 1380 [186]; 191 ALR 449 at 493-494 who referred to the special relationships needed to found a negligent misstatement case as providing an imperfect analogy with relationships between tortfeasors and sufferers of nervous shock.

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120. Subject therefore to the qualifications to which I have referred I would adhere in this case to what I said in *Tame* .

121. There was evidence here which might possibly, arguably, if accepted, be capable of satisfying both the common law as I understand it to be, and s 151P of the Compensation Act , to ground a cause of action for nervous shock. Accordingly, if the appellants are able to maintain the decision of the Court of Appeal as to the effect of the Act , or to make out a case with respect to the meaning of s 151P of the Compensation Act which was unsuccessful in that Court, they will succeed on this appeal, and a new trial will be necessary to determine both liability and damages.

122. I deal first with the construction of ss 151, 151E, 151F and 151P of the Compensation Act whi ch provide as follows:

> "**151 Common law and other liability preserved**
>
> This Act does not affect any liability in respect of an injury to a worker that exists independently of this Act, except to the extent that this Act otherwise expressly provides.
>
> …
>
> **151E Application - modified common law damages**
>
> (1) This Division applies to an award of damages in respect of:
>
> (a) an injury to a worker, or

(b) the death of a worker resulting from or caused by an injury,

being an injury caused by the negligence or other tort of the worker's employer.

(2) This Division does not apply to an award of damages to which Part 6 of the *Motor Accidents Act 1988* or Chapter 5 of the *Motor Accidents Compensation Act 1999* applies.

(3) This Division applies to an award of damages in respect of an injury caused by the negligence or other tort of the worker's employer even though the damages are recovered in an action for breach of contract or in any other action.

(4) Subsection (3) is enacted for the avoidance of doubt and has effect in respect of actions brought before as well as after the commencement of that subsection.

151F General regulation of court awards

A court may not award damages to a person contrary to this Division.

…

151P Damages for psychological or psychiatric injury

No damages for psychological or psychiatric injury are to be awarded in respect of an injury except in favour of:

(a) the injured worker, or

(b) a parent, spouse, brother, sister or child of the injured or deceased person who, as a consequence of the injury to the injured person or the death of the deceased person, has suffered a demonstrable psychological or psychiatric illness and not merely a normal emotional or cultural grief reaction."

123. As the Court of Appeal held, s 151P does not make provision for a separate and independent cause of action, or provide that damages will be awarded whenever the circumstances and relationships to which it refers exist: it means that no damages may be awarded unless at least those circumstances and relationships exist in the case of a claim arising out of an injury to or the death of a worker. Nor does the section operate to make s 4(1)(b) of the Act inapplicable to the appellants. This follows from the language of s 151 which affirms the common law except to the extent otherwise provided, and the clear words of s 151P itself, particularly the introductory negative words, "No damages … are to be awarded … except in favour of …".

124. The next question is whether s 4 of the Act operates to limit the common law and to deny its incremental advance with respect to claims for damages for nervous shock. It provides as follows:

> "**4 Extension of liability in certain cases**
>
> (1) The liability of any person in respect of injury caused after the commencement of this Act by an act, neglect or default by which any other person is killed, injured or put in peril, shall extend to include liability for injury arising wholly or in part from mental or nervous shock sustained by:
>
> (a) a parent or the spouse of the person so killed, injured or put in peril; or
>
> (b) any other member of the family of the person so killed, injured or put in peril where such person was killed, injured or put in peril within the sight or hearing of such member of the family.
>
> (2) Where an action is brought by a member of the family of any person so killed, injured or put in peril in respect of liability for injury arising wholly or in part from mental or nervous shock sustained by the plaintiff as aforesaid and claims have been made against or are apprehended by the defendant at the suit of other members of the family of such person in respect of liability arising by operation of subsection (1) out of the same act, neglect or default the defendant may apply to the Court in which the action is brought and that Court may thereupon stay any proceedings pending at the suit of any such other member of the family arising out of the same act, neglect or default and may proceed in such manner and subject to such regulations as to making members of the family of such person parties to the action as to who is to have the carriage of the action and as to the exclusion of any member of the family who does not come in within a certain time as the Court thinks just.
>
> (3) Where any application under subsection (2) is made the action shall be for the benefit of such members of the family of the person so killed, injured or put in peril as are joined by the Court as plaintiffs pursuant to such application and the Court may give such damages as it may think proportioned to the injury resulting to the persons joined as plaintiffs respectively, and the amounts so recovered after deducting the costs not recovered from the defendant shall be divided amongst the persons joined as plaintiffs in such shares as the Court finds and directs.
>
> (3A) Where any case to which subsection (3) applies is tried by a judge sitting with a jury, the jury shall find the shares of damages and the judge shall direct in accordance with the finding.

(4) Any action in respect of a liability arising by operation of subsection (1) shall be taken in the Supreme Court or the District Court.

(5) In this section:

'**Member of the family**' means the spouse, parent, child, brother, sister, half-brother or half-sister of the person in relation to whom the expression is used.

'**Parent**' includes father, mother, grandfather, grandmother, stepfather, stepmother and any person standing in loco parentis to another.

'**Child**' includes son, daughter, grandson, granddaughter, stepson, stepdaughter and any person to whom another stands in loco parentis.

'**Spouse**' means:

(a) a husband or wife, or

(b) the other party to a de facto relationship within the meaning of the *Property (Relationships) Act 1984* ,

but where more than one person would so qualify as a spouse, means only the last person so to qualify."

It is right, as the respondent submits, that the section was enacted in response to, and some five years after the decision of this Court in *Chester v Waverley Corporation* [130] in order to replace the common law by legislation extending the right to claim damages for nervous shock. As will appear, the emphasis is, in my opinion, appropriately upon the word "extending".

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[130] (1939) 62 CLR 1 .

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125. The primary judge gave several reasons why he thought that s 4 of the Act operated to preclude claims by the appellants:

"(1) In my opinion it follows from the plain and ordinary meaning of the words in the statute.

(2) It seems that four High Court Justices, in obiter dicta ... are of the same opinion [131] .

(3) To construe s 4(1)(b) as Kirby P has done [132] would mean that it has no function to perform at all.

(4) If s 4(1)(a) continues to have a function so too should s 4(1)(b) .

(5) If the law as laid down in s 4(1)(b) is to be altered it is for Parliament to do so, not the Courts by a process of construction which seems to deny the provision its plain ordinary meaning and any operation at all.

(6) There was a policy justification for enacting s 4(1)(b) so as to restrict the rights of family members other than spouses and parents in claims for damages for 'nervous shock'. The cause of action for 'nervous shock' is potentially a 'flood gates' one opening the doors of the Courts to a multitude of such claims. Psychiatric illness often depends on subjective opinion and is potentially a disease of indeterminate reference and all the more so in 1944 when the provision was enacted. As a 'quid pro quo' for allowing family members to be compensated for 'nervous shock' without having to prove reasonable foreseeability of the particular type of damage alleged the legislature apparently considered that for family members more remote than spouses and parents actual presence at, or within hearing of the accident site, should be required as a condition of recovering damages. In other words, the provision seems to have been a legislative compromise in circumstances where compromise was considered reasonable. The prospect of increased road user and work place insurance premiums if there was not some type of perceived curtailment of claims for psychiatric illness provides a policy reason for making it harder for more remote family members than spouse or parent to recover damages.

(7) If there is ambiguity in the provision, and in my opinion there is not, then a purposive construction is proper and, having regard to (6) above, I consider that such a construction should be given. That would result, in my opinion, in restricting the claims of family members who are more remote than spouse or parent to cases where the death, injury or peril occurred within the sight or hearing of the plaintiff as referred to in s 4(1)(b) . Children in general terms have more potential to form fresh relationships and forget mental trauma than do existing parents or spouses. At least that was probably so in 1944."

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[131] *Scala v Mammolitti* (1965) 114 CLR 153 at 159-160 per Taylor J; *Mt Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 407-408 per Windeyer J; *Jaensch v Coffey* (1984) 155 CLR 549 at 556-557 per Murphy J and at 602, 611 per Deane J.

[132] See also *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 at 404 per Lord Ackner.

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126. Hodgson JA (with whom Handley JA and Ipp AJA agreed) in reaching a different conclusion from the trial judge said this of s 4 of the Act [133] :

> "In my opinion, s 4 of the [Act] does not have the effect of excluding any liability at common law that may otherwise exist, arising out of a duty of care owed to persons other than the immediate victims of negligent acts. What s 4 says, in effect, is that where a person by negligence has caused the death, injury or peril of another person, the former person is liable for injury from mental or nervous shock sustained by certain other defined classes of people. It does not expressly say that there should be no liability in respect of mental or nervous shock sustained by persons other than the immediate victim, unless the conditions laid down by that section are satisfied. I do not think any of the statements relied on by the trial judge support a different view, except possibly the statement by Taylor J that this legislative provision substituted a statutory test for the common law test. However, I do not think that was a carefully chosen expression, intended to convey that the common law position was displaced. Furthermore, in addition to the view expressed by Kirby P in *Coates* , there has recently been a further decision by this Court supporting the view that the common law is not excluded: see *FAI General Insurance Co Ltd v Lucre* [134] .
>
> One other consideration which persuades me that the common law is not displaced is that s 4 starts with a breach of duty of care to one person, and then extends liability for that breach to include a liability to certain other persons: it does not provide that there is any duty of care to those other persons. In so far as the common law provides for liability to persons other than the immediate victim, it does so by means of a duty of care owed directly to those persons, rather than a liability built upon a breach of duty to the primary victim."

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[133] *Gifford v Strang Patrick Stevedoring Pty Ltd* (2001) 51 NSWLR 606 at 615.

[134] (2000) 50 NSWLR 261 at 263-264 per Mason P.

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127. In *Coates* to which both the primary judge and Hodgson JA referred, Kirby P (dissenting) had earlier said [135] :

> "In my view, s 4(1)(b) of the Act does not exhaustively define the right of persons to recover for nervous shock. The section is not expressed in a way apt to have that consequence: *Anderson v Liddy* [136] . The phrase 'shall extend to include' implies the continued existence of a right which is additional to other rights which remain unaffected. The history of the statute, being designed, in part, to overcome *Chester v Waverley* [*Corporation*] [137] , is not supportive of the suggestion of an exclusive definition of entitlements to damages for nervous shock. The procedural arrangements originally provided by the Act deny the legislative purpose of abolishing common law rights. Those rights remained as they were, and as they

were later to develop. It is an established doctrine in the interpretation of statutes that legislation should not be construed to take away common law rights except by clear terms."

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[135] (1995) 36 NSWLR 1 at 7-8 .

[136] (1949) 49 SR(NSW) 320 at 323.

[137] (1939) 62 CLR 1 .

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128. **Following paragraph cited by:**

Sheehan v SRA; Wicks v SRA (31 August 2009) (Beazley JA at 1; Giles JA at 81; McColl JA at 82)

The reasoning and conclusion of Naughton DCJ are not lightly to be dismissed. Section 4 of the Act was enacted 59 years ago. It made much more than an incremental change to the law. That the legislature intervened shows that it thought this then a fitting area of the law for legislative rather than judicial development. It is hardly to the point that the legislature might not have foreseen that the common law in relation to nervous shock would change as it has done. And despite that the common law of Australia in this area had developed, the legislature of New South Wales had enacted no relevant changes to s 4 of the Act at the time of the commencement of this action. It did not do so, for example, when either *Scala v Mammolitti* [138] (a New South Wales case) or *Mount Isa Mines Ltd v Pusey* [139] (a Queensland case) were decided, each decision extending the liability of defendants and both widely regarded at the time of their pronouncement as doing so, even though a special relationship of employer and employee existed in the latter. It would have been a simple matter for the legislature of New South Wales to have enacted at any time during the 38 years since the first of those cases was decided, explicit provisions to bring the law in New South Wales expressly into step with, or to enable it to keep step with the common law, or to restrict, or limit relevant rights as it did in 1989 by enacting s 151P of the Compensation Act . It is not presently relevant to consider the legislative changes made by the Parliament of New South Wales in 2002.

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[138] (1965) 114 CLR 153 .

[139] (1970) 125 CLR 383 .

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129. **Following paragraph cited by:**

Walters v Good Guys Discount Warehouse (Australia) Pty Limited (18 May 2022) (Karen Garner)
Dungog Shire Council v Babbage (20 May 2004)

There is a difficulty yet to be resolved and not adverted to by the courts below, or the parties in this Court, which arises when either a significant change in the common law is effected by a decision of a court, or, as here, where the decision may have the effect of holding that an enactment extending, and therefore apparently relevantly defining the rights to which it refers, has not finally defined those rights. The difficulty arises because the common law as stated, certainly as stated by this Court is, by a legal fiction, to be regarded as having always been the law, when in practice and truth the law has been different up to the moment of the pronouncement of this Court's decision. One consequence is that actions mounted, and defences pleaded upon the basis of the law as it was previously understood will become worthless. Another is that affairs which have been arranged on the basis of the prior understanding of the law, have to be, if they can be, rearranged, or may be set at nought. Lord Browne-Wilkinson drew attention to these matters in *Kleinwort Benson Ltd v Lincoln City Council* [140] . I said that they provided reason for caution in judicial activism in *Esso Australia Resources Ltd v Federal Commissioner of Taxation* [141] . Unfortunately, the law so far has found no way constitutionally to enable courts to prevent or ameliorate the problem by, for example, treating a landmark decision as applying prospectively only, or as having no precedential relevance to actions pending or not yet statute barred. And nor, regrettably, have legislatures generally chosen to intervene to cure potential injustices so arising. To hold that the law now extends beyond what it was when s 4 of the Act was enacted, is to hold that this extension is now and has for *some indefinite period* in the past, been the law. How this may affect claims earlier not pursued but still not statute barred, and insurance and re-insurance effected by insurers the Court has no means of knowing. The difficulty does not arise however if on its proper construction the relevant enactment can be seen to be truly ambulatory, that is, as speaking for the common law as it develops. These matters indicate a need for caution in reaching the decision that the appellants seek in this appeal.

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[140] [1999] 2 AC 349 at 357-364 .

[141] (1999) 201 CLR 49 at 104-105 [164] .

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130. It is therefore a very serious question whether s 4 of the Act may be regarded as having been encircled, indeed outstripped even, by the common law. In short, should the Court now treat this territory relevantly as the province of the common law?

131. Nonetheless, but not without some considerable hesitation I have formed the opinion that the legislature did not, by enacting s 4 of the Act , intend to bring to a standstill the development and application of the common law with respect to claims for nervous shock. It intended to right what was seen in 1944 to be a serious deficiency in the common law. Significantly the legislature did not enact "extend to, and be confined until further amendment to …". It deliberately chose the words "extend to" and relevantly no others. It thereby recognized the

existence at common law – there was no other source for it – of a "liability … for … mental or nervous shock", and its enactment of s 151P of the Compensation Act in 1989 serves as an indication that in one, and one instance only, it wished and decided to effect a restrictive alteration to the common law as it had developed and was developing. Section 4 of the Act is to be read as ambulatory, as applying the common law as it is from time to time subject only to such other enactments as may operate to vary it.

132. The appeals should be allowed with costs. The respondent should pay the appellants' costs of the appeals to the Court of Appeal. The cases should be remitted to the District Court for decision according to law. The costs of the proceedings in the District Court (both the trials so far and in the future) should abide the result in the District Court.

Cited by:

QUESTION OF LAW RESERVED (NO 1 OF 2024) [2025] SASCA 107 -
Hamzy v Commissioner of Corrective Services [2025] NSWSC 1023 -
Hamzy v Commissioner of Corrective Services [2025] NSWSC 1023 -
Hamzy v Commissioner of Corrective Services [2025] NSWSC 1023 -
Hamzy v Commissioner of Corrective Services [2025] NSWSC 1023 -
WHITE and COMMISSIONER OF POLICE [2025] WASAT 84 (25 August 2025)

171. In *Gifford v Strang Patrick Stevedoring Pty Ltd* [64] McHugh J discussed the relevance of the strength of the right in question:

> The presumption of non-interference is strong when the right is a fundamental right of our legal system; it is weak when the right is merely one to take or not take a particular course of action. Courts should not cut down the natural and ordinary meaning of legislation evincing an intention to interfere with these lesser rights by relying on a presumption that the legislature did not intend to interfere with them. Given the frequency with which legislatures now abolish or amend 'ordinary' common law rights, the 'presumption' of non-interference with those rights is inconsistent with modern experience and borders on fiction. If the presumption still exists in such cases, its effect must be so negligible that it can only have weight when all other factors are evenly balanced.

WHITE and COMMISSIONER OF POLICE [2025] WASAT 84 (25 August 2025)

Gifford v Strang Patrick Stevedoring Pty Ltd (2003) 214 CLR 269; [2003] HCA 33

WHITE and COMMISSIONER OF POLICE [2025] WASAT 84 -
Medical Board of Australia v Kok (Review & Regulation) [2025] VCAT 650 (22 July 2025) (N Campbell, Presiding Member; Dr A Sungaila, Practitioner Member; Dr S Shedda, Practitioner Member; N Campbell, Member)

48. McHugh J in *Gifford v Strang Patrick Stevedoring Pty Ltd* [2003] HCA 33, (2003) 214 CLR 269 at [36] , has described the presumption as 'admittedly weak these days that a statute is not intended to alter or abolish common law rights unless the statute evinces a clear intention to do so' and stated:

> ... In *Malika Holdings Pty Ltd v Stretton*, however, I warned of the need for caution in applying this presumption: nowadays legislatures regularly enact laws that infringe the common law rights of individuals. The presumption of non-interference is strong when the right is a fundamental right of our legal system; it is weak when the right is merely one to take or not take a particular course of action. Courts should not cut down the natural and ordinary meaning of legislation evincing an intention to interfere with these lesser rights by relying on a presumption that the legislature did not intend to interfere with them. Given the frequency with which legislatures now abolish or amend "ordinary" common law rights, the "presumption" of non-interference with those rights is inconsistent with modern experience and borders on fiction. If the presumption still exists in such cases, its effect must be so negligible that it can only have weight when all other factors are evenly balanced.
>
> (footnote omitted)

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 -
Lundbergs v Fu [2025] QSC 135 -
Lundbergs v Fu [2025] QSC 135 -
Lundbergs v Fu [2025] QSC 135 -
Saadat v Commonwealth [2025] SASC 59 -
Saadat v Commonwealth [2025] SASC 59 -
Civil Juries Charge Book [2023] JCV Civil_Juries_Charge_Book -
Melounis & Melounis (No 4) [2024] FedCFamC1F 778 (15 November 2024) (Altobelli J)

iii. There is an ancient presumption that legislation must not interfere with common law rights (see eg, *Potter v Minahan* (1908) 7 CLR 277 at 304). In *Gilford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 , Gleeson CJ explained why such presumptions should not be rigidly enforced in the modern era:

> 36 There is a presumption — **admittedly weak these days** — that a statute is not intended to alter or abolish common law rights unless the statute evinces a clear intention to do so. In *Malika Holdings Pty Ltd v Stretton*, however, I warned of the need for caution in applying this presumption: nowadays legislatures regularly enact laws that infringe the common law rights of individuals. The presumption of non-interference is strong when the right is a fundamental right of our legal system; **it is weak when the right is merely one to take or not take a particular course of action. Courts should not cut down the natural and ordinary meaning of legislation evincing an intention to interfere with these lesser rights by relying on a presumption that the legislature did not intend to interfere with them.** Given the frequency with which legislatures now abolish or amend "ordinary" common law rights, the "presumption" of non-interference with those rights is inconsistent with modern experience and borders on fiction. If the presumption still exists in such cases, its effect must be so negligible that it can only have weight when all other factors are evenly balanced.
>
> (Citations omitted and emphasis added)

Blo v CMA [2024] NSWPICMR 19 (22 July 2024)

20. The insurer submits the passage relied upon by the claimant in *Gifford* is not relevant to interpretation of s 30 of the CLA because it was in respect of the law as it existed prior to enactment of the CLA . The insurer submits *Gifford* concerned the *Law Reform (Miscellaneous Provisions) Act 1944 (NSW)* (the LRMP Act) as in force at the time and it was held that the LR MP Act did not abolish common law rights, so the plaintiff's claims could be decided based on those common law rights, which were more expansive than those available under s 4 of the LRMP Act .

Blo v CMA [2024] NSWPICMR 19 (22 July 2024)

18. The claimant refers to observations by McHugh J in *Gifford v Strang Patrick Stevedoring Pty Ltd* [2003] HCA 33 (*Gifford*) regarding the closeness and affection of relationships when determining whether a duty is owed to a person claiming nervous shock as a result of injury or death to another person. [1]

via

[1] The passage in *Gifford* relied on by the claimant is set out at paragraph of this decision.

Blo v CMA [2024] NSWPICMR 19 -
Blo v CMA [2024] NSWPICMR 19 -
Blo v CMA [2024] NSWPICMR 19 -
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Blo v CMA [2024] NSWPICMR 19 -
Blo v CMA [2024] NSWPICMR 19 -
Blo v CMA [2024] NSWPICMR 19 -
Bro v CRG [2024] NSWPICMR 18 (19 July 2024)

17. The claimant refers to observations by McHugh J in *Gifford v Strang Patrick Stevedoring Pty Ltd* [2003] HCA 33 (*Gifford*) regarding the closeness and affection of relationships when determining whether a duty is owed to a person claiming nervous shock as a result of injury or death to another person. [1]

Bro v CRG [2024] NSWPICMR 18 (19 July 2024)

34. However, as pointed out by the insurer, *Gifford* was determined where, at the time which the *Gifford* appeal relates, s 4 of the LRMP Act was in force (now repealed). It was noted in Gifford that s 4 of the LRMP Act has subsequently been "overtaken" by the CLA . As such, *Gifford* is of limited relevance to this merit review, which is to be determined under the CLA and not the repealed provisions of the LRMP Act .

Bro v CRG [2024] NSWPICMR 18 (19 July 2024)

17. The claimant refers to observations by McHugh J in *Gifford v Strang Patrick Stevedoring Pty Ltd* [2003] HCA 33 (*Gifford*) regarding the closeness and affection of relationships when determining whether a duty is owed to a person claiming nervous shock as a result of injury or death to another person. [1]

Bro v CRG [2024] NSWPICMR 18 (19 July 2024)

43. Section 30 of the CLA may not align with the observations of McHugh J in *Gifford* or with unique or non-traditional family models or situations where extended families live together. There are likely many families where, for example and sometimes extending from cultural backgrounds, cousins live together like brothers and sisters and may even think of each other as siblings. However, the CLA is limiting, rather than an expansive provision like s 4 of the LRMP Act . If the NSW legislature had intended to emphasise the "close and loving" quality of a relationship as McHugh J did in *Gifford* , presumably the legislation would have adopted different language for example by using language similar to s 73 of the Victorian *Wrongs Act 1958* by only requiring that a claimant was in "a close relationship with the victim". However, by restricting or limiting "close member of the family..." to mean only the listed categories I do not consider there is any scope to interpret the definition to include persons who do not strictly fall within one of the specified categories, regardless of their otherwise close relationship with the victim.

Bro v CRG [2024] NSWPICMR 18 -
Bro v CRG [2024] NSWPICMR 18 -
Bro v CRG [2024] NSWPICMR 18 -
Bro v CRG [2024] NSWPICMR 18 -
Bro v CRG [2024] NSWPICMR 18 -
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Bro v CRG [2024] NSWPICMR 18 -
Bro v CRG [2024] NSWPICMR 18 -
Bro v CRG [2024] NSWPICMR 18 -
Falconer v Commissioner of Police [No 2] [2024] WASCA 47 (01 May 2024) (Buss P; Vaughan and Hall JJA)

Gifford v Strang Patrick Stevedoring Pty Ltd [2003] HCA 33 ; (2003) 214 CLR 269

Falconer v Commissioner of Police [No 2] [2024] WASCA 47 -
Tsiragakis v JobCo Employment Services & Anor (Ruling) [2024] VCC 407 -
Tsiragakis v JobCo Employment Services & Anor (Ruling) [2024] VCC 407 -
Tsiragakis v JobCo Employment Services & Anor (Ruling) [2024] VCC 407 -
Hurt v The King [2024] HCA 8 -
Karpik v Carnival plc (The Ruby Princess) (Initial Trial) [2023] FCA 1280 -
CDLC Pty Ltd v Capital Estate Developments Pty Ltd [2023] ACTSC 284 (12 October 2023) (McWilliam J)

83 If it be the case that the available grounds for withholding consent are broader at common law, for assignments to which the *Leases Act* applies, that principle has been impliedly modified, noting that no special clarity is required in the statute to alter general common law principles: *Gifford v Strang Patrick Stevedoring Pty Limited* [2003] HCA 233; 214 CLR 269 at [36] . The principles that the parties each sought to draw upon and apply from the cases are not ones that would be categorised as fundamental common law rights or freedoms, such that the principle of legality needs to be considered.

The Catholic Archdiocese of Melbourne v RWQ (a pseudonym) [2023] VSCA 197 -
Walters v Good Guys Discount Warehouse (Australia) Pty Ltd [2023] NSWPICPD 29 (24 May 2023) (P Phillips J)

15. After hearing from the parties, the Member approached her determination with regard to the following question: does s 66(1A) of the 1987 Act preclude the making of the 2021 claim for permanent impairment compensation? Relevant to this was the validity and effect of the 2014 claim, the Complying Agreement and the 2021 claim in the context of the legislative and transitional provisions. The Member referred to the history and purpose of the 2012 amending Act with reference to the Second Reading Speech, and specifically the purpose of the amendments to s 66 of the 1987 Act (being the introduction of a threshold of greater than 10% WPI and a limit of only one claim) "to reduce disputes and reduce administration costs while allowing the scheme to focus on more seriously injured workers".[16] Noting the transitional provisions relevant to the 2012 amending Act and the Court of Appeal's interpretation of such in *Goudappel No 1*, the Member considered that at the time the 2014 claim was made and the Complying Agreement entered into, the amended s 66 was not applicable; however, *Goudappel No 2* changed this. With reliance on *Gifford v Strang Patrick Stevedoring Pty Limited* , [17] the Member held that the amended s 66 provisions applied to the 2014 claim, the Complying Agreement and the 2021 claim, and therefore, held that the 2014 claim for 4% WPI could not have advanced on a proper construction of the law. The Member examined the decision of *Stafford* in detail and in particular, Deputy President Roche's consideration regarding the validity of a "claim" at [67] and [90]–[96] , where the Deputy President held that a claim (valid or invalid) may be amended where there is a change in impairment between the date of an initial claim and the date of resolution or determination of that claim. [18]

via

[17] [2003] HCA 33 ; 214 CLR 269 .

Walters v Good Guys Discount Warehouse (Australia) Pty Ltd [2023] NSWPICPD 29 -
BFH v Allianz Australia Insurance Limited [2023] NSWPICMR 2 -
BFH v Allianz Australia Insurance Limited [2023] NSWPICMR 2 -
Healy v Bird [2022] VSC 823 (28 December 2022) (Keogh J)

86. The first defendant complained that if the duty was found to exist it would permit a wider scope of the types of family members pursuing secondary victim claims, such as grandchildren and great-grandchildren, thus removing any reasonable foreseeability and resulting in indeterminacy. The first defendant did not explain how such an issue would arise in this case, but not on the facts of cases such as *Gifford v Strang Patrick Stevedoring Pty Ltd* , [47] *Jaensch v Coffey*,[48] *Tame* and *King* . The plaintiffs' pleaded case limits consideration of the family duty of care to immediate family defined as any future partner and children of Healy.

via

[47] *Gifford* (n 36).

Healy v Bird [2022] VSC 823 -
Healy v Bird [2022] VSC 823 -
Healy v Bird [2022] VSC 823 -
BIJ v QBE Insurance (Australia) Limited [2022] NSWPICMR 75 -
BIJ v QBE Insurance (Australia) Limited [2022] NSWPICMR 75 -
BHD v QBE Insurance (Australia) Limited [2022] NSWPICMR 73 -
BHD v QBE Insurance (Australia) Limited [2022] NSWPICMR 73 -

BHD v QBE Insurance (Australia) Limited [2022] NSWPICMR 73 -
BIJ v QBE Insurance (Australia) Limited [2022] NSWPICMR 75 -
BIJ v QBE Insurance (Australia) Limited [2022] NSWPICMR 75 -
BHD v QBE Insurance (Australia) Limited [2022] NSWPICMR 73 -
BHD v QBE Insurance (Australia) Limited [2022] NSWPICMR 73 -
BHD v QBE Insurance (Australia) Limited [2022] NSWPICMR 73 -
BHD v QBE Insurance (Australia) Limited [2022] NSWPICMR 73 -
BIJ v QBE Insurance (Australia) Limited [2022] NSWPICMR 75 -
BIJ v QBE Insurance (Australia) Limited [2022] NSWPICMR 75 -
BHD v QBE Insurance (Australia) Limited [2022] NSWPICMR 73 -
BIJ v QBE Insurance (Australia) Limited [2022] NSWPICMR 75 -
BIJ v QBE Insurance (Australia) Limited [2022] NSWPICMR 75 -
Walters v Good Guys Discount Warehouse (Australia) Pty Limited [2022] NSWPIC 222 (18 May 2022) (Karen Garner)

74. Notwithstanding the decision in *Goudappel No. 1* at the time the 2014 Claim and the Complying Agreement were made, the law subsequently decided by the High Court in *Goudappel No. 2* must now be taken to have been the law at the time that the 2014 Claim and the Complying Agreement were made: *Gifford v Strang Patrick Stevedoring Pty Limited* , [10] per Callinan J at [129], citing *Kleinwort Benson Ltd v Lincoln City Council* . [11]

Walters v Good Guys Discount Warehouse (Australia) Pty Limited [2022] NSWPIC 222 -
Minister for the Environment v Sharma [2022] FCAFC 35 -
Minister for the Environment v Sharma [2022] FCAFC 35 -
Lendlease Building Contractors Pty Limited v Australian Building and Construction Commissioner (No 2) [2022] FCA 192 -
Khan v R [2022] NSWCCA 47 -
Khan v R [2022] NSWCCA 47 -
Potter v Gympie Regional Council [2022] QSC 9 -
Potter v Gympie Regional Council [2022] QSC 9 -
Potter v Gympie Regional Council [2022] QSC 9 -
Leggett v Hawkesbury Race Club Limited (No 3) [2021] FCA 1658 -
Leggett v Hawkesbury Race Club Limited (No 3) [2021] FCA 1658 -
Leggett v Hawkesbury Race Club Limited (No 3) [2021] FCA 1658 -
Stevens v DP World Melbourne [2021] VCC 2154 -
Stevens v DP World Melbourne [2021] VCC 2154 -
Stevens v DP World Melbourne [2021] VCC 2154 -
Stevens v DP World Melbourne [2021] VCC 2154 -
Stevens v DP World Melbourne [2021] VCC 2154 -
Stevens v DP World Melbourne [2021] VCC 2154 -
Colefax v Hojaij [2021] QDC 324 (14 December 2021) (Morzone QC DCJ)

56. In very broad terms a duty of care is owed only if a defendant ought reasonably to foresee that his or her conduct is likely to cause loss or damage to a plaintiff or a class of persons to which the plaintiff belongs. [21] But there remains no single comprehensive test for assessing whether a duty of care exists – reasonable foreseeability is not, in itself, a sufficient condition establishing a duty of care, [22] nor is analogy to existing precedent or an established category of duty [23] definitive in all circumstances, there is no common defining relationship between the parties [24] that can be relied on, or some other unifying practical guide such as proximity. [25] While these features may contribute in the exploration of the issue or draw focus in the inquiry, their utility is limited as a process of reasoning towards a conclusion. [26]

via

[21] Fleming, *The Law of Torts*, 9th ed, (1998) at 151. Cf. *Donoghue v Stevenson* [1932] AC 562 applying *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 ; *Chapman v Hearse* (1961) 106 CLR 112 at 120-1; [1962] ALR 379; Dixon CJ, Kitto, Taylor, Menzies and Windeyer JJ; *Caterson v Cmr for Railways* (1973) 128 CLR 99 at 101-2 per Barwick CJ.

Biggs v O'Connor [2021] VSC 826 (13 December 2021) (Keogh J)

66. The case of *Gifford v Strang Patrick Stevedoring Pty Ltd* (' *Gifford*') [26] arose out of the claim for damages for negligently inflicted psychiatric injury brought by the children of a man who was killed in an accident at work. The issue on appeal was whether the man's employer owed a duty of care to the children. Gleeson CJ concluded that at common law the respondent employer owed the appellant children a duty of care, and said:

> However, as a class, children form an obvious category of people who might be expected to be at risk of the kind of injury in question. Where there is a class of person, such as children, who are recognised, by the law, and by society, as being ordinarily in a relationship of natural love and affection with another class, their parents, then it is not unreasonable to require that an employer of a person in the second class, whose acts or omissions place an employee at risk of physical injury, should also have in contemplation the risk of consequent psychiatric injury to a member of the first class. [27]

Gummow and Kirby JJ affirmed the conclusion of the Court in *Scala,* and found that the cause of action of the children was not dependent on proof of the existence of liability to the father. [28] Their Honours concluded that the respondent employer's duty of care to the appellant children was, at most, coextensive with the duty it owed to their father. [29] Gummow and Kirby JJ said:

> [91] In *Hawkins v Clayton*, Gaudron J observed that, in attempting to ascertain the existence of a duty of care to avoid causing economic loss, "somewhat different" factors may arise where "the act or omission complained of amounts to an interference with or impairment of an existing right which is known or ought to be known to the person whose acts or omissions are called into question" than where the loss "is occasioned without infringement or impairment of an otherwise recognised right". We agree with that statement. By analogical extension, the common law will more readily impose a duty of care to avoid causing psychiatric harm to the child of an initial victim where the conduct of the defendant which is sought to be impugned constituted an infringement of otherwise recognised rights in the initial victim.
>
> [92] The respondent owed the appellants a duty of care to take reasonable care to avoid causing them a recognisable psychiatric illness as a consequence of their father's death in the course of his employment. Especially in circumstances where negligence by the respondent to the father is admitted, it is clearly arguable that the respondent breached these separate duties of care it owed to the appellants. [30]

via

[26] (2003) 214 CLR 269 .

Kassam v Hazzard [2021] NSWCA 299 -
IWC Industries Pty Ltd v Sergienko [2021] NSWCA 292 -
Giles v State of Queensland [2021] QCA 206 -
Campbell v Northern Territory of Australia (No 3) [2021] FCA 1089 -

Burrows v Macpherson & Kelley Lawyers (Sydney) Pty Ltd [2021] NSWCA 148 -
Abo v AAI Ltd t/as GIO [2021] NSWPICMR 21 -
Mannall v Howard (No 2) [2019] ACTSC 113 -
Mannall v Howard (No 2) [2019] ACTSC 113 -
Frangie v South Western Sydney Local Health District trading as Liverpool Hospital [2019] NSWDC 42 -
Frangie v South Western Sydney Local Health District trading as Liverpool Hospital [2019] NSWDC 42 -
Frangie v South Western Sydney Local Health District trading as Liverpool Hospital [2019] NSWDC 42 -
Caffrey v AAI Limited [2019] QSC 7 (30 January 2019) (Flanagan J)

101. As a preliminary observation, I note that Mason P's observations on the insufficiency of being a mere bystander – that is, a person who witnesses an accident or its aftermath but is entirely unrelated to any of the victims – preceded the High Court's decisions in *Tame v New South Wales* [101] and subsequently *Gifford v Strang Patrick Stevedoring Pty Limited* . [102] Follo wing close analysis of the types of relationships between plaintiff and victim that may attract liability for pure psychiatric harm, McHugh J stated in *Gifford* : [103]

> "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 *Ta me* , 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 said that, absent circumstances giving rise to a sudden shock, the risk of psychiatric injury will not be reasonably foreseeable in many cases."

via

[103] (2003) 214 CLR 269 at 290 , [52] .

Caffrey v AAI Limited [2019] QSC 7 (30 January 2019) (Flanagan J)
Gifford v Strang Patrick Stevedoring Pty Limited (2003) 214 CLR 269; [2003] HCA 33 ; applied

Caffrey v AAI Limited [2019] QSC 7 -
Caffrey v AAI Limited [2019] QSC 7 -
Caffrey v AAI Limited [2019] QSC 7 -
Bryant v Competitive Foods Australia Pty Ltd [2018] QDC 258 (17 December 2018) (Jarro DCJ)

68. Furthermore the reasonableness of imposing a duty of care in the circumstances of this matter must also be taken into account. This requires a consideration of the "salient features" of the case, as articulated by Allsop P in *Caltex Refineries (Qld) Pty Ltd v Stavar* (2009) 75 NSWLR 649 at [102] – [105] .[126] More relevantly the Architects properly, in my view, submitted the following "salient" features:

(a) Unlike claims of personal injuries against allegedly negligent architects arising from latent structural defects which were entirely within the architect's control, skill and expertise, the Architects lacked any real control over the circumstances giving rise to the accident.

(b) The Architects had no control over and, cannot have assumed responsibility for:

(i) drivers in the carpark not using the carpark in a reasonable way, including by not driving with due care and attention and not keeping a look out whilst driving through the carpark, in particular on approach to, and whilst driving onto the pedestrian crossing in the carpark;

(ii) the fulfilment of a parent's duty with respect to their child or children; or,

(iii) pedestrians in the carpark not using the carpark in a reasonable way, including by using the pedestrian crossing without first checking it was safe to cross.

(c) Mr Bryant was not 'vulnerable' in his use of the carpark. He was not unable to protect himself from the alleged design defects in the driveway or carpark such as to cast upon the Architects responsibility for the consequences of the accident. He was alone in control of his utility, including its speed of travel, and was able to make an assessment as to how he ought proceed through the driveway and carpark and obviate any hazards.

(d) The user of any carpark is vulnerable to a person darting out between parked cars and thus Mr Bryant ought to have reasonably anticipated the presence of children in or around the carpark and have been in a state of heightened awareness, in particular as he approached the pedestrian crossing.

(e) The relationship between both Mr Bryant and the Architects, and Mr Bryant and the deceased child are both

factors relevant as to whether a duty of care to avoid pure psychiatric injury was owed. A consideration of the relationships between the parties in the present matter militates against a duty being owed by the Architects.

(f) Moreover, a duty to avoid pure psychiatric harm has only been recognised in a limited number of "special" relationships between the plaintiff and the defendant, including relationships such as employer and employee, the operators of motor vehicles and cases involving medical negligence. [127]

(g) There was nothing "special" about the relationship between the Mr Bryant and the Architects. There was no connection between them save for Mr Bryant's allegations as to the Architects' negligent conduct alleged to have caused Mr Bryant's psychiatric illness. [128]

(h) Any control the Architects had over the events on 26 April 2012 was too remote to give rise to actionable negligence for the harm alleged to have been suffered by Mr Bryant. To impose a burden on the Architects would be contrary to principle, such principle *"based upon considerations of practicality and fairness"*. [129]

via

[127] See *Tame v New South Wales* at 340-341, [52] , *Mount Isa Mine Ltd v Pusey* (1970) 125 CLR 383, *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 , *Hancock v Nominal Defendant* [2002] 1 Qd R 578 and *Kemp v Lyell McEwin Health Service* (2006) 96 SASR 192.

Federal Commissioner of Taxation v Tomaras [2018] HCA 62 -
Federal Commissioner of Taxation v Tomaras [2018] HCA 62 -
Director of Public Prosecutions v Moreno [2018] VSC 675 -
Director of Public Prosecutions v Moreno [2018] VSC 675 -
Director of Public Prosecutions v Moreno [2018] VSC 675 -
Nationwide News Pty Ltd v Vass [2018] NSWCA 259 (08 November 2018) (McColl, Basten and Leeming JJA)

51. However, "the reach of the regulatory state [is such] that it is now difficult to assume that the legislature would not infringe rights or interfere with the general system of law". [17] Accordi ngly, "a much surer guide to the legislative intention in areas of legislation dealing with ordinary rights or the general system of law is to construe the language of the enactment in its natural and ordinary meaning, having regard to its context – which will include other provisions of the enactment, its history and the state of the law – as well as the purpose which the enactment seeks to achieve." [18] In the final analysis, "[t]he assistance to be gained from a presumption will vary with the context in which it is applied." [19]

via

18. Ibid at [30] ; see also Gifford v Strang Patrick Stevedoring Pty Ltd (2003) 214 CLR 269; [2003] HCA 33 (Gifford) at [36] .

Nationwide News Pty Ltd v Vass [2018] NSWCA 259 -
Fuller-Wilson v State of New South Wales [2018] NSWCA 218 -
Fuller-Wilson v State of New South Wales [2018] NSWCA 218 -
Puleio v Olam Orchards Pty Ltd [2018] VSC 109 (21 March 2018) (Zammit J)

NEGLIGENCE – Duty of care – Nervous shock – Agricultural accident – Death caused by alleged negligence of employer – Nervous shock suffered by wife of deceased after being told of husband's death – Deceased intoxicated at time of accident – Whether evidence of intoxication admissible – Whether duty of care owed to plaintiff – Scope of duty owed to deceased – Whether employer breached duty – No evidence that employer breached duty – *Wyong Shire Council v Shirt* (1980) 146 CLR 40 applied – *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 ; *Homsi v Homsi* [2016] VSC 354; *Hardy v Mikropul Australia Pty Ltd* [2010] VSC 42 discussed – *Transport Accident Act 1986* s 93 ; *Road Safety Act 1986* ss 56–7 .

Puleio v Olam Orchards Pty Ltd [2018] VSC 109 (21 March 2018) (Zammit J)

51. The leading authority on the duty of employers towards secondary victims is *Gifford v Strang Patrick Stevedoring Pty Ltd.* [40] That case concerned a claim for psychiatric injury brought by the children of the primary victim, an employee of a stevedoring company, who was killed by a forklift driven negligently by another employee of the same company. At issue was whether the employer owed an independent duty to take reasonable care to avoid causing the children a recognisable psychiatric injury as a result of their father's death in the course of employment. The Court unanimously held that this was so even though the children did not directly perceive their father's death. As McHugh J said:

> An employer owes a duty to take care to protect from psychiatric harm all those persons that it *knows or ought to know are in a close and loving relationship with its employee*. It is not a condition of that duty that such persons should be present when the employee suffers harm or that they should see the injury to the employee. [41]

Puleio v Olam Orchards Pty Ltd [2018] VSC 109 -
Puleio v Olam Orchards Pty Ltd [2018] VSC 109 -
Puleio v Olam Orchards Pty Ltd [2018] VSC 109 -
Bucknell v Parker [2018] QDC 36 (16 March 2018) (Lynham DCJ)

28. It is trite to say that neither respondent is liable for the loss suffered by the appellant which is the subject of the claim unless they owed the appellant a duty to take reasonable care to avoid causing the appellant loss or damage. Whilst there is no single test in assessing whether or not a duty of care exists, in general a duty of care will only be owed if a defendant ought reasonably to foresee that their conduct may be likely to cause loss or damage to a plaintiff. [19] As was succinctly explained by Kirby J in *Graham Barclay Oysters Pty Ltd v Ryan & Ors* (2002) 211 CLR 540 at 622–623 [230] :

> "There are certain 'standard questions' (*Romeo v Conservation Commission (NT)* (1998) 192 CLR 431 at 475 [115]) that dissect the composite notion of common law liability in negligence. Relevantly, those questions analyse the concept in terms of: (1) the duty of care; (2) the scope of the duty; (3) the breach; and (4) the causation of damage. Although these issues are commonly considered separately, it has been pointed out many times that

'each element can be defined only in terms of the others' (*John Pfeiffer Pty Ltd v Canny* (1981) 148 CLR 218 at 241–242) and, for example, that 'the actual nature of the damage suffered is relevant to the existence and extent of any duty to avoid or prevent it' (*Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 487). These words teach an important lesson. Excessive analysis and undue intellectual subdivision of what is basically a unitary concept can lead a decision-maker into over-sophisticated elaboration of a notion that is, at its heart, a reflection of practicality and common sense.

via

[19] Gifford v Strang Patrick Stevedoring Pty Ltd (2003) 214 CLR 269 ; Chapman v Hearse (1961) 106 CLR 112

Elliott v Minister administering Fisheries Management Act 1994 [2018] NSWSC 117 -
Shalhoub v State of New South Wales [2017] NSWDC 363 (14 December 2017) (P Taylor SC DCJ)

154. The precise ambit of "*intent to injure*" is not clear. In some contexts, including in the criminal sphere, intent has commonly included the concept of recklessness. It may be thought that if s 3B(1)(a) was to adopt a narrower concept of intent so as to exclude recklessness, it could easily have been expressed in the legislation. It might be thought that the limitation of common law rights in the absence of an intent to injure should not be enlarged beyond what is required by clear words or necessary intendment (*Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 at [36] ; [2003] HCA 33 , *Konneh v State of New South Wales (No.3)* [2013] NSWSC 1424 [27]-[32]). If that is so, any ambiguity about whether intent to injure includes recklessness should be resolved in favour of the broader meaning of intent.

South West Helicopters Pty Ltd v Stephenson [2017] NSWCA 312 -
South West Helicopters Pty Ltd v Stephenson [2017] NSWCA 312 -
Caratti v Commissioner of the Australian Federal Police [2017] FCAFC 177 -
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 -
Ibrahimi v Commonwealth of Australia (No 9) [2017] NSWSC 1051 (13 September 2017) (Bellew J)

263. A similar approach was taken in *Gifford v Strang Patrick Stevedoring Pty Limited* [264] . In that case, the children of an employee of a stevedoring company who was crushed to death at work by a vehicle which had been negligently operated by another employee sued the deceased's employer. None of the children witnessed the accident. They were subsequently told of their father's death and claimed to have suffered psychiatric injury as a consequence. The High Court concluded that the deceased's employer owed a duty of care to his children to avoid causing them a recognisable psychiatric illness. In reaching that conclusion, emphasis was placed on the existence of the relevant relationship [265] . In that regard McHugh J said [266] :

> [53] In the present case, the relationship between the children and their father made them a neighbour of Strang for duty purposes, and Strang owed the father a duty of care to provide a safe place of employment. The father was killed in the course of his employment by reason of the negligence of Strang. A reasonable employer in the position of Strang was bound to have in mind that any harm caused to its employee carried the risk that it would cause psychiatric harm to any children that he might have when they learned of his death. Because that is so, Strang owed a duty to the

children to take reasonable care in its relationship with their father to protect them from psychiatric harm. And the admission that Strang negligently caused the death of their father means that Strang breached its duty to the children. However, the trial judge made no finding as to whether any of the children suffered a recognisable psychiatric injury upon being told of their father's death. Accordingly, it is not possible to enter verdicts in favour of the children. The proceedings must be remitted to the District Court for further hearing.

via

264. (2003) 214 CLR 269; [2003] HCA 33

Ibrahimi v Commonwealth of Australia (No 9) [2017] NSWSC 1051 (13 September 2017) (Bellew J)

Tame v State of NSW; Annettes v Australian Stations Pty Limited (2002) 211 CLR 317; [2002] HCA 35; *Shee han v State Rail Authority of NSW*; Wicks *v State Rail Authority of NSW* (2010) 241 CLR 60; [2010] HCA 22 ; *Gifford v Strang Patrick Stevedoring Pty Limited* (2003) 214 CLR 269; [2003] HCA 33 referred to.

Ibrahimi v Commonwealth of Australia (No 9) [2017] NSWSC 1051 -
Victorian WorkCover Authority v BSA Limited [2017] VSC 224 -
Lightning Ridge Miners' Association Limited v Hall; Lightning Ridge Miners' Association Limited v Hall; O'Brien v Newton [2016] NSWLEC 1636 -
WorkPac Pty Ltd v Thearle [2016] NSWCA 303 (04 November 2016) (McColl and Ward JJA, Adamson J)

31. Gifford v Strang Patrick Stevedoring Pty Ltd (2003) 214 CLR 269; [2003] HCA 33 (Gifford HC) (at [44]) per McHugh J, approving Hodgson JA's construction of s 151P in Gifford CA; see also [62] and [93] – [94] per Gummow and Kirby JJ (Gleeson CJ agreeing (at [24]); Hayne J to like effect (at [105]); Callinan J also (at [123])).

Vikpro Pty Ltd v Wyuna Court Pty Ltd [2016] QCA 225 (06 September 2016) (Holmes CJ and Philippides and Philip McMurdo JJA,)

29. Given my view that the 1915 Act's repeal ended the appellant's immunity from recovery under cl 11.2, it is not strictly necessary for me to deal with the notice of contention. Had I reached a construction of s 89(b) sufficiently broad to embrace s 76 within its coverage, so that the latter section continued to apply to the lease after the enactment of the 2010 Act, I would have upheld the primary judge's decision on the basis advanced in the notice of contention, rejecting the appellant's arguments for the following reasons. Firstly, although it can reasonably be said that to continue s 76 in operation would be an empty benefit if it had no application to land tax under the 2010 Act, s 89(b) was not primarily concerned with the application of that section or its effect. It plainly had work to perform unconnected with provisions in leases concerning liability for land tax. Secondly, the subject matter of the 2010 Act does not give any indication that the definition of land tax in that Act is not to apply. To the contrary, the 2010 Act delineates, in ss 88 and 89 , between the treatment of land tax arising under that Act and the former Act, while making an exception to that delineation in s 93 ; plainly recognising the distinction to be drawn between land tax as imposed by the 1915 Act and as imposed by the 2010 Act. Thirdly, the presumption against alteration of rights has, in my view, no relevance here. Assuming, for present purposes, that the presumption can apply to statutory rights, as it does to common law rights, [25] I do not consider the right to resist recovery conferred here was a right of such significance as to attract the presumption. [26] Indeed, although it is unnecessary to explore this question any further, one might argue that it is the lessor's contractual rights which should not be defeated in the absence of clear language.

via

[26] See *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 per McHugh J at 284 as to the relationship between the strength of the presumption and the nature of the right under consideration.

Beven v Brisbane Youth Service Inc [2016] QSC 163 (28 July 2016) (Atkinson J)
Gifford v Strang Patrick (2003) 214 CLR 269; [2003] HCA 33 , cited

Beven v Brisbane Youth Service Inc [2016] QSC 163 -
Homsi v Homsi [2016] VSC 354 (28 June 2016) (J Forrest J)

52. The decisions of the High Court on recovery of damages for negligent inflictions of psychiatric injury in secondary victim cases are known to all tort students: *Pusey*, [45] *Jaensch* [46] and *Tame and Annetts*. [47] There are also a number of decisions in the High Court which deal with the Australia-wide implementation of the recommendations of the Ipp Report and their effect on claims for psychiatric injuries involving secondary victims: *Wicks* ,[48] *Gifford v Strang Patrick Stevedoring Pty Ltd* , [49] and *King* .

via

[49] (2003) 214 CLR 269 (*'Gifford'*).

Homsi v Homsi [2016] VSC 354 (28 June 2016) (J Forrest J)

52. The decisions of the High Court on recovery of damages for negligent inflictions of psychiatric injury in secondary victim cases are known to all tort students: *Pusey*, [45] *Jaensch* [46] and *Tame and Annetts*. [47] There are also a number of decisions in the High Court which deal with the Australia-wide implementation of the recommendations of the Ipp Report and their effect on claims for psychiatric injuries involving secondary victims: *Wicks* ,[48] *Gifford v Strang Patrick Stevedoring Pty Ltd* , [49] and *King* .

Homsi v Homsi [2016] VSC 354 (28 June 2016) (J Forrest J)

56. In *Gifford* , the father of three teenage children was crushed to death by a forklift driven negligently by a fellow employee of the defendant. The children did not witness the accident but were told of it later the same day. Gleeson CJ concluded that the relationship between the children and their father was sufficient to found a duty of care:

> Where there is a class of person, such as children, who are recognised, by the law, and by society, as being ordinarily in a relationship of natural love and affection with another class, their parents, then it is not unreasonable to require that an employer of a person in the second class, whose acts or omissions place an employee at risk of physical injury, should also have in contemplation the risk of consequent psychiatric injury to a member of the first class. [51]

Homsi v Homsi [2016] VSC 354 -
Homsi v Homsi [2016] VSC 354 -
Homsi v Homsi [2016] VSC 354 -
Eaton v TriCare (Country) Pty Ltd [2016] QCA 139 (03 June 2016) (Fraser and Philip McMurdo JJA and Boddice J,)

32. As this question is to be answered for the purpose of assessing a liability for the tort of negligence, there is a constraint of reasonableness. In *Gifford v Strang Patrick Stevedoring Pty Ltd* , Gleeson CJ said that: [31]

> "In the context of a question of duty of care, reasonable foreseeability involves more than mere predictability. And advances in the predictability of harm to others, whether in the form of economic loss, or psychiatric injury, or in some other form, do not necessarily result in a co-extensive expansion of the legal obligations imposed on those whose conduct might be a cause of such harm. The limiting consideration is reasonableness, which requires that account be taken both of interests of plaintiffs and of burdens on defendants."

Gleeson CJ there said, as he had said in *Tame v New South Wales* ,[32] that the central issue in this context is whether it was reasonable to require the defendant to have in contemplation the risk of psychiatric injury to the plaintiff, and to take reasonable care to guard against such injury. [33] Citing those passages, in *Nationwide News Pty Ltd v Naidu* , Spigelman CJ observed: [34]

> "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."

via

[31] (2003) 214 CLR 269, 276 ; [2003] HCA 33 , [9] .

Eaton v TriCare (Country) Pty Ltd [2016] QCA 139 (03 June 2016) (Fraser and Philip McMurdo JJA and Boddice J,)

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Eaton v TriCare (Country) Pty Ltd [2016] QCA 139 -
Eaton v TriCare (Country) Pty Ltd [2016] QCA 139 -
Shire of Toodyay v Merrick [2016] WASC 29 -
Shire of Toodyay v Merrick [2016] WASC 29 -
ABC v State of Queensland [2015] QDC 321 -

10. The particulars do not helpfully expand upon these statements. Nevertheless, and however badly expressed, it is reasonably clear that the appellant was asserting mental harm to himself, as a result of breaches of duty of care in the treatment by the defendants of his father. This articulates what is sometimes described as a "secondary or derivative claim." The basis of such a claim was explained in *Lane v Northern NSW Local Health District (No 3)* , [4] a case dealing with proceedings brought by two daughters in respect of the care provided to their mother. The nature of the cause of action was explained in the following passages.

> [7] The appellants asserted a secondary or derivative claim. That is, although the respondent owed them a duty of care, the content of that duty was referable to a separate duty owed to their mother. In principle, the existence of such a duty need not be doubted. For example, in *Annetts v Australian Stations Pty Ltd* [2002] HCA 35; 211 CLR 317, Gleeson CJ described the facts of the case at [3] :
>
> > '... 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.'
>
> [8] Like the present case, that was a situation where there was a pre-existing relationship between the parties, prior to the death of the family member, which involved an express or implied undertaking to take reasonable care for the health and well being of the family member. The High Court held that the duty to take reasonable care was not limited to circumstances where psychiatric injury flowed from a 'sudden shock' or where the injury to the family member was directly perceived by those suffering psychiatric injury, although in this case at least the latter element was satisfied in any event. (See also *Gifford v Strang Patrick Stevedoring Pty Ltd* [2003] HCA 33; 214 CLR 269 .)"

Wickes v Al-Mofathel [2015] ACTSC 266 (04 September 2015) (Refshauge J)

64. Mr Rewell SC referred in particular to the following principles set out by his Honour:

> (g) Legislation must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears between provisions, it must be alleviated, as far as possible, by adjusting the meaning of the competing provisions to achieve a result. This adjustment may require a Court to determine a hierarchy of provisions: *Project Blue Sky* at [70] per McHugh, Gummow, Kirby and Hayne JJ; *Ross v The Queen* (1979) 141 CLR 432 at 440 per Gibbs J; *Wil son* at [13] per Allsop P;
>
> (h) It is both permissible and appropriate to have regard to contextual material without a need for ambiguity to be established: *Caterpillar of Australia Pty Ltd v Industrial Court of NSW* [2009] NSWCA 83 at [86] ;
>
> (i) The contextual material, to which reference may be made, includes the history of the particular enactment, and the state of the law when it was enacted, namely, the legal and historical context of the legislation. This may include an examination of reports of law reform bodies (or the like): *Pyneb oard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 341 per Mason ACJ, Wilson and Dawson JJ; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ; *Wilson* at [12] per Allsop P;
>
> (j) It is an established principle that a statute should not be presumed to abrogate existing fundamental or common law rights in the absence of clear language. The nature of the right being

abrogated will determine whether the principle is strong or weak: *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 at [36] per McHugh J ; *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at [19] per Gleeson CJ; *Harrison* at [209]-[221] per Basten JA, Spigelman CJ agreeing at [2].

State of New South Wales v McMaster [2015] NSWCA 228 (10 August 2015) (Beazley P, McColl and Meagher JJA)

237. The genesis of the legislation was reviewed in *Gifford v Strang Patrick* [2003] HCA 33; 214 CLR 269 by McHugh J at [34]-[35] . As his Honour explained at [34], s 4 was a statutory response to the decision of the High Court in *Chester v Waverley Corporation* [1939] HCA 25; 62 CLR 1 and the decision of the House of Lords in *Bourhill v Young* [1943] AC 92. In *Chester v Waverley Corporation* , a claim for nervous shock brought by a mother who saw the dead body of her son in a council trench was rejected. In *Bourhill v Young* a claim by a woman who suffered nervous shock after hearing a motorcyclist collide with a motor vehicle was likewise rejected. At the time of its passage through Parliament, the Minister for Justice stated in the second reading speech that s 4 was "*a statutory extension of liability to meet the position created by the decision in* [*Bourhill*] *v Young ... [i]t creates no new substantive right of action*".

State of New South Wales v McMaster [2015] NSWCA 228 -
State of New South Wales v McMaster [2015] NSWCA 228 -
Raymond Steve Woods by his tutor June Marie Woods v Abdul Latif Abdulrahman and Or [2015] NSWDC 113 -
King v Philcox [2015] HCA 19 (10 June 2015) (French CJ, Kiefel, Gageler, Keane and Nettle JJ)

15. As enacted, the Wrongs Act 1936 contained no provision relating to recovery for nervous shock. The common law in the United Kingdom and in Australia at that time was not sympathetic to such recovery, treating it as "too remote" [20] and outside the scope of the relevant duty of care [21] . In 1939, however, a new s 28(1) was introduced into the Wrongs Act 1936[22] providing that a plaintiff should not be debarred from recovering damages for injury arising wholly or in part from mental or nervous shock [23] . A similarly motivated and more significant legislative response in New South Wales was the enactment of s 4 of the *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) . It was discussed in *Gifford v Strang Patrick Stevedoring Pty Ltd* [24] . Section 4 allowed for recovery for mental or nervous shock for a parent, husband or wife of a person killed, injured or put in peril by the negligence of the defendant. It also allowed recovery for any other member of the victim's family where the victim was "killed, injured or put in peril within the sight or hearing of such member of the family" [25] . The new provision used the language of sensory perception later found in s 30(2) of the *Civil Liability Act* 2002 (NSW) and considered by this Court in *Wicks* . Importantly, however, it operated as a defined extension of liability.

via

[24] See especially (2003) 214 CLR 269 at 277 280 [14] [22] per Gleeson CJ, 295 298 [70] [79] per Gummow and Kirby JJ (Hayne J agreeing at 303 [96]); see also at 282286 [32][42] per McHugh J, 311 316 [124][131] per Callinan J; [2003] HCA 33 . Similar provisions were enacted in the Australian Capital Territory and the Northern Territory: Law Reform (Miscellaneous Provisions) Ordinance 1955 (ACT), s 24; Law Reform (Miscellaneous Provisions) Ordinance 1956 (NT), s 25.

King v Philcox [2015] HCA 19 (10 June 2015) (French CJ, Kiefel, Gageler, Keane and Nettle JJ)

80. This Court has not before had to determine whether a duty of care is owed in the circumstances presented by this case. *Wicks* made passing reference to the issue of duty of care owed to those present at the aftermath of an accident but did not deal with it in detail [110] . *Jaensch v Coffey* [111] , *Tame* and *Gifford v Strang Patrick Stevedoring Pty Ltd* [112] all provide relevant guidance, but the issue cannot be properly decided by reference only to the nature

of the relationship between the victim of an accident and the claimant, or the victim and the defendant. As Deane J concluded in *Jaensch* [113] , the question of whether a duty of care is owed in particular circumstances falls to be resolved by a process of legal reasoning, by induction and deduction by reference to the decided cases and, ultimately, by value judgments of matters of policy and degree. Although the concept of "proximity" that Deane J held to be the touchstone of the existence of a duty of care [114] is no longer considered determinative, it nonetheless "gives focus to the inquiry" [115] . It does so by directing attention towards the features of the relationships between the parties and the factual circumstances of the case, and prompting a "judicial evaluation of the factors which tend for or against a conclusion" [116] that it is reasonable (in the sense spoken of by Gleeson CJ in *Ta me* [117]) for a duty of care to arise. That these considerations may be tempered or assisted by policy considerations and value judgments is not, however, an invitation to engage in "discretionary decision-making in individual cases" [118] . Rather, it reflects the reality that, although "[r]easonableness is judged in the light of current community standards" [119] , and the "totality of the relationship[s] between the parties" [120] must be evaluated, it is neither possible nor desirable to state an "ultimate and permanent value" [121] according to which the question of when a duty arises in a particular category of case may be comprehensively answered.

King v Philcox [2015] HCA 19 (10 June 2015) (French CJ, Kiefel, Gageler, Keane and Nettle JJ)

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via

[24] See especially (2003) 214 CLR 269 at 277 280 [14] [22] per Gleeson CJ, 295 298 [70] [79] per Gummow and Kirby JJ (Hayne J agreeing at 303 [96]); see also at 282286 [32][42] per McHugh J, 311 316 [124][131] per Callinan J; [2003] HCA 33 . Similar provisions were enacted in the Australian Capital Territory and the Northern Territory: Law Reform (Miscellaneous Provisions) Ordinance 1955 (ACT), s 24; Law Reform (Miscellaneous Provisions) Ordinance 1956 (NT), s 25.

King v Philcox [2015] HCA 19 -
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Agricultural Equity Investments Pty Limited v The Hon Chris Hatcher MP, Minister for Resources and Energy, Special Minister [2015] NSWLEC 23 -
Clarke (as Trustee of the Clarke Family Trust) v Great Southern Finance Pty Ltd (Receivers and Managers Appointed) (in liquidation) [2014] VSC 516 -
Clarke (as Trustee of the Clarke Family Trust) v Great Southern Finance Pty Ltd (Receivers and Managers Appointed) (in liquidation) [2014] VSC 516 -
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Clarke (as Trustee of the Clarke Family Trust) v Great Southern Finance Pty Ltd (Receivers and Managers Appointed) (in liquidation) [2014] VSC 516 -
Naw Eh Soe v Alberto Carapella; Saw Rain Bow v Alberto Carapella; Naw Su Su Bow v Alberto Carapella; Moe Moe Aye v Alberto Carapella [2014] NSWSC 1644 (20 November 2014) (Hamill J)

5. A good deal of time was taken up in the course of the day during which counsel attempted to advance that submission. In particular he sought to place reliance on the following cases and passages from those cases: *Emad Trolleys Pty Limited v Shigar* [2003] NSWCA 231 at [82] ; *Wicks v State Rail Authority of New South Wales* [2010] HCA 22; 241 CLR 60 at [37] and [44] ; *Gifford v Strang Patrick Stevedoring* [2003] HCA 33; 214 CLR 269 at [39] and [44] . After the luncheon adjournment, counsel for the plaintiffs indicated that he no longer pressed the submission that the case was not governed by the *Motor Accidents Compensation Act* . Accordingly, it is not necessary to deal with that rather adventurous, novel and (adopting the words of counsel for the defendant) self-destructive submission.

Curtis v The Queen [2014] NSWSC 1392 -
Lane v Northern NSW Local Health District (No 3) [2014] NSWCA 233 (22 July 2014) (Basten and Meagher JJA, Simpson J)

8. Like the present case, that was a situation where there was a pre-existing relationship between the parties, prior to the death of the family member, which involved an express or implied undertaking to take reasonable care for the health and well being of the family member. The High Court held that the duty to take reasonable care was not limited to circumstances where psychiatric injury flowed from a "sudden shock" or where the injury to the family member was directly perceived by those suffering psychiatric injury, although in this case at least the latter element was satisfied in any event. (See also *Gifford v Strang Patrick Stevedoring Pty Ltd* [2003] HCA 33; 214 CLR 269 .)

Regional Express Holdings Limited v Dubbo City Council (No 3) [2014] NSWLEC 87 (26 June 2014) (Pain J)

126. Rex's desire to continue with its business model of using smaller aircraft, which charging for the screening service potentially impinges on, is not a fundamental right to which this principle of statutory construction applies in my view. This approach would appear to be more characterised as a desire to take a particular course of action per McHugh J in *Gifford* at [36] cited above in par 121. As the Council submitted Rex is not compelled to use the airport. I do not consider a common law right of Rex is infringed by the Council's decision to charge it a fee.

Regional Express Holdings Limited v Dubbo City Council (No 3) [2014] NSWLEC 87 -
Lansdowne v Odpp (Qld) [2013] QMC 19 (19 December 2013)

[196] It is also well established that a statute should not be assumed to abrogate existing fundamental rights. Clear and unambiguous language is required to achieve that purpose (*Gifford v Stain Patrick Stevedoring Pty Ltd* (2003)214 CLR 269 [36]).

Meredith v Commonwealth (No 2) [2013] ACTSC 221 (20 November 2013) (Refshauge J)

535. The Commonwealth was in control of the dissemination of the terms and conditions of employment and of details of the superannuation scheme. The difficulty in evaluating that in this context is the relationship of employer and employee brings with it a high degree of control at various levels. See, for example, *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 at 301 ; [90].

Meredith v Commonwealth (No 2) [2013] ACTSC 221 -
Van Tongeren v Odpp (Qld) [2013] QMC 16 -
Daly v Thiering [2013] HCA 45 -
Cruse v Lifetime Care and Support Authority [2013] NSWSC 1546 (25 October 2013) (Harrison J)

33. As referred to by McHugh J in *Gifford* , legislatures nowadays regularly enact provisions that interfere with or infringe the common law rights of individuals. The instances of this at all levels are too numerous to mention. The *Limitation Act* 1969 might be thought to be an instructive and obvious example. The *Motor Accidents (Lifetime Care and Support) Act* might be another. There does not appear to me to be any good or obvious reason to cut down the natural and ordinary meaning of the provisions of that Act, to the extent that it evinces an intention to interfere with rights, not being fundamental rights of our legal system, by relying on a presumption that the legislature did not intend to interfere with them. I do not perceive Mr Cruse to contend that the arrangement or subsequent rearrangement of the ways in which, or the extent to which, catastrophically injured persons can claim or be given compensation for lifetime care and support, amounts to an interference of the order contemplated by McHugh J.

Cruse v Lifetime Care and Support Authority [2013] NSWSC 1546 -
Lee v New South Wales Crime Commission [2013] HCA 39 -
Lee v New South Wales Crime Commission [2013] HCA 39 -
Konneh v State of NSW (No.3) [2013] NSWSC 1424 (27 September 2013) (Garling J)

27. Because the answers to the separate questions involve understanding and interpreting some of the provisions of the *Bail Act* , which is now a code, it is convenient to re-state the central principles of statutory interpretation which are engaged in this case:

(a) the starting point for statutory interpretation is to engage in a purposive construction, that is, to prefer a construction which promotes the purpose and/or object underlying an Act: s 33 *Interpretatio n Act* 1987 ; *Carr v Western Australia* [2007] HCA 47; (2007) 232 CLR 138 at [5]-[6] per Gleeson CJ;

(b) the primary object of legislative interpretation is to construe the relevant provision so that it is consistent with the language and purpose of all of the provisions of the statute: *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at [69] and [71] per McHugh, Gummow, Kirby and Hayne JJ; *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, Mason and Wilson JJ at 320 ; and

(c) the heading of a part of an Act is taken to be a part of the Act: s 35(1) of the *Interpretation Act* . A heading may be referred to, in order to assist in resolving any uncertainty about the meaning of the language used: *Director-General Department of Corrective Services v Mickelson* (1992) 26 NSWLR 648 at 654D per Kirby P;

(d) it is well established that a statute should not be assumed to abrogate existing fundamental rights in the absence of clear language: *Gifford v Strang Patrick Stevedoring Pty Ltd* [2003] HCA 33; (2003) 214 CLR 269 at [36] per McHugh J .

Doe v Yahoo!7 Pty Ltd; Wright v Pagett [2013] QDC 181 -
Caldow v State of Victoria (Education Department of Victoria) [2012] VCC 1331 -
Caldow v State of Victoria (Education Department of Victoria) [2012] VCC 1331 -
Caldow v State of Victoria (Education Department of Victoria) [2012] VCC 1331 -

111. An inquiry into breach must attempt to identify the reasonable person's response to foresight of the risk of occurrence of the injury which the plaintiff suffered. That inquiry must attempt, after the event, to judge what the reasonable person *would* have done to avoid what is now known to have occurred. Although that judgment must be made after the event, it must seek to identify what the response would have been by a person looking forward at the prospect of the risk of injury. [14] In *Nationwide News Pty Ltd v Naidu* , Spigelman CJ observed:

> "The prospective nature of the inquiry as to breach has particular significance in the case of the risk of psychiatric injury. In any organisation, including in employer/employee relationships, situations creating stress will arise. Indeed, some form of tension may be endemic in any form of hierarchy. The law of tort does not require every employer to have procedures to ensure that such relationships do not lead to psychological distress of its employees. There is no breach of duty unless a situation can be seen to arise which requires intervention on a test of reasonableness.

> *Koehler* affirms the line of High Court authority, including, *Tame* and *Gifford* , which focuses attention on the purpose for which the inquiry as to foreseeability is undertaken, namely, to determine what reasonableness requires by way of response and, therefore, whether legal responsibility for the conduct should be attributed to the defendant for the injury to the plaintiff." [15]

Wolters v The University of the Sunshine Coast [2012] QSC 298 -
Wolters v The University of the Sunshine Coast [2012] QSC 298 -
Rail Signalling Services Pty Ltd v Victorian Rail Track [2012] VSC 452 -
WBM v Chief Commissioner of Police [2012] VSCA 159 -
JS v Graveur [2012] QCA 196 -
Tuohey v Freemasons Hospital [2012] VSCA 80 (04 May 2012) (Redlich and Mandie JJA and Kyrou AJA)

29. The displacement of the presumption is also warranted because of the nature of the common law rights altered by sub-s 28F(2) which deals with a claimant's right to a head of damages in tort. If the relevant right at common law is not fundamental, the extent of the protection afforded by the presumption against its alteration may be attenuated. [29] In *Gifford v Strang Patrick Stevedoring Pty Ltd*, the High Court considered the impact of provisions of the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) and the *Workers Compensation Act 1987* (NSW) on abolishing the common law right to damages for nervous shock. [30] The approach to statutory interpretation in that case has some resonance in this case given that the defendant's construction of sub-s 28F(2) also purports to, in effect, abolish a common law right to a head of damages in tort for a limited number of claimants. Despite the considerable differences in the wording, context and history of the relevant sections in *Gifford* , the following remarks of McHugh J remain pertinent:

> ... nowadays legislatures regularly enact laws that infringe the common law rights of individuals. The presumption of non-interference is strong when the right is a fundamental right of our legal system; it is weak when the right is merely one to take or not take a particular course of action. Courts should not cut down the natural and ordinary meaning of legislation evincing an intention to interfere with these lesser rights by relying on a presumption that the

> legislature did not intend to interfere with them. Given the frequency with which legislatures now abolish or amend 'ordinary' common law rights, the 'presumption' of non-interference with those rights is inconsistent with modern experience and borders on fiction ...
>
> The right to bring an action for psychiatric injury is an ordinary legal right. It is not a fundamental right of our society or legal system similar to the right to have a fair trial or to have a criminal charge proved beyond reasonable doubt. [31]

via

[30] (2003) 214 CLR 269 (Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Callinan JJ) ('*Giffo rd*').

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>
> The right to bring an action for psychiatric injury is an ordinary legal right. It is not a fundamental right of our society or legal system similar to the right to have a fair trial or to have a criminal charge proved beyond reasonable doubt. [31]

Tuohey v Freemasons Hospital [2012] VSCA 80 -
Aytugrul v The Queen [2012] HCA 15 (18 April 2012) (French CJ, Hayne, Heydon, Crennan and Bell JJ)

71. Putting that problem aside, the appellant appeared to be urging the creation of a legal rule, in the sense of a hitherto unsuspected construction of s 137 . He did so by recourse to the "legislative facts" to be found in the expert material. Legislative facts are to be distinguished from "adjudicative facts". Legislative facts are those which help the court to determine what a common law rule should be or how a statute should be construed [96] . They reveal how existing rules work and how rules which do not exist might work if they were

adopted. Sometimes legislative facts can legitimately be derived by analysing factual material not tendered in evidence either at trial or on appeal. That analysis can operate in many fields, but some of them are fields dependent on expert learning. Thus sometimes general references are made by courts to the causes of psychiatric injury [97] and the diagnosis of psychiatric illness [98] . Sometimes more specific reasoning is propounded after the court has had recourse to expert literature. Medical works have been taken into account in assessing the causation and foreseeability of psychiatric injury [99] . Works on psychology have been considered in formulating rules about identification evidence [100] , both directly [101] and indirectly [102] . This is not surprising, since the court's recognition of the "inherent frailties of identification evidence" has been said to arise "from the psychological fact of the unreliability of human observation and recollection." [103] If frailty rests on a psychological fact, and on psychological research [104] , expert material bearing on the psychological fact must have potential significance. Works on psychiatry have also been considered in explaining why children delay in complaining of sexual assault in relation to the unsafe and unsatisfactory ground of criminal appeal [105] . Expert studies on prison informants have been relied on to justify the proposition that evidence from that source may be tainted, and hence to justify the giving of warnings about it [106] . Psychiatric studies on the harm suffered by child victims of sexual offences have been taken into account in developing sentencing principles [107] . Accounting textbooks have been referred to in order to explain the differences between two methods of accounting. The goal was to determine which method reflected the legal test for accounting for general overheads in relation to an account of profits as a result of patent infringement [108] . Considerable reliance has been placed on environmental health studies in concluding that landlords had a duty of care to the son of tenants [109] .

via

[97] *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 at 304 [99] ; [2003] HCA 33 .

Lawson v Dunlevy [2012] NSWSC 48 (10 February 2012) (Garling J)

16. Before identifying the relevant provision of the *Bail Act* , it is appropriate to restate the central principles of statutory interpretation which are engaged in this case:

(a) the starting point for statutory interpretation is to engage in a purposive construction, that is, to prefer a construction which promotes the purpose and/or object underlying an Act: *Carr v Western Australia* [2007] HCA 47; 232 CLR 138 at [5]-[6] per Gleeson CJ;

(b) the primary object of legislative interpretation is to construe the relevant provision so that it is consistent with the language and purpose of all of the provisions of the statute: *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 at [69] and [71] per McHugh, Gummow, Kirby and Hayne JJ; and

(c) it is well established that a statute should not be assumed to abrogate existing fundamental rights in the absence of clear language: *Gifford v Strang Patrick Stevedoring Pty Ltd* [2003] HCA 33; 214 CLR 269 at [36] per McHugh J ; *Harrison v Melhem* [2008] 72 NSWLR 380 at [209]-[221] per Basten JA, Spigelman CJ agreeing at [2] .

HSH Hotels (Australia) Ltd v State of Queensland [2011] QCA 329 (18 November 2011) (Fraser JA and McMurdo and Boddice JJ,)

32. The appellant submitted that a narrow construction of s 297 should be adopted because that provision might interfere substantially with contracting parties' rights and with the conditions of grant of legal estates. The primary judge regarded that as a relevant consideration, [12] but as his Honour pointed out, it is clear that s 297 intended some

interference with contractual arrangements. The primary judge considered whether s 297(1) s hould be narrowly construed as applying only where a lease includes the precise expression "unimproved value" and an express reference to the 1944 Act, but ultimately rejected that construction. His Honour referred to the explanatory notes for the *Land Valuation Bill* 2010 (Qld), which in due course became the 2010 Act, and in particular the reference in the note to cl 297 to decisions of the New South Wales Supreme Court that there was no longer an "unimproved value" for land when the statutory provision for such valuations had been replaced by provisions for a "land value". The explanatory note continued:

> "There are a number of leases in Queensland that calculate rent, or other charges, by reference to the unimproved value of the land the subject of the lease. This clause is designed to ensure that valuations under the lease will continue to be made under Queensland valuation legislation."

The primary judge considered that this note and the language of s 297 identified its purpose, and that s 14A of the *Acts Interpretation Act* required the adoption of the interpretation which best achieved that purpose.

via

[12] His Honour cited *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 at [36] per McHugh J .

Thiering v Daly [2011] NSWSC 1345 -
Manthe v BHP Billiton Iron Ore Pty Ltd [2011] WADC 160 -
Manthe v BHP Billiton Iron Ore Pty Ltd [2011] WADC 160 -
Matthews v Greene [2011] WASC 258 (14 September 2011) (Edelman J)

59 It was also submitted that as a matter of construction a court should draw an inference which is most favourable to an accused person. There is a generally accepted approach to statutory interpretation which requires 'unmistakeable and unambiguous language' before a legislature could be imputed with an intention to abrogate or curtail rights or freedoms: ***Plaintiff S/157/2000 v Commonwealth of Australia*** [2003] HCA 2; (2003) 211 CLR 476, 492 [30] (Gleeson CJ); ***Momcilovic v The Queen*** [2011] HCA 34 [43] (French CJ) cf ***Gifford v Strang Patrick Stevedoring*** [2003] HCA 33; (2003) 214 CLR 269, 284 [36] (McHugh J) . Even assuming that this approach were to apply to the construction of a charge, and even if the possibility (and it is only a possibility; see above at [13]) of a summary trial were to be considered as such a right or freedom, it remains impossible to draw any inference in these cases that Mr Simpson or Mr Matthews have been charged with an offence in respect of any quantity of methylamphetamine. There is simply no reference to quantity.

Matthews v Greene [2011] WASC 258 -
Matthews v Greene [2011] WASC 258 -
Foggo v O'Sullivan Partners (Advisory) Pty Ltd [2011] NSWSC 501 -
Atanasio v BP Refinery (Kwinana) Pty Ltd [2011] WASCA 95 (15 April 2011) (Buss JA, Newnes JA, Murphy JA)

Gifford v Strang Patrick Stevedoring Pty Ltd [2003] HCA 33 ; (2003) 214 CLR 269

Atanasio v BP Refinery (Kwinana) Pty Ltd [2011] WASCA 95 -
HSH Hotels (Australia) Ltd v State of Queensland [2011] QSC 29 -
Con Ange v Fairfax Media Publications Pty Ltd [2010] NSWSC 1383 -
Con Ange v Fairfax Media Publications Pty Ltd [2010] NSWSC 1383 -
Hinkley v Star City Pty Ltd [2010] NSWSC 1389 (02 December 2010) (Ward J)
Gifford v Strang Patrick Stevedoring Pty Ltd [2003] HCA 33; (2003) 214 CLR 269
Halliday v Nevill

Hinkley v Star City Pty Ltd [2010] NSWSC 1389 -
M & J Rawlings Builders And Contractors v Rawlings [2010] VSCA 306 -
Northeast Business Park Pty Ltd v. Moreton Bay Regional Council [2010] QPEC 112 -
Gary Martin v Kevin Teeling [2010] NSWSC 814 -
Gary Martin v Kevin Teeling [2010] NSWSC 814 -
Gary Martin v Kevin Teeling [2010] NSWSC 814 -
Doughty v Martino Developments Pty Ltd [2010] VSCA 121 -
Western v Male [2010] SASC 163 -
Western v Male [2010] SASC 163 -
Western v Male [2010] SASC 163 -
Lehman Brothers Holdings Inc v City of Swan [2010] HCA 11 -
Lehman Brothers Holdings Inc v City of Swan [2010] HCA 11 -
Lehman Brothers Holdings Inc v City of Swan [2010] HCA 11 -
Wicks v State Rail Authority of New South Wales known as State Rail [2010] HCATrans 87 (13 April 2010) (French CJ; Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ)

> **GUMMOW J:** And *Gifford* as well, yes.

Wicks v State Rail Authority of New South Wales known as State Rail [2010] HCATrans 87 (13 April 2010) (French CJ; Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ)

> **GUMMOW J:** That interpretation of section 30(2) helps explain its relationship to section 32 . Section 30 just seems to be cutting out *Bourhill v Young* and cutting out *Gifford* and cutting out *Annetts* , even on the assumption that otherwise there would be recovery.

Wicks v State Rail Authority of New South Wales known as State Rail [2010] HCATrans 87 (13 April 2010) (French CJ; Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ)

> Your Honours, could we just go then to the case of *Gifford* , where I can just make some brief references. Your Honours, *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269. Your Honours, once again we find in this judgment the reference to "a distressing incident or its aftermath" and I would just like to focus upon those aspects. At page 275, at paragraph 7 :

Wicks v State Rail Authority of New South Wales known as State Rail [2010] HCATrans 87 -
Wicks v State Rail Authority of New South Wales known as State Rail [2010] HCATrans 87 -
Wicks v State Rail Authority of New South Wales known as State Rail [2010] HCATrans 87 -
Wicks v State Rail Authority of New South Wales known as State Rail [2010] HCATrans 87 -
Wicks v State Rail Authority of New South Wales known as State Rail [2010] HCATrans 87 -
Wicks v State Rail Authority of New South Wales known as State Rail [2010] HCATrans 87 -
Wicks v State Rail Authority of New South Wales known as State Rail [2010] HCATrans 87 -
Wicks v State Rail Authority of New South Wales known as State Rail [2010] HCATrans 87 -
Wicks v State Rail Authority of New South Wales known as State Rail [2010] HCATrans 87 -
Wicks v State Rail Authority of New South Wales known as State Rail [2010] HCATrans 87 -
City of Swan v Lehman Brothers Australia Ltd [2009] FCAFC 130 (25 September 2009) (Stone, Rares and Perram JJ)

> *Gifford v Strang Patrick Stevedoring Pty Limited* (2003) 214 CLR 269
> *Re Glendale Land Development Ltd (In Liq)*

City of Swan v Lehman Brothers Australia Ltd [2009] FCAFC 130 -
Sheehan v SRA; Wicks v SRA [2009] NSWCA 261 (31 August 2009) (Beazley JA at 1; Giles JA at 81; McColl JA at 82)

> 37 It is also convenient, before considering the provisions of the *Civil Liability Act* , to refer to relevant principles of statutory construction. This need only be done in brief terms, as neither party invoked any particular principle of statutory construction in aid of their respective arguments. As I understand the approach of each, it was that the express words of the section bore their ordinary meaning. They differed, however, as to what that ordinary meaning was. Neither

party suggested that the provision should be construed on the basis that Parliament does not intend to alter or restrict fundamental rights, freedoms and immunities: *Malika Holdings Pty Ltd v Stretton* [2001] HCA 14; (2001) 204 CLR 290; *Gifford v Strang Patrick Stevedoring Pty Ltd* [2003] HCA 33; (2003) 214 CLR 269 at [36] per McHugh J ; and *Harrison v Melhem* [2008] NSWCA 67; (2008) 72 NSWLR 380.

Sheehan v SRA; Wicks v SRA [2009] NSWCA 261 (31 August 2009) (Beazley JA at 1; Giles JA at 81; McColl JA at 82)

> 124 In *Chester* , as McHugh J explained in *Gifford* (at [34]), the High Court held that a mother who had suffered shock after seeing the dead body of her missing son in a trench under the control of the Council could not bring an action for nervous shock. In *Bourhill* , the House of Lords reached the same conclusion in relation to a woman who, while unloading a basket from a platform on the other side of a nearby stationary tram, suffered nervous shock after hearing a motorcyclist collide with a motor vehicle.

Sheehan v SRA; Wicks v SRA [2009] NSWCA 261 (31 August 2009) (Beazley JA at 1; Giles JA at 81; McColl JA at 82)

> 127 According to McHugh J (*Gifford* (at [34])), "in the Second Reading Speech on the Law Reform (Miscellaneous Provisions) Bill in the Legislative Council, the Minister for Justice said that s 4 was 'a statutory extension of liability to meet the position created by the decision in *[Bourhill] v Young* ... It creates no new substantive right of action.' " As Gummow and Kirby JJ (*Gifford* (at [76] - [77])) explained, at this stage, "[c]lause 4 ... drew no distinction between a parent or spouse of a person killed, injured or put in peril and any other family member". It was then amended to the form in which it was passed under which "the liability of a defendant would 'extend to include' liability for 'nervous shock' sustained by a relevant family member where the initial victim 'was killed, injured or put in peril within the sight or hearing of such member of the family'". According to the parliamentary record, (*Gifford* (at [78])):
>
> > "...[T]he amendment embodied a compromise between the interests of family members who sustain 'nervous shock' and the community which ultimately would bear the obligation that any extension of liability was thought to entail. The compromise was said to be that, in order to recover under the statute, 'farther removed relatives' would be subject to the additional requirement, not imposed on a parent or spouse, of *proving that the relevant death, injury or imperilment occurred within their sight or hearing* ...." (Emphasis added)

Sheehan v SRA; Wicks v SRA [2009] NSWCA 261 -
Sheehan v SRA; Wicks v SRA [2009] NSWCA 261 -
Sheehan v SRA; Wicks v SRA [2009] NSWCA 261 -
Sheehan v SRA; Wicks v SRA [2009] NSWCA 261 -
Sheehan v SRA; Wicks v SRA [2009] NSWCA 261 -
Sheehan v SRA; Wicks v SRA [2009] NSWCA 261 -
Sheehan v SRA; Wicks v SRA [2009] NSWCA 261 -
Sheehan v SRA; Wicks v SRA [2009] NSWCA 261 -
Sheehan v SRA; Wicks v SRA [2009] NSWCA 261 -
Sheehan v SRA; Wicks v SRA [2009] NSWCA 261 -
Sheehan v SRA; Wicks v SRA [2009] NSWCA 261 -
Sheehan v SRA; Wicks v SRA [2009] NSWCA 261 -
Sheehan v SRA; Wicks v SRA [2009] NSWCA 261 -
Sheehan v SRA; Wicks v SRA [2009] NSWCA 261 -
Sheehan v SRA; Wicks v SRA [2009] NSWCA 261 -
Sheehan v SRA; Wicks v SRA [2009] NSWCA 261 -
Commissioner of State Revenue v TEC Desert Pty Ltd [2009] WASCA 128 -
Commissioner of State Revenue v TEC Desert Pty Ltd [2009] WASCA 128 -

RMC v NAC [2009] QSC 149 (22 June 2009) (Byrne SJA)

34. In Australia, the same usage has long been established. In 1965, Burbury CJ called nervous shock "medically recognisable neurosis or damage to the mind." [30] Almost 40 years ago, Windeyer J equated the term with "recognizable psychiatric illness". [31] In Queensland, in 1971, Wanstall ACJ accepted that nervous shock meant "recognisable psychiatric illness." [32] In 1984, Brennan J spoke of it as "some recognizable psychiatric illness...". [33] A decade later, Gleeson CJ described nervous shock as "a recognizable psychiatric illness or injury", [34] and Kirby P approved the idea that it signifies "psychiatric illness or psychiatric or psychological disorder." [35] More recently, McHugh J has said: "'Nervous shock' is an outdated term that nowadays is taken to mean a recognisable psychiatric injury". [36]

via

[36] *Gifford v Strang Patrick Stevedoring Pty Limited* (2003) 214 CLR 269, 280 , [26] ; see also *Tame v New South Wales* (2002) 211 CLR 317, 378, [183], 382, [193]-[194], 402, [251], 427, [328] ; *Hancock v Nominal Defendant* [2002] 1 Qd R 578 where, at 587, [25] , Davies JA spoke of "psychiatric injury formerly called nervous shock"; and *Wilson v Horne* (1999) 8 Tas R 363, 370 – 371, 379, 384 – 386 .

Edwards v Edwards [2009] VSC 190 -
Holdeth Investments Pty Ltd v Ivinson and Halliday [2009] NTMC 16 (05 May 2009) (Dr John Allan Lowndes, SM)

112. In Gifford v Strang Patrick Stevedoring Pty Ltd (203) 214 CLR 269 at 284 ; 198 ALR 100 at 109 Mc Hugh J noted that although legislatures regularly enact laws that infringe the common law rights of individuals, the presumption against non-interference with common law rights is strong "when the right is a fundamental right of our legal system".

Stuart v Kirkland-Veenstra [2009] HCA 15 (22 April 2009) (French CJ,Gummow, Hayne, Heydon, Crennan and Kiefel JJ)

83. As noted earlier, the case which the plaintiff pleaded and sought to make at trial was that the officers owed both her late husband and her a duty which was identified as a duty to take reasonable care to protect his and her health and safety. Argument in this Court focused upon whether the officers owed Mr Veenstra a duty of care. It was accepted in this Court (as it had been in the Court of Appeal) that if no duty was owed to Mr Veenstra, the officers owed no duty to the plaintiff. And it was further accepted in this Court that if a duty was owed to Mr Veenstra, and if it was breached and that breach was a cause of psychiatric injury to the plaintiff, the plaintiff would also have an action for damages for that injury [82] .

via

[82] *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269; [2003] HCA 33 .

Stuart & Anor v Kirkland-Veenstra & Anor [2008] HCATrans 397 -
Martino Developments Pty Ltd v Doughty [2008] VSC 517 (27 November 2008) (Vickery J)

24. The approach of McHugh J in *Gifford* was affirmed by Gleeson CJ in *Electrolux Home Products Pty Ltd v Australian Workers' Union* [18] (at 328) where the Chief Justice said:

> Reliance was placed in argument upon what was said to be a general principle of construction that, where a statute takes away or interferes with common law rights, then it should be given, if possible, a narrow interpretation. The

generality of that assertion of principle requires some qualification. It is true that courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language ... However, as McHugh J pointed out in *Gifford v Strang Patrick Stevedoring Pty Ltd* modern legislatures regularly enact laws that take away or modify common law rights. The assistance to be gained from a presumption will vary with the context in which it is applied. For example, in *George Wimpey & Co Ltd v British Overseas Airways Corporation*, Lord Reid said that in a case where the language of a statute is capable of applying to a situation that was unforeseen, and the arguments are fairly evenly balanced, "it is ... right to hold that ... that interpretation should be chosen which involves the least alteration of the existing law". That was a highly qualified statement and, if it reflects a presumption, then the presumption is weak and operates only in limited circumstances.

Martino Developments Pty Ltd v Doughty [2008] VSC 517 -
Martino Developments Pty Ltd v Doughty [2008] VSC 517 -
Martino Developments Pty Ltd v Doughty [2008] VSC 517 -
Martino Developments Pty Ltd v Doughty [2008] VSC 517 -
NSW Food Authority v Nutricia Australia Pty Ltd [2008] NSWCCA 252 -
NSW Food Authority v Nutricia Australia Pty Ltd [2008] NSWCCA 252 -
New South Wales Crime Commission v Volkard Kelaita [2008] NSWCA 284 (04 November 2008) (Allsop P; Giles JA ; Bell JA)

15 The recognition in the common law of the need for clarity in the confiscation of property rights is rooted in the importance of such rights and their legitimate protection in civil society free from the exercise of arbitrary power, in particular in the use of the prerogative power, or in today's political framework, Executive power. Such concerns are deeply embedded in the common law and are, and have been, reflected in national and international public instruments of government for centuries: French Declaration of Human and Civil Rights 26 August 1789, Articles 2 and 17; United States Constitution, 5th and 14th Amendments; the European Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Paris 20 March 1952, Art 1; and the Australian Constitution, s 51(xxxi). Whilst the affectation of property rights in any given context may not necessarily be an interference with "fundamental" rights: see *Malika*, *Gifford* and *Bujdoso* ab ove, the forfeiture of property in circumstances provided by the Act can be seen to be a drastic interference with fundamental rights of property. Of course, that property may have a relationship with criminal activity which engages the Act and its underlying public policy. Nevertheless the interference with property rights is drastic, and the rights at this point in the process can be seen to be fundamental.

New South Wales Crime Commission v Volkard Kelaita [2008] NSWCA 284 -
New South Wales Crime Commission v Volkard Kelaita [2008] NSWCA 284 -
New South Wales Crime Commission v Volkard Kelaita [2008] NSWCA 284 -
Ulan Coal Mines v Minister for Mineral Resources [2008] NSWCA 174 -
Ulan Coal Mines v Minister for Mineral Resources [2008] NSWCA 174 -
Attorney General of New South Wales v Bar-Mordecai [2008] NSWSC 774 (30 July 2008) (McCallum J)

39 Mr Bar-Mordecai submitted that his vulnerability and the fact that the Commission controlled the risk of harm were factors relevant to the existence of a duty of care, relying on *Gifford v Strang Patrick Stevedoring Pty Limited* (2003) 214 CLR 269 at [90] and [102] . The point of the reference to [102] is unclear to me and appears to be a mistake. The decision in *Gifford* turned on the fact that the respondent was the employer of a stevedore who was crushed to death by a forklift vehicle driven negligently by another employee. Gummow and Kirby JJ noted at [90] that the respondent had a significant, perhaps exclusive degree of control over the risk of physical harm to the employee and the risk of consequent psychiatric harm to his children when they learned of the accident.

Attorney General of New South Wales v Bar-Mordecai [2008] NSWSC 774 -
Attorney General of New South Wales v Bar-Mordecai [2008] NSWSC 774 -
Downe v Sydney West Area Health Service (No 2) [2008] NSWSC 159 -
Harrison v Melhem [2008] NSWCA 67 (29 May 2008) (Spigelman CJ; Mason P; Beazley JA ; Giles JA ; Basten JA)

> 6 McHugh J did not expressly distinguish in this respect between the presumption against altering common law doctrines and the presumption against invading common law rights. His Honour did, however, identify circumstances in which the presumption would operate more strongly, describing that category as "fundamental legal principles" (*Malika Holdings* supra at [28]) or as "a fundamental right of our legal system" (*Gifford* supra at [36]). He distinguished "fundamental rights" which are "corollaries of fundamental principles" from "infringements of rights and departures from the general system of law" (*Malika Holdings* supra at [28]) and "a fundamental right" from a right "to take or not to take a particular course of action" (*Gifford* supra at [36]).

Harrison v Melhem [2008] NSWCA 67 -
Harrison v Melhem [2008] NSWCA 67 -
Harrison v Melhem [2008] NSWCA 67 -
Harrison v Melhem [2008] NSWCA 67 -
Harrison v Melhem [2008] NSWCA 67 -
Harrison v Melhem [2008] NSWCA 67 -
Harrison v Melhem [2008] NSWCA 67 -
Janelle Ratcliffe v Kyriacoula Mareney [2006] NSWDC 41 (07 March 2008) (Neilson DCJ)
Gifford v Strang Patrick Stevedoring Pty Ltd (2003) 198 ALR 100

Janelle Ratcliffe v Kyriacoula Mareney [2006] NSWDC 41 -
Green v Country Rugby Football League of NSW Inc [2008] NSWSC 26 -
Green v Country Rugby Football League of NSW Inc [2008] NSWSC 26 -
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 (21 December 2007) (Spigelman CJ at 1; Beazley JA; Basten JA)

> 22. As Gleeson CJ said in *Gifford* supra at 276 : "reasonable foreseeability involves more than mere predictability". In the same passage his Honour said "advances in medical knowledge have made us aware of the variety of circumstances in which emotional disturbance can trigger, or develop into, recognisable psychiatric injury" and concluded:
>
> "[A]dvances in the predictability of harm to others ... do not necessarily result in a co-extensive expansion of the legal obligations imposed on those whose conduct might be a cause of such harm. The limiting consideration is reasonableness, which requires that account be taken both of interests of plaintiffs and of burdens on defendants."

Nationwide News Pty Ltd v Naidu [2007] NSWCA 377 (21 December 2007) (Spigelman CJ at 1; Beazley JA; Basten JA)
Gifford v Strang Patrick Stevedoring Pty Ltd [2003] HCA 33 ; (2003) 214 CLR 269
Goldman Sachs JBWere Services Pty Ltd v Nikolich

Panagiotopoulos v Rajendram [2007] NSWCA 265 (28 September 2007) (Tobias JA at 1; McColl JA at 2; Basten JA at 3)

> *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383; *Tame v New South Wales* (2002) 211 CLR 317; *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 applied.

Panagiotopoulos v Rajendram [2007] NSWCA 265 -
Panagiotopoulos v Rajendram [2007] NSWCA 265 -
Hadjigeorgiou v New South Wales Crime Commission [2007] NSWCA 197 (29 August 2007) (Giles JA ; Santow JA ; Basten JA)
Gifford v Strang Patrick Stevedoring Pty Ltd (2003) 214 CLR 269 ;

Hadjigeorgiou v New South Wales Crime Commission [2007] NSWCA 197 (29 August 2007) (Giles JA ; Santow JA ; Basten JA)

95. It used to be an unchallenged approach to statutory construction that legislation does not "overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness": see *Potter v Minahan* (1908) 7 CLR 277 at 304 (O'Conner J). However, as noted by McHugh J in *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290 at [28]-[30] , that principle may be overstated in modern terms. It has its strongest application in what may be described as "fundamental principles" and in particular fundamental human rights: any general presumption against interference with common law rights is relatively far weaker: see also *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 at [36] (McHugh J) . Furthermore, as McHugh J noted in *Malika* at [28] , "care needs to be taken in declaring a principle to be fundamental". Different considerations may arise where the intrusion on general law protections appears to come about incidentally to the main purpose of the legislation: *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625, 635-6 .

New South Wales v Fahy [2007] HCA 20 (22 May 2007) (Gleeson CJ; Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ)

249. In *Tame* a majority in this Court rejected established control mechanisms as definitive tests of liability, although the factors which gave rise to them may still be relevant to questions of reasonableness [246] . The majority stated that the criterion of reasonableness imposed at all levels of inquiry (to determine the existence and scope of a duty of care, breach of duty and damage [247]) is an intrinsic control mechanism. The criterion of reasonableness sets boundaries in respect of liability for psychiatric injury, and anchors the boundaries in principle, rather than allowing them to depend on arbitrary and indefensible distinctions [248] .

via

[248] *Tame* (2002) 211 CLR 317 at 333 [18] and 337 [35]-[36] per Gleeson CJ, 339 [45] and 340 [51] per Gaudron J, 380-381 [189]-[191] per Gummow and Kirby JJ. In *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 at 304 [99] , Hayne J raised the possibility of the need to develop new control devices in substitution for rejected control mechanisms.

Mathew Chaina v The Presbyterian Church (NSW) Property Trust and 15 Ors [2007] NSWSC 353 -
Gifford v Strang Patrick Stevedoring Pty Ltd [2007] NSWCA 50 (19 March 2007) (Ipp JA ; Basten JA ; Handley AJA)

32 The basic principle is that a person who has not suffered an obvious physical injury may only recover damages for exposure to or knowledge of a shocking event if it causes a recognisable psychiatric injury (*Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269, 276 , 203 , 302 , 304) .

Gifford v Strang Patrick Stevedoring Pty Ltd [2007] NSWCA 50 -
Gifford v Strang Patrick Stevedoring Pty Ltd [2007] NSWCA 50 -
Gifford v Strang Patrick Stevedoring Pty Ltd [2007] NSWCA 50 -
Russell v Trustees of the Roman Catholic Church for the Archdiocese of Sydney [2007] NSWSC 104 -
Russell v Trustees of the Roman Catholic Church for the Archdiocese of Sydney [2007] NSWSC 104 -
Kemp v Lyell McEwin Health Service [2006] SASC 364 (01 December 2006) (Debelle J)

14. The question whether a duty of care is owed to a person to prevent the risk of that person sustaining a psychiatric injury has been considered in a number of decisions. For the purposes of this appeal, it is sufficient to refer to the most recent exposition of the relevant principles by the High Court in *Tame v New South Wales* and *Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317 ("*Tame*") and in *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269. Those decisions have established the following propositions:

> 1. Two matters are critical to the resolution of the question whether a defendant has a duty of care to a plaintiff to take reasonable care to avoid causing psychiatric injury. They are the reasonable foreseeability of the injury and the relationship between the parties. Foreseeability of injury does not of itself give rise to a duty of care. See *Tame* per Gleeson CJ at [12] and [13] and at [32], Gaudron J at [46], Gummow and Kirby JJ at [201], Hayne J at [249] ; *Gifford* per Gleeson CJ at [10] – [12], McHugh J at [47] – [48] Hayne J at [98] – [100] . There is a sufficient relationship to give rise to a duty of care between the wrongdoer and the plaintiff where the wrongdoer has a duty of care to a person and negligently causes death or severe personal injury to that person which in turn causes nervous shock to the plaintiff who is in a close and intimate relationship with that person. In that respect, the decisions in *Tame* and in *Gifford* affirm the remarks of Gibbs CJ and Deane J in *Jaensch v Coffey* (1984) 155 CLR 549 at 555 and 591 – 592 .
>
> 2. Liability for damages for psychiatric injury is not limited 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 aftermath: *Tame* per Gleeson CJ at [18], Gaudron J at [66], Gummow and Kirby JJ at [207] – [213], Hayne J at [267] ; *Gifford* per Gleeson CJ at [5], McHugh J at [45], Gummow and Kirby JJ at [65] .
>
> 3. The law expects a normal degree of fortitude but the concept of normal fortitude should not distract attention from the central enquiry as stated in the first proposition: *Tame* per Gleeson CJ at [16] , per Gaudron J at [62], Gummow and Kirby JJ at [199] to [201] ; *Gifford* , Gummow and Kirby JJ at [88] . Damages are recoverable in negligence only for a recognisable psychiatric injury and not for emotional distress: *Tame* per Gleeson CJ at [4] and [7], Gaudron J at [44], Gummow and Kirby JJ at [192] – [196], Hayne J at [285] ; *Gifford* per Gummow and Kirby JJ at [88] and [90] .

As Gleeson CJ said in *Gifford* at [8] , when determining whether a duty of care exists, the central issue is whether it was reasonable to require the defendant to have in contemplation the risk of psychiatric injury to the plaintiff and to take reasonable care to guard against that injury. Relevant to that issue is the burden that would be placed upon those in the position of the defendant by requiring them to anticipate and guard against harm of the kind allegedly suffered by the plaintiff. The essential concept is reasonableness: *Tame* per Gleeson CJ at [8], Gummow and Kirby JJ at [185] ; *Gifford* per Gleeson CJ at [9], McHugh J at [51] . 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. Reasonableness is

to be judged in the light of current community standards: *Tame* per Gleeson CJ at [14], Gummow and Kirby JJ at [200] - [201] .

Kemp v Lyell McEwin Health Service [2006] SASC 364 (01 December 2006) (Debelle J)

16. Shortly stated, the decision in *Gifford* established that an employer owed a duty to children to take reasonable care to avoid causing them a recognised psychiatric illness as a consequence of their father's death in the course of his employment. It also establishes that it was not only foreseeable that an employee's children might suffer psychiatric injury on learning of the employee's accidental death or serious injury at work, but also that the relationships between employer and employee and between the employee and children was so close as to require the conclusion that the duty was owed. The fact that the children did not actually see the incident or its aftermath but were only informed about an horrific accident is no bar to liability for damages for psychiatric injury. That decision applied the reasoning in *Tame* and was entirely consistent with the conclusion in *Annetts v Australian Stations Pty Ltd* where it was held that an employer owed a duty to parents to take reasonable care to avoid causing them a recognised psychiatric injury as a consequence of learning of the death of their son in the course of his employment. In that case, there were other facts which established a relationship between the plaintiffs and the employer, the plaintiffs having made inquiries about arrangements to be made for the care of their son and the employer having given assurances that he would be supervised.

Kemp v Lyell McEwin Health Service [2006] SASC 364 (01 December 2006) (Debelle J)

19. The magistrate erred in his statement of the relevant principles. He did not have regard to the principles expressed in *Tame* and in *Gifford* . He misunderstood the effect of the decision in *Gifford* and the nature of the relationship which, with foreseeability of injury, gives rise to the duty of care. He placed inappropriate reliance on cases such as *Sullivan v Moody* and *Halec h v State of South Australia*. He erred in concluding that to allow a duty of care would expose the Hospital to a massive obligation and liability to an indeterminate class of persons. It is not necessary to set out his reasons.

Kemp v Lyell McEwin Health Service [2006] SASC 364 -
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Kemp v Lyell McEwin Health Service [2006] SASC 364 -
Kemp v Lyell McEwin Health Service [2006] SASC 364 -
Kimberly-Clark Australia Pty Ltd v Thompson [2006] NSWCA 264 (21 September 2006) (Ipp JA at 1; Bryson JA at 2; Basten JA at 9)

Gifford v Strang Patrick Stevedoring Pty Ltd (2003) 214 CLR 269
Kendrick v Bluescope Steel (AIS) Pty Ltd (27 April 2006)

Kimberly-Clark Australia Pty Ltd v Thompson [2006] NSWCA 264 (21 September 2006) (Ipp JA at 1; Bryson JA at 2; Basten JA at 9)

65 It is clear from a reading of the judgments in that case that no issue arose in relation to that statement. It was clearly common ground that the provisions did apply to the widow's action in

nervous shock, the only issues being the proper construction of those provisions. The case went on appeal to the High Court: see *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 . The common assumption as to the application of s 151P continued to operate. However, while the decision of this Court, which precluded recovery by the widow, would have been the same whether or not s 151P in fact operated, the same cannot be said in relation to the decision of the High Court. In this Court, Ms Gifford failed because she merely heard of the death of Mr Gifford and had not seen the incident, nor been present at its immediate aftermath. By the time the case reached the High Court, that conclusion had been overtaken by decisions in that Court in *Tame v New South Wales* and *Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317. Having determined that the common law principles were not so constrained, it became necessary for the High Court to consider whether s 4(1) of the *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) provided an exclusive statement of the general law liability for nervous shock, or whether it merely reversed a particular constraint imposed by the general law. Accepting the latter as the appropriate approach, the next question was whether s 151P conferred an independent right to recover damages or whether it constituted a limitation on awards of damages in particular cases. It was accepted by all members of the Court that s 151P had a limiting effect, but made an exception in relation to a specific category of persons. Thus Gummow and Kirby JJ, in a passage agreed with by Gleeson CJ at [24], stated at [93], after referring to paragraph (b) of s 151P :

> "It may thus be said that the New South Wales legislature has specifically turned its mind to the issue that arises in the present appeals and has accepted that damages may be awarded to the child of a deceased employee who, as a consequence of the death, has suffered a 'demonstrable psychological or psychiatric illness'."

A similar approach was adopted by McHugh J at [44], Hayne J also agreeing at [105]; see also Callinan J at [123].

Fowler and Commissioner of Taxation [2006] AATA 808 -
Kimberly-Clark Australia Pty Ltd v Thompson [2006] NSWCA 264 -
Talbot & Olivier (A Firm) v Witcombe [2006] WASCA 87 (26 May 2006) (Steytler P)
Gifford v Strang Patrick Stevedoring Pty Ltd (2003) 214 CLR 269
Graham Barclay Oysters Pty Ltd v Ryan

Talbot & Olivier (A Firm) v Witcombe [2006] WASCA 87 -
Talbot & Olivier (A Firm) v Witcombe [2006] WASCA 87 -
Kathy Craddock v Bluescope Steel (AIS) Pty Limited [2006] NSWSC 311 (27 April 2006) (Associate Justice Malpass at 1)
Gifford v Strang Patrick Stevedoring Pty Limited (2003) 214 CLR 269
Gifford & Ors v Strang Patrick Stevedoring Pty Limited

Kathy Craddock v Bluescope Steel (AIS) Pty Limited [2006] NSWSC 311 (27 April 2006) (Associate Justice Malpass at 1)

27 It is well established by authority and not in dispute in this case, that s151P of the Act is not a source of rights to damages (*Gifford v Strang Patrick Stevedoring Pty Limited* (2003) 214 CLR 269 ; *Gifford & Ors v Strang Patrick Stevedoring Pty Limited* [2001] NSWCA 175). It is regarded as a limitation on awards of damages. It has been said that it takes away the right to recover damages in an action for nervous shock for workplace injuries, but makes an exception in favour of injured workers and members of their close families (214 CLR 269 at pp 287, 302-303).

Kathy Craddock v Bluescope Steel (AIS) Pty Limited [2006] NSWSC 311 -
State of New South Wales v Amery [2006] HCA 14 -
Commonwealth of Australia v Smith [2005] NSWCA 478 -
Commonwealth of Australia v Smith [2005] NSWCA 478 -
Ruddock v Taylor [2005] HCA 48 (08 September 2005) (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ)

219. It is of course always unfortunate when courts propound a different, particularly a radically different, principle of law, or interpretation of the Constitution from that which until then has been taken to be settled. Because courts cannot treat conduct and actions taken, or defences entered to them, before the new statement of the law, transitionally, as if the subsequent different legal view were not to apply to them, great inconvenience, uncertainty and hardship may be caused by shifts in judicial opinion and decisions [201] of which this case is an example. In *Kleinwort Benson Ltd v Lincoln City Council* [202] , a case directly concerned with a mistake of law, Lord Browne-Wilkinson (dissenting) went so far as to say, in effect, that for some purposes, the fiction that the law has not been changed by a judicial decision should be seen as that, a pure fiction and should therefore be disregarded for the purposes of assessing the legal quality of conduct before the change. His Lordship said [203] :

> "If that [transitional application of the law] be true of statutory legislation, the same must a fortiori be true of judicial decision. In my judgment, therefore, if a man has made a payment on an understanding of the law which was correct as the law stood at the date of such payment he has not made that payment under a mistake of law if the law is subsequently changed."

via

[201] *Astley v Austrust Ltd* (1999) 197 CLR 1 at 57-58 [158] ; *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 104-105 [164] ; *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 at 315-316 [129] .

R v Janceski [2005] NSWCCA 281 (18 August 2005) (Spigelman CJ at 1; Wood CJ at CL at 175; Hunt AJA at 212; Howie J at 213; Johnson J at 287)

> 65 Kirby J has often emphasised the duty of courts to obey a legislative text and has indicated that it is not permissible to adhere to pre-existing common law doctrines in the face of a statute. (See e.g. *R egie Nationale des Usines Renaud SA v Zhang* (2002) 210 CLR 491 at [143]-[147] .) McHugh J has stated that the presumption that a statute is not intended to alter or abolish common law rights must now be regarded as weak. (See *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290 at [28]-[30] ; *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 at [36] .) His Honour has, however, said that the presumption continues to operate with some strength when fundamental legal principles or fundamental rights are involved. (See *Gifford* supra at [36] ; *Malika Holdings* supra at [28] and see also at [29]-[30] and Gleeson CJ in *Electrolux Home Products Pty Ltd v Australian Workers Union* [2004] HCA 40; 78 ALJR 1232 at [19] .)

R v Janceski [2005] NSWCCA 281 -
R v Janceski [2005] NSWCCA 281 -
Beech v Building Appeals Board [2005] VSC 231 -
Honeywood v Munnings [2005] NSWSC 515 -
Honeywood v Munnings [2005] NSWSC 515 -
Mansfield v The Director of Public Prosecutions for Western Australia [2005] WASCA 79 (29 April 2005) (Steytler P, Wheeler JA, Pullin JA)

Gifford v Strang Patrick Stevedoring Pty Ltd (2003) 214 CLR 269
House v The King

Mansfield v The Director of Public Prosecutions for Western Australia [2005] WASCA 79 (29 April 2005) (Steytler P, Wheeler JA, Pullin JA)

> 87 Lord Diplock said [at 364] that in "law enforcement actions" the undertaking should not be required "as a matter of course". Lord Reid also did not rule out the possibility that in an appropriate case an undertaking would be required. Lord Wilberforce dissented and said that he considered that an undertaking should have been required. In ***Kirklees Metropolitan Borough Council v Wickes Building Supplies Ltd*** [1993] AC 227 the House of Lords held that local authorities

who were bringing a "law enforcement action" should in the exercise of the Court's discretion also usually be exempt from a requirement to give an undertaking. These English decisions are not binding on this Court. They are useful only to their degree of the persuasiveness of their reasoning: ***Cook v Cook*** (1986)

(Page 31)

162 CLR 376 at 390 ; ***Gifford v Strang Patrick Stevedoring Pty Ltd*** (2003) 214 CLR 269 at [82] .

Mansfield v The Director of Public Prosecutions for Western Australia [2005] WASCA 79 -
Pickering v McArthur [2005] QDC 81 -
Pickering v McArthur [2005] QDC 81 -
Koehler v Cerebos (Australia) Ltd [2005] HCA 15 (06 April 2005) (McHugh, Gummow, Hayne, Callinan and Heydon JJ)

33. In *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* [14] , the Court held that "normal fortitude" was not a precondition to liability for negligently inflicting psychiatric injury. That concept is not now to be reintroduced into the field of liability as between employer and employee. The central inquiry remains whether, in all the circumstances, the risk of a plaintiff (in this case the appellant) sustaining a recognisable psychiatric illness was reasonably foreseeable, in the sense that the risk was not far fetched or fanciful [15] .

via

[14] (2002) 211 CLR 317 . See also *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 .

Hicks v The Minister for Justice & A-G [2005] QSC 44 (11 March 2005) (Byrne J)

18. As the Attorney-General in his reasons accepted, this applicant suffered two recognized [34] psychiatric disorders through the stabbing. That being so, the applicant proved that he had sustained “nervous shock” compensable in conformity with the Schedule 1 compensation table. There ought therefore to have been an assessment of the sum to be paid for that component of the claim.

via

[34] As to the distinction between recognized and recognizable in this setting, see Butler D, “ *Gifford v Strang* and the New Landscape for Recovery of Psychiatric Injury in Australia” (2004) 12 *Torts Law Journal* 108, 123.

Hicks v The Minister for Justice & A-G [2005] QSC 44 -
Hicks v The Minister for Justice & A-G [2005] QSC 44 -
Witcombe v Talbot & Olivier (A Firm) [2005] WASC 26 -
Heptonstall v Gaskin (No 2) [2005] NSWSC 30 -
SB v State of New South Wales [2004] VSC 514 (14 December 2004) (Redlich J)

190. It may be that in search of a unifying concept the High Court returned to the “neighbourhood” principle encapsulated by Lord Atkin in *Donoghue v Stevenson* [223] in the judgments delivered in *Gifford v Strang Patricks Stevedoring Pty Ltd*. [224] The Plaintiffs were the children of a man killed in an industrial accident who brought a claim for damages for negligently inflicting psychiatric injury as a consequence of being informed of their father’s

death. Members of the High Court, as some of them did in *Graham Barclay Oysters*, returned to Lord Atkin's "neighbourhood" principle for guidance. [225]

via

[225] Ibid per McHugh J at [46] and [51] ; per Gummow and Kirby JJ at [86] and per Callinan at [118].

SB v State of New South Wales [2004] VSC 514 -
Blue Ribbon Products Pty Ltd v Tasmanian Industrial Commission [2004] TASSC 142 -
Caltex Petroleum Pty Ltd v The Commissioner for Main Roads [2004] WASC 239 -
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 (23 September 2004) (Handley, Sheller and Tobias JJA)

4 Judge Sidis handed down her judgments in the three proceedings before the publication of the decisions of the High Court 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 . These High Court decisions marked a change in the understanding of the law relating to claims to recover damages for psychological or psychiatric injury not consequent upon physical harm. In *Tame* at 344 [66] Gaudron J said:

> " '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 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."

Cubbon, Cubbon and Bates v Roads and Traffic Authority of NSW [2004] NSWCA 326 (23 September 2004) (Handley, Sheller and Tobias JJA)
As a consequence of this, the RTA should pay the costs of Kenneth from 18 July 2003, a date one month after the High Court decision in *Gifford* was published, on an indemnity basis.

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 -
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Cubbon, Cubbon and Bates v Roads and Traffic Authority of NSW [2004] NSWCA 326 -
Electrolux Home Products Pty Ltd v Australian Workers' Union [2004] HCA 40 (02 September 2004) (Gleeson CJ,McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ)

118. A basic principle of statutory construction is the presumption that legislatures do not intend to abrogate or curtail fundamental common law rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language [138] . Another basic principle of statutory construction is that, in the absence of express words or necessary implication, courts presume that legislatures do not intend to deprive persons of access to the courts [139] . Given that modern Parliaments routinely enact laws which adversely affect or modify common law rights, the application of each presumption varies according to its context. In *Gifford v Strang Patrick Stevedoring Pty Ltd* [140] I said:

> "There is a presumption – admittedly weak these days – that a statute is not intended to alter or abolish common law rights unless the statute evinces a clear intention to do so. In *Malika Holdings Pty Ltd v Stretton*, however, I warned of the need for caution in applying this presumption: nowadays legislatures regularly enact laws that infringe the common law rights of individuals. The presumption of non-interference is strong when the right is a fundamental right of our legal system; it is weak when the right is merely one to take or not take a particular course of action. Courts should not cut down the natural and ordinary meaning of legislation evincing an intention to interfere with these lesser rights by relying on a presumption that the legislature did not intend to interfere with them. Given the frequency with which legislatures now abolish or amend 'ordinary' common law rights, the 'presumption' of non-interference with those rights is inconsistent with modern experience and borders on fiction. If the presumption still exists in such cases, its effect must be so negligible that it can only have weight when all other factors are evenly balanced." (footnotes omitted)

via

[140] (2003) 214 CLR 269 at 284 [36] .

Electrolux Home Products Pty Ltd v Australian Workers' Union [2004] HCA 40 -
Electrolux Home Products Pty Ltd v Australian Workers' Union [2004] HCA 40 -
Electrolux Home Products Pty Ltd v Australian Workers' Union [2004] HCA 40 -
Dungog Shire Council v Babbage [2004] NSWCA 160 -
O'Leary v Oolong Aboriginal Corporation Inc [2004] NSWCA 7 -
O'Leary v Oolong Aboriginal Corporation Inc [2004] NSWCA 7 -
Perham v Connolly [2003] QSC 467 (10 November 2003) (Atkinson J)
Gifford v Strang Patrick Stevedoring Pty Ltd (2003) 198 ALR 100, [2003] HCA 33 , S111, 112 and 113 of 2002, 18 June 2003, cited

Perham v Connolly [2003] QSC 467 -
Spasovic v Sydney Adventist Hospital [2003] NSWSC 791 -
Dowdell v Knispel Fruit Juices Pty Ltd [2003] FCA 851 -
Dowdell v Knispel Fruit Juices Pty Ltd [2003] FCA 851 -
Dowdell v Knispel Fruit Juices Pty Ltd [2003] FCA 851 -
Cattanach v Melchior [2003] HCA 38 (16 July 2003) (Gleeson CJ,McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ)

259. Once it is accepted that there are benefits and burdens in parenthood, it will be in the economic interests of the parent to assert that the burdens outweigh the benefits. Foreclosing the inquiry prevents the parent (in pursuit of the parent's own economic interests) inflicting harm on the child to whom the parent owes obligations by the parent denying the benefits of that relationship. To put the matter another way, the parent should not be permitted to embark upon proving that the economic costs of the child will, in the long run, outweigh whatever advantages or benefits the parent may derive from the child's existence and the relationship between parent and child. As Gummow and Kirby JJ rightly point out in *Gifford v Strang Patrick Stevedoring Pty Ltd* [405] :

"the law has long placed particular value on the protection of the young from serious harm. The *parens patriae* jurisdiction referred to in *Marion's Case* [406] provides one illustration. The entitlement of parents of a child to be heard in child welfare proceedings concerning a child provides another illustration [407] . Further, through the imposition of obligations and the conferral of rights, both the general law and contemporary statute law have treated the relationship of parent and child as a primary means by which to secure the public interest in the nurturing of the young [408] ."

Cattanach v Melchior [2003] HCA 38 -
Cattanach v Melchior [2003] HCA 38 -