FINAL TORTS EXAM NOTES

70311

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DUTY OF CARE

Step 1: Establish whether established or non-established DOC

Establish whether

1. Relationship of P and D within the scope of an 'established duty category'- constituting an established DOC
2. Relationship falls outside of the established duty category.
    - To determine whether a DOC exists, take into account

a) Reasonable foseeability
b) Salient features

ESTABLISHED DOC

A) List of established DOCS

- Whether the plaintiff and the defendant's relationship falls into an established duty of care category is question of law.
  - If this is the case, provided that the **injury occurred *within the scope*** of that duty, then this element will **not be an issue**
- **NB:** bellow is not an exhaustive list

ESTABLISHED DUTY OF CARE CATEGORIES	
❖ **Doctor/dentist v patient**	***Rogers v Whitaker (1992) 175 CLR 479***
❖ **Employers to employees- safe system of work**	***Wilson v Clyde*** ***Kondis v State Transport Authority (1984) 154 CLR 672***
❖ **Hospital v patient**	***Albrighton v Royal Prince Alfred Hospital [1980] 2 NSWLR 542***
❖ **Manufacturer and consumer**	***Donoghue v Stevenson [1932] AC 562***
❖ **Motorist v other highway users** ❖ **ALSO ANALAGOUS to other activities, like jet ski riding etc**	***March v Stramare (1991)171 CLR 506***
❖ **Service providers**	***Woods v Multi-Sport***
❖ **Occupier of land to lawful entrants lawful entrants**	***Australian Safeways Stores v Zaluzna (1987) 162 CLR 479***
❖ **Licensed premises to plaintiffs – protect them from known risks and anti social behaviour**	***Adeels Palace***
❖ **School v pupil - esp. related to supervision**	***Commonwealth v Introvigne (1982) 150 CLR 258***
❖ **Sports player/sports company v players**	***Woods v Multisport***

❖ **Parents possess NO DUTY TO SUPERVISE a child**	***Robertson v Swincer***
❖ **Parents may/may not owe a duty of care to protect their children from 3rd parties** – although Court has indicated it would be "unrealistic" to expect parents to supervise their children/impose such a duty	***Smithv Leurs***
❖ **Prison officers –** if prisoners escape- duty to protect community members in the immediate vicinity	***Dorset Yacht Club***
❖ **Prison officers –** if prisoner(s) at risk	***Budjuso***
❖ **Doctors** may be held liable for negligent acts or **omissions affecting a child not yet conceived**. – current and future fetuses	***X and Y***
❖ **Doctors to P during the IVF treatment** of the mother after child was born with **cerebral thrombosis** ❖ Only extends to to protect the child when its in IVF/ in the mother's womb; not to advise about termination, as this would give rise to conflicting, "mutually inconsistent" duties	***Waller v James***
❖ **Mothers to their foetuses when driving**	***Lynch v Lynch***

NOVEL CASE/DOCs

A. Reasonable Foreseeability

- A novel duty of care will only be established if the plaintiff can prove that a reasonable person in the position of the defendant would **have recognised, or foreseen,** tat negligent their behaviour may cause injury to the planitiff

I. Not unlikely to occur- consequence of same general character

- All that must be foreseeable, or "**not unlikely to occur**" is that a "***consequence of the same general character*****"** (type of harm) as that which eventuated ***Chapman v Hearse* (1961) 106 CLR 112**
    - Therefore, it is not necessary that the plaintiff show that the precise injuries /manner in which their injuries were sustained was reasonably foreseeable - ***Chapman v Hearse* (1961) 106 CLR 112**
        i. In ***C v H***, the general consequence or the type of harm (*someone being run over*) was a reasonably foreseeable result of the act (*driving negligently*).

II. Plaintiff foreseeable as 'class of persons'

B. TEST Plaintiff only needs to have been **foreseen** as one of a **class of persons** affected by the defendant's negligence ***Chapman v Hearse* (1961) 106 CLR 112**

B. Reasonable Foreseeability

❖ The requirement of reasonable foreseeability is a **condition essential to**, *but not sufficient for* (not only requirement), the establishment of a duty of care - ***Jaensch v Coffey* (1984) 155 CLR AT 585-59** – must be another factor at play

1. Incramentalism – Key factual policy and salient features

- The principled, or favoured test used to supplement the essential (but insufficient) consideration of reasonable foreseeability is the **incremental, salient- feature focused approach**, – which uses **analogy** to **confirm the legal/factual link** between the duty owed by the D to the P ***Perre v Apandn* (1999) 198 CLR 180; *Sullivan v Moody* (2001) 207 CLR 562**

Assumption of responsibility of D to protect the plaintiff (***Perre v Apand***)

Personal Autonomy of P (***C.A.L. No 14 Pty Ltd v Motor Accidents Board & Scott* (2009) 239 CLR 390**

- If establishing a duty of care would **interfere with the plaintiff's autonomy**, it is unlikely to be imposed
    - i.e. A duty on the publican to prevent Mr Scott leaving with his motorcycle would have conflicted with Mr Scott's autonomy- no DOC to this extent. ***C.A..L. No 14 Pty Ltd v Motor Accidents Board & Scott* (2009) 239 CLR 390**

Plaintiff's vulnerability to harm (***Perre v Apand***)

- If plaintiff was particularly vulnerable, a duty of care could be more easilyes tablished
    - Not the case in ***C.A.L. No 14 Pty Ltd v Motor Accidents Board & Scott* (2009) 239 CLR 390,** the High Court noted that Mr Scott was not vulnerable – was an

experienced drinker,; assured publican three times that he was fit to drive; knew short route home very well

Defendant's control of the situation giving rise to risk (***Perre v Apand***)

- If D had a ***sufficient*** control over the situation, a duty of control may be established
  - **Level of control** (whether it is sufficient) **must be considered** - in ***Barclay Oysters*** – although the **Local Council** had broad powers over monitoring the environment, these did not give it ***sufficient*** control over the situation, Therefore, council not liable/no DOC.
  - E.g. of **not sufficient control - s*Agar v Hyde (2000)*** - Court said that IRFB had no control over how a particular rugby match was regulated (as it was the association's responsibility) and that more specifically, they had no control over the game that the appellants were injured in.

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- While vulnerability and control have been upheld as '*significant pointers'* of the imposition of the duty of care, **they cannot be said to be definitive circumstances** in which a duty of care can be established ie..
  - In ***Crimmins v Stevedoriing Industry Finance Committee* (1999) 200 CLR 1,** these factors were decive to the duty in question
  - They were also considered in ***Graham v Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540** ➔ vulnerability and control were not decisive here, but were considered

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Special Knowledge by D about **circumstances** giving rise to risk (***Perre v Apand***)

- If D ***knew or ought to have known*** of the **existing risk of harm** to plaintiffs, or a class to which they belonged, a duty of care will be established – ***Crimmins; Oysters***
  - i.e. ***Barclay Oysers,*** Barclay Org did **have knowledge of the harm-** testing for e-coli**, and disinfecting oyster in ultraviolet water etc**
- **add in Paris v Stephney Borough Council f**

- However, knowledge that the harm may result is **not, in isolation, sufficient** to establish a duty of care – ***Amaca Pty Ltd v New South Wales* (2004)**

Any **policy considerations** (***Sullivan v Moody; C.A.L. v Scott***) - see below

- If establishing a duty of care would **open the floodgates,** policy concerns dictate that it is unlikely such a duty would be imposed- ***Oysters; Ipp Report***

Any **conflicting duties** (***Sullivan v Moody***)

In ***C.A.L. v Scott*** imposition of a duty would result in a lack of legal coherence with the law of bailment; with legislative regimes in relation to alcohol, and with other torts, for example, if the publican had to use physical force to prevent MrScott from obtaining the keys to the motorcycle it would clash with the duty not to commit the torts of assault, battery etc

PUBLIC POLICY (where relevant)

- Public policy considerations, (related to justice and morality, or socio-economic values) have been used to indicate that a duty of care is appropriate, or to deny the existence of the duty
- **McHugh J (writing extra-judicially)** suggests theses are concerned with whether
  - Imposing a duty will **"open the floodgates"**
    - ***Agar v Hyde:*** **(rugby players injured)** deefendant Board did NOT owe a duty of care. If it was held that they did, this- could potentially be owed to thousands of other plaintiffs- opening the floodgates
  - ***Ethical and moral factors*** – concerned with restrictions on freedoms/actions justified by duty's imposition
  - ***Economic factor-*** whether the costs of imposing the duty outweigh the benefits
  - ***Justice factor*** –whether imposition of the duty is fair/reasonable in contemporary society
  - ***Public interest factor*** – effect on public interest

PUBLIC POLICY → NO DUTY OF CARE

Some particular policy considerations have been decisive in **denying a duty of care** in certain case categories:

1. **Armed Services** on active duty- ***Shaw Savill & Albion Co Ltd v Commonwelath***
   - That where damage is caused by armed services in/during active engagement there can be no duty of care owed as it would be impractical to impose such a duty during wartime
   a.
2. **Auditors to 3rd parties** (not to clients)- ***Esanda Finance Corporation v Peat Marwick Hungerfords***
   a. *Economic factor:* Would increase the cost of auditing services, the premiums payable to auditors, thereby decreasing availability of auditor services
   b. *Conflicting duties* - Statutory regimes already give rise to civil/criminal liability – conflicting duties
3. **Child protection** agencies – ***Sulliva v Moody***
   - Here, cout held no duty of care (policy reasons) – to find a duty would cut across other legal areas (defamation), would be incompatible with other duties (best interests of child), and to avoid potential indeterminacy of liability.
4. Immunity of **advocates** from negligence – ***D'Orta v Victoria Legal Aid***
5. **Police in criminal investigations** - - $ factor (priority of deployment resources),- ***Hill v Chief Constable of West Yorkshire*** **(UK case)**
   - No duty, as it would be inappropriate to subject this type of area to duty of care it would change the way they investigate crimes
6. **Wrongful life** cases - ***Harriton v Stephens***

Unforeseeable plaintiffs (where relevant) – NO DOC

Cannot prove DOC owed to them/DOC really owed to someone else

- The plaintiff cannot rely on a duty of care if they themselves were **unforeseeable;** that is, if they cannot prove that a DOC was owed to them/ a member of their class, or the duty was owed to someone else. - *'no duty of care owed to the world at* large... *there can be* ***no derivative cause of action****'* ***Bourhill v Young* (1984) AC 92** –
    - **altered prev stance under *Chester v Waverley*** (majority, as per Latham CJ found that a mother seeing her young son's body be pulled out of the water, causing psych shock, wasn't 'consistent with experience of common man').
    - Here, the plaintiff tried to state that **nervous shock** (which apparently caused her miscarriage), was catalyzed by **her hearing an accident/ viewing debris of accident (like blood)** on the road. Tried to suggest the motorist in the accident owed a DOC to her.
    - Court held that the motorist only owed a DOC to road users whom he could reasonably foresee would be injured by his negligence, the plaintiff was not such a person – D does not owe a "***duty to world at large"*** and the P cannot "rely ***on harm caused to someone else***"

KEY CASES

REASONABLE FORESEEABILITY

***Champan v Hearse* (1961) 106 CLR 112 *contribution case ***

Facts –

- **Mr Chapman drove** his car so negligently that it was involved in a serious collision on a dark , wet night.
- Chapman was thr own out of his car and onto the road
- A medical doctor, **Dr Cherry**, who was driving past shortly after the accident, stopped to offer medical assistance to Chapman and was on the road way when **he was run down and killed by Mr Hearse**
- The widow and family of Dr Cherry successfully sued Dr Hearse under the state compensation to relatives legislation in respect of the death
- The proceedings on appeal to the High Court were contribution proceedings brought by Hearse against Chapman

UNFORESEEABLE/ATYPICAL PLAINTIFFS

***Chester v Waverley Corporation* (1939) 62 CLR**

Facts

- Plaintiff (MOTHER) **suffered a severe nervous shock** when she was present as the drowned body of her young son (who had been missing for some hours) was recovered from a **water filled trench**, which had been inadequately fenced off by the employees of the council
- Tried to sue Council – needed to est Wavery Council owed her a DOC, and thus, that she was an RFP

***Levi v. Colgate Palmolive Pty Ltd* (1941) 41 SR (NSW) 48 – dermatitis reaction to bath products was so rare that not an RFP**

Facts –

- Plaintiff had a rare allergic reaction to Palmolive bath product – gave rise to **dermatitis**
- Followed instructions when using product
- Experienced severe dermatitits

***Haley v London Electricity Board* [1964]2QB 121; RF – high stats of blind people in London meant man walking past and injuring themselves on badly covered trenccsh = an RF P**

Facts –

- **Defendant- London Electircity Board-** digging a trench
- **Plaintiff-** Mr Haley
  - made a barrier around it – using a pitch, shovel and a broom
  - the plaintiff, who was a blind man, was walking along with a stick – missed the barrier- fell over and hit his head
    - Injuries left him deaf (now blind and deaf)

***Paris v Stepney Borough Council* [1951] AC 367 DOC owed- P more likely to be RF because vulnerable (blind)- higher DOC owed to vulnerable individuals**

Facts

- The Plaintiff [Paris] was a worker in the Defendant's [Stepney] garage.The Plaintiff only had one eye.
- In the course of his work, an accident caused damage to his good eye, making him almost totally blind The Plaintiff sued the Defendant for negligence.

Held

- It follows that a higher standard of care will be owed to a particularly vulnerable individual. Here, P was more vulnerable because he had one ye- could become blind in 2 eyes more easily than the average RP.

***Bourhill v Young* (1984) AC 92 – bystander to accident; didn't see collision, just heard damage – tried to claim nerves caused miscarriage**

Facts –

- The plaintiff, a fish wife, had alighted from a tram and walked around to the other side of it to collect her basket. Whilst she was on the side of the tram, a motorcyclist on the other side of the tram negligently negligently caused a collision and was killed. The plaintiff did not see the collision or the body of the motorcyclist, though se heard the event and saw the blood and debris on the road afterwards

Issue

Mrs Bourhill, at the time eight months pregnant, later gave birth to a stillborn child, and claimed she had suffered **nervous shock,** stress and sustained loss due to Mr Young.

Held

- The House of Lords held that although the motorcyclist owed a duty of care **to road users whom he could reasonably foresee** would be injured by his negligence. P was not in such a position, with the tram between her and the collision, that she would reasonably be affected by the negligence of

the deceased. The Law Lords made the point that the plaintiff could not "**rely on a wrong to someone else**" (as per Wright LJ at 108) and that the "**duty is not to the world at large'**

- NO DOC owed to P for hearing damage

SALIENT FEATURES:

***C.A.L No 14 Pty LTD v Motor Accidents Insurance Board* (2009) 239 CLR 30** Facts

- Plaintiff arrived in the pub at 5:15 . Licensee told him and his friend that there was a breathaliser set up outside the pub. Mr Cube (Mr Scott's friend) wife came and picked him up. Mr Scott said he didn't need to go home; would ring his wife when he did – stayed and kept drinking . One of the bar staff refused to sell him any more alcohol . After saying his wife would drive him home, and getting asked to leave, the licensee asked for his wife's phone number to call her. Mr Scott refused – demanded keys./bike and left. He had to drive 7km . Crashed 700m from home. His blood alcohol level was 0.253

Issue

- Duty of care was novel – concerned Mr Scott and Mr Kirkpatrick; the publican
- Widow and insurance company sued proprietor and licensee –said they had duty of care to patron

Held

Court held that licensees do not have a duty of care in this situation-

- **SALIENT FEATURES CONSDIDERED**

a. ***vulnerability***- The High Court noted that Mr Scott was not vulnerable – was an experienced drinker,; assured publican three times that he was fit to drive; knew short route home very well

b. ***commercial conduct*** – the publican's supplying of alcohol was appropriate- he did not press drinks n Mr Scottt and may not have supplied any more drinks after the arrangement was made

c. ***nature of arrangement –*** the sub-bailment of the keys and the motorcycle was found to be both gratuitous and at will and could therefore be terminated at any time by Mr Scott

d. ***narrow formulation of the duty –*** The plaintiff's formulation of the duty was too narrow, as it argued that there was a duty on the defendant to prevent the particular chain of circumstances leading towards Mr Scott's death

e. ***Mr Scott's autonomy*** – A duty on the publican to prevent Mr Scott leaving with his motorcycle would have conflicted with Mr Scott's autonomy

f. ***Lack of legal coherence*** – Imposition of a duty would result in a lack of legal coherence with the law of bailment; with legislative regimes in relation to alcohol, and with other torts, for example, if the publican had to use physical force to prevent MrScott from obtaining the keys to the motorcycle it would clash with the duty not to commit the torts of assault, battery etc

***Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211**

- **PRINCIPLE:** After 70 years of judicial consideration of the test for determining the existence of a duty of care, Australian law has returned to the fundamental principle that: **"A duty of care will be imposed when it is reasonable in all the circumstances to do so."**

FACTS: Class action

- **Plainiffs-** over 100 plaintiffs (class action)
- **Defendants –** Local Govt, State Govt, Oyster company
    - Severe storm caused faecal material to enter lake from outlets, caravan parks, sewerage and storm water drains.
    - State placed mandatory decontamination process in place, complied with.
    - Were careful – took some precautionary measures
        - voluntary delayed harvesting voluntarily delayed by two days.
        - Tested for E-Coli
        - No testing possible for Hep A in Oysters –
        - Disinfected in ultraviolet water
    - When found, oysters recalled, no harvesting remainder of season. Argued that State and council could and should have done more to prevent the outbreak/contamination (i.e. non-feasance) from affecting consumers and all others who may have suffered from outbreak
    - Mr Ryan, a consumer of the oysters being cultivated in Wallis Lake (NSW) by Graham Barclay Oysters Pty that were contaminated due to polluted run-off, contracted hepatitis A
    - Ryan was one of over 100 people infected with Hepatitis A after eating Graham Barclay Oysters.

HELD:/ ratio – dependant on various salient features

- **Were 3 defendants**
    - Oyster company (knew of the risk), Local Gov (Great Lakes Council) and State Gov sued for not controlling sewerage since they were responsible for the waterways – federal court held that all of the D's were liable – Appealed to full federal court → found that the council was not liable but the state and the Oyster company's appeals were rejected on the basis of negligence by omission

SALIENT FEATURES CONSIDERED IN REGARDS TO ALL DEFENDANT- PLAINTIFF DUTIES OF CARE

1) Degree and nature of control exercised by the authority over the risk of harm that eventuated
2) The degree of vulnerability of those who depend on the proper exercise by the authority of tis powers
3) The consistency or otherwise of the asserted duty of categories of cases, some features will be of increased significance

Ultimately, none of the defendants were found liable – relied on salient features approach

- **DEFENDANT 1- State govt:**
    - **In regards to the state gov**; Mr Ryan argued the state had a duty had a duty to protect consudmers from a forseeable risk of injury as a result of oyster consumption
        - Said the source of the duty was a network of statutory provisions giving the state "powers" over agriculture and public health
        - Ryan said they should've closed oyster fisheries that presented an unacceptable risk
    - His Honor Found, that the existence of statutory powers did not ordinarily give rise to a duty of care
        - Further , Ryan failed to prove and establish that the state gov was specifically responsible for the individual consumer. It was too far detached for Government to have this amount of knowledge for each individual consumer

- **DEFENDANT 2: Local Council**
    - No duty of care – although Ryan claimed the local council had broad powers over monitoring the environment
    - Those powers do not give the council sufficient control over the situation
    - Therefore, council not liable

- **DEFENDANT 3- Barclay Oysters**
    - Not liable, waited a number of days, tested for bacteria like Ecoli
    - As there are no rely company had acted reasonably, and therefore, was impossible to say they had a duty of care that had been breached

- For the Oyster company; they did have a duty of care, they knew of the harm to consumers established by the fact that they stopped harvesting the oysters. There was no breach of duty of care – they executed their duty of care reasonably and thus cannot be held liable.
    - A duty of care could be found since what was relevant was the "knowledge" and the vulnerability of the P.

***Agar v Hyde* (2000) 201 CLR 552 Judgment of Gaudron, McHugh, Gummow & Hayne JJ at [67]-[93] (Austlii)**

FACTS

- Two rugby union players sustained serious injuries during a rugby union game
- At the time of the incident, there was a body of evidence indicating the danger of scrums
- The plaintiffs alleged that the International Rugby Football Board owed them a duty of care to amend the rules so as to avoid these dangers

HELD

- The Defendant Board did not owe a duty of care because
- They had limited control over the matches.
    - If they did owe a duty of care, this could potentially be owed to thousands of other plaintiffs- opening the floodgates
- **Defence:** The plaintiffs voluntarily played the game and knew of the inherentn risks

CATEGORIES OF DUTIES OF CARE

1. Atypical Plaintiffs – ***Levi v Colgate; Hayley v London Electricity Board***
2. The Unborn child
    a. Wrongful birth
    b. Wrongful life
3. Manufacturers – product liability
4. Rescuers
5. Mental Harm/psychiatric injury: **Part 3 *Civil Liability Act* 2002 (NSW)**
6. Occupiers
7. Employers ➔ see ***Workers Compensation Act*** **scheme in proportionate liability section**
8. ~~Motorists ➔ see ***Motorist's Compensation Act*** **scheme in proportionate liability section~~

Category 1: Atypical plaintiffs

- An atypical plaintiff is one who is more susceptible to injury than a normal person of their physical or mental condition
    - Courts have resolved considerations in regards to 'atypical' plaintiffs:
        1. A defendant is under no duty of care to take special steps **to protect an atypical plaintiff**
        2. However, if an atypical P is injured in a situation where it was RF that a ***normal person*** would have been injured, they will **recover damages for all the injury they suffered** (irrespective of whether a normal person would have suffered ***the same degree*** of injury) - ***Levi v Colgate-Palmolive Pty Ltd* (1941)**

Vulnerable plaintiffs are not automatically rendered atypical

- However, vulnerable, or disabled plaintiffs must be differentiated from, and are not automatically rended **atypical;** allowing them to sometimes be **reasonably foreseeable** - ***Haley v London Electricity Board* (1964),**
  - P was susceptible/vulnerable (blind), but **not atypical** ,
  - Court held that although the risk of a blind person coming and getting injured **was slight**, it was **reasonably foreseeable t**hat a blind person may come across the trench, (**as 1 in 500 people in London were blind)**
    - Therefore, it was not onerous for the D to take proper precautions.
    - The duty of care included taking measures to **remove unreasonable hazards** from the path of a blind person.

Category 2: The Unborn Child

❖ While a fetus has **no legal identify,** the law recognizes that a duty of care **is owed** directly to the unborn child
- An action at law for damages suffered through negligent acts or omissions arising during pregnancy may only be brought ***following birth***.
- Thus, pre-birth injury may occur:
  1. **Before** the child is conceived;
  2. **Ex utero** (*during* **in vitro fertilisation**); or
  3. **In utero** (including **during birth**)
- In this situation, there must be evidence to establish a **causal connection** between the acts or omissions of the D and injury to the child.
-

A. Pre birth injury *before* the child is conceived – DOC to present and future fetuses

- A D may be held liable for negligent acts or omissions affecting a child not yet conceived.
  - ***X and Y v Paul (1991)-*** an obstetrician failed to do a routine test on **a pregnant woman for syphilis**. Court held that the obstetrician owed a duty of care not only **to her and the foetus she was then carrying**, but also to a **future unborn child** who became **infected with syphilis** during a subsequent pregnancy.

B. Ex utero – during in vitro fertilization - DOC to *not injure* pre or post pregnancy; not ext to advising to terminate

- In ***Waller v James* (2002),** Studdert J established that the court owed a duty of care **to P during the IVF treatment** of the mother after child was born with **cerebral thrombosis**
  - However this duty of care was limited to a duty ***not to injure*** the child ***before or during the mother's pregnancy***
  - Did NOT extend to advising child's parents to terminate the pregnancy
    - Would be a **conflict of interests** – acknowledged "*inform*" the parents may not have been in best interests of child
    - **Mutually inconsistent purposes** → what is best for parents (terminating pregnancy if risk of disabled child not worth it) may not necessarily be in the best interests of the child.

C. In utero – during birth - driving cases m

- In ***Watt v Rama* [1972] VR 353** the court held that the **driver** owed a duty of care to unborn child, as the **pregnancy could be reasonably foreseen by members of the community**
  - A pregnant woman **was involved in a car accident**, which was caused by the negligence of the D. The foetus she was carrying was injured in the accident and **was born with brain damage**, **epilepsy** and **paralysis** from neck down.
- ***Lynch v Lynch* (1991) 25 NSWLR 411 -** mother owes duty to unborn child ***only with respect to driving*** - this **DOC did NOT** extended to other lifestyle choices.

- A **child sued a mother** for negligence in causing injuries when she was **in her womb** due to a motor vehicle accident. The child was successful, as it was found that its mother owed a **DOC** to it when driving. was owed a duty of care as a **driver**
- However, the Court restricted the application of such a duty **strictly driving -**, as there is a very low threshold, which needs to be crossed to establish a duty of care in motor vehicle accidents.

WRONGFUL BIRTH

- In claims of wrongful birth, parents claim a **duty of care** is owed to them by **healthcare professionals**

Prior to *CLA* s70-71 – common law

- Historically, (that is, prior to the ***CLA* s70-71's** introduction), actions of wrongful birth would see parents claiming that "were it **not for D's negligence, the child would not have been born".**
  - Claims generally turned on the fact that a healthcare professional had dispensed negligent advice with respect to a **sterilization procedures**/failed sterilization procedures / **lost opportunity** for a legal abortion.
  - In such actions, the precedent of ***Cattanach v Melchoir* (2003)** saw common law allow **parents to recover damages** for costs of care of the child
    - i. ***Cattanach v Melchoir* (2003)** - Parents claimed that D, a healthcare professional, negligently administered a **sterilization** procedure on the plaintiff (mother; tubing ligation). **Were it not for this negligent procedure, the child would not have been born**. The court awarded damages with respect to **loss of earnings**, cost of **raising the child**, costs associated with **pregnancy and birth**, **pain of birth**
    - ii. ***Vievers v Connolly*- DISABLED CHILD-** P lost an opportunity to **terminate pregnancy** as a result of D's negeligence. As a result, a **severely handicapped child** was born. The court awarded damages for the costs of ***current and future*** care

Post *CLA* s70-71 – legislation has reversed common law position

- However, the introduction of ***CLA* s70-72** has largely overturned the historical common law position,a s established in ***Cattanaach v Melchoir* (2003).** Specifically,

CANNOT BE AWARDED

- ***CLA* S71 (1) - PREVENTS** recovery in cases of wrongful birth for 2 concerns that damages were awarded for in ***Cattanach***
  - **(a)** cost of **raising a child**
  - **(b) loss of earning** while raising the child.

CAN BE AWAREDED

- However, under ***CLA* s71(2),** damages **relating to pain, suffering, medical costs, or maternity leave (paid or unpaid) *may* be awarded** – as they were under ***Cattanach***
- Additionally, under ***CLA* S71 (2)** the additional cost of ***raising a DISABLED child*** **CAN** be recovered.- does not extend to all costs, but rather exclusively to **additional costs,** that can be recovered (cost of raising a healthy child will, in effect, be subtracted from damage equation)

WRONGFUL LIFE

- **Wrongful life claims have been rejected by Australian courts**.

- A wrongful life claim is generally ***made by a child*** who asserts he/she is owed a duty of care by parents' **health care professionals** whose negligence allowed P/them to be born.- i.e. failed contraceptive procedure to the child's morther, failure to diagnose mother's pregnancy, or to advise mother of termination procedures.
  - If the child was disabled, ***there is NO allegation*** that the practitioner's negligence caused the disability, just **that it allowed the child to be born**
    - ***McKay v Essex Area Authority* [1982] QB 1166** – mother contracted rubella resulting in child being born disabled. The child argued that D had been negligent in failing to tell mother of the appropriateness of abortion. Court held, as per Griffiths LJ that the practitioner DID NOT duty to child re advice to mother of appropriateness of abortion.- ***"I cannot accept that the doctor owes a duty to the foetus to urge its destruction"*** ; Griffiths LJ ***"such a proposition is wholly contrarty to the sanctity of human life"*** ; an idea reinforced in ***Harriton***
    - ***Bannerman v Mills* (1991) Aust Torts Reps 81-079 (NSW Sup Ct, Master Greenwood)** Followed *Mckay*- **followed 'tort of wrongful life is not known at common law ..even if it were would be impossible to assesss in monetary terms'**

Wrongful life claims have been largely rejected by Australian courts

- However, the majority's decision in ***Harriton V Stephens* (2002) NSWSC 461(Studdert J),** reflects the rejection of wrongful life claims by Australian courts. – Majority held:
  a) While a medical practitioner does indeed owe a duty to an unborn child, **this does NOT extend to preventing birth through termination of the pregnancy** or **non conception**
  b) It would be **impossible to quantify damages** as this would mean balancing whether non existence was preferable to child to life with disabilities

- This rejection is predicated on **ratio & policy considerations** including

MAJORITY DECISION IN *HARRITON* - Spigelman CJ & Ipp JA	**MINORITY DECISION IN *HARRITON* – Kirby J in dissent**
A. EXPOSURE OF PARENTS TO LIABILITY / DOC considerations • To make the D responsible for Alexis's (P's) disabilities by comparing her life without disabilities is to make the D (medical practitioner) liable for damage which he did not cause- **i.e. was not responsible for the disability's development/ conception of the child** • Furthermore, a Doctor's duty to advise re termination could **not logically be separated from a duty upon parents to terminate**	**A. EXPOSURE OF PARENTS TO LIABILITY / DOC considerations** • A duty against a health care provider says nothing about a mother or parent's duty: **they are in different categories.** • Denying a duty erects an immunity around negligent health care providers where children are born into a life of suffering because of the failings of those health care providers
B. THE SANCTITY OF LIFE • The **sanctity** of life - inherent to common law in Aus; reinforced previously in ***McKay v Essex Area Auhtority*** ○ The common law values all life and such a duty would conflict with this value	**B. THE SANCTITY OF LIFE** • Contrary to devaluing the P's life, awarding damages **practically enables a more dignified** life with **greater opportunities** to participate and less reliance on family/charity/social security**.**

C. IMPOSSIBILITY OF ASSESSING DAMAGES • Impossibility of assessing damages ○ It was impossible to compare, or equate, as this would mean balancing whether non existence was preferable to child to life with disabilities	**C. IMPOSSIBILITY OF ASSESSING DAMAGES** • No problem with respect to assessing damages – the **comparison is between no economic expense with the cost of care for Alexia.**
D. SELF ESTEEM OF DISABLED PEOPLE • The **self esteem of people with disabilities**; that is, in instances where the P/child lodging a wrongful life claim is disabled, allowing it to stand could imply that the birth of **non-disabled children is preferable**	**N/A**

- **Apply normal breach principles**
- **Apply normal causation principes**
- **Scope of liability (normal)**

Category 3: Good Samaritans

❖ Under ***CLA*** **s56,** a Good Samaritan s a "person who, in good faith, and without expectation or reward, comes to the assistance of a person who is apparently injured or at risk of being injured

NO DOC to act as GS

• The common law ***doesn't compel*** individuals to act as Good Samaritans
  ○ That is, there is no established DOC that mandates someone come to the recue of another individual, or piece of property that is in danger - ***Sutherland Shire Council v Heyman*** **(1985)**

However, GENERAL RULE is if D act in GS capacity and is injured, will be compensated

- However, under ***CLA*** **s56,** if a person **acting in good conscience** who goes to the **aid of someone and is injured** as a result, they **will be compensated** for their injuries – as affirmed at common law in ***Chapman v Hearse***
    - Extends to professional rescuers, like firefighters- ***Ogwo v Taylor* (1988)**
    - Extend to **mental harm/injury,** not just physical – ***Mt Isa Mines Ltd v Pasey* (1970)**

EXCEPTIONS

A. Exception – if Good Samaritan's negligence increase's victim's injuries – *CLA* S56(B)

- While there is no DOC to *become a rescuer,* once a person begins acting as a Good Samaritan/rescuer, a DOC is imposed – requires them to **act with reasonable care during the recue -** ***Kent v Griffiths* [2001]**
    - Thus, under ***CLA* s56(b)** if rescuer's **own negligence causes** OR **increases** the victim's injuries, it it is possible for the rescuer to be liable – ***Horsley v Mclaren, the Ogopogo* (1972).**

B. Exception- if Good Samaritan is intoxicated (by alcohol or drugs) – *CLA*s56(c)

C. Exception – if Good Samaritan impersonates a health care care worker/emergency worker - *CLA*s56(d)

D. Exception – does not apply to GS' employer who is vicariously liable – *CLA* s56(a)

- **Apply normal breach principles**
- **Apply normal causation principes**
- **Scope of liability (normal)**

Category 4: Rescuers

- While there is *generally* no legal duty to rescue, that is, to go to the aid of another in distress or peril, additional factors may be called in aid to give rise to such a duty.
- **A defendant who injures or endangers a person (including themselves) owes a duty of care to a rescuer**
    - ***Chapman V Hearse***
    - ***Mt Isa Mines v Pusey***

EXCEPTIONS

1. **Prison authorities (A) –** Prison authorities have a duty of care to take positive action to **protect prisoners** under its authority and care –***NSW V Bujdoso* (2005)**
    a. While authorities of Slverwater Prison Complex possessed knowledge that a prisoner (who was imprisoned for three counts of sexual assault with boys under 18 years) had been threatened by other inmates + knowledge of the risk

of physical injury to him – took no steps to protect/prevent him being attacked- was severely injured when hit with cell phone

2. **Prison authorities(B)-** also have a duty of care to **protect outsiders from escapee prisoners** – at least in the immediate vicinity from where they escaped- ***Dorset Yacht Co Ltd v Home Office* (1970)**
3. **Doctors –** While a medical practitioner previously did not possess a duty of care to a patient, in ***Lown v Woods* (1996) ,** the court held established that in a **special circumstance of medical emergency**
    - Novel fact situation; the doctor was not the boy's doctor and never had been. He refused to attend to the boy who was suffering an epileptic fit (he was in surgery at the time).
4. **licensed premesis –** ***Addels Palace v Moubarak*** – Owner of a licensed premesis has a duty of care to protect patrons from **known risks and anti social behavior**

Category 5: Manufacturers – product liability

- Product liability refers to the remedies available to individuals who are **injured by defective products** or who otherwise **suffer loss or damage** *caused by* **defective products**.
- Tort law covers the entire chain of supply subject to the requirement of reasonable foreseeability.
    - Consequently, tort actions related to manufacturer DOC can relate to ***defects*** in **design**, **formulation**, **manufacture**, **production**, assembly packaging and/or information provided with a product- ***Haseldine v Daw* (1941)**

DUTY OF CARE OWED BY MANUFACTUERERS

A. The duty of the manufacturer is ***one of reasonable care***- this meant that a manufacturer will not always be liable for defective products
    - ***Donoghue v Stevenson* (1932) landmark case –** first case to provide relief to a P who was not in a contractual relationship with the manufacturer of a defective product (**drink with dead snail in it)**, which she consumed, which caused her injury.
    - ***Grant v Australian Knitting Mills (1936)*** demonstrated that the application of *Donoghue* applied to a **broader range of products than food**; that is, in this case, to **underwear which the P had an allergic reaction to – developed an acute rash** - *'no distinction can logically be drawn for this purpose between a noxious thing taken internally and a noxious thing applied externally'*

Elements of manufacturer DOC

- Ultimately, D manufacturer will owe P a DOC if ***Grant v Australian Knitting Mills (1936)*** the **goods** do not reach the consumer in ***the same form that they left the manufacturer in***; that is, the **goods must reach consumer same form as they left manufacturer.**

- To be successful in a product liability action, the plaintiff must **identify which participatnt in the supply chain** was the person **responsible for the defect, otherwise claim will fail-** ***(Kilgannon v Sharpre Bros Pty Ltd (1986)***

- Furthermore, ***Grant v Australian Knitting Mills (1936)*** that a manufactuer will only owe a DOC to **P** if they were **a member of foreseeable class/** or if their **injury was foreseeable**
    - Decided that intermediate inspection was not relevant, rather

***Grant Australian Knitting Mills Ltd* (1935)**

Dr Grant bought underwear from a retail shop that had been supplied with the garments by Australian Knitting Mi
He **developed an acute rash** from wearing the **underwear and was hospitalised**. He sued and the Privy Council h

that the retailer were liable in contract for an implied breach of the conditions of the terms of sale and held manufacturers liable in negligence for the failure to take reasonable care in manufacturing the product.

- **Apply normal breach principles**
- **Apply normal causation principes**
- **Scope of liability (normal)**

Category 6: Pure Mental Harm (Novel Duty)

❖ Under the ***CLA*** **s27**, the **2 key kinds of mental harm include:**

1) **Pure mental harm-** refers to a **psychiatric or psychological illness**, which is **NOT** caused by or related to a physical injury.
2) **Consequential mental harm -** mental harm that is a **consequence of physical injury**

DUTY OF CARE –PURE MENTAL HARM

- The ***CLA*** creates a number of hurdles for claimants wanting to establish a duty of care owed by the defendant with respects to pure mental harm.
- Ultimately, under ***CLA*****s32(1),** there is no duty of care not to cause mental harm *except* where D ought to have **foreseen** that a **person of normal fortitude** could suffer a **recognized psychiatric illness** if **reasonable care** was **not** taken

- Specifically, the following must be established to show that D owes P a DOC for **PURE mental harm** :
- There must be a recognised psychiatric illness – ***S31 CLA***
- The claimant must be a person of 'normal fortitude'- ***CLA*** **S32(2)**
- The circumstances of the case such as
    i. Whether or not the mental harm was suffered as a result of sudden shock
    ii. whether the P witnessed victim being killed, injured or put in danger – ***CLA*** **S32(b)**
    iii. the nature of the relationship of the P to the person injured/put in danger . *CLA* **s32 (c)- (d)**
    iv. whether or not there was a pre-existing relationship between P and D

Compulsory Determinants OF PURE MENTAL HARM

ELEMENT 1: *CLA* S31, 33- Recognised psychiatric illness

- A duty of care will not be established unless P is suffering from a recognized psychiatric illness

A. **PURE MENTAL HARM *CLA* S 31** No liability for **pure mental** harm which is not a recognised psychiatric illness.

Proof - medical evidence

- Although **expert medical evidence is required** to prove that the condition is indeed a recognized psychiatric illness, the ***exact nature of the illness*** need not be foreseeable – ***Mount Isa Mines v Pusey -*** where the P suffered schizophrenia/depression/anxiety after helping 1 of 2 electricians
    - Court is also **NOT bound to accept a view stated by an** expert- ***Peterson v Cth* (2008)**
        - In ***Petereson***, P relied on the opions of 4 expert doctors to prove his PTSD was result of the the Voyager collision - established that it is necessary for the court to be satisfied with the expert's reasoning; that is, with the way the expert deduced, from the facts relayed to them by the P, that P sustained PTSD from the voyager collision

Distinction between grief /sorrow and a recognized psych illness

- Further, the **distinction** between "**grief and sorrow**" and a **"recognized psychiatric illness" –** ***Jaenesch v Coffey* (1984)**
    - Specifically, D is not liable for causing '**distress, fear, anxiety**, annoyance or despondency without any resulting in a recongised psychiatric illness – ***Tame v NSW; Annetts v Australian Stations Pty Ltd***

DSM guidelines are not meant to be applied mechanically

- While the court (like in ***Seedman***)sometimes refers to extracts from **DSM 4** to help determine whether an condition is a recognized psychiatric illness, these criteria are **NOT** meant to be used in a "cookbook fashion/ are not meant to be applied mechanically – ***NSW v Seedman* (2000).**

ELEMENT 2: *CLA* S32(1) – must be RF for to have foreseen that P was a person of "normal fortitude" would have suffered a rec psych illness

- Under ***CLA* s32(1),** as confirmed under ***Shane v Wicks,*** the **key determinant of a duty of care** is whether it was **reasonably foreseeable that a person of normal fortitude** would **suffer a psychiatric illness;**
    - **requirement of s32 *CLA.*** - "*the defendant ought to have **foreseen** that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if **reasonable** care were not taken*" (see s 32 of CLA)

- To establish that the nervous shock was reasonable foreseeable, it must be foreseen that the distressing nature of the events would cause a shock which so greatly affects the plaintiff that it results in mental illness- **sudden shock**
- Generally, relevant factors in determining reasonable foreseeability include: directness of perception, relationship with injured party, relationship between P and D, nature of shock.
    i. ***Tame v NSW* (2002) 211 CLR 31**- Not reasonably foreseeable that police clerical error with respect to blood alcohol level would lead to psychiatric injury.
    ii. ***Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317**

    iii. ***NSW v Seedsman***- junior police woman working in child protection unit; witnessing abuse, mutilation and death- developed PTSD ***after*** birth of her son. – **was R F**
    iv. ***Spence v Pacey -*** mother developed a psychiatric illness after caring for her coma accident victim son; too remote to be RF

Wicks v State Rail Authority of NSW (2010)

- The appellants, Mr Wicks and Mr Sheehan, were NSW policemen who were amongst the first to arrive to assist the dead and injured at a rail disaster, where a passenger train derailed at high speed. Upon arriving at the scene, the appellants were confronted with death, injury,

wreckage etc. Both appellants remained at the scene for some hours and then later claimed to be suffering from various forms of psychiatric disorder as a result. State Rail admitted negligence but argued that the appellants did not witness any of the victims 'being killed, injured or put in peril'.

Factors under *CLA* s32 that may be considered to *assist* in establishing a duty of care – are NOT essential/compulsory pre-requisites – *Shane v Wicks*

- Under ***Shane v Wicks,*** the court confirmed that the legislative requirements of ***CLA*** **s32** may be **useful in assisting to establish a duty of care/augment the validity of imposing one.**
- HOWEVER, these tests are not compulsory pre-requisites of a duty of care, and *DO NOT* have to be satisfied for a duty of care to be established.

CIRUCMSTNANCES 1: Sudden shock – s32(2)(a) *Shock* - see page 431

- Under **s32(1)*CLA*,** there is no duty not to cause mental harm except where **D ought to have foreseen** that person of normal firtutude could suffer a recognized psychiatric illness if care was not taken
  - ***CLC*** **s32(2)(a),** requires that, in cases of pure mental harm, the courts take **SUDDEN SHOCK** into account as on of the factors in assessing RF.
    - The shock will be sufficiently sudden if " *it is so distressing that the perception of the phenomenon affronts or insults the plaintiff's mind and causes a recognized psychiatric illness"* (Brennan J in ***Jaensech v Coffey***)
    - If shock is "***cumulative***", (as opposed to sudden) it is generally not reasonably foreseeable
      - ***NSW v Seedsman*** – **was RF:** junior police woman working in child protection unit witnessed abuse mutilation and death over a long period of time before developing PTSD after the birth of her son. In this case, the shock was foreseeable – satisfied sudden shock test.
  - Court held that the possibility of '**mental disturbance'** was foreseeable given her extensive and **intensive exposure to children's injuries** and children's bodies ***without specialist training***.
  - Court held that **there does NOT need to be a single 'shock'** in the sense of a ***sudden sensory perception***.
    - There **could be a multitude of intervening factors** affecting the plaintiff. Employer owed its employee a duty of care

- ***Spence v Pacey*** – **not RF; too remote-** mother developed psychiatric illness caring for a coma accident victim; too remote.

CIRCUMSTNACE 2: Relationship of P to D (as opposed to victim) -*CLA* s32(2)(d)

- **Under** *CLA* s32(2)(d), **there must a** pre existing relationship **between P and D.**
- However, in ***Tame & Annets*** the High Court **rejected the notion** that there are rigid categories of rules into which a factual situation must fit into to establish a duty of care.
  - Instead, the High Court approached the question as to whether a duty of care is owed to a P by a D based upon whether the **injury was reasonably foreseeable**.
  - In this case, McHugh J held that a **pre-existing relationship** was sufficient to create a duty of care.

- Specifically, in ***Anetts***, the **assurance** that the **defendant emp**loyer gave to the victim's parents (the P's)/Mr and Mrs Annetts about looking after their son gave rise to a duty of care – created a sufficient '**pre existing relationship'**

Factors under *CLA* s30 that may assist in determining whether damages will be dispensed– *Shane v Wicks*

❖ Under ***CLA*** **s30, THERE IS NO RECOVERY OF DAMAGES *unless* P was a witness at the scene, or was a close family member –** as confirmed under ***Shane v Wicks,***

❖

ELEMENT 4, CIRCUMSTNACE 2: Person killed was a close family member (relationship of P to victim) s30(2)(b)

At statute

- Under ***CLA*****s30(2)(b),** P can only get damages if a **close family member** of the person injured or put in peril (if not witnessed) in ***Jaensch v Coffey (1984-*** Mrs Coffey could hypothetically claim damages, as she was married to Mr Coffey (victim) (case is pre-CLA, but hypothetically she could)

However, can only claim damages if P was a close family member of victim

- However, at common law, all that is required for P to recover is that they **are reasonably foreseeable** by D as someone who would suffer nervous shock as a result of the defendant's negligent behavior
  - i.e. someone who hears bad news or is partly removed from the accident is **not RF-** ***Bourhill v Young* (1984) -** Preganant woman heard a collision between a car and a motorcycle and suffered a miscarriage. She was unable to recover damages for nervous shock. As the plaintiff herself was not in danger of physical impact, nor related to a person neither in any way that was endangered, nor within the line of vision at the time of the accident, the House of Lords held that she was not in the area of potential danger, which the defendant reasonably should have foreseen.

No clear parameters at common law- i.e. related via employment

- No clear relational parameters which define that nature of the victim in nervous shock – i.e. can be related by way of employment- ***Mt Isa Mines v Pusey*** **-** the psychologically injured P was not a family member of the victims. –
  - instead, 2 electricians were working above a powerhouse on the floor above the plaintiff.
  - They negligently misplaced a switchboard, - creating a short circuited, high powered current- casing explosions
  - 1 electrician died then, 1 died weeks later.
  - P helped getting one of the electricians to the ground floor
  - The shock of the event and the added knowledge that both men had died cause P to become depressed- and he suffered a sever schizophrenic reaction and developed intense depression and anxiety
    - Was also able to recover because role (i.e getting 1 down to ground level= rescuer) – if harmed when being a GS, can obtain damages)

CIRUCMSTNANCES 3: P Witnessed person being injured/killed/ put in peril – s30(2)(a)

- Under **s30(2),** a **duty of care for** pure mental harm cannot be established unless **P witnessed a person being killed or put in peril.**

Can have a DOC if caught up in immediate aftermath

- The perception has, however, been extended beyond a need for the P to ***actually witness*** the negligence at the scene- that is, the victim being killed, injured or put in peril (as per **s32(1).**
    - Consequently, at common law, the courts also include a P **who becomes caught up in the immediate aftermath of the accident** - ***Petrie v Dowling***
        - -i.e. in ***Jaensch v Coffey (1984*)**, Mrs Coffey was able to recover for nervous shock even though she did not witness the accident

Shane v Wicks **– witnessing the event can take place over an extended period of time**

- Under **s32(2),** a **duty of care for** pure mental harm cannot be established unless **P witnessed a person being killed or put in peril**
- However, under ***Shane v Wicks***, the court held that whilst the event of another person being killed, injured or put in peril must have been happening while the plaintiff witnessed it, such **an event may take place over an extended period**.
    - This was such a case, at least so far regarding victims being injured or put in peril.
    - The **consequences of the derailment took time to play out**. The perils to which the survivors were subjected did not end when the carriages came to rest

Shane v Wicks **– the fact that people are 'injured' or 'in peril' may be inferred**

- It may be inferred that some who suffered physical trauma in the derailment suffered further injury as they were removed from the wrecked carriages
- It may be inferred that many who were on the train suffered psychiatric injuries as a result of what happened to them in the derailment and at the scene, and that as they were being removed from the train, at least some of the passengers were still being injured
- If either inference is drawn, then the police officers witnessed, at the scene, victims of the accident 'being injured'

The survivors of the derailment remained in peril until they had been rescued by being taken to a place of safety. The police officers therefore witnessed victims 'being put in peril'

Generally, no recovery for bad news- but authorities are not clear ; undivided and have provided damages for bad news

- In Aus, it is assumed that there is no recovery for bad news which occasions nervous shock, however, authority is not clear on this point.-
- While in ***Jaenesche v Coffey*** , HCA was divided on this point, in other cases, **courts have allowed damages** to be recovered when P *did not see accident or events within its aftermath*, but **suffered shock** as a result of b**eing given bad news**
    - ***Coates v Government Insurance Office of NSW*** **(1995) -** rejected any distinction between seeing and hearing the event which has lead to the illness.
        - Specifically, Kirby **believed that the hearing of bad news over the telephone** was within the **concept of perception** as defined by the courts. – however, case was applying ***LRMP*** **s4.**
    - ***Petrie v Dowling*** **(1992)-** a mother recovered for nervous shock when she attended a hospital and was told of her daughter's death

Guidelines for the recovery of damages

- The Ipp report noted that the **damages awarded to claimants must be limited** because whilst it may seem fair from the perspective of the P, it *was not so fair from the perspective of the* D, as there is a contributory negligence on the part of the deceased or injured. *"Why should the D be*

required to pay full compensation for the mental harm suffered by the P when it can be said to be partly the fault of the person imperilled, injured or killed?".

- The result is that the **primary's victim's contributory negligence** reduces the secondary's victim's damages in the same proportion as that of the primary victim
- Further, in NSW no damages will be awarded to P for pure mental harm if **any provision** of the CLA or any other law would **prevent the recovery of damages** from the D by or through the victim in respect of the act or omission.

Go through normal principles of

- **BREACH**
- **CAUSATION**
- **REMOTIONESS**

CONSEQUENTIAL MENTAL HARM

- Where mental harm is consequential, **under s 32(3),** P needs to demonstrate a **separate duty of care**
- However, consequential mental harm is treated similarly to pure mental harm – the focus her eis on the injury, rather than the cause or manner in which it was inflicted
  - Courts are required under **s32(3)** to **examine the physical injury that produces the consequential mental harm as a circumstance of the case relevant to the duty of care**
  - Courts are generally directed that in considering whether a D owes a P who has suffered consequential mental harm a DOC, 'the circumstances of the case include the personal injury suffered by the plaintiff"
    - The bodily injury out of which the mental harm arose therefore becomes a relevant circumstance to consider in establishing a DOC for the consequential mental harm
  - Drug dependencies and alcohol dependencies in consequential mental harm

Recovery of damages

- In NSW, the courts may only award damages for **economic loss** when the harm suffered by P is a **recognised psychiatric illness**
- Legislation imposes a "**double requirement**" on P
  - Essentially, in order to recover economic loss damages for consequential mental harm, P must establish that the D **owed the P a DOC** to take car to avid inflicting mental harm, as **well as a duty to avoid inflicting physical harm.**
    (a) Damages for economic loss resulting from the negligent infliction of mental harm should be awarded only in respect of recognised psychiatric illness, even if the mental harm is consequential on physical injury
    (b) Such damages should be recoverable **only if D ought to have foreseen that a person of normal fortitude might, in the circumstances, suffer a recognised psych illness if reasonable care was not taken.**

(c) The duty in relation to mental harm is separate from, and independent of, the duty in relation to physical harm

- It is unclear, and the question remains open, as to whether non economic loss damages may be awarded for consequential mental harm, as it is not a recognised psychiatric illness – in ***NSW v Ibbett***, the courts implied that damages would be available in this context. Here, the plaintiff recovered damages for consequential mental harm which was characterised as "**anxiety and distress"**