

**Situations where the DOC changes and there are additional considerations:**

### **Pure Mental Harm**

#### **Pure mental harm DOC (s 27-33 CLA)**

A defendant may have a legal duty to take care to avoid pure psychiatric illness or psychological harm to a plaintiff

Pure mental harm arises where there has been mental harm that is psychiatric or psychological caused due to negligence that has not been caused by or related to physical injury of that person (Jaensch), and is also defined in s 27 to be mental harm other than consequential harm (which involves physical injury). It is treated under novel duty of care and thus is important in determining if the defendant had a duty of care to the plaintiff.

#### **1. There must be a recognised psychiatric illness (s 31)**

- Tame v NSW; Annetts v Australian Stations Pty Ltd - a person is not liable for distress, fear, anxiety, annoyance, grief, sorrow or despondency, without any resulting psychiatric illness
- Expert medical evidence as to the nature of P's psychiatric condition will be crucial

In Peterson v Commonwealth it was established that the plaintiff must also prove that the illness was also caused by the alleged negligence.

In Coates- the plaintiff's were children at the time of their father's death, one was hospitalised with stomach pain while the other suffered poor peer group relations, but no psychiatric illnesses so this failed.

#### **2. Was it reasonably foreseeable that a person of normal fortitude might, in the circumstance of the case, suffer a recognised psychiatric illness if care were not taken? (s 32(1))**

-The exact nature of the plaintiff's illness does not need to be foreseeable, all that is needed is the foreseeability of pure mental harm, as found in the Mount Isa Mines and Pusey case.

-In the Annetts case, the reaction of parents to the news of their son's death after he was lost in the desert was reasonably foreseeable, having regard to the relationship between the child

and the parents as they were assured of his safety (even though they were told over the phone).

In *Tame*, plaintiff was told she had a high blood alcohol rating after she crashed, she got a form of psychotic depression. She failed as a 'simple clerical error' was not enough, however an exception to this is s 32(4), which is exploiting D's lack of fortitude with knowledge.

No real measurement of 'normal fortitude', described as 'imprecise' and 'artificial' (*Tame*).

Normal fortitude: (*Tame*) '...some people with such a degree of susceptibility to psychiatric injury that is ordinarily unreasonable to require strangers to have in contemplation the possibility of harm to them'

Can consider the following circumstances of the case in determining reasonable foreseeability – CLA s 32(2)

(a)

CLA s 32:

2. Was it reasonably foreseeable that a person of normal fortitude might, in the circumstance of the case, suffer a recognised psychiatric illness if care were not taken?

a) Whether or not the mental harm was suffered as a result of sudden shock

- Is it Sudden shock or cumulative notion of shock

- 'Sudden and disturbing impression on the mind of feelings; usually, one produced by some unwelcome occurrence or perception, by pain, grief or violent emotion, and tending to occasion lasting depression or loss of composure'

- 'Mere knowledge of a distressing fact is not compensable; perception of the distressing phenomenon is essential.' (*Coffey*)

- Although, common law does not limit liability to cases where injuries caused are sudden shock. (*Tame*)

b) Whether P witnessed, at the scene, a person being killed, injured, or put in danger

-In the Wick case, in cases of accidents it was said that victims ‘...remained in peril until they had been rescued by being taken to a place of safety’.

- Alcock v Chief Constable of South Yorkshire Police - shock caused by bad news rather than direct perception of shocking events at scene cannot give rise to a claim for damages

- Have been instances where courts have allowed recovery of damages where P did not see the accident or its events but suffered shock as a result of being given bad news, e.g. Petrie v Dowling (mother recovered for nervous shock when she attended a hospital and was told of her daughter's death)

c) The nature of the relationship between P and anyone killed, injured or put in danger

-The closer their relationship, the more likely that a duty of care will be established.

-If someone is ‘akin to a rescuer’ there is likely to be a relationship link in favour of duty of care (Mount Isa)

d) Whether or not there was a pre-existing relationship between P and D

-Assurance that something won't happen, and then it happens, favours a duty of care being imposed (Annetts, where parents are assured they their son would be supervised but he went missing in desert and died).

- Tame v NSW; Annetts v Australian Stations Pty Ltd - rejected notion that there are rigid categories of rules into which factual situation must fit to establish a duty of care, but preexisting relationship may be relevant, e.g. where D continuously assures P of son's safety

Annetts – these factors are not preconditions for existence of DoC but are relevant to nature of relationship. If CLA applies and P suffers mental harm arising from another person (victim) being killed/injured/put in peril by act or omission of D

### **Limits on recovery (Section 30)**

This is only relevant when the plaintiff has nervous shock in connection with another person being killed, injured or put in peril by the act or omission of the defendant (Section 30(1))

## Section 30

(2) The plaintiff is not entitled to recover damages for pure mental harm unless:

- (a) the plaintiff witnessed, at the scene, the victim being killed, injured or put in peril, or
- (b) the plaintiff is a close member of the family of the victim.

Check rest of s 30 for what close member of the family of the victim means

Must consider combined effect of s 30 and s 32 – only those listed in s 30 who are also able to establish they are owed a DoC under s 32 can recover for psychiatric injury

Duty is not 'derivative', i.e. does not depend on DoC being owed to victim

Contributory negligence for pure mental harm:

Common law = victim's CN does not operate against claim of P who suffers mental harm

CLA s 30(3) = primary victim's CN reduces secondary victim's damages in same proportion as primary victim

Consequential mental harm

P must establish DoC in relation to physical injury as well as consequential mental harm

Courts must examine physical injury that produces consequential mental harm as a circumstance of the case - s 32(3)