

## *Torts*

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in this case. This was because the respondent had no control over the actions of the criminals, nor was there complete reliance upon Modbury (the video store also having the ability to take safety measures).

Courts have found that such a duty can exist where the defendant has a degree of control over the actions of the assailant, as in the relationship between the state and prisoners (*Dorset Yacht Co Ltd v Home Office* [1970]).

### 3D – Mental Harm

Mental harm (traditionally known as ‘nervous shock’) has always been subject to more stringent tests in negligence than physical harm. Prior to the passage of the *Civil Liability Act 2002* (NSW), claims for mental harm had been successful in the following circumstances;

1. The plaintiff suffered mental injury as a result of being placed in fear of physical harm by the defendant’s acts (*Victorian Railways Commissioner v Coultas* (1888)).
2. The plaintiff suffered mental injury as a result of physical harm caused by the defendant (*Donoghue v Stevenson* (1932)).
3. The plaintiff suffered mental injury as a result of witnessing others being physically harmed or put in peril (*Mount Isa Mines v Pusey* (1970)).
4. The plaintiff suffered mental injury upon discovery of physical harm to a family member (*Tame v NSW; Annetts v Australian Stations* (2002)).

Since its introduction, the common law has progressively moved towards greater recognition of the need to compensate for mental harm in negligence.

### *Bunyan v Jordan*

**Citation:** (1937) 57 CLR 1.

**Coram:** High Court of Australia.

**Facts:** Bunyan’s employer, Jordan, made frequent jokes about committing suicide with a handgun he kept in his office. One night, he tore up bank notes in front of her in his office, claiming that he would not be around to deal with it tomorrow. The next day, he fired the handgun in his office, causing Bunyan to suffer mental harm.

**Issue:** Was the mental harm suffered by the plaintiff reasonably foreseeable?

**Outcome:** Appeal dismissed.

**Ratio:** It was not foreseeable that Bunyan would suffer mental harm because she was not a person of normal mental fortitude. If Jordan knew of her particular susceptibility, then the outcome may have been different.

### ***Chester v Waverly Municipal Council***

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**Citation:** (1939) 62 CLR 1.

**Coram:** High Court of Australia.

**Facts:** A child drowned in a muddy pit of water by a highway owned by Waverly Council. The child's mother, Chester, found his body after hours of searching, causing her to suffer mental injury.

**Issue:** Did the Council owe Chester a duty of care?

**Outcome:** Appeal dismissed.

**Ratio:** While the Council owed a duty of care to the child, the estate of whom could have claimed damages, no duty of care was owed personally to the mother. Latham CJ found that it was not reasonably foreseeable that the mother's grief would be a foreseeable consequence of the Council's negligence in failing to cover the hole.

**Dissent:** Evatt J found, on the other hand, that rescuers who suffered some form of injury, physical or mental, as a result of looking for the child were a class of people who may have come to harm as a result of the defendants' actions.

### ***Mount Isa Mines Ltd v Pusey***

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**Citation:** (1970) 125 CLR 383.

**Coram:** High Court of Australia.

**Facts:** An accident occurred at a mine owned by the appellant. Pusey, among other workers at the mine, was ordered to go in and save his comrades. In the course of doing so, Pusey witnessed a close friend suffering enormously due to the injuries he sustained. As a result, Pusey suffered mental harm.

**Issue:** Did the appellant owe the respondent a duty of care to prevent the mental harm occasioned by the order to enter the mine?

**Outcome:** Appeal dismissed.

**Ratio:** Despite the fact that the defendant was never in physical danger himself, the Court found that a duty of care was owed. However, restrictions on the

ability of individuals to claim in negligence were established, none of which disqualify the case at hand;

1. **Mental Illness:** The plaintiff must have suffered a diagnosable mental illness to be able to claim; pure grief or shock is insufficient.
2. **Normal Fortitude Rule:** Damages can only be recovered if a reasonable person of normal mental fortitude would suffer harm.
3. **Direct Perception Rule:** The plaintiff must have directly perceived the distressing event, or its immediate aftermath.
4. **Sudden Shock Rule:** The shock incurred by the plaintiff had to be a sudden consequence of the event in question.

### ***Tame v New South Wales; Annetts v Australian Stations***

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**Citation:** (2002) 211 CLR 317.

**Coram:** High Court of Australia.

**Facts:** After having had her BAC analysed following a car accident, Tame was mistakenly recorded by police as having been over the legal limit. Though this error was quickly corrected, the short-term stress she suffered as a result caused her to develop depression.

The Annetts gave permission for their 16-year-old son to work on a farm owned by Australian Stations. This permission was given on the understanding that he would be at all times under strict supervision. Australian Stations failed to do this, however, and the son went missing. After months of agonising searching, the Annetts discovered that their son had died after wandering away from the property. They suffered mental harm as a result.

**Issues:** Was Tame's injury a foreseeable consequence of the police officer's mistake? Was the injury suffered by the Annetts excluded from attracting a duty of care due to the rules established in *Pusey*?

**Outcome:** Appeal dismissed in *Tame*. Appeal allowed in *Annetts*.

**Ratio:** The police officer cannot incur a duty of care for the exercise of a legal duty (*Sullivan v Moody* (2001)). Even if *Sullivan* did not apply, there was no duty of care as it was not foreseeable that Tame would suffer harm as a result of the negligent filing of the police report.

On the other hand, Australian Stations did owe the Annetts a duty of care for the mental harm suffered from losing their son. The rules established in *Pusey* do not need to all be met, though they may be instructive in a finding of reasonable foreseeability of harm. The fact that the harm was protracted and not sudden, or that the plaintiffs did not physically witness the event, should not exclude liability in the circumstances of the current case, due to the special relationship of trust between the parties (the promise that the child would be supervised).

### **Koehler v Cerebros**

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**Citation:** (2005) 222 CLR 44.

**Coram:** High Court of Australia.

**Facts:** Koehler was an employee of Cerebros. In the course of her employment, she was allegedly overloaded with work and, despite frequent complaints, the respondent did nothing to address this. She never intimated to Cerebros that she was concerned about the possibility of mental harm; only that she feared she could not complete the work to her satisfaction. She developed a psychiatric illness as a result.

**Issue:** Did Cerebros' failure to reduce Koehler's workload amount to a failure to provide a safe system of work?

**Outcome:** Appeal denied.

**Ratio:** Cerebros owes a duty of care to Koehler as she was working as their employee. However, the scope of that duty of care did not extend to the injury suffered by the plaintiff because the appellant agreed to do the work provided by the respondent and because she showed no outward signs of mental harm. As such, the injury suffered was not foreseeable.

The outcome of the *Tame; Annetts* case, while apparently evidence of a change in thinking in the judiciary providing greater recognition of mental harm, has been critiqued by feminist scholarship. Vines, San Roque & Rumble (2010: 31), in particular, point to the outcome of the *Koehler* case to demonstrate that there is still discrimination against feminised mental harm which occurs in the context of a 'masculinised' employment relationship. Because the harm was inflicted under these circumstances, it was dismissed as being 'her problem' and not actionable.

Further, the reversal of the judicial position by the *Civil Liability Acts* further shows that there is still a belief that mental harm is 'fraudulent or imaginary'.

The *Civil Liability Act* régimes were particularly significant for mental injury. As stated in the Ipp Commission's *Review of the Law of Negligence (2002)*, it was deemed necessary to restrict liability in negligence for mental harm for the following reasons;

1. It is harder to objectively perceive and diagnose mental harm as opposed to physical harm.
2. The number of individuals who could potentially suffer mental harm as a result of a single act of negligence is greater and less easily perceptible than that of physical harm.
3. Given limited resources, it is more important to compensate for physical harm rather than mental harm.

Given these findings, the provisions of the *Civil Liability Acts* attempt to limit potential liability for mental harm in negligence.

### ***Civil Liability Act 2002 (NSW)***

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The approach to be taken in mental harm cases under the CLA is the following;

1. According to s 27, what kind of mental harm did the plaintiff suffer (pure mental harm or consequential mental harm)?
2. Taking into account the circumstances of the case for each category established in s 32, did the defendant owe the plaintiff a duty of care?
3. In cases of pure mental harm, do s 30 or 31 exclude liability?
4. In cases of consequential mental harm, does s 33 limit liability?

### **Section 27:**

'In this part:

"consequential mental harm" means mental harm that is a consequence of a personal injury of any other kind.

"mental harm" means impairment of a person's mental condition...



"pure mental harm" means mental harm other than consequential mental harm.'

## **Section 32:**

'(1) A person ("the defendant") does not owe a duty of care to another person ("the plaintiff") to take care not to cause the plaintiff mental harm unless the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken.'

Ought to have foreseen: The plaintiff need not have foreseen that the plaintiff would suffer harm as long as a reasonable person would have so foreseen.

Person of normal fortitude might: It need be possible that a normal person, not suffering from any particular psychological susceptibility, may suffer harm. It does not matter if the plaintiff was a person of normal fortitude or not if a normal person would still suffer harm. Furthermore, even if a person of normal fortitude would not suffer harm;

'(4) This section does not require the court to disregard what the defendant knew or ought to have known about the fortitude of the plaintiff.'

As such, a susceptible person could be owed a duty of care for mental harm that would not be suffered by a person of normal fortitude if the defendant knew or ought to have known of this susceptibility.

In the circumstances of the case: The approach to the circumstances of the case depends on whether the mental harm suffered was pure or consequential;

'(2) For the purposes of the application of this section in respect of pure mental harm, the circumstances of the case include the following:

(a) whether or not the mental harm was suffered as the result of a sudden shock,

(b) whether the plaintiff witnessed, at the scene, a person being killed, injured or put in peril,

(c) the nature of the relationship between the plaintiff and any person killed, injured or put in peril,

(d) whether or not there was a pre-existing relationship between the plaintiff and the defendant.'

Not all these elements would need be in favour of the defendant, as long as they, considered in their totality, suggested that harm to the plaintiff was reasonably foreseeable.

'(3) For the purposes of the application of this section in respect of consequential mental harm, the circumstances of the case include the personal injury suffered by the plaintiff.'

The severity of the physical injury is thus the only factor for consideration for consequential mental harm.

Might... suffer a recognised psychiatric illness: The illness must be recognised by medical professionals. A duty of care may still be owed if the defendant did not suffer a psychiatric illness if it is possible that they would have suffered one (though this has implications for potential damages, as seen below).

### **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.'

Witnessed, at the scene: See *Wicks v SRA*; *Sheehan v SRA* below for interpretation of this provision.

Close member of the family: According to s 30(5), this provision includes parents (or persons with parental responsibility), children (or persons for whom one has parental responsibility), (step/half) brothers and (step/half) sisters and spouses (official or de facto).

‘(3) Any damages to be awarded to the plaintiff for pure mental harm are to be reduced in the same proportion as any reduction in the damages that may be recovered from the defendant by or through the victim on the basis of the contributory negligence of the victim.’

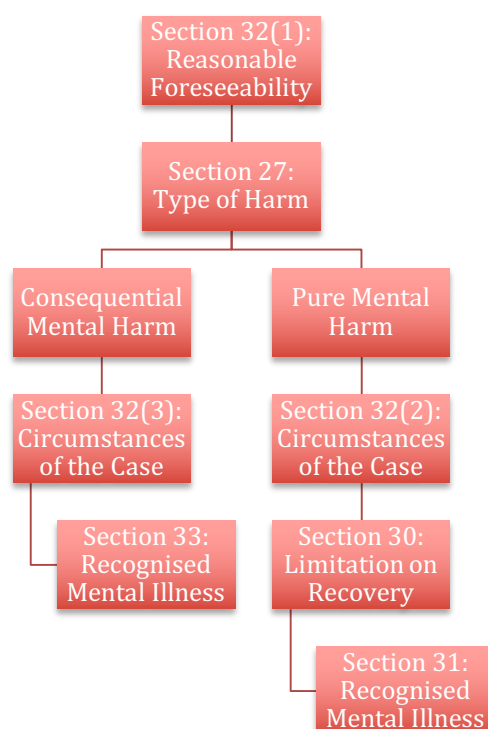
As such, the plaintiff can only claim the same proportion of damages which were claimed by the victim (i.e. if the defendant was 70% liable to the original victim, then the plaintiff can also only claim 70% of damages).

### Section 31:

‘There is no liability to pay damages for pure mental harm resulting from negligence unless the harm consists of a recognised psychiatric illness.’

### Section 33:

‘A court cannot make an award of damages for economic loss for consequential mental harm resulting from negligence unless the harm consists of a recognised psychiatric illness.’



### ***Wicks v State Rail Authority (NSW); Sheehan v State Rail Authority (NSW)***

**Citation:** (2010) 241 CLR 60.

**Coram:** High Court of Australia.

**Facts:** The appellants were police officers ordered to save victims of a train accident caused by the respondents' negligence. In the course of rescuing people, who had suffered severe physical harm, the police officers suffered psychiatric trauma, which developed into a mental illness.

**Issues:** Did the fact that the plaintiffs could not identify any single victim of the accident as the cause of their trauma exclude liability? Did the police officers witness the accident 'at the scene' for the purposes of s 30(2)(a) of the CLA?

**Outcome:** Appeal allowed.

**Ratio:** In cases where there are many victims of an accident, it is unnecessary to link the pure mental harm suffered to just one. Further, the police officers were 'at the scene' of the accident because it did not start and end instantaneously. The appellants probably witnessed individuals being injured as a result of being extricated from the wreckage, and, given the presence of live electrical wires, they certainly witnessed individuals in peril. As such, s 30(2) of the CLA does not exclude liability.

### ***3E – Pure Economic Loss***

Pure economic loss was traditionally considered to be outside the scope of the law of negligence. In *Bryan v Maloney* (1995), Brennan J identified two policy reasons for the courts' unwillingness to consider liability for such harm;

1. **Commercial Competition:** Economic loss is a natural consequence of taking risks in a capitalist system, and such interference with commercial competition may entail negative consequences for economic activity.
2. **Indeterminacy:** The knock-on effects of any single accountancy blunder, for example, have the potential to be so wide and far-reaching as to be indeterminate, and thus, unforeseeable.

However, the development of the tort of negligence beyond the notion of product liability in the 1960's resulted in a reversal of this position. That said, due to the policy considerations above, the courts felt the need to impose a more stringent