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Developments in Nervous Shock Claims

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SESSION SPEAKERS

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The legal framework

Legislative regime: NSW

NSW:

- *Civil Liability Act 2002* (NSW), Part 3 (ss 27-33) relates to "mental harm", including pure mental harm (absent a physical injury) and consequential mental harm (which is a consequence of a physical injury).
- To bring a claim for pure mental harm arising from shock as a secondary victim it requires:
  - a recognised psychiatric illness; plus
  - being a close family member of the victim; **or**
  - having witnessed the incident or its immediate aftermath,

  subject to the foreseeability test in s 32 (person of normal fortitude).

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The legal framework

The elements

To succeed in a nervous shock claim, an individual must typically prove:

- A duty of care existed (e.g. an institution owed a duty to the child in their care, and, by extension, to the close family member (non-delegable and/or vicarious liability). Alternatively, establish a novel duty of care per the salient features test (Sullivan v Moody (2001) 207 CLR 562, 579–80 [50]. Caltex Refineries (Qld) Pty Ltd v Stavar (2009) 75 NSWLR 649, 676 [102]–[104]. Crimmins v Stevedoring Industry Finance Committee (1999) 200 CLR 1; Graham Barclay Oysters Pty Ltd v Ryan (2002) 211 CLR 540; Tame v New South Wales (2002) 211 CLR 31).
- The duty was breached (the wrong was allowed to occur due to direct negligence or another wrongful act).
- The plaintiff (secondary victim) suffered a recognised psychiatric injury (mere distress or grief is not sufficient).
- There is a clear causal link between the breach (i.e. the learning of the abuse or the witnessing of death) and the psychiatric injury suffered.

The legal framework

Separate and distinct causes of action

The success of a nervous shock claim does not depend on the primary victim's claim be successful. The claims are separate and distinct. This is important because assuming you commence a claim for a primary victim by their parent tutor, as well as the parent tutor as a second plaintiff (bringing a nervous shock claim), it cannot be said that there is a conflict between the tutor's role and their position as a named party.

The fact that nervous shock claims are separate and distinct causes of action was confirmed in the recent decision of Keogh J in *Amanda Biggs v Garry Raymond O'Connor* [2021] VSC 826. While the facts of that case relate to a motor vehicle accident, the case provides a good illustration of how the success of a nervous shock claim is not dependent on the primary claim succeeding.

Key case law

Facts – Biggs v O'Connor

- In December 2017, Garry O'Connor, Shaun Biggs (plaintiff's husband), and two others played golf and consumed alcohol at Whittlesea Golf Club. O'Connor rode his Harley Davidson to the course. Despite being encouraged to leave it, he chose to ride home with Biggs as pillion passenger.
- Less than 1 km from the club, the motorcycle crashed into a fence. Both men were seriously injured; Biggs later died in hospital. Ms Biggs suffered psychiatric injury and sued O'Connor for negligence in the motorcycle's operation.
- O'Connor admitted impaired control due to intoxication but argued:
  - Biggs voluntarily assumed the risk (volenti non fit injuria).
  - No duty of care was owed to Biggs or, by extension, to Ms Biggs.
- Ms Biggs contended:
  - O'Connor failed to prove a volenti defence or absence of duty to Biggs.
  - Her psychiatric injury claim was based on an independent duty owed directly to her

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Key case law

High Court in *Scala v Mammolitti* (1965) 114 CLR 153 (***Scala***).

At [162]-[163] of *Scala* Windeyer J said:

*It is, I consider, implicit that the act, neglect, or default that caused death, injury or peril was in some sense wrongful. But that does not mean that, if a member of the family, who has suffered mental or nervous shock, brings an action, the defendant in that action can only be found liable to the plaintiff if he has been found to be liable or is liable in damages to the representatives of the person that he killed, or to the person whom he injured or put in peril. An action brought by the representatives, or by the injured man himself, might fail for a variety of reasons—**such as release, satisfaction, the statute of limitations, contributory negligence**—that would not mean that the conduct complained of was not wrongful.*

Key case law

Jaensch v Coffey 23 (1984) 155 CLR 549

The principle that the duty to avoid psychiatric injury to a secondary victim was independent from, and not to be regarded as secondary to or derived from, the duty owed to the primary victim was restated by Brennan and Deane JJ in *Jaensch v Coffey* 23 (1984) 155 CLR 549 (**Jaensch**) and by Leeming JA in South West Helicopters Pty Ltd v Stephenson (2017) 98 NSWLR 1 (**Stephenson**).

In Jaensch, Deane J considered what limitations should be imposed on the ordinary test of reasonable foreseeability in cases of mere psychiatric injury, and at [604] said:

> *The limitations upon the ordinary test of reasonable foreseeability in cases of mere psychiatric injury are conveniently stated in negative form. Two of them have already been mentioned. The first of those is that reasonable foreseeability of risk of personal injury generally will not suffice to give rise to a duty of care to avoid psychiatric injury un-associated with conventional physical injury: a duty of care will not arise unless risk of injury in that particular form was* ***reasonably foreseeable****. The other is that, on the present state of the law, such a duty of care will not exist unless the* ***reasonably foreseeable psychiatric injury was sustained as a result of the death, injury or peril of someone other than the person whose carelessness is alleged to have caused the injury****; there is no need to consider here whether this limitation should be more widely stated as excluding such a duty of care unless the carelessness was in any event wrongful in the sense that it involved a breach of a duty of care owed to the person who suffered or was at risk of physical injury: cf., e.g., a case where a defence of volenti non fit injuria is available against that person and see, generally, Scala v. Mammolitti ... Both are satisfied in the present case and it is unnecessary to determine whether each or either of them is properly to be seen as part of the requirement of proximity of relationship or as constituting some other and special controlling rule based on policy considerations. As at present advised, I am inclined to see them as necessary criteria of the existence of the requisite proximity of relationship in the sense that, for policy reasons,* ***the relationship will not be adjudged as being "so" close "as" to give rise to a duty of care unless they be satisfied*** *What is of critical importance for the purposes of the present appeal is the identification of the content of any further criteria included in the general line of demarcation which can, in the light of the cases, properly be drawn "between what is and is not a sufficient degree of proximity" in cases of mere psychiatric injury.*

Children as secondary victims

Gifford v Strang Patrick Stevedoring Pty Ltd (**Gifford**) (2003) 214 CLR 269

The case 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.

At [12] 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.*

At [86] 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.

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.

Key case law

Keogh J's conclusion at [79]

For a secondary victim to succeed ***it is necessary that the acts or omissions of the defendant driver in the management and control of the motor vehicle that caused the injury or death of the primary victim were in some sense wrongful****. However, the injury or death of the primary victim is not a legal element of the claim by the secondary victim. It is not necessary to establish that the primary victim has a good cause of action against the driver in order for the secondary victim to succeed.*

In the case of Scala the action by the primary victim failed and the Court concluded the "*failure of the action by the primary victim did not destroy the tortious character of the defendant's conduct in driving the motor vehicle in a manner which was a cause of the accident*".

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Key case law

RWQ (a pseudonym) v Catholic Archdiocese of Melbourne & George Pell [2022] VSC 483

The Facts:

- A father, RWQ, commenced a claim pursuant to the common law and Part XI of the *Wrongs Act* (Vic) that his son, AAA, was sexually abused by George Pell sometime between July and December 1996 which resulted in his son commencing illicit drug use at the age of 14 and used drugs consistently until his death on 8 April 2014 from a heroin overdose. RWQ claimed that as a result of learning about the abuse of his son, and his subsequent death, he suffered nervous shock.
- The plaintiff's key allegations were:
    - that his son (AAA) and a friend (BBB) were abused by Pell sometime between July and December 1996;
    - that as a result of the abuse AAA's behaviour deteriorated. He commenced using illicit drugs at the age of 14 and used drugs consistently until his death;
    - AAA died on 8 April 2014 from a heroin overdose caused by the psychological impact of the abuse;
    - RWQ was informed of the abuse of AAA by a member of the SANO[4] Task Force on 1 July 2015;
    - as a result of learning about the abuse of his son, RWQ suffered nervous shock for which he makes a claim at common law and pursuant to Part XI of the *Wrongs Act 1958*;
    - the applicant owed RWQ a duty to take care not to cause RWQ pure mental harm;
    - the applicant breached the duty to RWQ which was a cause of RWQ's injury;
    - further and in the alternative, the applicant was vicariously liable, or directly liable, for the abuse of AAA and the injury to RWQ.

  The Catholic Church unsuccessfully appealed the judgment to the court of appeal and the High Court.

Non-delegable duty of care

AA v The Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle [2026] HCA 2

Parties:

- Appellant: AA (pseudonym), sexually assaulted as a 13-year-old in 1969 by Fr Ronald Pickin, a parish priest of the Diocese of Maitland-Newcastle.
- Respondent: The Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle.

Bench: Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ.

Result: Appeal allowed 6:1 (Gleeson J dissenting). Primary judge's (Schmidt A-J) judgment in AA's favour restored, albeit with a reduction in damages to comply with the CLA.

Core question: Whether the Diocese owed AA a non-delegable duty of care and whether that duty could be breached by the intentional criminal act of a priest.

Non-delegable duty of care

The Facts & Procedural Journey

Facts:

- Fr Pickin was parish priest and taught scripture at AA's State high school.
- He invited AA and other boys to the presbytery on Friday nights, providing alcohol, cigarettes, and access to a poker machine.
- He sexually assaulted AA multiple times in a private area off his bedroom.

Procedural Journey:

- **Primary Judge (Schmidt A-J):** Diocese vicariously liable and in breach of common law duty of care. Damages: $636,480 (CLA limitations held not to apply to vicarious liability for intentional wrongdoing).
- **Court of Appeal:** Reversed on all grounds. Vicarious liability conceded untenable following *Bird v DP*. Ordinary duty of care overturned. No non-delegable duty per *Lepore*.
- **High Court:** Appeal allowed on non-delegable duty ground. *Lepore* overruled on intentional act point. Damages reduced to $335,960 (CLA limitations applied).

Non-delegable duty of care

Indicia for Non-Delegable Duty of Care (1–3)

1. Undertaken care, supervision or control

- Arises where the duty-holder has undertaken the care, supervision or control of the person, or is so placed as to assume particular responsibility for their safety (*Kondis* at 687).
- Diocese required Fr Pickin to perform parish priest functions including engaging with children for spiritual education. AA came under his care at the presbytery as a result of Fr Pickin purportedly performing priestly functions.

2. Vulnerability of the plaintiff / special dependence

- Children are paradigmatically vulnerable by reason of immaturity, inexperience and impressionability.
- Catholic Church doctrine exhorted the faithful to follow priests as "pastors and fathers," creating "exaggerated dignity and respect" that "could and did become dangerous."

3. Assumption of responsibility / special relationship

- Diocese placed Fr Pickin as parish priest for its own purposes (propagating the Catholic faith).
- Parents entrusted their children's safety to priests in the same way as to school authorities, to the knowledge of the Diocese.
- Diocese alone had practical capacity to supervise and control Fr Pickin's performance of priestly functions.

Non-delegable duty of care

Indicia for Non-Delegable Duty of Care (4–6)

4. The duty-holder has exclusive/practical control

- Diocese had paramount authority over a priest's duties, responsibilities and priorities.
- Parents had no control over appointment of priests or systems to review their suitability.
- Diocese controlled who became a priest, training, and instructions; yet provided minimal written rules and almost no training for how priests should interact with children.

5. Reasonable foreseeability of harm

- Does not require foreseeability of sexual assault specifically; the relevant class is personal injury to a child while under a priest's care.
- Bishop Toohey was aware as early as 1954 of complaints of sexual activity involving children by Fr McAlinden.
- A "not far-fetched or fanciful" risk is sufficient; constructive knowledge of risk (not actual knowledge of a specific perpetrator) establishes foreseeability.

6. School authority analogy — no principled basis for distinction

- Both dioceses and school authorities arrange for others to fulfil purposes, create relationships of trust and authority, and are the only party with capacity to supervise the person to whom children are exposed.
- Refusing to extend the same duty to a diocese would be arbitrary and unprincipled.

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Non-delegable duty of care

The Critical Overruling of *Lepore*

The majority in *Lepore* (2003) had held a non-delegable duty **could not** be breached by an intentional criminal act. The High Court (6:1) overruled this:

- A non-delegable duty is a more stringent form of duty: the duty is to *ensure* reasonable care is taken by a delegate, not merely to take reasonable care oneself.
- An intentional criminal act by a delegate is an obvious example of a failure to exercise reasonable care. There is no logical reason to exclude such acts.
- The *Lepore* reasoning was internally incoherent: it accepted an ordinary duty of care could extend to intentional criminal acts of third parties, yet excluded such acts from the non-delegable duty — a more protective standard.
- Post-*Lepore* developments in vicarious liability (*Prince Alfred College*, *CCIG Investments v Schokman*, *Bird v DP*) confirmed employers can be vicariously liable for intentional criminal acts. Retaining the *Lepore* exclusion was inconsistent with coherent development of the common law.
- A non-delegable duty holder is not an insurer; liability still requires reasonable foreseeability and a causal link between breach and harm.

Non-delegable duty of care

Framing of the Duty

The Court articulated the duty as follows:

"The Diocese owed a duty to a child to ensure that, while the child was under the care, supervision or control of a priest of the Diocese, as a result of the priest purportedly performing a function of a priest of the Diocese, reasonable care was taken to prevent reasonably foreseeable personal injury to the child."

Key qualifications:

- The child must actually be under the care, supervision or control of a priest.
- That must have arisen as a result of the priest purportedly performing a function of a priest of the Diocese (not merely incidentally to the priest's identity).
- The harm must be reasonably foreseeable personal injury.
- Not confined to diocesan premises: extends to a school, car, or child's home if the priest was there in connection with a priestly function.

Non-delegable duty of care

Damages and the *Civil Liability Act 2002* (NSW)

Key statutory provisions:

- **Section 3B(1)(a):** CLA (including Pt 1A damage limitations) does not apply to civil liability for an intentional act done with intent to cause injury or sexual assault by the person — i.e., the direct tortfeasor (Fr Pickin).
- **Section 3C:** Any provision excluding/limiting liability for a tort also operates to exclude/limit the vicarious liability of another for that tort.

The majority held:

- The Diocese's liability was for breach of its own non-delegable duty — a form of **direct liability**, not vicarious liability.
- Section 3B excludes liability of the direct tortfeasor (Fr Pickin), not the Diocese which owes its own duty.
- Section 3C had no application because the Diocese's liability was not vicarious.

Result: CLA Pt 1A limitations applied to Diocese's liability — damages reduced from $636,480 to $335,960.

Counterintuitively, AA would have recovered more under vicarious liability (s 3B excluding CLA via s 3C), but recovered less on non-delegable duty (s 3B inapplicable).

Non-delegable duty of care

Gleeson J's Dissent

Gleeson J (dissenting, would have dismissed the appeal) concluded:

- The Diocese did **not** owe AA a non-delegable duty of care on these facts.
- The Friday night events were not authorised by the Diocese: they were antithetical to the Diocese's purposes (providing alcohol and cigarettes to minors, allowing gambling).
- No evidence the Diocese led AA or his parents to believe the Friday night events were authorised.
- Being a priest was merely the "occasion" rather than the basis for the harm: the requisite nexus between the Diocese's relationship with AA and the harm was absent.
- No basis for an ordinary affirmative duty to prevent Fr Pickin's criminal acts: sexual assault by a priest was not the "very kind of thing" likely to happen as a result of placing a priest in a parish.
- Gleeson J did not need to resolve the *Lepore* overruling given her conclusion on the existence of the duty.

Non-delegable duty of care

Broader Implications & Other Noteworthy Matters

- **Bird v DP aftermath:** Having closed the vicarious liability door in *Bird v DP* (2024), the Court opened and clarified the non-delegable duty pathway.
- **Appellate restraint:** The High Court firmly rejected Leeming JA's substitution of factual findings, noting he was at a material disadvantage compared to the trial judge who observed AA's demeanour.
- **Constructive knowledge:** Bishop Toohey's awareness of complaints re Fr McAlinden (1954) established that Bishops as a class ought to have been aware of the risk. Constructive knowledge of risk suffices for foreseeability.
- **Canon Law and Church governance:** The Court engaged with Canon Law, the Presbyterorum Ordinis, and the doctrine of *in persona Christi* to establish effective control. Priests swearing an oath of obedience to the Bishop at ordination was central.
- **"Occasion" vs "instrument":** Fr Pickin's role was the instrument by which AA came under his control; AA went to the presbytery precisely because Fr Pickin was a priest.
- **Implications for religious organisations:** By analogy with school authority cases, the judgment places dioceses (and likely other religious organisations placing personnel in positions of authority over children) in the same position as school authorities re non-delegable duties.
- **No indemnity addressed:** The Court did not address whether the Diocese could seek contribution or indemnity from Fr Pickin's estate.

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Conflicting duties

Paul v Royal Wolverhampton NHS Trust [2024] UKSC 1

UKSC held (at [138]): A doctor's responsibilities "do not extend to protecting members of the patient's close family from exposure to the traumatic experience of witnessing the death or manifestation of disease or injury in their relative."

- Scope of duty "will vary with the circumstances and will depend, critically, on the purpose for which the service is provided" (at [133]).
- End-of-life care must not be "complicated" by nervous shock liability to families (at [117]).

Convergence with *Sullivan*:

- Same outcome, different route. Both analyses focus on the nature and purpose of the medical relationship and the limits of the duties that flow from it.
- The *Sullivan* approach is **more doctrinally precise**: rather than relying on accident/non-accident (which may not translate cleanly into Australian law), it provides a principled, factually-sensitive test.
- **More flexible:** Can accommodate cases where duties genuinely co-exist (e.g. direct, specific hospital dealings with family as in *McKenna*) while denying recovery in the typical case where no such specific relationship exists.

Paul is persuasive but the *Sullivan* principle is binding HCA authority — and more doctrinally robust for NSW courts.

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Conflicting duties

Sullivan v Moody [2001] HCA 59 — The Key Principle (Paragraph 60)

Facts: Fathers suspected of child sexual abuse claimed doctors/social workers owed them a duty of care. Allegations unfounded; appellants suffered psychiatric harm. HCA (Gleeson CJ, Gaudron, McHugh, Hayne & Callinan JJ) unanimously dismissed both appeals — obligations irreconcilable.

The principle (at [60]):

"People may be subject to a number of duties, at least provided they are not irreconcilable … if a suggested duty of care would give rise to inconsistent obligations, that would ordinarily be a reason for denying that the duty exists."

Key features of [60]:

- Not an absolute rule — existing duty to a third party does not per se preclude a further duty.
- Encompasses both statutory obligations and common law duties.
- Specifically invokes the example of a medical practitioner: may owe a duty to more than one person, but not where those duties are inconsistent.

At [62]: Statutory scheme required children's interests be treated as paramount — duty to protect suspects was irreconcilable. The conflict was not merely theoretical but "acute and operational."

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Conflicting duties

McKenna v Hunter & New England LHD [2013] NSWCA 476

Facts: Patient (Pettigrove) involuntarily detained under MHA 1990 at Taree hospital following psychotic episode. Discharged into friend's (Rose) care for return to VIC. Pettigrove killed Rose during psychotic episode en route. Rose's mother, sister & family member claimed nervous shock damages under CLA ss 30–32.

Majority (Beazley P, Macfarlan JA):

- Hospital owed Rose a duty — (a) direct dealings with Rose (released patient into his specific care); (b) control over the source of risk (discharge decision).
- The **conventional** doctor-patient duty can co-exist with MHA obligations. It was the **extended** duty (detain patient against clinical interests to protect third party) that created irreconcilable conflict.

Dissent (Garling J) — *Sullivan* [60] applied:

- MHA ss 20 & 28 mandated discharge if patient no longer mentally ill — duty to detain for Rose's protection = irreconcilable with that mandatory obligation.
- *Sullivan* [60] is "directly in point and contrary to the postulated duty."
- Duty postulated had "no real limits of principle" and burden would be "intolerable."

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Conflicting duties

Three Categories of Conflict

1. Confidentiality & the Duty to Warn

- A nervous shock duty may require disclosure of the patient's condition to family — directly conflicting with the duty of medical confidentiality.
- Not hypothetical: a terminally ill patient may have legitimate reasons not to inform family (emotional protection, autonomy over sensitive information, personal consequences).

2. Patient Autonomy & Treatment Decisions

- A patient's right to refuse treatment is a cornerstone of medical law. A nervous shock duty could require recommending intervention contrary to the patient's expressed wishes — to reduce the risk of a traumatic death for the family.
- Analogous to Garling J in *McKenna*: patient-centred obligation (statutory or common law) cannot be overridden by a proposed duty to a third party.

3. End-of-Life Care

- Decisions about withdrawing treatment are made in the patient's best interests. Per *Paul* at [117]: "it is undesirable for decisions about end-of-life care to be complicated by the risk" of nervous shock liability to family. This maps directly onto the *Sullivan* irreconcilability principle.

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Conflicting duties

Implications for NSW Courts & Practitioners

1. Threshold question (HCA authority): Courts must ask whether the proposed duty to the secondary victim is irreconcilable with the doctor's duty to the patient. If yes — ordinarily deny the duty. This inquiry is mandated by the common law and accommodated by s 32(2) CLA.

2. Standard medical negligence = conflict: In most cases, the proposed duty will conflict with confidentiality, patient autonomy, and patient-centred end-of-life care. These are **legal** conflicts going directly to duty — not merely policy considerations.

3. Not an absolute bar: Per *McKenna* majority, where hospital has direct, specific dealings with the secondary victim and the duty does not require acting contrary to the patient's interests, recognition of duty may follow. But this will be the exception, not the rule.

4. Stronger than importing *Paul* wholesale: Rooted in binding HCA authority, already applied in NSWCA, sensitive to facts of each case — rather than turning on a categorical accident/non-accident distinction that may be difficult to apply consistently.

5. Defence pleading: (1) No duty on *Sullivan* irreconcilability grounds; (2) s 32 factors negative a duty; (3) in the alternative, any duty is narrowly scoped per *McKenna* majority.

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Conflicting duties

A More Principled Path for NSW

- *Paul* [2024] UKSC 1 provides persuasive authority that medical negligence nervous shock claims face structural limits.
- But the *Sullivan v Moody* [60] irreconcilability principle provides the stronger doctrinal basis in NSW.
- Where a proposed duty to a secondary victim would conflict with the doctor's duty to the patient (confidentiality, autonomy, end-of-life care), the duty could be denied.
- This analysis sits within s 32 CLA and is fact-sensitive — allowing courts to distinguish cases where duties can genuinely co-exist.
- NSW courts should be invited to adopt this framework rather than importing English distinctions wholesale.

Employer liability

Lederer Group Pty Ltd v Hodson [2024] NSWCA 303

Court: NSW Court of Appeal (Ward P, Leeming JA, Basten AJA)

Decision: 18 December 2024 — Appeal and cross-appeal both allowed.

Facts: On 26 October 2020, an elderly man was fatally run over by a truck at the loading dock of Corrimal Shopping Centre. The Centre was owned by Lederer Group (host employer) and staffed by cleaners supplied by Hurex Pty Ltd (employer). Mr Hodson, a Hurex cleaner, ordinarily worked the afternoon shift.

- The morning shift cleaner (Mr Brydon) witnessed the immediate aftermath and became severely distressed.
- Lederer's site manager (Ms Necovski) called Hodson in early, telling him there had been a fatality and that Brydon was unable to continue working.
- When Hodson arrived, the body had already been covered by a white sheet (confirmed by CCTV). He never saw the deceased's injuries. He worked a double shift that day.
- Days later, Hodson inadvertently saw CCTV footage of the accident on a colleague's computer. He subsequently developed PTSD and major depressive disorder.

Employer liability

At First Instance (District Court) & Issues on Appeal

District Court found both defendants liable:

- **Lederer (85%):** Failed to direct Hodson not to attend the scene; s 32 CLA did not negative the duty given Hodson's known "emotional fragility."
- **Hurex (15%):** Failed to direct Hodson not to attend a "significant incident."
- Contributory negligence assessed at 10%; damages of ~$597k (Lederer) and ~$472k (Hurex).

Issues on Appeal:

- **Lederer's appeal:** (1) whether a duty of care was owed; (2) breach; and (3) causation.
- **Hurex's cross-appeal:** Foreseeability of the risk and whether any breach caused Hodson's injury.

Employer liability

Court of Appeal — No Duty of Care (s 32 CLA) & No Breach (Lederer)

1. No duty of care (s 32 CLA):

- Section 32 denies a duty unless the defendant ought to have foreseen that a person of normal fortitude might suffer a recognised psychiatric illness.
- The scene Hodson was exposed to — emergency vehicles, a covered body, a distressed colleague — was not objectively sufficient to trigger psychiatric injury in a person of normal fortitude.
- Court rejected the submission that a covered body is more traumatising than an uncovered one as contrary to common sense.

Section 32(2) factors weighed against duty:

- No sudden shock: Hodson was warned in advance of the fatality.
- Did not witness the deceased being killed or injured (s 32(2)(b)).
- No meaningful relationship with the deceased (s 32(2)(c)).
- Knowledge of "some emotional problems" insufficient to establish psychiatric vulnerability.

2. No breach: Hodson was not positively directed to the scene. Requiring Ms Necovski to give a specific direction not to attend — while managing an emergency — was a "counsel of perfection."

Employer liability

Court of Appeal — Causation Failed (Both Defendants)

All the plaintiff's expert evidence assumed Hodson had seen the deceased's uncovered body and horrific injuries — contorted limbs, crushed skull, brain matter. The CCTV footage made it unarguably clear this **never happened**.

Applying *Ramsay v Watson* and *Kubovic* basis rule:

- The key assumption (seeing the body/injuries) was falsified by objective CCTV evidence.
- The repeated exposure to the scene (another assumed fact) was not established.
- The CCTV viewing days later — a plausible alternative cause — was expressly disavowed as a cause of action.

Leeming JA on memory plasticity: Hodson's escalating accounts to successive doctors (from "witnessed an accident" to graphically describing visible brain matter) were likely the product of unconscious reconstruction, partly from watching the CCTV footage — not deliberate fabrication, but a well-recognised phenomenon of memory malleability under repeated litigation-related recall.

Employer liability

Court of Appeal — Hurex (No Duty / No Breach)

- Hurex had no day-to-day control over the Centre or Hodson's activities, visiting only monthly.
- It was not reasonably foreseeable to Hurex — operating at arm's length — that a shopping centre cleaner would be exposed to a fatal accident.
- The direction it allegedly should have given ("do not attend significant incidents") was impractically vague and could not have been expected of an employer in its position.

Employer liability

Significance for NSW Mental Harm Litigation

- The “normal fortitude” test is objective and prospective — assessed from the defendant’s perspective at the time, not with hindsight from the injury that actually occurred.
- The s 32(2) factors are neither necessary nor sufficient conditions for a duty, but courts must genuinely engage with them (the primary judge’s failure to do so was an error).
- Expert causation evidence is only as strong as its factual assumptions — where the premise is falsified by objective evidence (here, CCTV), even joint expert agreement carries little weight.
- The “sudden shock” requirement remains relevant under s 32(2)(a): pre-warned attendance at an aftermath scene does not easily qualify.
- Host employer liability requires more than a foreseeable risk in the abstract — the specific circumstances confronting the defendant’s agent must objectively threaten psychiatric harm to a person of normal fortitude.

Insurance & safeguarding

Childcare centres

There has been a notable rise in the reporting of childcare abuse claims in the last year or two. Media organisations have reported on how child sex abusers have been working in Australia's $22 billion childcare industry and have "exploited the lax regulation, piecemeal oversight and glaring staffing inadequacies" (ABC Four Corners).

150 childcare workers have been convicted, charged or accused of sexual abuse and inappropriate conduct. Half of the 42 people convicted were sentenced in the past five years alone and another 14 are currently before the courts.

The childcare industry is extremely profitable which is in part due to low wages and low staff ratios. Where half of everyone who is charged with a sexual offence in Australia is charge with a sexual; offence against a child, the foreseeable risk of a child being abused in a childcare setting is extremely high.

To reduce that risk, the various state and commonwealth governments do have in place requirements such as working with children checks. In NSW there is compulsory child protection training, a tripling of penalties in line with nationally agreed changes, more transparency including details of current investigations and extending the limitation period for offences to be prosecuted. That said, working with children checks remain state based, with no ability to do perform national checks.

Insurance & safeguarding

The standard: the precautions childcare centres should be taking

- Robust Recruitment Processes
- Comprehensive Training
- Clear Policies and Procedures
- Creating a Safe Environment
- Engaging Parents and the Community
- Monitoring and Evaluation
- Developing a Comprehensive Client Protection Policy (CPP)

Claims made and Occurrence Policies

Claims Made (and Notified) Policies:

- These cover claims made and notified within the policy period, regardless of when the event causing the claim occurred. This type is common in professional indemnity, directors and officers liability, statutory liability, and management liability insurance.
- The insured must notify the insurer of claims or circumstances that might give rise to claims **during the policy period to maintain coverage**. Failure to notify timely can lead to loss of coverage. Extensions such as extended notification periods or continuity provisions may provide additional time for notification.

Occurrence Policies:

- These cover claims based on when the incident occurred, regardless of when the claim is made or notified, covering events during the policy period even if the claim arises later.
- Claims Made policies typically indemnify the insured against claims first made during the policy period, with exclusions for known circumstances before the policy inception.
- Notification under Claims Made policies requires providing information about the claim promptly, which may include written demands, notices of dispute, or court proceedings. This is crucial for the insurer to evaluate and manage the risk appropriately.
- Before commencing proceedings, it is critical to obtain a copy of any insurance policies and closely consider the wording and whether it is a claims made policy or occurrence policy.
- Also the limits on insurance.

Professional liability: directors and officers' insurance

- If there has been breaches of the relevant standards, consider including a claim against the directors and officers of the company for breach of their directors duties. This may have the effect of increasing the pool of insurance.

GREENWAY CHAMBERS

Questions?

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