1. Mental Harm
2. Stolen Generation
3. Dust Diseases (Causation)
4. Product Liability
5. Vicarious Liability
6. Non Delegable duties
7. Potential short answer questions/ answers
MENTAL HARM

In establishing a duty for psychological harm, considerations need to be made to the Civil Liability Act 1936 (SA) and Salient features (common law).

1. Establish whether the plaintiff is a primary victim or a secondary victim:

   a. Primary: Plaintiffs in two-party cases who either fear for their own safety or who witness the defendant’s death or injuries.
   b. Secondary victim: plaintiffs in three-party cases who either witness or hear about the suffering that the defendant has caused to a primary victim

2. BEWARE OF RELEVANT DATES:

<table>
<thead>
<tr>
<th>Prior to 2002</th>
<th>Need to show all three conditions: normal fortitude, sudden shock, direct perception</th>
</tr>
</thead>
<tbody>
<tr>
<td>2002 – May 1st 2004</td>
<td>Tame and Annetts high court got rid of all the preconditions</td>
</tr>
<tr>
<td>May 1st 2004 - Current</td>
<td>CLA: normal fortitude returns as precondition; sudden shock and direct perception are merely circumstances</td>
</tr>
</tbody>
</table>

- **Reasonable foreseeability**: Donoghue v Stevenson; Chapman v Hearse
- Recognised/recognizable psychiatric injury
  - Rules out claims for ‘mere emotional distress: Mount Isa Mines v Pusey
- **Normal fortitude**: A person not of ‘normal fortitude’ precluded from recovering damages
  - Mount Isa Mines v Pusey
- **Sudden shock**:
  - ‘sudden sensory perception by’:
    - seeing
    - hearing
    - touching
  - ‘a person thing, or event which is so distressing that the perception of the phenomenon affronts or insults the P’s mind and causes a recognizable psychiatric illness’ Jaensch v Coffey
Bearers of bad tidings are eliminated by this definition

- **Direct Perception**
  - Can only recover if illness results from own and direct observation on traumatic event (or)
  - Immediate aftermath (using unaided or unmediated senses)
    - **Hambrook v Stokes Brothers**: Mother realized danger to her children by her own unaided senses when she saw an out of control lorry crash into the street her children were walking down.
    - **Jaensch v Coffey**: Fact that wife only present at aftermath (not witnessed initial accident) did not preclude liability.

### Between 2002 – 1st May 2004

- **Reasonable foreseeability**: ‘Something more than foreseeability of the likelihood of harm of the kind in issue is necessary before D will be held to owe a duty of care to take reasonable steps to avoid risk of that kind: Tame; Annetts
- **Recognised harm**:
  - Tame v NSW; Annetts v Australian Stations; Gifford v Strong
- **Conditions: Normal fortitude, Direct perception, sudden shock**
  - Courts decided that these ‘conditions’ should be considered relevant but not a pre-condition for the imposition of a duty: Tame; Annetts
- **Salient features (closeness and directness)**

<table>
<thead>
<tr>
<th>Pre existing relationship</th>
<th>Annetts: Child sent to ranch, went missing for several months before found dead. Parents had contract with station owners (pre existing relationship)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Control</td>
<td>Annetts: Station owners had control of boy, they sent him with another young jackaroo w/o adequate training or supervision. Car broke down, boys got lost and died of exhaustion/dehydration. Gifford: Worker crushed to death by reversing forklift. Three children suffered illness and were able to claim.</td>
</tr>
<tr>
<td>Conflicting duty on D?</td>
<td>Annetts</td>
</tr>
<tr>
<td>Would imposing a DOC on D owed to primary victim?</td>
<td>Annetts; Gifford</td>
</tr>
<tr>
<td>Vulnerability</td>
<td>Parents not in a position to minimize the risk of harm to their son or protect themselves from PPI. Annetts; Gifford</td>
</tr>
<tr>
<td>---------------</td>
<td>----------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Was the P in a class that the law (in other situations) finds deserving of protection</td>
<td>Gifford;</td>
</tr>
<tr>
<td>What was the time interval between act/omission and the commencement of P’s injury</td>
<td>Annetts; P’s developed injury after hearing about death after months of searching</td>
</tr>
<tr>
<td>Nature of relationship between P and primary victim</td>
<td>Annetts; Gifford: Both parent, child relationships</td>
</tr>
</tbody>
</table>

May 1st 2004 - Current

- *Civil Liability Act 1936 (SA) – Mental Harm – Duty of Care*

s 33(1)- A person (the defendant) does not owe a duty to another person (the plaintiff) to take care not to cause the plaintiff mental harm unless a reasonable person in the defendant’s position would have foreseen that a person of normal fortitude in the plaintiff’s position might, in the circumstances of the case, suffer a psychiatric illness.

**RF Question:**

The following circumstances must be regarded by the court of pure mental harm:

s 33(2)(a)(i)- whether or not the mental harm was suffered as the result of a sudden shock

s 33(2)(a)(ii)- whether the plaintiff witnessed, at the scene, a person being killed, injured or put in peril (Wicks)

s 33(2)(a)(iii)- the nature of the relationship between the plaintiff and any person killed, injured or put in peril

s 33(2)(a)(iv)- whether or not there was a pre-existing relationship between the plaintiff and the defendant

**Consequential mental harm** - mental harm that is a consequence of bodily injury to the person suffering the mental harm

s 33(2)(b)- in a case of consequential mental harm, the circumstances of the case include the nature of the bodily injury out of which the mental harm arose

s 33(3)- this section does not affect the duty of care of a person (the defendant) to another (the plaintiff) if the defendant knows, or ought reasonably to know, that the plaintiff is a person of less than normal fortitude.