SUPREME COURT OF QUEENSLAND

CITATION:	*Caffrey v AAI Limited* [2019] QSC 7
PARTIES:	**DAVID PAUL CAFFREY** (plaintiff) **v** **AAI LIMITED (ABN 48 005 297 807)** (defendant)
FILE NO/S:	BS No 6587/16
DIVISION:	Trial
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	30 January 2019
DELIVERED AT:	Brisbane
HEARING DATE:	9, 10 and 11 October 2018
JUDGE:	Flanagan J
ORDER:	**1. Judgment for the plaintiff against the defendant for $1,092,948.** **2. The parties to be heard as to costs.**
CATCHWORDS:	TORTS – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – PURE PSYCHIATRIC HARM – COMMON LAW – where the plaintiff police officer was deployed to the scene of a fatal motor vehicle accident – where the accident involved a single motor vehicle and the driver was the sole occupant of that vehicle – where the accident was caused by the driver's negligence – where the driver died at the scene in the presence of the plaintiff and the driver's parents – where the plaintiff sustained a psychiatric injury in the form of Post Traumatic Stress Disorder (PTSD) as a result of his experiences at the scene – where, following the accident, the plaintiff was dismissed from his employment with the Queensland Police Service on the basis of medical incapacity – where the defendant to the action is the deceased driver's insurer – whether the deceased driver owed the plaintiff a duty of care – whether policy considerations arising from the plaintiff's status at the time of the accident, as a police officer and holder of statutory office, bar the plaintiff's claim

TORTS – NEGLIGENCE – APPORTIONMENT OF RESPONSIBILITY AND DAMAGES – GENERALLY – where the plaintiff concedes he had, at the time of the accident, a pre-existing vulnerability to psychiatric harm – where the plaintiff, subsequent to that motor vehicle accident and prior to his dismissal from the Queensland Police Service taking formal effect, attended at a second motor vehicle accident while off-duty – where the second accident involved multiple child fatalities – whether, and to what extent, the second accident contributed to or aggravated the plaintiff's PTSD – whether the plaintiff would have developed symptoms of PTSD as a consequence of his exposure to general workplace stressors, irrespective of his attendance at the two accidents – whether any award of damages should be discounted, and by what amount, to account for these contingencies

Civil Liability Act 2003 (Qld), s 5
Motor Accident Insurance Act 1994 (Qld), s 5, s 52
Police Service Administration Act 1990 (Qld), s 2.3, s 2.4

ACQ Pty Ltd v Cook (2008) 72 NSWLR 318; [2008] NSWCA 161; distinguished
Béchard v Haliburton Estate (1991) 5 OR (3d) 512 (CA); (1991) 84 DLR (4th) 668; considered
Bowditch v McEwan & Ors (2001) 35 MVR 168; [2001] QSC 448; considered
Caltex Refineries (Qld) Pty Ltd v Stavar (2009) 75 NSWLR 649; [2009] NSWCA 258; considered
Chadwick v British Railways Board [1967] 1 WLR 912; [1967] 2 All ER 945; considered
FAI General Insurance Co Ltd v Lucre (2000) 50 NSWLR 261; [2000] NSWCA 346; considered
Gifford v Strang Patrick Stevedoring Pty Limited (2003) 214 CLR 269; [2003] HCA 33; applied
Hirst v Nominal Defendant [2005] 2 Qd R 133; [2005] QCA 65; applied
Homsi v Homsi [2016] VSC 354; considered
Jaensch v Coffey (1984) 155 CLR 549; [1984] HCA 52; applied
Jausnik v Nominal Defendant (No 5) (2016) 78 MVR 230; [2016] ACTSC 306; considered
King v Philcox (2015) 255 CLR 304; [2015] HCA 19; applied
Mount Isa Mines Limited v Pusey (1970) 125 CLR 383; [1971] ALR 253; applied
Ogwo v Taylor [1987] 3 WLR 1145; [1988] AC 431; applied
Perham v Connolly (2003) 40 MVR 224; [2003] QSC 467; considered
Phillips v MCG Group Pty Ltd [2013] QCA 83; applied

Tame v New South Wales; Annetts v Australia Stations Pty Ltd (2002) 211 CLR 317; [2002] HCA 35; applied
Wicks v State Rail Authority (NSW) (2010) 241 CLR 60; [2010] HCA 22; applied

COUNSEL: M Grant-Taylor QC, with DJ Murphy for the plaintiff
GW Diehm QC, with DJ Schneidewin for the defendant

SOLICITORS: Sciaccas Lawyers for the plaintiff
Jensen McConaghy Lawyers for the defendant

[1] On 17 February 2013 at about 7.00 pm, a Holden Commodore collided with a tree near the intersection of Beerburrum-Woodford Road and Glasshouse-Woodford Road at Hennessey Hill, Queensland.

[2] The vehicle was being driven by Byron Neil Williams.

[3] The plaintiff, who was a Senior Constable with the Queensland Police Service (QPS), sustained a psychiatric injury, namely Post Traumatic Stress Disorder (PTSD), as a result of his attendance at, and witnessing of, the aftermath of the collision.[1] Mr Williams died at the scene of the collision from his injuries. The plaintiff seeks damages for his psychiatric injury.

[4] At the time of the collision there was subsisting in relation to the vehicle a CTP insurance policy with the defendant, AAI Limited, pursuant to the provisions of the *Motor Accident Insurance Act* 1994 (Qld) ("MAIA"). The plaintiff brings the present action against the defendant pursuant to s 52(2)(b) of the MAIA, which provides that an action may be brought against the insurer alone if the insured person is dead.[2] Ordinarily an action for damages for personal injury arising out of a motor vehicle accident must be brought against the insured person and the insurer as joint defendants.[3]

[5] It is common ground between the parties that:[4]

(a) the plaintiff's psychiatric injury was an injury for which compensation was payable, and was in fact paid, to the plaintiff under the *Workers' Compensation and Rehabilitation Act* 2003 (Qld);

(b) the plaintiff's psychiatric injury was not an injury sustained under the circumstances contemplated by s 34(1)(c) of the *Workers' Compensation and Rehabilitation Act* 2003;

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1 The fact that as a result of his exposure to the aftermath of the collision the plaintiff has suffered a psychiatric injury is not in dispute: see "List of Matters Not in Dispute" filed 25 June 2018.

2 On 8 June 2018, the plaintiff filed a notice of discontinuance in respect of the second defendant, RACQ Insurance Ltd.

3 Section 52(1) of the MAIA.

4 List of Matters Not in Dispute filed 25 June 2018, paragraphs 7-10.

(c) the plaintiff's psychiatric injury was not an injury sustained under the circumstances contemplated by s 35 of the *Workers' Compensation and Rehabilitation Act* 2003;

(d) accordingly, pursuant to s 5(1)(b) of the *Civil Liability Act* 2003 (Qld), that Act does not apply in relation to deciding liability or any award of damages for the plaintiff's psychiatric injury.

Section 5(1)(b) provides that the *Civil Liability Act* 2003 does not apply in relation to deciding liability or awards of damages for personal injury if the harm resulting from the breach of duty is or includes an injury for which compensation is payable under the *Workers' Compensation and Rehabilitation Act* 2003, other than an injury to which s 34(1)(c) or 35 of that Act applies. Consequently, the *Civil Liability Act* 2003, including Chapter 2 ("Civil liability for harm"), has no application in relation to deciding liability or any award of damages in the present case. The proceedings are therefore to be determined in accordance with common law principles.

[6] It is not disputed that the collision was caused by the negligence of Mr Williams, arising from his failure to drive the vehicle at an appropriate speed and to maintain proper control of the vehicle, which was in turn caused by his self-intoxication and use of methamphetamines, amphetamines and marijuana.[5]

[7] The primary issue concerning liability is whether, as a matter of law, Mr Williams owed a duty of care to the plaintiff. The plaintiff identifies the issue as follows:[6]

> "… whether, as a matter of law, a duty of care is owed to a police officer, acting in the course of their duties, by the driver of a motor vehicle in respect of a psychiatric injury suffered by the police officer as a consequence of the driver's negligence."

The defendant denies that Mr Williams owed a duty of care to the plaintiff.[7]

[8] The quantification of the damages sought by the plaintiff arising from his admitted psychiatric injury is also in issue, in particular whether the plaintiff's damages should be discounted because of subsequent events which occurred on 22 August 2014 and the prospect of him developing a psychiatric injury irrespective of the events of 17 February 2013.

The plaintiff

[9] The plaintiff was, in my view, an honest and credible witness. He was a reasonably accurate historian. He did not seek to embellish his evidence in any way. He gave direct and straightforward answers in cross-examination. No submission was made by the defendant that the plaintiff was anything other than a credible witness.

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5 Plaintiff's Outline of Submissions, paragraph 3(e); Defendant's Outline of Submissions, paragraph 5; Amended Statement of Claim, paragraph 10; Further Amended Defence, paragraph 4(a).

6 Plaintiff's Outline of Submissions, paragraph 8.

7 Further Amended Defence, paragraph 8.

[10] He was born on 30 May 1968 in the United Kingdom. He completed his schooling at age 16. After being employed in a number of roles, he joined the Royal Military Police Reservists, where he remained for approximately two years.

[11] In 1992, he married and subsequently had two children. His wife is a registered nurse, specialising in oncology.

[12] In 1995, the plaintiff joined the West Mercia Constabulary where he remained until around 2005, when he migrated with his family to Australia. He did not resign from the West Mercia Constabulary at this time, but rather took a leave of absence, which he described as a "five-year career break".[8]

[13] During his service with the West Mercia Constabulary the plaintiff was exposed to disturbing events, such as road traffic accidents and suicides. Prior to migrating to Australia he did not receive any psychiatric treatment or psychological counselling, nor was he prescribed medication for any psychiatric disorder.

[14] Prior to migrating to Australia in 2005, he applied to the QPS. He undertook an interview with the QPS in 2004. Upon arrival in Queensland, he undertook the Police Abridged Competency Education ("PACE") course. This was a 16 to 17-week course. At the conclusion of this course he was sworn in as a Constable and was posted to the Caloundra police station. He moved his family to Mooloolah.

[15] In May 2006, after being stationed at Caloundra for approximately six months, he was transferred to the Kawana police station. He was unhappy with this transfer and sought to have the decision overturned. He was unsuccessful. The plaintiff clashed with the officer-in-charge at Kawana. The plaintiff had difficulty adjusting to the differences in the style of policing between the United Kingdom and Queensland. The tensions between the plaintiff and the officer-in-charge at Kawana reached a crisis point, resulting in the plaintiff being "managed" by the officer-in-charge. The plaintiff, in consultation with his general practitioner and others, decided that he needed some "time out".[9] The plaintiff was off work from approximately 27 July 2006 to 6 September 2006, when he returned to work on lighter duties. He returned to full-time duties at the Caloundra police station in March 2007. Part of the process of the plaintiff's graduated return to work included being psychiatrically assessed and receiving treatment from a psychologist.

[16] There was an extension of the plaintiff's probationary period as a Constable effective from 23 October 2006. The probationary period ended with the confirmation of the plaintiff's appointment as a Constable on 3 March 2007. He was promoted to Senior Constable on 19 November 2007[10] and was transferred to the Beerwah police station on 30 November 2007 on a permanent basis.

[17] It is convenient at this stage to deal with the reports of the two psychiatrists who examined the plaintiff in 2007. The plaintiff was examined by Professor Harvey

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8 T 1-65, line 18.
9 T 1-18, line 31.
10 Exhibit 3.

Whiteford on 7 February 2007. In his report of the same date Professor Whiteford opines that the plaintiff developed clinically significant anxiety and depressive symptoms in 2006, resulting in his being on leave for about six weeks. Professor Whiteford notes that the plaintiff received psychological counselling and then commenced a graduated return to an alternative police station. At the time he examined the plaintiff, Professor Whiteford considered that the plaintiff did not meet the American Psychiatric Association's Diagnostic and Statistical Manual, 4th ed, (DSM-IV) diagnostic criteria for any mental disorder. He believed that at the time the plaintiff went off work in July 2006 he would have met the DSM-IV diagnostic criteria for adjustment disorder with mixed anxiety and depressed mood. Professor Whiteford referred to the psychological treatment as being successful and resulting in a remission of the plaintiff's adjustment disorder. Professor Whiteford further opined:[11]

> "Mr Caffrey is able to perform the role of a Police Officer, will be able to successfully complete his current graduated return to work program and be able to work on a full-time basis."

[18] The psychologist who treated the plaintiff in 2006/2007 was Suzanne Raine. Ms Raine states that the treatment provided to the plaintiff in 2006/2007 was successful and it was her expectation that she would not need to consult with the plaintiff again in relation to the issues for which she treated him.[12]

[19] The plaintiff was also examined by Dr Prabal Kar on 11 October 2007. In his report Dr Kar opined that the plaintiff had underlying anger issues which were aggravated by his excessive alcohol intake. He did not diagnose the plaintiff as suffering from any adjustment disorder. Dr Kar stated: [13]

> "In my opinion, Mr Caffrey has anger problems which were aggravated by his alcohol consumption. When the alcohol intake is lower, his anger problems are much lower. I believe that, although he attributes his anger to many years of working in the police service and dealing with difficult people, I believe it is actually associated with his personality."

[20] In respect of Dr Kar's report, the plaintiff wrote a memorandum dated 16 November 2007 to the Rehabilitation Department questioning the accuracy of a number of matters in the report, including the reported extent of the plaintiff's alcohol intake.[14] Dr Kar's report was sought by the QPS with a view to assisting in determining where the plaintiff should be posted.[15]

[21] The reports of Professor Whiteford, Dr Kar and Ms Raine support a finding that when the plaintiff returned to duties as a police officer in 2007 he did not have any underlying psychiatric disorder.

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11 Exhibit 8, Agreed Trial Bundle, Tab C, page 164.
12 Exhibit 1.
13 Exhibit 8, Agreed Trial Bundle, Tab C, page 173.
14 Exhibit 8, Agreed Trial Bundle, Tab A, page 137-139.
15 T 1-48, lines 39 to 41.

[22] On 19 February 2008, the plaintiff submitted an application to have his employment with QPS changed from full-time to part-time. This was motivated by his desire to spend more time with his young children.[16] This application was granted on 11 March 2008.

[23] In April 2008, the plaintiff's wife was involved in a serious head-on collision and suffered multiple injuries. In June 2008 the plaintiff applied to work part-time for a further 12 months. This application was accepted. He subsequently filed applications to work part-time in September 2009, June 2010 and May 2011. Each of these applications were accepted.[17]

[24] In March 2012, the plaintiff again applied for part-time employment, however on this occasion it was refused and he was directed to return to full-time employment, which he did on 8 December 2012.[18] The plaintiff's evidence, which I accept, was that at no time between when he was obliged to return to full-time duties and the 17 February 2013 incident did he consider leaving the QPS.[19] His five year leave of absence from the West Mercia Constabulary had well and truly expired. His family were settled and happy living in Australia and he wished to continue his career with the QPS.[20]

[25] As at the date of the incident of 17 February 2013, the plaintiff was a full-time member of the QPS, stationed at Beerwah.[21]

The events of 17 February 2013

[26] On the night of 17 February 2013 the plaintiff was on duty with Senior Constable Collins. The plaintiff was the senior of the two officers. The plaintiff received a call from a member of the public stating that there had been a traffic accident and a male in the vehicle had had his "legs chopped off".[22] The plaintiff ascertained the general location of the accident and requested the member of the public to turn his vehicle lights on.

[27] Upon arrival, the plaintiff observed that Mr Williams' vehicle was wrapped around a tree. The member of the public who was present informed the plaintiff that the driver, Mr Williams, was still alive.

[28] The plaintiff climbed up to the vehicle and observed that Mr Williams' legs were "very squashed". Having completed a first aid course, the plaintiff sought to clear Mr Williams' airway. He placed his hand under Mr Williams' chin and sought to support his head from the back. Mr Williams started to gasp but his eyes were open.[23] At this stage neither the ambulance nor the fire brigade had arrived.

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16 T 1-20, lines 30-37.
17 T 1-21, lines 16-45.
18 Exhibit 8, Agreed Trial Bundle, Tab A, page 113.
19 T 1-71, lines 10-13.
20 T 1-71, lines 17-23.
21 T 1-22, lines 40-46.
22 T 1-24, line 3.
23 T 1-24, line 35.

[29] The plaintiff noticed that Mr Williams started to breathe more and the plaintiff encouraged him with words to the effect, "Come on, mate", "Don't give up".[24] The plaintiff believed that Mr Williams could hear what he was saying. At this time the plaintiff received a phone call from Police Communications enquiring as to which police district the accident had occurred in. The plaintiff made a curt reply saying, "I'm trying to keep someone alive, so is there any chance that you could fuck off and leave me to get on with it".[25] After hanging up from this phone call the plaintiff noticed that he had matter all over his hands as he was not wearing gloves. He believed the matter came from Mr Williams' head.

[30] The plaintiff then obtained some first aid material, put on gloves and returned to the vehicle. He instructed his partner to also put on gloves.

[31] It was at this time that Mr Williams' parents arrived on the scene. They had been driving around the area looking for their son as they were concerned about him.[26] The plaintiff sought to reassure Mr Williams' mother, stating that her son would survive. He also informed Mr Williams that his mother was present so that he should not give up.[27]

[32] After what felt like a lifetime to the plaintiff,[28] the fire brigade service arrived and were about to commence to cut Mr Williams from the vehicle. The plaintiff instructed the fire brigade personnel not to cut anything as from his first aid training he believed that because of Mr Williams' crush injuries, his release from the vehicle could cause a heart attack or shock which was potentially fatal. He instructed the fire brigade personnel to await the paramedics. In the meantime, the plaintiff continued to reassure Mr Williams' parents, after which the paramedics arrived.

[33] In seeking to recall the events of 17 February 2013, the plaintiff became visibly upset and an adjournment was required. His distress in recalling these events was, in my view, genuine. There was no suggestion to the contrary.

[34] Upon the arrival of the paramedics, one of them said to the plaintiff, "Just keep doing what you're doing". Steps were then taken to cut Mr Williams out of the vehicle. The plaintiff engaged with Mr Williams' mother, putting his arm around her saying words to the effect, "Look he's going to be – everybody's here for him. Everybody's working for him, you know? He's going to be all right."[29]

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[24] T 1-24, lines 40-41.

[25] T 1-25, lines 14-15.

[26] Mr Williams had in the days before the accident been arguing with his wife, who, as a result, had been staying with her parents at Woodford. On the night of the accident Mr Williams called his parents in an agitated state and told them he was driving to his in-laws' residence. Mr Williams' parents were so concerned about him as a result of this phone call that they drove to Woodford to try to locate him. When they were unable to find their son they returned to the Glasshouse Mountains and came across the scene of the accident; Exhibit 8, Agreed Trial Bundle, Tab B, page 10.

[27] T 1-25, lines 40 to 43.

[28] T 1-25, line 44.

[29] T 1-26, lines 19-20.

[35] After Mr Williams had been cut from the vehicle he was placed on a stretcher where the paramedics continued to work on him. By this stage a Senior Sergeant had arrived on the scene, as well as a senior paramedic. The plaintiff was informed that Mr Williams was going to die. The plaintiff with the Senior Sergeant and the senior paramedic went over to Mr Williams' parents and informed them of the situation. The plaintiff then took Mr Williams' mother's hand and said words to the effect, "Come on. Let's go – go to say goodbye".[30] The plaintiff then accompanied Mr Williams' parents to say goodbye to their son. Mr Williams died soon after.

[36] The plaintiff reflected on why this particular incident, distinct from all the other experiences he has had as a police officer, affected him as it did. The plaintiff explained as follows: [31]

> "And I was just thinking, whether it was then, now, or since – because I've kids meself – you see them coming into the world; you never imagine burying them, do you? But you'd never imagine seeing that. It's been rattling around my mind, why – all this stuff that I've said – why this hit me so hard. And it struck me last night, because I'd spoken to Dominic: I'd never seen that before. I had never seen that before. I'd never seen anybody die before me eyes. Fifty years old, two decades in the job, and I've never seen that before. Because we clean up. They're either dead or they're dying and there's people taking care of that; we just clean up, and we investigate. That's what we do. That's what coppers do. But – took me about two years to remove my son's face from that – sorry if that's not relevant, but … his face was superimposed on the lad's – on the lad's face. I just kept seeing me son."

[37] Senior Constable Collins returned to the station to do the necessary paperwork and the plaintiff remained at the scene until a tow truck arrived to remove the vehicle. He cleared up at the scene as much as he could and returned to the police station at around 1.30 am.

The aftermath

[38] In the weeks following the incident the plaintiff started to drink a lot.[32] He continued working with his partner, Senior Constable Collins. The plaintiff, however, started to become angry with people and over-reacting to situations. He was visited by a friend who was a mental health nurse, who suggested that the plaintiff should see his general practitioner, Dr Jean-Marc de Maroussem. The plaintiff booked a 15 minute appointment with Dr de Maroussem. This appointment took somewhere in the order of 45 minutes to an hour. According to the plaintiff, as soon as the first question was asked by Dr de Maroussem, "it sort of all fell apart".[33] The doctor certified for the plaintiff to have one month off work. The plaintiff stopped work on 4 March 2013. As time went by the plaintiff became more angry, sadder and contemplated suicide. He went so far as to prepare a rope over the garage roof. He also contemplated going back

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30 T 1-26, line 35.
31 T 1-26, line 36-T 1-27, line 2.
32 T 1-29, lines 16-17.
33 T 1-29, lines 34-35.

to work in order to obtain a firearm. He contemplated shooting certain police officers and then himself.[34]

[39] The plaintiff was referred by Dr de Maroussem to a consultant psychiatrist, Dr Dhushan Illesinghe. Four reports of Dr Illesinghe dated 8 July 2013, 11 September 2013, 27 September 2013 and 12 May 2014 were tendered.[35] Dr Illesinghe in his first report dated 8 July 2013 records that following the incident the plaintiff experienced poor sleep and was excessively emotional. He remained preoccupied with the accident and had frequent images of the events flashing "in his mind's eye". The plaintiff also experienced seeing his son's face on the body of the deceased person.

[40] Dr Illesinghe recorded the following diagnostic formulation:[36]

> "Mr Caffey has been a previously well-adjusted individual without significant psychological problems in his past. With the assessment so far, I have not been able to recognise previous traumatic incidents contributing towards his current presentation. Following the traumatic event of 17 February 2013, he has developed a range of psychological symptoms such as insomnia, anxiety, depression and specific post-traumatic symptoms such as flashbacks and reliving experiences. With this range of symptoms my diagnosis is one of Post-Traumatic Stress Disorder (DSM IV code 309.81)."

[41] Dr Illesinghe recommended hospitalisation for intensive psychological treatment. He did not think it appropriate for the plaintiff to consider returning to his duties.

[42] In his report dated 11 September 2013 Dr Illesinghe offered the following prognosis: [37]

> "Taking into consideration Mr Caffrey's premorbid level of functioning and the level of functioning following the incident of February 2013, my opinion is that he carries a poor prognosis. This is due to the significant level of anxiety that he is continuing to experience in relation to Police work after six months after the incident. Although he expresses a desire to return to his previous work, whether he is able to do this is doubtful."

[43] In his report dated 12 May 2014, Dr Illesinghe advised the QPS that the plaintiff's condition rendered him incapable of performing duties as a frontline police officer. Dr Illesinghe considered it would be detrimental to the plaintiff's mental state to do so and its impact was likely to be permanent.[38]

[44] At the request of the QPS, the plaintiff was interviewed by Dr John Slaughter on 18 November 2013. Dr Slaughter's report, dated 16 December 2013, was tendered.[39] Dr Slaughter considered that the plaintiff's symptoms fulfilled the diagnosis of chronic post-traumatic stress disorder. Dr Slaughter considered the plaintiff was at that time

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34 T 1-30, lines 15-16.
35 Exhibit 8, Agreed Trial Bundle, Tab C, pages 9, 11, 13 and 28.
36 Exhibit 8, Agreed Trial Bundle, Tab C, page 10.
37 Exhibit 8, Agreed Trial Bundle, Tab C, page 12, paragraph 5.
38 Exhibit 8, Agreed Trial Bundle, Tab C, page 28.
39 Exhibit 8, Agreed Trial Bundle, Tab C, page 16.

quite unfit for all police duties. He further considered that the plaintiff should not be in possession of a firearm.

[45] On 30 June 2014 QPS wrote to the plaintiff, calling upon him to retire from the QPS with effect from midnight on 19 September 2014.[40] The basis of this request was Dr Illesinghe's opinion that the plaintiff's incapacity rendered him permanently unfit and incapable of performing duties as a frontline police officer. The plaintiff did not accept the direction to retire. On 29 July 2014, the QPS wrote to the plaintiff dismissing him from his employment with the QPS on the basis of his medical incapacity with effect from midnight on 19 September 2014.[41]

[46] Prior to his dismissal taking effect on 19 September 2014, the plaintiff was involved, as an off duty police officer, in the aftermath of another motor vehicle accident on 22 August 2014.

The events of 22 August 2014

[47] On 22 August 2014 the plaintiff was driving home in the evening with his daughter, having visited his wife in hospital. When he turned onto Stevens Road at Glenview he noticed a car parked on the side of the road with a man waving him down. The man informed the plaintiff that he had found a child walking up from the Mooloolah Connection Road. The child was approximately 10 years of age and had informed the man that his mother had crashed the car. The man informed the plaintiff that he had already called triple zero.

[48] The plaintiff instructed the man to stay where he was with the child. The plaintiff asked if it was known whether there were other children in the car and was informed that the child's brothers and sisters were also in the car driven by their mother.

[49] The plaintiff drove to the site of the accident with his daughter still in the car. He instructed his daughter that whatever happened she was to stay in or with the car. He parked his car and put his headlights on high beam. He then made his way into the bush, utilising his iPhone torch. Approximately 30 to 40 metres into the bush he observed pieces of a motor vehicle and what was left of a windscreen. He found a female child who was already deceased. Another vehicle arrived on the scene. A young female emerged, telling the plaintiff that she was a nurse. He informed her that he was a police officer. He instructed the nurse to follow his lead. The young female then informed him, "I'm not a nurse; I'm [sic] a aged care".[42]

[50] The plaintiff then located another victim, who was a female child of approximately six years of age. The back of the child's head was smashed in. The plaintiff flicked the child's head back and the child then took a big gasp of air. The plaintiff then instructed the young female to put her hand behind the child's head and just keep talking to the child. The plaintiff then went back to his car to obtain a blanket.

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[40] Exhibit 8, Agreed Trial Bundle, Tab A, page 118.
[41] Exhibit 8, Agreed Trial Bundle, Tab A, page 115.
[42] T 1-34, line 3.

[51] The plaintiff, while returning with the blanket, tripped over a male child who was already deceased. The plaintiff returned with the blanket. At this time he noticed that police officers were arriving, as well as paramedics. The plaintiff pointed out to one of the police officers the position of the deceased male child and instructed him to cover the child with a blanket.

[52] The plaintiff then left the scene and returned home. He was unable to sleep for the following four days.[43]

[53] As observed in [33] above, the plaintiff in recalling the events of 17 February 2013 became very distressed. This is to be contrasted with how he gave his evidence in recalling the events of 22 August 2014. He did not become upset while recalling these events and demonstrated a degree of detachment. The plaintiff gave the following explanation as to why he subjectively considers the first incident the worst of the two experiences:

> "Mr Caffrey, in your mind, which was the worst of the two experiences, February 2013 or August 2014?--- I wouldn't want to be disrespectful to the dead, and I know there's a mum out there who doesn't have a son any more. I – I sort of – in dealing with carn – the carnage is – it's not hard to deal with the carnage. It's just – it's their bodies. And that might sound quite mercenary. You don't get attached as a copper emotionally. That's a really bad thing to do. You try to just be pragmatic. You're there to investigate. That's your job. That's what they always used to say. You're there to investigate. If you've got to deal with a body, well, you just deal with it. If you've got to deal with blood and guts, that's just the – that's just the nature of the job. Never bothered me. Never bothered me. You see, that one – I – I don't want – I don't want to put these on tiers of brutality because a mum and three dead kids is carnage. It was just carnage, you know. And I'd seen it a hundred times before but that first one was carnage. It wasn't as much carnage because there was less dead bodies but it sort of just tapped into me with his mum and I found out he got three kids. He hadn't long been married. It's just horror stories."[44]

[54] The effect of this evidence, in terms of the attribution of the plaintiff's psychiatric injury to the two incidents and his risk of developing the same or a similar injury in any event, is considered below in the context of the psychiatric evidence.

Duty of care

[55] The question of whether Mr Williams owed a duty of care to the plaintiff is to be determined in accordance with common law principles.

[56] The plaintiff pleads that Mr Williams, as the driver of the vehicle, owed the following duty:[45]

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[43] T 1-35, line 1.
[44] T 1-35, lines 26-40.
[45] Amended Statement of Claim, paragraph 13A.

> "To take reasonable care not [to] cause psychiatric injury to, inter alia, any persons who, acting in the course of the performance of their duties as a police officer, may be required to respond to an accident caused by his driving and who, in the course of their attendance and the performance of their duties as a police officer, may see, hear or be required to undertake tasks causing them to witness the suffering and/or death of persons at the scene of the car accident, including the suffering and/or death of [Mr Williams] himself."

[57] The plaintiff further pleads that:[46]

> "As at 17 February 2013 it was reasonably foreseeable that any person, acting in the course of their performance of their duty as a police officer, who attended on the scene of the car accident caused as a result of the negligence of [Mr Williams] … would suffer a psychiatric injury as a result of seeing, hearing and/or undertaking tasks which caused them to witness the suffering and death of others."

[58] The defendant denies the existence of any such duty of care on the following pleaded basis:[47]

(a) the risk of the plaintiff suffering a recognisable psychiatric injury or any psychiatric harm in consequence of his presence and actions at the collision was not reasonably foreseeable by Mr Williams;

(b) alternatively, any foreseeable risk of the plaintiff suffering a recognisable psychiatric injury or any psychiatric harm was slight and was not such as warranted Mr Williams taking or avoiding action in respect of it;

(c) Mr Williams did not owe the plaintiff a duty of care requiring him to take action to avoid any risk of psychiatric harm to the plaintiff; and

(d) as a matter of policy or principle, by reason of the plaintiff's status as a member of the QPS (a statutory office), and thereby attending the scene of the collision to exercise the powers and responsibilities conferred upon him by the *Police Service Administration Act* 1990 and the *Police Powers and Responsibilities Act* 2000 Mr Williams did not owe a duty of care to the plaintiff.

[59] The plaintiff accepts that his cause of action derives from the common law and is not a statutory cause of action.[48] The plaintiff submits however, that the statutory scheme established by the MAIA remains relevant to discerning whether or not a duty of care exists in this case.[49]

[60] The preamble to the MAIA states that it is an Act to provide for a compulsory third-party insurance scheme covering liability for personal injury arising out of motor vehicle accidents, and for other purposes. The objects of the MAIA include encouraging the speedy resolution of personal injury claims resulting from motor

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46 Amended Statement of Claim, paragraph 13B.
47 Further Amended Defence, paragraph 8.
48 T 3-35, lines 27 to 28.
49 T 3-35, lines 30 to 31.

vehicle accidents and promoting and encouraging, as far as practicable, the rehabilitation of claimants who sustain personal injury because of motor vehicle accidents.[50] The MAIA does not seek to restrict the class or category of persons who may claim under the statutory scheme. Section 5(1)(a) and (b) provides that the MAIA applies to:

> "… personal injury caused by, through or in connection with a motor vehicle if, and only if, the injury—
>
> (a) is a result of—
>
> (i) the driving of the motor vehicle; or
>
> (ii) a collision, or action taken to avoid a collision, with the motor vehicle; or
>
> (iii) the motor vehicle running out of control; or
>
> (iv) a defect in the motor vehicle causing loss of control of the vehicle while it is being driven; and
>
> (b) is caused, wholly or partly, by a wrongful act or omission in respect of the motor vehicle by a person other than the injured person."

[61] It may be accepted that the plaintiff has a prima facie entitlement to recourse under the statutory scheme as both limbs of s 5(1)(a) and (b) would be satisfied. The plaintiff submits that where he has a prima facie right to claim under the statutory scheme, "it would be an extremely serious step to deny him that recourse with a conclusion that a duty of care was not owed."[51] The defendant submits however, that any prima facie entitlement the plaintiff has to claim under the statutory scheme is of only marginal relevance to the determination of whether a duty of care is owed. As observed by White J (as her Honour then was) in *Bowditch v McEwan*:[52]

> "… Whilst generally the existence or not of insurance is not an appropriate basis for the determination of tort liability, particularly in the case of loss protection insurance, … nonetheless where policy issues do dictate the outcome, the availability of a fund and a comprehensive scheme imposed on all drivers by the legislature will be a proper factor to take into account, *Kars v Kars* (1996) 187 CLR 354 at 382.
>
> This is particularly so where the existence of liability insurance is exposed in the pleadings as, for example, s 52 of the *Motor Accident Insurance Act* 1994 (Qld), where the insurer is required to be joined as a defendant or, in certain circumstances, be the sole defendant. But the presence of such a scheme ought not dictate the answer to the question whether a duty of care should be imposed, particularly as it may not be truly comprehensive. To take the Queensland Act as an example, it imposes a scheme of compulsory insurance for the wrongful infliction of personal injury caused by, through or in connection with a motor vehicle but will not apply to injuries caused

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50 MAIA s 3(e) and (f).
51 T 3-36, lines 12 to 14.
52 [2001] QSC 448 at [31] to [33].

> by an uninsured motor vehicle unless the event happens on a public road or place.
>
> But, the existence of a reasonably comprehensive compulsory legislative scheme is a clear social policy decision by the legislature that those injured by careless driving should be compensated and if the dispute does not settle after a claim is made on the compulsory third party insurer it may, in accordance with the provisions of the *Motor Accident Insurance Act* 1994 (Qld), proceed to be litigated in the courts. No class of persons is expressly excluded from the ambit of the Act, see s 5. There is nothing to imply that a child in the position of the plaintiff is to be excluded. Accordingly, if policy reasons are to be the basis for a refusal to impose a duty of care, then in Queensland is a clearly discernable policy which does not depend for its content on what any particular court might judge to be fair, just or reasonable."

[62] In *Bowditch,* White J was required to determine if a mother owed a duty of care to her foetus still in utero in the context of motor accident negligence. In the present case the defendant, by its pleading, has specifically raised matters of policy and principle dictating against the existence of a duty of care. In such circumstances, the existence of the statutory scheme under the MAIA is only one of a number of factors, including policy issues, relevant to determining whether a duty of care is owed.

[63] There is one further observation to be made in relation to the statutory scheme under the MAIA. For similar schemes in other Australian jurisdictions, provisions have been enacted to limit the right of recovery for pure psychiatric injury and, in some cases, to specifically introduce tests of normal fortitude and sudden shock.[53] The MAIA does not contain similar provisions. The mere fact that other Australian jurisdictions have enacted provisions to limit the rights of persons and rescuers to recover damages for pure psychiatric injuries does not determine the existence of the pleaded duty of care at common law. Such provisions do not reflect acknowledgment by those legislatures that such a cause of action was previously maintainable. As observed by J Forrest J in *Homsi v Homsi*:[54]

> "… I do not see how the existence of a legislative provision which might imply the existence of a duty as postulated by Iman can assist in determining whether the duty truly arises at common law. There may be many reasons why the legislature decided to insert such a provision – not the least being an abundance of caution as to where the common law might progress over time. Ultimately, the question must be whether, having regard to the principles set out by the High Court and intermediate appellate courts, the Court is satisfied that such a duty exists."

[64] I respectfully agree with his Honour's observation.

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[53] Plaintiff's Outline of Submissions, paragraph 11; *Civil Liability Act* 2002 (NSW) Part 3; *Civil Liability Act* 1936 (SA) ss 33 and 53; *Civil Liability Act* 2002 (WA) s 5S; *Civil Liability Act* 2002 (Tas) s 34; *Road Transport (Third Party Insurance) Act* 2008 (ACT) s 6; *Motor Accident (Compensation) Act* (NT) s 5.

[54] [2016] VSC 354 at [66].

[65] The principles to be applied in determining whether or not the plaintiff was owed the pleaded duty are a product of the law having, to adopt Windeyer J's oft-quoted metaphor, "limped on with cautious steps" over the course of the last century.[55] The "old and irrational limitations" imposed at common law on actions for pure psychiatric harm have "one by one" fallen away.[56] The courts of this country have progressed, by incremental development, well beyond the once strict rule that psychiatric harm is actionable only when suffered in combination with physical injury to the plaintiff, or the plaintiff being placed in reasonable fear of physical injury.[57]

[66] Decisions granting exceptions to that rule in favour of various plaintiffs have allowed the law to arrive at its current state. Today, the satisfaction of multiple control mechanisms limiting liability for the infliction of pure psychiatric harm – among them requirements that a close relationship exist between the plaintiff and the victim of the accident in question, that the trigger for the plaintiff's psychiatric condition be a 'sudden shock', that the plaintiff has directly witnessed the accident, and that the plaintiff be a person of 'normal fortitude' – is no longer requisite to the existence of a duty of care. These requirements have been reduced in status; they are simply factors relevant to the primary question of reasonable foreseeability of psychiatric injury.[58]

[67] In *King v Philcox*,[59] the High Court considered the degree to which South Australian legislation[60] governing actions for pure mental harm enacts the common law. Justice Nettle observed that s 33 of the relevant legislation:[61]

> "… reflects and in part responds to the state of the law which had developed by the time of its enactment: that the notions of 'normal fortitude', 'shocking event' and 'directness of connection' were no longer conditions of liability but rather considerations relevant to the centrally determinative issue of foreseeability."

[68] The majority made similar comments.[62]

[69] The defendant however submits, and I accept, that this Court's consideration of whether a duty of care is owed in the present case must extend "beyond a question as to whether or not there was a foreseeable risk of injury".[63] As Nettle J further stated in *Philcox*:[64]

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55 *Jaensch v Coffey* (1984) 155 CLR 549 at 552 per Gibbs CJ, citing *Mount Isa Mines Limited v Pusey* (1970) 125 CLR 383 at 392 per Windeyer J; see also *Jaensch v Coffey* (1984) 155 CLR 549 at 592 per Deane J, *Homsi v Homsi* [2016] VSC 354 at [51] and *Perham v Connolly* [2003] QSC 467 at [54].

56 *Jaensch v Coffey* (1984) 155 CLR 549 at 552 per Gibbs CJ.

57 *Homsi v Homsi* [2016] VSC 354 at [28] and [32]; *Bourhill v Young* [1943] AC 42; *Victorian Railways Commissioner v Coultas* (1888) 13 App Cas 222.

58 Plaintiff's Outline of Submissions, paragraph 10, citing *Tame v New South Wales; Annetts v Australia Stations Pty Ltd* (2002) 211 CLR 317.

59 (2015) 255 CLR 304.

60 *Civil Liability Act* 1936 (SA) ss 33 and 53.

61 (2015) 255 CLR 304 at 335, [76].

62 (2015) 255 CLR 304 at 322, [29] and 314, [13].

63 Defendant's Outline of Submissions, paragraph 17, quoting *Tame* (2002) 211 CLR 317 at 330, [9] per Gleeson CJ, and citing *Sullivan v Moody* (2001) 207 CLR 562 and *Tame* (2002) 211 CLR 317 at 339, [46] per
Gaudron J.

64 (2015) 255 CLR 304 at 336, [79].

> "Foreseeability alone, however, is not enough. Section 33(1) does not displace the common law imperative that 'reasonable foreseeability' be understood and applied bearing in mind that it is bound up with the question of whether it is reasonable to require a person to have in contemplation the risk of injury that has eventuated. As Gleeson CJ observed in *Tame v New South Wales*:
>
> > 'What a person is capable of foreseeing, what it is reasonable to require a person to have in contemplation, and what kinds of relationship attract a legal obligation to act with reasonable care for the interests of another, are related aspects of the one problem. The concept of reasonable foreseeability of harm, and the nature of the relationship between the parties, are both relevant as criteria of responsibility.'"

[70] Justice J Forrest similarly noted in *Homsi* that "the test of reasonable foreseeability alone is insufficient to found a duty of care in psychiatric injury cases." His Honour required "something additional which the law recognises as being relevant to the imposition of a duty and which is not compromised by policy considerations."[65]

[71] In terms of the reasoning process by which the above principles should be applied to the case at hand, both parties[66] submit that this Court should again turn to Nettle J's reasons in *Philcox* for guidance:[67]

> "This Court has not before had to determine whether a duty of care is owed in the circumstances presented by this case. *Wicks* made passing reference to the issue of duty of care owed to those present at the aftermath of an accident but did not deal with it in detail. *Jaensch v Coffey*, *Tame* and *Gifford v Strang Patrick Stevedoring Pty Ltd* all provide relevant guidance, but the issue cannot be properly decided by reference only to the nature of the relationship between the victim of an accident and the claimant, or the victim and the defendant. As Deane J concluded in *Jaensch*, the question of whether a duty of care is owed in particular circumstances falls to be resolved by a process of legal reasoning, by induction and deduction by reference to the decided cases and, ultimately, by value judgments of matters of policy and degree. Although the concept of 'proximity' that Deane J held to be the touchstone of the existence of a duty of care is no longer considered determinative, it nonetheless 'gives focus to the inquiry'. It does so by directing attention towards the features of the relationships between the parties and the factual circumstances of the case, and prompting a 'judicial evaluation of the factors which tend for or against a conclusion' that it is reasonable (in the sense spoken of by Gleeson CJ in *Tame*) for a duty of care to arise. That these considerations may be tempered or assisted by policy considerations and value judgments is not, however, an invitation to engage in 'discretionary decision-making in individual cases'. Rather, it reflects the reality that, although '[r]easonableness is judged in the light of

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65 [2016] VSC 354 at [29].

66 Plaintiff's Outline of Submissions, paragraph 9; Defendant's Outline of Submissions, paragraph 28; T 3-4, lines 27-28; T3-6, lines 41-43.

67 (2015) 255 CLR 304 at 336-337, [80].

> current community standards', and the 'totality of the relationship[s] between the parties' must be evaluated, it is neither possible nor desirable to state an 'ultimate and permanent value' according to which the question of when a duty arises in a particular category of case may be comprehensively answered."

Foreseeability

[72] Justice Nettle first addressed, in general terms, the "threshold inquiry" of foreseeability.[68] In relation to this inquiry, both parties referred to *Wicks v State Rail Authority (NSW)*.[69] That decision concerned the liability of State Rail for psychiatric injuries suffered by two police officers who attended at the scene of a train derailment caused by State Rail's negligence. Though liability for psychiatric harm in New South Wales is regulated by statute, the joint judgment's comments on foreseeability, with the exception of their Honours' statute-based reference to 'normal fortitude', are applicable at common law:[70]

> "Although the Court of Appeal expressly declined to decide whether State Rail owed a duty to take reasonable care not to cause mental harm to Mr Wicks and Mr Sheehan, who each came to the scene of this accident as a 'rescuer' (the expression used by the parties in their agreed statement of issues), it would be open to this Court to decide that issue. Contrary to the submissions of State Rail, the question of duty of care is a question of law. To resolve this question would require consideration of whether it was reasonably foreseeable that a rescuer attending a train accident of the kind that might result from State Rail's negligence (in which there might be many serious casualties and much destruction of property) might suffer recognisable psychiatric injury as a result of his experiences at the scene. Or to put the same question another way, was it reasonably foreseeable that sights of the kind a rescuer might see, sounds of the kind a rescuer might hear, tasks of the kind a rescuer might have to undertake to try to ease the suffering of others and take them to safety, would be, in combination, such as might cause a person of normal fortitude to develop a recognised psychiatric illness? The question of foreseeability is to be posed in these terms because it must be judged before the accident happened."

[73] The relevant enquiry as to foreseeability, then, is whether a reasonable person in Mr Williams' position would have foreseen that a person in the position of the plaintiff, a serving police officer attending a motor vehicle accident of the kind that might result from Mr Williams' negligence, might suffer recognisable psychiatric injury as a result of his experiences at the scene. As Nettle J noted in *Philcox,* "[t]he reference to a person in the 'position' of the plaintiff is to the class of persons of which the plaintiff is a member, not necessarily the particular plaintiff."[71]

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68 (2015) 255 CLR 304 at 337, [82]-[85].

69 *Wicks v State Rail Authority (NSW)* (2010) 241 CLR 60; Plaintiff's Outline of Submissions, paragraph 12; Defendant's Outline of Submissions, paragraph 26.

70 (2010) 241 CLR 60 at 73, [33].

71 (2015) 255 CLR 304 at 337, [82], citing *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 487 per Brennan J.

[74] As a preliminary observation, and "[a]pproaching the matter in the first place as one of common sense and ordinary human experience", [72] it is reasonably foreseeable that, upon discovery of a motor accident such as the one involving Mr Williams, triple zero will be dialled, and emergency services personnel, including police officers like the plaintiff, will be summoned to the scene. So much was acknowledged by Brennan J in *Jaensch v Coffey,* where his Honour observed as follows: [73]

> "Rescuers have recovered when they come to the scene of an accident to render assistance to the injured, for it was foreseeable that they would come to the scene and their arrival there was treated as being a result of the defendant's careless conduct … The law treats a rescuer's response to the victim's injury as the natural and probable consequence of the conduct which causes the injury: 'The cry of distress is the summons to relief.'"

[75] Further, that it may be uncommon for a police officer like the plaintiff to arrive at an accident scene as a first responder, before any other emergency services personnel such as paramedics, does not prevent a duty being owed to the plaintiff. Arriving at an accident scene in a "statistically unlikely manner" is no impediment to a successful claim if it is reasonably foreseeable that the plaintiff may in any case be called to the scene and suffer harm there.[74]

[76] In addition, the presence of Mr Williams' parents at the scene was something occurring in the ordinary course of events. This is because, from Mr Williams' perspective, it would not be unexpected for his parents and relatives to be present at the scene of a serious accident caused by his negligence. Accordingly, to the extent that the presence of Mr Williams' parents contributed to the trauma experienced by the plaintiff, this should not be viewed as outside the contemplation of someone in Mr Williams' position.

[77] Turning then to the central inquiry: whether it is reasonably foreseeable that, after his arrival at the scene, a serving police officer in the plaintiff's position might suffer psychiatric injury. This requires attention to those considerations to which the joint judgment referred in *Wicks:* would sights of the kind a police officer might see, sounds of the kind a police officer might hear, tasks of the kind a police officer might have to undertake be, in combination, such as might cause a police officer to develop a recognised psychiatric illness?

[78] The plaintiff sought to draw an analogy between the facts of the present case and those of *Jausnik v Nominal Defendant (No 5),* a recent decision of the Supreme Court of the Australian Capital Territory.[75] The plaintiff, Mr Jausnik, was a police officer, and was involved in a high-speed police pursuit of the defendant driver, coincidentally also named Mr Williams, which began in New South Wales and eventually entered the ACT. In the course of that pursuit, Mr Williams negligently collided with a third vehicle, fatally injuring himself, severely injuring his passenger, and killing on impact all three

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72 *King v Philcox* (2015) 255 CLR 304 at 337, [82] per Nettle J.

73 (1984) 155 CLR 549 at 569 per Brennan J, quoting *Wagner v. International Ry. Co* (1921) 232 NY 176 at 180 per Cardozo J.

74 *King v Philcox* (2015) 255 CLR 304 at 338, [85] per Nettle J.

75 [2016] ACTSC 306; Plaintiff's Outline of Submissions, paragraph 18; T 3-38, lines 1-40.

occupants of the vehicle with which he collided, including an infant. Mr Jausnik, along with his fellow police officer, Mr Hannaford, who had been driving the police vehicle, immediately attended at the scene. Mr Jausnik as a result suffered psychiatric injury, and brought proceedings against the Nominal Defendant in place of Mr Williams. The Nominal Defendant in turn joined Mr Hannaford, together with the State of New South Wales as employer of the police officers.

[79] Though claims for pure psychiatric harm in the ACT are also governed by statute,[76] Mossop AsJ's findings in respect of Mr Williams' duty of care to Mr Jausnik are nonetheless of assistance:[77]

> "… what must be shown is that Mr Williams should have foreseen that Mr Jausnik might suffer a recognised psychiatric illness as a result of Mr Jausnik being required to attend to persons suffering injuries caused by Mr Williams' negligent driving. Put as a general proposition the question becomes: should a negligent driver have foreseen that a police officer of normal fortitude, attending the scene of an accident caused by the driver involving the death and injury caused in the present case, might suffer mental harm? When so expressed the answer is clearly 'yes'. It is reasonably foreseeable that a police officer may suffer mental harm when attending the scene of an accident such as occurred here. The threshold imposed by s 34 is passed."

[80] Similarly, the death and injury involved in the scene at which the plaintiff attended were described by him as "horrific". In oral submissions, counsel for the plaintiff stated that while photographs of the accident had been tendered, he "did not necessarily invite" the Court to view them: "they show ghastly sights and sights that could scarcely fail to cause even the strongest of will to experience disquiet."[78] I accept that description; it went unchallenged by the defendant.

[81] While the death and injury in *Jausnik* was necessarily greater than in the present case, due to there being one fatality here and four in *Jausnik,* this does not, in my view, render the plaintiff's mental harm less foreseeable than Mr Jausnik's. The cases cannot be separated simply by cold calculation of death toll. Mr Williams being the sole victim in fact lent a degree of intimacy to the plaintiff's involvement. Mr Williams suffered fatal injuries, and the plaintiff, essentially single-handedly for a time, sought to maximise Mr Williams' chances of survival by moving Mr Williams' head to clear his airway and trying to encourage him to stay alive. He was frustrated by what he perceived as Police Communications' interruption of his focused efforts. His bare hands at one point were covered in matter from Mr Williams' head. He saw Mr Williams' "very squashed" legs. He sought to prevent further injury to Mr Williams by directing firefighters not to cut Mr Williams out of the vehicle. The plaintiff's experience was made all the more traumatic by the presence of the dying man's parents at the scene; their presence, as I have previously observed, was not unexpected.[79] After having, quite naturally, sought to reassure Mr Williams' mother that her son would live,

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[76] *Civil Law (Wrongs) Act* 2002 (ACT) ss 34-36.
[77] [2016] ACTSC 306 at [112].
[78] T 3-36, lines 37-41.
[79] See [76] of these Reasons.

the plaintiff stood alongside her as she watched her son die. To adopt the words of Mason P in *FAI General Insurance Co Ltd v Lucre,* a decision to which I will return and which also involved only one fatality, "[o]ne does not need to be a psychiatrist to understand the reality of the respondent's reaction."[80] It was reasonably foreseeable.

[82] The defendant submits that "there is no authority that establishes that a police officer summoned to attend at the scene of an accident which has already occurred was owed a duty of care by the putative tortfeasor to take reasonable care to avoid psychiatric injury on the part of the police officer."[81] The question of whether a duty of care is owed in the present case is accordingly, in the defendant's submission, "a novel one".[82]

[83] The defendant further submits that the present case is distinguishable from *Jausnik* primarily due to three factors:

1. the plaintiff witnessed only the aftermath of the motor vehicle accident – he did not directly perceive it as it occurred;

2. Mr Williams is both the defendant and the sole victim of the accident; and

3. the plaintiff was not personally involved in the events leading up to the accident – he was not, for example, involved in a police pursuit of Mr Williams – in the sense that he might blame himself for it having occurred in the first place.

[84] Also of relevance, according to the defendant, is the plaintiff's lack of any pre-existing relationship with Mr Williams, and questions of policy set out at [58(d)] above.

[85] None of these factors, in my view, dictate against a finding that the pleaded duty was owed.

Direct Perception

[86] This factor may be dealt with briefly.

[87] I observe first that, contrary to the defendant's submission, the plaintiff police officer in *Jausnik* did not technically witness the relevant motor accident as it occurred. Mr Jausnik was certainly present at the time of the accident, sitting in the passenger seat of the police vehicle, but as Mossop AsJ noted, "when [the police vehicle] was approaching the intersection Mr Jausnik was concentrating on the radio and only looked up in response to Mr Hannaford's exclamation". As a result, Mr Jausnik saw the immediate aftermath of the collision, "what he described as 'dust and debris' and [he] thought he could see a 'car spinning'."[83] The difference between what Mr Jausnik and the plaintiff witnessed of their respective motor vehicle accidents may not, therefore, be as stark as the defendant contends; to distinguish the two on the basis that Mr Jausnik

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80 (2000) 50 NSWLR 261 at [25].
81 Defendant's Outline of Submissions, paragraph 24.
82 Defendant's Outline of Submissions, paragraph 15.
83 [2016] ACTSC 306 at [130].

attended the aftermath of the accident seconds after it occurred, whereas the plaintiff attended approximately 10-15 minutes after being alerted of it,[84] in fact appears arbitrary.

[88] Even if Mr Jausnik had been looking up at the moment of the collision, however, this would not have been a differentiating feature of any significance. It has been settled law in this country for over two decades that any 'direct perception' requirement will be satisfied by a plaintiff who views either the accident as it occurs, or its immediate aftermath. Further, the concept of an 'aftermath' is not to be viewed narrowly. As Deane J observed in *Jaensch*: [85]

> "Nor do the cases support the approach that the requirement can only be satisfied by a plaintiff who saw or heard the actual accident: both common sense and authority support the conclusion that the requirement of proximity of relationship may be satisfied by a plaintiff who has suffered psychiatric injury as a result of what he or she saw or heard in the aftermath of the accident at the scene …
>
> It has already been seen that the requirement of proximity in a case of mere psychiatric injury is satisfied where injury was sustained as a result of observation of matters involved in the aftermath of a road accident at the actual place of collision. The facts constituting a road accident and its aftermath are not, however, necessarily confined to the immediate point of impact. They may extend to wherever sound may carry and to wherever flying debris may land. The aftermath of an accident encompasses events at the scene after its occurrence, including the extraction and treatment of the injured. In a modern society, the aftermath also extends to the ambulance taking an injured person to hospital for treatment and to the hospital itself during the period of immediate post-accident treatment."

[89] Deane J stated expressly that he did not intend these comments regarding perception of the aftermath of an accident to be confined to relatives of the victim:[86]

> "While the relationship of the plaintiff with the threatened or injured person (e.g. that of spouse, parent, relative, rescuer or uninvolved stranger) may well be of critical importance on the question whether risk of mere psychiatric injury was reasonably foreseeable in the particular case, the preferable view would seem to be that a person who has suffered reasonably foreseeable psychiatric injury as the result of contemporaneous observation at the scene of the accident is within the area in which the common law accepts that the requirement of proximity is satisfied, … regardless of his particular relationship with the injured person."

[90] Further, Deane J in making these observations referred to *Chadwick v British Railways Board*;[87] the plaintiff there, whose claim was successful, was a volunteer rescuer at the aftermath of a train derailment and was a stranger to all victims of that derailment.

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84 T 1-24, lines 11-14.
85 (1984) 155 CLR 549 at 606-608.
86 (1984) 155 CLR 549 at 606.
87 [1967] 1 WLR 912, cited in *Jaensch v Coffey* (1984) 155 CLR 549 at 605 and 606 per Deane J.

[91] The plaintiff in *Jaensch*, Mrs Coffey, whose spouse was the victim of a motor accident, succeeded in her claim for psychiatric harm resulting from what she "saw and heard at the hospital" while her husband was receiving "immediate post-accident treatment".[88] I acknowledge that Mrs Coffey, unlike the plaintiff, was in a pre-existing relationship with the victim. I further note Nettle J's observation that "in the absence of a close or any relationship between accident victim and claimant" there must be a close degree of "temporal proximity as between accident and mental harm".[89]

[92] The plaintiff's temporal proximity to the accident was, however, closer than that of Mrs Coffey; the plaintiff arrived at the scene approximately 10-15 minutes after being alerted to it by a member of the public, whereas Mrs Coffey did not attend the accident scene at all.

[93] What the plaintiff saw at the scene falls within the ambit of Deane J's concept of an aftermath. That concept extends to extraction and treatment, along with ambulance transport. The plaintiff, as a first responder, arrived at the scene before any ambulance, and before the firefighters who eventually extracted Mr Williams from his vehicle.

[94] For completeness, I note too the High Court's decision in *Wicks*. Under the New South Wales legislation there considered, a relevant circumstance in a court's determination of liability for mental harm is whether or not the claimant "witnessed, at the scene, a person being killed, injured or put in peril".[90] The joint judgment held that "being injured" and "being put in peril" are ongoing concepts:

> "It would not be right, however, to read [the relevant legislation] as assuming that all cases of death, injury or being put in peril are events that begin and end in an instant, or even that they are events that necessarily occupy only a time that is measured in minutes. No doubt there are such cases. But there are cases where death, or injury, or being put in peril takes place over an extended period. This was such a case, at least in so far as reference is made to victims being injured or put in peril.
>
> The consequences of the derailment took time to play out. Some aboard the train were killed instantly. But even if all of the deaths were instantaneous (or nearly so), not all the injuries sustained by those on the train were suffered during the process of derailment. And the perils to which living passengers were subjected as a result of the negligence of State Rail did not end when the carriages came to rest."[91]

[95] The plaintiff in *Wicks* consequently satisfied the witnessing factor. So too does the plaintiff here. That Mr Williams was in a continuing state of peril or injury at the time of the plaintiff's arrival is evident simply from the fact that Mr Williams had to be cut from his vehicle. Applying Murphy J's statement of principle in *Jaensch* that "the Court should not adopt a view of public policy more restrictive of recovery than has been adopted by those Australian legislatures which have dealt with the subject"[92], it is

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88 (1984) 155 CLR 549 at 608.
89 *King v Philcox* (2015) 255 CLR 304 at 91; see also *Homsi v Homsi* [2016] VSC 354 at [47].
90 (2010) 241 CLR 60 at 70, [21].
91 (2010) 241 CLR 60 at 76, [44]-[45].
92 (1984) 155 CLR 549 at 557.

clear that the plaintiff would satisfy the direct perception factor under New South Wales legislation, and therefore equally does so at common law.

Mr Williams as both defendant and sole victim

[96] Mr Williams' status as both defendant and sole victim would, for some years in this country, have barred the plaintiff's claim. This proscription was founded on Deane J's statement in *Jaensch* that "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".[93]

[97] A series of recent decisions – primary among them *Shipard v Motor Accident Commission,*[94] *FAI General Insurance Co Ltd v Lucre*[95] and *Homsi v Homsi*[96] – have, however, removed that bar.

[98] *Lucre* involved a collision between the plaintiff's truck and the negligent defendant's car; the defendant died of her injuries at the scene, and the plaintiff truck driver suffered psychiatric injury as a result. Mason P held:[97]

> "The mere fact that the death, injury or peril is that of the defendant (or the defendant's deceased) cannot justify invariable rejection of a claim for damages for negligently inflicted psychiatric injury.
>
> ... There is no reason in principle or logic why a primary tortfeasor, who may even have acted intentionally as well as negligently, should escape liability to another who suffers psychiatric injury simply because no third party was also injured. Take the present situation. The application of Deane J's dictum might see liability turning upon whether or not the deceased was the only occupant of the vehicle that careered into the respondent's truck."

[99] The defendant accepts that "the circumstance that the defendant whose death caused the psychiatric injury of the plaintiff was the sole negligent party [does] not deny of a duty of care."[98] The defendant contends however, that the present case is distinguishable from *Lucre.* Like the plaintiff, the truck driver in *Lucre* was a stranger to the defendant victim; however, the truck driver was directly involved in the accident as it occurred.[99] As Mason P stated in *Lucre*:[100]

> "The appellant submits that the respondent is in the category of a 'mere bystander' … The appellant submits, and I agree, that something more is required … In my view, what distinguished the respondent from the 'mere bystander' was the immediacy of his involvement in the accident that

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93 (1984) 155 CLR 549 at 604, quoted in *Homsi v Homsi* [2016] VSC 354 at [42] and *FAI General Insurance Co Ltd v Lucre* (2000) 50 NSWLR 261 at [4].
94 (1997) 70 SASR 240.
95 (2000) 50 NSWLR 261.
96 [2016] VSC 354.
97 (2000) 50 NSWLR 261 at [13]-[14], quoted in *Homsi v Homsi* [2016] VSC 354 at [45].
98 Defendant's Outline of Submissions, paragraph 18.
99 Defendant's Outline of Submissions, paragraph 20.
100 (2000) 50 NSWLR 261 at [17]-[27].

> caused the death that caused the psychiatric injury. That immediacy is quite obvious in both time and space. But there is a deeper connexion stemming from those circumstances. According to the laws of physics, the vehicle under the control of the respondent contributed directly to the death of the deceased. This distinguished the respondent from a bystander, even one who was a passenger in his truck. This circumstance and the inquiries that inevitably ensued from it (both official and informal) were so clearly capable of generating a sense of unresolved anxiety and guilt that it is reasonable, fair and just to impose a duty of care upon the deceased. One does not need to be a psychiatrist to understand the reality of the respondent's reaction. Like the trial judge, I would emphasise the foreseeability of this reaction in these circumstances. It is a foreseeability that far outstrips the law's undemanding test of foreseeability of damage.
>
> These factors in combination suffice in my mind to establish what, until recently, would have been termed 'proximity' capable of generating the necessary duty of care.
>
> The situation is closely analogous to a category discussed by Lord Oliver in *Alcock* (at 408) being cases:
>
> *...where the negligent act of the defendant has put the plaintiff in the position of being, or of thinking that he is about to be or has been, the involuntary cause of another's death or injury and the illness complained of stems from the shock to the plaintiff of the consciousness of this supposed act. The fact that the defendant's negligent conduct has foreseeably put the plaintiff in the position of being an unwilling participant in the event establishes of itself a sufficiently proximate relationship between them and the principal question is whether, in the circumstances, injury of that type to the plaintiff was or was not reasonably foreseeable.*"

[100] The defendant's submission should not be accepted, for reasons detailed below.

The plaintiff as more than 'mere bystander'

[101] As a preliminary observation, I note that Mason P's observations on the insufficiency of being a mere bystander – that is, a person who witnesses an accident or its aftermath but is entirely unrelated to any of the victims – preceded the High Court's decisions in *Tame v New South Wales*[101] and subsequently *Gifford v Strang Patrick Stevedoring Pty Limited*.[102] Following close analysis of the types of relationships between plaintiff and victim that may attract liability for pure psychiatric harm, McHugh J stated in *Gifford*:[103]

> "In other cases, an association with the primary victim or being in their presence may be sufficient to give rise to a duty to take reasonable care to protect a person from suffering psychiatric harm. This will often be the case where the person suffering psychiatric harm saw or heard the harm-causing incident or its aftermath. As members of this Court pointed out in *Tame*, in

[101] (2002) 211 CLR 317.
[102] (2003) 214 CLR 269.
[103] (2003) 214 CLR 269 at 290, [52].

> determining whether the psychiatric injury suffered was reasonably foreseeable, relevant considerations may include whether the person who suffers that injury directly perceived the distressing incident or its immediate aftermath or suffered a sudden shock. If so, a duty to take care may exist even though the primary victim and the person suffering psychiatric harm had no pre-existing relationship. In *Tame*, Gleeson CJ said that such matters are relevant where the nature of the relationship is not that of parent and a child. They are relevant because they go to the issue whether it was reasonable to require the defendant to have in contemplation injury of the kind suffered by the plaintiff and to take steps to guard against such injury. Gaudron J said that, absent circumstances giving rise to a sudden shock, the risk of psychiatric injury will not be reasonably foreseeable in many cases."

[102] The path is not, therefore, necessarily closed in this country to mere bystander claims. The threshold requirement posited by the defendant – that the plaintiff must be more than a mere bystander – may not in fact be applicable.

[103] But in any event, the plaintiff could not sensibly be described as a mere bystander to Mr Williams' death. He took steps to keep Mr Williams alive. He encouraged Mr Williams. He sought to comfort Mr Williams' parents. He instructed firefighters not to cut Mr Williams from his vehicle until paramedics arrived. Having been informed that Mr Williams was near death, he assisted Mr Williams' parents in saying a final farewell to their son and he observed Mr Williams pass away. It may be accepted that, unlike the truck driver in *Lucre*, the plaintiff was not involved in the collision leading to Mr Williams' death. But that does not diminish the immediacy of the plaintiff's involvement in the aftermath of the accident.

[104] If this is not sufficient, the plaintiff may be considered more than a mere bystander on another basis: he falls within the well-established 'rescuer' category of claimant.

The plaintiff as rescuer

[105] The defendant urged caution in oral submissions in the use of the word "rescuer":[104]

> "… one has to be careful about this expression, by the use of this word 'rescuer' … it's not of much assistance to use such words, they tend to invoke an emotional sense rather than a proper determination of the class to whom a particular plaintiff belongs. In *Pusey* the proper class is to look at an employee, for police officers to look at police officers, and they need to be separated even from ambulance officers and fire brigade officers, not in the least because there are different statutes that affect their operation."

[106] The correct approach, in my view, is first to determine whether the plaintiff, by analogy with decided cases, falls within a broad 'rescuer' category, then to consider whether, as a matter of policy, specific sub-sets of rescuers (serving police officers, for example) should be denied a duty of care.

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[104] T 3-18, lines 10-16.

[107] In *Lucre,* Mason P referred to Lord Oliver's description of the "unwilling participant" category of claimant in *Alcock v Chief Constable of South Yorkshire Police*.[105] This is one of a number of types of case which Lord Oliver held fall within a wider classification: "cases where the plaintiff has, to a greater or lesser degree, been personally involved in the incident out of which the action arises, either through the direct threat of bodily injury to himself or in coming to the aid of others injured or threatened."[106] His Lordship stated, as a matter of established law, that rescuers share that same classification and are owed a duty of care:[107]

> "Into the same category, as it seems to me, fall the so called 'rescue cases.' It is well established that the defendant owes a duty of care not only to those who are directly threatened or injured by his careless acts but also to those who, as a result, are induced to go to their rescue and suffer injury in so doing. The fact that the injury suffered is psychiatric and is caused by the impact on the mind of becoming involved in personal danger or in scenes of horror and destruction makes no difference.
>
> 'Danger invites rescue. The cry of distress is the summons to relief … the act, whether impulsive or deliberate, is the child of the occasion:' *Wagner v International Railway Co* per Cardozo J.
>
> So in *Chadwick v British Railways Board*, the plaintiff recovered damages for the psychiatric illness caused to her deceased husband through the traumatic effects of his gallantry and self-sacrifice in rescuing and comforting victims of the Lewisham railway disaster."

[108] As noted at [74], Brennan J in *Jaensch* referred to rescuers as a category of plaintiff to whom a duty is generally owed. His Honour was joined in this by both Gibbs CJ and Deane J.[108] More recently, the High Court in *King v Philcox*[109] made similar mention of rescuers, as did Lee J, of this Court, in *Reeve v Brisbane City Council*.[110]

[109] Recognition of this duty in Australia is often traced to Windeyer J's judgment in *Mount Isa Mines Ltd v Pusey*,[111] in which the plaintiff engineer, who worked at a powerhouse and went to the aid of fellow employees who were severely burned in an explosion caused by the negligence of their employer, successfully brought an action for pure psychiatric harm against his employer. This was so despite the plaintiff having had no previous close relationship with the injured employees. The defendant seeks to distinguish *Pusey* from the present case on the following basis:[112]

> "… the plaintiff [in *Pusey*] was not at the scene in the capacity of a rescuer of the injured co-workers, he was there as their co-worker and the questions for determination were considered in the context of the non-delegable employer duty. The description of the plaintiff in *Pusey* as a rescuer is in

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105 [1992] 1 AC 310 at 416.
106 [1992] 1 AC 310 at 408.
107 [1992] 1 AC 310 at 408.
108 (1984) 155 CLR 549 at 555 per Gibbs CJ and at 611 per Deane J.
109 (2015) 255 CLR 304 at 322, [29] per French CJ, Kiefel and Gageler JJ and at 327, [43] per Keane J.
110 [1995] 2 Qd R 661 at 673; see also Peter Handford, *Tort Liability for Mental Harm* (Thomson Reuters (Professional) Australia Limited, 3rd Ed, 2017) at 882.
111 (1970) 125 CLR 383; see for example *King v Philcox* (2015) 255 CLR 304 at 322, [29].
112 Defendant's Outline of Submissions, paragraph 25.

> truth apt to mislead as to the reasons why a duty of care was owed. It obscures the true circumstances and divests focus from the actual circumstances of other plaintiffs who might broadly be called rescuers."

[110] While the outcome in *Pusey* did not hinge on the plaintiff being classified as a rescuer, Windeyer J in the course of his Honour's reasons acknowledged that a duty to rescuers was already, by that time, established:[113]

> "The supposed rule that only relatives can be heard to complain is apparently a transposition of what was originally a humane and ameliorating exception to the general denial that damages could be had for nervous shock. Close relatives were put in an exceptional class … Whatever the basis of the special position which it has been supposed should be given to near relatives, one thing can be said of it. That is that its application was in cases where the duty of care arose simply out of the duty to a "neighbour" in the legal sense. Relatives of an injured person might be neighbours in that sense, and in time rescuers joined them."

[111] I turn then to consider whether or not the plaintiff falls within this category. The plaintiff directed the Court's attention to *Perham v Connolly,*[114] a Queensland decision concerning a proceeding brought against a solicitor by a former client, alleging the solicitor's negligence had resulted in the client suffering loss of the chance to successfully claim for psychiatric injury. Justice Atkinson ultimately held that the plaintiff's account of the motor vehicle accident at which he claimed to have rendered assistance was untrue.[115] Her Honour stated, however, that had the plaintiff been a credible witness, he could have claimed successfully as a rescuer:[116]

> "If he in fact has suffered from PTSD as a result of being a rescuer after the motor vehicle accident of 1 September 1994, then there is little doubt that he had a good cause of action against the driver whose negligence caused the accident."

[112] On the plaintiff's account, he attended at an accident in which a car carrying four passengers collided with a telegraph pole, such that the pole was embedded in the car. One form of assistance the plaintiff claimed to have offered at the scene was climbing inside the car in order to release a seatbelt that had been preventing one of the passengers from being extracted from the car.[117]

[113] The plaintiff in the present case performed a similar task when he climbed onto the wreckage of Mr Williams' vehicle, adjusted Mr Williams' head so as to open his airway, and tried to encourage Mr Williams to stay alive.

[114] Opening Mr Williams' airway was a clear attempt by the plaintiff to increase Mr Williams' chances of survival until he could be safely removed from the vehicle.

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[113] (1970) 125 CLR 383 at 404.
[114] [2003] QSC 467.
[115] [2003] QSC 467 at [100].
[116] [2003] QSC 467 at [47].
[117] [2003] QSC 467 at [5].

This accords with the High Court's description in *Wicks* of rescuers undertaking tasks "to try to ease the suffering of others and take them to safety."[118]

[115] The plaintiff's words of encouragement may be compared to those of the plaintiff rescuer in *Chadwick v British Railways Board,* whose "very cheerful and encouraging demeanour" worked to "allay the fears" of the victims of the train derailment at which he attended.[119]

[116] Also of assistance is *Béchard v Haliburton Estate.* The Ontario Court of Appeal held that the plaintiff there, in seeking to alert the driver of an oncoming vehicle to the presence of an injured motorcyclist on the road by waving her arms and crying out, performed "a role similar to that of a rescuer" because she was "indirectly attempting to save" the motorcyclist from being run over and suffering additional harm.[120] The plaintiff here, in alerting the firefighters to the risk that Mr Williams may suffer a heart attack if cut from his vehicle, performed an analogous 'warning off' role.

[117] I further note that a rescue attempt need not be successful to found a claim.[121] That Mr Williams ultimately died at the accident scene therefore presents no impediment to the plaintiff.

[118] As the plaintiff may be classified as a rescuer, he is entitled to recover, subject to the policy concerns considered below.

Policy considerations

[119] The defendant submits that the plaintiff's status as a police officer – that is, a holder of statutory office – at the time of the accident informs the plaintiff's relationship with the deceased, Mr Williams, and precludes any duty being owed to the plaintiff.[122] This submission comprises three primary arguments, which may be summarised as follows:

(a) A duty being owed to the plaintiff would discourage members of the public from reporting incidents requiring police attendance, and is therefore inconsistent with the public benefit aims of the legislative scheme establishing and governing the QPS.

(b) A duty being owed to the plaintiff would expose defendants to unjustifiably expanded liability in respect of psychiatric harm.

(c) Members of the public are entitled to expect that a police officer deployed to the scene of an accident will be equipped, by way of sufficient training and experience, to avoid pure psychiatric harm. Injury of that type is accordingly not reasonably foreseeable, and no duty arises.

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[118] (2010) 241 CLR 60 at 73, [33].
[119] [1967] 1 WLR 912 at 916.
[120] (1991) 5 OR (3d) 512 (CA), cited in Peter Handford, *Tort Liability for Mental Harm* (Thomson Reuters (Professional) Australia Limited, 3rd Ed, 2017) at 884.
[121] *Chester v Municipality of Waverley* (1939) 62 CLR 1 at 38 per Evatt J; *Béchard v Haliburton Estate* (1991) 5 OR (3d) 512 (CA).
[122] Defendant's Outline of Submissions, paragraphs 29 and 35.

[120] Each of these submissions should, in my view, be rejected.

(a) Inconsistency with legislative scheme: reluctance to report

[121] It is uncontentious that the plaintiff attended at the accident scene "for statutory purposes" and to exercise "the powers and responsibilities conferred upon him by statute".[123]

[122] The relevant statutes are the *Police Service Administration Act* 1990 (Qld) ("PSAA") and the *Police Powers and Responsibilities Act* 2000 (Qld) ("PPRA"). Together, these Acts establish and govern a police service tasked with furthering broad public interest aims.[124] Section 2.3 of the PSAA relevantly provides:

> "**2.3 Functions of service**
>
> The functions of the police service are the following—
>
> (a) the preservation of peace and good order—
>
> (i) in all areas of the State; and
>
> (ii) in all areas outside the State where the laws of the State may lawfully be applied, when occasion demands;
>
> (b) the protection of all communities in the State and all members thereof—
>
> (i) from unlawful disruption of peace and good order that results, or is likely to result, from—
>
> (A) actions of criminal offenders;
>
> (B) actions or omissions of other persons;
>
> (ii) from commission of offences against the law generally;
>
> (c) the prevention of crime;
>
> (d) the detection of offenders and bringing of offenders to justice;
>
> (e) the upholding of the law generally;
>
> (f) the administration, in a responsible, fair and efficient manner and subject to due process of law and directions of the commissioner, of—
>
> (i) the provisions of the Criminal Code;
>
> (ii) the provisions of all other Acts or laws for the time being committed to the responsibility of the service;
>
> (iii) the powers, duties and discretions prescribed for officers by any Act;

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[123] Defendant's Outline of Submissions, paragraph 29; T 1-46, lines 15-20.
[124] Defendant's Outline of Submissions, paragraph 36.

(g) the provision of the services, and the rendering of help reasonably sought, in an emergency or otherwise, as are—

(i) required of officers under any Act or law or the reasonable expectations of the community; or

(ii) reasonably sought of officers by members of the community."

[123] In order for the police to fulfil these functions in practice, they must, according to the defendant, be promptly informed of and granted access to "scenes of trauma".[125] It is for this reason that the PPRA confers on police officers wide powers of entry and investigation in respect of accident and crime scenes.[126] Similar considerations inform s 2.4 of the PSAA, which provides:

"**2.4 Community responsibility preserved**

(1) The prescription of any function as one of the functions of the police service does not relieve or derogate from the responsibility and functions appropriately had by the community at large and the members thereof in relation to—

(a) the preservation of peace and good order; and

(b) the prevention, detection and punishment of breaches of the law.

(2) In performance of the functions of the police service, members of the service are to act in partnership with the community at large to the extent compatible with efficient and proper performance of those functions."

[124] The defendant submits that any duty to avoid causing the plaintiff psychiatric harm is inconsistent with both the "inherent public interest" in police attending at accident and crime scenes, and with s 2.4 of the PSAA. Such a duty would, in the defendant's submission, discourage those who have, or who fear they have, negligently caused an accident from reporting that accident to authorities. Those close to these persons would be similarly discouraged. This reluctance, it is said, is born of a concern not to expose attending officers and other emergency services workers to psychiatric harm, and in turn to avoid incurring civil liability to those officers.[127] Because this liability does not "crystallise" until police are actually contacted and attend at the scene, members of the public may hesitate before dialling triple zero.[128]

[125] I reject this submission.

[126] I note at the outset that, as a matter of established law in this country, a civilian may already be liable for *physical* harm suffered by police officers while responding to an

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[125] Defendant's Outline of Submissions, paragraph 36; T 3-13, lines 23-35.
[126] PPRA ss 19, 54-57 and 176; T 3-13, lines 27-29.
[127] Defendant's Outline of Submissions, paragraph 36; T 3-13, line 37 to T 3-14, line 2; T 3-16, lines 11-19.
[128] T 3-14, lines 4-13; T 3-16, 38-47.

incident, such as a car accident or fire, caused by the civilian's negligence.[129] No 'firefighter's rule' barring emergency service personnel from claiming for physical injuries has been imported into Australian courts from their US counterparts.[130] This duty in respect of physical injury to police officers is yet to be denied on the basis that it may deter members of the public from reporting emergencies. I see no reason why a duty in respect of psychiatric harm should be said to have such a deterrent effect where the same is not said of physical harm.

[127] Further, from a practical perspective, a duty to the plaintiff is unlikely to cause accidents to go unreported. Where, as in the present case, the negligent driver is severely injured in the accident, they will be unable to report it. A passer-by will instead contact authorities, as occurred in respect of Mr Williams' accident. The passer-by would on no view be liable for any psychiatric harm suffered by police, and would have no reason to hesitate in contacting emergency services.[131] Their negligence did not cause the accident and, as observed by Gummow and Kirby JJ in *Tame*, no duty to avoid causing psychiatric injury is generally owed by mere 'bearers of bad news'.[132]

[128] Where the negligent driver is not severely injured, and is able to contact the authorities, it is likely, as a matter of ordinary human experience, that their first priority following a serious accident will be survival; that is, to ensure their own and others' injuries are attended to, and accordingly to contact emergency services. The possibility that they might later be held liable in civil proceedings to a police officer, or any other party affected by the motor accident, is unlikely to be an overriding concern in the midst of the aftermath. It will not, in practice, discourage the majority of negligent drivers from alerting emergency services.

[129] To suggest, as the defendant does, that negligent parties may instead seek to conceal the consequences of their actions is out of step with community expectations. As a matter of societal standards, a driver is expected to report accidents caused by their negligence, even where the consequences of that accident are disastrous and the driver may face heavy penalties. Accordingly, under the *Transport Operations (Road Use Management) Act* 1995 (Qld), this State classifies as a criminal offence a negligent driver's failure to remain at the scene of an accident involving another person's death or injury, together with a failure to seek medical attention for that person.[133] The negligent driver's duty to report the accident exists irrespective of whether they feel reluctant to subject themselves to the range of civil and criminal penalties that may result.

[130] There is, in my view, no relevant inconsistency in duties in the present case. A driver who has negligently caused an accident can, and is expected to, report the accident, fulfil their duty to report the accident and then, quite cohesively, go on at a later time to fulfil a duty to compensate an attending police officer for any reasonably foreseeable psychiatric injuries they may suffer as a result of attending at the accident.

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[129] *Ogwo v Taylor* [1988] AC 431 at 437-438 per Dillon LJ, citing *Haynes v Harwood* [1935] 1 KB 146; *Hirst v Nominal Defendant* [2005] 2 Qd R 133 at [18]-[20] per Keane JA, citing *Haynes v Harwood* [1935] 1 KB 146; *Club Italia (Geelong) Inc v Ritchie* (2001) 3 VR 447.

[130] *Club Italia (Geelong) Inc v Ritchie* (2001) 3 VR 447 at [50]-[51].

[131] T 3-16, lines 20-31.

[132] *Tame* (2002) 211 CLR 317 at 394-395, [226]-[228] per Gummow and Kirby JJ.

[133] Section 92.

[131] The mere fact that a negligent driver may experience reluctance to contact authorities does not, therefore, preclude a duty being owed to the plaintiff. Such a duty is not inconsistent with a negligent driver's specific duty under the *Transport Operations (Road Use Management) Act* to report accidents, or with the public's general responsibility under s 2.4 of the PSAA to assist in detection of breaches of the law.

(b) Expansion of liability

[132] The defendant further contends that a duty being owed to the plaintiff in the present case would unacceptably expand the categories of potential defendants and claimants in respect of psychiatric harm, and expose defendants to increased liability: [134]

> "If a duty is said to be owed by the driver of the vehicle to the police officer, so it must be that others whose acts or omissions might result in police officers attending scenes of trauma also owe a duty of care to police officers.
>
> Some examples which come to mind include a suicide victim or an elderly person who slips on a bathroom floor as a result of not having a properly closed shower screen, resulting in severe or fatal head injuries.
>
> It is outside of legal principle to confine duties to cases where there is a statutory scheme of compensation.
>
> Further, the duty would have to be owed to a raft of others including ambulance and fire brigade officers, or those attending the accident scene to remove bodies or property such as cars, and to doctors and nurses at the hospital in the early stages of treatment at least."

[133] The defendant cited, in support of this proposition, Deane J's finding in *Jaensch* that the aftermath of an accident "extends to the ambulance taking an injured person to hospital for treatment and to the hospital itself during the period of immediate post-accident treatment."[135]

[134] This submission should be rejected. First, any 'raft' of claims in respect of psychiatric harm would be limited by a threshold requirement: claimants must be suffering from a recognisable psychiatric illness. In *Tame,* Gummow and Kirby JJ commented on the strength of this requirement as a control mechanism:[136]

> "[A] plaintiff who is unable affirmatively to establish the existence of a recognisable psychiatric illness is not entitled to recover … Fright, distress or embarrassment, without more, will not ground an action in negligence … the requirement to establish a recognisable psychiatric illness reduces the scope for indeterminate liability or increased litigation. It restricts recovery to those disorders which are capable of objective determination. To permit recovery for recognisable psychiatric illnesses, but not for other forms of emotional disturbance, is to posit a distinction grounded in principle rather

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[134] Defendant's Outline of Submissions, paragraphs 50-53.
[135] (1984) 155 CLR 549 at 607-608; Defendant's Outline of Submissions, paragraph 53; T 3-5, lines 15-42.
[136] (2002) 211 CLR 317 at 382, [193]-[194] per Gummow and Kirby JJ.

than pragmatism, and one that is illuminated by professional medical opinion rather than fixed purely by idiosyncratic judicial perception."

[135] Secondly, courts are equipped to control any increase in claims by adopting a principled approach to the particular facts of each case: "whether a duty of care is owed in particular circumstances falls to be resolved by a process of legal reasoning, by induction and deduction by reference to the decided cases and, ultimately, by value judgments of matters of policy and degree."[137]

(c) Public expectation of police resilience

[136] In the defendant's contention, reasonable members of the public are entitled to expect that police officers and other emergency service personnel, as a product of their training and frequent exposure to accident and crime scenes, are equipped to avoid or resist psychiatric harm.

[137] This expectation is said to be founded on the public's general experience of and interaction with the police. Police officers are known to attend daily at confronting scenes without, in the majority of cases, suffering psychiatric harm.[138] The defendant tendered a QPS document titled 'Hazard/Demand Profile' which lists, as a known psychological hazard potentially faced by police officers, exposure to "bodies and body parts due to violent or natural death", including as a result of motor vehicle accidents.[139] Police officers' regular attendance at motor vehicle accidents is also reflected in statutory powers specific to such accidents, which extend to "traffic control, securing public safety, preserving evidence, investigating potential crimes, making arrests and overseeing the removal of persons and property."[140] The plaintiff agreed in cross-examination that police officers may in addition "at times render first aid to accident victims."[141]

[138] The defendant submits that, due to this public expectation in respect of police training and resilience, any risk of psychiatric harm to a police officer would not reasonably have fallen within the contemplation of a person in the position of Mr Williams. Consequently, on the defendant's case, such harm is not reasonably foreseeable and no duty is owed to the plaintiff.[142]

[139] In support of this conclusion, the defendant sought to draw analogy with *ACQ Pty Ltd v Cook*, a decision of the New South Wales Court of Appeal.[143] Analysis of that decision makes it evident that the defendant's argument should be rejected.

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137 *King v Philcox* (2015) 255 CLR 304 at 336-337, [80] per Nettle J.
138 Defendant's Outline of Submissions, paragraph 41.
139 Exhibit 8, Agreed Trial Bundle, Tab A, page 121; Defendant's Outline of Submissions, paragraph 32.
140 Defendant's Outline of Submissions, paragraph 30, citing sections 13, 14, 19, 124, 164-169, 176, 365, 443, 624, and Chapter 3 of the PPRA.
141 T 1-46, line 46 to T 1-47, line 8; Defendant's Outline of Submissions, paragraph 31.
142 T 3-11, lines 15-33.
143 (2008) 72 NSWLR 318.

[140] The case concerned a linesman electrocuted while seeking to repair a power line negligently brought down by a pilot conducting aerial spraying of a cotton field. The plaintiff was one of two linesmen deployed to the accident site; together, they agreed that the second linesman would attend to having the fallen power line isolated from the nearest electricity source, and that the plaintiff would in the meantime cross the field on foot to make a preliminary determination of the repair work needed. The extreme muddiness of the field required the plaintiff to focus frequently on the placement of his feet, preventing him from being properly able to assess his distance from the power line. He unintentionally entered the 1-metre 'safe working clearance' surrounding the line, and was the victim of a 'flashover', a phenomenon made more likely to occur by humid conditions like those on the field on the day in question. This distance was prescribed by his employer in its published safety rules, and was emphasised, together with the risk of flashover, in employee training.[144]

[141] Campbell JA (Beazley and Giles JJA agreeing) held that the pilot owed no duty of care to the plaintiff:[145]

> "In the present case, a person in Mr Stubbs' position ought reasonably have foreseen that careless flying in the immediate vicinity of the power line might bring the power line down. He should reasonably have foreseen that a power line that was brought down was capable of inflicting very serious injury or death on a person who came near it. However, Mr Cook was not on the ground anywhere in the vicinity at the time the plane was flying. It is reasonably foreseeable by an aircraft pilot that if he flies the plane in such a fashion as to bring down a power line, power workers will come to repair the damage. It is reasonably foreseeable that, once such a power worker had come, he could injure himself as a consequence of his own inadvertence. However, to the extent that a reasonable person considering the matter can know in advance, a power worker sent to repair a damaged power line is likely to be properly trained and experienced, and likely to be able to take care of himself so far as avoiding electric shock is concerned. Those likelihoods are such that it would not seem to be a realistic possibility that a power authority would send a person who was not properly trained, experienced, and capable of protecting himself. In that circumstance, the taking of reasonable care for the interests of the hypothetical electrical power worker does not result in the imposition of a duty of care to that power worker on the pilot. I conclude that Mr Stubbs did not owe a duty of care to Mr Cook to operate the aircraft with reasonable care."

[142] The plaintiff in *ACQ* was presented, before crossing the field, with a choice between safe and unsafe ways of conducting his work. Campbell JA, later in his Honour's reasons, held the plaintiff's employer was not liable to the plaintiff because:[146]

> "Mr Cook was clearly aware that his first priority was always expected to be his own safety. If, on walking some distance into the cotton field he found that the going was too difficult for him to be confident about maintaining the clearance, or if the conditions were such that he could not get and keep a

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144 (2008) 72 NSWLR 318 at [67] and [205] per Campbell JA.
145 (2008) 72 NSWLR 318 at [101] per Campbell JA.
146 (2008) 72 NSWLR 318 at [210].

> clear view of where the line was, it was always an available alternative for him to give up, return to his vehicle and wait for Mr Buddee's return, or if there was some particular urgency to get the repair job finished (as there was not in the present case) to contact Port Macquarie by radio and ask to have the power turned off remotely."

[143] Further, each of the decisions Campbell JA cited – and to which the defendant referred in oral submissions[147] – in support of his Honour's conclusion that the pilot owed no duty to the plaintiff, involved a similar fact scenario: a plaintiff deployed to carry out technical work, in non-emergency conditions, injured because he chose to conduct the work in an unsafe way, despite a safe method being available. So, in *O'Connor v Commissioner for Government Transport*, when a plumber chose to stand on the very awning he had been sent to repair while carrying out that repair work, despite trestles and a plank being available for his use, and despite the awning being affected by obvious dry rot, his employer was not liable to his widow after he suffered a fatal fall consequent upon the awning buckling.[148] Similarly, in *Commissioner for Railways v Schier,* a metalworker injured while uncoupling two railway trucks failed in his claim against the Commissioner, because he carried out the uncoupling "manually, doing so while the engine was still engaged in a 'bumping-up' operation", despite that method of uncoupling being expressly prohibited by his employee's published regulations, and despite a safe alternative method being available: moving between the trucks and uncoupling them only after the 'bumping-up' operation had been completed.[149] An electrician who was injured when he touched a copper pipe he had mistaken for a piece of rubber flex in a caravan he was working on, while the caravan was connected to an electrical supply, was presented with a similar choice in *Daley v Gypsy Caravan Co Pty Ltd*: *"*It would have been possible for the plaintiff to turn the supply off, but he decided to leave it on, to enable him to use a voltmeter that he had with him."[150] The caravan manufacturer owed no duty to the plaintiff, as the manufacturer could expect him, as a trained electrician, to carry out the repair work in a safe way.

[144] If, to adopt an example put forward by the defendant, a police officer were confronted at an accident scene with "jagged metal when leaning into the vehicle to retrieve an item or to provide first aid to a victim" and cut himself or herself on that metal through his or her own failure to approach the scene safely, *ACQ* may arguably apply.[151] The risk of physical injury in the defendant's example is obvious, and a reasonable person may expect a trained and experienced police officer to avoid harm by choosing a safe means of accessing the vehicle. This expectation on the part of the public is supported by the fact that such training forms part of the QPS' non-delegable duty of care.[152] The defendant submits that any duty owed to the plaintiff is "a general duty to take reasonable care to avoid the risk of injury to others", encompassing both physical and psychiatric injury, such that the public may expect a police officer to be equally capable of protecting himself or herself against psychiatric harm. It is not quite as obvious, however, what precisely the plaintiff could practically have done differently or more safely, so as to protect himself against psychiatric harm at the accident scene. He was

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147 T 3-8, lines 36-47.
148 (1954) 100 CLR 225, cited in *ACQ Pty Ltd v Cook* (2008) 72 NSWLR 318 at [74] per Campbell JA.
149 [1964] NSWR 880, cited in *ACQ Pty Ltd v Cook* (2008) 72 NSWLR 318 at [74] per Campbell JA.
150 [1966] 2 NSWR 22, cited in *ACQ Pty Ltd v Cook* (2008) 72 NSWLR 318 [86] per Campbell JA.
151 Defendant's Outline of Submissions, paragraph 48.
152 Defendant's Outline of Submissions, paragraph 48.

attending at the scene of an emergency, a highly pressurised situation; he could not, unlike the plaintiff in *ACQ,* simply walk away until any risk factor was controlled – that is, until Mr Williams was no longer in a state that might cause the plaintiff psychiatric harm.

[145] The defendant submits that police officers and other emergency services personnel employ techniques of emotional detachment to guard against psychiatric harm at scenes of trauma. Dr Cantor stated in oral evidence that "police need to operate with professional detachment for their own psychological protection."[153] The plaintiff's evidence, however, was that he generally, when approaching an accident scene, did successfully detach himself:[154]

> "I – I sort of – in dealing with carn – the carnage is – it's not hard to deal with the carnage. It's just – it's their bodies. And that might sound quite mercenary. You don't get attached as a copper emotionally. That's a really bad thing to do. You try to just be pragmatic. You're there to investigate. That's your job. That's what they always used to say. You're there to investigate. If you've got to deal with a body, well, you just deal with it. If you've got to deal with blood and guts, that's just the – that's just the nature of the job. Never bothered me. Never bothered me."

[146] Dr Cantor's report of 28 September 2015 suggests that the plaintiff suffered psychiatric injury not because he failed to make any attempt to detach himself from the accident of 17 February 2013, but instead because his existing 'armour' of detachment was pierced by the intense humanity of the situation:[155]

> "Police officers, to preserve their mental health, have to exercise professional detachment, for example, with delivering death notifications to households. They would approach this according to a procedure for which they had been trained. However, Mr Caffrey's experience of the first accident involved his having to assist at a much more personal level, without being able to protect himself by way of training, procedures and professional detachment."

[147] In *Ogwo v Taylor*, Lord Bridge of Harwich held the defendant, in negligently starting a fire, was liable to a firefighter who suffered physical injury while responding to the fire:

> "Of course I accept that not everybody, whether professional fireman or layman, who is injured in a fire negligently started will necessarily recover damages from the tortfeasor. The chain of causation between the negligence and the injury must be established by the plaintiff and may be broken in a number of ways. The most obvious would be where the plaintiff's injuries were sustained by his foolhardy exposure to an unnecessary risk either of his own volition or acting under the orders of a senior fire officer. But, subject to this, I can see no basis of principle which would justify denying a remedy in damages against the tortfeasor responsible for starting a fire to a professional fireman doing no more and no less than his proper duty and

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153 T2-9, lines 15-17; Defendant's Outline of Submissions, paragraph 44.
154 T 1-35, lines 27-35.
155 Exhibit 8, Agreed Trial Bundle, Tab C, page 72 at 95.

> acting with skill and efficiency in fighting an ordinary fire who is injured by one of the risks to which the particular circumstances of the fire give rise. Fire out of control is inherently dangerous. If not brought under control, it may, in most urban situations, cause untold damage to property and possible danger to life. The duty of professional firemen is to use their best endeavours to extinguish fires and it is obvious that, even making full use of all their skills, training and specialist equipment, they will sometimes be exposed to unavoidable risks of injury, whether the fire is described as 'ordinary' or 'exceptional.' If they are not to be met by the doctrine of volenti, which would be utterly repugnant to our contemporary notions of justice, I can see no reason whatever why they should be held at a disadvantage as compared to the layman entitled to invoke the principle of the so-called 'rescue' cases."[156]

[148] An accident scene, like a fire, is inherently dangerous from a psychiatric perspective. A person who by their negligence causes such an accident must have in contemplation the fact that police officers are human and, as the plaintiff submits, not entirely immune to psychiatric injury,[157] even where they make use of all available training, experience and detachment techniques the public might expect them to have acquired.

[149] Certainly, the public are entitled to expect a high degree of psychiatric endurance from police officers. I accept the defendant's submission that, if one were to choose between two people to attend at an accident scene, one a police officer and one not, a reasonable person would conclude that the police officer would be better equipped to "handle" the scene.[158] Reasonable foreseeability may therefore pose a greater hurdle to police officers in claims for pure psychiatric harm than it does for others. However, as observed at [82] of these Reasons, the 17 February 2013 accident exposed the plaintiff to deeply distressing and personalised circumstances. Applying Mason J's much-cited formulation of reasonable foreseeability from *Wyong Shire Council v Shirt*, the plaintiff's psychiatric harm was not a far-fetched or fanciful result of Mr Williams' negligent driving.[159]

[150] The defendant further submits that, because the plaintiff as a serving police officer was likely to attend scenes of trauma on 17 February 2013 in any case, irrespective of whether or not Mr Williams chose to drive negligently, the plaintiff was not a person to whom Mr Williams was required to turn his mind in contemplating who might be harmed by his conduct:[160]

> "If I'm the driver of a motor vehicle who's contemplating I need to make sure I keep a safe distance behind the vehicle in front of me so that I don't run into the back of it, I'm not likely to be thinking rationally, at least that I need to do that for any other reason than that person is unlikely to be involved in a motor vehicle accident unless I fail to exercise reasonable care. In other words, that the prospect that that person is going to be exposed to the kinds of forces that will be involved in a rear-end collision

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[156] [1987] 3 WLR 1145 at 1149-1150.
[157] T 3-39, lines 14-22.
[158] T 3-11, lines 21-32.
[159] (1980) 146 CLR 40 at 47.
[160] T 3-17, lines 19-32.

> arises really, only, as a likelihood if I fail to take reasonable care. Whereas here for the police officer, like the doctor or the nurse or the ambulance officer, the prospect that they are going to confront traumatic scenes remains as a virtual certainty, as opposed to a mere chance if I fail to exercise reasonable care. And that's an additional factor, in our submission, arising out of the relationship that is part of the reason why it would be said that, to use the old expression, "the police officer is not my neighbour" in that respect. Not somebody who I need to have in contemplation at that point in time."

[151] I reject this submission. In *Ogwo v Taylor* Dillon LJ observed:[161]

> "It is said … that there was no duty of care owed to the plaintiff in the case of an ordinary fire like this, because the plaintiff undertook to bear the ordinary risks of his calling. … I cannot see that it follows, because the plaintiff undertakes for the benefit of the public to use his skills to fight fires, that he also undertakes, vis-à-vis the defendant, not to make any claim if by the defendant's carelessness he suffers injury in fighting in the course of his duties an unnecessary extra fire. Beyond that the answer is, in my judgment, provided by the decision of this court in the well-known case of *Haynes v Harwood* [1935] 1 KB 146. There it was held that a police officer on duty, who had a general duty to protect the life and property of the inhabitants, could, when injured while endeavouring to stop some runaway horses in a crowded street, recover damages from the person by whose servant's negligence it had come about that the horses were runaways. The police officer was entitled to recover because he was endeavouring to save the people in danger from death or injury."

[152] A member of the public, like Mr Williams, is not entitled to drive in any manner he wishes, without regard to police officers who may attend at an accident he may cause, simply because police officers "undertake for the benefit of the public" to attend at such scenes. This imposes no greater duty on Mr Williams than the "recognised obligation on each road user to exercise reasonable care for others."[162] Dillon LJ's reference to *Haynes v Harwood* is also of relevance, given the plaintiff was present at the accident scene of 17 February 2013 both pursuant to statutory duty and in a rescuer capacity.

[153] Keane JA, in *Hirst v Nominal Defendant* (Jerrard JA and Douglas J concurring), made extensive reference to *Haynes.*[163] His Honour's decision involved a police officer who, as a consequence of conducting a high-speed pursuit of a speeding driver, was involved in a motor vehicle accident and sustained minor whiplash together with severe PTSD.[164] Though the police officer continued the pursuit unreasonably, resulting in a reduction in damages to account for his contributory negligence, that continuation did not amount to

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[161] [1988] AC 431 at 437-438.

[162] *Hirst v Nominal Defendant* [2005] 2 Qd R 133 at [52] per Douglas J, citing *West v GIO (NSW)* (1981) 148 CLR 62 at 67-68 per Stephen, Mason, Aickin and Wilson JJ; see also *King v Philcox* (2015) 255 CLR 304 at 342, [100] per Nettle J.

[163] *Hirst v Nominal Defendant* [2005] 2 Qd R 133 at [20].

[164] *Hirst v Nominal Defendant* [2004] QSC 272 at [26] and [30] per McMurdo J.

a *novus actus interveniens*. After quoting from *Haynes*, Keane JA made the following comments:[165]

> "Users of the highway are subject to lawful directions by police officers acting in the course of their duty. In this case, the driver of the blue car not only failed to obey a lawful direction to pull over, but created a specific situation of danger by driving on in circumstances where he should reasonably have known that Mr Hirst would be duty-bound to attempt to apprehend him, and would attempt to do so at least until the pursuit became too dangerous to continue. This situation of elevated risk arose because of the combination of the failure by the driver of the blue car to obey a lawful direction and the discharge by Mr Hirst of his obligations as a police officer. … Having created this situation, the specific content of the duty owed by the driver of the blue car to Mr Hirst was to put an end to the situation of elevated risk which he, the driver of the blue car, had unreasonably and unlawfully created, either by slowing down or by pulling over. His failure to do so prolonged the situation of elevated risk, and in a very substantial way caused Mr Hirst's injuries."

[154] Contrary to the defendant's submission, an officer being duty-bound to pursue a speeding driver, or by analogy to attend at an accident scene caused by a driver's negligence, such that the officer may engage in a pursuit or attend at an accident scene multiple times in the course of a day, does not absolve the driver of a duty to the police officer. The police officer being without choice – that is, being legally obliged to respond to emergencies – in fact places himself or herself in a situation of 'elevated risk' in respect of psychiatric harm.

[155] I therefore find that Mr Williams owed the pleaded duty of care to the plaintiff.[166]

Causation

[156] The plaintiff pleads that a causal connection exists between the negligence of Mr Williams and the plaintiff suffering a psychiatric injury.[167] The primary basis upon which the defendant denies causation is that a duty of care was not owed. The defendant does not suggest that if the duty of care exists, a breach of that duty was not causative of the psychiatric injury suffered by the plaintiff. As it is not disputed that the collision was caused by the negligence of Mr Williams and that the plaintiff suffered a psychiatric injury as a result, it follows from my finding that a duty of care was owed that causation is established.

[157] The defendant however, pleads a secondary causation issue, namely that:[168]

(a) the plaintiff suffered from pre-existing vulnerability to the development of a psychiatric illness such as post-traumatic stress disorder;

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[165] *Hirst v Nominal Defendant* [2005] 2 Qd R 133 at [25].
[166] See [56] above.
[167] Amended Statement of Claim, paragraph 14.
[168] Further Amended Defence, paragraphs 9(b)(i) and (ii), paragraph 10(b).

(b) the plaintiff would have come to suffer the same or similar degree and type of illness, with or without contribution by the subject vulnerability by virtue of the accident occurring on 22 August 2014; and

(c) further, by virtue of pre-existing vulnerability to psychiatric illness and by virtue of his occupation as a serving police officer in which he was likely to be exposed to multiple stressors over the period of his service, the plaintiff was at significant risk of developing the same or similar psychiatric impairment in any event.

[158] This issue is relevant to calculating the quantum of the plaintiff's damages. There is very little difference in how quantum is calculated by the parties except for the applicable discount for contingencies reflecting the plaintiff's pre-existing and continuing vulnerability to psychiatric illness. The plaintiff contends that there should not be any discount, or at most 25 per cent, for such contingencies. The defendant contends that the discount should be as high as 65 per cent. The resolution of this issue requires a consideration of the psychiatric evidence.

The psychiatric evidence

[159] The psychiatric evidence supports a finding that the plaintiff was and is a person possessed of a vulnerability to suffering a psychiatric injury. This is conceded by the plaintiff.[169] Professor Whiteford expressed it this way:[170]

> "Since the plaintiff had decompensated in response to a stressor then he could be taken to be a person more vulnerable to decompensation in the presence of stressors if exposed to those stressors. …
>
> The stressor need not be of the same character as the one which caused the initial decompensation. It could be exposure to any personal stressor, including to a traumatic event, which could cause decompensation in the plaintiff. He would be at higher risk than others similarly exposed to the same kind of stressor."

The previous decompensation to which Professor Whiteford refers is that suffered by the plaintiff in 2006.

[160] Dr Tom Bell, who is a consultant physician in psychiatry, interviewed the plaintiff on 3 December 2014 and provided a report dated 5 December 2014.[171] Dr Bell also prepared a supplementary report dated 8 October 2018[172] and gave oral evidence. Dr Bell makes reference in his first report to the plaintiff's existing vulnerability:[173]

> "The fatal motor vehicle accidents in the last two years have finally brought the psychiatric dysfunction to the fore; but, the seeds of that dysfunction were probably sewn much earlier in his working life."

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169 Plaintiff's Outline of Submissions, paragraph 31.
170 Exhibit 7, page 2.
171 Exhibit 8, Agreed Trial Bundle, Tab C, pages 53 to 61.
172 Exhibit 2.
173 Exhibit 8, Agreed Trial Bundle, Tab C, page 58.

[161] Doctors Cantor, Chung, Shaikh and Slaughter provided both individual reports and a joint expert report and gave concurrent evidence.[174] In the joint expert report, all four psychiatrists were of the opinion that the plaintiff had a level of ongoing vulnerability, but they did not believe that prior to the first accident the plaintiff would have met the diagnostic criteria for a specific personality or other psychiatric disorder.[175] In the course of the concurrent evidence Dr Shaikh opined that the plaintiff, prior to the first accident, was vulnerable and had a higher potential than someone who did not have this vulnerability to develop PTSD.[176] Dr Cantor agreed that the plaintiff's pre-existing vulnerability was a risk factor for the development of PTSD.[177] Dr Chung and Dr Slaughter were also in general agreement that the plaintiff, prior to the events of 17 February 2013, had a degree of vulnerability. I therefore proceed, in considering the second causation issue, on the basis that the plaintiff had a pre-existing vulnerability to suffering a psychiatric injury such as PTSD. I have already found in [21] above that when the plaintiff returned to duties as a police officer in 2007 he did not have any underlying psychiatric disorder. This finding is further supported by the opinions expressed in the joint report that the plaintiff would not have met the diagnostic criteria for a specific personality or other psychiatric disorder prior to the events of 17 February 2013.

[162] The experts also considered the effect on the plaintiff's PTSD of the first accident compared to that of the second accident. In his report dated 8 October 2018, Dr Bell opined as follows:[178]

> "It is clear from the reports, particularly those of his treating psychiatrist Dr Illesinghe, who would have had more therapeutic contact hours with Mr Caffrey than anyone else, that the accident in February 2013 carried enormous significance in terms of causing and sustaining Mr Caffrey's psychiatric condition, (Post-Traumatic Stress Disorder and Major Depressive Disorder).
>
> I acknowledge that the second accident, in August 2014, while distressing of course in its own right, occurred when Mr Caffrey was in any case only a few weeks away from being dismissed from the Queensland Police Service due to the extent of his psychiatric dysfunction which had emanated primarily from the February 2013 accident.
>
> The February 2013 accident was close to 100% responsible for causing Mr Caffrey's psychiatric condition, (allowing a few percentage points for disgruntlement with the Queensland Police Service, generally, over bureaucratic matters, etc); and, that accident carried a similar amount of responsibility in regard to the maintenance of his condition over the next 18 months."

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[174] Dr Cantor's Report is dated 28 September 2015, Exhibit 8, Agreed Trial Bundle, Tab C, page 72; Dr Chung's Reports are dated 12 August 2014 and 10 February 2015, Exhibit 8, Agreed Trial Bundle, Tab C, pages 30 and 62; Dr Shaikh's three reports are dated 22 March 2016, 30 November 2017 and 1 March 2018, Exhibit 8, Agreed Trial Bundle, Tab C, pages 99, 140 and 157. There are also file notes of a telephone conversation with Dr Chung, Exhibit 6, and Dr Shaikh, Exhibit 5.

[175] Exhibit 8, Agreed Trial Bundle, Tab C, page 153, paragraph 4.

[176] T 2-21, lines 15 to 25.

[177] T 2-22, line 12.

[178] Exhibit 2, page 2.

[163] Dr Bell clarified this opinion in evidence, stating that the February 2013 accident was close to 100% responsible for the condition the plaintiff had (a period of approximately 18 months) up to the second accident. Thereafter, Dr Bell opined that both accidents were responsible for the plaintiff's post-traumatic stress disorder in equal measure.[179]

[164] In the joint report Drs Chung, Cantor and Shaikh were of the view that the psychiatric condition suffered by the plaintiff in consequence of the second accident was an aggravation of a pre-existing post-traumatic stress disorder, chronic. The reason they described it as an "aggravation" was because the plaintiff continued to present with symptoms reflective of PTSD immediately preceding the second accident. This was in circumstances where all experts were of the opinion that the plaintiff's likely prognosis, having regard to his psychiatric condition following the first accident, irrespective of the second accident, was poor. Dr Chung, for example, noted that in his assessment of August 2014, immediately prior to the second accident, the plaintiff's symptoms were of a severe nature and continuing. Dr Cantor also noted severe symptoms of PTSD preceding the second accident.

[165] The expert opinions as to the effect of the second accident must be considered in light of the aftermath of the first accident. Following the first accident, the plaintiff had been unable to carry out police duties for approximately 17 months. Dr Illesinghe as early as 11 September 2013 had opined that the plaintiff had a poor prognosis. Subsequently, on 12 May 2014, Dr Illesinghe advised the QPS that the plaintiff's condition rendered him incapable of performing duties as a frontline police officer and that it would be detrimental to the plaintiff's mental state to do so and its impact was likely to be permanent. Also prior to the second accident, the plaintiff had already been dismissed from his employment with QPS on the basis of his medical incapacity with effect from midnight on 19 September 2014. In light of the profound effect on the plaintiff of the first accident, I accept the expert opinion that the effects of the second accident are properly described as an aggravation of the plaintiff's pre-existing post-traumatic stress disorder.

[166] The attempts by the experts to ascribe a percentage impact to the first accident compared to the second accident were unhelpful. As noted by Dr Chung, there was quite a difference of opinion as to the apportionment/contribution between the first accident and the second accident insofar as the onset of full-blown PTSD was concerned. Any percentage contribution on the split between the two accidents was considered by Dr Chung to be nothing more than just a "best guess". Dr Chung further stated, "There was no science to it".[180] In his report dated 1 March 2018,[181] Dr Shaikh opined that the first accident was more significant in relation to the plaintiff's psychiatric distress and incapacity than the second accident. He initially ascribed 75% to the first accident and 25% to the second accident. However, when given further history as to the second accident which involved the death of children, Dr Shaikh opined that the attribution was perhaps equal from each of these events.[182]

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[179] T 2-51, lines 35-46.
[180] Exhibit 6.
[181] Exhibit 8, Agreed Trial Bundle, Tab C, page 157 at 159.
[182] T 2-12, line 45 to T 2-13, line 2.

[167] The plaintiff's evidence as outlined at [53] above was that he subjectively considered the first incident the worst of the two experiences. Dr Cantor considered that the plaintiff's subjective opinion, while worthwhile, may not be correct in terms of attribution.[183] Dr Chung also considered that the plaintiff would probably not be in a position to assess his own disability as he is not trained to do so.[184] Dr Shaikh, whilst accepting the plaintiff's opinion as being important in some respects, noted that the plaintiff is not psychiatrically-trained so as to understand the impact of the two incidents.[185] Rather than seek to arbitrarily attribute a percentage to each accident, I proceed on the basis that following the first accident the plaintiff developed chronic PTSD and had a poor prognosis.

[168] As to whether it was likely the plaintiff would have developed PTSD if he had not attended the first accident at all, this issue was not addressed in the joint expert report. Nor did Dr Bell address it in either of his reports. Dr Shaikh, in his supplementary report dated 1 March 2018,[186] was asked to address the following question:

> "Assuming the underlying vulnerability described what was the likely psychiatric outcome for Mr Caffrey from exposure to attending the 2014 accident if Mr Caffrey had not been exposed to attending the 2013 accident, that is, what is the likelihood that Mr Caffrey would have developed post-traumatic stress disorder to a similar degree if he had been exposed to attending the 2014 accident without having been exposed to attending the 2013 accident?"

Dr Shaikh responded as follows:

> "In the absence of the 2013 event, I believe the likelihood that Mr Caffrey would have developed post-traumatic stress disorder to a similar degree is close to moderate. There is evidence from documentation to suggest that there had been improvements in Mr Caffrey's mental health in 2014, and he presented with a substantial deterioration in his symptomology, and aggravation phenomena following the event of 2014. I maintain the view, however, that from an overall perspective the event of February 2013 was more significant towards his psychiatric distress and incapacity than the event of 2014."

[169] It is, in my view, apparent from Dr Shaikh's response that, in answering the question posed, he has not excluded the plaintiff's ongoing symptoms arising from the first accident. Dr Shaikh's reference to "improvements in Mr Caffrey's mental health in 2014" may only be understood as a reference to improvements in the plaintiff's mental health following the first accident.

[170] Dr Shaikh further clarified his answer after having received further details of the second accident. Dr Shaikh, at the time of writing his report of 1 March 2018, was not fully aware of these details. He considered that the involvement of children would likely

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[183] T 2-7, lines 1317.
[184] T 2-7, lines 21-25.
[185] T 2-7, lines 29-31; see also T 2-14, line 43 - T 2-16, line 14 (Dr Chung) and T 2-24, line 46 - T 2-25, line 11 (Dr Shaikh).
[186] Exhibit 8, Agreed Trial Bundle, Tab C, page 159.

increase the severity of trauma for the plaintiff arising from the second accident. Dr Shaikh opined that the extent of trauma arising from the 2014 accident was greater than he had previously believed.[187]

[171] Dr Shaikh considered that the manner in which the plaintiff was involved in the second accident made it "highly likely to have led to the development of PTSD symptoms".[188]

[172] Dr Chung considered that the likelihood that the plaintiff would have developed PTSD only from the second accident would have been very high.[189] Dr Chung further opined:[190]

> "The plaintiff had a long history of service with the police and had been exposed to a number of traumatic incidents throughout his career. With the onset of PTSD, the individual does not always exhibit symptoms until they become overwhelmed. It is usually just a matter of time such that the plaintiff probably would have developed PTSD at some time in the future i.e. regardless of the event of 2013.
>
> In this instance, it is irrelevant which of the events in 2013 and 2014 precipitated the PTSD – they were both very significant and could have each on their own triggered the likely decompensation into full-blown PTSD in any event."

[173] Both Dr Cantor and Dr Slaughter agreed with the opinions expressed by Dr Shaikh and Dr Chung.[191]

[174] Senior Counsel for the plaintiff sought to clarify this evidence:[192]

> "MR GRANT-TAYLOR: Dr Cantor, it must be accepted that this man was profoundly injured in a psychiatric sense by his involvement in the event of February 2013, best attested to by, amongst other things, his unbroken absence from work for about 17 months thereafter from March of 2013 right up until the incident of August 2014 and by the fact that prior to August of 2014 he had already been dismissed from QPS, the police force, because of that condition. Is that an acceptable observation?
>
> DR CANTOR: Yes.
>
> MR GRANT-TAYLOR: Against that background it's true to say, isn't it, that this man was already – I hesitate to use the term 'damaged goods' by August of 2014?
>
> DR CANTOR: Yes.
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> MR GRANT-TAYLOR: Against that background, given the ongoing consequences of his profound injury, can I suggest to you that it's very

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187 Exhibit 5, page 4, "Answer to Question 4".
188 T 2-29, lines 29-30.
189 Exhibit 6, page 1.
190 Exhibit 6, page 1.
191 T 2-29, lines 38-43.
192 T 2-35, line 27-T 2-36, line 28.

> difficult to say under those circumstances, once we remove from the history February 2013, what his reaction would have been to the event of August 2014 in that notional, in that hypothetical situation?
>
> DR CANTOR: Yes, it's – it's difficult to – to say how he would have responded to the events of 2014. Certainly there – there were some risk factors that were present which would make a – a psychiatrist relatively pessimistic, but – but there could be a wide range of reactions to that event.
>
> MR GRANT-TAYLOR: He – at one end of the scale he may have reacted as badly as he did to February 2013, at one end of the scale.
>
> DR CANTOR: Yes.
>
> MR GRANT-TAYLOR: At the other end of the scale, he may have suffered, if he was going to develop a condition at all, relatively transient symptoms, lasting perhaps weeks or months; not leading to any period of time off work; not leading to a need for treatment and, in respect of which, he completely recovered?
>
> DR CANTOR: That's a possibility.
>
> MR GRANT-TAYLOR: Doctor Shaun, would you agree with that?
>
> DR SHAUN [CHUNG]: Uh hmm.
>
> MR GRANT-TAYLOR: Doctor Slaughter, would you agree with that?
>
> DR SLAUGHTER: Yes.
>
> MR GRANT-TAYLOR: Dr Shaikh, would you agree with that?
>
> DR SHAIKH: Yes."

[175] Dr Shaikh considered that given the plaintiff's underlying vulnerability and in the absence of him attending either the first or second accidents, there was a mild to moderate risk of the plaintiff suffering post-traumatic stress disorder by reason of exposure to the typical stressors involved in attending to the usual duties of a police officer.[193]

[176] The above evidence supports, in my view, the following findings. The plaintiff was a person who had a pre-existing vulnerability to suffering PTSD. The first accident caused the plaintiff to suffer PTSD, which was chronic and of such severity as to render him permanently unsuitable for employment as a police officer. The plaintiff's prognosis after the first accident was poor. The second accident caused an aggravation of the plaintiff's post-traumatic stress disorder. No further finding as to the percentage contribution of the first accident compared to the second accident can sensibly be made. Because of the plaintiff's vulnerability to developing symptoms of PTSD, there was a high likelihood of him decompensating as a result of the second accident and developing symptoms of PTSD. Irrespective of the plaintiff attending the 2013 and 2014 accidents, he had a mild to moderate risk of developing symptoms of PTSD arising from exposure to the typical stressors involved in attending to the usual duties of

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[193] Exhibit 8, Agreed Trial Bundle, Tab C, Report of Dr Shaikh dated 1 March 2018, page 159.

a police officer. It cannot, however, be determined with any certainty whether the second accident or future police duties would lead to chronic PTSD which would render the plaintiff incapable of carrying out police duties. Although the plaintiff since 2006 had a vulnerability to developing PTSD, he was able to carry out police duties on both a full-time and part-time basis up to and including the events of 17 February 2013.

[177] The defendant carries the evidentiary onus of establishing why the plaintiff's damages should be reduced because of these contingencies. The relevant authorities and principles for undertaking this task are summarised in *Phillips v MCG Group Pty Ltd*[194] referring to *Seltsam Pty Ltd v Ghaleb*:[195]

> "[57] In *Seltsam Pty Ltd v Ghaleb* Ipp JA, with whom Mason P agreed, said:
>
> > '104 What was said in *Watts v Rake* and *Purkess v Crittenden* now has to be qualified by these principles (cf *Commonwealth of Australia v Elliott* [2004] NSWCA 360 at [81]). *Malec* has an important bearing, for example, on the way in which a court must determine whether a defendant has discharged the "disentangling" evidentiary burden on it of showing that part of the plaintiff's condition was traceable to causes other than the accident and that, had there been no accident, the plaintiff would have suffered disability from his pre-existing condition.
> >
> > 105 Where a defendant alleges that the plaintiff suffered from a pre-existing condition, the evidential onus as explained in *Watts v Rake* and *Purkess v Crittenden* remains on the defendant and must be discharged by it. Nevertheless, to the extent that the issues involve hypothetical situations of the past, future effects of physical injury or degeneration, and the chance of future or hypothetical events occurring, the exercise of "disentanglement" discussed in those cases is more easily achieved. That is because the court is required to evaluate *possibilities* in these situations – not proof on a balance of probabilities.
> >
> > 106 Without intending to give an exhaustive list of possibilities, it may be that, had the defendant's negligent act not occurred, a pre-existing condition might have given rise to the possibility that the plaintiff's enjoyment of life and ability to work would have been reduced and to a susceptibility to further injury; in addition, other causes entirely unrelated to the defendant's negligent act might have contributed to the plaintiff's ultimate condition.
> >
> > 107 Appropriate allowances must be made for these contingencies. A proper assessment of damages requires the making of a judgment as to the economic and other consequences which might have been caused by a

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[194] [2013] QCA 83 at [57].
[195] [2005] NSWCA 208.

> worsening of a pre-existing condition, had the plaintiff not been injured by the defendant's negligence. A pre-existing condition proved to have possible ongoing harmful consequences (capable of reasonable definition) to the plaintiff, even without any negligent conduct on the part of the defendant, cannot be disregarded in arriving at proper compensation.
>
> 108 As was pointed out in *Newell v Lucas* [1964-5] NSWR 1597 (at 1601 per Walsh J, with whose judgment Hardie and Asprey JJ agreed), the court must determine whether a comparison may be made between the plaintiff's condition prior to the injuries sustained by the defendant's negligence (including the plaintiff's economic and other prospects in that condition) and the plaintiff's condition and prospects after the injuries. Nothing in *Watts v Rake* and *Purkess v Crittenden* precludes the judge from carrying out this exercise.
>
> 109 Of course, if the evidence does not adequately establish the pre-existing condition or its possible consequences (as was the case in *Purkess v Crittenden*), it would not be possible to carry out such a comparison and assessment. In regard to the possible consequences, a scintilla of evidence would not suffice. The evidence must be such that a reasonable person could draw from it the inference that the possible consequences contended for by the defendant existed (see McCormick, *Evidence*, 5th ed, para 338, p511).'" (footnotes omitted).

[178] The primary basis on which the defendant seeks a 65% discount of the plaintiff's damages is the high likelihood that the plaintiff would have developed PTSD in any event, whether by reason of the second accident alone or other stressors in his work as a police officer. Such a discount is, in my view, too high. As correctly submitted by the plaintiff, there is a difficulty in having his vulnerability to developing symptoms of PTSD translate to a circumstance justifying such a discount to damages. As to the plaintiff's pre-existing vulnerability, it is impossible to say in the notional situation that had the plaintiff not been injured in February 2013, just how that vulnerability would have manifested.[196] The task is to assess the degree of probability that an event would have occurred or might have occurred and adjust damages to reflect that degree of probability.[197] What must be assessed, once the degree of probability that an event would have occurred is determined, is "what its future effects, both as to their nature and their future development and progress, were likely to be".[198] In the present case it is difficult to simply set aside the consequences of the plaintiff's chronic PTSD developed from the first accident and hypothesise as to how he would have reacted to the second accident and undertaking police duties into the future. The range of

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[196] Plaintiff's Outline of Submissions, paragraph 31.

[197] *Hopkins v WorkCover Queensland* [2004] QCA 155 at [34], citing *Wilson v Peisley* (1975) 7 ALR 571 and *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638 at 643.

[198] *Purkess v Crittenden* (1965) 114 CLR 164 at 168; Plaintiff's Outline of Submissions, paragraph 32.

possibilities include the plaintiff decompensating to the same extent that he did following the first accident to him suffering relatively transient symptoms. In light of my factual findings the appropriate discount is, in my view, 30%.

Quantum

[179] The parties agree that the starting point for general damages is $100,000. Applying the discount of 30%, I assess general damages at $70,000. No interest is payable on general damages as the plaintiff received a statutory lump sum payment from WorkCover Queensland which exceeded the amount of general damages.

[180] The assessment of the plaintiff's past economic loss should be divided into two periods; the first from 4 March 2013 to 22 August 2014 and the second from 23 August 2014 to the date of judgment. The plaintiff submits and I accept that this division is appropriate because the discount of 30% should not apply to the first period which predates the second accident. The calculation is made by reference to the net weekly average earnings of the plaintiff as a Senior Constable, together with the applicable allowance. The total for the first period is $93,847.52. For part of the second period (from 23 August 2014 to 11 October 2018) the amount is $297,446.97. To this must be added a further amount for the second period from 12 October 2018 to the date of judgment, being 30 January 2019 (111 days) at the net weekly average of $1,515.42, which is an amount of $24,030.23. The combined amount of past economic loss for the second period must be discounted by 30%. The plaintiff's past economic loss for the second period of 23 August 2014 to 30 January 2019 is therefore $225,034.04.

[181] Since the plaintiff was medically retired from the QPS effective from 19 September 2014, he has made various attempts to return to work. He did obtain work as an in-home support worker with Glasshouse Community Care, where he was employed from 27 June 2016 to 7 August 2016, but was unable to continue this employment. His earnings from this employment of $618.60 are to be deducted from his net earnings in the second period ($224,415.44). I accept the plaintiff's essentially unbroken absence from employment from early March 2013 is a direct consequence of his involvement in the events of 17 February 2013. The total amount for past economic loss is therefore $318,262.96.

[182] The parties agree that the applicable rate for interest on past economic loss is 1.34% per annum. In calculating interest on past economic loss however, there must be brought to account the net payments of periodic worker's compensation paid to the plaintiff following the events of 17 February 2013, being an amount of $84,063.61. Interest on past economic loss at 1.34% per annum is therefore calculated on the amount of $234,199.35. Interest is to be calculated for the period 4 March 2013 to 30 January 2019 (five years 333 days). This calculation results in the amount of $18,554.49 for interest on past economic loss.

[183] Special damages are agreed in the amount of $23,136.55. Interest on actual out-of-pocket expenses totalling $2,000 is agreed at 1.34% per annum for the period February 2013 to date of judgment, yielding $158.45.

[184] For past loss of superannuation benefits, it is agreed that this should be calculated at 18% of the total award for past economic loss. This reflects the contribution that the QPS would have made to the plaintiff's superannuation. Eighteen per cent of the total of past economic loss is $57,287.33.

[185] As to the award for the plaintiff's future loss of earning capacity, this is calculated on the basis of the plaintiff retiring from the QPS when he attains the age of 60 on 30 May 2028. Future loss of income is calculated by working out the plaintiff's earnings as he would have advanced through the remaining pay-points of the rank of Senior Constable until the point of retirement. The average of the yearly earnings of the notional balance of the plaintiff's career in the QPS is calculated at $1,690.70, which is further discounted at 5% per annum over nine and a-half years (multiplier 396.7) to the retirement age of 60, which equals $670,700. Applying the discount of 30% which caters for all vicissitudes, including residual employability and the plaintiff's vulnerability to psychiatric decompensation, this results in an award for future economic loss of $469,490.

[186] As to future loss of superannuation benefits, these are also calculated at 18% of the total award for future economic loss. Eighteen per cent of $469,490 is $84,508.20.

[187] As to future medical expenses, I accept that the general consensus of the psychiatric experts was that an appropriate treatment regime for the plaintiff may include weekly or fortnightly consultations for three to five years at a cost of anything between $270 and $350 per hourly consultation, coupled with medication costing $108 per month. I accept that an appropriate allowance for future treatment is an average of $200 per week, discounted at 5% per annum over four years (multiplier 189.6), which equates to $37,920. For medication an appropriate allowance is $108 per month, which equates to $24.79 per week discounted at 5% per annum over four years (multiplier 189.6), which is an amount of $4,700. I would also allow a global assessment of $1,000 for associated travelling expenses. The total is $43,620, which is to be discounted by 30%, arriving at a figure for future medical expenses of $30,534.

[188] The parties have agreed *Fox v Wood* damages in the amount of $21,015.90.

[189] I therefore assess the plaintiff's damages as follows:

Head of Damage	**Amount**
General Damages	$70,000.00
Interest on General Damages	$0.00
Past Economic Loss	$318,262.96
Interest on Past Economic Loss	$18,554.49
Past Loss of Superannuation Contributions	$57,287.33
Future Loss of Earning Capacity	$469,490.00

Future Loss of Superannuation Contributions	$84,508.20
Past Special Damages	$23,136.55
Interest on Past Special Damages	$158.45
Future Special Damages	$30,534.00
Fox v Wood	$21,015.90
TOTAL	$1,092,947.88

Disposition

1. Judgment for the plaintiff against the defendant for $1,092,948.

2. I will hear the parties as to costs.