SUPREME COURT OF QUEENSLAND

CITATION:	*AAI Limited v Caffrey* [2019] QCA 293
PARTIES:	**AAI LIMITED** ABN 48 005 297 807 (appellant) **v** **DAVID PAUL CAFFREY** (respondent)
FILE NO/S:	Appeal No 1992 of 2019 SC No 6587 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2019] QSC 7 (Flanagan J)
DELIVERED ON:	10 December 2019
DELIVERED AT:	Brisbane
HEARING DATE:	19 August 2019
JUDGES:	Sofronoff P and Philippides and McMurdo JJA
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	TORTS – NEGLIGENCE – OTHER PARTICULAR CLAIMANTS, DEFENDANTS AND CIRCUMSTANCES – POLICE – where the respondent was a Senior Constable in the Queensland Police Service – where the respondent was called to attend a scene where a car had crashed into a tree – where the driver of the car had been driving at excessive speed while intoxicated by methamphetamine, amphetamine and marijuana – where the respondent rendered first aid to the driver who was critically injured – where the driver died soon afterwards – where the respondent was diagnosed with post-traumatic stress disorder as a result of attending the crash – where the respondent sued the appellant insurer pursuant to s 52(2)(b) of the *Motor Accident Insurance Act* 1994 (Qld) claiming that, as a result of the driver's negligent driving, he suffered psychiatric injury – where the substantial issue at trial was whether the driver owed the respondent a duty of care to avoid causing him the psychiatric harm that he had suffered by reason of his attendance, in the course of his duties as a police officer, at the scene of the crash – where the learned trial judge held that the driver owed the respondent such a duty – where the learned trial judge found that the driver had been negligent and that his breach of duty had caused the respondent's psychiatric injuries – where the

appellant submits that the learned trial judge erred in holding that a duty of care could be owed by a person who causes a traumatic event, not to cause pure psychiatric harm to a person who, in the course of their occupation, are exposed to the highly distressing aftermath of a traumatic event – where the appellant does not challenge the principles governing liability for causing psychiatric harm to rescuers – where the appellant accepts that the respondent had satisfied all those common law requirements – where the appellant submits that the respondent's status as a police officer denied him a right to recover because of policy considerations which render the foreseeability of injury unreasonable – whether the principles that govern the right of rescuers to recover damages for injuries extends to police officers in the course of their occupation

Motor Accident Insurance Act 1994 (Qld), s 52(2)(b)

Hale v London Underground Ltd [1993] PIQR Q30, cited
Haynes v Harwood [1935] 1 KB 146, explained
Hirst v Nominal Defendant [2005] 2 Qd R 133; [2005] QCA 65, followed
Jausnik v Nominal Defendant (No 5) (2016) 316 FLR 359; [2016] ACTSC 306, approved
Tame v New South Wales (2002) 211 CLR 317; [2002] HCA 35, applied
Wicks v State Rail Authority (NSW) (2010) 241 CLR 60; [2010] HCA 22, explained

COUNSEL: P J Dunning QC, with D J Schneidewin, for the appellant
M Grant-Taylor QC, with D Murphy, for the respondent

SOLICITORS: Jensen McConaghy Lawyers for the appellant
Sciacca's Lawyers for the respondent

[1] **SOFRONOFF P:** The respondent, David Caffrey, was a Senior Constable with the Queensland Police Service when, on the evening of 17 February 2013, he attended the scene at which a man named Williams had crashed his Holden Commodore into a tree.[1]

[2] Williams was trapped in the wreckage of his car. He was still alive but he had been grievously injured. Senior Constable Caffrey saw that his legs were "very squashed". Williams was in a very bad way and was gasping for breath. Senior Constable Caffrey rendered first aid, instructed Senior Constable Collins to assist, and encouraged Williams with words like, "Come on, mate", "Don't give up", hoping that Williams could hear. While struggling to keep Williams alive, Senior Constable Caffrey received a call on his mobile phone. It was a call from Police Communications asking him to identify the police district in which the crash had happened. No other emergency services vehicles had yet arrived to help. Senior Constable Caffrey was brusque in his response, "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?" He

[1] Senior Constable Caffrey, along with Senior Constable Michael Collins, were the first emergency services at the scene. As the more senior officer, Senior Constable Caffrey was in charge of the crash site.

then noticed that he had bloody matter on his hands. He thought that it had probably come from the inside of Williams's head.

[3] Williams had had a distressing day. He had argued with his wife and she had gone. He had phoned his parents in a disturbed and anxious state, saying that he was going to find his wife. His parents became concerned about him and drove around the area searching for him. In this way they came onto the place where their son was dying. Senior Constable Caffrey reassured Williams's mother that her son would live. He told Williams that his mother was there and that he should not give up.

[4] The fire brigade arrived and prepared to cut Williams out of his wrecked car. Senior Constable Caffrey had to warn the firefighters not to move him because that might cause a heart attack or shock. He continued to tend to Williams and to reassure his mother and father. Paramedics arrived and Williams was removed and taken by stretcher to an ambulance. A senior paramedic told Senior Constable Caffrey that Williams was going to die. Together with the senior paramedic and a Senior Sergeant who had arrived, Senior Constable Caffrey broke the news to the parents. Senior Constable Caffrey took Williams's mother by the hand and said, "Come on, let's go to say goodbye". He accompanied her to where her son lay. Soon afterwards, Williams died.

[5] This performance of duty had an enormous effect upon Senior Constable Caffrey. He began to drink a great deal of alcohol. He began to show undue anger and irritation. Senior Constable Caffrey became angrier and sadder. He contemplated committing suicide. One day he slung a rope in preparation for suicide. He fantasised about going back to work so that he could secure a pistol. He fantasised using the weapon. On a friend's advice he consulted a general practitioner. As soon as the consultation began, Senior Constable Caffrey began to weep. He said that, "it sort of all fell apart". The doctor certified that he was unfit for work for a month.

[6] In his evidence to Flanagan J, Senior Constable Caffrey tried to explain what had happened to him:

> "And I was just thinking, whether it was then, now or since – because I've kids meself [*sic*] – you see them coming into the world; you never imagine burying them, do you? But you'd never imagine seeing that. Its' 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 [*sic*] eyes. Fifty years old, two decades into 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 [*sic*] son."[2]

[7] The evidence of a psychiatrist, Dr Illesinghe, was as follows:

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2 ARB1, 13 at [36].

> "Mr Caffey [*sic*] 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)."[3]

[8] The cause of action was wholly based on the common law. Senior Constable Caffrey sued the appellant insurer[4] for damages alleging that, as a result of Williams's negligent driving, he suffered psychiatric injury. He alleged that Williams owed him a duty to take reasonable care to avoid causing him harm in the form of psychiatric injuries. Williams's negligence was not in dispute. He had been driving at an excessive speed while intoxicated by methamphetamine, amphetamine and marijuana. The substantial issue at the trial, and the only issue in this appeal, is whether Williams owed Senior Constable Caffrey a duty of care to avoid causing him the harm that he had suffered by reason of his attendance, in the course of his duties as a Queensland police officer, at the scene of the crash. Flanagan J held that Williams owed the plaintiff such a duty, that Williams had been negligent and that his breach of duty had caused the psychiatric injuries. His Honour assessed damages in the sum of $1,092,947.88.

[9] The appellant raised two grounds of appeal as follows:

> "1. The learned trial judge erred in holding that a duty of care could be owed by a person who causes horrific and distressing injuries to him or herself and/or someone else, not to cause pure psychiatric harm to a person who, in the course of his or her occupation, is required to attend events where such horrific and distressing injuries will be present. As a matter of public policy the learned trial judge should have held that such a duty of care could not arise in favour of a person in such occupation for pure psychiatric harm caused in the course of that occupation.
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> 2. The learned primary judge erred in, to the extent his Honour did so, considering the reasoning of Mossop As J in *Jusnik v Nominal Defendant No* 5 at [79] to be of assistance in determining whether a duty of care for pure psychiatric harm could arise in circumstances such as the case before his Honour, as the question of duty of care had been conceded before Mossop As J, as recorded by Mossop As J at [118]." (Emphasis added)

[10] The appellant's written outline of argument said:

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3 ARB1, p 14 at [40].

4 Pursuant to s 52(2)(b) of the *Motor Accident Insurance Act* 1994 (Qld).

> "This appeal; as did the trial; raises a novel and policy laden question – whether tort law in Australia should recognise for persons who in the course of their occupation are exposed to the highly distressing aftermath of a traumatic event an entitlement to recover for pure psychiatric injury against the person whose lack of care caused the traumatic event, the aftermath of which they were professionally responding to.

[11] Put in that way, the appellant must fail.

[12] The appellant does not question any of the authorities that have established the principles governing liability for causing psychiatric harm to rescuers. In summary, as Mr Grant-Taylor QC and Mr Murphy for the respondent correctly submitted, they are:

(a) Damages are recoverable only for injury constituted by a recognisable psychiatric condition and not for emotional distress, alarm, fear, anxiety, annoyance or upset.[5]

(b) It is not necessary to prove that the plaintiff was of "normal fortitude".[6]

(c) It is not necessary to prove that the injury was the result of a "sudden shock".[7]

(d) The ordinary principles of negligence apply to cases of pure psychiatric injury.[8] These principles take into account issues about "normal fortitude"[9] and "sudden shock".[10]

[13] The appellant did not challenge these propositions. The appellant's argument accepted that the respondent had proved every one of the common law requirements that would render the appellant liable to the respondent for the injuries that he had suffered. The appellant submitted that, despite proving the conventional elements of the cause of actions, the respondent's status *as a police officer* denied him a right to recover because of "policy considerations" which render the foreseeability of injury "unreasonable".

[14] The appellant put forward three policy considerations that were said to deny the existence of liability.

[15] First, it was submitted that if a police officer could recover then that would create an indeterminate class of prospective plaintiffs which would include police officers, firefighters, paramedics, doctors and nurses, as well as some non-medical staff at a hospital.[11]

[16] Second, it was said that an "extension of the duty of care" to this class would constitute "an inapt tool" as a means of responding to loss constituted by psychiatric harm. An "obvious and apt tool" to deal with the prospect of such harm is by recourse to the liability of the employer of these prospective plaintiffs.[12]

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5 *Tame v New South Wales* (2002) 211 CLR 317, at [7], [44], [194].
6 *ibid*. at [16], [62], [189].
7 *ibid*. at [17].
8 *ibid.* at [51]; and see *King v Philcox* (2015) 255 CLR 304, at [12].
9 *ibid*. at [201], [208].
10 *ibid*. at [18], [189], [213].
11 Appellant's Outline, at [19].
12 *ibid*. at [20], [21].

[17] Third, it was submitted that, if the respondent could recover, then a person in the position of the respondent in this case will recover damages if the person who caused the damage is insured but will not recover if the person responsible is not wealthy or insured.[13]

[18] It was also submitted that if a duty of care was owed to police officers, and others whose job it is to save people from injuries, then that would lead to capricious outcomes. It was submitted that a duty of the kind postulated by the judgment below lacks coherence.[14]

[19] I doubt that it is the proper function of an intermediate court of appeal, when deciding a question of law, to undertake a policy analysis of the common law of tort liability and to allow policy to determine the outcome rather than to apply the principles that have been established in relevant case law.

[20] The dictum of Cardozo J in *Wagner v International Railway Co* is frequently quoted as a starting point in discussions about the law on this subject:[15]

> "Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognises them as normal. It places their effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperilled victim; it is a wrong also to his rescuer."

[21] In *Wicks v State Rail Authority (NSW)*,[16] a case in which the plaintiff rescuers were police officers, a unanimous court held that the existence of a duty of care to protect against psychiatric harm to a rescuer depends upon whether it was reasonably foreseeable that the sights that a rescuer might see, sounds that a rescuer might hear and 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.[17]

[22] In *Haynes v Harwood*,[18] an English case that was decided in 1934, a police constable, who was on duty, was injured when he tried to stop a runaway van towed by horses. It was held that his injuries were reasonably foreseeable and that they were the natural and probable consequences of the defendant's actions. His attempt to stop the horses in an effort to prevent injury to others was foreseeable because police officers were under a general duty to intervene to protect life and property. In another English case, *Hale v London Underground Ltd*,[19] the plaintiff rescuer was an on duty fireman who suffered post-traumatic stress disorder as a result of his interventions. Liability was admitted but that was merely consistent with the authority of *Haynes v Harwood*.

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13 *ibid*. at [22], [23].
14 *ibid*. at [25].
15 (1921) 232 NY 176, at 180.
16 (2010) 241 CLR 60.
17 *ibid*. at [33]; the High Court was asked not to determine the issue whether a duty was owed in the circumstances of the case.
18 [1935] 1 KB 146.
19 [1993] PIQR Q30.

[23] In *Hirst v Nominal Defendant*[20] this court decided that the speeding driver of a car was liable to a police officer who, in the course of his duty, had pursued that driver at high speed and had lost control of his own car during the pursuit. The fact that, in a sense, the plaintiff's injuries were caused as a result of his own voluntary decision to drive his car at high speed in pursuit and as a result of his own loss of control of the car he was driving, were held not to absolve the speeding driver from liability in negligence. Keane JA[21] said that the situation of elevated risk in which the plaintiff found himself arose because of a combination of the speeding driver's unlawful conduct and the plaintiff's discharge of his obligations as a police officer. To say that the plaintiff's actions were "voluntary" would involve a failure to recognise that, as a police officer, he was constrained by his duties to act in the way in which he did. The driver's failure to stop or slow down once the plaintiff began his pursuit elevated the risk and, in a substantial way, caused the plaintiff's injuries.[22] Keane JA referred to *Haynes v Harwood* with approval.

[24] *Hirst* is inconsistent with the proposition of law for which the appellant advocates. The appellant did not challenge the correctness of that decision and, unless the members of the Court of Appeal hearing this appeal consider that *Hirst v Nominal Defendant* was clearly wrong, we are obliged to follow it. I am respectfully of the opinion that the decision was clearly right. As a matter of principle, this case and *Hirst* cannot be distinguished. Both cases concern a police officer who suffered psychiatric injury[23] caused by a reasonably foreseeable response to a situation of risk that was created by the negligence of the defendant.

[25] In *Jausnik v Nominal Defendant (No 5)*,[24] Mossop As J came to the same conclusion. The plaintiff was a police officer. He was a passenger in a police car driven by his partner when they began to pursue a speeding driver (also, coincidentally, named "Williams"). During the pursuit they drove through the city of Queanbeyan at speeds as high as 157kph. Williams crashed his car and he and his own passenger suffered serious injuries. The plaintiff rendered first aid at the scene to both occupants of the wrecked vehicle. Williams later died. The plaintiff later suffered psychiatric injury as a result of this experience and sued the Nominal Defendant for damages for the injuries that he claimed had been caused by Williams's negligent driving. Mossop As J said:

> "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 the 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."

[26] I respectfully agree with that statement and it accords with the decision of this court in *Hirst* as well as with the early English case of *Haynes v Harwood*. The appellant's second ground of appeal complains that Flanagan J should not have relied upon this decision because "the question of duty of care had been conceded

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20 [2005] 2 Qd R 133.

21 with whom Jerrard JA and Douglas J agreed.

22 *supra*, at [25].

23 The plaintiff police officer in *Hirst v Nominal Defendant* had suffered psychiatric injury as well as physical injury: see [2004] QSC 272, at [30]-[33] per McMurdo J.

24 [2016] ACTSC 306.

before Mossop As J, as recorded by Mossop As J at [118]". This ground is based on a mistaken reading of the case. What is recorded as having been conceded at [118] of the reasons of his Honour was that the State of New South Wales owed the plaintiff a duty of care. The Nominal Defendant had put in issue whether the negligent driver owed any duty[25] to the plaintiff in circumstances similar to the present case and his Honour considered this separately.[26]

[27] I add that in *Wicks*[27] the reasons of the High Court[28] about the factors upon which liability to rescuers might depend did not include any suggestion that their status as police officers might be relevant in the way that the appellant now submits.

[28] Over the years defendants have come up with different ingenious arguments for why they should not be found liable for negligently causing injury, physical or psychiatric, to police officers. In *Haynes v Harwood* the defendant argued that the police officer voluntarily took on the risk of physical injury because, it was submitted, he was under no duty to attempt to stop the horses any more than there is any duty "on a man seeing another in the water drowning to plunge and rescue him … nor yet on a passer-by seeing child under the feet of a horse to pull him out and prevent his being run over". The defendant also argued that if the plaintiff police officer had not tried to stop the horses "his position in the force would not have been prejudicially affected".[29] These arguments were fallacious because they equated the absence of a duty to act with an absence of liability in a negligent defendant for injury caused by that negligence when a plaintiff's acts were reasonably foreseeable.

[29] In *Hirst* the Nominal Defendant argued that the police officer's injuries were really his own fault because they were the "result of his own deliberate act".[30] It was argued that holding that a speeding driver owed this pursuing police officer a duty of care amounted to saying that a careless driver owed the police officer a duty to prevent him causing harm to himself.[31]

[30] The authorities to which reference has been made establish that, provided the usual principles that govern the right of rescuers to recover damages for injuries are satisfied, the fact that a rescuer happens to be a police officer does not constitute a legal bar to liability whether the injury is physical (*Haynes v Harwood*), psychiatric (*Jausnik*) or both (*Hirst*).

[31] Further, contrary to the appellant's submissions,[32] Flanagan J did not fail or omit to consider the relationship between the plaintiff and the negligent driver before deciding whether psychiatric injury was reasonably foreseeable. His Honour applied the authorities about psychiatric harm suffered by rescuers.[33] His Honour concluded correctly that, in accordance with the principles established by those

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25 *ibid*. at [9].
26 *ibid.* see the pleading at [7] and the reasoning at [110]-[114].
27 *supra.*
28 nor was this supposed preclusive fact mentioned in the New South Wales Court of Appeal judgment that found that there was no duty of care: *Sheehan v State Rail Authority (NSW)* [2009] Aust Torts Reports 82-028.
29 *supra*, at 148.
30 *supra*, at 134.
31 *ibid*.
32 Appellant's Outline, at [29].
33 Reasons, at [101]-[118].

authorities, Williams owed a duty to the plaintiff.[34] The appellant does not allege that there is any error in any step in his Honour's reasoning in that regard. The appellant points to no error of fact.

[32] Contrary to the appellant's submissions Flanagan J did not fail to "engage an analysis [*sic*] of the policy considerations". His Honour performed this analysis at paragraphs [119] to [155] and rejected the three policy considerations urged upon him.[35] Except to complain incorrectly that his Honour did not consider these ideas, there is no submission or ground of appeal that says that his Honour's disposal of them was erroneous. It is unnecessary to consider this submission further.

[33] This appeal should be dismissed with costs.

[34] **PHILIPPIDES JA:** I agree with Sofronoff P.

[35] **McMURDO JA:** I agree with Sofronoff P.

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34 *ibid*. at [118].

35 The policy grounds and his Honour's treatment of them was as follows: (i) If there was a duty of care owed to police rescuers then members of the public would be discouraged from calling 000 (it would not because a bystander would do so, self-preservation would do so and it is against the law not to report an accident in which death or injury has been caused); (ii) If there was a duty of care then that would expose defendants to "unjustifiably expanded liability" (it would not do so because the law provides control mechanisms in cases involving psychiatric injury; and it might be added, that if such a duty exists as a matter of law, the liability is justified by law); (iii) the public is entitled to expect that police officers are sufficiently trained and experienced to resist such harm so that harm is not reasonably foreseeable (this is contrary to authority. In any case, resilience is a question of fact, not a question of law.).