

**Johnson Tiles Pty Ltd v Esso Australia Pty Ltd [2003] VSC 27
(Supreme Court of Victoria)**

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In 1998, there was a huge explosion at Esso's natural gas plant at Longford in Victoria. Esso was the sole supplier of natural gas to Gascor which was the sole distributor of gas in Victoria. The explosion shut down the Longford plant. As a result Melbourne was without any gas supply for a number of weeks. The explosion was due to the carelessness of Esso in maintaining its plant. As a result of the lack of gas supply, a number of gas customers (both business and private) and workers claimed they had suffered losses.

An action was brought in the Supreme Court of Victoria as a group proceeding pursuant to Part 4A of the *Supreme Court Act 1986* (Vic). The plaintiffs represented three groups of claimants: business users, domestic users and 'stood-down' workers.

The losses suffered by the business users group may be divided into two classes: (1) those who suffered physical damage as well as consequential losses, and (2) those who suffered no physical damage. The latter claimed economic losses, such as loss of profits (arising from an inability to meet demand because production had ceased). The domestic users' losses included the expenses of buying electrical appliances to replace gas appliances which could not be operated. These were purely economic losses. The employee losses were also purely economic. They included loss of wages for persons who had been stood down as a result of the failure of gas supply. Thus, except for the customers who suffered some physical damage, most of the claims fell into the category of pure economic loss (that is, loss not resulting from any physical injury to person or property).

Esso accepted that the flow of gas had been interrupted by its negligence in designing, installing, operating and maintaining the Longford plant. Thus, the critical issue for determination was whether Esso owed a duty of care to the plaintiffs or any member of the groups they represented to avoid the losses suffered.

At the time of the explosion the distribution of gas in Victoria was governed by a series of contracts between, first, Esso and Gascor (the distributor), secondly, between Gascor and the gas retailers, and, finally, between the gas retailers and the customers. Under these contracts Esso, Gascor and the retailers each in turn disclaimed any liability for economic loss arising from a failure to supply gas. The retailers were also protected against claims by customers for failure to supply gas by the provisions of the *Gas Industry Act 1994* (Vic).

In the Supreme Court Gillard J applied a three step methodology for determining the existence of a duty of care [745]:

- 'Reasonable foreseeability of injury;
- whether there is a relationship of proximity; and
- identification and consideration of competing salient features for and against the finding of a duty of care.'

According to Gillard J (at [755]) 'The cases establish the following relevant salient features -

- Reliance by plaintiff and undertaking of responsibility by defendant;
- a regime of contracts between various parties in a supply chain;
- a statutory regime regulating the supply of a service;
- whether the imposition of a duty of care would impose liability "in an indeterminate amount or an indeterminate time to an indeterminate class";
- whether a finding of a duty of care would be inconsistent with community standards in relation to what is ordinarily legitimate in the pursuit of personal advantage;
- the knowledge of the tortfeasor of an ascertainable class of persons likely to suffer harm if the tortfeasor was negligent;

- whether the claimants are vulnerable persons unable to protect themselves from harm;
- whether a duty would impair the legitimate pursuit by the tortfeasor of its own commercial interest.’

Applying these principles he decided:

- Esso owed a duty of care to gas customers to avoid a stoppage of gas *causing property damage*. This case was indistinguishable from *Donoghue v Stevenson* and *Grant v Australian Knitting Mills*.

Esso did not owe any duty to the employees who had been stood down. The class was indeterminate. Esso could not possibly know the number of workers likely to be affected.

- Esso did not owe a duty of care to the business or private customers to avoid pure economic loss. There were a number of factors that favoured the existence of a duty of care, including:
 - That the losses were reasonably foreseeable;
 - That the class, although large, was not indeterminate. Esso knew the number of its business and private gas customers;
 - That Esso’s actions were defensible as a legitimate business activity.

However, other factors suggested the absence of any duty. These included:

- In contrast to the plaintiffs in *Perre v Apand*, the gas customers were not totally reliant on Esso. Gas supply interruptions were not completely unknown or unexpected. The business customers could, and many had, taken out back-up precautions or insurance. The private customers were inconvenienced but not reliant on Esso. Esso’s contracts showed that it had not assumed the risk for losses suffered as a result of a gas stoppage. Gillard J said (at [1347]): ‘The gas customers are aware that there is no guarantee of uninterrupted supply, they know what steps can be taken to avoid or minimise the risk of harm to their particular business or interest and it is their choice as to what they should do. Gas customers are in a far better position than anyone else to assess their likely loss due to interruption of supply and if insurance is the preferred means of minimising the loss, they can take out insurance based upon a reasonable assessment of the likely harm and factor the expense of the premium into the price of their products or services.’
- The contractual framework was relevant and worked against the recognition of any duty to avoid pure economic loss. All the supply contracts contained a term that the supplier would not be responsible for losses suffered as a result of a gas stoppage.
- The statutory framework did not impose a duty on Esso for pure economic loss. Given this indication of legislative intent, it would be inappropriate for the court to impose such a duty.

On balance Gillard J decided that no duty was owed for purely economic loss.