Recognised psychiatric injury

Whayman & Whayman v MAIB [2003] TASSC 149

The plaintiffs were the parents of Matthew Whayman, who was killed in a motor vehicle accident in Tasmania on 26 March 1999. He was a passenger in a car which collided head-on with another car that was being driven on the wrong side of the road. The plaintiffs sued the defendant Motor Accidents Insurance Board pursuant to the *Motor Accidents (Liabilities and Compensation) Act* 1973, s16, for damages for nervous shock sustained by each of them as a consequence of the negligent driving of the deceased driver. It was not disputed that the driver owed the plaintiffs a duty of care, that he was negligent and that nervous shock to the plaintiffs was reasonably foreseeable. The sole issue was whether or not the plaintiffs had established that they had suffered compensable nervous shock.

THE WAY THE PLAINTIFFS PUT THEIR CASES

The plaintiffs pleaded their cases on a dual basis. They alleged that they had each suffered from a Major Depressive Illness and in the alternative had suffered a Pathological Grief Reaction.

MAJOR DEPRESSIVE ILLNESS

Cox CJ accepted the expert evidence called by the defence (and specifically rejected the evidence of psychiatric expert called for the plaintiffs). He found that neither plaintiff at any time had suffered a Major Depressive Illness. This finding was important, as clearly a Major Depressive Illness is a recognised psychiatric illness.

PATHOLOGICAL GRIEF REACTION

It was common ground at the trial that each plaintiff suffered from something more than 'mere grief'. Each had suffered a severe intractable form of grief. All psychiatric evidence agreed that Pathological Grief Reaction was not a psychiatric illness within the accepted classification of illnesses – DSM IV-TR. His Honour according found that neither plaintiff suffered from what was recognised by psychiatry as an illness.

THE DECISION

It was for His Honour to decide whether a condition, which fell short of a condition recognised by psychiatrists as a psychiatric illness, could nevertheless be a 'recognised psychiatric illness' as that term is understood in the law.

His Honour decided this point in favour of the plaintiffs.

The authorities clearly indicate that mere grief cannot sound in damages. They indicate that before damages are recoverable, there must be a recognised psychiatric illness. What the authorities do not do is to define what is meant by the words 'recognised psychiatric illness'.

The issue arose in argument in the High Court in *Gifford v Strang*,[1] and appears to have interested the Court – particularly Gleeson CJ. Unfortunately, that interest was not reflected in the judgment. There is no assistance provided as to the meaning of the term 'recognised psychiatric illness'.

Clearly there is a continuum of reactions to the event which confronted the plaintiffs. At one end of the scale is mere grief or sorrow, and at the other, a psychiatric illness resulting in permanent inpatient care. The plaintiffs fell somewhere on this continuum.

In two cases, something less than an illness recognised as such by a psychiatrist has been held to be sufficient. In *De Franceschi v Strorrier*,[2] Miles CJ of the ACT Supreme Court held that as the effect on the plaintiff went beyond 'ordinary grief' her claim succeeded, even though she did not have an illness recognised as such by psychiatrists. He relied on the decision of the New South Wales Court of Appeal in *Swan v Williams ('Swan')*.[3] In that case, the majority followed what was said by Brennan J in *Jaensch v Coffey*.[4] Cox CJ referred to *Swan* to support his conclusion that the plaintiffs ought to succeed.

There are indications in the judgments and transcript of argument in *Tame v NSW*[5] and in *Gifford* to suggest that an appeal from the judgment of Cox CJ might succeed. In *Coates v GIO of NSW*,[6] Gleeson CJ observed:

'There is no clear line between severe but natural grief, on the one hand, and "nervous shock" on the other. Many people become physically ill in reaction to grief. Many people grieve for a deceased relative or friend for an extended period. This does not mean that such people are suffering from psychiatric illness or injury.'[7] PL

Endnotes: **1** *Gifford v Strang Patrick Stevedoring Pty Ltd ('Gifford')*. Decision reported at [2003] HCA 33. Transcript available at www.austlii.edu.au. **2** (1988) 85 ACTR 1. **3** (1987) 9 NSWLR 172. **4** (1983 – 1984) 155 CLR 549. Compensation is awarded for the disability from which the plaintiff suffers, not for its conformity with a label of dubious medical acceptability. **5** [2002] 191 ALR 449. **6** (1995) 36 NSWLR 1. **7** ibid, p4.