actions for pure psychiatric injury after the Ipp reforms

By Ian Freckelton

The High Court decision in *Tame v NSW; Annetts v Australian Stations Pty Ltd*[1] promised to make fundamental changes that would advantage plaintiffs claiming damages for pure psychiatric injury – where no physical injuries had been caused by the negligence of a defendant. This tended to be confirmed by early decisions applying the *Tame/Annetts* decision. However, the Ipp recommendations, followed by legislation in most jurisdictions, intervened.

This article analyses the impact of the legislative changes that have sought to effect a partial reversal of the *Tame/Annetts* decision. It argues that while the position of plaintiffs has been worsened, the deterioration is of modest dimensions and in most cases can be accommodated by good preparation and careful focusing of pleadings.

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THE COMMON LAW AFTER THE *TAME* AND *ANNETTS* DECISIONS

The conceptually unsound and unfair common law limitations on plaintiffs' entitlements to recovery for psychiatric injury were cast aside by the High Court decisions in *Tame/Annetts*. The result was that:

- A plaintiff still had to prove that as a result of a defendant's breach of their duty of care was the suffering or worsening of a recognised psychiatric illness.
- The breach of a defendant's duty of care need only have been a cause of the plaintiff's psychiatric illness.
- A plaintiff need not prove that they were of normal fortitude or ordinary robustness; however, where they were not, the liability of the defendant was determined by what was reasonably foreseeable – both in terms of the categories of persons potentially affected by the breach of the defendant's duty of care and in terms of the injuries potentially caused by it.
- It ceased to be necessary for a plaintiff who had suffered psychiatric injury as a result of the breach of a defendant's duty of care also to prove that they suffered a 'nervous shock' in the sense of a 'sudden affront to the senses'.
- Recovery ceased to be limited persons who directly perceived a tortious event or its immediate aftermath.
- However, in the absence of a malign intention, it was likely that no action lay against the bearer of bad news for psychiatric harm caused by the manner in which the news if conveyed or, if the news be true, for psychiatric harm caused by the fact of its conveyance.

THE IPP COMMITTEE RECOMMENDATIONS

The second of the reports by the Committee of Eminent Persons into the Law of Negligence (chaired by Ipp JA), prompted by the 'insurance crisis' was communicated to the Australian Treasurer on 30 September 2002, subsequent to the High Court's decision in *Tame/Annetts*. The Ipp Committee noted that the law had traditionally made it harder for people to recover damages for negligently-caused pure psychiatric injury on the basis that:

> '(a) the existence and extent of mental harm may be difficult to diagnose objectively and to prove for legal purposes; (b) the number of people who suffer pure mental harm as a result of a single act of negligence may be greater and less easy to foresee than the number of people who many suffer physical harm as a result of a single act of negligence; and (c) because resources are limited, it is more important to compensate people for physical harm than for pure mental harm.' [at p135]

The Ipp Committee identified difficulties because of what it classified as 'the lack of suitable forensic criteria' for identifying mental illnesses and recommended the appointment of a panel of experts to develop guidelines for assessing whether a person has suffered 'a recognised psychiatric illness'.

The Committee recommended against constraining recovery by persons on the basis of a 'list of eligible relationships' but, recognising nonetheless that governments may conclude that legislation enacting such a list may be desirable, proposed one (at p142). The core recommendation of the Ipp Committee did not suggest fundamental realignment of the law from that which was articulated by the High Court, proposing that plaintiffs bringing actions for pure psychiatric injury should be able to recover damages only if they have suffered a recognised psychiatric illness and providing that:

> 'A person (the defendant) does not owe another (the plaintiff) a duty to take care not to cause the plaintiff pure mental harm unless the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances, suffer a recognised psychiatric illness if reasonable care was not taken.
>
> For [these] purposes, the circumstances of the case include matters such as:
>
> (i) whether or not the mental harm was suffered as the result of a sudden shock;
> (ii) whether the plaintiff was at the scene of shocking events, or witnessed them or their aftermath;
> (iii) whether the plaintiff witnessed the events or their aftermath with his or her unaided senses;
> (iv) whether or not there was a pre-existing relationship between the plaintiff and the defendant; and
> (v) the nature of the relationship between the plaintiff and any person killed, injured or put in peril.' [at p144]

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The Panel recommended that any damages awarded to the victim of psychiatric injury be reduced by the same proportion as any damages recoverable from the defendant for the principal negligence. It also proposed in respect of damages for economic loss resulting from negligently caused consequential mental harm that recovery be available only where the mental harm consists of a recognised psychiatric illness and the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances, suffer a recognised psychiatric illness if reasonable care was not taken.

COMMON LAW DECISIONS SUBSEQUENT TO THE *TAME* AND *ANNETTS* DECISIONS

A number of significant decisions followed the *Tame/Annetts* decisions, including a further decision by the High Court. Four decisions particularly stand out thus far.

In *Gifford v Strang Patrick Stevedoring Pty Ltd*[2] the High Court was asked to apply its decision in *Tame/Annetts*. Strang employed Mr Barry Gifford as a wharf labourer and clerk. On 14 June 1990, he was killed by what the trial judge described as an 'horrific' accident when a large forklift vehicle reversed over him, crushing him to death immediately. Soon after the accident, Mrs Kristine Gifford, his estranged wife, was informed that he had been killed. Darren Gifford, Kelly Gifford and Matthew Gifford were the children of Barry and Kristine Gifford. They were the appellants before the High Court. They learnt of their father's death later that same day. At the time they were aged 19, 17 and 14. While the children did not live with the deceased, they maintained a close and loving relationship with him. Their father visited them almost daily. The children claimed that they were shocked and distressed at the news. None of them saw the deceased's body after the accident; they were apparently discouraged from doing so because of the horrific injuries that he had suffered.

The High Court affirmed that an employer owes a duty to take care to protect from psychiatric harm all those persons it knows or ought to know are in a close and loving relationship with its employee. It reiterated that, in light of its *Tame/Annetts* decisions, it is not a condition of that duty that such persons should be present when the employee suffers harm or that they should see the injury to the employee. Gleeson CJ held that 'The question is whether, additionally, [the employer] was under a duty of care which required it to have in contemplation psychiatric injury to the children of its employee, and to guard against such injury. The relationship of parent and child is important in two respects. First, it goes to the foreseeability of injury. That a child of the age of the various appellants might suffer psychiatric injury in consequence of learning, on the day, of a terrible and fatal injury to his or her father, is not beyond the 'common experience of mankind'. ... Secondly, it bears upon the reasonableness of recognising a duty on the part of the respondent. If it is reasonable to require any person to have in contemplation the risk of psychiatric injury to another, then it is reasonable to require an employer to have in contemplation the children of an employee.'[3]

McHugh J noted that 'The collective experience of the common law

judiciary is that those who have a close and loving relationship with a person who is killed or injured often suffer psychiatric injury on learning of the injury or death, or on observing the suffering of that person. Actions for nervous shock by such persons are common. So common and so widely known is the phenomenon that a wrongdoer must be taken to have it in mind when contemplating a course of action affecting others."[4] The High Court upheld the appeals of all three children and remitted the matter to the District Court for determination of the outstanding issues.

In the important decision of the NSW Court of Appeal in *State of NSW v Napier*[5] the principles enunciated by the High Court in *Tame/Annetts* were applied. Napier was a factory manager from the Junee Correctional Centre, which had been operated by Australasian Correctional Management Pty Ltd ('ACM') under statutory arrangements with the NSW Department of Corrective Services. The appellants were ACM and the State of NSW. Napier was employed by a company that manufactured plugs and cords at the factory. The factory business was an aspect of the training and welfare of the inmates.

The trial judge found that ACM and the State of NSW were responsible for and had absolute control over security at the factory and that ACM was contractually bound to Napier's employer to provide for his security. Napier introduced a range of efficiency and then non-smoking measures at the factory. Thereby he incurred the wrath of the prisoners. He was subjected to an increasing incidence and severity of threats. Among other things, the prisoners made it clear that they knew the names and address of his close family. They made distressing and depraved threats against his young daughter and son. The threats took a toll on Napier, with disturbance of his sleep to a point where he was sleeping only two hours per night. He complained to the prison governor but nothing was done to increase the level of security during the day at the factory.

On 10 April 1997 Napier arrived at the factory to find it closed and the prisoners locked down. He learned that the correctional authorities had discovered within the factory a home-made gun, shotgun cartridges, knives and daggers. A prison officer told him that Napier and another man were believed to be the intended targets. After a short time, Napier broke down completely, was laid off work by his doctor for three months and never returned. He sued his employer, ACM and the State of NSW for psychiatric injuries consequent upon negligence. He settled the claim against his employer and ultimately secured verdicts against the remaining defendants for $432,365.

ACM and the State of NSW appealed, arguing that the injury was >>

not reasonably foreseeable, that a duty of care did not exist between themselves and Napier, and that the awards of general damages and damages for future economic loss were excessive. They lost.

The leading judgment was given by Mason P, with whom Meagher JA agreed. The judgment of the court was reserved, pending the decision of the High Court in *Tame/Annetts*. The appellants accepted that any duty of reasonable care owed by them to Napier had been breached and that the breach had caused or materially contributed to his psychiatric injuries.

Mason P affirmed that the common law test of reasonable foreseeability is undemanding and depends simply on proof that the relevant risk was not far-fetched or fanciful. He found that it was sufficient in the case before him that psychiatric injury was foreseeable as a possible consequence of the conduct of the appellants. Thus, the trial judge's finding of reasonable foreseeability was legitimate – deficient security and failure to respond adequately to the rising tide of threats and violence were likely to take their toll on persons in Napier's position and to lead to psychiatric illness.

Mason P found that it was straightforward that the appellants owed Napier a duty of care. He noted that there was no longer any hard and fast dividing line between psychiatric injury and physical injury cases; in particular, that there was no longer any requirement that the plaintiff directly perceive a traumatic incident or that he or she be afflicted by a sudden shock. He observed that although it was no longer necessary for a plaintiff to be a person of normal fortitude, this was not in issue in Napier's case because he was of such a character.

Mason P noted that in relation to personal injury, certain categories of relationship generate a duty of reasonable care. These include occupier/lawful entrant and employer/employee. In respect of Napier, he found that the control vested in a prison authority is the basis of a special relationship that extends to a duty to take reasonable care to prevent harm stemming from the

unlawful activities of third persons, such as prisoners. This duty extended beyond other prisoners to persons working within a prison complex such as Napier. He found the relationship between ACM and the State of NSW and Napier fell easily within the established category of occupier/entrant, including the special subset of prison authority and lawful entrants to a prison occupied and controlled by the authority. He indicated also that he was prepared to hold that the relationship between the appellants and Napier was sufficiently analogous to that of employer and employee as to generate a commensurate duty of care, extending to a duty to exercise reasonable care to protect against psychiatric injury. He arrived at this conclusion on the basis of the degree of control that the appellants exercised over the factory, and the fact that they had actual knowledge of the risk of injury, the threats that had been made against Napier and the limited measures that they had taken to address the threats.

He held that to hold the appellants amenable to a duty of reasonable care was consonant with the principles stated by Gummow and Kirby JJ in *Tame/Annetts:*

> 'A fundamental objective of the law of negligence is the promotion of reasonable conduct that averts foreseeable harm. In part, this explains why a significant measure of control in the legal or practical sense over the relevant risk is important in identifying cases where a duty of care arises. Further, it is the assessment, necessarily fluid, respecting reasonableness of conduct that reconciles the plaintiff's interest in freedom of action. So it is that the plaintiff's integrity of person is denied protection if the defendant has acted reasonably. However, protection of that integrity expands commensurately with medical understanding of the threats to it. Protection of mental integrity from the unreasonable infliction of serious harm, unlike protection from transient distress, answers the 'general public sentiment' underlying the tort of negligence that, in the particular case, there has been a wrongdoing for which, in justice, the offender must pay. Moreover the assessment of reasonableness, which informs each element of the cause of action, is inherently adapted to the vindication of meritorious claims in a tort whose hallmark is flexibility of application. Artificial constrictions on the assessment to reasonableness tend, over time, to have the opposite effect.'[6]

Mason P noted that Napier's psychiatric illness had not stemmed solely from what he was told by way of bad or distressing news affecting third parties. He heard a number of the prisoners' threats at first hand; others were relayed to him. The consequences for him were drastic, diagnoses of his condition varying from nervous breakdown, post-traumatic stress disorder, major depressive episode, chronic adjustment disorder with anxiety amounting to generalised anxiety disorder, depression amounting to major depression, panic disorder and agoraphobic symptoms. He declined to interfere in any way with the damages awarded at trial.

The judgment of Spigelman CJ reached the same result, but with some subtle differences. He found that principles of occupiers' and employers' liability were not precisely apposite in the context of an employee of an independent contractor conducting operations within a prison. He accepted that in determining whether a duty of care existed to take reasonable care to prevent psychiatric injury resulting from criminal behaviour or threatened criminal behaviour by prison inmates, foreseeability was not enough. He found that Napier's vulnerability, the appellants' assumption of responsibility over security in the factory, and that they had the capacity to exercise control over the prisoners, were crucial considerations. The combination of these factors meant that they had the relevant duty, which they breached, to Napier.

In Cubbon, Cubbon and Bates v Roads and Traffic Authority of NSW[7] the appellants to the NSW Court of Appeal were siblings and the children of Dorothy Cubbon and the sister of >>

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Statutory reforms based upon the Ipp recommendations have effected a partial reversal of the High Court decisions in *Tame/Annetts* and *Gifford*, save in Queensland and the Northern Territory.

Maree Cubbon, who were killed in 1997 as the result of a motor vehicle accident caused by the negligence of the respondent. Each of the appellants claimed to have suffered nervous shock as a result of the accident and its aftermath. In each case, the trial judge dismissed the appellant's claim. In relation to each claim, the trial judge found that the respective appellant had, on the evidence, enjoyed a close and loving relationship with both Dorothy and Maree Cubbon. However, Geoffrey's claim failed on the basis that the trial judge was not able to make a finding that, on the balance of probabilities, the major depression from which Geoffrey suffered was caused by the shock and distress that he experienced as a result of the accident. In relation to Kenneth and Lynda, the trial judge held that the necessary degree of proximity to the circumstances of the motor vehicle accident had not been established because neither Kenneth nor Lynda attended at the scene of the accident and the distress experienced when they viewed the damage to the car did not take place until several days after the accident.

The trial judge's decisions were handed down before the High Court decisions in *Tame*, *Annetts* and *Gifford*. On appeal, the NSW Court of Appeal confirmed that direct perception of an incident or its aftermath is not in all cases a necessary requirement for a claim for damages for negligently inflicted psychiatric injury not consequent upon physical harm. Once distance in time and space (in the sense that Kenneth had not been present at the scene of the accident nor its aftermath in the morgue or the hospital on the night of the accident), was put aside as essential to the recovery of damages for nervous shock, the necessary degree of proximity was established by the trial judge's finding that Kenneth enjoyed a close and loving relationship with both Mrs Cubbon and Maree. This meant that he succeeded in his appeal.

The court held that the test for causation, which the trial judge should have applied, was whether the RTA's negligence, resulting in the deaths of Mrs Cubbon and Maree, caused or materially contributed to the major depression from which Geoffrey suffered. There was medical evidence that Geoffrey, by at least 1999, was suffering from major depression and that the circumstances of the deaths of Mrs Cubbon and Maree and the aftermath to which Gregory was exposed at the morgue and the hospital and beyond, materially contributed to the recognised psychiatric illness of depression. Accordingly, the Court of Appeal held that it was not open to the trial judge to conclude that the death of Geoffrey's mother and sister and the circumstances and aftermath of these deaths, so far as they affected Geoffrey, did not cause or materially contribute to the recognised psychiatric illness of major depression.

The Court of Appeal noted that the approach of the trial judge was that Lynda could succeed only if she demonstrated that the real cause of her depression was shock. It held this to have been erroneous and that the question that should have been asked was whether the circumstances of the death of Mrs Cubbon and Maree and the sequelae of that event as experienced by Lynda caused or materially contributed to her major or chronic depression.

In the Western Australian Court of Appeal decision of *Maddalena v CSR Ltd*[8] the appellant appealed from a decision in which his action against the respondents had failed. The appellant claimed that he had suffered physical illness as a result of being negligently exposed to inhalation of asbestos dust, fibres and particles while working at Wittenoon and had also suffered psychiatric injuries in the form of anxiety and depression. Many of his friends and colleagues had died of asbestos-related diseases. The consensus of the expert witnesses (save one) was that the appellant was suffering from a psychiatric injury. Although the witnesses expressed themselves in different ways, the essence of the diagnosis was that as a result of the appellant's exposure to asbestos and of the traumatic effect on him of the death of his brother and others close to him, he had become so anxious about his own fate that he had developed physical symptoms to an extent far greater than those caused by the relatively minor degeneration of his respiratory system. In other words, the appellant believed himself to be affected by asbestosis to a far greater extent than he actually was. The true diagnosis was anxiety or depression, or both, to such an extent as to constitute a recognisable psychiatric injury – of some consequence.

The Court of Appeal held that the case constituted a claim for pure mental trauma of the kind permitted by the High Court decisions in *Tame* and *Annetts* and by the NSW Court of Appeal in *CSR Ltd v Thompson*,[9] the >>

appellant suffering a range of psychiatric symptoms as a result of the breach of duty in exposing him to a noxious substance. The court set aside the trial judge's finding and replaced it with a finding that the appellant had suffered a psychiatric injury caused by his exposure to asbestos while in the employ of at least one of the respondents at Wittenoon, and that his injury was caused by the respondents' negligence.

An example of the *Tame/Annetts* decision not resolving a pure psychiatric injury claim on behalf of a plaintiff is to be seen in the majority decision of the NSW Court of Appeal in *O'Leary v Oolong Aboriginal Corporation Inc.*[10] The respondent was a residential drug and rehabilitation centre that specialised in treating members of the Aboriginal community. The appellant was employed as a bookkeeper by the respondent from 1983 until 1999. In October 1998, the appellant went on leave and a number of changes occurred during, and immediately after, this period. All books of account were removed from his office, his workspace was moved to a verandah area, his computer was taken away and he was no longer allowed to sign cheques. The respondent offered no explanation for what was happening. Other employees were aware that the appellant was suspected of misappropriating funds. The appellant was never confronted by the respondent with this suspicion nor asked for an explanation. By January 1999, the appellant was no longer able to cope with the situation and resigned.

These events took place in circumstances where the appellant had in September 1998 been diagnosed as suffering from an adult adjustment disorder, required some time off work, and had presented the respondent with a medical certificate to this effect.

The appellant commenced proceedings claiming negligence on the part of the respondent in failing to take adequate precautions for his safety at work, resulting in the appellant suffering psychological injury, namely adjustment disorder with depression. The trial judge found that the respondent employer owed to the appellant a duty to take reasonable care to avoid injury to the appellant as its employee. He also found a breach of the duty. The central issue was one of foreseeability, the trial judge holding that the injury sustained by the appellant was 'far too remote' and that the respondent could not have reasonably foreseen that a possible consequence of its conduct was that the plaintiff would suffer a recognised psychiatric illness. The adverse decision in this regard was the basis of the appellant's appeal.

Spigelman CJ held that there remains an important distinction between stress and a recognised psychiatric illness. He found the evidence not to justify an outcome whereby the plaintiff was permitted to recover for a situation in which stress, an inevitable concomitant of every day life including working life, had led to psychiatric damage. He observed too that 'normal fortitude' is a relevant consideration but not an independent test or pre-condition of liability. The reaction of the appellant to the evidence of suspicion of his conduct and progressive isolation was sufficiently idiosyncratic that it could not be said to be reasonably foreseeable that psychiatric injury, as distinct from non-compensable stress, could result from the respondent's conduct.

To similar effect, Sheller JA held that full force must be given to the distinction between any emotional distress suffered and a recognisable psychiatric illness, the distinction being one of degree rather than kind and subject to change with advances in medical knowledge. He commented that little attention has been given by the courts to identifying the basis upon which this distinction is to be made. He found that the behaviour of the respondent as an employer towards the appellant in several respects was wrong, if not disgraceful. He held, too, that because of his experience in the respondent's workplace, the appellant suffered a recognised psychiatric illness. However, while the respondent should have reasonably foreseen that its conduct would have caused the appellant to suffer some form of workplace stress, the evidence did not demonstrate that it could have foreseen that the appellant would have developed reactive depression.

By contrast, McColl JA (in dissent) held that whether the respondent ought reasonably to have foreseen that its conduct might cause the appellant to suffer psychiatric harm was to be judged by the standards of the reasonable person – the question was whether in all the circumstances, the risk of the appellant sustaining a recognisable psychiatric illness was reasonably foreseeable in the sense that it was not far-fetched or fanciful. He held that the risk was a matter that ought to have been foreseen by a reasonable employer in the circumstances of the changes wrought to the appellant's employment conditions. Further, he observed that the respondent's conduct struck at the heart of the relationship of trust that should exist between employer and employee. He found that it was reasonably foreseeable that exposing an employee even to a short period of profound stress, which struck at the heart of his integrity and honesty, was as capable of causing psychiatric illness as a sustained period of stress over a lengthy period.

THE STATUTORY LAW REFORMS

Save in Queensland and the Northern Territory and the Northern Territory, statutory reforms based upon the Ipp recommendations have effected a partial reversal of the High Court decisions in *Tame/Annetts* and *Gifford*.

Under s5S of the *Civil Liability Act* 2002 (WA), s33 of the *Civil Liability Act* 1936 (SA), and s34 of the *Civil Wrongs Act* 2002 (ACT) it is provided that a defendant does not owe a plaintiff a duty of care not to cause the plaintiff 'mental harm' unless the defendant ought to have foreseen 'that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken'. In short, there is a presumption against an action being able to be brought unless the preconditions are satisfied by plaintiffs. The 'circumstances of the case' are stipulated to include:

(a) whether or not the mental harm was suffered as the result of a

sudden shock;
(b) whether the plaintiff witnessed, at the scene, a person being killed, injured or put in peril;
(c) the nature of the relationship between the plaintiff and any person killed, injured or put in peril;
(d) whether or not there was a pre-existing relationship between the plaintiff and the defendant.

The court can still have regard to what the defendant knew or ought to have known about the fortitude of the plaintiff.

Under s53 of the *Civil Liability Act* 1936 (SA) damages may be awarded for mental harm only if the injured person was physically injured in the accident or was present at the scene of the accident when the accident occurred; or is a parent, spouse or child of a person killed, injured or endangered in the accident. Damages may be awarded for pure mental harm only if the harm consists of a recognised psychiatric illness.

The Tasmanian provision (s34 of the *Civil Liability Act* 2002 (Tas)) is in very similar terms save that the two indicia which the court is obliged to have regard to are:
(a) whether or not the mental harm was suffered as the result of a sudden shock; and
(b) whether or not there was a pre-existing relationship between the plaintiff and the defendant.

Section 72 of the *Wrongs Act* 1958 (Vic) and s30 of the *Civil Liability Act* 2002 (NSW) are along similar lines to the Western Australian, South Australian and Tasmanian legislation. However, they contain some additional provisions. Both provisions state that they do not affect the duty of care of a defendant if the defendant knows, or ought to know, that the plaintiff is a person of less than normal fortitude. This does not change the common law.

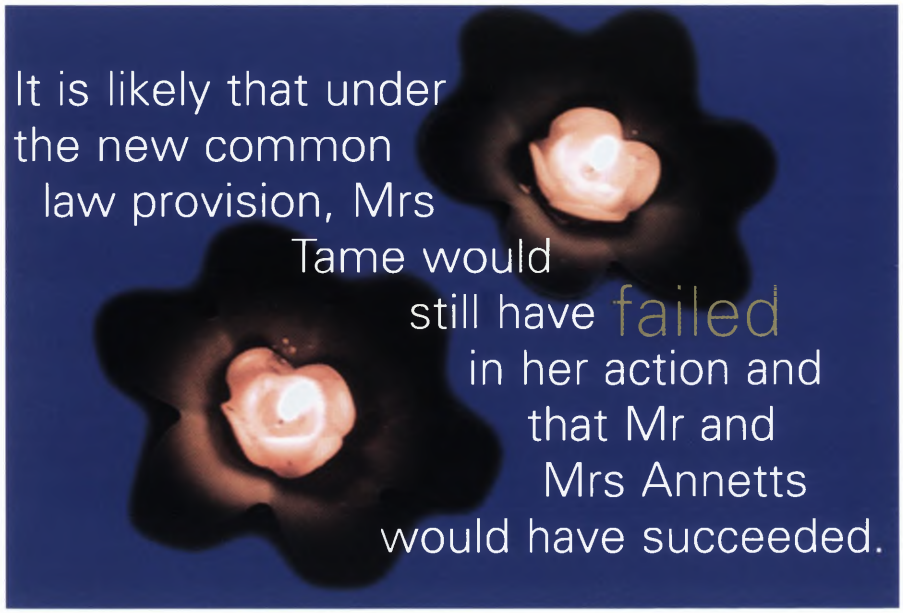
Importantly, though, s73 of the Victorian Act and s30 of the NSW Act provide that a plaintiff is not entitled to recover damages for pure mental harm arising wholly or partly from mental or nervous shock in connection with another person being killed, injured or put in danger by the act or omission of the defendant unless:
- the plaintiff witnessed, at the scene, the victim being killed, injured or put in danger; or
- the plaintiff is or was in a close relationship with the victim (Victoria) or is a close member of the family of the victim (NSW).

Under the NSW legislation a 'close member of the family' of a victim is defined to be:
- a parent of the victim or other person with parental responsibility for the victim, or
- the spouse or partner of the victim, or
- a child or stepchild of the victim or any other person for whom the victim has parental responsibility, or
- a brother, sister, half-brother or half-sister, or stepbrother or stepsister of the victim.

A 'spouse or partner' is defined to mean a husband or wife, or the other party to a de facto relationship within the meaning of the *Property (Relationships) Act* 1984 (NSW). Where more than one person would so qualify as a spouse or partner, only the last person so qualifies.

Section 31 of the NSW Act prescribes (for the sake of clarity) that there is no liability for a defendant to pay damages for pure mental harm resulting from negligence unless the harm consists of a recognised psychiatric illness. This is not defined.

In the Northern Territory, in an action for injury to the person caused after the commencement of the *Law Reform (Miscellaneous Provisions) Act* 1956 (NT), the position in relation to pure psychiatric injury actions has changed little. The plaintiff is not debarred from recovering damages merely because the injury complained of arose wholly or in part from mental or nervous shock. The liability of a person in respect of injury caused by act, neglect or default by which another person is killed, injured or put in peril is stated to extend to include liability for injury arising wholly or in part from mental or nervous shock sustained by – (a) a parent or the husband or wife or de facto partner of the person so killed, injured or put in peril; or (b) another member of the >>



family of the person so killed, injured or put in peril, where the person was killed, injured or put in peril within the sight or hearing of that other member of the family.

THE NEW LAW FOR PURE MENTAL HARM ACTIONS

The significant adjustment to the common law (save in Queensland and the Northern Territory) has not changed the fact that a plaintiff must prove that he or she has suffered a psychiatric illness as a result of the defendant's breach of a duty of care. This will still be strictly construed.

An important development, though, is the partial re-emergence of the 'ordinary fortitude' test. It is no longer simply one of the indicia of reasonable foreseeability; there must have been foresight or the capacity to foresee that a person of normal fortitude might suffer a recognised psychiatric illness. The question for plaintiff lawyers is whether this significantly diminishes the entitlements of plaintiffs. It is likely that under the new common law provision, Mrs Tame would still have failed in her action and that Mr and Mrs Annetts would have succeeded. Thus, Mr O'Leary failed in his claim, partly because the evidence adduced on his behalf was found to be inadequate. An action by plaintiffs such as the Giffords, the Cubbons or Mr Napier would still succeed, as would that of Mr Maddalena. Probably, the bar is slightly raised against that small category of plaintiffs whose psychiatric decompensation is prompted by a surprisingly minor event or which is far in excess of what could reasonably have been anticipated by the tortfeasor (for example, Mrs Tame). However, even under the common law the unpredictable nature of the plaintiff's reaction remained an indicium of reasonable foreseeability, and therefore constituted a mechanism for denying compensability.

Much now depends on what is established as 'reasonably foreseeable'. A difficulty for plaintiffs can occur where the position adopted on behalf of the defendant is that stress and distress, both psychological injuries falling short of compensable psychiatric injuries, were foreseeable but pathology of the kind exhibited by the plaintiff could not have been predicted. In *Van Soest v Residual Health Management Unit*[11] the majority saw it as significant that psychiatry distinguished between mere mental distress and psychiatric illness, albeit that the distinction was one of degree rather than kind and might change with advances in medical knowledge. Gummow and Kirby JJ in *Tame/Annetts*[12] noted that in *McLoughlin v O'Brian*[13] Lord Bridge of Harwich made the point that in cases of psychiatric injury, a question of reasonable foreseeability 'depends on what knowledge is to be attributed to the hypothetical reasonable man [sic] of the operation of cause and effect in psychiatric medicine'. In his judgment, Hayne J raised a number of questions about breach of duty and causation, asking what knowledge of psychiatry is to be imputed to the reasonable person[14] and 'How is the distinction to be made between compensable injury and non-compensable 'ordinary' or 'normal' emotional consequences?'[15] His Honour observed[16] that little explicit attention had been given to identifying the basis upon which the distinction is to be made 'beyond noting that it is only the former which is to be compensable. So far, the courts appear to have been content to defer to the way in which psychiatrists distinguish between the two.' These concerns were again identified by Sheller JA in *O'Leary*.

This leaves uncertain how plaintiffs can prove what constitutes a reasonable expectation on the part of defendants – in particular, whether psychiatrists can play a legitimate role in expressing opinions about what the reasonable person would anticipate in terms of a breach of duty with the potential to lead to a recognised mental illness, namely a compensable psychiatric injury, as against a psychological injury. Probably the question is one that does not call for expert opinion as the question that requires answer is what the reasonable person, presumably untutored by expert psychiatric opinions, would conclude about risk. A secondary question is the steps that a reasonably prudent and careful defendant would undertake to ascertain whether a consequence of their conduct could be psychiatric as against psychological injuries. This might be a matter for expert evidence.

In addition, in South Australia, NSW and Victoria there has been a reassertion of the requirement of physical and temporal proximity or close relationship for most categories of potential plaintiffs claiming to have suffered the traditional category of 'nervous shock' psychiatric injury. Once more, this reasserts a rule in

place of the more flexible indicium retained by the common law by the *Tame/Annetts* decisions. Claims for psychiatric injury that are brought by persons not present at the scene or not closely related to the person killed or injured are relatively rare and were never going to be easy to establish under the post-*Tame/Annetts* common law. However, such claims are brought from time to time by friends, workmates, extended family and acquaintances. Under the common law post-2002 they were feasible, albeit difficult. Much now depends on the specific categories of preclusion set out in the respective provisions. In South Australia, Victoria and NSW there is specific regulation of the categories of potential plaintiffs. However, elsewhere, where the post *Tame/Annetts* common law continues to apply or where the nature of the relationship between the person injured or killed and the plaintiff is a relevant matter to the 'circumstances of the case', the more remote the relationship between the primary victim of the defendant's conduct and the plaintiff, the more difficult will be the plaintiff's action.

What can be asserted with confidence after the Ipp reforms is that plaintiffs in pure psychiatric injury cases need to establish a clear psychiatric injury going beyond psychological injury, a nexus between the defendant's breach of their duty of care and the psychiatric injury and the fact that the response of the plaintiff was not far-fetched or fanciful, in the sense of being beyond the reasonable expectation of the defendant. For plaintiffs in South Australia, NSW and Victoria, when the essence of the action is psychiatric injury consequent upon nervous shock arising from death or injury to a loved one, there are particular requirements of geographic propinquity or close relationship (as variously specified), which will limit potential actions. ■

Notes: **1** (2002) 211 CLR 317; [2002] HCA 35; 191 ALR 449; 76 ALJR 1348 on appeal from *Morgan v Tame* (2000) 49 NSWLR 21 and *Annetts v Australian Stations Pty Ltd* (2000) 23 WAR 35. **2** (2003) 77 ALJR 1205; [2003] HCA 33. **3** *Ibid,* at [10]. **4** Ibid, at [47]. **5** [2002] NSWCA 402. **6** *Tame/Annetts* at [185]. **7** [2004] NSWCA 326. **8** [2004] WASCA 231. **9** (2003) 59 NSWLR 77 at 83; see too Napolitano v CSR Ltd, unreported; SCt of WA (Seaman J); Library No 94087; 30 August 1994. **10** [2004] NSWCA 7. **11** [2000] 1 NZLR 179 at 197. **12** At [202]. **13** [1983] 1 AC 410 at 432. **14** At [262]. **15** At [265]. **16** At [292].

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