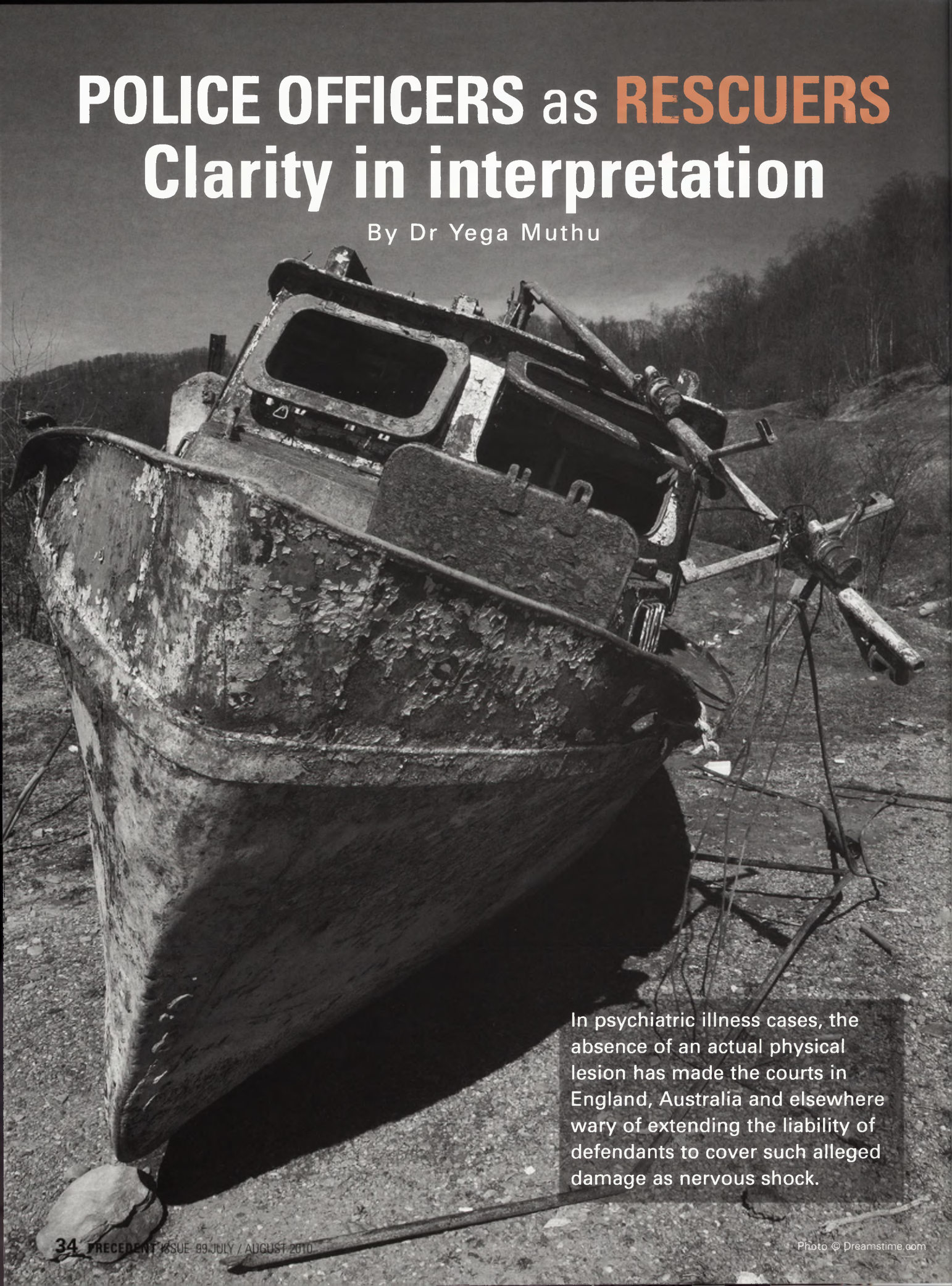
POLICE OFFICERS as RESCUERS
Clarity in interpretation

By Dr Yega Muthu



In psychiatric illness cases, the absence of an actual physical lesion has made the courts in England, Australia and elsewhere wary of extending the liability of defendants to cover such alleged damage as nervous shock.

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Jurisprudential principles and guidelines were established from the *Coultas*[1] case in the 19th century, where the Privy Council held that 'damages arising from mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gatekeepers.'[2] This view, indeed, had already been altered by the turn of the century in many cases and, subsequently, in *McLoughlin v O'Brien*[3] and *Jaensch v Coffey,*[4] where recovery was extended to a situation where the plaintiff did not see the accident itself but came upon the 'immediate aftermath' of the accident; and, as a consequence, the plaintiff suffered psychiatric illness.

The High Court of Australia in *Annetts* (*Annetts v Australian Stations Pty Ltd*)[5] and *Tame* (*Tame v New South Wales*)[6] ruled relating to sudden shock, which is no longer seen as part of the common law of Australia, that the plaintiff should have had direct perception of the distressing phenomenon or its immediate aftermath in order to recover damages for ensuing nervous shock. In short, the High Court of Australia reverted back to the concept of reasonable foreseeability of illness as a determining criterion for a duty to exist. Although shock was originally coined by Erichson in 1886 as 'a physical impact which injured the central nervous system through concussion of the spine',[7] it is no longer regarded in psychiatry as a requirement for all psychiatric injuries. Nevertheless, it has continued to be noted as a stressor for post-traumatic stress disorder (PTSD) in DSM-IV-TR.[8] The High Court decisions in *Tame* and *Annetts* reformed the law dramatically, removing most of the technical differences between eligibility for compensation between physical and non-physical injury. However, they were handed down in the midst of the so-called 'insurance crisis' of 2002 and were immediately partially overturned by legislative amendment in NSW.

Issues of duty turn on reasonable foreseeability. The High Court of Australia has not made the following requirements as prerequisites; namely, normal fortitude, 'sudden shock' and 'direct perception' and recognisable psychiatric disorder as a requirement for establishing a duty of care. These considerations are only factors that the High Court takes into account when determining whether there is a duty to avoid the negligent infliction of psychiatric illness.

Subsequently in *Gifford v Strang Patrick Stevedoring Pty Ltd,*[9] the High Court ruled that an employer owes a duty of care to avoid psychiatric injury to the children of their employees. The children in this case were financially dependent on the employee father. Hence, a claim for financial dependence was lodged by the children whose father was killed as a result of the wrongful act of the defendant pursuant to *Compensation to Relatives Act* 1897 (NSW).

In *Koehler v Cerebos (Australia) Ltd,*[10] the High Court upheld the decision of the Full Court, similarly treating the issue of foreseeability as determinative, and similarly finding that a reasonable person in the position of Cerebos would not have foreseen the risk of psychiatric injury to Koehler as a result of the duties she was required to perform at work.[11] She had agreed to undertake the work, and parties are free to so negotiate, within the limits of applicable statutes. In the court's view, employers are entitled to assume, in the absence of warning signs, that employees can do the job. As with the Western Australian Supreme Court, the High Court characterised Ms Koehler's complaints as indicative of an industrial relations dispute rather than health risks. The decision is unwelcome in the light of growing acceptance of psychiatric-induced illness on children[12] and family members,[13] where the courts have awarded damages for the negligent infliction of psychiatric illness.[14]

In *NSW v Fahy* [2007] HCA 20, the High Court of Australia, by a majority of 4 to 3, refused to allow recovery to the plaintiff who developed post-traumatic symptoms after assisting a victim who was stabbed in the chest and then rushed to the nearby medical centre. Psychiatrists confirmed that in assisting the victim, she developed post-traumatic symptoms because she had no assistance from her police partner or received any form of debriefing from her department. The High Court of Australia held that it is insufficient to allege that the state is responsible for her mental state, and hence is vicariously liable, since the *Police Act* 1990 (NSW) imposes duties and responsibilities on police officers required to undertake tasks, where an obligation for police officers to stay together at a scene of a crime would create a tension. Gummow and Hayne JJ, in a joint judgment, stated that police officers could work together and provide support; but 'the worse the incident is, the more likely it is that officers will not be able to spend any time supporting each other because they will be fully occupied in controlling the situation and dealing with its consequences' (at [67]). In short, their Honours felt that this expectation to stay together would create a tension pursuant to the *Police Act* 1990 (NSW).

It is disheartening to learn that the High Court did not give weight to the psychiatric evidence but based its decision on a balance between the interest of the state and the individual.

The Australian scheme for compensation introduced control levels for claims in this area, enshrined in the *Civil Liability Act* 2002. This was subsequently followed by the *Civil Liability (Personal Responsibility) Act* 2002. The implementation of these two Acts was timely during and after the decision of the Australian High Court judgment in *Annetts* and *Tame*. The *Civil Liability Act* 2002 mirrors the categories of claimants who may make a claim in a psychiatric illness case, as emphasised in the *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW).

The statute uses the term 'mental harm' as opposed to psychiatric injury as adopted in the common law. Mental harm is defined as 'impairments of a person's mental condition' (s27). This also extends to personal injury, negligence and consequential mental harm. This part also applies to an action brought in contract, tort or other statutes (s28).[15] The NSW Court of Appeal had an opportunity to examine the phrase 'mental harm' in *Burke v State of New South Wales & Ors,*[16] and concluded that the legislation has >>

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amended the common law definition of nervous shock to support the above-mentioned.

The Ipp Report drew a distinction between 'consequential mental harm' and 'pure mental harm'. Consequential relates to a psychological/psychiatric harm following a personal injury. Whereas pure mental harm refers to a recognised[17] psychiatric injury as opposed to the word 'recognisable', the term 'recognised' or 'recognisable' under the common law denotes a physiological or pathological manifestation when the mind affects the body. Modern scientists have attempted to identify and localise specific patho-physiological mechanisms that produce and influence pain sensations; progress on this front is advancing slowly. External stimuli may set off a biological cascade that contributes to the sensation of pain, but cognition and emotion also contribute to the experience of pain. Cognitive awareness of and emotional response to pain (which are affected by psycho-social and cultural influences) in turn influence the brain and body's subsequent physiological responses. Unlike the 'Cartesian' approach that views pain as a product of either biology (body) or psychology (mind), a more informed approach is to acknowledge the interdependence of the two, in addition to cultural influences.[18]

With regards to determining liability, *Tame* and *Annetts* established that reasonable foreseeability should be the criteria for formulating a duty of care, and dispensed with requirement of normal fortitude. Although the legislation in five jurisdictions provides that for the purposes of ascertaining a recognised psychiatric illness, the defendant ought to foresee that a person of normal fortitude might suffer psychiatric harm (s32(4)).[19]

Section 30(2) states that the plaintiff is not entitled to recover damages for pure mental harm unless the plaintiff witnessed the scene, which includes seeing the victim being killed, injured or put in peril, and the plaintiff is a close member of the family of the victim.[20] Damages for psychiatric illness are limited to persons who are victims of or are present at the scene of the accident. The individuals include family members who have demonstrated a recognised form of psychiatric disorder as opposed to mere grief, sorrow or being upset. Family members are the same category as defined in the *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) as re-enacted in s30(5) of the *Civil Liability Act* 2002 (NSW). They include a parent, spouse, sister or child of victim. In respect of spouse, married or de facto will suffice.

Further, it also includes someone who witnessed a traumatic event. Both categories of family members or an individual must demonstrate psychiatric illness as demonstrated in s37 *Civil Liability Act* 2002 (NSW) and not merely a normal emotional or cultural grief reaction. This requirement mirrors the *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW); s77 *Motor Accidents Act* 1988 (NSW) and s151P *Workers Compensation Act* 1987(NSW).

The provisions confirm the majority decision of the High Court in *Annetts* and *Tame*: that a defendant has to foresee that a person of normal fortitude might suffer from psychiatric illness if reasonable care was not taken. The provisions reveal the explicit nature of what type of psychiatric claim is involved, without specifying the status of the circumstances. For example, whether or not the mental harm suffered was endured as a consequence of a particular event? Although the word 'sudden shock' is not mentioned, it must depend on the arbiter of fact as to what constitutes sudden shock. The common law has dealt with this area of concern, reigning back to *Jaensch*. The Act also described the requirement for an identifiable psychiatric illness and consequential mental harm resulting from physical injury.

The NSW Court of Appeal's decision of *Sheehan v SRA; Wicks v SRA*[21] involved two police officers who rescued victims at the site of the 2003 Waterfall derailment and subsequently suffered psychiatric illness. The Court of Appeal interpreted s30(2) of the *Civil Liability Act* narrowly. Section 30(2) states that the plaintiff is not entitled to recover damages for pure mental harm, unless the plaintiff witnessed the scene, which includes seeing the victim being killed, injured or put in peril, and the plaintiff is a close member of the family of the victim.[22] Damages for psychiatric illness are limited to persons who are victims of, or are present at, the scene of the accident. The individuals include family members who have demonstrated a recognised form of psychiatric disorder as opposed to mere grief, sorrow or being upset. The operation of s30(2) does not extend to what happens during a rescue operation and precludes recovery. Both claimants in this case were unsuccessful against the defendant. The court was fearful of potential frivolous claims in the future. The Court of Appeal relied on previous English authorities relating to rescue cases. Further consideration was given to the requirements by the House of Lords in *Alcock v Chief Constable of South Yorkshire*,[23] where it was held that the shock must be caused by perception of the accident or its immediate aftermath; that transmission by live television broadcast was not recoverable, and that the immediate aftermath did not include viewing bodies in a mortuary eight or nine hours later. *Alcock* made it clear that there is no defined category of persons who would be deemed to have a close tie of love and affection with the victim.

Up to this point, therefore, it has been established that both primary and secondary victims can recover for psychiatric injury where physical injury, at least, is foreseeable, but that where the plaintiff is a secondary victim, he or she is subject to additional controls limiting recovery.

Accordingly, if a plaintiff is a pure primary victim, he or she will have no further hurdles to jump. If he or she is a secondary victim (that is, sustained injury as a result of witnessing shocking events in which loved ones were involved), he or she can recover, provided he or she has a tie

of love or affection to the primary victim and that he or she was close in time and space (including the aftermath) to the accident; and that he or she perceived the events through their own unaided senses. In addition, this recognised psychiatric injury must have been shock-induced.

This development has caused judges to draw illogical and arbitrary policy distinctions in post *Alcock*[24] cases which followed on from the Hillsborough disaster, where police officers suffered from PTSD as a result of their rescue intervention, namely, *Frost*[25] and *White*.[26]

Lord Ackner in *Alcock, Frost* and *White* referred to policy and floodgates arguments in that the Courts might be fearful of opening the floodgates of litigation in psychiatric illness claims. The reason for this is partly that psychiatric illness claims are not visible to the naked eye like a physical injury, and psychiatric illness evidence can be feigned, faked or confabulated. It reveals that 'shock' relates not to effect, but to cause, and is purely a limiting device. Psychological injury may be real and lasting, it may be foreseeable, and it may result from a devastating emotional trauma, but if it is not caused by witnessing a sudden and shocking event, it is not compensable in England.

In the light of this scepticism, their Lordships have disallowed recovery in cases such as in *Alcock, Frost* and *White*. Although their Lordships were in fear of the floodgates and policy concerns, they created a distinction between primary and secondary categories of plaintiffs.

This restrictive view, as adopted by the House of Lords, was abandoned by the High Court of Australia in *Annetts*[27] and *Tame*.[28]

On 12 February 2010, the High Court granted the officers special leave to appeal from the decision of the Court of Appeal. The High Court delivered its decision on 16 June 2010. In *SRA v Wicks; Sheehan v SRA* [2010] HCC 22, the High Court of Australia allowed the plaintiffs' appeal and remitted the issues of negligence and duty of care for the Court of Appeal's consideration.[29]

The High Court of Australia considered ss27-33 of the *Civil Liability Act* 2002. In a joint judgment, the majority of the Court, consisting of French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ, stated, after examining s30(2):

> '[44].It would not be right, however, to read s30, or s30(2)(a) in particular, 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'.

Furthermore, at [50], [51], [52], [53] and [54], the High Court stated:

'[50]. Contrary to State Rail's submission, the expression >>

"being ... put in peril" should not be given a meaning more restricted than that conveyed by the ordinary meaning of the words used. More particularly, "being ... put in peril" is not to be confined to the kind of apprehended casualty which was at issue in *Hambrook v Stokes Bros*[16], where a mother feared a runaway lorry might have injured her child. It is not to be read as confined to the cases discussed by Evatt J in *Chester v Waverley Corporation*[17] by reference to the decision in *Hambrook*. Nor is the expression to be read down by reference to how the phrase was to be understood when used in s4 of the *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW). Rather, the expression should be given the meaning which the words ordinarily convey. A person is put in peril when put at risk; the person remains in peril (is "being put in peril") until the person ceases to be at risk.

[51]. The survivors of the derailment remained in peril until they had been rescued by being taken to a place of safety. Mr Wicks and Mr Sheehan witnessed, at the scene, victims of the accident being put in peril as a result of the negligence of State Rail.

[52]. State Rail's submission that neither Mr Wicks nor Mr Sheehan witnessed, at the scene, a victim or victims being killed, injured or put in peril should thus be rejected.

[53]. State Rail's further submission, that the combined effect of s30(1) and s30(2) requires that a plaintiff must demonstrate that the psychiatric injury of which complaint is made was occasioned by observation of what was happening to a *particular* victim, should also be rejected.

[54]. In a case such as the present, where there were many victims, s30(2) does not require that a relationship be identified between an alleged psychiatric injury (or any particular part of that injury) and what happened to a particular victim. To read the provision as requiring establishment of so precise a connection would be unworkable. It would presuppose, wrongly, that the causes of psychiatric injury suffered as a result of exposure to an horrific scene of multiple deaths and injuries could be established by reference to component parts of that single event. Rather, the reference in s30(1) to "another person (the victim)" should be read[18] as "another person or persons (as the case requires)". The reference to "victim" in s30(2)(a) is to be read as a reference to one or more of those persons. In a mass casualty of the kind now in issue, s30(2)(a) is satisfied where there was a witnessing at the scene of one or more persons being killed, injured or put in peril, without any need for further attribution of part or all of the alleged injury to one or more specific deaths.'

The High Court of Australia, following its decision in *Sheehan*, however, agreed that the communication of terrible disheartening news following any of these circumstances satisfies the test of reasonable foreseeability to support recovery for consequent mental damage.

The High Court of Australia indicated, as it has previously in *Annetts* and *Tame*, that the touchstone of liability is still foreseeability of harm for the negligent infliction of psychiatric illness. The present law pertaining to psychiatric illness in Australia is that there is no requirement to show sudden shock or direct perception of a traumatic event. Furthermore, it is well established that the plaintiff must suffer a recognisable form of psychiatric illness, which has been amended by statute to include a recognised psychiatric illness. The attention will no doubt turn to the plaintiff's psychiatric evaluation, as a claim for mere emotional distress without a diagnosed illness is unlikely to succeed. In terms of evidence, the plaintiff must prove the relationship between him or her with the defendant, where the arbiter of law can deduce that the defendant could have foreseen that their negligent act would cause psychiatric illness to the plaintiff. In view of the slow progression and incremental approach of the law pertaining to psychiatric illness, the NSW Parliament made a dramatic move to 'legalise' this area of the law by codifying the rules into the *Civil Liability Act* 2002, hence giving effect to legislative intent to exposure to a traumatic event. ■

Notes: 1 [1888] 13 AC 222. **2** [1888] 13 AC 222, 225. **3** [1982] 2 All ER 298. **4** [1984] 155 CLR 549. **5** [2002] HCA 35. **6** [2002] HCA 35. **7** G Mendelson, 'Posttraumatic Stress Disorder as Psychiatric Injury in Civil Litigation' (1995) 2 *Psychiatry, Psychology and Law* 53. **8** American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (Text Revision), 4th ed, Washington, 2000. **9** [2003] HCA 33. **10** [2005] HCA 15. **11** *Koehler v Cerebos (Australia) Ltd* [2005] HCA 15 at 26. **12** Rima Hor, 'Case Notes: Psychiatric Injury in the Workplace: The Implications of *Koehler v Cerebos*' (2005) 27, *Sydney Law Review* 556. **13** Des Butler, 'Nervous shock at common law and third party communications: are Australian nervous shock statutes at risk of being outflanked?' (1996) 4, *Torts Law Journal*, 120. **14** *Gifford v Strong Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269. **15** Section 30 *Civil Liability Act* 2002 (TAS); s5R(2) *Civil Liability Act* 2002 (WA) **16** [2004] NSWSC 725. **17** Section 53 *Civil Liability Act* 1936 (SA); ss32-35 *Civil Liability Act* 2002 (TAS); Part 8 and ss33 and 35 *Wrongs Act* 1958 (VIC); ss5S and 5T *Civil Liability Act* 2002 (WA); Queensland follows the common law and the general principles of the *Civil Liability Act* 2003 (Qld); *Law Reform (Miscellaneous Provisions) Act* (NT)1956, s23,24,25(5) clarify the requirements for PTSD and categories of claimants. **18** G Duncan,'Mind-Body Dualism and the Biopsychosocial Model of Pain: What Did Descartes Really Say?' (2000) 4 *Journal of Medicine and Philosophy* 485. **19** Section 72(3) *Wrongs Act* 1958 (VIC); ss5S (4) *Civil Liability Act* 2002 (WA); no threshold limitation in the ACT, *Civil Law (Wrongs) Act* 2002 (ACT); s35 *Civil Liability* Act 2002 (TAS). **20** Sections 53, 54 *Civil Liability Act* 1936 (SA); ss32 *Civil Liability Act* 2002 (TAS); s73 (2) *Wrongs Act* 1958 (VIC); s36 *Civil Law (Wrongs) Act* 2002 (ACT); s25 *Law Reform (Miscellaneous Provisions) Act* (NT)1956, s25 clarifies the requirements for PTSD and categories of claimants. **21** [2009] NSWCA 26. **22** Sections 53, 54 *Civil Liability Act* 1936 (SA); s32 *Civil Liability Act* 2002 (TAS); s73 (2) *Wrongs Act* 1958 (VIC); s36 *Civil Law (Wrongs) Act* 2002 (ACT); s25 *Law Reform (Miscellaneous Provisions) Act* (NT)1956, s25 clarifies the requirements for PTSD and categories of claimants. **23** [1982] 2 All ER 298. **24** [1991] 4 All ER 907. **25** [1997] 1 All ER 540. **26** [1999] 1 All ER 1. **27** [2002] HCA 35. **28** [2002] HCA 35. **29** K Arlington, 'Court Victory for two Waterfall policemen', *Sydney Morning Herald*, 17 June 2010.

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