# THE AMBIT OF LIABILITY FOR NEGLIGENTLY CAUSED MENTAL HARM - FINDING THE BALANCE

*Norman A Katter**

**ABSTRACT**

*The High Court of Australia in* Tame v New South Wales; Annetts v Australian Stations Pty Limited *and affirmed in* Gifford v Strang Patrick Stevedoring Pty Ltd, *has restated the common law of Australia for negligently inflicted mental harm. These common law initiatives have been largely adopted in statutory form in some Australian States in civil liability statutes which follow the recommendations of the Ipp Report on Negligence Law. These common law and statutory initiatives seek to strike a balance between an appropriate limitation on potential claimants for negligently inflicted psychiatric illness and the recovery of damages in clear and obvious situations of mental harm arising from the close or special relationship or circumstances of the defendant tortfeasor, victim and plaintiff. These initiatives have also removed from this area of the law some policy-driven control mechanisms whose applications as pre-conditions to recovery have produced illogical and unjust results.*

## I INTRODUCTION

Nervous shock is similar to purely economic loss in that it has the propensity to manifest at one or more removes from the direct effect or detriment of negligence (the ripple effect). Consequently the common law has developed control mechanisms beyond the requirement of reasonable foreseeability to limit potential claimants both for negligently inflicted nervous shock and negligently generated economic loss. As Gleeson CJ has stated:

> Defining the circumstances in which it is reasonable to require a person to have in contemplation, and take steps to guard against, financial harm to another person, or emotional disturbance that may result in clinical depression, requires the caution which courts have displayed.

He further stated in *Gifford v Strang Patrick Stevedoring Pty Ltd* that:

> Advances in the predictability of harm to others, whether in the form of economic loss, or psychiatric injury, or in some other form, do not necessarily result in a co-extensive expansion of the legal obligations

* LLB *Qld*, LLM *Qld*, PhD *QUT*; Barrister-at-Law.

> imposed on those whose conduct might be a cause of such harm The limiting consideration is reasonableness which requires that account be taken both of interests of plaintiffs and of burdens on defendants [1]

## II The Control Mechanisms in Nervous Shock Prior to *Tame* and *Annetts*

The foremost control in claims for nervous shock is the requirement of a recognisable psychiatric illness. Negligently caused distress, alarm, fear, anxiety, annoyance, or despondency without a recognisable psychiatric illness does not found an action.[2]

The second is linked to the reasonable foreseeability requirement and presupposes that the plaintiff is a person of 'normal fortitude' and that defendants are not to be held to reasonably foresee the abnormal or 'more extreme reactions to shock unfortunately suffered by abnormally susceptible people'[3] that may result from a negligent act. This control device however has been applied as an indispensable pre-condition to recovery requiring 'the plaintiff be a person of normal emotional or psychological fortitude or, if peculiarly susceptible, that the defendant knows or ought to know of that susceptibility' [4]

The third control is 'direct perception' or 'immediate aftermath'. The genesis of these controls lay in the requirement of a sufficient causal proximity between the negligent act and resultant psychiatric illness underpinned by 'floodgate concerns'. These controls require the plaintiff to directly perceive the distressing phenomena or their aftermath. Perception by seeing, hearing or touching a distressing event, thing or person is a pre-requisite to recovery for negligently inflicted psychiatric harm [5] Psychiatric illness induced by mere knowledge of a distressing fact is not compensable; perception by the plaintiff of the distressing phenomenon is essential [6] This means that not only is the bearer of bad news shielded from action for psychiatric illness but the negligent tortfeasor who caused the 'bad news' is also immune from suit.

The fourth control is 'sudden shock' As Gaudron, J rightfully observed in *Tame* and *Annetts* '[w]hen the law limited claimants to those who, by reason of their closeness in time or space, directly perceived distressing phenomena or their aftermath . . it was inevitable that the law should select sudden shock as that which rendered foreseeable the risk of

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1 (2003) 77 ALJR 1205 ( *Gifford* )
2 *Tame* and *Annetts* (2002) 76 ALJR 1348, 1351
3 *Tame* and *Annetts* (2002) 76 ALJR 1348, 1367 1368 (McHugh J)
4 *Tame* and *Annetts* (2002) 76 ALJR 1348 1383 (Gummow and Kirby JJ)
5 *Tame* and *Annetts* (2002) 76 ALJR 1348 1386
6 *Tame* and *Annetts* (2002) 76 ALJR 1348 1386

psychiatric injury'.[7] Sudden shock is merely expressing the notion of sudden sensory impact resulting from the witnessing of some distressing event or its aftermath

## III The High Court's Approach to Control Mechanisms in *Tame* and *Annetts*

Before dealing with each control it is appropriate at this stage to briefly state the facts of *Tame* and *Annetts*.

### A *The Facts of* Tame

The facts as recited by Gleeson, CJ were as follows: The alleged tortfeasor was Acting Sergeant Beardsley In February 1991, he completed a report concerning a motor traffic accident which took place in January 1991 Mrs Tame was the driver of a car involved in a collision with a car driven by Mr Lavender The accident was clearly the fault of Mr Lavender Both drivers were subjected to blood testing Mr Lavender's blood alcohol level was 0 14 Mrs Tame's was nil Mr Lavender was charged with an offence; and Mrs Tame later sued for, and obtained, damages for physical injury When Acting Sergeant Beardsley filled in the report form in February 1991, he erroneously attributed to both Mrs Tame and Mr Lavender a blood alcohol reading of 0 14 (It would have been a surprising coincidence if they both had precisely the same level ) He noted the mistake later in February or March 1991, and corrected it In the meantime, however, a copy in the uncorrected form had been obtained by an insurer Neither the police nor anybody else acted on the erroneous information The insurer admitted liability in June 1991 During 1992, Mrs Tame heard of the mistake from her solicitor Mrs Tame became obsessed about the error She was also emotionally disturbed about other matters Ultimately, in 1995, her condition was diagnosed as psychotic depression.[8]

### B *The Facts of* Annetts

The facts as summarised again by Gleeson CJ were that Mr and Mrs Annetts' son, aged 16, had gone to work for the respondent as a jackeroo in August 1986. Seven weeks later, allegedly, contrary to assurances that had earlier been given to the parents, he was sent to work alone as caretaker of a remote property In December 1986, he went missing in circumstances where it was clear that he was in grave danger When Mr Annetts was informed of this by the police, over the telephone, he collapsed There was a prolonged search for the boy, in which Mr and

7 *Tame* and *Annetts* (2002) 76 ALJR 1348 1359
8 *Tame* and *Annetts* (2002) 76 ALJR 1348 1354

Mrs Annetts took some part. His bloodstained hat was found in January 1987. In April 1987 the body of the boy was found in the desert. He had died of dehydration, exhaustion and hypothermia. Mr and Mrs Annetts were informed by telephone. Subsequently Mr Annetts was shown a photograph of the skeleton which he identified as that of his son.[9] Mr and Mrs Annetts, who themselves had responsibilities for the care of their son, only agreed to permit him to go to work for the employer after having made enquiries of the employer as to the arrangements that would be made for his safety and, in particular, after being assured that he would be under constant supervision. Contrary to those assurances, he was sent to work, alone, in a remote location.[10] The aetiology of the psychiatric illness of Mr and Mrs Annetts was unclear.[11]

### C *Recognisable Psychiatric Illness*

The requirement of a recognisable psychiatric illness as opposed to emotional distress has remained as a steadfast control on recoverable damage after Tames and Annetts. As expressed in the joint judgment of Gummow and Kirby JJ, the requirement of a recognisable psychiatric illness reduces the scope for indeterminate liability since it restricts recovery to those disorders which are capable of objective determination.[12] Furthermore, to restrict recovery to a recognisable psychiatric illness excluding other forms of emotional disturbance 'is to posit a distinction grounded in principle rather than pragmatism, and one that is illuminated by professional medical opinion rather than fixed purely by idiosyncratic judicial perception'.[13] Gleeson CJ comments that the manifold circumstances in which one person's conduct may be a factor in inducing an emotional response in another, underlie the distinction between a recognisable psychiatric illness and various forms of emotional stress.[14] To allow recovery for the range of emotional responses falling short of manifest psychiatric illness would 'impose an intolerable burden on ordinary behaviour'.[15]

### D *Normal Fortitude*

A majority on this issue in *Tame* and *Annetts* (Gleeson CJ, Gaudron, Gummow and Kirby JJ),[16] while acknowledging the usefulness of a 'normal standard of susceptibility' to psychiatric illness as a general

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9 *Tame* and *Annet* (2002) 76 ALJR 1348, 1355
10 *Tame* and *Annetts* (2002) 76 ALJR 1348, 1356
11 *Tame* and *Annetts* (2002) 76 ALJR 1348, 1355
12 *Tame* and *Annetts* (2002) 76 ALJR 1348, 1382
13 *Tame* and *Annetts* (2002) 76 ALJR 1348, 1382
14 *Tame* and *Annetts* (2002) 76 ALJR 1348, 1351
15 *Tame* and *Annetts* (2002) 76 ALJR 1348, 1351
16 (2002) 76 ALJR 1348, 1353, 1355, 1359, 1382-1384

guideline in the application of what the tortfeasor should reasonably foresee, rejected any notion that it is a separate and definitive test of liability disqualifying a plaintiff with a particular susceptibility to nervous shock from recovery Gaudron J referred to special relationships or special features of relationships, including knowledge of the particular susceptibility of the plaintiff, that render the risk of psychiatric injury to the plaintiff foreseeable, even though it would not be foreseeable in the case of other persons [17] This view was reinforced in the joint judgment of Gummow and Kirby JJ who stated that 'the concept of normal fortitude should not distract attention from the central enquiry, which is whether, in all the circumstances, the risk of the plaintiff sustaining a recognisable psychiatric illness was reasonably foreseeable, in the sense that the risk was not far-fetched or fanciful [footnote omitted]' [18]

The bland assertion that a plaintiff cannot recover for pure psychiatric damage unless he is a person of normal fortitude was rejected as a proposition of law. For the majority, 'normal fortitude' was merely the 'way of expressing the idea that there are some people with such a degree of susceptibility to psychiatric injury that it is ordinarily unreasonable to require strangers to have in contemplation the possibility of harm to them' [20] But as Gleeson CJ noted, that does not mean 'that judges suffer from the delusion that there is a 'normal' person with whose emotional and psychological qualities those of any other person may readily be compared' [21]

The minority on this issue (McHugh, Hayne and Callinan JJ) regarded the maintenance of 'normal fortitude' as an important factor in reaching a just outcome in the application of the objective criterion of reasonable foreseeability of psychiatric harm McHugh J commented that defendants are entitled to act on the basis that there will be a normal reaction to his or her conduct [22] He concluded the normal fortitude test 'strikes a fair balance between the need for compensation for victims of shock and the right of the individual to avoid liability for actions that ordinary persons would not see as likely to give rise to psychiatric illness' [23]

### E *Direct Perception or Immediate Aftermath*

Five judges of the High Court in Tame and Annetts (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ)[24] explicitly rejected the need for direct

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17 *Tame* and *Annetts* (2002) 76 ALJR 1348 1359
18 *Tame* and *Annetts* (2002) 76 ALJR 1348 1383
19 *Tame* and *Annetts* (2002) 76 ALJR 1348, 1383
20 *Tame* and *Annetts* (2002) 76 ALJR 1348, 1353
21 *Tame* and *Annetts* (2002) 76 ALJR 1348 1353
22 *Tame* and *Annetts* (2002) 76 ALJR 1348 1367
23 *Tame* and *Annetts* (2002) 76 ALJR 1348, 1368
24 (2002) 76 ALJR 1348-1353 1355-1356 1356-1358, 1388-1389

perception of the distressing event or its aftermath as an indispensable pre-condition for recovery of claims for 'nervous shock'. As a result of the approach taken by McHugh J to the duty of care question, it was unnecessary for him to consider the place (if any) of controls in the common law of Australia.[25] Callinan J, while not abandoning these controls, reinterpreted and extended their scope and application such that they could include psychiatric illness caused by communication of distressing news at a time before the plaintiff should reasonably have reached a settled state of mind about the event.[26]

Underlying the majority's rejection of 'direct perception' or 'immediate aftermath' as a pre-condition of recovery was the anomalous, illogical and unjust results ensuing from their application. Particularly since a more significant causal factor in cases of psychiatric illness is not the 'direct perception' of the event, or the precise manner in which the horror of the event is conveyed, but the relationship between the plaintiff and the accident victim [footnote omitted]'.[27] Gummow and Kirby JJ instanced the circumstance where these controls (direct perception or immediate aftermath) produced the result

> that a plaintiff who did not view her daughter's abduction or murder or view her mutilated body until six to seven days after her death is outside the immediate aftermath and is unable on that basis alone to bring a claim in negligence against the defendant health authority for its alleged failure adequately to diagnose and treat the sexual offender who committed the crimes.[28]

They stated that such a result lacks apparent logic or legal merit. They further commented that distance in time and space from a distressing phenomenon, and means of communication or acquisition of knowledge concerning that phenomenon, may be relevant to assessing reasonable foreseeability, causation and remoteness of damage in a common law action for negligently inflicted psychiatric illness, but they are not themselves decisive of liability.[29] Gummow and Kirby JJ summarised the application of these controls by commenting that

> [a] rule that renders liability in negligence for psychiatric harm conditional on the geographic or temporal distance of the plaintiff from the distressing phenomenon or on the means by which the plaintiff acquires knowledge of that phenomenon, is apt to produce arbitrary outcomes and to exclude meritorious claims.[30]

The application of 'direct perception' or 'immediate aftermath' in the present case of *Annetts* would have produced a result whereby obvious

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25 *Tame* and *Annetts* (2002) 76 ALJR 1348, 1371, 1372.
26 *Tame* and *Annetts* (2002) 76 ALJR 1348, 1415.
27 *Tame* and *Annetts* (2002) 76 ALJR 1348, 1388.
28 *Tame* and *Annetts* (2002) 76 ALJR 1348, 1388.
29 *Tame* and *Annetts* (2002) 76 ALJR 1348, 1388.
30 *Tame* and *Annetts* (2002) 76 ALJR 1348, 1388.

psychiatric illness caused to the parents through the 'agonisingly protracted' communications of their son's disappearance, — death by exhaustion and starvation in the desert — would go uncompensated but 'a similar injury suffered by parents who see their son being run down by a motor car' could be compensated.[31] Gleeson CJ considered such a distinction indefensible.[32]

The rejection of direct perception of the distressing event or its immediate aftermath as an indispensable pre-condition to recovery for mental harm has been affirmed by the High Court in *Gifford*. *Gifford* involved claims for damages for negligently inflicted psychiatric injury brought by the children of a man who was killed in an accident at work. The issue and facts as recited by Gleeson CJ were whether the man's employer owed a duty of care to the children (plaintiffs).[33] The defendant, a stevedoring company, employed the late Mr Barry Gifford, who was crushed to death by a forklift vehicle. Negligence on the part of the driver of the vehicle, who was also an employee of the defendant, and on the part of the defendant itself, was alleged, and was admitted. At the time, the plaintiffs were aged 19, 17 and 14 respectively. They did not witness the accident. They were all informed of what had occurred later on the same day. The plaintiffs claimed to have suffered psychiatric injury in consequence of learning what had happened to their father. Gleeson CJ in *Gifford* concisely summarised the common law with respect to 'direct perception' or 'immediate aftermath' as follows:

> The Court of Appeal decided against the appellants on the ground that there can be no liability at common law for damages for mental injury to a person who is told about a horrific accident or injury to a loved one but does not actually perceive the incident or its aftermath [footnote omitted]. That proposition is inconsistent with the reasoning of this Court in *Tame* and *Annetts* and cannot stand with the actual decision in *Annetts* [footnote omitted]. It does not follow however, that the circumstance that the appellants were not present when their father suffered his fatal injury and did not observe its aftermath, is irrelevant to the question whether the respondent owed them as well as their father a duty to take reasonable care to prevent injury of the kind they allegedly suffered.[34]

### F *Sudden Shock*

Gleeson CJ, Gaudron, Hayne, Gummow and Kirby JJ rejected the requirement of sudden shock in *Tame* and *Annetts* fundamentally on the notion that an action should rest on proof of a recognisable psychiatric disorder, not on the aetiology of the disorder.[35] The recognition that

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31 *Tame* and *Annetts* (2002) 76 ALJR 1348, 1355.
32 *Tame* and *Annetts* (2002) 76 ALJR 1348, 1355.
33 *Gifford* (2003) 77 ALJR 1205, 1207.
34 *Gifford* (2003) 77 ALJR 1205, 1207.
35 (2002) 76 ALJR 1348 at 1355, 1359-1360, 1384-1386, 1398-1399.

individuals may suffer recognisable psychiatric illness without any sudden shock suggests that such a control is pragmatic and leads to harsh results and the rejection of meritorious claims. As Gummow and Kirby JJ indicate the requirement of 'sudden shock' means a parent

> who observes an adult child deteriorate over 14 days whilst being negligently treated in the defendant hospital and then dies must be denied recovery in respect of the negligence of the hospital because the parent's psychiatric harm was not induced by shock and the death when it came was expected [36]

While the majority accepted that the absence of such shock from sudden sensory perception of a distressing event or its aftermath may be a factor for consideration in the reasonable foreseeability of the causation of psychiatric illness, such absence was not automatically a disqualifying factor.

## IV THE HIGH COURT'S APPROACH TO DUTY OF CARE IN *TAME* AND *ANNETTS*

A detailed analysis[37] of Lord Atkin's celebrated judgment in *Donoghue v Stevenson*[38] and his references therein to the earlier cases of *Heaven v Pender*[39] and *Le Lievre v Gould*[40] indicates that Lord Atkin perceived that reasonable foreseeability, as a test for duty of care, 'was demonstrably too wide'[41] to use his words. He considered that 'if properly limited was capable of affording a valuable practical guide'.[42] Lord Atkin then proceeded to expound his version of the underlying rationale for a duty of care:

> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.[43]

Immediately following this statement Lord Atkin continued: 'This appears to me to be the doctrine of *Heaven v Pender* as laid down by Lord Esher (then Brett M.R.) when it is limited by the notion of proximity

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36 *Tame* and *Annetts* (2002) 76 ALJR 1348, 1385.

37 Norman A. Katter, *Duty of Care in Australia* (Sydney: The Law Book Co. Ltd, 1999) 23-39.

38 [1932] AC 562.

39 (1883) 11 QBD 503.

40 [1893] 1 QB 491.

41 *Donoghue v Stevenson* [1932] AC 562, 580.

42 *Donoghue v Stevenson* [1932] AC 562, 580.

43 *Donoghue v Stevenson* [1932] AC 562, 580.

introduced by Lord Esher himself and A L Smith LJ in *Le Lievre v Gould* [44]

Lord Atkin then stated in his judgment that proximity should not be confined to mere physical nearness:

> I think that this sufficiently states the truth if proximity be not confined to mere physical proximity but be used as I think it was intended to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act[45]

Lord Atkin's test of 'neighbourhood' or 'proximity' was an overriding control on reasonable foreseeability at large. While McHugh J in *Tame* and *Annetts* expressly acknowledged that reasonable foreseeability is not at large and that 'you come under a duty only in respect of acts and omissions that you can reasonably foresee may affect your neighbours – persons who are directly and closely affected by your acts', he concluded that reasonable foreseeability and proximity were an amalgam of concepts.[46]

Whether or not Lord Atkin intended that reasonable foreseeability and proximity could be combined or should be treated as independent tests for duty of care, his judgment in *Donoghue v Stevenson* does indicate that a defendant is not liable to all those whose damage can reasonably be foreseen as a result of the defendant's negligence but only to those 'neighbours' who are in 'such close and direct relations' to the defendant or who are *so closely and directly affected* by the defendant's act, that the defendant ought reasonably to have them in contemplation.[47] (Emphasis added)

Four judges explicitly[48] (and three implicitly)[49] utilised Lord Atkin's 'proximity' or 'neighbour' principle in *Tame* and *Annetts* in determining the duty issue.

### A *Lord Atkin's Test in Annetts and Tame*

#### 1 *Annetts*

Underpinning the finding of duty by all justices in the High Court in *Annetts* was the close and direct relationship[50] existing between the employer (defendant) and the parents of the deceased boy, the parents

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44 *Donoghue v Stevenson* [1932] AC 562, 580–581.

45 *Donoghue v Stevenson* [1932] AC 562, 581 (emphasis added).

46 (2002) 76 ALJR 1348, 1366–1367.

47 *Tame* and *Annetts* (2002) 76 ALJR 1348, 1366–1367.

48 (2002) 76 ALJR 1348, 1351–1352, 1356–1360, 1366–1367, 1371–1373, 1413–1414.

49 (2002) 76 ALJR 1348, 1390–1391, 1397, 1403–1404.

50 (2002) 76 ALJR 1348, 1351–1352, 1356–1360, 1366, 1371, 1373, 1390–1391, 1397, 1403–1404, 1413–1414.

having sought and relied on the assurances of care by the employer before giving their consent to their son's employment in remote Australia. Such close and direct relations placed the parents as 'persons so closely and directly affected by [the employer's negligence] that the employer ought reasonably to have had them in contemplation'[51] applying Lord Atkin's 'proximity' test. This same application of Lord Atkin's 'neighbour' principle as the foundation and test for duty was evident in all judgments of the High Court in *Gifford*.

2 *Tame*

It was unnecessary in *Tame* for the Court to consider 'proximity' or 'neighbourhood' since psychiatric illness caused to a person in the position of Mrs Tame was not a reasonably foreseeable consequence flowing from a police officer's (defendant) negligence in mistakenly reporting the blood alcohol level of Mrs Tame. Furthermore, there were wider policy implications that made it inappropriate to raise a duty of care in the case of the police officer's negligent misstatement. What were these wider policy implications? Firstly, the police officer's statutory and common law duties to the public to honestly and frankly report on an accident and the tests that follow were inconsistent with a duty of care to protect a private individual from possible psychiatric illness when that individual was the subject of the investigation and report.[52] It would sterilise the duties of the police officer and the ability to report if the public duty was accompanied by a private law duty of care to the individual who was the subject of the report.

Secondly, a finding of duty in *Tame* would break the coherence of the law since the police officer's negligent statement was published to a third party and was defamatory. The plaintiff could easily have sued for defamation and the Court would have been required to look at issues of privilege and public interest and weigh the public interest against the competing interests of the plaintiff. This recognition by the law of defamation, of balancing the rights and duties of the police officer and the possible protection of the public officer with the rights of the plaintiff, would all be undermined and rendered irrelevant by the application of the law of negligence.[53]

### B *Bearer of Bad Tidings*

Explicit in the judgments in the High Court in Tame and Annetts is recognition that the communicator of distressing news, unless acting with malice or an intention to produce psychiatric illness, is immune from any

51 [1932] AC 562, 580.
52 (2002) 76 ALJR 1348, 1354
53 *Tame* and *Annetts* (2002) 76 ALJR 1348

duty of care or action for negligence if the news causes psychiatric illness Gummow and Kirby JJ stated that such protection for bearers of bad news was policy driven 'since the law encourages the free and prompt supply' of such information to concerned parties even if it is distressing news [54] It follows that there is no legal duty to break bad news gently [55]

## V Statutory Initiatives Resulting from Tame and Annetts and the Ipp Recommendations on Negligence Law

Some States in Australia have either implemented[56] or are in the process of implementing[57] civil liability statutes containing provisions which follow the common law lead with respect to negligently caused psychiatric illness and adopt the recommendations of the panel chaired by Ipp J of the Supreme Court of New South Wales This panel was appointed to review the law of negligence and civil liability in Australia

### A *Pure Mental Harm and Consequential Mental Harm*

These statutes draw a distinction between pure mental harm (where the plaintiff suffers mental harm only, not consequential on any physical bodily injury to himself) and consequential mental harm resultant on personal injury to the plaintiff [58] This distinction is similar to the law's distinction between pure economic loss and economic loss consequential on injury to the plaintiff's person or property.

### B *Requirement of Recognised Psychiatric Illness*

While 'mental harm' is defined as impairment of a person's mental condition,[59] these statutes expressly negate any liability for damages resulting from either negligently caused pure mental harm or consequential mental harm unless the harm consists of a recognised psychiatric illness [60] This requirement of a recognised psychiatric illness

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54 *Tame* and *Annetts* (2002) 76 ALJR 1348, 1389.

55 *Tame* and *Annetts* (2002) 76 ALJR 1348, 1389.

56 *Civil Liability Act 2002* (NSW); *Civil Liability Act 2002* (WA); *Civil Liability Act 2002* (Tas); *Civil Law* (Wrongs) *Act 2002* (ACT) Queensland and Victoria have not enacted the recommendations of the Ipp Panel with respect to mental harm

57 The Law Reform (Ipp Recommendations) Bill 2003 (SA) (at time of writing)

58 *Civil Liability Act 2002* (NSW) s 27; *Civil Liability Act 2002* (WA) s 5N; *Civil Liability Act 2002* (Tas) s 29; *Civil Law* (Wrongs) *Act 2002* (ACT) s 29; The Law Reform (Ipp Recommendations) Bill 2003 (SA) cl 8

59 *Civil Liability Act 2002* (NSW) s 27; *Civil Liability Act 2002* (WA) s 5N; *Civil Liability Act 2002* (Tas) s 29; *Civil Law* (Wrongs) *Act 2002* (ACT) s 29; The Law Reform (Ipp Recommendations) Bill 2003 (SA) cl 8

60 *Civil Liability Act 2002* (NSW) ss 31, 33; *Civil Liability Act 2002* (Tas) ss 33, 35; *Civil Law* (Wrongs) *Act 2002* (ACT) s 30B; The Law Reform (Ipp Recommendations) Bill 2003 (SA) cl 34

is explicit in the judgments in the High Court in *Tame* and *Annetts* and thereby excludes various forms of emotional response falling short of a psychiatric disorder established in professional medical opinion

### C *Objective Test of Normal Fortitude*

The Ipp Report concluded that as a result of the High Court judgments in *Tame* and *Annetts*, a person is not precluded from recovering for mental illness if they are not of normal fortitude The Panel considered that *Tame* and *Annetts* had propounded what was merely an objective test of foreseeability whereby a duty of care could only arise if 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 [61] Providing this requirement was satisfied, it was not relevant whether the plaintiff was of normal fortitude or not.

This foreseeability question has been drafted into the civil liability statutes The drafting of this 'foreseeability' requirement suggests a negative hurdle rather than positively providing a definition for duty of care The conclusion that the section as drafted does not provide an exhaustive formula for duty of care is supported by a further subsection permitting the court to ignore the objective 'normal fortitude' requirement where the defendant subjectively had knowledge or ought to have known that the plaintiff was a person of less than normal fortitude [63]

### D *Factors Relevant to Foreseeability*

Four factors[64] are specifically included in the civil liability statutes (although, these are not exhaustive lists) as matters relevant to answering the 'foreseeability' question These four factors, gleaned from *Tame* and *Annetts* may assist the plaintiff in establishing that the defendant ought to have foreseen that a person of normal fortitude might in the circumstances suffer psychiatric illness:

1 The first factor is whether there was sudden shock caused to the plaintiff This would link with the second factor;

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61 Commonwealth of Australia *Review of the Law of Negligence Final Report* (September 2002), [7.26]

62 *Civil Liability Act 2002* (NSW) s 32; *Civil Liability Act 2002* (WA) s 5P; *Civil Liability Act 2002* (Tas) s 34; *Civil Law (Wrongs) Act 2002* (ACT) s 30A; The Law Reform (Ipp Recommendations) Bill 2003 (SA) cl 27

63 *Civil Liability Act 2002* (NSW) s 32; *Civil Liability Act 2002* (WA) s 5P; *Civil Liability Act 2002* (Tas) s 34; *Civil Law (Wrongs) Act 2002* (ACT) s 30A; The Law Reform (Ipp Recommendations) Bill 2003 (SA) cl 27

64 *Civil Liability Act 2002* (NSW) s 32; *Civil Liability Act 2002* (WA) s 5P; *Civil Liability Act 2002* (Tas) s 34; *Civil Law (Wrongs) Act 2002* (ACT) s 30A; The Law Reform (Ipp Recommendations) Bill 2003 (SA) cl 27

2 Whether the plaintiff witnessed at the scene, a person being killed, injured or put in peril;
3 The third factor is the closeness of relationship between the plaintiff and the primary victim
4 The fourth factor is whether or not there was a pre-existing relationship between the plaintiff and the defendant

As discussed earlier in this paper, Lord Atkin's 'neighbourhood' or 'proximity' principle was the test applied for duty of care in both *Tame* and *Annetts*[65] and *Gifford*.[66] McHugh J in *Gifford* restated the test as follows:

> A person is a neighbour in Lord Atkin's sense if he or she is one of those persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected. If the defendant ought reasonably foresee that its conduct may affect persons who have a relationship with the primary victim, a duty will arise in respect of those persons. The test is would a reasonable person in the defendant's position who knew or ought to know of that particular relationship, consider that the third party was so closely and directly affected by the conduct that it was reasonable to have that person in contemplation as being affected by that conduct?[67]

The four factors above, included in the civil liability statutes, bear directly on the 'neighbour' question, that is, whether the defendant ought reasonably to have had the plaintiff (or plaintiffs) in contemplation as likely to suffer mental harm from the defendant's conduct. Relevant to the 'neighbour' question is the physical and temporal proximity of the plaintiff to the direct detriment or injury to the primary victim (first and second factors) or the circumstantial proximity of the parties, namely, the closeness and directness of relationship between the plaintiff and primary victim and thereby the plaintiff and defendant (third and fourth factors).

### E *No Pre-Condition of Direct Perception or Immediate Aftermath*

The rejection by the High Court of the need for direct perception by the plaintiff of the distressing event or its immediate aftermath has been adopted in the civil liability legislation.[68] This is achieved by providing that a plaintiff cannot recover damages for pure mental harm unless:

- the plaintiff was at the scene of the incident causing detriment to the primary victim; or
- the plaintiff is a close member of the family of the primary victim

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65 (2002) 76 ALJR 1348, 1351-1352, 1356-1360, 1366-1367, 1371-1373, 1413-1414, 1390-1391, 1397, 1403-1404
66 (2003) 77 ALJR 1205, 1208, 1215-1216, 1222, 1224-1225, 1227
67 (2003) 77 ALJR 1205, 1216
68 *Civil Liability Act 2002* (NSW) s 30; *Civil Liability Act 2002* (Tas) s 32; *Civil Law (Wrongs) Act 2002* (ACT) s 34; The Law Reform (Ipp Recommendations) Bill 2003 (SA) cl 34; *Wrongs Act 1958* (Vic) s 67ff

The latter requirement would allow recovery through communication of distressing news to the plaintiff even though the plaintiff was not present at the scene of the injury or its aftermath 'Close member of the family' of the victim includes a wide circle of relationship in the New South Wales legislation[69] (step-relations, half-brothers and sisters and de facto partners). The proposed South Australian legislation refers only to parent, spouse or child of the victim This legislative drafting is an express acknowledgement that the closeness of relationship between the plaintiff and the primary victim may be a more significant causal factor in the case of psychiatric illness than direct perception of the incident causing injury to the primary victim or its aftermath [70]

### F *Equating The Position of Plaintiff and Primary Victim*

The New South Wales legislation equates the position of the plaintiff with that of the primary victim for purposes of recovery of damages.[71] Consequently, any damages to be awarded to the plaintiff for pure mental harm are to be reduced in the same proportion as the contributory negligence of the primary victim Furthermore, if the law provides a defence to the defendant in relation to any claim for damage by or through the primary victim against the defendant, that same defence will prevent recovery by the plaintiff who suffered mental harm [72] Equating the position of the plaintiff with that of the primary victim, while acknowledging their closeness of relationship, ignores the two distinct torts. The proximity of relationship between the primary victim and plaintiff is merely the circumstantial basis for the establishment of a separate duty of care owed by the defendant directly to the plaintiff.

## VI Summary of the Current Law on Negligently Inflicted Mental Harm

The common law and statutory changes, while reflecting a rejection of some policy-driven control mechanisms which had led to unjust and illogical results, strike a balance between limiting the range of potential claimants and facilitating recovery where there is such a close and direct relationship between the parties that foreseeability of mental harm to the plaintiff is obvious.

The common law and statutory restatement of the law indicate there are sufficient controls in an action for negligently inflicted psychiatric illness

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69 *Civil Liability Act 2002* (NSW) s 30; *Civil Liability Act 2002* (Tas) s 32; *Civil Law (Wrongs) Act 2002* (ACT) ss 29, 31;The Law Reform (Ipp Recommendations) Bill 2003 (SA) cl 34

70 *Tame v New South Wales; Annetts v Australian Stations Pty Limited* (2002) 76 ALJR 1348, 1388

71 *Civil Liability Act 2002* (NSW) s 30

72 *Civil Liability Act 2002* (NSW) s 30

inherent in the general determinants for duty, breach and damage and that the controls of 'direct perception', *immediate aftermath* and *sudden shock*, while factors which may assist in the determination of reasonable foreseeability and the closeness of relationship between wrongdoer and plaintiff, are not indispensable pre-conditions to recovery

A plaintiff must establish for a potential action for negligently inflicted psychiatric illness that he or she has a recognisable psychiatric illness rather than mere emotional distress caused by the defendant's negligence

A duty of care will arise where the defendant wrongdoer ought to have foreseen that a person of normal fortitude might suffer a recognised psychiatric illness resulting from the defendant's negligent conduct and the plaintiff was a person in the circumstances, so closely and directly affected by the defendant's negligent conduct that the plaintiff ought to have been in the contemplation of the defendant as likely to suffer psychiatric harm The circumstances referred to in the case of pure mental harm would include the physical and temporal proximity of the plaintiff to the incident causing detriment to the primary victim or the closeness of the relationship between plaintiff and primary victim and plaintiff and defendant

A plaintiff cannot recover for pure mental harm and would not be owed a duty of care unless he was present at the scene of the incident causing injury to the primary victim (SA legislation) or witnessed the victim being killed, injured or put in peril (NSW legislation) or alternatively, unless the plaintiff is a close member of the family of the victim

A duty can arise from the communication (not against the communicator) of distressing news which causes psychiatric illness or in the absence of some sudden shock to the plaintiff, providing the relationship and circumstances were such that the general determinants for duty can be satisfied between plaintiff and defendant The bearer of bad news cannot be liable for psychiatric illness in the absence of malice or intent to cause psychiatric illness, but the wrongdoer who caused the 'bad news' may be liable.

A duty may also arise in circumstances where the plaintiff does not have a normal susceptibility to psychiatric illness, if the defendant was aware of this particular susceptibility.

Finally, the New South Wales legislation equates the position of plaintiff and primary victim in the case of pure mental harm, reducing any damage awarded to the plaintiff by the extent of contributory negligence of the primary victim and providing a full defence against the plaintiff's claim where such a defence was available against the primary victim.

While the common and statutory restatement of the law in this area potentially may increase the number of claims for negligently inflicted

psychiatric illness, the inherent controls in the general determinants for the tort will allay any floodgate fears and ensure a limited range of claimants

The positive outcome of this restatement is the rejection of controls whose rigid application had, and would continue to produce anomalous, illogical and unjust results

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