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# Legal issues

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## THE MODERN AUSTRALIAN LAW OF MENTAL HARM: PAROCHIALISM TRIUMPHANT\*

In the 19th century, within the constraints of the Imperial system of precedent, each colonial jurisdiction was developing its own common law jurisprudence, including the law of torts. However, as part of the nation-building compact, one of the aims of the Founding Fathers was to ensure a reasonable degree of uniformity of common law amongst the States (and later, Territories) of the Federation.<sup>1</sup> To this end, Pt III of the Commonwealth *Constitution*<sup>2</sup> created the High Court of Australia as the Court of Appeal from all State Supreme Courts whether they are exercising federal or purely State jurisdiction.<sup>3</sup> Its determinations on common law appeals from any jurisdiction are binding on all Australian courts.<sup>4</sup> This system has enabled the High Court to mould and develop a relatively uniform Australian torts law.

Common law compensation for negligently occasioned “pure” psychiatric injury resulting from “non-physical impact”, which was historically known as nervous shock,<sup>5</sup> dates back to the pre-federation Victorian case of *Coultas v Victorian Railway Commissioners* (1886) 12 VLR 895. The award of damages in this case was successfully appealed to the Judicial Committee of the Privy Council (*Victorian Railway Commissioners v Coultas* (1888) 13 AC 222) which opined (at 225) that “damage 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 gate-keeper”. The Privy Council’s opinion bound all Australian courts for a long time.

Throughout the 20th century the development of statutory law relating to psychiatric injury was slow. In 1944 the New South Wales Parliament created a statutory cause of action for nervous shock, which provided that a member of the family of a person killed, injured or put in peril by the negligence of the defendant may bring an action for nervous shock if the person was within the sight or hearing of such member of the family.<sup>6</sup> Similar provisions were adopted in 1955 by the Northern Territory and the Australian Capital Territory.<sup>7</sup> Other jurisdictions were governed by common law, which required that, for the duty of care to arise in pure nervous shock cases, claimants had to be present at the scene and perceive the injury to or death of the close relative with their own unaided senses (*Chester v Council of Municipality of Waverley* (1939) 62 CLR 1). It was only in *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 and *Jaensch v Coffey* (1984) 155 CLR 549 that the High Court provided a uniform matrix for the law of pure nervous shock in Australia (discussed below).

Rules for recovery of damages for psychiatric illness enunciated in *Jaensch v Coffey* were reconsidered by the High Court of Australia in *Tame v New South Wales; Annetts v Australian*

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\* Based on a paper titled “Nervous Shock and the Torts Reform in Australia”, presented at the 29th International Congress on Law and Mental Health, Paris, 2-8 July 2005.

<sup>1</sup> Clark IA, *Studies in Australian Constitutional Law* (Charles F Maxwell, Melbourne, 1901) pp 190-208.

<sup>2</sup> *Commonwealth of Australia Constitution Act 1900* (UK). The High Court itself was established by the *Judiciary Act 1903* (Cth).

<sup>3</sup> *Australia Act 1986* (Cth) abolished all appeals to the Judicial Committee of the Privy Council from the State Supreme Courts.

<sup>4</sup> Crawford J, *Australian Courts of Law* (Oxford University Press, Melbourne, 1986) p 160. Jurisdictional variations were mainly due to legislative actions; historically, the areas of the law that torts regulated by statute included defamation, occupiers’ liability and contributory negligence.

<sup>5</sup> Mendelson D, “English Medical Experts and the Claims for Shock Occasioned by Railway Collisions in the 1860s: Issues of Law and Ethics and Medicine” (2002) 25 (4) *International Journal of Law and Psychiatry* 303; Mendelson D, *Interfaces of Medicine and Law: The History of the Liability for Negligently Caused Psychiatric Injury (Nervous Shock)* (Ashgate, 1998).

<sup>6</sup> *Law Reform (Miscellaneous Provisions) Act 1944* (NSW), s 4 together with s 3 was repealed in part by the *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW) and replaced by the *Civil Liability Act 2002* (NSW), Pt 3.

<sup>7</sup> *Law Reform (Miscellaneous Provisions) Act 1955* (ACT), s 24(1). This provision has been repealed and a modified version is now contained in the *Civil Law (Wrongs) Act 2002* (ACT), s 36; *Law Reform (Miscellaneous Provisions) Act 1956* (NT), s 25.

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*Stations Pty Ltd* (2002) 211 CLR 317; [2002] HCA 35 (*Tame; Annetts*). The decision, brought down in early 2002, profoundly changed the principles governing the common law of compensation for negligently inflicted pure psychiatric injury. However, in late 2002 and 2003, the rules in *Tame; Annetts* were legislatively modified by six jurisdictions, New South Wales, Tasmania, Western Australia, the Australian Capital Territory, Victoria and South Australia. The new statutory regime was created as part of the legislative implementation, to a greater or lesser extent, of a series of wide-ranging reforms to the law of torts by each of the nine Australian jurisdictions (including the Commonwealth) during the same period.

New South Wales, Tasmania, Western Australia, the Australian Capital Territory, Victoria and South Australia changed the appellation of “nervous shock” to “mental harm”,<sup>8</sup> which the legislation (apart from Victoria) defines as “impairment of the person’s mental condition”.<sup>9</sup> In all six jurisdictions the “mental harm” head of damage is divided into two categories:

- “consequential mental harm”, which follows on physical injury (as where depression is suffered as a result of an injury to the body); and
- “stand alone” or “pure mental harm” (where a person suffers a recognised psychiatric illness as a result of either witnessing or being involved in traumatic events or experiencing the negligently inflicted death of or injury to a loved one).

Under statutory reforms, only claimants who suffer a recognised (as against the common law’s sloppy “recognisable”) psychiatric illness or disorder can recover damages for negligently occasioned mental harm.<sup>10</sup>

The aim of the reform legislation was to modify the common law; consequently its salient features need to be analysed in the context of the common law as it operated before 2002 and the revolutionary decision of the Australian High Court in *Tame; Annetts*.

### **Common law of pure mental harm before 2002**

Between 1984 and 2002, the Australian common law relating to psychiatric injury was governed by the High Court’s decision in *Jaensch v Coffey* (1984) 155 CLR 549. In this case, the High Court allowed recovery for what is now called “pure mental harm” to Mrs Coffey who was at home when her husband was severely injured in a vehicle collision.

The court determined that Mrs Coffey could recover damages for pure mental harm because, though not present at the scene of the accident, she came to the hospital during the period of the immediate post-accident treatment of her injured husband. Following the *Jaensch v Coffey* decision, claimants could recover damages for a recognised psychiatric illness, which is a result of a shock occasioned by the death or injury of their loved ones (or fellow workers if the claimant is a rescuer), even though they were not physically present at the scene of the accident. However, the claimants must have experienced the “immediate aftermath” of the event “with their own unaided senses”.<sup>11</sup> The claimant’s sensory perception of the accident could be either visual or auditory or both.<sup>12</sup> For example, once notified by the police of her husband’s accident, Mrs Coffey went to the Royal Adelaide Hospital’s emergency ward, where she saw him being wheeled into the operating room.

The *Jaensch v Coffey* test of causation required that the psychiatric illness be induced by a single “shock”.<sup>13</sup> Moreover, the subjective test of causation<sup>14</sup> was qualified by the prerequisite of “normal

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<sup>8</sup> *Civil Law (Wrongs) Act 2002* (ACT), s 32; *Civil Liability Act 2002* (NSW), s 27; *Civil Liability Act 2002* (Tas), s 29; *Civil Liability Act 2002* (WA), s 5Q; *Civil Liability Act 1936* (SA), s 3. The change followed a recommendation contained in Ipp D, Cane P, Sheldon D and Macintosh I, *Review of the Law of Negligence Report* (2 October 2002) at [3.42]; see <http://www.revofneg.treasury.gov.au/content/reports.asp> (Second Report, released on 2 October 2002) (Ipp Report).

<sup>9</sup> In Victoria, the *Wrongs Act 1958* (Vic), s 67, defines “mental harm” in a less circular manner as “psychological or psychiatric injury”. No explanation is provided for the distinction between psychological and psychiatric injury.

<sup>10</sup> *Hinz v Berry* [1970] 2 QB 40 at 42-43 per Lord Denning MR; *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 394 per Windeyer J.

<sup>11</sup> *Jaensch v Coffey* (1984) 155 CLR 549 at 560. See also *Campbelltown City Council v Mackay* (1989) 15 NSWLR 501.

<sup>12</sup> In *Petrie v Dowling* [1989] Aust Torts Reports 80-263, the court awarded compensation for nervous shock to a mother who collapsed with grief upon being informed at the hospital that her young daughter was killed in a collision caused by the defendant’s negligence.

<sup>13</sup> See eg *Campbelltown City Council v Mackay* (1989) 15 NSWLR 501.

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fortitude”, whereby the claimant is required to show that a person of “normal fortitude” would have suffered pure psychiatric injury as a result of the defendant’s negligent act or omission.<sup>15</sup> The criterion of “normal fortitude” did not apply where the defendant had prior knowledge of the plaintiff’s susceptibility to psychiatric illness.<sup>16</sup>

With respect to the remoteness of damage, once breach and causation were established, the “take your victim as you find him” rule applied to extend the liability to any exacerbation of the victim’s pre-existing psychological vulnerability.<sup>17</sup>

#### *Common law exceptions to recovery*

*Jaensch v Coffey* broadened the scope of defendants’ liability to claimants who were not present at the scene of the accident. In order to contain the potential opening of the floodgates, in *Jaensch v Coffey* the High Court excluded the following:<sup>18</sup>

- claimants who experienced normal rather than pathological grief<sup>19</sup> as a result of their loved one’s death or injury;
- claimants who developed psychiatric illness as a result of prolonged and constant association and care of a seriously injured relative subsequent to immediate post-accident treatment (at 565 per Brennan J);
- claimants who were told about the death or injury of their loved one, rather than perceiving the accident or its immediate aftermath with their own unaided senses; this is known as the “mere knowledge” rule;<sup>20</sup>
- claimants who suffered psychiatric injury as a result of being involved in an accident occasioned by the tortfeasor, where the shocking death of the tortfeasor triggered a recognised psychiatric disorder;<sup>21</sup> and
- bystanders in the sense of officious intermeddlers, curious onlookers and involuntary onlookers who were strangers to the victim of the accident.

The *Jaensch v Coffey* theory of recovery for pure psychiatric damage was underpinned by a special notion of proximity which was discarded by the High Court in the late 1990s. This meant that the *Jaensch v Coffey* theory relating to pure mental harm would have to be reconceptualised. The High Court did so in the bizarre case of *Tame v New South Wales*<sup>22</sup> and the tragic case of *Annetts v Australian Stations Pty Ltd*.<sup>23</sup> The two appeals were heard together.

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<sup>14</sup> *Rosenberg v Percival* (2001) 205 CLR 434; [2001] HCA 18 at [24], [44], [45] per McHugh J; at [87] per Gummow J; at [153], [154] per Kirby J.

<sup>15</sup> *Bunyan v Jordan* (1936) 36 SR (NSW) 350; (1937) 57 CLR 1; *Barnes v Commonwealth* (1937) 37 SR (NSW) 511; *Levi v Colgate-Palmolive Pty Ltd* (1941) 41 SR (NSW) 48; *Bourhill v Young* [1943] AC 92; *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383; *Jaensch v Coffey* (1984) 155 CLR 549; *Woodrow v Commonwealth* (1993) 45 FCR 52.

<sup>16</sup> *Jaensch v Coffey* (1984) 155 CLR 549 at 565.

<sup>17</sup> *Nader v Urban Transit Authority (NSW)* (1985) 2 NSWLR 501; *Havenaar v Havenaar* [1982] 1 NSWLR 626; *Commonwealth v McLean* (1996) 41 NSWLR 389.

<sup>18</sup> Deane J held that in addition to the general test of reasonable foreseeability, the claimants must establish the existence of special proximity between the parties. The notion of proximity as a “conceptual determinant for the existence of duty of care” overarching the test of reasonable foreseeability was developed by Deane J, with whom all justices of the High Court, except Brennan J, eventually agreed. However, Deane J’s notion of proximity was abandoned in *Sullivan v Moody*; *Thompson v Connon* (2001) 207 CLR 562; [2001] HCA 59 at [42].

<sup>19</sup> *Swan v Williams (Demolition) Pty Ltd* (1987) 9 NSWLR 172; [1987] Aust Torts Reports 68,656 at 80-104.

<sup>20</sup> The “mere knowledge” rule in relation to tortfeasors was thus defined by Windeyer J in *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 407: “If the sole cause of shock be what is told or read of some happening then, ... unless there be an intention to cause a nervous shock, no action lies against ... the person who caused the event of which they tell.”

<sup>21</sup> For example, in *Shipard v Motor Accident Commission* (1997) 70 SASR 240, Mr Shipard was driving a prime mover when Mr Young, riding his motorcycle, collided with the prime mover and was decapitated. Mr Shipard successfully claimed damages for “nervous shock” and post-traumatic stress disorder, which he suffered as a result of the collision that was due to Mr Young’s negligence. See also *FAI General Insurance Co Ltd v Lucre* (2000) 32 MVR 540 in which a car driver was wholly responsible for a collision with a truck. The car and its driver were crushed under the truck. The truck driver, though not physically injured, successfully claimed damages for post-traumatic stress disorder occasioned by the crash. The court held that he was an immediate victim to whom the deceased owed a duty of care.

<sup>22</sup> Appeal from *Morgan v Tame* (2000) 49 NSWLR 21 (affirmed).

<sup>23</sup> Appeal from *Annetts v Australian Stations Pty Ltd* (2000) 23 WAR 35 (reversed).

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As noted above, the High Court's decision in *Tame; Annetts* appeared radical in many respects. Their Honours commented that the special prerequisites are arbitrary and based on fear rather than principle.<sup>24</sup> In the event, the court reconsidered three substantive law rules. The first was the "direct perception" rule (at [45] per Gaudron J), which involved duty of care, while the "sudden shock" rule and the "normal fortitude" rule involved causation.

In *Tame*, a policeman, in the course of investigating a motor car collision between Mrs Tame and another driver, inadvertently transposed the heavily intoxicated driver's blood-alcohol reading and her own, which was nil. Although the mistake was subsequently corrected, and no one had acted on the erroneous information, Mrs Tame claimed that she developed a psychotic depressive illness, not as a result of the shock of the collision but when her solicitor told her of the incorrect entry. The High Court determined that the police officer did not owe Mrs Tame a duty to take reasonable care to avoid causing her injury of the kind she had suffered.

In *Annetts*, a 16-year-old, James Annetts, from New South Wales worked as a jackaroo on the defendant's cattle station in Western Australia. Prior to James undertaking the job, the defendant employer assured his parents in a telephone conversation that their son would be safe, working under constant supervision. This did not occur; instead, James was sent to work alone as a caretaker at a remote location. Mr Annetts collapsed on being told by the police that James was missing. James's remains were found nearly five months after his death. Allowing recovery, the High Court determined by a majority that ordinary principles of negligence should govern cases of pure mental harm "unhindered by artificial constrictions based on the circumstance that the illness for which redress was sought was purely psychiatric" (at [236] per Gummow and Kirby JJ).<sup>25</sup>

### **Elements of action for negligently occasioned pure psychiatric injury at common law**

In *Tame; Annetts*, the High Court recast the substantive aspects of this cause of action in the following way.

#### ***Reasonable foreseeability***

The court held that reasonable foreseeability of risk should be the fundamental test for the imposition of a duty of care in pure psychiatric injury claims. Consequently, at common law there is now no difference between cases of physical injury and cases of psychiatric injury. In both, reasonable foresight of the risk of harm will prima facie determine the existence of a duty of care, though, as McHugh J (at [105]) noted: "[A]t least in some situations, policy issues may be relevant to the issue of reasonable foresight because reasonableness requires a value judgment."

Moreover, the risk of the plaintiff developing a psychiatric injury must be reasonably foreseeable at the time the alleged wrongful conduct was supposed to occur. Thus in *Koehler v Cerebos (Australia) Ltd* (2005) 79 ALJR 845; [2005] HCA 15, the plaintiff claimed that due to the employer's negligence in overloading her with work, she became stressed and suffered a severe depressive injury. McHugh, Gummow, Hayne and Heydon JJ, in a joint judgment (Callinan J concurring in a separate judgment), stated (at [36]):

[T]he employer engaging an employee to perform stated duties is entitled to assume, in the absence of evident signs warning of the possibility of psychiatric injury, that the employee considers that he or she is able to do the job.

The joint judgment (at [28]) emphasised that the plaintiff's complaints about her work did not *at the time* bear the significance which hindsight may now attribute to them. What was said did not convey *at that time* any reason to suspect the possibility of future psychiatric injury. (emphasis in original)

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<sup>24</sup> Mendelson D, "The Defendants' Liability for Negligently Caused Nervous Shock in Australia – Quo Vadis?" (1992) 18 Mon LR 16.

<sup>25</sup> In *Annetts*, the damage suffered by James's parents was pure psychiatric injury; however, because of the telephone conversation, the relationship between them and the defendant employer was based on a pre-existing relationship. Consequently, Mr Annetts's psychiatric injury would have been compensable under the general principle that a duty of care arises in situations where there exists a prior undertaking.

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### *The “normal fortitude” test*

Although Mrs Tame’s failure to recover damages turned on the issue of “normal fortitude”, the majority held that “normal fortitude” is a relevant consideration but not an independent test or a precondition of liability for negligently inflicted psychiatric injury.<sup>26</sup> Gummow and Kirby JJ said (at [189]) that “normal fortitude” should be factored into the court’s assessment: “at the stage of breach, of the reasonable foreseeability of the risk of psychiatric harm.” McHugh J (at [110]) dissented on this point and observed that foreseeability of risk in pure psychiatric injury cases should not “be anchored by reference to the most vulnerable person in the community” as this “would place an undue burden on social action and communication”, and “would seriously interfere with the individual’s freedom of action and communication”. His Honour concluded that to

require the actor to take steps to avoid potential damage to the peculiarly vulnerable would impose an intolerable burden on the autonomy of individuals. Ordinary people are entitled to act on the basis that there will be a normal reaction to their conduct.

According to Callinan J in *Koehler v Cerebos (Australia) Ltd* (2005) 79 ALJR 845; [2005] HCA 15 (at [55]), the fact that “a psychiatrist placed in the same position as an employer might have foreseen a risk of psychiatric injury, does not mean that a reasonable employer should be regarded as likely to form the same view”.

### **The “sudden shock” and “direct perception” factors**

In *Tame; Annetts*, Gleeson CJ (at [18]), concurring with Gummow and Kirby JJ,<sup>27</sup> declared that the common law

should not and does not, limit liability for damages for psychiatric injury to cases where the injury is caused by a sudden shock, or to cases where a plaintiff has directly perceived a distressing phenomenon or its immediate aftermath.

His Honour went on to say (at [18]) that “sudden shock” and “direct perception” are factual considerations pertinent to

the question whether it is reasonable to require one person to have in contemplation injury of the kind that has been suffered by another and to take reasonable care to guard against such injury. In particular, they may be relevant to the nature of the relationship between plaintiff and defendant, and to the making of a judgment as to whether the relationship is such as to import such a requirement.

In other words, the “sudden shock” and “direct perception” control mechanisms were removed from the category of prerequisites or preconditions to the recovery of damages for negligently inflicted pure psychiatric injury, and became factors to be considered in determining the nature of the relationship between the parties. According to Gummow and Kirby JJ (at [225]):

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.

Gaudron J (at [66]) observed that “in many cases, the risk of psychological or psychiatric injury will not be foreseeable in the absence of a sudden shock”. Gummow and Kirby JJ (at [210]) commented that cases of “protracted suffering” – presumably caused by a series of distressing events, as opposed to “sudden shock” – should be considered at the stage of causation and remoteness of damage rather than the duty of care. Jettisoning of “sudden shock” as a prerequisite to the determination of duty and breach will extend liability to many kinds of negligent conduct that may cause or contribute to a recognised psychiatric illness.

### *Mere knowledge*

Once distance in time and space ceased to be a barrier to the imposition of a common law duty of care for pure psychiatric injury, the “mere knowledge” rule was discarded. Claimants can now recover damages from the tortfeasor (not the messenger, unless the latter acted with an intent to inflict

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<sup>26</sup> See also *Koehler v Cerebos (Australia) Ltd* (2005) 79 ALJR 845; [2005] HCA 15 at [33].

<sup>27</sup> *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317; [2002] HCA 35 at [189], [213], [214], [225] per Gummow and Kirby JJ; see also at [51], [66] per Gaudron J and at [267] per Hayne J.

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nervous shock),<sup>28</sup> upon being told of a tragic event that befell a person with whom they are or were in a close relationship.

### **The nature of the relationship**

The new interpretation of foreseeability and direct perception elements in *Tame; Annetts* was applied and elaborated on in *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269; [2003] HCA 33. In this case, the High Court determined that the lack of direct perception by the children of the death of their father was “not fatal” to their action in negligence for nervous shock (at [65] per Gummow and Kirby JJ). Gleeson CJ (at [10]) stated that at common law:

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.

McHugh J observed that the determining factor in reasonable foreseeability of psychiatric injury, and hence the duty of care, should be “the closeness and affection of the relationship – rather than the legal status of the relationship” (at [48]).

Neither in *Tame; Annetts* nor in subsequent cases did the High Court discuss the applicable causation test, which, given that the shock is no longer a prerequisite of liability for pure psychiatric injury at common law, will need to be reformulated.

### **Codification of the law of psychiatric injury in Australia**

The High Court’s extension of liability in *Tame; Annetts* was greeted with some alarm. Six jurisdictions followed the recommendations contained in the Ipp Panel’s *Review of the Law of Negligence Report*,<sup>29</sup> which aimed to overcome parts of the decision. The new statutory principles, often expressed in different words, are applicable to any claim for damages for mental harm resulting from negligence regardless of whether the claim is brought in tort, contract, equity, under a statute or any other cause of action.<sup>30</sup>

New South Wales, Tasmania, Western Australia and Victoria exclude various statutes and provisions in each jurisdiction from statutory civil liability for mental harm.<sup>31</sup> For example, the four jurisdictions bar cases where the injury or death has “resulted from smoking or other use of tobacco products”.<sup>32</sup> Compensation claims for these kinds of injuries are to be pursued under pre-reform common law or under other (specific) legislation. In Victoria, under an opaquely worded s 69(2) of the *Wrongs Act 1958* (Vic):

A claim for damages referred to in sub-section (1)(e) [dust-related condition] or (1)(f) [smoking or other use of tobacco products] does not include a claim for damages that relates to the provision of or the failure to provide a health service.

Presumably this means that while the claims for dust-related and tobacco-related injuries will remain within the purview of the pre-reform common law, compensation claims for negligent medical treatment of such injuries will have to be pursued under the relevant statutory provisions of the amended *Wrongs Act 1958* (Vic).

In all jurisdictions apart from the Australian Capital Territory, claimants have to meet statutory thresholds before they can recover damages for non-economic loss.<sup>33</sup>

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<sup>28</sup> *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 407.

<sup>29</sup> See Ipp Report, n 8.

<sup>30</sup> Ipp Report, n 8 at [2.1]-[2.3].

<sup>31</sup> *Civil Liability Act 2002* (NSW), s 3B(1); *Civil Liability Act 2002* (Tas), s 3B(1); *Civil Liability Act 2002* (WA), s 3A(1); *Wrongs Act 1958* (Vic), s 69(1). For a more detailed discussion of Victorian provisions see Luntz H, “Recovery of Damages for Negligently Inflicted Psychiatric Injury: Where Are We Now?”, paper delivered to the Forensic Psychiatry Association, 16 August 2004.

<sup>32</sup> *Civil Liability Act 2002* (NSW), s 3B(1)(c); *Civil Liability Act 2002* (Tas), s 3B(1)(b); *Civil Liability Act 2002* (WA), s 3A(1); *Wrongs Act 1958* (Vic), s 69(1)(f).

<sup>33</sup> *Trade Practices Act 1974* (Cth), ss 87P-87S; *Civil Liability Act 2002* (NSW), s 16; *Civil Liability Act 1936* (SA), s 52; *Civil Liability Act 2003* (Qld), ss 61 and 62; *Wrongs Act 1958* (Vic), ss 28LB, 28LE and 28LF; *Personal Injuries (Liabilities and Damages) Act 2003* (NT), Div 4, ss 22-28; *Civil Liability Act 2002* (Tas), s 27; *Civil Liability Act 2002* (WA), ss 9, 10.

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### *Elements of liability*

The six reforming jurisdictions accepted the *Tame; Annetts* doctrine that reasonable foreseeability should be the touchstone for the existence of a duty of care in psychiatric injury cases. They were rather less certain that the test should dispense with the “normal fortitude” requirement. Consequently, New South Wales,<sup>34</sup> Tasmania,<sup>35</sup> Western Australia<sup>36</sup> and the Australian Capital Territory<sup>37</sup> enacted provisions that are very similar to s 33(1) of the *Civil Liability Act 1936* (SA):

A person (the “defendant”) does not owe a duty to another person (the “plaintiff”) to take care not to cause the plaintiff mental harm unless a reasonable person in the defendant’s position would have foreseen that a person of normal fortitude in the plaintiff’s position might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken.<sup>38</sup>

The reference to “mental harm” means that in five jurisdictions, the statutory test for the existence of a duty of care applies to both consequential and pure mental harm. Victoria’s definition<sup>39</sup> is virtually identical except that it only applies to “pure mental harm”, thus excluding consequential mental harm. The Victorian legislation is a more accurate reflection of the common law, which historically has treated consequential mental harm in the same way as any physical injury and its medical complications.

In all six jurisdictions, the legislation provides that a duty of care is imposed in the circumstances of the case where the defendant ought to have foreseen “that a person of normal fortitude *might* ... suffer a recognised psychiatric illness”. The *Concise Oxford English Dictionary* defines “might” as “expressing a possibility based on an unfulfilled condition”.<sup>40</sup> The term can be interpreted as referring to a mere chance or contingency. Whether by design or inadvertence, a statutory test for the imposition of a duty to take reasonable care based on a possibility or chance of mental harm is much more onerous on the defendant than the statutory test for the duty of care in general negligence, which grounds the duty on foreseeability of “not insignificant” risk.<sup>41</sup> Depending on how far the judges are willing to extend the scope of liability for mental harm, it is always possible to speculate that the defendant ought to have foreseen a chance that a person of normal fortitude might suffer such an injury. However, speculation as the basis for the imposition of liability does not necessarily make a good law.

### *New category of case*

The statutory definition of requirements for the existence of a duty in cases of mental harm (“pure mental harm” in Victoria) has effectively created a distinct category of case, which prescribes tests that are additional to the general statutory and common law principles governing breach of duty and causation.

The conjunction “unless” in the primary provision makes the imposition of a duty of care for mental harm (pure mental harm in Victoria) exceptional, in the sense that it is contingent upon the plaintiff being able to establish three elements on the balance of probabilities:

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<sup>34</sup> *Civil Liability Act 2002* (NSW), s 32(1).

<sup>35</sup> *Civil Liability Act 2002* (Tas), s 34(1).

<sup>36</sup> *Civil Liability Act 2002* (WA), s 5S(1).

<sup>37</sup> *Civil Law (Wrongs) Act 2002* (ACT), s 34(1).

<sup>38</sup> The statutory duty of care is subject to an exception, which codifies the common law principle that knowledge of the plaintiff’s vulnerability imposes upon the defendant a duty to take greater care. See *Civil Liability Act 2002* (Tas), s 34(4); *Civil Liability Act 2002* (NSW), s 32(4); *Civil Liability Act 2002* (WA), s 5S(4) reads: “This section does not require the court to disregard what the defendant knew or ought to have known about the fortitude of the plaintiff.” The *Civil Law (Wrongs) Act 2002* (ACT), s 34(4) and the *Wrongs Act 1958* (Vic), s 72(3), state: “This section does not affect the duty of care of a person (the defendant) to another (the plaintiff) if the defendant knows, or ought to know, that the plaintiff is a person of less than normal fortitude.”

<sup>39</sup> *Wrongs Act 1958* (Vic), s 72(1).

<sup>40</sup> The *Concise Oxford English Dictionary* (Soanes C and Stevenson A, eds) (Oxford University Press, 2004); Oxford Reference Online, Oxford University Press: see <http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t23.e35332> viewed 1 May 2005.

<sup>41</sup> *Civil Law (Wrongs) Act 2002* (ACT), s 43(3); *Wrongs Act 1958* (Vic), s 48(3); *Civil Liability Act 2002* (NSW), s 5B(1)(b); *Civil Liability Act 2002* (Tas), s 11(3); *Civil Liability Act 2002* (WA), s 5B(3).

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- duty of care: reasonable foreseeability of a recognised psychiatric illness that might be suffered by a person of “normal fortitude” based on the objective test of “a reasonable person in the defendant’s position” in the “circumstances of the case”;
  - breach (or content) of duty: failure by the defendant to take “reasonable care” to avoid such harm; the breach is to be determined in accordance with statutory principles of the “calculus of negligence”;<sup>42</sup> and
  - causation: the court has to be persuaded that “a person of normal fortitude” in the plaintiff’s position might, in the circumstances of the case, have suffered a recognised psychiatric illness.

The adjectival phrase “normal fortitude” is not defined in the legislation, and will be governed by the common law understanding of this notion.

*The “circumstances of the case”*

The reference to the “circumstances of the case” in the definition of the duty of care indicates that the “circumstances” (as specified in the legislation) form an element of the cause of action, at least in relation to pure mental harm. In five jurisdictions,<sup>43</sup> the “circumstances of the case” in relation to pure mental harm are defined as including:

- whether or not the mental harm was suffered as the result of a sudden shock;
- whether the plaintiff witnessed, at the scene, a person being killed, injured or put in danger;
- the nature of the relationship between the plaintiff and any person killed, injured or put in danger; and
- whether or not there was a pre-existing relationship between the plaintiff and the defendant.

The first two factors or considerations were drafted in response to the *Tame; Annetts*’s refusal to limit the liability for damages for pure mental harm “to cases where the injury is caused by a sudden shock, or to cases where the plaintiff has directly perceived a distressing phenomenon or its immediate aftermath”.<sup>44</sup>

The second factor, while imposing the requirement of the claimant witnessing “at the scene, a person being killed, injured or put in danger”, actually broadens the scope of liability, for it appears to include bystanders (strangers).

The third consideration, involving “the nature of the relationship between the plaintiff and any person killed, injured or put in danger”, is open to interpretation. Apart from family members, it might also include close (“affectionate”) friendships, collegiate relationships and co-workers as well as rescuers.

The fourth factor, relating to the presence of “a pre-existing relationship between the plaintiff and the defendant”, reflects the common law which, as a general rule, tends to impose the duty of care on parties in pre-existing relationships.

The four factors are not cumulative, and presumably, the plaintiff will need to satisfy only one or two of them in order to fulfil the requirement of the “circumstances of the case”.

Victoria, New South Wales and Tasmania<sup>45</sup> impose two further threshold requirements in relation to pure mental harm. The legislation prohibits recovery for pure mental harm “arising wholly or partly from mental or nervous shock in connection with another person (the victim) being killed, injured or put in peril by the act or omission of the defendant”<sup>46</sup> unless the plaintiff “witnessed, at the

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<sup>42</sup> *Civil Law (Wrongs) Act 2002* (ACT), s 43(2); *Wrongs Act 1958* (Vic), s 48(2); *Civil Liability Act 2002* (NSW), s 5B(2); *Civil Liability Act 2002* (Tas), s 11(2); *Civil Liability Act 2002* (WA), s 5B(2).

<sup>43</sup> *Civil Liability Act 2002* (NSW), s 32(2); *Civil Liability Act 2002* (Tas), s 34(2); *Civil Liability Act 2002* (WA), s 5S (2); *Civil Law (Wrongs) Act 2002* (ACT), s 34(2); *Wrongs Act 1958* (Vic), s 72(2).

<sup>44</sup> *Tame v New South Wales* (2002) 211 CLR 317; [2002] HCA 35 at [18] per Gleeson CJ.

<sup>45</sup> *Wrongs Act 1958* (Vic), s 73(2); *Civil Liability Act 2002* (NSW), s 30; *Civil Liability Act 2002* (Tas), s 32.

<sup>46</sup> *Civil Liability Act 2002* (NSW), s 30(1); *Civil Liability Act 2002* (Tas), s 32(1). *Wrongs Act 1958* (Vic), s 73(1) has identical wording, except that ‘danger’ is substituted for ‘peril’.

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scene, the victim being killed, injured or put in danger”;<sup>47</sup> or “the plaintiff is [‘is or was’] in Victoria] a close member of the family of the victim”.<sup>48</sup>

In South Australia, under the *Civil Liability Act 1936* (SA), s 53(1):

Damages may only be awarded for mental harm if the injured person –

- (a) was physically injured in the accident or was present at the scene of the accident when the accident occurred; or
- (b) is a parent, spouse or child of a person killed, injured or endangered in the accident.

In these four jurisdictions (as well as in Western Australia),<sup>49</sup> the legislation effectively entrenches the right of bystanders present at the scene to recover for “mental or nervous shock”, if they can establish the statutory requirements for the existence of the defendant’s duty of care. With the exception of Western Australia (where recovery will be subject to “the nature of the relationship between the plaintiff and any person killed, injured or put in peril”),<sup>50</sup> the legislation also confirms that close family members do not need to be present at the scene of the accident in order to recover damages for pure mental harm.

Section 36(1) of the *Civil Law (Wrongs) Act 2002* (ACT) is narrower in its scope:

[L]iability in relation to an injury caused by a wrongful act or omission by which someone else (“A”) is killed, injured or put in danger includes liability for injury arising completely or partly from mental or nervous shock received by –

- (a) a parent of A; or
- (b) a domestic partner of A; or
- (c) another family member of A, if A was killed, injured or put in danger within the sight or hearing of the other family member.

The Northern Territory has retained its existing statutory cause of action for nervous shock, which allows recovery where close relatives of the person killed, injured or put in peril sustain injury arising wholly or in part from mental or nervous shock.<sup>51</sup>

None of the statutes defines the term “mental or nervous shock”. This suggests that the legislatures wished to retain its historic, common law meaning as defined in *Mount Isa Mines v Pusey* and *Jaensch v Coffey*, with its emphasis on sudden experience that traumatises the mind or emotions.

Queensland is the only State jurisdiction entirely governed by common law.

Thus, after 100 years of Federation, Australia has acquired a patchwork of statutory and common law rules that govern recovery for mental harm. Each regime is different and may not be easily amenable to a harmonising process. One could call it parochialism triumphant.

*Danuta Mendelson*

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<sup>47</sup> *Wrongs Act 1958* (Vic), s 73(2)(a); *Civil Liability Act 2002* (NSW), s 30(2)(a); *Civil Liability Act 2002* (Tas), s 32(2)(a). The Tasmanian provision preserves the *Jaensch v Coffey* notion of an “immediate aftermath” by adding: “or put in peril or the immediate aftermath of the victim being killed or injured”.

<sup>48</sup> *Civil Liability Act 2002* (Tas), s 32(2)(b); *Civil Liability Act 2002* (NSW), s 30(2)(b); *Wrongs Act 1958* (Vic), s 73(2)(b).

<sup>49</sup> *Civil Liability Act 2002* (WA), s 5S(2)(b) provides: “in respect of pure mental harm, the circumstances of the case include the following ... (b) whether the plaintiff witnessed, at the scene, a person being killed, injured or put in peril.”

<sup>50</sup> *Civil Liability Act 2002* (WA), s 5S(2)(c).

<sup>51</sup> *Law Reform (Miscellaneous Provisions) Act 1956* (NT), s 25.