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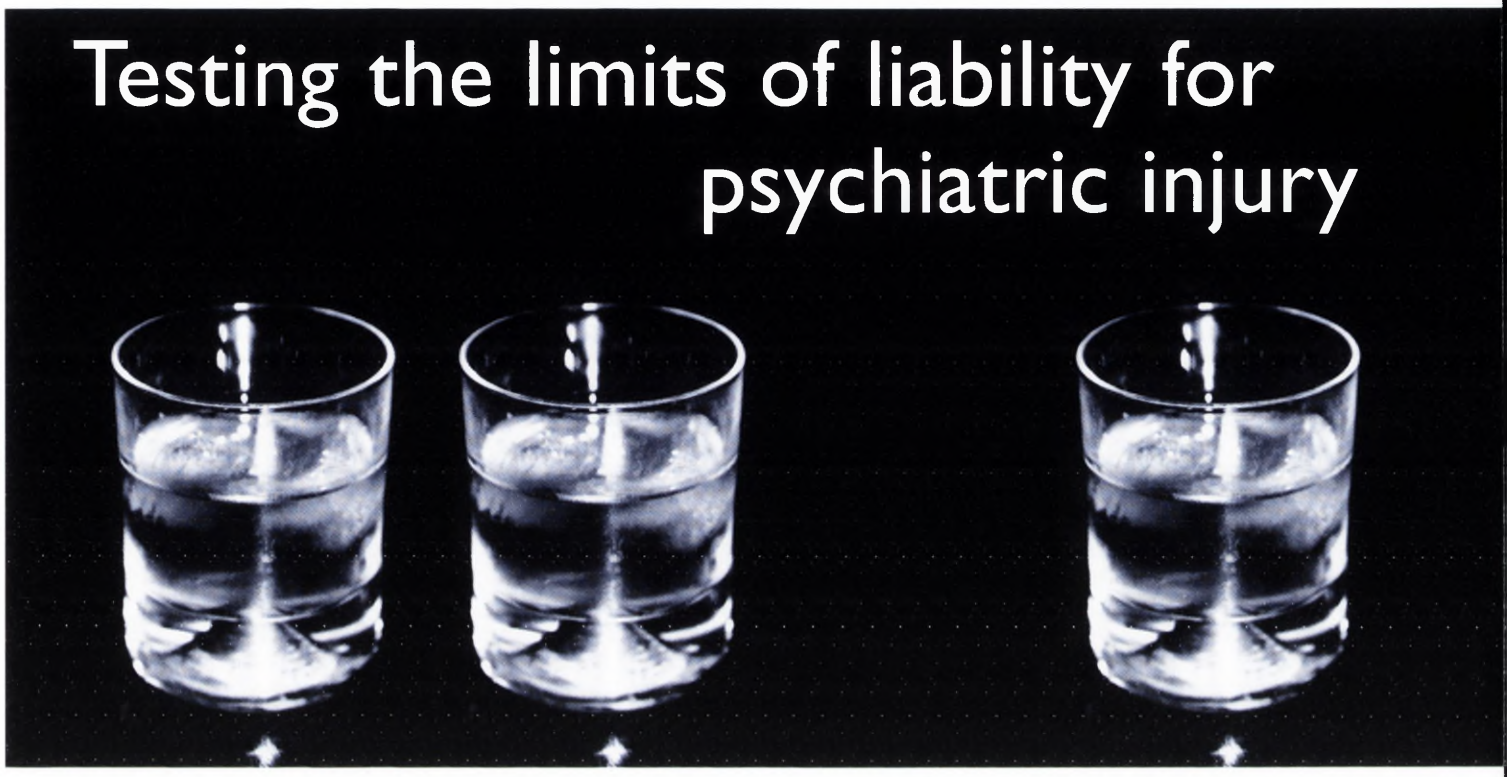
Testing the limits of liability for psychiatric injury



Two cases argued before the High Court last December will determine to what extent special common law rules restrict the recovery of damages in cases of 'pure' psychiatric injury.

Introduction

It is over 16 years since the High Court of Australia last examined the requirements for recoverability of damages for pure psychiatric injury in *Jaensch v Coffey*[1]. Since that time, the constitution of the High Court has changed completely. Not one of the judges who sat in the case of *Jaensch* is now sitting in the High Court.

Yet in Britain, there have been four decisions of the House of Lords in the last decade on the troubling issue of the principles which cover liability for the negligent infliction of psychiatric injury.

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Much of the current law governing liability for the negligent infliction of psychiatric injury is derived from decisions which were made in this country and in Britain at a time when far less was known about psychiatry and how psychiatric illnesses occur than is known today. There are special rules which constitute arguably irrational limitations on psychiatric injury claims which do not apply to other claims for personal injury. Such rules are derived from an era when there was endemic distrust of psychiatry amongst the judiciary.

The question of whether the law is lagging too far behind psychiatry, and whether some of the limitations on recovery of damages for pure psychiatric illness ought to be jettisoned in the light of twenty-first century psychiatric knowledge, are questions which have recently been argued before the High Court.

On 4 and 5 December 2001, the High Court of Australia heard appeals which test the limits of liability for psychiatric injury. It heard appeals in two cases, one from the decision of the NSW Court of Appeal in *Morgan v Tame*[2] (known as *Tame v State of NSW* in the High Court) and one from the decision of the Full Court of the Supreme Court of Western Australia in *Annetts v Australian Stations Pty Ltd*[3].

It should be noted than some of the limitations on psychiatric injury claims which were discussed in the High Court appeals do not apply to cases brought by persons entitled to rely upon the provisions of the *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) and comparable legislation elsewhere. Some of the special rules which were challenged in *Tame* and *Annetts* do not restrict claims ▶

by some secondary victims of negligence including parents or spouses of a person injured or put in peril by a tort who have suffered psychiatric illness.[4]

Tame v State of NSW

The facts in *Tame* were unusual, some might say bizarre. Mrs Tame was involved in a car accident in January 1991. In the course of investigating the accident a 'P4 report' was completed by the police. The P4 report was incorrectly completed by a policeman for whose actions the defendant, the State of NSW, was liable. The P4 report showed the plaintiff, Mrs Tame, as having a blood alcohol reading of 0.14. That was in fact the reading of the other driver involved in the accident. The correct reading for Mrs Tame was nil. Mrs Tame was a teetotaller who abhorred the notion of drink-driving.

During a telephone conversation in June 1992, Mrs Tame's solicitor, Mr Weller, asked her whether she had been drinking prior to the accident. He told her that the 'form for the insurance company' (by which he meant the Police Accident Report form) showed that she had a blood alcohol reading of about three times the legal limit.

Mrs Tame testified that she was very shocked on learning this information; it was like a blow. 'I couldn't believe (a mistake like that) could happen.' She began to worry about how many people would be told, and how her good name would suffer.

Mrs Tame was at all times aware that the entry on the form was a mistake. She telephoned the police at Windsor. Constable Morgan told her that her blood alcohol reading was nil and that the information about it on the P4 form was a mistake.

The solicitor for the defendant in the litigation which Mrs Tame had brought in respect of the car accident admitted liability in July 1992. In early 1993, Mr Weller sought and received from the police service a formal assurance that the mistake had been rectified, coupled with an apology.

Notwithstanding the fact that Mrs Tame knew that the entry on the form was a mistake, she ruminated that others might think that the accident was due to her drunkenness. She worried about how many people had been told something which she regarded as a serious insult to her reputation. She became obsessional about the police mistake, fearing that something similar could happen again. She had feelings of guilt that she was being punished for something she had done in the past. She talked about the mistake constantly to her husband and her friends. She found herself virtually unable to think about anything else. Sleep became difficult. The stress led to depression, and she developed a psychotic depressive illness.

Her reactions were found by the trial judge to be irrational but genuine. Her credibility was tested at length in cross-examination, it was corroborated by other witnesses, and she was accepted as a witness of truth by the trial judge. He found that the discovery of the police mistake caused depressive illness to this vulnerable plaintiff. There was evidence that her inability to accept that the mistake had been corrected and counteracted was an aspect of the illness itself, something which her treating psychiatrist, Dr Mitchell, and other doctors described as a recognised phenomenon in psychiatry.

In the event, Garling DCJ, the trial judge, held that the State of New South Wales (which was vicariously liable for the negligence of the policeman who carelessly recorded the wrong blood alcohol reading on the P4 form) was liable in negligence for the psychiatric injuries suffered by Mrs Tame as a result of her receiving knowledge of the mistake in the P4 report.

The NSW Court of Appeal, in a unanimous decision[5], overturned the trial judge's decision. In doing so the court, per Mason P, acknowledged that the case tests the limits of the cause of action for negligently inflicted pure psychiatric injury.

The President of the Court of Appeal also acknowledged the uncertainty in present Australian law regarding the extent of liability for pure psychiatric injury. He said:

'It is clear that a cause of action for negligent infliction of pure psychiatric injury exists and that some aspects of that cause of action are distinctive from claims based upon physical injury. Beyond this lie uncertain seas that are to be navigated by the charts of the leading cases in the High Court: *Bunyan v Jordan*[6], *Chester v Waverley Municipality*[7], *Mt Isa Mines Ltd v Pusey*[8] and *Jaensch v Coffey*[9]. These maps are authoritative yet they are somewhat dated and sometimes unclear in a field where much has happened in the field of psychiatric knowledge and overseas case law.'

The Traditional Distinction Between Physical and Psychiatric Injury

The NSW Court of Appeal, drawing on some of the cases mentioned by its President, confirmed that causes of action for pure psychiatric illness are distinct from claims based upon personal bodily injury. They noted that four of the five judges in the most recent High Court decision in this area, *Jaensch v Coffey*, incorporated a distinction between physical and psychiatric injury as an integral step in their reasoning.

In the appeal to the High Court in *Tame*, the appellant argued that the traditional distinction between the two kinds of injury was antiquated, unjustified and out of step with modern psychiatry (which understands that much mental illness has a physical basis). The appellant opened her submissions to the High Court by stating that the orthodox distinction between physical and psychiatric injury was based on ignorance and fear: ignorance of the true nature of psychiatric illness; fear of the 'floodgates' opening if it is afforded parity with physical illness in our tort system. The appellant asked the High Court to abolish the distinction and the special rules which accompany it, and to declare that modern Australian law treats all victims of negligence equally.

'Normal Fortitude'

The Court of Appeal considered that there are special rules regulating the duty of care in cases of pure psychiatric injury which do not apply to claims based upon physical injury. First of all, the court held that no duty of care is owed to a plaintiff in a pure psychiatric injury claim unless a person of 'normal fortitude' would suffer psychiatric injury by the negligent act or omission of the defendant. The only qualification to this rule is if the defendant has knowledge of any particular susceptibility in the plaintiff. According to the Court of Appeal therefore, Australian law only imposes a duty to take reasonable care to avoid psychiatric injury to a person of 'normal fortitude'.

The Court of Appeal decided that the trial judge had failed to apply the person of 'normal fortitude' test. In their view he had assumed that the foreseeability element of the duty embraces foreseeability of a 'vulnerable personality'. He did not refer to, nor apply, Brennan J's test of 'normal standard of susceptibility' in *Jaensch v Coffey*.

The Court of Appeal decided that the *talem qualem* rule as it applies to psychiatric injury (also known as the 'eggshell psyche' rule) is a rule of compensation not of liability. They took the view that Garling DCJ had assumed it was a rule which applied to the foreseeability element in the duty of care, rather than the damages which were recoverable once a duty were established. The Court of Appeal endorsed the statement in *Commonwealth v McLean*[10]:

'The "eggshell skull" principle makes a defendant liable for damage of an unforeseeable extent, but not for unforeseeable damage of a different kind.'

Spigelman CJ expressed the view that the 'person of normal fortitude' test represented a 'viable and justifiable restriction on the scope of liability for psychiatric injury'.

Mason P perceived an 'unresolved tension in this corner of the law'. He said that:

'To apply generally-enunciated principles of foreseeability would usually require regard to be taken of the fact that "...the community is not formed of normal citizens, with all those who are less susceptible or more susceptible to stress being regarded as extraordinary. There is an infinite variety of creatures, all with varying susceptibilities"[11].'

The President acknowledged that the 'reasonable fortitude' test is really an additional control device applicable to pure psychiatric injury claims ('none the worse for that'), rather than an aspect of conventional foreseeability.

The Court of Appeal decided that 'normal fortitude' is a matter of judicial notice. Although Garling DCJ had drawn on the experience of the District Court and the expert evidence in the case to conclude that extreme reactions of the character displayed by Mrs Tame could foreseeably be triggered by errors of the kind under consideration, the Court of Appeal concluded differently. It unanimously decided that the effects of the police mistake on Mrs Tame were so idiosyncratic that the 'normal fortitude' test could not be satisfied. They upheld the appeal on the ground that the psychiatric injury suffered by Mrs Tame would not have been suffered by a person of normal fortitude.[12]

Foreseeability

The Court of Appeal in *Tame* found that there was no basis for the police officer perceiving that shock and a psychiatric illness induced by it were a reasonably foreseeable consequence of the mistake. Mason P went so far as to say that foreseeability was not established not only if one assumes the special 'normal fortitude' standard, but also if one takes into account the robustness of the population at large. Mason P and Handley JA took the view that the risk in this case was 'far fetched or fanciful' thereby failing the undemanding test for foreseeability laid down in *Wyong Shire Council v Shirt*[13].

Effectively the Court of Appeal decided that the psychiatric injury in Mrs Tame's case was too remote.

"...the deliberate self infliction of harm should generally be seen to break the causal link."

Spigelman CJ commented that the connection between Mrs Tame's injuries and the clerical error in the police accident report was 'too tenuous' and therefore the damage was too remote.

The approach taken by the Court of Appeal in *Tame* has been adopted since in NSW and other parts of Australia.

In *Annetts*, the plaintiffs were the parents of a 16-year-old boy who had perished in the Western Australian desert due to the alleged carelessness of his employer, the proprietor of a cattle station. The parents were told by telephone in December 1986 of his disappearance from the cattle station. In April 1987 they were informed that his remains had been located.

In the Western Australian Supreme Court, Ipp J said:

'I have difficulty accepting that it is reasonably foreseeable that a parent of normal fortitude might sustain psychiatric injury upon being informed of the death of a 16 year old child.'

In the NSW Court of Appeal decision in *AMP v RTA and Anor*[14] an ▶

employee injured in a work accident sought an extension of time within which to claim damages at common law for his back injury. During the hearing of the application he was subjected to rigorous cross-examination. He became depressed and committed suicide eight days after the cross-examination. His widow suffered nervous shock and loss of financial support. She sued the employer for damages. She succeeded in the first instance.

The Court of Appeal overturned the decision. It found (per Spigelman CJ) that there was no causal link between the tort and the death. Spigelman CJ decided that the deliberate self infliction of harm should generally be seen to break the causal link.

The Court of Appeal also denied recovery on the basis that the risk of the deceased's depression and suicide was not a reasonably foreseeable consequence of the original tort (the workplace accident).

It held that for the purpose of determining reasonable foreseeability, causation and remoteness, both the plaintiff and the deceased, in order to succeed, needed to be of 'normal fortitude'.

Heydon JA said:

'In ordinary experience people of normal fortitude only commit suicide because they are suffering great physical, mental or emotional stress. Litigation generates stress of a different kind in persons of normal fortitude, but not stress of a magnitude or kind making either suicide or a psychiatric illness a reasonably foreseeable response.'

In the High Court the appellant Tame argued that there was no binding decision of that court which imposed the 'normal fortitude' test as an additional control device on the duty of care in cases of pure psychiatric injury. The Court of Appeal had erred in concluding that the majority in *Jaensch* had endorsed the normal fortitude test.

The appellant argued that the 'normal fortitude' test is meaningless. It is a pseudo-test devoid of content. It is blind to modern psychiatric knowledge of the extent of emotional vulnerability in the Australian population. The appellant relied upon evidence given at the trial by the President of the Australian and New Zealand College of Psychiatrists, Dr Jonathon Phillips. He said that a large number of Australians have the same kind of vulnerability as Mrs Tame. A recent World Health Organisation report predicts that by 2010 depression will be the second greatest disease burden for mankind.

> "...the traditional distinction between the two kinds of injury was antiquated, unjustified and out of step with modern psychiatry."

The appellant also argued that the presumption that the plaintiff is of 'normal fortitude' in pure psychiatric injury cases does not sit happily with the normal foreseeability rule that is concerned not with 'normal' phenomena, but with those that are not 'far fetched or fanciful'. It was also argued that the 'normal susceptibility' standard is irreconcilable with the long established principle of negligence that tortfeasors must take victims as they find them (the *talem qualem* rule). The appellant relied upon the dicta of Windeyer J in *Mt Isa Mines v Pusey*[15].

The House of Lords has recently decided that 'normal fortitude' has no place in the test for liability to primary victims: *Page v Smith*[16]. The English approach has been followed in some Australian jurisdictions: see for example *FAI General Insurance Co Ltd v Curtin*[17].

In *Tame*, the appellant argued that since Mrs Tame was a primary victim of police negligence, the question of a duty to her similarly should not encompass the 'normal fortitude' test.

The appellant argued alternatively that even if the 'normal fortitude' test was indeed part of Australian law governing pure psychiatric injury, on the facts of the case, Mrs Tame satisfied the test. There was unchallenged psychiatric evidence in the case that persons of 'normal fortitude' could suffer the kind of harm which befell Mrs Tame. The trial judge had drawn on his experience in a busy trial court to reach the same conclusion and his decision ought not to be dismissed. The Court of Appeal had simply ignored the opinions of the experts and failed to give due weight to the trial judge's views.

'Sudden Affront to the Sensory System'

The other main ground on which the majority in the Court of Appeal rejected Mrs Tame's claim was that an essential requirement for liability for pure psychiatric injury is that the psychiatric illness be caused by a 'sudden affront to the sensory system' rather than being caused by the accumulation of stressors. Mrs Tame did not fulfil this requirement because she did not suffer psychiatric injury by 'shock'.

This was the view of Mason P and Handley JA. Mason P reviewed the evidence and commented that Mrs Tame did not display symptoms of immediate shock in the sense required by Brennan J in *Jaensch*. He concluded that it was rumination which triggered the symptoms of Mrs Tame's psychotic depression. It did not come about as the result of a sudden sensory perception in the sense required in the earlier authorities.

Although there was an abundance of psychiatric opinion at the trial that modern psychiatry acknowledges that psychiatric illness can be caused by an event or a phenomenon without a sudden 'shock', Mason P took the view that such advances in psychiatric knowledge as may have occurred in the last decade offer no basis for ignoring this deliberately adopted control mechanism. He said that if there is to be a change it is a matter for the High Court. Handley JA agreed with the President that the action failed because Mrs Tame did not suffer nervous 'shock' as a result of learning about the mistake in the report; she did not suffer a sudden affront or assault on her psyche.

Spigelman CJ took the view that there was no authoritative statement of the High Court which formally bound the Court of Appeal to apply the requirement of a sudden assault on the senses. He noted that this requirement has recently been rejected by the South African Supreme Court of Appeal in *Barnard v Santam Bpk*[18].

In the event, Spigelman CJ did not decide the case on this ground. He refused to do so because it was unclear to him whether or not the trial judge had found that there was a sudden assault on Mrs Tame's senses when she first learned of the assertion about her blood alcohol. In his view, the trial judge had failed to make a relevant finding of fact on this matter, and if the appeal were not to be decided on the other 'normal fortitude' ground he would have ordered a new trial.

The insistence by the majority in the Court of Appeal in *Tame* on 'sudden shock' has been duplicated in other cases since, in NSW and elsewhere.

Ipp J in *Annetts* in the WA Full Court decided that there was a 'direct perception' requirement which had not been satisfied in that case.

In *Gifford v Strang Patrick Stevedoring Pty Ltd*[19] the NSW Court of Appeal applied similar reasoning, deciding that there can be no liability at common law for mental injury to a person who is told about even an horrific accident or injury to a loved one but does not actually perceive the incident or its aftermath.

In respect of the *Tame* Court of Appeal's insistence on the requirement of shock, in the sense of a sudden assault on the senses, the High Court was told that such a requirement ignores the evidence given at the trial by a number of psychiatrists that shock is not a necessary part of the process by which an event or circumstance can cause serious psychiatric illness. It was submitted that the 'shock' requirement is founded in the endemic distrust of psychiatry which was prevalent at the end of the nineteenth century when the concept of 'nervous shock' was created. It has no foundation in modern psychiatry, and should not be part of modern law governing recovery for pure psychiatric injury.

Conclusion

The outcome of the appeals in *Tame* and *Annetts* is likely to determine whether the orthodox view, that psychiatric injury claims are to be treated differently (and some might say with greater scepticism) from claims for physical personal injury, is still part of the common law of this country at the start of the twenty-first century. Whichever way the cases are decided, they will have a considerable impact upon the growing number of mental injury cases that come before courts and tribunals throughout the country arising from a diverse range of stressors, few of which are as unusual, or at first blush as innocuous, as a clerical error in a traffic accident report.

Furthermore, it is possible that the High Court will use these appeals to make fundamental pronouncements concerning liability in negligence for consequences extending far beyond psychiatric injury. The Chief Justice signalled during the special leave application in *Tame* that the case might be a useful vehicle for re-examining the requirements of foreseeability.

A large part of the more than six hours of argument in the appeal itself was concerned with what should be the content of the duty of care in cases of negligence where the content of the duty of care was not settled.

In *Jaensch v Coffey*, the last High Court pronouncement on liability for psychiatric injury, 'proximity' was installed as the touchstone for determining a duty in novel factual situations. More recent High Court decisions such as *Perre v Apand*[20] and *Sullivan v Moody*[21] have dethroned proximity as the unifying characteristic of cases in which a duty will be found.

In response to repeated questions from the High Court, especially from Justice Hayne, counsel for the appellants in *Tame* argued that in cases of pure psychiatric injury, reasonable foreseeability of the risk of some psychiatric harm should be the only duty requirement, unless the circumstances justified the imposition of another control based on sound policy. It may be that the High Court will use *Tame* to enunciate some new duty criteria of universal application to replace the now defunct concept of proximity.

In the course of argument in the appeal, the Chief Justice and Justice McHugh were at pains to point out that changes to the law as proposed by the appellant could have far reaching effects, including upon people who, by reason of the collapse of a major insurance company, were uninsured.

The appellant's answer was that the remedy is to have proper surveillance of insurance companies, not to interfere with people's rights simply because of fear of too many cases or insufficient insurance. PL

Footnotes:

1 [1984] 155 CLR 549.
2 [2000] 49 NSWLR 21.
3 [2000] WASCA 357.
4 see ss4(2) and (4) of the NSW Act.
5 [2000] 49 NSWLR 21.
6 [1937] 57 CLR 1.
7 [1939] 62 CLR 1.
8 [1970] 125 CLR 383.
9 [1984] 155 CLR 549.
10 [1996] 41 NSWLR 389 at 406D-E.
11 per Waller J in *Chadwick v British Railways Board* [1967] 1 WLR 912 at 922.
12 per Spigelman CJ at 28[35], per Mason P at 46[143] and per Handley JA at 50[166].
13 [1980] 146 CLR 40 at 48 per Mason J.
14 [2001] NSWCA 186.
15 [1970] 125 CLR 282 at 406.
16 [1996] 1 AC 155 at 170C, H, 180G, 189D-E.
17 [1997] Aust Torts Reports 81-442 at 64,500.
18 [1999] (1) SA 202.
19 [2001] 51 NSWLR 606.
20 [1999] 198 CLR 180.
21 [2001] 183 ALR 404.