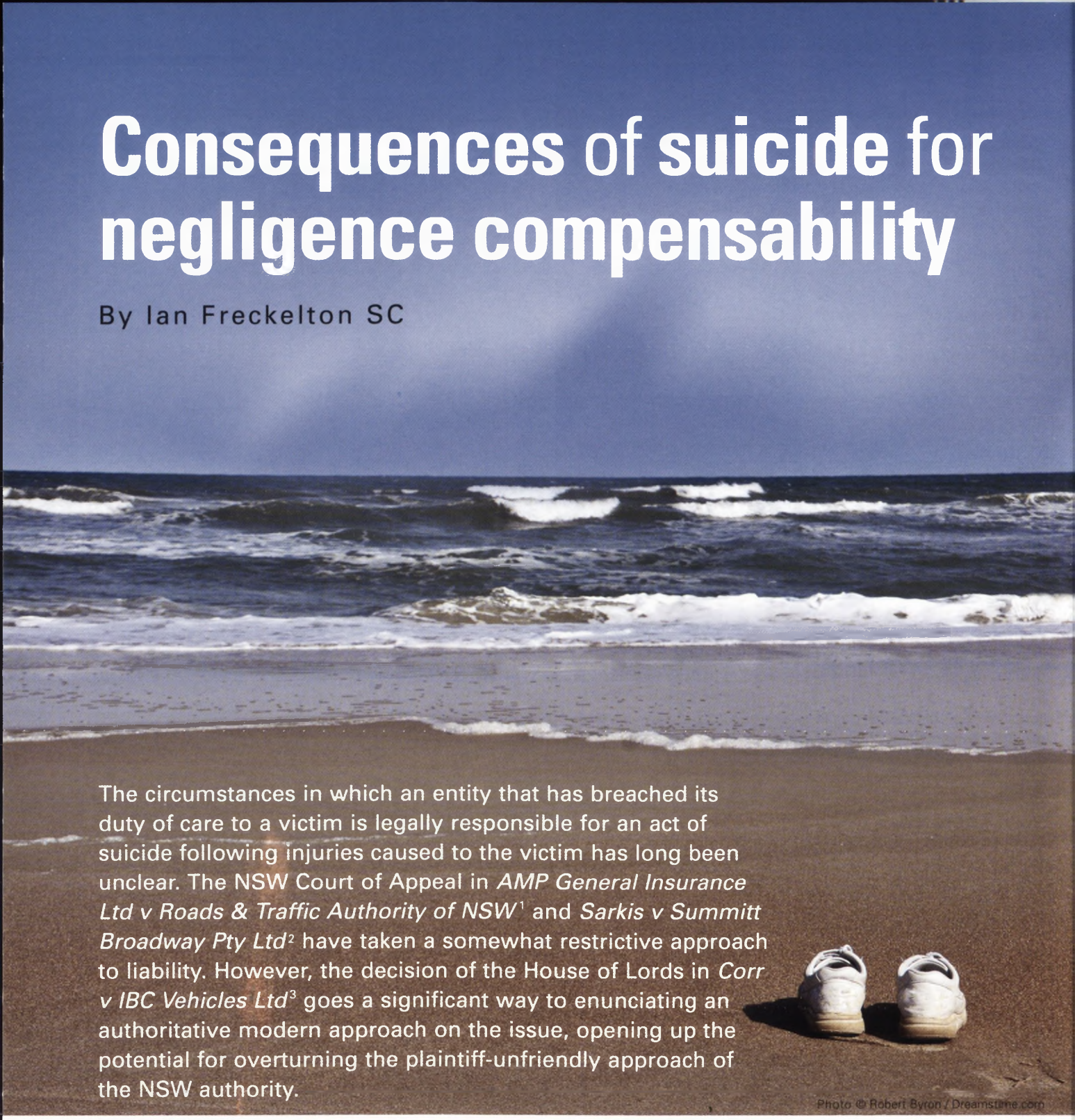
Consequences of suicide for negligence compensability

By Ian Freckelton SC



The circumstances in which an entity that has breached its duty of care to a victim is legally responsible for an act of suicide following injuries caused to the victim has long been unclear. The NSW Court of Appeal in *AMP General Insurance Ltd v Roads & Traffic Authority of NSW*[1] and *Sarkis v Summitt Broadway Pty Ltd*[2] have taken a somewhat restrictive approach to liability. However, the decision of the House of Lords in *Corr v IBC Vehicles Ltd*[3] goes a significant way to enunciating an authoritative modern approach on the issue, opening up the potential for overturning the plaintiff-unfriendly approach of the NSW authority.

This article analyses the differences in approach between NSW and the UK and endeavours to plot the likely course of the law on this important and difficult issue for plaintiffs whose claims have the potential to be defeated by the suicide of a primary victim of negligence.

THE *AMP GENERAL INSURANCE* DECISION

In the *AMP General Insurance* case, an employee of the defendant was injured in an accident at work in 1993. In 1997, he commenced a common law claim for damages against the defendant after the limitation period had expired. An application for an extension of time was determined in favour of the employee but he suffered stress as a result of being cross-examined, then developed depression and committed suicide eight days after the hearing. As a result, his widow (the plaintiff) suffered nervous shock and loss of financial support. The defendant and the insurer appealed her success at first instance in her action against the employer, challenging the damages awarded for nervous shock and under the *Compensation to Relatives Act* 1897 (NSW).

The Court of Appeal unanimously allowed the appeal. Spigelman CJ held that the causal chain between the tort and the suicide was broken. He expressed the view that considerations of policy and value judgements are appropriate when determining matters of causation in negligence claims, and that the deliberate self-infliction of harm should generally be seen to break the causal link (at [27], applying *Reeves v The Commissioner of Police of the Metropolis*[1]). He commented (at [30]):

> 'Actions involving the deliberate infliction of self harm should generally be regarded as "independent and unreasonable" and as a break in the sequence of events that may otherwise constitute a causal chain for the purpose of attributing legal responsibility. Issues of foreseeability may arise. It may be appropriate to recognise the deliberate infliction of self-harm as a separate kind of damage – distinct from both personal injury and psychiatric harm – for foreseeability purposes.'

He held (at [9]) that a duty to protect a person from causing harm to himself or herself is rare or unusual and that in the case before the court there was no duty upon the employer, or any person who had conduct of the proceedings, to protect the deceased from self-harm. He found that there was no causation in fact as the cross-examination did not operate to reactivate the psychiatric injury caused by the accident:

> '[it involved] qualitatively different matters from those which were involved in the diagnosed Adjustment Disorder with Depression and Anxiety. The conduct after the legal proceedings cannot, in my opinion, be characterised as a revival of the feelings of inadequacy and concern about his future job prospects which arose as a result of the back injury and which had been successfully treated. The conduct after the legal proceedings concerned a different manifestation of what may well have been the same fundamental personal inadequacy that had caused the original reaction. However, as such a different manifestation, it was not a response which ought be regarded as causally related to the original injury. The causal chain was, in my opinion, broken.' (at [39]–[40]).

Heydon JA reached a similar result and held that for the purposes of determining reasonable foreseeability, causation and remoteness, both the plaintiff and the deceased must be assumed to be persons of normal fortitude, unless the contrary was known to the defendant at the date of the tort. It was not sufficient to find merely that development of a psychiatric illness 'of some kind' by the deceased was foreseeable as a result of the physical injuries suffered by the deceased at the date of the tortfeasor's negligence. Importantly, he expressed the view that suicide must have been reasonably foreseeable as a result of the accident. He held that the risk of the deceased's depression resulting in his suicide was not a reasonably foreseeable consequence of the 1993 tort. This meant that no duty was owed to the plaintiff to take care to avoid the risk of mental trauma to him; there was no causation in fact by reason of the tort; and the damage to the plaintiff from the deceased's suicide was too remote to sound in damages from the defendant: 'The assumption that the deceased was of normal susceptibility must be made in relation to causation as it is to be made in relation to foreseeability' (at [153]). Davies AJA agreed with Spigelman CJ and Heydon JA, but approached the question somewhat differently, holding that the cross-examination of the deceased at the leave application was a *novus actus interveniens*, which broke the chain of causation. Put another way, the depression and suicide were not a continuation of the depression suffered by the deceased following his back injury, but resulted from the cross-examination and the deceased's pursuit of compensation. He held that the events did not 'occur in the ordinary course of things' (at [200]).

THE *SARKIS* DECISION

In *Sarkis*, the deceased sustained whiplash injuries in a motor vehicle accident in the course of his employment. Some months later he took his own life. The deceased's de facto partner and infant daughter sought compensation for his death. No compensation was payable in respect of any injury to or death of a worker caused by an 'intentional self-inflicted injury'.

The proceedings were compromised. The employer then sued the negligent driver of the other vehicle under the *Workers' Compensation Act* 1987 (NSW) to recover the compensation paid to the dependants of the deceased. The trial judge found that the suicide was a foreseeable consequence of the accident and that damages would have been recoverable under the *Compensation to Relatives Act* >>

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1987 (NSW). The driver appealed. The NSW Court of Appeal (Handley, Ipp and Bryson JJA) held that a plaintiff seeking to recover damages from a tortfeasor for a suicide or attempted suicide must establish that it was caused by the tort, and that the damage was not too remote, but that reasonable foresight does not establish legal responsibility – causation must also be established.

The court affirmed that a wrongdoer is responsible for all damage of the same type or kind as that which was reasonably foreseeable, even if the particular damage, or its extent, were not reasonably foreseeable, or the damage occurred in an unexpected and unforeseeable manner. It noted that the trial judge had found that it was reasonably foreseeable that the physical injuries suffered in the motor vehicle accident could bring on a reactive depression, which then caused the victim to take his own life, and observed that there is a substantial body of decisions supporting such findings.

The Court of Appeal was not inclined to disturb these findings. However, it referred (at [65]) to the *AMP General Insurance* decision and affirmed that the common law concept of commonsense causation accepts that the chain of causation between breach and damage is broken for the purpose of attributing legal responsibility for that damage if there has been an intrusion of a new cause which disturbs the sequence of events – something that can be described as either unreasonable or extraneous or extrinsic. It applied the view of Spigelman CJ that actions involving the deliberate infliction of self-harm should generally be regarded as 'independent and unreasonable', and as a break in the sequence of events. However, it observed pointedly that there are limits to the assistance that can be provided by psychiatrists and psychologists in such cases (at [71]).

The court found that in *Sarkis* there was no lack of new and extraneous causes intervening between the motor vehicle accident and the worker's suicide. It held that the events subsequent to the accident that overwhelmed the worker were extraneous to and not connected with the accident or its consequences; the evidence established strong grounds for a finding that by the date of the suicide, the accident was no more than 'an antecedent condition not amounting to a cause of the worker's suicide' (at [47]). It held that, as a matter of common sense, it was not open to find that the motor vehicle accident was a cause of the worker's suicide (at [75]–[76]).

THE STATUTORY TORT REFORMS

Under the tort reforms early in the 21st century, attempts were made to codify the law as to causation, to make specific provision for the *volenti* rule and to articulate the principles of contributory negligence. However, the statutory provisions are not likely to affect in a significant way the principles in the *AMP* and *Sarkis* decisions.

CORR v IBC VEHICLES LTD

In *Corr v IBC Vehicles Ltd*, Mr Corr, a man of 30, was employed as a maintenance engineer by IBC Vehicles Ltd ('the employer'). In 1996, while he was working on a prototype line of presses that produced vehicles for Vauxhall cars, an automated arm, without warning, struck him on the right side of his head, severing most of his right ear. As a result of the accident, for which Mr Corr was in no way responsible, he underwent long and painful reconstructive surgery. He remained disfigured and suffered persistently from unsteadiness, tinnitus and severe headaches. He had difficulty sleeping and experienced PTSD, which was characterised by severe flashbacks and nightmares. He drank more alcohol than before the accident and became bad-tempered. Mr Corr also became depressed, a condition that worsened with the passage of time. He was admitted to hospital for depression twice in February 2002 after taking an overdose of drugs. He was assessed in March as being a significant suicide risk by jumping from a building. He was treated with ECT, but only to modest effect. By 15 April, it was recorded in his care plan that he felt life was not worth living and that he regarded himself as a burden to his family. On 20 May, a psychologist concluded that Mr Corr felt hopeless and was experiencing suicidal ideation. He diagnosed Mr Corr's conditions as 'severe anxiety and depression'. On 23 May, Mr Corr committed suicide by jumping from the top of a multi-storey car park.

In 1999, Mr Corr had commenced proceedings against his employer, claiming damages for physical and psychological injuries. After his death, the proceedings were amended to substitute his widow and personal representative as the claimant, and a dependency claim was brought by her for financial loss attributable to his death. Her claims depended upon proving causation between her husband's suicide and the employer's breaches of its duty of care to him.

It was agreed that at the time of his death, Mr Corr had the capacity to manage his own affairs. His intellectual abilities were not affected by the accident and his appreciation of danger was not significantly worsened. He would have been aware that by jumping from a high building he would end his life. Thus, issues of the extent to which he contributed to his own demise arose.

According to evidence, Mr Corr desisted from suicide for a considerable time because of what he recognised would be the effect upon his family. He understood the difference between right and wrong and so his condition would not have amounted to McNaghten insanity (namely, that he did not know the nature and quality of his conduct or that it was wrong). However, he became severely depressed, resulting in his experiencing feelings of hopelessness that became increasingly difficult for him to resist. A critical change took place when he stopped understanding his feelings of hopelessness as symptoms of a depressive illness and when they instead came to determine his reality. It was agreed that at the time of his death, Mr Corr was suffering from a disabling

mental illness which impaired his capacity to make reasoned and informed judgements about his future. Evidence was given that between one in six and one in ten sufferers of severe depression kill themselves.

The employer accepted that it owed Mr Corr as its employee a duty to take reasonable care to avoid causing him physical and psychological injury, and that it had breached its duty. As a consequence of the breach, Mr Corr suffered severe injuries for which, until the date of his death, he was entitled to recover and for which his personal representative was entitled to recover after his death. He had no pre-existing mental health vulnerabilities or injuries and it was accepted that it was the depressive illness that caused him to take his own life. The question ultimately before the House of Lords was whether Mr Corr's death was caused by the wrongful act of the employer; namely, its breach of duty of care. It was accepted that the employer was not liable for the consequences of its conduct, which were not reasonably foreseeable or which were caused by a new factor that intervened – a *novus actus interveniens*. In general, though, it was acknowledged that a tortfeasor is responsible for any personal injury, whether physical or psychiatric, which is suffered by a victim as a result of the tortfeasor's wrongdoing.

The employer maintained that Mr Corr's suicide:

- fell outside its duty of care;
- was not an act that was reasonably foreseeable and so was not an act for which the employer could be held liable ('the foreseeability' issue);
- broke the chain of causation and constituted a *novus actus interveniens* ('the novus actus issue');
- was an unreasonable act that broke the chain of causation ('the unreasonable act issue');
- was the voluntary act of the deceased, and so precluded recovery by reason of the principle of *volenti non fit injuria* ('the volenti issue'); and
- amounted to contributory negligence ('the contributory negligence issue').

The House of Lords unanimously dismissed the appeal by the employer.

THE JUDGMENTS IN *CORR*

The leading judgment was that of Lord Bingham of Cornhill. He commenced by accepting the decision of Spigelman CJ in the *AMP General Insurance* case at [9] – that there is no duty upon an employer to protect an employee against self-harm – and also acknowledged that it is 'unusual for a person to be under a duty to take reasonable care to prevent another person doing something to his loss, injury or damage deliberately'. However, he found that the case before him did not fall within this category on the basis that the employer owed Mr Corr a duty of care, and that as a result of the injuries Mr Corr sustained from his employer's breach of duty he was not fully responsible for his actions, to a point where his suicidal conduct could not be said to fall outside the scope of the duty owed to him by his employer.

Lord Bingham reflected upon whether suicide is a kind of damage separate from psychiatric and personal injury and which, therefore, needs to be separately foreseeable, and observed that the proposition that 'suicide does make a difference' is a feeling perhaps derived 'from the recognition of the finality and irrevocability of suicide, possibly fortified by the religious prohibition of self-slaughter and recognition that suicide was, until relatively recently, a crime' (at [13]). However, he held that such a feeling 'cannot absolve the court from the duty of applying established principles of the facts before it' (at [13]). He found that 'the inescapable fact' was that depression, possibly severe, possibly very severe, was a foreseeable consequence of the employer's breach of its duty of care to Mr Corr. Lord Bingham was prepared to accept that some manifestations of severe depression could be so unusual and unpredictable as to be outside the bounds of what is reasonably foreseeable. However, he found that Mr Corr's case did not fall into such a category – 'a reasonable employer would . . . have recognised the possibility not only of acute depression but also of such depression culminating in a way in which, in a significant minority of cases, it unhappily does' (at [13]). Thus, for him, the foreseeability issue appears to have related to foreseeability of depression with suicidal features, and thus with a potential outcome of suicide.

Dealing with the issue of *novus actus interveniens*, Lord Bingham observed that its rationale is fairness – namely, that it is not fair to hold a tortfeasor responsible for damage caused by an independent, supervening cause: 'This is not the less so where the independent, supervening cause is a voluntary, informed decision taken by the victim as an >>

adult of sound mind making and giving effect to a personal decision about his own future' (at [15]). He found that Mr Corr's suicide was the response of a man suffering a severely depressive illness which impaired his capacity to make a reasoned and informed judgement about his future – an illness that was the consequence of his employer's tort. This meant that it was in no way unfair to hold the employer responsible 'for this dire consequence of its breach of duty, although it could well be thought unfair to the victim not to do so' (at [16]).

He repudiated the proposition that for a tortfeasor to be found liable, a person needed to be McNaghten insane at the time of committing suicide. Lord Bingham doubted the significance of the distinction between *novus actus interveniens* and 'unreasonable conduct' by a plaintiff in the context of the commission of suicide. However, even accepting such a distinction, he found it impossible to hold that the damages attributable to Mr Corr's death were rendered too remote because his conduct was unreasonable (at [17]).

Lord Bingham found it straightforward that Mr Corr did not consent voluntarily to his death, but committed suicide because of the condition that his employer's breach of duty had induced. He was inclined to absolve the deceased of any fault or blame for the consequences of a situation that was of the employer's making, not his. Consequently, he assessed his contributory negligence as non-existent.

Lord Scott, agreeing with Lord Bingham, observed that the consideration of causation in a suicide case can easily become over-influenced by the cataclysmic nature and finality of an act of suicide. He found that on a 'but for' test, Mr Corr's jump from the car park was caused by his employer's negligence and that the question was whether an apparent *novus actus*, albeit one that was causally connected on a 'but for' basis to the original negligence, broke the chain of causative consequences for which Mr Corr's negligent employer should accept responsibility.

Lord Scott emphasised that where physical injury was a reasonably foreseeable consequence of the negligence, the defendant is liable for psychiatric damage caused by the negligence, even though physical injury, as it turned out, was not caused, and whether or not psychiatric damage as a consequence of the negligence was foreseeable. He, too, therefore, did not require specific foreseeability of suicide. He concluded that as Mr Corr remained an autonomous individual who retained the power of choice, it was appropriate to conclude that part of the fault for his suicide lay with him (at [31]).

He applied the decision of the House of Lords in *Reeves*, a case where a person known to be a suicide risk was held in police custody and succeeded in a suicide attempt, and determined that the allocation of responsibility to Mr Corr's case should be 20 per cent, distinguishing the 50 per cent in the Reeves case on the basis that Mr Corr's suicidal tendency which led him to take his own life was one of the psychiatric products of his employer's negligence.

Lord Walker noted that before the accident Mr Corr was not a suicide risk – he was a happy family man. His employer owed him no special duty, simply a responsibility to take reasonable care to ensure that he did not sustain personal injuries in the course of his work. He agreed with Lord Bingham that it was not appropriate to attach the label of 'blameworthy' to Mr Corr's decision to end his life, when, 'with his judgement impaired by severe depression', he jumped to his death (at [44]).

Lord Mance agreed with the opinions of Lords Bingham and Walker. In light of the limited material before the House of Lords, he did not feel it appropriate to deduct a percentage for contributory negligence, but expressed 'considerable sympathy' for the general approach of Lord Scott on the issue. Like Lord Neuberger, he preferred to leave open the possibility that such a deduction could be appropriate in circumstances of deliberate suicide committed in a state of depression induced by an accident (at [47]).

Lord Neuberger, too, agreed with the reasons for the judgment of Lord Bingham. He observed that the only issue of liability was whether the fact that Mr Corr's suicide was his own conscious act at a time when he was sane should defeat the claim. He stated that he had difficulty in seeing how it could be said that suicide was not a reasonably foreseeable result of the employer's breach of its duty of care, or even a reasonably foreseeable symptom of his severe depression (at [56]). He commented that:

> 'It is notorious that severely depressed people not infrequently try to kill themselves: indeed, the evidence before us suggests that the chances are higher than 10%. ... I would expect [the employer] to appreciate that there was a substantial risk of a suicide attempt by someone who suffers from severe depression, and that suicide attempts often succeed.' (at [56]).

He expressed the view that there was insufficient material before the House to enable an assessment to be made as to whether there should be a deduction for contributory negligence, but recorded his agreement in principle with Lords Scott and Mance on the subject and commented that, 'in the absence of special factors', the apportionment, as in Reeves, 'might well be 50%' (at [62]). However, he accepted that a 'nuanced approach is appropriate, and the existence of a spectrum can and should be recognised' (at [64]). He observed that in Mr Corr's case, his capacity was impaired rather than removed, meaning that there would have been some 'fault' on his part.

REPERCUSSIONS OF THE *CORR* DECISION FOR AUSTRALIAN PLAINTIFFS

The House of Lords' decision in *Corr* was unanimous that if personal injury is foreseeable by an employer breaching its duty of care, then, generally, a subsequent suicide in the context of psychiatric illness induced by the breach will meet the requisite test for causation. It did not require that the suicide itself needed to be foreseeable by a tortfeasor for liability. In addition, the House of Lords held that there will not be a *novus actus interveniens* where an injured person commits suicide, even if the person is not McNaghten insane, if the suicide occurs in the context of personal injury-induced depression. It appears that the situation may be less clear-cut when the deceased had pre-existing symptomatology,

possibly whether or not that was known to the employer.

Where the House of Lords was at odds was in relation to the extent of reduction for contribution by the person committing suicide, if the person is not so ill as to be almost an automaton. Different members of the House exhibited sympathy for the reduction for contribution, ranging between 20 per cent and 50 per cent.

At present, there is something of a gap between UK and NSW law in relation to the considerations used to determine whether causation exists between a breach of duty and a later commission of suicide as a result of symptomatology of mental illness. However, the differences are of modest proportions. Both the UK and NSW decisions accept that suicide can be compensable where it is caused by negligence, and that where there is intrusion of a new cause that disturbs the sequence of events there will be a break in the chain of causation.

Where they differ is in the view of Spigelman CJ in *AMP General Insurance*, and applied by the court in *Sarkis*, that actions involving the deliberate infliction of self-harm should generally be regarded as 'independent and unreasonable' and as a break in the sequence of events. However, the House of Lords carefully circumscribed its decision to facts comparable to those before it; namely, where personal injury was reasonably foreseeable and the suicide was closely related to that personal injury and not attributable to other pre-existing or subsequent factors. To this extent, Lord Bingham did not identify a difference between his approach, and that of his colleagues, and that of Spigelman CJ in *AMP General Insurance Ltd*.

The House of Lords may well have reached the same result as the NSW Court of Appeal in both the *AMP General Insurance* and *Sarkis* decisions because, on the facts, the suicides were not so direct a product of the foreseeable personal injury suffered by the victims. The important issues determining whether Australia's law is to be at variance with that in the UK are whether compensability for the relatives of a person who has committed suicide requires reasonable foreseeability of the possibility of suicide by the tortfeasor, and whether deliberate self-infliction of harm will generally break the causal link (by constituting a *novus actus interveniens*) between breach of duty and death. A means of reconciliation may lie in the question of capacity for deliberateness or voluntariness where the psychiatric state within which suicide is committed is the foreseeable depression arising from a breach of duty. ■

Notes: **1** [2001] NSWCA 186. **2** [2006] NSWCA 358. **3** [2008] UKHL 13; [2008] 2 WLR 499; [2008] 2All ER 943. **4** [2000] 1 AC 360.

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