Making a case for ignoring the recommendations relating to pure mental harm in the Ipp Report

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The recommendations in the *Ipp Report* for reforming the current common law approach to pure mental harm appear at first glance to have taken account of the High Court's decision in *Tame v State of New South Wales ("Tame"); Annetts v Australian Stations Pty Ltd*[1] *("Annetts")*. However, closer examination of those decisions would indicate that some of the observations expressed by members of the court have been given insufficient weight.

This paper will argue that the wording of Recommendation 34 in the *Review of the Law of Negligence Report* should not be adopted in legislation in the Northern Territory as it does not reflect sufficiently closely the thinking of the High Court in the most recent relevant cases. In following this argument, some of the history of tort law in relation to negligence will be examined, with particular reference to these more recent cases.

In order to reinforce the argument, there will be apparent duplication of many of the points raised. This seems relevant in the context of highlighting the extent to which a variety of authoritative sources have interpreted the High Court's decisions in the same way.

NEGLIGENCE AND NERVOUS SHOCK

The foundations of tort law in the context of negligence were almost certainly laid in *Donoghue v Stevenson*[2], most particularly in the judgment of Atkin, LJ where he said "[y]ou must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour"[3].

He then continues to define "my neighbour" as:

> persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.[5]

Thus this case highlights the concept of 'reasonable foreseeability' and the relationship between those affected by negligence and the alleged tortfeasor which have echoed down the years and resonate in the High Court today. A minor difference today would lie in the fact that now the plaintiff is sometimes the secondary victim who is linked to the defendant through the primary victim.[5]

A similar landmark in Australian legal history was established by the case of *Jaensch v Coffey*[6] where Gibbs CJ notes:

> [a]s the law relating to damages for what is somewhat crudely called "nervous shock" has limped on with cautious steps, to use the metaphor suggested by Windeyer J. in *Mount Isa Mines Ltd. v. Pusey* [sic][7] , the old and irrational limitations on the right to recover damages for an injury of this kind have one by one been removed.[8]

FINDING THE RATIO DECIDENDI

One of the aspects of law which is both fascinating but also frustrating is that, even when the High Court delivers a concurring rather than a majority decision, trying to find a common ratio in the reasons given by each judge for arriving at that decision is often impossible. In an article published on the web by Allens Arthur Robinson, AAR's Beth Turnbull notes that in a case before the NSW Supreme Court where neither sudden shock nor direct perception were present and which involved referring to the outcome of the *Annetts/Tame* case in the High Court:

> Chief Justice Young found it difficult to extract any coherent test from the separate judgments but concluded that the exercise is to identify a special relationship between the plaintiff and defendant and determine whether in combination with reasonable foreseeability of nervous shock, there was a duty of care.[9]

In this particular case, concerning two men who were bungy jumping in tandem with fatal results, Young CJ was asked to determine whether there was a duty of care in order for the relatives to proceed with an action for nervous shock against the manufacturer of the equipment. This was the first case to come

before the NSW Supreme Court since the decision in *Tame/Annetts*. The outcome of the action is as yet unknown.

COMPARING NOTES WITH OTHER LEGAL SYSTEMS

Other jurisdictions are also slowly refining the processes in relation to nervous shock. Cases appearing in the English courts are, of course, referred to in the textbooks, although such cases are no longer automatically followed by Australian courts. In fact, the House of Lords in the actions arising out of the Hillsborough stadium disaster[10] followed a more restrictive set of 'controls', which Lord Griffiths in his judgment reproduces in quoting from the remarks made by Lord Hoffman in the judgment in Alcock:

1. There must be a close tie of love and affection between the plaintiff and the victim.
2. The plaintiff must have been present at the accident or its aftermath.
3. The psychiatric injury must have been caused by direct perception of the accident or its immediate aftermath and not by hearing about it from somebody else.[11]

Clearly, in light of the High Court's judgment in both Tame/Annetts and *Gifford v Strang*[12] (see later for discussion of this case), these 'controls' are highly restrictive in their effect.

New Zealand, unlike Australia, has taken almost all personal injury cases out of the common law courts since establishing a comprehensive no fault accident compensation scheme covered by the one Act[13]. An exception to inclusion under this Act is mental trauma, some aspects of which are now excluded from the legislation, with a consequent 'spectacular upsurge in damages claims being filed for mental trauma and exemplary damages in personal injury cases'[14].

A 1998 New Zealand case[15] was cited as confirming that, in the context of damages, the New Zealand courts will 'have to take guidance from Australia and other common law jurisdictions in formulating an appropriate level of award.'[16] Thus, Australia's High Court judgments are seen as providing a model for New Zealand courts to examine.

A WELFARE APPROACH TO NEGLIGENCE

Before the *Ipp Report* was finalised, the Chief Justice of New South Wales delivered an address in which he was critical of the welfare approach to tort law reform epitomised by the New Zealand legislation. In the context of mental harm, he expressed his concern that English decisions did not seem to provide consistent guidelines and there was a distinct problem with cases in Australia where:

> actual decisions in many cases appear to be undermining the control devices. This sometimes appears to be the case because counsel simply do not rely on such devices, so that they are not referred to in the reasons for judgment with the result that the case is subsequently referred to as authority inconsistent with the control. The pressure to rationalise this area of the law is considerable.[18]

Interestingly, his criticisms voiced in this extract, and more specifically in the footnote in his comments, will be shown to have had a very clear response from the High Court in succeeding cases. It is also worth noting that NSW has now legislated to adopt the recommendation from the *Ipp Report* which is the subject of this paper, which could produce some interesting appeal cases.

AN INTERESTING ANALYSIS

An article on the web from Sparke Helmore[19] offers a very readable summary of the salient points in the various judgments of the members of the High Court in *Tame/Annetts*. The 'control mechanisms' established by various courts, and referred to in the passage above by Chief Justice Spigelman, are listed and compared with the salient points in the judgments. The article noted that the somewhat mechanistic approach defined by the 'controls' had been replaced by the High Court who had gone

> back to the founding principles in common law negligence as encapsulated in Donaghue v Stevenson, . . .
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> Accordingly, the High Court defined the essential question in common law claims for nervous shock as being whether it was *"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"*.
>
> This standard of reasonableness was of relevance to both the establishment of a duty of care, and for determining whether a breach had occurred.[20]

The article also noted that this new approach would still require the plaintiff to establish a duty of care and reasonable foreseeability to an extent which was unlikely to result in the opening of the floodgates, which is a recurring concern. Later the author discussed the 'sudden shock', 'direct perception' and 'normal fortitude' rules, noting that all were rejected and that in relation to the third, "Gummow and Kirby JJ cautioned that the concept of [']normal fortitude['] should not distract from the central inquiry" which was the reasonable foreseeability of

the 'plaintiff sustaining a psychiatric illness'[21];

> Accordingly, Gummow and Kirby JJ concluded that the 'normal fortitude' stipulation is no more than an aspect of the conventional requirement of reasonable foreseeability, and it does not operate as a free standing control mechanism in cases of negligently inflicted psychiatric harm.[22]

Thus the two aspects – reasonableness and foreseeability – plus a commonsense approach by the court in examining the circumstances of a case were seen as replacing the concept of a set of rules to be applied mechanically. The application of the control relating to 'normal fortitude' was, although in different words in the various judgments, unanimously rejected.

TWO MORE RECENT CASES

The first of these is noted in an article in the *Sydney Morning Herald*[23] reporting that the three children of Barry Gifford, having had a NSW Court of Appeal decision overturned by the High Court[24], were in the District Court for a retrial of their claim for mental harm resulting from the horrific death of their father in a workplace accident in 1990. The employer had already admitted negligence but both the Supreme Court and the Appeal Court had applied the 'rules' which were held to apply before the High Court's decision in *Tame/Annetts*. The outcome of the retrial is not yet known.

The second case[25] was decided earlier this year. It concerned a woman who, having been retrenched by her employer from her position as merchandising representative, was re-employed on a part-time basis. The workload proved too heavy and she eventually developed a psychiatric illness. She was initially successful in a claim for pure mental harm in the District Court of Western Australia but the finding was overturned by the Full Court of the Supreme Court of Western Australia and this latter outcome was upheld by the High Court.

Both appeals held that 'the employer could not reasonably have foreseen that the appellant was exposed to a risk of psychiatric injury as a consequence of her duties at work'.[26]

Thus, *Annetts* has clearly laid the ground rules, reinforced in *Gifford v Strang*, that the relationship between plaintiff and victim is of paramount importance in assessing the reasonable foreseeability that a particular person will suffer pure mental harm, while *Tame* has been clearly the background in *Koehler v Cerebos* for determining that reasonable foreseeability of the mental harm must be established for a claim to succeed.

A LEGAL BRIEFING BY THE AUSTRALIAN GOVERNMENT SOLICITOR

Prior to the two most recent cases mentioned in the last section but after the High Court decision in *Tame/Annetts*, a legal briefing was prepared in relation to claims for psychological injury. This deals very systematically with various issues including a recognisable psychiatric injury and the associated standards for assessing it, negligence and psychiatric injury - covering sudden shock, direct perception and normal fortitude – and the application of *Tame* and *Annetts*.

The conclusion reached again stresses the use of arbitrary tests was to be replaced by:

> a simple test of reasonable foreseeability. That analysis is to be undertaken with consideration of the relationships between the parties, the physical and temporal proximity of the plaintiff to the event that causes the psychological injury, and what might be the expected response of a person of normal fortitude. It is still the case that far-fetched or fanciful outcomes which are not reasonably foreseeable will not give rise to a duty of care.
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> . . . .it appears likely that only a few cases will be successful where a plaintiff claims for pure psychiatric injury other than in circumstances where:
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> > the injury arose from a sudden shock;
> >
> > in circumstances where the plaintiff was present immediately at or in the aftermath of a precipitating event; and
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> > the plaintiff was likely to be particularly traumatised due to the relationship with the primary victim of the negligence.
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> The greatest change as an outcome of Tame/ Annetts seems to be in relation to elongated courses of events that have caused psychiatric illness, such cases now appearing to have greater prospects of success.[27]

Importantly, in relation to 'normal fortitude', the document notes further that:

> Gleeson CJ at [29] and McHugh J at [115]–[116] stated that the consideration of whether an injury was reasonably foreseeable in light of a person of normal fortitude is not to be determined with scientific predictability. That is, evidence of a medical expert that a psychiatric injury could reasonably flow to a person of normal fortitude from the event would not necessarily ensure a plaintiff's success. Rather, the question is whether the tortfeasor could reasonably have been expected to foresee that his mistake carried a risk of harm of the kind that resulted.[28]

Thus, the overall effect is a move away from rigid definitions towards the need for reasonable foreseeability of the likelihood of a psychiatric injury and employing a commonsense approach to assessing the reasonable foreseeability of the particular harm which has resulted.

WHY SHOULD THE *IPP REPORT* RECOMMENDATION 34 BE REJECTED?

There are aspects of the wording of this recommendation which could be likely to lead to an unnecessary number of appeals. In particular, part (b) with its reference to a person of 'normal fortitude' could continue to cause problems in the lower courts, as originally happened in *Annetts*. Interestingly, while the recommendations stipulate that the plaintiff must be a person of 'normal fortitude' – implying a standard to be met – there is no similar requirement that the defendant should have some standard ability to foresee a risk of harm, so the attempt to clarify the procedure for the courts is only partially fulfilled. The Annetts case has also highlighted the fact that a long drawn-out period of uncertainty can be at least as if not more detrimental to mental health than a sudden shock and this is not sufficiently clearly covered in the recommendation.

In addition, *Gifford v Strang Patrick Stevedoring Pty Ltd*[29] has established that not being present when an accident occurs nor even seeing the victim's body does not preclude the duty of care of an employer towards the family of an employee, given a close and loving relationship between the members.

Reinforcing this is an article in Focus, Insurance & Reinsurance, in which an AAR employee wrote:

> The High Court's decisions in Tame v New South Wales ***(Tame)*** and Annetts v Australian Stations Pty Limited ***(Annetts)*** dispensed with two of the special rules that previously existed to limit liability for nervous shock, namely, the requirements of 'sudden shock' and 'direct perception'. In those cases, the court rejected these rules as being too rigid, preferring the flexibility of 'reasonable foreseeability'. (See 'Nervous shock: what limits remain' in the *AAR Annual Review of Insurance Law 2002*). It was foreshadowed that this was likely to expand liability for nervous shock claims. The recent decision of *Gifford v Strang Patrick Stevedoring Pty Ltd*[31] confirms this. [32]

Similarly, it appears that 'normal fortitude' should as a concept be modified by particular circumstances and so this aspect should be considered in the light of reasonable foreseeability and the 'egg-shell skull' principle.

CONCLUSION

In view of the High Court's decisions in recent cases involving claims for mental harm, there is no good case for introducing legislation into the Northern Territory along the lines of Recommendation 34 in the *Ipp Report* to assist the courts in assessing claims and reducing the likelihood of further appeals. The guidelines provided by the most recent High Court judgments are sufficiently clear that removal of the previous 'controls' should not present grave difficulties to a lower court in following the reasoning in those judgments.

It is interesting to note that the trend of thinking by the High Court applies consistently. Gummow J, in his judgment in *Perre v Apand*[33] noted:

> [t]he emergence of a coherent body or precedents will be impeded, not assisted, by the imposition of a fixed system of categories... I prefer... a number of 'salient features'... to sustain the existence of a duty of care.[34]

Thus, even in a pure economic loss case, the High Court prefers the conceptual approach rather than the more mechanistic method using 'controls'.

For the Northern Territory to legislate along the lines of Recommendation 34 in the *Ipp Report* would run counter to the intention of the High Court in its establishing guidelines to ensure an equitable outcome.

ENDNOTES

1 (2002) 211 CLR 317; 191 ALR 449; [2002] HCA 35.
2 [1932] AC 562.
3 Ibid 580.
4 Ibid.
5 Gifford v Strang Patrick Stevedoring Pty Ltd (2003) 198 ALR 100; [2003] HCA 33.
6 (1984) 155 CLR 549
7 (1970) 125 CLR 383, 395, 403.
8 Jaensch v Coffey (1984) 155 CLR 549, 552.
9 http://www.aar.com.au/pubs/prod/recall2nov02.htm.
10 Alcock v Chief Constable of South Yorkshire Police [1992] 1 AC 310 and White and Others v Chief Constable of South Yorkshire and others [1999] 2 AC 455; 1 All ER 1.
11 White and Others v Chief Constable of South Yorkshire and others [1999] 1 All ER 1, 2,
12 Gifford v Strang Patrick Stevedoring Pty Ltd (2003) 198 ALR 100; [2003] HCA 33.
13 Accident Rehabilitation and Compensation Insurance Act 1992 (NZ).
14 John Miller, 'Compensation for Mental Trauma Injuries in New Zealand' (1998) 3 The Australasian Journal of Disaster and Trauma Studies, http://www.massey.ac.nz/~trauma/issues/1998-3/miller1.htm.
15 Danes Shotover Rafts Limited v Palmer, (NZ) Court of Appeal – 2 November 1998.
16 Rob Coltman, 'The New Employers' Liability: "Nervous