Of course, legislative changes now specify considerations relevant to the determination of whether a public authority has breached its duty.[6]

Public authorities should have formal, documented risk management systems and procedures for dealing with all aspects of footpath and road maintenance, including acceptable standards, inspections and priority planning.[7]

Where there is evidence that an adequate risk management program was in place and budgetary resource allocations did not allow the removal of all risks, plaintiffs will rarely succeed,[8] particularly where there is no evidence that the authority knew of the specific risk.[9] PL

Endnotes: **1** (2001) 206 CLR 512 at [163]. **2** at [12]. **3** at [13]. **4** at [14]; [16]-[17]. **5** *Sutherland Shire Council v Pallister* [2002] NSWCA 66; *ACT v Badcock* (2000) 169 ALR 585; cf *Spencer v The Council of the City of Maryborough* [2002] QCA 250. **6** For example, in ss 35 and 37 *Civil Liability Act* 2003 (Qld); and in s 42 *Civil Liability Act* 2002 (NSW). **7** See NSW Public Bodies Review Committee report *The Effects on Government Agencies of the Abolition of Nonfeasance Immunity* http://www.parliament.nsw.gov.au/prod/web/phweb.nsf/frames/committees?open&tab=committees. **8** *Percy v Noosa Shire Council* [2002] QCA 245 at [17]; *Burwood Council v Byrnes* [2002] NSWCA 343 at [6]-[11]. **9** *RTA v McGuinness* [2002] NSWCA 210 at [38]; [52] -[53].

DAVID BARAN, NSW

Victory for common sense

Gifford v Strang Patrick Stevedoring Pty Ltd (2003) 77 ALJR 1205

In *Tame v New South Wales* and *Annetts v Australian Stations Pty Ltd*[1], the High Court eradicated arbitrary rules such as normal fortitude, shock or sudden sensory perception as being determinative of a plaintiff's right to sue for nervous shock.

The rights of pure secondary victims (that is, persons who were not at the scene of the distressing event) were undecided.

On this issue the High Court granted special leave to appeal in the matter of *Gifford v Strang Patrick Stevedoring Pty Ltd* ('Gifford'), a case relating to three children whose father was killed on the respondent's work site.

A further issue in *Gifford* was whether section 4(1)(b) of the *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) ('the Act') operated so as to permit recovery only by those persons who had a family member killed, injured or put in peril within their sight or hearing. The court unanimously held that section 4(1)(b) of the Act operated to extend liability and could not be used to deny the three plaintiffs the right to sue for lack of perception.

In determining whether the defendant owed a duty of care to the plaintiffs, Gleeson CJ focused upon the reasonableness of ▶

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recognising a duty to children, such that 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 formulated a principle similar to the 'neighbour' principle in *Donoghue v Stevenson*, and held that persons who had a close tie of love with the deceased could bring actions for nervous shock, and that this should not be limited to children. The focus of the inquiry should be the relationship, not its legal status.

Gummow and Kirby JJ stated:

'Australian law seeks to protect, in an appropriate case, the plaintiff's freedom from serious mental harm which manifests itself in a recognisable psychiatric illness.'

Despite the High Court's decisions, there are traces of arbitrary rules (once thought to be part of Australian common law) in the mental harm provisions of the *Civil Liability Act* 2002 (NSW). One glaring example is section 32 which provides that a person does not owe a duty of care to another person to take care not to cause the plaintiff mental harm unless the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken.

Despite the High Court's clarity of principle in formulating a common sense approach to the common law by applying the 'neighbour' principle, legislatures have intervened, bringing the spectre of arbitrary rules, which could result in unjust outcomes for meritorious claims. The situation poses yet another challenge to lawyers seeking to advance the rights of injured plaintiffs.

Endnote: 1 (2002) 76 ALJR 1348.

HAMISH MACDONALD, QLD

Driver intoxication and a passenger's contributory negligence

Joslyn v Berryman; Wentworth Shire Council v Berryman [2003] HCA 34

The relevant standard in assessing whether a passenger who is injured in a motor vehicle accident is guilty of contributory negligence, where he or she knew or ought to have known that the driver was intoxicated, is an objective one. This is the case both at common law and under the *Motor Accidents Act* 1988 (NSW), although the common law test is broader in its application.

Background

The plaintiff was injured when his vehicle, in which he was a passenger, overturned. The defendant driver was in an intoxicated state.

The previous evening, the plaintiff and the defendant had attended a party where they both drank heavily. Shortly before the accident, the plaintiff had been driving and the defendant had noticed he was dozing off.

The defendant remonstrated with the plaintiff who responded: 'Well, you drive the car then.'

The plaintiff knew that his vehicle had a broken speedometer and a propensity for rolling over and that the defendant had lost her licence. The defendant accepted the invitation to

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