Restrictions on recovery for pure mental harm

By Anna Walsh

In 2002, the High Court considered the cases of *Tame v The State of New South Wales* and *Annets v Australian Stations Pty Ltd*[1] and, in doing so, was given an opportunity to reformulate the traditional principles governing liability for pure mental harm.

Since then, civil liability legislation has been enacted in the states and territories, clarifying the necessary preconditions to bringing such actions. This article reviews recent cases and legislative developments affecting actions for pure mental harm.

Cases of pure mental harm must be distinguished from cases involving consequential mental harm from a physical injury. Traditionally, compensation for pure mental harm has been available where it is reasonably foreseeable that the defendant's act or omission may cause a recognised psychiatric injury to a particular plaintiff.[2] In determining whether the mental harm is a reasonably foreseeable consequence of negligence, the courts have considered whether a person of normal fortitude is likely to have suffered mental harm; whether the plaintiff witnessed the shocking event or its aftermath, and whether a special relationship with the defendant meant that the plaintiff should have been considered to be a person who might be affected by the defendant's acts or omissions.

It is not possible to identify every relationship that will give rise to a duty to take care not to cause mental harm. Prior to the introduction of civil liability legislation, courts adopted a pragmatic attitude to applying the general rules governing cases of pure mental harm, with the emphasis differing according to the facts of the case. In the *Tame* and *Annets* cases, the High Court was asked to consider whether the person of normal fortitude test, and the requirement of a sudden shock or a direct sensory perception of a phenomena or its aftermath, were preconditions to establishing a duty of care and liability for damages for pure mental harm.

In *Tames*, the appellant was involved in a motor vehicle accident in 1991. She was not at fault and sustained minor injuries. During the course of completing a P4 accident report form, the policeman erroneously transposed the blood alcohol readings of the appellant and the other driver, attributing a reading of 0.14 to the appellant instead of zero. Although the error was corrected, the appellant became obsessed with it, developing a psychiatric illness and bringing a claim against the state for nervous shock.

The case came before Judge Garling of the District Court of NSW. His Honour found adequate foreseeability and proximity, deciding that a person of good character who had been careful not to drink and drive might suffer a psychological injury after discovering that a form had erroneously recorded a high blood alcohol reading for them and had been forwarded to other people.[3] The appellant was found to have suffered a depressive illness as a result of the negligent transposition of the readings, as well as post-traumatic stress disorder, and was awarded damages of $115,692.

The case was appealed and overturned, with a further appeal upheld by the High Court. The majority held that there was no relationship between the appellant and the policeman that would require him, in the context of completing a report form, to contemplate her as a person

who might suffer mental harm from an error made by him on that form. Although there was evidence to suggest that some people might indeed develop a psychiatric illness after being informed of a minor clerical error, such people would not be considered to be of normal fortitude and, accordingly, mental harm was not the kind of harm that a reasonable person would need to avoid in those circumstances. The person of normal fortitude test was considered to be an appropriate means of identifying reasonable conduct in the particulars of this case.

Annets involved a very different factual scenario. Here, a young man died on a remote Western Australian property in 1986. His parents were given assurances by the respondent that their son would be looked after and would not be left to work alone. Unfortunately, he did work alone and, a few months later, went missing in dangerous circumstances. The father was informed that his son was missing by the police in a telephone call and collapsed. Both he and his wife joined in the search for their son. Eventually, the young man's blood-stained hat was found and then, some months later, so was his body, with the cause of death identified as dehydration, exhaustion and hyperthermia. The appellants were informed of their son's death by telephone and subsequently the father was shown a photograph of his dead son's skeleton. Both appellants suffered psychiatric injury.

At first instance, Heenan J in the WA District Court dismissed the claim on the basis that, although it was reasonably foreseeable that the appellants might suffer mental harm on hearing of their son's death, the telephone call five months after the death did not equate to a sudden sensory perception of the harm. The appellants appealed, but the majority agreed with Hennan J regarding the need for the appellants to demonstrate a sudden sensory perception of the event. The Court of Appeal also overturned Heenan J's finding that the harm was reasonably foreseeable, instead holding that a person of normal fortitude was not likely to suffer psychiatric injury (as opposed to deep anxiety and grief) from being informed of a family member's death over the telephone.

The majority of the High Court reversed the decision, finding for the appellants, and noting that the manner in which the appellant's son died was such that it was impossible for them to have witnessed his death or for them to have experienced a sudden sensory perception of anything. It was, however, likely that they would develop mental anguish of a kind that could give rise to a psychiatric illness, with the relationship between the parties being such that the respondent ought to have contemplated that persons of normal fortitude might suffer mental harm on learning of the death of their son. The majority rejected sudden shock as a precondition for recovery of damages, and relied upon the context of the relationship between the parties, and the relationship between the appellants and the victim, as being sufficient to ground the action. >>

These cases demonstrate a flexible approach by the High Court in determining whether it is reasonably foreseeable that a person might suffer mental harm as a result of negligent conduct. Although the class of persons who might suffer such injury is not closed, adequate precautions (such as the person of normal fortitude test) need to be in place to ensure that the floodgates are not opened, but decisions should ultimately depend on all the circumstances of the particular case.

Following these decisions, civil liability legislation to limit liability and the recovery of damages was introduced across Australia. The NSW *Review of the Law of Negligence Report* recommended a requirement that the plaintiff who is not a close family member must be at the scene of shocking events, or have witnessed them or witnessed the aftermath. Apart from Queensland and the NT, where pure mental harm is not specifically referred to in their legislation, NSW,[4] Victoria,[5] the ACT,[6] SA[7] and WA[8] have taken a narrower view of the that recommendation, and prohibit damages for mental harm where a plaintiff, who is not a close family member, has not witnessed, at the scene, the victim being killed, injured or put in peril. Tasmania,[9] however, allows damages where the plaintiff has witnessed the immediate aftermath of the victim being killed or injured.

Three cases in NSW have demonstrated a strict interpretation of the statutory requirement of what it is to witness, at the scene, victims being killed, injured or put in peril. In *Burke v State of New South Wales & Ors*,[10] the plaintiff claimed to have witnessed the Bimbaden Lodge being destroyed in the Thredbo landslide in July 1997. He brought an application to extend the limitation period and, during the course of the application, the defendant argued that the plaintiff did not have a viable case.

The plaintiff gave evidence that from some distance away, he heard certain sounds that caused him to rush to the Lodge, which he found had been destroyed. He knew all 18 victims who had died, one of whom was his best friend. He stayed at the scene and found property belonging to his best friend in the rubble and concluded that his best friend was trapped underneath.

The court held that what must be witnessed by the plaintiff has to take place at the scene, with the scene being the place where the relevant action happens. To witness an event involves perception by presence and embraces sight or hearing, with the plaintiff needing to perceive a victim being killed, injured or put in peril. The phrase 'to be put in peril' contemplates being exposed to serious and immediate danger. Here, the plaintiff did not see or hear any of the victims die or being put in peril. He did not see the landslide or the Lodge being destroyed, but he did attend the aftermath of the accident. The court held that he did not satisfy the legislative requirements of witnessing, at the scene, the victim being killed, injured or put in peril, and the application was unsuccessful.

Following *Burke* were the cases of *Wicks v Railcorp* and *Sheehan v State Rail*.[11] Here, two plaintiffs brought separate proceedings for mental harm arising from the train derailment near Waterfall Railway Station in January 2003. The scene of the accident was described as catastrophic, with overall horror and carnage. The plaintiffs were police officers and, as professional rescuers, they were required to attend the accident scene where they rendered assistance, including moving bodies. The plaintiffs claimed they witnessed victims who had died or were injured as a result of the accident, and they witnessed physically injured victims being put in further peril when their conditions worsened while they waited for medical assistance. They also claimed to have witnessed unidentified, anonymous, non-injured survivors of the crash being put in peril of mental injury by their continued presence at the accident site. Both claimed to have suffered post-traumatic stress disorder as a result of witnessing the accident aftermath and ongoing suffering of the victims.

Noting the limitations imposed by the legislation, referring to the *Burke* judgment and the minister's second reading speech, Malpass AJ held that the phrase, the 'scene of the accident' was the accident derailment scene and not the post accident wreckage and carnage. As with *Burke*, the term 'to be put in peril' was held to refer to persons who were not killed or injured in the accident or who were exposed to serious and immediate danger such as a deterioration in their condition. The plaintiffs were unsuccessful in both demonstrating that they witnessed victims being put in peril, and that what they witnessed was at the scene of the accident.

These cases establish that a more rigorous test exists for the bystander witnessing a shocking event to establish a duty of care. Current legislative preconditions for a claim for pure mental harm mean that the plaintiff must be a close family member or a bystander at the scene of the accident where the victim was killed, injured or put in peril, and that it was foreseeable that a person of normal fortitude might suffer a recognised psychiatric injury had the defendant not taken reasonable care. In considering whether the injury was reasonably foreseeable, the court is to take into account a number of factors, including whether there was sudden shock and the relationship between the parties. None of those factors, it would seem, are preconditions, but this will be subject to case law interpretation. In conclusion, the legislative changes reflect both the commonsense approach demonstrated by the High Court in the *Annets* decision with regards to claims by close family members, and a pragmatic approach to limit liability to bystanders who actually witness shocking events as they happen to the victim. ■

Notes: **1** (2002) 191 ALR 449. **2** *Jaensch v Coffey* (1984) 155 CLR 549. **3** (1998) Aust Torts Reports 81-482 at 65, 203. **4** Section 30(2)(a) *Civil Liability Act 2002* (NSW). **5** Sections 72 and 74 *Wrongs Act 1958* (Vic). **6** Sections 32 to 36 *Civil Law (Wrongs) Act 2002* (ACT). **7** Sections 33 and 53 *Civil Liability Act 1936* (SA). **8** Section 5S *Civil Liability Act 2003* (WA). **9** Sections 32 and 34 *Civil Liability Act 2002* (Tas). **10** [2004] NSWSC 725. **11** [2007] NSWSC 1346.

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