Tame v New South Wales

Annetts v Australian Stations Pty Ltd

(2002) 191 ALR 449; [2002] HCA 35

(High Court of Australia)

(relevant to Chapter 5, under heading "Nervous Shock" on p 126)

The "ordinary principles of the tort of negligence, unhindered by artificial constrictions", determine the existence of a duty of care in respect of negligently inflicted psychiatric injury (nervous shock).

Accordingly, a duty of care in respect of psychiatric injury requires reasonable foreseeability on the part of a person in the position of the defendant of injury of that kind to a person in the position of the plaintiff. There is no requirement of "sudden shock" or "direct perception" by the plaintiff of a distressing phenomenon or its immediate aftermath. However, in addition to reasonable foreseeability of psychiatric injury, there must be a relationship between the parties such that the defendant should have had the plaintiff in contemplation as a person closely and directly affected by the defendant's conduct. Absence of "normal fortitude" on the part of the plaintiff does not preclude the existence of a duty of care but will be relevant to whether psychiatric injury was reasonably foreseeable.

GUMMOW and KIRBY JJ. [some footnotes in whole or part omitted] **[484]** 148. These two proceedings, an appeal from a decision of the New South Wales Court of Appeal (*Morgan v Tame* (2000) 49 NSWLR 21) and an application for special leave to appeal against a decision of the Full Court of the Supreme Court of Western Australia (*Annetts v Australian Stations Pty Ltd* (2000) 23 WAR 35), concern liability for negligently inflicted psychiatric harm.

149. In the first proceeding, *Tame v New South Wales*, the appellant [plaintiff] seeks to restore an award at trial of damages for psychiatric harm consequent on being told that a police traffic collision report had erroneously recorded that she had been driving while intoxicated; the Court of Appeal set aside that award. The issue in the second, *Annetts v Australian Stations Pty Ltd*, is whether the Full Court erred in dismissing an appeal against an adverse determination on a preliminary issue that certain assumed facts did not give rise to a duty of care on the part of the respondent [defendant] to exercise reasonable care and skill to avoid causing foreseeable psychiatric injury to the applicants [plaintiffs]. The applicants had pleaded that they sustained "nervous shock" when their adolescent son disappeared and subsequently died in the Western Australian desert as a result of the alleged negligence of his employer, the respondent.

[485] 150. The appeal in *Tame* should be dismissed and the decision of the Court of Appeal affirmed; the question posed in *Annetts* should have been answered favourably to the applicants; special leave should be granted and the appeal allowed.

Tame v New South Wales

151. On 11 January 1991, the appellant, Mrs Tame, was involved in a motor vehicle collision at Richmond, outside the Sydney area. The driver of the other vehicle, Mr Terence Lavender, was clearly at fault. He had a blood alcohol reading of 0.14 and was driving on the wrong side of the road. A blood sample taken from Mrs Tame shortly after the accident yielded a nil blood alcohol reading.

152. Constable Morgan of the Windsor Police Station completed a traffic collision report on the accident, but left blank those portions of the report relating to the blood alcohol content of the drivers. Subsequently, in February 1991, Senior Constable Beardsley, the acting traffic sergeant at Windsor Police Station, completed those portions of the form. However, he mistakenly recorded the blood alcohol content of both drivers as 0.14. Acting Sergeant Beardsley detected the error on the form some time between February and late March 1991, at which point he corrected the original report. …

153. Mr Lavender had been driving an uninsured vehicle and Mrs Tame sued the Nominal Defendant. The claim was handled by NZI Insurance ("NZI"), which admitted liability on 11 June 1991. The claim against the Nominal Defendant was ultimately settled in August 1994 with a substantial sum being paid to Mrs Tame. By May 1992, NZI became reluctant to continue paying for physiotherapy treatment undertaken by Mrs Tame for significant leg and back injuries she sustained in the collision. This became a source of anxiety for Mrs Tame, who spoke with her solicitor, Mr Weller, about NZI's apparent refusal to meet the ongoing costs of the physiotherapy. Mr Weller contacted NZI's solicitor about the matter.

154. During a conversation in June 1992, Mr Weller asked Mrs Tame whether she had been drinking prior to the accident. She had consumed very little alcohol in the previous 20 years and she was horrified at the suggestion. Mr Weller told her that NZI's copy of the traffic collision report (which bore the error that Acting Sergeant Beardsley had corrected on the original report) indicated that her blood alcohol content at the time of the accident was three times the lawful limit. Mrs Tame was alarmed by this information, and began to worry about how many people would be told of it and the detrimental effect she considered this would have on her reputation.

155. Immediately after speaking with Mr Weller, Mrs Tame telephoned the Windsor Police Station and was told that her blood alcohol reading at the time of the collision had been nil and that the information on the form was a mistake. NZI's solicitor reconfirmed the admission of liability on 29 July 1992. In early 1993, Mr Weller obtained from the Police Service a formal apology and an assurance that the mistake on the traffic collision report had been rectified. However, Mrs Tame continued to believe that NZI's reluctance to pay for her physiotherapy was connected with the false information on the traffic collision **[486]** report. In fact, NZI believed the treatment was unnecessary. Mrs Tame became obsessed with the mistake on the form. She feared she was being punished for something she had done in the past, and spoke repeatedly about the mistake with her husband and friends. She found it difficult to sleep and experienced shame, guilt, stress and depression, for which she sought counselling. Her psychiatrist, Dr Mitchell, diagnosed Mrs Tame's condition in 1995 as psychotic depressive illness. …

156. Mrs Tame brought proceedings in negligence against Constable Morgan and the State of New South Wales in the District Court. During the trial (before Garling DCJ, without a jury) it became apparent that the mistake had been made by Acting Sergeant Beardsley and not Constable Morgan. The Court held that the State was vicariously liable for Acting Sergeant Beardsley's negligence in completing the traffic collision report. Mrs Tame was awarded $115,692 in damages.

157. An appeal by the State to the New South Wales Court of Appeal (Spigelman CJ, Mason P and Handley JA) was allowed unanimously. The Court held that, in the absence of actual knowledge of a particular susceptibility, the law imposes only a duty to take reasonable care to avoid psychiatric injury to a person of "normal fortitude". Their Honours considered that it was not reasonably foreseeable that a person of normal fortitude might sustain psychiatric injury from a clerical mistake of the type that occurred here. Further, Mason P expressly held that, whether or not one assumed a potential victim of normal fortitude, the risk of psychiatric injury was not reasonably foreseeable. Mason P and Handley JA also allowed the appeal on the additional basis that Mrs Tame did not suffer a sudden affront or assault on her psyche from the perception of a horrifying event, which their Honours considered a necessary pre-condition to recovery in negligence for psychiatric harm. Although, as a matter of law, Spigelman CJ accepted this pre-condition to recovery, he declined to allow the appeal on this ground because there were insufficient findings of fact.

158. By special leave, Mrs Tame appeals to this Court on several grounds. In particular, she contends that the Court of Appeal erred in applying the "normal fortitude" and "sudden shock" requirements. Counsel for Mrs Tame submit that neither of these "requirements" were necessary elements in her cause of action in negligence for pure psychiatric injury.

Annetts v Australian Stations Pty Ltd

159. This application for special leave falls to be decided on a somewhat artificial factual substratum. The case is yet to go to trial. The applicants brought their action in the Supreme Court of New South Wales. Upon the motion of the respondent and with the consent of the applicants, the action was transferred to **[487]** the Supreme Court of Western Australia. By order dated 5 May 1999, Heenan J of the Supreme Court of Western Australia directed that a preliminary issue be tried separately from and prior to the trial of any other issues. The preliminary issue was whether, on the assumption that the facts pleaded in specified paragraphs in the applicants' Amended Statement of Claim were true, those assumed facts were "sufficient, at law, to give rise to an independent tortious duty of care owed by [the respondent] to [the applicants] to exercise reasonable care and skill to avoid causing them psychiatric injury". The specified paragraphs of the Amended Statement of Claim contain both assertions of fact and assertions of law. Nonetheless, it is possible to state in a general way the assumed facts upon which the application now before this Court proceeds.

160. In August 1986, James Annetts, the son of the applicants, left the family home in Binya, New South Wales, to work for the respondent as a jackaroo at Flora Valley, a cattle station situated about 40 kilometres south-east of Halls Creek in the Kimberley district of Western Australia. James was then 16 years of age. Before he left home, his mother telephoned Mrs Loder, the wife of the respondent's station manager, and inquired about the conditions under which James would be working. Mrs Loder told Mrs Annetts that James would be working at Flora Valley under constant supervision, that he would share a room with several other men and that he would be well looked after. The respondent admits generally that the applicants made inquiries of its servants or agents in relation to the arrangements that would be made for James' safety and that the applicants were provided with assurances thereof.

161. Notwithstanding these assurances, on 13 October 1986 Mr Loder assigned James to work alone as caretaker at Nicholson Station, about 100 kilometres east of Flora Valley. James had worked at Flora Valley for only seven weeks. On 3 December 1986, the respondent learned that James was missing and had reason to suspect that he was in grave danger of injury or death. The applicants were not informed that their son was missing until 6 December, when a police officer at Griffith, New South Wales, telephoned Mr Annetts and told him that apparently James had run away. Mr Annetts collapsed and Mrs Annetts took over the conversation.

162. Subsequent events were summarised by Ipp J in the Full Court as follows:

> At some time, not revealed by the facts before the court, an intensive search was begun for James and another teenager, Simon James Amos, who had been employed by the respondent as a jackaroo on another station. Thereafter, [the applicants] had a number of telephone conversations with police officers at Halls Creek police station, Mr Loder, and numerous other persons in the Halls Creek area concerning the whereabouts of their son. In January 1987, [the applicants] went to Halls Creek where they remained for some four to five days. They were then shown some of their son's belongings, including a hat covered in blood. Thereafter, on several occasions until the end of April 1987, [the applicants] went to the Halls Creek area in attempts to obtain information about James.
>
> On 26 April 1987, Mr Annetts was informed by telephone that the vehicle driven by James had been found bogged in the desert but there were no signs of any people around it. Later that day, he was told that two sets of remains had been found nearby. **[488]** On 28 or 29 April 1987, Mr Annetts, alone, returned to Halls Creek. At the police station, he was shown a photograph of a skeleton and he identified it as being that of James.
>
> The parties accept that, in fact, James 'died on or about 4 December 1986 in the Gibson Desert some 133 kilometres south of Balgo as a result of dehydration,

> exhaustion and hypothermia'. Thus, [the applicants] learned of his death almost five months after it occurred. They were far away from James when he died.

163. By their Amended Statement of Claim, the applicants pleaded that James died as a result of the respondent's negligence. The negligence is identified as the placement of James on his own as caretaker of an isolated property, the provision of a defective and unsuitable vehicle, the failure to train James in the skills necessary for survival in such isolation, and the failures to implement or maintain effective radio communication with James and promptly to notify the police of his disappearance.

164. Although not formulated with specificity, the assumed facts apparently include that the applicants suffered not only a grief reaction, but an "entrenched psychiatric condition". However, as Ipp J explained in the Full Court, the assumed facts did not specify precisely when the applicants sustained this condition. The Full Court postulated two alternative situations. The first was that Mr and Mrs Annetts sustained psychiatric injury on 6 December 1986, when they were told that James was missing from his place of employment and was believed to have run away. The second was that they sustained psychiatric injury upon ultimately learning of James' death in late April 1987, the injury being caused by that development coupled with the accumulated effect of the earlier events.

165. Heenan J resolved the preliminary issue adversely to Mr and Mrs Annetts. He found that the respondent owed Mr and Mrs Annetts no relevant duty of care, because they did not "directly" perceive their son's death or its aftermath and their psychiatric injury was not the result of a "sudden sensory perception".

166. The Full Court of the Supreme Court of Western Australia (Malcolm CJ, Pidgeon and Ipp JJ) unanimously dismissed an appeal by the applicants. Ipp J, with whom Malcolm CJ and Pidgeon J agreed, held that the respondent did not owe Mr and Mrs Annetts a duty of care to exercise reasonable care and skill to avoid causing them psychiatric injury. Regardless of which of the two alternative situations described above applied, the psychiatric injuries sustained by the applicants were not reasonably foreseeable and the applicants were not in a sufficiently proximate relationship with the respondent to found a duty of care. Ipp J favoured the view that persons of "normal fortitude" in the position of the applicants would not have sustained a psychiatric illness, as opposed to deep anxiety and grief, either upon being informed that their son had run away or upon receiving confirmation of his death. In any event, Ipp J held that, in neither of the postulated situations should the respondent have foreseen that its conduct might result in a "sudden sensory perception" on the part of the applicants of a phenomenon so distressing that a recognisable psychiatric illness would be caused thereby. His Honour further held that the applicants had not established **[489]** the requisite degree of proximity as they did not directly perceive the consequences of the respondent's conduct.

167. In seeking special leave to appeal against the decision of the Full Court, Mr and Mrs Annetts submit that the common law of Australia does not and should not recognise the "sudden shock" or "direct perception" rules as pre-conditions of liability. Further, they submit that the "normal fortitude" stipulation is no more than an aspect of the conventional requirement of reasonable foreseeability, and does not operate as a free-standing control mechanism in cases of negligently inflicted psychiatric harm.

Negligence and "nervous shock" ...

[491] 178. Initially, in 1888, the Judicial Committee of the Privy Council in *Victorian Railways Commissioners v Coultas* (1888) 13 App Cas 222 held that nervous shock, unaccompanied by physical injury, was too remote a consequence of a negligent accident to sound in damages. To permit recovery, their Lordships said (at 226), would have the result that "[t]he difficulty which now often exists in case of alleged physical injuries of determining whether they were caused by the negligent act would be greatly increased, and a wide field opened for imaginary claims." …

180. In *Dulieu v White & Sons* [1901] 2 KB 669, the King's Bench Divisional Court was dealing with a procedure in the nature of a demurrer. Their Lordships referred to the criticism of *Coultas* by Palles CB in *Bell v Great Northern Railway Co* (1890) 26 LR Ir 428, and permitted recovery in negligence for "nervous shock" occasioned by an apprehension of

physical injury to the plaintiff herself, at least where the consequences of the shock were partly physical. Subsequently, in 1924, the English Court of Appeal ordered a new trial where an action under Lord Campbell's Act had been dismissed. The plaintiff in *Hambrook v Stokes Brothers* [1925] 1 KB 141 sued in respect of the death of his wife. Thus, he had to show that, if death had not ensued, his wife would have been entitled to maintain an action in respect of the wrongful act, neglect or default of the defendant. The defendant's lorry had seriously injured her child within her hearing. Atkin LJ spoke in general terms of a "duty to take care to avoid threatening personal injury **[492]** to a child in such circumstances as to cause damage by shock to a parent or guardian then present". This later was transmuted into an apparent rule that only relatives could recover for "nervous shock" caused by perception of physical injury to another. …

181. The reference by Atkin LJ in *Hambrook* to those "present" also proved to be significant. In 1938, the Court of Appeal in *Owens v Liverpool Corporation* [1939] 1 KB 394 upheld an appeal against the dismissal of an action by four family mourners at a funeral for distress caused by witnessing a collision between a negligently driven tramcar and the hearse. The incident involved no apprehension, or sight, or sound of physical injury to a human being. However, the decision in *Owens* was doubted by the House of Lords in *Bourhill v Young* [1943] AC 92. In that case, it was held that the defendant motorcyclist owed no duty of care to avoid causing nervous shock to the plaintiff, who was not herself in danger of physical impact, nor related to such person, nor within the defendant's line of vision at the time of the accident. Matters did not end there.

182. *Pusey* [*Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383], decided by this Court in 1970, upheld an award of damages for mental disorder occasioned by "nervous shock" at the sight of an injured co-worker unknown to the plaintiff. By 1984, both the House of Lords and this Court had permitted recovery for "nervous shock" where the plaintiff was not present at the scene of the accident caused by the defendant's negligent driving. In *McLoughlin v O'Brian* [1983] 1 AC 410 and *Jaensch v Coffey* (1984) 155 CLR 549, the shock resulted from what each plaintiff saw and was told at the hospital shortly after motor vehicle accidents which killed or seriously injured members of their respective families. However, recent authorities in the House of Lords dealing with "nervous shock" (*Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310; *Page v Smith* [1996] AC 155; *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455), to which further reference will be made, have specified a number of "control mechanisms" which are "additional" or "special", adjectives used by Hale LJ in her summary of the English law in *Hatton v Sutherland* [2002] 2 All ER 1 at 11-13. One such "mechanism" requires "secondary victims" (those who witness injury caused to others) to demonstrate close ties of love and affection with the "primary victim" and propinquity in time and space to the relevant accident or its immediate aftermath.

183. Advances in the capacity of medicine objectively to distinguish the genuine from the spurious, and renewed attention to the need to establish breach, causation and a recognisable psychiatric illness that is not too remote, indicate **[493]** the need for re-accommodation of the competing interests which are in play in "nervous shock" cases. But that accommodation is better achieved by direct attention to, rather than attempts to ignore, the conflict of interests involved. This reflects the preferred approach to defining the limits of liability in negligence, which takes as its starting point, not merely the actions of the defendant, but the interests which are sufficient to attract the protection of the law in this field. …

Control mechanisms …

[494] 187. This Court is presently concerned with three control mechanisms which influenced the intermediate appellate courts. They are (i) the requirement that liability for psychiatric harm be assessed by reference to a hypothetical person of "normal fortitude", (ii) the requirement that the psychiatric injury be caused by a "sudden shock", and (iii) the requirement that a plaintiff "directly perceive" a distressing phenomenon or its "immediate aftermath". It is an objection to the adoption of these rules that this would substitute for the consideration in the particular case of the general requirements of duty of care, reasonable foreseeability, causation and remoteness of damage, notions which would foreshorten inquiry

into those matters by the imposition of absolutes with no necessary relation to basic principles. …

188. It should be decided here that the three control mechanisms listed above are unsound. …

189. None of the three control mechanisms has been accepted by this Court as a pre-condition to liability for negligently inflicted psychiatric harm. The first of the mechanisms, the standard of "normal fortitude", is not a free-standing criterion of liability, but a postulate which assists in the assessment, at the stage of breach, of the reasonable foreseeability of the risk of psychiatric harm. Further, for the reasons that follow, the common law of Australia recognises neither the second nor third, "sudden shock" and "direct perception", as pre-conditions to the recovery of damages for negligently inflicted psychiatric harm.

190. As will become apparent, the requirements of "sudden shock" and "direct perception" of a distressing phenomenon or its "immediate aftermath" have operated in an arbitrary and capricious manner. Unprincipled distinctions and artificial mechanisms of this type bring the law into disrepute. …

[495] 191. Moreover, the emergence of a coherent body of case law is impeded, not assisted, by such a fixed system of categories. Rigid distinctions of the type required by the "direct perception" rule inevitably generate exceptions and new categories, like the "immediate aftermath" qualification, as the inadequacies of the recognised categories become apparent and "hard cases" are accommodated. The old rule that "nervous shock" sounded in damages only where it arose from a reasonable fear of immediate personal injury to oneself (*Dulieu v White & Sons* [1901] 2 KB 669 at 675), and its subsequent relaxation to permit recovery where the plaintiff feared for the safety of another (*Hambrook v Stokes Brothers* [1925] 1 KB 141), illustrates the point. As the categories and exceptions proliferate, the reasoning and outcomes in the cases become increasingly detached from the rationale supporting the cause of action.

Psychiatric harm

192. Before turning to consider each of the postulated control mechanisms, it is appropriate to identify the justification that is said to support them. At base, the justification lies in a perceived distinction between psychiatric and physical harm. Authorities (*White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455 at 493-494) have isolated four principal reasons said to warrant different treatment of the two categories of case. These are (i) that psychiatric harm is less objectively observable than physical injury and is therefore more likely to be trivial or fabricated and is more captive to shifting medical theories and conflicting expert evidence, (ii) that litigation in respect of purely psychiatric harm is likely to operate as an unconscious disincentive to rehabilitation, (iii) that permitting full recovery for purely psychiatric harm risks indeterminate liability and greatly increases the class of persons who may recover, and (iv) that liability for purely psychiatric harm may impose an unreasonable or disproportionate burden on defendants. …

193. Several points may be made here. First, the concerns underlying propositions (i), (ii) and (iv) apply, to varying degrees, in cases of purely physical injury, yet it is not suggested that they justify denying a duty of care in that category of case. Secondly, many of these concerns recede if full force is given to the distinction between emotional distress and a recognisable psychiatric illness. … In Australia, as in England, Canada and New Zealand, a plaintiff who is unable affirmatively to establish the existence of a recognisable psychiatric illness is not **[496]** entitled to recover: *Jaensch v Coffey* (1984) 155 CLR 549 at 587. Grief and sorrow are among the "ordinary and inevitable incidents of life" (*Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 at 416); the very universality of those emotions denies to them the character of compensable loss under the tort of negligence. Fright, distress or embarrassment, without more, will not ground an action in negligence. …

194. … Properly understood, the requirement to establish a recognisable psychiatric illness reduces the scope for indeterminate liability or increased litigation. It restricts recovery to those disorders which are capable of objective determination. To permit recovery for recognisable psychiatric illnesses, but not for other forms of emotional disturbance, is to posit

a distinction grounded in principle rather than pragmatism, and one that is illuminated by professional medical opinion rather than fixed purely by idiosyncratic judicial perception. …

195. Thirdly, the law of negligence already supplies its own limiting devices. In *Bourhill v Young* [1943] AC 92 at 107-108, Lord Wright said that in cases of "nervous shock" a crucial point was that the plaintiff cannot build on a wrong to someone else, such as the victim of the accident observed by the plaintiff. This suggests caution in the use of the terms "primary" and "secondary" victim. It has been observed earlier in these reasons under the heading "Control mechanisms" that, in requiring a plaintiff to establish fault, causation and a lack of remoteness of damage, the ordinary principles of negligence circumscribe recovery. Further, the tort of negligence requires no more than reasonable care to avert reasonably foreseeable risks. Breach will not be established if a reasonable person in the defendant's position would not have acted differently. The touchstone of liability remains reasonableness of conduct.

196. The asserted grounds for treating psychiatric harm as distinctly different from physical injury do not provide a cogent basis for the erection of exclusionary rules that operate in respect of the former but not the latter. To the extent that any of these concerns are not adequately met in particular categories of case by the operation of the ordinary principles of negligence, they may be accommodated, in the manner explained later in these reasons, by defining the scope of the duty of care with reference to values which the law protects.

[497] *Normal fortitude*

197. The attention given to this notion by both the Court of Appeal in *Tame* and the Full Court in *Annetts* may suggest that a plaintiff has no action unless he or she be an individual of "normal fortitude". The concept is said to derive from a passage in the speech of Lord Wright in *Bourhill v Young* at 109-110. However, it is made plain in that passage that the attention to the notional person of "normal fortitude" is the application of a hypothetical standard that assists the assessment of the reasonable foreseeability of harm, not an independent pre-condition or bar to recovery. His Lordship said at 110:

> It is here, as elsewhere, a question of what the hypothetical reasonable man, viewing the position, I suppose ex post facto, would say it was proper to foresee. What danger of particular infirmity that would include must depend on all the circumstances, but generally, I think, a reasonably normal condition, if medical evidence is capable of defining it, would be the standard. The test of the plaintiff's extraordinary susceptibility, if unknown to the defendant, would in effect make him an insurer. …

199. However, it does not follow that it is a pre-condition to recovery in any action for negligently inflicted psychiatric harm that the plaintiff be a person of "normal" emotional or psychological fortitude or, if peculiarly susceptible, that the defendant know or ought to have known of that susceptibility. The statement by Spigelman CJ in the Court of Appeal in *Tame* that a plaintiff "cannot recover for 'pure' psychiatric damage unless a person of 'normal fortitude' would suffer psychiatric damage by the negligent act or omission" should not be accepted. Windeyer J observed in *Pusey* (1970) 125 CLR 383 at 405-406 that the notion of a "normal" emotional susceptibility, in a population of diverse susceptibilities, is imprecise and artificial. The imprecision in the concept renders it inappropriate as an absolute bar to recovery. Windeyer J also pointed out that the contrary view, with its attention to "normal fortitude" as a condition of liability, did not stand well with the so-called "egg-shell skull" rule in relation to the assessment of damages for physical harm.

200. Analysis by the courts may assist in assessing the reasonable foreseeability of the relevant risk. The criterion is one of *reasonable* foreseeability. Liability is imposed for consequences which the defendant, judged **[498]** by the standard of the reasonable person, ought to have foreseen: *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)* [1961] AC 388 at 423. …

201. However, the concept of "normal fortitude" should not distract attention from the central inquiry, which is whether, in all the circumstances, the risk of the plaintiff sustaining a recognisable psychiatric illness was reasonably foreseeable, in the sense that the risk was not far-fetched or fanciful: see *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 48. It may be that, in some circumstances, the risk of a recognisable psychiatric illness to a person who falls

outside the notion of "normal fortitude" is nonetheless not far-fetched or fanciful. If that is so, it is then for the tribunal of fact to determine what a reasonable person would do by way of response to the risk, in the manner indicated in *Wyong Shire Council v Shirt*. Where the plaintiff's response to the defendant's conduct is so extreme or idiosyncratic as to render the risk of that response far-fetched or fanciful, the law does not require the defendant to guard against it. …

203. Nonetheless, questions of reasonable foreseeability are not purely factual. Expert evidence about the foreseeability of psychiatric harm is not **[499]** decisive. Such evidence cannot usurp the judgment that is required of the decision-maker. Further, it is not necessary that the particular type of disorder that eventuated be reasonably foreseeable; it is sufficient that the class of injury, psychiatric illness, was foreseeable as a possible consequence of the defendant's conduct: *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383. So much follows from the proposition that liability does not depend upon "the capacity of a reasonable man to foresee damage of a precise and particular character or upon his capacity to foresee the precise events leading to the damage complained of": *Chapman v Hearse* (1961) 106 CLR 112 at 121. If liability be established by application of these criteria, then, consistently with the approach tentatively favoured by Windeyer J in *Pusey* (at 406), the "egg-shell skull" rule applies to the assessment of damages.

Sudden shock …

205. In *Jaensch v Coffey* (1984) 155 CLR 549, Brennan J stated (at 565) that:

> [a] plaintiff may recover only if the psychiatric illness is the result of physical injury negligently inflicted on him by the defendant or if it is induced by 'shock'. Psychiatric illness caused in other ways attracts no damages, though it is reasonably foreseeable that psychiatric illness might be a consequence of the defendant's carelessness. The spouse who has been worn down by caring for a tortiously injured husband or wife and who suffers psychiatric illness as a result goes without compensation; a parent made distraught by the wayward conduct of a brain-damaged child and who suffers psychiatric illness as a result has no claim against the tortfeasor liable to the child.

Mrs Coffey's psychiatric illness was in fact sustained through the "shock" of seeing her severely injured husband at the hospital shortly after his motor vehicle accident. Accordingly, in a sense, his Honour's remarks were not essential for the decision. Brennan J explained that he understood "shock" in this context to mean (at 567):

> the sudden sensory perception – that is, by seeing, hearing or touching – of a person, thing or event, which is so distressing that the perception of the phenomenon affronts or insults the plaintiff's mind and causes a recognizable psychiatric illness. A psychiatric illness induced by mere knowledge of a distressing fact is not compensable; perception by the plaintiff of the distressing phenomenon is essential. If mere **[500]** knowledge of a distressing phenomenon sufficed, the bearers of sad tidings, able to foresee the depressing effect of what they have to impart, might be held liable as tortfeasors.

The last sentence of this passage suggests that a desire to avoid imposing liability on the "bearers of sad tidings" justified, at least in part, the requirements of "sudden shock" and "direct perception" which his Honour identified. As will appear, the approach we favour denies, for policy reasons, liability on the part of bearers of bad news without invoking requirements or distinctions which appear to have an insecure basis in contemporary psychiatry.

206. No other member of the Court in *Jaensch v Coffey* expressly adopted the requirement of "sudden shock". The remarks of Deane J (at 601) (with whom Gibbs CJ agreed generally) are inconclusive and neither Murphy J nor Dawson J directly considered the issue. Subsequent authority in the House of Lords has identified "sudden shock" as a distinct and necessary element of liability: *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310. … However, in the absence of acceptance by a majority of this Court of the need to establish "sudden shock", it is not a settled requirement of the common law of Australia.

207. With respect to those who espouse it, a "sudden shock" requirement would have no root in principle and therefore would be arbitrary and inconsistent in application. As a growing body of criticism has pointed out (see *Gifford v Strang Patrick Stevedoring Pty Ltd*

(2001) 51 NSWLR 606 at 616), individuals may sustain recognisable psychiatric illnesses without any particular "sudden shock". … The pragmatic justifications for the rule are unconvincing, for the reasons given earlier at [192] to [196]. The harsh and arbitrary operation of the rule has attracted judicial criticism in various jurisdictions: *Campbelltown City Council v Mackay* (1989) 15 NSWLR 501 at 503-504 per Kirby P. …

208. Assuming that the other elements of the cause of action have been made out, liability in negligence, for which damage is the gist of the action, should turn on proof of a recognisable psychiatric disorder, not on the aetiology of that disorder. …

[501] 210. Cases of protracted suffering, as opposed to "sudden shock", may raise difficult issues of causation and remoteness of damage. Difficulties of that kind are more appropriately analysed with reference to the principles of causation and remoteness, not through an absolute denial of duty. …

[502] 213. The requirement to establish "sudden shock" should not be accepted as a pre-condition for recovery in cases of negligently inflicted psychiatric illness.

Direct perception and immediate aftermath

214. This related "requirement" has not been authoritatively adopted by this Court as an essential ingredient in an action for negligence for psychiatric harm. …

[503] 218. Direct perception of a distressing phenomenon or its immediate aftermath appears to be a settled requirement of English law: *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310. The "immediate aftermath" includes the journey by ambulance to the hospital and the scene at the hospital itself. It was the lack of direct perception that precluded recovery in *Alcock* by plaintiffs who watched live television footage of the overcrowding at the football stadium at Hillsborough where their loved ones were crushed to death, or who heard of the events from friends or radio reports and only later saw recorded footage. Plaintiffs in that category could not establish the requisite propinquity in time and space to the incident or its immediate aftermath. …

[504] 221. A rule that renders liability in negligence for psychiatric harm conditional on the geographic or temporal distance of the plaintiff from the distressing phenomenon, or on the means by which the plaintiff acquires knowledge of that phenomenon, is apt to produce arbitrary outcomes and to exclude meritorious claims. … The rule is also disjoined from the realities of modern telecommunications which have developed greatly since this control factor was propounded. …

[505] 225. Distance in time and space from a distressing phenomenon, and means of communication or acquisition of knowledge concerning that phenomenon, may be relevant to assessing reasonable foreseeability, causation and remoteness of damage in a common law action for negligently inflicted psychiatric illness. But they are not themselves decisive of liability. To reason otherwise is to transform a factor that favours finding a duty of care in some cases into a general pre-requisite for a duty in all cases. This carries with it the risk of attribution of disproportionate significance to what may be no more than inconsequential circumstances.

Bearers of bad tidings

[506] 228. The content of a putative duty of care in novel categories of case accommodates itself to basic values which the corpus of the law promotes or protects. One relevant interest is that of the individual in the privacy of personal affairs: *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 185 ALR 1. On the other hand, the loved ones of a person who has been killed, injured or put in peril ordinarily have an interest in being told promptly of that circumstance and the law encourages the free and prompt supply of the relevant information to those persons. It is for this reason that, in the absence of a malign intention, no action lies against the bearer of bad news for psychiatric harm caused by the manner in which the news is conveyed or, if the news be true, for psychiatric harm caused by the fact of its conveyance. The discharge of the responsibility to impart bad news fully and frankly would be inhibited by the imposition in those circumstances of a duty of care to avoid causing distress to the recipient of the news. There can be no legal duty to break bad news gently. This is so even if degrees of tact and diplomacy were capable of objective

identification and assessment, which manifestly they are not. Neither carelessness nor insensitivity in presentation will found an action in negligence against the messenger.

229. It is unnecessary here to consider in any detail two further questions. The first is whether carelessness in the accuracy of a message conveyed, as opposed to the manner or fact of its conveyance, may attract liability for negligently inflicted psychiatric illness. *Barnes v The Commonwealth* (1937) 37 SR (NSW) 511, decided by the New South Wales Full Court as long ago as 1937, indicates that at least in some situations there may be liability even where the defendant does not know the information is incorrect. In *Barnes*, the Full Court overruled a demurrer to a declaration by the plaintiff that she had suffered "nervous shock" upon being incorrectly informed, by memorandum sent by an officer of the Commonwealth Invalid and Old-Age Pensions Office, that her husband had been admitted to a mental hospital.

230. The second matter is whether, where the tortious conduct may be identified independently from the communication of its consequences, liability attaches to the former but not to the latter. This will be most apparent when the tortfeasor and the messenger are different parties. Why should a separately identifiable tortfeasor be sheltered from liability in the same manner as one who conveys information about the distressing consequences of the tortfeasor's **[507]** conduct? Thus it may be necessary on an appropriate occasion to reconsider the suggestion by Windeyer J in *Pusey* (at 407) that, "[i]f the sole cause of shock be what is told or read of some happening" then, in the absence of intention to cause "nervous shock" no action lies against *the person who caused the event* which the bearer of bad news relates. A proposition of that breadth appears to import a requirement of "direct perception" which, for the reasons given earlier, is an unsound criterion of liability for negligently inflicted psychiatric harm.

The outcome in Tame v New South Wales

231. It is unlikely that an investigating police officer owes a duty of care to a person whose conduct is under investigation. Such a duty would appear to be inconsistent with the police officer's duty, ultimately based in the statutory framework and anterior common law by which the relevant police service is established and maintained fully to investigate the conduct in question: *Hill v Chief Constable of West Yorkshire* [1989] AC 53. Counsel for Mrs Tame submitted that Mrs Tame's conduct was not under investigation at the time the traffic collision report was completed. It was said that Mrs Tame was an accident victim in respect of whom there was no suspicion of any criminal offence. However, it is unnecessary to pursue that question, because, for the reasons that follow, Mrs Tame's action fails at the outset.

232. No case in negligence can be made out against the respondent in respect of the conduct of Acting Sergeant Beardsley. This is because a reasonable person in Acting Sergeant Beardsley's position would not have foreseen that his conduct in carelessly completing the traffic collision report involved a risk of causing a recognisable psychiatric illness to the appellant. It may be conceded that it was reasonably foreseeable that such carelessness may cause surprise, distress or anger, particularly as the report was likely to be distributed to the appellant's insurer and could be accessed, for a fee, by members of the public. However, it also was reasonably foreseeable (a) that an erroneous recording of the appellant's blood alcohol level, once detected, would promptly be rectified, given the obvious nature of an error which attributed to both drivers precisely the same blood alcohol content and (b) that, if pressed, the Police Service would offer a formal apology in respect of any such error, as subsequently occurred here.

233. But it was not reasonably foreseeable that a person in the position of Mrs Tame would sustain a recognisable psychiatric illness from a clerical error which she was told was a mistake that had been rectified and in respect of which she received a formal apology. The appellant's reaction was extreme and idiosyncratic. The risk of such a reaction was far-fetched or fanciful and, in the manner indicated in *Wyong Shire Council v Shirt* (1980) 146 CLR 40, was not one which the law of negligence required a reasonable person to avoid. …

234. … **[508]** The question of reasonable foreseeability involves an assessment respecting the foresight of a reasonable person in the defendant's position; that foresight may

differ from the foresight of qualified psychiatrists. The judgment belongs, ultimately, to a court, not to an expert witness. In making that judgment, a court will draw upon its reserves of common sense and reasonableness.

235. The appeal in *Tame* should be dismissed with costs.

The outcome in Annetts v Australian Stations Pty Ltd

236. The Full Court erred in failing to apply the ordinary principles of the tort of negligence, unhindered by artificial constrictions based on the circumstance that the illness for which redress was sought was purely psychiatric. In particular, neither the lack of the applicants' direct perception of their son's death or its immediate aftermath, nor the circumstance that the applicants may not have sustained a "sudden shock", is fatal to the applicants' claims. In accordance with the ordinary principles of negligence applied to the assumed facts, the respondent owed the applicants a duty of care. The preliminary issue formulated by Heenan J should be resolved in the affirmative.

237. The connections between the parties indicate the existence of a duty of care. An antecedent relationship between the plaintiff and the defendant [eg the relationship between employee and employer as in *New South Wales v Seedsman* [2000] NSWCA 119], especially where the latter has assumed some responsibility to the former to avoid exposing him or her to a risk of psychiatric harm, may supply the basis for importing a duty of care. …

238. A duty to avert psychiatric harm in these circumstances finds some, necessarily imperfect, analogy in cases of negligent misstatement causing pure economic loss, where a duty of care may arise with an assumption of responsibility by the defendant and reasonable reliance by the plaintiff: *Tepko Pty Ltd v Water Board* (2001) 206 CLR 1.

239. In the present case, the applicants sought and obtained from the **[509]** respondent assurances that James would be appropriately supervised. The respondent undertook specifically to act to minimise the risk of harm to James and, by inference, to minimise the risk of psychiatric injury to the applicants. In those circumstances, the recognition of a duty of care does not raise the prospect of an intolerably large or indeterminate class of potential plaintiffs.

240. The applicants had no way of protecting themselves against the risk of psychiatric harm that eventuated. In that regard, nothing turns upon which of the situations postulated by Ipp J in the Full Court as to the time that harm was sustained may be established at trial of the remaining issues in the action. The control over the risk of harm to James, and the risk of consequent psychiatric harm to the applicants, was held to a significant, perhaps exclusive, degree by the respondent. It controlled the conditions under which James worked.

241. Is there, to adapt what was put and rejected on the facts in *Bryan v Maloney* (1995) 182 CLR 609 at 623-624, any real question of inconsistency between the existence of a duty of care to the parents of James and the legitimate pursuit by the respondent of its business interests? The answer is in the negative. It is likely that the respondent's duty of care to the applicants to exercise reasonable care to avoid causing them psychiatric injury with respect to James' death in the course of his employment by it was, at most, co-extensive with the tortious and express or implied contractual duties that it had owed to James directly as his employer.

242. The application for special leave in *Annetts* should be granted and the appeal allowed. The orders of the Full Court dated 21 November 2000 should be set aside. In their place it should be ordered that the appeal to that Court be allowed, that the question posed by Heenan J in the schedule to his order for the trial of a preliminary issue dated 5 May 1999 be answered "Yes" … .

[In separate judgments, Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ agreed that the appeal in *Tame* should be dismissed and that the appeal in *Annetts* should be allowed. However, the members of the court expressed a diversity of reasons for reaching these conclusions.

Gleeson CJ agreed with Gummow and Kirby JJ that "sudden shock" and "direct perception" are not requirements of Australian law and noted that "normal fortitude cannot be regarded as a separate and definitive test of liability".

Gaudron J rejected the requirement of "direct perception" and observed that "ordinarily, 'normal fortitude' will be a convenient means of determining whether a risk of psychiatric injury is foreseeable" and that "no aspect of the law of negligence renders 'sudden shock' critical either to the existence of a duty of care or to the foreseeability of a risk of psychiatric injury".

McHugh, Hayne and Callinan JJ held that a duty of care in respect of psychiatric injury requires reasonable foreseeability of injury of that kind to a person of normal (or, in the words of Hayne J, "reasonable or ordinary") fortitude. In view of the pre-existing relationship between the applicants and the respondent in *Annetts*, McHugh J found it unnecessary to consider whether "the special rules" relating to psychiatric injury represent current Australian law. Hayne J held that "rules requiring direct impact of events upon the senses of the plaintiff" should be discarded in the context of psychiatric injury. Callinan J favoured retention of a requirement of "sudden shock" and a requirement of "direct perception". In Callinan J's opinion both these requirements were satisfied in *Annetts*.]

Tame v New South Wales
Appeal dismissed

Annetts v Australian Stations Pty Ltd
Appeal allowed

[Editorial comment

This extract replaces the extract of the decision of the Supreme Court of Western Australia, Full Court in *Annetts v Australian Stations Pty Ltd* (Chapter 5 p 146). The reassessment by the High Court in *Tame* and *Annetts* of the Australian common law on liability for negligently inflicted psychiatric injury has displaced the 1984 decision of the High Court in *Jaensch v Coffey* (Chapter 5 p 126) as the leading Australian case on this topic. The 1992 decision of the House of Lords in *Alcock v Chief Constable of South Yorkshire Police* (Chapter 5 p 136) remains of comparative interest.

In *New South Wales v Napier* [2002] NSWCA 402, Mason P, with whom Meagher JA agreed, made the following observations about the decision of the High Court in *Tame*:

> 67. The reasons of the majority justices in *Tame* establish that there is no hard and fast line dividing cases based on pure psychiatric injury and other cases of personal injury as regards the criteria for determining whether a duty of care exists. In particular, there is no pre-requisite of the plaintiff's "direct perception" of a traumatic incident, nor need there be a "sudden shock".
>
> 68. The majority in *Tame* have also rejected any requirement to show that the plaintiff was a person of "normal fortitude" … .

Compare *Gahagan v Taylor Bros (Slipway & Engineering) Pty Ltd* (2003) Aust Torts Reports ¶81-687; [2002] TASSC 115 where Evans J in the Supreme Court of Tasmania said:

> 4. In *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 191 ALR 449, the High Court rejected the use of three control mechanisms which have been applied by courts when determining whether a duty of care exists in relation to a claim for psychiatric injury. These mechanisms are:

* the requirement that a plaintiff directly perceive a distressing phenomenon or its immediate aftermath;
* the requirement that the psychiatric injury be caused by a sudden shock; and
* the requirement that liability for psychiatric harm be assessed by reference to a hypothetical person of normal fortitude.

A report published in *The Australian*, 18 March 2003, WA Country Edition, stated that the claim for damages for psychiatric injury by Mr and Mrs Annetts against Australian Stations Pty Ltd had been settled on terms favourable to the plaintiffs.]