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Claims for Psychological Injury

The common law in Australia in relation to compensation for psychological or psychiatric injury has developed cautiously, with a distinction drawn between psychiatric injury and physical injury.

That distinction has been determined by four central principles, each of which has been used to justify limiting the situations in which compensation is recoverable for pure psychiatric injury. Those principles were summarised by Gummow and Kirby JJ in *Tame v New South Wales*; *Annetts v Australian Stations Pty Ltd* [2002] HCA 35; (2002) 191 ALR 449 ('*Tame* and *Annetts*') at [192]:

- 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
- litigation in respect of purely psychiatric harm is likely to operate as an unconscious disincentive to rehabilitation
- permitting full recovery for purely psychiatric harm risks indeterminate liability, and
- liability for purely psychiatric harm may impose an unreasonable or disproportionate burden on defendants.

Recognisable Psychiatric Injury

In the absence of a physical injury, mental or emotional distress or suffering (including emotions such as grief, sorrow, distress, worry, anxiety, disappointment, anger, outrage) will generally not be compensable – a recognisable psychiatric injury or illness is required. In *Tame* and *Annetts*, the High Court confirmed that in seeking compensation for psychiatric injury in an action for negligence it must be established that a plaintiff suffers from a recognisable psychiatric illness. Gummow and Kirby JJ noted that:

> In Australia…a plaintiff who is unable affirmatively to establish the existence of a recognisable psychiatric illness is not entitled to recover. Grief and sorrow are among the "ordinary and inevitable incidents of life"; 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. [193]

The Australian position accordingly remains far removed from the American common law which has identified the right of each individual to have their peace of mind protected, with a consequent right to recover for negligent infliction of emotional distress.

In order to receive compensation under the *Safety, Rehabilitation and Compensation Act 1988* ('the SRC Act') for an injury to the mind it is not necessary for a plaintiff to identify a condition with the label of a recognised medical condition. It is,

however, essential for them to demonstrate that he or she is suffering from 'a condition that is outside the boundaries of normal mental functioning and behaviour'. Therefore a compensable injury or disease cannot exist when the employee is 'not mentally ill or mentally disturbed or suffering from any psychological disorder' (*Comcare v Mooi* (1996) 137 ALR 690).

THE ROLE OF DSM-IV

It is often difficult to assess whether a psychiatric injury or illness exists. This is particularly the case because the assessment of whether an injury or illness exists may often turn upon a plaintiff's subjective reporting of various matters, rather than verifiable, objective proof.

However, diagnostic tools such as the American Psychiatric Associations' *Diagnostic and Statistical Manual of Mental Disorders* 4th edition, Text Revision (2000) ('DSM-IV'), provide some clarity. The DSM-IV sets out diagnostic criteria for the various known mental disorders and can be of significant assistance in determining whether a recognisable psychiatric injury (or 'injury' or 'disease' within the meaning of the SRC Act) has been suffered.

Determining this question by reference to the DSM-IV occurs relatively frequently in courts and tribunals (see, for example, *Cook and Repatriation Commission* [2001] AATA 269 at [37]; *McAuslan v Australian Overseas Communications Corporation Limited* [1992] ACTSC 111 at [102] and *Morgan v Tame* [2000] NSWCA 121 at [99]).

However, the DSM-IV should not be considered conclusive in this regard. In *NSW v Seedsman* [2000] NSWCA 119 Spigelman CJ stated:

> The DSM-IV is certainly not written as legislation. It describes, in terms which should be taken as guidelines rather than strict boundaries, a condition which a clinician may diagnose when certain criteria are met.

DSM-IV is not a statutory formulation which a court must construe and decide whether its requirements are satisfied. It is, as its title suggests, a diagnostic manual for clinical use. (See also *Budworth v Repatriation Commission* [2001] FCA 317; (2001) 33 AAR 48 at [57]–[59] and *Tame* and *Annetts* at [293] ff.)

DAMAGES AWARDED WITHOUT PSYCHIATRIC INJURY

Damages can be awarded for mental distress that does not constitute a recognisable psychiatric illness where such distress has been suffered as the result of the commission of some other wrong. Such damages are sometimes referred to as 'parasitic damages' because they are awardable only where they can be attached to some recognised wrong other than negligence – usually an intentional tort. For example, if an assault, battery or false imprisonment has occurred and physical harm or inconvenience results, damages for mental distress may be added to the main award for damages (see, for example, *Hurst v Picture Theatres* [1915] 1 KB 1).

Parasitic damages for mental distress are also available in relation to actions for trespass to land (see, for example, *Waters v Maynard* (1924) 24 SR (NSW) 618), torts involving interference with goods (see, for example, *Graham v Voigt* (1989) 89 ACTR 11), defamation and most torts involving pure economic loss such as deceit, interference with contract and infringement of copyright.

In breach of contract actions damages are not recoverable for anxiety, disappointment, distress and other normal emotions which fall short of a recognisable psychiatric injury or illness unless there is an implied or express term of the contract that the promisor will provide pleasure, enjoyment or personal protection for the promisee. Damages will also be recoverable for distress or disappointment consequent upon the suffering of physical inconvenience as a result of a breach of contract.

(See, for example, *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 405, per McHugh J; *Jarvis v Swans Tours Ltd* [1973] QB 233.)

It also appears that damages for mental distress may be awarded in claims based on a contravention of a statute such as the *Trade Practices Act 1974* (Cth) (*Aldersea v Public Transport Corporation* [2001] 3 VR 499 at 506–507).

Negligence and Psychiatric Injury

The common law has developed slowly in relation to pure psychiatric injury caused by negligence. Initially, damages for psychiatric injury were only recoverable if they were consequent upon the plaintiff's own injuries (*Victorian Railway v Coultas* (1888) 13 App Cas 222). However, the right of the plaintiff to recover damages for pure psychiatric injury gradually increased as cases arose which highlighted the arbitrary and unjust manner in which the rule against damages for pure psychiatric injury operated. Three rules had emerged to limit the circumstances in which a plaintiff could recover damages for psychiatric injury, namely:

- the sudden or nervous shock rule – pure psychiatric injury is only compensable if it arose from a 'sudden affront of the senses'
- the direct perception rule – only persons who directly perceive a tortious event or its immediate aftermath and have close and intimate relationship with the primary victim of the negligence can recover damages for pure psychiatric injury; and
- the normal fortitude rule – a person cannot recover for pure psychiatric damage unless it was reasonably foreseeable that a person of normal fortitude would have suffered from a psychiatric injury as a result of the negligent act or omission.

These rules were considered by the High Court in *Tame* and *Annetts*.

Tame and *Annetts*

In 1991, Mrs Tame was involved in a motor vehicle collision. The other driver, who was at fault, had a blood alcohol content reading of 0.14. Mrs Tame tested negative to the blood alcohol test but the police officer completing the accident report, mistakenly recorded her blood alcohol as 0.14. This error was detected within a short period and corrected. However, before that amendment was made, a copy of the incorrect accident report had been provided to the insurer of the driver at fault.

When Mrs Tame discovered this information, she became distressed, worrying about how many people would be told and the effect it would have on her reputation, even though the report had been corrected and the NSW police service made a formal apology. Mrs Tame consequently developed a psychotic depressive illness. Medical evidence was provided that she was predisposed to psychotic depression, a susceptibility of which the police officer could not have been aware.

In the case of *Annetts*, Mr and Mrs Annetts' son, James, went to work as a jackeroo for Australian Stations in Western Australia as a 16 year old. The Annetts, being particularly concerned about the safety of their son in such a harsh working environment, contacted Australian Stations. They only agreed to allow their son to work for Australian Stations after making enquiries as to the safety arrangements that would be put in place for James and being assured that he would be under constant supervision. However, despite those assurances, after only 7 weeks he was sent to work alone as a caretaker in a remote location.

In December 1986 it was discovered that James was missing and likely to be in grave danger. Mr and Mrs Annetts were informed of this over the phone by police and Mr Annetts subsequently collapsed. A prolonged search for James then ensued leading to the discovery of his bloodstained hat in January

1987 and finally his body in April. On the basis of medical evidence, it was concluded that James had died in December 1986 as a result of dehydration, exhaustion and hypothermia.

Sudden shock

One of the grounds upon which the Full Court of the Supreme Court of Western Australia found against the Annetts was that their psychiatric injuries had arisen over a period of time as opposed to arising from sudden or nervous shock after learning of the disappearance of their son.

By a majority the High Court rejected the proposition that only psychiatric injury suffered as a result of a 'nervous shock', in the sense of a 'sudden affront to the senses', creates an entitlement to compensation. The majority's position is summarised by Gleeson CJ's comments at [36]:

> The process by which the applicants became aware of their son's disappearance, and then his death, was agonizingly protracted, rather than sudden. And the death by exhaustion and starvation of someone lost in the desert is not an 'event' or a 'phenomenon' likely to have many witnesses. But a rigid distinction between psychiatric injury suffered by parents in those circumstances, and similar injury suffered by parents who see their son being run down by a motor car, is indefensible.

Direct perception

The Full Court of the Supreme Court of Western Australia had also found that there was no direct perception by the Annetts with their own senses of a distressing phenomenon on 6 December 1986, when they were informed of James' disappearance. Therefore, as there had there been no direct perception of an event (namely James' death) or its immediate aftermath, the Annetts were not entitled to compensation for psychiatric injury.

By a majority, this rule was also rejected. As Gaudron J concluded at [51]:

> To treat those who directly perceive some distressing phenomenon or its aftermath and those identified in *Jaensch v Coffey* as the only persons who may recover for negligently caused psychiatric harm is, as Gummow and Kirby JJ point out, productive of anomalous and illogical consequences. More fundamentally, it is to limit the categories of possible claimants other than in conformity with the principle recognised in *Donoghue v Stevenson*, namely, that a duty of care is owed to those who should be in the contemplation of the person whose acts or omissions are in question as persons closely and directly affected by his or her acts. Accordingly, the "direct perception rule" is not and cannot be determinative of those who may claim in negligence for pure psychiatric injury.

Nonetheless:

- the relationships between the primary victim of the negligence and the plaintiff, the plaintifff and the defendant
- the physical and temporal distance of the plaintiff from the distressing event, and
- the manner in which they became aware of the distressing event

will remain important, finding reflection in whether or not the prospect of the plaintiff suffering a psychiatric injury was reasonably foreseeable (Gleeson CJ at [18], Gaudron J at [52], Gummow and Kirby JJ at [225]).

Normal fortitude

In *Tame*, New South Wales Court of Appeal found that it was not reasonably foreseeable that a person of normal fortitude would sustain psychiatric injury from a clerical mistake of the kind involved in the accident report form. Similarly, in *Annetts* it was held that it was not reasonably foreseeable that

parents of normal fortitude would suffer from a psychiatric injury as a result of hearing of the death of their son.

By a majority, the High Court rejected the notion that the normal fortitude of a plaintiff needs to be established as a separate independent test of liability (Gleeson CJ at [16]). Nonetheless, it was accepted that the notion of 'ordinary fortitude' should have continuing relevance in relation to whether or not psychiatric injury is reasonably foreseeable. That is, the consideration of whether a person in the defendant's position should reasonably have foreseen an injury of such a kind as that sustained by the plaintiff will likely be assisted by a reference to a person of normal fortitude.

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.

Of course, this is to be distinguished from a situation where a defendant is aware of a particular vulnerability or susceptibility of the plaintiff to psychiatric injury, in which case the person of normal fortitude may be irrelevant.

The High Court's decision

The High Court unanimously dismissed Mrs Tame's action as, amongst other reasons, the police officer who had made a mistake on the accident report form could not have reasonably foreseen that Mrs Tame would suffer from a psychiatric injury as a result of that error.

In *Annetts*, the High Court unanimously upheld the Annetts' claim, the majority finding that they should be compensated for their psychiatric injury as it was a reasonably foreseeable consequence of the negligence of Australian Stations. Gleeson CJ stated at [38]:

> No one would doubt the foreseeability of psychiatric injury to the [Annetts] if they had seen their son being run over by a car, or trampled by a stock horse. The circumstances of his disappearance and death were such that injury of that kind was more, rather than less, foreseeable.

Conclusion

In claims for pure psychiatric injury based on negligence, the standard elements of negligence must be shown, namely a duty of care to take steps to reduce the risk of such injury being suffered, a breach of that duty of care, causation and reasonably foreseeable loss that is not too remote.

The High Court has replaced the arbitrary tests which had applied to psychiatric injury in preference for 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.

It follows that the abolition of the rules relating to psychiatric injury will arguably have only a limited impact upon the success of claims for such injuries. The requirements of relational, physical and temporal proximity will be relaxed to a degree by the Courts, but it appears likely that only a few cases will be successful where a plaintiff claims for pure psychiatric injury other than in circumstances where:

- 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
- the plaintiff was likely to be particularly traumatised due to the relationship with the primary victim of the negligence.

The greatest change affected by *Tame* and *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.

Civil law reform

After the High Court handed down its decision in *Tame* and *Annetts*, Mr Justice Ipp submitted the final report of the *Review of the Law of Negligence* (available at <http://revofneg.treasury.gov.au/content/review2.asp>). The report recommends that the state of the law following *Tame* and *Annetts* be promoted by a legislative statement embodying the following principles:

(a) the mental harm suffered must consist of a recognised psychiatric illness

(b) a defendant will not owe a plaintiff a duty of care to avoid pure mental harm unless the defendant ought to have seen that a person of normal fortitude might, in the circumstances, suffer a recognised psychiatric illness if reasonable care was not taken

(c) for the purposes of (b), the circumstances of the case include:

  – whether the mental harm was as a result of nervous shock
  – whether the plaintiff was at the scene or witnessed the aftermath
  – whether the plaintiff witnessed the events or the aftermath with their own senses
  – whether there was any pre-existing relationship between the plaintiff and the defendant
  – the nature of the relationship between the plaintiff and the person killed, injured or put in peril.

The report also recommended that damages for economic loss should only be recoverable for mental harm consequential upon physical harm if the plaintiff suffered a recognised psychiatric illness and it was foreseeable that the a person of normal fortitude might suffer such harm.

A number of States and Territories have acted upon these recommendations and passed legislation in those terms (these changes will be addressed in a forthcoming *Legal Briefing*). This has had a direct and immediate impact upon claims seeking damages for pure psychiatric injury.

Application of *Tame* and *Annetts*

The general principles in *Tame* and *Annetts* have also been applied in a number of other cases, particularly with respect to the Court's comments regarding reasonable foreseeability. Gleeson CJ pointed out that reasonable foreseeability may be relevant to questions of the existence and scope of a duty of care, breach of duty or remoteness of damage, and emphasised that the fundamental process in examining a defendant's conduct was its reasonableness (at [8]). Gummow and Kirby JJ also noted the importance of the analysis of the defendant's conduct in order to reconcile the plaintiff's interest in protection from harm with the defendant's interest in freedom of action (at [183]).

McHugh and Hayne JJ considered reasonable foreseeability was an 'undemanding' test, such that as long as an injury was not a fanciful or far fetched result of the particular negligence, it would be reasonably foreseeable. The fact that they considered the test failed to take in to account the reasonableness of the defendant's conduct appears to be a strong factor in their conclusions that the pre-existing rules in relation to psychiatric injury should not be readily disregarded.

These comments focusing on the reasonableness of a defendant's conduct have been applied in a number of negligence claims for physical injury.

- The NSW Court of Appeal in *Rundle v State Rail Authority* [2002] NSWCA 354, in finding that the plaintiff who was injured whilst squeezing through a window on a double-decker train to spray graffiti on the roof was not entitled to compensation, referred to the High Court comments in relation to reasonableness identified above. Applying those comments, the Court of Appeal found that the claim of the plaintiff did not accord with reason and so, although the injury he suffered was reasonably foreseeable, he should not recover damages.

- *Proprietors of Strata Plan 17226 v Drakulic* [2002] NSWCA 381 was concerned with an action for damages when the plaintiff was attacked in the entrance foyer of the apartment building owned by the defendants. She sued the defendants as the lock on the security door was defective. The Court of Appeal referred to Gleeson CJ's comments on reasonableness in relation to negligence. It then concluded that, in the context of the extent to which control may have potentially been exercised over the assailant by the defendants, reasonableness would not have required the defendant to obtain that control.

- In *MA v Keane* [2003] NSWCA 50, Filler JA (with whom Santow JA and Gzell J agreed) referred to the passage of McHugh J in *Tame* to emphasise the importance, when considering negligence, to take into account all reasonable conduct.

It therefore appears, on the basis of the initial application of *Tame* and *Annetts* by superior courts in Australia, that the concept of reasonable foreseeability and the reasonableness of the conduct of a defendant, having received considerable emphasis by the High Court, will now receive greater attention, arguably to the benefit of defendants.

Defending Claims

CASE PREPARATION In defending a claim for compensation based on psychological injury, thorough investigation and preparation is of vital importance. In most of these cases the plaintiffs will provide medical evidence that suggests they are suffering from a psychiatric illness. Such evidence can generally be tested in two ways.

Firstly, as in the majority of litigated matters regarding personal injury, often the most effective means of challenging a plaintiff's medical evidence is to demonstrate that the facts upon which a diagnosis or opinion are based are not accurate. Such information may be obtained through:

- the plaintiff's employers, colleagues, friends and/or family who are prepared to discuss the matter frankly
- video surveillance
- access to the plaintiff's sick leave and other employment records and medical records (by issuing subpoenas or otherwise).

Secondly, alternative expert evidence can be obtained. When seeking an alternative expert opinion, it is important to bear in mind that medical experts who are known to give favourable reports to defendants may not be as persuasive to a court or tribunal as experts who provide reports to both plaintiffs and defendants and have a reputation for not giving reports more favourable to one or the other.

After an expert is selected specifically for the task at hand, great care should be taken to brief the expert with all available information about the plaintiff that may be relevant to whether or not they suffer the injury alleged. Any facts known about the plaintiff that may be inconsistent with the history outlined in the plaintiff's medical reports should be highlighted, as should any other matters which may provide an alternative explanation for the onset of the plaintiff's

condition. Such experts should also generally be provided with the medical reports obtained by the plaintiff.

The questions posed to the expert should be carefully crafted to obtain evidence on the important aspects of the claim, and may include a request to comment on specific diagnoses reached by the plaintiff's doctors or other significant opinions expressed.

CAUSATION ISSUES An often overlooked basis for contesting a claim for damages based on psychological injury is that such an injury was the result of gradually developing processes in the plaintiff's life which would have taken place regardless of whether or not the tortious event had occurred, and so the element of causation cannot be satisfied. In such a case, the event is not the cause of the injury in the physical sense, but an event which the plaintiff projects onto, to enable them to cope with their already existing feelings (*Hoffmueller v Commonwealth* (1981) 54 FLR 48).

An illustration of a claim for psychological injury being defeated on this basis can be found in *Wodrow v Commonwealth of Australia* (1993) 45 FCR 52 where Gallop and Ryan JJ, after reviewing the medical evidence, made the following finding:

> We are not able to come to any other conclusion than that when the [tortious event occurred] the plaintiff's pre-existing personality traits had developed to such a stage that the [event] did not contribute to, but [was] rather the occasion for, the onset of the symptoms which the underlying disease of the plaintiff's personality would have produced in any event. That is not such a cause as will give rise to a claim for damages. Where a defendant's acts provide, as an interpersonal cause, merely the reason why a person suffered detriment, those acts will not always, in our opinion, provide a causal relationship for legal purposes. [83]

This phenomenon is described by the psychiatrist Dr Rod Milton as follows:

> Many people are by nature anxious and worry about details. They often cope well enough with life for years, particularly with the support of a devoted spouse; but as they age they become less resilient and are likely to respond adversely to every day troubles and conflicts. These people often become the subject of work-stress-based work compensation claims in their mid-40s, but careful analysis often shows that the particular response to stress experienced at work and claimed to cause incapacity was but an extension of previous personality patterns as demonstrated over the years in supervisors' reports or work attendance records.

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