



Session 4
Friday, 26/5/2006, 2.00pm

Pure psychiatric claims

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Pure Psychiatric Claims

by Judge D J McGill.

This paper is concerned with “pure” psychiatric injury, which term is used in contrast to psychiatric injury which is secondary to, or associated with, physical injury. It appears to be uncontroversial that, if the plaintiff has also suffered physical injury, if there is liability for the physical injury there is liability for the psychiatric injury as well, subject in theory (but rarely in practice) to issues of causation.¹ But a situation can often arise where the plaintiff is claiming to have suffered only psychiatric injury. In that situation, the focus has ordinarily been specifically on whether there is liability for psychiatric injury.

There is a useful monograph addressing the law in this area as at January 2004 by Professor Butler of the Queensland University of Technology,² which also covers the historical development of the law. It discusses three of the four recent decisions of the High Court in this area.

Classification of plaintiffs

Plaintiffs in such a situation are often divided into two categories, so called primary and secondary victims. Primary victims are those who are directly involved as the recipients of the relevant conduct on the part of the defendant, whereas secondary victims are those who are involved as spectators, or who otherwise suffer incidentally from injury or threat of injury to someone else. The distinction was made explicit by Lord Oliver in *Alcock v Chief Constable of South Yorkshire Police*³, and was subsequently confirmed by the House of Lords in *Page v Smith*⁴, where the majority

¹ Psychiatric injury can also be covered by an award of damages for defamation: *Rigby v Mirror Newspapers Ltd* (1963) 64 SR (NSW) 34; *Campbelltown City Council v Mackay* (1989) 15 NSWLR 501 at 511. It would probably be necessary for the plaintiff to have complied with the *Personal Injuries Proceeding Act* 2002.

² D Butler, “Damages for Psychiatric Injuries” (the Federation Press, 2004). See also his article at (2005) 2 Australian Civil Liability (3) 25.

³ [1992] 1 AC 310 at 407. This case involved a number of test claims by friends or relatives of people killed in the Hillsborough Stadium disaster.

⁴ [1996] AC 155. The plaintiff was involved in a motor vehicle accident, and suffered psychiatric injury but no physical injury. The House of Lords rejected the idea that psychiatric injury was not a reasonably foreseeable consequence of a collision of moderate severity, but said that so long as physical injury was reasonably foreseeable that was enough, and the plaintiff recovered. The

held that the position of primary and secondary victims was different. In the case of primary victims, it was held to be sufficient if physical injury to them was reasonably foreseeable, although presumably in cases where that did not apply recovery could also occur in a situation where psychiatric injury was reasonable foreseeable. In the case of secondary victims, however, certain control mechanisms were applied to restrict liability; these control mechanisms were a degree of proximity both in time and space and in relationship with the primary victim, direct perception of the incident or its aftermath rather than being told of it, and foreseeability of psychiatric injury to a person of normal fortitude.⁵

I do not want to dwell on the distinction between these categories under English law, because it seems clear that the position is different in Australia, in relation to both categories of plaintiff.⁶ However, I think the classification has some practical use. There is a possibility of overlap: for example, a person in the same vehicle as a loved one who is killed or injured may suffer no physical injury in the collision, but may suffer psychiatric injury partly as a result of exposure to the risk of physical injury, and partly as a result of the injury to the loved one. The advantage in classifying matters in this way is that it involves considering similar situations together. A further division of “primary victim” cases may be those where the plaintiff suffers psychiatric injury but was also at risk of physical injury (as in *Page v Smith*) and those where something which posed no risk of physical injury to the plaintiff nevertheless in fact produced an adverse psychiatric reaction.

In relation to the former category, it appears that the law in Australia is different from in England. In *Page v Smith* it was held that so long as physical injury to the plaintiff was reasonably foreseeable it was unnecessary to consider separately whether psychiatric injury was reasonably foreseeable; in effect, physical and psychiatric injury were treated as injuries of the same kind for the purpose of the foreseeability test. In doing so, the majority expressly rejected the approach of Deane J in *Jaensch v*

discussion of secondary victims was introduced to distinguish cases where these control factors had arisen in the past.

⁵ See *Hancock v Nominal Defendant* [2002] 1 Qd R 578 at [47].

⁶ In *Tame v New South Wales* (2002) 211 CLR 317 McHugh J at [93] expressly rejected the distinction as one recognised by the law in Australia.

*Coffey*⁷ that the relevant reasonable foreseeability was of psychiatric injury.⁸ On the other hand, the approach of Deane J has been consistently followed in Australia in this respect, and the authority of *Page* was expressly rejected by the New South Wales Court of Appeal,⁹ and does not appear to have gathered any support in the High Court. This means that in Australia, although one can for the purposes of categorisation consider separately primary victims who were foreseeably at risk of physical injury and primary victims who were not, that appears not to be determinative as to whether there was a duty.

The other important distinction is that the High Court in *Annetts v Australian Stations Pty Ltd*¹⁰ rejected all the control mechanisms proposed in respect of secondary victims, as control mechanisms, though they remained factors which are relevant to the existence of a duty. So in Australia, although it is not necessary to show that psychiatric injury was reasonably foreseeable to a person of normal fortitude, or that there was a close relationship between the primary victim and the plaintiff, it is certainly helpful to be able to show that.

Primary victims – recent cases

There have been four recent decisions dealing with pure psychiatric injury in the High Court, two involving primary victims¹¹ and two involving secondary victims.¹² The two primary victims were both plaintiffs who were not at risk of a physical injury, so necessarily the relevant issue was whether there was foreseeable risk of psychiatric injury. In *Tame v New South Wales*¹³ the High Court rejected a claim for psychiatric injury alleged to have been suffered because a police officer, who was investigating a motor vehicle accident involving the plaintiff, incorrectly recorded the other driver's blood alcohol level as relating to the plaintiff. The High Court held that there was no duty to the plaintiff, partly because psychiatric injury to a person of normal fortitude

⁷ (1984) 155 CLR 549.

⁸ Lord Lloyd suggested at p.195 that this was based on a misunderstanding of what Lord Porter had said in *Borhill v Young* [1943] AC 92, an unlikely proposition.

⁹ In *Morgan v Tame* (2000) 49 NSWLR 21 at [9], the decision which went on appeal to the High Court.

¹⁰ Reported with *Tame* at (2002) 211 CLR 317.

¹¹ *Tame* (supra) and *Koehler v Cerebos (Australia) Ltd* (2005) 79 ALJR 845.

¹² *Annetts* (supra) and *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269.

¹³ (2002) 211 CLR 317.

was not reasonably foreseeable as a result of such a mistake, but also because a duty to protect the plaintiff from distress would have been inconsistent with the defendant's public duty to investigate the motor vehicle accident in question.¹⁴

The court was obviously alive to the fact that police investigations are often stressful to a person being investigated,¹⁵ and that to impose a duty on police to take reasonable care to avoid psychiatric injury would make life very difficult for them. Because of this special circumstance, it is difficult to know to what extent the actual decision in *Tame* can be generalised, except perhaps to say that courts will be wary about imposing duty to avoid a psychiatric injury in circumstances where there is some conflicting obligation on the part of the defendant.

More recently the High Court considered a claim for psychiatric injury in an employment context: *Koehler v Cerebos (Australia) Ltd.*¹⁶ In that case the plaintiff claimed that she had suffered psychiatric injury as a result of having been subjected to unrealistic work requirements: the work she was expected to do was more than she could cope with in the time available. This claim succeeded at trial.¹⁷ It was found that the work-load was excessive, and that it was foreseeable that the plaintiff might suffer psychiatric injury as a result of the stress that she was placed in because of the unrealistic demands on her. That stress could have been removed by either increasing her hours¹⁸ or providing her with assistance, or presumably by reducing the amount of work that she was required to do.

The High Court on appeal expressly rejected at [19] an analysis that started from the proposition that an employer owes an employee a duty to take all reasonable steps to provide a safe system of work without any distinction between physical and psychiatric injury, and then analysing the question of whether there was a breach of

¹⁴ Gleeson CJ at [26]; Gaudron J at [57]; Hayne J at [298]; see also McHugh J at [126], Gummow and Kirby JJ at [231]. This aspect of the decision was followed by the Court of Appeal in *Hood v State of Queensland* [2003] QCA 408, together with *Sullivan v Moody* (2001) 207 CLR 562.

¹⁵ Particularly if he happens to be guilty. The same is true of a trial, if it goes that far: *R v Ford* [2006] QCA 142 at [195].

¹⁶ (2005) 79 ALRJ 845.

¹⁷ Perhaps unsurprisingly, in view of the wide statements as to the position of an employer by McHugh J in *Annetts* (supra) at [140] – [143]

¹⁸ She was employed to work on a part-time basis.

duty in the manner described in *Wyong Shire Council v Shirt*.¹⁹ Instead the court held that it was necessary to take account of the obligations which the parties owed one another under the contract of employment: [21]. The court also expressly rejected the approach of the English Court of Appeal²⁰ that the only question to be considered was whether this kind of harm to this particular employee was reasonably foreseeable.²¹

The majority²² said that in this case it was also relevant to consider that the employee had agreed to perform the duties, though in that particular case this was said to be of only limited significance: [28]. Nevertheless, the point was made that insistence upon performance of a contract cannot be a breach of a duty of care: [29]. Of greater importance was the finding that the employer had no reason to suspect that the appellant was at risk of psychiatric injury as a result of what she was doing. Although she complained about being overworked, there was no suggestion that her attempts to perform her duties were putting or would put her health at risk.

It seems to follow from *Koehler* that breach of the general duty of care of an employer will not be as readily accepted when the employer is alleged to have failed to avoid psychiatric harm. Although the case talks about foreseeability, that is not in the context of the existence of a duty, but in considering whether the employer's conduct was in breach of it. In that context, it was necessary to show that it was reasonably foreseeable by the employer that the particular plaintiff would suffer psychiatric injury from what was being done, and it was also relevant to consider what the particular plaintiff had actually agreed to do in the course of the employment.

The majority also referred to a host of other issues as being potentially relevant, without really explaining what impact they had on the actual decision, or why it was not necessary to consider them in that particular case. For example, they referred to the possible effect of anti-discrimination legislation at [21], but did not provide any guidance as to what might be that effect. If an employer is aware that a potential

¹⁹ (1980) 146 CLR 40 at 47-8.

²⁰ In *Hatton v Sutherland* (2002) ICR 613, [2002] 2 All ER 1

²¹ The emphasis here must be on "only". At [35] the majority accepted that *Hatton* was right to focus on the position of the plaintiff as an individual.

²² McHugh, Gummow, Hayne and Heydon JJ. Callinan J delivered a separate concurring judgment.

employee is at risk of psychiatric injury, is the employer entitled to refuse to employ? Is the employer entitled to make it an express term of the contract that the employee will achieve certain performance standards? Presumably if the contract did contain such a term, insistence upon those performance standards could not amount to a breach of the employer's duty of care, even if that did lead to psychiatric injury in an employee known to be vulnerable.

The problem with this decision is that it leaves many questions unanswered as to the limits of conduct which would be a breach of the employer's duty in the context of psychiatric injury. In particular, it does not explain just what is the position of an employer who does have reason to foresee psychiatric injury. The majority emphasised the fact that, although the employer had complained of the workload, she had not conveyed any reason to suspect the possibility of future psychiatric injury.²³ Does this mean that her position would have been different if she had complained that she was being put under stress that put her at risk of psychiatric injury? If so, in the future astute or well advised employees who feel that they are being overworked may well remedy that deficiency.

Although the High Court did not reinstate the "normal fortitude" test rejected in *Tame*, it seems to me that the practical effect of *Koehler* is that an employer is entitled to assume that the employee is of normal fortitude in the absence of evidence to the contrary. Perhaps I am reading too much into *Koehler*, which should be seen as turning more particularly on its own facts, and on little more than the confirmation of the proposition accepted in the Full Court that the basis on which the plaintiff succeeded at trial was wrong. That would explain what seems to be a good deal of obscurity about the judgment. It does not attempt a comprehensive identification of the circumstances in which an employer would be in breach of a duty to avoid psychiatric injury. Nevertheless, the reasons do suggest that it is going to be relatively difficult for a plaintiff to succeed on this basis in an employer/employee context,²⁴ in the absence of evidence to show that the prospect of psychiatric injury to

²³ *Koehler* (supra) at [28], [41].

²⁴ Compared with the ease with which employees succeed in the case of physical injuries, as illustrated by the contemporaneous decision in *Czatyрко v Edith Cowan University* (2005) 79 ALJR 839.

the particular plaintiff was reasonably foreseeable, in the sense of being not far fetched or fanciful.

What about employees whose employment by its very nature is likely to put them in stressful situations? This was considered by the House of Lords in *White v Chief Constable of South Yorkshire Police*.²⁵ That case also arose out of the Hillsborough disaster, and concerned claims by six police officers who had been present at the stadium, though outside the range of physical risk, but had assisted in tending victims of the tragedy, or in one case had been responsible for dealing with the bodies of victims at the hospital. They were representative plaintiffs for what were described as a large number of police officers²⁶ who claimed to have suffered psychiatric injury, usually post-traumatic stress disorder, as a result of their exposure to the incident.

The House of Lords (with one dissentient) held that they were not entitled to recover. The notion that an employer's duty necessarily extended to a duty not to cause psychiatric injury was directly rejected. In effect, they were subject to the same control mechanisms as other secondary victims, and on that basis they were unsuccessful. Some of the members of the House of Lords were obviously directly influenced by the fact that it would be unjust to draw a distinction between the police officers who had suffered psychiatric injury as a result of witnessing the events and the spectators who were in the same position, and whose claims had previously been unsuccessful.²⁷ Lord Steyn, one of the majority judges, essentially rehearsed a number of policy reasons why recovery for psychiatric injury should be limited. He said at p.491:

“In an ideal world all those who have suffered as a result of the negligence ought to be compensated. But we do not live in Utopia: we live in a practical world where the tort system imposes limits to the classes of claims that rank for consideration as well as to the heads of recoverable damages.”

²⁵ [1999] 2 AC 455.

²⁶ According to Lord Goff, 52 police had commenced proceedings: p.466.

²⁷ In *Alcock v Chief Constable of South Yorkshire Police* (supra).

One of the features of the *Hillsborough* litigation is that it put some sense of scale on the potential effect on liability payouts of an acceptance of unrestricted liability for psychiatric injury. In that disaster there were 95 fatalities and some hundreds of other people who suffered physical injury.²⁸ In *Frost* the court considered claims by six plaintiffs as test cases from the 52 police officers who had commenced proceedings. In *Alcock* there were 10 specific claims, from what was said to be very many other claims for psychiatric illness.²⁹ There were of course thousands of people at the grounds and millions more watched the events on television. In one sense this shows that psychiatric injury is relatively rare in the case of people exposed to trauma of this kind. But it also shows that accepting liability generally for psychiatric injury would often substantially increase the number of claims that arise from a particular incident.

The particular control mechanisms adopted in *White* were quite different from those adopted in *Koehler*, but in a sense the practical result was the same: in each case the plaintiffs lost. But this opened a further division between the legal position in Australia and England. In *White* there was a rejection of the notion that there is a general duty on the part of the employer to avoid psychiatric injury to an employee. That was in turn expressly rejected in *Annetts* by McHugh J at [140].

One of the features of the *Koehler* approach is that it is relevant to consider the work that the employee is required to do under the contract of employment. That could, in my opinion, easily be relevant in the case of employees whose work was particularly likely to expose them to traumatic incidents, such as police officers, ambulance officers, or others who are likely to be exposed to such matters. The position, however, may well be different in the case of those who suffer psychiatric injury as a consequence of being exposed to risk of physical injury, as in *Keays v State of Queensland*.³⁰ That case involved a police officer who was shot at in the course of his duty. The bullet just missed³¹ but the officer suffered psychiatric injury. In that case, the focus of the dispute was on whether there was a necessary causal link between the relevant negligence and the injury. That the defendant owed a duty to the

²⁸ In *Frost* Lord Steyn gave a figure of “more than 700”, but in *Alcock* the trial judge said that “more than 400” needed hospital treatment: [1992] 1 AC at 315.

²⁹ [1992] 1 AC at 352 per Parker LJ

³⁰ [1998] 2 Qd R 36.

³¹ It actually passed through part of his uniform and damaged his official notebook in his shirt pocket.

plaintiff to avoid causing him psychiatric injury was not an issue on the appeal, and received scant attention in the trial judgment although it was noted that what was required to discharge the duty had to take into account the particular circumstances of the police service.³² At the very least, as a result of the decision in *Koehler*, the determination of that case today would become more difficult, though there would remain the distinguishing feature that in that case the plaintiff was certainly exposed to a risk of physical injury.

A more recent example of a primary victim was the plaintiff in *Pickering v McArthur*, a decision of the Queensland Court of Appeal.³³ That case was unusual, in that it involved an allegation that the defendant knew or ought to have known that the plaintiff was susceptible to psychiatric injury, and that the defendant had represented that he was qualified to counsel the respondent about his personal life and psychological development. An application to strike out the pleading failed,³⁴ the defendant appealed, and the Court of Appeal dismissed the appeal. The case therefore turned on what was arguable rather than what the law really was, but Keane JA (with whom the other members of the Court agreed) said that those facts were apt to suggest that the defendant owed the plaintiff a duty to take reasonable care to avoid causing psychiatric harm: [10]. This was notwithstanding that the plaintiff came to be in contact with the defendant by attending him for “massage therapy.” On the face of it a duty to avoid psychiatric injury was fairly readily applied, but the case was decided on a pleading point, and does not necessarily reflect the outcome after a trial.

Secondary victims – recent cases

In Australia secondary victims have on the whole fared well. The two recent High Court decisions both dealt with family members. *Annetts v Australian Stations Pty Ltd*³⁵ was in one respect unusual, in that there had been a direct assurance from the defendant to the plaintiffs that their son would be under constant supervision, which assurance was broken in circumstances which ultimately led to his death in a remote

³² (Plaint 1544/95, McGill DCJ, 14.11.96, unreported), citing *R v Commissioner of Police ex parte Ross* [1992] 1 Qd R 289 at 292.

³³ [2005] QCA 294.

³⁴ [2005] QDC 81.

³⁵ Reported with *Tame* at (2002) 211 CLR 317.

area. In these circumstances, it was not clear that the mere facts of the relationship between the plaintiffs and the primary victim, and that it was reasonably foreseeable that a failure to take reasonable care for the primary victim could result in psychiatric injury if that failure led to the death of the primary victim meant that there was a duty to the plaintiffs.

In that case there was nothing sudden about the event so far as the plaintiffs were concerned; the plaintiffs had been made aware of his disappearance, but it was not until months later when his body was found that his death was confirmed. Nevertheless, the High Court refused to exclude liability on the basis of an absence of any sudden shock, or direct perception, or physical proximity to the incident. Although there was a close relationship in that case between the primary and secondary victims, the other control mechanisms applied to second victims in England were not applied. In the process of doing this, the judgments contained a fairly wide-ranging and thoughtful discussion of the problems arising in this area.

If I may express a personal preference, I found the analysis of Hayne J particularly thoughtful and appropriate. One feature that appeared in that analysis was a consideration of the distinction between those forms of mental distress for which recovery is available and those for which it is not. In this area there has generally been simply a bland acceptance that any recognised psychiatric condition was actionable.³⁶ His Honour recognised one difficulty with this, that what may be a useful basis of classification for the purposes of determining whether a particular patient required any and what treatment may not necessarily be a useful basis for distinguishing between those cases where compensation is appropriate and those cases where it is not. In the course of the process of reasoning to a conclusion³⁷ that the requirement of reasonable fortitude should not be abandoned, his Honour said at [296]:

“To permit recovery for whatever prevailing psychiatric opinion recognises as a form of psychiatric injury in every case where negligent

³⁶ There is a useful collection of the cases equating this with the older term “nervous shock” in *Hicks v Minister for Justice* [2005] QSC 44 per Byrne J.

³⁷ In which he was in the minority together with McHugh and Callinan JJ

conduct of the defendant can be causally related to its onset would allow recovery in circumstances that stretch the bounds of recovery beyond what is socially useful.”³⁸

Any limitation suggested by the specific undertaking to the plaintiffs by the defendant in that case was swept away in the later decision of *Gifford v Strang Patrick Stevedoring Pty Ltd.*³⁹ That case also raised issues under particular New South Wales legislation, but the court decided what the position was at common law. The plaintiffs, children of an employee of the defendant who was killed in an industrial accident, claimed to have suffered psychiatric injury as a result. The New South Wales Court of Appeal rejected their claims on the basis that they had not directly observed the effects of the accident, but in the High Court this was held to be irrelevant, and they were entitled to recover although only told of its consequence.⁴⁰ The judges had no difficulty in regarding psychiatric injury to children⁴¹ in such circumstances as not just foreseeable but readily foreseeable.⁴² Although most continued to reject that as a sufficient ground for liability⁴³, the duty arose because of the existence of the duty to the deceased anyway⁴⁴, and the relationship between the plaintiffs and the deceased.⁴⁵

Although some of the judges used wider language than others, it seems to me that this decision really means that any close family members who suffer psychiatric injury will be able to recover so long as there was a duty of care to the primary victim. That was the effect of the Queensland Court of Appeal decision in *Hancock v Nominal*

³⁸ In *Gifford* (supra) he mentioned the alternative, that new control devices could be developed to replace those rejected: [99].

³⁹ (2003) 214 CLR 269.

⁴⁰ There had been no finding at the trial as to whether the plaintiffs had actually suffered psychiatric injury, and the action was remitted for findings on that.

⁴¹ Even adult children: one was 19, two were in the workforce, and none lived with the deceased: [102].

⁴² McHugh J at [47] said that those in a “close and loving relationship with a person who is killed or injured often suffer psychiatric injury on learning of the injury or death, or on observing the suffering of that person.”

⁴³ Gleeson CJ at [9]; Gummow and Kirby JJ at [67]; Hayne J at [98]; and see McHugh J at [52].

⁴⁴ Gummow and Kirby JJ at [87]; Hayne J at [101] and [103].

⁴⁵ Gleeson CJ at [12]; McHugh J at [53]; Hayne J at [101], [103]. Gummow and Kirby JJ at [89] spoke of the protection of the young from harm, and at [90] of the fact that the plaintiffs were dependent on the defendant to avert this harm.

Defendant,⁴⁶ which arose out of a motor vehicle accident where the son of the plaintiff was killed. That case was said to turn on the closeness of the ties of love and affection between the plaintiff and the deceased: [90]. There is nothing in *Annetts* or *Gifford* to cast any doubt on the approach in *Hancock*, or restrict its application.

Conclusion

Unlike most other states, Queensland did not enact any of the legislative restrictions on claims for psychiatric injury based on the Ipp report. However, the Civil Liability Act and Regulation⁴⁷ contain a mechanism for restricting quantum in these claims, which is likely to make most claims for psychiatric injury uneconomic.⁴⁸ In such a situation, few will be run, and the ones that are run are likely to be the hard cases which will encourage favourable judgments on liability.

It seems to me that the recent decisions in this area, although clarifying certain matters, are more about removing restrictions to recovery, without providing any clear guidelines as to the situations in which recovery will now be available. The English rules may be arbitrary, but at least they are clear, and the outcome of litigation is much more predictable as a result. From the point of view of a trial judge, the present situation, in any case which is not factually close to one of the recent authorities, is very unhelpful. We are told that mere foreseeability of psychiatric injury is not enough, but we are not told clearly just what more is enough. Although there has been overall some liberalising of the rules, it has been at the expense of certainty, and that in itself is likely to discourage many claims. I hope that in the long run the situation will be clarified, perhaps by the development of new control mechanisms as contemplated by Hayne J.

⁴⁶ [2002] 1 Qd R 578. This decision was referred to with apparent approval in *Gifford* by Gummow and Kirby JJ at [89].

⁴⁷ *Civil Liability Act* 2003 s.61(1)(c)(i); *Civil Liability Regulation* 2003, Schedule 4 Part 2, Schedules 5, 6,.

⁴⁸ A “moderate mental disorder” produces an ISV of no more than 10 (\$11,000).