By John Solomon

NERVOUS SHOCK
Definitions and developments

The broadening of legal conceptions of 'nervous shock' are inextricably linked to increasing social acceptance.

In 1901, the Kings Bench ruled that a woman behind a bar suffered shock when a horse-drawn carriage crashed into the bar.[1] In 1925, the Kings Bench held that plaintiffs could claim for shock where they saw their children suffer injury, despite the plaintiff themselves being uninjured.[2] However, in 1939 the House of Lords ruled that a mother developing a mental disorder upon watching the body of her infant child being removed from the council's water-filled trench was not reasonably foreseeable.[3] For that, the mother would actually have had to witness the child drowning.

Since then, legal understandings of mental harm have undergone significant expansion and, by 1984, Australian law had developed as reflected by the case of *Jaensch v Coffey*.[4]

JAENSCH v COFFEY

The plaintiff was married to a police officer and, within a few months of giving birth, she was informed that her husband had been injured in a collision between his motorcycle and a car. She was told that his condition was 'pretty bad'. When she saw him the next morning at hospital with 'all these tubes coming out of him', she thought he was going to die. Subsequently, the plaintiff developed severe anxiety and depression, causing gynaecological problems and requiring a hysterectomy. Roughly one month later, the plaintiff was confident that her husband would survive.

The court held that injury to the victim caused by negligence of the defendant could reasonably foreseeably result in psychiatric injury to the plaintiff. In finding a duty of care, the court placed significant weight on the relationship between the plaintiff and victim; that is, the likelihood of Mrs Coffey sustaining a psychiatric injury was more foreseeable because she was the victim's wife.

DSM-IV

In an attempt to define psychiatric injury, courts have often referred to the Diagnostic and Statistical Manual of Mental Disorders, 4th Edition text revision (DSM-IV). This manual, developed by the American Psychiatric Association, is used by clinical psychiatrists and psychologists to help diagnose mental disorders.[5]

Considering the construction of diagnostic criteria in the DSM-IV, it is easy to understand why lawyers and judges might be tempted to apply the manual as quasi-legislation. In *Burke v Commonwealth of Australia*[6] it was stated that '*... the Court should not approach DSM-IV criteria as if they were incorporated into an Act of parliament ...*'. Similarly, in *NSW v Seedsman*, the NSW Court of Appeal 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.'[7]

Its role in supplying guidelines only is supported by the DSM-IV itself, which provides that the manual is not designed for use in forensic settings.[8] Psychiatric definitions of mental disorders are subject to constant revision, and while the manual is capable of providing some guidance, the diagnosis of a psychiatric injury requires the specialist knowledge of clinical psychiatrists and psychologists.

'Normal' or 'reasonable fortitude'

Generally, damages for nervous shock are not recoverable unless an ordinary person of normal fortitude in the position of the plaintiff would have suffered some shock. However, this does not mean that persons of lower than normal or reasonable fortitude will be unable to claim the full extent of the damage they have suffered as the result of a psychiatric injury at common law. This is allowed by virtue of the 'eggshell skull' rule. Once it has been established that the defendant could have foreseen *some injury of the kind suffered by the plaintiff*, the defendant must compensate that plaintiff for the full extent of injury suffered.[9] The rule applies only to the *extent*, but not *type* of injury sustained by the plaintiff.

Where it is reasonably foreseeable that a defendant's actions would cause a plaintiff psychiatric injury, the defendant will be liable for the full extent of that injury, even if the *extent* of the plaintiff's injury was greater than anticipated. Further, the law explicitly provides that while unusually sensitive or vulnerable persons may claim for the full extent of their injuries, it must have been foreseeable that the person of normal or reasonable fortitude would sustain *some* injury.[10]

In the case of Mrs Coffey, the court noted that, prior to her marriage, she had led an unhappy life characterised by childhood abuse. As a result of this, Mrs Coffey had an 'exceptional predisposition to anxiety and depression'.[11] Despite this, the court held that Mrs Coffey should not be precluded from claiming on the basis of not having ordinary fortitude.

Nervous shock

In addition to the psychiatric injury requirement, the court held that the injury must be the result of a 'nervous shock', namely:

> 'the sudden sensory perception – that is, by seeing, hearing or touching – of a person, thing or event, which is so

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distressing that the perception of the phenomenon affronts or insults the plaintiff's mind and causes a recognisable psychiatric illness.'[12]

Establishing requisite proximity is likely to be significantly easier where the victim has a close relationship with the plaintiff.[13]

In *Jaensch v Coffey,* the court had no difficulty finding that Mrs Coffey had suffered nervous shock, given the proximity between herself and the victim.

Direct perception of event or its immediate aftermath

The law has had little trouble accepting that where plaintiffs directly perceive with their own senses the tortious event, they may suffer a psychiatric injury. However, it has traditionally been more difficult for plaintiffs who arrived subsequent to the event to bring an action. To remedy this, the 'aftermath doctrine' has been developed. Essentially, this doctrine provides that the aftermath of an accident encompasses events at the scene after its occurrence, including the extraction and treatment of the injured, and post-accident treatment.[14] The 'perception' element may be considered as a requirement that the event or its aftermath be registered 'by one or other of a person's senses'.[15] The court held that this requirement was clearly satisfied in Mrs Coffey's case.

Subsequent to *Jaensch v Coffey* in 1984, there was little development to the common law of nervous shock until the High Court's joint consideration of *Tame v New South Wales* and *Annetts v Australian Stations Pty Ltd.*

TAME v NEW SOUTH WALES

In 1991, Acting Sergeant Beardsley completed a report concerning a car accident that had taken place the month before, which involved cars driven by Mrs Tame (plaintiff) and Mr Lavender (defendant). A blood test revealed that Mr Lavender had a blood alcohol reading of 0.14 and that Mrs Tame had a reading of 0.00. The plaintiff successfully sued the defendant for minor injuries.

The officer accidentally recorded that the plaintiff's blood alcohol reading was 0.14 rather than 0.00. However, he realised his error and corrected the mistake. Upon learning of the clerical error, the plaintiff became obsessed by it and by 1995 had developed psychotic depression. Claiming that the clerical error was causative of her disorder, the plaintiff brought an action against the officer.

ANNETTS v AUSTRALIAN STATIONS PTY LTD

The plaintiff's son, James, went to work for the defendant as a jackaroo in Western Australia at the age of 16. James' parents consented to this as the defendant gave assurances that James would be fully supervised. The defendant subsequently sent James to work alone as the caretaker of a remote property. In December 1986, James went missing in circumstances suggesting he was in danger. When Mr Annetts was informed of his son's disappearance by police over the telephone, he collapsed.

In January 1987, James' bloodstained hat was found. In April 1987, James' body was found in the desert. He had died from dehydration, exhaustion and hypothermia. The plaintiffs were informed via telephone and Mr Annetts was subsequently shown a photograph of the skeleton, which he identified as James.

TAME v NEW SOUTH WALES: ANNETTS v AUSTRALIAN STATIONS PTY LTD [2002] HCA 35

Consistent with *Jaensch,* the majority of the court held that reasonable foreseeability, while necessary, was in itself insufficient to create a duty of care.[16] To require only that causing the plaintiff a psychiatric injury be neither 'far fetched' nor 'fanciful' was considered incredibly broad and would potentially render too many defendants liable.[17]

In the case of *Tame,* the court suggested that the relationship between the officer and the plaintiff could not be described as close and was insufficient to give rise to a duty of care. Conversely, in *Annetts*, the relationship between the plaintiffs and the defendant was sufficiently close, given that they were required to give the victim permission to work, which was done only on the assurances of the defendant.

The categories of plaintiff who may suffer nervous shock fell into two classes. These were (a) the normal plaintiff who could be predicted to suffer psychiatric injury in some circumstances and (b) the particularly vulnerable plaintiff who may be susceptible to psychiatric injury where normal plaintiffs would not. This second category was further broken down according to whether or not the defendant knew of the plaintiff's vulnerability. Essentially, where the defendant is, or should be, aware of the plaintiff's vulnerability, the test to be applied is subjective, rather than objective, meaning that the defendant may be liable to fully compensate the plaintiff.

While the formulation of normal fortitude remained unchanged, the majority of the court held that it was no longer to be considered an express requirement in establishing a claim for nervous shock. All justices accepted that normal fortitude is implicated in determining reasonable forseeability, but disagreed on the extent to which it is necessary.

Nervous shock

The majority of the High Court rejected the need to establish that a person suffering from psychiatric injury prove that they suffered a 'nervous shock' occasioned by a 'sudden affront to the senses'. However, while nervous shock was not considered a separate element by the majority, it was suggested that the existence or absence of nervous shock may speak to the remoteness of the injury and, where it does not exist, may result in problems establishing causation.[18]

This approach allows the court significant flexibility. For example, in the case of *Annetts,* the plaintiffs knew of their son's disappearance and likelihood of injury for a long period before actually being informed of his death. Indeed, the ordeal was characterised as '*…agonisingly protracted*'.[19] Despite this, due to the high level of forseeability that the plaintiffs would develop psychiatric injury, and the proximity

between the plaintiff and the defendant, the fact that no 'nervous shock' *per se* existed was no bar to compensation.

An individual with a 'close and intimate' relationship with the victim is now able to bring a claim where they have perceived the immediate aftermath of the event and that direct perception is not necessary.

The majority held that whether or not the event or its immediate aftermath is directly perceived by the claimant is not a stand-alone element, but an indicator of reasonable forseeability, causation and remoteness.

WHAT IS REQUIRED TO ESTABLISH NERVOUS SHOCK UNDER *TAME* AND *ANNETTS*

(a) That the defendant owes a duty of care to the plaintiff.

(b) That it was reasonably foreseeable that the plaintiff would suffer a psychiatric injury due to the defendant's actions. This is to be determined by several factors, including but not limited to:
(i) whether the plaintiff is of normal fortitude;
(ii) whether the injury occurred through a sudden affront to the senses;
(iii) the relationship between the plaintiff and victim; and

(c) That the negligent act of the defendant caused the plaintiff to sustain a recognised psychiatric injury.

NERVOUS SHOCK UNDER LEGISLATION: A COMPARISON

Limitations	NSW	ACT	SA	TAS	VIC	WA
Pure mental harm (can be claimed)	Section 31	Section 33	Section 53(2)	Section 31	Section 23	Section 5S(1)
Duty arising from reasonable forseeability that normal fortitude develops psychiatric illness	Section 32(1)	Section 34(1)	Section 33(1)	Section 34(1)	Section 72(1)	Section 5S(1)
Required relationship	Section 30(2) (a) Plaintiff witnessed, at the scene, the victim being killed or put in peril or (b) the plaintiff is a close member of the family of the victim.	Section 36(1) (a) A parent; or (b) a spouse; or (c) a person who is living in a de facto marriage relationship with; or (d) family member of, the victim if the victim was killed, injured or put in danger within the sight or hearing of the other family member	Section 53(1) (a) Plaintiff was physically injured or was present at the time of the event or (b) is a parent, spouse or child of a person killed, injured or endangered in the accident.	Section 32(2) (a) Plaintiff witnessed, at the scene, the victim being killed, injured or put in peril or the immediate aftermath of the victim being killed or injured; or (b) the plaintiff is a close member of the family of the victim.	Section 73(2) (a) Plaintiff witnessed, at the scene, the victim being killed, injured or put in danger; or (b) the plaintiff is or was in a close relationship with the victim. NB: close personal relationship is not defined.	No restrictions on the basis of relationship.
Sudden shock	Section 32(2) (a)	Section 34(2) (a)	Section 33(2) (i)	Section 34(2) (a)	Section 72(2) (a)	Section 5S(2) (a)
At scene or aftermath	Section 32(2)(b) NB: aftermath not included	Section 34(2)(b) NB: aftermath not included	Section 33(2)(ii) NB: aftermath not included	Section 32(2)	Section 72(2)(b) NB: aftermath not included	Section 5S(2)(b) NB: aftermath not included
Pre-existing relationship	Section 32(2) (d)	Section 34(2) (d)	Section 33(2) (iv)	Section 34(2) (b)	Section 72(2) (d)	Section 5S(2) (d)
Nature of relationship	Section 32(2) (c)	Section 34(2) (c)	Section 33(2) (iii)	Section: 32(3)	Section 72(2) (c)	Section 5S(2) (c)

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QLD and NT are not included, as their legislation does not contain specific provisions relating to mental harm. Instead, in both jurisdictions 'Injury' is defined as 'personal and psychiatric injury' but there is no other discussion of the scope of such claims. Common law principles of foreseeability apply instead.

There are some subtle differences between the language used in the Acts relating to the requirement that plaintiffs actually witness the tortious event. First, NSW and VIC expressly require that the plaintiff witness, at the scene, the victim being killed, injured or put in danger.

Alternatively, South Australia requires that the plaintiff witnessed the person being injured *or was present at the time of the event.* which appears to be a lower threshold to satisfy than that required in NSW and ACT.

Finally, Tasmania has adopted the common law position, allowing a claim not only for plaintiffs who were actually at the scene, but also for those who have been exposed to the 'immediate aftermath' of the event.

Also, the various Acts require different levels of relational proximity between plaintiffs and victims in order to make a claim for nervous shock where the plaintiff was not present at the scene. For example, the ACT legislation requires that the claimant be a spouse or parent of the victim. However, in NSW and TAS, the class of plaintiff who may claim under this legislation is broader. Providing even greater scope, the VIC and WA equivalents do not define the meaning of 'close personal relationship'. Arguably, then, plaintiffs who are not legally related may bring a claim for nervous shock under this legislation, even where they were not present at the event.

DIFFERENCES BETWEEN THE COMMON LAW AND CIVIL LIABILITY LEGISLATION

The majority in *Tame* and *Annetts* suggests that normal fortitude could be taken into consideration when assessing whether the plaintiff's development of a psychiatric injury was reasonably foreseeable. However, the majority expressly stated that this was a factor, and not solely determinative of reasonable foreseeability.

Despite this, legislative incorporation of this element has, on its face, universally made it a precondition for establishing reasonable foreseeability.

In *Tame* and *Annetts,* the majority was critical of the notion that temporal proximity between the claimant and victim was always required. However, under most legislation, plaintiffs must demonstrate that they were close in both time and space to the victim and, generally, that they personally witnessed the tortious event. Unless this can be demonstrated, plaintiffs can arguably bring a claim only if they can demonstrate relational proximity.

According to NSW, ACT, TAS and SA legislation, sufficient relational proximity requires that the victim be a close family member. This requirement significantly constrains the formulation of close relational proximity as provided by common law, which is generally accepted as including individuals with a '*... close tie of love and affection to the victim*'.[20]

This legislative restriction may preclude individuals with strong relationships (such as close family friends) from claiming nervous shock where they were not physically present at the scene. Arguably, the ACT legislation provides that only plaintiffs who directly witnessed the tortious event, and are parents or domestic partners, can claim nervous shock. VIC, however, does not define a 'close personal relationship', and WA does not have any legislative relational requirements in the context of nervous shock, meaning that compensation may extend beyond legal relations in those jurisdictions.

On the other hand, it is equally arguable that the various sections are instead intended to extend the class of claimants, not restrict them. Indeed, s36 of the ACT legislation is headed '*extensions of liability...in certain cases*'. While there are no similar headings in the other jurisdictions, it is notable that in *Gifford v Strang Stevedoring Pty Ltd* [21] the High Court expressly concluded that the intention of the NSW legislation was to extend the common law, not confine it.

WICKS AND *SHEEHAN*

In June 2010, the High Court delivered its decision in *Wicks and Sheehan v State Rail Authority of NSW known as State Rail*. This was an appeal from the NSW Court of Appeal involving the Waterfall train disaster of 2003 (*Sheehan v State Rail Authority (SRA); Wicks v SRA* [2009] NSWCA 261).

The appellant argued that the fact that the victims were lying injured in a wrecked train, in circumstances where their injuries were deteriorating, and where there were live power-lines surrounding the wreck, fell within the meaning of 'put in peril'. In such circumstances, therefore, the rescuers must fall within the class of persons to which mental harm was foreseeable. On the other hand, the respondent argued that, as the danger had passed, the rescuers were no longer in peril and were not entitled to claim. This latter argument succeeded in the Court of Appeal. However, it was overturned by the High Court.

The High Court held that 'being...put in peril' meant that a person was put in peril when put at risk – the person remained in peril until the person ceased to be at risk. The survivors of the derailment remained in peril until they were rescued and taken to safety.

Further, the High Court rejected the respondents' submissions that the combined effect of ss30(1) and 30(2) of the *Civil Liability Act* required that a plaintiff must demonstrate that psychiatric injury of which complaint was made was occasioned by the observation of what was happening to a particular victim. Instead, where there were many victims, s30(2) did not require that a relationship be identified between a psychiatric injury and what happened to a particular victim.

The High Court considered that to read the legislation in any other way would be unworkable, and would wrongly presuppose that the causes of psychological injury suffered as a result of exposure to a horrific scene of multiple deaths could be established by component parts of a single event. In a mass casualty event, s30(2) was satisfied where there was a witnessing at the scene of someone being injured, killed or put in peril, without the need for further attribution of part or all of the alleged injury to one or more specific deaths.[22]

CONCLUSION

The law of nervous shock is still evolving, although there have been few decided cases since the watershed year of 2002 when most of the various Acts were enacted, and the decision of *Tame; Annetts* was delivered. Time will tell as to what extent the class of persons entitled to claim is extended and/or restricted. However, it would appear from the recent High Court decision in *Wicks* that the court will avoid a restrictive interpretation of the legislation. ■

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Notes: **1** *Dliue v White & Sons* [1901] 2 KG 669. Note: the claims success was related largely to the plaintiff's having a subsequent miscarriage, meaning there was a physical injury to which the psychiatric injury could attach. **2** *Hambrook v Stokes Brothers* [1925] 1 KB 141. **3** *Chester v Waverley Corporation* (1939) 62 CLR 1. **4** *Jaensch v Coffey* (1984) 155 CLR 549. **5** American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders*, 4th Edition, Text Revision. Washington DC, American Psychiatric Association, 2000, p463. **6** [2006] VSC 25. **7** *New South Wales v Seedsman* [2000] NSWCA 116 per Spigelman CJ. **8** American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, Text Revision. Washington, DC, American Psychiatric Association, 2000, ppxxxii - iii. **9** 'Eggshell skull rule', *Encyclopaedic Australian Legal Dictionary*, http://www.lexisnexis.com.au. **10** See, for example, *Chapman v Lear* (8 April 1988, QSC, No. 3732 of 1984). **11** Per Gibbs CJ in *Jaensch v Coffey* (1984) 155 CLR 549 (accessed at http://law.ato.gov.au), p3. **12** Per Brennan J at 16, *Jaensch v Coffey* (1984) 155 CLR 549. **13** *Ibid.* **14** *Jaensch v Coffey* (1984) 155 CLR at 607-8 as cited in Nicholas Chin, 'A remedy for nervous shock or psychiatric harm - Who pays? (2002), 9(4) *Murdoch University Electronic Journal of Law*, 30. **15** Per Callinan J at 365 *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* [2002] HCA 35; (2002). **16** Per McHugh and Hayne JJ in *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* [2002] HCA 35; (2002). **17** *Ibid*, at 96. **18** Per Callinan J at 365 in *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* [2002] HCA 35; (2002) HCA 35; (2002). **19** Per Gummow and Kirby JJ at 36, *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* [2002] HCA 35; (2002). **20** 20. Ibid at 351 (Callinan J). **21** (2003) 214 CLR 269. **22** *Wicks v State Rail Authority of New South Wales; Sheehan v State Rail Authority of NSW* [2010] HCA 22.

John Solomon *is a partner at Moray and Agnew Lawyers in Canberra, specialising in personal injury. He has acted in many high-profile matters, including the HMAS Voyager litigation and dust diseases claims.*