GREENWAY CHAMBERS

SHORT ON PRINCIPLE AND PREDICTABILITY
DAMAGES FOR PURE MENTAL HARM

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I. INTRODUCTION

1. As the authors of *Fleming's The Law of Torts* have observed, this area of the law is "short on principle and predictability".[1]

2. Many medical negligence proceedings include claims for what was referred to in the common law as 'nervous shock'. As with other aspects of the common law in general and medical negligence in particular, such claims must now be considered within the context of the *Civil Liability Act 2002* (NSW) (**the Act**). This paper outlines some fundamentals of the application Part 3 of the Act to claims for what is now known as 'mental harm' in the specific context of medical negligence claims.

3. Typically, claims for nervous shock in medical negligence matters arise in circumstances where there is an adverse medical outcome for a patient of a hospital or doctor leading to a claim being brought by against the hospital or doctor by relatives of the patient. Often, such claims are brought by parents of infant plaintiffs in obstetric matters.

4. While obstetric claims are usually significant claims, there appears to be a nascent effort, at least on the part of some plaintiff's firms, to commence nervous shock proceedings on behalf of relatives of patients in relatively minor claims. Anecdotally, some firms appear to have become increasingly emboldened to commence such nervous shock claims where a breach of duty is admitted or relatively easy to establish even where the patient's injury and disability is minor or fully resolved.

5. The Act commenced on 20 March 2002. On 2 September 2002 the High Court handed down its decision in *Tame v NSW* and *Annetts v Australian Stations Pty Limited*.[2] On 6 December 2012 Part 3 of the Act commenced.

6. In understanding and applying the present statutory framework, it is both helpful and useful to understand the law as it existed prior to the enactment of Part 3 of the Act. The development of the law in relation to claims for nervous shock involved consideration of facts occurring other than in the context of medical negligence. The principles, however, remain relevant.

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[1] Fleming's The Law of Torts, 10th Edition, 2011, C Sappideen and P Vines at 182.
[2] (2002) 211 CLR 317.

II. NERVOUS SHOCK AT COMMON LAW – A VERY BRIEF HISTORY

7. For many years, courts have distinguished between injury to the body and injury to, or through, the mind. The latter injury has been variously referred to as "nervous shock", "psychological injury" and "mere psychiatric injury". Mere psychiatric injury is concerned with harm in the nature of psychiatric injury not associated with any other form of injury to person or property resulting for allegedly tortious conduct.[3]

8. The common law in Australia relating to claims for psychiatric injury expanded gradually over time. The development can be traced over 60 odd years. From what may seem in more modern times the harsh decision of *Chester v Waverly Corporation*[4], to a recognition of the justiciability of psychiatric injury in *Mount Isa Mines Ltd v Pusey*,[5] to the laying down of further judicial guideposts in *Jaensch v Coffey*,[6] culminating in the decision in *Tame* and *Annetts*[7] the courts imposed certain limitations on the circumstances in which a defendant owed a duty of care in respect of a psychiatric injury to a plaintiff.

i. Chester v Waverly Corporation and *Mt Isa Mines v Pusey*

9. In *Jaensch v Coffey* Brennan J provides a succinct snapshot of the development of the High Court's approach to claims for psychiatric illness (at 565):[8]

> The foreseeability of shock-induced psychiatric illness has gained a more ready acceptance by Australian courts during the last half-century. The change in approach is manifest when *Chester v. Waverley Corporation* is compared with *Mount Isa Mines Ltd. v. Pusey*. In *Chester v. Waverley Corporation*, a mother suffered "severe nervous shock" when, in her presence and sight, the dead body of her 7-year old son was found in and taken from a water-filled trench which the defendant corporation had dug in a road and had carelessly failed to fence. Her action failed. In *Mount Isa Mines Ltd. v. Pusey*, the trial judge found that the defendant employer ought to have foreseen the possibility of an employee suffering an injury within the broad category of psychiatric illness when going to the rescue of other employees in the same building who suffered gruesome burning injuries as the result of negligence on the parts of both the employer and the injured employees. There the award of damages was upheld. In both cases this Court's decision turned upon whether, on the facts of the case, the causing of the plaintiff's psychiatric illness by shock was reasonably foreseeable by the defendant (see, in Chester's Case, Latham C.J. at p.10, Rich J. at p.11, Starke J. at pp.13-14 and Evatt J. at p.29; in Pusey's Case, at pp.389- 390,391,395 - where Windeyer J. uses the phrase "set off by shock" - and pp.402,414).

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[3] The definitions of "mental harm", "consequential mental harm" and "pure mental harm" are set out under Part 3 of the Act at s27.
[4] (1939) 62 CLR 1.
[5] (1970)125 CLR 383.
[6] (1984) 155 CLR 549.
[7] (2002) 211 CLR 317.
[8] (1984) 155 CLR 549.

10. In *Mt Isa Mines v Pusey*, the High Court stated two propositions in finding that the employer was responsible to a worker claiming a psychiatric illness: One, if a worker was injured in an accident, it was reasonably foreseeable that a co-worker would go and investigate the injured worker's welfare; and two, it was reasonably foreseeable that a co-worker going to the scene of the accident might suffer a psychiatric injury.[9]

ii. Law Reform (Miscellaneous Provisions) Act 1944

11. Following what was considered to be a harsh result in *Chester v Waverly Corporation*, the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) (***LR(MP) Act***) was enacted Part 3 of which was in the following terms:

> **Part 3 Injury arising from mental or nervous shock**
>
> **3 Personal injury arising from mental or nervous shock**
>
> (1) In any action for injury to the person caused after the commencement of this Act, the plaintiff shall not be debarred from recovering damages merely because the injury complained of arose wholly or in part from mental or nervous shock.
>
> (2) ....
>
> **4 Extension of liability in certain cases**
>
> (1) The liability of any person in respect of injury caused after the commencement of this Act by an act, neglect or default by which any other person is killed, injured or put in peril, shall extend to include liability for injury arising wholly or in part from mental or nervous shock sustained by:
>
> (a) a parent or the husband or wife of the person so killed, injured or put in peril, or
>
> (b) any other member of the family of the person so killed, injured or put in peril where such person was killed, injured or put in peril within the sight or hearing of such member of the family.
>
> …
>
> (5) In this section:
>
> ***Member of the family*** means the husband, wife, parent, child, brother, sister, half-brother or half-sister of the person in relation to whom the expression is used.
>
> ***Parent*** includes father, mother, grandfather, grandmother, stepfather, stepmother and any person standing in loco parentis to another.
>
> ***Child*** includes son, daughter, grandson, granddaughter, stepson, stepdaughter and any person to whom another stands in loco parentis.

12. Section 3 the *LR(MP) Act* extended a cause of action to include a claim for mere psychological injury. Section 4 of the *LR(MP) Act* extended liability of a

[9] (1970)125 CLR 383 per Walsh J at 411.

wrongdoer first, to parents and spouses of a person who was killed or injured without more and, secondly, to other family members where the person was killed or injured "within the sight or hearing of such member of the family".

iii. Jaensch v Coffey

13. Following the decision of the High Court in *Jaensch v Coffey* the law in Australia was that psychiatric injury was not actionable unless it was "induced by shock".[10] The requirement that the injury had to be induced by shock for a plaintiff to be successful in a claim for psychiatric injury meant that there had to be a perception by the plaintiff of the distressing phenomenon. This was a precondition to the recognition of a duty of care. In *Jaensch v Coffey* Brennan J described it thus (at 566-567):

> The notion of psychiatric illness induced by shock is a compound, not a simple, idea. Its elements are, on the one hand, psychiatric illness and, on the other, shock which causes it. Liability in negligence for nervous shock depends upon the reasonable foreseeability of both elements and of the causal relationship between them. It is not surprising that Lord Macmillan noted in *Bourhill v. Young*, at p 103, that:
>
> > " ... in the case of mental shock there are elements of greater subtlety than in the case of an ordinary physical injury and these elements may give rise to debate as to the precise scope of legal liability."
>
> I understand "shock" in this context to mean 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 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.

14. The law in Australia did not impose a liability on a defendant unless it was reasonably foreseeable that the negligent conduct would cause a person of "normal fortitude" to suffer psychiatric injury.[11] The rationale was that the law expected reasonable fortitude and robustness of citizens. In *Morgan v Tame* Spigelman CJ referred relevantly to comments of Herron CJ in *Beavis v Apthorpe*:[12]

> The hypersensitivity to shock may prevent there being any breach of duty in the first place.[13]

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[10] *Jaensch v Coffey* at 565.
[11] *Morgan v Tame* (2000) 49 NSWLR 21 per Spigelman CJ at 25-28.
[12] *Ibid* at 26.
[13] [1963] NSWR 1176 at 1183.

15. Of course, once liability was established the application of the 'eggshell skull' principle meant that a defendant would then be liable for the full extent of the damage regardless of the sensitivity of the injured person – eggshell skull being a principle of compensation, not liability.

iv. Tame and *Annetts*

16. In *Tame* and *Annetts* the High Court removed some of the limitations which had operated at common law in accordance with the decision in *Jaensch v Coffey*. In *Tame* and *Annetts* a majority of the High Court held that establishing "sudden shock" was no longer a precondition for recovery.[14] As Gaudron J explained (at [66]):

> "Sudden shock" may be a convenient description of the impact of distressing events which, or the aftermath of which, are directly perceived or experienced. And it may be that, in many cases, the risk of psychological or psychiatric injury will not be foreseeable in the absence of a sudden shock. However, no aspect of the law of negligence renders 'sudden shock' critical either to existence of a duty of care or to the foreseeability of a risk of psychiatric injury. So much should now be acknowledged.

17. Further, the majority of the High Court in *Tame* and *Annetts* stated that liability for damages for psychiatric injury was not limited to cases where a plaintiff had directly perceived a distressing phenomenon or its immediate aftermath.[15] The 'direct perception rule' was no longer determinative of those plaintiffs who may claim in negligence or pure psychiatric injury.[16]

18. Finally, the majority in *Tame* and *Annetts* held that it was no longer a "precondition to recovery in any action for negligently inflicted psychiatric harm that the plaintiff be a person of 'normal' emotional or psychological fortitude".[17]

19. As referred to above, the High Court's decision in *Tame* and *Annetts* removed the control limitations of "sudden shock", "direct perception" and "normal fortitude". The effect of the decision was to re-state the law concerning the circumstances in which a defendant owed a duty to take reasonable care to avoid psychiatric injury to a plaintiff.

20. The decision in *Tame* and *Annetts* established a number of propositions.

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[14] (2002) 211 CLR 317 per Gleeson CJ at [18], Gaudron J at [66], Gummow, Kirby JJ at [188], [204]-[213] and Callinan J at [363]. Note that *Tame v NSW* was heard together with *Annetts v Australian Stations Pty Ltd*.
[15] (2002) 211 CLR 317 per Gleeson CJ at [18], Gaudron J at [51], Gummow, Kirby JJ at [188], [214]-[225].
[16] (2002) 211 CLR 317 per Gaudron J at [51].
[17] (2002) 211 CLR 317 per Gummow and Kirby JJ at [16]. See also [61], [188] and [197]-[203].

i. A psychiatric injury was not actionable unless it constituted a "recognisable psychiatric illness".[18] Limited exceptions may apply such as a physical manifestation arising when a pregnant woman suffered a miscarriage or the injury had psychosomatic effects such a paralysis.[19] Otherwise pure psychiatric injury falling outside limited categories was not actionable. Mere emotional distress, anxiety or grief did not amount to a "recognisable psychiatric illness". In other words, where it was reasonably foreseeable that the conduct of a defendant might cause a plaintiff to suffer stress but it was not reasonably foreseeable that the plaintiff would suffer a "recognisable psychiatric injury", liability could not be established.[20]

   Whether a plaintiff has suffered an injury that was a "recognisable psychiatric injury" was a question of fact. Typically, but not otherwise, a recognisable psychiatric injury was one that was the subject of consideration in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*, the present iteration of which is commonly referred to as DSM-V.[21]

ii. A necessary, though not sufficient, condition for the existence of a duty was that a recognisable psychiatric injury to the plaintiff was reasonably foreseeable to a person in the defendant's position.[22] As with a physical injury, it was not necessary that a particular type of psychiatric illness be reasonably foreseeable. Rather, it was sufficient that a class of psychiatric illness or injury was reasonably foreseeable as a consequence of the defendant's conduct.[23] Finally, it was not necessary for the defendant to foresee the precise events leading to the damage complained of.[24]

iii. It remains always open to the court to find that an injury was not reasonably foreseeable in circumstances where the illness or injury suffered by the plaintiff in response to the defendant's conduct was unexpected or unusual.[25]

   By way of example, in *Tame* the injured motorist did not succeed because it was not reasonably foreseeable that she would suffer a

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[18] (2002) 211 CLR 317 at per Gleeson CJ at [7], per Gaudron J at [44] and per Gummow and Kirby JJ at [193].
[19] See eg. *McLoughlin v O'Brian* [1983] AC 410 at 431.
[20] See eg. *O'Leary v Oolong Aboriginal Corporation Inc* (2004) Aust Torts Reports 81-747.
[21] See eg. *Tame* and *Annetts* at per Hayne J at [287]-[294].
[22] *Tame* and *Annetts* at [12] and [201]. See also *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 at [98].
[23] *Tame* and *Annetts* at [203].
[24] Ibid.
[25] See eg. *Tomisevic v Menzies Wagga Southern Pty Ltd* [2005] NSWCA 178 at [39], *O'Leary v Oolong Aboriginal Corporation Inc* (2004) Aust Torts Reports 81-747, *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 at [33]-[42].

psychiatric injury resulting from the clerical error made by the acting sergeant of police attending a motor accident. Gummow and Kirby JJ found that her reaction was "extreme and idiosyncratic" such as to make the risk of injury "far-fetched and fanciful" and not one the law of negligence required a reasonable person to avoid.[26]

iv. The determination of whether a defendant owed the plaintiff a duty of care necessarily required consideration of the relationship between the parties. Where a plaintiff was vulnerable, that factor counted towards the recognition of a duty. Likewise, where the defendant controlled the risk of harm to which the plaintiff was exposed, also counted towards the recognition of a duty.

v. A duty was not imposed in a particular case unless it was reasonable to do so in the circumstances. In *Gifford v Strang Patrick Stevedoring*[27] Gleeson CJ stated: "the limiting consideration is reasonableness which requires that account be taken both of interests of plaintiffs and burdens on defendants" adding that "it would be unreasonable to require people to anticipate guard against all kinds of foreseeable psychiatric injury to others that might be consequence of their acts or omissions".[28]

vi. Notwithstanding that the control limitations of "sudden shock", "direct perception" and "normal fortitude" were no longer touchstones of whether a duty of care is owed, they remained relevant considerations as to whether a duty arises in a particular case or has been breached.[29]

Applying *Tame* and *Annetts*, the High Court held in *Gifford v Strang* that the fact that a person who was told about an horrific accident tor injury to a loved one did not actually see the incident or its aftermath was no bar to liability for damages for psychiatric injury.[30] The High Court held that the relationship of the three plaintiffs as adult children of the deceased worker was such that it was reasonably foreseeable that each would suffer psychiatric injury on being informed that their father died as a consequence of the defendant's negligence.

III. PART 1A OF THE ACT – DUTY OF CARE AND CAUSATION

21. *All* common law claims for personal injury including claims for mental harm must be considered within the context of and in accordance with the Act. Part 1A is

[26] *Tame* and *Annetts* at [233] referring to *Wyong Shire Council v Shirt* (1980) 146 CLR 40 per Mason J at 47-48; also *Tame* and *Annetts* per Gleeson CJ at [29], Gaudron J at [63], McHugh J at [120], Hayne J at [300]: per Callinan J at [334].
[27] (2003) 214 CLR 269.
[28] See also *Tame* and *Annetts* at [8]-[16] and [185].
[29] *Tame* and *Annetts* at [18], [62] and [200]-[201].
[30] (2003) 214 CLR 269.

the proper starting point for consideration of duty of care and causation is the relevant provisions of the Act:

> **Division 2 Duty of Care**
>
> **5B General principles**
>
> (1) A person is not negligent in failing to take precautions against a risk of harm unless:
>
> (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and
>
> (b) the risk was not insignificant, and
>
> (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.
>
> (2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things):
>
> (a) the probability that the harm would occur if care were not taken,
>
> (b) the likely seriousness of the harm,
>
> (c) the burden of taking precautions to avoid the risk of harm,
>
> (d) the social utility of the activity that creates the risk of harm.
>
> …
>
> **Division 3 Causation**
>
> **5D General principles**
>
> (1) A determination that negligence caused particular harm comprises the following elements:
>
> (a) that the negligence was a necessary condition of the occurrence of the harm (**"factual causation"**), and
>
> (b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (**"scope of liability"**).
>
> (2) In determining in an exceptional case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be accepted as establishing factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

(3) If it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the negligent person had not been negligent:

(a) the matter is to be determined subjectively in the light of all relevant circumstances, subject to paragraph (b), and

(b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.

(4) For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

5E Onus of proof

In proceedings relating to liability for negligence, the plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation.

i. The duty of care

22. First, a plaintiff must establish that a duty of care was owed to the plaintiff by the defendant.

23. The content of the duty owed by the provider of medical services to a patient has been the subject of judicial statement in *Rogers v Whitaker* about which there is no serious controversy:

> The law imposes on a medical practitioner a duty to exercise reasonable care and skill in the provision of professional advice and treatment. That duty is a "single comprehensive duty covering all the ways in which a doctor is called upon to exercise his skills and judgement; it extends to the examination, diagnosis and treatment of the patient and the provision of information in an appropriate case. It is of course necessary to give content to the duty in the given case.[31]

24. In the same judgment Gaudron J expressed the general duty in the following terms:

> Thus, the general duty may be stated as a duty to exercise reasonable professional skill and judgment.
>
> ...
>
> The duty involved in diagnosis and treatment is to exercise the ordinary skill of a doctor practising in the area concerned. To ascertain the precise content of this duty in any particular case it is necessary to determine, amongst other issues, what, in the circumstances,

[31] *Rogers v Whitaker* (1992) 175 CLR 479 per Mason CJ, Brennan, Dawson, Toohey and McHugh JJ at [483].

> constitutes reasonable care and what constitutes ordinary skill in the relevant area of medical practice.[32]

25. Typically, there is no issue that a defendant hospital or doctor owes a patient a duty of care. Likewise, the relationship between a plaintiff and the patient/victim is such that no issue arises that the hospital or doctor also owes the plaintiff a duty of care.

ii. Identifying the risk of harm

26. Secondly, for the purposes of s5B of the Act, a plaintiff must identify with the requisite precision, the risk of harm about which the defendant allegedly knew or ought to have known in respect of which precautions should have been taken.

27. A plaintiff must identify the risk of harm accurately. It should not be defined either too broadly or too narrowly. There are no hard and fast rules as to how a relevant risk is defined as the risk will always depend on the facts of the case. That risk must be considered in the light of all the relevant facts which are known or ought to have been known to the defendant.

28. For example, was it reasonably foreseeable that the parents of a child who suffered a brain injury during interventional neuroradiology (endovascular embolization of an arteriovenous malformation) would themselves suffer a psychiatric illness.

iii. Breach of duty

29. Thirdly, a plaintiff must establish that the defendant has breached the duty of care that was owed by the defendant to the plaintiff.

30. The question of whether a defendant's conduct is sufficiently reasonable in the circumstances to discharge the duty owed is a question that is determined prospectively (ie. not with the benefit of hindsight).[33]

31. In determining whether a defendant has breached its duty to a plaintiff, it is important to bear in mind that merely because there were steps or avenues available to avert the risk identified that were not taken by a defendant does not mean by that fact alone that a defendant has breached its duty.[34] It remains for a plaintiff to show that the defendant's conduct was not a reasonable response to the risk of injury to the plaintiff.[35]

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[32] *Rogers v Whitaker*, per Gaudron J at [492].
[33] *Vairy v Wyong Shire Council* (2005) 223 CLR 422 per Hayne J at [126].
[34] *Shoalhaven City Council v Pender* [2013] NSWCA 210 at [52] per McColl JA.
[35] *Dovuro v Wilkins* (2003) 215 CLR 317 at [38] per McHugh J.

iv. The defendant's breach must have caused the injury

32. A plaintiff must establish that a defendant's breach duty has caused the psychiatric injury. In order to establish causation a plaintiff must demonstrate that the defendant's negligence was a necessary condition of the occurrence of harm.[36] In other words, the plaintiff must prove factual causation.

33. The Act imposes the "but for" test as the first gateway to proof of causation. The "but for" test is a necessary test, save for exceptional cases to which s5D(2) applies.[37] The High Court has articulated that statutory test in terms:

> The determination of factual causation in accordance with section 5D(1)(a) involves nothing more or less than the application of a "but for" test of causation. That is to say, a determination in accordance with section 5D(1)(a) that negligence was a necessary condition of the occurrence of harm is nothing more or less than a determination on the balance of probabilities that the harm that in fact occurred could not have occurred absent the negligence.[38]

34. The question of factual causation under s5D(1)(a) involves a determination of a probable course of events had the defendant not been negligent. It is necessary for a plaintiff to establish, on the assumption that the defendant had acted in a manner asserted by the plaintiff, that the likely outcome would have been different. The suggestion of a possible outcome should some alternate been taken does not satisfy the "but for" test.[39]

v. Onus

35. Section 5E of the Act imposes the onus on a plaintiff to establish causation. The onus may be discharged by relying upon the inferences open on the facts of the case. Ultimately, proof of the causal link between an omission and an occurrence requires consideration of the probable course of events had the omission not occurred.[40]

IV. PART 3 OF THE ACT – DAMAGES FOR MENTAL HARM

36. Part 3 of the Act sets out the law which the Court is to have regard to in the determination of claims for mental harm. It is in the following terms:

> **Part 3 Mental harm**
>
> **27 Definitions**
>
> In this Part:

[36] Section 5D(1) of the Act.
[37] See eg. *NSW v Mikael* (2012) NSWCA 338 at [90].
[38] *Wallace v Kam* [2013] HCA 19 at [16].
[39] See eg. *Woolworths Limited v Strong* (2012) 246 CLR 182.
[40] *Woolworths Limited v Strong* (2012) 246 CLR 182 at [32].

consequential mental harm means mental harm that is a consequence of a personal injury of any other kind.

mental harm means impairment of a person's mental condition.

negligence means failure to exercise reasonable care and skill.

personal injury includes:

(a) pre-natal injury, and

(b) impairment of a person's physical or mental condition, and

(c) disease.

pure mental harm means mental harm other than consequential mental harm.

28 Application of Part

(1) This Part (except section 29) applies to any claim for damages for mental harm resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise.

(2) Section 29 applies to a claim for damages in any civil proceedings.

(3) This Part does not apply to civil liability that is excluded from the operation of this Part by section 3B.

29 Personal injury arising from mental or nervous shock

In any action for personal injury, the plaintiff is not prevented from recovering damages merely because the personal injury arose wholly or in part from mental or nervous shock.

30 Limitation on recovery for pure mental harm arising from shock

(1) This section applies to the liability of a person (the defendant) for pure mental harm to a person (the plaintiff) arising wholly or partly from mental or nervous shock in connection with another person (the victim) being killed, injured or put in peril by the act or omission of the defendant.

(2) The plaintiff is not entitled to recover damages for pure mental harm unless:

(a) the plaintiff witnessed, at the scene, the victim being killed, injured or put in peril, or

(b) the plaintiff is a close member of the family of the victim.

(3) Any damages to be awarded to the plaintiff for pure mental harm are to be reduced in the same proportion as any reduction in the damages that may be recovered from the defendant by or through the victim on the basis of the contributory negligence of the victim.

(4) No damages are to be awarded to the plaintiff for pure mental harm if the recovery of damages from the defendant by or through the victim in respect of the act or omission would be

prevented by any provision of this Act or any other written or unwritten law.

(5) In this section:

close member of the family of a victim means:

(a) a parent of the victim or other person with parental responsibility for the victim, or

(b) the spouse or partner of the victim, or

(c) a child or stepchild of the victim or any other person for whom the victim has parental responsibility, or

(d) a brother, sister, half-brother or half-sister, or stepbrother or stepsister of the victim.

spouse or partner means:

(a) a husband or wife, or

(b) a de facto partner,

but where more than one person would so qualify as a spouse or partner, means only the last person to so qualify.

31 Pure mental harm—liability only for recognised psychiatric illness

There is no liability to pay damages for pure mental harm resulting from negligence unless the harm consists of a recognised psychiatric illness.

32 Mental harm—duty of care

(1) A person (the defendant) does not owe a duty of care to another person (the plaintiff) to take care not to cause the plaintiff mental harm unless the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken.

(2) For the purposes of the application of this section in respect of pure mental harm, the circumstances of the case include the following:

(a) whether or not the mental harm was suffered as the result of a sudden shock,

(b) whether the plaintiff witnessed, at the scene, a person being killed, injured or put in peril,

(c) the nature of the relationship between the plaintiff and any person killed, injured or put in peril,

(d) whether or not there was a pre-existing relationship between the plaintiff and the defendant.

(3) For the purposes of the application of this section in respect of consequential mental harm, the circumstances of the case include the personal injury suffered by the plaintiff.

(4) This section does not require the court to disregard what the defendant knew or ought to have known about the fortitude of the plaintiff.

33 Liability for economic loss for consequential mental harm

A court cannot make an award of damages for economic loss for consequential mental harm resulting from negligence unless the harm consists of a recognised psychiatric illness.

37. Bearing in mind the provisions of Part 3, several issues typically arise:

- Is the plaintiff a person who is entitled to recover damages for mental harm;
- Is the plaintiff a person to whom a duty of care was owed;
- Has the plaintiff suffered a recognized psychiatric illness;
- Has the recognized psychiatric illness arisen in connection with the act or omission of the defendant; and
- Is the plaintiff required to show a recognized psychiatric illness to claim future economic loss.

i. Some definitions

38. Bearing in mind that Part 3 expands a liability under Part 1A, regard should be had to the definitions in Part 1A:

5 Definitions

In this Part:

harm means harm of any kind, including the following:

(a) personal injury or death,

(b) damage to property,

(c) economic loss.

negligence means failure to exercise reasonable care and skill.

personal injury includes:

(a) pre-natal injury, and

(b) impairment of a person's physical or mental condition, and

(c) disease.

39. It is clear from the definitions in Part 1A that an injured person can bring a claim in negligence for personal injury in the nature of a mental condition.

40. Part 3 itself contains further definitions relevant to the damages for mental harm.

> **consequential mental** harm means mental harm that is a consequence of a personal injury of any other kind.
>
> **mental harm** means impairment of a person's mental condition.
>
> **negligence** means failure to exercise reasonable care and skill.[41]
>
> …
>
> **pure mental harm** means mental harm other than consequential mental harm.

41. Lest there be any doubt the decision in *Wicks v State Rail Authority* made it clear that by operation of s28(1), the provisions of Part 3 of the Act apply to any claim for damages for mental harm arising from negligence.[42] By s27 mental harm means the "impairment of a person's mental condition".

42. Sections 30 (relating to the limitation on recovery of damages) and 31 (relating to the limitation of a defendant's liability) concern claims for "pure mental harm". That term is understood by reference to the definitions of "consequential mental harm", "mental harm" and "pure mental harm".[43]

43. The effect of the definitions is that a person's claim for pure mental harm must relate to the impairment of the person's mental condition that is not mental harm suffered as a consequence of any other personal injury. By way of example, a psychological injury resulting from chronic pain caused by an orthopaedic injury is consequential mental harm. Such an injury is to be distinguished from an impairment of a person's mental condition arising separately to any other injury.

ii. Is the plaintiff entitled to recover damages?

44. In accordance with s30(2) of the Act, a person suffering alleged "pure mental harm" must have either one, witnessed "at the scene, the victim being killed, injured or put in peril", *or* two, be a person who is "a close member of the family of the victim".

a. Killed, injured or put in peril

45. In considering the expression "killed, injured or put in peril" the High Court in *Wicks* highlighted the statute's use of the words "being" in s30(1) and "witnessed" in s30(2)(a) (at [43]):

> By contrast, because sub-s (2)(a) requires witnessing of the event at the scene, it must be read as directing attention to an event that was happening while the plaintiff "witnessed" it.

46. The term should not however, be restricted to events that begin and end in an instant but, rather, include cases of people being put in peril over extended

[41] The same definition of "negligence" is included in s5.
[42] (2010) 241 CLR 60 per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ at [18].
[43] Section 27 of the Act.

periods. In the course of considering the temporal aspect of being put in peril the High Court stated in *Wicks* (at [50]):[44]

> A person is put in peril when put at risk; the person remains in peril (is "being put in peril") until the person ceases to be at risk.

47. In *Wicks* the Court considered the circumstances of sights, sounds, tasks and suffering which might confront a person to whom a duty might be owed.[45] The Court recognized that relevant events may take minutes or much longer (at [44]):

> It would not be right, however, to read s 30, or s 30(2)(a) in particular, as assuming that all cases of death, injury or being put in peril are events that begin and end in an instant, or even that they are events that necessarily occupy only a time that is measured in minutes. No doubt there are such cases. But there are cases where death, or injury, or being put in peril takes place over an extended period.

48. In *Ryan v Philcox*[46] the High Court considered subs33(1) and (2) of the *Wrongs Act 1936* (SA) – a very similarly worded provision equivalent to sub s 30(1) and (2) of the Act and summarized the position (per French CJ, Kiefel and Gageler JJ at [13]):

> The common law, as explained in *Wicks v State Rail Authority (NSW)*, rejects propositions that "reasonable or ordinary fortitude", "shocking event" or "directness of connection" are preconditions to liability additional to "the central question ... whether, in all the circumstances, the risk of the plaintiff sustaining such an injury was reasonably foreseeable". Section 33 does not adopt any of those criteria as additional conditions of liability save that the foreseeability of risk must relate to "a person of normal fortitude in the plaintiff's position". The circumstances set out in s 33(2) are not necessary conditions of the existence of a duty of care. Rather they are to be treated as relevant to the assessment of that foreseeability of harm that is a necessary condition. The term "psychiatric illness" used in s 33(1) describes a subset of "mental harm". A similar category is also found in s 53(2), which limits recovery of damages awarded for pure mental harm to cases of harm consisting of "a recognised psychiatric illness"[18]. The question of causation is not raised by the grounds of appeal in this case. It follows, for the purposes of this appeal, that if Mr King owed Ryan Philcox the relevant duty of care, it was breached by his negligent driving which had the consequence that Ryan Philcox suffered a recognised psychiatric illness.

b. A close family member

49. Secondly, in the alternative, to be a person entitled to damages a plaintiff must show that she or he is a close family member of the victim.[47]

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[44] (2010) 241 CLR 60.
[45] At [33].
[46] (2015) 255 CLR 304.
[47] Section 30(2) of the Act.

50. The term ‘close family member’ is defined in s30(5) of the Act.

> In this section:
>
> **"close member of the family"** of a victim means:
>
> (a) a parent of the victim or other person with parental responsibility for the victim, or
>
> (b) the spouse or partner of the victim, or
>
> (c) a child or stepchild of the victim or any other person for whom the victim has parental responsibility, or
>
> (d) a brother, sister, half-brother or half-sister, or stepbrother or stepsister of the victim.
>
> **"spouse or partner"** means:
>
> (a) a husband or wife, or
>
> (b) a de facto partner,
>
> but where more than one person would so qualify as a spouse or partner, means only the last person to so qualify.

51. The definition of close family member adopts and develops the definition and entitling provision of the *LR(MP) Act*.

52. The term “parental responsibility” is not defined in the Act. Some guidance, however, might be taken from the *Family Law Act 1975* (Cth):

> **61B Meaning of parental responsibility**
>
> In this Part, parental responsibility, in relation to a child, means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.

53. Otherwise, the definitions appear relatively unproblematic satisfied or not on findings of fact.

iii. Was a duty of care owed to the Plaintiffs?

54. The paradigms of circumstances in which a person might suffer pure mental harm are unlimited. As such, the answer to the question of whether a defendant owes a plaintiff a duty of care cannot be answered in a formulaic fashion.

55. Sometimes the question of whether the defendant owed a plaintiff a duty of care in accordance with s32 cannot be answered definitively. This is so because resort must be had to the amorphous touchstone of foreseeability.

56. Section 32 operates as a necessary condition for finding that a defendant owed a duty of care.[48] The circumstances identified in s32(2) are matters to be taken into account in considering whether a duty operates and not themselves

[48] *Optus Administration v Wright* [2017] NSWCA 21 per Bathurst JA at [56].

necessary conditions of the existence of a duty.[49] Consistent with the High Court's earlier decision in *Tame* and *Annetts*, foreseeability is the central element of duty of care.[50]

57. In *Wicks* the High Court considered how s32 of the Act operated in relation to whether a duty was owed by a defendant to a plaintiff claiming pure mental harm (at [22]):

> Consideration of the operation of s 32 (in particular sub-ss (1) and (2)) must begin from the observation that neither s 32 itself, nor any other provision of the Civil Liability Act (whether in Pt 3 or elsewhere), identifies positively when a duty of care to another person to take care not to cause mental harm to that other should be found to exist. Rather, like s 30(2), s 32(1) is cast negatively. It provides that a duty is not to be found unless a condition is satisfied. The necessary condition for establishment of a duty of care, identified by s 32(1), is that the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken.

58. One effect of s32 of the Act is to require a particular and separate inquiry into the existence of a duty of care with respect to mental harm. There is no duty of care not to cause mental harm, unless the composite criterion specified in s32 is satisfied. Contrary to what was decided in *Tame* and *Annetts*, s32 provides that duty of care is not to be found unless the composite criterion is satisfied. In *Optus Administration* Basten JA stated the requirement (at [36]):

> The section imposes a qualification on the test of reasonable foreseeability by specifying three elements that the defendant ought to have foreseen, namely, (a) that "a person of normal fortitude" might (b) "in the circumstances of the case" suffer (c) "a recognised psychiatric illness", if reasonable care were not taken.

59. Foreseeability must be decided as a matter of foresight and not hindsight, without knowledge of the precise circumstances in which the harm actually inflicted and as though it had not occurred.[51] The circumstances are "neither a necessary nor a sufficient condition for finding that a defendant owed a duty to take reasonable care not to cause a plaintiff pure mental harm".[52]

60. Though a plaintiff must establish that the defendant owed the plaintiff a general duty of care, that conclusion is of limited relevance. It is also a requirement to assess whether a person of normal fortitude would suffer a recognised psychiatric illness "in the circumstances of the case".

61. The circumstances to be considered include those set out at s32(2).

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[49] *Wicks* at [23] and [27]-[29]; *Optus Administration* per Basten JA at [56].
[50] *Wicks* at [26].
[51] Ibid at [47].
[52] *Wicks* at [27].

> (2) For the purposes of the application of this section in respect of pure mental harm, the circumstances of the case include the following:
>
> (a) whether or not the mental harm was suffered as the result of a sudden shock,
>
> (b) whether the plaintiff witnessed, at the scene, a person being killed, injured or put in peril,
>
> (c) the nature of the relationship between the plaintiff and any person killed, injured or put in peril,
>
> (d) whether or not there was a pre-existing relationship between the plaintiff and the defendant.

62. As it is a requirement to assess whether a person of normal fortitude would suffer a recognised psychiatric illness "in the circumstances of the case", it is necessary to specify the critical event with a degree of precision.[53]

63. In *Tame* and *Annetts* Gummow and Kirby JJ referred to the judgment of Lord Wright in *Bourhill v Young*[54] and stated that the notion of "normal fortitude" is merely the application of a hypothetical standard that assists the assessment of reasonable foreseeability of harm. It is not an independent pre-condition or bar to recovery.[55]

64. The terms "sudden shock" referred to in s32(2)(a) was discussed in *Wicks*. The term should be understood as a reference to an event or cause as distinct from a consequence.[56] But as the High Court noted in *Wicks*, any finding that there was no single shocking event would not be determinative of the issue of foreseeability and would not preclude a conclusion that a duty of care was owed.

a. Bearers of bad news

65. There is no duty of care to break bad news gently.[57]

66. Occasionally, a distinction may need to be drawn between communication which merely informs a person of bad news and a communication which conveys facts amounting to a breach of duty owed to the person. A plaintiff might allege that a psychological illness has resulted from the fact of being informed of bad news as distinct from alleging that the psychological injury has resulted from the defendant's negligence. Liability will attach to the latter but *not* the former.[58]

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[53] *Optus Administration* per Basten JA at [54].
[54] [1943] AC 92 at 109-110.
[55] *Tame* and *Annetts* at [197].
[56] *Wicks* at [30].
[57] *Mt Isa Mines v Pusey* per Windeyer J at 407; *Tame* and *Annetts* per Gummow, Kirby JJ at [227].
[58] *Tame* and *Annetts* at [230], per Callinan J at [366].

67. In *Tame* and *Annetts* three judges of the Court considered the issue of communicating bad news. The rationale was explained by Gummow and Kirby JJ (at [228]):[59]

> 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.

68. As Gummow and Kirby JJ stated (at [230]):

> Why should a separately identifiable tortfeasor be shelter from distressing consequences of the tortfeasor's conduct?[60]

69. Callinan J was more direct (at [366]):

> The communicator will not be liable unless he or she had the intention to cause psychiatric injury, and was not otherwise legally liable for the shocking event. A person making the communication in the performance of a legal or moral duty will not be liable for making the communication.

iv. Has the plaintiff suffered a recognised psychiatric illness?

70. Section 31 of the Act is clear that before considering whether a person has suffered a recognised psychiatric illness, one must first determine that the claim is for damages relating to "pure mental harm".[61]

71. Once pure mental harm is established, there is no liability in a person to pay damages for pure mental harm unless the harm consists of a recognised psychiatric illness.

72. Typically, evidence as to whether a person has suffered a recognised psychiatric illness includes opinions expressed by experts within the context of signs and symptoms enumerated in DSM – V. While the diagnostic manual is treated as a de facto guide to the presence or otherwise of a recognised psychiatric illness, one should bear in mind that reliance on it is not necessarily determinative.

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[59] See also Callinan J at [366].
[60] *Tame* and *Annetts*.
[61] See the definitions of "consequential mental harm", "mental harm" and "pure mental harm".

v. Aetiology of the plaintiff's mental harm

73. Consistent with the statutory regime regarding causation set out in s5D of the Act, a plaintiff's claim for damages for mental harm must result from the defendant's negligence.[62]

74. Accordingly, it is necessary to understand the aetiology of the alleged injuries. Such understanding is important in determining the extent to which the respective injuries of a plaintiff has resulted from the defendant's negligence and not from some other event. For example, there is a distinction between on the one hand suffering a recognised psychiatric illness resulting from the fact of the death of a family member and on the other hand from the fact of learning that the victim was treated negligently.

vi. Economic loss for consequential mental harm

75. *All* claims for future economic loss must have regard to s 13 of the Act. This is so whether the claim arising out of a physical injury or a mental injury. Section 13 is in the following terms:

> **13 Future economic loss—claimant's prospects and adjustments**
>
> (1) A court cannot make an award of damages for future economic loss unless the claimant first satisfies the court that the assumptions about future earning capacity or other events on which the award is to be based accord with the claimant's most likely future circumstances but for the injury.
>
> (2) When a court determines the amount of any such award of damages for future economic loss it is required to adjust the amount of damages for future economic loss that would have been sustained on those assumptions by reference to the percentage possibility that the events might have occurred but for the injury.
>
> (3) If the court makes an award for future economic loss, it is required to state the assumptions on which the award was based and the relevant percentage by which damages were adjusted.

76. Part 3 of the Act limits economic loss for a particular type of mental harm. It expressly precludes an award of damages for economic loss arising from "consequential mental harm" unless the harm consists of a recognised psychiatric illness. Section 33 does not limit claims in relation to "pure mental harm":

> **33 Liability for economic loss for consequential mental harm**
>
> A court cannot make an award of damages for economic loss for consequential mental harm resulting from negligence unless the harm consists of a recognised psychiatric illness.

[62] Section 28(1) of the Act.

77. Section 33 requires a plaintiff claiming consequential mental harm (harm resulting from a personal injury of any other kind as distinct from pure mental harm) to establish that the plaintiff has suffered a recognised psychiatric illness.

78. In *Sorbello v South Western Sydney Local Health District*[63] Schmidt J determined a claim by the plaintiff parents of a child who suffered significant brain injury as a consequence of hypoxia during the child's birth. While Schmidt J noted the limitation imposed by s33 to claims for consequential mental harm she determined the claims for future economic loss arising from pure mental harm in accordance with the requirements of s13 of the Act.

79. In assessing the plaintiff's economic loss, Schmidt J held that notwithstanding that infant's disabilities placed a significant burden of care on the plaintiff mother, it was as a result of the mother's recognised psychiatric illness that she was unable to exploit her earning capacity. The Court did not accept the defendant's contention that the plaintiff's failure to exercise her earning capacity was a result of a choice made by the plaintiff (at [105]):

> In her oral evidence, [the plaintiff] described how she avoids those opportunities and instead spends her time, often alone, doing very little other than using her phone, in the ways she described. This, I am satisfied is not the result of either indolence, or free choice, but of her illness.

80. In rejecting the defendant's contention as to economic loss, the Court reiterated that the onus was on a defendant to identify practical job opportunities that were available to the plaintiff in the past and likely in the future.[64] Schmidt J ultimately assessed the plaintiff's loss of earning capacity for the past and the future at 100%.[65]

RICHARD JA SERGI
GREENWAY CHAMBERS

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[63] [2016] NSWSC 853.
[64] See *Mead v Kearney* [2012] NSWCA 215 at [34]-[37].
[65] [2016] NSWSC 853 at [148].