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Précis Paper

Nervous Shock and Psychiatric Claims: a consideration of Tame v New South Wales (2002) 211 CLR 317; [2002] HCA 35

A discussion of the High Court's decision in *Tame v New South Wales* (2002) 211 CLR 317; [2002] HCA 35 (in which Michael Finnane QC appeared for the State of New South Wales), and its significance for nervous shock and psychiatric claims

Discussion Includes

- Facts of *Tame v New South Wales* (2002) 211 CLR 317; [2002] HCA 35 (*Tame*)
- The law of nervous shock prior to *Tame*
- Appeal to the NSW Court of Appeal
- Reasonable foreseeability
- Appeal to the High Court
- *Annetts v Australian Stations Pty Limited* (2002) 211 CLR 317; [2002] HCA 35
- Holding of the High Court in *Tame*
- *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269; [2003] HCA 33
- Significance of *Tame*
- Is nervous shock to some degree a feminist issue as a result of *Tame*?
- Could the assessment of reasonable foreseeability change with time?
- Difficulty of recovering damages for nervous shock post-*Tame*

Précis Paper

Video Title

1. In this edition of BenchTV, Michael Finnane QC (Senior Counsel, Arbitrator and Mediator – 2 Wentworth Chambers, Sydney) and Edward P. Anderson (Barrister – 2 Wentworth Chambers, Sydney) discuss the High Court's decision in *Tame v New South Wales* (2002) 211 CLR 317; [2002] HCA 35 (in which Michael Finnane QC appeared for the State of New South Wales), and its significance for nervous shock and psychiatric claims.

Facts of *Tame v New South Wales* (2002) 211 CLR 317; [2002] HCA 35 (*Tame*)

2. Mrs Tame was involved in a car accident. The driver of the other vehicle was uninsured, driving an unregistered vehicle, and was under the influence of alcohol with a BAC of 0.14. The police arrived at the scene, took the details, and left.

3. Mrs Tame was taken to hospital for her injuries, which were not all that significant, and after being given a blood alcohol test at the hospital, she was found to have no alcohol in her blood.

4. Subsequently, an Acting Sergeant Beardsley, in filling out the form setting out the details of the accident, erroneously recorded Mrs Tame's blood alcohol reading as 0.14. These forms were commonly sent to insurance companies and to plaintiffs by the police as a means of setting out all the necessary information about the accident.

5. Mrs Tame became aware of the error because a copy of the inaccurate form was sent to the insurance company. At the time, she was involved in an argument with the insurance company about payment for physiotherapy expenses, which the company was refusing to pay, and became convinced that the inaccurate blood alcohol reading recorded on the form had something to do with her not being paid her physiotherapy expenses. She had a psychiatric reaction to this error.

6. The error was noticed and within a month was corrected and removed from the form, and about a year later, the police service apologised to Mrs Tame for the error.

7. Mrs Tame claimed that she suffered nervous shock as a result of the error, even though the error was only on the form for one month. She claimed that the psychiatric consequences of the error were very shattering and still existing.

8. In the District Court, Garling J awarded Mrs Tame in excess of $100,000 in damages.

9. Michael Finnane SC became involved in the matter when it proceeded to the NSW Court of Appeal. In that appeal, junior counsel for Mrs Tame was Nicholas Mullany, the author of a small work on nervous shock.

10. Mr Mullany's theory was that one could sue for nervous shock in circumstances such as Mrs Tame's. Given that he essentially argued Mrs Tame's appeal, Finnane SC is of the view that Mr Mullany was running a point he felt was an important question of law which he wanted a higher court to accept.

The law of nervous shock prior to *Tame*

11. When the case went on to appeal, the NSW Court of Appeal was faced with the law at that time concerning nervous shock. The law concerning nervous shock prior to *Tame* had the following elements:
    i. the existence of a physical injury;
    ii. the person claiming nervous shock had to come upon the injured person and suddenly suffer the nervous shock;
    iii. the person claiming nervous shock had to be a person of normal fortitude;
    iv. it had to be a psychiatric shock and not just a bit of upset; and
    v. it had to be reasonably foreseeable that this nervous shock could occur.

12. Early nervous shock cases involved people coming upon children killed in car accidents etc, and the sudden reaction of the mother or father who saw them. These were situations in which the individual claiming nervous shock actually perceived or observed an event occurring, as opposed to someone hearing something at arm's length. Prior to *Tame*, there had never been a case of someone successfully claiming nervous shock as a result of what someone had told them.

13. There also had to be some relationship between the person who was injured and the person who suffered the nervous shock. Although the original nervous shock cases involved family relationships, the relevant law could be extended to cover other relationships as well.

14. In summary, for nervous shock to be made out, the following factors had to be present:
    i. sudden perception;
    ii. normal fortitude; and
    iii. reasonable foreseeability.

15. Every nervous shock case prior to *Tame* involved a person who saw something that caused the shock. For example, a mother coming across her dead son in a car, who had been shot dead by a police officer. She sued the police for nervous shock. This is starkly different to Mrs Tame's case in the sense that Mrs Tame was not present for what would be defined as the event causing the nervous shock.

16. It is important to note that Mrs Tame was not claiming for psychiatric reaction as a result of being in a collision with a drunk driver, but was claiming for psychiatric reaction as a result of someone erroneously stating that she was driving under the influence of alcohol. There was never any suggestion that she sustained a psychological injury as a result of the motor accident itself.

Appeal to the NSW Court of Appeal

17. Nicholas Mullany for Mrs Tame urged the NSW Court of Appeal to extend the notions of nervous shock so that damages for nervous shock could be obtained in circumstances involving the erroneous filling in of a document.

18. Finnane SC argued in the Court of Appeal that the Court could not do this, because if the already established law regarding nervous shock was going to be changed, it should only be changed by the High Court. The Court of Appeal accepted this proposition.

19. The Court found for the State of New South Wales because it determined that the injury to Mrs Tame was not reasonably foreseeable. Acting Sergeant Beardsley could not have reasonably foreseen that if he filled in a form wrongly, the person with whom the form was concerned would suffer an abnormal psychiatric reaction.

Reasonable foreseeability

20. Even if there exists a duty of care between people, unless a particular damage is reasonably foreseeable, there can be no recovery. Reasonable foreseeability is therefore a control mechanism that applies generally in the law of negligence.

21. Applying the concept to Mrs Tame's case, the question would be: would it be reasonably foreseeable to a police officer carrying out a duty (filling in a form), that if he filled in the form wrongly, the person with whom the form was concerned would suffer a very strong psychiatric injury? Importantly, the police officer had never met Mrs Tame, so it could not

be said that he was doing something knowing something about her, he was simply carrying out a routine task.

Appeal to the High Court

22. Mrs Tame appealed the decision of the NSW Court of Appeal to the High Court. She argued her whole case again, inviting the High Court to change the law to allow for damages for nervous shock in circumstances such as her own.

23. The High Court ran Mrs Tame's case together with the case of *Annetts v Australian Stations Pty Limited* (2002) 211 CLR 317; [2002] HCA 35.

Annetts v Australian Stations Pty Limited (2002) 211 CLR 317; [2002] HCA 35

24. In *Annetts v Australian Stations Pty Limited* (2002) 211 CLR 317; [2002] HCA 35 (*Annetts*), the Annetts allowed their 17-year-old son to work on a remote cattle property in Western Australia. However, he was completely isolated on the property, and as a result decided to walk off, after which he died of thirst and starvation.

25. Although the Annetts became aware that their son had died of thirst and starvation, they were not present at the scene, did not see the dead body at the cattle property, and did not find him for some time afterwards. When they found their son, they were looking at a skeleton or a partly decomposed body. Even though they did not perceive the event and it was not sudden, Mrs Annetts suffered a considerable psychiatric reaction.

26. Heenan J of the Supreme Court of Western Australia decided that because of the requirement of sudden perception, and the fact that Mrs Annetts had not suddenly perceived anything, she could not recover for nervous shock.

27. On appeal to the High Court, the three control tests for nervous shock were considered. The Court accepted that the manager of the cattle property owed a duty of care to the Annetts' son, and it was reasonably foreseeable that the Annetts could suffer nervous shock if their son died following a breach of the manager's duty to look after the son.

28. The High Court held that direct viewing of the scene was not necessary, and further, that Mrs Annetts was a person of normal fortitude. Someone with a predisposition to mental illness or a psychiatric condition prior to an accident may be adversely affected in an assessment of whether they were a person of normal fortitude, however, although Mrs

Annetts had a somewhat nervous disposition, the High Court held that this did not mean that she was not a person of normal fortitude.

29. Therefore, Mrs Annetts recovered damages for nervous shock.

Holding of the High Court in *Tame*

30. The judges had different reasons for reaching their decision. Gleeson CJ and Gummow and Kirby JJ all held that the control tests should no longer apply, and that only reasonable foreseeability should be looked at.

31. The relationship between the parties is always relevant to the question of reasonable foreseeability. If there is no relationship, it might not be reasonably foreseeable that the plaintiff could suffer nervous shock; if there is a close relationship, it might be reasonably foreseeable.

32. Glesson CJ and Gummow and Kirby JJ held that the question of normal fortitude was of no consequence, that sudden perception was not necessary, and this was not the law in Australia.

33. They held that Acting Sergeant Beardsley could not reasonably have foreseen that in filling out a form about Mrs Tame, she would have a severe psychiatric reaction.

34. McHugh, Callinan and Hayne JJ all agreed that reasonable foreseeability was the deciding factor in the case, and thought that normal fortitude was a matter of importance.

35. Hayne J also thought that normal fortitude was something that was still required, but that sudden perception of events was not required.

36. At [298] of the judgment, Hayne J stated that, "[p]olice officers investigating possible contravention of the law do not owe a common law duty to take reasonable care to prevent psychiatric injuries to those whose conduct they are investigating". An example is where a police officer, in the course of an investigation, loses an exhibit, resulting in the weakening of the prosecution case and the acquittal of the person charged. Although negligent, the complainant has no right of action against the police officer for losing the exhibit.

37. Another example is where the police failed to stop a woman removing a child from Australia, in contravention of a Family Court order. Although the father suffered enormous loss in trying to get the child back, he was unable to recover. This was because, although the police were extremely negligent, they did not owe him a duty of care.

Gifford v Strang Patrick Stevedoring Pty Ltd (2003) 214 CLR 269; [2003] HCA 33

38. In *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269; [2003] HCA 33, decided after *Tame*, a waterside worker was injured and died. Though the deceased's children did not witness the incident, they suffered psychiatric injury as a result.

39. The Court of Appeal held that as the children did not witness the incident, they could not recover for nervous shock. However, the High Court held that this was wrong, and allowed the appeal.

40. Several of the judges made it clear that the real test is reasonable foreseeability of harm in circumstances where there is such a relationship between the parties that it would be expected to be obvious to the wrongdoer that the injured party could be injured.

41. The employer had a duty of care to the worker, and it was reasonably foreseeable that upon hearing of his death, his children would become psychiatrically injured. Hence, they could recover damages for nervous shock.

Significance of *Tame*

42. Mrs Tame's case is significant on a number of fronts.

43. Firstly, it has put to rest the possibility that anybody could sue for nervous shock arising from somebody filling in a form wrongly. This is because the relationship between these two parties is not such that there could be reasonable foreseeability of harm.

44. Secondly, the old control tests for nervous shock do not apply. If somebody becomes aware that someone they know has suffered a severe accident, and suffers psychiatric injury as a result, they can recover provided it was reasonably foreseeable they would suffer that injury.

45. Although the control tests no longer apply, they are still relevant in a sense. Normal fortitude, for example, is, to a degree, written into the *Civil Liability Act 2002* (NSW). Normal

fortitude might also still have some relevance in determining both reasonable foreseeability and general entitlement to sue.

Is nervous shock to some degree a feminist issue as a result of the judgment in *Tame*?

46. Although Mrs Tame was a woman, as was the plaintiff in one of the first nervous shock cases, anybody could suffer nervous shock, so it is not necessarily a woman's issue. The shock would be expected of anybody if the person who suffered it had a close relationship with the victim.

Could the assessment of reasonable foreseeability change with time?

47. If it was purely under the common law, the assessment of reasonable foreseeability probably would change with time. However, under the present highly-structured statutory system, which changes when there is a change in the law to make it difficult for plaintiffs to recover, it is not clear how far reasonable foreseeability will change.

48. Insurance companies may put pressure on the government to change the law, if they think it will change very much.

Difficulty of recovering damages for nervous shock post-*Tame*?

49. Post-*Tame*, it is more difficult to recover damages for nervous shock, as the requirements of the *Civil Liability Act 2002* (NSW) must be satisfied. This involves duty of care, breach of duty, causation, loss, etc.

50. The only NSW court to which the *Civil Liability Act* does not apply is the Dust Diseases Tribunal – the common law applies entirely there. In the Dust Diseases Tribunal, the Act provisions apply only to a very limited extent in relation to damage, but not to the tests for liability.

51. Therefore, it is possible that someone suffering severe nervous shock upon learning that they have mesothelioma may be able to go to the Dust Diseases Tribunal rather than the common law courts. In that case, the Civil Liability Act tests will not apply.

52. In conclusion, the only real effect of Tame on the recovery of damages for nervous shock is to theoretically make it easier to recover.

BIOGRAPHY

Michael Finnane SC

Senior Counsel, Arbitrator and Mediator, 2 Wentworth Chambers, Sydney

A former judge of the District Court of New South Wales and Colonel of the Australian Army Legal Corps, Michael has an expansive practice. Prior to his judicial appointment in 2000, Michael maintained a broad practice representing clients in long and complex matters, such matters including Royal Commissions and inquiries undertaken on behalf of the New South Wales Government. Michael is accredited as a Mediator by LEADR, acting in numerous commercial mediations, and has appeared on behalf of clients, including the New South Wales Government. Michael also holds qualifications as an Arbitrator.

Edward P. Anderson

Barrister, 2 Wentworth Chambers, Sydney

Edward approached the bard in 2017. Prior to this, he was a solicitor at Mills Oakley in the liability practice group. Whilst working as a solicitor, Edward had a broad practice advising and acting for clients (including insurers and underwriters) in proceedings before State and Federal Courts. Edward is currently briefed in various commercial and criminal matters on behalf of plaintiffs and defendants.

BIBLIOGRAPHY

Focus Case

Tame v New South Wales (2002) 211 CLR 317; [2002] HCA 35

Judgment Link

Tame v New South Wales (2002) 211 CLR 317; [2002] HCA 35

Cases

Annetts v Australian Stations Pty Limited (2002) 211 CLR 317; [2002] HCA 35
Gifford v Strang Patrick Stevedoring Pty Ltd (2003) 214 CLR 269; [2003] HCA 33

Legislation

Civil Liability Act 2002 (NSW)