



# Précis Paper

## Claims for Psychiatric Injury

A discussion of the law relating to psychiatric injury, including nervous shock claims, intentional tort, and vicarious liability

### **Discussion Includes**

- Who can make claims for nervous shock
- Changes brought about by the *Civil Liability Act 2002* (NSW)
- Intentional tort in relation to injuries that occur on school or church premises
- Vicarious liability of employers for psychiatric injury
- Advising plaintiffs as to whether or not to make a claim for nervous shock
- Assessment of damages for psychological injury
- What evidence is necessary for a nervous shock claim to be fully prepared

# Précis Paper

## Claims for Psychiatric Injury

1. In this edition of BenchTV, Tim McKenzie (Barrister, Second Floor Wentworth Chambers, Sydney) and Greg Beauchamp (Barrister, Second Floor Wentworth Chambers, Sydney) discuss nervous shock claims, intentional tort, and assessment of damages for psychological injury.

### Introduction

2. Around 30 years ago, nervous shock claims were mostly 'add-ons' to other claims. Typically they were not big cases, and damages were fairly constrained.
3. The law has changed not only in terms of the legislation, but also in terms of what damages can now be recovered.

### Who can make claims for nervous shock?

4. The position at common law did not change for a long time. But then some time shortly before the *Civil Liability Act 2002* (NSW), the categories of who could claim broadened.
5. The people who could bring a claim for nervous shock were expanded by two High Court cases:
  - *Annetts v Australian Stations Pty Ltd* [2002] HCA 35
  - *Gifford v Strang Patrick Stevedoring Pty Limited* [2003] HCA 33

### *Key facts of Annetts v Australian Stations Pty Ltd [2002] HCA 35*

6. A 16-year-old boy wanted to go jackarooing. His parents were reluctant to let him go, but they had a meeting with the owner of Australian Stations, and were assured that their son would be looked after.
7. The reality was that he was left alone in a homestead in the middle of the desert, hundreds of kilometres away from the other staff, or any other human being for that matter.
8. The boy goes missing. After some months, it appears that the worst has happened, and the parents suffer a nervous shock. Some months after that, the remains of the boy are found.

9. The question at common law of whether or not the parents could recover damages arose over the fact that they did not witness the event or immediate aftermath of their son's death.
10. In accordance with the history of English common law, a person claiming nervous shock was required to see the event, and be of 'normal fortitude'. The word 'fortitude' ruled out a lot of eggshell skull cases.
11. Although the common law contemplated an eggshell plaintiff, in nervous shock claims the plaintiff had to have 'normal fortitude'.
12. The High Court decided the parents were entitled to recover, irrespective of the fact that they did not see the event or its aftermath.

*Key facts of Gifford v Strang Patrick Stevedoring Pty Limited [2003] HCA 33*

13. A father was killed in an accident in which he was squashed by a heavy forklift. There was no event or aftermath that the children saw, but they brought a claim for nervous shock on the basis of their (close and loving) relationship with their father.
14. There was a question as to whether a certain section of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) expanded or restricted the common law.
15. The main question, however, was whether the children were able to bring a claim for nervous shock without having seen the event or its immediate aftermath.
16. A foundational principle of the modern law of torts is the neighbour principle. His Honours Justice Kirby and Justice McHugh held that there are many relationships out of which someone can recover damages for nervous shock because of closeness of connection. Justice McHugh found that 'for the purpose of a nervous shock action, the neighbour of a wrongdoer in Lord Atkin's sense includes all those who have a close and loving relationship with the person harmed'.
17. So the class of people who could make a claim for nervous shock had been expanded ... until the introduction of the *Civil Liability Act 2002* (NSW).

Changes brought about by the Civil Liability Act 2002 (NSW)

18. The *Civil Liability Act 2002* (NSW) restricted the categories of people who could make a claim for nervous shock. Close family members, or witnesses to the actual event, or both, can claim under s 32.
19. 'Close member of the family' is defined broadly under the NSW legislation.
20. *Wicks v State Rail Authority of New South Wales* [2010] HCA 22 involved a 'witness-type' claimant (as opposed to a close-family-member-type claimant). The defendant in this case perceived the event as being the actual derailing of the carriage.
21. S 30 of the *Civil Liability Act* states that a claimant cannot recover as a witness, unless he or she witnesses at the scene the victim being killed, put in peril, or injured. So it seems as though a very strong contemporaneous connection is required. The High Court dealt with this by viewing the event as a continuum, and the claimants recovered damages in this case.
22. But not all witness claimants will be successful. The success of a claim will always turn on the facts of the case.
23. In NSW, s 151AD of the *Workers Compensation Act 1987* (NSW) came into effect to prevent a person from bringing a claim against the employer of a victim. It states that no damages for mental harm arising from nervous shock may be awarded against an employer in relation to the death of a worker.
24. Most claims made by a family member against an employer would instead fall under s 25 of the *Workers Compensation Act 1987* (NSW), which now provides a death benefit of something in excess of \$77,000. The legislation was changed so that the death benefit would go up substantially, but that no claims for nervous shock could be made by family members.
25. The motor accident situation is covered by the *Civil Liability Act* (close family members can bring claims for nervous shock) Bearing in mind for the motor accident situation that there is a threshold that must be met before any damages for non-economic loss can be recovered (11% whole person impairment).
26. 'Put in peril' is a unique category. It was available at common law, and is now preserved under the *Civil Liability Act*.
27. When suing an employer for nervous shock in an employment situation, the co-worker must establish, in accordance with High Court authority such as *Koehler v Cerebos*

*(Australia) Ltd* [2005] HCA 15, that it is foreseeable that he or she will suffer psychiatric injury.

28. A major concern for those commencing actions for nervous shock claims is what damages they might be able to recover. The Court of Appeal has generally dealt with the *Civil Liability Act* by saying that the task of the trial judge is to calculate a percentage of the most extreme case, rather than calculating an amount to award.
29. We tend to minimise the effect of psychiatric injury as a society. The common experience of the community is that people quite often suffer in silence. And if an event has had a disabling influence (for example PTSD) on a child, it may be decades until the disabling effect is felt.
30. It is important to remember that it is not just people in the armed or emergency services, or police, who suffer from PTSD, even though they are probably exposed to those situations likely to cause PTSD more frequently.

#### Intentional tort in relation to injuries that occur on school or church premises

31. The area of intentional tort is tricky. The High Court has had a reasonable go at trying to define vicarious liability for intentional tort.
32. When a teacher or religious person in a position of authority abuses a child, either sexually or physically, a question arises as to what circumstances will justify the victim suing the employer, or governing body, for that intentional tort.
33. The High Court dealt with this question in the case of *Prince Alfred College Incorporated v ADC* [2016] HCA 37 by reference to earlier English authorities, and by trying to establish situations where an employer may have made it possible for an employee to commit an intentional tort.
34. Three key cases were referred to:
  - *Lloyd v Grace, Smith & Co* [1912] UKHL 1
  - *Deatons Pty Ltd v Flew* [1949] 79 CLR 370
  - *Lister v Hesley Hall Ltd* [2001] UKHL 22

#### *Vicarious Liability*

35. Vicarious liability is also a very difficult area. The High Court has dealt with vicarious liability in a couple of cases, including in *Sullivan v Moody* [2001] HCA 59, and *New South Wales v Lepore* [2003] HCA 4.
36. In *Prince Alfred College Incorporated v ADC* [2016], the High Court attempted to set out principles which could be used in future, bearing in mind that this case was really about an extension of time application.
37. In deciding against the plaintiff in this case, the High Court set out what it believed the relevant approach in the future would be. It pointed to five relevant factors to be taken into account when determining whether to hold an employer vicariously liable for an employee's criminal act (where in the commission of that act the employee used or took advantage of the position which the employment placed the employer vis-à-vis the victim), namely:
- Authority
  - Power
  - Trust
  - Control
  - Ability to achieve intimacy with the victim
38. Vulnerability of the victim is another factor in establishing the necessary connection.
39. It is critical to establish the facts whereby not only the criminal conduct of the relevant teacher or religious person can be shown, but also the liability of the employer for the conduct of that person.
40. If vicarious liability can be established, the victim is not constrained by the *Civil Liability Act* as to the restrictions on negligence or damages.

*Advising a plaintiff as to whether or not to make a claim for nervous shock*

41. It is vital for a practitioner to consider whether the circumstances can be established to support a finding that a client was abused by a person acting in the scope of their employment. Claims for psychiatric injury are extremely difficult for plaintiffs, in an adversarial sense, so every attempt is usually made to try to resolve such claims before they reach the courtroom.
42. It is not every case that a practitioner should advise a client to bring a claim for nervous shock. Practitioners have an obligation to tell their clients whether they have a reasonably arguable case on the merits.

43. The case of *AX by tutor ZX v Ashfield Municipal Council* [2012] NSWDC 32 is an example of when a practitioner should have advised a client against bringing proceedings. In this case, the trial judge held that he had to apply the *Civil Liability Act*, ruling that a person of normal fortitude would not have suffered the type of psychological reaction that the plaintiff had.
44. The stakes are high for a plaintiff like the one in this case. The costs paid by the plaintiff might not be recovered by the party-party costs order. There is also the very human and real consideration of a plaintiff having to relive their traumatic experience in the witness box.
45. If the damages are not going to be the reward for the loss that the plaintiff perceives, but rather the trial of having to relive the traumatic experience through cross-examination, avoiding such trial may well outweigh any small amount of damages the plaintiff might be likely to recover. Indeed, the trend these days is to try to avoid plaintiffs having to give such evidence in the courtroom.
46. It is important to remember that alternative dispute resolution can be very effective. It is the duty of the practitioner to make situations such as this as easy as possible for their client, without denying them their rights.

What evidence is necessary for a nervous shock claim to be fully prepared?

47. Aside from evidence obtained from medicos or psychiatrists, lay evidence from family and friends about how the plaintiff has been affected is very important - what used to be called 'before-and-after evidence'.
48. It is also important that the plaintiff record, or keep a diary of, the details of how he or she has been affected.
49. Even though there are more cases coming through of genuine nervous shock, or psychological injury, constraints still exist, and they depend on the judges who sit in the Court of Appeal.
50. When it comes to physical injury, the level of proof, on the balance of probabilities, is accepted and genuinely understood by most judges. When it comes to psychiatric injury, it seems to be the case that the level of proof required to be met is higher. If it really is the case, then we may have fallen into error, because it is still an injury, irrespective of whether it is physical or psychiatric.

51. Perhaps this is the result of a hangover from the age of the judges who are determining these matters, having grown up themselves in a time where psychiatric injury was not so readily recognised as it is in modern society; perhaps a change will be seen as younger judges evolve into the court system.



## **BIOGRAPHY**

### Tim McKenzie

Barrister, Second Floor Wentworth Chambers, Sydney

Tim was called to the Bar in 1991 where he specialises in common law and administrative law with a particular emphasis on industrial accidents, motor vehicle accidents, public liability and professional negligence claims. Tim regularly appears in the Supreme and District Courts and the Administrative Appeals Tribunal and also has extensive experience representing clients at mediations and informal settlement conferences. Tim also regularly organizes seminars for the Tilbury Group (a Sydney common law seminar) and has been a keynote speaker at most seminars on substantive law, procedure and ethics.

### Greg Beauchamp

Barrister, Second Floor Wentworth Chambers, Sydney

Greg was admitted as a solicitor of the Supreme Court of NSW in 1975 and was called to the Bar in 1978 where he practices in the areas of income protection, industrial law, superannuation law, personal injury law and torts. Greg's extensive practice in personal injury litigation led him to the previously neglected area of an insured rights to Total and Permanent Disability and Income Protection benefits. He has appeared in countless matters both at first instance in the Supreme Court and at the appellate level.

## **BIBLIOGRAPHY**

### Cases

*Annetts v Australian Stations Pty Ltd* [2002] HCA 35

*Gifford v Strang Patrick Stevedoring Pty Limited* [2003] HCA 33

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*Wicks v State Rail Authority of New South Wales* [2010] HCA 22

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*Lloyd v Grace, Smith & Co* [1912] UKHL 1

*Deatons Pty Ltd v Flew* [1949] 79 CLR 370

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*Sullivan v Moody* [2001] HCA 59

*New South Wales v Lepore* [2003] HCA 4

*AX by tutor ZX v Ashfield Municipal Council* [2012] NSWDC 32

### Legislation

*Civil Liability Act 2002* (NSW)

*Law Reform (Miscellaneous Provisions) Act 1946* (NSW)

