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Nervous shock: *Tame v New South Wales* and *Annetts v Australian Stations Pty Ltd*

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*A number of legal issues have remained open since the High Court last considered the question of liability in negligence for nervous shock in 1984. In **Tame** and **Annetts**, two recent decisions of the court, a number of the outstanding questions were addressed. Specifically, the court considered the issues of whether the 'reasonable foresight' test included a requirement of 'normal fortitude', and whether a claimant needs to establish a 'sudden shock' and a 'direct perception' of the accident or its aftermath.*

Introduction

Prior to 2002, the case of *Jaensch v Coffey*[1] in 1984 had been the last High Court decision to consider the question of liability in negligence for 'nervous shock' (as psychiatric injury incurred independently of any physical harm is 'anachronistically' described by the law).[2] The absence of decisions at the highest appellate level is not the product of a well-settled, clear and easily applied set of legal principles. Indeed, lower courts have struggled with many of the legal issues left unclear by *Jaensch v Coffey*.

Courts have tended to take a restrictive approach to liability for 'nervous shock' in Australia, as throughout the common law world[3] and, indeed, perhaps civil law jurisdictions as well.[4] In Australian law, liability for nervous shock has been limited by the use of a number of 'control mechanisms' setting out legal requirements beyond mere foreseeability of harm: since 'foresight of harm does *not* suffice to establish the existence of a duty of care'.[5] One well-settled requirement of the law is that plaintiffs must establish that they have suffered a recognisable psychiatric illness, as opposed to mere grief, sorrow, fright or distress.[6] This limit on the type of harm sounding in damages has been unanimously accepted as a continuing prerequisite to liability in Australia, though the difficulties in drawing the boundaries between 'grief' and psychiatric illness have been acknowledged by some judges.[7]

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1 (1984) 155 CLR 549; 54 ALR 417.

2 M Davies, *Butterworths Tutorial Series: Torts*, 3rd ed, Butterworths, Sydney, 1999, p 190.

3 See, generally, the survey of the common law in N J Mullany and P R Handford, *Tort Liability for Psychiatric Damage: The Law of 'Nervous Shock'*, Law Book Co Ltd, Sydney, 1993.

4 See Hayne J in *Tame v New South Wales* and *Annetts v Australian Stations Pty Ltd* (2002) 191 ALR 449 (*Tame* and *Annetts*) at [251]–[252].

5 Ibid, at [250] per Hayne J.

6 See, eg, *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 394 per Windeyer J; [1971] ALR 253; and Gleeson CJ, *Tame* and *Annetts*, at [7]: 'save in exceptional circumstances, a person is not liable, in negligence, for being a cause of distress, alarm, fear, anxiety, annoyance, or despondency, without any resulting recognised psychiatric illness'. See also *Tame* and *Annetts* at [193] per Gummow and Kirby JJ.

7 See, eg, Hayne J, *Tame* and *Annetts* at [285]–[296].

It is in relation to the existence, application and scope of other limiting devices that there has been continuing uncertainty in Australian law. One general difficulty has been conceptual: there are differing views about where in the conceptual framework of negligence law these control mechanisms fit. Are they merely aspects of the reasonable foreseeability test;[8] do they operate as determinants of a second stage of inquiry such as the existence of a relationship of 'proximity';[9] or are they separate and distinct policy limitations on the existence of liability?[10] Further, and in relation to the specific control mechanisms themselves, uncertainties exist as to three critical issues;[11] these issues were considered by the High Court in *Tame v New South Wales* and *Annetts v Australian Stations Pty Ltd*[12] (*Tame* and *Annetts*), heard and decided together in 2002:

(1) Is it a requirement that the reasonable foreseeability of nervous shock is limited to the foreseeability of such a reaction to the (negligently) caused accident by someone of 'normal' or 'ordinary' mental fortitude? In other words, is recovery limited to cases in which only a plaintiff of normal fortitude would suffer psychiatric damage from the negligent conduct? Windeyer J in *Mount Isa Mines Ltd v Pusey*[13] appeared to question the need for such 'normal fortitude', but the requirement has been applied by English courts (in relation to plaintiffs not themselves primary victims of the negligent conduct)[14] and was accepted by the New South Wales Court of Appeal in *Tame's* case.[15]

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8 This accords with Brennan J's approach in *Jaensch v Coffey* (1984) 155 CLR 549; 54 ALR 417. See also the general treatment of nervous shock in R P Balkin and J L R Davis, *Law of Torts*, 2nd ed, Butterworths, Sydney, 1996, pp 242–50, which discusses the different control mechanisms as aspects of reasonable foreseeability, although at p 250 the authors note 'that this criterion alone, without other accompanying "proximity factors", will not generally serve to impose liability'.

9 Eg, Deane J in *Jaensch v Coffey* (1984) 155 CLR 549; 54 ALR 417.

10 See the discussion in F Trindade and P Cane, *The Law of Torts in Australia*, 3rd ed, Oxford University Press, Oxford, 1999, p 367.

11 A fourth factor that may limit liability is the requirement of a sufficient closeness of relationship between the sufferer of nervous shock and the victim of the accident. This was not an issue in either *Tame* or *Annetts*, though it is raised by a case on appeal to the High Court from NSW: *Gifford v Strang Patrick Stevedoring Pty Ltd* (2001) 51 NSWLR 606. The issue has proved to be problematic in England (where see, eg, *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310; [1991] 4 All ER 907). Restrictive provisions have been passed in NSW limiting claims to those who are either victims of an accident or close 'relatives' of the victims in the context of industrial accidents (Workers Compensation Act 1987 s 151P), or who are victims of, close relatives of the victims of, or bystanders present at the scene of, motor vehicle accidents (Motor Accident Compensation Act 1999 s 141) (and see also Wrongs Act 1936 (SA) s 35A(1)(c) in relation to motor accidents). Similar restrictions have been included for general application under the Civil Liability Amendment (Personal Responsibility) Act 2002 (NSW) (assented to 28 November 2002). In *Gifford v Strang*, the NSW Court of Appeal interpreted s 151P of the first Act, not as founding liability in the circumstances it refers to, but as providing that damages cannot be awarded unless those circumstances exist.

12 (2002) 191 ALR 449.

13 (1970) 125 CLR 383; [1971] ALR 253.

14 See *Page v Smith* [1996] AC 155; [1995] 2 All ER 736.

15 *Tame v Morgan* (2000) 49 NSWLR 21.

(2) Must the foreseeable psychiatric injury have been caused by a 'sudden' shock or sensory perception? Brennan J's judgment in *Jaensch v Coffey*[16] appeared to suggest such a requirement. Although no other members of the court in that case expressly adopted this, some lower courts have treated such a requirement as authoritative.[17] In other cases, the need for a 'sudden' shock has been criticised.[18]
(3) Is it necessary that the plaintiff directly perceived a distressing event or its 'immediate aftermath'?

Unfortunately, although evidencing a more expansive approach to recovery for nervous shock, the High Court in *Tame* and *Annetts* has failed to provide an *authoritative* guide as to the legal position in Australia. All seven judges, in the course of six separate judgments,[19] disallowed the claim and appeal of Mrs Tame, and allowed the appeal of Mr and Mrs Annetts that the facts as alleged were sufficient at law to give rise to a duty of care. None the less, their reasons differed considerably and it is difficult to find a majority opinion in favour of any clear proposition. This diversity of opinions makes it difficult to draw confident conclusions as to the appropriate analysis to be adopted. In particular, there were considerable divisions in the court about all three of the questions raised by the cases as to the ongoing relevance of the control mechanisms. Before considering the judgments and how these controversies were addressed by the court, the facts of the two cases will be briefly outlined.[20] *Annetts*' case, in particular, raises most clearly the inherent difficulties in drawing the boundaries of any liability for nervous shock.

Facts

In *Annetts*, the appellants were the parents of 16-year-old James who had gone to work for the respondent on a remote outback cattle station near Halls Creek in Western Australia. Prior to James commencing employment, his mother had sought, and obtained, assurances from the station manager that he would be well looked after and under constant supervision. Despite such assurances, James was sent as caretaker to a remote out-station about 100 km from the main station. Several weeks later, James went missing. Upon being told this over the telephone, James' father collapsed. James' parents made several trips to Halls Creek, and extensive searches were carried out, during which time some of James' belongings were found. It was not until nearly five months later that James' body was found in the desert, his vehicle having broken down. James had died from dehydration, exhaustion and hypothermia. His parents suffered psychiatric illness on hearing that James had gone missing and later of his death. The Western Australian Full Court had dismissed the Annetts' claim, in short because persons of 'normal fortitude' in the position of the parents would not foreseeably have suffered psychiatric injury, and the

16 (1985) 155 CLR 549; 54 ALR 417.
17 See *Tame* and *Annetts* (2002) 191 ALR 449 at [206] per Gummow and Kirby JJ, citing *Reeve v Brisbane City Council* [1995] 2 Qd R 661 and *Pham v Lawson* (1997) 68 SASR 124.
18 Eg, *Campbelltown City Council v Mackay* (1989) 15 NSWLR 501 at 503 per Kirby P.
19 Gummow and Kirby JJ delivered a joint judgment.
20 The decisions of the courts below were considered in this *Journal* in D Butler, 'Voyages in uncertain seas with dated maps: recent developments in liability for psychiatric injury in Australia' (2001) 9 *TLJ* 14.

Annetts had not suffered a sudden sensory perception, nor directly perceived the consequences of the defendant's negligence. The High Court considered all three of these legal 'criteria' and their relevant status in the law of nervous shock.

In *Tame*, the facts raised a much weaker claim for damages,[21] given the historically restrictive approach of courts to nervous shock claims generally. Mrs Tame had been involved in a car accident, which was clearly the fault of the other driver. After the accident, both parties were blood tested and the other driver had a blood-alcohol reading of 0.14. As a result of a clerical error by a police officer, the report form on the accident stated both Mrs Tame's and the other driver's blood-alcohol reading as 0.14. A few weeks later, the error was noticed and corrected. No one acted on the erroneous report, though Mrs Tame's insurers did receive a copy of it. About a year after these events, Mrs Tame found out about the error. Mrs Tame became obsessed about the error and, ultimately, suffered psychotic depression. Although the plaintiff had succeeded in her claim in the District Court, the NSW Court of Appeal had unanimously allowed the appeal by the defendant. It is perhaps surprising that leave to appeal was granted to the High Court at all.

'Normal fortitude'

Of the seven judges, McHugh, Hayne and Callinan JJ considered that the test of reasonable foreseeability incorporates within it the foreseeability of psychiatric injury to a person of normal, ordinary or reasonable mental fortitude.[22] Hayne J, for example, stated the test in the following terms: 'the duty which the defendant owes should be held to be a duty to act with reasonable care not to cause psychiatric injury to a person of reasonable or ordinary fortitude.'[23]

Indeed, in a significant retreat from established precedent, McHugh J criticised the 'undemanding' test of reasonable foreseeability adopted in *Wyong Shire Council v Shirt*,[24] that a risk is foreseeable so long as it is not 'far-fetched or fanciful'.[25] In McHugh J's view:

> When it is necessary to determine foreseeability in the duty context, the development of the law of negligence as a socially useful instrument now requires the rejection of the attenuated test of foreseeability . . . adopted by this court in *Shirt*.[26]

Hence, defendants ought not to be required to take into account 'remote possibilities of harm'.[27] Having taken this restrictive view, McHugh J linked it to the maintenance of the normal fortitude test in nervous shock cases:

> Once it is accepted that a risk is not necessarily reasonably foreseeable because it is not far-fetched or fanciful, criticism of the 'normal fortitude' test wears a different

21 See also I Freckelton, 'Damages for Psychiatric Injury: Setting the Limits' (2000) 7 *Psychiatry, Psychology and Law* 184 at 290, stating that the case had 'little merit'.
22 (2002) 191 ALR 449 at [90], [109] per McHugh J, [273] per Hayne J, [331] per Callinan J.
23 Ibid, at [273].
24 (1980) CLR 40; 29 ALR 217.
25 (2002) 191 ALR 449 at [96].
26 Ibid, at [104].
27 Ibid, at [108].

> complexion. Once the notion of reasonableness regains its rightful place at the front of the negligence inquiry, it must follow that a defendant is entitled to act on the basis that there will be a normal reaction to his or her conduct. The position is different if the defendant knows that the plaintiff is in a special position. But otherwise the defendant should not be penalised for abnormal reactions to his or her conduct.
>
> To insist that the duty of reasonable care in pure psychiatric illness cases be anchored by reference to the most vulnerable person in the community — by reference to the most fragile psyche in the community — would place an undue burden on social action and communication.[28]

Two other members of the court, however, considered that foreseeability of psychiatric injury to a person of normal fortitude was not a *requirement or precondition* of liability, but opinions differed as to the exact role of 'normal fortitude'. Gummow and Kirby JJ, in their joint judgment, strongly rejected any role for such a restriction. They considered that the question is one of *reasonable* foreseeability of the relevant risk.[29] Although this imported an objective standard, they stressed that:

> the concept of 'normal fortitude' should not distract attention from the central inquiry, which is whether, in all the circumstances, the risk of the plaintiff sustaining a recognisable psychiatric illness was reasonably foreseeable, in the sense that the risk was not far-fetched or fanciful. It may be that, in some circumstances, the risk of a recognisable psychiatric illness to a person who falls outside the notion of 'normal fortitude' is nonetheless not far-fetched or fanciful.[30]

None the less, Gummow and Kirby JJ recognised some role for 'normal fortitude' in the context of the objective criterion of reasonable foreseeability. References to the 'notional person of "normal fortitude" is the application of a hypothetical standard that *assists the assessment* of the reasonable foreseeability of harm, not an independent pre-condition or bar to recovery'.[31]

Somewhere between these two approaches are the views of Gleeson CJ and Gaudron J. Gleeson CJ stated that courts:

> refer to 'a normal standard of susceptibility' as one of a number of 'general guidelines' in judging reasonable foreseeability . . . [and that] idea is valid and remains relevant, even though 'normal fortitude' cannot be regarded as a separate and definitive test of liability.[32]

Similarly, Gaudron J, though denying that normal fortitude is the 'sole criterion' determinative of foreseeability,[33] none the less saw it as relevant and important as *ordinarily* a convenient means of determining whether a risk is foreseeable.[34]

Hence, all members of the court to varying degrees accept a role for

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28 Ibid, at [108]–[109].
29 Ibid, at [200].
30 Ibid, at [201] (footnote omitted).
31 Ibid, at [197] (emphasis added). See also at [200].
32 Ibid, at [16]. See also at [29], in rejecting Mrs Tame's nervous shock as not reasonably foreseeable, Gleeson CJ states: 'This conclusion does not depend upon the application, as an inflexible test of liability, of a standard of normal fortitude;' but Mrs Tame's susceptibility was a factor to be taken into account.
33 Ibid, at [60], [61].
34 Ibid, at [62].

'normal fortitude', but it is not clear whether the differently expressed opinions as to the nature of that role are merely a matter of semantics and emphasis or whether they lead to significant differences in application and outcomes. Further, since two, and possibly four, members of the court reject 'normal fortitude' as an express and separate element of the reasonable foreseeability test, it is surprising that the recent *Review of the Law of Negligence Final Report* concludes that the High Court has adopted the foreseeability of harm to a person of 'normal fortitude' as the operative test in Australian law.[35]

'Sudden shock'

In relation to the issue of 'sudden shock', Callinan J considered that it is a continuing requirement of the law. Perhaps surprisingly, given the interpretations by others of the events in *Annetts* as involving 'agonisingly protracted' suffering,[36] Callinan J considered the requirement to have been satisfied in that case.[37] McHugh J left open the question of whether 'sudden shock' was an additional requirement of liability, the issue not needing to be decided. This was because Mrs Tame's claim failed at the threshold test of 'reasonable foreseeability' of nervous shock to a person of normal fortitude. In relation to the Annetts' claims, McHugh J decided that a duty existed on the basis of the parties' pre-existing relationships, namely that created by the employment of James by the defendants and the assurances given by them to the Annetts about taking care of him.[38]

Although the other five members of the court agreed that 'sudden shock' was not a separate legal requirement, again there appeared to be considerable differences of opinion amongst the majority as to the role it should play. Gummow and Kirby JJ considered that situations involving 'protracted suffering' may raise difficult issues of causation and remoteness, and should be dealt with at that stage of a negligence inquiry.[39] Gleeson CJ considered the existence of a 'sudden shock' as a relevant factual indicator of a 'proximity' of relationship between defendant and plaintiff.[40] Gaudron J considered that psychiatric injury will often not be foreseeable without a 'sudden shock', but that it was not a critical requirement of the existence of a duty.[41] Finally, Hayne J considered that a 'sudden shock' is 'not ordinarily' to be regarded as an additional element above and beyond the ordinary fortitude test,[42] but finds reflection in the determination of the response of a person of ordinary fortitude.

Again, it is not clear whether these are merely semantic differences, or whether they will have a significant impact upon the application of the law. It

35 See [9.13]. The *Report* was the result of a government sponsored review of negligence law and was authored by a panel chaired by Justice Ipp. It is available at <http//revofneg.treasury.gov.au>.
36 (2002) 191 ALR 449 at [36] per Gleeson CJ; see also at [210] per Gummow and Kirby JJ.
37 Ibid, at [364].
38 Ibid, at [139].
39 Ibid, at [210].
40 Ibid, at [35]. See also at [18].
41 Ibid, at [66].
42 Ibid, at [275].

is clear, however, that these represent very different conceptual approaches as to the appropriate stage of inquiry in which 'sudden shock' is factored: as part of the foreseeability test, or as establishing 'proximity', or as part of the causation inquiry.

'Direct perception'

In relation to the issue of whether there needs to be a 'direct perception' by a plaintiff suffering psychiatric injury of the distressing event or its 'immediate aftermath' in order to give rise to liability, a similar division to that evident in the analysis of 'sudden shock' arose amongst the members of the court. Callinan J saw it as a continuing element of liability, but considered it satisfied in *Annetts*.[43] McHugh J left the issue open. Gummow and Kirby JJ saw it as a factor relevant in assessing reasonable foreseeability, causation and remoteness. Gleeson CJ did not consider it an essential requirement but an indicator of 'proximity'. Gaudron J agreed with Gummow and Kirby JJ that insisting upon a requirement of 'direct perception' would produce anomalous results, but that in its absence, plaintiffs would still need to identify additional special features of their relationships with the defendants, so that the latter should have the former in contemplation as directly affected by their acts.[44] Finally, Hayne J perceived 'direct perception' as having the same role as 'sudden shock'.

Comment

The application of these principles to the facts of the two cases was a fairly straightforward matter, leading to opposite conclusions being reached in relation to each. In *Tame*, even those judges who denied the requirement of 'normal fortitude' as a prerequisite to liability considered that Mrs Tame's claim could not succeed. Her nervous shock was not a reasonably foreseeable consequence of a 'clerical error which she was told was a mistake that had been rectified and in respect of which she had received a formal apology'.[45] In the view of Gummow and Kirby JJ, Mrs Tame's reaction was 'extreme and idiosyncratic' and the risk of such a reaction 'was far-fetched or fanciful'.[46] Importantly, the joint judgment reiterated that the reasonable foresight test is that of the reasonable person in the defendant's position, and not that of experts. Hence, expert evidence by psychiatrists that such a reaction by a person in a delusional state of mind was foreseeable was not decisive.[47] Not surprisingly, Mrs Tame's claim was also rejected by the rest of the court, most obviously, on the approach of McHugh, Hayne and Callinan JJ, because her response did not coincide with that of a person of ordinary fortitude and hence was not foreseeable.

Unrelated to the issues addressed above, some members of the court stressed two further reasons for denying a duty of care. First, any duty owed

43 Ibid, at [365], but note the curious definition of 'direct perception' adopted by Callinan J, discussed below.
44 Ibid, at [52].
45 Ibid, at [233] per Gummow and Kirby JJ.
46 Ibid, at [233]. See also Gleeson CJ at [29].
47 Ibid, at [234].

in the circumstances by the police officers to Mrs Tame would conflict with their primary responsibility to investigate the matter in question.[48] Secondly, since Mrs Tame's claim was that incorrect information had been provided about her, her concern was with her reputation. Hence, the law of defamation is the more appropriate mechanism for reconciling the competing interests of the parties.[49]

In *Annetts*, the result was also unanimous, this time in the appellants' favour. Having rejected the requirement of 'sudden shock' and 'direct perception' as prerequisites to a claim, Gleeson CJ, Gaudron, Gummow and Kirby, and Hayne JJ stressed the reasonable foreseeability of the response of the Annetts to the events which had occurred. Indeed, *Annetts* is a perfect illustration of the dangers of using control mechanisms such as 'sudden shock' and 'direct perception' as *universally* applicable prerequisites of legal liability. The tragic facts of the case bear this out: the long, drawn out search for and ultimate recovery of James' body were not directly perceived by his parents. None the less, psychiatric illness as a consequence seemed not only reasonably foreseeable, but perhaps even likely.

McHugh J also considered that the shock suffered by the appellants was foreseeable, and went on to add that the pre-existing relationship between the appellants and respondent established a duty of care. Perhaps the most problematic reasoning was that of Callinan J. He concluded that both 'sudden shock' and a 'direct perception' of the accident or immediate aftermath were necessary. Surprisingly, however, his Honour considered that both these requirements were satisfied on the facts of *Annetts*. In relation to 'direct perception', this followed from Callinan J's rather idiosyncratic definition of that notion. He said:

> I would regard a requirement of direct perception as being no more than a requirement that, by one or other of the senses, a 'bilaterally related person' perceive, or come to know of, or realise, at the time of, or as soon as is practicable after its occurrence, a shocking event or its shocking aftermath. So long as, in the case of non-contemporaneity, the lapse of time would not have caused a person of normal fortitude to have reached a settled state of mind about the event, the temporal connection will be capable of existing.[50]

With all due respect, this is difficult to follow. 'Direct perception' extended merely to hearing about an event seems a meaningless concept. Further, the additional point about 'non-contemporaneity' is not easy to understand. If persons have not yet been told about an event, how can they ever have reached a 'settled state of mind' about the matter? The requirement that any communication must have occurred as soon as 'reasonably practicable' after the event[51] is also odd. What has this got to do with the plaintiffs? If there is an unreasonable delay in the communication, why should this be relevant to its impact upon the relatives? Being told 'today your son was killed in a

48 See, eg, ibid, at [26] per Gleeson CJ, [122]–[126] per McHugh J, [298] per Hayne J, [336] per Callinan J.

49 Ibid, at [123] per McHugh J. This is the same point as was made in *Sullivan v Moody* (2001) 207 CLR 562; 183 ALR 404.

50 *Tame* and *Annetts* at [365].

51 Ibid, at [366].

horrific accident' seems no different to being told 'last week your son was killed in a horrific accident'. All in all, Callinan J's judgment raises far more questions than it answers.

Conclusion

So where does this leave the law of nervous shock? Certainly, the rejection by five of the seven members of the court of 'sudden shock' and 'direct perception' as prerequisites of liability is welcome. Knowing that the absence of these two elements does not preclude liability, however, does not clarify how the new boundaries of nervous shock law will be drawn. Gummow and Kirby JJ's joint judgment exhibits the most liberal approach. In essence, they treat nervous shock cases as just another species of negligence, to be analysed in the same way. The more cautious tenor of Gleeson CJ's and Gaudron J's judgments is not necessarily in complete support of such a step; but nor do these judgments give support to the more restrictive approaches (albeit in very different ways) of McHugh, Hayne and Callinan JJ.[52]

It should be noted that reforms have been suggested in the *Review of the Law of Negligence Final Report*, prepared by the Panel chaired by Justice Ipp as a consequence of the insurance and torts 'crisis'. If adopted,[53] the recommendations may clarify some of the uncertainties remaining after *Tame* and *Annetts*, particularly in relation to the appropriate conceptual framework. In short, the *Report* proposes that, where a plaintiff suffers a recognised psychiatric illness, a defendant will owe such a plaintiff a duty of care if 'the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances, suffer a recognised psychiatric illness if reasonable care was not taken'. In determining this question, factors such as 'sudden shock', witnessing the events or their aftermath, personally or otherwise, and the relationship of the plaintiff to the victim of the accident and the defendant, are all relevant considerations in assessing reasonable foreseeability. Whatever the merits of the *Report's* recommendations as a whole, this is perhaps a reasonable compromise which may well encapsulate the essence of most of the judgments in *Tame* and *Annetts*. In particular, it may provide a clear conceptual framework as a starting point for analysis, something which the High Court judgments, unfortunately, failed to do.

52 Whereas McHugh J might well support the treatment of nervous shock cases in the same terms as negligence (he leaves the status of 'sudden shock' and 'direct perception' open), he takes a much more restrictive approach to reasonable foreseeability generally. Hayne J appears the most insistent on the need for 'normal fortitude'; and Callinan J insists on both 'sudden shock' and 'direct perception' as prerequisites of liability.

53 See also the more restrictive principles contained in the Civil Liability Amendment (Personal Responsibility) Act 2002 (NSW) (assented to 28 November 2002). To my knowledge, none of the other States' legislative responses to the torts and insurance 'crisis' passed in 2002 contain provisions setting out the requirements for a nervous shock claim.