With its recent decision in the conjoined appeals in *Tame v New South Wales* and *Annetts v Australian Stations Pty Ltd*, the High Court has ushered in a new era in the development of the law relating to liability for psychiatric injury. In its first pronouncement on this topic for 17 years, the Court has abandoned direct perception and sudden shock, two of the policy requirements which had been imposed by previous decisions to keep the scope of liability within acceptable limits, and has redefined the normal fortitude test. In contrast to recent troublesome cases such as *Perre v Apand Ltd*, where each judgment seems to proceed on individual lines, *Tame* (as it will presumably be referred to) reveals a clear measure of agreement on the part of the majority. The joint judgment of Gummow and Kirby JJ provides the authoritative statement, Gleseson CJ and Gaudron J contribute short supporting judgments, and Hayne J is also in agreement on most issues. McHugh J concurs in the result, but in relation to the *Annetts* appeal his reasoning is different from the rest of the court. Callinan J alone retains the direct perception and sudden shock limitations, but adopts interpretations which enables him to reach the same outcome as the majority.

Australian law has thus in effect endorsed the view that liability for psychiatric injury should be determined by applying the foreseeability test – if, in all the circumstances, psychiatric damage to the plaintiff is reasonably foreseeable as a result of the defendant’s actions, then there should be a duty of care, unless policy reasons compel a different conclusion. Various factors will be important in making this determination, the most important of which, in a secondary victim case, will be the existence of a close family or similar relationship between the plaintiff and the person killed, injured or imperilled by the defendant’s negligence. However, the barriers of direct perception and sudden shock have been lowered. While remaining relevant, they no longer rule out deserving claimants. The view now adopted is well documented in academic literature and has received judicial support in a number of quarters. The decision emphasises the divide that now exists between the jurisdictions which are prepared to trust to the foreseeability approach and those such as England where over recent years the House of Lords in the two Hillsborough cases has made it harder for plaintiffs to recovery for psychiatric injury – while controversially softening the foreseeability test for one particular class of victim. Interestingly, though the High Court’s decision was handed down at a time when the recent controversy over the public liability insurance crisis was at its height, there is very little suggestion that the Court felt pressured to temper the expansion of liability to the mood of the times. However, a few weeks after the decision, the Panel set up by the Commonwealth Government to review the law of negligence

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2 I.e. since *Jaensch v Coffey* (1984) 155 CLR 549.
5 See the judgment of Thomas J in *Van Soest v Residual Health Management Unit* [2000] 1 NZLR 179; see also *Barnard v Santam Bpk* 1999 (1) SA 202.
6 Which include Ireland and South Africa as well as Australia: see Handford, op cit n 1, 600-607.
8 Though *W v Essex County Council* [2001] 2 AC 592 may indicate the possibility of a more enlightened approach.
10 The only real reference to this controversy appears in the judgment of McHugh J, who advocates a modification of the foreseeability test: see (2002) 76 ALJR 1348 at 1364-1367.
released its final report. It will be suggested below that that the seeming acceptance of the
decision masks a somewhat more restrictive approach.

The cases

In the first of the two cases to reach the High Court, Mrs Janet Tame claimed that the State of
New South Wales was vicariously liable for the negligence of a police officer who had
erroneously recorded a blood alcohol reading of 0.14 against her name on a P4 accident report
form after she had been involved in a road accident caused by the negligence of the other
driver. Though the mistake was corrected within a short time, news of the false reading was
communicated to her via the insurance company and her solicitor. She immediately phoned
the police and was told that the mistake had been corrected. In spite of this, Mrs Tame, who
had hardly touched alcohol for many years and was vehemently opposed to drinking and
driving, was deeply affected by the news, suspecting that it was the reason why some of her
medical bills were not being paid. She was diagnosed as suffering from a psychotic
depressive illness caused by the impact of these events on a vulnerable personality. She
recovered damages at first instance, but the case was reversed on appeal to the New South
Wales Court of Appeal, from which decision special leave was obtained to appeal to the
High Court.

The other case involved the classic “nervous shock” secondary victim situation – except that
the plaintiffs were not present at the scene of the accident or its aftermath, but were several
thousand miles away when they learnt of their son’s disappearance by means of a telephone
call. Sixteen year old James Annetts had travelled from Sydney to Halls Creek in the north of
Western Australia to work as a jackaroo on the defendant’s sheep station – after his mother
had received assurances by telephone from the wife of the station manager that he would be
working under constant supervision, and properly fed and looked after. In fact, not long after
his arrival, he was sent to work alone on an outlying part of the property. After a few weeks
of this, he and another teenager from a neighbouring station took a four-wheel drive vehicle
and disappeared. News of his disappearance was communicated to his parents by telephone
in December 1986. His father collapsed and his mother took over the telephone call. The
parents travelled several times to Halls Creek during the next few months in search of some
news, but nothing had been found except some of his belongings, including a hat covered in
blood. Nearly five months later, Mr Annetts was informed – again by telephone – that the
bodies of the two boys had been discovered in the desert, where they had become stranded
when the vehicle became bogged. Mr Annetts identified the skeleton from a photograph.
After a long battle to establish their right to be heard in the coronial inquiry, the Annetts
commenced proceedings for negligence. As a preliminary issue, the court was asked to
determine whether there was a duty of care. Heenan J in the Supreme Court of Western
Australia held that psychiatric injury was foreseeable but that the other duty requirements in
psychiatric injury cases were not satisfied. The Full Court dismissed the appeal, differing
from Heenan J in being unwilling to concede that such injury was foreseeable. When the
plaintiffs sought special leave to appeal to the High Court, it was ordered that the application
be heard by the Full Court at the same time as the hearing in Tame.

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13 Tame v Morgan S120/2000 (6 April 2001). The police officer who made the wrong entry was in fact not
   Constable Morgan but Acting Sergeant Beardsley. At the High Court hearing on 5 Dec 2001 the Court made an
   order dismissing Morgan from the proceedings.
14 See Annetts v McCann (1990) 170 CLR 596.
The decision in *Tame*

The High Court confirmed that the defendant did not owe Mrs Tame a duty of care. Three strands of reasoning combined to compel this conclusion. First, the nature of the activity on which the police officers were engaged was the preparation of a report on a road accident for their superiors. A finding that the defendant owed a duty to participants in the accident or other members of the public would be inconsistent with this. Secondly, there was a need to preserve coherence between the law of negligence and the law of defamation, and if the defendant was under any liability for the communication of a false blood alcohol reading it should be in defamation and not negligence. In each case, the Court was drawing on and developing the general principles about duty of care in negligence which it had stated for the first time in *Sullivan v Moody*.

The third reason was that psychiatric injury to Mrs Tame was not reasonably foreseeable. All the judges agreed that Mrs Tame’s particular susceptibility was not something a defendant could have reasonably been expected to foresee. But there is a difference between the judges as to whether this result is achieved by adopting a “normal fortitude” test separate from the general issue of foreseeability, or whether it is simply an application of general principle.

**Normal fortitude reinterpreted**

Prior to this case, courts had long accepted that in applying the foreseeability test, the plaintiff was assumed to be a person of normal fortitude, and the issue was whether it was possible to foresee psychiatric injury to a person of normal fortitude. This is not to say that the plaintiff must be a person of normal fortitude, but simply that there will be no liability unless psychiatric injury to such a person is foreseeable. (It is different, of course, if the plaintiff knows that the plaintiff has some special susceptibility.) Once liability is established, however, the defendant must take the plaintiff as found: the plaintiff can recover for all harm actually suffered even if it would not be suffered by a person of normal fortitude.

These principles, which go back to older cases such as *Dulieu v White & Sons* and *Bourhill v Young*, were specifically affirmed by the intermediate appellate courts in both *Tame* and *Annetts*. Spigelman CJ in the former case provided a very full discussion of the authorities. These cases confirmed that the doubts expressed by Windeyer J in *Mount Isa Mines Ltd v Pusey* were not representative of current law. It was only by applying the different test of foresight of harm to a person with a vulnerable personality that Garling DCJ had been able to find for Mrs Tame at first instance. This approach was repudiated by the New South Wales Court of Appeal.

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18 (2002) 76 ALJR 1348 at 1354 per Gleeson CJ, 1358 per Gaudron J, 1390 per Gummow and Kirby JJ, 1402-1403 per Hayne J. McHugh J at 1370 said it was unnecessary to decide this issue. Callinan J does not mention it.
19 Ibid at 1354 per Gleeson CJ, 1358-1359 per Gaudron J, 1369 per McHugh J, 1407 per Callinan J. The other judges do not refer to this issue.
21 [1901] 2 KB 669.
22 [1943] AC 92.
However, in the High Court the leading judgment of Gummow and Kirby JJ suggested that the test applied by Spigelman CJ was not quite correct. In their view, the reference in Bourhill v Young to the notional person of normal fortitude was the application of a hypothetical standard that assisted in the assessment of reasonable foreseeability of harm, not an independent precondition or bar to recovery.26

“[T]he notional person of normal fortitude is one of a number of general guidelines in judging reasonable foreseeability.28 and Gaudron J said that normal fortitude was not the sole criterion of liability, but was ordinarily a convenient means of determining whether the risk of psychiatric injury was foreseeable.29 However, the other three judges clearly endorsed the normal fortitude test as a separate rule.30 McHugh J specifically approved the judgment of Spigelman CJ, and Hayne J said normal fortitude was a very important limitation on the duty of care in psychiatric injury cases and should not be abandoned.

Gleeson CJ and Gaudron J appeared to adopt a similar view. Gleeson CJ said that the courts refer to a normal standard of susceptibility as one of a number of general guidelines in judging reasonable foreseeability,28 and Gaudron J said that normal fortitude was not the sole criterion of liability, but was ordinarily a convenient means of determining whether the risk of psychiatric injury was foreseeable.29 However, the other three judges clearly endorsed the normal fortitude test as a separate rule.30 McHugh J specifically approved the judgment of Spigelman CJ, and Hayne J said normal fortitude was a very important limitation on the duty of care in psychiatric injury cases and should not be abandoned.

Their Honours were united in holding that on the facts a reasonable person in the position of the police officer in question would not have foreseen that his carelessness involved a risk of psychiatric harm to Mrs Tame. The difference between them is perhaps crystallised by the way they formulated this conclusion. Gummow and Kirby JJ, for example, said that it was not reasonably foreseeable that a person in the position of Mrs Tame would sustain a recognisable psychiatric injury,31 McHugh J that it was not reasonably foreseeable that such injury would be suffered by a person of normal fortitude.32 How often the difference in the tests will lead to a different result remains to be seen. But it seems clear that the majority has taken a small step forward by attempting to dismantle one of the barriers thought to have been part of the former law.

The decision in Annetts

In the view of the court below, it was not the role of an intermediate appellate court to develop the law,33 and so it affirmed the traditional requirements of direct perception and sudden shock. This was in fact a very conservative decision, compared with other first instance and appellate decisions of Australian courts in recent years.34 However, five of the

27 Ibid at 1383.
28 Ibid at 1353.
29 Ibid at 1359.
30 Ibid at 1362-1364, 1367-1369 per McHugh J, 1398-1400 per Hayne J, 1409-1410 per Callinan J.
31 Ibid at 1390.
32 Ibid at 1369.
33 (2000) 23 WAR 25 at 40 per Malcolm CJ, 47 per Ipp J.
seven judges in the High Court held that neither direct perception nor sudden shock could be supported as limitations on the scope of reasonable foreseeability. This opened the way to a holding that the defendants owed a duty of care to Mr and Mrs Annetts because there was a sufficient relationship between the parties, especially in light of the assurances given to Mrs Annetts, and because in the circumstances psychiatric injury was reasonably foreseeable. McHugh J took a different approach, holding that the ordinary rules relating to psychiatric injury were important only where there was no pre-existing relationship between the parties, whereas here there was an employment relationship between the defendant and the deceased James Annetts, under which the defendant owed duties to take care both in contract and tort, and furthermore in his view there was a contract with his parents: the assurances gave rise to a duty to supervise him so as to avoid inflicting harm on the parents, and were the consideration for his going there. Callinan J alone retained the requirements of direct perception and sudden shock, but managed to water them down in such a way as to find that they were satisfied on the facts.

The rejection of direct perception

In many ways the most exciting aspect of the High Court’s decision is that the Court has clearly rejected the former requirement of “direct perception”. The first classic secondary victim case, *Hambrook v Stokes Bros*, had required that plaintiffs perceive the accident with their own senses, but later decisions extended this to perception of the aftermath, first at the scene, and more recently in hospital. Case after case held that there would be no liability where the shock suffered by the plaintiff was caused by being informed of the catastrophe by someone else.

This suggests bygone social conditions where relatives could be expected to be close at hand and arrive at the accident scene within minutes. Such days are long gone. As Kirby P has pointed out, today it is common for people to be linked to the world around them by modern communication devices such as mobile telephones. “Inevitably, such telephones may bring, on occasion, shocking news, as immediate to the senses of the recipient as actual sight and sound of the catastrophe would be. This is the reality of the world in which the law of nervous shock must now operate.” The events of September 11 2001 in New York and October 12 2002 in Bali graphically demonstrate the force of his remarks. English cases attempting to introduce a more modern view were snuffed out by the House of Lords in *Alcock v Chief Constable of South Yorkshire Police*, but a more enlightened view has taken root in Australia.

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35 See (2002) 76 ALJR 1348 at 1355-1356 per Gleeson CJ, 1359-1360 per Gaudron J (who however says little about the issue of assurances), 1390-1391 per Gummow and Kirby JJ, 1403-1404 per Hayne J.
36 Ibid at 1371-1373.
37 Ibid at 1414-1415.
38 [1925] 1 KB 141.
42 *Hevican v Ruane* [1991] 3 All ER 65; *Ravenscroft v Rederiaktiebolaget Transatlantic* [1991] 3 All ER 73.
44 See cases cited above n 34.
In this context the Full Court decision in Annetts seemed to represent a return to a more conservative attitude, but the High Court has firmly repudiated that view, accepting that the aftermath concept is an artificial and unsatisfactory way of delimiting boundaries of recovery, and that in appropriate circumstances psychiatric injury caused by the communication of news of an accident by another may be foreseeable. This is not to say that direct perception is irrelevant in the application of the foreseeability test, simply that there is no rule excluding a duty of care where direct perception is not present. In the fullest discussion of the issue, Gummow and Kirby JJ said that the direct perception limitation has never been authoritatively adopted by the High Court, and in its previous decision in Jaensch v Coffey the only judge to endorse it was Brennan J. In their view, any rule that made liability for psychiatric injury conditional on the geographical or temporal distance of the plaintiff from the distressing phenomenon, or on the means by which the plaintiff acquired knowledge of that phenomenon, was apt to produce arbitrary outcomes and exclude meritorious claims. Invoking Kirby J’s previous pronouncement, they pointed out that the rule was disjoined from the realities of modern communications. Affirming a point often made in both the legal and the psychiatric literature, they said that the most significant causal factor in psychiatric illness cases was not direct perception or the manner in which the horror of the event was conveyed, but the relationship between the plaintiff and the accident victim. Their Honours concluded:

“Distance in time and space from a distressing phenomenon, and means of communication or acquisition of knowledge concerning that phenomenon, may be relevant to assessing reasonable foreseeability, causation and remoteness of damage in a common law action for negligently inflicted psychiatric illness. But they are not themselves decisive of liability. To reason otherwise is to transform a factor that favours finding a duty of care in some cases into a general pre-requisite for a duty in all cases. This carries with it the risk of attribution of disproportionate significance to what may be no more than inconsequential circumstances.”

There is no doubt that on the facts the closeness of the relationship between Mr and Mrs Annetts and their 16-year old son, and the assurances made to them, without which they would not have allowed him to go and work in a remote part of Western Australia thousands of kilometres from home, made the case compelling. This is not to say that the High Court would necessarily have affirmed earlier decisions in which courts found a duty in the absence of direct perception. For example, in Petrie v Dowling, where a mother who was told by a nurse that her daughter was dead had no previous relationship with the hospital, the High Court may well not have found enough in the circumstances to satisfy the foreseeability test. On the other hand in Reeve v Brisbane City Council, where a wife suffered severe shock when told of her husband’s death in an accident at the bus depot where he worked, there was no precise equivalent of the assurances in Annetts but it seems reasonable to assume that the defendants could have foreseen that the news would be communicated to her and that she might suffer some sort of psychiatric injury as a result - though it has to be admitted that the general proximity test now rejected by the High Court was a powerful factor in the decision. It seems that one case that influenced the High Court was Pham v Lawson, where the Full Court in South Australia held that the existence of the duty became less likely as all of the matters which were important for its existence became more remote. Heenan J in Annetts at first instance adopted this test but found that no duty existed on the facts. His approach is

45 See (2002) 76 ALJR 1348, at 1353 per Gleeson CJ, 1357 per Gaudron J, 1386-1389 per Gummow and Kirby JJ, 1395-1398 per Hayne J.
46 Ibid at 1388-1389.
much closer to the High Court’s eventual decision than the restrictive attitude of the Full Court.

The rejection of sudden shock

One of the most important features of psychiatric damage law in recent years is the recognition of a rule that there has to be a “sudden shock” rather than a gradual onset of psychiatric illness. In the words of Brennan J – to whose judgment in Jaensch the rule seems to owe its origin – the psychiatric injury must be “shock-induced.” Not found in the older cases, the rule has emerged to act as a brake on the ever-widening scope of the duty of care. No doubt it also owes something to the persistence of the traditional term “nervous shock”, with its potential for confusing the damage suffered and the manner of infliction. The fact remains that prior to the High Court’s latest decision “sudden shock” had firmly taken root in the authorities. It was affirmed by Mason P in Tame (though Spigelman CJ specifically refrained from basing his judgment on this issue) and by Malcolm CJ and Ipp J in Annetts.53 There were important judicial statements emphasising how out of line this was with the medical evidence about the causing of psychiatric illness – notably a well-known dictum of Kirby P in Campbelltown City Council v Mackay and an equally important statement by Henry LJ in the English Court of Appeal. But these represented a minority view.

The High Court has taken an important step to bring law and medicine closer together by repudiating this requirement. To do so, Gummow and Kirby JJ went back to its source, the judgment of Brennan J in Jaensch. In a penetrating analysis, they suggested that the reason for this limitation was Brennan J’s fear that “If mere knowledge of a distressing phenomenon sufficed, the bearers of sad tidings … might be held liable”. However, no other judge in this case had endorsed it; it had no root in principle; and it was arbitrary and inconsistent. Liability should turn on the proof of a recognisable psychiatric disorder, not its aetiology. There were powerful arguments in favour of the rejection of the requirement. These included the views of the English Law Commission and the South African Supreme Court of Appeal, the existence of important areas of psychiatric damage law such as the work stress cases in which there was no such requirement, unsatisfactory outcomes in the case law, and the association between the sudden shock requirement and the now-discredited “impact rule”. Their conclusion, that sudden shock should not be accepted as a precondition for recovery, was endorsed by three other judgments, only Callinan J adopting a more conservative position. McHugh J, on the view he took of the case, did not find it necessary to discuss the issue. There can be no doubt that this is a progressive development. The fact that the shock was sudden rather than gradual remains relevant as a factor in the overall determination whether psychiatric injury was reasonably foreseeable, but the absence of sudden shock no longer mandates a decision in favour of the defendant. The artificial interpretations of the

52 Ibid at 32.
53 Annetts v Australian Stations Pty Ltd (2000) 23 WAR 25 at 40 per Malcolm CJ, 52-54 per Ipp J.
56 (2000) 76 ALJR 1348 at 1384-1386.
61 (2002) 76 ALJR 1348 at 1353 per Gleeson CJ, 1360 per Gaudron J, 1395-1398 per Hayne J.
62 Ibid at 1414.
63 Ibid at 1361.
facts and the unfortunate outcomes that the sudden shock rule brought about should now be a thing of the past.

The sourcing of the sudden shock requirement by Brennan J in the problem of bearers of bad news led Kirby and Gummow JJ to offer some views on this issue. The well-known statement of Windeyer J in *Pusey* that where “shock” is caused purely by communication of some happening, in the absence of intention to cause shock “no action lies against either the bearer of the bad tidings or the person who caused the event of which they tell”, required reinterpretation in the light of the abandonment of the direct perception rule. In their Honours’ view, the first proposition could be accepted without acceding to the second. It appears that the price of the important steps forward in *Tame* may be the rejection of any duty not to break bad news badly, the odd indications to the contrary in the case law notwithstanding. If so, this is an acceptable price to pay. Gummow and Kirby JJ make it clear that this ruling does not extend to false bad news, where a duty may still exist.

**Recognisable psychiatric injury and emotional distress**

The throwing overboard of so many of the restrictions of the former law makes it important to identify those that remain. One vital rule is the requirement that the plaintiff must prove the existence of a recognisable psychiatric illness. Most of the judgments take pains to emphasise the distinction between an illness which falls into this category and mere emotional distress, for which no liability exists. Kirby and Gummow JJ draw a contrast between the position in Australia, England, Canada and elsewhere, where the requirement of a recognisable psychiatric injury or illness is adhered to, and the United States, where recovery is permitted for mere emotional distress. Their Honours stress that many of the concerns which have led courts to impose restrictions on recovery for psychiatric injury recede if full force is given to the distinction between emotional distress and a recognisable psychiatric illness.

Two comments may be made about this. One is that, at least so far as Australia is concerned, a largely unsung development whereby from time to time courts have indicated a preparedness to recognise liability for emotional harm even in the absence of anything amounting to a recognisable psychiatric illness has been nipped in the bud. This again may be a small price to pay for the advances achieved by the High Court in *Tame*. The other is that stigmatising the United States cases as recognising liability for pure emotional distress may be an oversimplification. True it is that United States courts constantly refer to “emotional distress” as the damage suffered by plaintiffs, but it is not always clear whether this means pure emotional distress or a state roughly equivalent to what Australian and English courts mean by recognisable psychiatric injury. Much depends on the contrast

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64 Ibid at 1389-1390.
67 See (2002) 76 ALJR 1348 at 1351 per Gleeson CJ, 1356 per Gaudron J, 1377-1378, 1381-1382 per Gummow and Kirby JJ, 1400 per Hayne J.
68 See also ibid at 1400 per Hayne J.
71 See, eg, *Johnson v Ruark Obstetrics and Gynecology Associates PA*, 395 SE 2d 85 (NC) at 97 per Mitchell J: “the term ‘severe emotional distress’ means any emotional or mental disorder, such as, for example, neurosis,
being pointed. Most United States courts formerly imposed a “physical harm” requirement. In recent years an increasing number of courts have departed from this limitation. But does this mean that recovery is permitted for pure emotional distress, or simply for psychiatric as opposed to physical harm? It is impossible to be sure, and it appears that the position varies from one jurisdiction to another.

The report of the Negligence Review Panel

As noted, the High Court handed down its judgments in Tame in the middle of the current controversy about a public liability insurance crisis. Some three weeks later, the Panel appointed by the Commonwealth to review the law of negligence, under the chairmanship of Justice David Ipp, submitted its final report. Chapter 9, dealing with mental harm (the term chosen by the panel in preference to psychiatric harm) contains an account of the High Court’s decision, and the main recommendation in this area seems broadly consistent with it. But on a closer reading there are some matters which occasion disquiet.

The main recommendation is that there should be a legislative statement of what the Panel considers the current state of the law to be. That statement, it is recommended, would embody the following principles:

“(a) There can be no liability for pure mental harm (that is, mental harm that is not a consequence of physical harm suffered by a mentally-harmed person) unless the mental harm consists of a recognised psychiatric illness.

(b) A person (the defendant) does not owe another (the plaintiff) a duty to take care not to cause the plaintiff pure mental harm unless 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.

(c) For the purposes of (b), the circumstances of the case include matters such as:

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

(ii) whether the plaintiff was at the scene of shocking events, or witnessed them or their aftermath;

(iii) whether the plaintiff witnessed the events or their aftermath with his or her own unaided senses;

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

psychosis, chronic depression, phobia or any other type of severe and disabling mental or emotional condition which may be generally recognized and diagnosed by professionals trained to do so”.

Eg, in Rickey v Chicago Transit Authority 457 NE 2d 1 (1983) the court accepted psychiatric problems as sufficient evidence of physical manifestation. Contrast Wilson v Sears Roebuck & Co 757 F 2d 948 (1985), where the plaintiff had nightmares, frequent headaches, dizziness, depression, nervousness, weight loss and poor appetite and was medically diagnosed as suffering from post-traumatic stress disorder, but the court ruled that he could not recover for emotional distress because he did not demonstrate any objectively verifiable symptoms.

Another recommendation is that a panel of experts should be appointed to develop guidelines for assessing whether a person has suffered a recognised psychiatric illness.

These recommendations, and the Report’s chapter on mental harm generally, contain two significant reinterpretations of the common law – neither of them justified by anything in the Tame decision. The first is that the damage requirement has been restated to require a recognised, rather than a recognisable, psychiatric illness. Ever since this requirement was first stated in this form by Lord Denning MR and Windeyer J in 1970, the term consistently used has been “recognisable”. The High Court in Tame faithfully follows this usage. The potential limitation of liability resulting from being confined to recognised psychiatric illness – particularly in the light of the further recommendation that a panel of experts should be appointed to draw up guidelines to assist in determining when such an illness has been suffered – is readily apparent. Further disquiet is occasioned by the remarks of Senator Helen Coonan which accompanied the release of the report. She was reported as saying:

“What this measure is directed to is to ensure that those who do have a recognised mental illness are compensated. But people who might be just malingering, if you like, or just have an anxiety condition or depression that they really do need to get over and get back to work … obviously they are not going to be compensated.”

Apart from the implication that anxiety conditions and depression are not recognised mental illnesses, the tenor of her observations – that those who do not have a recognised mental illness are simply malingering, and should pull themselves together – is reminiscent of judicial attitudes of fifty and more years ago. Such attitudes, surely, do not represent progress.

The other significant point in the above recommendation, again echoed in the Panel’s discussion of the existing law, is that the normal fortitude rule has re-emerged. Thus, for example, the Panel in stating the effect of the Tame decision says: “It was foreseeable, so the Court held, that persons of normal fortitude would suffer mental harm as a result of what the parents had been through.” But this, as has been demonstrated above, is a minority view – the view of Spigelman CJ and Ipp J himself in the courts below, and the view of McHugh, Hayne and Callinan JJ in the High Court, but not the formulation adopted by the majority.

It is hoped – but with little confidence – that whatever legislation eventuates does not adopt the above recommendation without amendment. If the object of a legislative statement is simply to set out the current law in legislative from, the need for it is questionable, since it will simply serve to stifle development of the common law. Still more is this so if it results in restriction of the common law by stealth.

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74 Ibid, recommendation 34.
75 Ibid, recommendation 33.
77 Gaudron J and Gummow and Kirby JJ consistently refer to “recognisable psychiatric illness: see, eg, (2002) 76 ALJR 1348 at 1359-1360 per Gaudron J, 1381-1382 per Gummow and Kirby JJ. Gleeson CJ uses both terms, though without any suggestion that there is any difference in meaning: ibid at 1351,1356.
79 See, eg, the observations of Birkett J in Griffiths v R & H Green & Silley Weir Ltd (1948) 81 LLLR 378 at 380.
80 Op cit n 73, para 9.11.
New era or false dawn?

How satisfactory is the outcome of the decision? For the plaintiffs involved, satisfaction would be less than complete. Mrs Tame - correctly, it is submitted - was left remediless. Mr and Mrs Annetts succeeded where they had failed in the courts below, but still have a considerable way to go, because before they are entitled to any damages they have to establish that they suffered recognisable psychiatric injury, and that this was caused by the defendant’s negligence. Perhaps they may be prepared to see the recognition of a duty of care as a sufficient symbolic recognition of fault on the part of the defendants.

In terms of the law, the case is a major step in what, it is submitted, is the right direction. But there is some occasion for disquiet. Will it be white-anted by conservative interpretations such as that evident in the Report of the Negligence Review Panel, or limited in its effect by the proposed negligence legislation which the Commonwealth wants the States to adopt and which, as this was being written, it was announced the States would accept? More fundamentally, perhaps, will the courts in applying the foreseeability test be able to resist being urged to turn the “factors” back into strict rules? Maybe we should heed the warning of what has happened in California, always a leader in United States negligence law. In 1968 in *Dillon v Legg*, a case where a mother recovered damages for emotional distress suffered on witnessing the death of her infant daughter, the California Supreme Court held that liability should depend on what was foreseeable by a reasonable person in all the circumstances, taking into account factors such as the plaintiff’s location, whether the shock resulted from what the High Court now calls direct perception, and relationship to the accident victim. Twenty years and many contradictory cases later, the same court in *Thing v La Chusa* - led by Eagleson J uttering the *bon mot* that “there are clear judicial days on which a court can foresee forever” – reinterpreted these factors as strict rules. It would be very sad if, for any of these reasons, the important steps taken by the High Court in *Tame* were allowed to falter.

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82 441 P 2d 912 (1968).
84 Ibid at 830.
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