Harm to the mental state of a claimant - as opposed to physical harm - has traditionally been called 'nervous shock'. However, despite this term still being used in some areas, it no longer accurately describes the common law regarding mental harm.

The term 'nervous shock' arose from the initial legal position that mental harm had to be as a result of a sudden shock. Since 2002 however this is no longer the case (Tame v New South Wales (2002) 211 CLR 317), and thus the term 'nervous shock' is now, in some cases, being replaced by 'mental harm' or 'psychiatric harm'.

Queensland is almost unique amongst Australian jurisdictions in that the rules surrounding a person’s liability for another person suffering psychiatric harm is governed purely by the common law - and not by legislation.

Under the common law, a person can only be liable in negligence for causing another person to suffer a recognised psychiatric illness – there is no liability for causing only emotional distress (Tame v New South Wales (2002) 211 CLR 317; Mount Isa Mines Ltd v Pusey (1970) 125 CLR 383 at 394 per Windeyer J). It is also now well settled that there is no need for the psychiatric harm to be as a result of, or connected with, physical harm to the claimant – pure psychiatric harm is sufficient (Jaensch v Coffey (1984) 155 CLR 549; FAI General Insurance Co Ltd v Curtin (1997) 25 MVR 289).

The law recognises that a defendant might owe a duty in relation to the pure psychiatric harm suffered by someone who foreseeably attends an accident scene created by the defendant’s negligence. The test of reasonable foreseeability alone, however, is insufficient to found a duty of care in psychiatric injury cases. There were historically 3 ‘rules’ about whether psychiatric harm was reasonably foreseeable, including:

1. The psychiatric harm had to be the result of a ‘sudden shock’;
2. The psychiatric harm had to be caused by the claimant’s direct perception of a traumatic event or its aftermath which was caused by the defendant; and
3. The claimant had to be of ‘normal fortitude’.
Although not all aspects of these ‘rules’ continue to apply in a strict manner, the courts have continued to place restrictions, albeit less stringent than in the past, on the kinds of psychiatric injury which will be held to be reasonably foreseeable.

Generally, there is no longer any need for the psychiatric harm to be as a result of a ‘sudden shock’. There is also no longer any limit on a person recovering damages for psychiatric harm simply because they have not directly perceived a distressing event or its immediate aftermath. However, direct perception may assist in proving that psychiatric harm was reasonably foreseeable. A new factor which has come into play with the fading out of the ‘direct perception rule’ is whether the claimant had a relationship with the primary victim (who was injured as a result of the defendant’s actions) or with the defendant directly.

In cases where claimants have recovered damages for psychiatric harm caused by injury to a third party, the relationship between the claimant and the third party has generally fallen into one of three categories, namely family, rescuer or employment. Although it has been made clear in recent cases that the relationship will not be decisive, it may be relevant in applying the test of foreseeability. It is in this respect that a recognisable relationship between the plaintiff and the victim is likely to be helpful in establishing whether injury by psychiatric harm was foreseeable.

The need to consider whether a claimant was of ‘normal fortitude’ when considering their psychiatric injury is no longer seen as a requirement or pre-condition to a finding of reasonable foreseeability. It is simply one of the factors that may assist in the assessment of reasonable foreseeability.

These issues were recently considered in the context of a fatal motor vehicle accident by the Supreme Court of Queensland in *Caffrey v AAI Limited* [2019] QSC 7. On 17 February 2013 Byron Williams (“Mr Williams”) was killed in a single vehicle accident when he collided with a tree on the Sunshine Coast, Queensland. The plaintiff was a Senior Constable with the Queensland Police Service and suffered a psychiatric injury as a result of his attendance at, and witnessing of, the aftermath of the accident. The plaintiff was on duty at the time and attended the scene prior to the arrival of the ambulance or fire services. While Mr Williams had suffered fatal injuries, he was still alive when the plaintiff attended the scene. The plaintiff, essentially single-handedly for a time, sought to maximise Mr Williams’ chances of survival by moving his head to clear his airway and trying to encourage him to stay alive. The plaintiff’s experience was made all the more traumatic by the presence of Mr Williams’ parents at the scene. The plaintiff sought to reassure Mr Williams’ mother that her son would survive.

After the fire service and paramedics attended the scene, and Mr Williams was cut from his vehicle, the plaintiff was informed that Mr Williams was going to die. The plaintiff informed Mr Williams’ parents of the situation and accompanied them to say goodbye to their son. Mr Williams died soon after.

As the plaintiff’s psychiatric injury was an injury for which compensation was payable under the *Workers’ Compensation and Rehabilitation Act 2003*, the *Civil Liability Act 2003* (CLA) did not apply in relation to deciding liability or any award of damages. The proceedings were therefore determined in accordance with common law principles.
It was not in dispute that the accident was caused by Mr Williams' negligence. The primary issue concerning liability was whether, as a matter of law, Mr Williams owed a duty of care to the plaintiff. The defendant CTP insurer denied the existence of any such duty of care on the basis that:

1. The risk of the plaintiff suffering a psychiatric injury as a consequence of his presence and actions at the scene of the accident was not reasonably foreseeable by Mr Williams;
2. Alternatively, any foreseeable risk of a psychiatric injury was slight and was not such as warranted Mr Williams taking or avoiding action in respect of it; and
3. As a matter of policy, by reason of the plaintiff's status as a police officer, and attending the scene of the accident in that capacity, Mr Williams did not owe a duty of care to the plaintiff.

As the defendant CTP insurer specifically raised matters of policy in the case, the trial judge held that the existence of the statutory CTP scheme under the *Motor Accident Insurance Act 1994* (MAIA) was one of a number of factors relevant to determining whether a duty of care was owed. The trial judge noted that while similar schemes in other Australian jurisdictions have provisions to limit the right of recovery for pure psychiatric injury and, in some cases, to specifically introduce tests of normal fortitude and sudden shock, the MAIA does not contain similar provisions. The trial judge held that the mere fact that other jurisdictions have enacted provisions to limit the rights of persons to recover damages for pure psychiatric injuries did not determine the existence of the duty of care at common law.

The trial judge noted that the historical ‘rules’ referred to above have been reduced in status and they are now simply factors relevant to the primary question of reasonable foreseeability of psychiatric injury. In the present case, the trial judge found that the relevant enquiry as to foreseeability was whether a reasonable person in Mr Williams' position would have foreseen that a person in the position of the plaintiff, a serving police officer attending an accident of the kind that might result from Mr Williams' negligence, might suffer a psychiatric injury as a result of his experience at the scene. The trial judge found that it was reasonably foreseeable that, upon discovery of an accident such as the one involving Mr Williams, 000 will be called, and emergency services personnel, including police officers like the plaintiff, will be summoned to the scene. The fact that it may be uncommon for a police officer (like the plaintiff) to arrive at an accident scene as a first responder, and before any other emergency services personnel such as paramedics, did not prevent a duty being owed. The trial judge also found that, from Mr Williams' perspective, it would not be unexpected for his parents and relatives to be present at the scene of a serious accident caused by his negligence. The trial judge found that the plaintiff's psychiatric injury was reasonably foreseeable.

In finding that a duty of care was owed, the trial judge rejected the following arguments raised by the defendant’s CTP insurer:

1. The plaintiff witnessed only the aftermath of the accident (he did not directly perceive it as it occurred);
2. Mr Williams is both the defendant and the sole victim of the accident; and
3. The plaintiff was not personally involved in the events leading up to the accident (he was not, for example, involved in a police pursuit of Mr Williams).

In dealing with the first of those issues, the trial judge found that the plaintiff would satisfy the ‘direct perception’ test at common law as what he saw fell within the concept of the aftermath of the accident. That concept extends to extraction and treatment. The plaintiff, as a first
responder, arrived at the scene before any ambulance, and before the fire service eventually extracted Mr Williams from his vehicle. Mr Williams was in a continuing state of peril or injury at the time of the plaintiff’s arrival at the scene. The trial judge found that the plaintiff was more than a ‘mere bystander’. He encouraged Mr Williams and took steps to keep him alive. He sought to comfort Mr Williams’ parents. While the plaintiff was not involved in the collision leading to Mr Williams’ death, it did not diminish the immediacy of his involvement in the aftermath of the accident.

If that was not sufficient, the trial judge also found that the plaintiff fell within the well established ‘rescuer’ category of claimant. The trial judge held that the correct approach to this issue was to first determine whether the plaintiff fell within a broad ‘rescuer’ category, and then to consider whether, as a matter of policy, specific sub-sets of rescuers (such as serving police officers) should be denied a duty of care. The trial judge found that the plaintiff may be classified as a rescuer. A rescue attempt need not be successful to found a claim. That Mr Williams ultimately died at the accident scene presented no impediment to the plaintiff.

The trial judge rejected the defendant CTP insurer’s argument that as a matter of policy, the plaintiff’s status as a police officer, which informed his relationship with Mr Williams, precluded any duty being owed to him. The trial judge found that the policy arguments did not give rise to any relevant inconsistency in duties in the present case. A driver who has negligently caused an accident can, and is expected to, report the accident, fulfil their duty to report the accident and then, go on at a later time to fulfil a duty to compensate an attending police officer for any reasonably foreseeable psychiatric injury they may suffer as a result of attending the accident. The trial judge found that the mere fact that a negligent driver may experience reluctance to contact authorities did not preclude a duty being owed to the plaintiff. Such a duty was not inconsistent with the negligent driver’s specific statutory duty to report accidents or with the public’s general responsibility to assist in detection of breaches of the law.

The trial judge also rejected the defendant’s CTP insurer’s argument that reasonable members of the public are entitled to expect that police officers and other emergency service personnel, due to their training and frequent exposure to accident and crime scenes, are equipped to avoid or resist psychiatric harm. The trial judge found that an accident scene is inherently dangerous from a psychiatric perspective. A person who by their negligence causes an accident must have in contemplation the fact that police officers are human and not entirely immune to psychiatric injury (even where they make use of all available training, experience and detachment techniques the public might expect them to have acquired). The trial judge found that police officers are without choice – they are legally obliged to respond to emergencies – and this places them in a situation of ‘elevated risk’ in respect of psychiatric harm.

While the case was determined in accordance with common law principles, in our view the result would have been no different if decided under the CLA.

The decision in Caffrey is perhaps the first judicial consideration, at least at the Supreme Court level, regarding the circumstances when a duty of care will be owed to a first responder in the context of a fatal motor vehicle accident in Queensland. The outcome is consistent with previous decisions from other Australian jurisdictions partially expanding liability for psychiatric harm. The outcome may potentially raise issues of possible recovery actions by workers’ compensation insurers against the relevant CTP insurer where workers’ compensation claims have been accepted, and benefits paid, to the first responder. Given the potential
implications for the statutory CTP scheme in Queensland, we expect that the defendant CTP insurer will appeal the decision. Alternatively, the outcome in Caffrey may provide CTP insurers with a sufficient basis to lobby Government to amend the legislation to limit the right of recovery for pure psychiatric injury similar to the position other Australian jurisdictions.

We will continue to monitor the position and provide further updates regarding this interesting area of the law in future editions of CTP files.

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