HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

Matter No S111/2002

DARREN GIFFORD — APPELLANT

AND

STRANG PATRICK STEVEDORING PTY LIMITED — RESPONDENT

Matter No S112/2002

KELLY GIFFORD — APPELLANT

AND

STRANG PATRICK STEVEDORING PTY LIMITED — RESPONDENT

Matter No S113/2002

MATTHEW GIFFORD — APPELLANT

AND

STRANG PATRICK STEVEDORING PTY LIMITED — RESPONDENT

Gifford v Strang Patrick Stevedoring Pty Ltd
[2003] HCA 33
18 June 2003
S111/2002, S112/2002 and S113/2002

ORDER IN EACH MATTER

1. *Appeal allowed.*

2. *Set aside the orders of the New South Wales Court of Appeal dated 14 June 2001 and, in lieu thereof, order that:*

   (a) appeal to the Court of Appeal is allowed;

   (b) the orders of the District Court of New South Wales dated 24 August 1999 are set aside; and

   (c) the matter be remitted to the District Court for determination of all outstanding issues.

3. *The respondent to pay the costs of the appellant in this Court and in the Court of Appeal.*

4. *Costs of each party in the District Court to abide the outcome of proceedings in that Court.*

On appeal from the Supreme Court of New South Wales

Representation:

B J Gross QC with D E Baran for the appellants (instructed by G H Healey & Co with Graeme R Jensen & Co)

J D Hislop QC with T F McKenzie for the respondent (instructed by Gillis Delaney Brown)

CATCHWORDS

Gifford v Strang Patrick Stevedoring Pty Ltd

Torts – Negligence – Psychiatric injury – Employee killed in workplace accident – Whether employer owed duty of care to children of deceased employee – Whether reasonable care required to guard against the risk of psychiatric injury – Whether duty existed at common law – Whether the existence of duty was negated by s 4(1)(b) of *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW).

Law Reform (Miscellaneous Provisions) Act 1944 (NSW), s 4(1)(b).
Workers Compensation Act 1987 (NSW), s 151P.

1 GLEESON CJ. These three appeals, which were heard together, arise out of claims for damages for negligently inflicted psychiatric injury brought by the children of a man who was killed in an accident at work. The issue is whether the man's employer owed a duty of care to the children.

2 The respondent to each appeal, a stevedoring company, employed the late Mr Barry Gifford, who was crushed to death by a forklift vehicle. Negligence on the part of the driver of the vehicle, who was also an employee of the respondent, and on the part of the respondent itself, was alleged, and was admitted. At the time, the appellants were aged 19, 17 and 14 respectively. They did not witness the accident. They were all informed of what had occurred later on the same day.

3 The appellants claim to have suffered psychiatric injury in consequence of learning of what had happened to their father. This aspect of their claims has not yet been determined. A similar claim by the mother of the appellants failed upon the ground that she had suffered no psychiatric injury, but had merely been affected by normal grief of a kind that did not give rise to an entitlement to damages. Her appeal against that decision was dismissed[1].

4 In the District Court of New South Wales, the claims of the appellants were dismissed upon the ground that, by reason of s 4(1)(b) of the *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) ("the Act"), the respondent was under no liability for the "nervous shock" allegedly suffered by the appellants, because their father had not been killed, injured, or put in peril within their sight or hearing[2]. The New South Wales Court of Appeal (Handley and Hodgson JJA, Ipp AJA) considered that the respondent's reliance upon s 4(1)(b) was misplaced. However the Court of Appeal reached the same ultimate conclusion as the primary judge upon the ground that, because the appellants had merely been told about the incident, and did not directly perceive either the event that resulted in the death of their father or its aftermath, then there was no duty of care at common law.[3]

5 Since the decision of the Court of Appeal, this Court has held, in *Tame v New South Wales* and *Annetts v Australian Stations Pty Ltd*[4], that direct perception of an incident or its aftermath is not in all cases a necessary aspect of

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1 *Gifford v Strang Patrick Stevedoring Pty Ltd* (2001) 51 NSWLR 606.

2 At the time to which these appeals relate, s 4(1)(b) was in force. It has subsequently been overtaken by the *Civil Liability (Personal Responsibility) Act* 2002 (NSW), s 32, but that provision is presently irrelevant.

3 *Gifford v Strang Patrick Stevedoring Pty Ltd* (2001) 51 NSWLR 606 at 617.

4 (2002) 76 ALJR 1348; 191 ALR 449.

a claim for damages for negligently inflicted psychiatric injury. Accordingly, it will be necessary to reconsider the claims of the appellants in the light of that decision. If it is concluded that the Court of Appeal was in error in deciding that the respondent owed no duty of care to the appellants at common law, it will then be necessary to deal with the respondent's Notice of Contention, which seeks to support the dismissal of the appeals upon the ground favoured by the trial judge, that is to say, s 4(1)(b) of the Act. In that connection, the appellants rely upon an argument, rejected both at first instance and in the Court of Appeal, to the effect that the operation of s 4(1)(b) of the Act is displaced by s 151P of the *Workers Compensation Act* 1987 (NSW) ("the Workers Compensation Act").

6 In the event that the appellants succeed, the matter will have to be remitted to the District Court for the determination of the outstanding issues, including the issue that was fatal to the claim of the appellants' mother.

The common law duty of care

7 The Court of Appeal decided against the appellants on the ground that there can be no liability at common law for damages for mental injury to a person who is told about an horrific accident or injury to a loved one but does not actually perceive the incident or its aftermath[5]. That proposition is inconsistent with the reasoning of this Court in *Tame* and *Annetts*, and cannot stand with the actual decision in *Annetts*[6]. It does not follow, however, that the circumstance that the appellants were not present when their father suffered his fatal injury, and did not observe its aftermath, is irrelevant to the question whether the respondent owed them, as well as their father, a duty to take reasonable care to prevent injury of the kind they allegedly suffered.

8 For the reasons I gave in *Tame* and *Annetts*, I consider that the central issue is whether it was reasonable to require the respondent to have in contemplation the risk of psychiatric injury to the appellants, and to take reasonable care to guard against such injury[7]. Relevant to that issue is the burden that would be placed upon those in the position of the respondent by requiring them to anticipate and guard against harm of the kind allegedly suffered by the appellants.

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5 (2001) 51 NSWLR 606 at 616-618 per Hodgson JA; Handley JA agreeing at 608; Ipp AJA agreeing at 623.

6 (2002) 76 ALJR 1348 at 1353 [18], 1357 [51], 1380-1381 [187]-[191], 1386-1387 [214]-[216], 1388-1389 [225], 1395 [256], 1398 [271]-[272], 1415 [366]; 191 ALR 449 at 456, 461-462, 494-495, 502-503, 505, 514, 518, 541-542.

7 (2002) 76 ALJR 1348 at 1351-1352 [9]-[10], 1353 [18]; 191 ALR 449 at 453-454, 456.

9 As the facts in *Tame* illustrated so vividly, just as it would place an unreasonable burden upon human activity to require people to anticipate and guard against all kinds of foreseeable financial harm to others that might be a consequence of their acts or omissions, so also it would be unreasonable to require people to anticipate and guard against all kinds of foreseeable psychiatric injury to others that might be a consequence of their acts or omissions. In the case of Mrs Tame, her personal susceptibility raised an additional problem of foreseeability. However, just as advances in medical knowledge have made us aware of the variety of circumstances in which emotional disturbance can trigger, or develop into, recognisable psychiatric injury, so they also make us aware of the implications, for freedom of action and personal security, of subjecting people to a legal requirement to anticipate and guard against any risk to others of psychiatric injury so long as it is not far-fetched or fanciful. In the context of a question of duty of care, reasonable foreseeability involves more than mere predictability. And advances in the predictability of harm to others, whether in the form of economic loss, or psychiatric injury, or in some other form, do not necessarily result in a co-extensive expansion of the legal obligations imposed on those whose conduct might be a cause of such harm. The limiting consideration is reasonableness, which requires that account be taken both of interests of plaintiffs and of burdens on defendants. Rejection of a "control mechanism", such as the need for direct perception of an incident or its aftermath, originally devised as a means of giving practical content to that consideration, does not involve rejection of the consideration itself.

10 In its capacity as an employer, the respondent was under a duty of care towards the father of the appellants. The question is whether, additionally, it was under a duty of care which required it to have in contemplation psychiatric injury to the children of its employee, and to guard against such injury. The relationship of parent and child is important in two respects. First, it goes to the foreseeability of injury. That a child of the age of the various appellants might suffer psychiatric injury in consequence of learning, on the day, of a terrible and fatal injury to his or her father, is not beyond the "common experience of mankind"[8]. (The fact that all three of the victim's children are said to have suffered psychiatric injury might give rise to some questions for the experts on a new trial, but is not presently relevant). Secondly, it bears upon the reasonableness of recognising a duty on the part of the respondent. If it is reasonable to require any person to have in contemplation the risk of psychiatric injury to another, then it is reasonable to require an employer to have in contemplation the children of an employee.

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8 cf *Chester v Waverley Corporation* (1939) 62 CLR 1 at 10 per Latham CJ.

11 In *Jaensch v Coffey*[9], Gibbs CJ said:

> "Where the relationship between the person killed or physically injured and the person who suffers nervous shock is close and intimate, not only is there the requisite proximity in that respect, but it is readily defensible on grounds of policy to allow recovery."

12 Not all children have a close and intimate relationship with their parents; and it may be that, even when parents are killed in sudden and tragic circumstances, most grieving children do not suffer psychiatric injury. However, as a class, children form an obvious category of people who might be expected to be at risk of the kind of injury in question. Where there is a class of person, such as children, who are recognised, by the law, and by society, as being ordinarily in a relationship of natural love and affection with another class, their parents, then it is not unreasonable to require that an employer of a person in the second class, whose acts or omissions place an employee at risk of physical injury, should also have in contemplation the risk of consequent psychiatric injury to a member of the first class.

13 Subject to the matter next to be considered, I would conclude that the respondent owed a duty of care to the appellants.

Section 4(1)(b)

14 Section 4 of the Act is set out in the reasons for judgment of Callinan J. The legislative history is described in an article written by Mr D Butler and published in 1996 in the *Torts Law Journal*[10].

15 The provision was a response by the New South Wales legislature to the decision of this Court in *Chester v Waverley Corporation*[11]. In considering the nature of that response, it is important to note some features of the existing state of the common law, as exemplified in *Chester*. In *Chester*, the majority ruled against the claim of a mother who suffered "nervous shock" following the drowning of her child in a trench excavated by the local council and left unguarded. The mother did not witness the drowning, but participated in a search for the child, and was present when the child's body was recovered. Evatt J, in dissent, considered that the case fell within the principles relating to search and rescue, and that the council's duty of care to the mother was owed because, although she was not at the scene of the accident when the child was drowned, she came there soon afterwards in search of the child and might have

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9 (1984) 155 CLR 549 at 555.

10 Butler, "Nervous shock at common law", (1996) 4 *Torts Law Journal* 120.

11 (1939) 62 CLR 1.

been a participant in a possible rescue[12]. As Deane J pointed out in *Jaensch v Coffey*[13], in terms of modern law, the conclusion of Evatt J is to be preferred to that of the majority. However, the reasoning of Evatt J was put on a limited basis, and his analysis in terms of primary and secondary liabilities was criticised by Professor Fleming[14] in the first edition of his work on the law of torts.

16 While the reasoning of all the members of the Court in *Chester* has since been overtaken by developments in the common law of Australia, that of Evatt J demonstrates a point that is significant in considering the legislative purpose behind s 4 of the Act. Section 4 deals with psychiatric injury to members of the family of a victim. Section 3 provides that in an action for injury caused after the commencement of the Act, "the plaintiff shall not be debarred from recovering damages merely because the injury complained of arose wholly or in part from mental or nervous shock". Section 4 goes on to provide that the liability of any person in respect of injury caused by the act, neglect or default by which any other person is killed, injured or put in peril, shall "extend to include liability" for injury arising from mental or nervous shock sustained by family members in certain circumstances. In the case of a parent, or husband or wife, of the victim, it is not stipulated that the victim must be killed, injured or put in peril in the sight or hearing of the plaintiff. In the case of other family members, there is such a stipulation. The expression "member of the family" is defined (s 4(4)). Relevantly, it includes children. Hence, if s 4(1)(b) were definitive of the potential liability of the respondent to the appellants, the appellants would fail, because the father was not killed, injured or put in peril within their sight or hearing.

17 As the reasoning of Evatt J in *Chester* shows, s 4 does not cover the entire range of persons who, as the common law stood in 1944, might have sued for "nervous shock". In particular, it does not cover rescuers who are not family members. The English decision of *Chadwick v British Railways Board*[15], in 1967, which concerned nervous shock suffered by a man who had participated in emergency services following a collision between two railway trains, did not represent a development in the common law. The principles upon which it was decided were the same as those which Evatt J said should have been applied in *Chester*[16]. If s 4 of the Act amounted to a definitive statement of the

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12 (1939) 62 CLR 1 at 37-39.

13 (1984) 155 CLR 549 at 591.

14 Fleming, *The Law of Torts*, (1957) at 180.

15 [1967] 1 WLR 912; [1967] 2 All ER 945.

16 See also *Haynes v Harwood* [1935] 1 KB 146.

circumstances in which a claim for mental or nervous shock of the kind referred to in s 3 might succeed, then it did not "extend" the liability of defendants; in certain respects it narrowed that liability, even by reference to the state of the common law in 1944.

18 In *Coates v Government Insurance Office of New South Wales*[17], on the view I took of other issues in the case, it was unnecessary (and therefore, I thought, inappropriate) for me to decide whether s 4(1)(b) operated to limit rights that would otherwise have been given by the common law. It appeared to me then, and appears to me now, that the question is whether the statute evinces an intention that it is to be definitive of rights and liabilities in the case of all claims for damages for nervous shock, or whether the statute is to be regarded as supplementary to, and not derogating from, the rights of persons at common law[18]. In *Coates*, Kirby P, who found it necessary to decide the point, preferred the second construction. The same view was taken by Mason P in *FAI General Insurance Co Ltd v Lucre*[19], and by the Court of Appeal in this case.

19 In the present case, Hodgson JA, with whom Handley JA and Ipp AJA agreed, pointed out that s 4 does not expressly state that there shall be no liability in respect of mental or nervous shock sustained by persons other than the immediate victim, unless the conditions laid down by the section are satisfied. That is correct, and significant.

20 Hodgson JA went on to say[20]:

> "One other consideration which persuades me that the common law is not displaced is that s 4 starts with a breach of duty of care to one person, and then extends liability for that breach to include a liability to certain other persons: it does not provide that there is any duty of care to those other persons. In so far as the common law provides for liability to persons other than the immediate victim, it does so by means of a duty of care owed directly to those persons, rather than a liability built upon a breach of duty to the primary victim."

21 The second sentence is accurate, but the explanation of the form of s 4, referred to in the first sentence, might possibly be found in the view of the common law taken by Evatt J in *Chester*, which was rather different from the

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17 (1995) 36 NSWLR 1.

18 See *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 505-506 per Mason CJ and Toohey J.

19 (2000) 50 NSWLR 261 at 263-264.

20 (2001) 51 NSWLR 606 at 615.

modern view. Indeed, that was the basis of Professor Fleming's criticism of the reasoning of Evatt J noted earlier[21].

22 Whether or not it owes its origin to an outmoded or unorthodox view of the common law as involving primary and secondary liability, the scheme of s 4, including the expression "shall extend to include liability" of a certain kind in certain circumstances, is difficult to reconcile with a legislative intention comprehensively to define liability. Furthermore, the legislative history shows that, although s 4 represented a parliamentary compromise as to the desirable extent of reform, it was intended to confer, rather than take away, rights.

23 The Court of Appeal was right to conclude that s 4 of the Act does not have the effect of excluding the liability of the respondent to the appellants if such liability otherwise exists at common law.

24 As to the argument, advanced on behalf of the appellants, to the effect that s 151P of the Workers Compensation Act, in cases such as the present, displaces s 4, I agree with what has been said by Gummow and Kirby JJ.

Conclusion

25 The appeals should be allowed. I agree with the consequential orders proposed by Gummow and Kirby JJ.

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21 Above at [15].

26 McHUGH J. Section 4 of the *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW)[22] enacted that a member of the family of a person killed by the negligence of another may bring an action for nervous shock[23] if the person was killed "within the sight or hearing of such member of the family." The children of an employee claim that they suffered nervous shock when they were told that their father had been killed at work. His death was caused by the negligence of his employer. The children were not present when he was killed, nor did they see his dead body. They learnt of his death some hours after it occurred. Accordingly, they cannot bring an action under s 4. But does s 4 abolish the common law right of a family member to bring an action for nervous shock suffered as the result of the wrongful death of the relative? If not, did the employer's duty to take reasonable care for the safety of their father during the course of his employment include a separate duty to the children to protect them from suffering nervous shock by reason of a breach of the duty owed to their father? These are the principal issues in these appeals from a decision of the Court of Appeal of New South Wales holding that the common law action is not abolished, but that the employer owed no such duty to the children.

27 In my opinion, the Court of Appeal was correct in holding that the *Law Reform (Miscellaneous Provisions) Act* does not abolish the common law right of a family member to bring an action for nervous shock. But it erred in holding that the employer owed no duty to the children. An employer owes a duty to take care to protect from psychiatric harm all those persons that it knows or ought to know are in a close and loving relationship with its employee. It is not a condition of that duty that such persons should be present when the employee suffers harm or that they should see the injury to the employee. That is the logical consequence of the reasoning in *Tame v New South Wales*[24] – a decision of this Court delivered after the decision of the Court of Appeal in the present case.

28 An issue also arises in these appeals as to whether s 151P of the *Workers Compensation Act* 1987 (NSW) provides an independent cause of action for nervous shock. In my opinion, it does not do so.

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22 Sections 3 and 4 of the *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) were repealed by the *Civil Liability Amendment (Personal Responsibility) Act* 2002 (NSW) and have now been replaced by Pt 3 of the *Civil Liability Act* 2002 (NSW).

23 "Nervous shock" is an outdated term that nowadays is taken to mean a recognisable psychiatric injury.

24 (2002) 76 ALJR 1348; 191 ALR 449.

Statement of the case

The District Court

29 Darren Gifford, Kelly Gifford and Matthew Gifford sued Strang Patrick Stevedoring Pty Ltd ("Strang") in the District Court of New South Wales for damages for nervous shock suffered when they were told of the death of their father as a result of a workplace accident. Strang admitted that its negligence caused the death of their father, however the District Court dismissed their actions[25]. Naughton DCJ, who heard the actions, held that in New South Wales s 4(1)(b) of the *Law Reform (Miscellaneous Provisions) Act* covered the field of nervous shock actions, and that it replaced the common law action with a statutory cause of action. Accordingly, his Honour held that, as the deceased was not killed, injured or put in peril within the sight or hearing of any of the children, s 4(1)(b) prevented them from recovering damages for nervous shock. His Honour made no finding as to whether any of the children had suffered nervous shock[26].

The Court of Appeal

30 The Court of Appeal (Handley and Hodgson JJA and Ipp AJA[27]) dismissed appeals by the children[28]. Their Honours held that s 4(1)(b) of the *Law Reform (Miscellaneous Provisions) Act* did not cover the field of nervous shock and did not affect a person's right to bring an action for nervous shock at common law. But they held that the common law actions must fail. They

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25 *Gifford v Strang Patrick Stevedoring Pty Limited* unreported, District Court of New South Wales, 24 August 1999.

26 The wife of the deceased also claimed damages for nervous shock. Naughton DCJ dismissed her action on the basis that she had not suffered any demonstrable psychological or psychiatric illness caused by mental reaction to news of the deceased's accidental death. Subsequently, the Court of Appeal affirmed this finding [*Gifford v Strang Patrick Stevedoring Pty Ltd* (2001) 51 NSWLR 606 at 621 [66]]. This Court rejected her application for special leave to appeal to this Court.

27 Handley JA and Ipp AJA agreed with Hodgson JA on all issues except for his Honour's discussion of s 4(1)(a) of the *Law Reform (Miscellaneous Provisions) Act* on which their Honours chose not to express an opinion and which is not relevant for the purposes of this appeal.

28 *Gifford v Strang Patrick Stevedoring Pty Ltd* (2001) 51 NSWLR 606.

applied the reasoning in cases decided before *Tame*[29]. Those decisions severely restricted the grounds upon which an action for nervous shock could be brought at common law. They held that a person was not entitled to damages if no more appeared than that a person had suffered psychiatric injury on being told of the death of, or injury to, a loved one. To bring such an action, the defendant must have breached its duty to the loved one and the plaintiff must have seen the incident or been present at its immediate aftermath[30].

The material facts

31 Strang employed Mr Barry Gifford as a wharf labourer and wharf clerk. On 14 June 1990, he was killed by what the trial judge described as an "horrific" accident when a large forklift vehicle reversed over him, crushing him to death immediately. Soon after the accident, Mrs Kristine Gifford, his estranged wife, was informed that he had been killed. Darren Gifford, Kelly Gifford and Matthew Gifford are Barry and Kristine Gifford's children. They learnt of their father's death later that same day. At the time they were aged 19, 17 and 14. While the children did not live with the deceased, they maintained a close and loving relationship with him. Their father visited them almost daily. The children claim that they were shocked and distressed at the news. None of them saw the deceased's body after the accident; they were apparently discouraged from doing so because of the horrific injuries that he suffered.

Section 4 of the *Law Reform (Miscellaneous Provisions) Act*

32 Strang has filed a notice of contention that seeks to support the decision of the Court of Appeal by contending that in New South Wales s 4 of the *Law Reform (Miscellaneous Provisions) Act* has abolished a family member's right to bring a common law action for nervous shock. The notice contends that, so far as family members are concerned, actions for nervous shock can be brought only in accordance with the conditions specified in s 4. If this contention were upheld, questions of common law duty would be irrelevant.

33 In my opinion, both the wording of s 4 and its history demonstrate that the section does not exhaust the rights of a family member to bring an action for nervous shock resulting from the death or injury of a relative. Section 4 confers rights; it does not abolish them. The right of action that it confers on parents and spouses is superior to the right that it confers on other family members. But nothing in the section or its history suggests that the right of either group to bring

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29 (2002) 76 ALJR 1348; 191 ALR 449.

30 *Gifford v Strang Patrick Stevedoring Pty Ltd* (2001) 51 NSWLR 606 at 616-617 [40]-[44].

an action for nervous shock is confined to the statutory right that s 4 confers. Section 4 relevantly provides:

> "(1) The liability of any person in respect of injury caused after the commencement of this Act by an act, neglect or default by which any other person is killed, injured or put in peril, shall extend to include liability for injury arising wholly or in part from mental or nervous shock sustained by:
>
> (a) a parent or the husband or wife of the person so killed, injured or put in peril; or
>
> (b) any other member of the family of the person so killed, injured or put in peril where such person was killed, injured or put in peril within the sight or hearing of such member of the family."

34 Section 4 was a statutory response to the decision of this Court in *Chester v Waverley Corporation*[31] and the decision of the House of Lords in *Bourhill v Young*[32]. In *Chester*, this Court held that no action for nervous shock could be brought by a mother who had suffered shock after seeing the dead body of her missing son in a trench under the control of the council. In *Bourhill*, the House of Lords denied a right of action to a woman who suffered nervous shock after hearing a motor cyclist collide with a motor vehicle. At the time she was unloading a basket from a platform on the other side of a nearby stationary tram. In the Second Reading Speech on the Law Reform (Miscellaneous Provisions) Bill in the Legislative Council, the Minister for Justice said[33] that s 4 was "a statutory extension of liability to meet the position created by the decision in [Bourhill] v Young … It creates no new substantive right of action."

35 When s 4 was enacted, it was seen as a beneficial provision that expanded the ability of close family members to recover for nervous shock. It was a legislative response to the perceived inadequacies in the common law, as then understood, to provide compensation to family members for nervous shock suffered as the result of injury to their relatives[34]. It removed the need for a family member to show the existence of a duty to the family member or that

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31 (1939) 62 CLR 1.

32 [1943] AC 92.

33 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 8 November 1944 at 830.

34 See *Jaensch v Coffey* (1984) 155 CLR 549 at 601-602 per Deane J.

psychiatric injury to that person was reasonably foreseeable. The Minister said[35] that the bill would "provide a considerable advance on the present law". Nothing in s 4 or its history supports Strang's submission that the section was intended to operate to the exclusion of the common law and cover the field in relation to claims for nervous shock by family members.

36 There is a presumption – admittedly weak these days – that a statute is not intended to alter or abolish common law rights unless the statute evinces a clear intention to do so[36]. In *Malika Holdings Pty Ltd v Stretton*[37], however, I warned of the need for caution in applying this presumption: nowadays legislatures regularly enact laws that infringe the common law rights of individuals. The presumption of non-interference is strong when the right is a fundamental right of our legal system; it is weak when the right is merely one to take or not take a particular course of action. Courts should not cut down the natural and ordinary meaning of legislation evincing an intention to interfere with these lesser rights by relying on a presumption that the legislature did not intend to interfere with them. Given the frequency with which legislatures now abolish or amend "ordinary" common law rights, the "presumption" of non-interference with those rights is inconsistent with modern experience and borders on fiction. If the presumption still exists in such cases, its effect must be so negligible that it can only have weight when all other factors are evenly balanced.

37 The right to bring an action for psychiatric injury is an ordinary legal right. It is not a fundamental right of our society or legal system similar to the right to have a fair trial or to have a criminal charge proved beyond a reasonable doubt. Nor is the presumption against interfering with ordinary common law rights of the same strength as the presumption that laws do not operate retrospectively. Whether or not the *Law Reform (Miscellaneous Provisions) Act* excludes the common law has to be determined by construing the legislation in its natural and ordinary meaning, having regard to its context and the purpose of

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35 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 5 December 1944 at 1491.

36 *Potter v Minahan* (1908) 7 CLR 277 at 304. See also *Sargood Bros v The Commonwealth* (1910) 11 CLR 258 at 279 per O'Connor J; *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 341 per Mason ACJ, Wilson and Dawson JJ; *Bropho v Western Australia* (1990) 171 CLR 1 at 18 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ and myself; *Coco v The Queen* (1994) 179 CLR 427 at 437-438 per Mason CJ, Brennan and Gaudron JJ and myself.

37 (2001) 204 CLR 290 at 298-299 [28]-[30].

the enactment. The context and purpose of a law includes the history of the enactment and the state of the law when it was enacted[38].

38 Section 4(1) says that liability in respect of a negligently inflicted injury shall "extend to include" liability for nervous shock. The words "extend to include" indicate that the New South Wales legislature sought to alter the common law in that State, as understood at the time, for the benefit of certain family members. The words of s 4(1), and in particular the words "extend to include", indicate that the section expanded the scope of the common law so far as family members were concerned, but otherwise maintained the existence of a common law action for nervous shock for those persons.

39 There is not a word in the *Law Reform (Miscellaneous Provisions) Act* that suggests that its purpose was to abolish generally the common law right to bring an action for damages for nervous shock. Nothing in the legislation itself or the Second Reading Speech indicates that the legislature intended that only those family members included in the definition in s 4(5) of the *Law Reform (Miscellaneous Provisions) Act* could bring an action for nervous shock. The fact that the legislature did not seek to exclude the common law is evident from a statement in the Second Reading Speech where the Minister said that s 4 would not affect the liability of newspaper publications who would continue to be governed by the common law[39]. Against that background, it would be surprising if s 4 had the purpose – *sub silentio* – of abolishing the common law rights of the family members of an injured or deceased person and confining their rights to those conferred by the section. This is particularly so, given that the evident purpose of the legislation was to give family members rights of action denied to other persons who suffer nervous shock as the result of the careless conduct of wrongdoers.

40 Because the present issue has not previously arisen for determination, judicial utterances concerning the issue have been limited. But on two occasions, members of this Court have expressed the view that s 4 was an extension and not an abolition of the common law right to bring an action for nervous shock. In *Scala v Mammolitti*[40], Taylor J said that, although s 4 extended the field in which persons standing in a special relationship to a person killed, injured or put in peril

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38 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 341 per Mason ACJ, Wilson and Dawson JJ; *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290 at 299 [30].

39 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 8 November 1944 at 830.

40 (1965) 114 CLR 153 at 159-160, Barwick CJ and Windeyer J agreeing.

might recover for nervous shock, "it otherwise leaves the earlier law untouched." In *Mount Isa Mines Ltd v Pusey*[41], Windeyer J said that New South Wales had modified the common law by enacting the *Law Reform (Miscellaneous Provisions) Act* and that the common law concerning nervous shock continued to develop.

41 Statements in the New South Wales Supreme Court are also consistent with the view that s 4 does not exclude the operation of the common law in New South Wales. In *Anderson v Liddy*[42], Jordan CJ referred to s 4 as extending "in certain respects the common law liability of wrongdoers" in relation to nervous shock. His Honour referred to actions by family members brought under s 4 as "special cases". In *Coates v Government Insurance Office of New South Wales*[43], Kirby P held that s 4(1) does not exhaustively define the rights of persons to recover for nervous shock. His Honour said that, on its proper construction, the section provided a right for certain persons to bring proceedings for nervous shock in addition to common law rights that remained unaffected. Clark JA tentatively agreed with Kirby P on this issue[44]. Similarly in *FAI General Insurance Co Ltd v Lucre*[45], Mason P, with whose judgment Meagher and Giles JJA agreed, said that the "section does not purport to restrict the continuing development of the common law of Australia".

42 Accordingly, it was not the purpose of s 4 of the *Law Reform (Miscellaneous Provisions) Act* to abolish the rights of the persons identified in that section to bring common law actions for nervous shock suffered as the result of harm to, or the putting in peril of, a relative. Nor is the position changed because in 1944 lawyers and the legislature of New South Wales understood the common law to be more restricted than this Court has now declared it to be.

Is s 151P of the *Workers Compensation Act* an independent source of rights?

43 Counsel for the children submitted that s 151P of the *Workers Compensation Act* should be given a purposive construction – one providing an independent right to sue for nervous shock – even though it is expressed in the negative language of restriction, rather than the positive language of entitlement.

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41 (1970) 125 CLR 383 at 408.

42 (1949) 49 SR(NSW) 320 at 323.

43 (1995) 36 NSWLR 1 at 7-8.

44 (1995) 36 NSWLR 1 at 22.

45 (2000) 50 NSWLR 261 at 263-264.

Section 151P is in Pt 5 of the Act which is entitled "Common law remedies". Relevantly, Pt 5 provides:

> "**151 Common law and other liability preserved**
>
> This Act does not affect any liability in respect of an injury to a worker that exists independently of this Act, except to the extent that this Act otherwise expressly provides.
>
> ...
>
> **151E Application – modified common law damages**
>
> (1) This Division applies to an award of damages in respect of:
>
> (a) an injury to a worker, or
>
> (b) the death of a worker resulting from or caused by an injury,
>
> being an injury caused by the negligence or other tort of the worker's employer.
>
> ...
>
> **151P Damages for psychological or psychiatric injury**
>
> No damages for psychological or psychiatric injury are to be awarded in respect of an injury except in favour of:
>
> (a) the injured worker, or
>
> (b) a parent, spouse, brother, sister or child of the injured or deceased person who, as a consequence of the injury to the injured person or the death of the deceased person, has suffered a demonstrable psychological or psychiatric illness and not merely a normal emotional or cultural grief reaction."

44 The Court of Appeal correctly concluded that s 151P was a limitation on awards of damages rather than the source of an independent right to damages. The relevant parts of the legislation assume the existence of rights of action for nervous shock arising out of workplace injuries and confine the right to claim damages in such actions to injured workers and their immediate family members. The heading "Common law remedies" in the relevant part of the *Workers Compensation Act* reflects this fact, as does the heading "Modified common law damages" in Div 3 which contains s 151P. Thus, s 151P does not give plaintiffs a right to recover damages. On the contrary, it takes away the right to recover

damages in an action for nervous shock for workplace injuries but makes an exception in favour of injured workers and members of their close families.

The common law action for nervous shock

45 The Court of Appeal held that the children could not maintain a common law claim for damages for nervous shock because they did not see the accident that caused their father's death or its aftermath. Hodgson JA said[46] "authority is strongly against the view that there can be liability at common law for damages for mental injury to a person who is told about even an horrific accident or injury to a loved one but does not at any time actually perceive the incident or its aftermath." However, this Court held in *Tame*[47] that the common law does not limit liability for nervous shock to injuries brought about by a sudden shock in circumstances where the plaintiff has directly perceived a distressing event or its immediate aftermath. Accordingly, the Court of Appeal erred in dismissing the claim on the ground that the children were not present at the accident or its aftermath.

46 The question then is, whether the relevant principles of the law of negligence required a finding that the respondent owed the children a duty of care to prevent psychiatric injury. That depends on whether the children were "neighbours" in Lord Atkin's sense of that term[48]. Were they so closely and directly affected by Strang's relationship with their father that Strang ought reasonably to have had them in contemplation when it directed its mind to the risk of injury to which it was exposing their father? That Strang negligently caused the death of their father is conceded. So it is unnecessary in this case to determine whether a risk of physical harm to the father existed and, if so, whether it could reasonably be disregarded. It is necessary, however, to determine whether exposing the father to that risk gave rise to a risk that the children would suffer nervous shock and whether *that* risk to the children could reasonably be disregarded[49].

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46 *Gifford v Strang Patrick Stevedoring Pty Ltd* (2001) 51 NSWLR 606 at 616 [40].

47 (2002) 76 ALJR 1348 at 1353 [18] per Gleeson CJ, 1357 [51], 1360 [66] per Gaudron J, 1380-1381 [189], 1386 [213], 1386 [214], 1388-1389 [225] per Gummow and Kirby JJ, 1397 [267] per Hayne J; 191 ALR 449 at 456, 461-462, 465, 494, 502, 505 and 517.

48 *Donoghue v Stevenson* [1932] AC 562 at 580.

49 *Tame v New South Wales* (2002) 76 ALJR 1348 at 1367 [108]; 191 ALR 449 at 475.

47 The answer to these questions lies in the nature of the relationship between the children and their father. The collective experience of the common law judiciary is that those who have a close and loving relationship with a person who is killed or injured often suffer psychiatric injury on learning of the injury or death, or on observing the suffering of that person. Actions for nervous shock by such persons are common. So common and so widely known is the phenomenon that a wrongdoer must be taken to have it in mind when contemplating a course of action affecting others. Accordingly, 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. They are among the persons who are likely to be so closely and directly affected by the wrongdoer's conduct that that person ought reasonably to have them in mind when considering if it is exposing the victim to a risk of harm. In *Alcock v Chief Constable of South Yorkshire Police*, Lord Keith of Kinkel pointed out[50]:

> "The kinds of relationship which may involve close ties of love and affection are numerous, and it is the existence of such ties which leads to mental disturbance when the loved one suffers a catastrophe. They may be present in family relationships or those of close friendship … It is common knowledge that such ties exist, and reasonably foreseeable that those bound by them may in certain circumstances be at real risk of psychiatric illness if the loved one is injured or put in peril. The closeness of the tie would, however, require to be proved by a plaintiff, though no doubt being capable of being presumed in appropriate cases."

48 It is the closeness and affection of the relationship – rather than the legal status of the relationship – which is relevant in determining whether a duty is owed to the person suffering psychiatric harm. The relationship between two friends who have lived together for many years may be closer and more loving than that of two siblings. There is no policy justification for preventing a claim for nervous shock by a person who is not a family member but who has a close and loving relationship with the person harmed or put in peril. In a claim for nervous shock at common law, the reasonable foresight of the defendant extends to all those with whom the victim has or had a close and loving relationship.

49 Whether such a relationship exists in a particular case will often be a matter for evidence although, as Lord Keith pointed out in the above passage, in some cases the nature of the relationship may be such that it may be presumed. Among such relationships are those of parent and child. As s 4 of the *Law Reform (Miscellaneous Provisions) Act* recognises, the children of a person who is killed, injured or put in peril are especially likely to suffer nervous shock upon

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50 [1992] 1 AC 310 at 397. See also at 403 per Lord Ackner, 415-416 per Lord Oliver of Aylmerton, 422 per Lord Jauncey of Tullichettle.

learning that their parent has suffered harm. Ordinarily, the love and affection between a parent and child is such that there is a real risk that the child may suffer mental injury on being informed of the harm to, or of observing the suffering of, the parent. The ordinary relationship between parent and child is so close and loving that a wrongdoer cannot reasonably disregard the risk that the child will suffer mental injury on being informed that his or her parent has been harmed or put in peril as a result of the wrongdoer's negligence.

50 Nor can the wrongdoer reasonably disregard some other close and loving relationships. Husband and wife, sibling and sibling, de facto partners and engaged couples, for example, almost invariably have close and loving relationships. No doubt the parties to such relationships may sometimes be estranged. Despite this possibility, however, so commonly are these relationships close and loving that a wrongdoer must *always* have such persons in mind as neighbours in Lord Atkin's sense whenever the person harmed is a neighbour in that sense. To require persons in such relationships to prove the closeness and loving nature of the relationship would be a waste of curial resources in the vast majority of cases. The administration of justice is better served by a fixed rule that persons in such relationships are "neighbours" for the purposes of the law of nervous shock and the defendant must always have them in mind. Similarly, the wrongdoer must *always* have in mind any person who can establish a close and loving relationship with the person harmed.

51 Although a close and loving relationship with the person harmed brings a person within the neighbour concept, it is not a necessary condition of that concept. In some cases, a relationship, short of being close and loving, may give rise to a duty to avoid inflicting psychiatric harm. A person is a neighbour in Lord Atkin's sense if he or she is one of those persons who "are so closely and directly affected by my act that I ought *reasonably* to have them in contemplation as being so affected"[51]. If the defendant ought reasonably foresee that its conduct may affect persons who have a relationship with the primary victim, a duty will arise in respect of those persons. The test is, would a reasonable person in the defendant's position, who knew or ought to know of that particular relationship, consider that the third party was so closely and directly affected by the conduct that it was reasonable to have that person in contemplation as being affected by that conduct?

52 In other cases, an association with the primary victim or being in their presence may be sufficient to give rise to a duty to take reasonable care to protect a person from suffering psychiatric harm. This will often be the case where the person suffering psychiatric harm saw or heard the harm-causing incident or its aftermath. As members of this Court pointed out in *Tame*, in determining

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51 *Donoghue v Stevenson* [1932] AC 562 at 580 (emphasis added).

whether the psychiatric injury suffered was reasonably foreseeable, relevant considerations may include whether the person who suffers that injury directly perceived the distressing incident or its immediate aftermath or suffered a sudden shock. If so, a duty to take care may exist even though the primary victim and the person suffering psychiatric harm had no pre-existing relationship. In *Tame*[52], Gleeson CJ said that such matters are relevant where the nature of the relationship is not that of parent and a child. They are relevant because they go to the issue whether it was reasonable to require the defendant to have in contemplation injury of the kind suffered by the plaintiff and to take steps to guard against such injury. Gaudron J[53] said that, absent circumstances giving rise to a sudden shock, the risk of psychiatric injury will not be reasonably foreseeable in many cases. Gummow and Kirby JJ said[54]:

> "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."

The employer owed a duty of care to the children

53 In the present case, the relationship between the children and their father made them a neighbour of Strang for duty purposes, and Strang owed the father a duty of care to provide a safe place of employment. The father was killed in the course of his employment by reason of the negligence of Strang. A reasonable employer in the position of Strang was bound to have in mind that any harm caused to its employee carried the risk that it would cause psychiatric harm to any children that he might have when they learned of his death. Because that is so, Strang owed a duty to the children to take reasonable care in its relationship with their father to protect them from psychiatric harm. And the admission that Strang negligently caused the death of their father means that Strang breached its duty to the children. However, the trial judge made no finding as to whether any of the children suffered a recognisable psychiatric injury upon being told of their father's death. Accordingly, it is not possible to enter verdicts in favour of the children. The proceedings must be remitted to the District Court for further hearing.

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52 (2002) 76 ALJR 1348 at 1353 [18]; 191 ALR 449 at 456.

53 (2002) 76 ALJR 1348 at 1360 [66]; 191 ALR 449 at 465.

54 (2002) 76 ALJR 1348 at 1388 [225]; 191 ALR 449 at 505.

Orders

54 The appeals should be allowed. The orders of the Court of Appeal should be set aside. In place thereof, it should be ordered that the appeals to that Court be allowed, that the orders of the District Court be set aside and the matters be remitted to that Court for further hearing. The respondent should pay the costs in this Court and in the Court of Appeal. The costs in the District Court should follow the outcome of the further hearing.

55 GUMMOW AND KIRBY JJ. These three appeals against a decision of the New South Wales Court of Appeal (Handley and Hodgson JJA, Ipp A-JA)[55] concern the liability of an employer for "nervous shock" allegedly suffered by the children of an employee upon learning that their father had been killed in the course of his employment.

56 On 14 June 1990, the appellants' father, Mr Barry Gifford was killed in a forklift accident which occurred during the course of his employment by Strang Patrick Stevedoring Pty Limited ("the respondent"), as a wharf labourer and container location clerk at Darling Harbour in Sydney. The appellants, who were then aged 19, 17 and 14 respectively, were informed of their father's death at their home in Woolloomooloo later that day. They were shocked and distressed at the news. None of the appellants saw the deceased's body after the accident; it appears they were discouraged from doing so because of its damaged condition.

57 The appellants and their mother, the deceased's widow, Mrs Kristine Gifford, each commenced proceedings against the respondent in the Supreme Court of New South Wales seeking damages in negligence for "nervous shock". Each action was, by order of that Court, transferred to the District Court and each was heard on 11 May 1998 as a civil arbitration under the *Arbitration (Civil Actions) Act* 1983 (NSW) ("the Arbitration Act"). Section 18 of that statute provided, in certain circumstances, for the District Court, upon application by a person aggrieved by the arbitral award, to order a rehearing of the action as if the action had never been referred to arbitration. Upon applications made under s 18 of the Arbitration Act, the District Court (Naughton DCJ) conducted a rehearing of each action, uninformed as to the content of the arbitrator's award in each case. On 24 August 1999, the District Court gave judgment for the respondent in each proceeding. The appellants and their mother each appealed unsuccessfully to the Court of Appeal. The leading judgment was delivered by Hodgson JA.

58 Special leave to appeal to this Court was granted to the appellants but refused to Mrs Gifford. The Court of Appeal upheld the trial judge's finding that, although Mr Gifford's death caused Mrs Gifford to experience shock, distress and an extended grief reaction, it did not cause her to develop a recognisable psychiatric illness. In this country, emotional distress or grief not amounting to a recognisable psychiatric illness does not found a common law action in negligence[56].

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55 *Gifford v Strang Patrick Stevedoring Pty Ltd* (2001) 51 NSWLR 606.

56 *Tame v New South Wales* (2002) 76 ALJR 1348 at 1356 [44], 1381-1382 [193], 1400 [285]; 191 ALR 449 at 460, 495-496, 522.

59 Mrs Gifford also brought a claim on behalf of the three children under the *Compensation to Relatives Act* 1897 (NSW) ("the Compensation to Relatives Act"), the respondent having admitted that its negligence caused the death of the deceased. The claim was heard by Naughton DCJ together with the negligence actions but was the subject of a separate judgment, from which no appeal was brought. Section 4(1) of the Compensation to Relatives Act provides for the recovery, by specified relatives of a person killed by a wrongful act, neglect or default, of damages "proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action is brought". As the recent discussion in *De Sales v Ingrilli*[57] indicates, there is a long history of judicial interpretation of similar language in cognate legislation and its antecedents which restricts the damages recoverable in such actions to pecuniary loss and forbids any consideration of mental suffering or loss of society.

The District Court

60 In the negligence actions, Naughton DCJ made no findings as to whether the appellants suffered a recognisable psychiatric illness consequent upon being informed of the death of their father. One result is that, even if the appellants otherwise are successful in this Court, their actions must be returned to the District Court for determination of outstanding issues.

61 Naughton DCJ entered verdicts for the respondent because he decided that in any event s 4(1)(b) of the *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) ("the 1944 Act") operated to exclude the children's common law claims to damages for "nervous shock"; the deceased was not killed, injured or put in peril within the sight or hearing of any of the children. Section 4(1) states:

> "The liability of any person in respect of injury caused after the commencement of this Act by an act, neglect or default by which any other person is killed, injured or put in peril, shall extend to include liability for injury arising wholly or in part from mental or nervous shock sustained by:
>
> (a) a parent or the husband or wife of the person so killed, injured or put in peril; or
>
> (b) any other member of the family of the person so killed, injured or put in peril where such person was killed, injured or put in peril within the sight or hearing of such member of the family."

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57 (2002) 77 ALJR 99 at 109-111 [54]-[58], 122 [119]; 193 ALR 130 at 143-144, 160.

"Member of the family" is defined in s 4(5) to mean "the husband, wife, parent, child, brother, sister, half-brother or half-sister of the person in relation to whom the expression is used"; "child" is defined to include "son, daughter, grandson, granddaughter, stepson, stepdaughter and any person to whom another stands in loco parentis".

62 In the course of his reasons, Naughton DCJ referred also to Pt 5 (ss 149-151AC) of the *Workers Compensation Act* 1987 (NSW) ("the Workers Compensation Act"), which is headed "Common law remedies". In particular, his Honour rejected a submission, put by counsel for the appellants, respecting s 151P of that statute. This provides:

> "No damages for psychological or psychiatric injury are to be awarded in respect of an injury except in favour of:
>
> (a) the injured worker, or
>
> (b) a parent, spouse, brother, sister or child of the injured or deceased person who, as a consequence of the injury to the injured person or the death of the deceased person, has suffered a demonstrable psychological or psychiatric illness and not merely a normal emotional or cultural grief reaction."

Section 151P does not assist the appellants by conferring a private right of action for breach of statutory duty[58]. Rather, the appellants submitted that s 151P excludes what otherwise would be any application to them of s 4(1)(b) of the 1944 Act.

The Court of Appeal

63 The Court of Appeal agreed with the trial judge's conclusion that s 151P of the Workers Compensation Act does not displace the operation of s 4(1)(b) of the 1944 Act[59]. However, their Honours disagreed with the primary judge as to the effect of s 4(1)(b). The Court of Appeal held that that provision does not exclude any liability that may otherwise exist at common law[60].

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58 *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397 at 405; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 459-461.

59 (2001) 51 NSWLR 606 at 608, 614, 623.

60 (2001) 51 NSWLR 606 at 608, 615, 623.

64 The Court of Appeal nonetheless held that the appellants could not recover; this was because no liability was said to arise at common law for damages for mental injury to a person who is told about an horrific injury to a loved one but does not actually perceive the incident or its aftermath[61].

In this Court

65 *Tame v New South Wales* and *Annetts v Australian Stations Pty Ltd*[62], which were heard and decided by this Court after judgment was delivered by the Court of Appeal in the present case, determined that liability in negligence for "nervous shock" does not depend upon satisfaction of an absolute requirement that a plaintiff "directly perceive" the relevant distressing incident or its "immediate aftermath". The lack of direct perception by the appellants of the death of their father is not itself fatal to their action in negligence for "nervous shock". It follows that the Court of Appeal erred in dismissing the appeals on that basis.

66 The identification of that error, however, does not establish that the respondent owed the appellants a duty to take reasonable care to avoid causing them psychiatric harm. A consequence of the rejection of an absolute requirement of "direct perception" is the need for consideration in the particular case of the ordinary principles of the law of negligence in accordance with which a duty of care either is established or denied. This reflects the process of reasoning which followed in *Brodie v Singleton Shire Council*[63] from the removal from the corpus of the common law of the "immunity" of "highway authorities"; the removal of that restriction provided occasion for what otherwise would have been the ordinary operation of the elements of the tort of negligence.

67 A duty of care in cases involving psychiatric injury is not defeated at the outset by the absence of "direct perception"; but it does not follow that a duty arises in all circumstances to which the control mechanism previously has been said to attach. Indeed, it would be quite wrong to take it from *Tame* and *Annetts* that reasonable foreseeability of mental harm is the only condition of the existence of a duty of care[64]. This aspect of the present appeals is considered further below under the heading "Duty of care".

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61 (2001) 51 NSWLR 606 at 608, 616-617, 623.

62 (2002) 76 ALJR 1348 at 1353 [18], 1357 [51], 1380-1381 [189], 1388-1389 [225]; 191 ALR 449 at 456, 461-462, 494, 505.

63 (2001) 206 CLR 512 at 539-540 [54]-[55], 604 [238]-[239].

64 cf *Review of the Law of Negligence*, Final Report, September 2002, §9.13.

68 By its Amended Notice of Contention, the respondent submits that the decision of the Court of Appeal should be affirmed on the basis that the trial judge was correct to conclude that s 4(1)(b) of the 1944 Act operated to prevent the appellants' claim for damages for "nervous shock". If accepted, that contention would foreclose any occasion for the application to the present case of the ordinary principles governing the existence of a common law duty of care.

69 The respondent further submits that, even if s 4(1)(b) does not have the effect for which it contends, no duty of care arose in the present circumstances. The respondent points in particular to the significance to the finding of a duty of care in *Annetts* of the reliance by Mr and Mrs Annetts on the assurances given by the respondent in that case as to the care that would be taken in its employment of their adolescent son on its isolated cattle station; an antecedent relationship therefore existed between Mr and Mrs Annetts and their son's employer[65]. It is said that the respondent in the present case provided no similar assurances upon which the appellants relied respecting their father's safety from harm during the course of his employment.

Section 4(1) of the 1944 Act

70 The terms of s 4(1) are set out earlier in these reasons. Legislation in the same terms has been enacted in the Australian Capital Territory and the Northern Territory[66]. It is to be noted at the outset that, as indicated by s 12 of the *Interpretation Act* 1987 (NSW), the reference in s 4(1) of the 1944 Act to a person being "killed, injured or put in peril" is taken to be a reference to a "matter or thing" occurring in New South Wales. The respondent's Amended Notice of Contention thus raises directly a question concerning the construction of s 4 which Windeyer J in *Mount Isa Mines Ltd v Pusey*[67] found unnecessary to resolve and which could not have arisen in *Annetts* even if the law of New South Wales otherwise had applied as the *lex loci delicti* (the law of the place of the wrong) in that case. The injury and death of the respondent's co-worker in *Pusey* occurred in Queensland; the imperilment and death of the appellants' son in *Annetts* occurred in Western Australia.

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65 (2002) 76 ALJR 1348 at 1355-1356 [37], 1373 [144], 1391 [239], 1403 [302]-[303], 1415 [366]; 191 ALR 449 at 459, 483-484, 508-509, 525-526, 541-542.

66 *Law Reform (Miscellaneous Provisions) Act* 1955 (ACT), s 24(1); *Law Reform (Miscellaneous Provisions) Act* 1956 (NT), s 25(1).

67 (1970) 125 CLR 383 at 408.

71 Section 4(1) of the 1944 Act confers or contemplates a cause of action on the part of each of the persons described in par (a) and, in the circumstances specified, on the part of each of those described in par (b) against a person who, by an act, neglect or default causes the death, injury or imperilment of another. As the decision of this Court in *Scala v Mammolitti*[68] indicates, the cause of action is not dependent upon proof of the existence of liability in that person to the person killed, injured or put in peril.

72 In *Scala*, Kitto J summarised the effect of s 4(1) as follows[69]:

> "It lays down a general rule of liability as an addition to existing rules of liability, implying, of course, that the act, neglect or default was wrongful because in breach of a duty that was owed to the person killed, injured or put in peril, whether the duty arose from 'neighbourhood', from contract, or from statute."

His Honour continued that the provision extended "the range of the claims to the possibility of which the general principles of the law" exposed a defendant in respect of injury caused by conduct of the specified character[70]. A new ground thus was added to the grounds already existing upon which damages could be recovered against the defendant in respect of injury caused by the wrongful act, neglect or omission; the category of persons entitled to recover was correspondingly enlarged and the common law "alter[ed]" to that extent[71]. Taylor J said that the sub-section operated "to extend the field in which persons standing in a special relationship to a person killed, injured or put in peril may recover for nervous or mental shock"[72].

73 An understanding of the nature of the alteration or extension which s 4(1) effected, and the mischief it was intended to remedy, is assisted by reference to the historical context of its enactment[73]. A construction that would promote the

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68 (1965) 114 CLR 153.

69 (1965) 114 CLR 153 at 157.

70 (1965) 114 CLR 153 at 157.

71 (1965) 114 CLR 153 at 157-158.

72 (1965) 114 CLR 153 at 159.

73 See, eg, the approach adopted by Latham CJ in *Woolworths Ltd v Crotty* (1942) 66 CLR 603 at 612-619.

statutory purpose or object thus disclosed is to be preferred to a construction that would not promote that purpose or object[74].

74 On 5 August 1942, the House of Lords in *Bourhill v Young*[75] held that the defendant motorcyclist owed no duty of care to avoid causing "nervous shock" to the plaintiff, who heard (but did not see) a collision caused by the defendant's negligence. The plaintiff was not herself in danger of physical impact, nor related to such person, nor within the defendant's line of vision at the time of the accident. The House of Lords therefore held that the plaintiff was not in the area of potential danger which the defendant reasonably should have had in view[76]. In the course of their speeches, Lord Thankerton, Lord Wright and Lord Porter[77] each doubted the correctness of the earlier decision of the English Court of Appeal in *Owens v Liverpool Corporation*[78]. The Court of Appeal had upheld an appeal against the dismissal of an action by four family mourners at a funeral for distress caused by witnessing a collision between a negligently driven tramcar and the hearse; the incident had involved no apprehension, or sight, or sound of physical injury to a human being.

75 In his second reading speech on the Bill for what became the 1944 Act, the responsible Minister told the Legislative Council of the Parliament of New South Wales on 8 November 1944 that cl 4 of the Bill was "a statutory extension of liability to meet the position created by the decision in [*Bourhill*] *v Young*"[79]. Implicit in this was the understanding that the House of Lords decision stated the common law for New South Wales as much as for the United Kingdom[80]. The Minister referred[81] also to the decision of this Court in *Chester v Waverley*

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74 *Interpretation Act* 1987 (NSW), s 33, rendered applicable by the combined operation of s 5(1) and s 5(3).

75 [1943] AC 92.

76 [1943] AC 92 at 99, 102, 105, 111, 119.

77 [1943] AC 92 at 100, 110 and 116 respectively.

78 [1939] 1 KB 394.

79 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 8 November 1944 at 830.

80 cf *Parker v The Queen* (1963) 111 CLR 610 at 632-633.

81 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 8 November 1944 at 830-831.

Corporation[82] and indicated that the Bill was intended to provide for plaintiffs in the position of Mrs Chester. The majority in *Chester* had held that a local council was not liable for the "nervous shock" Mrs Chester sustained upon seeing her deceased child's body recovered from a water-filled trench left inadequately protected by the council.

76 Clause 4 as it stood at the time of the second reading speech drew no distinction between a parent or spouse of a person killed, injured or put in peril and any other family member. At that point in its evolution, cl 4(1) provided:

> "The liability of any person in respect of injury caused after the commencement of this Act by an act, neglect or default by which any other person is killed, injured or put in peril, shall extend to include liability for injury arising wholly or in part from mental or nervous shock sustained *by any member of the family* of the person so killed, injured or put in peril." (emphasis added)

77 This sub-clause subsequently was amended on 5 December 1944 to bring it into the form in which it now appears in the 1944 Act[83]. The amendment introduced a distinction between a parent or spouse of a person killed, injured or put in peril and any other family member. In respect of the latter, the amended clause provided that the liability of a defendant would "extend to include" liability for "nervous shock" sustained by a relevant family member where the initial victim "was killed, injured or put in peril within the sight or hearing of such member of the family".

78 The parliamentary record discloses that the amendment embodied a compromise between the interests of family members who sustain "nervous shock" and the community which ultimately would bear the obligation that any extension of liability was thought to entail[84]. The compromise was said to be[85] that, in order to recover under the statute, "farther removed relatives" would be subject to the additional requirement, not imposed on a parent or spouse, of proving that the relevant death, injury or imperilment occurred within their sight

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82 (1939) 62 CLR 1.

83 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 5 December 1944 at 1489, 1491.

84 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 5 December 1944 at 1490.

85 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 5 December 1944 at 1490.

or hearing. However, one result of the amendment, not specifically adverted to by the Minister, was that, whilst the parent who sustained "nervous shock" upon learning of the death, injury or imperilment of a child occurring otherwise than within the parent's sight or hearing would be entitled to recover under the provision, the child who suffered "nervous shock" upon learning of (but not witnessing) the death, injury or imperilment of a parent would not, by force of the 1944 Act, be so entitled.

79 The amendment of cl 4(1) thus curtailed or restricted the extension of liability which originally had been proposed; the ordinary meaning of the provision as enacted nonetheless was to extend rather than to restrict liability[86]. The declaration in s 4(1) that the liability there referred to "shall extend to include" liability for injury arising from "nervous shock" sustained in the circumstances specified in pars (a) and (b) is not to be read as though it contained the unexpressed qualification that liability was to extend only so far and no further.

80 The adoption by the Parliament of New South Wales in 1944 of a particular understanding of the common law as it then existed does not itself control the further development of the common law of Australia. In *Environment Protection Authority v Caltex Refining Co Pty Ltd*, Mason CJ and Toohey J observed that[87]:

> "[t]he circumstance that Parliament (or a drafter) assumed that the antecedent law differed from the law as the Court finds it to be is not a reason for the Court refusing to give effect to its view of the law."

81 Moreover, a statutory extension of, and attempt to remedy a perceived deficiency in, the common law is not readily to be construed as restricting further development in common law principle as new deficiencies are disclosed. The mischief at which s 4(1) was directed was the apparent rigidity, or incomplete development, in the common law which was seen as unjustly disfavouring the position of plaintiff family members in "nervous shock" actions. Remedial legislation of this nature is not to be construed as frustrating the further development of common law principle and any corresponding expansion of common law rights which that development may involve. Some analogy is provided by the requirement of legislation for clear terms to abolish or modify

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86 *Anderson v Liddy* (1949) 49 SR (NSW) 320 at 323; *Coates v GIO of NSW* (1995) 36 NSWLR 1 at 7-8, 22.

87 (1993) 178 CLR 477 at 505-506.

fundamental common law principles or rights or to depart from the general system of law[88].

82 It is apparent from this Court's decision in *Annetts*, if it was not apparent before, that a defendant in an appropriate case may be liable in negligence for a recognisable psychiatric illness sustained by a plaintiff upon the death, injury or imperilment of a family member killed, injured or imperilled otherwise than within the plaintiff's sight or hearing. The common law of Australia as now understood has to that extent superseded the assumption as to the reach of the common law (then generally seen as the English common law declared by the House of Lords and Privy Council) upon which s 4(1)(b) of the 1944 Act was framed[89]. Although great assistance continues to be derived by this Court from the learning and reasoning of United Kingdom courts, the precedents of other legal systems, save for those of the Privy Council in Australian appeals, are not binding. They are now useful only to the degree of the persuasiveness of their reasoning[90]. The provision in s 4(1)(b), expressed in the language of extension rather than restriction, neither inhibits that advancement nor displaces what otherwise would be its application in New South Wales. Section 4(1) expands the scope of a liability as formerly perceived, but it does not purport prospectively to fix its outer bounds.

83 *Esso Australia Resources Ltd v Federal Commissioner of Taxation*[91] indicates that the common law may in some instances proceed by analogy with what legislatures previously have determined to be the appropriate balance between competing interests in the relevant field. The respondent relies upon s 4(1) of the 1944 Act as an illustration of the converse process; that legislative development may have proceeded by way of extension of the common law, but, it is said, it thereby also foreclosed further development of the common law. That submission respecting the 1944 Act should not be accepted.

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88 *Potter v Minahan* (1908) 7 CLR 277 at 304; *Bropho v Western Australia* (1990) 171 CLR 1 at 18; *Coco v The Queen* (1994) 179 CLR 427 at 437; *R v Carroll* (2002) 77 ALJR 157 at 170-171 [81]; 194 ALR 1 at 20.

89 cf *Skelton v Collins* (1966) 115 CLR 94 at 104, 112-113, 123-124, 133-134, 138-139.

90 *Cook v Cook* (1986) 162 CLR 376 at 390.

91 (1999) 201 CLR 49 at 60-63 [19]-[28]; cf at 86 [97]. See also *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 12-13 [33], 27 [83], 45-47 [128]-[130], referring to *Lamb v Cotogno* (1987) 164 CLR 1 at 11.

84 Section 4(1)(b) is not an answer to any action which the appellants may otherwise be entitled to bring.

Duty of care

85 In order to make good their cause of action in negligence, the appellants first must identify a duty owed to them by the respondent which is distinct from any obligation which subsisted between the respondent and their father. For the reasons that follow, a duty of that kind emerges by application of the ordinary principles of the law of negligence.

86 The respective positions of the child of an employee and his or her employer may readily be seen to attract the "neighbourhood" principle encapsulated by Lord Atkin in *Donoghue v Stevenson*. From the point of view of the employer, children of an employee are "persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question"[92].

87 Several considerations here combine to enliven what Stephen J in *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* identified[93], with reference to the speech of Lord Atkin in *Donoghue v Stevenson*[94], as a broad principle underlying liability in negligence, being the "general public sentiment" that, in the case at bar, there has been wrongdoing for which, in justice, the offender must pay. The considerations here include: (i) the advancement by the labour of an employee of the employer's commercial interests; (ii) the employee's exposure to risk of death by carelessness on the part of the employer; and (iii) the reasonable foreseeability of psychiatric injury to children of an employee in the event of the employee's death. Psychiatric injury to children of the employee is a consequence which the respondent, judged by the standard of the reasonable person, ought to have foreseen[95].

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92 [1932] AC 562 at 580.

93 (1976) 136 CLR 529 at 575. See also *Tame v New South Wales* (2002) 76 ALJR 1348 at 1351-1352 [9]-[11], 1356-1357 [46], 1366-1367 [105]-[108], 1380 [185], 1393 [250]; 191 ALR 449 at 453-454, 460-461, 474-475, 493, 511-512.

94 [1932] AC 562 at 580.

95 See *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)* [1961] AC 388 at 423.

88 Moreover, in attempting to define the scope of liability in negligence, it is useful to identify those interests which are sufficient to attract the protection of the law in any given field[96]. It was said in *Tame* that the interest which the law seeks to protect in actions such as the present is more narrowly defined than the interest in "peace of mind" which has been held in the United States to warrant legal protection[97]. Australian law seeks to protect, in an appropriate case, the plaintiff's freedom from serious mental harm which manifests itself in a recognisable psychiatric illness.

89 More specifically, the law has long placed particular value on the protection of the young from serious harm. The *parens patriae* jurisdiction referred to in *Marion's Case*[98] provides one illustration. The entitlement of parents of a child to be heard in child welfare proceedings concerning a child provides another illustration[99]. Further, through the imposition of obligations and the conferral of rights, both the general law and contemporary statute law have treated the relationship of parent and child as a primary means by which to secure the public interest in the nurturing of the young[100]. It was not disputed in *Annetts* that, if the ordinary principles of negligence otherwise applied, the relationship of parent and child would be sufficient to import a duty of care on the part of the respondent to avoid causing psychiatric illness to the appellants as a consequence of the wrongful death of their child. In *Hancock v Nominal Defendant*[101], the Queensland Court of Appeal dismissed an appeal against an award of damages for psychiatric illness sustained by the respondent upon learning of the death of his adult son caused by the negligent driving of the appellant.

90 Although the appellants here did not claim to have relied upon any specific assurances by the respondent as to their father's safety from harm, the relationship between the parties to this litigation otherwise shares important characteristics with the relationship at issue in *Annetts*[102]. The appellants here

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96 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 251 [191].

97 (2002) 76 ALJR 1348 at 1377-1378 [171]-[175]; 191 ALR 449 at 489-490.

98 *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218 at 258-259.

99 *J v Lieschke* (1987) 162 CLR 447 at 462, 463-464; cf *In re Gault* 387 US 1 (1967).

100 cf *Russell v Russell* (1976) 134 CLR 495 at 549.

101 [2002] 1 Qd R 578.

102 (2002) 76 ALJR 1348 at 1391 [240]-[241]; 191 ALR 449 at 509.

had no way of protecting themselves against the risk of psychiatric harm which eventuated. The respondent controlled the conditions under which Mr Gifford worked and held a significant, perhaps exclusive, degree of control over the risk of harm to him and the risk of consequent psychiatric harm to the appellants. The respondent's control over the risk of harm was, in a legal and practical sense, direct rather than remote[103]. Moreover, there is no inconsistency between the existence of a duty of care to the appellants and the legitimate pursuit by the respondent of its business interests[104]. The respondent's duty of care to the appellants to exercise reasonable care to avoid causing them psychiatric injury as a consequence of their father's death in the course of his employment would be, at most, co-extensive with the tortious and express or implied contractual duties that it owed Mr Gifford directly as his employer. The law requires an employer in the position of the respondent so to order its affairs as to avoid causing injury or death to its employees.

91 In *Hawkins v Clayton*[105], Gaudron J observed that, in attempting to ascertain the existence of a duty of care to avoid causing economic loss, "somewhat different" factors may arise where "the act or omission complained of amounts to an interference with or impairment of an existing right which is known or ought to be known to the person whose acts or omissions are called into question" than where the loss "is occasioned without infringement or impairment of an otherwise recognized right". We agree with that statement. By analogical extension, the common law will more readily impose a duty of care to avoid causing psychiatric harm to the child of an initial victim where the conduct of the defendant which is sought to be impugned constituted an infringement of otherwise recognised rights in the initial victim.

92 The respondent owed the appellants a duty of care to take reasonable care to avoid causing them a recognisable psychiatric illness as a consequence of their father's death in the course of his employment. Especially in circumstances where negligence by the respondent to the father is admitted, it is clearly arguable that the respondent breached these separate duties of care it owed to the appellants.

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103 cf *Agar v Hyde* (2000) 201 CLR 552 at 562 [16], 564 [21], 581-582 [81]-[83]; *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 558-559 [102].

104 cf *Bryan v Maloney* (1995) 182 CLR 609 at 623-624; *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 235 [147].

105 (1988) 164 CLR 539 at 594. See also *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 251 [191].

Section 151P of the Workers Compensation Act

93 It may be added that s 151P of the Workers Compensation Act, the text of which has been reproduced earlier in these reasons, does not operate upon the common law to produce any different result. The provision precludes the recovery of damages for psychological or psychiatric injury except in the circumstances specified in pars (a) and (b) thereof. Paragraph (b) relevantly permits the award of damages in favour of a child of an injured or deceased worker who, as a consequence of the injury or death, has suffered a demonstrable psychological or psychiatric illness and not merely a normal emotional or cultural grief reaction. It may thus be said that the New South Wales legislature has specifically turned its mind to the issue that arises in the present appeals and has accepted that damages may be awarded to the child of a deceased employee who, as a consequence of the death, has suffered a "demonstrable psychological or psychiatric illness". The appellants claim that they have suffered such an illness. There is an arguable evidentiary foundation for that claim. It should therefore be determined, in each case, at trial.

94 The other State legislatures appear not to have passed legislation in equivalent terms to s 151P of the Workers Compensation Act. There is therefore lacking that consistent pattern of State legislation which may in an appropriate case, and in the manner indicated in *Esso Australia Resources Ltd v Federal Commissioner of Taxation*[106], influence by analogy the development of the common law. It is sufficient here to say that s 151P of the Workers Compensation Act envisages rather than denies the existence of a duty of care on the part of the respondent to take reasonable care to avoid causing the appellants a recognisable psychiatric illness.

Orders

95 Each appeal should be allowed. The orders of the Court of Appeal dated 14 June 2001 should be set aside. In their place it should be ordered that each appeal to that Court be allowed, that the orders of the District Court dated 24 August 1999 be set aside, and that each matter be remitted to that Court for determination of the outstanding issues. The respondent in this Court should pay the costs of the appellants in this Court and in the Court of Appeal. The costs of each party in the District Court are to abide the outcome of the proceedings in that Court.

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106 (1999) 201 CLR 49 at 60-63 [19]-[28].

96 HAYNE J. I agree that, for the reasons given by Gummow and Kirby JJ, s 4(1)(b) of the *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW)[107] should not be construed as confining a defendant's liability to a child for damages for injury "arising wholly or in part from mental or nervous shock", allegedly suffered as a result of the killing, injuring or putting in peril of that child's parent, to cases where the parent was killed, injured or put in peril "within the sight or hearing" of the child. The question which then arises in these appeals is whether the respondent owed the appellants a duty to take reasonable care to avoid inflicting psychiatric injury on them.

97 The Court of Appeal of New South Wales held that the appellants could not recover for psychiatric injury allegedly suffered as a result of their hearing that their father had been run over and killed at work, because they did not perceive the incident or its aftermath[108]. In *Tame v New South Wales* and *Annetts v Australian Stations Pty Ltd*[109] (judgment in which was given after the Court of Appeal's decision in the present matters), this Court held that the lack of direct perception of a traumatic incident is not fatal to a claim for damages for psychiatric injury[110]. It follows that the Court of Appeal erred.

98 It may readily be accepted that an employer may reasonably foresee that, if an employee is killed or seriously injured at work, others who have close ties of affection for the employee may suffer psychiatric injury on learning of the death or injury. Reasonable foreseeability of psychiatric injury is a necessary condition for finding a duty of care to avoid injury of that kind, but it alone is not a sufficient condition. In *Tame* and *Annetts*, the Court held that some forms of control mechanism, which it has been suggested should be applied to limit recovery for psychiatric injury, should not be adopted. "Normal fortitude" was

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107 Sections 3 and 4 of the *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) have now been repealed by the *Civil Liability Amendment (Personal Responsibility) Act* 2002 (NSW) but that repeal does not affect this case.

108 *Gifford v Strang Patrick Stevedoring Pty Ltd* (2001) 51 NSWLR 606 at 608 [1] per Handley JA, 617 [44]-[45] per Hodgson JA, 623 [76] per Ipp AJA.

109 (2002) 76 ALJR 1348; 191 ALR 449.

110 *Tame v New South Wales*; *Annetts v Australian Stations Pty Ltd* (2002) 76 ALJR 1348 at 1353 [18] per Gleeson CJ, 1357-1358 [51]-[52] per Gaudron J, 1388-1389 [221]-[222], [225] per Gummow and Kirby JJ, 1395 [257], 1397 [266]-[267] per Hayne J, 1413-1415 [360]-[361], [365]-[366] per Callinan J; 191 ALR 449 at 456, 461-462, 504-505, 514, 516-517, 539-540, 541-542.

held not to be a precondition to liability[111]. "Sudden shock" was held not to be a necessary requirement for such a claim[112]. "Direct perception" was, as I have said, also rejected.

99 The rejection of these tests may, or may not, be consistent with developing other control mechanisms in the future. For my own part, I remain of the view[113] that if psychiatric injury extends to all the conditions which psychiatric medicine would classify as a form of "psychiatric injury", it will be necessary to develop one or more control devices in substitution for those which have now been rejected. It may be that the control mechanisms which are developed will emerge from further developments in the law of negligence and, in particular, consideration of the place to be given to the duty of care as a prerequisite of liability[114]. Control mechanisms developed in this way may have wider applications than just cases of psychiatric injury. But it may also be that, as knowledge about the causes of psychiatric injury and the effects of traumatic events increases, control mechanisms based on that knowledge may become evident and could be applied to claims for damages for psychiatric injury.

100 Following *Tame* and *Annetts*, however, I consider that I am now bound to conclude that an employer owes a duty to take reasonable care to avoid psychiatric injury to an employee's children. (It may be that the duty is wider than that but it is not necessary, in this case, to decide whether it is.)

101 The employer owes that duty of care to those family members because not only is it foreseeable that they may suffer psychiatric injury on learning of the employee's accidental death or serious injury at work, the relationships between employer and employee and between employee and children are so close as to require the conclusion that the duty is owed. I consider that this follows from the Court's holding in *Annetts* that an employer owes a duty of care to the parents of an employee who is a minor. I recognise that there are some differences between *Annetts* and the present cases. In the present cases, there is not that element, found in *Annetts*, of parents entrusting the welfare of their child to an employer.

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111 (2002) 76 ALJR 1348 at 1353 [16] per Gleeson CJ, 1359 [61]-[62] per Gaudron J, 1382-1384 [197], [199]-[203] per Gummow and Kirby JJ; 191 ALR 449 at 455-456, 464, 497-499.

112 (2002) 76 ALJR 1348 at 1353 [18] per Gleeson CJ, 1357-1358 [51]-[52] per Gaudron J, 1388 [221]-[222] per Gummow and Kirby JJ, 1397 [266]-[267] per Hayne J; 191 ALR 449 at 456, 461-462, 504-505, 516-517.

113 *Tame* and *Annetts* (2002) 76 ALJR 1348 at 1400-1402 [285]-[294]; 191 ALR 449 at 522-524.

114 *Tame* and *Annetts* (2002) 76 ALJR 1348 at 1393 [249]; 191 ALR 449 at 511.

Further, it might be said that there may be differences between the reaction that a child may have to the untimely death of a parent and the reaction that a parent may have to the death of a child. But for present purposes such differences are not material. The pre-existing relationships between the three parties – employee, employer and children – coupled with reasonable foresight of the particular kind of harm suffered, require the conclusion that a duty to take reasonable care to avoid psychiatric injury is owed by the employer to the employee's children.

102 At the time of their father's death the appellants did not live with him. Two of the appellants were then in the workforce, and the oldest of the three, Darren, was an adult. The deceased had maintained a close and loving relationship with his children.

103 The conclusion that the respondent owed the appellants a duty to take reasonable care to avoid causing them psychiatric injury follows from the combination of two matters. First, the respondent, as employer of the appellants' father, controlled the work which he did, and how, and where, he did it. Because, as employer, it controlled those matters, the respondent was bound to take reasonable care, and ensure that reasonable care was taken, to avoid harm to the employee[115]. Secondly, the employer can reasonably foresee that children of the employee may suffer psychiatric injury if the employee is killed or seriously injured at work. If, as was held in *Annetts*, the employer owes that duty to the parents of an infant employee, there is no sound basis for concluding that the same kind of duty is not owed to the infant children of the employee. Nor is there any sound basis for concluding that the duty extends only to the *infant* children and not to the oldest child, Darren, who was 19 at the time of the accident. The fact that the father lived apart from his children does not require or permit a different conclusion.

104 Whether the respondent breached the duty it owed to the appellants has not yet been determined. The respondent's admission that it breached its duty of care to the appellants' father may well be thought to have an important bearing on that issue. Nor has it been determined whether, as a result of the respondent's negligence, the appellants suffered psychiatric injury as distinct from emotional distress. Those issues will have to be determined.

105 I agree with Gummow and Kirby JJ that, for the reasons they give, s 151P of the *Workers Compensation Act* 1987 (NSW) requires no different conclusion. I agree in the orders their Honours propose.

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115 *Kondis v State Transport Authority* (1984) 154 CLR 672 at 687-688 per Mason J.

106 CALLINAN J. These appeals raise questions with respect to the interaction between state (New South Wales) ameliorative legislation, the contemporary operation of which has since been outstripped by developments in the common law of Australia, and that common law.

Facts

107 Barry Gifford was employed by the respondent stevedoring company at Darling Harbour in Sydney, New South Wales. On 14 June 1990 he was married to, but separated from Kristine Gifford ("Mrs Gifford"), who was then 43 years old. She was permanently employed by the South Sydney Council and had entered into a relationship with another man. There were three children of the marriage: a son, Darren Gifford ("Darren") aged 19; a daughter, Kelly Gifford ("Kelly") aged 17; and a younger son, Matthew Gifford ("Matthew") a schoolboy of 14 years ("the appellants").

108 From the time of his separation from Mrs Gifford in 1984 to the time of his death in 1990, Mr Gifford and his three children were in a close and loving relationship. He regularly visited his former residence where the appellants lived and engaged in various activities with them. His relationship with Mrs Gifford was without rancour.

109 On 14 June 1990 Mr Gifford, in the course of his employment, was walking along a wharf when a negligently operated, heavy forklift truck reversed over him. He was crushed to death immediately. The accident was an horrific one.

110 Mrs Gifford was very soon informed of the death. Later, but on the same day, the appellants were told of it by friends of the family. Neither the appellants nor Mrs Gifford saw Mr Gifford's corpse.

Proceedings at first instance

111 Mrs Gifford brought proceedings against the respondent under the *Compensation to Relatives Act* (1897) (NSW) on behalf of the appellants. She and they also sued for damages for nervous shock.

112 After some arbitration proceedings (of no relevance to this appeal) the actions were heard together in the District Court of New South Wales (Naughton DCJ) in July and August 1999. His Honour gave judgment on 24 August 1999 in favour of the respondent in the actions for nervous shock, and a separate judgment, with which this Court is not concerned, in the action under the *Compensation to Relatives Act*. Nor is the Court concerned with the judgment against Mrs Gifford in favour of the respondent on her claim for damages for nervous shock. Because of the view that his Honour took of the

effect of relevant legislation he did not make findings with respect to causation, and the nature and extent of any damage suffered by the appellants.

113 His Honour held, after reviewing a number of cases, that the appellants could not recover damages for nervous shock because s 4 of the *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) ("the Act")[116] displaced the common law by substituting a statutory test which they were unable to satisfy, it being clear that the "deceased was not killed, injured or put in peril within the sight or hearing of any of the children".

The appeal to the Court of Appeal

114 The appellants appealed to the Court of Appeal of New South Wales (Hodgson and Handley JJA and Ipp AJA)[117]. Hodgson JA found that Naughton DCJ had erred in holding that s 4 of the Act excluded any liability at common law that might otherwise have existed, arising out of a duty of care owed to persons other than the immediate victims of negligent acts[118].

115 Handley JA and Ipp AJA relevantly agreed with Hodgson JA with respect to the operation of s 4 of the Act[119]. The Court of Appeal nonetheless dismissed the appellants' appeals on the basis that a necessary element of a claim for nervous shock was absent, of direct visual perception of the event, or perhaps its immediate aftermath[120]. Hodgson JA made these remarks[121]:

> "It is not possible to compensate everyone who is injured, and the law must draw lines. It should be kept in mind that the civil standard of proof on the balance of probabilities necessarily means that damages may sometimes be awarded for injuries which did not occur or have been exaggerated, and/or against persons whose actions did not cause them. It is difficult enough for courts to resolve conflicting evidence in relation to

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116 Sections 3 and 4 of the *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) were repealed by the *Civil Liability Amendment (Personal Responsibility) Act* 2002 (NSW) but that repeal does not affect this case.

117 *Gifford v Strang Patrick Stevedoring Pty Ltd* (2001) 51 NSWLR 606.

118 *Gifford v Strang Patrick Stevedoring Pty Ltd* (2001) 51 NSWLR 606 at 615.

119 *Gifford v Strang Patrick Stevedoring Pty Ltd* (2001) 51 NSWLR 606 at 608 per Handley JA, 623 per Ipp AJA.

120 *Gifford v Strang Patrick Stevedoring Pty Ltd* (2001) 51 NSWLR 606 at 622-623.

121 *Gifford v Strang Patrick Stevedoring Pty Ltd* (2001) 51 NSWLR 606 at 617.

> claimed physical injuries, and harder still to do so in relation to claimed mental injuries to persons actually perceiving a horrific event. It is or would be much harder again to resolve conflicting evidence in relation to mental injuries claimed to arise from merely hearing about horrific events. Floodgates arguments are often criticised, but there are limits to the compensation that the community can afford to pay, particularly in relation to claimed injuries the existence and causation of which are so difficult to determine with assurance. In my opinion, it is reasonable to maintain the line that has been drawn in the cases.
>
> There may be some room for development in relation to what amounts to perception of an incident, just as there has been some development so as to include perception of the close aftermath of an incident and not merely perception of the incident itself. Some cases have required direct unaided perception; but there may be a question as to how far liability extends, for example, where sound is amplified or events are seen by those present portrayed live on a large television screen, and so on. It is not necessary to consider that question in this case."

116 The Court of Appeal was pressed by the appellants with an argument that ss 151, 151E, 151F, and particularly 151P of the *Workers Compensation Act* 1987 (NSW) ("the Compensation Act") re-established the right to a common law action, effectively therefore conferred an independent cause of action, and prescribed *all* of the relevant criteria for it in circumstances of the kind which existed here. The argument was rejected on the basis that s 151P operates as a limiting mechanism and not so as to provide a new and distinct statutory cause of action[122].

The appeal to this Court

117 In this Court the appellants contend that at common law direct visual perception of a relevant event or its immediate aftermath is not necessary. They argue that statements made by this Court in *Tame v New South Wales*; *Annetts v Australian Stations Pty Ltd*[123] which were decided after the decision of the Court of Appeal in this case make that clear. In substance that submission is correct.

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122 *Gifford v Strang Patrick Stevedoring Pty Ltd* (2001) 51 NSWLR 606 at 614 per Hodgson JA.

123 (2002) 76 ALJR 1348 at 1353 [17]-[18], 1355 [36] per Gleeson CJ, 1357-1358 [51]-[52], 1360 [65] per Gaudron J, 1388-1391 [221], [225], [236], [238] per Gummow and Kirby JJ, 1414-1415 [365], [366] per Callinan J; 191 ALR 449 at 456, 459, 461-462, 465, 504-505, 508, 541-542.

118 In *Tame* I attempted to state some bright line rules distilled from the cases and elsewhere for the prosecution of what, for convenience and other reasons, I there called, and I would continue to call claims for damages for nervous shock, as does s 4 of the Act itself. In doing so I sought to identify and define the classes of persons in cases of nervous shock capable of being so closely and directly affected by a tortfeasor's negligence that the tortfeasor ought reasonably to have had them in contemplation in acting or omitting to act in the way in which he or she did, within the classic formulation of Lord Atkin in *Donoghue v Stevenson*[124]. I said[125]:

> "In my opinion, the reasons for judicial caution in cases of nervous shock remain valid, as do the principles formulated by the courts in this country to give effect to that caution. The principles may need to be refined as new situations, and improvements in the professional understanding, diagnosis and identification of psychiatric illness occur. Those principles are currently in summary these. There must have occurred a shocking event. The claimant must have actually witnessed it, or observed its immediate aftermath or have had the fact of it communicated to him or her, as soon as reasonably practicable, and before he or she has or should reasonably have reached a settled state of mind about it. The communicator will not be liable unless he or she had the intention to cause psychiatric injury, and was not otherwise legally liable for the shocking event. A person making the communication in the performance of a legal or moral duty will not be liable for making the communication. The event must be such as to be likely to cause psychiatric injury to a person of normal fortitude. The likelihood of psychiatric injury to a person of normal fortitude must be foreseeable. There need to exist special or close relationships between the tortfeasor, the claimant and the primary victim. Those relationships may exist between employer and employee and co-employees and relationships of the kind here in which an assurance was sought, and given, and dependence and reliance accordingly ensued. Other relationships may give rise to liability in future cases. A true psychiatric injury directly attributable to the nervous shock must have been suffered."

119 Subject to some qualifications I do not understand a majority of the other members of the Court to have stated a, or any very different view from the one that I did as to the various criteria. A particular qualification relates to "normal

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124 [1932] AC 562 at 580.

125 (2002) 76 ALJR 1348 at 1415 [366]; 191 ALR 449 at 541-542.

fortitude" which only McHugh J[126] and I[127] thought to be an indispensable element of a cause of action for nervous shock. None of the other members of the Court however thought absence of normal fortitude irrelevant[128]. The balance of their opinion was that it could be of significance on the issue of foreseeability. No clear consensus emerged however as to how "perception" was to be defined or treated, or as to the classes of persons to whom a tortfeasor should be regarded as owing a duty of care not to cause nervous shock[129] because no doubt the unique features of *Tame* made it unnecessary to decide those matters conclusively.

120 Subject therefore to the qualifications to which I have referred I would adhere in this case to what I said in *Tame*.

121 There was evidence here which might possibly, arguably, if accepted, be capable of satisfying both the common law as I understand it to be, and s 151P of the Compensation Act, to ground a cause of action for nervous shock. Accordingly, if the appellants are able to maintain the decision of the Court of Appeal as to the effect of the Act, or to make out a case with respect to the meaning of s 151P of the Compensation Act which was unsuccessful in that Court, they will succeed on this appeal, and a new trial will be necessary to determine both liability and damages.

122 I deal first with the construction of ss 151, 151E, 151F and 151P of the Compensation Act which provide as follows:

> "**151 Common law and other liability preserved**
>
> This Act does not affect any liability in respect of an injury to a worker that exists independently of this Act, except to the extent that this Act otherwise expressly provides.

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126 (2002) 76 ALJR 1348 at 1360-1361 [71], 1367-1369 [109]-[119]; 191 ALR 449 at 466, 475-478.

127 (2002) 76 ALJR 1348 at 1415 [366]; 191 ALR 449 at 541.

128 (2002) 76 ALJR 1348 at 1353 [16], 1355-1356 [29], [38] per Gleeson CJ, 1356 [45], 1359-1360 [59]-[65] per Gaudron J, 1380-1381 [187], [189], 1382-1384 [197]-[203] per Gummow and Kirby JJ, 1393-1394 [251], [253] per Hayne J; 191 ALR 449 at 455-456, 458-460, 463-465, 494, 497-499, 512-513.

129 See however Gummow and Kirby JJ at (2002) 76 ALJR 1348 at 1380 [186]; 191 ALR 449 at 493-494 who referred to the special relationships needed to found a negligent misstatement case as providing an imperfect analogy with relationships between tortfeasors and sufferers of nervous shock.

…

151E Application - modified common law damages

(1) This Division applies to an award of damages in respect of:

(a) an injury to a worker, or

(b) the death of a worker resulting from or caused by an injury,

being an injury caused by the negligence or other tort of the worker's employer.

(2) This Division does not apply to an award of damages to which Part 6 of the *Motor Accidents Act 1988* or Chapter 5 of the *Motor Accidents Compensation Act 1999* applies.

(3) This Division applies to an award of damages in respect of an injury caused by the negligence or other tort of the worker's employer even though the damages are recovered in an action for breach of contract or in any other action.

(4) Subsection (3) is enacted for the avoidance of doubt and has effect in respect of actions brought before as well as after the commencement of that subsection.

151F General regulation of court awards

A court may not award damages to a person contrary to this Division.

…

151P Damages for psychological or psychiatric injury

No damages for psychological or psychiatric injury are to be awarded in respect of an injury except in favour of:

(a) the injured worker, or

(b) a parent, spouse, brother, sister or child of the injured or deceased person who, as a consequence of the injury to the injured person or the death of the deceased person, has suffered a demonstrable psychological or psychiatric illness and not merely a normal emotional or cultural grief reaction."

123 As the Court of Appeal held, s 151P does not make provision for a separate and independent cause of action, or provide that damages will be

awarded whenever the circumstances and relationships to which it refers exist: it means that no damages may be awarded unless at least those circumstances and relationships exist in the case of a claim arising out of an injury to or the death of a worker. Nor does the section operate to make s 4(1)(b) of the Act inapplicable to the appellants. This follows from the language of s 151 which affirms the common law except to the extent otherwise provided, and the clear words of s 151P itself, particularly the introductory negative words, "No damages … are to be awarded … except in favour of …".

124 The next question is whether s 4 of the Act operates to limit the common law and to deny its incremental advance with respect to claims for damages for nervous shock. It provides as follows:

> "**4 Extension of liability in certain cases**
>
> (1) The liability of any person in respect of injury caused after the commencement of this Act by an act, neglect or default by which any other person is killed, injured or put in peril, shall extend to include liability for injury arising wholly or in part from mental or nervous shock sustained by:
>
> (a) a parent or the spouse of the person so killed, injured or put in peril; or
>
> (b) any other member of the family of the person so killed, injured or put in peril where such person was killed, injured or put in peril within the sight or hearing of such member of the family.
>
> (2) Where an action is brought by a member of the family of any person so killed, injured or put in peril in respect of liability for injury arising wholly or in part from mental or nervous shock sustained by the plaintiff as aforesaid and claims have been made against or are apprehended by the defendant at the suit of other members of the family of such person in respect of liability arising by operation of subsection (1) out of the same act, neglect or default the defendant may apply to the Court in which the action is brought and that Court may thereupon stay any proceedings pending at the suit of any such other member of the family arising out of the same act, neglect or default and may proceed in such manner and subject to such regulations as to making members of the family of such person parties to the action as to who is to have the carriage of the action and as to the exclusion of any member of the family who does not come in within a certain time as the Court thinks just.

(3) Where any application under subsection (2) is made the action shall be for the benefit of such members of the family of the person so killed, injured or put in peril as are joined by the Court as plaintiffs pursuant to such application and the Court may give such damages as it may think proportioned to the injury resulting to the persons joined as plaintiffs respectively, and the amounts so recovered after deducting the costs not recovered from the defendant shall be divided amongst the persons joined as plaintiffs in such shares as the Court finds and directs.

(3A) Where any case to which subsection (3) applies is tried by a judge sitting with a jury, the jury shall find the shares of damages and the judge shall direct in accordance with the finding.

(4) Any action in respect of a liability arising by operation of subsection (1) shall be taken in the Supreme Court or the District Court.

(5) In this section:

'**Member of the family**' means the spouse, parent, child, brother, sister, half-brother or half-sister of the person in relation to whom the expression is used.

'**Parent**' includes father, mother, grandfather, grandmother, stepfather, stepmother and any person standing in loco parentis to another.

'**Child**' includes son, daughter, grandson, granddaughter, stepson, stepdaughter and any person to whom another stands in loco parentis.

'**Spouse**' means:

(a) a husband or wife, or

(b) the other party to a de facto relationship within the meaning of the *Property (Relationships) Act 1984*,

but where more than one person would so qualify as a spouse, means only the last person so to qualify."

It is right, as the respondent submits, that the section was enacted in response to, and some five years after the decision of this Court in *Chester v Waverley Corporation*[130] in order to replace the common law by legislation extending the

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130 (1939) 62 CLR 1.

right to claim damages for nervous shock. As will appear, the emphasis is, in my opinion, appropriately upon the word "extending".

125 The primary judge gave several reasons why he thought that s 4 of the Act operated to preclude claims by the appellants:

> "(1) In my opinion it follows from the plain and ordinary meaning of the words in the statute.
>
> (2) It seems that four High Court Justices, in obiter dicta ... are of the same opinion[131].
>
> (3) To construe s 4(1)(b) as Kirby P has done[132] would mean that it has no function to perform at all.
>
> (4) If s 4(1)(a) continues to have a function so too should s 4(1)(b).
>
> (5) If the law as laid down in s 4(1)(b) is to be altered it is for Parliament to do so, not the Courts by a process of construction which seems to deny the provision its plain ordinary meaning and any operation at all.
>
> (6) There was a policy justification for enacting s 4(1)(b) so as to restrict the rights of family members other than spouses and parents in claims for damages for 'nervous shock'. The cause of action for 'nervous shock' is potentially a 'flood gates' one opening the doors of the Courts to a multitude of such claims. Psychiatric illness often depends on subjective opinion and is potentially a disease of indeterminate reference and all the more so in 1944 when the provision was enacted. As a 'quid pro quo' for allowing family members to be compensated for 'nervous shock' without having to prove reasonable foreseeability of the particular type of damage alleged the legislature apparently considered that for family members more remote than spouses and parents actual presence at, or within hearing of the accident site, should be required as a condition of recovering damages. In other words, the provision seems to have been a legislative compromise in circumstances where compromise was considered reasonable. The prospect of

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131 *Scala v Mammolitti* (1965) 114 CLR 153 at 159-160 per Taylor J; *Mt Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 407-408 per Windeyer J; *Jaensch v Coffey* (1984) 155 CLR 549 at 556-557 per Murphy J and at 602, 611 per Deane J.

132 See also *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 at 404 per Lord Ackner.

increased road user and work place insurance premiums if there was not some type of perceived curtailment of claims for psychiatric illness provides a policy reason for making it harder for more remote family members than spouse or parent to recover damages.

(7) If there is ambiguity in the provision, and in my opinion there is not, then a purposive construction is proper and, having regard to (6) above, I consider that such a construction should be given. That would result, in my opinion, in restricting the claims of family members who are more remote than spouse or parent to cases where the death, injury or peril occurred within the sight or hearing of the plaintiff as referred to in s 4(1)(b). Children in general terms have more potential to form fresh relationships and forget mental trauma than do existing parents or spouses. At least that was probably so in 1944."

126 Hodgson JA (with whom Handley JA and Ipp AJA agreed) in reaching a different conclusion from the trial judge said this of s 4 of the Act[133]:

"In my opinion, s 4 of the [Act] does not have the effect of excluding any liability at common law that may otherwise exist, arising out of a duty of care owed to persons other than the immediate victims of negligent acts. What s 4 says, in effect, is that where a person by negligence has caused the death, injury or peril of another person, the former person is liable for injury from mental or nervous shock sustained by certain other defined classes of people. It does not expressly say that there should be no liability in respect of mental or nervous shock sustained by persons other than the immediate victim, unless the conditions laid down by that section are satisfied. I do not think any of the statements relied on by the trial judge support a different view, except possibly the statement by Taylor J that this legislative provision substituted a statutory test for the common law test. However, I do not think that was a carefully chosen expression, intended to convey that the common law position was displaced. Furthermore, in addition to the view expressed by Kirby P in *Coates*, there has recently been a further decision by this Court supporting the view that the common law is not excluded: see *FAI General Insurance Co Ltd v Lucre*[134].

One other consideration which persuades me that the common law is not displaced is that s 4 starts with a breach of duty of care to one

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133 *Gifford v Strang Patrick Stevedoring Pty Ltd* (2001) 51 NSWLR 606 at 615.

134 (2000) 50 NSWLR 261 at 263-264 per Mason P.

person, and then extends liability for that breach to include a liability to certain other persons: it does not provide that there is any duty of care to those other persons. In so far as the common law provides for liability to persons other than the immediate victim, it does so by means of a duty of care owed directly to those persons, rather than a liability built upon a breach of duty to the primary victim."

127 In *Coates* to which both the primary judge and Hodgson JA referred, Kirby P (dissenting) had earlier said[135]:

> "In my view, s 4(1)(b) of the Act does not exhaustively define the right of persons to recover for nervous shock. The section is not expressed in a way apt to have that consequence: *Anderson v Liddy*[136]. The phrase 'shall extend to include' implies the continued existence of a right which is additional to other rights which remain unaffected. The history of the statute, being designed, in part, to overcome *Chester v Waverley* [*Corporation*][137], is not supportive of the suggestion of an exclusive definition of entitlements to damages for nervous shock. The procedural arrangements originally provided by the Act deny the legislative purpose of abolishing common law rights. Those rights remained as they were, and as they were later to develop. It is an established doctrine in the interpretation of statutes that legislation should not be construed to take away common law rights except by clear terms."

128 The reasoning and conclusion of Naughton DCJ are not lightly to be dismissed. Section 4 of the Act was enacted 59 years ago. It made much more than an incremental change to the law. That the legislature intervened shows that it thought this then a fitting area of the law for legislative rather than judicial development. It is hardly to the point that the legislature might not have foreseen that the common law in relation to nervous shock would change as it has done. And despite that the common law of Australia in this area had developed, the legislature of New South Wales had enacted no relevant changes to s 4 of the Act at the time of the commencement of this action. It did not do so, for example, when either *Scala v Mammolitti*[138] (a New South Wales case) or *Mount Isa Mines Ltd v Pusey*[139] (a Queensland case) were decided, each decision extending the

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135 (1995) 36 NSWLR 1 at 7-8.

136 (1949) 49 SR(NSW) 320 at 323.

137 (1939) 62 CLR 1.

138 (1965) 114 CLR 153.

139 (1970) 125 CLR 383.

liability of defendants and both widely regarded at the time of their pronouncement as doing so, even though a special relationship of employer and employee existed in the latter. It would have been a simple matter for the legislature of New South Wales to have enacted at any time during the 38 years since the first of those cases was decided, explicit provisions to bring the law in New South Wales expressly into step with, or to enable it to keep step with the common law, or to restrict, or limit relevant rights as it did in 1989 by enacting s 151P of the Compensation Act. It is not presently relevant to consider the legislative changes made by the Parliament of New South Wales in 2002.

129 There is a difficulty yet to be resolved and not adverted to by the courts below, or the parties in this Court, which arises when either a significant change in the common law is effected by a decision of a court, or, as here, where the decision may have the effect of holding that an enactment extending, and therefore apparently relevantly defining the rights to which it refers, has not finally defined those rights. The difficulty arises because the common law as stated, certainly as stated by this Court is, by a legal fiction, to be regarded as having always been the law, when in practice and truth the law has been different up to the moment of the pronouncement of this Court's decision. One consequence is that actions mounted, and defences pleaded upon the basis of the law as it was previously understood will become worthless. Another is that affairs which have been arranged on the basis of the prior understanding of the law, have to be, if they can be, rearranged, or may be set at nought. Lord Browne-Wilkinson drew attention to these matters in *Kleinwort Benson Ltd v Lincoln City Council*[140]. I said that they provided reason for caution in judicial activism in *Esso Australia Resources Ltd v Federal Commissioner of Taxation*[141]. Unfortunately, the law so far has found no way constitutionally to enable courts to prevent or ameliorate the problem by, for example, treating a landmark decision as applying prospectively only, or as having no precedential relevance to actions pending or not yet statute barred. And nor, regrettably, have legislatures generally chosen to intervene to cure potential injustices so arising. To hold that the law now extends beyond what it was when s 4 of the Act was enacted, is to hold that this extension is now and has for *some indefinite period* in the past, been the law. How this may affect claims earlier not pursued but still not statute barred, and insurance and re-insurance effected by insurers the Court has no means of knowing. The difficulty does not arise however if on its proper construction the relevant enactment can be seen to be truly ambulatory, that is, as speaking for the common law as it develops. These matters indicate a need for caution in reaching the decision that the appellants seek in this appeal.

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140 [1999] 2 AC 349 at 357-364.

141 (1999) 201 CLR 49 at 104-105 [164].

130 It is therefore a very serious question whether s 4 of the Act may be regarded as having been encircled, indeed outstripped even, by the common law. In short, should the Court now treat this territory relevantly as the province of the common law?

131 Nonetheless, but not without some considerable hesitation I have formed the opinion that the legislature did not, by enacting s 4 of the Act, intend to bring to a standstill the development and application of the common law with respect to claims for nervous shock. It intended to right what was seen in 1944 to be a serious deficiency in the common law. Significantly the legislature did not enact "extend to, and be confined until further amendment to …". It deliberately chose the words "extend to" and relevantly no others. It thereby recognized the existence at common law – there was no other source for it – of a "liability … for … mental or nervous shock", and its enactment of s 151P of the Compensation Act in 1989 serves as an indication that in one, and one instance only, it wished and decided to effect a restrictive alteration to the common law as it had developed and was developing. Section 4 of the Act is to be read as ambulatory, as applying the common law as it is from time to time subject only to such other enactments as may operate to vary it.

132 The appeals should be allowed with costs. The respondent should pay the appellants' costs of the appeals to the Court of Appeal. The cases should be remitted to the District Court for decision according to law. The costs of the proceedings in the District Court (both the trials so far and in the future) should abide the result in the District Court.