

Case Commentary
**Recovery For A Pathological Grief Reaction
Following Bereavement**
Sloss V NSW¹

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In *Sloss*, the Supreme Court of New South Wales considered the general approach to be taken to negligently caused psychiatric illness cases. This case commentary will briefly discuss the Law of Torts and the application of social theory. It will also review the rules governing recovery for psychiatric illness, in particular, the category of the plaintiff's claim, and tests for duty of care, foreseeability, proximity of relationship, psychiatric evidence and economic loss. Following this, a comparison is made between the approaches of the Australian and English courts with reference to recovery for the negligent infliction of psychiatric illness. This case is significant at the Supreme Court level as cases on psychiatric illness are complex, as tedious for legal practitioners and scholars as they are harrowing for the plaintiff victims. The facts in this case ought to provoke strong sympathy.

INTRODUCTION

It is stated that "Tort is the paradigmatic law of mixed society".² The formulation and application of tort law represents society's attempts to reduce accidents, to compensate for loss and to implement a particular pattern of wealth distribution. The issue of compensation is balanced against wealth distribution. Increasingly, it is a self-conscious device used by judges to reconcile the demands of corrective justice within the constraints of distributive justice.

The former is concerned with 'correcting any unfairness that may arise, while the latter is concerned with the 'distribution of honour, money and other things', which a community divides among its members.'³ It is apparent that this Aristotelian idea of distributive justice in modern times is followed self-consciously by the courts in the law of torts.

Aristotle believed that corrective justice is divided into two categories, namely the **voluntary** and the **involuntary**.⁴ The voluntary category relates to transactions such as the sale and supply of goods and services. Whilst the involuntary category may itself be further subdivided into two sub categories, namely the **secret** i.e. **theft** and the **violent** i.e. **assault and battery**.

However recovery of damages for psychiatric illness has proved to be a continuing problem for the common law. In Australia, judges have spoken of a 'logical extension', to recompense the plaintiff for the negligent infliction of psychiatric illness by the defendant. The requirements for psychiatric illness are bound by the duty of care subject to the following pre requisites:

- (a) The relevant head of damage must be a recognisable form of psychiatric illness or "psycho neurosis" caused by "shock" where the sufferer is suddenly affronted by a traumatic accident. Psychiatric illness, in this context, consists of Post Traumatic Stress Disorder (PTSD), which is defined by the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV)⁵.
- (b) The claimant's reaction to trauma will be assessed against the standard of ordinary phlegm or normal disposition, unless the defendant is aware of the plaintiff's inherent susceptibilities.⁶
- (c) Proximity factors such as space and time balanced against whether it is just, fair and reasonable to impose a duty on the defendant.⁷
- (d) Whether the defendant had breached the standard of care depends on the degree of risk, practical precautions taken by the defendant and the social utility of the defendant's conduct, which caused damage.⁸

Evidently, whatever the situation ought to be, there was no recovery in Australian Law for economic loss sustained as a result of the defendant's negligent infliction of psychiatric illness as Mrs Sloss. Yet, in the case discussed below, Hidden J agreed that the law should accommodate her claim for psychiatric illness. This in itself illustrates that tort law is constantly evolving and changing. As Lord Macmillan opined in *Donoghue v Stevenson*⁹, '...[T]he categories of negligence are never closed..'

THE FACTS

The plaintiff's son, Cameron, was charged with conspiracy to import heroin¹⁰ and was convicted and imprisoned. The plaintiff, Mrs Sloss visited her son in remand and then returned home. Later the plaintiff learnt that her son had died of a heroin overdose administered by another prisoner. The defendant was negligent in allowing the prisoner to be in the wing where her son was. It follows therefore, 'but for' the defendant's negligence and the lethal injection administered by another prisoner, the plaintiff would not have suffered psychiatric illness. However, the defendant argued that prior to her son's death, the plaintiff had a pre-existing clinical depression. This was as a consequence of a claim by the Australian Tax Office for \$100,000 in income tax after her tax affairs was investigated. This led her to suffer serious anxiety and depression. However with treatment from both her doctors and after being relieved of her tax burden, the "predominant causal factor" was learning of her son's death.¹¹ In view of this the plaintiff also submitted a claim for economic loss in that her performance to run her business diminished and she sustained loss. The nexus between her psychiatric illness and the loss caused in the business was not established. Therefore a claim for economic loss was not made out.

ACCUMULATION OF EVENTS

Hidden J eloquently identified the accumulation of events that led the plaintiff to suffer shock as pathological grief disorder. In brief, there are seven identifiable factors in the judgment.

1. The plaintiff was summoned to the hospital;
2. She was informed by hospital staff that her son had suffered a heart attack;
3. She was later asked to leave the room as her son had expired;
4. She identified her son's body at the morgue;
5. 'Shock' and 'Distress' were exacerbated by her son's body being retained for investigative purposes;
6. The body was cremated several weeks later; and
7. The plaintiff finally learnt that the cause of her son's death was 'murder'.

APPLICATION OF THE LAW

Counsel for the defendant cited the case of *Coates v Government Insurance Office (NSW)*¹². Here the plaintiff was killed in a car accident caused by the defendant driver. The plaintiff's children claimed damages for negligent infliction of psychiatric illness procured by the defendant. They did not witness the aftermath of the accident but suffered shock after being informed of the accident. Recovery was allowed although the children were not in sight or of hearing of the event. The judgment of Gleeson CJ and Clarke JA is of considerable interest. Gleeson CJ felt that it was not clear as to the approach of law of England and Australia with respect to Psychiatric Illness after considering the House of Lords decision in *Alcock v Chief Constable of South Yorkshire* [1992].¹³ However, adopting Gibbs CJ passage in *Jaensch v Coffey*, he commented that "the law must continue to proceed in this area step by cautious step."¹⁴ On the other hand, Clarke JA acknowledged the divergence in judicial attitude between England and Australia. In the latter country, it is possible to recover for psychiatric illness in the absence of viewing the accident or its aftermath, subject to the requirement that the victim was closely related. In England, direct visual or aural perception of seeing, hearing and touching in the aftermath is required.

PSYCHIATRIC TESTIMONY

Forensic Examination by Drs Milton, Tam, Lewin and Dyball

Dr Rod Milton examined Mrs Sloss. His examination revealed that she remembered the manner in which her son died. Firstly, accounts of a lethal substance injected to his body and how he was held down and struggled for his life.¹⁵ Her sadness and distress continued as a result of her son's death.

Since the incident in 1983, she has been treated by a general practitioner, Dr Kwon Kan Tam¹⁶. Dr Tam diagnosed her as being depressed, complaining of

nightmares and associated physical ailments. In 1992, Mrs Sloss also faced a claim of \$100,000 from the Australian Taxation Office (ATO). The claim involved a query of her tax returns for a period of five years between 1983 to 1988.¹⁷ This caused her to suffer stress and depression in view of her financial difficulties. During this period, her second husband was diagnosed as terminally ill and subsequently died. She had to cope with this news as well.

Following Dr Tam's medical note to the ATO, describing the effect of stress and depression it had had on her and after further investigation by the ATO, she was relieved of her tax obligation. During this time, she was referred to a Dr Milton who diagnosed her as suffering from a 'pathological grief reaction'. The defendant tried to argue that her illness was caused as a result of her tax debt. This argument did not carry any weight as Dr Lewin¹⁸ confirmed from his report that 'her emotional reaction was triggered after hearing of her son's death.'¹⁹ This was a continuing cause of her depression.

Although Dr Lewin²⁰ stated that the ongoing difficulties with the ATO might have triggered her condition, the "linear causality" of her reaction to her son's death was in his view the 'predominant causal factor'. The defendant engaged a Dr Kenneth Dyball who suspected the diagnosis. Dr Dyball commented that her financial situation with the ATO and death of her husband was of equal significance. This "grade of depression" of such intensity was present and led her to seek psychiatric treatment.²¹ Further the defendant attacked Mrs Sloss's credibility as a witness. In that, she falsely ascribes her illness in response to her son's death after being absolved from a huge tax burden. This in their view amounted to a 'double dipping' proceeding in court.²² Hidden J did not find any evidence to confirm the allegation. Hidden J based his reasoning on the corroborative evidence of Mrs Sloss's daughter and a friend of the family. In particular, his honour found that Mrs Sloss was a vibrant, extroverted and gregarious person. Her condition changed significantly after the death of her son. She was "upset all the time", had difficulty in speech and her loved ones became concerned for her health. She became very irritable and short-tempered. This in turn reflected in her attitude towards the staff members of the business she ran.²³

CLAIM FOR ECONOMIC LOSS

Mrs Sloss' businesses ranged from running a brothel and phone sex business to an associated escort service during 1986-1998. These businesses are affected as a result of poor performance in handling the business after her son's death. However, a researcher²⁴ into the sex industry stated that prostitution was in decline during this period as clients were in "fear of the AIDS virus and the reluctance of many to use condoms"²⁵ as a form of contraceptive to have sexual intercourse with a prostitute. In a similar vein, the decline of the phone sex industry was in response to a limitation in tax deductions of unusual nature. In other words, "...businessmen could not claim a deduction for entertaining clients at brothels, together with a general economic downturn".²⁶

In view of this Hidden J could not see the nexus between her condition and the decline of the business. This was a direct result of other socio economic factors, quite alien to the present claim in question.

General Damages

Justice Hidden was satisfied that she suffered shock as a result of the loss of her son. His reasoning is based on modern case authorities, a psychiatrist's report confirming a pathological grief reaction and corroborative evidence of her loved ones. He excluded the depressive nature of her reaction to her tax problem and husband's death. Taking into account the plaintiff's age and deteriorating health, the awarded a sum of \$70,000 and agreed out of pocket expenses of \$6,210.

THE REASONING OF THE DECISION IN SLOSS

Hidden J of the Common Law Division allowed recovery to a mother who suffered 'shock' as a result of hearing of the death of her son who was incarcerated. The defendant, the State of NSW did not contest that it owed a duty of care to the prisoner, but refused to accept liability for nervous shock suffered by the mother. The judge found that the duty of care extended to all persons in sufficient emotional proximity to suffer emotional shock. However, this did not extend to recovery for economic loss that had an adverse effect on the plaintiff's mental state to run her business.

EXTENSION OF THE BOUNDARIES OF PSYCHIATRIC ILLNESS

A clutch of recent cases in the Supreme Court of New South Wales has again extended the bounds of psychiatric illness. Although the Common Law Division of the Supreme Court in *Sloss v New South Wales* recognised that not every novel claim succeeds, the general outward trend is infallible and the law pertaining to psychiatric illness is cautiously being assimilated with the law on physical injury.

THE SIGNIFICANCE OF THE CASE IN AUSTRALIAN LAW

In Australia, this case will be received with a wholehearted response, to the extent to which the law proceeds in this area by taking a step at a time. In Australia a claim for psychiatric illness is supported by legislation. Whereas in England, the common law must be left to develop at its own pace without drawing any unnecessary arbitrary or illogical distinctions. If new plaintiffs make so bold as to fall ill in unprecedented circumstances, they must be ready for the response that they are before their time. Hidden J was convinced by the accumulation of events that led to the plaintiff suffering shock. It also supports the proposition that the visual image is all-important. It is what fed to the eyes, which makes the instant effect upon emotions, and the lasting effect upon the memory.

SHORTCOMINGS OF HIDDEN J'S JUDGMENT

Hidden J did not consider any of the English authorities in this area, in particular, *Alcock v Chief Constable of South Yorkshire*²⁷. As the state of the law in the UK is uncertain, his Honour could have commented on the divergence of judicial attitude in both countries as has Clarke JA in *Coates*. This may be construed as a shortcoming of Hidden J's decision. Although Hidden J did not question the closeness of the relationship between the plaintiff and the victim, he felt comfortable with the modern authorities that laid down the law. He did not comment on it further. It is unhelpful that he did not consider what would have happened in the common case of a family where the parents are not married to one another. Although this point was not in issue, reasonable foreseeability had been raised in similar cases and in the interest of justice and certainty, should the court draw lines of limitation in a claim for economic loss as in the present case? It would appear that the fear of 'floodgates' and policy factors would exclude such 'unmeritorious' cases.

CONCLUSION

The Australian courts have applied the law pertaining to psychiatric illness in a consistent and coherent manner since *Jaensch v Coffey*²⁸. Although it is acknowledged that not every novel claim succeeds; the law with regards to psychiatric illness is cautiously being assimilated with the law on injury generally.²⁹ In *Sloss*, the court did not have to distinguish between the kind of shock the plaintiff suffered, whether it constituted a Post Traumatic Stress Disorder (PTSD) or Pathological Grief Disorder (PGD)³⁰. Although the difference is a matter of aetiology, Justice Hidden was convinced that the kind of illness the plaintiff suffered was the latter. However, a similar analogy could have been drawn from the English case of *Vernon v Bosely (No.1)*.³¹ The Court of Appeal was of the opinion that although normal grief or bereavement was not compensatable, nevertheless recovery was allowed as in *Sloss*, in that the plaintiff's profound and impressive account of his personality disorder was overwhelming.

There is a similarity of the claim both in *Sloss* and *Vernon*. In the latter case, the plaintiff claimed that his successful business career diminished as a result of the incident. The court felt that there is an element of confabulation and the claim was rather excessive. The collapse of the plaintiff's business would have happened anyway, regardless of the manner in which the plaintiff suffered shock³². This is similar to *Sloss*, the plaintiff's business declined as a result of a down turn in the economy and the customers' fear of the AIDS virus. Therefore the nexus between the shock and decline of the business could not be established.

One must welcome the decision in *Sloss*, as it applied modern authorities within this jurisdiction, avoided any policy issues and applied corrective justice to the party concerned. It is hoped that future courts will exercise a similar attitude from this decision.

ENDNOTE

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¹ [1999] NSWSC 995; 6th October 1999. <http://www.lawlink.nsw.gov.au/>

² Calabresi G, "Torts – the Law of a Mixed Society" (1978) 56 *Texas Law Review* 519

³ McLeod I, "The Natural Law Tradition" in McLeod I, *Legal Theory* (London: MacMillan Press, 1999) 27

⁴ *ibid* p.28-29

⁵ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (Washington, 4th ed, 1995) 438

⁶ *Jaensch v Coffey* [1984] 155 CLR 549

⁷ *Perre v Apand Pty Ltd* (1999) 73 ALJR 1190

⁸ *Paris v Stepney Borough Council* [1951] AC 367

⁹ [1932] AC 562

¹⁰ The nature of the charge is not dealt with in this case note and rests in the realm of criminal law

¹¹ Note 1 at para 14

¹² (1995) 36 NSWLR 1. In this case, a parent died in a road accident. Thereafter, his children were notified of the accident.

¹³ [1992] 1 AC 310. The plaintiffs here could not succeed in their action, quite apart from the failure to establish nervous shock.

¹⁴ (1984) 155 CLR 549 at 555

¹⁵ Note 1 at para 6

¹⁶ a general medical practitioner

¹⁷ Note 1 at para 10

¹⁸ Dr Lewin is a psychiatrist whom Mrs Sloss consulted with regards to her terminally ill husband

¹⁹ Note 1 at para 13

²⁰ Note 1 at para 10, a psychiatrist

²¹ Note 1 at para 20

²² Note 1 at para 23

²³ Note 1 at para 7

²⁴ Note 1 at para 29, "Ms Roberta Perkins, a university graduate"

²⁵ Note 1 at para 29

²⁶ Note 1 at para 29

²⁷ (1991) 1 AC 310

²⁸ (1984) 155 CLR 549

²⁹ *Pham v Lawson* (1997) 68 SASR 124

³⁰ Note 5 at 424,427

³¹ [1997] 1 ALL ER 577. Here a nanny negligently drove her car with the plaintiff's two daughters' inside into a river. She managed to remove herself from the incident. The plaintiff, a father rushed to the scene and was unclear as to whether his two daughters had drowned or not.

³² *Vernon v Bosley* (No.2) [1997] 1 ALL ER 614. It is strange that the defendants received anonymously after the first case, the plaintiff's divorce papers. Here, the plaintiff successfully argued that the shock sustained was much reduced-this was contrary to the CA's first impression. In turn, the court allowed fresh evidence and advised on the change of circumstances.