

### *Tame v NSW (2002) 211 CLR 317*

- ❖ Re: pure mental harm
- ❖ Plaintiff involved in accident, police error meant the other driver's BAC was attributed to her
- ❖ Plaintiff became obsessed and developed psychiatric illness
- ❖ Held: police did not owe her a duty of care
- ❖ The mental harm which occurred was not reasonably foreseeable in the circumstances
- ❖ Was far-fetched, there was no sudden shock, would not be the result for most individuals of a normal fortitude
- ❖ Conflict of duties
  - To find a duty would conflict with police's statutory reporting duties
- ❖ Conflict of laws
  - Other areas better suited for this matter, eg. defamation

### **Messengers**

- ❖ Discussed in the obiter of *Annetts v Australian Stations*
- ❖ There is no duty of care for mental harm caused by the manner in which bad news is communicated
- ❖ Due to public policy reasons about importance of open reporting and communication
- ❖ There could be a duty for carelessness in accuracy of information communicated
- ❖ Finding a duty would open floodgates
- ❖ Section 73 hence does not apply to messenger cases

### **TEST FOR PURE MENTAL HARM**

1. Is there pure mental harm? (section 67)
2. Is it resulting from events occurring to another person?
  - a. If yes, satisfy section 73
3. Reasonable foreseeability test:
  - a. Normal fortitude or less than normal fortitude? (section 72(1) and 72(3))
  - b. According to the circumstances of the case (section 72(2) and *Wicks v State Rail Authority*)
  - c. Common law assists in interpreting these considerations
4. Salient features
  - a. Emphasis on those in *Annetts*, *Tame* and *Gifford*
5. Consequential mental harm: difference arises at remoteness stage
  - a. There is an additional foreseeability test here

# Topic 5: Negligence - breach of duty

## 5.1 – Introduction

### What is negligent conduct?

- ❖ The nature of the inquiry at breach stage is to determine whether, by what the defendant has specifically done or not done, he/she has behaved sufficiently carelessly such as to constitute negligence at law
- ❖ Two fold task:
  - Establishing the standard of care against which the defendant will be assessed
  - Determining whether defendant meets or falls short of the expected standard of care
- ❖ Negligence is what a prudent and reasonable man would not do
- ❖ Reasonableness test is entirely objective
- ❖ No degrees of breach – it either is or is not
- ❖ Question of breach is a factual enquiry – past cases are not binding

### **Wrongs Act 1958 (Vic)**

#### Section 48: General principles

- (1) A person is not negligent in failing to take precautions against a risk of harm unless—
- (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known); and
  - (b) the risk was not insignificant; and
  - (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.
- (2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things)—
- (a) the probability that the harm would occur if care were not taken;
  - (b) the likely seriousness of the harm;
  - (c) the burden of taking precautions to avoid the risk of harm;
  - (d) the social utility of the activity that creates the risk of harm.
- (3) For the purposes of subsection (1)(b)—
- (a) insignificant risks include, but are not limited to, risks that are far-fetched or fanciful; and
  - (b) risks that are not insignificant are all risks other than insignificant risks and include, but are not limited to, significant risks.