In conclusion Brooking J. stated that in his opinion 'if a dealer is permitted to carry on business as such under this trust deed creditors of the business will be exposed to rules of such a nature, compared with those which would otherwise exist, as to render it appropriate to impose a condition which will have the effect of preventing the dealer from operating as such under the deed'.[48] This was, of course, sufficient to dispose of the appeal before him.

The decision is, however, significant in a more general sense. As Brooking J. observed, the issues which were before him were of considerable importance in view of the 'recent widespread use of corporate trading trusts of exiguous capital'.[49] His judgment confirms the validity of the misgivings felt by Professor Ford and he emphasizes the comparatively disadvantageous position of creditors of trading trusts. It is also suggested that it is possible upon reading between the lines to detect a plea for a change.

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JAENSCH V. COFFEY[1]

The outcome of *Jaensch v. Coffey* in the High Court of Australia will have surprised few. The Appellate Committee of the House of Lords had recently been down the same track in *McLoughlin v. O'Brian*.[2] In both cases the plaintiff was allowed to recover substantial damages for nervous shock from a negligent tortfeasor even though the plaintiff had been neither in any physical danger personally nor an eyewitness to the accident or its 'immediate' aftermath.

In *Jaensch v. Coffey* the plaintiff's husband had been severely injured in a motor accident caused by the defendant's negligence. The plaintiff was at home at the time of the accident. She was taken to a hospital and there saw her husband in severe pain being wheeled in and out of an operating theatre on three occasions. The plaintiff's early unhappy life had predisposed her to anxiety which coupled with her experience at the hospital caused her to believe that her husband would die and the security of her happy marriage would be 'washed down the drain'. As a result, although her husband survived, six days later, the plaintiff suffered severe anxiety and depression which in turn led to gynaecological problems resulting in a hysterectomy.

Jaensch v. Coffey is important for a number of reasons.

1. *General Scope of Liability for Nervous Shock*

In practical terms the case is important in so far as the High Court was unanimous in allowing the plaintiff to recover. Thus it is established at the highest level in Australia that damages for nervous shock are recoverable in situations where the claimant was neither in any physical danger nor had witnessed the accident or its immediate aftermath. The limited foresight of nervous disorder envisaged in 1939 by the High Court in *Chester v. Waverley Corporation*[3] was disapproved either expressly or by implication by the whole Court.[4]

2. *Nervous Shock*

Also on the practical level certain members of the High Court provide a definition of nervous shock, (a practice eschewed by legislatures when dealing with the matter). Brennan J. defined it as some recognizable psychiatric illness caused by shock. 'Shock' meant

[48] *Ibid.* 37-8.
[49] *Ibid.* 36.

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[1] (1984) 58 A.L.J.R. 426 affirming (1983) 33 S.A.S.R. 254 (F.C.).
[2] [1983] 1 A.C. 410.
[3] (1939) 62 C.L.R. 1.
[4] (1984) 58 A.L.J.R. 426, 428 *per* Gibbs C. J.; 433 per Brennan J. (changing appreciation of foreseeability); 444 *per* Deane J. (even Evatt J.'s famous dissent at p. 44 would be too narrow); 453 *per* Dawson J.

> [T]he sudden sensory perception — that is, by seeing, hearing or touching — of a person, thing or event, which is so distressing that the perception of the phenomenon affronts or insults the plaintiff's mind and causes a recognizable psychiatric illness. A psychiatric illness induced by mere knowledge of a distressing fact is not compensable; perception by the plaintiff of the distressing phenomenon is essential. If mere knowledge of a distressing phenomenon sufficed, the bearers of sad tidings, able to foresee the depressing effect of what they have to impart, might be held liable as tortfeasors.[5]

Deane J. drew on the traditional distinction between forms of psychoneuroses and mental illness, which are recognized *injuria*, and grief and sorrow, being *damnum sine injuria*.[6] In his judgment Deane J. made an examination of medical literature concerning psychiatric injury following trauma.[7] The literature divulged no clear aetiology of mental illness. In medical terms it was recognized, *inter alia*, that 'nervous shock' could be caused to someone with no pre-existing relationship with the victim of a disaster and that there was a real risk of psychiatric illness resulting from bereavement or from the prolonged nursing of a badly injured spouse or close relative independently of any shock received at the time of the accident. It cannot be argued from the medical literature that limitations on liability for psychoneuroses resulting from bereavement or nursing are unforeseeable.[8]

3. *The Duty of Care*

The most interesting aspects of *Jaensch v. Coffey* are the three distinct approaches that emerge to delineate the duty of care.

(i) Open Policy Approaches

(a) *Gibbs C.J., and Dawson J.*

In *Anns v. Merton London Borough Council* Lord Wilberforce said:

> The position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter — in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.[9]

This approach, which was accepted in *McLoughlin v. O'Brian*, found voice in the judgments of Gibbs C.J. and Dawson J. The test to determine the liability for nervous shock was one of reasonable foreseeability.

Gibbs C.J. said that limits should be set on claims for nervous shock. He favoured Lord Wilberforce's view in *McLoughlin v. O'Brien* of considering factors such as: 'the class of persons whose claims should be recognized; the proximity of such persons to the accident; and the means by which the shock is caused.'[10] Dawson J. reserved judgment on this matter but indicated a preference for policy limitations.[11]

(b) *Murphy J.*

His Honour had no difficulty with the duty of care. He took the view that the defendant's negligence was sufficient to establish a duty of care with liability for all loss suffered unless there are acceptable

[5] *Ibid.* 434.
[6] *Cf. Whitemore v. Euroways Express Coaches Ltd, The Times,* 4 May 1984, in which damages were recovered for shock by a plaintiff who had seen her severely injured spouse in hospital even though she had suffered no medical shock or psychiatric disorder.
[7] (1984) 58 A.L.J.R. 426, 448.
[8] *Cf. Pratt & Goldsmith v. Pratt* [1975] V.R. 378 (F.C.).
[9] [1978] A.C. 728, 751-2.
[10] (1984) 58 A.L.J.R. 426, 428-9.
[11] (1984) 58 A.L.J.R. 426, 453.

public policy reasons for limiting recovery. He noted that 'the Court should not adopt a view of public policy more restrictive of recovery than has been adopted by those Australian legislatures which have dealt with the subject'.[12]

(ii) Hidden Policy Approaches

(a) *Brennan J.*

Brennan J. said that it was not necessary for the plaintiff to prove that a reasonable man in the defendant's position could foresee that any particular psychiatric illness might be caused by his conduct; it sufficed that he could have foreseen that his conduct might cause some recognized psychiatric illness induced by shock. Brennan J. preferred the reasoning of Lord Scarman and Lord Bridge of Harwich in *McLoughlin v. O'Brian*[13] that there were no sound policy limitations in relation to nervous shock. He noted that foreseeability of shock-induced injury has gained a more ready acceptance by Australian courts during the last half century. It is now accepted by the community and by the courts that the sudden perception of a distressing phenomenon might induce psychiatric illness. Nevertheless Brennan J. introduced such considerations by the back door in his discussion of passers-by or others who, out of morbid curiosity, attend at the scene of an accident. Their attendance at the scene and perception of the accident could not, in his Honour's view, fairly be regarded as the result of the defendant's conduct. The attendance of a rescuer, parent or spouse could properly be regarded as the result, and the reasonably foreseeable result, of the defendant's negligent infliction of injury upon the victim.

It is suggested that his Honour's comment that a passer-by may not be able to recover, may be better justified on policy grounds rather than by reference to reasonable foreseeability and causation. When the scene of the accident is left behind and perception of some later phenomenon induces a psychiatric illness in the plaintiff, the principles are unchanged although the factual difficulties may be increased. The elements of causation and reasonable foreseeability must be proved and this will be a question of fact in each case. Presumably a point is reached on Brennan J.'s time scale when the event is no longer within his definition of shock. In *McLoughlin v. O'Brian*, Lord Scarman preferred to restrict the duty of care in relation to nervous shock by not extending it beyond 'parents and children who without seeing or hearing the accident, or being present in the immediate aftermath, suffer nervous shock in consequence of it.'[14]

(b) Deane J.[15]

His Honour thought that, in relation to personal injuries, the test of reasonable foreseeability was qualified by the requirement of 'proximity' of relationship which must be satisfied before a duty of care would arise. He stated that it was inevitable that in cases falling within settled areas of the law of negligence, such as cases involving ordinary physical injury in the workplace or in a motor car collision, it will have been established in previous cases that the relationship between the parties necessarily possesses the requisite degree of proximity. However, reasonable foreseeability on its own indicates no more than that a duty of care will exist if, and to the extent that, it is not precluded or modified by some overriding requirement or limitation. In his Honour's view the requirement of a relationship of proximity should be accepted as a continuing general limitation or control of the test of reasonable foreseeability as the determinant of a duty of care. In his view, proximity involves the notion of nearness or closeness and embraces physical proximity (in the sense of space and time) between the plaintiff and the defendant, circumstantial proximity such as the relationship of employer and employee and causal proximity in the sense of the closeness or directness of the relationship between the act or cause of action and the injury sustained.

Applying the test of reasonable foreseeability, his Honour held that the risk of injury by nervous shock to Mrs Coffey was reasonably foreseeable. The fact that she suffered nervous shock at the

[12] *Ibid.* 429. See Law Reform (Miscellaneous Provisions) Act 1944 (N.S.W.); Law Reform (Miscellaneous Provisions) Ordinance 1955 (A.C.T.); Law Reform (Miscellaneous Provisions) Ordinance 1956 (N.T.).

[13] [1983] 1 A.C. 410, 429-431, 431-443 respectively.

[14] *Ibid.* 431.

[15] (1984) 58 A.L.J.R. 426, 439-453.

hospital rather than at the scene of the accident did not have the consequence that the risk of injury to her was not reasonably foreseeable. The second and more difficult question was whether some additonal requirement confined the operation of the test of foreseeability. Although he stated that it was unnecessary to determine whether this should be regarded as a requirement of proximity or as part of a controlling rule based on policy considerations, he was inclined to see the limitations as 'necessary criteria of the existence of the requisite proximity of relationship'. However on the facts of the case before him, there was no reason to limit recovery.

Whether the limiting of the duty of care in the manner suggested by Deane J. will develop remains to be seen. The factors of pre-existing relationship, physical proximity and knowledge have been important factors in introducing the duty of care to new fact situations in the past and it is as well for lawyers to recognize this. The problem in present-day society is that modern systems of production, marketing and communication have made the potential for harm more proximate if less personal and less direct than in the past. If reasonable foreseeability is the test then Lord Atkin's answer to the question 'Who is my neighbour?' provides as useful a general guide as can be devised. That is, unless one wishes to return to the older tests of recognized legal relationships or physical proximity as being the criteria for a number of separate duties to act with care. It would appear that both Brennan J. and Deane J. in relation to nervous shock saw these as factors rather than as restrictions on the duty of care. As helpful as it would be to have Deane J.'s 'logical or causal proximity' limit on the duty of care, such a factual restriction is as likely to be as unsatisfactory as the situational limits were in the past.

4. *Predisposition and Abnormality*

Gibbs C.J. assumed (without deciding) that injury for nervous shock is not recoverable unless an ordinary person of normal fortitude would have suffered some shock.[16] Although Mrs Coffey had an exceptional predisposition to anxiety and depression, the trial judge found that her predispostion was controlled and that she was a person of normal fortitude. His Honour therefore agreed that her predisposition did not prevent her claim succeeding.

Murphy J. stated that if liability extends to 'normal' persons, it must also extend to predisposed persons who at least should be able to recover where a 'normal' person would have recovered and to the same extent.[17]

The issue was not discussed by Brennan J. in any detail. His Honour simply noted that although Mrs Coffey's early life had predisposed her anxiety and depression, the trial judge had found she was a person of 'normal fortitude'.[18]

Deane J. noted that despite her predisposition, Mrs Coffey was a person of normal fortitude. Her predisposition was not sufficient to warrant a conclusion that her injury by nervous shock was beyond the limits of reasonable foreseeability. His Honour stated that 'the fact that such injury may have been more likely or more severe in Mrs Coffey's case than in the case of a person of a different disposition does not absolve the defendant of liability in negligence in respect of it'.[19]

Dawson J. stated that he 'agreed with Deane J. that, having regard to the findings of the trial judge, there is no force in the submission that the plaintiff's mental injury can be explained by reference to an abnormal susceptibility on her part'.[20]

This reasoning settles the modern trend of cases which establish that if nervous shock to the plaintiff is reasonably foreseeable by the tortfeasor there will be liability. It is immaterial that the tortfeaser could not have foreseen the precise psychoneurotic process which led to the kind or type of injury suffered by the plaintiff.[21] It is also immaterial that the plaintiff suffered consequences due to an underlying personality disorder if it was reasonably foreseeable that a person of normal fortitude would have suffered nervous shock.[22] It follows that if a normal person would not have suffered nervous

[16] *Ibid.* 429.
[17] *Ibid.* 429.
[18] *Ibid.* 438.
[19] *Ibid.* 452.
[20] *Ibid.* 453.
[21] *Chapman v. Hearse* (1961) 106 C.L.R. 112.
[22] *Mount Isa Mines Ltd v. Pusey* (1970) 125 C.L.R. 383; *Hoffmueller v. Commonwealth* (1981) 54 F.L.R. 48 (N.S.W. C.A.); *Brice v. Brown* [1984] 1 All E.R. 997.

shock then an abnormal plaintiff will not recover unless the tortfeaser knew of the plaintiff's particular susceptibility.[23] However, findings of abnormality are likely to be rare in view of the medical literature on the risk of nervous shock and its aetiology. Also the House of Lords' approach in *Haley v. London Electricity Board*[24] shows that knowledge of a particular susceptibility amongst the public at large is likely to bring it within the scope of being reasonably foreseeable.

5. *Causation and Remoteness*

One aspect of the predisposition/abnormality argument which lingers in some nervous shock cases turns on the point that the defendant's negligence has not caused the nervous shock. The plaintiff's medical condition results from the fact that the plaintiff seizes upon the 'cause' and projects internal psychological tensions onto the 'cause' and thereby manifests symptoms of disorder.[25]

Alternatively, some manifestations of nervous shock may be categorised as harm of a different kind or type from that which the tortfeasor ought reasonably to have foreseen as a likely consequence of negligence.[26]

Two other problems in relation to nervous shock seem appropriate to a discussion of causation and remoteness.

(a) *Long Term Nursing*

In his consideration of the medical literature Deane J. said:

> There is also strong expert support for the proposition that there is a real — and foreseeable — risk that psychiatric illness may result from mental stress during the period consequent upon bereavement, particularly conjugal bereavement, or during a period of constant association and care of a badly injured spouse or other close relative independently of any shock sustained at the time of the actual death or injury.[27]

Nevertheless Deane J. supported the decision in *Pratt & Goldsmith v. Pratt*.[28] In that case it was held that a mother, who had sustained nervous shock some substantial time after an accident to her daughter as a result of observing her daughter's pitiable state, was not entitled to recover damages. Deane J. supported the decision on the grounds of proximity limiting the duty of care. Brennan J. regarded this approach as erroneous.[29] However, Brennan J. might support the outcome of *Pratt v. Pratt* on the basis either that the effluxion of time would mean that such injury would be too remote to be treated as a consequence or alternatively as not being reasonably foreseeable.[30]

(b) *Reports Causing Nervous Shock*

Deane J. left open the issue of a public road user's duty of care to persons who receive reports of injuries to relatives and thereby suffer nervous shock, suggesting that different considerations might apply.[31]

The potential large-scale liability of a negligent airline or railway operator following a disaster would appear to be daunting. It would be restricted at common law by an approach such as the proximity requirement of Deane J.[32] Nevertheless such fears can be overstated. As it was put by Kaufman C.J. in *Day v. TWA Inc*.[33] in relation to the defendant airline's liability under Article 17 of the Warsaw Convention:

[23] *Levi v. Colgate-Palmolive Pty Ltd* (1941) 41 S.R. (N.S.W.) 48 (F.C.).
[24] [1965] A.C. 778.
[25] See *Hoffmueller v. Commonwealth* (1981) 54 F.L.R. 48, 59-62 *per* Mahoney J.A.
[26] See *Rowe v. McCartney* [1976] 2 N.S.W.L.R. 72, 89-90 *per* Samuels J.A.
[27] (1984) 58 A.L.J.R. 426, 448.
[28] [1975] V.R. 378 (F.C.).
[29] (1984) 58 A.L.J.R. 426, 438.
[30] *Cf. S. v. Distillers Co. (Biochemicals) Ltd* [1970] 1 W.L.R. 114.
[31] (1984) 58 A.L.J.R. 426, 463. See *Brown v. The Mt Barker Soldiers' Hospital Inc.* [1934] S.A.S.R. 128; *Battista v. Cooper* (1976) 14 S.A.S.R. 225 (F.C.).
[32] See also Edwards, L. R., 'The Liability of Air Carriers for Death and Personal Injury to Passengers' (1982) 56 *Australian Law Journal* 108.
[33] 528 F. 2d. 31, 35 (2nd Cir. C.A. 1975).

> The airlines are in a position to distribute among all passengers what would otherwise be a crushing burden upon those few unfortunate enough to become 'accident' victims.[34] Equally important, this interpretation fosters the goal of accident prevention.[35]
>
> The airlines, in marked contrast to individual passengers, are in a better posture to persuade, pressure or, if need be, compensate airport managers to adopt more stringent security measures against terrorist attacks.[36] If necessary, the airlines can hire their own security guards. And, the companies operate under circumstances more conductive to investigating the conditions at the airports they regularly serve than do their passengers. Moreover they can better assess the probabilities of accidents, and balance the reduction in risk to be gained by any given preventive measure against its cost.
>
> Finally, the administrative costs of the absolute liability system embodied in the Warsaw Convention, as modified by the Montreal Agreement, are dramatically lower than available alternatives. If Article 17 were not applicable, the passengers could recover — if at all — only by maintaining a costly suit in a foreign land against the operator of the airport. The expense and inconvenience of such litigation would be compounded by the need to prove fault and the requirements of extensive pre trial investigation, travel, and other factors too difficult to anticipate. Such litigation, moreover would often unduly postpone payments urgently needed by the seriously injured victim or his surviving dependants.[37]

And all this without mention of the defendant's ability to spread the risk further through insurance.[38]

Also left open was the personal liability placed on the conveyor of information concerning an accident which induces shock.[39] The former issue is likely to be resolved by remoteness tests, whereas the latter issue is likely to be resolved by a restriction of the reporter's duty of care or by concentrating on the reporter's intention as was envisaged by Windeyer J. in *Mount Isa Mines v. Pusey*.

In *Jaensch v. Coffey* the High Court found no policy reasons for limiting recovery for nervous shock. Nevertheless it is clear from the above summary that through their different approaches there are a variety of limiting devices in operation in relation to nervous shock recovery at common law reflecting supposed policy issues. As Lord Scarman said,

> Why then should not the courts draw the line, as the Court of Appeal manfully tried to do in this case? Simply, because the policy issue as to where to draw the line is not justiciable. The problem is one of social, economic, and financial policy. The considerations relevant to a decision are not such as to be capable of being handled within the limits of the forensic process.[40]

Until a coherent compensation scheme is introduced nationally, victims and their legal advisers will have to grapple with the inadequacies of the common law and a proliferation of statutory remedies. Such a scheme would need to compensate those whose needs arose from disability whether the cause of that disability is accidental injury or sickness. As far as nervous shock is concerned there remain unresolved definitional problems with regard especially to the griefstricken as well as the general problem of the type and amount of compensation.

ANN O'CONNELL* AND ROBERT EVANS**

[34] See Calabresi, G., *The Costs of Accidents* (1970) 39-45.
[35] *Cf. Ibid.* 150-2.
[36] *Cf. Union Oil Co. v. Oppen* 501 F. 2d 558, 569-70 (9th Cir. 1974).
[37] Rosenberg, M. and Sovern, M. I., 'Delay and Dynamics of Personal Injury Litigation' (1959) 59 *Columbia Law Review* 1115.
[38] See Luntz, H., Hambly, A. D. & Hayes, R. A., *Torts: Cases and Commentary* (2nd ed., 1985) 12-7.
[39] See *Blakeney v. Pegus* (1885) 6 N.S.W.L.R. 223 (F.C.); *cf. Bunyan v. Jordan* (1936) 36 S.R. (N.S.W.) 350; *Mount Isa Mines Ltd. v. Pusey* (1970) 125 C.L.R. 383, 407 *per* Windeyer J. excepting an intention to cause nervous shock *e.g. Wilkinson v. Downtown* [1897] 2 Q.B. 57; *Janvier v. Sweeney* [1919] 2 K.B. 316.
[40] [1983] 1 A.C. 410, 431. The current random systems of compensation are a matter for critical comment by Murphy J. in his judgment, (1984) 58 A.L.J.R. 426-30.

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