In contrast, Deane J. in *Moorgate Tobacco* tended to parallel the views of Dixon J. in *Victoria Park* and Brandeis J. in *International News Service*, in his reluctance to entertain much scope for judicial creativity in this context. While contemplating flexibility in construing the traditional actions, his Honour firmly concluded that the balance between equitable protection and untrammelled competition must be ordered by Parliament and predicated on the established limits of the traditional causes of action,[11] rather than importing consumer-oriented standards as a guide to expanding the existing avenues of intellectual property.

Similarly cautious is Deane J.'s unqualified affirmation of the concept of intellectual property so enduringly expressed in the classical Dixon *dictum*, as a series of separate protected interests which have all been formulated as public-interest inspired exceptions to the general principle that products of the intellect and human endeavour will otherwise pass freely into the public domain. Recognition of an action to protect a 'quasi-property' in information generally in the context of unfair competition would undoubtedly threaten the survival of this over-arching concept.

The perennial problem of achieving balance between the competing interest of the public in free access to information and ideas, and the protection of the creative or enterprising individual, now exists in the context of unprecedented growth in the traditional causes of action and intellectual property regimes. The High Court's refusal to entertain the introduction of an elusive species of quasi-property, defined largely by reference to circumstances of unfair competition, may be seen as predictable. Its decision nevertheless formally re-entrenches a rigid and peculiarly British concept of intellectual property, which will not facilitate assimilation to more flexible, natural-law inspired definitions operative in European jurisdictions.

JULIE DODDS*

R.W.G. MANAGEMENT LTD V. THE COMMISSIONER FOR CORPORATE AFFAIRS AND THE NATIONAL COMPANIES AND SECURITIES COMMISSION*

In his article 'Trading Trusts and Creditors' Rights'[1] Professor Ford expressed grave concern for the position of creditors dealing with trading trusts. He went so far as to say that 'the fruits of the union of the law of trusts and the law of limited liability trading companies is a commercial monstrosity. The scope for frustrating creditors is considerable'.[2] The theme of Professor Ford's article is that the decision to supply a company with goods and services may be influenced by the belief that assets controlled by a company belong to the company. One could add to this the fact that any supplier could reasonably expect to have recourse against the assets of the company in the event that it is unable to meet its obligations. As Professor Ford points out, where a company is a trustee the appearance of credit worthiness may be false.[3] As Grbich observes the fact that a trust is not a legal entity and cannot sue or be sued is so obvious that it is often overlooked.[4]

The substantial move of business into trusts has been motivated by tax considerations. As Grbich puts it 'the game is evolving fast'.[5] As the game evolves, the need to reconsider the position of creditors dealing with trading trusts becomes increasingly critical. This is particularly so in the case of the under capitalized corporate trustee. Grbich vividly depicts the plight of creditors who deal with so called '$2 nominee trustee companies'. 'It is said that hanging helps focus the mind. There is nothing like a few wounded creditors foisted with bad debts incurred by a man of straw corporate trustee company to focus

[11] (1984) A.I.P.C. 90-141, 39,003.
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*Unreported judgment delivered 18 December 1984. Page references are to the transcript.
[1] (1981) 13 M.U.L.R. 1.
[2] *Ibid.* Grbich in Grbich, Y. F. R., Hutchins, J., Payes, D. and De Wijn, J. W., *Winding up Trusts* (1984) 183 refers to 'the modern mutation of the trust form'.
[3] Ford, *op. cit.* 1.
[4] Grbich, *op. cit.* 183.
[5] *Ibid.*

the mind on some of the legal problems with such structures . . . In particular what happens when a creditor puts the heat on a corporate trustee with little or no capital? The creditor applies the heat, the assets go up in a puff of smoke and the creditor is left with burnt fingers and an empty company till'.[6]

This is a colorful way of emphasizing the point that the fact that the trustee is, at common law, personally liable is little consolation to creditors. It therefore becomes necessary to consider what rights a creditor may have to 'get at' the assets of the trust. The short answer is that the creditors may take advantage of the trustee's right of indemnity against the fund and so recover by subrogating its rights. But as Professor Ford emphasizes, there is a striking contrast between the ability of creditors of limited liability companies to 'get at' company assets and the more restricted opportunities of creditors of corporate trustees.[7]

He describes the right of creditors to be subrogated to the right of the trustee as derivative. Creditors stand in the shoes of the trustee and have no greater legal right than him.[8] The trustee is at law personally liable for all liabilities even though incurred on behalf of the trust. Equity, however, provides him with a right of indemnity against the trust assets and also with a right of indemnity against the beneficiaries personally. Furthermore, the trustee has an equitable lien over the trust assets to the extent of any liabilities incurred on behalf of the trust.

A trustee acting in breach of trust or outside the terms of the trust will have no right of indemnity against the trust assets or the beneficiaries personally. Even a breach of duty unrelated to the dealing with the individual creditor may affect his position. For example, the trustee may have misappropriated some of the trust funds.[9] An express exclusion of the right of indemnity may be made precisely for the purpose of preventing creditors from 'getting at' the trust fund.[10]

Recently, in his decision in *R.W.G. Management Limited v. The Commissioner for Corporate Affairs and the National Companies and Securities Commission*[11] Brooking J. expressed similar concern for the rights of creditors of trading trusts. During the course of argument and judgment frequent reference was made to Professor Ford's article.

The matter came before the Court as an appeal from a decision of the Commissioner for Corporate Affairs under s. 134 of the Securities Industry Code 1981. It is clear that, whilst paying due regard to the Commissioner's decision, the court in hearing an appeal under s. 134 hears and decides the matter *de novo*.[12] An opportunity presented itself for a comprehensive consideration of the issue of the trustees' right of indemnity *vis-à-vis* trust creditors. The circumstances in which such opportunity arose may briefly be outlined.

The appellant was a company formed to take over the stockholding business of a partnership known as Roach, Tilly, Grice and Co. (R.T.G.). This was prompted by the fact that as of April 1984 the articles of association of the Stock Exchange of Melbourne have permitted the admission of a company as a member. R.T.G. entered into an agreement with Elders IXL Ltd the substance of which was that Elders Finance and Investment Co. ('Elders Finance') would acquire a 40% interest in R.W.G. The partners then agreed with Elders Finance that (1) they would sell the business to R.W.G. as trustee of a unit trust; (2) Elders Finance would subscribe 40% of the capital and the remaining 60% would be held by the partners or their nominees, (3) a trust deed constituting the R.T.G. & Co. Trust and an acquisition agreement for the purchase of the business would both be entered into when the company (R.W.G.) had acquired a dealer's licence under Part IV of the Securities Industry Code.

[6] *Ibid.* 184.

[7] Ford, *op. cit.* 1.

[8] *Ibid.* 15.

[9] *Hardoon v. Belilios* [1901] A.C. 118. In a recent decision McGarvie J. held (in the Victorian Supreme Court) that the principle of *Hardoon v. Belilios* applied where there were multiple beneficiaries and that unit holders in public trusts were personally liable to the extent of their unit holdings where there was no disclaimer: *Financial Review*, April 4 1985.

[10] *Re Johnson* (1880) 15 Ch.D.548.

[11] Grbich, *op. cit.* 185.

[12] *Re Gem Exploration & Minerals N.L. and the Companies Act* (1975) 2 N.S.W.L.R. 584; *Re Andels* (1977) A.C.L.C. 40-319; *Shepherd v. Companies Auditors Board* 5 A.C.L.R. 369; *Re Kornblums Furnishings Ltd* (1982) V.R. 123.

The rules of the Stock Exchange impose certain conditions as to liquid capital which must be complied with by companies seeking membership. Brooking J. interpreted these rules as broadly requiring that a member company's assets must always exceed its liabilities by $250,000 or 5% of those liabilities, whichever is the greater amount. Upon R.W.G's application for a dealer's licence the Commissioner imposed a condition upon the granting of the licence to the effect that the company's right of indemnity against trust assets could not be included as part of its assets for the purposes of complying with the rules regarding liquid capital. R.W.G. appealed to the Supreme Court against the imposition of this condition. The effect of the condition would have been to require that the trustee company should *itself* have assets much greater than were proposed. In other words it would have required that the assets of the company *itself* rather than the assets of the trust should satisfy the condition.

Counsel for the R.W.G. argued that the question whether a trading trust should as a matter of policy be permitted to be a dealer was not raised by the appeal. He submitted that the only question to be determined was whether the trustees' right to be indemnified should be treated as a current asset of the Trustee Company for the purpose of the Stock Exchange's liquid capital rules.

Brooking J. agreed that the Commissioner had not decided that a trading trust was 'innately unsuitable'[13] to act as a dealer. Nevertheless he considered that the way in which the Commissioner had chosen to frame the condition did not inhibit him from considering what he understood to be the Commissioner's 'real objection' to the issuing of a dealer's licence to a trading trustee without compliance with a condition which would ensure that the capital position of the company itself was vastly different from what one would normally expect and vastly higher than was proposed by R.W.G. He said that

> That objection, shortly stated, is that on the proposal put forward the trading trustee, in carrying on business as a dealer, is to incur substantial liabilities to a very large number of persons without being the owner of the assets of that business, out of which assets those liabilities will have to be met. The trustee's right of indemnity against those assets, says the Commissioner, is not a satisfactory substitute for the assets themselves. Accordingly, the trustee ought not to be free to incur the liabilities unless its assets are augmented by a gigantic infusion of capital.[14]

In other words, in Brooking J.'s view, the Commissioner was moved by the same concerns felt by Professor Ford, that is, a concern for those who deal with trustees and therefore have no direct access to trust funds. In the course of his judgment Brooking J. demonstrated a similar anxiety for such creditors. The fundamental question to be decided was whether the company's 'right to be indemnified out of trust assets places its creditors as a dealer in as good a position as if it owned those assets beneficially'.[15] He went on to say that the answer to this question was that the creditors' position would be as satisfactory 'only if the consequence of the trustees' indemnity is that whenever a liability is incurred by a trustee there will be a commensurate right to be indemnified out of the trust assets'.[16]

In deciding this matter it was necessary for Brooking J. to direct his attention to issues about which some degree of uncertainty existed. The first of these concerns the status of the trustees' lien over trust property. Was the effect of the lien to vest a proprietary right in the *trustee i.e.* was it an asset of the trustee company which in the event of its winding up would be available in distribution among the company's creditors? If so, his Honour considered that it would be available for creditors *generally* and not merely for those whose debts gave rise to the lien.[17] In so deciding Brooking J. followed the decision in *Re Enhill*[18] in which it had been held that the right of indemnity and lien was a chose-in-action and personal property which could be used to satisfy *all* personal liabilities *i.e.* both trust and non-trust liabilities.[19] In following *Re Enhill* Brooking J. adopted a view contrary to that expressed by Professor Ford.

[13] Transcript p. 6.
[14] *Ibid.* 7.
[15] *Ibid.* 9. The trust deed in question had clearly been drafted with a view to eliminating some of the difficulties which might confront creditors of trading trusts who seek payment out of the trust fund. In particular a generous right of indemnity was expressly provided and it was also provided that third parties should be entitled to assume that the trustee was acting within the terms of the trust.
[16] Transcript pp. 8, 9.
[17] *Ibid.* 18.
[18] [1983] V.R. 561.
[19] For an excellent note on *Re Enhill* see De Wijn, J. W., 'Re Enhill Pty Ltd: Trust and Non-Trust Creditors' [1983] *Australian Tax Review* 24.

It is relevant to digress in order to consider opposing views as to whether or not the trustee's right of indemnity and lien constitute a proprietary interest in the trust estate. Two issues may be isolated:

1. Is the right of indemnity and lien proprietary in nature?
2. If this is so, is it available to all creditors or only to trust creditors?

In *Octavio Investments v. Knight*[20] the High Court had held that the right of indemnity was a proprietary right, but implied that it was available only to trust creditors. It said that the trustee's interest in the trust property amounts to a proprietary interest, 'and is sufficient to render the bald description of the property as "trust property" inadequate. It is no longer property held solely in the interests of the beneficiaries of the trust, and the trustee's interest in that property will pass to the trustee in bankruptcy for the benefit of the creditors of the trust trading operation should the trustee become bankrupt'.[21] Professor Ford was most critical of the decision in *Octavio* and described it as a 'hard case making bad law'.[22] His central criticism was that it was wrong to say that the trustee has a proprietary interest in the trust assets. He said that he had rather, a power over the assets which had to be exercised in a certain way *i.e.* in the interest of the beneficiaries. In *Re Enhill*, Professor Ford's criticisms were referred to but the majority nevertheless followed *Octavio*. Lush J. said that whilst Professor Ford had suggested that the right of indemnity was a power, '[i]t is, however, a power which can be and is designed to be exercised for the trustee's own benefit . . . and is, I respectfully think, properly to be classed as property of the trustee'.[23] Young C.J. said that, notwithstanding Professor Ford's criticism, he was bound to treat *Octavio* as deciding that 'the right of a trustee to be indemnified out of the assets of a trust and the proceeds of the exercise of that right are assets of the trustee in a winding up'.[24]

It has been said that the position adopted in *Octavio* and *Re Enhill* is totally inconsistent with the recognized principle of equity that a trustee cannot benefit personally from his office.[25] It could also be argued, with respect, that the courts in both *Octavio* and *Re Enhill* demonstrate a lack of understanding of the nature of the right of indemnity. Professor Ford draws a distinction between two aspects of the right of indemnity: '[t]he right of a trustee to reimburse himself from the trust estate for the amount of any expenditure by him for trust purposes will be referred to as his right of recoupment. The right which a trustee has to use trust property to discharge a liability which he has incurred for the purposes of the trust will be referred to as his right of exoneration. The expression "right of indemnity" will be used generically to cover both rights'.[26] Where the trust creditor has already been paid by the trustee personally then obviously the *right of recoupment* is a chose-in-action and an asset or a proprietary interest in the trust property in the sense of a debt owed to the trustee *personally* by the trust. Such an asset is available for all trust creditors. In *Re Enhill*, however, the creditors had not been paid and the right of exoneration or right of direct access to the trust fund was in question. The right of exoneration, it is submitted, is necessarily a right limited only to satisfying the debt owed by the trustee and may be used only for that purpose. Any suggestion that non-trust creditors should have access to trust assets is contrary to the concept of the trust.

Brooking J. did not refer to Professor Ford's article on this point and was content to follow *Re Enhill* and to accept that 'the proceeds of a trustee's lien are available for division amongst creditors generally, not only amongst creditors whose debts gave rise to the lien . . . So in the hypothetical case the dealer's business is liable to be prejudiced by the dealer's ability to incur additional liabilities without at the same time necessarily creating an equivalent asset for the benefit of creditors'.[27] This was despite the *dicta* in *Octavio*, in which the assumption was made that the lien was available for distribution amongst trust creditors generally. *Octavio* was not referred to on this point.

[20] (1979) 144 C.L.R. 360.
[21] *Ibid.* 369.
[22] Ford, *op. cit.* 26-7.
[23] [1983] V.R. 561, 567.
[24] *Ibid.* 563.
[25] De Wijn, *op. cit.* 26-7.
[26] Ford, *op. cit.* 3. De Wijn points out that the indemnity concept arose in days when persons of substance often assumed fiduciary roles and trust liabilities may well have been paid out of personal assets before the trustee was indemnified out of trust assets: De Wijn, *op. cit.* 27.
[27] Transcript p. 19. Grbich puts it colourfully 'if the trustee does go on a frolic of his own, gaily pledging his own funds and trust funds, then the implication of *Re Enhill* is that beneficiaries and trust creditors may have to wait in line with other creditors of the trustee'. Grbich, *op. cit.* 190.

If *Re Enhill* is correct and that were to be the end of the matter, then creditors of trading trusts would be in as good (or as bad) a position as creditors of other companies in that they would line up with all the other creditors of the trustee. But, of course, that is not the end of the matter.

As Brooking J. saw it there remained two questions to be considered:

1. the continued existence of the right of indemnity and
2. any limitations which might be imposed upon that right.

His Honour asked '[C]an creditors be confident that the rights conferred by the general law and by the trust deed concerning indemnity out of the trust property always be there?'[28] Could the right be excluded? In this context his Honour drew a distinction between the right to be indemnified by the beneficiaries personally and the trustees' general law right to be indemnified out of trust assets. The former right, he said, could always be expressly excluded by the trust instrument.[29]

As to the right of indemnity out of trust assets, Brooking J. was prepared to accept that if the right rested upon an implied contract then it could doubtless be expressly excluded. But he considered that the right did not depend upon any contract[30] but arose out of the nature of the office of trustee. It was a right 'incidental to the character of trustee and inseparable from it'.[31] Furthermore, in *Kemptron Industries v. Commissioner of Stamp Duties (Qld.)*[32] McPherson J. had suggested that because the right of indemnity was inseparable from the office of trustee it was probably incapable of exclusion by the trust instrument. His Honour then went on to say: '[w]ith so much trade nowadays in the hands of corporate trustees which have a trifling capital, do not own beneficially the assets of the business and are able to incur debts without bringing the real owners under any personal liability to the creditors, it might be thought a wholesome principle that the trustee's right of indemnity, which is really all that is left to the creditors, should not be ousted by the deed of trust. (In Queensland the statutory indemnity cannot be excluded *(Trusts Act* 1973 ss. 65 and 72))'.[33] He then referred to Professor Ford's article and to his suggestion that a denial by the trust instrument of the right of indemnity though good against the trustee might in certain circumstances be capable of being attacked by trust creditors. Professor Ford had suggested that an analogy could be drawn with the rule that a settlement conferring an interest determinable on bankruptcy is void as against the trustee in bankruptcy.[34] Brooking J. chose not to go into this question, presumably because the deed in question had not attempted to exclude the right of indemnity. It is submitted, however, that his comments indicate an opinion that such a rule would be desirable. In other words, a measure of protection could be given (as in Queensland) by a rule to the effect that a provision purporting to exclude the right of indemnity is void as against trust creditors. As far as the trustee himself was concerned his Honour concluded that the *Trustee Act 1958 (Vic.)* settled the matter, that it was open to the settlor to deny a right of indemnity and that if a trustee was willing to accept the trust in such circumstances, he could not see why he should not be free to do so.[35]

Moving on to the question of limitations upon the right to indemnity, Brooking J. enunciated the familiar general principle that the right to indemnity out of trust assets is limited to liabilities incurred in the execution of the trust. Furthermore, it could not be asserted if the trustee was in breach of his obligation to administer the trust with skill and diligence. His Honour predicted allegations by beneficiaries of trading trusts that the trustees' right to indemnity had been lost would increase as a result of the decision in *Octavio*.[36] Presumably, he meant that this would be because if the right of

[28] Transcript p. 20.

[29] *Gillan v. Morrison* [1901] A.C. 118, 127; *Hardoon v. Belilios* [1901] A.C. 118, 127. *Kemptron Industries v. Commissioner of Stamp Duties* (1961) 15 A.T.R. 627, 631, 634. Professor Ford agrees with this and points out that it is up to the trustee to decide if he wished to accept office upon such adverse terms: Ford, H. A. J. and Lee, W. A., *Principles of the Law of Trusts* (1983) 635.

[30] [1982] Ch. 61.

[31] *In Re the Extoll Coal Co. Ltd* (1866) 35 Bear. 449.

[32] (1961) 15 A.T.R. 627, 634.

[33] Transcript p. 21.

[34] Ford, *op. cit.* 17-8.

[35] Trustee Act 1958 (Vic.) s. 36(2). Under s. 2(3) the powers conferred by s. 36(2) apply in the absence of an expressed contrary intention.

[36] Transcript p. 26.

indemnity has not been lost, and if it is a proprietary interest in trust assets then the beneficiaries will have to share the assets with the creditors. The incentive for beneficiaries to make such allegations is clear and renders the position of trust creditors even more precarious.

Counsel for the Commissioner submitted that a further restriction existed upon the trustees' right of indemnity. He argued that if there had been a breach of trust as a result of which loss had been suffered by the estate the right of indemnity could not be asserted until the loss had been made good. This meant that if the trustee, because of insolvency, could not make good the loss, then the right of indemnity was lost.[37] If this view were correct an even greater blow would be struck at the creditors of trading trusts.

Professor Ford in his article referred to a general principle that a defaulting trustee cannot claim, as against the beneficiaries, a beneficial interest until he has made good his default.[38] He cited *Jacobs v. Rylance*[39] and *Doering v. Doering*[40] as authorities for this principle.

Brooking J. pointed out that in these cases the amount due from the trustee exceeded the amount due to the trustee from the trust estate. He cited *Re Dacre*.[41] There the amount misappropriated by the trustee was less than the benefit owed to him. It was held that the legacy could be retained to an amount equal to what had been appropriated. It was said that the trustees share was deemed to have been paid to the extent he was liable to restore the trust property. His Honour concluded that 'a balance is to be struck with the result that the trustee will still have the right of indemnity to the extent to which the liabilities properly incurred exceed the compensation due to the estate. For it is clear that the rule that a defaulting trustee cannot claim a share in the estate unless and until he has made good his default is founded on the principle that where there is an aggregate fund in which the trustee is beneficially interested and to which he owes something he must be taken to have paid himself that amount on account of his share'.[42] He went on to say that the rule had been applied 'where the beneficial interest exists by virtue of his right to indemnity and a creditor claims by subrogation'.[43] In other words a trustee indebted to the estate forfeits his indemnity to the extent of his indebtedness.[44]

Turning finally to broader issues Brooking J. commented that his judgment had 'proceeded throughout on the conventional view that trust creditors can come against trust property only by subrogation to trust property'.[45] He clearly held that this conventional view represented the current state of the law but just as clearly perceived that it placed the creditors of a trading trust at a significant disadvantage. His Honour referred once more to Professor Ford's article in which he raised the question of whether in this country some satisfactory basis could be found for permitting creditors recourse to trust assets independently of subrogation. Professor Ford considers the dependence of the creditor upon the trustees right of exoneration as anomalous. He points out that the trend in company law has been to improve the position of persons extending credit to companies. He suggests, for example, that the fact that a trustee who in good faith incurs a liability which leads to a profit to the trust property is entitled to a right of indemnity could support a principle that where it is a creditor who has conferred a benefit on the trust property he should be able to recover out of the trust property to the extent of that benefit.[46] Brooking J. chose not to comment on this question but observed that on the present state of the Victorian authorities these suggestions did not afford any additional protection for creditors for the purpose of the appeal before him.[47]

[37] Transcript p. 27.
[38] Ford, *op. cit.* 13-4.
[39] (1874) L.R. 17 Eq. 341.
[40] (1889) 42 Ch.D. 203.
[41] [1915] 2 Ch. 480.
[42] Transcript p. 28-9.
[43] Transcript p. 29. His Honour cited *Re Johnson* (1880) 15 Ch.D. 548.
[44] Transcript p. 30. His Honour revealed that he had 'not overlooked' the discussion in *Re Staff Benefits Pty Ltd* (1979) 1 N.S.W.L.R. 207, 214 in which Needham J. expressed the opinion that to bar a right of indemnity the breach should be related to the subject matter of the trust. Professor Ford suggests that His Honour may have been excluding only breaches of trust which caused no loss to the trust estate.
[45] Transcript p. 35. His Honour recognized that a wider view had been taken than in the U.S.A. and referred to *Scott on Trusts* (3rd ed., 1967) Vol. iii, paras 267-271 A.31; Restatement of the Law of Trusts 2nd Series paras 267, 269-71A; 139 A.L.R. 152 *et. seq.*
[46] Ford, *op. cit.* 29-30.
[47] Transcript p. 36.

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.

SUSAN MORGAN*

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.