A PRIMER ON THE MODERN LAW OF 'NERVOUS SHOCK'

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[In this paper a review is undertaken of the principles governing recovery in tort for the negligent infliction of psychiatric harm (often referred to as 'nervous shock'). The paper begins with an overview of the tort of negligence and then considers the specific rules which have evolved in the regulation of recovery for negligently-inflicted psychiatric harm, which greatly restrict the class of persons for whom, and the circumstances in which, redress is available. It is suggested that critics of the rules have rarely been concerned with issues other than the perceived need to compensate the injured. They have indicated less concern about the underlying question of justice as between the parties to disputes. The final section reviews theoretical justifications for the imposition of liability for nervous shock in negligence, with an emphasis on the corrective justice theories of Ernest Weinrib and Stephen Perry. They note that a comparison of moral claims must be undertaken and justification must be found for shifting any loss from the plaintiff to the defendant.]

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I INTRODUCTION

Balkin and Davis note that in 'negligence alone of the torts ... do the constituent elements lack reasonably clear definition'.[1] For example, it has long been doubted whether there is any utility in employing a 'duty of care' analysis. It has been argued that, once unreasonable conduct has been proven, cases can be decided on more concrete grounds, such as remoteness or contributory negligence.[2] However, the duty concept survives as a means of categorising the types of cases in which the law will offer redress.[3]

Recent discussion has focused upon one of the requirements for establishing a duty of care, namely the role of that amorphous concept 'proximity'. In *Jaensch v Coffey*,[4] Deane J objected to the simplistic two-step test for liability set out in *Anns v Merton London Borough Council*,[5] which instated foreseeability of harm as the sole indicium of a duty of care, capable of being negatived on policy grounds only. His Honour argued that the notion of foreseeability had to be tempered by other factors establishing 'proximity' in the relationship between the parties to the commission of an alleged injury. 'Proximity' was said to be a 'broad and flexible touchstone'[6] of the categories of case in which liability was recognised:

> It involves the notion of nearness or closeness and embraces physical proximity (in the sense of space an [*sic*] time) between the person or property of the plaintiff and the person or property of the defendant, circumstantial proximity such as an overriding relationship of employer and employee or of a professional man and his client and causal proximity in the sense of the closeness or directness of the relationship between the particular act or cause of action and the injury sustained.[7]

This concept was subsequently accepted by a majority of the High Court as essential in the recognition of new categories of cases in negligence.[8] It also features prominently in English cases concerned with the negligent infliction of psychiatric illness.[9]

However, Brennan J expressed the opinion in *Jaensch v Coffey* that the sorts of 'proximity' factors outlined by Deane J 'are appropriately taken into account by

1 R Balkin and J Davis, *Law of Torts* (2nd ed, 1996) 198.

2 Percy Winfield, 'Duty in Tortious Negligence' (1934) 34 *Columbia Law Review* 41, 58–65.

3 John Fleming, 'Remoteness and Duty: The Control Devices in Liability for Negligence' (1953) 31 *Canadian Bar Review* 471, 473–4.

4 (1984) 155 CLR 549.

5 [1978] AC 728, 751–2.

6 *Jaensch v Coffey* (1984) 155 CLR 549, 584.

7 Ibid 584–5. See also *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 497–8

8 Eg *San Sebastian Pty Ltd v Minister Administering the Environmental Planning and Assessment Act 1979* (1986) 162 CLR 340, 381–2.

9 See, eg, *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 ('*Alcock*'), 398 (Lord Keith), 402 (Lord Ackner), 410–3 (Lord Oliver), 420 (Lord Jauncey); Law Commission (UK), *Common and Public Law Liability for Psychiatric Illness*, Consultation Paper No 137 (1995) 17–18

the general principles of causation and reasonable foreseeability.'[10] He stated that '[t]here are no other elements which might preclude a duty of care arising where the kind of damage caused by a defendant's conduct is ... reasonably foreseeable'.[11] There can be little doubt that each of the factors mentioned by Deane J *can be* of assistance in determining whether foreseeability of harm has been established in any particular case. So why treat proximity factors separately? It might be said that the question of foreseeability is a pure question of fact, whereas proximity is a limiting factor involving value judgments and policy. However, Brennan J undoubtedly incorporates the latter considerations into his discussion of foreseeability, as have judges before him.[12] The question is not purely factual. The criticism must then be reduced to the proposition that proximity suffers from an *especial* lack of precision or concreteness. As such, it leaves to the judge an undesirable discretion.[13]

The lack of concreteness in the notion of proximity was the foundation for adverse comment about its utility by a majority of justices in the recent decision of the High Court of Australia in *Hill v Van Erp*.[14] The question in that case was whether the intended beneficiary of a will could claim damages against a solicitor when the will was declared invalid due to the carelessness of the solicitor. Dawson, Toohey, McHugh and Gummow JJ each expressed the opinion that 'proximity' was of limited use in answering the question of whether the defendant owed a duty of care to the plaintiff. Dawson J stated that proximity 'expresses the result of a process of reasoning rather than the process itself, but remains a useful term because it signifies that the process of reasoning must be undertaken'.[15] Gummow J perhaps best expressed the views of the majority, stating that proximity 'may provide a broad conceptual "umbrella" beneath which the concerns particular to discrete categories of case can be discussed'.[16] The vexing issue is: what should be considered in determining whether proximity is satisfied? Dawson J noted that 'the features of a relationship which gives rise to a duty of care do not always answer the description of nearness or closeness'.[17] These were the elements identified as relevant to the analysis of nervous shock cases by Deane J in *Jaensch v Coffey*.[18] Whether they are of utility in such cases will be considered shortly. In *Hill v Van Erp* itself, shared expectations and the notion of

[10] (1984) 155 CLR 549, 577 See also *McLoughlin v O'Brian* [1983] 1 AC 410, 431 (Lord Scarman).

[11] *Jaensch v Coffey* (1984) 155 CLR 549, 577.

[12] See generally Peter Heffey, 'The Negligent Infliction of Nervous Shock in Road and Industrial Accidents — Part I' (1974) 48 *Australian Law Journal* 196, 199.

[13] *San Sebastian Pty Ltd v Minister Administering the Environmental Planning and Assessment Act 1979* (1986) 162 CLR 340, 368. See also Justice Michael McHugh, 'Neighbourhood, Proximity and Reliance' in Paul Finn (ed), *Essays on Torts* (1989) 36; Des Butler, 'Proximity as a Determinant of Duty: The Nervous Shock Litmus Test' (1995) 21 *Monash University Law Review* 159.

[14] (1997) 142 ALR 687.

[15] Ibid 700.

[16] Ibid 747.

[17] Ibid 699.

[18] (1984) 155 CLR 549, 584

general reliance were seen as pivotal in the decision that a duty of care was owed by the defendant solicitor to the plaintiff.[19]

The foregoing underlines the proposition that there remains doubt as to what the necessary elements of negligence are and how they function and interact.[20] Further problems arise in the *application* of the rules. How, for instance, does one determine whether a defendant has breached a duty of care that he or she owes to another? In *Wyong Shire Council v Shirt*,[21] Mason J indicated that the question, to be determined objectively, involves a consideration of 'the magnitude of risk [of injury which the defendant's conduct involves] and the degree of probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities the defendant may have'.[22] The courts have often found it difficult to determine whether there was a breach of the duty to avoid causing psychiatric injury. There exists a fine line between preserving freedom of action, on the one hand, and ensuring that persons are not exposed to 'unreasonable' risks on the other.

Balkin and Davis point out that it is in fact problematic to state that the test for breach is purely objective.[23] The actions of a reasonable person must be judged in the circumstances occupied by the defendant at the time of the accident. Thus, 'the boundary between the external facts and the qualities of the actor is ill defined.'[24] In so far as a failure to live up to standards *is* objectively determined, there is the possibility that injustice will arise. This problem is most acute in circumstances of an accident in which a momentary lapse has given rise to large claims for damages. The justification for fixing the defendant with the loss which has occurred is not necessarily a straightforward exercise.

Given the difficulties encountered in the application of negligence principles, is it altogether surprising that the courts have proceeded with considerable caution in determining psychiatric injury (or 'nervous shock') cases?[25] The courts have formulated, applied, abandoned and reformulated many rules of recovery since *Dulieu v White & Sons*.[26] The present shape of those rules might appear, for that

19 See also Jane Swanton and Barbara McDonald, 'The Reach of the Tort of Negligence' (1997) 71 *Australian Law Journal* 822, 826.

20 See also David Gardiner, '*Jaensch v Coffey*: Foresight, Proximity and Policy in the Duty of Care for Nervous Shock' (1985) 1 *Queensland Institute of Technology Law Journal* 69, 72; McHugh, above n 13, 6–8.

21 (1980) 146 CLR 40.

22 Ibid 47–8.

23 Balkin and Davis, above n 1, 266-7

24 Ibid.

25 What follows is not intended to be an exhaustive historical review. There exists a considerable body of literature tracing the evolution of the 'law of nervous shock' See especially Law Commission (UK), above n 9; Nicholas Mullany and Peter Handford, *Tort Liability for Psychiatric Damage: The Law of 'Nervous Shock'* (1993); Michael Napier and Kay Wheat, *Recovering Damages for Psychiatric Injury* (1995). Refer also to the general textbooks on torts. Note, in particular, that I do not discuss the following legislative provisions: *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 4, *Law Reform (Miscellaneous Provisions) Act 1955* (ACT) s 24, and *Law Reform (Miscellaneous Provisions) Ordinance 1956* (NT) s 25. See also Des Butler, 'Nervous Shock at Common Law and Third Party Communications: Are Australian Nervous Shock Statutes at Risk of Being Outflanked?' (1996) 4 *Torts Law Journal* 120, 124–5.

26 [1901] 2 KB 669.

reason, to be somewhat arbitrary. In *Alcock v Chief Constable of South Yorkshire Police*,[27] Lord Oliver admitted that the rules *are* artificial and that the result, in a particular case, may well depend 'more upon the court's perception of what is the reasonable area for the imposition of liability than upon any logical process of analogical deduction.'[28] Despite this admission, the commentators have had little difficulty in criticising the courts or in devising their own radical plans for the reformation of the law. Mullany and Handford, for instance, have called for a complete liberalisation of the rules. In their view, 'many of the detailed limitations imposed in psychiatric damage cases should be rejected, and foreseeability should be the key issue, limited only by sound policy notions *where appropriate*.'[29] At the other end of the spectrum, Stapleton has argued for the complete abolition of liability for negligently inflicted psychiatric ills, marking the 'disrepute' into which current rules bring the law.[30] In relation to the requirement that secondary victims prove a tie of love and affection with the primary victim, she writes:

> In future cases will it not be a grotesque sight to see relatives scrabbling to prove their especial love for the deceased in order to win money damages and for the defendant to have to attack that argument? Moreover, most other feasible control devices which might be used instead of 'ties of love' would still turn on the status of the plaintiff and so produce the same unseemly arguments over meaningless boundaries.[31]

Most commentators favour the view adopted by Mullany and Handford. However, one can often detect in them a degree of dogmatism. They seem concerned merely with the availability of compensation rather than with the intricacies of *attributing liability to particular conduct*. For example, concern is often raised about the requirement that the defendant must have foreseen injury caused *by way of a shock* to the plaintiff. The commentators dispute the need for this in the face of uncontested evidence that a psychiatric illness has been suffered by the plaintiff. It is submitted here that the judges are right in saying that the thing must stop somewhere.[32] Liability should not be stretched beyond reasonable limits, in particular beyond the limits within which it can be justified in corrective justice terms. It is the aim of this article to highlight the essential features of the corrective justice relation by reference to the writings of two prominent torts philosophers, Ernest Weinrib and Stephen Perry. By so doing, the necessarily restrictive nature of the law of nervous shock can be better understood.

[27] [1992] 1 AC 310.

[28] Ibid 411.

[29] Mullany and Handford, above n 25, 84 (emphasis added).

[30] Jane Stapleton, 'In Restraint of Tort' in Peter Birks (ed), *The Frontiers of Liability* (1994) vol 2, 83, 95

[31] Ibid.

[32] *Bourhill v Young* [1943] AC 92, 110, where Lord Wright said: 'The lawyer likes to draw fixed and definite lines and is apt to ask where the thing is to stop. I should reply it should stop where in the particular case the good sense of the jury or the judge decides'.

II THE RULES

The discussion now turns to a more systematic treatment of the rules governing the imposition of liability for psychiatric ills caused by negligent conduct. In the most general of terms, the plaintiff must prove the following in order to succeed: (i) a duty of care owed to him or her, established by the presence of (a) reasonable foreseeability of a real risk that psychiatric injury to the plaintiff, or to a member of the class to which he or she belongs, might be sustained and (b) proximity in the relationship between the parties; (ii) a breach of the duty of care through failure to reach the standard of the reasonable person faced with the creation of a similar risk; and (iii) causation of damage which is not too remote.[33] Discussion in this section is concerned mainly with the establishment of the duty of care.

A *The Range of Plaintiffs*

It should first be noted that a distinction has been made in the cases between so-called 'primary' and 'secondary' victims. This distinction was first alluded to in speeches in *Bourhill v Young*.[34] Lord Wright, for instance, noted that some persons are the direct victims of accidents which cause shock, in that they are immediately involved themselves, whilst others are only affected in a derivative way, that is through the circumstance of some connection with a victim in the first category.[35] Lord Wright emphasised that a secondary victim 'cannot build on a wrong to someone else'.[36] Again, in *Jaensch v Coffey*, Brennan J stated that 'the *duty* owed to one is not to be regarded as secondary to or derived from the *duty* owed to the other'.[37] Whether a primary or secondary victim, the plaintiff must prove that the defendant owed a duty *to him or her*. With respect to primary victims, there is usually little difficulty. Mental harm most often will be the result of an accident which has left the plaintiff physically injured or has involved a physical contact. That a psychiatric illness might be the result is usually foreseeable. Proximity factors will also be easily satisfied, so that a duty is established. Generally, however, it is much more difficult for *secondary* victims to establish that a duty was owed to them by the defendant. The courts have been very careful to ensure that claims of liability do not explode with an avalanche of 'victims' tenuously affected by some 'shocking' event or other.

The duty question has been recently reformulated in English law. In *Page v* Smith,[38] a bare majority of the House of Lords decided that, where a primary victim is concerned, there is no requirement that the defendant should have foreseen the possibility of a psychiatric illness arising. It was held to be

[33] *Jaensch v Coffey* (1984) 155 CLR 549, 586 (Deane J).
[34] [1943] AC 92.
[35] Ibid 108. See also *Alcock* [1992] 1 AC 310, 407 (Lord Oliver).
[36] *Bourhill v Young* [1943] AC 92, 108.
[37] (1984) 155 CLR 549, 560 (emphasis added).
[38] [1996] 1 AC 155. See generally William Rogers, '*Page v Smith*: Shock, Foresight and Vulnerable Personalities' (1995) 3 *Torts Law Journal* 149.

enough that the defendant could have, in the circumstances, foreseen the possibility of *some* personal — that is, physical *or* psychiatric — harm arising from his or her conduct. According to Lord Lloyd:

> In an age when medical knowledge is expanding fast, and psychiatric knowledge with it, it would not be sensible to commit the law to a distinction between physical and psychiatric injury, which may already seem somewhat artificial, and may soon be altogether outmoded. Nothing will be gained by treating them as different 'kinds' of personal injury, so as to require the application of different tests in law.[39]

The distinction between the types of injury that are foreseeable has been retained in relation to secondary victims. In order to recover for psychiatric ills, plaintiffs must prove that that *kind* of injury was foreseeable by the defendant, 'for the very reason that the secondary victim is almost always outside the area of physical impact, and therefore outside the range of foreseeable physical injury'.[40]

There were inherent difficulties in finding liability on the facts in *Page v Smith*, yet a majority of the House of Lords managed to overcome them. The defendant failed to give way when making a turn on the highway, so that he collided with the plaintiff's car. Although the plaintiff's car was damaged, neither he nor his wife were hurt in the incident. The collision had been minor. But the plaintiff previously suffered from a fatigue syndrome, known as myalgic encephalomyelitis, and this recrudesced following the accident. Such an occurrence was not foreseeable. Yet foreseeability of physical injury was held by the majority of their Lordships to be enough. Their Lordships in the minority, who were only concerned with the foreseeability of a *psychiatric illness*, would have dismissed an appeal from a finding of no liability. Lord Jauncey described the case as being 'far too removed from those cases in which foreseeability of nervous shock has been established'.[41]

Another holding made by the House of Lords in *Page v Smith* was that none of the 'control mechanisms' created by the courts need be satisfied in relation to primary victims. The control mechanisms referred to by Lord Lloyd are the previously mentioned proximity factors and the requirement that the plaintiff be a person of ordinary fortitude. His Lordship indicated that they were not required for the reason that, being dependent upon the foreseeability of personal injury, there could be no liability to all the world. 'Proximity of relationship cannot arise, and proximity in time and space goes without saying'.[42] Much will now depend upon the categorisation of plaintiffs and this itself might be a very artificial line-drawing exercise. It is not necessarily easy to separate the primary from the secondary victims. Trindade asks: 'What of a passenger train which is derailed by the negligence of the engine driver? Is it only the passengers sitting in

[39] *Page v Smith* [1996] 1 AC 155, 188.

[40] Ibid 187.

[41] Ibid 180. Cf *Hoffmueller v Commonwealth* (1981) 54 FLR 48, a case with similar facts and result. The result was reached, however, upon the application of the ordinary test — whether it was foreseeable that 'mental disturbance of some kind' might be caused. (1981) 54 FLR 48, 53.

[42] *Page v Smith* [1996] 1 AC 155, 189.

the derailed carriage or all the passengers on the train who are within the range of foreseeable physical injury?'[43] What factors will determine the category into which he or she falls? Surely, the answer is proximity factors.[44]

As adumbrated, the susceptibility of the plaintiff to psychiatric illness is another factor determining who can sue. The rule in Australia is this: a defendant need only keep in mind persons of ordinary fortitude when determining the risks to others arising from his or her actions. Lord Porter stated in *Bourhill v Young* that the 'driver of a car or vehicle, even though careless, is entitled to assume that the ordinary frequenter of the streets has sufficient fortitude to endure such incidents as may from time to time be expected to occur in them'.[45] However, should persons of ordinary fortitude be foreseeably injured by any failure to take care, it is, then, no objection that the particular plaintiff is of extraordinary susceptibility to psychiatric illness.[46] What is more, the defendant will be held to a higher standard of care where he or she *knows* of the plaintiff's extraordinary susceptibility.[47] In the usual case, the fortitude requirement will rule out recovery for secondary victims unless they have particularly close ties with a primary victim[48] or, it appears, with a particularly significant item of destroyed property.[49]

In England, the issue of plaintiff susceptibility to psychiatric ills now arises only in respect of secondary victims.[50]

43 Francis Trindade, 'Nervous Shock and Negligent Conduct' (1996) 112 *Law Quarterly Review* 22, 24 See also C Hopkins, 'A New Twist to Nervous Shock' (1995) 54 *Cambridge Law Journal* 491.

44 For further questions, see Peter Handford, 'A New Chapter in the Foresight Saga: Psychiatric Damage in the House of Lords' (1996) 4 *Tort Law Review* 5, 8; Vivien Pickford and Louise Dunford, 'Nervous Shock Under English Law: Neither Satisfactory nor Logically Defensible?' (1996) 4 *Journal of Law and Medicine* 176, 178–9.

45 [1943] AC 92, 117.

46 Ibid 110; *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383, 407, *Jaensch v Coffey* (1984) 155 CLR 549, 568. Cf *Benson v Lee* [1972] VR 879, 881 where Lush J stated. 'There may, however, be cases in which an unusual susceptibility is such as to take the consequences suffered by the plaintiff outside the boundaries of reasonable foresight'.

47 *Jaensch v Coffey* (1984) 155 CLR 549, 568. See comments in *Chester v Council of the Municipality of Waverley* (1939) 62 CLR 1, 27 (Evatt J); *Chadwick v British Railways Board* [1967] 1 WLR 912, 922 (Waller J); *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383, 405 (Windeyer J).

48 See, eg, *Alcock* [1992] 1 AC 310; *McFarlane v EE Caledonia Ltd* [1994] 2 All ER 1, 14. Cf Des Butler, 'Nervous Shock from Witnessing Catastrophes: Medical Enlightenment or Legal Conservatism?' (1995) 15 *Queensland Lawyer* 201.

49 Psychiatric research suggests, in fact, that 'ordinary' persons very rarely suffer psychiatric illnesses. Predisposition or susceptibility is a major determinant in the causation of such illnesses. See, eg, Harold Kaplan, Benjamin Sadock and Jack Grebb, *Kaplan and Sadock's Synopsis of Psychiatry* (7th ed, 1994) 607–8. The authors state that '[e]ven when faced with overwhelming trauma, the majority of people do not experience post-traumatic stress disorder symptoms.' They go on to outline the main predispositional traits as: '(1) the presence of childhood trauma; (2) borderline, paranoid, dependent or antisocial personality disorder traits; (3) an inadequate support system; (4) genetic-constitutional vulnerability to psychiatric illness; (5) recent stressful life changes; (6) perception of an external locus of control, rather than an internal one; and (7) recent excessive alcohol intake.'

50 *Page v Smith* [1996] 1 AC 155, 189 (Lord Lloyd).

B *Foreseeability of Injury by Shock*

In relation to all plaintiffs in Australia, but only to secondary victims in England, it is a requirement that the defendant should have foreseen the possibility of a psychiatric illness arising by way of shock from his or her conduct. This requirement was stressed by Denning LJ in *King v Phillips*[51] and approved by the Privy Council in *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co*[52] and by the High Court in *Mount Isa Mines Ltd v Pusey*.[53] It was the subject of extended discussion by Brennan J in *Jaensch v Coffey*, where his Honour made clear that '[p]sychiatric illness caused in other ways attracts no damages'.[54]

In Brennan J's view, the test of foreseeability comprises two separate limbs: it must be foreseeable that the defendant's conduct (i) would cause a shock to the person of ordinary fortitude and (ii) that such shock would result in a psychiatric illness. His Honour stated that, in order to satisfy this test, it would not be necessary that 'the precise events leading to the administration of the shock should be foreseeable.'[55] It is sufficient that the possibility of a shock arising is foreseeable.[56] The test is not a stringent one:

> The defendant will be liable for any type of damage which is reasonably foreseeable as liable to happen even in the most unusual case, unless the risk is so small that a reasonable man would in the whole circumstances feel justified in neglecting it.[57]

However, this test does not negate the importance of policy considerations. Brennan J *has* made a policy decision in defining the subject of the test, that is 'shock', as meaning some 'sudden sensory perception ... 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.'[58] Mere *knowledge* of a distressing event is not considered by him to be sufficient,[59] nor is it sufficient that the plaintiff might be 'worn down by caring for a tortiously injured' relative.[60]

[51] [1953] 1 QB 429.

[52] [1961] AC 388, 426 ('*The Wagon Mound*').

[53] (1970) 125 CLR 383, 402. See also *Storm v Geeves* [1965] Tas SR 252, 264 (Burbury CJ); *Benson v Lee* [1972] VR 879 (Lush J)

[54] (1984) 155 CLR 549, 565. Cf the perfectly reasonable result in *Walker v Northumberland County Council* [1995] 1 All ER 737, a case in which a council was held liable for a permanent mental breakdown resulting from high-stress work The council had been aware of an earlier breakdown brought about for the same reasons. See further *Dooley v Cammell Laird and Co* [1951] Lloyd's Rep 271; *Frost v Chief Constable of South Yorkshire Police and Others* [1997] 3 WLR 1194; Lesley Dolding and Richard Mullender, 'Law, Labour and Mental Harm' (1996) 59 *Modern Law Review* 296.

[55] *Jaensch v Coffey* (1984) 155 CLR 549, 563

[56] See also *Chapman v Hearse* (1961) 106 CLR 112, 120–1; *Storm v Geeves* [1965] Tas SR 252, 265; *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383, 402 (Windeyer J), 413–14 (Walsh J).

[57] *Jaensch v Coffey* (1984) 155 CLR 549, 562–3, quoting from *Czarnikow v Koufos* [1969] 1 AC 350, 385–6

[58] *Jaensch v Coffey* (1984) 155 CLR 549, 567.

[59] Ibid.

[60] Ibid 565.

Mullany alerts us to the fact that the results of the foreseeability inquiry might be different according to whether a prospective or an ex post facto analysis is adopted. The difference is between asking whether psychiatric injury was foreseeable as the result of *an* accident, as opposed to this particular accident.[61] According to the current approach, the issue is to be determined by the judge 'relying on his [or her] own opinion of the operation of cause and effect in psychiatric medicine, as fairly representative of that of the educated layman', viewed ex post facto or after the fact.[62] Mullany believes, however, that the ex post facto perspective is open to misuse, so that an unfair burden is placed upon plaintiffs. He argues that *all* plaintiffs should be required to satisfy foresight requirements on the basis of the former test in order to avoid any unfairness in employment of the latter test. 'Tortfeasors' foresight is not their foresight in hindsight.'[63] In this regard, it is interesting to note that in *Page v Smith*,[64] the House of Lords overruled earlier authority applicable to primary victims. Lord Lloyd commented that the introduction of hindsight 'into the trial of an ordinary running down action would do the law no service'.[65] All that is now required under English law is foresight of the possibility of personal injury. This is to be determined *prospectively*.[66]

C *Event Proximity*

The murkiest area of the law of negligence must surely be that concerned with the determination of proximity. As discussed, proximity factors have been utilised as 'a continuing general limitation or control of the test of reasonable foreseeability as the determinant of a duty of care.'[67] Contrary to the decision of the House of Lords in *Page v Smith*, it is submitted that the notion of proximity has a proper function in determining a duty of care in relation to both primary *and* secondary victims of negligence. It continues to be employed in all jurisdictions to assess the claims of secondary victims. As far as primary victims are concerned, proximity must inevitably be of importance in determining whether or not recovery should be permitted in cases where a plaintiff is merely put in *fear* for his or her own safety. How else is a court to decide whether a duty of care was owed in circumstances where no physical contact took place? Notions of reasonable foreseeability remain inadequate for this task.

In *Jaensch v Coffey*, Deane J concurred with the speech of Lord Wilberforce in *McLoughlin v O'Brian*[68] in singling out closeness of time and space as important

61 Nicholas Mullany, 'Psychiatric Damage in the House of Lords — Fourth Time Unlucky *Page v Smith*' (1995) 3 *Journal of Law and Medicine* 112, 116.
62 *McLoughlin v O'Brian* [1983] AC 410, 432.
63 Mullany, above n 61, 116.
64 [1996] 1 AC 155.
65 Ibid 189.
66 Ibid.
67 *Jaensch v Coffey* (1984) 155 CLR 549, 584.
68 [1983] AC 410, 422.

elements in establishing proximity.[69] More specifically, such elements can be said to be relevant to 'event' proximity (although Deane J preferred to discuss them in terms of 'causal' proximity).[70] Their importance seems axiomatic in so far as it is 'the fact and consequence of the defendant's negligence that must be proved to have caused' the plaintiff's psychiatric illness.[71] However, the concepts of time and space are infinite. Arbitrary lines of demarcation often need to be drawn with respect to them. This exercise is complicated by the fact that: (i) the different proximity limbs can have different weightings in different cases;[72] and (ii) there is a degree of overlap with the determination of causation itself, in so far as causation is a question of common sense and experience.[73]

Brennan J's definition of what constitutes a 'shock' indicates a concern with time and space factors in determining whether or not psychiatric illness is compensable.[74] His Honour drew a distinction between, on the one hand, an event which takes the plaintiff by surprise and which somehow embroils him or her immediately in the misfortune which results and, on the other, learning of such an event in circumstances of a lesser degree of involvement, most likely after the fact. The suggestion is that it is more plausible that persons will find difficulty in coping with, and will suffer injury as a result of, being embroiled themselves in events — rather than in situations where they were removed from those events. For example, it is more plausible that injury will follow direct perception of an accident rather than later visits at a hospital.[75]

Deane J had little difficulty in accepting that event proximity can subsist where the plaintiff 'suffered psychiatric injury as a result of what he or she saw or heard in the [a]ftermath of [an] accident'.[76] He defined the 'aftermath' as encompassing

> events at the scene after [an accident], including the extraction and treatment of the injured. In a modern society, the aftermath also extends to the ambulance taking an injured person to hospital for treatment and to the hospital itself during the period of immediate post-accident treatment.[77]

However, Deane J differed from Brennan J in his emphasis upon the shock arising through *understanding* of 'the true impact of the facts of the accident itself'.[78] The potential impact of a shocking event upon those physically present is obvious, but that does not exclude the possibility of legally compensable shock arising in less dramatic circumstances. His Honour stated that '[i]t is conceivable

69 (1984) 155 CLR 549, 606–7.
70 Ibid.
71 *McLoughlin v O'Brian* [1983] AC 410, 422.
72 *Jaensch v Coffey* (1984) 155 CLR 549, 585; *Reeve v Brisbane City Council* [1995] 2 Qd R 661, 667. See also Bernadette Lynch, 'A Victory for Pragmatism? Nervous Shock Reconsidered' (1992) 108 *Law Quarterly Review* 367, 368–9.
73 *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506; *Bennett v Minister of Community Welfare* (1992) 176 CLR 408.
74 *Jaensch v Coffey* (1984) 155 CLR 549, 567
75 Ibid 570.
76 Ibid 606.
77 Ibid 607–8.
78 Ibid 608.

that, if left to develop by analogy and logical necessity on a case by case basis, the common law in Australia may eventually change to the extent that it comes to recognize liability' in circumstances of subsequent social contact.[79] Recent state court decisions have shown a preference for this approach and a movement away from requiring presence at the scene of an accident or its aftermath.[80] As will become apparent, such a shift cannot but undermine the cogency of the rules in this area.

An important comment upon the function of the proximity requirement appears in Lord Oliver's speech in *Alcock*.[81] His Lordship acknowledged the fact that 'grief' — or rather, psychiatric illness — might result from hearing bad news.[82] But bad news is something to be expected at times. His Lordship indicated that not every unfortunate occurrence can be attributed to the fault of others who are then to be made responsible for all the consequences. There is no pressing policy need to extend the reach of the law to such lengths.[83] Only those plaintiffs who stand in some legally recognised relation of proximity to the defendant will succeed. This necessary relation 'cannot be said to exist where the elements of immediacy, closeness of time and space, and direct visual or aural perception are absent.'[84]

Perhaps it was Lord Oliver's speech that assisted Vines in coming to the conclusion that the concept of proximity is multi-layered and 'needs to be seen in the context of the attribution of social responsibility.'[85] In her view, '[p]hysical proximity is not definitive of the social responsibility in an accident, but it may lead us to an understanding of it.'[86] This is, perhaps, the best explanation of how the proximity requirement actually influences decision-making. It is rooted in notions of moral attribution of responsibility and therefore fits neatly into the moral theories of tort which will shortly be examined. For now though, it is apt to note that, in *Jaensch v Coffey*, Deane J echoed the views expressed in previous decisions that the 'general underlying notion of liability in negligence is "a general public sentiment of moral wrongdoing for which the offender must pay"'.[87]

Some of the 'milestones' which have defined the boundaries of liability by reference to proximity in time and space are now examined.[88] The first case of

[79] Ibid 602.

[80] *Reeve v Brisbane City Council* [1995] 2 Qd R 661; *Coates v Government Insurance Office of New South Wales* (1995) 36 NSWLR 1, *Pham v Lawson* (1997) 68 SASR 124.

[81] [1992] 1 AC 310.

[82] Ibid 416.

[83] Ibid.

[84] Ibid 416–7. See also Harvey Teff, 'Liability for Psychiatric Illness after Hillsborough' (1992) 12 *Oxford Journal of Legal Studies* 440, 448.

[85] Prue Vines, 'Proximity as Principle or Category Nervous Shock in Australia and England' (1993) 16 *University of New South Wales Law Journal* 458, 467.

[86] Ibid.

[87] (1984) 155 CLR 549, 607. See also *Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstadt'* (1976) 136 CLR 529, 574–5 (Stephen J); McHugh, above n 13, 13.

[88] The relevant cases are those involving claims by secondary victims I omit a discussion of cases giving rise to difficulty of classification, including *Schneider v Eisovitch* [1960] 2 QB 430

note was a decision of the English Court of Appeal in *Hambrook v Stokes Bros.*[89] The plaintiff, pregnant, had walked her children part of the way to school and then turned back for home. Shortly afterwards she saw a driverless truck careering around a bend she had just passed and immediately thought of her children. The plaintiff headed towards the school and was informed of an injury to a child. As it turned out, her daughter had been struck by the truck and the plaintiff went immediately to the hospital. She suffered a miscarriage and died. Under the liberal guidance of Atkin LJ, recovery was permitted to her husband pursuant to provisions of the *Fatal Accidents Act 1846* (UK)[90] without real discussion of the proximity issues. In subsequent cases the courts became interested in measuring distances and time.

In *Storm v Geeves*,[91] a young girl was killed by the negligent driving of the defendant, while waiting for a school bus adjacent to her home. The child's brother and sister watched these events, which were immediately reported to their mother. The mother rushed out of her house to find her deceased daughter pinned under the truck. Burbury CJ stated that it was reasonably foreseeable that the negligence of the defendants 'would bring to the vicinity of the accident at or about the time it occurred a person placed in such circumstances in relation to the accident or its victims as to be likely to suffer injury by shock from witnessing the accident or its immediate consequences'.[92] In *Benson v Lee*,[93] the plaintiff mother was further removed from the accident in which her son was knocked down by a car and rendered unconscious on the road some 100 yards from the home in which she was situated. As in *Storm v Geeves*, another child of the plaintiff relayed news of the accident and the plaintiff rushed to the scene. Lush J held it to be sufficient that she perceived one of the 'events which go to make up the accident as an entire event', which included 'seeing the aftermath of the accident'.[94]

In *Mount Isa Mines Ltd v Pusey*,[95] the plaintiff was at work at an electricity generator when he heard a loud explosion caused by the negligence of fellow employees working on a switchboard. The employees were so severely burned that they both died within days of the plaintiff assisting them to an ambulance. The plaintiff suffered an acute schizophrenic reaction as a result of the experience. Windeyer J stated that recovery was, in this case, limited to circumstances

('*Schneider*'); *Andrews v Williams* [1967] VR 831, *Gannon v Gray* [1973] Qd R 411 — each of which involved some serious *physical* injury to the plaintiffs. One cannot help but agree with comments by Paull J in *Schneider* [1960] 2 QB 430, 442, that in such cases it is 'extremely difficult to divide up the consequences of the shock'.

89 [1925] 1 KB 141.

90 *Fatal Accidents Act 1846* (UK) 9 & 10 Vict, c 93.

91 [1965] Tas SR 252.

92 Ibid 264

93 [1972] VR 879.

94 Ibid 880.

95 (1970) 125 CLR 383.

in which an employee came across the scene of an accident which resulted in 'disastrous and pitiful consequences for another man.'[96] Furthermore:

> I do not question decisions that nervous shock resulting simply from hearing distressing news does not sound in damages in the same way as does nervous shock from witnessing distressing events. If the sole cause of the shock be what is told or read of some happening then ... unless there be an intention to cause nervous shock, no action lies against either the bearer of the bad tidings or the person who caused the event of which they tell.[97]

The 'aftermath' concept was extended in two fairly contemporaneous cases decided at the highest levels. In *McLoughlin v O'Brian*,[98] the plaintiff's family was involved in a road accident at a point two miles from their home, where the plaintiff herself was situated. The plaintiff was told of the accident an hour later by a neighbour and went to the hospital, where she saw family members with varying injuries which had not been fully attended to. Her daughter Kathleen, for example, had a fractured collar-bone and abrasions, was begrimed with dirt and oil and was crying. Lord Wilberforce described the scene as 'distressing in the extreme'.[99] The House of Lords accepted that there might be liability but stressed the need for immediacy of presence at the aftermath. The plaintiff was held to be proximate enough to the event to be allowed damages. It was of obvious importance in characterising the scene at the hospital as part of the aftermath that the plaintiff's family members had not yet been alleviated of their post-accident circumstances.

The facts in *Jaensch v Coffey*[100] were similar. The plaintiff's husband was a motorcyclist injured in a collision early one evening. The police informed the plaintiff of this event and escorted her to hospital that same evening. Her husband was in severe pain in the casualty section and was operated upon twice during the night. After going home early the next morning, the plaintiff was recalled to intensive care where her husband's condition had worsened. She saw her husband with 'all these tubes coming out of him'.[101] Recovery for a psychiatric illness was permitted on the principles discussed above. Brennan J stated that '[l]iability cannot rationally be made to depend upon a race between a spouse and an ambulance'.[102]

There followed a number of cases in which liability was denied due to a lack of event proximity. In *Anderson v Smith*,[103] the plaintiff had left her infant daughter

96 Ibid 407.

97 Ibid; *contra Barnes v Commonwealth* (1937) 37 SR (NSW) 511 (information that husband had been institutionalised in a mental asylum untrue); *Furniss v Fitchett* [1958] NZLR 396 (information that patient suffering from paranoia true, but certificate had not been headed with the words 'confidential' nor any other precautions taken). See explanation of the latter case by Harold Luntz and David Hambly, *Torts: Cases and Commentary* (4th ed, 1995) 496

98 [1983] AC 410.

99 Ibid 417.

100 (1984) 155 CLR 549.

101 Ibid 558

102 Ibid 578

103 (1990) 101 FLR 34.

in the care of the child's grandmother while she went out for some drinks. The grandmother left the back door of her home open and the infant was able to crawl out into the backyard where she fell into the pool. The infant was resuscitated but suffered severe brain damage. The plaintiff was informed of these events by the police and attended the hospital where she waited for a considerable time before being permitted to see her daughter. The plaintiff spent three months at the hospital, learning to take care of her daughter, who remained comatose. She was taught how to drain the infant's throat using a tube inserted through the mouth. Eventually the infant was released from hospital, only to die in her sleep about nine months after the accident. Nader J denied recovery for a psychiatric illness on the basis that the plaintiff was not affected by any sudden perception of a shocking event. The illness was, instead, the result of a 'prolonged contact with a complex set of stressful events'.[104]

Alcock[105] arose from the Hillsborough Stadium football disaster in which 95 people were killed due to overcrowding in parts of the stadium. Sixteen appellants to the House of Lords sought damages for psychiatric illness suffered as a result of the deaths of relatives or friends and all were denied recovery. Some of the appellants had been at the stadium during the tragic events, others saw live television broadcasts, while the remainder were informed of events by less direct means. Establishing event proximity proved an impossible hurdle for all. Their Lordships discussed the specifics of only a few cases. Brian Harrison and Robert Alcock were both at the ground as events unfolded, but removed from the Leppings Lane terrace where the carnage occurred. They saw scenes which were 'obviously distressing',[106] however their 'perception of the actual consequences of the disaster to those to whom they were related was ... gradual.'[107] So, even though Alcock identified his brother-in-law in a mortuary where the latter was in a 'bad condition', Lords Ackner and Jauncey emphasised that too much time (at least eight hours) had elapsed to satisfy proximity requirements.[108] Lord Ackner compared the case before him with that of *McLoughlin v O'Brian* and declared that Mrs McLoughlin's arrival at hospital 'within an hour or so' of the accident placed her at the margins of proximity.[109] Aftermath meant '*immediate* aftermath'.[110] In relation to those who viewed the events on television, Lord Keith noted that the scenes that had been telecast did not depict the suffering of recognisable individuals and that those scenes could not, therefore, be 'equiparated with the viewer being within "sight or hearing of the event or of its immediate aftermath"' nor could the scenes be regarded as likely to give rise to

104 Ibid 50. See also the similar cases of *Spence v Percy* [1992] 2 Qd R 299; *Taylorson v Shieldness Produce Ltd* [1994] PIQR 329

105 [1992] 1 AC 310.

106 Ibid 417.

107 Ibid.

108 Ibid 405 (Lord Ackner), 424 (Lord Jauncey).

109 Ibid 405.

110 Ibid.

shock.[111] Lords Ackner and Oliver were of the same view.[112] In the words of Lord Oliver:

> These images provided no doubt the matrix for imagined consequences giving rise to grave concern and worry, followed by a dawning consciousness over an extended period that the imagined consequence had occurred, finally confirmed by news of the death and, in some cases, subsequent visual identification of the victim.[113]

This was an elongated and somewhat retrospective process which did not attract the protection of the law due to reasons more concerned with policy than logic.[114]

Auld J's judgment in *Taylor v Somerset Health Authority*[115] offers further elucidation of the *Alcock* requirements. His Lordship noted the strictness of the speeches in *Alcock* and interpreted them as indicating that what is required is some 'external, traumatic event or its immediate aftermath causing shock.'[116] That is, the relevant events must in an obvious way operate externally upon the primary victim.[117] There could be no compensation for the wife of a man who died of a heart attack, which was the final consequence of a progressively deteriorating heart condition which the defendant failed to diagnose, in circumstances where she merely identified his body in a mortuary one hour and 20 minutes after the death. The circumstances of the death did not amount to any relevant 'event', so that there was no question of the visit to the mortuary falling within the concept of the aftermath. Even if it were so, the plaintiff's visit to the mortuary was not 'immediate' enough.

Recent Australian decisions have, as mentioned, downplayed the primacy of time and space in determining whether proximity exists. In *Reeve v Brisbane City Council*,[118] the plaintiff was the widow of a man run over and killed by a bus. She was told of the death one hour and 20 minutes later, but she neither visited the depot where the accident occurred nor did she see the body until a few days later at the funeral parlour. Nevertheless, she suffered a depressive illness which 'led to [a] psychiatric disturbance'.[119] While Lee J acknowledged that recovery would depend upon establishing proximity, his Honour paid scarce attention to the *limiting* function of that requirement. He asked the following rhetorical question:

> [O]n what rational basis can there be imposed a duty to take reasonable care to avoid a foreseeable risk of injury by means of nervous shock in respect of a

111 Ibid 398.
112 Ibid 405 (Lord Ackner), 417 (Lord Oliver)
113 Ibid 417.
114 Ibid.
115 [1993] 4 Med LR 34.
116 Ibid 37.
117 See, eg, Rosalind English, 'Nervous Shock: Before the Aftermath' (1993) 52 *Cambridge Law Journal* 204.
118 [1995] 2 Qd R 661.
119 Ibid 662

> person willing and able to attend the scene of an accident or its aftermath but not in respect of a person unwilling or by circumstances out of their control unable to attend?[120]

His Honour stated that the weight to be attached to any particular proximity factor might vary from case to case.[121] As such, he saw no reason why attendance at the accident or aftermath was required as a matter of law.[122] Proximity could be satisfied by the close relationship between the plaintiff and the victim 'notwithstanding the absence of any physical connection with or independent perception of the accident or its aftermath'.[123] Communication of distressing news would be enough.[124] Yet, it is submitted that it would be unsophisticated and, more importantly, potentially unjust to treat the fact of relationship to the primary victim as itself sufficient to establish proximity between the plaintiff and the defendant. As will become apparent, relationship is most relevant in so far as it establishes the causal responsibility of the defendant. That is, it offers an explanation of *the medium* through which shock to the plaintiff was caused.

The final case of interest is *Pham v Lawson*,[125] in which Bollen and Lander JJ expressed agreement with an opinion of Kirby P in *Coates v Government Insurance Office of New South Wales*,[126] that physical presence at an accident or its aftermath is not required of secondary victims. The emphasis in the judgments is upon the vagueness of the aftermath concept and on the compelling nature of the emotional ties of secondary victims, no matter how they learn of death or injury to a relative or loved one. According to Bollen and Lander JJ, '[t]here is no reason in logic to exclude those persons from claims for nervous shock'.[127] However, it is submitted that this is not the correct issue. The real issue is whether the *defendant* can justifiably be expected to compensate each and every person affected by his or her negligence. Like Lee J, their Honours would base liability upon a mere inquiry into causal responsibility. Yet it would appear to be inevitable that accidents will occur in this busy and crowded world. No amount of precaution-taking will curtail that inevitability. It is for this reason that factors must be identified indicating not only that the defendant is causally responsible but which, additionally, would attract moral censure. Such a factor is unlikely to subsist in the mere circumstance that others may foreseeably suffer a reaction to distressing news. It *is* found in the distressing nature of an accident which he or she foresaw and failed to avert. The emphasis in earlier cases, therefore, has rightly been upon the actions of the defendant rather than upon the reactions of plaintiffs in deciding what should be the extent of the defendant's liability. Subsidiary to this is the point that, if liability were to be based upon the mere

120 Ibid 671
121 Ibid 673
122 Ibid 675.
123 Ibid 674.
124 Ibid.
125 (1997) 68 SASR 124.
126 (1995) 36 NSWLR 1.
127 *Pham v Lawson* (1997) 68 SASR 124, 148.

receipt of distressing news, any physical or temporal requirement must be rendered completely unnecessary. This would open defendants up to a wide vista of potentially debilitating claims. The extent of their liability would depend on mere chance. Unlucky would be the defendant responsible for the death or injury of a victim with 10 siblings of a highly emotional nature scattered in far-flung regions of the world. He or she would have real cause for feeling a sense of injustice.

D *Causal Proximity*

The notion of causal proximity, as employed by Deane J in *Jaensch v Coffey*, is concerned with how closely related the defendant's conduct is with the plaintiff's mental harm.[128] It is necessarily a product of policy in that it limits the extent to which a duty of care is owed.[129] That duty will only arise where a primary victim is vulnerable to direct involvement in an accident or a secondary victim is vulnerable to shock arising from contact with an accident involving a person with whom he or she has a close relationship or ties of affection. Involvement in an accident or perception of a shocking event involving a loved one are the legally recognised causative links in the negligent infliction of mental harm. They ensure the causal veracity of claims. It appears as though damage to the plaintiff's property will also suffice.

It should be noted that there exists an overlap in the concepts of event and causal proximity. The existence of a shocking event is a feature relevant to both. In *Jaensch v Coffey*, Deane J indicated that he preferred an analysis in terms of causal proximity as being less 'mechanical' than that involved with measurement of time and distance.[130] Given that the overall exercise of determining whether a duty of care is owed is a question of degree and judgment, it would seem that the 'mechanical' nature of considerations of event proximity is of more assistance than is the notion of causal proximity. One could refer back to a never-ending series of causes responsible for the occurrence of a given event. The relevant causes must be identified by use of common sense and experience and this is, to a greater extent than measurement of time and distance, an arbitrary exercise. It is suggested, therefore, that English courts have been correct in emphasising the latter concepts.[131] Causal proximity is of limited, though real, assistance. In the remainder of this section, factors which courts have employed in order to ensure the genuineness of claims, other than the nature of the event, are examined.

1 *Relationship with the Primary Victim*

Some might question an analysis of relationship factors under the sub-heading 'causal proximity'. Murphy, for instance, is adamant that the question of relationship 'relates to foreseeability and not to proximity: the closer the relationship

[128] (1984) 155 CLR 549, 607. See also *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 497–8.

[129] See especially Butler, 'Proximity as a Determinant of Duty', above n 13, 170–1

[130] (1984) 155 CLR 549, 606–7.

[131] See, eg, *McLoughlin v O'Brian* [1983] AC 410; *Alcock* [1992] 1 AC 310

between the plaintiff and the primary victim, the more foreseeable it is that they will suffer an adverse psychological reaction.'[132] But, it is apparent that some plaintiffs who suffer foreseeable harm due to a relationship with the primary victim *do not* recover. Only relationships of a certain quality qualify (and there are a number of presumptions made as to which are likely to qualify). The courts therefore use relationship rules in order to *limit* recovery on policy grounds.[133]

The law has, until recently, kept a tight rein on the categories of persons who were said to be in 'relational proximity'.[134] Only formal relationships were recognised and these tended to be limited to the relationships of parent to child and spouse to spouse. Although judges tried to rationalise this on the basis that it was only in such cases that shock and consequent psychiatric illness were foreseeable, the injustice of this narrow approach has been all too obvious. In *Mount Isa Mines Ltd v Pusey*, Windeyer J noted that it is apparent 'that persons other than relatives of persons hurt may genuinely suffer nervous shock ... on witnessing another's suffering or danger in an unexpected accident.'[135] His Honour expressed the sentiment that the time had come when courts should move away from treating close relatives as an 'exceptional class' in amelioration of 'the general denial that damages could be had for nervous shock.'[136]

A momentous change in the English judicial attitude can be seen in the decision of the House of Lords in *Alcock*.[137] Their Lordships were unanimous in rejecting a categorical approach to relational proximity and, instead, emphasised the need for a factual relationship of love and affection. The possibility was mooted that such love and affection could be found outside familial bonds. Lord Keith stated that the 'kinds of relationshp [*sic*] 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.'[138] In a similar vein, Lord Oliver commented that it is the fact of an affectionate relationship which is the 'source of the shock and distress in all these cases'.[139] The proper approach, then, is to consider each case on its own facts in order to determine whether the plaintiff and the primary victim were in a close relationship of love and affection.[140] No principle exists necessarily excluding distant relatives or close friends from satisfying the requirement. It seems that the comparison which should be made is with the strength of the bonds usually found to exist between spouses or

132 John Murphy, 'Negligently Inflicted Psychiatric Harm: A Re-appraisal' (1995) 15 *Legal Studies* 415, 425–6.

133 See, eg, *Jaensch v Coffey* (1984) 155 CLR 549, 555 (Gibbs CJ); *Rhodes v Canadian National Railway* (1991) 75 DLR (4th) 248, 295 (Taylor and Woods JJA); Francis Trindade, 'The Principles Governing the Recovery of Damages for Negligently Caused Nervous Shock' (1986) 45 *Cambridge Law Journal* 476, 485–9; Mullany and Handford, above n 25, 106–7, Teff, above n 84, 445.

134 See, eg, Mullany and Handford, above n 25, 106.

135 (1970) 125 CLR 383, 404–5

136 Ibid 404.

137 [1992] 1 AC 310.

138 Ibid 397.

139 Ibid 416.

140 Ibid 422 (Lord Jauncey).

between parents and their children.[141] Persons standing in those relationships can be presumed as satisfying proximity criteria, although evidence may be led to rebut this.[142] Lord Keith might even have applied the presumption in the case of fiancés, whose ties of love and affection 'may be stronger ... than [those in the case] of persons who have been married to each other for many years.'[143]

A lingering question apparently remains in respect of mere bystanders, that is persons with no, or no substantial, relation to the primary victim or victims. In *Jaensch v Coffey*, Deane J did not categorically rule out recovery in respect of such persons, although he indicated that the circumstances in which they succeeded would be 'unusual'.[144] In *Alcock*, Lord Ackner had some further comments about this issue, which seem to be at odds with the requirement that there be a relationship of love and affection between the plaintiff and the primary victim:

> [W]hile it may be very difficult to envisage a case of a stranger, who is not actively and foreseeably involved in a disaster or its aftermath, other than in the role of a rescuer, suffering shock-induced psychiatric injury by the mere observation of apprehended or actual injury of a third person in circumstances that could be considered reasonably foreseeable, I see no reason in principle why he should not, if in the circumstances, a reasonably strong-nerved person would have been so shocked.[145]

His Lordship gave the example of a petrol tanker crashing into a school and bursting into flames as one in respect of which a reasonably strong-nerved person may suffer psychiatric illness.[146] With respect, it might have been wiser if his Lordship had refrained from such speculation. The real question is Lord Oliver's: how far would policy be advanced by extending the bounds of liability to cover such a case? Would there be any moral justification in allowing a complete stranger an award in such a case, while relatives of children killed or injured could not recover? It is submitted that the Court of Appeal was correct when, as a matter of policy, it ruled out recovery for 'mere' bystanders (who could not, alternatively, be classed as rescuers) in *McFarlane v EE Caledonia Ltd.*[147]

2 *Fear for Others*

It is interesting to note that the courts have had little difficulty in accepting that shock might arise not only through actual, but also through the *fear* of, harm.[148]

[141] Ibid 403 (Lord Ackner), 422 (Lord Jauncey)

[142] Ibid 397–8 (Lord Keith), 403 (Lord Ackner). For a critique of this approach, see Teff, above n 84, 445–6.

[143] [1992] 1 AC 310, 397.

[144] (1984) 155 CLR 549, 610.

[145] [1992] 1 AC 310, 403. See also 416 (Lord Oliver)

[146] Ibid 403.

[147] [1994] 2 All ER 1. Cf David Oughton and John Lowry, 'Liability to Bystanders for Negligently Inflicted Psychiatric Harm' (1995) 46 *Northern Ireland Legal Quarterly* 18.

[148] See especially Napier and Wheat, above n 25, 87–90. In *McFarlane v EE Caledonia Ltd* [1994] 2 All ER 1, 10, Stuart-Smith LJ (Ralph-Gibson and McCowan LJJ agreeing) outlined three situations in which he believed that a person might become a 'participant' through fear: (1) where he or she is in actual danger created by the event, but escapes physical injury; (2) where

In *Dulieu v White & Sons*,[149] one of the earliest cases, the plaintiff recovered in circumstances where a pair-horse van came crashing into her public house, although there was no contact with her person. Kennedy J stated that there could be no barrier to recovery where 'the ill results of negligence which caused the fear are as measurable in damages as the same results would be if they arose from an actual impact'.[150] In that case, his Lordship limited recovery for fear to circumstances in which the plaintiff feared for his or her own safety.[151] This limitation was abandoned shortly thereafter in *Hambrook v Stokes Bros*,[152] in which a mother suffered such anxiety for the safety of her children when she saw a driverless truck career around a bend in the road, that she miscarried and eventually died. The English Court of Appeal allowed recovery on policy grounds, Bankes LJ stating that there was greater warrant for compensation in the case of a mother who feared for the safety of her children than for a mother who was concerned only about her own safety: 'Does the law say that the defendant ought reasonably to have anticipated the non-natural feeling of the timid mother, and not the natural feeling of the courageous mother?'[153] The result in that case was echoed in *Barnes v Commonwealth*.[154]

3 *Property Damage*

A small number of cases have touched upon the issue of recovery for a psychiatric illness negligently caused by damage to property. Although it is said that there is no property in a corpse,[155] a 1938 decision of the English Court of Appeal in *Owens v Liverpool Corporation*[156] provides the departure point in respect of these cases. It concerned a tram which was so negligently driven as to collide with a hearse which was then part of a funeral procession. The hearse was being followed by a carriage conveying a number of the deceased's relatives, namely his 'aged mother', an uncle, a cousin and the cousin's husband. They were witness to the coffin being overturned in the hearse by the force of the collision with the tram, so that 'as was alleged, there was a danger of its being ejected into the road.'[157] The plaintiffs alleged that they 'witnessed and were horrified by' the accident and suffered 'severe shock'.[158] The first point made by the court was that they entertained 'considerable doubt ... as to injury being

there is no actual danger to the person, but he or she believes reasonably that danger exists due to the sudden and unexpected nature of the event, and (3) where the person must enter a danger zone, such as in the case of a rescuer.

149 [1901] 2 KB 669.

150 Ibid 675.

151 Ibid, relying upon an earlier decision in *Smith v Johnson & Co* (Unreported, Queen's Bench Division, Wright and Bruce JJ, January 1897).

152 [1925] 1 KB 141.

153 Ibid 151.

154 (1937) 37 SR (NSW) 511 The difficulty with the case, though, is that it involved the mere negligent communication of distressing information.

155 *R v Sharpe* (1856) D & B 160 (Erle J); *Williams v Williams* (1882) 20 Ch D 659 (Kay J)

156 [1939] 1 KB 394 ('*Owens*').

157 Ibid 397 (Mackinnon LJ).

158 Ibid 397–8.

sustained by the plaintiffs'.[159] However, as a decision of the Court of Passage could only be reversed upon an error of law, their Lordships could not interfere with the finding of the judge below. In these circumstances, they were not prepared to rule out the possibility of 'shock' being sustained as the result of witnessing events such as those which occurred. It was therefore held:

> On principle we think that the right to recover damages for mental shock caused by the negligence of a defendant is not limited to cases in which apprehension as to human safety is involved. The principle must be that mental or nervous shock, if in fact caused by the defendant's negligent act, is just as really damage to the sufferer as a broken limb.[160]

The result of this case was doubted by three of their Lordships in *Bourhill v Young*.[161] Lord Thankerton could see no justification for the imposition of a duty of care between the parties[162] and Lords Wright and Porter agreed.[163] Certainly, *Owens* was decided at a time before the courts had imposed strict proximity limitations upon the establishment of a duty of care. Furthermore, it was decided at a time when the test of remoteness was that propounded in *Re Polemis and Furness, Withy & Co Ltd*,[164] which simply called attention to the direct consequences of a negligent act, no matter how unforeseeable.[165] For these reasons, there existed fewer means by which a court could introduce a policy restrictive of recovery. The case is therefore of little precedential value.

The next case of interest is *Attia v British Gas Plc*,[166] a 1987 decision of the English Court of Appeal. The defendants had been engaged by the plaintiff to install central heating and negligently started a fire which extensively damaged her home and its contents. The plaintiff witnessed these events and watched the blaze for four hours before it was extinguished. In consequence, she suffered a psychiatric illness and claimed damages. The Court of Appeal was not prepared to rule out recovery on the determination of a preliminary issue. Dillon and Woolf LJJ treated the question as one of remoteness. They indicated that a duty of care to avoid *any type of injury* to the plaintiff was established, once it was accepted that proximity arose because of the defendant's engagement to carry out work in the plaintiff's home.[167] It was not beyond foresight that the plaintiff might suffer a psychiatric illness due to a breach of the duty by way of damage to the home and its contents. Bingham LJ's judgment is somewhat confused, because at a number of points his Lordship seemed to indicate that he saw the case as involving the issue of a separate duty of care to avoid psychiatric

159 Ibid 398.
160 Ibid 400.
161 [1943] AC 92.
162 Ibid 100.
163 Ibid 110 (Lord Wright), 116 (Lord Porter).
164 [1921] 3 KB 560.
165 Danuta Mendelson, *The History of the Liability for Nervous Shock in Australia, 1886–1993: A Study in the Interfaces of Medicine and Law* (LLM Thesis, Monash University, 1994) 68
166 [1988] 1 QB 304 ('*Attia*').
167 Ibid 312 (Dillon LJ), 314–5 (Woolf LJ).

injury.[168] However, in the end it seems as though he decided the case on the grounds of remoteness of damage.[169] In this regard, all the judgments were in conformity with *Page v Smith*, in so far as it is assumed that the plaintiff was a primary victim. However, two points must be made. First, a real issue arises as to whether the plaintiff's property could be seen to be so intimately bound up in her personality as to characterise her as a primary victim. Secondly, it must be asked whether Australian courts would follow the analysis of the Court of Appeal and depart from insistence upon the need to establish a separate duty of care to avoid causing psychiatric ills. It is submitted that the plaintiff should have been treated as a secondary victim, so that the issues of causal proximity and policy were called into question.[170] Australian courts *would* insist upon the establishment of a separate duty of care, in conformity with the reasoning in *Jaensch v Coffey*.[171]

Regarding the policy dimensions of the case before him, Bingham LJ had the following to say in *Attia*:

> Suppose, for example, that a scholar's life's work of research or composition were destroyed before his eyes as a result of a defendant's careless conduct, causing the scholar to suffer reasonably foreseeable psychiatric damage. Or suppose that a householder returned home to find that his most cherished possessions had been destroyed through the carelessness of an intruder in starting a fire or leaving a tap running, causing reasonably foreseeable psychiatric damage to the owner. I do not think that a legal principle which forbade recovery in these circumstances could be supported.[172]

A number of reasons exist for disputing this. First, it has been noted that *Attia* seems to offer a higher degree of protection for the plaintiff whose property is accidentally damaged than to the plaintiff who witnesses injury to another. There is nothing to preclude damages for psychiatric injuries consequent upon the sudden destruction of a house,[173] yet there is no hope of recovery in circumstances where the plaintiff has been required to identify the remains of a close relative in a mortuary hours after a disaster.[174] Second, the question must be asked whether the law should encourage such emotional attachment to property as would result in psychiatric illness upon its damage. The value of negligently

168 Ibid 319–20.

169 Ibid 319.

170 Andrew Grubb, 'Psychiatric Injury and Mishandling of a Corpse' (1996) 4 *Medical Law Review* 216, 219.

171 (1984) 155 CLR 549. See also Jane Swanton, 'Issues in Tort Liability for Nervous Shock' (1992) 66 *Australian Law Journal* 495, 502–3.

172 [1988] 1 QB 304, 320.

173 *Campbelltown City Council v Mackay* (1988) 15 NSWLR 501.

174 *Hevican v Ruane* [1991] 3 All ER 65, a case finding for the plaintiff in such circumstances, is criticised in *Alcock* [1992] 1 AC 310, 398 (Lord Keith), 401 (Lord Ackner), 418 (Lord Oliver) In *Anderson v Smith* (1990) 101 FLR 34, 51 Nader J asked:

> But, is it reasonable for the law to vest the artificial (created by positive law) relationship of property to owner with a greater capacity for the infliction of compensable injury to the owner than the natural relationship of infant to mother has for the infliction of such injury to the mother?

See also Swanton, 'Issues in Tort Liability for Nervous Shock', above n 171, 503; Suzanne Woollard, 'Nervous Shock: The Story So Far' (1996) 30 *Law Teacher* 105, 109–10

damaged property can always be recovered and that *should* be as far as the bounds of liability extend. The Law Commission (UK) takes a different view and even contemplates recovery where the property damaged belongs to a third party. Where this is the case, the Commission 'expect[s]' that the usual criteria applicable to secondary victims would be employed and that a 'close relationship' be established between the plaintiff and the property.[175] These views reflect scarce consideration of the moral dimensions of liability for mental harm in negligence.[176]

E *Causation*

In his judgment in *March v E & MH Stramare Pty Ltd*,[177] Mason CJ emphasised that the issue of causation was no longer a black and white one, since the abandonment of contributory negligence as a complete defence and the adoption of apportionment legislation.[178]

> [T]he courts are no longer as constrained as they were to find a single cause for a consequence and to adopt the 'effective cause' formula. These days, courts readily recognise that there are concurrent and successive causes of damage on the footing that liability will be apportioned as between the wrongdoers.[179]

While the 'but for' test is helpful when applied as a negative criterion, it is especially inadequate in cases where there are two or more acts or events which are each sufficient to bring about the plaintiff's injuries or where a novus actus interveniens arises.[180] Causation in tort is a matter of 'common sense'. Value judgments and policy considerations necessarily intrude in determining causal issues.

In intentional tort, so long as it can be said that the defendant intended or was reckless as to the causation of psychiatric illness, proof that the defendant's acts or words were sufficient as a cause gives rise to little difficulty or controversy. However, the situation is different in negligence, where the law finds liability as between the plaintiff and the defendant only in respect of the latter's causal

175 Law Commission (UK), above n 9, 31.

176 That there is inconsistency in the protection which the law currently affords those who have suffered as a result of the negligent damage of their property is apparent from the decision of the New South Wales Court of Appeal in *Campbelltown City Council v Mackay* (1988) 15 NSWLR 501 The Court unanimously rejected a claim founded upon a duty of care to avoid causing psychiatric injury on the basis that damage to the plaintiff's house had involved neither the sudden perception of a shocking event nor the causation of a psychiatric illness. However, the *quantum* of damages obtained by the plaintiffs at first instance was upheld on the ground that they had suffered foreseeable anxiety and distress consequent upon damage to their 'dream' home: (1988) 15 NSWLR 501, 511, following *Perry v Sydney Phillips & Son* [1982] 1 WLR 1297 and *Brickhill v Cooke* [1984] 3 NSWLR 396 Damages were awarded parasitic upon property damage All that can be said is that the whole issue must be the subject of a thorough re-examination by the courts.

177 (1991) 171 CLR 506.

178 Ibid 512.

179 Ibid.

180 *Bennett v Minister of Community Welfare* (1992) 176 CLR 408, 413

contribution to the injuries sustained.[181] Difficulty might arise in determining the *exact extent* of the defendant's responsibility. The question might also arise as to whether a contributing cause was, in law, a material one.[182]

Psychiatric illness is subjective in nature and is, to a significant extent, the result of personal interpretations of events or conduct.[183] While the events in question may, in any given case, be sufficient to give rise to a psychiatric illness in the ordinary person, it might alternatively be that they were merely a *trigger to* the onset of the plaintiff's illness. If so, the causal contribution of the defendant might be of reduced importance or even illusory. This problem has been long recognised by the courts, although it is at times forgotten. In *Wilson v Peisley*,[184] Barwick CJ observed in relation to the facts of that case:

> The trauma of the accident for which the appellant was responsible no doubt made a present reality of that which was ever a real possibility. Thus, whilst the appellant must pay for bringing out that condition, what he must pay must ... justly reflect the fact that that condition was not merely latent in the respondent but that events, not of an unusual or unlikely kind, could and might in the ordinary course of life have evoked that condition had not the appellant's negligence intervened.[185]

If one accepts that the development of a psychiatric illness was a foreseeable risk in *Page v Smith*, the question that still needed to be addressed was: to what extent did the defendant actually contribute to the illness which followed the collision?[186]

The correct approach was taken by Lee J in *Harrison v Suncorp Insurance & Finance*.[187] The plaintiff had witnessed a fatal motor accident in his rear-view mirror and stopped by the side of the road in order to render assistance. He found the body of one of the drivers beside the burning wreck of his vehicle with part of his skull missing and his brain scattered over the road. As a result, the plaintiff suffered post-traumatic stress disorder. He also developed a schizophrenic disorder. Evidence was presented that the latter illness is, in 90 per cent of cases, contracted by persons who are genetically predisposed to the condition. The plaintiff was at an enhanced risk of developing the disorder on the basis of his brother's affliction with schizophrenia. The disorder is often triggered by a major stressful experience. Lee J, in finding the defendant liable for the causation of both disorders, stated:

> I have not ignored the evidence as to the plaintiff's predisposition towards schizophrenic-related illnesses. But, in my view, although that is something

[181] The issue is a different one where liability must be apportioned amongst a group of defendants.

[182] See, eg, *Western Australia v Watson* [1990] WAR 248.

[183] Kaplan, Sadock and Grebb, above n 49, 607; Michael Trimble, *Post-Traumatic Neurosis* (1981) 45–54.

[184] (1975) 7 ALR 571.

[185] Ibid 574. See also *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638, 643.

[186] Cf *Hoffmueller v Commonwealth* (1981) 54 FLR 48, 60 (Mahoney JA); Des Butler, 'Susceptibilities to Nervous Shock: Dispensing with the Mythical "Normal Person"' (1997) 1 *Macarthur Law Review* 107, 132–3.

[187] (Unreported, Supreme Court of Queensland, Lee J, 12 December 1995).

> which may impact on the assessment of the plaintiff's damages, it is not something which would go to break the chain of causation.[188]

An appropriate discount on the award of damages was ordered.

III THEORETICAL ISSUES

A *The Place of Negligence*

Is the law relating to the negligent infliction of psychiatric illness an 'intolerable embarrassment' which should be 'wipe[d] out' as Stapleton suggests?[189] Stapleton is of the opinion that the techniques available for controlling liability in this area are 'artificial' and that the resultant boundaries are 'meaningless'.[190] The foregoing analysis is indeed indicative of the fact that the current boundaries are somewhat haphazard. It was noticed, in particular, that *Page v Smith* has created logical 'gaps' in the law relating to the primary victims of negligence resulting in psychiatric injury and that the law relating to secondary victims continues to perplex. However, the courts have not declared that the law in this area is settled. More appropriate limits upon liability are forever being sought. In this light, Weir has remarked:

> [W]hat is wrong with just line-drawing, or even slightly unjust line-drawing, when a line has to be drawn somewhere, is beyond me. [Stapleton's] refusal to compromise on this issue leads her to throw in the sponge or throw out the water, baby and all.[191]

He points out that the current state of the rules relating to recovery for the negligent infliction of psychiatric illness is *not irrational*, even if it is arbitrary.[192] Drawing the line is a process involving judgment. Reasons have been offered by the courts for drawing lines where they have done so. Is not the task for us, then, to identify the best reasons given for imposing or rejecting liability and building upon them?

It is apparent that the problematic nature of psychiatric illness lies in the fact that there is always the potential that large numbers of persons might be injured in the event of a horrific accident. Because shock operates through the mind, it is able to afflict people who are beyond the range of the physical effects of an act of negligence.[193] If liability were to be extended so that all persons affected could recover, defendants would often be burdened with liability out of proportion to the negligence complained of.[194] This is problematic for the adversarial system

188 Ibid 18.
189 Stapleton, above n 30, 94, 96.
190 Ibid 95.
191 Tony Weir, *'Errare Humanum Est'* in Peter Birks (ed), *The Frontiers of Liability* (1994) vol 2, 107.
192 Ibid.
193 Francis Trindade and Peter Cane, *The Law of Torts in Australia* (2nd ed, 1993) 342.
194 Ibid 341. See also Law Commission (UK), above n 9, 52.

and creates a dilemma for the courts.[195] For those familiar with this area of law, it is apparent that courts have been concerned primarily with this dilemma. However, this is rarely articulated.

Handsley's comments on this issue sum up the grievances of many critics. Unfortunately the undoing of their argument is also apparent in the following passage:

> [T]ort law is a system of compensation, and therefore it should concentrate on the need for compensation, rather than on the effects of compensation. This is not to say that negligence law should or could (or is likely to) concentrate solely on the needs of plaintiffs, for the fault requirement is as deeply ingrained as the compensation principle. The point is that fault has always been ... a black and white concept, even though in reality there may be shades of grey on either side of the negligence line. That being the case, concerns about disproportionate liability have no place in tort law.[196]

The problem is, as Stapleton perceptively has reminded us, that so much modern activity can be seen as interfering with the rights or interests of others and can be described in terms of injury.[197]

> [W]e need to eschew that old confusing cliché that tort is about compensation and loss-spreading, and to focus in a detailed way on those concerns which provide reasons for denying recovery to those who have admittedly been injured [through negligence.][198]

The best foundation for such a task is to identify the moral issues inherent in any tort judgment. A very important element will be the degree of fault which is required to be proven. Adjudging the faultiness or blameworthiness of the defendant's actions is a multifaceted task.

Negligence is concerned with failures to take care in circumstances where the reasonable person would have acted to avoid the risks created by the defendant. As already noted, the standard is not wholly objective.[199] However, the primary concern of the law is not with the subjective state of mind of the defendant and his or her justifications for engaging in the impugned conduct, but, rather, with what was reasonable in the circumstances. The standard of care is external to the actor. Why is such a standard adopted? Keating puts forward an account based upon the necessity of preserving to individuals, in our busy and crowded world, a certain degree of freedom to act in order that they might each be able to pursue their ideas of the good:

> Because due care as reasonableness holds that the lives of persons are distinct and their aims and aspirations different, it insists that risks and precautions must be valued in terms of criteria that are mutually acceptable and independent of any particular conception of the good. For this reason, due care as reason-

195 See, eg, Napier and Wheat, above n 25, 9.

196 Elizabeth Handsley, 'Mental Injury Occasioned by Harm to Another: A Feminist Critique' (1996) 14 *Law and Inequality* 391, 433

197 Stapleton, above n 30, 84.

198 Ibid.

199 See above n 23 and accompanying text.

> ableness celebrates tort law's use of objective valuations as a bulwark of our mutual freedom.[200]

The key lies in facilitating individual preferences in a 'mutually acceptable' way. This entails agreement to some minimum amount of protection for activity. Cast in these terms, it is understood that the law cannot, and should not, offer protection for every incursion into the space occupied by others, for this would, itself, be unduly restrictive of the freedom of the individual. A balance is required. This balance is achieved, according to Keating, in the refusal of the courts to protect mere 'emotional' or economic interests — at least to the same extent as other, more basic, interests. Such basic interests are the 'natural focal points for reasonable persons seeking to sustain a mutually beneficial form of social cooperation on fair terms.'[201] Keating explains in greater detail the reasons for protecting, in particular, persons from *physical* injury to themselves and their property:

> Physical injury, which threatens death and irreversible harm to the capacities necessary to the pursuit of a human life, is plainly the most grievous general form of accidental interference with personal freedom. Personal property, although not as central as bodily integrity to persons' capacity to shape their own lives, is nonetheless an essential social condition for the efficacious pursuit of a conception of the good.[202]

One surmises from such a statement that one of the difficulties with protection for mental integrity is that mental integrity, in itself, is not a sufficient means by which pursuit of the good can be facilitated. On the other hand, as Handsley appropriately points out, 'a physically disabled person can still enjoy life and make a positive contribution to society, whereas a mentally injured person is unlikely to have any such ability.'[203]

Wright defends the objective standard, in terms of corrective justice, on grounds similar to Keating's. He refers to rights to equal negative freedom, that is rights to freedom from unjustified interferences with 'one's existing resources' used in order to pursue one's life plans.[204] A subjective standard of care would expose persons to any number of risks depending upon the 'capacities of the particular others with whom one happens (often unpredictably) to interact'.[205] In order to secure properly the expectations of the individual, 'one's rights in one's person and property must be defined by an objective level of permissible risk exposure by others which ... must be equally applicable to all'.[206]

[200] Gregory Keating, 'Reasonableness and Rationality in Negligence Theory' (1996) 48 *Stanford Law Review* 311, 327.
[201] Ibid
[202] Ibid 344
[203] Handsley, above n 196, 426.
[204] Richard Wright, 'The Standards of Care in Negligence Law' in David Owen (ed), *Philosophical Foundations of Tort Law* (1995) 256.
[205] Ibid 259
[206] Ibid.

If negligence rules merely provide a *minimum* degree of protection to persons and their property, so that they can interact with some degree of security, there is no justification for offering protection against those harms which do not unreasonably interfere with such capacity. Not every action which impedes another, and which might therefore be thought of as creating injury, can be the subject of damages. The courts, in dealing with cases of the negligent infliction of psychiatric illness, can be seen to be deferring to the truth of this statement. Tort law offers different levels of protection according to the relative importance of the interest in question.[207] However, the negligence cases which have been examined indicate that, even where the interest protected is undeniably important — referring specifically to the interest in mental integrity — there must be a limit upon liability for the consequences of activities resulting in accidental harm. It would be wrong if liability for the negligent infliction of psychiatric illness were either abolished or, on the other hand, liberalised to a significant extent.

B *Corrective Justice Theories*

1 *Ernest Weinrib*

The next question is whether the rules that *do* result in the imposition of liability can be justified in terms of basic notions of corrective justice. In answering it, this paper first turns to the writings of Ernest Weinrib, a prominent Canadian torts philosopher. Weinrib begins his exposition by noting that the standard of care in negligence is breached by actions which create unreasonable risks.[208] This focus on risk-creation is significant because 'risk is a relational concept that connects doing and suffering.'[209] But not every risk created by a person in the 'crowded conditions of modern life' will result in a breach of the duty of care.[210] This would 'deny the moral possibility of [any] action'.[211] Having said that, an actor *does* have the capacity to modulate the risks entailed by his or her conduct and *can potentially* be held responsible for risks which are 'real' in that there is a foreseeable possibility that they will result in injury.[212] Liability becomes an issue when the defendant's conduct has in fact injured the plaintiff. '[W]ithout the causal connection of suffering to the wrongful creation of risk, there is no actor responsible for the suffering and thus no one from whom, as a matter of corrective justice, the sufferer can recover.'[213]

[207] See, eg, Stephen Perry, 'Protected Interests and Undertakings in the Law of Negligence' (1992) 4 *University of Toronto Law Journal* 247, 247 where the learned author opines: 'It is not appropriate simply to assume that all interests are *prima facie* protected in the same way and then ask in the particular case whether a loss was too remote, for example, or whether its recovery is precluded on policy grounds that may or may not have anything to do with the nature of the interest as such.'

[208] Ernest Weinrib, *The Idea of Private Law* (1995) 147.

[209] Ibid.

[210] Ibid 151–2.

[211] Ibid 152.

[212] Ibid.

[213] Ibid 153.

Weinrib next attempts an explanation of how liability is brought home to the defendant in any given case, via the concepts of duty and proximity. What he seeks to achieve is substantial justification for the imposition of liability on the defendant rather than, for example, upon the whole class of persons who undertook risky activities:

> What we need is a characterization of the risk that allows us to distinguish the potential for harm in the defendant's act from the background harms that are part and parcel of all action. The very characterization of the risk as unreasonable means that the qualification takes place with respect to a more limited category of injury than injury simpliciter.[214]

There is a practical need to narrow the terms of any legal inquiry to a meaningful level of risk-creation; that is, to move from the general to the particular. But Weinrib elides any real explanation of how this is done. He states that duty and proximity 'connect specific accidents to the risks out of which they materialize'.[215] Both of these mechanisms 'demand a judgment, which different people might plausibly make differently, about what ... is the sort of consequence that a reasonable person ought to have anticipated and guarded against.'[216] The only real guide for the judge in this exercise is a comparison with analogous cases.[217]

Perry argues that what is at the heart of Weinrib's theory is disrespect for personality in the abstract.[218] This can be seen in the fact that he anchors his theory of negligence in the creation of risk. The problem is this: while there might be little difficulty in accepting that *intentional* harm should be the subject of reparation in corrective justice, it is not clear why *inadvertent* harm should be. Causation of loss itself is irrelevant. By Weinrib's conception, conduct can be wrongful without causing harm to anybody's interests.[219] However, Weinrib himself prefaces his discussion with the reservation that he is attempting merely to explain an existing phenomenon, the rules of negligence.[220] In this respect, it is a truism that legal redress is only sought in those cases where harm *has materialised.* Yet Perry surely has a point in indicating that there is, in fact, nothing in Weinrib's theory to *prevent* claims by those who have been subjected to risks not resulting in harm, thereby countering the argument that negligence is best explained in terms of corrective justice.

Cane has argued that Weinrib is incorrect in characterising the rules of negligence as being concerned merely with issues of corrective justice. He states that *Donoghue v Stevenson,*[221] for example, can be seen as embodying distributive concerns. The House of Lords decision was concerned with

214 Ibid 166.
215 Ibid 167.
216 Ibid 166–7.
217 Ibid 167.
218 Stephen Perry, 'The Moral Foundations of Tort Law' (1992) 77 *Iowa Law Review* 449, in response to an earlier article by Ernest Weinrib, 'Rights and Advantage in Private Law' (1989) 10 *Cardozo Law Review* 1283.
219 Perry, 'The Moral Foundations of Tort Law', above n 218, 486.
220 Weinrib, *The Idea of Private Law*, above n 208, 8–11.
221 [1932] AC 562.

> principles about who, as between manufacturers and consumers, should have an entitlement: should the consumer have an entitlement to be free from injury or should the manufacturer have an entitlement to inflict injury?[222]

But the case did not arise out of thin air. The fact is that the plaintiff sought compensation for the carelessness of the defendant as it was injurious to her. Cane's question fails to address the dynamics of the litigation process (although this fault is shared by Weinrib) and is demonstrably too wide. He puts it in other terms though, by stating that an 'effect of the case was ... to redistribute resources (in the form of legal rights) from one group (manufacturers) to another group (bystanders).'[223] This is no doubt true. Weinrib might thus be forced to concede that negligence rules can be seen to have a number of justifications. However, he is primarily concerned with the purposes of, rather than the effects following, liability rules. A similar approach has been adopted in this paper.

2 *Stephen Perry*

Weinrib's general theory of tort as an intrinsic ordering incorporates no satisfactory explanation of factors limiting liability in tort, such as proximity or remoteness. His attempt at incorporating such an explanation into his theory of negligence is not particularly compelling. The thrust seems simply to be that there is a need for the law, by some means, to deal with unconvincing claims for reparation. Can Stephen Perry better account for this process of invalidation? Perry's theory of outcome responsibility involves two levels of inquiry. The first level is concerned with the identification of persons who have made a difference in the world, that is persons who have interfered with the well-being of another. Perry outlines some of the considerations relevant to that identification — not necessarily an easy task — in respect of torts generally:

> Both the basis of and limitations on outcome-responsibility are determined by the sense of having made a difference ... [T]here is no doubt that it is present where our actions set in motion a foreseeable train of events that conforms to known or partially known causal regularities, since this increases our sense that we could have had a measure of *control* over the situation, or at least that some agent, perhaps an idealized one, could have had some control.[224]

What this suggests then, is that responsibility for a specific outcome involves 'a retrospective evaluation of action that depends on a comparison with what would have been foreseen by an idealized agent to whom has been attributed a certain level of knowledge of the relevant causal regularities.'[225] In law there exists a range of possibilities from 'omniscience at one end to the actual knowledge and beliefs' of the actor at the other end of the spectrum.[226] Negligence is concerned with an objective standard of care deploying the notion of a reasonable person

222 Peter Cane, 'Corrective Justice and Correlativity in Private Law' (1996) 16 *Oxford Journal of Legal Studies* 471, 481.
223 Ibid 482.
224 Perry, 'The Moral Foundations of Tort Law', above n 218, 505
225 Ibid.
226 Ibid.

and what he or she would have foreseen in the circumstances. According to Perry, this standard reflects a judgment that 'it is appropriate to employ a uniform idealization of agency that is determined by reference to some notion of "common" knowledge, or what the "ordinary" person ... can be expected (in a non-normative sense) to know.'[227]

The challenge Perry then sets himself is to present a convincing account of the principles of reparation in negligence as being grounded in his moral conception of outcome-responsibility. He asserts that the comparative inquiry involved in the second stage of his theory — where responsibility is attributed to one or more of the parties identified — need not involve 'the ascription of blame or culpability.'[228] It is enough that the actions of the defendant have resulted in harm. What is involved is 'a judgment of the action and not the agent because there is no necessary implication that the agent [him- or] herself was capable of possessing and acting upon' the knowledge ascribed to him or her.[229] He continues:

> The present suggestion is that when common knowledge of the relevant causal regularities would lead an agent of average mental capacities to be aware of a sufficiently high level of risk of harm to other persons, taking account of both the probability and seriousness of the outcome, then the action should be treated for purposes of reparation as faulty because it is more appropriate that the agent whose action is being evaluated should bear the loss than that the victim should.[230]

Lest this should seem insufficient, Perry affirms that such a judgment about the defendant's actions has normative consequences for the actor him- or herself. This arises through our sense that the reasonable person, if not the defendant him- or herself, could have acted without imposing an unacceptably high risk in like circumstances.[231]

It should be apparent that Perry's theory does not suffer from the indeterminacy which lurks in that of Weinrib. Proper explanation is given of the role that proximity factors play in limiting liability, although Perry does not attach the operation of those factors specifically to the formulation of a duty of care. Proximity factors have a bearing on whether the defendant has 'made a difference' in so far as they indicate a 'direct manipulation of one's immediate physical environment', such manipulation having potential consequences for others in the same vicinity.[232] All this is to underscore the primacy of time and space factors in the imposition of liability in cases such as those which have been the focus of this article. According to Perry though, proximity factors also have a role in determining whether damage is too remote — that is, in determining the extent to which the defendant has a duty of reparation.[233]

[227] Ibid 507.
[228] Ibid 509.
[229] Ibid.
[230] Ibid 509–10.
[231] Ibid 510–11.
[232] Ibid 504.
[233] Ibid 505.

> The reason is that the existence of fault depends itself on epistemic considerations, in the form of belief in or actual or constructive knowledge of causal regularities, and this gives rise to a natural continuity between fault and [remoteness].[234]

3 *A Caveat*

On the question of limits to liability, reference must be made to a caveat put forward by Tony Honoré.[235] He argues that retributive principles require that defendants should not be burdened with liability which is disproportionate to their culpability.[236] The role of tort law is limited but this is not to suggest that the legislature cannot step in in order to compensate persons for extra-tortious injuries. Honoré argues that, in order for the claims of corrective justice to be morally viable, ways must be found for spreading the remaining losses.[237] Corrective justice needs to be supplemented by some loss-spreading or distributive scheme.[238] This is particularly the case with respect to negligence, which is founded on a low degree of fault and therefore demands restraint in the award of damages at common law.

IV CONCLUSIONS

In this paper, the law relating to the negligent infliction of psychiatric illness has been examined. It has been demonstrated that the courts have been wary of finding liability in favour of secondary victims and have formulated detailed rules governing the circumstances in which they can recover. Although the rules might be arbitrary and in need of reassessment, the basic policy of the law is clear. Liability is predicated upon secondary victims having been embroiled in, or caught up in, an accident involving persons with whom they are related or share a tie of love and affection. Doubt was cast upon the decisions indicating that there could be liability in respect of psychiatric ills arising from the perception of property destruction.

Much academic commentary has been critical of the rules. The commentators have been largely in favour of expanding the boundaries of the tort of negligence so that a greater number of persons might be compensated for psychiatric ills. However, it was suggested that, while the critics have paid some respect to the policy concerns of the courts, they have failed to address the underlying issues of corrective justice as between parties to a dispute and to provide convincing justifications for extended liability. The imposition of liability *can* be justified in terms of corrective justice, but there must be limits upon the range of consequences for which defendants are held responsible. This follows from the comparative nature of the moral inquiry into liability, and the rules of proximity

234 Ibid.

235 See generally Tony Honoré, 'The Morality of Tort Law — Questions and Answers' in David Owen (ed), above n 204, 73.

236 Ibid 89.

237 Ibid.

238 Ibid 90.

and remoteness of damage reflect this fact. The rules of proximity in negligence emphasise the legal concern to compensate secondary victims who have suffered as a result of injuries brought about by the direct manipulation of their physical environment in circumstances where there exists some meaningful relation between them and the primary victim.