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# From Coultas to Alcock and Beyond

## Will Tort Law Fail Women?

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Lord Oliver's observation in the House of Lords' recent and highly significant deliberation in the nervous shock case, *Alcock and Others v Chief Constable of the South Yorkshire Police*,<sup>1</sup> is particularly instructive in any consideration of nervous shock law:

Grief, sorrow, deprivation and the necessity of caring for loved ones who have suffered injury or misfortune must, I think, be considered as ordinary and inevitable incidents of life which, regardless of individual susceptibilities, must be sustained without compensation. It would be inaccurate and hurtful to suggest that grief is made any the less real or deprivation more tolerable by a more gradual realisation, but to extend liability to cover injury in such cases would be to extend the law in a direction for which there is no pressing policy need and in which there is no logical stopping point.<sup>2</sup>

Lord Oliver's observation points to the mismatch of law and sympathetic language where sorrow must be sustained without compensation. It also completely masks the fact that caring for injured loved ones is a task largely taken upon themselves by women in the community. It encapsulates the dilemmas of nervous shock law. It is an unduly restrictive view from the feminist perspective, which would

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1 [1992] 1 AC 310.

2 *Ibid* at 409.

take a more compassionate view of the ‘infinitely varied circumstances of human relationships.’<sup>3</sup>

Bender has made many critical comments on this issue. In particular, she has suggested that the current structure to our legal framework — one which is perhaps exemplified in the *Spence v Perry*<sup>4</sup> situation, where the mother constantly cared for and worried about her injured daughter — sends implicit messages to women in our community:

Denying legal recognition of the harm by failing to award ... “compensation” sends negative messages to the plaintiffs about the importance or value of their lives, autonomy and the range of their suffering.<sup>5</sup>

To begin with, this paper draws out the threads to the criticisms of law advanced by feminist theorists, focussing in particular upon arguments concerning the gendered nature of harms and injury. It then examines one particular area of tort law, that of nervous shock, in order to ask the question ‘does tort law fail women’. An historical overview of cases reveals that a subtle moral scrutiny initially informed the legal outcome. However, step by step, the law has moved to recompense women, particularly mothers, and to recognise their suffering consequential upon harm to immediate family members. Yet, the case law shows that the courts continue to prevaricate, often in moving and poetic language. They speak of a sympathy that does not extend to legal translation of emotional harms, particularly because it is not distinctly physical and is consequential upon injury to another. Legal redress through the law of negligence remains locked into an emphasis upon physical injury and physical impact.

The restrictive parameters to the law of nervous shock, particularly the narrow formulation of the duty question in many of the cases, confirm the concerns which feminists have raised about the inadequacy of the law of torts adequately to encompass women’s injuries. In examining the case law, this paper contrasts the graphic horror or long term anxiety often involved in nervous shock situations (often eloquently depicted in judgments) and the legalistic response (again, often eloquently articulated) that is sympathetic but ultimately denies compensation. The tension thus drawn out exemplifies the paper’s original characterisation of the law as poetic (in)justice; its poignancy is underlined in the case of women, for it is they who suffer disproportionately from injuries to family members.

The paper proceeds by way of examination of early judicial attempts to grapple with the nature of mothers’ relationships with their children. The variation in judicial approach is illustrated by particular reference to a key early case: the 1939 Australian High Court decision in *Chester v Waverley Corporation*.<sup>6</sup> The majority

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3 *Caparo Industries plc v Dickman* [1990] 2 AC 605 at 616 per Lord Bridge.

4 [1992] 2 Qd R 299.

5 L Bender ‘Feminist Re(Torts): Thoughts on the Liability Crisis, Mass Torts, Power and Responsibilities’ (1990) 4 *Duke Law Journal* 848 at 875.

6 (1939) 62 CLR 1.

approach in *Chester* is one of emotional abstraction which effectively discounts the strength of the bond between mother and child. It is a determinedly anti-poetic conclusion in the face of tragedy. The dissent of Evatt J is by way of comparison both a literary tour de force and a plea for a different understanding of the duty of care involved in the legal resolution of the issues in nervous shock. Justice Evatt saw the mother's suffering as real harm. The paper goes on to look at more recent judicial responses and concludes with a reference to the recent British case law which involves the characterisation of the law of nervous shock as 'spectator of the accident' law.

## Theoretical background

Torts is a field of law which has defied many of the criticisms directed at the assembly-line format of traditional legal thought. As a body of law, tort law has encompassed so great a degree of judicial discretion and such overwhelming evidence of judicial law-making and policy considerations that it must be set within an historical and theoretical framework that defies the traditional doctrinal approach to law. As Bennett has noted,<sup>7</sup> tort law is for the most part a fluid and flexible area of law which provides the judiciary with considerable scope for policy decisions within the parameters of the relevant legal principles and concepts:

Tort law is characterised by loose sets of relatively abstract principles which allow maximum discretion to be exercised (in the main) by reference to 'common sense' values.<sup>8</sup>

A recent challenge for teachers of tort law has been the application of certain influential critiques to traditional tort law boundaries. Of these, the most important has undoubtedly been feminist theory. This paper will apply feminist theory but it will mention other critical approaches briefly by way of introductory comparison, with a view to distilling overlaps between critiques.

## Earlier critiques

The critical tradition in American legal scholarship is characterised by attention to certain themes — such as instrumentalism, formalism and the public/private dichotomy — which have proved to be foundational to the evolution of modern United States legal doctrine.<sup>9</sup> Economic analysis was one such critique. It viewed law scep-

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7 L Bennett 'Ideology in Australian Judicial Practice: A Non-Reductionist Account of a Jurisdictional Issue in Labour Law' (1989) 17 *International Journal of the Sociology of Law* 207 at 216.

8 *Ibid* at 216.

9 N Duxbury 'Robert Hale and the Economy of Legal Force' (1990) 53 *The Modern Law Review* 421 at 421.

tically from 'outside'. Still, it adopted an entirely different perspective from feminist theory, in taking the standpoint precisely of the rational, self interested, self seeking 'man of law' that feminist analysis seeks to emphasise and redefine.

Another influential American theory, the Critical Legal Studies movement, is perhaps closer to feminist critique in drawing attention to harms that engender a 'near-universal acceptance'<sup>10</sup> and are 'routinely tolerated'<sup>11</sup> by the law, in contrast to harms that are condemned yet are manifestly 'incidental or disruptive.'<sup>12</sup> Howe sets out one means by which Kelman's assertion of the need to redefine the meaning of 'social injury' within the framework of critical criminology might be adapted and developed within feminist discourse. There is the related work by Abel, who asserts a correlation between class, race, and gender, and 'the way in which the experience of injury is transformed into a claim for legal redress.'<sup>13</sup> While seeking more to relate this to a strategy of political empowerment, these theorists share boundaries with feminist theorists, who also seek to challenge and expand the definitional boundaries to legally recoverable harm. What we are looking at is our perception of injury.

## Feminist theories

Writing in 1987, Jackson and Powell observed in their major text on professional negligence that 'the solicitor, in common with other professional men, is required to exercise reasonable care and skill ... Nor is the solicitor expected to be faultless in his judgment.'<sup>14</sup> The gender based myopia implicit in such a statement has recently been the subject of sustained criticism through feminist scholarship. It points to women's 'silence' in law.

Feminist theory is one of the most concerted critiques that has been advanced in relation to the law of torts generally and the law of negligence more specifically. Within the framework of a range of criticisms of the law, several salient points can be emphasised. Feminist theory, in attempting to break with the legal reproduction of men's values and consequent treatment of women as 'other', provides incisive criticisms of the 'reasonable man' upon which the law of negligence relies in constructing a supposedly neutral standard bearer against which to measure the extent of duty owed and standard of care breached. This seemingly neutral

10 A Howe "'Social Injury" Revisited: Toward a Feminist Theory of Social Justice' (1987) 15 *International Journal of the Sociology of Law* 423 at 427, citing M Kelman 'Criminal law: the originals of crime and criminal violence' in D Kairys ed *The Politics of Law: A Progressive Critique* 1982 at 218–21.

11 *Ibid.*

12 *Ibid.*

13 R Abel 'Torts' in Kairys *supra* n.10.

14 R Jackson & J Powell *Professional Negligence* Sweet & Maxwell London 1987 at 206–7. See also EF Mannix and JE Mannix *Professional Negligence* which commences in its preface 'Australian law on negligence of professional men has been limited ...' 3rd edn Butterworths Sydney, 1982.

construct has been exposed by feminist theorists to be gender specific: to represent the values of the average man and to perpetuate the view that women comprise some 'other' value that cannot be quantified in legal terms. Thus, Graycar and Morgan, in their work *The Hidden Gender of Law*, refer for example to tort law's 'failure to treat as work the many and varied tasks that women do for which they do not receive remuneration.'<sup>15</sup>

By this view, the law of torts reproduces the socially institutionalised refusal to recognise the nature and extent of women's work and perpetuates the injustices and inequalities consequent upon that lack of recognition, in its assessment of common law damages. In characterising women's work as non-economic loss, the courts have effectively disenfranchised women from the common law damages system. Referring in particular to the decision in *Burnicle v Cutelli*,<sup>16</sup> Graycar and Morgan note a 'graphic illustration of the failure to come terms with the real material effects of a loss of a woman's capacity to work in the home.'<sup>17</sup>

### The need for a reappraisal of injury

Feminist theories, which have concentrated upon the gendered nature of legal harms, have challenged tort law to reconsider the framework of individual rights and to reorient the subject in the wider, more collective context of responsibilities. Feminist theorists have pointed the way forward for the construction of a possible alternative approach which in 'effecting a paradigm shift in common sense understanding of social injury — would include harm to women.'<sup>18</sup> Feminist jurisprudence has not only advanced the conceptual argument but has considered in detail the scope of legal categories and doctrines.

One of the most influential works in the tort law context has been that of Bender, who has persuasively argued that the current tendency towards 'negative responses make it extremely difficult to understand what feminism is and what promise it holds for all of us.'<sup>19</sup> Bender's salient conclusion is that tort law, like the other areas of law scrutinised by feminist analyses, perpetuates, through its focus on individuality, reasonableness and economic efficiency, 'traditional male values and perspectives.'<sup>20</sup> A feminist perspective would redefine the law to focus on 'interdependence and collective responsibility.'<sup>21</sup> Furthermore: 'feminism raises questions about both the external structure of our negligence analysis — how we frame our

15 R Graycar & J Morgan *The Hidden Gender of Law* Federation Press Sydney 1990 at 74.

16 (1982) 2 NSWLR 26.

17 *Supra* n.15 at 75.

18 Howe *supra* n.10 at 428.

19 L Bender 'A Lawyer's Primer on Feminist Theory and Tort' (1988) 38 *Journal of Legal Education* 3 at 3.

20 *Ibid* at 4.

21 *Ibid*.

understanding of negligence problems — and its internal categories, such as duty and the standard of care.’<sup>22</sup>

For Bender, as it reproduces and perpetuates men’s values, patriarchy has powerful implications for vast areas of law and society, from the political system to the legal profession<sup>23</sup> and, most significantly, for the conceptual doctrines and categories upon which law redresses harm and injury: ‘[b]ecause our legal system has developed from an unstated male norm, it has never focussed adequately on harms to women.’<sup>24</sup>

By this insight, the duty formulation in the law of negligence is revealed as woefully inadequate: indeed, it is exposed as manifesting the trademark stamp of legal rationality. A critical view of this form of reasoning was encapsulated many years ago (which in dealing with formalism might equally have dealt with patriarchy) by Wallace and Fiocco:

‘Legal rationality’, that is, reasoning with rules, is recognized at the expense of all other components of decision, such as creativity, imagination, feelings, states of mind, instincts and the limitations inherent in language itself.<sup>25</sup>

Tort law’s inability to deal with the particular harms suffered by women is exemplified in the case of nervous shock, at the same time as it affords women a modicum of success in the legal outcome. As Graycar and Morgan note, once we isolate the way in which the legal system responds to ‘women’s participation in families and their broader relationships with others’,<sup>26</sup> we confront the veracity of Smart’s assertion that ‘women encounter law as gendered persons’<sup>27</sup> and Frug’s related assertion that women encounter law ‘as relatives of others.’<sup>28</sup> In keeping, the nervous shock case law evinces a ‘dispassionate unpredictability’ to its occasional recognition, ‘that a mother’s fear of injury to her child is a real fear, experienced by her in a material, harmful and ultimately compensable way ...’.<sup>29</sup> In the hierarchy of legal harms there has been only tentative recognition of the extent of women’s work and women’s harms.

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22 *Ibid.*

23 *Ibid* at 7. Bender notes in this respect the patriarchal and masculinist means both of framing legal problems and the means of effecting their resolution: ‘Men have constructed an adversary system, with its competitive, sparring style, for the resolution of legal problems.’

24 *Ibid* at 8.

25 J Wallace & J Fiocco ‘Recent Criticisms of Formalism in Legal Theory and Legal Education’ (1980) *Adelaide Law Review* 309 at 314.

26 Graycar & Morgan *supra* n.15 at 177.

27 *Ibid* at 176, citing C Smart ‘Law’s Truth: Women’s Experience’ in R Graycar ed *Dissenting Opinions: Feminist Explorations in Law and Society* Allen & Unwin Sydney 1990 at 7.

28 *Ibid.* Citing Frug ‘Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook’ (1985) 34 *American University Law Review* 1065 at 1078.

29 *Ibid* at 178.



## Sexual harassment of working women: highlighting tort law's inadequacies

Virtually single-handedly, Catherine MacKinnon developed the cause of action based on sexual harassment of working women.<sup>30</sup> MacKinnon's contention was that the traditional legal remedies against harm must be revealed as conceptually inappropriate and technically inadequate in relation to this particularly gendered harm. It was precisely in recognition of the limiting features of an action in tort law that MacKinnon proposed the conceptual unsuitability of the law of negligence to deal with this specifically female harm: sexual harassment. It is not that sexual harassment is not an injury and not a wrong, but that the extent and consequences of that wrong render the application of the law of torts and the structure of its remedies inadequate. A whole new area of law was required to deal with this type of harm experienced by women.

The major difference between the tort approach and the discrimination approach, then, is that tort sees sexual harassment as an illicit act, a moral infraction, an outrage to the individual's sensibilities and the society's cherished but un-lived values. Discrimination law casts the same acts as economic coercion, in which material survival is held hostage to sexual submission.<sup>31</sup>

Furthermore, MacKinnon considers that the individualised nature of legal remedies in the tort law context masks the social, political and economic implications of the harm at issue. It is in the remedial nature of tort law that it 'individualises the experience of injury, thereby hiding its gendered nature.'<sup>32</sup> The thread that links feminist theoretical analyses here is their assertion of 'women's different perspective on the wrongs (or injuries) we experience'<sup>33</sup> and consequent construction of a 'model for equality'<sup>34</sup> which accounts for that different perspective and which considers women's too familiar experiences (pregnancy discrimination, rape laws, sexist stereotypes, employment discrimination and sexual harassment in the workplace) *as injuries*. For the purposes of this paper, this sensibility can be related to the treatment of women's distress, suffering, anxiety and fear for their children, and the need to treat this as *harm* in the nervous shock context.

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30 Bender, *supra* n.19 at 8. MacKinnon's work, particularly her landmark treatise *Sexual Harassment of Working Women: A Case of Sex Discrimination* Conn. New Haven 1979, was largely responsible for the 1986 decision of the United States Supreme Court in *Meritor Savings Bank v Vinson* 106 S Ct 2399 (1986), where the court recognized that 'sexual harassment resulting in a hostile working environment is a violation of Title VII'.

31 Graycar & Morgan *supra* n.15 at 355-366, citing C McKinnon *Sexual Harassment of Working Women: A Case of Sex Discrimination*.

32 *Ibid* at 356, noting that the increasing reliance upon class actions as a means of obtaining redress for harms specifically suffered by women might offer a way out of MacKinnon's concerns about 'tort as an individualised remedy'.

33 Howe *supra* n.10 at 429.

34 *Ibid*.

## Tort law and the gendered nature of harm

Margaret Atwood once wrote that women are afraid of being killed: men are afraid of being mocked. When we consider the financial outcomes of the recent Andrew Ettinghausen and Jason Donovan suits<sup>35</sup> side by side with the financial outcomes in anti-discrimination cases and the resources accorded to policing of women, we see how the law values those respective fears. Atwood's comment points to the single most significant problem with all aspects of the law in its dealings with women: it cannot, and does not attempt to, adequately protect women from the multitude of harms that are inflicted upon them, and upon their children, mostly by men.

Notwithstanding the fact that 'injuries to women occur on an epidemic proportion',<sup>36</sup> the construction of injuries and consequent legal doctrines and categories is, from the feminist perspective, male-placed and mis-placed. Even the very political and public policy priorities that contribute to the distribution of harm in our society are male-placed: for example, the use of the roads to shift freight, the failure stringently to enforce breaches of road rules, the 'downsizing' of the public sector, and the increasing reliance upon employment contracts and individual 'negotiation' in the workplace.<sup>37</sup> Furthermore, the means of resolution of the resulting conflicts that are conceptualised as legal issues is for the most part the masculinist one referred to by Bender: the competitive, sparring style underwrites the resolution of legal conflict.

MacKinnon notes that tort law sees injury as injury to the individual person, with its essential purpose being to 'compensate individuals one at a time for mischief which befalls them as a consequence of the one-time ineptitude or nastiness of other individuals.'<sup>38</sup> Tort law is therefore not concerned with the context to women's injuries, and because it is 'unsituated in a recognition of the context that keeps women secondary'<sup>39</sup> it 'considers individual and compensable something which is fundamentally social and should be eliminated.'<sup>40</sup>

These arguments raise critical issues about tort law. Feminist analysis forces us to confront arguments about the prevention of 'future' 'generalised' harms.<sup>41</sup> Feminist theory shifts our focus from compensation to consideration.

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35 Both of which involved the awarding of large sums in relation to damage to reputation. The cases arose through the seeming humiliation of being insinuated to be gay (by certain British tabloids in Donovan's case) and through publication of a naked photo (by an Australian publication in Ettinghausen's case).

36 Graycar & Morgan *supra* n.15 at 307.

37 For comments upon this issue, see BA Hocking 'Economic Rationalism and Social Justice: Is There a Way Forward?' (1994) 13 *Socio-Legal Bulletin* 4-12.

38 Graycar & Morgan *supra* n.15 at 354, citing C MacKinnon *Sexual Harassment of Working Women* 1979.

39 *Ibid* at 354.

40 *Ibid* at 355.

41 Howe *supra* n.10 at 429. Howe refers to Thornton's crucial arguments in relation to the capacity of anti-discrimination and affirmative action laws and measures to prevent the occurrence of 'future



## Nervous shock: occasional recognition of women's frailty or mothers' rights?

It is in the area of what has traditionally been termed nervous shock that women have been most notably successful in pursuing negligence actions. The law's concern in this area is precisely with the relationship between persons. The disruption of the relationship between family members due to another's negligence is what the law seeks to define and recompense. Inevitably, given the fear of the floodgates which has characterised judicial jurisprudence in negligence, nervous shock is an area that has been closely confined and restricted. Judicial approaches have essentially emphasised a distinction between two differentially perceived types of injury: physical injury and nervous shock. The central problem from the feminist perspective is that 'the law has always displayed a reluctance to compensate as generously for nervous shock as for direct physical injury.'<sup>42</sup>

An historical overview indicates the extent to which the courts have drawn restrictive conceptual boundaries around this relationship-based harm and thus excluded women. Indeed, the very early restrictive decisions exemplify Chamallas and Kerber's contention that the law in this area traditionally treated emotional security as a 'qualitatively inferior interest' and further that the law devalued women's harms in describing 'even physical harm to women as emotionally based.'<sup>43</sup>

The early decision in *Victorian Railways Commissioners v Coultas*<sup>44</sup> denied recovery to a woman who suffered severe shock, a miscarriage and prolonged physical injury as a result of a near miss at a railway crossing.<sup>45</sup> Their Lordships explicitly refrained from stating that impact was necessary, but they made it clear that 'mere sudden terror unaccompanied by any actual physical injury'<sup>46</sup> would not sustain a claim for damages in nervous shock. This case therefore formulated the impact rule that still underpins the law today. At least in the very early stages of the development of the law, subsequent American cases reinforced the assumption implicit in the legal reasoning in *Coultas*: that physical injury caused by fright

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harms' and the need for these measures to extend beyond the individualised impact of the civil law model to 'foreclose the possibility of harmful conduct of a general kind.' M Thornton 'Affirmative Action and Higher Education' in M Sawyer ed *Program for Change: Affirmative Action in Australia* Allen & Unwin Sydney 1985 at 123.

42 F Trindade & P Cane *The Law of Torts in Australia* 2nd edn Oxford University Press 1993 at 340. Trindade and Cane note that historically the drawing of a judicial distinction between the two types of injury is virtually universal: 'Apart from an isolated dictum of Denning LJ in *King v Phillips* [1953] 1 QB 429, 440 to the effect that the duty owed by the driver of a motor vehicle did not differ according to whether the injury inflicted was physical injury or nervous shock.' (at 340).

43 M Chamallas & L Kerber 'Women, Mothers, and the Law of Fright: A History' (1990) 88 *Michigan Law Review* 814 at 823.

44 (1888) 13 App Cas 222 (Privy Council).

45 Chamallas & Kerber, *supra* n.43 at 826, cite *Coultas v Victorian Railways* as disclosing that the plaintiff suffered a miscarriage.

46 (1888) 13 App Cas 222 at 225.

merited less favourable treatment than physical harm 'produced by any other causal mechanism.'<sup>47</sup> However, Trindade and Cane have noted that the decision was not received favourably in Australia.<sup>48</sup>

The plaintiff was, however, successful in the famous early case of *Dulieu v White & Sons*<sup>49</sup> which awarded a woman damages for nervous shock consequent upon fear for her safety when a horse-drawn van drove into the public house as she stood behind the bar. The claimant, who had been pregnant at the time of the shock, subsequently endured the premature birth of a so called 'idiot' infant. While clearly not determinative of the legal outcome, it seems arguable that the plaintiff's location, which was effectively in the home (as the bar was run by her husband) did have some influence upon the legal outcome. This may have provided both a limiting factor to the scope of duty and perhaps reflected the pragmatic judicial attitude that, within a workplace that doubled as a home, a pregnant woman did not expect to be exposed to the types of risks that lay outside.<sup>50</sup> Fear of injury to herself was however, the central legal determinant: at that time, the law was still emerging from the restrictions imposed by the 'impact rule' laid down in *Victorian Railways Commissioner v Coultas*.<sup>51</sup> The law was shifting into the restrictions imposed by the fear of immediate personal injury to oneself, or the 'zone of danger' requirement.<sup>52</sup> Arguably, however, at least the case stands for the proposition that in exercising reasonable behaviour, the range of persons to whom one owes a duty should encompass a person who might be pregnant at the time of any careless act. The plaintiff was, after all, reasonably foreseeable.

The *Dulieu* case was followed by *Bourhill v Young*<sup>53</sup> where a duty was denied to a pregnant woman who was standing at about 45 feet from the point of impact of a motor accident which she witnessed in terms of noise but not actual sight. The plaintiff had no reasonable or actual fear of injury to herself but suffered fright resulting in severe nervous shock, and her child was subsequently (and consequently) stillborn.<sup>54</sup>

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47 Chamallas & Kerber *supra* n.43 at 828, citing *Mitchell v Rochester Railway* 151 NY 107; 45 NE 35 (1896) and *Spade v Lynn & Boston Railroad* 168 Mass 285; 47 NE 88 (1897).

48 Trindade & Cane, *supra* n.42 at 343.

49 [1901] 2 KB 669.

50 Chamallas & Kerber, *supra* n.43 at 831-2, noting that the broader conceptual reasoning of Kennedy J appeared to be based not on appreciation of gender but upon the belief that nervous shock ought to be treated as a real harm along the lines of other injuries for which tort law provides compensation. The concurring opinion of Phillimore J evidenced the narrower view in finding the plaintiff's location (working in the bar in her husband's public house) relevant to the delimitation of the duty.

51 (1888) 13 App Cas 222.

52 NJ Mullany & PR Handford *Tort Liability for Psychiatric Damage* Law Book Company 1993 at 3-4.

53 [1943] AC 92.

54 *Ibid* at 92-3 (headnote).

The case is an important one for several reasons. First, it incorporated the principle laid down in the American decision in *Palsgraf*<sup>55</sup> into English law, stressing the need for the foreseeability of the plaintiff.<sup>56</sup> Secondly, the plaintiff was 'doomed to celebrity, in the pages of the Law Reports, in language thought acceptable in another era, as the pregnant 'fishwife'.'<sup>57</sup> The House of Lords held that the plaintiff was not a foreseeable victim. It would appear that the plaintiff was considered by Lords Wright and Porter to be hypersensitive to nervous shock due to her pregnancy,<sup>58</sup> although the legal formulation was that the plaintiff was considered outside the area of potential duty of care, which conclusion was 'based upon a test of presence within foreseeable range of impact.'<sup>59</sup>

As Trindade and Cane have observed, the pregnancy related reasoning in *Bourhill* is out of step with consideration of the same issue in *Dulieu*, for in *Dulieu*, Kennedy J held that the defendant 'could not avoid liability for nervous shock by pointing to the plaintiff's pregnancy — he had to take his victim as he found her.'<sup>60</sup> It would appear that on the whole, the law was formulated more generously in relation to this issue in Australia than in England. Certainly, there is a line of authority in Australia which stands for the proposition that, once there is a finding of duty, the defendant cannot renounce that duty by relying upon some hypersensitivity of the plaintiff.<sup>61</sup> However, the difficulty in nervous shock cases has been in the finding of a reasonably foreseeable duty owing in the first place where the injury involved was a psychological one. It is certainly arguable that in formulating the law, particularly in the early cases, the courts have adopted either a male standard or one which, more purportedly neutrally, 'certainly is nonpregnant persons.'<sup>62</sup> This has led Bender to observe that the tendency towards findings that a mother's harm was not reasonably foreseeable has postulated a 'high degree of robustness' in the average mother.<sup>63</sup>

The House of Lords was recently called upon to consider this question in *Page v Smith*.<sup>64</sup> Without exception, their Lordships state that the defendant is entitled to assume that the plaintiff is a person of 'normal fortitude',<sup>65</sup> with Lord Jauncey allowing for an exception where the tortfeasor has 'special knowledge of the victim's unusual condition.'<sup>66</sup> It is clear from the judgments that the House of Lords

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55 *Palsgraf v Long Island Rail Co* (1928) 162 NE 99 (NY).

56 *Mullany & Handford*, *supra* n.52 at 66.

57 *Jaensch v Coffey* (1984) 155 CLR 549 at 594 per Deane J.

58 Trindade & Cane, *supra* n.42 at 342.

59 D Gardiner 'Jaensch v Coffey' (1985) 1 *QITLJ* 69 at 70.

60 Trindade & Cane, *supra* n.42 at 342.

61 The leading Australian authority is *Mt Isa Mines v Pusey* (1971) 125 CLR 383 and includes *Jaensch v Coffey* (1984) 155 CLR 547. An English authority is *Dooley v Cammell Laird Ltd* (1951) 1 Lloyd's Rep 271. Trindade & Cane, *supra* n.42 at 342.

62 Chamallas & Kerber *supra* n.43 at 832.

63 Bender *supra* n.19 at 36.

64 [1995] 2 All ER 736.

65 Lord Ackner points out, at 742, that this phrase is 'imprecise'.

66 [1995] 2 All ER 736 at 750.

considers that any unusual susceptibility of the plaintiff has no significance to questions of duty. In a claim for nervous shock, '[t]he defendant can be liable only if the hypothetical reasonable man in his position should have foreseen that the plaintiff, *regarded as a person of normal fortitude*, might suffer nervous shock leading to an identifiable illness.'<sup>67</sup> Dishearteningly, from a feminist perspective, the example Lord Ackner chooses to justify this has echoes of the condescension of eras past. The example is that of a car reversing into a tight parking space, bumping a stationary car, causing a 'condition with consequential physical injury'<sup>68</sup> in a person in the stationary car. It is an innocuous enough example if left at that, but Lord Ackner describes this person as a 'hysterical woman',<sup>69</sup> thus perpetuating the myth inherent in the law reports that it is only women 'prone to hysteria'<sup>70</sup> who suffer nervous shock, and, further, suggesting that timid nervousness is a relatively common state of mind for women to be in.

That a mother's distress or shock at the death of a child has not been easily countenanced within the legal formulation was perpetuated in *Waube v Warrington*.<sup>71</sup> In this case, a mother watching her child crossing the road from a window *saw* the child killed due to the negligent driving of the defendant. The mother, who was in frail health, suffered shock and died thereafter. However, redress was denied. The decision has been explained in terms of the unlikelihood of negligent driving resulting in running into someone, coupled with the unlikelihood of running over a child in the street, and the even greater unlikelihood of causing shock to a person happening to be looking out of the window at the time of running over that child.<sup>72</sup> However, is this unlikely in a mother's case? It appears that the American court, in reaching its decision, relied upon *Palsgraf v Long Island RR*<sup>73</sup> which, while it certainly stands for the proposition that a duty cannot be owed to the unforeseeable plaintiff, was, however, concerned with a completely different set of circumstances.<sup>74</sup> In adopting this line of reasoning, the court did not have to confront the particular issue of the nature of the harm which a mother might suffer in the circumstances of experiencing the loss of a child in this way. Perhaps the conviction that nervous shock was not something experienced by 'normal' people, judged from tort law's male yardstick, the reasonable man, lay behind the reasoning in this case?<sup>75</sup> Is it unlikely that the mother would be watching and waiting for her child?

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67 *Ibid*, at 741, per Lord Keith, emphasis added.

68 *Ibid*, at 749.

69 *Ibid*.

70 *Ibid*.

71 (1935) 258 NW 497; 216 Wis 603.

72 49 *Harvard Law Review* at 1042 (article by Professor Magruder referred to by Evatt J in *Chester v Waverley Corporation* (1939) 62 CLR 1 at 33–34).

73 (1928) 248 NY 339.

74 As Evatt J argues in *Chester v Waverley Corporation* (1939) 62 CLR 1 at 33, *Palsgraf* 'had very little to do with the case except to illustrate the truism that an act of which A can complain as negligence may not be negligence of which B can complain although B suffers damage and injury.'

75 Chamallas & Kerber, *supra* n.43 at 847.

76 (1939) 62 CLR 1.

## The Australian High Court decision in *Chester v Waverley Corporation*

This somewhat disheartening early case law is exemplified by the seemingly dispassionate processes of the majority reasoning in *Chester v Waverley Corporation*.<sup>76</sup> In that case, the High Court denied a duty, based upon lack of reasonable foresight, to a mother who witnessed her seven year old son's body dragged from the defendant council's trench. The unguarded, virtually unprotected, forty foot long trench, had become filled with water as a result of heavy rain. The case is a singularly important one, for it provides an indication of the boundaries to the law during its development several decades ago. The majority judgments fully illustrate the inherent lack of legal weight accorded women's work in caring for family members. However, it also illustrates, through the powerful dissenting judgment of Evatt J, that certain members of the judiciary have always possessed the insight and humanity which feminist jurisprudence has criticised as lacking in so many male judges.

The single most significant precedent in favour of redress available to the High Court in considering the *Chester* case was the English decision in *Hambrook v Stokes*.<sup>77</sup> This seemingly aberrant decision<sup>78</sup> saw redress granted<sup>79</sup> to a husband whose wife had suffered severe nervous shock resulting in haemorrhage and, shortly after, death. The wife, who was pregnant at the time, had feared for the safety of her child after she saw a runaway lorry careering down a hill in the direction of her child, and had subsequently been unable to find the child. Her survivors sued the lorry driver under the *Fatal Accidents Act 1846* (UK) which governed such tort law actions for wrongful death.<sup>80</sup> The legal issue confronting the court was whether she herself could have recovered had she survived the incident.<sup>81</sup>

Several points are worth mentioning in relation to this case. In an interesting approach to the issue, and one of direct relevance to a feminist perspective, Bankes LJ recognised a mother's fear for her child's safety as a legally quantifiable harm. Such fear is equated with fear of harm to the mother herself. Yet, in attempting to draw no distinction between fear of harm to herself and fear of harm to her child, Bankes LJ directly formulated the duty question in terms of a good mother (who fears for her child) and a bad mother (who fears only for herself). While the legal

77 [1925] 1 KB 141.

78 Although Mullany and Handford observe that in this decision alone (where the plaintiff died) as distinct from that in *Dulieu v White* and in *King v Phillips*, there is little question that the plaintiff would have recovered had the action been brought today. They suggest that the plaintiff in both *Dulieu* and *King* would not have satisfied the threshold test had their actions been brought today. Mullany & Handford *supra* n.52 at 21.

79 Two of the three judges allowed recovery.

80 Graycar & Morgan *supra* n.15 at 178.

81 *Ibid.*

outcome supports the claim of a mother harmed through the fear of likely harm to her child, a moral judgment is somewhat implicit in the legal formulation: it might be suspected that the husband recovered partly because of his legally approved choice of wife.

The successful legal result is therefore curiously unsatisfactory from a feminist view:

Assume two mothers crossing this street at the same time when this lorry comes thundering down, each holding a small child by the hand. One mother is courageous and devoted to her child. She is terrified, but thinks only of the damage to the child, and not at all about herself. The other woman is timid and lacking in the motherly instinct. She also is terrified but thinks only of the damage to herself and not at all about her child. The health of both mothers is seriously affected by the mental shock occasioned by the fright. Can any real distinction be drawn between the two cases? Will the law recognise a cause of action in the case of the less deserving mother, and none in the case of the more deserving one? 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? I think not.<sup>82</sup>

The choice of language here may well be telling us a moral and social tale, but this passage does at least direct our attention to the tension in the law between a mother's fear of harm to herself and of fear of harm to her child. Is the judge trying, in the language of the times, to recognise the mother's fear of harm to her child as a real harm? Notwithstanding the problematic interpretation that might be placed upon this reasoning if it was viewed through a feminist perspective, there is no denying the critical significance of this decision.

Graycar and Morgan note that the case illustrates 'one of the important stages' through which the rule relating to recovery and recognition of psychiatric illness at law evolved,<sup>83</sup> because the distinction between fear of harm to oneself and fear of harm to one's children became blurred. The law had, after all, to take this step outside the confinement of harm in order to broaden the net of responsibility for negligent acts.

In *Chester v Waverley Corporation*, Evatt J refers to *Hambrook v Stokes Brothers* as an 'epoch-making decision'<sup>84</sup> and one which does not warrant a narrow reading. The decision in that case cannot be intended to be limited to application to mere "wayfarers" or "passers-by" (as it had been interpreted by the Full Court) for this would mean that recovery might be granted to a mother who stumbled instantly upon her child after an accident and not to a mother who endured hours of waiting and searching. In Evatt J's view, 'the law is at once more civilized and more humane.'<sup>85</sup> For Evatt J, the principle in that case is not intended to be a limited one:

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82 [1925] 1 KB 141 at 151.

83 *Supra* n.15 at 178.

84 (1939) 62 CLR 1 at 21.

85 *Ibid* at 23.



rather, it is one behind which 'lies the broader principle enunciated by Lord Atkin in *Donoghue v Stevenson*'<sup>86</sup> that is, behind which lies the neighbour principle based upon reasonable foreseeability. Therefore, an humane view is proposed: a 'far sounder principle' which is that 'psychic impact must be "fairly contemporaneous" with the casualty.'<sup>87</sup> Interestingly, too, in the light of more recent developments in the law, is the fact that in both *Hambrook v Stokes Brothers* and Evatt J's dissent in *Chester v Waverley*, the duty is not considered limited in principle to parents or relatives. The law had therefore shifted towards a more flexible relation based harm. A different approach to the existing precedents leads Evatt J to a different legal outcome. *Hambrook* is not distinguished, and the attempt to do so is seen to be artificial. The seeming obstacle posed by *Coultas* is dealt with by noting that in 1888, it was assumed that a shock to the nerves did not cause actual physical injury. Hence, *Coultas* is seen to have no application to a case, such as the instant case, where the shock did cause the nervous system an actual physical disturbance.

### Justice Evatt's eloquent dissent

Justice Evatt's dissenting judgment is both legally persuasive and literally eloquent. It provides a graphic illustration of the nature of the mother's fears and the impetus which those fears and her distress provided in her suffering nervous shock. The judgment is also legally realistic and attuned to the restrictions inherent in the law. It still 'stressed the need for plaintiff perception',<sup>88</sup> but the judicial reasoning takes into account and stresses different issues as a means of reaching an alternative legal result.

Two primary differences in Evatt J's approach require emphasis. The first is that detailed attention is paid to the particular facts of the case. Secondly, hinging upon the first, the dissenting judgement draws upon literary references, from William Blake and Tom Collins, as a means of illustrating graphically the mother's fears in searching for her son. Justice Evatt observes that during the half hour period when the trench was being searched, which followed upon several hours of anxious searching for the child, '... the plaintiff's condition of mind and nerves can be completely understood only by parents who have been placed in a similar agony of hope and fear with hope gradually decreasing.'<sup>89</sup> Referring to the judicial technique employed by the trial judge in the matter, which had insisted upon 'excluding the cause of the drowning and the nature of the locality from the factors which operated upon her mind,'<sup>90</sup> Evatt J suggests that 'it is impossible to abstract

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86 *Ibid.*

87 *Ibid* at 31.

88 Mullany & Handford *supra* n.52 at 155.

89 (1939) 62 CLR 1 at 17.

90 *Ibid* at 19.

from the totality of events any factor which during the critical waiting period contributed to her distress and shock.<sup>91</sup>

Thus, in a highly persuasive dissenting judgment which is now widely preferred to the judgment of the majority,<sup>92</sup> Evatt J argues that a broad, humane approach to the law on this matter requires the recognition that the defendant council failed to guard against the risks. Further, had the defendant council directed its mind at all to the consequences of their default, they would have foreseen not necessarily the precise type of harm but still the likelihood of some harm. Whether or not the mother in question reacted more severely to the accident than might others is not the issue: the central point is that where one is negligent one owes a duty to 'all members of all categories'<sup>93</sup> of foreseeable plaintiff. The concern is with the relationship between the plaintiff and the primary victim: that is, between mother and child, rather than upon legal elements to the duty. Justice Evatt shifts the reasoning from the legal elements which may allow redress into the realm of the mother's suffering. The context to the mother's suffering is graphically depicted in order to illustrate the universality of the mother's tragedy.

### The majority approach in *Chester*

However, the majority of the court took an entirely different and far more legalistic approach. In the judgment of Latham CJ in *Chester v Waverley Corporation*, the legal tools available — in particular, the question of the duty of care — are reformulated so as to avoid a confrontation with the emotional investment and care given by mothers in caring for children:

The question which must be asked in order to determine whether the defendant was negligent or not is whether the defendant should have foreseen that a mother would suffer from nervous shock amounting to illness if she saw the dead body of her child where the death of the child had been brought about by the negligence of the defendant towards the child. This mode of formulating the question is very favourable to the plaintiff. For reasons which I have indicated, the question should probably be put in a form which substituted the words "person" and "another person" for "mother" and "child".<sup>94</sup>

The reformulation is clearly intended to be significant.<sup>95</sup> In divorcing the mother from the child and abstracting the plaintiff as part of the judicial formulation of the

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91 *Ibid.*

92 Graycar & Morgan, *supra* n.15 at 183, state that the Evatt judgment 'has been almost universally preferred by courts and commentators since the decision in the 1939 case.' Mullany and Handford refer to 'Evatt's J's now seemingly preferred dissent.' Mullany & Handford *supra* n.52 at 155.

93 (1939) 62 CLR 1 at 26.

94 *Ibid* at 10.

95 The question is usefully raised from the feminist teaching perspective in Graycar & Morgan *supra* n.15 at 183.

duty of care in nervous shock, and in embracing the plaintiff, no consideration needs to be paid to the strength of the bond. By this view, it is almost implicit that the mother's reaction, one of severe shock, will not be characterised as giving rise to a duty. It is a lawful but somewhat dispassionate tactical means of avoiding the imposition of legal responsibility in this situation. This dispassionate thread links the majority judgments in *Chester*. Equally, the judgment of Rich J appears to divorce and depersonalise the strength of the mother's reaction from the death of the child: her care for the child cannot be quantified (and hence legally foreseeable) in the same way as the law might recognise fear or care for herself. Her suffering is seen through a judicial lens that remains distressingly familiar today: it is mere, it is over-reaction, it is essentially derivative and consequential. The language is that of the presentation of the news and it provides an under-emotional lens which conveniently shifts to a comparison with another, completely different, type of situation which is also not within the realm of legal injury:

In the present instance I think that a mother's shock on the production of the dead body of her child falls outside the duty of the municipality in relation to the care of its roads. She was not using the road nor a witness of the accident. Her subsequent shock is not reasonably within the contemplation of the defendant as a consequence of the condition of the road. A negligent motorist who caused great facial disfigurement to a pedestrian could not be made liable to every person who throughout the pedestrian's life experienced shock or nausea on seeing his disfigurement. The train of events which flow from the injury to A almost always includes consequential suffering on the part of others.<sup>96</sup>

Similarly the reasoning of Starkey J evidences a determination to break the chain of emotional causation between the child's death and the mother's suffering in order to avoid confronting the imposition of a legal duty. Again, a disassociation takes place so that the law need not compensate the mother for her suffering:

The failure to guard the trench was but indirectly connected with the shock to the appellant and the act or omission of the respondent was not so closely and directly connected with the shock sustained by the appellant that it can be traced to that act or omission. In my opinion the shock to the appellant is not within the ordinary range of human experience; it is so remote from the act or omission of the respondent in opening or guarding the trench that no reasonable person ought to or would foresee or contemplate the injury to the appellant.<sup>97</sup>

Justice Evatt's judgment is extraordinary not only for its compassionate contemporary view of the plaintiff's suffering but more specifically for its literary allusions. Through this use of literature, the story is constructed with lucidity and more persuasively:

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96 (1939) 62 CLR 1 at 11.

97 *Ibid* at 13-14.

The Evatt dissent turned, in part, upon a more forceful reconstruction of the narrative, and upon an extensive emphathetic exposition of the 'state of nerve exhaustion' of the plaintiff.<sup>98</sup>

Also, most importantly, through the use of the Australian literary allusions, a different interpretation of the facts in the case emerges from the facts that were set out 'summarily but insufficiently' in the Full Court's statement that the discovery of the drowning had caused the suffering of the shock. Meehan has contended that in taking his own different view of the facts, Evatt J's judgment:

[P]roceeded, with literary assistance, to invest those naked words with a greater 'sufficiency,' in a judicial narrative that sought to recreate in the most forceful manner possible, the 'very terrifying setting of the tragedy', the 'most grievous character' of the shock, and the special cultural resonances that the loss of children must import in the Australian context.<sup>99</sup>

Therefore, Evatt J was able to take the next step and leave the other judges in the case behind: unlike the majority, Evatt J decided that the defendant council had been negligent both in relation to the dead child and in relation to the child's mother. The majority were not prepared to hold that the council's recognisable negligence to the child extended to a duty towards the mother, because the harm to the mother could not fall within the reasonable anticipation of the defendant. For Evatt J, however, the relationship between the plaintiff and the victim of the harm in *Chester* is not only one which must be viewed with sympathy, but it is also one which can be translated into law where it is destroyed by another's negligence. Perhaps Evatt J provided an early indication of the more modern sensibility concerning the closeness of relationships. Interestingly, the harshness of the majority view in *Chester* was censured in an article in *The Law Quarterly Review* in 1939, where it was argued even then that the majority view lacked emotional logic:

With all respect, this argument is not very convincing: is it really outside the common experience of mankind that a mother should suffer a severe physical shock under such distressing circumstances?<sup>100</sup>

## Major recent cases dealing with negligently inflicted nervous shock

The law in this area has clearly evolved through phases and the cases provide signposts rather than definitive indications of the law's development. Another step

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98 *Ibid.*

99 *Ibid.*

100 Meehan, M 'An Australian Shock Case' (1939) *The Law Quarterly Review* Vol CCXX 495 at 496.

along the path was taken in 1953 in the decision of the English Court of Appeal in *King v Phillips*<sup>101</sup> where Lord Denning commented that since *Bourhill v Young* 'the test of liability ... is foreseeability of injury by shock.'<sup>102</sup> Yet, commenting 'perceptively'<sup>103</sup> upon the law at that time, Professor Goodhart<sup>104</sup> observed that confusion had arisen in the cases 'from applying to claims based on shock restrictions hedging negligence actions based on the infliction of *physical* injuries.'<sup>105</sup>

The foresight concerning emotional injury and that concerning physical injury had therefore merged, and Professor Goodhart views this as an erroneous assumption. By the time of the decision in *King v Phillips* it appeared that 'liability must in all cases be shown to rest on that congruence.'<sup>106</sup> Yet there are situations where the watcher of an accident cannot foreseeably suffer physical harm but can foreseeably suffer shock. And since 'her cause of action is based on shock it is only foresight of shock which is relevant.'<sup>107</sup> The analysis provides another step along the path to a fuller recognition of the rightful liability of a defendant who has caused harm to a plaintiff through having 'triggered the psychiatric illness.'<sup>108</sup>

### *Jaensch v Coffey*: the touchstone of proximity

In *Jaensch v Coffey*,<sup>109</sup> which currently states the law in Australia, the High Court decided that Mrs Coffey, the wife of a traffic constable injured due to negligent driving by the defendant, Jaensch, could recover damages for the psychiatric illness caused by what the plaintiff saw and heard in relation to her husband's injuries. Although her husband slowly recovered, Mrs Coffey actually suffered not only the debilitating effects of her psychiatric illness, but eventually severe physical damage: pain and uterine bleeding resulting in a tubal ligation and a hysterectomy.<sup>110</sup>

It was in this case that Deane J first espoused the modern notion of proximity which is considered to have radically reformulated the Australian law of negligence. Until then, nervous shock law in particular had focussed conceptually upon the notion of reasonable foreseeability: this pivot had been perpetuated in the influential decision of the House of Lords in *McLoughlin v O'Brian*.<sup>111</sup> Yet, referring

101 [1953] 1 QB 429.

102 *Ibid* at 441.

103 *Beecham v Hughes* (1988) 52 DLR (4th) 625 at 642 per Taggart JA.

104 Goodhart 'The Shock Cases and Area of Risk' (1953) 16 *MLR* 14.

105 *Beecham v Hughes* (1988) 52 DLR (4th) 625 at 642 per Taggart JA.

106 Goodhart *supra* n.104 at 23-4.

107 *Ibid* at 22.

108 *McLoughlin v O'Brian* [1983] AC 410 at 441 per Lord Bridge.

109 (1984) 155 CLR 549.

110 Gardiner *supra* n.59 at 73.

111 *Ibid*.

to the decision in *Wyong Shire*,<sup>112</sup> Deane J pronounced that the reasonable foreseeability test had been diluted to a point where some other control mechanism was required to accommodate the fact that reasonable foreseeability cannot be 'the sole determinant of the existence of a duty of care.'<sup>113</sup> By this formulation, proximity operates as a control upon the generalist test of reasonable foreseeability: a 'touchstone for determining the existence and content of any common law duty of care to avoid reasonably foreseeable injury of the type sustained.'<sup>114</sup>

Proximity thus designates a 'separate and general limitation upon the test of reasonable foreseeability in the form of relationships which must exist between the plaintiff and defendant before a relevant duty will arise.'<sup>115</sup> Yet it remains the case that policy lies at the heart of negligence decisions. Since Deane J's formulation of proximity is essentially a vehicle for the inclusion of policy factors, it means more than the House of Lords use of the same term: a distinction is drawn with the use of proximity as a term meaning 'no more than a consideration relevant to whether there was a reasonably foreseeable risk of injury or a breach of any duty of care.'<sup>116</sup>

Several factors are considered relevant to the general notion of the closeness of the parties: these are physical, circumstantial and causal proximity. In deciding *Jaensch*, Deane J expands the 'aftermath' notion in the nervous shock application of the proximity test. Both the conceptual basis to the law and the plaintiff's connection to the 'aftermath' of the accident are reformulated.

The factors identified as relevant to the closeness of the parties by Deane J, that is, physical, circumstantial and causal proximity, stand alongside elements such as 'reliance' which are introduced in cases of nonfeasance and pure economic loss. However, Deane J's formulation of proximity is not limited solely to a consideration of the closeness or nearness of the relationship between the parties. The principle is widened to encompass also considerations of public policy that are unrelated to the ordinary meaning of proximity. The interaction between Deane J's initial consideration of the closeness of relationship and the policy considerations has been astutely summarised by Derrington J of the Queensland Supreme Court:

Despite criticism from the House of Lords and even within the High Court itself, this convenient appellation of proximity, conveying the quality of closeness of relationship sufficient to make it just and reasonable that the tortfeasor should compensate the injured party, is now firmly part of the law in Australia.<sup>117</sup>

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112 (1980) 146 CLR 40. In this case the High Court endorsed a view of reasonable foreseeability as encompassing simply a risk that was not 'far fetched or fanciful'.

113 (1984) 155 CLR 549 at 581.

114 *Ibid* at 583.

115 *Ibid* at 584.

116 *Ibid*.

117 The Hon Mr Justice DK Derrington 'The Limits of Awards of Economic Loss Through the Cases' (1989) 63 *ALJ* 13.



The development of this doctrine of proximity has become one of the distinguishing features of Australian negligence law.<sup>118</sup>

In more recent Australian nervous shock cases, as in the earlier decision in *Benson v Lee*,<sup>119</sup> the determination of the legal requirement of duty of care has been tempered by an acknowledgement of some particular injuries suffered by women. Part of the policy that is at work here is the simple recognition of extreme suffering directly caused by another's act which has killed or severely injured a loved one. Increasingly, we see creeping into the case law the notion that the plaintiff need not necessarily have been related to the injured person but rather that the legal outcome will reflect the general principle that 'the closer the ties of love and affection between the plaintiff and the victim the stronger will be the plaintiff's case.'<sup>120</sup> However, it must be stressed that the degree of distress and level of emotional input from the plaintiff to the relationship are not determinative issues at law. It remains the case that the law pivots around the technical concept of proximity, which is determined by the court in each situation. Thus there is no predictability of outcome and notions of impact still tend to dominate.

What can be asserted more confidently now is that the legal issue that is determinative of outcome is that 'in every case it is a question of whether the defendant ought to have foreseen that the plaintiff might suffer shock.'<sup>121</sup> Thus the old confusion between foreseeability of physical injury and foreseeability of nervous shock has been replaced by a more rational formulation. That confusing early congruence has however been replaced by a more open acknowledgement of the place for policy (disguised as proximity) in determining where the line should be drawn around a defendant's liability for his conduct.

However, the House of Lords appears to have reintroduced this confusion by adopting a different test of foreseeability depending on whether the victim is a participant or a bystander. In *Page v Smith*,<sup>122</sup> their Lordships held that in cases involving a participant, it is sufficient for the plaintiff to prove that personal injury of some kind was reasonably foreseeable. Nor is it considered necessary that physical injury actually occur: '[i]t could not be right that a negligent defendant should escape liability for psychological injury just because, though serious physical injury was foreseeable, it did not in fact transpire.'<sup>123</sup> However, as a control mechanism,

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118 Meredith comments that there is 'some debate currently within the High Court as to the relevance of the doctrine of proximity' citing *Gala v Preston* (1991) 172 CLR 243; *Stevens v Brodrigg Sawmilling Co Pty Ltd* (1986) 160 CLR 16; *San Sebastian Pty Ltd v The Minister* (1986) 162 CLR 340; *Cook v Cook* (1986) 162 CLR 376. J Meredith 'Step by Cautious Step — A Recent Finding on Nervous Shock' (1991) *QLSJ* 427 at 428.

119 [1972] VR 879.

120 Trindade & Cane *supra* n.42 at 344.

121 *Ibid* at 345, citing *Alcock* and *Jaensch v Coffey* (1984) 155 CLR 549 at 569–70 per Brennan J, and at 605–11 per Deane J.

122 [1995] 2 All ER 739, Lords Keith and Jauncey dissenting.

123 [1995] 2 All ER 739 at 759.

the test for a secondary victim remains reasonable foreseeability of a psychiatric injury, along with the requirements of proximity, and that reasonable foreseeability is judged in light of a victim of 'normal fortitude'.<sup>124</sup> While it is encouraging to note that their Lordships consider there is no justification for regarding physical and psychiatric injury as different 'kinds' of injury, it must be wondered why this is only the case for primary victims. It would seem appropriate, in the interests of consistency, to adopt the same test for both types of claims.

### ***Alcock*: a great leap backwards?**

Lest the early cases be seen only as remnants of a less understanding, uncaring judicial age, it is arguable that, in the modern context, an equally restrictive approach has recently been taken by the House of Lords in the Hillsborough decision, *Alcock v Chief Constable of South Yorkshire*.<sup>125</sup> This decision clarifies several aspects of the law relating to nervous shock in a new, and potentially commonplace, social situation. The case is also known as the Hillsborough case because it arose from the collapse of the Hillsborough football stadium in Liverpool in 1989 during the FA Cup semi-final. Police responsible for crowd control at the match allowed an excessively large number of intending spectators into a section of the ground which was already full. Nearly a hundred spectators were killed and approximately four hundred were injured as a result of the crush caused by the excessive crowd in the stadium.

The Hillsborough cases appear to pave the way towards a new line of seemingly harsh authority, where virtual physical presence at an accident or at its direct aftermath is required in order to maintain an argument concerning shock inducement. Yet a more compassionate approach is in evidence in the notion of a rebuttable presumption which simply requires proof of the closeness of the emotional tie between plaintiff and primary victim. It remains to be seen whether this approach, rather than dispassionate legal formulations concerning physical proximity and direct perception, will provide a legal way forward.

*Alcock* was only the third time that the House of Lords had been called upon to deliberate on the issue of nervous shock.<sup>126</sup> The issues confronting the House of Lords were slightly unusual. Scenes from the football ground were broadcast live on television from time to time during the course of the massacre. However, in accordance with television broadcasting guidelines, none of the television broadcasts actually depicted the suffering or dying of recognisable individuals. The chief

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124 *Ibid* at 760–1, per Lord Lloyd.

125 [1992] 1 AC 310.

126 M Davie 'Negligently Inflicted Psychiatric Illness: The Hillsborough Case in the House of Lords' (1992) 43 *Northern Ireland Legal Quarterly* (No. 3) 237. The other two cases were *Hay (or Bourhill) v Young* [1942] 2 All ER 396; [1943] AC 92 and *McLoughlin v O'Brian* [1982] 2 All ER 298; [1983] 1 AC 410.

constable of the force responsible for crowd control at the match admitted liability in negligence in respect of those who were killed and injured in the disaster but denied that he owed any duty of care to the particular claimants.

Of the sixteen claimants, only two were actually at the Hillsborough ground (and these not in the area where the disaster occurred)<sup>127</sup> but all were relatives of persons in the area. They claimed against the chief constable as relatives of others, for nervous shock resulting in psychiatric illness alleged to have been caused by seeing or hearing news of the disaster. Of the claimants, thirteen had had relatives and friends killed, two had had relatives and friends injured, and in one case their relative had escaped injury. It has been suggested that the cases that reached the House of Lords were the 'difficult ones', since liability had been admitted in the 'more straightforward' cases, including several cases involving psychiatric shock.<sup>128</sup> The House of Lords' decision, which draws heavily upon the conceptual and analytical framework advanced by the House in *McLoughlin*, provides a delimiting of the strict legal requirements which underpin recovery in nervous shock actions, particularly in relation to large-scale incidents.

However, comments advanced by way of obiter leave some confusion in the law, and the overall effect is one of having to slot your case into the appropriate step on the incremental negligence ladder. Following *McLoughlin* and *Alcock*, there is considerable legal support for the proposition that the closer the tie (in relationship and care) the greater the legal support for the claim. The Court in *Alcock* drew upon the 'ideas inherent'<sup>129</sup> in the *McLoughlin* formulation to the effect that 'the closer the tie the greater the claim for consideration.'<sup>130</sup> Thus, the law has shifted closer to the Evatt formulation with its emphasis upon the relationship between the plaintiff and the primary victim. Whatever language a court may use to recognise this, it provides an advance upon the more orthodox approach to this area of law.

The basis for the appeal to the House of Lords was that the only test for establishing liability for shock induced psychiatric illness was whether such illness was reasonably foreseeable.<sup>131</sup> In fact, the sole question for the House of Lords concerned whether the defendant chief constable owed a duty of care to the plaintiffs to avoid causing them psychiatric illness through the circumstances in which they perceived the events.<sup>132</sup> The plaintiffs therefore sought to extend the boundaries to this cause of action. While the approach taken at first instance is particularly interesting, the significance of the House of Lords decision lies in its confirmation of the largely restrictive approach adopted in the Court of Appeal.<sup>133</sup> The need to

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127 G Exall 'Nervous Shock after Hillsborough' (1992) *Solicitors Journal* (10 Jan) 13.

128 *Ibid.*

129 *Ibid.*

130 [1983] 1 AC 410 at 422 per Lord Wilberforce.

131 [1992] 1 AC 310 at 388-9.

132 *Davie supra* n.126 at 237.

133 B Hepple & R O'Dair 'Tort' (1992) 45 *Current Legal Problems (Annual Review)* (Part 1) 151.

limit the general foreseeability test is articulated and the doctrine of proximity provides that limiting feature in the decision. What is exceptional in these recent cases is not just the open acknowledgement that policy may drive the test of reasonable foresight for duty but the extent of the invocation of public policy issues and open acknowledgment of the justiciability of those issues. In this regard nervous shock mirrors economic loss in negligence, although the latter has produced far more cases.

### **The influence of *McLoughlin* to the outcome in *Alcock***

In his formulative judgment in *McLoughlin*, Lord Wilberforce stressed the three elements inherent in any nervous shock claim: the class of persons whose claims should be recognised, the proximity of such persons to the accident and the means by which shock is caused. Insofar as the class of persons is concerned, he suggested that close scrutiny is required of 'cases involving less close relationships': the closer the tie (in relationship and care) the greater the claim for consideration. Interestingly, both the higher courts in *Alcock* stressed a narrow interpretation of the ratio in *McLoughlin*, arguing that Lord Wilberforce in essence attempted to limit the extent of admissible claims.

The wide ratio of the case ... appeared to be simply the test of reasonable foresight, and this meant (according to the majority) that factors of time, space, and intimacy of relationship could be controlled at the level of fact-finding. By contrast, the Court of Appeal in the Hillsborough cases treated Lord Wilberforce's much narrower ('immediate aftermath') ratio as the ratio of the case, and then placed a restrictive interpretation upon that narrow ratio.<sup>134</sup>

Lord Wilberforce referred to other relevant factors — proximity to the scene in time and place and the nature of the accident. He suggested that experience has shown that to insist on direct and immediate sight or hearing would be impractical and unjust and that as a result of the 'aftermath' doctrine, one who comes very soon onto the scene from close proximity, is considered in fact to possess the requisite proximity. A strict test of physical proximity (by sight or hearing) is proposed, subject only to the qualifications that in certain situations, presence at the accident is not possible, and the notions of 'aftermath' or 'rescue' may bring a person within the scope of foresight and duty. By this view, the injustice and impracticality of insisting upon direct and immediate sight or hearing is clearly recognised. Therefore, notwithstanding the apparent attempt at limiting the duty through insistence upon strict legal requirements, it is precisely by means of such conceptual links that the scope of duty is effectively extended in *McLoughlin*.

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134 *Ibid* at 166.

In his now famous passage in *McLoughlin*, Lord Wilberforce suggests that there has as yet been no case in which the law has compensated shock brought about by communication by a third party.<sup>135</sup> For the purposes of the subsequent legal argument in *Alcock*, the important recognition in *McLoughlin* is that although at present the shock must come 'through sight or hearing of the event or of its immediate aftermath', there might be situations when 'whether some equivalent of sight or hearing, e.g. through simultaneous television, would suffice may have to be considered'.<sup>136</sup> Nevertheless, despite its caution, the *Alcock* judgement does not specifically negate the implication that, since *McLoughlin*, recovery for nervous shock could be possible in Hillsborough type circumstances.

The significance of *Alcock* may well lie in its providing another example, at least for the conceptual future, of the inevitable possibilities associated with the 'radiating effects' of *Donoghue v Stevenson*.<sup>137</sup> As Warner has noted in a detailed examination of cases in this area, those effects have been that, since 1932, the 'negligence action sought to pull in many of the other actionable situations in which negligence might be an element.'<sup>138</sup>

## A way forward?

While it is clearly a slow and tentative process, the case law has clearly shifted towards an increased emphasis upon and legal translation of the closeness of the emotional tie between the victim of the accident and the sufferer of the nervous shock. This has given effect to the loss of that relationship as real harm or injury. The Evatt view in *Chester*, so lonely in 1939, is now more closely akin to the majority High Court view, and the force of Evatt J's pronouncements has been recognised as a 'powerful dissent' by Lord Wilberforce in *McLoughlin v O'Brian*.<sup>139</sup> The case law since that time, seen across jurisdictions, indicates that the courts have taken further tentative steps along the road towards the removal of the arbitrary barriers to redress that have been erected in this area. Yet there is a depressing indication that damage to property may be considered more likely at law to give rise to compensable harm for consequential nervous shock.

135 Citing as authority *Hambrook v Stoke Bros* [1925] 1 KB 141; [1924] ALL ER 110; *Abramzik v Brenner* (1967) 65 DLR (2d) 651.

136 *McLoughlin v O'Brian* [1982] 2 ALL ER 298 at 304-5; [1983] 1 AC 410 at 421-423 quoted in *Alcock* [1992] 1 AC 310 at 386.

137 The phrase is that of K Warner, 'Judicial reasoning and precedent: negligently inflicted psychological injuries' (1990) 10 *Legal Studies* (No. 1) 63 at 75.

138 *Ibid.* The decision of the High Court in *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 might be given as a recent example of these effects. The effect of this decision was to draw the principles traditionally preserved as *Rylands v Fletcher* (1866) LR 1 Ex 265; *affd* (1868) LR 3 HL 330 under the general ambit of the law of negligence.

139 [1983] AC 410 at 422. Lord Oliver observed in *Alcock* that a court today would have no difficulty in viewing the mother's presence and reaction in *Bourhill v Young* and in *Chester v Waverley Corporation* as foreseeable. This is also Deane J's formulation in *Jaensch v Coffey*.

## Is harm to property more harmful than harm to children?

At least Nader J has stepped outside the boundaries of the law to criticise the development of the extraordinary dichotomy between harm to property and harm to children. The discussion stems from a reading of McHugh JA's reasoning in *Campbelltown City Council v Mackay*.<sup>140</sup> It is suggested that the apparently more favourable situation in the case of damage to the plaintiff's property cannot be based on any 'reasonable foundation'.<sup>141</sup> Concluding *Anderson*,<sup>142</sup> Nader J argues that while this distinction may be logical, it can barely be justified on policy grounds. There is a clear recognition of the artificiality of the distinction and of the emotional implications involved in the assumption that damage to property always injures its owner:

[I]s 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? Might it not be time for another 'cautious step' in this area of the law so as to put parents of infant children on the same footing at least as owners of property in the relevant respect.<sup>143</sup>

## The spectator/accident emphasis

Trindade and Cane's comment about the restrictive principle formulated in *Spence*, where the mother cared for and worried about the injured daughter for many years, is particularly instructive. They note that the case stands for the proposition that: 'mental illness suffered as a result of caring over a long period for a person disabled by negligence would not be compensable.'<sup>144</sup> This seems indisputable, since compensation in this area requires 'sudden sensory perception.'<sup>145</sup> Again, the more masculinist line of reasoning surfaces: suffering and harm resulting from caring for other people is part and parcel of life and not the basis to a legal action. Again, the legal reasoning and remedy excludes the social reality of most women's lives. Implicit in this reasoning is that the law, reflecting the values of the community, does not particularly value caring for people, or, at least, is prepared to recognise only particular types of caring for others: where the harm is sudden, direct and impacted like a bolt from the heavens upon life. By this view, furthermore, the decision in *Spence* exemplifies the tendency in this area of law towards 'accident preference' and through its formulation of precise limitations

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140 (1989) 15 NSWLR 501.

141 *Ibid* at 510.

142 (1990) 101 FLR 34.

143 *Ibid*.

144 Trindade & Cane *supra* n.42 at 345.

145 *Ibid*. Quoting *Jaensch v Coffey* (1984) 155 CLR 549 at 567.



confirms that 'nervous shock is unlikely to be recoverable in cases where a person is disabled by a negligently caused illness as opposed to a traumatic accident.'<sup>146</sup>

Where does this leave women who "see" (in a broad sense) their children suffer harm or injury due to the negligent act of another and devote their time to the care of that child? So a more stringent criticism of the likely effect of the restrictive approach is that advanced by Vines, who has argued that the requirement of 'shock' or 'sudden sensory perception' has been incorporated through the proximity notion into legally recognisable nervous shock and provides a major limiting factor in recognition of the category of harm. It may mean that a mother may be 'equally traumatised by having nursed a child who has a long battle with AIDS caused by a blood transfusion, but this would not amount to a sudden sensory perception and she could not recover for nervous shock'.<sup>147</sup>

There has been a case involving nervous shock to a mother consequent upon physical illness caused to a daughter by negligent construction of a chimney<sup>148</sup> where the judge pronounced that it was 'readily foreseeable that a significant number of mothers exposed to such an experience might break down under the shock of the event and suffer illness'.<sup>149</sup> The British Columbia Court of Appeal in *Beecham v Hughes*<sup>150</sup> however took an approach similar to that in *Spence* and queried the 'causal proximity' in a claim involving a post accident situation where the plaintiff cared for his severely disabled common law wife in hospital for many years. The court found that the length of time between the onset of the depressive illness and the accident cast doubt upon whether the plaintiff fell into the requisite reasonably foreseeable 'neighbour' category. Yet the court recognised that if the plaintiff's reactive depression had resulted from the stress of seeing his wife, day after day, in a condition utterly unlike her condition before the accident, the damage would have been foreseeable.

At least to date, the law has been formulated in such a way as to exclude from the ambit of compensation a range of situations which might result in women caring for (broadly defined) accident victims over a long period of time. Isolation of the particular cases that have brought successful outcomes must be counted against those many and varied cases where plaintiffs have not been successful.

## Time spent caring for a victim

Gardiner has commented that certain recent decisions indicate that the Australian High Court too may have reached the tail end of its own adventurous redefinitive

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146 *Ibid.*

147 P Vines 'A Defence of Proximity in Australia: Looking at Negligence Through Nervous Shock' (1992) *ALTA Interest Group Paper* 47th ALTA Conference.

148 *Ward v Ballaughton Estate* (1989) MLR 428.

149 *Ibid* at 440.

150 (1988) 52 DLR 625.

'tort phase.'<sup>151</sup> This view may be exemplified in the decision of the Queensland Full Court in *Spence v Percy*.<sup>152</sup> In *Spence*, the court stressed, following the *Jaensch* and *McLoughlin* line of authority, that there was insufficient causal proximity between the onset of psychiatric illness and the events of an accident where a mother suffered severe anxiety and nervous shock three years after an accident caused by the defendant's negligence which left her daughter in a coma. The onset of the psychiatric illness and breakdown occurred after three years, when the mother, having cared for the daughter following the accident, was told that the daughter had died suddenly. Although medical evidence clearly supported the finding of the trial judge that the illness was a direct consequence of the mother's initial reaction to the accident, the Full Court considered the illness not 'shock induced'. Noting that hitherto the dual requirements of reasonable foresight and proximity had been confined to the scene of the accident, the court overturned the trial judge's finding that the illness was a direct consequence of the reaction to the accident. The situation was held not to fall within the 'aftermath' of the accident. Mention is made of several other distressing circumstances in the mother's difficult life as contributing, if not major, causes of her illness.

In its line of reasoning, the court itself broke the causal chain between between the events of the accident and the onset of the illness. The court separated the long period that the plaintiff mother had spent caring for her injured daughter. This is in accordance with the principles in *Alcock*,<sup>153</sup> where Lord Ackner observed that nervous shock 'has yet to include psychiatric illness caused by the accumulation over a period of time of more gradual assaults on the nervous system.'<sup>154</sup> It is a seemingly harsh, dispassionate yet legally correct view, which follows, but fails to realise the expansionary potential of, the High Court's line of reasoning through *Jaensch v Coffey* and the Victorian Supreme Court in *Benson v Lee*.<sup>155</sup> In both these cases, the plaintiff mothers were linked into the aftermath as they saw the injured party within a few hours of the accident.<sup>156</sup> The judicial emphasis upon the impact of the accident, while legally defensible, inevitably raises questions about where the lines will be drawn. Recent cases do not indicate that even now the harm caused to women through such nervous shock situations has been understood.

In *Anderson v Smith and Another*<sup>157</sup> the Supreme Court of the Northern Territory was confronted with a mother's claim for nervous shock in respect of the death of her child left in the care of the child's grandparents. The child's death

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151 D Gardiner *Outline of Torts* Butterworths (1992) vii. Referring specifically to the decision in *Gala v Preston* (1991) 172 CLR 243.

152 [1992] 2 Qd R 299.

153 [1992] 1 AC 310.

154 *Ibid* at 401.

155 [1972] VR 879. In this case, the mother first saw her son lying on the road and then accompanied him to hospital.

156 The High Court refused leave to appeal in *Spence*.

157 (1990) 101 FLR 34.

was the result of drowning when the grandmother left the door open which led out to the swimming pool. The mother had moved with the children to live with the grandparents only days before the accident, following a violent confrontation with her husband. Like the plaintiff in *Spence*, the life of the plaintiff in *Anderson* had been intermittently unhappy and stressful. The mother, who had been out with friends at the time of the accident, failed in her claim for nervous shock, again due to failure to prove that her depressive state was a direct consequence of the negligent accident. Mention is made in *Anderson* of the mother's grief and guilt, of her spending days and nights at the hospital with the child, and of her feeling that she had 'failed as a mother'<sup>158</sup> when the daughter remained in a coma. It was decided that the plaintiff was one of the class of persons who should be recognised and satisfied the requirement of proximity in time and space to the accident, but the court drew an 'insurmountable barrier'<sup>159</sup> around the means by which the shock was caused. Justice Nader was of the view that there was no 'acceptable evidence'<sup>160</sup> that the psychiatric illness was the result of the shock of the perception of the phenomenon of her daughter in the hospital at all. It is emphasised, in denying redress, that the psychiatric illness of the mother in this case is considered not to be 'the result of *shock*'<sup>161</sup> but of prolonged contact with a complex set of stressful events which culminated in the death of her daughter. This is illustrative of Nolan's contention that '[p]laintiffs may also find it difficult to establish causation where their home life or other external circumstances added to the pressures on them at the relevant time'.<sup>162</sup> As in *Spence*, there is some indication that the mother's unfulfilled hopes of her daughter's recovery, and the 'dashing of those hopes'<sup>163</sup> by the eventual death following the months of care, may have been fatal to the need to prove shock. It would seem that somehow gradual realisation of the reality of the loss, and a subsequent suffering of shock (ie, illness) remains outside the judicial perception of nervous shock.

### **Caring for others is a part of life**

It might be argued, therefore, that the strict emphasis upon the technical legal requirements and the convenient misnomer of nervous 'shock' have acted as barriers to women's wider recovery in this area. So once again it is clear that the law is reluctant to compensate for a form of harm more commonly suffered by women than men. It is particularly clear in many recent nervous shock cases that very

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158 *Ibid* at 40.

159 *Ibid* at 49.

160 *Ibid*.

161 *Ibid* at 50.

162 D Nolan 'Recovering Damages for Psychiatric Injury at Work' (1995) 24 *Industrial Law Journal* 280 at 282, commenting on *Walker v Northumberland County Council* [1995] IRLR 35 (QBD).

163 *Ibid*.

often the remedy is simply not made available because the courts have drawn the lines at a particular policy point while still relying upon the legal requirements of proximity and reasonable foreseeability. Those lines are drawn, whether articulated in the decisions or not, with reference to policy. This in itself means that the courts very often simply see what is more traditionally 'women's work' — caring for others — as inevitably lying outside the ambit of the law. The courts have, for the most part, taken a restrictive view of the 'significance of the personal relationship between the witness and the primary accident victim'<sup>164</sup> and not countenanced a broad conceptual recognition of the significance of emotional and human ties. Nor have they even consistently recognised the full significance of that relationship to which they have accorded most legal recognition in this area of law: that between mother and child. If negligence's omnipresent and none too benevolent conceptual God, proximity, can intervene between mother and child or indeed between any relations of life,<sup>165</sup> He is most likely to do so.

It is an unduly restrictive view from the feminist perspective, which would take a more compassionate view of the 'infinitely varied circumstances of human relationships.'<sup>166</sup> Therefore, exclusion from the law is of the very essence of so many women's lives. This exclusion is encapsulated in the Hillsborough cases, of which the decision in *Alcock* is the culmination. While this decision usefully clarifies the current conceptual requirements in a nervous shock action under English law, it also illustrates, as a comparative consideration, the more restrictive and categorical approach of the English courts on this issue compared to the approach of their Australian counterparts. It has in fact been suggested in the English context that the Hillsborough cases provide a good illustration of the retreat of the law of negligence from 'broad principles' to the 'traditional categorization of recognizable duties of care.'<sup>167</sup> Lord Oliver's pronouncement provides echoes of Latham CJ's admonition (perhaps to womankind to react more like mankind?) in the High Court in 1939:

Death is not an infrequent event, and even violent and distressing deaths are not uncommon. It is, however, not a common experience of mankind that the spectacle, even of the sudden and distressing death of a child, produces any consequence of more than a temporary nature in the case of bystanders or even of close relatives who see the body after death has taken place.<sup>168</sup>

It was also open to the Queensland court in *Spence* to formulate the liability in terms that emphasise the closeness of the emotional tie more fully. Seen from a

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164 *Ibid* at 839.

165 *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310 at 402 ff per Lord Ackner.

166 *Caparo Industries plc v Dickman* [1990] 2 AC 605 at 616 per Lord Bridge.

167 Hepple & O'Dair *supra* n.133 at 165–6.

168 (1939) 62 CLR 1 at 10.

feminist perspective, such a presumption, in the *Spence* situation, would consider taking care of the loved one in the legal balance sheet. In the Hillsborough situation, it would encompass a recognition that viewing the graphic portrayal of an accident on television or having fears confirmed through communication by third party can be as distressing as actual physical presence at the scene. And in the now recognisably out of date approach in *Chester v Waverley Corporation*, it would require recognition, with Evatt J, of the shock, distress and anguish experienced by the searching mother as within the ordinary range of human experience and a foreseeable consequence of the defendant's negligence.

Surely this broader formulation provides a way forward? Yet, in nervous shock cases, the courts continue for the most part to fall back upon dispassionate legal formulations concerning causal proximity and direct perception. The one consolation is that mothers have had limited success in actions brought upon this basis: yet, again, the remedy is unpredictable, limited, restrictive, cautiously legalistic and particularly individualistic. Inevitably, the social effect in terms of a re-education and redefinition of harm, let alone of a persuasive recognition of women's involvement in caring for others, is minimal.

## Intentional infliction of emotional harm

In considering tort law's inadequacies from a feminist perspective, it is useful to consider a related area, in which Evatt J also displays an empathy with women's harm. Although there has been some debate concerning whether intentional infliction of nervous shock is a separate category of tort law, or is best subsumed under the general negligence banner,<sup>169</sup> a concrete decision on that outcome is unnecessary for the purposes of this paper. The wording of precedents in this area refer to acts 'calculated' and 'intended or likely' to cause damage: the judgments even speak of 'reckless' behaviour. In light of this, it appears that authorities in this strand of tort law can have at least persuasive weight in the area of nervous shock, especially considering the law of negligence in a feminist context.

Just as women form the majority of victims of unintentional nervous shock, they also form the majority of victims in intentionally inflicted nervous shock. An early case in this area, *Bunyan v Jordan*,<sup>170</sup> sees a general unwillingness by the judiciary, bar Evatt J, to adequately recognise and recompense these victims for the harm inflicted upon them. In that case, the plaintiff claimed damages for shock as a result of an incident in the shop where she was employed. Her employer, who had been drinking at the time, brandished a revolver and observed to someone in his office that he intended to shoot someone or himself. Shortly afterwards, the

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169 R Magnusson, 'Recovery for Mental Distress in Tort, with Special Reference to Harmful Words and Statements' (1994) *Torts Law Journal* 126 at 157.

170 (1937) 57 CLR 1.

statement was repeated to the plaintiff, who became extremely nervous. A shot was in fact fired in the defendant's office, which the plaintiff heard, although shortly afterwards the defendant returned unhurt. The plaintiff subsequently suffered from a neurasthenic breakdown: medical evidence supported the view that this was caused by a shock.

The trial judge held that there was no evidence that the plaintiff apprehended any personal injury to herself, and that there was no such relationship between the plaintiff and the defendant as to create in the defendant a legal duty not to terrify the plaintiff by wrongful action causing mental shock followed by physical consequences. The trial judge's verdict was affirmed by the Full Court of the Supreme Court. The plaintiff pursued the matter in the High Court.

The decision canvasses the significant *Wilkinson v Downton*<sup>171</sup> line of authority, which involves redress for deliberate intent to cause injury through emotional harm. That case had involved the playing of a practical joke informing the plaintiff, wrongly, of harm to her spouse. The plaintiff had rushed to the scene of the supposed accident only to discover that the informer had been playing a black joke. Again, the law is dealing with feelings and reactions to distressing information about loved ones. In a search for the true meaning of *Wilkinson v Downton* and the question of deliberate intent to cause injury as constituting in itself the tortious element in an otherwise lawful act, Latham CJ emphasised the need for both an intention to injure and the clear likelihood that the act done was likely to cause harm. In considering negligence, the *Wilkinson* line of authority forms a pivot to Latham CJ's approach. It is as if the nature of the injury, fright, automatically belongs in *Wilkinson* reasoning. The standard of conduct is questioned less than the standard of the plaintiff's robustness:

In the case of ordinary persons, if a man said to them that he was going to shoot somebody and they then heard a shot or even saw the speaker shoot himself or someone else, they would be disturbed or upset in varying degrees, but they would not suffer from illness producing a nervous breakdown. Such a consequence is not within the scope of reasonable anticipation.<sup>172</sup>

A stricter view of the action is taken by Rich J who at times uses words that seem to practically hector the plaintiff. For Rich J, plaintiff's counsel had virtually manoeuvred about a position where he was 'at liberty to disregard the pleadings and rely on any cause of action which ingenuity might then or thereafter discover in the evidence which he was able to lead.'<sup>173</sup> Justice Rich then suggests that the plaintiff's claim and condition might be more unkindly attributable to the loss of her employment than by the 'spectacle of an alcoholic storekeeper, pretending

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171 [1897] 2 QB 57.

172 (1937) 57 CLR 1 at 14.

173 *Ibid* at 15.



however realistically, that he was taking his own life.’<sup>174</sup> The subsequent nervous shock is not seen to be the realistic reaction of a reasonable person. His Honour then lapses into a degree of well expressed condescension:

But perhaps a female clerk could not be expected to discover the incongruities of the respondent’s behaviour, and to discredit the theatrical threats ...<sup>175</sup>

The approach of Evatt J in this case is again different. In Evatt J’s view, an action stems directly from the *Wilkinson v Downton*<sup>176</sup> and *Janvier v Sweeney*<sup>177</sup> line of authority. That action lies where a person wilfully alarms or terrifies another by the deliberate act of threatening to commit suicide, and that condition of alarm or terror causes physical illness. His Honour does not draw a distinction between nervous shock and physical illness. Nor does the fact that many persons, or a majority of persons, ‘or even that especially formidable person ‘the ordinary, normal human being’ would not be alarmed or terrified or have suffered illness as a result of the defendant’s action’ provide a barrier to recovery.’<sup>178</sup> So again Evatt J’s emphasis is upon different issues, this time upon the behaviour of the defendant. And again the language is selected with a clear view towards strongly emphasising the plaintiff’s case and confronting the negligence of the defendant.

## The next step

It is clear that any further changes in particularly incrementally developing areas of negligence may be most likely to emanate from Parliament. It might be asked why the law cannot simply compensate harm where it is caused by another’s negligence and why the lack of consideration for others that harm indicates should not be compensated:

This continual mysterious movement, this continuing insistence that plaintiffs should only be slightly innovative in the manner in which they are injured, serves no obvious purpose; and it simply adds insult to injury to tell the losing plaintiffs that their real problem was lack of “the customary phlegm” ... when all we mean is that the common law has not caught up with them yet.<sup>179</sup>

Yet despite the incremental advances, it is unlikely that the courts will radically change the law:

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174 *Ibid.*

175 *Ibid.*

176 [1897] 2 QB 57.

177 [1919] 2 KB 316.

178 *Ibid* at 18.

179 S Hedley ‘Nervous Shock — The Common Law Moves in a Mysterious Way (Again)’ (1991) 50 *The Cambridge Law Journal* 229 at 231.

All the indications are that any expansion of liability is now firmly in the hands of Parliament. It is submitted that, in view of the manifest injustices yielded by the law, Parliament should respond by dispensing with the requirement of direct perception, at least for claimants with a strong bond of affection with the primary victim.<sup>180</sup>

Although the House of Lords recognised that damages for nervous shock could be recovered in situations such as that which occurred at Hillsborough, the actual decision in the case went against the claimants on the specific question of proximity. Although the approach is one of greater flexibility, caution in relation to the proximity requirement — that increasingly ‘normative facet of the modern duty of care’<sup>181</sup> — is also very much in evidence in the recent Australian law.<sup>182</sup> Hepple and O’Dair have commented that this ‘new conservatism’ is not a ‘purely English phenomenon.’<sup>183</sup> They point to similarly conservative shifts in judicial policy in this area of tort law in California and British Columbia.<sup>184</sup> Yet recent economic loss cases do indicate expansionary tendencies in that area of negligence throughout the common law.

## Concluding feminist considerations

As the review of nervous shock cases reveals, this area of law has proven to be conceptually inadequate as a means of dealing with the specifically gendered harms that are suffered by women. As in the equally vital area of domestic violence, where a range of intraspousal and intrafamilial immunities have ‘shrouded domestic violence against women and children from legal redress’<sup>185</sup> so too with nervous shock cases, a range of conceptual and technical barriers have been erected as a means of denying women recovery where they have suffered severe distress and shock in relation to harm that has been caused to their children.

In a rare paper which specifically endeavours to set the law relating to fright-based injury within a feminist framework, Chamallas and Kerber assert that the law of fright and emotional injury involves actions more commonly claimed by women than men and evidences a legal outcome heavily influenced by ‘gendered thinking’.<sup>186</sup> The extent of that gendered thinking has been such that the law

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180 KJ Nasir ‘Nervous Shock and *Alcock*: The Judicial Buck Stops Here’ (1995) 55 *The Modern Law Review* 705 at 707.

181 Mullany & Handford *supra* n.52 at 80. They note that there has been an increasingly normative absorption of this ‘nebulous concept’ into the ‘modern duty of care.’

182 *Ibid.* (Commenting on the High Court decision in *Gala v Preston* (1991) 172 CLR 243.) Mullany observes that in relation to the problematic proximity concept, the recent High Court decision ‘promised much’ but ‘sheds little illumination’.

183 *Supra* n.133 at 167.

184 *Ibid.* Citing the Californian Supreme Court decision in *Thing v La Chusa* 771 P 2d 814 (1989) and the decision of the British Columbian Court of Appeal in *Rhodes v Canadian National Railway* (1991) 75 DLR (4th) 248.

185 Bender *supra* n.19 at 8.

186 *Supra* n.43 at 815.

constructed and created 'specific doctrinal obstacles ... to contain recovery in such cases.'<sup>187</sup> Standard legal texts analysing this area of law have failed to recognise the gendered assumptions and implications that lay behind the operation of the three specifically restrictive doctrines that have operated to limit recovery in this area. Yet those doctrines (the impact rule, the bystander rule and the physical injury rule) reinforced the 'process of gender differentiation and gender disadvantage'<sup>188</sup> implicit in the early operation of the law until the historical shift which saw the 'modern trend to greater recovery.'<sup>189</sup> The 'degendered version'<sup>190</sup> told by the texts obscures the place occupied by legal doctrines which have upheld the greater value placed by the law upon physical injury and property rather than upon emotional security and human relationships. As such, this area of torts has exemplified the hierarchy of values which has 'privileged men' throughout law.

The cases examined in this paper, in the context of nervous shock, exemplify the gap between feminist theory and the law's conceptualisation of harm and recognition of injury. They illustrate Bender's contention about the nature of the interpretive vantage point adopted by our legal system:

It is a system that resolves problems through male inquiries formulated from distanced, abstract, and acontextual vantage points, while feminism emphasizes relationships, context, and factual particulars for resolving human problems.<sup>191</sup>

The law of negligence provides one possible net of protection for the inestimable number and types of harm suffered by women. It is, after all, a body of law which commenced with a humanist base. Lord Atkin's comments in *Donoghue v Stevenson* have long provided us with a backbone to the law. It is not just that His Honour laid down the principles concerning reasonable foreseeability and the 'neighbour principle', but that these legal requirements represent the legal translation of broader concepts of social obligation in relation to harm:

I do not think so ill of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilized society and the ordinary claims it makes upon its members as to deny a legal remedy where there is so obviously a social wrong.<sup>192</sup>

In essence, family based harm, which affects women in complete disproportion, has traditionally been considered outside the ambit of tort law.<sup>193</sup> Yet what nervous shock case law reveals, as for other areas of negligence, is the potential

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187 *Ibid* at 814.

188 *Ibid* at 819.

189 *Ibid*.

190 *Ibid*.

191 *Supra* n.19 at 10–11.

192 [1932] AC 562 at 583.

193 *Howe supra* n.10 at 431.

for a certain limited form of redress on a highly individualistic basis. Intermittently, this form of redress has been resisted by feminist theorists; the individualised basis to recovery in a negligence action is seen to obscure the gendered basis to the harm suffered. MacKinnon's argument that workplace harassment falls completely outside the traditional boundaries and requires precisely the new body of rules that has been developed is a salient argument in point. A reorientation away from 'arbitrary and artificial barriers'<sup>194</sup> such as causal proximity and direct perception, might provide a legal way forward if we are to attempt our correction of law which implicitly mis-places and male-places social liability.

Nervous shock cases, which have generally favoured women, particularly mothers, albeit within a limited framework, therefore illustrate MacKinnon's central contention concerning the inadequacies of tort law. This points to the need not only for legal redefinition in relation to harm and injury but a more comprehensive, humane framework than that accommodated within the conceptual boundaries of the law of negligence. Further, this perceived devaluation of women's suffering is what needs to be recognised more fully in the law.

More recently, in another area of tort law, we see a subtle shift in approach that may presage a way forward. Lord Justice Dillon in *Khorasandjian*<sup>195</sup> actually refers to the need for protection of the vulnerable plaintiff and recognises the extent to which fortitude is variable. The language used is this time once again more phlegmatic and pragmatic than poetic, and there perhaps lies the way ahead:

The law expects the ordinary person to bear the mishaps of life with fortitude and, as was put in a case cited by Lord Bridge in *McLoughlin v. O'Brian*, customary phlegm; but it does not expect ordinary young women to bear indefinitely such a campaign of persecution as that to which the defendant has subjected the plaintiff.<sup>196</sup>

In this specific legal context and more generally, the problem remains that injuries identified with men tend to form the primary standard. Feminist theory would ask an ever critical question about the need to adequately recognise, translate and compensate women's experience of suffering (and particularly of fears of harm to their loved ones or to themselves) through the law.

Duty based responsibility and a reassessment of risk is the future of the law of negligence. Parallel developments may be traced through nervous shock law and negligent misstatement. Both areas are increasingly looking at relation and responsibility based liability. Nervous shock is sidetracked by emphases upon the law as spectator based, and negligent misstatement by the confusion over types of economic loss. Both involve a consideration of the relationship between various parties. Both are relation based, but not relation specific. Both have the potential, through the judicial emphasis on proximity, to be expansionary and to cover a

194 *Beecham v Hughes* (1988) 52 DLR (4th) 625 per Taggart JA at 639.

195 *Khorasandjian v Bush* [1993] QB 727 (CA).

196 *Ibid* at 736 per Dillon LJ.

wide range of neglected harms. Negligent misstatement has recently moved in that expansionary direction. Nervous shock must be the next area of law to follow.

Perhaps the Court of Appeal has led the way with its recent sympathetic formulation in *Coates v GIO of NSW*.<sup>197</sup> In that case, the children of a man killed by the negligence of a car driver claimed damages for nervous shock, although neither had witnessed the accident or aftermath, learning of the accident through later communication. On the issue of that third party communication, the court held that recovery of damages for reasonably foreseeable nervous shock is not precluded, at least in the case of 'young and loving children of a deceased victim',<sup>198</sup> merely because those children were not present at the accident or aftermath. The judgment of the court is remarkable both in its condemnation of outdated, albeit recent, judicial attitudes, especially concerning modes of communication, and in its compassionate treatment of victims of nervous shock. Noting that the House of Lords recently rejected liability for communication induced shock in *Alcock*, Kirby P considers this to be a case of 'artificial line drawing'<sup>199</sup> and that the ruling was 'hopelessly out of contact with the modern world'.<sup>200</sup>

However, the most distinguishing feature of the case, one indicating a move towards better judicial understanding of psychiatric damage, is evidenced by a more caring, sympathetic attitude in the judgment of Kirby P:

The law should now recognise that ... it is as much the direct *emotional* involvement ... as his or her *physical* presence ... that is pertinent to the level and nature of the injury suffered, and the consequent psychological damage ...<sup>201</sup>

His Honour offers another glimmer of hope, one which underscores the arguments put forward in this paper, suggesting that the Australian courts are preparing to take that step beyond *Alcock* and move in an expansionary direction:

There is no warrant, in 1994, for a court such as this to exhibit the same resistance and antipathy to this head of claim as was voiced in the last century and in earlier decades of this.<sup>202</sup>

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197 (1995) 36 NSWLR 1.

198 *Ibid* at 9.

199 *Ibid*.

200 *Ibid* at 11.

201 *Ibid*, emphasis in original.

202 *Ibid* at 15.