

IF I ONLY HAD A HEART!

The Australian Case of Annetts and the Internationally Confounding Question of Compensation in Nervous Shock Law

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The question of when to award compensation for nervous shock is one faced by many jurisdictions across the common law world, yet approaches to the issue have been markedly divergent. This is particularly apparent in the context of secondary victims (such as parents) who bring an action for nervous shock suffered as a result of the serious injury or death of a loved one (such as a child) in a traumatic event.

In this area of law a key requirement for recovery has been that of “sudden sensory perception” of the ill-fated event or at least the “aftermath” of the event which caused the death or serious injury of the loved one. This requirement is a legal one, and one not grounded in science. “Shock” has enabled the law to draw boundaries around the potential for indeterminate liability in this area, and has led to the technical exclusion of parents who may have suffered even “agonisingly protracted” awareness of their loved one’s fate.

This paper examines the decisions of the *Annetts and Anor v Australian Stations Pty Ltd*¹ and *Tame v Morgan*² in the High Court of Australia and asserts that this requirement of the law of nervous shock has long been overdue for change. We commend the recent decision of the High Court to “dramatically extend the right of a plaintiff to sue for psychiatric injury”³ and dispense with requirement of “sudden shock” and “direct perception”. Instead, the High Court in *Annetts*, a case fully demonstrating an “agonisingly protracted” awareness of their son’s death by the suffering parents, preferred the “reasonable foreseeability” test. We also discuss the

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¹ (2002) 211 CLR 317.

² (2002) 211 CLR 317.

³ P Hunt, “Liability for Psychiatric Injury Extended” (2002) 40 (November) *Law Society Journal* 62.

more recent High Court decision in *Gifford v Strang Patrick Stevedoring Pty Ltd*⁴, where the High Court applied the test and concluded that a duty may be owed to those persons in a close relationship with an injured person, despite their not directly perceiving the event. We commend the emergence at common law of what Professor Des Butler has termed “the new landscape for recovery for psychiatric injury in Australia”,⁵ and as part of that, further commend the New South Wales Parliament’s dramatic move to codify these changes in the *Civil Liability Act 2002* and its subsequent refinement of them in the *Civil Liability Amendment (Personal Responsibility) Act 2002*.

Prior to *Annetts*, the requisite elements for establishing a claim in nervous shock law in Australia were that the plaintiff:

1. suffer from a recognised psychiatric illness
2. be a person of reasonable fortitude at the time of commission of the tort
3. be subject to a sudden or nervous shock
4. have directly perceived the accident or its immediate aftermath.

These criteria created significant differentials between compensability for psychiatric as opposed to physical injury and were inconsistently applied and controversial.⁶ However, *Tame* and *Annetts* dramatically reformed the Australian law of nervous shock, significantly removing most of the technical differences between physical and psychological injury. These reforms were then partially overturned by the legislative reforms born of the “Insurance Crisis” of 2002.⁷

When handing down their decisions, their Honours all expressed their awareness of the insurance crisis and the ramifications of their decisions. Chief Justice Gleeson, for example, set out his question in terms of “reasonableness”, providing a link between legal conceptions of responsibility, contemporary social conditions and standards, and meanwhile setting it out so that it acted as a limiting factor upon recovery.⁸ In *Tame* and *Annetts* the Court abolished the “nervous/sudden shock rule”, the “direct perception” rule and the “normal fortitude” rule.⁹

The result was an expansion of the range of circumstances in which a person suffering psychiatric injury may recover as a result of the abolition of the “direct perception” rule and the “sudden shock” requirement;¹⁰ but the plaintiff was still required to show their membership of a class of persons who should have been within the reasonable contemplation of

⁴ (2003) 214 CLR 269.

⁵ D Butler, “Gifford v Strang and the New Landscape for Recovery for Psychiatric Injury in Australia” (2004) 12 *Torts Law Journal* 108–27.

⁶ I Freckelton, “New Directions in Compensability for Psychiatric Injuries” (2002) 9(2) *Psychiatry, Psychology and Law* 271–83, at 271.

⁷ *Ibid* 272.

⁸ *Ibid* 273.

⁹ David Davies, “Pure Psychiatric Injury—Recovery for Compensation” (2003) 23(8) *Proctor* 24.

¹⁰ *Ibid* 23.

the defendant as sufferers of psychiatric injury if receiving news of the distressing event by telephone or other medium.¹¹

The old laws governing negligently inflicted psychiatric injury are the remnants¹² of the judiciary of the past—"There is now, however, an indication of a change of judicial attitude brought about by a better understanding of mental illness and its relationship to shock."¹³ However, this judicial progress has arguably been curtailed by the legislature.¹⁴

Nervous Shock Law

A. Defining Nervous Shock

Nervous shock is the traditional name for psychiatric illness, the best known of which in this context is post-traumatic stress disorder.¹⁵ Post-traumatic stress disorder is defined as the development of characteristic symptoms following exposure to an extreme traumatic event.¹⁶

It is important to distinguish between the two classes of victim in nervous shock cases: those directly affected by a negligent act, as a result of which psychiatric injury is suffered, are known as primary victims.¹⁷ Secondary victims are those family members, rescuers, bystanders and others who suffer psychiatric injury as a result of what has happened to someone else.¹⁸ Cases involving primary victims are relatively straightforward personal injury matters. It is with cases involving secondary victims, in which the plaintiff must prove the closeness of their relational tie, that this paper is concerned.¹⁹ Nevertheless, this approach

¹¹ Ibid.

¹² Peter Semmler QC, "Testing the Limits of Liability for Psychiatric Injury" (2002) 51 *Plaintiff* 37.

¹³ L Dunford and V Pickford, "Is There a Qualitative Difference Between Physical and Psychiatric Harm in English Law?" (1999) 7 *Journal of Law and Medicine* 39-40.

¹⁴ As Seeto notes, "[t]o move away from the flexibility of the common law position and categorically define who may claim, as the legislation does, is regrettable." Nicole Seeto, "Shock Rebounds: Tort Reform and Negligently Inflicted Psychiatric Injury" (2004) 26 *Sydney Law Review* 293, 300.

¹⁵ L Dombek and A Fisher, above n 9, 6.

¹⁶ According to the revised fourth edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV-TR), there are five major identifiers of post-traumatic stress disorder: a stressor event, re-experiencing symptoms, avoidance behaviour, a numbing of general responsiveness and arousal. The individual must experience a disturbance and impairment of their life as a result of exposure to the stressor event. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (Text Revision)* (4th ed, 2000) 463.

¹⁷ An example of such a primary victim is where an individual is run down by a car and suffers post-traumatic stress disorder as a result. See also B A Hocking and A Smith, "From Coultas to Alcock and beyond. Will Tort Law Fail Women?" (1995) 11 *Queensland University of Technology Law Journal* 120.

¹⁸ L Dombek and A Fisher, "Post Disaster Management" (Paper presented at Exeter College, Oxford, 10 September 1997) 6. (Copy on file with authors).

¹⁹ Previously as demonstrated in *McLoughlin v O'Brien* (1983) 1 AC 410, once relational proximity has been established, plaintiffs must face the often greater hurdle of proving physical proximity to the accident in time and space. In a legal sense this has meant that the plaintiff must either have experienced the accident or witnessed its immediate aftermath. This requirement of physical, temporal and relational proximity to a traumatic event has strictly limited the success of numerous nervous shock cases in the past and

was abandoned by the High Court of Australia in *Annetts* and *Tame* as arbitrary and artificial to follow.

B. Disparity Between Science and the Law

The common law has adopted a much narrower view of “compensable harm” than the science of psychiatry. Its usual restrictions include:

- (i) Comparing the claimants’ reaction to trauma with the standard of ordinary phlegm or normal disposition, unless the defendant is aware of the plaintiff’s inherent susceptibilities.²⁰
- (ii) In the English jurisdiction, taking proximity factors such as space and time, as a requirement, into account and balancing these factors against whether it is just, fair and reasonable to impose a duty on the defendant.²¹ Whereas in Australia, such a requirement is not a precondition for recovery for the negligent infliction of psychiatric illness.²²
- (iii) Determining whether the defendant breached the standard of care, taking into account the degree of risk, the practical precautions taken by the defendant and the social utility of the conduct of the defendant which resulted in damage.²³

Recovery of damages for psychiatric illness has proved to be a continuing problem for the common law. As will be seen below, numerous ideas have passed into and out of fashion with the courts in their struggle to resolve the underlying policy tensions. This has not made the situation any easier for plaintiffs. Nor has the current medico-legal mix of restrictions, which can pose insurmountable hurdles for the majority of plaintiffs. So it was with the *Annetts*, who were “removed” from the death of their son by the simple fact of where and how it occurred.²⁴

Case in Point: *Annetts v Australian Stations Pty Ltd*

In August 1986, 16 year old James *Annetts* was employed as a jackaroo (farmhand) on a cattle station in a remote part of Western Australia. His mother had sought and obtained reassurance from the manager of the station that her son would be appropriately supervised.

Another young man, 17 year old Simon Amos, was employed in the same capacity at around the same time as James. Despite their youth and inexperience, and despite the assurances given to Mrs *Annetts* by the manager of the property, both the boys were sent to work alone at remote locations only seven weeks after their arrival in Western Australia. Soon after, in December 1986, the two boys went missing. It appeared that

continues to do so.

²⁰ *Jaensch v Coffey* (1984) 155 CLR 549 (hereinafter *Jaensch*).

²¹ *Alcock v Chief Constable of South Yorkshire Police* (1992) 1 AC 310.

²² *Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317.

²³ *Paris v Stepney Borough Council* (1951) AC 367.

²⁴ J Dietrich, “Nervous Shock: *Tame v New South Wales* and *Annetts v Australian Stations Pty Ltd*” (2003) 11 *Torts Law Journal* 11.

they had become increasingly unhappy with the work, its hardship and isolation, and had decided to “escape” in a vehicle which they drove into the desert.²⁵ They met a tragic fate. Their parents were far away. They had been missing for several days before the station manager informed the police of the boys’ absences. The police then telephoned Mr Annetts and informed him that his son was missing. On hearing this news, Mr Annetts collapsed and his wife took over the telephone conversation.

A number of intensive searches were undertaken to locate James and his companion, and his parents were in telephone contact with the police. The missing young men became the subject of a police investigation. James’ parents travelled to the investigation scene on a number of occasions.²⁶

In January 1987, James’ blood-stained hat was located and shown to the boy’s parents.²⁷

In April 1987, Mr Annetts was informed by the police that they had found his son’s vehicle, which had been bogged in the desert. Later that same day, Mr Annetts was told that two sets of remains had been found nearby. Mr Annetts identified a skeleton in a photograph shown to him as his son.

The coroner found that James died on or about 4 December 1986 in the Gibson Desert about 133 km south of Balgo as a result of dehydration, exhaustion and hypothermia. Both his parents developed psychiatric injuries as a result of their son’s tragic death.

Apart from the uniquely Australian setting of the tragedy, the fact situation differs little from the range of cases that have been considered in England²⁸, Canada²⁹, South Africa³⁰, Ireland³¹ and New Zealand³² in this area of law. It is “the classic secondary victim case”.³³

A. A Recognisable Form of Psychiatric Illness?— The Application of the DSM Manual

As a result of the cumulative manner in which they learnt about the tragedy which claimed the life of their son, the plaintiffs in *Annetts* were diagnosed with a grief reaction and a reaction extending beyond “mere grief” to an entrenched and recognisable psychiatric condition within the ambit of the DSM Manual.³⁴

25 See S Muirhead and B Hocking, “A Uniquely Australian Tragedy? (The Law of Nervous Shock Limps On)” (2001) 6 *Tolley’s Communications Law* 111.

26 Ibid 112–13.

27 Ibid 113.

28 *White v Chief Constable of South Yorkshire* (1999) 1 All ER 1.

29 *Devji v District of Burnaby* (1999) BCCA 599.

30 *Barnard v Satnam Bank Bpk* (1999) SA 202.

31 *Bell v Great Northern Railway Co of Ireland* (1890) 26 LR Ir 428.

32 *Van Soest v Residual Health Management Unit* (2000) 1 NZLR 179.

33 P Handford, “When the Telephone Rings: Restating Negligent Liability for Psychiatric Illness: *Tame v Morgan* and *Annetts v Australian Stations Pty Ltd*” (2001) 23 *Sydney Law Review* 598.

34 American Psychiatric Association, above n 17, 463.

B. Legal Issues Arising from Annetts

At trial and on appeal, the law “removed” the suffering of Mr and Mrs Annetts from the tragedy of their son’s disappearance by virtue of the geographical distance between them and their son at the time. When the Annetts sought damages for psychiatric illness resulting from the defendant cattle station management’s negligent treatment of their son while he was in their employ, they confronted the “shock” or “sudden sensory perception” obstacle of the relevant legal doctrine, as it was the way in which they came to know about the disappearance and subsequent death of their son which otherwise stymied their claim. It was their pursuit of that claim which challenged the Court to consider whether the facts were sufficient at law to give rise to an independent tortious duty of care owed by the defendant cattle station owners to the parents to exercise reasonable care and skill to avoid causing them psychological injuries. The law’s history did not bode well for the suffering parents.

The History of Nervous Shock Law in Australia

Australian judges have long exercised caution in the recognition of negligently inflicted psychiatric illness.³⁵ Early Australian cases found liability in situations of *intentional* infliction of emotional distress,³⁶ but rejected *negligently* inflicted psychiatric illness. For example, in *Chester v Waverley Municipality*,³⁷ a mother suffered shock after seeing her dead son being lifted out of a trench. The High Court of Australia decided that a duty was not owed to her, as her injury could not have been reasonably anticipated by the defendant.³⁸

35 D Butler, “Media Negligence in the Information Age: A New Frontier for a New Century” (2000) 8 *Torts Law Journal* 159, 162.

36 For example, in *Bunyan v Jordan* (1937) 57 CLR 1, the defendant’s threats threw the plaintiff into an emotional state which caused a neurasthenic breakdown. It was said that the defendant, “in the course of socially worthless conduct, failed to exercise care to avoid causing nervous shock to the plaintiff” (16). It was recognised that damages may be recovered for the intentional infliction of psychiatric illness. See also H Luntz and D Hambly, *Torts: Cases and Commentary* (2002) 497. Further, in *Levi v Colgate* (1941) 41 SR (NSW) 48, the defendant, the manufacturer of a washing product, owed no duty to take precautions to a consumer sensitive to dermatitis, but only the same duty owed to a normal consumer. According to Luntz and Hambly, again at 360, “although the defendant was under no duty to take special precautions to protect the abnormal, if an abnormal plaintiff suffered loss in circumstances in which a normal plaintiff would also have suffered loss, the fact that the abnormal plaintiff suffered more loss than the normal plaintiff would not prevent the plaintiff recovering for all the losses. This argument has been applied to nervous shock as well as to physical damage”.

37 (1939) 62 CLR 1; C J Miller, “Mental Shock and the Aftermath of a Train Disaster” (1968) 31 *Modern Law Review* 92, 94; A L G, “Case Note: An Australian Shock Case” (1939) CCXX *Law Quarterly Review* 495.

38 G L Fricke, “Nervous Shock—the Opening of the Floodgates” (1981) 7 *University of Tasmania Law Review* 113, 115. See *Abramzik v Brenner* (1967) 65 DLR (2nd) 651 (*Abramzik*). The Saskatchewan Court of Appeal denied recovery to a mother who suffered “nervous shock” on being informed by her husband that two of her children had been killed in a road accident. *Abramzik* may have been decided differently today: current legal developments would be taken into account, in particular the notion that for a mother to witnesses the immediate aftermath of an accident and suffer shock as a result would be a

A. The Law Reform (Miscellaneous Provisions) Act 1944 (NSW)

Criticism of *Chester* resulted in the passing of the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW). Section 3 of the Act abrogated the *Chester* case and gave the court the authority to have regard to the negligent infliction of psychiatric illness arising from shock, and to award damages in such cases. Section 4 defined the category of allowable claimants to include members of a family who suffered psychiatric injury as a result of a loved one being negligently killed, injured or put in peril.³⁹

This legislative reform seemed to encourage rather than discourage the Australian common law in developing a more open stance towards negligently inflicted psychiatric illness. Later cases saw a relaxation of the requirements of reasonable foreseeability to allow close family members to claim nervous shock after witnessing the occurrence and aftermath of accidents involving their relatives.⁴⁰ The widening of foreseeability to include “witnessing the aftermath” began in *Benson v Lee*⁴¹, where the plaintiff was informed by a third party that her son had been knocked down by a car. The plaintiff mother rushed to the scene of the accident 100 yards away. In this case Lush J stated:

“if within the limits of foresight something is experienced through direct and immediate perception of the accident, or some part of the events constituting it, which imparts shock, that is all . . . the law requires.”⁴²

Further, while foreseeability of shock of some kind was required, the precise nature of the shock suffered need not be foreseeable.⁴³

B. *Jaensch v Coffey*⁴⁴

Similar issues were discussed by the High Court in the landmark case of *Jaensch v Coffey*⁴⁵ In this case, the plaintiff saw her injured husband in

common experience of mankind which would therefore be compensable.

³⁹ Similar legislation is in force in the Australian Capital Territory (*Law Reform (Miscellaneous Provisions) Act 1955*, ss 17, 22, 23, 24(1)(5), 32 clarifies the requirements for post-traumatic stress disorder and categories of claimants; D Butler, “Nervous Shock at Common Law and Third Party Communications: are Australian Nervous Shock Statutes at Risk of Being Outflanked?” (1996) 4 *Torts Law Journal* 120 and the Northern Territory (*Law Reform (Miscellaneous Provisions) Act 1956*, s 23, 24, 25(5) clarify the requirements for post-traumatic stress disorder and categories of claimants).

⁴⁰ For example, both a brother who watched his infant sibling involved in a terrible accident and their mother, who was summoned to the aftermath, recovered damages in *Storm v Geeves* (1965) Tas SR 252.

⁴¹ (1972) VR 789.

⁴² Ibid.

⁴³ *Mount Isa Mines Ltd v Pusey* (1970) 12 CLR 383. In this case, the plaintiff attempted to rescue workmates who had been badly burnt by an electric arc while working on a switchboard. As a result of this incident, the plaintiff suffered schizophrenia. The plaintiff was awarded damages on the basis that, “what the defendant had to foresee was the occurrence of the class of injury, mental disorder, rather than the particular illness.” N J Mullany and P R Handford, “Moving the Boundary Stone by Statute: the Law Commission on Psychiatric Illness” (1999) 22 *University of New South Wales Law Journal* 350.

⁴⁴ (1984) 155 CLR 549.

⁴⁵ Ibid; Y Muthu, “Negligent Infliction of Psychiatric Illness: An Area which Remains to

a combination of events which led her to suffer psychiatric illness. The High Court of Australia dealt with the definition of the “aftermath” of an accident, the observation of which could give rise to a claim of nervous shock. It was found that the “aftermath” of an accident should not be restricted to the actual site of the injurious event.⁴⁶ Instead, it extended to the hospital during the period of the immediate post-accident treatment of the person physically injured by the tortfeasor.⁴⁷ It is important to note that in this decision the Court was prepared to contemplate recovery where a plaintiff was so devastated by being told of an accident involving family members that he or she was unable to attend the various scenes.

The majority of the Court allowed recovery in *Jaensch*. However, Deane J sought to impose a new test for the establishment of a duty of care, in addition to the test of reasonable foreseeability. This test was the test of proximity.

C. Proximity

The notion of proximity is concerned with closeness in space, time and relationship. In *Jaensch*, Deane J concurred with the speech of Lord Wilberforce in the English case of *McLoughlin v O'Brian*⁴⁸, in which closeness of time and space were identified as important elements in establishing liability.⁴⁹ According to Deane J, a duty of care could be established in cases of physical proximity (closeness of space and time), circumstantial proximity (close or overriding relationships) or causal proximity (close or direct causal relationships between acts and injuries or losses).⁵⁰ In such cases the defendant's negligence must be a proven primary and continuing cause⁵¹ of the plaintiff's psychiatric illness.⁵²

Thus, according to Deane J, to establish a duty of care one must prove:

- (i) The reasonable foreseeability of a real risk of that harm of the kind suffered by the plaintiff or a member of that class;
- (ii) The existence of the requisite element of proximity in the relationship between the parties and;

be Clarified?” (1999) 4 *Malayan Law Journal* clxxvii.

46 D Mendelson, “The Defendant's Liability for Negligently Caused Nervous Shock in Australia—Quo Vadis?” (1992) 18 *Melbourne University Law Review* 16, 37; R Atkinson, “. . . of the Tort of Negligence” (1987) *Queensland Law Society Journal* 237.

47 D Mendelson, above n46. The High Court noted that, in view of today's fast and efficient ambulance services, it would be anomalous to allow recovery only to those plaintiffs who could “beat the ambulance to the scene of the accident,” per Deane J (1984) 58 ALJR 426, 462; F A Trindade, “The Principles Governing the Recovery of Damages for Negligently Caused Nervous Shock” (1986) 45 *Cambridge Law Journal* 476, 498–99.

48 (1983) 1 AC 410 (*McLoughlin*).

49 C Witting, “A Primer on the Modern Law of “Nervous Shock” (1998) 22 *Melbourne University Law Review* 62, 72.

50 (1984) 155 CLR 549, 584–85; D Butler, “Proximity as a Determinant of Duty: the Nervous Shock Litmus Test” (1995) 21 *Monash University Law Review* 159, 161.

51 In other words, was it the predominant causal factor that led to the illness?

52 Deane J acknowledged that arbitrary lines of demarcation often need to be drawn with respect to time and space which are otherwise infinite.

- (iii) The absence of any statutory provision or common law rule . . . which operates to preclude the imposition of such a duty of care in the circumstances of the case.⁵³

Deane J's approach was essentially an expansion and adaptation of the existing English approach which had been adopted in that country in *Anns v Merton London Borough Council*.⁵⁴ In *Anns*, in the leading judgement of Lord Wilberforce (with which the majority of the House of Lords concurred), it was held that a duty of care would exist where a relationship of sufficient proximity existed for the relevant harm to be foreseeable by the defendant and where there were no considerations which might reduce or negate the duty he owed to the plaintiff.⁵⁵

Brennan J took a different approach to the question of duty of care in *Jaensch*. Whilst appreciating the objective aspect of the foresight test, Brennan J "stressed that it was a question of fact whether a set of circumstances might induce psychiatric illness."⁵⁶ Time and distance were viewed as matters going to causation and reasonable foresight, which were not matters of policy which limited liability.⁵⁷

Brennan J also drew a distinction between the sudden sensory perception of an event as opposed to learning of an event in less confronting circumstances during its aftermath.⁵⁸ His Honour held that it was more plausible that persons would find difficulty in coping with, and would suffer injury as a result of being engaged in a traumatic event than in hearing about the involvement of others in such an event.⁵⁹

D. Critical Analysis of Proximity in the English and Australian Jurisdictions following *Jaensch*

While Deane J stood alone in *Jaensch* on his formulation of proximity, subsequent decisions of the court saw a growing acceptance—and later criticism—of the concept.⁶⁰

The notion of proximity was further developed in the case of *Sutherland*

53 J Keeler, "The Proximity of Past and Future: Australian and British Approaches to Analysing the Duty of Care" (1989) 12 *Adelaide Law Review* 93, 97.

54 (1978) AC 728 (*Anns*).

55 (1978) AC 728, 751–52, per Lord Wilberforce.

56 D Gardiner, "*Jaensch v Coffey*, Foresight, Proximity and Policy in the Duty of Care for Nervous Shock" (1985) 1 *Queensland University of Technology Law Journal* 69, 75.

57 Ibid 75. This approach was also taken in *Brice v Brown* (1984) 1 AII ER 997, per Stuart-Smith J, 1007.

58 C Witting, "A Primer on the Modern Law of 'Nervous Shock'" (1998) 22 *Melbourne University Law Review* 62, 72.

59 Similarly in *Nader v Urban Transit Authority* (1985) 2 NSWLR 501, the defendant was held liable for the psychiatric injury suffered because it was of a kind that was foreseeable, though foresight of the extent of the injury was not required.

60 D Butler, "Mass Media Liability for Nervous Shock: a Novel Test for Proximity" (1995) 3 *Torts Law Journal* 75, 76. In *Sutherland SC v Heyman* (1985) 157 CLR 424, Deane J restated the approach he had first formulated in *Jaensch v Coffey*. It is really a three stage approach, namely, reasonable foreseeability, proximity and policy. Emphasis typically falls on the second stage, "proximity".

Shire Council v Heyman.⁶¹ In this case, Deane J restated the three stage approach he had first formulated in *Jaensch*. In the same case, Brennan J rejected the *Anns* two stage approach, arguing that it allowed for massive extensions of liability and that its vague “considerations to the contrary” were an inadequate limit to liability. In his judgement, Brennan J expressed his preference for the “incremental” approach whose roots were essentially in the categorical approach to law.⁶²

In *Hill v Van Erp*⁶³, the notion of proximity was criticised for its failure to provide a discrete legal principle.⁶⁴ In the High Court of Australia, Dawson J expressed reservations about proximity’s role as “a unifying theme”.⁶⁵ He opined that the concept of proximity embodies “the proposition that in the law of negligence, reasonable foreseeability of harm may not be enough to establish a duty of care”⁶⁶ and that a process of reasoning—which might be viewed as a formal incorporation of policy considerations into the process of legal reasoning—must be gone through in order to limit it.⁶⁷

In the English case of *Caparo plc v Dickman*,⁶⁸ the criticisms of *Anns* offered by Brennan J were accepted by the House of Lords. In this case, the House of Lords did not search for a general overarching principle but reverted to the categories approach.⁶⁹ However, Lord Bridge argued that new situations should be considered in three stages, the first two of which bore a remarkable resemblance to the approaches in *Anns* and *Jaensch*. The considerations at each stage are:

- (i) foreseeability;
- (ii) proximity; and
- (iii) notions of fairness, justice and reasonableness.

Lord Bridge noted that:

The concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific

61 (1985) 157 CLR 424; J Allen and M Dixon, “Notes: Foreseeability Sinks and Duty of Care Drifts: the High Court visits Rottneest” (1993) 23 *Western Australian Law Review* 320, 324.

62 The categorical approach allows modest extensions to the law by analogy with established categories.

63 (1997) 188 CLR 159; B Feldthusen, “Liability for Pure Economic Loss: Yes, but Why?” (1999) 28 *University of Western Australia Law Review* 84, 118.

64 See also *San Sebastian Pty Ltd v The Minister* (1986) 162 CLR 340, *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 and *Bryan v Maloney* (1994) BCL 279, in which further erosion of the proximity criterion took place.

65 *Hill v Van Erp* (1997) 188 CLR 159, 160.

66 (1997) 188 CLR 159. See also D G Gardiner, above n 63, 69; D Ipp, “Negligence—Where Lies the Future?” (2003) 23 *Australian Bar Review* 5.

67 (1997) 188 CLR 159, 206, 220. In *Gala v Preston* (1991) 172 CLR 243, Brennan, Dawson and Toohey JJ concentrated specifically on policy considerations instead of principle to deny relief to a drunken teenager who was injured when the driver of a car in which the teenager was joyriding lost control of the car which then collided with a tree.

68 (1990) 2 AC 605.

69 (1990) 2 AC 605, 617–18 per Lord Bridge.

situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope.⁷⁰

In Australia, Kirby J favoured *Caparo*'s three stage approach in *Pyrenees Shire Council v Day*.⁷¹ Although criticism of proximity as the determining test was continuing to grow, the favoured approach after *Pyrenees Shire Council* involved considerations of foreseeability, proximity and policy.⁷² Subsequently, in *Perre v Apand Pty Ltd*⁷³, McHugh J of the High Court of Australia expressed objections to *Caparo*. He argued that given the inherent uncertainty about the meaning of proximity, it should not be given greater weight than other factors. He further argued that the *Caparo* three stage approach threatened to deprive the law of such certainty as it already had regarding the concepts of fairness, justice and reasonableness, and offered little practical guidance to practitioners.

McHugh J acknowledged that whatever formula was used, in grey areas the court would have to exercise its discretion. In such circumstances, he maintained justice and morality should be employed only when principle had failed to provide an answer. This caveat reflected the objections which had been made earlier in regard to *Anns* in England.

Ultimately, McHugh J stated that "Deane J's concept of proximity . . . is no longer seen as the unifying criterion of duties of care"⁷⁴ as "it is a category of indeterminate reference par excellence".⁷⁵

Nonetheless, the proximity criterion remains material in determining the existence of a duty of care. In *Modbury Triangle v Anzil*,⁷⁶ Kirby J referred to the "failed notion of proximity" but also commented that: "As a measure of factors relevant to the degree of physical, circumstantial and causal closeness, proximity is the best notion yet devised by the law to delineate the relationship of 'neighbour'."

In *Sullivan v Moody*⁷⁷ the High Court of Australia categorically rejected the notion of proximity as a general criterion for the determination of a duty of care because it offered little practical guidance. The High Court also rejected the three stage approach adopted by Lord Bridge in the House

70 (1990) 2 AC 605, 618.

71 (1998) 192 CLR 330. Kirby J considered competing approaches and argued that the three stage approach in *Caparo*, while not perfect, was better than any of the others. This preference was reiterated in *Perre v Apand* (1999) 73 ALJR 1190 and was applied again in *Crimmins v Stevedoring Industry Finance Committee* (1999) 167 ALR 1.

72 C Phegan, "The Tort of Negligence into the New Millennium" (1999) 73 *Australian Law Journal* 885, 886, 891.

73 (1999) 198 CLR 180; B McDonald and J Swanton, "Foreseeability in Relation to Negligent Infliction of Nervous Shock" (1995) 69 *Australian Law Journal* 945.

74 (1999) 198 CLR 180, 210; similarly, in *Spence v Perry* (1990) ATR 81, Derrington J attempted to apply the test of causal proximity but the Full Court rejected the proximity criterion. The judge in question tried to hold the defendant liable for psychiatric illness suffered by a mother three years after the relevant accident.

75 (1999) 198 CLR 180, 210.

76 (2000) 205 CLR 254.

77 (2001) 207 CLR 562.

of Lords decision in *Caparo Industries plc v Dickman*⁷⁸ which involved the notions of fairness, justness and reasonableness and which the Court felt did not represent the law in Australia. The court stated that what was required was the development of principles capable of general application.

The High Court did acknowledge that “proximity” might still be relevant as a factor when considering areas of economic loss and psychiatric illness. Nevertheless, in the recent decisions of the High Court of Australia in both *Annetts v Australian Stations Pty Ltd*⁷⁹ and *Tame v Morgan*,⁸⁰ which will be discussed later in this piece,⁸¹ the majority of the High Court of Australia stated that proximity was not a precondition for recovery in a psychiatric illness case. This was essentially a reiteration of what the Western Australian Supreme Court stated in *Annetts v Australian Stations Pty Ltd*⁸² and what the New South Wales Court of Appeal stated in *Morgan v Tame*.⁸³ Spigelman CJ in *Tame* confirmed that the concept of proximity was no longer to be regarded as a unifying principle, however, it remained a material consideration in determining the existence of a duty of care.⁸⁴

E. The Aftermath Principle

According to the aftermath principle, secondary victims who have viewed only the aftermath of a traumatic event rather than the traumatic event itself, are permitted to recover damages. In *Jaensch v Coffey*, Deane J expanded the previous definition of “aftermath” which referred only to the “events at the scene after an accident, including the extraction and treatment of the injured,” noting that in a modern society, “the aftermath also extends to the ambulance taking the injured person to the hospital for treatment and to the hospital itself during the period of immediate post-accident treatment.”⁸⁵

This development of the notion of “aftermath” suggested that the closeness of the relationship between the primary victim and any secondary victims played a greater part than geographical proximity in determining whether a duty of care was owed and whether psychiatric injury was foreseeable.⁸⁶

78 (1990) 2 AC 605.

79 (2002) 211 CLR 317.

80 (2002) 211 CLR 317.

81 (2000) NSWCA 121 <<http://www.lawlink.nsw.gov.au>> at 25 August 2000 (Copy on file with author). In another case, *AMP v RTA and Anor* (2001) NSWCA 186 (2 August 2001), the issue was whether an employer was liable to a deceased employee’s widow for psychiatric illness suffered by her as a result of the employee’s depression and suicide. The plaintiff was awarded \$101,895 in damages for nervous shock. The defendant and insurer appealed. The appeal was allowed. On appeal, it was held that considerations of policy and value judgements indicated that deliberate self infliction of harm should generally be seen to break the causal link. Thus no duty was owed to the plaintiff to prevent her from suffering mental trauma. It was held that there was no causation as the injury was too remote in law.

82 (2000) 23 WAR 35.

83 (2000) 49 NSWLR 21. See also *Dandashli v Dandashli* (2000) NSWCA 273.

84 (2000) 49 NSWLR 21.

85 *Jaensch v Coffey* (1984) 155 CLR 549, 607.

86 P Handford, “When the Telephone Rings: Restating Negligent Liability for Psychiatric

While the question of whether a plaintiff who was merely told of an accident could recover damages was left open by Gibbs and Deane JJ, they commented that it is difficult to see why a rule based on public policy should preclude recovery for psychiatric injury sustained by a wife and mother who is so devastated by being told on the telephone that her husband and children have all been killed that she is unable to attend the scene while permitting recovery for the reasonably, but perhaps less readily foreseeable psychiatric injury sustained by a wife who attends at the scene or its aftermath at the hospital when a husband has suffered serious but not fatal injuries.⁸⁷

However, the Court noted that there was no binding authority which compelled it on this issue, neither was there an existing legal principle which excluded reasonably foreseeable damage to a person who suffered nervous shock without being in sight or hearing of the relevant event. This caution has been reflected in post-*Jaensch* cases which have called on courts to consider the aftermath test in relation to the notion of proximity.

In the New South Wales Court of Appeal decision of *Campbelltown City Council v Mackay*,⁸⁸ Kirby P, as he then was, questioned the rule that liability in an action for nervous shock could only arise where shock arose from a sudden sensory perception. In his judgement, Kirby P considered that the law was predicated upon a scientific anachronism which had long since ceased to be scientifically justified, and commented: "It is artificial to imprison the legal cause of action for psychiatric injury in an outmoded scientific view about the nature of its origin."⁸⁹

This gentle movement away from the requirement of a plaintiff's presence at the scene of an accident or its immediate aftermath was recognised by the South Australian court in *Pham v Lawson*.⁹⁰ In that case, the Court noted that this movement should be incremental and adaptive to current legal circumstances and that it should not be used as a yardstick by any means.

Nonetheless, in the New South Wales case of *Knight v Pederson and Ors*,⁹¹ damages were recovered by the child of a parent killed by a negligent act, even though the child was out of sight and hearing when the parent was killed.

The question of recovery for claims for nervous shock occasioned by communication has since been left open by the High Court. In *Coates v Government Insurance Office of New South Wales*⁹² Kirby P stated that it would be artificial to restrict recovery to a direct perception of the occurrence of

Illness: *Tame v Morgan and Annetts v Australian Stations Pty Ltd* (2001) 23 *Sydney Law Review* 600.

⁸⁷ (1983) 155 CLR 549, 551-552, 595-596.

⁸⁸ (1989) 15 NSWLR 501.

⁸⁹ (1989) 15 NSWLR 501, 503.

⁹⁰ (1997) 68 SASR 124.

⁹¹ [1999] NSWCA 333.

⁹² (1995) 36 NSWLR 1 (*Coates*).

the tort, or to its immediate aftermath. In today's world, shock occasioned by the communication, by telephone or by oral message, of an event after it had taken place, should be seen as foreseeable and directly related to the wrong sued upon as if the vulnerable observer had received the shocking perception by his or her own eyes or ears. In this case, Kirby P again stated that the actual perception rule was a product of outmoded notions of psychology and psychiatry, which was used by the courts as the basis of a policy shield against expanding the liability of wrongdoers for the harm they cause.

F. Appellate Court Decisions After Jaensch

Since *Jaensch v Coffey*, claims have been allowed in situations where a plaintiff has merely heard about an accident involving loved ones.⁹³ For example, in *Petrie v Dowling*,⁹⁴ damages were recoverable for the plaintiff's shock and consequent illness, which arose after the receipt of distressing news.⁹⁵

In *Sloss v New South Wales*,⁹⁶ the New South Wales Supreme Court allowed recovery to a mother who suffered "shock" as a result of hearing

93 D Partlett, "Negligence—Limits of Liability for Nervous Shock Negligently Caused—Reasonable Foreseeability and Proximity as Criteria for Duty of Care" (1985) 59 *Australian Law Journal* 44.

94 (1989) Aust Torts Rep 80–263. See also D Butler, "Identifying the Compensable Damage in 'Nervous Shock' Cases" (1997) 5 *Torts Law Journal* 67, where the author cites *Coates v Government Insurance Office of New South Wales* (1995) 36 NSWLR 1. In this case, Kirby P rejected the submission of the defendant that an individual who was not present at the scene or aftermath of an accident and was informed about the accident by telephone or a later message should not be entitled to recover. Kirby P opined that the relevant rule was in part a product of 19th century notions of psychology and psychiatry. "The suggested rule is hopelessly out of contact with the modern world of telecommunication. If any judge has doubts about this, he or she should wander around the city streets and see the large number of persons linked by mobile telephones to the world about them. Inevitably such telephones may bring, on occasion, shocking news, as immediate to the senses of the recipient as actual sight and sound of a catastrophe would be. This is the reality of the world in which the law of nervous shock must operate." Similar to this case is *Reeve v Brisbane City Council* (1995) 2 Qd R 661. Although it is acknowledged that not every novel claim succeeds, the law with regards to psychiatric illness is cautiously being assimilated into the law on injury generally, as stated in *Pham v Lawson* (1997) 68 SASR 124. D Butler, "Case Notes: *Pham v Lawson*: Widening the Sphere for Bystander Recovery for Nervous Shock" (1998) 6 *Torts Law Journal* 195.

95 (1989) Australian Torts Reports 80–263. The Supreme Court of Queensland applied the obiter comments of Deane J in *Jaensch v Coffey* (1984) Aust Torts Rep 80–300. In *Quayle v State of New South Wales* (1995) Aust Torts Rep 81–367, the plaintiff suffered psychiatric trauma on receipt of the news that his wife had suffered irreversible brain damage whilst in an abortion operation. The plaintiff succeeded on the grounds of suffering shock and providing care for his wife thereafter. N J Mullany, "Recovery for Psychiatric Injury by Report: Another Small Step Forward" (1996) 4 *Tort Law Review* 96. In *Gifford v Strang Patrick Stevedoring Pty. Ltd.* [2001] NSWCA 175 (14 June 2001), a widow and her children failed in their claim for nervous shock pursuant to *Workers Compensation Act 1987* s151 and *Law Reform (Miscellaneous Provisions) Act 1944* s4 because they could not sustain evidence of a demonstrable psychological condition resulting from learning about the father's death. Also see *Stergiou v Citibank* [1999] FCA 1321 (24 September 1999) and *Kavanagh v Akhtar* (1998).

96 [1999] NSWSC 995, <<http://www.lawlink.nsw.gov.au>> at 6 October 1999 (Copy on file with author).

of the death of her son, who had been incarcerated. The defendant, the state of New South Wales, did not contest that it owed a duty of care to the prisoner, but it refused to accept liability for the nervous shock suffered by the plaintiff mother. The judge found that the state's duty of care extended to all persons in sufficient emotional proximity to suffer nervous shock. However, this duty did not extend to recovery for economic loss which had resulted from an effect on the plaintiff's mental state so adverse that she was unable to run her business.⁹⁷

Three other cases followed *Sloss* in the superior courts. In *State of New South Wales v Seedsman*,⁹⁸ a police officer in charge of investigating crimes against children suffered from post-traumatic stress disorder as a result of exposure to the nature and brutal reality of those crimes. No form of counselling or therapy was provided by the Police Service to alleviate any stress, anxiety or depression the officer may have had. The court allowed recovery for the negligent infliction of psychiatric illness.⁹⁹

In *Tame v Morgan*,¹⁰⁰ the plaintiff suffered psychotic depression¹⁰¹ upon learning that a police officer had made a report in which she was recorded as having been drinking when in fact she had not. The plaintiff succeeded in the District Court, receiving damages in the sum of \$115,000. However, the decision was overturned in the New South Wales Court of Appeal, on the basis that it was not reasonably foreseeable that an individual in the plaintiff's position would have suffered the kind of injury complained of. The plaintiff had lost again.

Subsequently, in *Annetts*, having failed at first instance, Mr and Mrs Annetts took their case to the Western Australian Supreme Court of Appeal.¹⁰² It was accepted in evidence that Mr and Mrs Annetts' son went missing from his place of employment and that shock was sustained by the boy's parents as a result of learning of their son's disappearance and eventual death.¹⁰³ The Court considered the problems confronting the law of psychiatric illness in this area and found that there was no binding

97 Y Muthu, "Sloss v State of New South Wales: Pathological Grief Disorder" (2000) 4 *Malaysian Journal of Law and Society* 169, 172.

98 [2000] NSWCA 119, <<http://www.lawlink.nsw.gov.au>> at 25 August 2000 (Copy on file with author). Previously in *Gillespie v Commonwealth* (1991) 104 ACTR 1, an employer was required to prepare an employee who was transferred from one embassy to another embassy in a foreign country to a less stressful post. In this case, the plaintiff suffered from post-traumatic stress disorder as result of being transferred to a foreign embassy, however, the employer had complied with the required formalities.

99 D Butler, "Voyages in Uncertain Seas with Dated Maps: Recent Developments in Liability for Psychiatric Injury in Australia" (2000) 9 *Torts Law Journal* 4.

100 (2000) 23 WAR 35.

101 The illness suffered by the plaintiff, designated psychotic depression, included paranoia and anxiety.

102 [2000] WASCA 357 <<http://www.austlii.edu.au>> at 22 August 2001; I Freckelton, "Compensability for Psychiatric Injury: An Opportunity for Modernisation and Reconceptualisation" (2001) 9 *Journal of Law and Medicine* 137.

103 [2000] WASCA 357, (21 November 2000) <<http://www.austlii.edu.au>> at 22 August 2001 (Copy on file with author).

Australian authority¹⁰⁴ supporting recovery for psychiatric damage caused solely by learning of a distressing event by telephone.¹⁰⁵

The Court noted that whether any duty of care was owed by the defendant station owner to Mr and Mrs Annetts was a matter of fact, and commented that the finding of an existing duty of care was always more likely where the plaintiff was at the scene of a traumatic event and so perceived the injury to the loved one. Otherwise the existence of the duty of care became less likely as the criteria for its existence became more remote.¹⁰⁶ The chances of Mr and Mrs Annetts' case succeeding were not good.

The defendant cattle station knew that the plaintiffs' son was young, had had little experience as a jackaroo and that his parents were concerned about his safety and wellbeing. Strong concern for the young man's wellbeing had been communicated to the cattle station by the mother and assurances given by the servants or agents of the pastoral station as to his wellbeing. While they were not physically proximate to their son at the time of his disappearance and death, surely it was clearly foreseeable that the parents could suffer trauma possibly amounting to psychiatric injury if harm befell their son as a consequence of the defendant's negligence. As Lord Oliver commented in the English case of *Alcock v Chief Constable of South Yorkshire*,¹⁰⁷

The traumatic effect on a mother of the death of her child is as readily foreseeable in a case where the circumstances are described to her by an eye witness at the inquest as it is in a case where she learns of it at a hospital immediately after the event.¹⁰⁸

Nonetheless, as suggested by its earlier comments, the Court finally took a traditional line, noting that: "The circumstances of the case show that the psychiatric injury claimed was not based upon a sudden sensory perception as the parents were not directly involved."¹⁰⁹

Similarly, Ipp J held that:

¹⁰⁴ at para [23] Ipp J stated, "On the basis of the direct perception requirement, the appellants have not established the requisite degree of proximity under either of the scenarios I have postulated. Apart from the occasion (in January 1987) when Mr Annetts saw a blood covered hat belonging to James, and when he identified James' remains (from a photograph seen some five months after his death), they did not directly perceive the consequences of the respondent's breach of duty. I do not consider the two instances I have mentioned as satisfying the requirement."

¹⁰⁵ M Stauch, "Risk and Remoteness of Damage in Negligence" (2001) 64 *Modern Law Review* 191, 192. The court considered proximity in terms of time and space and concluded that learning about the death, which led to the shock sustained, was outside the temporal and geographical aftermath of the accident.

¹⁰⁶ (2000) 23 WAR 35, 61.

¹⁰⁷ (1992) 1 AC 310.

¹⁰⁸ [2000] WASC 104 <<http://www.asutlii.edu.au/cgi-bin/disp.pl/cases/wa/WASC>> at 17 July 2001 (Copy on file with author) 13.

¹⁰⁹ [2000] WASC 104 <<http://www.asutlii.edu.au/cgi-bin/disp.pl/cases/wa/WASC>> at 17 July 2001 (Copy on file with author) 13 6, 7.

On the basis of the direct perception requirement, the appellants have not established the requisite degree of proximity under either of the scenarios I have postulated. Apart from the occasion (in January 1987) when Mr Annetts saw a blood covered hat belonging to James, and when he identified James' remains (from a photograph seen some five months after his death), they did not directly perceive the consequences of the respondent's breach of duty. I do not consider the two instances I have mentioned as satisfying the requirement.¹¹⁰

It had been 18 years since the High Court of Australia last had the opportunity to examine the law pertaining to psychiatric illness in *Jaensch*. As Des Butler observes, the triumvirate of cases recently decided by the High Court—*Tame v New South Wales*; *Annetts v Australian Stations Pty Ltd* and *Gifford v Strang Patrick Stevedoring Pty Ltd* “provided the opportunity for the court to settle an area of common law which for long has been bristling with contentious issues and to provide guidance for lower courts which have for some time struggled to divine the law from ageing and imperfect High Court authorities.”¹¹¹

G. Annetts and Tame on Appeal to the High Court

The full court of the High Court heard the merits of *Annetts*¹¹² concurrently with the case of *Tame*,¹¹³ on appeal from the New South Wales appellate court.¹¹⁴ They had to consider, in *Annetts*, whether the defendant station owners owed James Annetts' parents a duty of care, and in *Tame*, whether a duty was owed by the defendant to a person involved in a motor vehicle accident who was wrongly named by the police as having a blood alcohol level three times the legal limit and who consequently suffered shock.

In determining whether there was duty in each case, the Court reflected on existing common law in relation to psychiatric injury. The common law required the presence of three factors in addition to the basic standard that psychiatric injury be a reasonably foreseeable result of the respondent's actions. These factors were:

- (i) Normal fortitude: The foreseeability must be of psychiatric injury occurring in a person “of normal fortitude” rather than a person with a more fragile psyche.
- (ii) Presence of sudden shock: The psychiatric injury must have been caused by a sudden shock to the senses.
- (iii) Direct perception: The injured person must have perceived directly a distressing phenomenon or its aftermath.¹¹⁵

¹¹⁰ [2000] WASCA 357 (21 November 2000) <<http://www.austlii.edu.au>> at 22 August 2001 (Copy on file with author).

¹¹¹ Butler, above n.5 (2004), p. 108, citing *Jaensch v Coffey* (1984) 155 CLR 549 and *Mount Isa Mines v Pusey* (1970) 125 CLR 383.

¹¹² *Ibid* s 1.

¹¹³ *Ibid* s 1.

¹¹⁴ Both cases were heard on 4 and 5 December 2001 and judgement was handed down on 5 September 2002.

¹¹⁵ P Handford, above n 33, 610.

These tests, which firmly distinguish the common law surrounding psychiatric injuries from the looser standards which prevail for other forms of injury, have evolved on the basis of the fact that injury to the mind is not observable. As a result, there is a perceived danger of encouraging exaggerated or false claims. However, in the past these tests have proved to be inflexible and inappropriate in certain factual scenarios.

The judges in *Annetts* and *Tame* differed in their opinions and delivered separate judgements. However, the High Court effectively disposed of the requirements for “sudden shock” and “direct perception of a distressing phenomenon.”¹¹⁶ *Annetts* itself effectively showed that psychiatric injury could arise from anxiety or stress over a prolonged period as well as from a sudden event, and the majority of the court (Glesson CJ, Gaudron J, Gummow J, Kirby J and Hayne J) recognised this, arguing that the “sudden shock” mechanism should not be maintained as, “Cases of protracted suffering, as opposed to ‘sudden shock’, [could] raise difficult issues of causation and remoteness of damage. Difficulties of that kind are more appropriately analysed with reference to the principles of causation and remoteness, not through an absolute denial of liability.”¹¹⁷

The court differed on whether the “normal fortitude” test should be preserved. The majority agreed that the test should be retained: a respondent could not be expected to foresee the consequences of his or her actions on a person, perhaps such as Mrs Tame, who was of less-than-normal psychological fortitude. Despite the divergence of opinion on whether or not the test should have been kept, a definition of the test was agreed upon. This definition stated that, once it had been proved that it was reasonably foreseeable that a person of normal fortitude would have suffered psychiatric illness in the relevant circumstances, the defendant would be held liable for the entire illness suffered by the plaintiff, even if the plaintiff had an “eggshell psyche”.¹¹⁸

The majority also held that the injury suffered by the plaintiff must be a *recognisable* psychiatric disorder as defined in the DSM Manual, and as opposed to mere grief, sorrow or upset.¹¹⁹

The *Annetts* were granted leave to appeal. Assurances as to their son’s welfare and supervision were relevant to the duty finding. The Court held that Australian Stations had breached its duty of care to Mr and Mrs *Annetts* by sending their 16 year old son, contrary to those assurances, out to work alone in an isolated area as a result of which he disappeared and subsequently died. The news that their son had disappeared, the uncertainty about his fate, and the eventual news of his death, caused them to suffer shock. The rationale behind this decision was that a person

116 *Jaensch v Coffey* (1984) 155 CLR 549, 567, per Brennan J.

117 (2002) 211 CLR 317, 389 [211].

118 (2002) 211 CLR 317, 430 [335].

119 (2002) 211 CLR 317, 388 [208].

of normal disposition would have suffered the kind of illness complained of by Mr and Mrs Annetts.¹²⁰ By contrast, the appeal in *Tame* was not allowed. The case arose from an error in a drink-driving record, which mistake was promptly rectified. However Mrs Tame considered that her reputation had been harmed and suffered psychiatric injury due to this mix up. The Court held that it could not have been within the relevant police officer's reasonable contemplation that Mrs Tame would suffer psychiatric illness as a result of the error that he made. Thus he owed her no duty of care inasmuch as Mrs Tame was specifically susceptible to the illness from which she suffered and that special susceptibility was not reasonably foreseeable. Gleeson CJ was of the view in *Tame* that any foreseeability of harm had to be reasonable, while other judges reiterated that for the purposes of cohesion in the law it could hardly impose a duty on a police officer to the subject of an investigation not to cause a person such as Mrs Tame stress in the proper pursuit of that investigation.¹²¹

H. The Consolidation with *Gifford v Strang*

The final case in the "new landscape for recovery for psychiatric injury in Australia"¹²² is *Gifford v Strang Patrick Stevedoring Pty Ltd*.¹²³ Here the High Court ruled that an employer owes a duty of care to avoid psychiatric injury to the children of its employees. Finally we witness the demise of a rule identified some years ago by Professor Peter Cane as unacceptable: that of proving closeness of relationship. The relevant New South Wales law had already sought to remove the need for a family member to prove closeness of relationship with the relevant family member: it had been intended as "a beneficial provision expanding the ability of close family members to recover for nervous shock."¹²⁴ The deficiencies in the common law position were recognised with that statutory provision.¹²⁵ Thus it was no longer necessary to "prove" the closeness and affection of the relationship, and the High Court demonstrated an understanding of parental emotions in resolving that children-parent is a "relationship of natural love and affection."¹²⁶ It will still be necessary to consider whether a duty is owed to the person suffering psychiatric injury pursuant to the DSM diagnosis of mental disorder, supported by psychiatric testimony, but following *Annetts*, sudden shock and direct perception of the incident are no longer required.

120 P Hunt, "Liability for Psychiatric Injury Extended" (2002) 40 *Law Society Journal* 62, 65.

121 Butler, above n 5, 110.

122 Butler, above n 5.

123 [2003] HCA 33.

124 Butler, op. cit. (2004) 113.

125 Ibid, citing *Chester v Waverley Corporation* (1939) 62 CLR 1 and *Bourhill v Young* (1943) AC 92.

126 (2003) 198 ALR 100, 104.

Legislative Approaches

The commendable decision of the High Court in the case of *Annetts* finally brought the law of nervous shock into closer alignment with that governing claims brought over physical injury, while simultaneously placing nervous shock law on a footing more firmly based upon modern scientific knowledge. The next part of this paper discusses whether and to what extent this expansion of psychiatric illness law has been curtailed by Australian legislatures. It also discusses the approaches taken by other jurisdictions across the common law world, as well as briefly canvassing public policy considerations affecting and likely to affect the development of psychiatric illness law up to this point and into the future.

The key contention of this paper is that *Annetts* forced an overdue confrontation as to the failure of medical knowledge to inform the law in this area, as well as the need for increased communication between the disciplines of science and law. The paper concludes by arguing that, despite recent expansions of liability for nervous shock, the law has thus far failed to adequately protect the emotional rather than the physical investments of plaintiffs which, when jeopardised by the injury of a loved one, result in nervous shock. It further argues that, given recent policy concerns about compensation and insurance crises and the increase in litigation, whether the progress so far evident in the High Court's grant of leave to appeal to the plaintiffs in *Annetts* and in the *Civil Liability Act* and *Civil Liability Amendment (Personal Responsibility) Act* of 2002, is likely to change this in practice, has yet to be seen.

In 2002 changes¹²⁷ were made to the law by the New South Wales Parliament in the *Civil Liability Act*. Several significant measures to discourage actions for minor injuries were introduced.¹²⁸ The most notable included the limitation of the award of damages for legal costs,¹²⁹ a threshold for general damages, set at 15 per cent of the

127 On 2 October 2002, the Federal Assistant Treasurer Senator Helen Coonan released the final report of the Review of the Law of Negligence (the *Review*). The report was authored by a panel chaired by the Honourable Justice David Ipp of the New South Wales Supreme Court and also comprising Professor Peter Cane, Associate Professor Donald Sheldon and Mr Ian Macintosh. The panel was asked to inquire into the law of negligence and to develop a series of proposals to provide a principled approach to reforming the law of negligence. The basis for these far-sighted reforms was recommendations contained in the Review of the Law of Negligence authored by another panel, similarly chaired by Justice Ipp. The Review was commissioned to provide a principled evaluation of the existing law as a blueprint to assist governments to achieve comprehensive reforms. The panel appointed to undertake the Review sought to strike a balance between the interests of injured people and those of the community at large and to impose a reasonable burden of responsibility on individuals to take care of others and to take care of themselves. The panel made 61 recommendations on specific changes that could be made to the law of negligence.

128 Spigelman C J, "Negligence: The Last Outpost of the Welfare State" (paper presented at the Judicial Conference of Australia Colloquium, Launceston, 27 April 2002) <http://www.agd.nsw.gov.au> at 10 Sep 2002 (copy on file with author).

129 E.g. no order for legal costs should be made where the award of damages is less than \$30,000. Where the award is between \$30,000 and \$50,000, the plaintiff may recover no more than \$2,500 in legal costs.

most extreme case,¹³⁰ and a \$350,000 cap on general damages.¹³¹

The New South Wales Parliament has since introduced the *Civil Liability Amendment (Personal Responsibility) Act 2002*. This Act significantly extends the provisions of the *Civil Liability Act* and attempts to enforce the responsibility of individuals for their actions. Many of the provisions of this later Act are likely to have far-reaching consequences. The more significant provisions are the new sections 5B and 5C which are concerned with duty of care and sections 5D and 5E which cover the meaning of reasonable foreseeability and causation. Sections 16 and 17 address pain and suffering for non-economic loss. Most relevant to this paper are sections 27 and 30, which deal with mental harm.¹³²

According to the *Civil Liability Amendment (Personal Responsibility) Act*, damages for psychiatric illness are limited to persons who are victims of, or present at the scene of, an accident.¹³³ Those persons who can recover include family members who have demonstrated a recognisable form of psychiatric disorder as opposed to mere grief, sorrow or being upset. "Family members" comprise those individuals listed within that category in the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) and include the parents, spouse (or de facto), siblings or children of a victim.

Damages may also be recovered by any individual not related to the primary victim, who has suffered a recognisable form of psychiatric disorder extending beyond a normal emotional or cultural grief reaction after witnessing a traumatic event.¹³⁴

No recovery will be permitted where damages are otherwise restricted by the Act "or any other written or unwritten law."¹³⁵

These legislative provisions confirm the majority decision of the High Court in *Annetts* and *Tame* which insisted that a defendant is liable for a plaintiff's psychiatric injury if the defendant ought to have foreseen that a person of normal fortitude might suffer psychiatric injury if reasonable care was not taken by them.¹³⁶ They also confirm the High Court requirement, laid out in *Annetts* and *Tame*, that the plaintiff suffer a recognisable form of psychiatric illness.¹³⁷ While this codification of the law regarding recovery for psychiatric illness is a step forward in some ways, some argue that to "move away from the flexibility of the common law position and categorically define who may claim, as the legislation does, is regrettable."¹³⁸

¹³⁰ *Civil Liability Act 2002*, s16(1).

¹³¹ *Civil Liability Act 2002*, s16(2).

¹³² <http://www.lawlink.nsw.gov.au/report/lpd_reports.nsf/pages/civil_bill_2002> at 20 November 2002 (copy on file with author). The limitation is listed on page 22 of the Report: the victim, a bystander or a close relative may recover.

¹³³ *Civil Liability (Personal Responsibility) Act 2002*, s30.

¹³⁴ *Civil Liability (Personal Responsibility) Act 2002*, s30(2)(a).

¹³⁵ *Civil Liability (Personal Responsibility) Act 2002*, s30(4).

¹³⁶ *Civil Liability (Personal Responsibility) Act 2002*, s32(1).

¹³⁷ *Civil Liability (Personal Responsibility) Act 2002*, s31.

¹³⁸ (Dyanah) Seeto, "Shock Rebounds: Tort Reform and Negligently Inflicted Psychiatric

International Perspectives on Nervous Shock Law, Proximity and the Aftermath Principle

A. England

In 1983, the year before the Australian decision in *Jaensch v Coffey*, the judgement in the case frequently known as its English twin—*McLoughlin v O'Brian*¹³⁹—was handed down. At this time, Australian courts had made up for their previous sluggishness in expanding liability in nervous shock cases, and the approaches to these cases were substantially in harmony in the two jurisdictions. Since that time, however, the Australian courts have outstripped the English in their recognition of liability for nervous shock cases. Faced with a number of cases resulting from mass disasters like the Hillsborough tragedy,¹⁴⁰ the English judiciary has stoically been holding the line against any further expansion of liability for nervous shock.

While encouragingly considering the closeness of relationships outside those between spouses and parents and children, in the House of Lords case of *Alcock v Chief Constable of South Yorkshire Police*,¹⁴¹ their Lordships refused to countenance recovery by anyone who had learnt of the disaster by any means other than direct perception of the event, or the aftermath within two hours of the event taking place, with their unaided senses.¹⁴²

In *White v Chief Constable of South Yorkshire*,¹⁴³ the plaintiffs—secondary victims of the Hillsborough tragedy—were a number of police officers. In this case, Lord Goff established a number of important criteria for determining whether an entitlement to damages for psychiatric illness existed. These criteria were:

- (i) The plaintiff must have close ties with the victim;
- (ii) The plaintiff must have been present at the accident or at its immediate aftermath; and
- (iii) The psychiatric injury must have been caused by direct perception of the accident or its immediate aftermath and not upon hearing about it from someone else.¹⁴⁴

Lord Hoffman qualified this summary but cautioned that it should not be viewed as an exhaustive list.¹⁴⁵ Finally, the majority held that rescuers were owed no duty unless they had been within the area of physical danger—the police officers' claim was denied, and the law had narrowed again.

Injury" (2004) 26 *Sydney Law Review* 293, 300.

139 (1983) 1 AC 410.

140 The "Hillsborough tragedy" was the death by crushing of 95 people in 1989 and the injury of several hundred at the FA Cup semi-final held in Hillsborough. The tragedy resulted from a decision by the police to open up a barrier to speed admission to the semi-final.

141 (1992) 1 AC 310.

142 (1992) 1 AC 310.

143 (1999) 2 AC 455, 472, discussed in (2000) 23 WAR 35, 56.

144 (2000) 23 WAR 35, 36.

145 (1999) 1 All ER 1.

In its 1995 *Consultation Paper on Liability for Psychiatric Illness*, the Law Commission reviewed the current English law on psychiatric injury.¹⁴⁶ In that paper, the Commission identified the key criteria which the court will apply, specifically:

- (i) The plaintiff must suffer a recognised psychiatric illness such as post-traumatic stress disorder or pathological grief disorder. As in Australia, mental distress alone is insufficient: *Hicks v Chief Constable of the South Yorkshire Police*.¹⁴⁷
- (ii) Where the plaintiff is a secondary victim, the psychiatric illness must be shock induced (*Sion v Hampstead Health Authority*¹⁴⁸) and the result of the direct perception of an event or its immediate aftermath;
- (iii) The plaintiff must also be able to prove a sufficient degree of physical and emotional proximity.¹⁴⁹

There are poignant reminders in *Annetts* of the “seriously doubted” first instance decisions of the English courts in *Hevican v Ruane*¹⁵⁰ and *Ravenscroft v Rederiaktiebolaget Transatlantic*.¹⁵¹ Those decisions allowed recovery by the suffering yet “distant” families (one son had been working far away on an oil-rig in the North Sea). Both cases were overturned on appeal. Whereas, by way of contrast, the somewhat similar case of *Annetts* (which involved an Australian version of vulnerable young men at work in relevantly remote situations) failed before the two lower courts, with the Full Court of the Supreme Court of Western Australia particularly restrictive in upholding the decision of the trial judge.¹⁵² Yet this case has now contributed on appeal to the High Court to an emerging landscape of psychiatric injury.

For the moment, however, the English common law in regard to nervous shock has “all the hallmarks of a legal system learning from experience and trying to adjust to the changing demands of a more litigious society. Courts are in fact making it up as they go along.”¹⁵³

B. South Africa

Pertinent to the subject matter of this piece is the South African decision of *Barnard v Santam Bpk*.¹⁵⁴ In this case, a 13 year old boy was killed in a bus accident; the appellant mother suffered psychiatric injury upon being informed by her husband (who had himself received the information over the telephone) of the death of her son. Deputy Chief Justice Van Heerden cited the comments of Kirby J in *Coates* in a judgement which rejected the

¹⁴⁶ English Law Commission, London, *Consultation Paper on Liability for Psychiatric Illness No 137*, 1995.

¹⁴⁷ (1992) 2 All ER 65. This case involved a claim for damages which arose from the Hillsborough disaster.

¹⁴⁸ Unreported, 27 May 1994.

¹⁴⁹ L Dombek and A Fisher, above n 11, 6–7.

¹⁵⁰ (1991) 3 All ER 65.

¹⁵¹ (1991) 3 All ER 73.

¹⁵² Butler, above n 5, 111.

¹⁵³ L Dombek and A Fisher, above n 11, 6–7.

¹⁵⁴ (1999) 1 SA 202.

notion that all hearsay victims of psychiatric illness should be excluded from seeking damages. It was further held that notions of reasonableness and fairness did not preclude the court from finding that the respondent's negligence was the legal cause of the appellant's shock. The remaining four members of the court concurred.

This decision provides "Confirmation that negligence law can provide redress against some forms of carelessly communicated bad news."¹⁵⁵ The decision relied heavily on Australian authorities and was consistent with developments in the rest of the common law world. Nonetheless, the decision was downplayed by Ipp J in *Annetts* on the grounds that South African civil law was based on the law of delict, rather than tort, and was limited only by causation and public policy—proximity had no role.¹⁵⁶

C. Canada

Canada has generally also taken a cautious approach to the expansion of liability for nervous shock. An example of this cautious approach is the 1999 decision of the British Columbia Court of Appeal in *Devji v District of Burnaby*,¹⁵⁷ in which the Court had regard to a duty of care that required "not merely foreseeability but also proximity and something more".¹⁵⁸ In this case the Court was not able to conclude that the psychiatric injury suffered by the plaintiff parents was reasonably foreseeable when they attended a hospital to identify the body of their daughter. The Court refused to expand the aftermath principle beyond its previous limits, or to contemplate the award of damages where direct perception was lacking, emphasising the need to maintain existing limits on liability in such cases.

D. Ireland

It was an Irish judge who first repudiated the old rule of non-recovery for nervous shock.¹⁵⁹ In keeping with this avant garde individual, later judgements in Ireland have shown a similar recognition of the need to develop the law in this area.

Generally speaking, the Irish judiciary has taken a more rational approach to the aftermath principle than England's.¹⁶⁰ They have granted recovery to a "hearsay" victim,¹⁶¹ and recognised that employers owe their employees a duty to protect them from psychiatric injury.¹⁶²

155 Graeme Orr, "Book Review of Barbara Hocking, *Liability for Negligent Words*" (2001)

16 *Professional Negligence* 1, 60.

156 (2000) 23 WAR 35, 60.

157 (1999) BCCA 599.

158 (1999) BCCA 599, (2003) 23 WAR 60, para 67.

159 *Bell v Great Northern Railway Co of Ireland* (1890) 26 LR Ir 428.

160 *Mullally v Bus Eireann* (1992) ILRM 722.

161 *Kelly v Hennessy* (1995) 3 IR 253. In this case recovery was permitted to a mother who was informed by telephone of an accident involving her children. The mother had later attended the hospital.

162 *Curran v Cadbury (Ireland) Ltd* (2000) 2 ILRM 343. The duty of employers to avoid psychiatric harm to employees had been denied by the House of Lords in *White*.

E. New Zealand

Also pertinent to the subject matter of this paper is the dissenting judgement of Thomas J in the recent New Zealand Court of Appeal case of *Van Soest v Residual Health Management Unit*.¹⁶³ While the majority held that reasonable foreseeability was insufficient to establish liability where other proximity requirements were absent, Thomas J was in favour of adopting reasonable foreseeability as the sole test of liability for psychiatric injury and abandoning the rules involving geographical, temporal and relational proximity.

Public Policy Considerations

In his decision in *Chester v Waverley Municipal Council*,¹⁶⁴ Rich J noted that “The law must fix a point where its remedies stop short of complete reparation for the world at large, which might appear just to a logician who neglected all social consequences which ought to be weighed on the other side.”¹⁶⁵

This “point” is the great bone of contention for judges in nervous shock cases, who are torn between the utopian ideal of fully compensating plaintiffs for their injuries and the reality of a world in which the “consequences of such lack of restraint for the rest of the community” would be dire.¹⁶⁶ The tension these conflicting pressures create is borne out by the numerous ideas which have come into and gone out of fashion with judges in an attempt to resolve the dilemma that they have created.

Past policy considerations which were employed to limit liability in nervous shock cases have been, and continue to be, debunked. Notions such as the lesser severity of psychiatric injury by comparison with physical injury, the fear of fraudulent claims, concern about “compensationitis”, a wider class of people as potential claimants, and concerns about placing disproportionate burdens on defendants—have all been cited in the past in attempts to hold the line against a rising tide of nervous shock claims.¹⁶⁷

¹⁶³ (2000) 1 NZLR 179.

¹⁶⁴ (1939) 62 CLR 1, 11.

¹⁶⁵ (1939) 62 CLR 1, 11. Cited in D Ipp, “Negligence—Where Does the Future Lie?” a paper given in January 2003 at the Supreme Court and Federal Court Judges’ Conference. (Copy on file with author).

¹⁶⁶ In *Chester* Rich J commented: “The attempt on the part of the appellant to extend the law of tort to cover this hitherto unknown cause of action has, perhaps, been encouraged by the tendencies plainly discernible in the development which the law of tort has undergone in its process towards its present amorphous condition. For the so-called development seems to consist in a departure from the settled standards for the purpose of giving to plaintiffs causes of action unbelievable to a previous generation of lawyers. Defendants appear to have fallen completely out of favour.” *Chester v Waverley Corporation* (1939) 62 CLR 1, 11.

¹⁶⁷ These policy considerations have been refuted (respectively) as follows: as mental attitude becomes more important, the seriousness of psychiatric injury similarly gains in importance: see H Teff, “Psychiatric Injury in the Course of Policing: a Special Case?” (1997) 5 *Tort Law Review* 184; H Teff, “The Hillsborough Football Disaster and Claims for ‘Nervous Shock’” (1992) 32 *Medicine, Science and Law* 251; H Teff, “The Requirement of ‘Sudden Shock’ in Liability for Negligently Inflicted Psychiatric Damage” (1996) 4 *Tort Law*

Increasingly, these and similar notions are refuted or recognised as being without foundation, and so are being left to the past.

Justice Kirby has sought on many occasions to elevate the approach in *Caparo* which allows for policy articulations to come to the forefront of negligence reasoning in the High Court, but recently accepted that his view had not gained currency. Nor has the High Court been “plaintiff friendly” during the extensive statutory reform period that has followed the Ipp Report in 2002. In fact, just as some argued that the pendulum of judicial opinion had swung far too strongly in favour of the plaintiff,¹⁶⁸ so others argued that recent cases have simply been “continuing a trend that has been apparent since the end of 1999 [and] . . . distinctly favoured defendants.”¹⁶⁹ Indeed, Professor Luntz wrote of this trend in both 2001¹⁷⁰ and 2003,¹⁷¹ and then again in 2004.¹⁷²

The *Civil Liability Act* 2002 (discussed earlier in this piece, and accompanying concerns about a “compensation crisis” and increasing litigation within Australia), while not dealing specifically with nervous shock law, will presumably have an effect on the mentality of the judiciary in nervous shock cases. It has only limped from its narrow boundaries since the 1939 decision in *Chester v Waverley Council* where only Justice Evatt was capable of understanding that a reasonable mother in the shoes of that grieving mother would suffer shock. For those States where the Ipp recommendations have been adopted or considered, it is worth noting

Review 44; H Teff, “Tort Liability for Psychiatric Damage: The Law of ‘Nervous Shock’” (1994) 10 *Professional Negligence* 108. While concerns about fraudulent claims for psychiatric illness are difficult for the layman (including the judiciary) to debunk, it has been argued that a psychiatrist will be just as likely to pick up a fraudulent psychiatric illness claim as a physician would be to pick up a claim for damages for a fraudulent back injury (English Law Commission, above n 150). Concerns about compensation have been the main concern (Lord Steyn). However, the Law Commission points out that claims for damages for physical injury are just as likely to produce compensationitis, if not more likely, as sufferers of psychiatric conditions are more likely to be dissuaded from bringing actions because of the stigma associated with their conditions, the prospect of psychological assessment and the condition itself (Teff). Teff also dismisses concerns about the “wider class of claimants”, arguing that psychiatric illness from accidents to other people is not that common, and less so where involvement is only with the aftermath or through the communication of a third party. In addition, the “wider class of claimants” concern suggests that those suffering psychiatric illness are not as worthy of protection as those suffering physical injury. It has been noted that “we would not refuse compensation for physical injuries just because the train was full.” See H Teff, “Involuntary Participation and Survivor’s Guilt” (1998) 6 *Tort Law Review* 190; H Teff, “Liability for Negligently Inflicted Nervous Shock” (1983) 99 *Law Quarterly Review* 100; H Teff, “Liability For Negligently Inflicted Psychiatric Harm: Justifications And Boundaries” (1998) 57 *Cambridge Law Journal* 91.

168 Ipp’s opinion is unsurprisingly in line with the report of the panel which undertook the Review of the Law of Negligence—which he chaired—and which lead to the introduction of the *Civil Liability Act (NSW) 2002*.

169 Harold Luntz, “Editorial Comment: Round-up of Cases in the High Court of Australia in 2003” (2004) 12 *Torts Law Journal* 1, 1.

170 Harold Luntz, “Torts Turnaround Downunder” (2001) 1 *Oxford University Commonwealth Law Journal* 95

171 Harold Luntz, “Turning Points in the Law of Torts in the Last 30 Years” (2003) 15 *ILJ* 1, 22.

172 Luntz, above n 169.

this observation by Boyd: "It is arguable that s75AE of the TPA [*Trade Practices Act 1974 (Cth)*] is wider in scope than the Ipp Report's proposed doctrine of mental harm as contained in Recommendations 33, 34 and 35 . . . However, it may be a reason for a plaintiff suffering from mental harm to commence proceedings under the TPA as opposed to negligence."¹⁷³

Conclusion

A range of events is said to have prompted recent statutory attempts to roll back what some perceive to be the "juggernaut" of negligence in Australia, including the decision of the High Court of Australia in *Annetts*. A more widely suggested cause is the world-wide collapse in the insurance industry. Whatever the cause, the result was a New South Wales Parliamentary review of the law pertaining to compensation and the introduction of changes to physical and psychological injury law in the shape of the *Civil Liability Act 2002 (NSW)* and the *Civil Liability Amendment (Personal Responsibility) Act 2002 (NSW)*.

The consequences of the *Civil Liability Act* and the *Civil Liability Amendment (Personal Responsibility) Act* and *Annetts* on the law of nervous shock in Australia are likely to be far-reaching, but whether in practice they result in an expansion of liability for nervous shock remains to be seen.

An examination of other common law jurisdictions around the world indicates that Australia is at the vanguard of the incremental expansion of liability for nervous shock. First instance and supreme court appeal decisions in *Annetts* were more in keeping with restrictive English nervous shock law than the recent radical legislative changes in New South Wales and other states in Australia. However, increasing refutation of many of the traditional policy reasons for limiting recovery bodes well for the *Annetts*' last chance to recover in the High Court of Australia, as does that Court's decision in granting the *Annetts* leave to appeal, and the subsequent codification of the rules laid out in that case in the *Civil Liability Acts* of 2002. It is only to be hoped that the recent concerns about compensation and insurance crises and increasing litigation will not act as a brake on the necessary continued expansion of liability in this area of the law.

¹⁷³ Guy Boyd, "Personal Injuries Law Reform: An Unintended Effect on Product Liability Claims?" (2003) 11 *Torts Law Journal* 262, 277. Section 75 AE of the *Trade Practices Act 1974 (Cth)* deals with liability for defective goods causing injuries where loss is sustained by a person other than the injured individual.