Still limping: The ongoing development of the law on pure psychiatric injury

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In the judgments and legal commentary of recent decades, 'nervous shock' is a term increasingly seen in inverted commas. As legal shorthand for pure psychiatric injury, it is widely considered to be 'apt to mislead'[1] and anachronistic.[2]

The term, with its 'echoes of frail Victorian heroines',[3] is rooted in 19th century medical understanding of and social attitudes towards pure psychiatric injury.[4] The first judicial reference to 'nervous shock' is found in the 1888 case of *Victorian Railway Commissioners v Coultas* (*Coultas*),*[5]* where the claim for pure psychiatric injury failed before the Privy Council on the grounds that (psychiatric) damage could not be proven, that the type of injury was too remote a consequence from the tortious action, and that as a matter of policy, to find the defendant liable in such circumstances would leave a 'wide field open for imaginary claims'.[6]

In the 1970 case of *Mount Isa Mines Ltd v Pusey* (*Pusey*), Windeyer J remarked that the law 'marching with medicine though in the rear and limping a little, has come a long way since [*Coultas*]'.[7] And, undoubtedly, the law, medical understanding and social attitudes regarding psychiatric injuries have developed considerably in the decades since *Pusey* was decided.

However, in the 21st century, the old scepticisms and policy anxieties evoked by pure psychiatric injury claims are readily identifiable in judicial and legislative action. In the field of personal injury, psychiatric injury claims remain claims apart: the establishment of liability requires different and often more onerous hurdles to be overcome than in the case of physical injuries, and any development of the law in favour of claimants is particularly troubling to some judges, legislators, statutory authorities and commentators.

This is especially so in the sub-category of what are sometimes called 'secondary victim' cases: where the claimant has not been directly involved in or directly witnessed the negligent mechanism of injury which gives rise to the claim, often learning of it afterwards.[8] It is in this sub-category that public policy grounds against findings of liability bite hardest, and it is where each of the matters discussed below is located.

It is also a field where, in recent decades, there has been a significant divergence in the common law position between England and Australia, with the High Court imposing less rigid and onerous requirements on plaintiffs than is the case in England[9] – to the evident alarm of Australian legislators.

The case for limiting liability

Why is it that pure psychiatric injuries are considered so problematic from a policy perspective, such that in England, Australia and elsewhere it has been considered necessary to discriminate against these claimants compared with their physically injured counterparts?

While a detailed analysis and critique of these policy grounds is beyond the scope of this article,[10] it is necessary to set out the key points which powerfully inform the historical development of the law discussed below.

The main arguments against pure psychiatric injury claims can be summarised as follows:

1. The existence of mental harm is more difficult to prove than physical harm, and carries with it the associated risk of trivial and/or fraudulent claims. This is coupled with the traditional medical and cultural notions of extreme psychiatric response being hysterical and irrational,[11] and so less worthy of compensation than physical injury.[12]
2. Because psychological injury can afflict people beyond the range of physical effects of negligence, there is potential for a vast class of claimants arising from the one negligent act (that is, opening the floodgates).[13]
3. Following on from (2) above, the imposition of liability in such cases burden the defendant with liability out of proportion to the negligence alleged, and thus produce iniquitous outcomes.[14] Further, the fear of liability may inhibit normal and desirable societal activities and interactions.[15]

Historical development in England and in Australia

From the base position of the Privy Council in *Coultas*, the 'limping' progress of the common law in the 20th century can roughly be tracked as follows: first, recognition that pure psychiatric harm occasioned by a reasonable fear of physical injury to oneself could sound in damages.[16] Then, a recognition that psychiatric harm occasioned by reasonable fear of physical injury to immediate family could also be compensable.[17] In *Pusey*, entitlement was extended to a claimant who witnessed an industrial injury involving a work colleague.

Two constants throughout these progressions were the need for the claimant to have directly been involved in or to have witnessed the negligently caused 'shocking event' and the requirement relevant to the question of reasonable foreseeability and breach that the claimant be of 'normal fortitude' – save for where the claimant's 'peculiar susceptability' to psychiatric injury was known to the defendant.

In the early 1980s, two cases with similar facts allowed the House of Lords and the High Court respectively to further clarify the common law position on pure psychiatric injury.

The English case of *McLoughlin v O'Brian*[18] (*McLoughlin*) concerned a woman who claimed to have sustained psychiatric injury from seeing her severely injured children (one of whom subsequently died) in hospital approximately two hours after they had been involved in a negligently caused motor vehicle accident.

The leading judgment of Lord Wilberforce held that in order to succeed in such matters, a claimant must satisfy – in addition to establishing the ordinary elements of the duty of care – three additional factors (referred to as 'control mechanisms'):[19]

1. that they have or had close ties of love and affection with the primary victim;
2. that they had temporal and spatial proximity to the shocking event or immediate aftermath; and

3. that they witnessed the shocking event or aftermath with their own senses (sight or hearing).[20]

In *McLoughlin*, the majority of Law Lords held that the (requisitely shocking) scene confronting the claimant at the hospital two hours after the motor vehicle accident made her sufficiently 'present' at the aftermath of the incident, and so her claim succeeded.

The Australian case of *Jaensch v Coffey*[21] (*Jaensch*) similarly concerned a post-incident hospital scene, where the claimant saw her seriously injured husband several hours after he was involved in a negligently caused motor vehicle accident.

The judgment of Brennan J was similar to the reasoning in *McLoughlin*; namely, that the claimant could be said, by seeing her husband in hospital, to have experienced sudden shock while present at the aftermath of negligently caused accident.[22] By contrast, Deane J was far less concerned about issues of when, where and how the claimant came to understand the gravity of the situation, noting medical literature to the effect that there were no necessary correlations between psychiatric injury occasioned by sudden shock and the severity of the injury.[23] Deane J, at that time in the midst of his quixotic attempt to establish the concept of 'proximity' as a touchstone in the tort of negligence, considered that the nature of the relationship between the claimant and the person(s) injured ought to be the most significant determinant of the existence of a duty of care.[24]

In the later cases of *Alcock v Chief Constable of South Yorkshire Police*[25] (*Alcock*) and *Tame v New South Wales; Annetts v Australian Stations Pty Ltd*[26] (*Tame/Annetts*), the differences in the common law position in England and Australia would become far more pronounced.

Alcock arose from the 1989 Hillsborough Stadium disaster in which 96 spectators died. Sixteen claimants, all relatives of people who had died (14 parents, 1 brother, 1 fiancée) brought claims in negligence against South Yorkshire Police in relation to their psychiatric injuries. Two of the claimants had been at Hillsborough, although they were not in the Leppings Lane end of Hillsborough Stadium where the fatal crush occurred. Some had been involved in the search for their loved ones in the hours after the event, including at a makeshift morgue. Other claimants, along with millions of others, watched television coverage of the events.

In their extremely narrow application of the test set out in *McLoughlin*, the Law Lords held that, for various reasons, the police did not owe a duty to any of the claimants.

Those who had watched the events on television were found not have directly perceived with their own senses the incident or its aftermath. A claimant's location of his child's body in a morgue eight hours after the disaster failed the 'immediate aftermath' test (it was two hours in *McLoughlin*).[27] The claimant who had lost a brother was found not to have had a particularly close relationship with the deceased, and so failed on the facts to establish a close relationship of love and affection.

Alcock was widely perceived to be heavily policy-driven ('the search for [legal] principle was called off in *Alcock*')[28] and has been described as the common law's 'low-water mark' in pure psychiatric injury matters.[29] Ten years after *Alcock*, the High Court's ruling in the combined cases of *Tame/Annetts* can be seen as the high-water mark.

Ms Tame developed psychiatric injury as a consequence of an administrative error made by a police officer regarding a blood/alcohol reading. The High Court rejected her claim, finding that the claimant had developed an unforeseeably extreme psychiatric reaction to an objectively minor and inconsequential error. It further found that, as a matter of policy, the police officer's primary duty was to make a report with the purpose of giving it to superiors – there was no duty to take measures to make sure that a person does not suffer mental harm as a result of producing the report, and even if there was such a duty, it would yield to the primary duty in a situation of conflict.

Mrs Annetts' claim succeeded. The claimant was the mother of a 16-year-old boy who was employed on an outback cattle station. At the outset of her son's employment, she had raised with the employer her concerns about her son working alone in remote locations, and received assurances from her employer that the boy would be supervised at all times. Subsequently, the boy was sent out to attend another cattle station without supervision and disappeared. His body was discovered after a search lasting four months. Accordingly, the process by which Mrs Annetts suffered a psychiatric injury was not through sudden shock, but by a slow and protracted process.

In the reasoning common to both claims, the High Court found that the *McLoughlin* control mechanisms of direct perception, witnessing/aftermath and 'sudden shock' as pre-requisites for a finding of liability were not part of Australian law. The 'normal fortitude' test was also abandoned as imprecise and artificial. Gummow and Kirby JJ considered the control mechanisms were unprincipled and artificial mechanisms that brought the law into disrepute, and that this sort of categorical approach hindered the development of a coherent body of case law.[30]

As for Mrs Annetts, it was the uncontested proof of the psychiatric disorder relevant to her son's death that mattered, rather than the precise manner by which it had come about. The Court considered that factors such as sudden shock and direct perception were merely relevant to the question of reasonable foreseeability, which together with normal policy considerations surrounding duty of care provided the appropriate legal framework for pure psychiatric loss claims.[31]

Legislative responses

In the aftermath of *Alcock*, the harshness of which was widely criticised in the common-law world,[32] the UK Law Commission published a report recommending the abandonment of the second and third of the *McLoughlin* control mechanisms because, among other things, the distinction between shock-induced and non-shock-induced psychiatric illness was without scientific or clinical merit.[33] That report was published in 1998 and there has been no legislative response to date.[34]

It was said that in the aftermath of *Tame/Annetts,* Australia led the common law world in its recognition of the fact that psychiatric injuries were just as real as physical injuries.[35] The legislative interventions that have followed suggest that legislators were not keen on retaining this accolade.

From 2002, in response to the Ipp Report[36] and the so-called insurance/torts 'crisis' in which it was alleged that the law was moving unaffordably and unsustainably far in favour of the injured,[37] parliaments throughout Australian pushed through a raft of legislation

designed to re-codify the law on psychiatric injury so as to override the common law position.[38]

In all states except Queensland and Western Australia, the legislative changes ushered in the return of pre-requisite categories to act as limitation measures in pure psychiatric injuries cases,[39] including the re-introduction of the 'normal fortitude' test.[40] Section 53(1) of the *Civil Liability Act 1936* (SA) is an example of this categorical approach introduced into legislation throughout Australia in the early 2000s:

'Damages may only be awarded for mental harm if the injured person—

(a) was physically injured in the accident or was present at the scene of the accident when the accident occurred; or
(b) is a parent, spouse,[41] or child of a person killed, injured or endangered in the accident.'

In essence, s53(1)(a) encompasses an amalgam of the second and third *McLoughlin* control mechanisms, while s53(1)(b) covers the first.

Recent cases: *King* and *Homsi*

The contrasting judgments in the recent cases of *King v Philcox* (*King*)[42] and *Homsi v Homsi* (*Homsi*)[43] are apposite illustrations of the divided state of Australian law on pure psychiatric injury: the former being a case where the common law position is the subject of rigid legislative control mechanisms, and the latter case where it is not.

The claim in *King* was brought by the brother of a man who had been killed in a motor vehicle accident. Mr Philcox had driven past the accident scene several times but was unaware that his brother had been involved in it. When he later learnt that he had in fact been viewing the scene of his brother's death, this knowledge caused him to develop a major depressive disorder.

With duty of care, breach and causation all established, the claimant's entitlement turned entirely upon the wording of the relevant section of the South Australian legislation (see above). Unlike other jurisdictions like New South Wales and Victoria, which speak of 'close member of the family'[44] and 'close relationship'[45] respectively, s53(1)(b) of the South Australian legislation explicitly defines the qualifying relationships and does not include siblings. Therefore, the legal question all the way up to the High Court was whether the claimant was 'present at the scene of the accident when the accident occurred' and so could be entitled under s53(1)(a). The High Court found that the claimant was not relevantly 'present' in the meaning of the legislation, distinguishing the case from the earlier matter of *Wicks v State Railway Authority of New South Wales*,[46] where the claim of a police officer who had attended the scene of a train derailment succeeded due to the marginally different wording of the New South Wales legislation.

In *Homsi*, Forrest J of the Supreme Court of Victoria was required to assess a novel claim for pure psychiatric injury largely untrammelled by legislation. The claimant was the mother of a man who had died in a road accident due to his own negligence. The judgment takes account of the historical development of the common law regarding pure psychiatric injury and cogently considers whether the duty of care ought to be extended further in the present case, so as to find a duty not to cause psychiatric injury to another by self-inflicted injury.

Forrest J did not find such a duty, noting that it has never previously been recognised and, more tellingly, that there were strong policy reasons why such a duty should not be recognised, including:

- the large number of potential claimants that might eventuate if this particular duty was recognised (while at the same time noting that in the broader context of psychiatric injury 'floodgates arguments' are problematic);[47]
- the need for tort law to align with community expectations of the legal duties and obligations that we owe to each other, noting that to recognise a duty not to harm oneself in a manner which may produce foreseeable psychiatric injury to another would, in a wide variety of scenarios, lead to iniquitous findings of liability far out of line with public sentiment;[48] and
- the likely significant interference that the recognition of a such duty could have on family relationships.[49]

Discussion

Though the claimants failed in both *King* and *Homsi*, the bases upon which the claims were determined could scarcely be more different.

Mr Philcox's claim failed because of the legislation where entitlement or disentitlement between otherwise equally meritorious claims can turn on artificial, arbitrary and medically unsustainable distinctions.[50] While the categorical control mechanisms in Australian statutes are less stringent than the English common law position as set out in *Alcock*, by their nature they can produce legal outcomes just as harsh. Had Mr Philcox been a parent of the deceased rather than a brother (even an estranged parent as opposed to a devoted brother), or had he sooner understood precisely what he was seeing, his claim would have succeeded.

Bound by recent legislation, the High Court in *King* was required to apply precisely the type of categorical approach to pure psychiatric injury which the judges in *Tame/Annetts* had, more than a decade before, considered to be an unprincipled impediment to the development of coherent legal principles and one that risked producing results that are difficult to justify to the community.

By contrast, Mrs Homsi's claim failed because, following a principled and even-handed consideration of the competing arguments, the judge found that the claimed duty of care did not exist in common law, nor should it.

The legislative reforms that occurred in many Australian jurisdictions in the early 2000s, partly in response to the High Court's decision in *Tame/Annetts*,[51] reflected an instinct that has held sway among judges and legislators ever since pure psychiatric injury claims emerged over a century ago: that this type of claim must be tightly controlled, lest an avalanche of claims and indeterminate liability ensue. Quite how soundly based these fears are is a matter for debate.

More questionable still is the continued use of crude, categorical control mechanisms to hobble the development of the common law in this complex area.

The judgments in *Homsi* and in *Tame/Annetts* are examples of what Lord Bridge, who delivered the most liberal judgment in *McLoughlin*,[52] said of the proper mechanism by

which claims for pure psychiatric injury should be confined: 'if asked where the thing is to stop, I should answer […] "where in the particular case the good sense of the judge, enlightened by progressive awareness of mental illness, decides".'[53]

[1] *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383, 394.

[2] Joachim Dietrich, 'Nervous shock: Tame v New South Wales and Annetts v Australian Stations' (2003) 11 *Torts Law Journal*, 1.

[3] Margaret Fordham, 'Psychiatric Injury, Secondary Victims and the "Sudden Shock" requirement' (2014) *Singapore Journal of Legal Studies*, 42.

[4] *Ibid*, 41.

[5] (1888) 13 App Cas 222.

[6] *Ibid*, 226.

[7] (1970) 125 CLR 383, 395.

[8] Peter Handford, 'Psychiatric Injury Law In England and Australia – Drawing Closer Together?' (2007) *Journal of Law and Medicine*, 176.

[9] Fordham, see above note 3, 42; Handford, see above note 8, 176.

[10] See Des Butler, 'An assessment of competing policy considerations in case of psychiatric injury resulting from negligence' (2002) 10 *Torts Law Journal* 1; Prue Vines, Mehera San Roque & Emily Rumble, 'Is "Nervous Shock" Still a Feminist Issue? The Duty of Care and Psychiatric Injury in Australia' (2010) 18 *Tort Law Review* 9.

[11] Vines, San Roque & Rumble, see above note 10, 20.

[12] Ramanan Rajendran, 'Told Nervous Shock: Has the Pendulum Swung in Favour of Recovery by Television Viewers?' (2004) *Deakin Law Review* 733; Butler, see above note 10, 5.

[13] Christian Witting, 'A Primer on the Modern Law of Nervous Shock' (1998) 22 *Melbourne University Law Review* 62, 64.

[14] Fordham, see above note 3, 41; Witting, see above note 13, 87.

[15] Des Butler, see above note 10, 16.

[16] *Dulieu v White & Sons* (1901) 2 KB 669.

[17] *Hambrook v Stokes Brothers* (1925) 1 KB 141.

[18] [1983] 1 AC 410.

[19] Fordham, see above note 3, 44.

[20] [1983] 1 AC 410, 421-423.

[21] (1984) 155 CLR 549.

[22] *Ibid*, 567.

[23] Fordham, see above note 3, 48.

[24] (1984) 155 CLR 549, 601.

[25] (1992) 1 AC 310.

[26] (2002) 211 CLR 317.

[27] (1992) 1 AC 310, 405.

[28] *Frost v Chief Counsel of South Yorkshire Police* (1999) 2 AC 455, 511.

[29] Fordham, see above note 3, 44.

[30] (2002) 211 CLR 317, 380-381..

[31] Handford, see above note 8, 176.

[32] Rajendran, see above note 12, 744.

[33] Fordham, see above note 3, 45.

[34] *Ibid*, 45.

[35] Peter Handford, *Mullany and Handford's Tort Liability for Psychiatric Damage* (2nd ed, Lawbook Co, Sydney, 2006) [1.180].

[36] Commonwealth of Australia, *Review of the law of Negligence: Final Report* (2002) (Ipp Report).

[37] Fordham, see above note 3, 57; Handford, see above note 8, 188.

[38] Handford, see above note 8, 177.

[39] Vines, San Roque & Rumble, see above note 10, 14.

[40] Handford, see above note 8, 190.

[41] The section has subsequently been amended to include 'domestic partner'.

[42] (2015) HCA 19.

[43] (2016) VSC 354.

[44] *Civil Liability Act* 2002 (NSW) s30.

[45] *Wrongs Act* 1958 (Vic) s73.

[46] (2010) 241 CLR 60.

[47] (2016) VSC 354, [72].

[48] *Ibid*, [74].

[49] *Ibid*, [75].

[50] Butler, see above note 10, 27.

[51] Handford, see above note 8, 188.

[52] Rajendran, see above note 12, 738.

[53] [1983] 1 AC 410, 443.