THE DEFENDANTS' LIABILITY FOR NEGLIGENTLY CAUSED NERVOUS SHOCK IN AUSTRALIA — QUO VADIS?*

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> The Law is always approaching and never reaching consistency. It is forever adapting new principles from life at one end, and it always retains old ones from history at the other.
>
> Oliver Wendell Holmes

MEDICAL AND LEGAL ORIGINS OF THE CONCEPT OF NERVOUS SHOCK

The phrase 'nervous shock,' like the term 'insanity', was originally introduced into legal usage from medicine. Neither of these terms are used in clinical practice today, and the concepts which they originally denoted have been modified and refined since the nineteenth century. They continue however, to be utilized by lawyers who have assigned to them a specific juridical content.

The law, having taken a long time to accept 'nervous shock' as a cause of action, has preserved this term through the means of judicial precedents, largely unaware that it no longer has any clinical meaning.

The survival of the term 'nervous shock', and of the ideas associated with it as a legal concept, has meant that the law today is trying to fit complex contemporary psychiatric knowledge within the Procrustean bed of a simplistic and limited model of mental illness.

The legal issues involved in the liability of the defendant for 'nervous shock' are important, and there continues to be a certain degree of misunderstanding by medical practitioners of what is implied by lawyers when they use this term. Conversely, lawyers are often frustrated when told that 'nervous shock' has no medical meaning and is not a diagnostic term.

In this paper I shall set out a short history of law as it pertains to the defendants' liability for nervous shock inflicted by negligence in Australia, particularly as reflected in decisions by the High Court of Australia. I shall also analyse the current legal views on this issue, describing the various ways in which the concept of liability for negligently caused nervous shock has been used so as to reconcile it with modern psychiatric diagnosis and practice.

Legally, the essence of the defendant's liability for nervous shock is that a specific event, which is the result of his or her wrongful action, has emotion-

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ally injured the plaintiff. There are three categories of cases where the claimant may obtain compensation for nervous shock.

The first category is where the wrongful conduct by the defendant has caused the plaintiff to suffer a physical injury, which is followed by a diagnosable mental condition. The second category involves compensation for nervous shock to a plaintiff who, without experiencing physical impact or suffering a physical injury, was present at the site of an accident. Such a plaintiff might have a cause of action if he or she has been placed in peril by the wrongful act of the defendant, or has been present when a close relative or a co-worker was killed, injured or placed in danger. Those acting as rescuers who develop nervous shock and consequently sue for damages would also be included in this category of claimants.[1] The third and, jurisprudentially, the most controversial category of cases involving the negligent infliction of nervous shock is that of a plaintiff who has not been present at the site of an accident in which a close relative, or co-worker, has been killed or injured, but who has suffered emotionally as a result of witnessing the 'aftermath' of the event, in circumstances where the death or injury of the primary victim[2] has been caused by the defendant's tortious, that is, wrongful, conduct.

How far should the law go in allowing a claim for damages against a defendant, where the wrong done by him or her was primarily a wrong done to someone other than the plaintiff, and the plaintiff — at the relevant time — was far away from the scene of the defendant's wrongful act?

The absence of an actual physical impact or a demonstrable physical lesion has made the courts, in Australia and elsewhere, wary of extending the liability of the defendants to cover such alleged damage as 'nervous shock'. It has taken ninety eight years — from the *Coultas* case in 1886 to the case of *Jaensch* v *Coffey* in 1984[3] — to establish jurisprudential principles and guidelines which delineate the scope of the defendant's liability for negligent infliction of nervous shock in Australia.

The actual phrase 'nervous shock' in relation to psychological injury appears to have been used for the first time in print in 1866 by John Eric Erichsen, Professor of Surgery at University College Hospital, London. In that year Erichsen published a set of six lectures, one of which was devoted to a discussion of the nervous manifestations which followed the experience of

[1] The duty of care owed to rescuers seems to be based on the principle that the wrongdoer ought to expect that some people will instinctively rush to the rescue of those injured, and therefore should be legally liable for any injury which they may suffer in the course of rescue. This will be so, whether the injury suffered by the rescuer is physical or psychiatric in nature. *Chadwick* v *British Railways Board* [1967] 1 WLR 912; *Eaton* v *Pitman* [1991] Aust Torts Reports 81-092.

[2] The term 'primary victims' has been used in psychology to denote those who have experienced maximum exposure to the catastrophic event. 'Secondary victims' are rescuers, the grieving relatives and friends of the primary victims. A J W Taylor, A G Frazer: *Psychological sequelae of Operation Overdue following the DC-10 Aircrash in Antarctica* (Victoria University, Wellington, New Zealand: Victoria University of Wellington Publications in Psychology 1981 no 27).

[3] *Jaensch* v *Coffey* (1984) ALJR 426; (1983–4) 155 CLR 549; (1984) Aust Torts Reports 80-300.

shock and injuries 'received in collisions on railways'.[4] Erichsen argued that symptoms of so-called 'railway spine' where due to an inflammation of the spinal cord through 'vibratory jarring' of the nervous system causing a 'molecular derangement'. Erichsen thus used the term 'nervous shock' to indicate that symptoms following railway accidents were a consequence of an organic, albeit non-demonstrable, injury.[5]

In 1870 Le Gros Clark published *Lectures on the Principles of Surgical Diagnosis*,[6] in which he suggested that the cases of so-called railway spinal concussion should be regarded as instances of emotional shock, rather than of a special injury to the spinal cord. This idea of Le Gros Clark was developed by Herbert Page who was opposed to Erichsen's organic view of nervous shock. In his book *Injuries of the Spine and Spinal Cord and Nervous Shock*,[7] published in 1883, Page argued that such symptoms were of emotional origin. According to Page, 'nervous shock'[8] was a 'functional' disorder[9] produced as a consequence of fear and alarm triggered by the shock of an accident. In 1884, two American neurologists published articles suggesting that symptoms of nervous shock — in the sense in which Page used this phrase — had the characteristics of a traumatic hysteria.[10]

At the same time, another neurological diagnosis was advanced for the symptoms which some people suffered following the shock of accidents, that of 'traumatic neurasthenia'. The term 'neurasthenia' was originally coined by a New York doctor, George Miller Beard, to indicate a state of 'physical and mental exhaustion'.[11] Neurasthenia was seen as a psycho-physiological disorder caused by the stress of the advanced civilisation of the late nineteenth century, and as such it was readily accepted by both the medical profession and the lay public.[12]

[4] J E Erichsen, *On Railway and Other Injuries of the Nervous System* (Philadelphia, Henry C Lea, 1867); J E Reiches, *On Concussion of the Spine: Nervous Shock and Other Obscure Injuries of the Nervous System in their Clinical and Medico-Legal Aspects* (London, Longmans, Green & Co, 1875).

[5] The term 'organic' was used in the 19th century to denote disorders based upon damage or change to bodily tissue.

[6] F Le Gros Clark, *Lectures on the Principles of Surgical Diagnosis* (London, J & A Churchill, 1870); S V Clevenger, *Spinal Concussion* (Philadelphia and London, F A Davis, 1889) p 26.

[7] H W Page, *Injuries of the Spine and Spinal Cord and Nervous Shock* (London, J & A Churchill, 1883).

[8] Thus, then as now, views were polarized between those who advanced an 'organic' theory of causation for post-accident complaints and those who regarded such sequel as being of psychological origin.

[9] 'Functional disorder' was a 19th century appellation denoting a bodily dysfunction without any apparent lesion.

[10] J J Putnam, 'The medico-legal significance of hemianaesthesia after concussion accidents.' (1884) 4 *American Journal of Neurology* 507; G L Walton, 'A case of hysterical hemianaesthesia' (1884) 111 *Boston Medical and Surgical Journal* 558.

[11] G M Beard, *A Practical Treatise on Nervous Exhaustion (Neurasthenia) Its Symptoms, Nature, Sequences, Treatment*, (New York, Treat, 1881). The disorder was characterised by fatigue, irritability, depression, insomnia, headache and lack of capacity for enjoyment.

[12] E M Brown, 'Regulating damage claims for emotional injuries before the First World War' (1990) 8 *Behavioral Sciences and the Law* 421, 427–8. Neurasthenic patients were generally considered to differ from those afflicted with hysteria in that the latter would

Neuropsychiatrists tended to classify neuroses according to whether they followed fright, shock, 'general shock commotion' or the combined effects of these experiences. There was a general belief, that in each instance, the condition would only occur in a person psychologically predisposed to neurosis.[13] Medical linkage of a person's predisposition to neurotic illness consequential upon a traumatic event led the courts to insist that only persons of 'normal disposition' or 'ordinary fortitude' could recover damages for nervous shock.[14]

For Erichsen, the possibility of excessive litigation by people who suffered psychogenic damage following non-impact trauma was not a major issue. There were however many doctors, including Page, who tended to regard such litigants as malingerers who presented a condition which was not a medical disorder, but a 'compensation neurosis' or 'litigation neurosis' primarily motivated by the lure of pecuniary damages.[15] The distrust with which many doctors approached complaints of patients whose suffering could not be corroborated by demonstration of a visible lesion, and the belief in the so called 'compensation neurosis', have persisted among a significant segment of the medical profession. These medical attitudes have exerted a negative influence over the legal debate as to whether damages for nervous shock should be compensable and, if so, in what circumstances.[16]

The first step towards recognition that nervous shock could be compensable as a separate head of damage, even in cases where the defendant's conduct did not result in a physical contact with the plaintiff's person, was taken in Australia in 1886, exactly twenty years after the publication of Erichsen's lectures. The Victorian case of *Coultas* v *Victorian Railway Commissioners*[17] became the forerunner of a long lineage of celebrated cases in which the legal validity of 'nervous shock' has been argued in Australia, in the

actively display their symptoms (convulsions, paralysis, incoordination of movement, anaesthesia, etc,), while the neurasthenics experienced all manner of mental and physical discomfort. Where the experience leads to physical incapacity, the dividing line between hysteria and neurasthenia may become blurred. F Schiller, *A Mobius Strip: Fin-de-Siecle Neuropsychiatry and Paul Mobius* (Berkeley, University of California Press, 1982); P Gay, *The Bourgeois Experience*, vol II: *The Tender Passion* (New York, Oxford University Press, 1986).

[13] W F Schaller, 'Diagnosis in traumatic neurosis' (1918) 71 *Journal of the American Medical Association* 338. This hypothesis was challenged by some treating doctors even at that time.

[14] *Wilkinson* v *Downton* (1897) 2 QB 57. This meant, that persons with 'predisposition to neurosis' could be precluded from recovering damages for nervous shock.

[15] The term 'compensation neurosis' was coined by C T J Rigler in his monograph *Uber die Folgen der Verletzungen auf Eisenbahen* (Berlin, Reimer, 1879). For the medical history of 'nervous shock' see G Mendelson, *Psychiatric Aspects of Personal Injury Claims* (Springfield, Charles C Thomas, 1988); E M Brown, 'Regulating damage claims for emotional injuries before the First World War' op cit.

[16] The fear of malingering has persisted despite the fact that already in the 19th century many clinical studies which compared the symptoms of patients who were pursuing a claim for damages and those who were not involved in the litigation process, showed that there was very little difference between them. P C Knapp, 'Traumatic nervous affections. An attempt at their classification based on a study of ninety cases' (1892) 104 *The American Journal of the Medical Sciences* 629, 641; W F Schaller, 'Diagnosis in traumatic neurosis' op cit.

[17] *Coultas et uxor* v *The Victorian Railway Commissioners* (1886) 12 VLR 895.

United Kingdom and in the USA. In the *Coultas* case a gatekeeper, employed by the Victorian Railways Commissioner, carelessly ushered the buggy driven by Mrs Coultas' husband across the railway level crossing in East Richmond, Melbourne. Just as they had passed over one set of rails, a train came past. Frightened by the approach of the train, Mary Coultas fainted. Shortly afterwards she suffered a miscarriage, and was ill for several months. Medical evidence at the subsequent court hearing indicated that she had suffered a 'severe nervous shock from the fright, and that the illness from which she afterwards suffered was the consequence of the fright'.[18]

In issue was the remoteness of damage.[19] The test for remoteness of damage in negligence prior to the *The Wagon Mound (No 1)* case[20] required that the damage should be a 'direct and natural consequence' of the breach of the defendant's duty of care. The Full Bench of the Supreme Court of Victoria decided that Mrs Coultas could recover for mental and physical injuries resulting from nervous shock caused by the defendant's negligent conduct. Although the train had not physically 'touched' the buggy, damages resulting from nervous shock were not too remote because they were a natural and reasonable consequence of a fright caused by the train dashing past the plaintiff. Thus, at least in respect of remoteness of damage in negligence, the Victorian Supreme Court treated Mrs Coultas' claim for nervous shock as a claim for physical injury.

The decision of the Victorian Supreme Court, however, was reversed on appeal to the Privy Council.[21] The Judicial Committee of the Privy Council decided that the award of damages:

> '... arising from mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot ... be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gate-keeper'.[22]

This was because an award of damages for nervous shock would open 'a wide field ... for imaginary claims'.[23] The result of the Privy Council's advice to

[18] *Victorian Railways Commissioners* v *James Coultas and Mary Coultas* (1888) 13 AC 222, 224.

[19] Until 1934, when in the case of *Donoghue* v *Stevenson* (1932) AC 562, a general duty of care based upon reasonable foreseeability was established as the governing principle of the tort of negligence, a plaintiff who intended to sue the defendant in negligence, had to show that the defendant's conduct came within one of the established categories of the duty to take care. The case of *North Eastern Railway Company* v *Wanless* [1874] LR 7 HL 2; 43 LJ QB 185 had established the requisite duty of care in respect of the 'level crossing' accidents. Thus, once the gate-keeper, who was an employee of the Victorian Railway Commissioners admitted negligence, the question of duty of care did not arise. F Pollock, *The Law of Torts* (8th ed, London, Stevens and Sons Limited, 1908) 456–8. Railway companies were under a statutory duty to provide places where the public could cross the railway lines and to observe certain precautions intended to protect the public.

[20] *Overseas Tankship (UK) Ltd* v *Morts Dock & Engineering Co Ltd* [The Wagon Mound No 1] [1961] AC 388.

[21] *Victorian Railways Commissioners* v *James Coultas and Mary Coultas* (1888) 13 AC 222.

[22] Id 225.

[23] Id 226.

the Queen was an apparently blanket denial of recovery for negligently caused nervous shock not accompanied by physical impact on the grounds that this head of damage was too remote to sound in damages. The Judicial Committee's decision in *Coultas* was very controversial, not merely because of its refusal to recognise nervous shock as a compensable head of damages.[24] The decision set a precedent for regarding liability in negligence for non-impact psychiatric injury as requiring a distinct and restrictive treatment in law.

The reasoning behind the Privy Council's decision reflected social prejudices of the time about medico-legal consequences of railway collisions. In the 19th century the railways were the greatest source of injury and accidental death — in 1893 there were 47,729 people injured or killed on railroads in the United States.[25] The great majority of those who used the railways, and who therefore were exposed to a proportionately greater risk of injury, belonged to the poorer strata of society. Some judges suspected that many of the plaintiffs making claims against the railway companies were healthy people who were not motivated by genuine suffering, but by the hope of enrichment through compensation.

This is in spite of the fact that already in the 1880's, intensive clinical research into psychological consequences of fright suggested that serious 'general functional disorders' or 'neuroses' often develop even after slight injuries. By the time the Twelfth International Medical Congress was held at Wiesenbaden in 1893, it was generally accepted that disorders which follow emotional non-physical trauma were genuine medical conditions though they were psychiatric, rather than physical in nature. Theoretical basis for such classification was provided by Freud and Breuer in 1895 with the publication of *Studies in Hysteria*.[26] In their monograph, Freud and Breuer compared symptoms of hysteria with those following psychological trauma due to fright. The authors concluded that neurotic symptoms may be produced by the antagonism of mutually incompatible emotional trends.[27]

As early as the American Civil War, doctors began to examine combat-related psychiatric conditions suffered by soldiers who had not sustained a

[24] In Tasmania, the *Coultas* case was invoked as an authority for a blanket denial of damages for nervous shock in the case of *Davies* v *Bennison* (1927) 22 Tas LR 52. However section 4 of the *Wrongs Act* 1932 (Vic) expressly abrogated the Privy Council's decision by providing that: 'In any action for injury to the person the plaintiff shall not be debarred from recovering damages merely because the injury complainted of arose wholly or in part from mental or nervous shock'. This provision has been reproduced in: *Wrongs Act* 1958 (Vic), s 23; *Wrongs Act Amendment Act* 1936 (SA), 28(1), [now s 6]; *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW), s 3(1); *Law Reform (Miscellaneous Provisions) Ordinance* 1955 (ACT), s 23; *Law Reform (Miscellaneous Provisions) Act* 1955 (NT), s 24.

[25] P Bailey, F Kennedy, 'Injuries and disorders of the nervous system following railway and allied accidents' in F Peterson, W S Haines and R W Webster (ed.), *Legal Medicine and Toxicology* (2nd ed, Philadelphia, W B Saunders Co, 1923) Vol 1, 397–440.

[26] S Freud, J Breuer, *Studies on Hysteria* (1895) (Trans J Strachey, London, Hogarth Press, 1955); S Freud, 'On the grounds for detaching a particular syndrome from neurasthenia under the description of "anxiety neurosis".' (1895) in *Standard Edition of the Complete Psychological Works of Sigmund Freud* (London, Hogarth Press, 1962) vol 3.

[27] H Oppenheim, E E Mayer, *Diseases of the Nervous System. A Textbook for Students and Practitioners of Medicine* (London, J B Lippincott Co, 1901).

physical injury.[28] These conditions were further studied by experts during the First World War who noted that their manifestations were similar to the emotional injuries suffered by persons involved in railway and other peacetime accidents. Since psychiatrists were able to successfully treat the acute psychosomatic symptoms of the so called 'war-neurosis' with psychotherapy and hypnosis, it was postulated that the etiology of that particular disorder was psychological rather than organic. Clinical observations made during the First World War led the participants of the Fifth International Psychoanalytical Congress in Budapest in 1918 to conclude that, there is no essential difference between peacetime neurotic illnesses and 'the psychoneuroses of war'. 'Traumatic neuroses' were thus to be explained as distinct neurotic reactions similar to all other types of neuroses.

By 1925 psychiatry had formulated a scientifically acceptable theory of neuroses, including traumatic neuroses.[29] In a nutshell, according to the psycho-analytical view, the trauma of any stressful accident, in an individual with a specific emotional vulnerability, may trigger off latent predisposing mechanisms and result in a neurotic illness.[30] During this period, anatomists and physiologists were able to develop an understanding of the autonomic nervous system which regulates such involuntary processes as breathing, heart rate and digestion.[31] It was observed that many bodily functions are controlled by the autonomic nervous system[32] so that the organism can adapt to changing conditions without the need for conscious decisions. All internal functions of the body are regulated and coordinated by the electrical messages of the autonomic nervous system[33] and the hormonal (chemical) messages of

[28] The condition was first reported during the American Civil War by J M DaCosta. 'On irritable heart: a clinical study of a form of functional cardiac disorder and its consequences. (1871) 6 *American Journal of Medical Science* 17.

[29] S Freud, *Psychopathology of Everyday Life* (Trans A A T Brill, London, Fisher Unwin, 1914); S Freud, 'Selected Papers on Hysteria' *Nervous and Mental Diseases Monograph Series* 1920 no 4.

[30] G Mendelson, 'The concept of post-traumatic stress disorder: a review' (1987) 10 *International Journal of Law and Psychiatry*, 45; C B Scrignar, *Post-traumatic Stress Disorder* (2nd ed, New Orleans, Bruno Press, 1988); M R Trimble, *Post-Traumatic Neurosis From Railway Spine to Whiplash* (Chester, New York, John Wiley & Sons, 1981).

[31] The central nervous system has two divisions: the autonomic (involuntary, automatic) and somatic (voluntary and sensory) nervous system.

[32] The autonomic nervous system is sub-divided into the 'sympathetic' system, in which neurons originate from the spinal column, and the 'parasympathetic' system, in which the neurons originate from the base of the brain. The two systems have opposite functions within the body and use different chemicals (neurotransmitters) to transmit their electrical signals to the target glands and organs.

[33] The controlling structure of the autonomic system is a small nucleus (neurone cluster) called hypothalamus. The size of a soybean, the hypothalamus is located below or ventral to the thalamus and forms the floor and part of the inferior lateral walls of the third ventricle. It co-ordinates autonomic nervous system functions, and ensures that its sympathetic and parasympathetic divisions work in harmony and adjust their activities to changing bodily needs. As well as regulating the autonomic functions of the body, it also controls many hormone secretions of the endocrine system through the pituitary gland, and receives information from areas of the brain, called the limbic system, which are concerned with emotional and instinctual behaviour. Hypothalamus regulates body temperature, sex drive, thirst, hunger and plays a role in emotions of pain and pleasure.

the neuroendocrine system.[34] Research into physiological responses to adverse emotional stress further demonstrated that such stress may cause profound changes to the operation of muscles and glands of the body giving rise to physiological disorders. Walter B Cannon[35] described physiological mechanisms which control the phenomenon known as the 'flight-or-fight' response, whereby a sufficient degree of fright or threat would make one's heart pound, mouth go dry, hairs prickle at the back of one's neck, and eyes feel as if they were popping out of their sockets. Otto Loewi[36] established the connection between chemicals and the body's electrical activity by demonstrating that physiologically, the living organism, when confronted with a threat to its physical integrity, or homoeostasis, responds to such a 'traumatic stimulus' by activating the sympathetic nervous system[37] which stimulates the neuroendocrine system, especially the adrenal medulla.[38] By pinpointing demonstrable psycho-physiological changes to the organism which were produced as a response to an external shock, psychiatrists and neurophysiologists were able to show that physiology and emotions are closely interrelated within the human organism, and that the notion of a complete separation between mind and body as described by Descartes is unsustainable.

With the greater understanding of psycho-physiological consequences which can follow non-physical impact, medical nomenclature moved away from a classification of psychosomatic syndromes based upon the aetiology of a particular accident. Emotional and physical symptoms that used to be variously described under such traditional appellations as 'railway spine',

[34] Endocrines are glands or their secretions where secretion takes place directly into the blood stream rather than by ducts.

[35] W B Cannon, *Bodily Changes in Pain, Hunger, Fear and Rage: An Account of Recent Researches into the Function of Emotional Excitement* (2nd ed, New York, Appelton, 1929).

[36] O Loewi, 'The humoral transmission of nervous impulse' The Harvey Lectures, 1933, Baltimore; O Loewi, 'The chemical transmission of nerve action' Nobel Lecture, Dec 12 1936; cited in L A Stevens, *Explorers of the Brain* (London, Angus and Robertson, 1971). See also B Holmstedt, G Liljestrand, *Readings in Pharmacology* (New York, The Macmillan Co, 1963).

[37] Accoding to Cannon, the sympathetic nervous system centres around its function during times of emergency.

[38] Adrenal medulla is the central part of the two adrenal, or epinephric, glands which are situated above each kidney. Adrenal medulla secretes two hormones: the epinephrine hormone, also known as adrenaline (a powerful stimulator of the sympathetic nervous system) and noradrenaline. In situations of danger, hypothalamic chemicals alert the pituitary gland which then secretes a hormone known as ACTH (adrenocorticotropic hormone produced by the pituitary; it stimulates the adrenal glands to release glucocorticoid hormones into the bloodstream) which acts upon adrenal glands. The adrenal glands, in anger or fear, are capable of secreting 20 times the usual amount of stress hormones, particularly cortisol, which prepare the body to deal with the stressful situation by mobilising supplies. Another adrenal chemical converts fats and proteins into sugar. In response to severe stress, the adrenals produce adrenaline and noradrenaline in greater quantities: the heart beats faster, the blood pressure increases and pupils of the eye dilate to improve vision. The combined surge of hormones relaxes bronchial tubes for deeper breathing, increases blood sugar to supply maximum energy, slows down the digestive process to conserve muscular energy and modifies blood components so that it clots more easily on an open wound. Thus, in a matter of seconds, the body substances can be drastically altered. According to Cannon, these changes prepare the organism for fight or flight as an adaptation for survival. J Fincher, *The Brain* (New York, Torstar Books, 1984) 98.

'shell-shock' or 'battle-fatigue' were critically re-examined and abandoned. As a result, psychiatrists decided to divide mental disorders into four generic types: organic conditions,[39] functional psychoses,[40] neuroses[41] and personality disorders.[42] But the courts, still governed by the old rule that mere mental pain and anxiety do not sound in damages[43] and by their apprehension of being swamped by spurious claims, persisted in their insistence that in order to be recoverable, the psychological damage had to have some physical manifestations; though for the purposes of the law, it did not matter whether the medical cause of these physical manifestations was physiological, neurotic or psychotic.[44]

At the time, it was generally accepted among psychiatrists that the most important factor in psychosomatic illness was not the severity of the traumatic event which caused the neurosis, but the person's predisposition to neurosis.[45] Since predisposition to mental illness was considered an important medical factor in the aetiology of psychiatric disorders, it was not unreasonable that the courts should regard absence of such predisposition as an essential element of the tort in cases of psychological damage following

39 G Mendelson, *Psychiatric Aspects of Personal Injury Claims*, op cit 28. 'Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association' 1987, known as DMS-III-R. Those mental disorders which were secondary to brain disease were classified as 'organic conditions'.

40 The 'functional psychoses' — schizophrenia and manic-depressive psychosis — were conceptualised as disorders in which the severe disturbance of mental function has had the effect of gross interference with insight, the ability to meet some ordinary demands of life and to maintain contact with reality. Because of the absence of a demonstrable organic cause, the disturbance was considered as one of function rather than structure.

41 Those mental disorders which did not have any demonstrable organic basis and which were a result of maladaptive use of unconscious mental defence mechanisms were designated as neuroses. In a neurotic condition, the unconscious psychological and physiological defence mechanisms would be utilised to avoid overwhelming anxiety which threatens to arise as a consequence of unconscious intrapsychic conflicts, or the entering into conscious awareness of unacceptable wishes or emotional drives. Neuroses are distinguished by unimpaired perception of reality by the patient and by his or her awareness of the mental disturbance. The principal manifestations of neuroses include excessive anxiety, hysterical symptoms, depression, phobias, obsessional and compulsive symptoms.

42 Personality disorders were considered to be clinical conditions essentially comparable to psychoses and neuroses. They were defined as 'deeply ingrained maladaptive patterns of behaviour generally recognisable by the time of adolescence or earlier and continuing throughout most of adult life.' Mental Disorders: *Glossary and Guide to their Classification* (Geneva, World Health Organisation, 1978) 38.

43 Lord Wensleydale in *Lynch* v *Knight and Wife* (1861) 81 HL 347, 361–2 stated that: 'Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone, though where a material damage occurs, and is connected with it, it is impossible a jury, in estimating it, should altogether overlook the feelings of the party interested.'

44 The occurrences of psychosis following traumatic experiences were relatively rare but not totally unknown.

45 There was also a prevalent view that the second most important factor in the duration and symptomatology of neurosis was the lure of compensation, viz H W Smith, H C Solomon, 'Traumatic neuroses in court' (1943) 30 *Vancouver Law Review* 87. In their very influential article, the authors urged the courts to make the law of torts more stringent so as to prevent persons predisposed to neurosis possibly enriching themselves through compensation.

non-physical impact trauma. It was Justice Wright who in 1897[46] stressed that the plaintiff who alleges injury by way of nervous shock needs to show that at the time of the event he or she was a person in 'an ordinary state of health and mind'.[47]

THE HIGH COURT OF AUSTRALIA AND THE DEFENDANTS' LIABILITY FOR NERVOUS SHOCK DURING THE INTER-WAR PERIOD

Developments in medicine and neuropsychiatry before and after World War I exerted considerable influence on the judicial willingness to grant compensation for nervous shock in Great Britain.[48] The Irish and the English courts had rejected the authority of the *Coultas* decision even in the 1890's.[49] However, the peculiarities of the Colonial legal structures, with their strict doctrine of precedent, meant that the Privy Council's decision in *Coultas* was binding on the courts of Australia in the area of negligent infliction of non-impact nervous shock,[50] thus preventing any progress in this area of the tort law.[51] The High Court of Australia had an opportunity to judicially elucidate

[46] *Wilkinson* v *Downton* [1897] 2 QB 57.

[47] Where psychiatric illness developed as a result of physical injury to the claimant, the issue of predisposition did not arise, because of the principle that the tortfeasor must take his victim as he finds him: per Kennedy J in *Dulieu* v *White* [1901] 2 KB 669. If the tortfeasor happens to physically injure someone who has a weak heart and who dies as a result of an otherwise slight injury, he cannot exculpate himself by pleading that if his victim had a stronger heart, the consequences of the wrongful conduct would have been minimal. Similarly, the 'egg-shell skull' rule, as it is known, applies where the tortfeasor happened to physically injure a person with a 'neurotic personality' or someone predisposed to psychosis — he has to bear all the consequences which flowed naturally and directly from his tortious conduct. The case of *Dulieu* v *White*, op cit, was decided long before the case of *The Wagon Mound No 1*, op cit, established that the test for remoteness of damage in negligence should be based upon the question whether the defendant could have reasonably foreseen the kind of damage which in fact was suffered by the plaintiff.

[48] In the case of *Wilkinson* v *Downton*, op cit, Wright J, in an effort to distinguish the *Coultas* case, created a new innominate tort — a cause of action on the case for damages for an intentional infliction of nervous shock. Mr Justice Wright distinguished the *Coultas* decision on the ground that, the Judicial Committee merely held that the illness which was the effect of shock caused by fright was too remote a consequence of an unintentional though negligent act. Therefore, the decision could not be, and was not an authority in actions for damages for an intentional infliction of nervous shock. This new cause of action was re-affirmed by the Court of Appeal in the case of *Janvier* v *Sweeney* [1919] 2 KB 316.

[49] *Bell* v *The Great Northern And Western Ry Co* (1890) 26 LR IR 428; *Pugh* v *London, Brighton & South Coast Ry Co* (1896) 2 QB 248; *Wilkinson* v *Downton* (1897) 2 QB 57; *Dulieu* v *White* (1901) 2 KB 669; *Hambrook* v *Stokes Bros* (1925) 1 KB 141.

[50] *Davies* v *Bennison*, op cit.

[51] The *Coultas* decision was distinguished in cases where there was some physical injury to, or interference with the person of the plaintiff: *Daly* v *Commissioner of Railways* (1906) 8 WALR 125; *Sealy* v *Commissioner of Railways* [1915] QWN 1. Damages for non-impact nervous shock could be recovered in the tort of nuisance: *Pelmoth* v *Phillips* (1899) 20 NSWR 58, as well as in action on the case for an intentional infliction of nervous shock: *Johnson* v *The Commonwealth and Ors* (1927) 27 NSW SR 133.

liability of defendants for negligently inflicted nervous shock when it delivered its judgment in the case of *Bunyan* v *Jordan*[53] in 1937.

In *Bunyan* v *Jordan* the plaintiff, Miss Bunyan, overheard her inebriated employer, Mr Jordan, tell another employee that he intended to shoot himself or someone else. She later heard a shot fired by the defendant Jordan in another building. Having returned to his office unharmed, Jordan proceeded to tear-up one pound notes, shouting that he would not live until the morning. Miss Bunyan became 'agitated and nervous', and later suffered symptoms of neurasthenia as a result of which she was unable to work for three months. Miss Bunyan sued her employer for nervous shock resulting in psychological damage.

The High Court acknowledged that plaintiffs may recover damages for intentional infliction of nervous shock,[53] but that in the present case the essential elements of this tort were absent.[54] The issue of Mr Jordan's liability for negligently inflicted nervous shock, was analysed on the basis of reasonable foreseeability of the risk of nervous shock as between two strangers.[55] The High Court held that since a reasonable man in the defendant's position could not have reasonably foreseen that his acts would cause Miss Bunyan an injury, Mr Jordan did not owe her a duty of care in respect of his, admittedly, antisocial conduct.[56] In an obiter dictum Mr Justice Dixon (as he then was) noted that:

> 'On medical evidence, the jury might find that the defendant's actions threw the plaintiff into a sufficiently emotional condition to lead to neurasthenic breakdown amounting to an illness'.[57]

His Honour then indicated that such an illness, even without accompanying physical injury should be regarded by the courts as:

> 'a form of harm or damage sufficient for the purpose of any action on the case in which the damage is the gist of the action, that is, supposing that the other ingredients of the cause of action are present'.[58]

The case of *Bunyan* v *Jordan* was a half-step towards recognition of negligently inflicted 'mere' nervous shock as a compensable head of damage dependent on foreseeability of harm 'of some such nature' as that which had

52 *Bunyan* v *Jordan* (1936–1937) 57 CLR 1.

53 The High Court cited with approval the English cases of *Wilkinson* v *Downton* (1897) 2 QB 57 and *Janvier* v *Sweeney* (1919) 2 KB 316 which had established a nominate tort of an intentional infliction of nervous shock.

54 Mr Jordan did not utter the threats in Miss Bunyan's presence, nor did he intend to cause her any distress.

55 The majority of the High Court appear to have regarded Miss Bunyan as an officious bystander, rather than an employee — which indeed she was — to whom a duty of care is owed by the employer.

56 The High Court, particularly Rich J, was quite derisive about Miss Bunyan's reaction to the drunken behaviour of her employer. However, the plaintiff's emotional response is explicable within the context of the depression which in 1937 was still very deep in Australia. Miss Bunyan would have realised that if something did happen to her employer, she would very likely lose her job with little prospect of obtaining another.

57 *Bunyan* v *Jordan*, op cit 16.

58 Id.

actually occurred.[59] The judgments of the majority show that the judiciary did not take much cognisance of medical developments in the field of psychosomatic disorders. By the 1930s neurasthenia was used as a medical term denoting a wide range of psychoneurotic conditions, however in the judgments of the High Court this psychiatric condition was still exclusively associated with fright and terror.

The High Court's somewhat limited comprehension of the medical and psychiatric science pertaining to traumatic neurosis was again illustrated in 1939 in the case of *Chester* v *The Council of the Municipality of Waverley*.[60] In August 1937 the defendant Council excavated a seven-foot-deep trench at the end of the street where the plaintiff and her family lived. Due to heavy rains, the virtually unprotected trench filled with water. On a Saturday afternoon, at about 2 pm, the plaintiff's seven-year-old son, Max, went out to play. When he failed to return home by 3 pm, Mrs Chester went out to look for him. After a long search the police were called to explore the water-filled trench. Mrs Chester was present when, after about half an hour, the body of her son was located and taken out of the water in the trench. Mrs Chester developed serious psychiatric illness and she subsequently sued the Council for damages on the basis of 'severe nervous shock'.

On appeal to the High Court, it was held by a majority (Latham CJ, Rich and Starke JJ; Evatt J dissenting) that the plaintiff's action should fail because the facts did not disclose a breach of any duty owed by the defendant Council to Mrs Chester. According to Latham CJ, the defendant's duty of care did not extend to Mrs Chester because:

> 'it cannot be said that such damage (that is, nervous shock) resulting from a mother seeing the dead body of her child should be regarded as "within the reasonable anticipation of the defendant" ... Death is not an infrequent event, and even violent and distressing deaths are not uncommon'.[61]

Perhaps the learned Chief Justice was merely reflecting hardened sensibilities of the late 1930's when he asserted that

> 'It is, ... not a common experience of mankind that the spectacle, even of the sudden and distressing death of a child, produces any consequences of more than a temporary nature in the case of bystanders or even of close relatives who see the body after death has taken place'.[62]

Although the *Coultas* case was not mentioned in the majority judgments,

59 F A Trindade, 'The intentional infliction of purely mental distress' (1986) 6(2) *Oxford Journal of Legal Studies* 219.

60 *Chester* v *The Council of the Municipality of Waverley* (1939–40) 62 CLR 1.

61 *Chester* ibid 10. Latham CJ discussed the issue of reasonable foreseeability of nervous shock in the case of Mrs Chester in the following terms: 'The question which must be asked in order to determine whether the defendant was negligent or not is whether the defendant should have foreseen that a mother would suffer from nervous shock amounting to illness if she saw the dead body of her child where the death of the child had been brought about by the negligence of the defendant towards the child. This mode of formulating the question is very favourable towards the plaintiff... the question should probably be put in a form which substituted words 'person' and 'another person' for 'mother' and 'child'.'

62 Ibid.

the 'floodgates' argument, which was at the basis for the Privy Counci's rejection of recovery for mere nervous shock, was also apparent in the *Chester* case half a century later. Latham CJ ruminated:

> 'in this case the plaintiff must establish a duty owed by the defendant to herself and a breach of that duty. The duty which it is suggested the defendant owed to the plaintiff was a duty not to injure her child so as to cause her a nervous shock when she saw, not the happening of the injury, but the result of the injury, namely, the dead body of the child. It is rather difficult to state the limit of the alleged duty. If a duty of the character suggested exists at all, it is not really said that it should be confined to mothers of children who are injured. It must extend to some wider class — but to what class?'[63]

Policy reasons for the denial of duty of care in respect of nervous shock were grounded in fear of unlimited litigation and in ignorance of medical science, particularly psychiatry.[64] The majority judges appear to have viewed damage occasioned by nervous shock in the same way in which some railway surgeons like Herbert Page explained this kind of injury some seventy years earlier.

Mr Justice Evatt, in his dissenting judgment, insisted that an account should be taken of the totality of the circumstances which had led to the death of Max, and to Mrs Chester's response.[65] On the issue of duty of care based upon reasonable foreseeability in cases of nervous shock suffered by parents distressed by the death of their children, Evatt J said that:

> 'So far as the argument rests upon the contention that no other parents would have suffered shock and illness from the ordeal undergone by Mrs Chester, I think this is a mere assertion and is contradicted by all human experience. I think that only "the most indurate heart" could have gone through the experience without serious physical consequences'.[66]

Unlike the majority judgments, Evatt J utilised the then latest advances of psychiatric and physiological understanding of emotional stress to distinguish *Coultas*. His Honour noted that the Committee's decision held only that damages due to 'mere sudden terror unaccompanied by any actual physical injury' were too remote to be recovered. However, according to Evatt J:

> 'It must always be a question of fact whether shock to the nerves causes "actual physical injury". To-day it is known that it does. In 1888 it was widely assumed that it did not . . . It is on this basis that the *Coultas' case* is to be understood, and if so understood it has no application to cases like the

[63] Id 7.

[64] Thus according to Rich J: 'The train of events which flow from the injury to A almost always includes consequential suffering on the part of others. The form the suffering takes is rarely shock; more often it is worry and impecuniosity. But 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 the social consequences which ought to be weighed on the other side.' Id 11.

[65] Id 19.

[66] Id 25.

> present where "shock to the nerves" is another name for actual physical disturbance to the nervous system'.[67]

The reasoning of Mr Justice Evatt in the *Chester* case, which at last laid to rest the unfortunate spectre of *Coultas*, was widely acclaimed and was eventually adopted by the Australian High Court in *Jaensch* v *Coffey*[68] in 1984.

POST WORLD WAR II DEVELOPMENTS IN RESPECT OF NEGLIGENTLY INFLICTED NERVOUS SHOCK

Partly as a reaction to the majority judgments in the *Chester* case, and partly following the decision in *Bourhill* v *Young*,[69] the NSW Parliament in 1944 enacted special legislation which gave a statutory independent cause of action for nervous or mental shock to a parent, child or spouse of a person killed, injured or put in peril by the defendant's act of neglect or default.[70] The statute made it unnecessary for a close relative to establish, as a foundation of the action, that there was a foreseeable risk of harm to such a plaintiff. Similar provisions were adopted in 1955 by the Northern Territory and the Australian Capital Territory.

Other Australian States, however, were still bound by the decision in *Chester*. For thirty one years, the Australian common law remained virtually static in its denial of damages for psychiatric illness where such illness was caused by emotional shock due to physical injury to perons other than the plaintiff, in circumstances where the claimant did not actually observe the injury being inflicted.[71] This was so despite the fact that during World War

67 Id 47.

68 In *Hay or Bourhill* v *Young* (1942) 2 ALL ER 396, 406 Lord Wright commented on the judgment of Evatt J in the following way: 'I cannot, however, forbear referring to a most important case in the High Court of Australia, Chester v. Waverley Municipal Council, where the court by a majority held that no duty was made out. The dissenting judgement of Evatt, J., will demand the consideration of any judge who is called upon to consider these questions.' A L Goodhart, 'An Australian shock case' (1939) 55 *The Law Quarterly Review* 495; N Landau, 'The duty in cases of nervous shock' (1939–1941) 2 *Res Judicatae* 139.

69 *Hay or Bourhill* v *Young* (1942) 2 ALL ER 396.

70 *The Law Reform (Miscellaneous Provisions) Act* 1944 (NSW), Pt III, s 4. The original *Law Reform (Torts) Bill*, headed '*Injury arising from Mental or Nervous Shock*', was introduced in 1942 but its passage was impeded due to the World War II.

71 Thus in *Shewan* v *Sellars* (No 1) decided in 1962 and reported in (1963) 57 *The Queensland Justice of the Peace* 108, the husband who was injured in a motor car accident in which his wife and child were also seriously injured, was denied damages for breakdown resulting in loss of employment 'caused by a anxiety [sic] neurosis resulting from worry or shock.' The judgements of Rich J and Latham CJ in the *Chester* case were quoted as reason for denial of damages for nervous shock, though the trial judge misunderstood the issues of duty of care and remoteness of damage. In *Andrews* v *Williams* [1967] VR 831, the Victorian Supreme Court allowed the plaintiff recovery for nervous shock, which she had suffered after being informed that her mother died in a motor car collision in which she also was seriously injured. The Court held that the defendant driver owed a duty of care to the plaintiff as a road user. At issue therefore was remoteness of damage, and it was reasonably foreseeable that she may suffer injury in the form of nervous shock arising from the fact of a near relative being killed at the same time and by the same act. But cf: *Spencer* v *Associated Milk Services Pty Ltd & Anor* [1968] QD R 393 where the

II,[72] and particularly in the post-War period, a number of scientific papers were published which examined the psychopathology of the sequelae which follow exposure of a person to life threatening experiences that have resulted in the death of many others.[73] As a result of these studies, the knowledge of psychiatric disorders advanced quite rapidly and a number of old theories regarding the aetiology of neurosis were either abandoned or modified.

Doctors began to take note of a cluster of symptoms which tended to persist for a long time after the traumatic experience and which seemed resistant to all psychotherapeutic approaches.[74] Observation of these intractable psychological symptoms led some researchers to revive the old Erichsenian hypothesis that sufferers of an emotional trauma might have undergone some kind of organic change after all. However, greater knowledge of neuroanatomy and psychophysiology meant that the scientific focus of the research was shifted from the spinal cord to the sympathetic nervous system.

Clinical studies which followed suggested that traumatic environmental events may have not only short term effect — as demonstrated by Cannon and Loewi — but also long term neuropsychological and physiological consequences. It was postulated that traumatic events may trigger an idiosyncratic physiologic response in the victim which may lead to chronic perceptual impairment and changes in the sympathetic nervous system. Thus psychiatry began to provide scientifically demonstrable explanations for its theoretical propositions in respect of long term psychological disorders following non-physical impact trauma. Scientific developments in psychoneurology and psychophysiology resulted in a wider recognition of psychiatry as a respected branch of medicine. This scientific acceptance was in turn reflected in judicial attitudes towards liability of defendants for negligent infliction of psychiatric injury consequential upon perception of physical harm to another person.

Thus in the case of *Storm* v *Geeves*,[75] Burbury CJ allowed damages for nervous shock suffered by the mother and the brother of a little girl, Wilma, who was killed through the defendant's negligence.[76] The mother was not

17-year old plaintiff was seriously injured in a car accident caused by the defendants' negligence. Several days later he was told that both his parents were killed in the same collision. He suffered a severe emotional disturbance and sued the defendants, inter alia, for damages for nervous shock. Lucas J decided that a reasonable man in the defendants' position could have foreseen that the plaintiff on being told of his parents' death, would develop a neurotic condition.

72 E Miller, *The Psychoneuroses in War* (New York, The Macmillan Co, 1940); R Grinker, J Spiegel, *Men under Stress* (Philadelphia, PA, Blakiston, 1945).

73 L Ettinger, 'Pathology of the concentration camp syndrome' (1961) 5 *Arch Gen Psychiatry* 371; R Jaffe, 'Dissociative phenomena in former concentration camp inmates' (1968) 49 *Int J Psychoanal* 310; E K Koranyi, 'A theoretical view of the survivor syndrome' (1969) 30 *Diseases of the Nervous System* (Suppl) 115; E C Trautman, 'Fear and panic in Nazi concentration camps: a biosocial evaluation of the chronic anxiety syndrome' (1964) 10 *Int J Soc Psychiatry*, 134.

74 D Dobbs, W P Wilson, 'Obervations on persistence of war neurosis' (1960) 21 *Diseases of the Nervous System* 686.

75 *Storm* v *Geeves* [1965] Tas LR 252.

76 Burbury CJ's decision in *Storm* v *Geeves* ibid, has been acknowledged and cited with approval by Windeyer J in *Mount Isa Mines Ltd* v *Pusey* and by Gibbs CJ, Brennan, Murphy and Deane JJ in *Jaensch* v *Coffey*. It should be noted that the High Court in its subseqent approval of the case had never questioned the possibility that a close relative

present at the time when an out of control truck crashed into her daughter. However, alerted to what had happened by her son, she immediately ran to the site of the tragedy and for nearly an hour watched as the helpers attempted to move the truck's wheel off Wilma and then waited for her body to be placed in an ambulance.

A further step towards recognition that a psychotic disorder following a traumatic non-impact accident at work may be compensable at common law in Australia, was taken by the High Court in 1970 in the case of *Mount Isa Mines Ltd* v *Pusey.*[77] The case arose in Queensland. The plaintiff, Mr Pusey, had worked as an engineer in the defendant's powerhouse for 15 years. On the day of the accident two electricians were severely burned by an electric arc while they were testing a switchboard. Mr Pusey did not witness the explosion but when he heard the noise, he went to the upper floor where he assisted one of the burnt electricians by carrying him to an ambulance. Nine days later Mr Pusey heard that the man had died.[78] For about four weeks Mr Pusey continued to work without any apparent impairment to his health. However, thereafter he developed a serious mental disorder which was diagnosed as an acute schizophrenic episode.

Like *Coultas*, but unlike the *Chester* case, the issue in *Pusey* involved remoteness of damage. The fact that the defendant employer owed the plaintiff employee a duty of care was not challenged. The defendant argued that an injury such as schizophrenia which manifested itself some four weeks after the accident, from an event which was not actually witnessed by the plaintiff and which moreover, involved a stranger, was too remote to be compensable.[79] The High Court rejected the defence argument and unanimously allowed Mr Pusey recovery for nervous shock caused by coming to the rescue[80] and observing the grievous injuries to his workmates. This was so, even though the plaintiff himself was never threatened by the explosion, was not related to the victims, and might not have known them prior to the accident.

In relation to the apparent time interval between the accident and the onset of the illness, McTiernan and Windeyer JJ adopted Mr Justice Evatt's test in the *Chester* case, that for the purposes of reasonable foreseeability it is sufficient for the onset of the plaintiff's shock and subsequent illness to be 'fairly contemporaneous with the casualty'.[81] Windeyer J argued that the law should recognise medical and scientific developments of the twentieth century which

other than a parent, a child or a spouse may recover damages for nervous shock, provided other elements of the tort were satisfied.

[77] *Mount Isa Mines Ltd* v *Pusey* (1971) 125 CLR 383.

[78] The other electrician died on the day following the accident.

[79] For a more detailed analysis of the case, see P G Heffey 'The negligent infliction of nervous shock in road and industrial accidents; Parts I and II' (1974) 48 *The Australian Law Journal* 196, 240.

[80] *Chadwick* v *British Railways Board* [1967] 1 WLR 912 Waller J held that the plaintiff could recover damages for nervous shock when — though not a passenger or a railway employee — he came to help in rescue activities following a negligently caused railway accident which killed ninety people and injured many others, because both the rescue and the shock were reasonably foreseeable.

[81] *Mount Isa Mines Ltd* v *Pusey*, op cit 391.

have brought about a profound change in the philosophy and in clinical practice of medicine:

> 'The Cartesian distinction between mind and matter for a long time had an obdurate influence of men's thinking. The interrelation of mind and body was little understood and often unacknowledged. But this position has given way in medicine and should, I think, give way in law.'[82]

In respect of recoverability of damages for nervous shock, Windeyer J declared that:

> 'Law, marching with medicine but in the rear and limping a little, has today come a long way since the decision in *Victorian Railway Commissioners v Coultas*, which in recent times has been regularly by-passed by courts. An illness of the mind set off by shock is not the less an injury because it is functional, not organic, and its progress is psychogenic.'[83]

His Honour also addressed the issue of foreseeability of nervous shock in relation to remoteness of damage, in the following terms:

> 'Liability for nervous shock depends on foreseeability of nervous shock. That, not some other form of harm, must have been a foreseeable result of the conduct complained of. The particular pathological condition which the shock produced need not have been foreseeable. It is enough that it is a recognizable psychiatric illness.'[84]

In *Pusey*, the plaintiff's psychiatric illness consequent upon his emotional shock of seeing and aiding two severely burnt men was indeed rare, but it was not unknown and therefore was reasonably foreseeable. To found liability, it was sufficient that mental disorder as a class, rather than as a particular type of injury, should be a foreseeable consequence of the defendant's conduct. *Mount Isa Mines Ltd* v *Pusey* was a seminal case which defined the legal status of 'nervous shock' as a separate head of damages in negligence. The High Court accepted unequivocally that 'all forms of mental or psychological disorder which are capable of resulting from shock'[85] are compensable, when other elements of the cause of action are present.[86]

The *Pusey* case also revealed an interesting insight into the diagnostic difficulties which psychiatrists of the late 1960s faced in relation to patients suffering the after-effects of severe psychological trauma. In his judgment, Mr Justice Windeyer noted that one of the psychiatrists who gave evidence that Mr Pusey suffered from schizophrenia did not like that label. The doctor however was unable to find 'a more suitable diagnostic label'[87] to describe his

[82] Id 405.
[83] Id 395.
[84] Id 402.
[85] Id 414 per Walsh J.
[86] Though the issue of predisposition did not arise in *Pusey*, it was addressed by the High Court, particularly by Windeyer J who said in an obiter dictum that he was not 'to be taken as assenting to the proposition that nervous shock caused to a man who is prone to such shock is not compensable when a similar occurrence harming a 'normal' man would be.' p 405.
[87] *Pusey*, op cit 403.

patient's severe psychiatric condition which resulted from an emotional shock suffered through his involvement in the aftermath of the accident.

The psychiatrist witness in *Pusey* might have used the nineteenth century term 'traumatic neurosis'[88] to denote the persistent symptoms which sometimes follow psychologically traumatic experience. Unfortunately, the phrase 'traumatic neurosis' had always lacked specific diagnostic meaning, and with time, acquired opprobrious connotations among certain doctors and lawyers.[89] As a result, the medical condition which it purported to describe — including cases which the lawyers still loosely call 'nervous shock' — did not attain the status of a medically recognised, distinct clinical entity until the last quarter of the twentieth century.[90] For it was only after the publication in 1968 of a comprehensive monograph on this topic by Keiser,[91] that the concept of traumatic neurosis received close scientific attention from clinicians and researchers, eventually getting the appellation 'Posttraumatic Stress Disorder' (PTSD).[92]

In 1978 a psychoanalytical model of 'traumatic neurosis' was postulated.[93] Building upon the concept of a 'stimulus barrier' to psychic trauma as an innate human biological component, it was argued that with the personal maturation process, the 'stimulus barrier' becomes gradually reinforced through psychological components consisting of the ego's defensive functions. These defensive functions become activated in response to a negative experience. When the defensive functions are unable to master or assimilate the negative experience, a state of anxiety ensues which, depending on the gravity of the failure to cope with the experience may result in an acute traumatic reaction. At about the same time, clinical studies on the neuroendocrine response to stress began to indicate that patients with a neurotic disorder may have less effective mechanisms to maintain psychoendocrine homoeostasis, and that this purely biological vulnerability may underline an

[88] W Asten, 'Traumatic neurasthenia' *Transactions of the Medico-Legal Society of London* (Session 1911–1912 reprinted by Fred B Rothman & Co, South Hackenbach, New Jersey, 1971) vol 9, 7; W F Schaller, 'Diagnosis in traumatic neurosis' (1918) 71 *Journal of the American Medical Association* 338.

[89] F Lawton, 'A Judicial view of traumatic neurosis' (1979) 47 *Medico-Legal Journal* 6. The most learned Lord Justice who considered claims involving 'traumatic neurosis' to be intrinsically fraudulent, defined the condition as: '. . . that oddity which arises when somebody has been injured in an accident and the lesions, if I may use the term . . . have healed; everything seems to indicate that the patient is nearly as good as he was before the accident and yet he presents with all kinds of symptoms.' Id.

[90] The term 'trauma' is used in psychiatry as a 'word of art', with generic meaning encompassing all insults to personality, which however, do not necessarily involve a threat to life or limb. Thus death of a loved person, or loss of a job would be considered traumatic without being life-threatening. The psychodynamic model considers any painful, though not physically threatening, disruption of family life which impacts upon a developing child to be 'traumatic'.

[91] L Keiser, *The Traumatic Neurosis* (Philadelphia, J B Lippincott Co, 1968) G Mendelson, 'The Concept of Posttraumatic Stress Disorder: a review' op cit.

[92] *Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association* (Third edition Washington DC 1980).

[93] S S Furst, 'The stimulus barrier and the pathogenicity of trauma' (1978) 59 *International Journal of Psycho-Analysis* 345; H K Gediman, 'The concept of stimulus-barrier' (1971) 52 *International Journal of Psycho-Analysis* 243.

increased likelihood of developing severe emotional symptoms to stressful situations.[94]

JAENSCH v *COFFEY*[95]

The 1980 Diagnostic and Statistical Manual of Mental Disorders known as DSM-III, provided for the first time detailed diagnostic criteria for the Post-traumatic Stress Disorder.[96] DSM-III classified PTSD as a type of anxiety neurosis,[97] and its diagnostic criteria incorporated the existence of a recognisable traumatic stressor[98] — a triggering event — that would evoke significant symptoms of distress in almost everyone.[99] DSM-III thus accorded formal recognition to the scientific theory that PTSD is a specific psychiatric diagnosis with biological as well as emotional pathology.

Some of these new medical, psychoanalytical and neurobiological developments were taken into account by legal writers[100] and by the judiciary in 1984, in the case of *Jaensch* v *Coffey*.[101] In this case the High Court had to decide whether the defendant owed a duty of care towards a plaintiff who was not present at the site of the accident in which her husband was badly hurt, but who suffered nervous shock after seeing her injured husband at the hospital.

The experiences of Mrs Coffey, the plaintiff, have been vividly described in

94 S R Burchfield, 'The stress response: a new perspective' (1979) 41 *Psychosomatic Medicine* 661; N Kurokawa, H Suematsu, H Tamai, et al: 'Effect of emotional stress on human growth hormone secretion' (1977) 21 *Journal of Psychosomatic Research* 231. G C Smith, D Copolov, 'Physical manifestations of stress' (1983) 7(11) *Patient Management* 85.

95 *Jaensch* v *Coffey* (1984) 54 ALR 417; (1984) 58 ALJR 426; (1983–4) 155 CLR 549; [1984] Aust Torts Reports 80–300.

96 *Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association* (Third edition op cit).

97 The symptomatology of the disorder includes intrusive re-experiencing the traumatic event by the patient; avoidance of the reminders of that event; reduced involvement with the external world following the shock and a previous absence of certain neurotic symptoms which would manifest themselves after the traumatic event. G Mendelson, 'The concept of posttraumatic stress disorder: a review', op cit.

98 It has been accepted, that the traumatic stressor which precipitates a PTSD always originates from the environment. The stress can be caused by direct damage to the central nervous system through head injury and malnutrition or may take the form of assault, serious accident, rape, military combat, deliberately caused disaster, such as bombing, torture and death camps. C B Scrignar, *Post-traumatic Stress Disorder*, op cit 16–18.

99 DSM-III-R gives the psychiatric definition of 'trauma' as inclusive of exposure to environmental factors which are either 'outside the range of human experiences', or 'markedly distressing to almost everyone' such as the serious threat to one's life or physical integrity, serious threat to one's children, spouse, or close relatives and friends, destruction of one's home or community, or 'seeing another person who is mutilated, dying, or dead or the victim of physical violence'. These traumatic stressors, in certain circumstances may initiate PTSD. *Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association* (Third edition Revised, Washington DC, 1987).

100 J M Hart, 'Neurosis following trauma: a dark horse in the field of mental disturbance' (1977) 8 *Cumberland Law Review* 495.

101 *Jaensch* v *Coffey* (1984) 54 ALR 417.

their respective judgments by Brennan and Deane JJ.[102] Mrs Coffey was at home in the evening of 2 June 1979 — away from the scene of the accident — when her husband, Allan, was seriously injured in a collision which was due to the admitted negligence of Mr Jaensch, the defendant. After being notified of the accident, Mrs Coffey went to the hospital where she saw her husband with his hips dislocated and in obvious pain. She spent anxious hours while he underwent three operations. Mr Coffey remained in a cricial condition for three to four weeks afterwards.

Some six days after the accident, Mrs Coffey developed the initial symptoms of severe anxiety and depression. These evolved into a serious psychiatric illness which on one occasion, involved an admission to a psychiatric ward at Royal Adelaide Hospital. Expert evidence was given to the effect that Mrs Coffey's psychiatric condition caused gynaecological problems, and an hysterectomy was performed. Mrs Coffey sued the driver of the car, which had collided with her husband, for nervous shock.

In issue was the duty of care.[103] The defence argued that Mrs Coffey should not be awarded damages for nervous shock because she was not present at the site of the accident, and because she was predisposed to 'nervous shock' through the tragic experiences which marred her childhood. Both these arguments were rejected by the Supreme Court of South Australia which awarded damages for nervous shock to Mrs Coffey, and the High Court dismissed the appeal against that judgment.[104]

From the legal-medical point of view, one of the most important aspects of the case was the High Court's recognition that nervous shock is both like and unlike a physical injury. The High Court unanimously confirmed the decision in *Pusey* that, in cases where there was no physical impact, damage for the purposes of nervous shock includes any recognised psychiatric disorder which is capable of resulting from shock. This consideration made the medical diagnosis of the plaintiff's psychiatric condition pivotal in determining, at the threshold stage, whether or not the claimant would have a cause of action in nervous shock.[105] In order to found an action for nervous shock, the plaintiff must suffer the requisite damage. It is the medical practitioner who makes the diagnosis as to whether or not the plaintiff's alleged injury amounts to a psychiatric illness, however, the court will decide the acceptability of the medical opinion.[106]

Both Brennan and Deane JJ, in their separate judgments, attempted to

102 Id 423–4, 447.

103 On the issue of causation, The High Court accepted the trial Judge's finding 'that the things which she saw and heard on the night of 2nd/3rd June 1979 and during 3rd June after she had gone to the hospital in response to a telephone call at about 8.30 am caused her psychiatric illness — anxiety and depression.' *Jaensch* v *Coffey*, id, ALR 424.

104 F A Trindade, 'Negligently caused nervous shock — an antipodean perspective' (1985) 5 *Oxford Journal of Legal Studies* 305.

105 Medical diagnosis of the plaintiff's injury has always been important at the stage of causation, remoteness of damage and for the purposes of assessment of quantum of damages. But in the non-physical-impact cases, especially of the third category, medical diagnosis is decisive of whether or not the plaintiff has a cause of action at all.

106 *Swan* v *Williams (Demolition) Pty Ltd* [1987] Aust Torts Reports 80-104; 9 NSWLR 172 infra.

clarify the type of psychiatric disorders which would be included under the rubric of nervous shock. Deane J referred to psychoneurosis and mental injury that does not result from, and is not associated with, an apparent bodily harm as a 'mere psychiatric injury'. Reviewing medical literature on the subject of nervous shock Mr Justice Deane noted that despite advances in the knowledge of mental illness since the *Chester* case, 'much still remains unexplained' because medical experts tended to be ambivalent and sometimes contradictory in the explanations offered as to the likely causes of a psychiatric illness consequent upon an accident involving actual or threatened serious injury to another person.[107] While emphasising 'the importance of the element of sudden fright or surprise in neurosis following trauma', Deane J commented that there is 'no necessary correlation between psychiatric illness caused by nervous shock and the severity of the "shock" '.[108]

Until *Jaensch* v *Coffey*, the identification of emotional illness with physical injury meant that the courts insisted upon the plaintiff having to perceive the actual accident with his or her 'unaided senses' through either being present at, or so close to, the site of the accident as to enable the claimant to directly observe the immediate consequences of the defendant's wrongful conduct.[109] The implication was that a plaintiff who did not directly observe the scene of the accident and its aftermath, but who suffered an emotional injury upon being informed about the consequences of defendant's negligent conduct,[110] could only recover damages for nervous shock by showing that the defendant had owed him or her the relevant duty of care prior to the accident.

The prior duty of care would have been owed to the plaintiff by the defendant where there was sufficient physical and temporal proximity between them to establish such a relationship — for example, they were both road users at the relevant time and the plaintiff's physical well being was actually threatened by the defendant's conduct.[111] In such situations of 'pre-existing duty of care', the plaintiff could sometimes recover damages for shock resulting from

[107] D J Leibson, 'Recovery of damages for emotional distress caused by physical injury to another' (1976–1977) 15 *Journal of Family Law* 163; B Raphael, B S Singh, L Bradbury, 'Disaster: the helpers' perspective' (1980) 2 *Medical Journal of Australia* 445; N Parker, 'Accident litigant with neurotic symptoms' (1977) 2 *Medical Journal of Australia* 318; N T Sidley, 'Proximate cause and traumatic neurosis' (1983) 11 *Bulletin of the American Academy of Psychiatry and the Law* 197.

[108] *Jaensch* v *Coffey*, op cit, ALR 457.

[109] In *Benson* v *Lee* [1972] VR 879 the Victorian Supreme Court allowed damages for nervous shock to a mother who was at her home some 100 yards away from the scene of an accident in which her son was left unconscious on a roadway after being struck by a car driven by the defendant. She did not see or hear the accident, but after being told of it by her eldest son, she ran to the scene, saw her son unconscious and went with him in an ambulance to the hospital, where she was informed that he was dead. The recovery was allowed because the plaintiff's nervous shock was occasioned by a 'direct perception of some of the events which go to make up the accident as an entire event, and this includes . . . the immediate aftermath . . .' per Lush J at 880. This passage from *Benson* v *Lee* was cited with approval in *Jaensch* v *Coffey* by Brennan and Deane JJ.

[110] In *Storm* v *Geeves, Mount Isa Mines Ltd* v *Pusey* and *Bernson* v *Lee* the respective plaintiffs arrived at the scene of the accident almost immediately and not merely observed the tragic aftermath of the defendant's negligence but were actively involved in caring for its victims.

[111] *Hambrook* v *Stokes Bros* [1925] 1 KB 141, 142.

the defendant's negligence even though, technically, the shock was caused by information conveyed to the plaintiff rather than through the plaintiff's sensory perception of the shocking event. However, the law did not offer any clear guidelines on the issue and, as a consequence, decisions tended to be quite arbitrary.[112]

In *Jaensch* v *Coffey*, the High Court held that the definition of an 'aftermath' of an accident giving rise to a claim of nervous shock should not be restricted to the claimant being present at the actual site of the injurious event. Rather, the definition of such an 'aftermath' should extend to the hospital during the period of the immediate post-accident treatment of the person physically injured by the tortfeasor.[113] Therefore, according to the High Court, the fact that Mrs Coffey was not involved in the collision in which her husband was injured and did not even witness it, would not debar her from compensation for nervous shock. The High Court noted that, in view of to-day'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.'[114]

In *Jaensch* v *Coffey* the High Court did not have to decide whether the plaintiff who only heard of the accident, but who had no visual perception of it or its aftermath, would be able to recover damages for nervous shock. However, in an obiter dictum, Deane J stated that it would be difficult to see a reason why recovery should be denied to a mother for psychiatric injury caused upon being told that her husband and children had been killed, and who was so devastated by this information that she could not attend the scene of the accident.[115]

The High Court in *Jaensch* v *Coffey* reiterated that the injury contemplated by the description 'nervous shock' for the purpose of the law of negligence is a psychiatric illness caused by shock. Technically, the injury for which recovery is allowed is not the 'shock' itself, rather, it is the illness resulting from it.[116]

[112] *Andrews* v *Williams* [1967] VR 831; cf: *Spencer* v *Associated Milk Services Pty Ltd & Anor.* [1968] Qld R 393 supra f 69.

[113] 'The facts constituting a road accident and its aftermath are not . . . necessarily confined to the immediate point of impact. They may extend to wherever sound may carry and to wherever flying debris may land. The aftermath of an accident encompasses events at the scene after its occurrence, including the extraction and treatment of the injured. In a modern society, aftermath also extends to the ambulance taking an injured person to hospital for treatment and to the hospital itself during the period of immediate post-accident treatment.' per Deane J, *Jaensch* v *Coffey*, op cit ALR 462.

[114] Deane J noted that the progress of medical technology has enabled doctors to save many victims of serious accidents who previously had no chance of survival. His Honour gave an example of the circumstances where a victim of a collision suffers an injury to the spinal cord caused by bloodless accident. The shock sustained by the plaintiff — a close relative — present at the scene of the tragedy would be rendered insignificant by the shock of information provided to that person at the hospital.

[115] *Jaensch* v *Coffey* op cit, ALR 463.

[116] In *Mount Isa Mines Ltd* v *Pusey* op cit, Windeyer J explained the 'consequential sense' of the term 'nervous shock' in the following terms: 'Sorrow does not sound in damages. A plaintiff in an action of negligence cannot recover damages for a 'shock', however grievous, which was no more than an immediate emotional response to a distressing experience sudden, severe and saddening. It is, however, today a known medical fact that severe emotional distress can be the starting point of a lasting disorder of mind or body,

Brennan J stated that the phrase 'nervous shock' was useful as a term of art to indicate the aetiology of a psychiatric illness for which damages are recoverable. For legal purposes, such psychiatric illness may comprise any form of mental or psychological disorder capable of resulting from 'shock'. Brennan J used the phrase 'shock-induced psychiatric illness' throughout his judgment, thus stressing the importance which the High Court assigned to the sudden traumatic impact upon the plaintiff when establishing causation between 'shock' and the consequent mental disorder. According to Mr Justice Brennan:

> 'a plaintiff may recover only if the psychiatric illness is the result of physical injury negligently inflicted on him by the defendant or if it is induced by "shock". Psychiatric illness caused in other ways attracts no damages, though it is reasonably foreseeable that psychiatric illness might be a consequence of the defendant's carelessness.'[117]

Mr Justice Brennan's view, that the plaintiff may only recover for non-physical-impact psychological injury, if it is induced by a 'shocking event' which includes an immediate aftermath of an accident, was accepted by other members of the High Court.

As the High Court extended the liability of the defendants to include persons who were not physically present at the site of the accident but only saw the injured victim at the hospital, the High Court Bench also established three (possibly four) prerequisites to the recoverability of damages for nervous shock in such cases. The first requirement was that the claimant should perceive the shocking event through his or her 'own unaided senses', and that the risk of a psychiatric illness developing as a result of this shock to the senses must be reasonably foreseeable. Secondly, it is essential that the damage takes the form of a recognised psychiatric illness. According to the third prerequisite, the plaintiff has to show physical and temporal proximity to the site of the accident or to its immediate aftermath. The 'immediate aftermath' was defined by the High Court as including the hospital during the period of the immediate post-accident treatment of the person physically injured by the tortfeasor.

In compliance with the fourth requirement, the claimant suing for nervous shock in non-physical impact cases has to show that he or she is a person of normal predisposition.[118] This last requirement was not stated by the High Court in categorical terms, but neither has it been explicitly rejected. Mr Justice Windeyer in the *Pusey* case expressed his dissatisfaction with the legal rule regarding predisposition in non-physical-impact cases of nervous shock. According to this rule, a claimant who has suffered shock through perception of another's injury which was caused by the defendant's wrongdoing can have

some form of psychoneurosis or a psychosomatic illness. For that, if it be the result of a tortious act, damages may be had. It is in that consequential sense that the term 'nervous shock' has come into the law.' 394.

[117] Per Brennan J, *Jaensch* v *Coffey* op cit, ALR 429.

[118] The High Court noted that Mrs Coffey, despite earlier psychological problems, was at the time of her husband's accident 'a person of normal fortitude'.

no action in negligence unless such claimant is shown to be emotionally and mentally 'normal'. Mr Justice Windeyer noted that:

> 'The idea of a man of normal emotional fibre, as distinct from a man sensitive, susceptible and more easily disturbed emotionally and mentally, is I think imprecise and scientifically inexact.'[119]

However, in *Jaensch* v *Coffey* the High Court ignored Mr Justice Windeyer's observation and assumed that in order to be recoverable, nervous shock must be produced on a person 'of normal fortitude', 'of normal disposition', or 'of normal standard of susceptibility'.[120] According to Chief Justice Gibbs:

> 'It may be assumed (without deciding) that injury for nervous shock is not recoverable unless an ordinary person of normal fortitude in the position of the plaintiff would have suffered some shock'.[121]

It may be trite to note here that every person has a 'breaking point' in respect of traumatic stress, beyond which he or she will develop a specific psychiatric disorder which in law may be recognised as 'nervous shock'. There are psychiatric rating scales for stressful life events which give comparative values in rank order for these experiences.[122] In *Jaensch* v *Coffey* the High Court adopted the finding of the trial judge, that Mrs Coffey was a person of 'normal fortitude'. Therefore, it is arguable that their Honours left open the question as to whether the proof of the plaintiff being a person of 'normal disposition' is an absolute precondition to recovery in the third category of nervous shock cases, or whether the requirement of 'normal fortitude' is merely one of the factors to be taken into account in establishing the requisite duty of care in such cases.

Apart from the prerequisites discussed above, the High Court in *Jaensch* v *Coffey* also imposed a number of limitations upon recoverability of damages for non-physical impact nervous shock. Thus, the High Court re-affirmed the rule in *Blake* v *Midland Ry Co*[123] that such emotions as anxiety and 'mere grief and sorrow' do not sound in damages.[124]

In respect of the duty of care, the High Court refused to extend the liability of defendants to those plaintiffs whose psychiatric illness was not caused by the shock sustained at the approximate time of the actual injury or death of a close relative, but which followed later upon bereavement or anxiety.[125]

[119] *Mount Isa Mines Ltd* v *Pusey*, op cit 405.

[120] The requirement of predisposition was originally imposed by Wright J in *Wilkinson* v *Downton* [1897] 2 QB 57, who stated that nervous shock must be produced on a person 'in an ordinary state of health and mind'.

[121] *Jaensch* v *Coffey*, op cit, ALR 421.

[122] DSM-III-R, op cit.

[123] *Blake* v *Midland Ry Co* (1852) 21 LJ QB 233.

[124] According to Deane J: 'It is now the settled law in this country that there is a distinction, for the purposes of the law of negligence, between mere grief and sorrow which does not sound in damages and forms of psychoneurosis and mental illness (which lawyers imprecisely termed "nervous shock") which may . . .'. *Jaensch* v *Coffey* [1984] 54 ALR 417, 446.

[125] 'The spouse who has been worn down by caring for a tortiously injured husband or wife and who suffers psychiatric illness as a result goes without compensation; a parent made

On this issue, the High Court observed that the law should be slow in recognising the claims of plaintiffs whose psychiatric illness does not stem from a sudden sensory perception of the shocking event, but from a 'more remote' consequence of prolonged and constant association and care of a seriously injured relative subsequent to immediate post-accident treatment.

Moreover, the High Court reiterated the exception to the general duty of care in negligence, that the plaintiff's nervous shock, if sustained as a result of concern brought about by death, injury or peril of the defendant himself or herself, will not be compensable.[126] Finally, the High Court noted that the scope of the defendant's duty of care in nervous shock cases should be limited so as to exclude bystanders.[127] According to *Jaensch* v *Coffey*, although the categories of claimants for nervous shock are not closed, it is unlikely that 'mere bystanders' — as against rescuers and persons with close emotional ties to the victim of the 'shocking event' — will be successful in an action to recover damages for nervous shock unless they can satisfy the requirement of proximity.

POST *JAENSCH* v *COFFEY* DEVELOPMENTS

The case of *Jaensch* v *Coffey* coincided with relatively early stages of neurophysiological investigations of severe environmental stress upon human homoeostasis. In the years since the High Court's decision, new developments have taken place in the field of bio-medical research into the psychological and physiological effects of emotional trauma.

Recent scientific investigations have provided evidence that the locus coeruleus is the 'nerve trauma center' of the brain.[128] A nucleus of the brainstem, the locus coeruleus contains norepinephrine-producing cells.[129] These nerve fibres branch out to produce an extraordinarily complex net which reaches into almost every part of the brain and spinal cord. In situations of adverse environmental stress locus coeruleus activates the neurotransmitter system[130] priming the organism to detect the apprehended danger, and to make appro-

distraught by the wayward conduct of a brain-damaged child and who suffers psychiatric illness as a result has no claim against the tortfeasor liable to the child.' per Brennan J, *Jaensch* v *Coffey*, op cit, ALR 429; see also Deane J, 458.

126 This exception was first formulated by Lord Robertson in *Bourhill* v *Young*, op cit.

127 Lord Atkin in *Hambrook* v *Stokes Bros* op cit, first discussed the possibility of bystanders being able to recover damages for nervous shock.

128 R M Restak, *The Brain*, (Toronto, Bantam Books, 1984).

129 Norepinephrine, alternatively known as noradrenaline, is a neurotransmitter in the nerve cells of the sympathetic nervous system. Norepinephrine is the agent responsible for stimulation of the sympathetic nerves which in turn speed up of the heart rate.

130 Neurotransmitter is a chemical — one of a some thirty messenger molecules that transmit impulses from neurone to neurone. A neurone, also called nerve cell, is the basic conducting unit of the nervous system. It consists of a cell body and threadlike projections that conduct electrical impulses. The axon, a single long fibre, transmits impulses, while the shorter extensions called dendrites receive them. Neurotransmitter is stored in axons. J Fincher, *The Brain* (New York, Torstar Books, 1984).

priate defensive neurobiologic responses. The resulting neurobiologic alterations lead to arousal and the appearance of alarm behaviour.[131]

These changes are usually transitory, however in certain individuals the alarm-like state of the organism fails to return to its former homoeostasis and persists long after the original traumatic event has passed. Persons who experience prolonged states of anxiety and physiological arousal following an emotionally traumatic episode, together with concomitant emotional disturbances, are said to be suffering from PTSD. Although the natural course of PTSD has yet to be fully documented, biological studies of neuroendocrine systems on animals indicate that when an animal is subjected to an uncontrollable stress it develops abnormal behaviour patterns which have been termed 'behavioural depression'. This behavioural depression may be due to a permanent alteration and depletion in the levels of such neurotransmitters as norepinephrine, dopamine[132] and serotonin[133] in the various brain regions.

Moreover, neurobiological studies suggest that PTSD may also be associated with alterations to gene expression.[134] The long-lasting neurobiologic alterations[135] seem to occur through gene activity (altered gene expression) and microstructural remodelling when the stress-altered neurotransmitter activity produces changes in the membrane potential and cell metabolism.[136] The re-experiencing of the traumatic event in the form of intrusive thoughts, nightmares, or flashbacks may be explained by the microstructural neuronal changes in the sensory pathways of the organism.

However, at this stage of scientific endeavour the direct links between adverse environmental trauma, the changes to neurotransmitters and such behavioural responses as unchecked aggression and suicide (as against

[131] J H Krystal, 'Animal models for posttraumatic stress disorder' in E L Giller Jr (ed) *Biological Assessment and Treatment of Posttraumatic Stress Disorder*, (Washington, American Psychiatric Press Inc, 1990).

[132] Dopamine excess in man is thought to contribute to severe mental illness, such as schizophrenia.

[133] Serotonin: 5-hydroxytryptamine or 5-HT. It appears that decrease in turnover of serotonin has implications for such conditions as anxiety, depression, unchecked aggression and suicide. J M Weiss, P A Goodman, B G Losito, et al, 'Behavioral depression produced by an uncontrollable stressor: relationship to norepinephrine, dopamine, and serotonin levels in various regions of rat brain' (1981) 3 *Brain Research Reviews* 167. D P Van Kammen, '5-HT: a neurotransmitter for all seasons?' (1987) 22 *Biological Psychiatry* 1; H M Van Praag, R S Kahn, G M Asnis, et al, 'Denosologisation of biological psychiatry or the specificity of 5-HT disturbances in psychiatric disorders' (1987) 13 *Journal of Affective Disorders* 1.

[134] Genes are units of inheritance that control particular characteristics or capabilities. Genes are located on the chromosomes of the cell nucleus and consist of segments of DNA molecules.

[135] Theoretically, neurobiologic alterations may be either of transient or of long-lasting nature. Some inter-cellular changes appear to be responsible for affecting the organism's behavioral reactivity as well as its formation of short-term and long-term memory. The issue of whether particular neuronal and molecular changes are in fact permanent is of some legal importance, because in cases where it is demonstrated that a permanent neuronal and molecular change has occurred, the legal distinction between 'actual physical harm' and 'mere psychiatric injury' may not apply.

[136] Metabolism refers to the chemical changes taking place within an organism, whether building up or breaking down body substances.

behavioural depression) are yet to be empirically demonstrated.[137] Medical science tends to be cautious in ascribing every human behaviour to a singular cause. In psychiatry, PTSD refers to a discrete psychiatric condition with fairly specific cognitive, anxiety and autonomic system symptoms — and it should not be misused for purposes of litigation.[138]

When the High Court in *Jaensch* v *Coffey* clarified and defined the basic requirements and parameters of the liability of the defendant for negligent infliction of nervous shock, it did so on the basis of the legal and medical knowledge available in 1984. Since then, law and medicine have continued to develop. As a result of these developments, some aspects of the liability which were broached by the High Court merely as dicta relating to hypothetical circumstances have crystallised into actual causes of action. Current research into the mechanisms of perception and the aetiology of psychiatric disorders indicates that a person may suffer a psychiatric illness after having perceived the traumatic event by senses other than sight.[139] Therefore, in certain circumstances, direct auditory perception of the tragic occurrence, or seeing 'live' television images of death and injury may be as psychologically damaging as the person's physical presence at the site of the accident.

Cases dealing with the liability of the defendant for negligent infliction of nervous shock, subsequent to the High Court's decision in *Jaensch* v *Coffey*, suggest that the legal definition of what constitutes the requirement of 'an immediate aftermath', for the purposes of causation and remoteness of damage in establishing such liability, will require clarification. The concept of legal causation in nervous shock cases also needs to be examined in the light of advances in the understanding of psychiatric illness, as well as progress in medical science and communication systems technology. Moreover, such legal rules as the requirement of 'normal predisposition' and the presumption that 'mere grief and sorrow' do not sound in damages may need to be reviewed in the light of improved comprehension of the physiological and emotional functioning of the human organism. Finally, the issue whether a remedy for nervous shock should be available in the case where a series of traumatic events due to the defendant's initial negligence, eventually cause the plaintiffs to suffer psychiatric illness, requires further assessment in the context of recent psychiatric research.

[137] The most recent clinical studies of PTSD suggest that this disorder is associated with chronic abnormalities in sympathetic nervous system arousal, in hypothalamic — pituitary — adrenal, cortical and noradrenergic axis function, as well as in the physiology of sleep and dreaming. J H Krystal, op cit; M J Friedman, 'Interrelationships between biological mechanisms and pharmacotherapy of posttraumatic stress disorder' in M E Wolf and A D Mosnaim (eds), *Post-traumatic Stress Disorder* (Washington, American Psychiatric Press Inc, 1990).

[138] A Victorian County Court Judge cited Post-traumatic Stress Disorder as an extenuating circumstance when sentencing a former police sergeant who forced a man to make false confession after beating and kicking him, and who assaulted other crime suspects. *Queen* v *Hahnel* The Age, 30 May 1991 (unreported).

[139] Changes in the activity of locus coeruleus have been found following visual, auditory, tactile, and nociceptive stimuli. M M Murburg, M E McFall, R C Veith, 'Catecholamines, stress and posttraumatic stress disorder' *Biological Assessment and Treatment of Posttraumatic Stress Disorder* op cit, 36.

The second part of this paper will concentrate on those cases which illustrate the ramifications of progress in medical interpretation of emotional trauma upon the legal decision-making process. The legal cases discussed below do not reflect as yet any distinct trends. Rather, there exists at present a patchwork of ad hoc decisions, some of which may serve as sign-posts for future general theoretical reappraisal of the liability of the defendant for negligently inflicted nervous shock. The cases illustrate not only the directions along which this kind of liability may evolve, but also its rigid limitations.

PERCEPTION OF THE TRAUMATIC EVENT BY SENSES OTHER THAN SIGHT

Mr Justice Deane in *Jaensch* v *Coffey* observed that a person may suffer psychiatric illness upon auditory rather than visual perception of the immediate results of the wrongdoer's conduct. Subsequent to this statement, Kneipp J of the Queensland Supreme Court in the case of *Petrie* v *Dowling*[140] awarded compensation for nervous shock to a mother who collapsed with grief upon being informed at the hospital that her daughter was killed in a collision caused by the defendant's negligence.

The plaintiff, Mrs Petrie, was told while at work that her young daughter had been injured in an accident. Mrs Petrie rushed to the casualty section of the hospital where, while trying to make light of the situation, she said to the nursing sister:

'She isn't dead, is she?'

'I'm afraid so', came the reply.

Upon hearing these words, Mrs Petrie was overcome with shock, which led to a severe psychiatric illness. Kneipp J held that Mrs Petrie could recover damages for nervous shock, even though she was not present at the site of the accident and had suffered the shock before actually seeing the body of her child. Mrs Petrie suffered nervous shock while at the hospital to which her daughter was taken, that is, she was physically present at the 'immediate aftermath' of the accident as defined by the High Court, although she did not see the immediate post-accident state of her child's body.[141]

In Australia as the law stands now, it is a prerequisite to recovery for nervous shock that there be sudden, direct sensory perception of the shocking event. Where the claimant is physically present either at the scene of the accident or at its immediate aftermath, this perception is always regarded as direct though it may be visual, tactile or auditory.

Until recently, only the plaintiff's presence at the site of the accident or its immediate aftermath could fulfil the requirement of directness and immediacy of perception resulting in a shock. However, modern technology has made

140 *Petrie* v *Dowling* [1989] Aust Torts Reports 80-263.

141 It appears, that in England, the scene of the hospital will only be regarded as 'part of the catastrophe itself' for the purposes of recovery of damages for nervous shock, only if the claimant — parent, child or spouse — arrives at the hospital *before* the victim has 'been cleaned up or attended to'. *Jones and Others* v *Wright* [1991] 3 All ER 88, 97.

communications instantaneous through the medium of satellite signals. A television viewer or a radio listener may be thousands of kilometres away from the actual events, yet he or she can have an instantaneous visual and auditory perception of them. In relation to the liability of the defendant for the negligent infliction of nervous shock, technological advances in communications have made it imperative for the law to determine whether or not the requirement of physical presence should be retained or dispensed with.

Moreover, if the test of proximity of space is to be altered, then the question will arise whether the courts should differentiate between sight and hearing when the stressful environmental stimulus has been perceived through the medium of television or radio, and the plaintiff has suffered nervous shock without being physically present at the scene of the accident or at the hospital. The answer to this question will depend upon the degree of notice which the courts take of the medical understanding of psychological stress. From a medical point of view, it is as much the direct emotional involvement of the plaintiff in the accident as his or her actual physical presence at the scene and its immediate aftermath that will be material to the level of stress suffered and the ensuing psychological illness or disorder.

ALCOCK & ORS v *CHIEF CONSTABLE*[142]

The law's insistence upon the requirement of spatial proximity between the stressful event and the claimant, while overlooking the bio-psychological aspect of stress, may lead to problems of legal reasoning as evidenced by the case of *Alcock & Ors* v *Chief Constable.* Although *Alcock* v *Chief Constable* is an English case, it is sadly, only a matter of time before the Australian Courts will be confronted with a similar set of facts. The case provides and example of the law's retreat in the face of modern technological and social realities of life. The case of *Alcock* v *Chief Constable* touches upon many aspects of liability for negligently inflicted nervous shock and will be examined as a self-contained entity.

In the *Alcock* case, the claim by sixteen plaintiffs arose out of the events which took place in April 1989 at Hillsborough Stadium during the FA Cup semi-final, when shortly before the start of a major football match the police allowed a mass of spectators outside the stadium to gain access to an area of the ground which was already full. As a consequence, 95 people were crushed to death and 400 others were injured. As soon as the catastrophe began to unfold, the emergency services initiated rescue operations. The part of the ground where the disaster occurred was inaccessible because of steel pens which surrounded it, and the area from where the ambulances were, which

[142] At first instance the case was reported as *Jones* v *Wright* [1991] 1 All ER 353 and as *Alcock and Ors* v *Chief Constable of South Yorkshire Police* (1991) 2 WLR 814. On appeal to the Court of Appeal: *Jones and Others* v *Wright* [1991] 3 All ER 88. The House of Lords judgment was reported as *Alcock and Others* v *Chief Constable of South Yorkshire Police* [1991] 3 WLR 1057 and *Copoc & Others* v *Wright (Chief Constable of the South Yorkshire Police)* (unreported), The Times, 29 November 1991.

took the injured and dead to hospitals and morgues, was cordoned off. No relatives were initially admitted to the hospitals, and identification of the bodies took place only after many hours, when temporary morgues were established and the relatives were allowed to enter. All technical arrangements were implemented for the purposes of efficiency, and not in order to protect from nervous shock those persons who searched and waited outside in helpless agony of uncertainty and grief to find out the fate of their loved ones.

The Chief Constable admitted liability in negligence in respect of death and physical injuries. However, he contested liability in respect of those claimants who suffered psychiatric illness though they were not directly involved in the crush, but were connected with the primary victims by the bonds of affectionate relationship. The claim proceeded to the House of Lords upon an assumption that each of the 15 plaintiffs[143] had suffered shock leading to psychiatric illness as a result of seeing or hearing news of the disaster. In issue was the duty of care.[144]

Mr Justice Hidden, in a landmark decision, allowed recovery of damages for Post-traumatic Stress Disorder to eight plaintiffs whose close relatives[145] perished in the crush and who suffered shock when watching the 'live' television broadcast, and to one person, Mr Henderson, who was present elsewhere at the stadium and who lost two brothers in the disaster. The Court of Appeal allowed an appeal by the defendant Chief Constable against the ruling of Hidden J and dismissed cross-appeals by six unsuccessful plaintiffs. The House of Lords upheld the appellate decision.[146]

The twin fears of 'opening of the floodgates' whereby the defendant might become liable to an indeterminate number of claimants in cases where a catastrophe is communicated 'live' through the electronic mass media, and by the potentially enormous number of claims which might be generated when a disaster occurs at a huge venue,[147] underlined the considerations of the House of Lords. Yet, these two kinds of claims are qualitatively different. In respect of the indeterminate number of claimants, the objection is *not* that there might be a large but foreseeable number of claims for nervous shock, rather, it

143 The award of damages by Hidden J to one of the sixteen plaintiffs was not contested.

144 Although there was an assumption of causation for the purpose of establishing the existence of duty of care, any of the plaintiffs who succeeded on the issue of duty, would then have to prove causation in order to obtain damages.

145 Hidden J limited the recovery to those claimants who were parents, children, siblings and spouses and thus could satisfy the proximity of relationship requirement. The claims of plaintiffs who were in a more remote family relationship; who either heard about the disaster, or saw the catastrophe on recorded television news were rejected. The appeal to the House of Lords was made by the six of the originally successful plaintiffs and one of the unsuccessful ones.

146 Lesley Lomax in her article 'Closing the floodgates' (1991) 141 *New Law Journal* 664, described the judgments of the Court of Appeal as 'a retrograde step' and expressed hope that the House of Lords would display a more enlightened and progressive attitude. Her hopes were not fulfilled.

147 Parker LJ in the Court of Appeal noted that plaintiff's cases were representative of numerous other claimants who suffered psychiatric illness as a result of the disaster. *Jones and Others* v *Wright* [1991] 3 All ER 88, 92.

is a fear that the volume of claims for nervous shock caused by a television broadcast may not be capable of being determined beforehand.[148] It is different with claims of persons who are physically present at the venue of the disaster, insofar as the volume of such potential claims is usually reasonably foreseeable. The number of close relatives and rescuers who will suffer Post-traumatic Stress Disorder as a result of being present at the scene of the catastrophe, even though they may not sustain physical injury, is both reasonably foreseeable and capable of prior estimation.[149] Yet, as a consequence of the failure to differentiate between the two classes of claimants, the rulings made primarily in order to deny legal right to compensation to claimants who suffer psychiatric illness as a consequence of watching the tragedy which overcame their loved ones through simultaneous television broadcast, will adversely affect all plaintiffs who sue for nervous shock in the UK.

The decision in *Alcock* v *Chief Constable* has major jurisprudential implications. Their Lordships took the positive step of recognising that nervous shock consequent upon non-physical impact should be regarded as a separate cause of action. The House of Lords also confirmed the general principle of liability following non-impact trauma established by its earlier decision in *McLoughlin* v *O'Brian.*[150] According to that principle, psychiatric illness resulting from negligently caused shock can be compensable without the necessity of the plaintiff establishing that he or she was actually injured or was in fear of personal injury, providing that the shock resulted:

'a) From death or injury to the plaintiff's spouse or child or the fear of such death or injury and
b) The shock has come about through the sight or hearing of the actual event, or its immediate aftermath.'[151]

At the same time, the House of Lords went back to its decision in *Bourhill* v *Young*[152] which held that psychiatric illness brought about by the infliction of physical injury, or the risk of such injury, upon another person should be treated differently from the ordinary case of a direct physical harm suffered in an accident. Thus, according to Lord Ackner:

'It is now generally accepted that an analysis of the reported cases of

148 Stapleton J, 'Duty of care and economic loss: a wider agenda' (1991) 107 *The Law Quarterly Review* 249.

149 A C McFarlane 'Vulnerability to Posttraumatic Stress Disorder' in M E Wolf and A D Mosnaim (eds), *Post-traumatic Stress Disorder: Etiology, Phenomenology and Treatment* (American Psychiatric Press Inc, Washington, DC, 1990).

150 *McLoughlin* v *O'Brian* [1983] 2 All ER 298; [1983] 1 AC 410. In that case the plaintiff, Mrs McLoughlin, was allowed to recover damages for nervous shock though she was not present at the site of the accident. After being told by a neighbour that her family was involved in a serious vehicular collision, she was taken to the hospital where she learned that her youngest daughter had been killed, and saw her husband and other children badly injured. In *Alcock* their Lordships clearly preferred the narrow judgment of Lord Wilberforce in *McLoughlin* to the more expansive approach of Lord Bridge, who warned that liability of defendants should not be predetermined by an immutable rule of fixed categories and questioned the propriety of curtailing a cause of action to satisfy judicial policy. Lord Bridge did not deliver a judgment in *Alcock.*

151 *Alcock* v *Chief Constable,* op cit 1102.

152 *Bourhill* v *Young* [1943] AC 92.

nervous shock establishes that it is a type of claim in a category of its own. Shock is no longer a variant of physical injury but a separate kind of damage.'[153]

The House of Lords declared that whereas reasonable foreseeability remains the central test in establishing the existence of duty of care in respect of physical harm to the primary victim, in cases of non-physical impact nervous shock, the test of reasonable foreseeability should be supplemented by an additional 'requisite relationship of proximity between the claimant and the party said to owe the duty'.[154]

Lord Ackner[155] and Lord Jauncey of Tullichettle[156] expressly adopted Mr Justice Deane's concept of proximity as postulated in *Jaensch* v *Coffey*, although they interpreted it much more restrictively than the Australian High Court. According to the House of Lords, the elements of the requirement of proximity as conditioning the duty of care are: (1) the class of persons whose claims should be recognised; (2) the proximity of such persons to the accident in time and space; (3) the means by which the shock was caused.[157]

Within the context of the English law,[158] Hidden J extended the defendant's liability in respect of the class of persons who should be regarded as being within the ambit of reasonable foreseeability and thus having the legal right to sue, to include siblings as well as parents, children and spouses. The House of Lords rejected such an extension.[159] Their Lordships regarded the requisite element of proximity in relation to the parties as an important control test of

153 *Alcock* v *Chief Constable* op cit 1103.
154 Id 1100; see also 1105.
155 Id 1105–1106.
156 Id 1121. Lord Oliver of Aylmerton also accepted the concept, though not without misgivings. His Lordship commented that 'the concept of "proximity" is an artificial one which depends more upon the court's perception of what is the reasonable area for imposition of liability than upon any logical process of analogical deduction' p 1113.
157 *Alcock* v *Chief Constable* id 1105, per Lord Ackner.
158 Australian courts have consistently refused to place any arbitrary restrictions on the categories of claimants. In *Jaensch* v *Coffey* op cit 434, Brennan J quoted with approval the following passage from Mr Justice Windeyer's judgment in *Pusey*: 'There seems to be no sound ground of policy, and there certainly is no sound reason in logic, for putting some persons who suffer mental damage from seeing or hearing the happening of an accident in a different category from others who suffer similar damage in the same way from the same occurrence. The supposed rule that only relatives can be heard to complain is apparently a transposition of what was originally a humane and ameliorating exception to the general denial that damages could be had for nervous shock. Close relatives were put in an exceptional class . . . What began as an exception in favour of relatives to a doctrine now largely abandoned has now been seen as a restriction, seemingly illogical, of the class of persons who can today have damages for mental ills caused by careless conduct.' *Pusey* op cit 404.
159 Lord Ackner quoted, without adopting, section 4(5) *Law Reform (Miscellaneous Provisions) Act* 1944 NSW (No 28) which provides that: 'Member of the family' means the husband, wife, parent, child, brother, sister, half-brother or half-sister of the person in relation to whom the expression is used. 'Parent' includes, father, mother, grandfather, grandmother, stepfather, stepmother, and any person standing in loco parentis to another. 'Child' includes son, daughter, grandson, granddaughter, stepson, stepdaughter and any person to whom another stands in loco parentis.' *Alcock* op cit 1107. Lord Oliver of Aylmerton also expressed desirability of legislation similar to the NSW provisions.

reasonable foreseeability. Lord Ackner stated that in order to come within the recognised class, the 'more remote' relatives and friends would have to prove that their relationship to the primary victim of the defendant's negligence was:

> 'so close and intimate that their love and affection for the victim is comparable to that of the normal parent, spouse or child of the victim and should for the purpose of this cause of action be so treated.'[160]

Mr Henderson — even though he was present at the stadium when his two brothers were crushed to death — could not recover because:

> 'his claim was not presented upon the basis that there were such close and intimate relationship between them, as gave rise to that very special bond of affection which would make his shock-induced psychiatric illness reasonably foreseeable by the defendant.[161]

Thus in the UK, siblings, grandparents and other relatives face the prospect of being cross-examined on the sufficiency of love and affection in their relationship with the primary victim. Presumably in order to prove the requisite closeness and intimacy, the plaintiffs will need to produce receipts of gifts, visits and personal letters written to their injured or dead sisters, brothers, grandchildren, etc. Considering that the persons suing for nervous shock already have to show that they are suffering from a psychiatric illness or condition caused by the shocking event of the death or injury to their family member at the threshold of their cause of action, as well as having to overcome the requirements of physical proximity and causation, such a restrictive interpretation of family relationships is unnecessarily invasive. It is hoped that the Australian courts will refrain from adopting the House of Lords' approach[162] and the prurient legal inquiries consequent upon it.

The restrictive approach towards a class of persons who are regarded as foreseeable in respect of damage through nervous shock has left in a jurisprudential limbo the case of *Attia* v *British Gas PLC.*[163] In *Attia* the Court of Appeal allowed damages to the plaintiff who suffered nervous shock after she saw a fire — which was caused through the negligence of the defendant — burn down her house. In the *Alcock* case, Lord Oliver of Aylmerton made adverse comments with regards to the case of *Owen* v *Liverpool Corporation*[164] in which the Court of Appeal awarded damages to the relatives of the deceased who suffered shock when, during a funeral procession, a negligent tram

[160] *Alcock* v *Chief Constable*, op cit. 1106. The House of Lords devoted considerable time to the discussion of whether and if so, in what circumstances, strangers who are not involved in the accident and who are not rescuers can recover damages for nervous shock.

[161] Id 1108. The House of Lords acknowledged that the law imposes duty of care upon the defendant in cases of rescuers and employees who suffer nervous shock as a result of witnessing negligently caused death or injury of another.

[162] Brennan J in *Jaensch* v *Coffey* ALR op cit 434 did 'not find it desirable as a matter of policy or permissible as a technique of judicial development of the law to create new criteria of limitation upon the scope of the cause of action in negligence causing psychiatric illness.'

[163] *Attia* v *British Gas PLC* [1987] 3 All ER 455; [1987] 3 WLR 1101.

[164] *Owens* v *Liverpool Corporation* [1939] 1 KB 394.

driver collided with the hearse and upset the coffin. The Court of Appeal in *Attia* relied upon its earlier judgment in *Owen* as a precedent. Although cited in argument, the case of *Attia* was not referred to in their Lordships' opinions. Does this omission indicate that the House of Lords approves of recovery for psychiatric illness caused by the shock of damage being done to an object, providing it is real property? Should the law of England foster the notion that people make greater emotional investment in their houses[165] than in their siblings and their grandchildren?

The negative presumption of absence of love and affection was also applied to the case of Mr Alcock, who was present at the scene of the disaster and who lost his brother-in-law. He was classified as being outside the class of potential sufferers from shock-induced psychiatric illness. Moreover Mr Alcock, like Mr Copoc,[166] was held to have failed to satisfy the strict temporal element of the requirement of proximity. In the circumstances of *Alcock* v *Chief Constable*, the 'immediate aftermath' of the catastrophe meant identification of the bodies in one of the morgues. As explained above, relatives were only allowed to enter hospitals and morgues many hours after the disaster. Mr Alcock was one of the first to identify the body of his brother-in-law some eight hours after the catastrophe. The body was in a bad condition, still blue with bruising and with a blood-red chest.[167] The House of Lords however, decided that the period of an 'immediate aftermath' should not be extended beyond an hour from the time of the accident. An hour being, apparently, the time within which Mrs McLoughlin had arrived at the hospital in *McLoughlin* v *O'Brian*. Accordingly, the House of Lords declared that 'in the post accident identification cases . . . there was not sufficient proximity in time and space to the accident.'[168] Moreover, Lord Jauncey of Tullichettle stated that only a plaintiff who 'goes within a short time after an accident to rescue or comfort a victim'[169] can recover damages for nervous shock, thereby excluding any person who rushes to the scene after being told that his or her loved one has been killed, but because of the distance involved or the time delay in communication, is unable to 'beat the ambulance'.

On the House of Lords' interpretation of what constitutes an 'immediate aftermath' in terms of 'spatial and temporal propinquity' and purpose, Mrs Chester — who saw the body of Max being raised from the bottom of the water-filled trench only some four hours after the drowning took place — would still be denied recovery for nervous shock! The reason provided by the House of Lords for its restrictive interpretation of the 'immediate aftermath'

165 This is not to deny the great psychological trauma associated with the destruction of one's home in a disaster, viz: A C McFarlane, B Raphael, 'Ash Wednesday: the effects of a fire' (1984) 18 *Australian and New Zealand Journal of Psychiatry* 341; J Clayer *Evaluation of the Outcome of Disaster. Health Commission of South Australia* 1984 unpublished paper.

166 Mr Copoc after watching the images of the disaster on the live broadcast, and knowing that his son had a ticket for the area involved, rushed to Sheffield in search of his son — he was only admitted to see his son's body in the morgue at 6 a.m.

167 D R Jones, 'Secondary disaster victims: the emotional effects of recovering and identifying human remains' (1985) 142 *Am J Psychiatry* 303.

168 *Alcock* v *Chief Constable*, op cit, 1108 per Lord Ackner.

169 Id 1125.

was that in cases where there was no single, sudden, immediate and direct visual perception of the distressing event, a traumatic process was 'elongated' or gradual, and therefore should be regarded as being outside the definition of nervous shock.[170] Lord Oliver of Aylmerton stated that 'to extend liability to cover injury in such cases would be to extend the law in a direction for which there is no pressing policy need and in which there is no logical stopping point.'[171]

Thus the two major reasons for the House of Lords' decision that the phrase 'immediate aftermath' should be given a narrow literal interpretation were the absence of pressing policy needs for any extention of the defendant's liability and the possibility that any extension would become an open ended one. At least the House of Lords did not invoke 'reason and justice' and beneficence in support of its restrictive definition of boundaries of liability, as did Stephenson LJ in the Court of Appeal in *McLoughlin* v *O'Brian*,[172] when he said that:

> 'In concluding that the court must leave the bounds where policy has so far set them [Mrs McLoughlin was denied recovery by the Court of Appeal] and rule and the plaintiff out of the area of legal liability, I derive some comfort from reflecting that to encourage such claims as this would not only be oppressive to the careless in many activities and to their insurers, but would also do a grave disservice to many sufferers from nervous shock and mental injury, which may be exacerbated and prolonged or even made incurable by the anxieties of litigation.'[173]

On the issue of whether or not watching simultaneous television transmission of the scenes from Hillsborough could be 'equiparated with the viewer being within "sight or hearing of the event or of its immediate aftermath" '[174] — the House of Lords unanimously decided that it could not. This was because, according to Lord Keith of Kinkel, the broadcast apparently did not depict the suffering of recognisable individuals[175] 'such being excluded by the broadcasting code of ethics, a position known to the defendant'.[176] His

[170] The House of Lords followed the Court of Appeal in its rejection of two recent English cases in which damages for nervous shock were awarded. In *Hevican* v *Ruane* [1991] 3 All ER 65 the plaintiff was told to go to the police station because his son was involved in a serious accident, which was due to the defendant's negligence. Upon being informed that his son died in the collision, the plaintiff went to the mortuary to identify his son's body. In *Ravenscroft* v *Rederiaktiebolaget Transatlantic* [1991] 3 All ER 73, the plaintiff's son was seriously injured when he was crushed by a shuttle wagon while working on the cargo deck of a vessel owned by the defendant. The son was taken to the hospital but died after two hours of intensive care. The plaintiff was called into the hospital where she was told by her husband that their son had died. In *Hevican* and in *Ravenscroft*, the respective plaintiffs developed severe reactive depression.

[171] *Alcock* v *Chief Constable*, op cit 1119.

[172] *McLoughlin* v *O'Brian* [1981] 2 WLR 1014.

[173] Id 1030.

[174] *Alcock* v *Chief Constable*, op cit, 1102.

[175] The Court of Appeal did not view the television programme and therefore did 'not know precisely what was shown' per Nolan LJ *Jones and Others* v *Wright* [1991] 3 All ER 88, 122. The Appellate Committee of the House of Lords was probably in the same position.

[176] *Alcock* v *Chief Constable*, op cit, 1101, with Lord Oliver of Aylmerton expressly concurring. Lord Ackner stated that the breach by the camera-men of the broadcasting

Lordship therefore concluded that the scenes of the disaster were capable of giving rise to anxiety and distress, but they did not give rise to shock, in the sense of a sudden assault upon the nervous system.[177]

The requirement of spatial and temporal proximity is based upon two legal grounds. One is a policy-based desire of the courts to limit the defendant's liability in non-physical-impact claims to those plaintiffs who had some physical proximity either to the scene of impact or to its immediate aftermath. Thus Lord Oliver of Aylmerton, echoing Latham CJ and Rich J in *Chester*, declared that any extension of the notion of proximity beyond an 'immediately created nervous shock' would be 'a step along a road which must ultimately lead to virtually limitless liability.'[178]

Social and economic, as well as legal, arguments govern judicial discretion in delineating the parameters of any tort liability. The argument for requiring an immediate physical presence of the plaintiff is primarily based upon the old legal and medical attitudes which have been so suspicious of any claims based upon 'mere' psychological harm. The requirement of the plaintiff's physical presence reinforces the prerequisite that damage in cases of non-physical-impact psychiatric injury must be induced by a sudden and damaging sensory perception of the 'shocking event'. As such, it serves as yet another safeguard against potentially fraudulent claims. From the medical point of view, the requirement of physical presence dates to the time before there was much understanding of human psychobiology and psychiatry.

It is now known that the perception of an event which is outside the range of usual human experience — such as the serious threat to one's physical integrity, the serious harm or threat to one's children, spouse or other close relatives; the destruction of one's home or community — may permanently affect the individual's physical as well as emotional homoeostasis, leading to an alteration of behaviour and possibly causing a specific psychiatric disorder.[179] Generally, but not always, visual perception of the traumatic event has the strongest emotional impact.[180]

If the law were to take cognisance of medical causation, it would follow that as long as the damage suffered is of compensable kind, it should be of little relevance through which particular sensory pathway the claimant has perceived the shocking event. It is therefore arguable that today, there is less need to regard the requirement of spatial or physical proximity to the scene of the

code of ethics would have amounted to novus actus interveniens. Lord Ackner's approach is not easily reconcilable with the application of the doctrine of novus actus interveniens as explained by Lord Reid in *Dorset Yacht Co* v *Home Office* [1970] AC 1004, 1030.

177 Lord Oliver of Aylmerton expressly concurred.

178 *Alcock* v *Chief Constable*, op cit 1119.

179 G C Smith, D Copolov, 'Physical manifestations of stress' op cit; E L Giller Jr (ed): *Biological Assessment and Treatment of Post-traumatic Stress Disorder* op cit; C B Scrignar *Post-traumatic Stress Disorder* op cit 40.

180 According to the 'Traumatic Principle' as postulated by Scrignar: 'The central factor in the development of PTSD is not necessarily the type or duration of the environmental trauma, but whether the trauma poses a realistic threat to life or limb and a person is consciously aware and has full appreciation of the potential for serious injury or death to self or others' *Post-traumatic Stress Disorder*, op cit, 13.

accident or its immediate aftermath as the *sine qua non* of recovery.[181] Rather, the requirement should be considered as one of the factors to be taken into consideration when deciding the essential question of whether the emotional impact which the 'live' broadcast of a disaster produces upon the claimant has an instantaneous, sudden and lasting traumatic effect. For, as Lord Bridge pointed out in *McLoughlin* v *O'Brian*:

> 'It is well to remember that we are concerned only with the question of liability of a defendant who is, ex hypothesi, guilty of fault in causing the death, injury or danger which has in turn triggered the psychiatric illness.'[182]

In Australia, provided other elements of the cause of action are present,[183] the plaintiff will not be denied damages for negligently inflicted nervous shock merely because there has been an interval of some hours between the accident to the primary victim and the presence of the claimant at the hospital or at the morgue. Thus, in the case of *Budget Rent-A-Car Systems Pty Ltd* v *Van Der Kemp*,[184] the NSW Court of Appeal awarded damages for nervous shock at common law to the plaintiff who was in New Zealand at the time when his wife was killed through the defendant's negligent driving in NSW.[185]

The award of damages for nervous shock will not restore to the plaintiff the negligently killed relative, and it will not make the loss of a loved one easier to bear or fill the empty space. The award of damages in tort to plaintiffs who suffer psychiatric illness, though they are not the primary victims of the defendant's negligence but are connected with the primary victim by the bonds of affectionate relationship, reaffirms the principle that a civilised society recognises and legally protects the private individual's interest in his or her physical and psychological integrity, and that wrongful conduct which results in mental injury with consequent serious emotional and social dislocation[186] is not to be regarded as socially acceptable.

[181] C M Sanders, 'A comparison of adult bereavement in death of a spouse, child and parent' (1979–80) 10(4) *Omega* 303, suggests that most of the parents whose child died or was killed, when interviewed 'gave the appearance of individuals who have suffered a physical blow [which] left them with no strength or will to fight, hence totally vulnerable.' p 317.

[182] *McLoughlin* v *O'Brian* [1982] 2 All ER 298, 319; [1983] 1 AC 410, 441–2.

[183] In *Wilks* v *Haines* [1991] Aust Torts Reports 81-078, the Supreme Court of NSW refused to award damages for nervous shock to a claimant who was employed as a dormitory supervisor at a school at which two of her colleagues were murdered and a third injured. The plaintiff was not at the school when the attack took place, however, she allegedly suffered a severe nervous shock as a result of realisation that she might have been a victim, rather than by her realisation of what happened to her colleagues.

[184] *Budget Rent-A-Car Systems Pty Ltd* v *Van Der Kemp* [1984] 3 NSWLR 303.

[185] On arrival back in Australia — having been told of his wife's death on the telephone — Mr van der Kemp became hysterical and was virtually disabled for nine months. Although not explicitly stated, the plaintiff probably pursued his claim under *The Law Reform (Miscellaneous Provisions) Act* 1944 (NSW), Pt III, s 4, rather than at common law.

[186] B Raphael, *The Anatomy of Bereavement. A Handbook for the Caring Professions.* (London, Hutchinson, 1984).

TEMPORAL PROXIMITY BETWEEN THE SHOCKING EVENT AND THE ONSET OF PSYCHIATRIC ILLNESS AS A REQUIREMENT FOR THE LIABILITY OF THE DEFENDANT FOR NEGLIGENTLY CAUSED NERVOUS SHOCK

Developments in communications technology have necessitated a re-examination of the requirement that damages for nervous shock cannot be awarded unless the plaintiff was physically present either at the scene of the accident or at its immediate aftermath. At the same time, developments in medical technology have put in issue the validity of legal reasoning behind the requirement for close temporal proximity between the shocking event and the onset of the psychiatric illness. According to *Jaensch* v *Coffey*, in cases where the plaintiff was not present at the site of the accident in which another person has been wrongfully killed or injured, but who has suffered emotional injury as a result of witnessing the immediate 'aftermath' of that event, there has to be both causal and temporal proximity between the shock producing event and the plaintiff's psychiatric injury.

In *Jaensch* v *Coffey*, the interval between Mrs Coffey's shock and the beginning of her psychiatric illness was approximately nine days. In the *Pusey* case, there was a four week delay between the shocking event witnessed by Mr Pusey and the onset of his schizophrenic episode. In both cases, the High Court stated that each of the respective intervals was encompassed within the requirement of temporal proximity between the onset of the plaintiff's shock and subsequent illnesses, which Evatt J defined as having to be 'fairly contemporaneous with the casualty'.[187]

The requirement that there be both causal and temporal links between the wrongful event productive of shock and the subsequent psychiatric illness has led judges — who have to grapple with the effects which technological advances of modern medicine have on human emotions — to use highly contrived arguments in order to make compensatory awards.

In the case of *Spence* v *Percy & Anor,*[188] the plaintiff's daughter, Claire, suffered serious injuries as the result of the admitted negligence of the defendants in March of 1983 in Townsville. When Mrs Spence, who lived in Brisbane, received the news of her daughter's injuries and likely death, she suffered shock and anxiety. These became more profound when, having flown to Townsville the next day, she saw Claire in a coma. Claire remained permanently comatose until her death. Nevertheless, from the time she first saw Claire in the hospital, Mrs Spence hoped — against all odds — that her daughter would recover. Therefore when, on 17th of July 1986, the news came of Claire's death, she became very distraught and severely depressed.

Can the interval of three years and four months between the negligent conduct causing physical injury to the daughter which resulted in the shock to her mother, and the actual psychiatric illness which Mrs Spence suffered only upon Claire's death, be encompassed within the High Court's statement that

[187] *Chester* v *Waverley Corporation*, op cit, 31.
[188] *Spence* v *Percy & Anor* [1991] Aust Torts Reports, 81-116.

the shock and the subsequent psychiatric illness must be 'fairly contemporaneous'? This question can be approached in two ways. It may be argued that for the purposes of the defendant's liability for negligent infliction of nervous shock, the long duration of survival by the original (first-impact) victim of the defendant's wrongful conduct is irrelevant. The only relevant question is whether the psychiatric illness suffered by the plaintiff had occurred soon after the shock, and whether the shock itself occurred by way 'of sudden sensory perception' of the distressing event or of its immediate aftermath. This is because the High Court has specified that psychiatric illness which is a result of the plaintiff being 'worn out' by constant anxiety and sorrow borne out of the knowledge of victim's condition and prognosis is not compensable.

In Mrs Spence's case, the answer to the question posed in this way would have to be that the plaintiff's experiences had placed her outside the requirements of the liability for negligently caused nervous shock as defined by the High Court in *Jaensch* v *Coffey*. Had Mrs Spence suffered psychiatric injury upon first seeing Claire comatose in the hospital, she would have been able to recover damages for nervous shock. However, the plaintiff admitted that she suffered psychiatric illness not as a result of that particular impact, but as a result of a series of distressing events over the intervening years which culminated in her daughter's death. This indeed was the judgment of the Full Court of the Supreme Court of Queensland.

The second way to answer the question relating to the psychiatric illness ensuing upon hearing that the original victim has died, after being kept alive for a number of years through artificial life support systems, is to equate medical causation with legal causation. This is what the trial judge did in the *Spence* case[189] when he said that as long as the plaintiff can show 'directness of causation', the temporal criterion of receiving the shock through sight or hearing of the original event or of its immediate aftermath should be regarded as 'totally irrelevant'.[190] Such an interpretation of the temporal link between the shocking event and the plaintiff's injury is incompatible with the High Court's definition of the temporal requirement of the cause of action. Claire's life, possibly at the insistence of her mother, was prolonged a number of times through emergency operations. She might have lived on in the comatose state, not merely for three but for five, maybe even ten years or more.[191]

For similar reasons, Justice Nader of the Northern Territory Supreme Court in the case of *Anderson* v *Smith & Anor*[192] found that he was unable to award damages for nervous shock to the plaintiff who suffered a depressive

[189] *Spence* v *Percy & Anor* [1990] Aust Torts Reports, 81-039.

[190] Justice Derrington suggested that no matter how long the interval between the original shocking event and the consequent psychiatric illness, the plaintiff, who like Mrs Spence can establish that: 'she suffered a psychiatric illness directly caused by shock at the death of her daughter as the inevitable aftermath of her injury . . . should succeed'. *Spence* v *Percy & Anor* [1990] id 68,041.

[191] Prior to Claire's accident, Mrs Spence's other daughter's son suffered death which led to his mother's nervous breakdown some months after Claire's accident. Subsequently, the relationship between Mrs Spence and her bereaved daughter deteriorated, because she blamed her mother for insufficient emotional support.

[192] *Anderson* v *Smith & Anor* (1992) 101 FLR 34.

illness upon the death of her infant daughter some fifteen months after the original accident which was due to the defendant's negligence.[193] The plaintiff, Mrs Anderson, was told by the police that her infant daughter Amy, after being found lying in the pool face down, had been taken to the hospital where efforts were being made to revive her. The child was revived, but remained in a deep coma until her death. The plaintiff looked after Amy, feeding her through a tube and applying suction, first at the hospital and then at home. Justice Nader found that Mrs Anderson's psychiatric illness was not caused by the shock of being told of the drowning injury and then seeing her daughter injured and comatose. Rather, the illness was a result of 'prolonged contact with a complex set of stressful events culminating in the death of Amy.'[194]

It was acknowledged, that the plaintiff did perceive the phenomenon of Amy injured within the ambit of the legal definition of 'immediate aftermath' of the accident, and that this perception must have been 'indescribably distressing to the plaintiff'.[195] Yet again, modern technology has enabled the child to survive for long enough for the law to say that the psychiatric illness to the mother should not be attributed to the sudden shock of seeing her child injured. It is in the realm of speculation whether the plaintiff would have suffered a lasting psychiatric condition had Amy died within a day or two of the drowning; however, it is equally speculative to argue that even if the child did eventually recover Mrs Anderson would not have suffered a lasting emotional injury. Experience shows that faced with grave injuries to their children, parents tend to focus exclusively upon their offspring and to gather such emotional resources as they can possibly muster until some kind of resolution of the crisis, whereupon they may recognise that they themselves are suffering an illness and are in need of professional help.

The jettisoning of the temporal requirement that the onset of the psychiatric illness be fairly contemporaneous with the shocking event would undoubtedly create new problems for substantive and procedural law. Such questions as what should be regarded as the proximate cause of the plaintiff's psychiatric illness would need to be answered. Should it be the shock of the original physical injury to the victim or the shock of his or her death? How can causation between the wrongful act of the defendant and the ensuing emotional injury be established in circumstances where there is an interval of several years between the two events? Should the time for the purposes of the Limitation of Actions Act begin to run from the date of the accident when the wrongful conduct of the defendant caused the physical injury to the primary victim, or from the date of the victim's death which would be the immediate cause of the plaintiff's actual injury? Finally, is it fair and reasonable that the threat of litigation for damages for nervous shock hang over the defendant for an indefinite period?

Presumably, it was in order to guard against the possibility of such

[193] The Court found that the defendant — the child's grandmother — who was supervising the child at the time of the accident, was in breach of duty of care to Amy, when she failed to securely close the door leading to an unfenced swimming pool.

[194] *Anderson* v *Smith & Anor* op cit, 50.

[195] Ibid.

uncertainties and the indeterminate threat of litigation, that the High Court insisted upon the requirement that the onset of psychiatric illness be 'fairly contemporaneous' with the plaintiff's perception of the shocking event. Yet the fact remains that modern medical science enables victims to exist, often in a pitiful state, for many years where these people previously had no chance of surviving the injury inflicted upon them by the defendant's wrongful conduct.

Should close relatives of those victims go without compensation merely because they suffered a psychiatric illness not at the beginning but at the end of the tragedy? The issue of causation in the case of a plaintiff whose close relative survives for a long time through 'heroic' medical intervention arises only when such claimant suffers nervous shock not at the initial contact with the defendant's victim, but only at the death of such a person. This brings into consideration yet another element of the tort which needs re-examination, namely the requirement of predisposition.

THE REQUIREMENT OF THE PLAINTIFF HAVING NO PRIOR PREDISPOSITION TO NERVOUS SHOCK REVISITED

The view that 'traumatic neurosis' could only develop in predisposed individuals, gained general acceptance among the medical profession at the end of the nineteenth century. However, after the First World War some doctors began to voice their disagreement with this hypothesis.[196] Later, even individual judges, like Mr Justice Windeyer and others, questioned the presumption postulating that the world is composed mostly of individuals who are not pre-disposed to emotional or mental disturbance.[197]

In *Jaensch* v *Coffey* the High Court adopted the conventional medical view on the aetiology of psychoneurosis when it assumed that in non-physical-impact cases, in order to recover damages for nervous shock, the plaintiff would need to show that he or she was a person of 'normal' predisposition at the time of the accident. Since 1984, however, there has been a review of the medical status of predisposition in relation to psychoneurosis. It is now recognised that predisposition, while an important factor, is not the only element in the aetiology of the Post-traumatic Stress Disorder.[198] Undoubtedly, the

[196] Contribution to discussion of Dr Julius Grinker in: W F Schaller, 'Diagnosis in traumatic neurosis' (1918) 71 *Journal of the American Medical Association* 338.

[197] Thus, in 1967 Waller J said: 'The community is not formed of normal citizens, with all those who are less susceptible or more susceptible to stress to be regarded as extraordinary. There is an infinite variety of creatures, all with varying susceptibilities.' *Chadwick* v *British Railways Board* [1967] 1 WLR 912, 922.

[198] D G Fowlie, M O Aveline, 'The emotional consequences of ejection, rescue and rehabilitation in Royal Air Force Aircrew' (1985) 146 *British Journal of Psychiatry* 609. The authors demonstrated that among the group of men who had been especially selected and trained and who were generally regarded as psychologically very stable, 40% of survivors who had ejected from the military aircraft experienced prolonged emotional symptoms. E L Giller Jr (ed), *Biological Assessment and Treatment of Posttraumatic Stress Disorder* op cit; G Mendelson, 'The concept of posttraumatic stress disorder: a review'. op cit.

victim's personality as well as his or her cultural background play an important role in ascribing a psychological meaning which such person may attach to the shocking event, and thus influence the long term emotional response to it.[199]

Recent studies also suggest that Post-traumatic Stress Disorder following a traumatic event may be caused as much by a sudden alteration in neurobiological activity of the brain mechanisms,[200] as by the psychologically predisposing factors.[201] Research on rhesus monkeys has also demonstrated that genetic predisposition to traumatisation, although a factor, does not necessarily lead to an enduring behavioural disturbance when the animal is exposed to stress. Whether an exposure to sudden stress will result in such a disturbance will depend on the particular interaction of neurobiological, genetic and environmental factors in the monkey's life.[202]

Thus, studies on animals[203] exposed to severe or repeated inescapable adverse stimuli have shown that only a proportion of the animals will suffer traumatic behavioural disturbance. This kind of behavioural disturbance has been explained as a state of learned helplessness — known as 'the inescapable stress response'.[204] The inescapable stress response in animals is characterised by a cluster of symptoms which are very similar to those displayed by human sufferers of PTSD.[205] Psychologically, these symptoms include markedly diminished interest in significant activities, diminished food consumption and weight loss in animals. In humans, these symptoms tend to be supplemented by restricted affective range, interpersonal detachment, and a sense of foreshortened future.[206]

199 G Mendelson, *Psychiatric Aspects of Personal Injury Claims* op cit 236–42.

200 The primary neuronal centre for ascending dorsal noradrenergic system in the brain is locus coeruleus. The locus coeruleus is a compact, bilateral group of cells located in the caudal pontine central grey, adjacent to the fourth ventricle of the mammalian brain. Studies on monkeys have shown, that threatening situations and stimuli associated with alarm (conditioned fear stimuli) elicit an activation of the locus coeruleus. The locus coeruleus primes the organism to detect danger and to make appropriate defensive responses. J H Krystal, 'Animal models for posttraumatic stress disorder' op cit.

201 At any rate one may properly ask, why should the modern legal system discriminate against people who have been tortiously injured but who happened to be born with a predisposing gene.

202 J H Krystal, 'Animal models for posttraumatic stress disorder' op cit.

203 The first investigations into the animal responses to acute unavoidable or inescapable stress were made in the mid-1960s: E L Bliss, J Zwanzinger, 'Brain amines and emotional stress' (1986) 4 *Journal of Psychiatric Research* 189.

204 J H Krystal, 'Animal models for posttraumatic stress disorder' op cit 10–11. A clinical model for the inescapable stress response (IS) postulates that it produces an initial alarm response, followed by conditioned alarm states and exaggerated reactivity to previously tolerated stressors. The studies on animals have shown that inescapable stress response may manifest itself physically through opioid and nonopioid forms of analgesia, stomach ulceration, immunosuppression, and lowered tumour resistance.

205 M M Murburg, M E McFall, R C Veith, 'Catecholamines, stress and post-traumatic stress disorder' *Biological Assessment and Treatment of Post-traumatic Stress Disorder*, op cit. It should be pointed out that these symptoms may also occur as a consequence of a single traumatic event of short duration.

206 Both animal and human studies have demonstrated that stress induces alterations in central and peripheral noradrenergic function, with particularly profound changes occurring in central and peripheral catecholamines. The inescapable stress syndrome had

The Common Law as yet has not taken cognisance of the reassignment of predisposition in the new bio-medical model of neurotic illness. In a recent South Australian case,[207] the counsel for the defence relied upon the statements in respect of predisposition in *Jaensch* v *Coffey* when he argued that the plaintiff should not recover damages for physical injury because of her abnormal susceptibility to the kind of damage she had sustained. King CJ rejected counsel's argument by stating that the criteria which govern foreseeability of risk in cases of physical injury are different from the requirement of 'normal susceptibility' which governs the criterion of reasonable foreseeability in nervous shock cases. Thus, a legal double standard still pertains in respect of recovery of damages for nervous shock. Those claimants who have been 'predisposed' to neurosis or psychosis and who are psychologically injured as a result of wrongfully inflicted physical injury may recover for nervous shock. However, those claimants who have been similarly 'predisposed' and who suffer similar psychological injury as a result of tortiously inflicted 'mere' emotional trauma, may be barred from recovery for nervous shock on the basis that they fail the requirement of 'normal predisposition'.[208]

Since 1984, the High Court has progressively extended the defendant's duty of care to include persons who may be careless, or inattentive[209] and whose faculties may be 'impaired either *naturally* or by reason of the effect of alcohol' [emphasis added] in the area of physical injury.[210] The statutory cause of action for nervous shock[211] does not refer to predisposition, and there is no valid reason why the common law should not extend its protection to persons who may be particularly vulnerable to morbidity following emotional trauma. The prior vulnerability of persons who do not display the 'customary

been observed to reduce levels of brain norepinephrine which is thought to be necessary for the learning of avoidance behaviours.

207 *Eaton* v *Pitman* [1991] Aust Torts Reports 81-092. The case involved a plaintiff who developed a spontaneous stress fracture in the bones of her spine through abnormal susceptibility to such fractures (congenital spondylolisthesis), when she came to the assistance of a person injured by the defendant.

208 In the 1960s, the Workmen's Compensation tribunals in some States of the USA began to award compensation to workers who had suffered psychiatric disorders following a traumatic event at work in cases where there was no physical injury or impact and even where the claimant's predisposition to neurosis was medically established. One of the reasons for dispensing with the requirement that the claimant under the *Workmen's Compensation Act* be of 'normal fortitude' in non-physical impact cases was the principle that an employer takes the employee with all his pre-existing problems, and if the employee is injured or becomes ill at work the employer should not escape responsibility by alleging predisposition. Though, in awarding compensation in such cases the tribunals, and the courts which upheld the awards, took into account new psychiatric understanding of mental disorders and illness: J B Robitscher, *Pursuit of Agreement: Psychiatry And The Law* (Philadelphia, Lippincott J B Co, 1966) 112–13. *Carter* vs *General Motors*, 361 Mich 577 (1960) 106 NW 2d 105, (1960) Carter's physician felt that he had a predisposition towards psychotic condition for a number of years. See also: *Trombley* vs *Michigan*, 366 Mich 649 (1962) 115 NW 2d 561 (1962).

209 *Mclean* v *Tedman & Anor* [1984] Aust Torts Reports 80-310, (1984) 155 CLR 306; *Bus* v *Sydney County Council* [1989] Aust Torts Reports 80-249, (1989) 167 CLR 78.

210 Per Deane J, *March* v *E & M H Stramare*, (1991) Aust Torts Reports 81-095 68,834; 65 ALJR 334, 340.

211 Section 4 of the *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) and eqivalent provisions in NT and the ACT op cit.

phlegm' can be taken into account when the quantum of damages is calculated.

The *Spence* and the *Anderson* cases also illustrate the dilemma created by the *Jaensch* v *Coffey* requirement that the plaintiff in the third category of nervous shock cases be a person of 'normal fortitude'. This is because the requirement of predisposition leads to an internal inconsistency when seen together with the High Court's insistence that the psychiatric illness must be 'shock-induced' within a relatively short time after the injurious event. A person of 'normal fortitude', faced with a relative who has been severely injured through negligence of the defendant, would presumably be expected to fight his or her own emotions until the death of the victim. Through the requirement of the temporal link between the onset of psychiatric illness and the wrongful shocking event, the tort discriminates against a person of 'normal disposition' and only awards compensation to those plaintiffs whose immediate reaction to the event itself is to suffer psychiatric illness.

Yet, the suffering of the former is no less real than the suffering of the latter — it is brought about just as suddenly, although the agony is prolonged by the rise and fall of generally, false hopes. Moreover, modern psychiatry recognises that psychological injury is a complex process, rarely occurring as a result of an isolated 'shock'. It is clear, in my opinion, that the time has come to reconsider the issue of compensation for nervous shock in the light of constant technological and theoretical advances of medical science. The very real suffering inflicted upon relatives, who have to live with the sight and knowledge that someone they love may be comatose for many years, should be acknowledged by our legal system; either by way of expanding the liability of the defendant for negligent infliction of nervous shock or by way of legislation providing for a statutory compensation in such cases.

Mrs Spence's response to the trauma of the accident in which her daughter was injured also illustrates the distinction which the law makes between the compensable psychiatric illness which she had suffered upon Claire's death, and the non-compensable 'mere grief and sorrow' which was originally brought about by the shock of seeing her comatose child in the hospital. Since the legal outcome of claims for nervous shock depends upon medical characterisation of the alleged injury, it is important to examine the terms and the roles of the medical witness and the judge in these cases.

'MERE GRIEF AND SORROW'

The High Court used the term 'any recognisable psychiatric illness'[212] to define injuries for which recovery will be allowed in the nervous shock claims. Such definition necessarily implies that the judges need to have regard to expert psychiatric evidence as to whether the injury complained of amounts to a psychiatric illness. Modern medicine has recognised that bereavement

[212] *Jaensch* v *Coffey* op cit, ALR 424.

may be a cause of psychiatric illness.[213] The psychological state which the lawyers traditionally call 'mere grief and sorrow' is often interpreted by doctors as referring to an 'uncomplicated bereavement', that is, grief which is not associated with the full depressive syndrome.[214] Conversely, 'abnormal' grief, that is, grief combined with depressive and anxiety symptoms, may present as a recognised mental disorder. Although grief is generally regarded as a purely emotional phenomenon, persons undergoing bereavement have been shown to have abnormal physiological functions which may be associated with severe depression.[215]

By stating that 'mere grief and sorrow' does not sound in damages, the High Court left open the option of awarding damages for an 'abnormal' grief reaction. This 'opening' has been utilised by the courts so as to award compensation to those plaintiffs whose grief upon the death or injury of their loved ones resulted in a recognised mental disorder. However, as the law stands at present, the award of damages depends entirely upon the medical diagnosis of whether the claimant's grief is 'normal' or 'abnormal'. Thus, the judge who disregards such medical opinion is technically in error. Two contrasting decisions illustrate this point.

In the case of *Petrie* v *Dowling*,[216] Mrs Petrie's response to the news of the death of her daughter was medically diagnosed as an 'abnormal grief' reaction, containing such psychopathological features as 'depersonalisation' and 'derealisation'. In Mrs Petrie's case, Kneipp J accepted the opinions of medical expert witnesses as to the psychiatric condition of the plaintiff, and decided that the shock of her daughter's death caused Mrs Petrie to suffer not just a 'normal' reaction to grief but a psychiatric illness which was compensable.

In the case of *Swan* v *Williams (Demolitions) Pty Ltd*,[217] the plaintiff company claimed damages from the defendant for the loss of Mr Swan's services resulting from nervous shock caused to him by his wife's death. Mr Swan's wife was killed when a 630 kg sandstone block fell upon her car as a result of the negligence of the defendant. Mr Swan was examined by two psychiatrists, neither of whom was called to give evidence. In their reports however, they both agreed that the plaintiff did not suffer a psychiatric illness. Dr John Woodforde stated that the patient suffered 'an unresolved and atypical bereavement reaction following upon the sudden death of his wife',[218] but

213 It is matter of clinical judgment by the physician, on the DSM-III-R diagnostic rules and medical examination, to decide whether the bereaved person is experiencing 'normal' grief or whether he or she suffers from a diagnosable psychiatric disorder. Age and sex may influence the risk of morbidity following loss of a spouse. The outcome is generally considered to be worse for men than women. G Mendelson, *Psychiatric Aspects of Personal Injury Claims*, op cit 58.

214 DSM-III-R, op cit.

215 These include the suppression of the immune system, impaired lymphocyte function, elevated urinary catecholamine output. B Raphael, *The Anatomy of Bereavement. A Handbook for the Caring Professions* op cit.

216 *Petrie* v *Dowling* [1989] Aust Torts Reports 80-263.

217 *Swan* v *Williams (Demolition) Pty Ltd* [1987] Aust Torts Reports 80-104; (1987) 9 NSWLR 172.

218 *Swan* v *Williams (Demolition) Pty Ltd* id, 197.

that '[T]here was no evidence of any anxiety or severe depression ... hallucinations or any psychotic phenomena'.[219] Dr Robbie originally reported that Mr Swan did not present with 'an abnormal mourning reaction' and he did not suffer from a psychiatric illness.[220] In his second report Dr Robbie was even more emphatic, stating that Mr Swan had 'absolutely no psychiatric condition'.[221]

The opinions of the expert medical witnesses as to the absence of any psychiatric illness or disorder were accepted by the trial Judge who declined to award damages for nervous shock. On appeal Samuels JA in his dissenting judgment, agreed with the trial Judge and stated that since the medical witnesses had refused to categorise the plaintiff's condition as a 'psychiatric illness', there could be no basis for the finding that Mr Swan suffered any medical disorder capable of amounting to mental or nervous shock as the law understood that term.

However, the majority in the Court of Appeal[222] disregarded the uncontested psychiatric diagnosis of no psychiatric illness, holding instead that Mr Swan underwent more than an ordinary grief as a result of his wife's death. According to the majority decision, what had happened to Mr Swan amounted to an injury resulting from nervous shock within the meaning of words in the *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW).[223]

Incidentally, it would appear that Priestley JA misread Mr Justice Brennan's judgment in *Jaensch* v *Coffey*. The learned Judge of Appeal, in order to justify his rejection of expert medical evidence in the case before him, argued that Mr Justice Brennan suggested in his judgment that the term 'psychiatric illness' should be ignored, because it was 'a label of dubious medical acceptability'.[224] In fact, it was not the term 'psychiatric illness', but the phrase 'nervous shock' that Brennan J objected to.[225] Indeed, the term 'nervous shock' is not an accurate description of the range of psychiatric illness, rather, it indicates 'psychologically induced morbidity over and above normal stress reactions and grief trauma'.[226] The designation 'psychiatric illness', on the other hand, has a particular and carefully defined medical meaning — it is a descriptive term for denoting the individual's subjective experience of being unwell as a consequence of a mental disorder.

In *Jaensch* v *Coffey* the Bench properly accepted expert medical evidence on the issue of psychiatric diagnosis — whether or not the claimant had

219 Ibid.
220 Id 197.
221 Id 198.
222 Priestley J A with whom McHugh JA (as he then was) agreed.
223 Mr Swan was thus entitled to damages of $10,000 for nervous shock.
224 Mr Justice Brennan's remark in *Jaensch* v *Coffey* op cit ALR 425 to the effect that: 'compensation is awarded for the disability from which the plaintiff suffers, not for its conformity with a label of dubious medical acceptability' was quoted by Priestley J A with an implication that the passage referred to the diagnosis of psychiatric illness.
225 According to Brennan J: 'The term 'nervous shock' is useful nevertheless as a term of art to indicate aetiology of a psychiatric illness for which damages are recoverable in an action on the case when the other elements of the cause of action are present.' *Jaensch* v *Coffey* op cit, ALR 425.
226 B Raphael, *When Disaster Strikes*, op cit 200.

developed a mental disorder which the law considers a compensable injury. As long as the distinction between compensable and non-compensable emotional injuries remains, it would appear prudent that judges should refrain from imposing their own opinion in disregard of expert medical evidence as to the presence or absence of psychiatric illness.

It would certainly be germane to the cause of justice, as we understand it today, to re-examine the whole concept of compensation for the sudden loss of a loved person and to abolish the old rule that so called 'mental emotions' of grief and sorrow are not compensable. The rule is based on an old Cartesian distinction between body and mind which has been discarded by medical science a very long time ago. Moreover, recent clinical studies have revealed that grief adversely affects neuroendocrine homoeostasis by altering the immune and endocrine systems of the body.[227] There is evidence that during the two initial years following bereavement, bereft individuals tend to suffer from an increased rate of cancer, cardiovascular disease, Cushing's disease, ulcerative colitis and thyrotoxicosis.[228] The abolition of the rule which prevents compensation for 'mere grief and sorrow' should not be effected, however, on the ad hoc basis of arbitrary judicial decisions. Rather, a full analysis of both medical and jurisprudential issues involved needs to be undertaken.

CAUSATION IN RESPECT OF LIABILITY FOR NEGLIGENT INFLICTION OF NERVOUS SHOCK

In *Jaensch* v *Coffey* causation was not a major issue. It was agreed by both parties that Mrs Coffey's psychiatric illness was caused by the shock of seeing her husband, who suffered serious injury as a result of the defendant's negligent conduct. However, some recent cases in respect of nervous shock have illustrated the impact which different understandings of what constitutes causation in law and medicine may have on the outcome of the litigation. As one of the limitations of the defendant's liability in nervous shock, the High Court in *Jaensch* v *Coffey* reiterated that where the plaintiff's psychiatric illness is sustained as a result of shock brought about by witnessing a self-inflicted death, injury or peril of the negligent person, such damage will not be compensable. This is a policy-based exception to the duty of care founded upon the desire to limit the duty of care owed to third parties.

In order to minimise the harshness of the exception, the courts have developed an interstitial approach to the High Court's decision. In the case of *Harrison* v *State Government Insurance Office (Qld) & Anor*,[229] Vasta J interpreted the *Jaensch* v *Coffey* exclusion of the defendant's liability as applicable only to those nervous shock cases where the conduct of the defendant which led to his or her death or injury did not endanger the physical safety of the

[227] G Mendelson, *Psychiatric Aspects of Personal Injury Claims*, op cit 57.
[228] Ibid.
[229] *Harrison* v *State Government Insurance Office (Qld) & Anor* [1985] Aust Torts Reports 80-723.

claimant. In the *Harrison* case, Mrs Harrison, the plaintiff, was a passenger in a vehicle driven by her husband which left the road and collided with a guard rail. The accident was caused solely by Mr Harrison's own negligence. Thus his severe injuries and his subsequent death were self-inflicted. His wife suffered minor physical injuries but developed psychiatric illness following the trauma of the accident and concern for her husband. Mrs Harrison recovered damages for her physical injuries and for nervous shock on the grounds that the psychiatric expert witnesses could not distinguish between the shock associated with the crash in which she was involved, and the trauma brought about by the plaintiff's concern for the injuries suffered by her husband.[230]

The issue of causation becomes more problematic in the context of ascertaining legal responsibility for nervous shock when the defendant's wrongful conduct is one of a number of conditions sufficient to produce that damage. Lord Reid in *Stapley* v *Gypsum Mines Ltd*[231] pointed out that:

> 'The question [of legal causation] must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not.'[232]

Several sufficient and independent causes of the plaintiff's nervous shock were present in the case of *X* v *Pal & Ors.*[233] In that case, the plaintiff became pregnant in 1973 and consulted Dr Pal, an obstetrician. Dr Pal, the first defendant, carried out a number of tests on her but failed to screen her for syphilis. She subsequently gave birth to a child with gross hydrocephaly who died of toxoplasmosis. Neither the infant's condition, not its death were related to syphilis.[234] After childbirth, the plaintiff changed obstetricians and began to see Dr Harris, the second defendant. He also failed to screen her for

230 Cf: *Klug* v *Motor Accidents Insurance Board* [1991] Aust Torts Reports 81-134. The plaintiff was a passenger in a car driven by his de facto wife. The vehicle crashed as a result of the driver's negligence. The wife was killed and the plaintiff was injured. The plaintiff became pathologically grief stricken and sued in respect thereof. Mr Justice Zeeman of the Tasmanian Supreme Court found at p 69,273, that the plaintiff's psychiatric condition had its 'origin not in the occurrence of the accident itself, but in the death of the deceased.' As such, his claim came within the obiter statement by Deane J that no duty of care would exist in respect of a psychiatric illness sustained as a result of the death of a person where that person was responsible for his or her own death.

231 *Stapley* v *Gypsum Mines Ltd* [1953] AC 663. Quoted with approval by the High Court in *March* v *E & M H Stramare Pty Ltd & Anor* [1991] Aust Torts Reports 81-095; (1991) 65 ALJR 334.

232 *Stapley* v *Gypsum Mines Ltd* id 681.

233 *X* v *Pal & Ors* [1991] Aust Torts Reports 81-098; (1991) 23 NSWLR 26.

234 According to Clarke JA, the plaintiff was already infected with syphilis in January 1973. The timing of the mother's infection is vital to establishing liability of the defendants, yet the judgment provides no evidence for this assertion. The medical report of Dr Merory who saw the plaintiff in November 1975, and was quoted by Clarke JA states that: '(AA) was deeply shocked and she didn't know she had acquired syphilis and equally shattered by the abnormality of her baby' *X* v *Pal & Ors* op cit 68,894; 58.

syphilis. She gave birth to her second child in 1975. The infant was born dysmorphic and mentally retarded.

The plaintiff was referred to Dr Grunseit, a specialist pediatrician and the third defendant, prior to the birth of her second child. Apparently, Dr Grunseit assured the plaintiff, that despite the fact that her first baby was born deformed and died within a few weeks of birth, she could proceed with a second pregnancy. When the second baby, at the age of seven weeks did not progress well, he ordered serological tests to be carried out. These tests revealed that both the plaintiff and her child were infected with syphilis.[235]

The NSW Court of Appeal decided, inter alia, that each of the three defendants had failed to order an early test for syphilis and therefore were liable in negligence to the mother who suffered nervous shock upon being told that she and her severely dysmorphic infant were infected with syphilis. The decision of the Court of Appeal in respect of the causal link between the defendants' carelessness and the plaintiff's nervous shock is open to question.[236]

Mr Justice Brennan in *Jaensch* v *Coffey* observed that the process of attributing causation for the defendant's liability for negligent infliction of nervous shock is a two-tier one. His Honour said that:

> 'The notion of psychiatric illness induced by shock is a compound, not a simple, idea. Its elements are, on the one hand, psychiatric illness and, on the other, shock which causes it. Liability in negligence for nervous shock depends upon the reasonable foreseeability of both elements and of the causal relationship between them.'[237]

Since 1984, the High Court in *March* v *E & M H Stramare*[238] has refined the concept of causation from the point of view of legal liability. The majority agreed that neither the criterion of reasonable foresight, nor the '*causa sine qua non*' should be regarded as exclusive tests of causation. Rather, the question whether the defendant's conduct was a 'cause' at law of the injury needs to be determined by 'value judgment involving ordinary notions of language and common sense'.[239] As Deane J said in *March* v *Stramare*:

> 'For the purposes of the law of negligence, the question of causation arises in the context of the attribution of fault or responsibility whether the *identified* negligent act or omission of the defendant was so connected with the plaintiff's loss or injury that, as a *matter of ordinary common sense and experience*, it should be regarded as a cause of it'[240] [emphasis added].

[235] The liability of the defendants for the syphilitic condition of the infant will not be discussed as it is irrelevant to the subject-matter of this article.

[236] The judgments of the Court of Appeal in *X* v *Pal* are characterised by the use of emotive language. Although the plaintiff's infection apparently was asymptomatic, Clarke J A repeatedly described the plaintiff as 'suffering from syphilis' rather than being infected with this disease. When Mahoney JA decided that the weight of scientific evidence did not establish that the mother's syphilis contributed to the child's deformities and brain syndrome, his Honour did so with 'a deep and natural regret'. *X* v *Pal & Ors* id 68,873; 30.

[237] *Jaensch* v *Coffey* op cit ALR 430.

[238] *March* v *E & M H Stramare Pty Ltd & Anor* op cit.

[239] *March* v *E & M H Stramare* op cit. per Deane J at 68,835; 341, Mason C J, Toohey and Gaudron JJ agreeing; McHugh J dissenting.

[240] *March* v *E & M H Stramare* id Aust Torts Reports 68,835; ALJR 341.

From the very beginning of the evolution of the liability for negligently caused nervous shock, the judiciary has emphasized the importance of the plaintiff's sensory perception of the consequences of the defendant's tortious conduct when establishing the causal relationship between the 'nervous shock' and the consequent mental disorder. In *Jaensch* v *Coffey* Justice Brennan stated that:

> 'A psychiatric illness induced by mere knowledge of a distressing fact is not compensable; perception by the plaintiff of the distressing phenomenon is essential.'[241]

In the case of *X* v *Pal*, the plaintiff's child was born with asymptomatic congenital syphilis. This disease either manifests itself through characteristic symptoms immediately upon birth — which was not the case with the plaintiff's baby — or it does not manifest itself at all until the later stages of life.[242] In the instant case, what did manifest itself upon the child's birth was the gross deformities of dysmorphia. The court accepted medical evidence that the baby's deformities were not caused by its congential syphilis, but were the result of other unconnected causes. Thus, the Court of Appeal held that although the carelessness of all three defendant doctors contributed to the infant being born with syphilis, their conduct was not the legal cause of the infant's perceptible physical and mental injuries. Therefore, the *perception* by the mother of her baby having been born with closely spaced and very small eyes, 'bat' ears, an unusually shaped nose and 'webbed neck' which undoubtedly resulted in feelings of grief and distress,[243] could not be attributed to the wrongful conduct of the defendants.

It is not disputed that as a result of her tragic experiences Mrs X suffered psychiatric illness. In issue is the question whether the disclosure that her child suffered congenital syphilis should be regarded as the legal cause of the plaintiff's nervous shock. The plaintiff claimed that her 'shock' was caused by being told, following the blood tests performed some seven weeks after delivery, that both she and her severely dysmorphic infant were infected with syphilis.[244] Thus, the plaintiff suffered shock not through a perception of a wrongfully caused distressful phenomenon,[245] but through 'mere knowledge' — by the doctors telling her that she and her daughter would need to undergo treatment for syphilis.[246] Mr Justice Brennan's caveat in respect of 'mere knowledge' was prompted by his concern that 'the bearers of sad tidings, able

[241] *Jaensch* v *Coffey* op cit, ALR 430.

[242] This would have been the case with the plaintiff's child, if she had not been treated for the infection.

[243] A J Solnit, M H Stark, 'Mourning and the birth of a defective child' (1961) 16 *The Psychoanalytic Study of the Child* 523.

[244] Blood tests also revealed that whereas the plaintiff tested positive, her husband tested negative to the VDRL test. The husband apparently blamed the plaintiff for what had happened and that caused her much distress.

[245] The Court of Appeal decided that the child was born with syphilis as a result of the defendants' negligence, but that the disease was asymptomatic.

[246] Syphilis today is a completely curable infection, and the plaintiff's daughter was free of the disease within eighteen months of treatment.

to foresee the depressing effect of what they have to impart'[247] should not be held liable as tortfeasors in nervous shock. Yet, in the case of *X* v *Pal*, the bearers of the sad tidings were found liable for nervous shock.[248]

A SERIES OF TRAUMATIC EVENTS DUE TO THE DEFENDANT'S INITIAL NEGLIGENCE EVENTUALLY CAUSING THE PLAINTIFF TO SUFFER PSYCHIATRIC ILLNESS: THE EMERGENCE OF A NEW TORT OF VEXATION?

The issue of causation also arises in situations where there are a number of consecutive events, all of which are sufficient to cause an adverse emotional shock and psychiatric illness.

Already at the end of the last century it was fashionable to claim that the 'general stress of modern civilisation' was a factor in causing neurasthenia and even insanity. However, only in recent years has the development of rating questionnaires which measure life events, such as the 'Social Readjustment Rating Scale' allowed researchers to plan and carry out comparative and reproducible studies in respect of chronic or repeated stress.

The rating questionnaires assign a numerical value to the extent of psychological 'readjustment' necessitated by the particular stressful experience within a defined environment.[249] Their findings, which relate to the adverse effects of gradual and cumulative personal stress as well as a series of identifiable stressful incidents within the work environment, can also be applicable to other recurring stressful life events. It has been postulated that repeated stressful life events may be implicated in the precipitation of almost any of the psychiatric disorders listed in DSM-III-R. Repeated stressful life events may also lead to 'abnormal illness behaviour' which is not considered to be a diagnosable psychiatric illness.[250]

Among the physiological effects of chronic stress is a reduction in the level of testosterone and a modification of the endocrine effects of acute stress.[251] Like the response to acute stress, the body's response to chronic stress is associated with alterations in the immune and the neuroendocrine system. These changes suggest that there is a causal link between chronic stress and depression.[252]

In tandem with research into the neurophysiology and pharmacology of

[247] *Jaensch* v *Coffey*, op cit, 430.

[248] The defendant doctors did not infect the plaintiff with syphilis. The plaintiff acquired the disease through sexual intercourse with a male syphilitic. This could have occurred either before or after January 1973, but prior to March 1975. It was her sexual partner who caused the plaintiff's infection and thereby the infection of her child. Yet, she sued her medical advisers, and the Court of Appeal found them liable.

[249] G Mendelson, *Psychiatric Aspects of Personal Injury Claims.* op cit 137–43.

[250] Id 139.

[251] Id 141.

[252] G C Smith, D Copolov, 'Physical manifestations of stress' op cit. The neuroendocrine alterations involve levels of serotonin, dopamine and noradrenaline in the brain.

depression and PTSD, techniques of nuclear neuro-imaging are being constantly refined and perfected.[253] At present, neuro-imaging techniques can produce a series of colour coded photographic images which represent the anatomy as well as some biochemical and physiological functions of the living human brain.[254] In the future, it will be possible to better visualise and quantify neurophysiological and biochemical activity of regions of the brain, and thus to determine whether plaintiffs complaining of depression or PTSD, following trauma brought about by the defendant's wrongful conduct, do in fact suffer from abnormal alterations of brain function. The neuro-imaging data always needs to be correlated with emotional and behavioural data obtained through psychiatric examination. Nevertheless, it may be that in the future, the availability of nuclear neuro-imaging will remove 'nervous shock' from the realm of 'mere emotional injury' and place it within the realm of demonstrable physical harm. When the existence of psychiatric illness can be correlated with abnormality of physiological and biochemical brain function, the fears of 'opening the floodgates' of claims by second impact victims of the defendant's wrongful conduct, as well as the issue of possible fraud and dishonesty on the part of such claimants, should lose their potency as legal arguments in favour of the curtailment of compensation for such victims. Restrictions, including the rule that to be compensable psychiatric illness must follow wrongful conduct involving a single non-physical impact nervous shock, will need to be re-examined.

The courts in Australia are beginning to recognise that the strict requirements for establishing the defendant's liability in negligently caused nervous shock cases, are preventing compensation of worthy claims of claimants who suffered psychiatric illness through negligent conduct of others, where this conduct did not result in a single shocking event but led to a progressive series of damaging episodes. It is arguable that, perhaps, a new tortious remedy should be developed to compensate such claimants. Where the psychological

253 R C Gur, R E Gur, 'The use of neuroimaging techniques in brain injury.' J Dywan, R D Kaplan, F J Pirozzolo, *Neuropsychology and the Law* (New York, Springer-Verlag, 1991) 164, 182.

254 There are a number of neuroimaging techniques currently available. The electroencephalogram (EEG) measures regional electric activity of the brain; computed tomography (CT) and magnetic resonance imaging (MRI) are used to generate displays of brain structures and possible lesions. Three-dimensional resolution images representing biochemical and physiological processes in the brain can be produced either through positron-emission tomography (PET) scans, or through single photon emission computed tomography (SPECT). This is done by means of video monitoring of the brain function after administration of a radiopharmaceutical. The regional differences in the intensity of the radiotracer uptake represent differences in metabolism through variations of blood flow. These isotopic techniques are used at present to study children with partial epilepsy for the purpose of localising epileptogenic foci in the cerebral cortex with view to their surgical removal and subsequent cure of seizures without the need for drug therapy. SPECT studies have also been performed for patients suffering from Alzheimer's disease and Pick's dementia. R C Gur, R E Gur, 'The use of neuroimaging techniques in brain injury' id; P T Trzepacz, M Hertweck, C Starratt, L Zimmerman, M H Adatepe, 'The relationship of SPECT scans to behavioural disfunction in neuropsychiatric patients.' (1992) 33 *Psychosomatics* 62; D Cook, 'Nuclear Neuroimaging in childhood partial epilepsy' (unpublished) Program and Abstracts of the Australian Jewish Medical Association Fifth National Conference, Launceston 1992: 39.

injury is induced by a series of traumatic events due to the defendant's initial negligence, such damage cannot be regarded in law as an instance of nervous shock, however, this does not mean that it should not be compensable.

Thus, in the case of *Council of the City of Campbelltown* v *Mackay*[255] the NSW Court of Appeal awarded the plaintiffs substantial damages for vexation. Within eight months of moving into a newly completed 'dream home', the plaintiffs observed the presence of hairline cracks which were due to the faulty underpinning of the house. Before the remedial work on the house was completed, heavy rains caused such extensive damage to the house that it became uninhabitable and the Council issued an order for demolition of the premises. Six months after moving out of the house, Mrs Mackay became pregnant but delivered a stillborn child before term. Dr Milton, Mrs Mackay's treating psychiatrist, indicated that the two factors of the collapse of the house and the stillbirth had combined to produce her severe psychiatric condition, and that without either one of them the patient's depressive state might not have ensued.

Two years after having to move out of their home, the plaintiffs' marriage had irretrievably broken down and they were separated. From at least this point onwards, Mr Mackay also developed symptoms of a psychiatric illness. In relation to Mr Mackay, the psychiatrist reported that the plaintiff's 'depression and marital breakdown [were] a direct result of the stress associated with the collapse of the house'.[256] The plaintiffs brought an action in negligence against the Council, two engineers and a firm of contractors. The trial judge awarded damages to the plaintiffs for damage to their home and consequential losses, including nervous shock. The NSW Court of Appeal held that the trial judge had erroneously classified the plaintiffs' injuries as nervous shock, since the psychiatric illness which they both suffered was not caused by the sudden perception of the damage to their home. The appeal was dismissed however, because damages for nervous shock awarded by the trial judge were supportable on the basis of vexation, worry, distress and inconvenience.

Instead of relying upon the defendant's liability for nervous shock inflicted by negligence, the Court of Appeal allowed the plaintiffs damages for psychiatric damage which they both suffered by relying on an, until now, virtually nominal award for vexation.[257] The Court of Appeal did so because, as Justice Kirby pointed out:

> '. . . the price paid for the failure of the law to develop is the persistence of a legal entitlement to recovery which nowadays bears little relationship to contemporary psychological understanding. Such artificialities bring the law into disrepute. They force claimants to try to squeeze their claims into outmoded formulae. They subject expert witnesses to the pressure to distort

[255] *Campbelltown City Council and Others* v *Mackay and Another* [1989] Aust Torts Reports 80-244; (1988) 15 NSWLR 501.
[256] *Campbelltown City Council* id Aust Torts Reports 68,618; NSWLR 510.
[257] *Perry* v *Sidney Phillips and Son* [1982] 1 WLR 1297.

opinions on what they may feel to be legitimate claims, out of deference to outmoded formulations of the legal basis of entitlement to recovery'.[258]

Indeed, the time has come to reconsider the issue of compensating plaintiffs who suffer psychiatric illness resulting from shock consequent upon the defendant's wrongdoing, in the light of constant scientific and technological advances of medical science. This can be done either by making the requirements establishing the defendant's liability for nervous shock more flexible and accommodative of the modern medical understanding of psychiatric illness,[259] or a new tort of vexation leading to nervous shock should be extended to apply not merely to property owners who suffer psychiatric illness as a consequence of tortious damage to their property, but also to relatives whose parents or children have been wrongfully injured.[260]

As it stands at present, the law with regard to the liability for negligently inflicted nervous shock is both restrictive and uncertain. It is critical that the High Court should re-visit *Jaensch* v *Coffey* in order to clarify the scope of this cause of action and to point out *quo vadis*?

258 *Campbelltown City Council* v *Mackay*, op cit Aust Torts Reports 68,613; NSWLR 503.

259 In a recent case the Supreme Court of Victoria awarded compensation under the *Accident Compensation Act* 1985 (Vic) to a policeman for 'total and incurable loss of mental powers involving incapacity to work' (which the claimant performed before suffering the injury) following neurosis caused by a decade of work-related stress: *Accident Compensation Commission* v *Hawkins*, 30 April 1991 Victorian Supreme Court (unreported).

260 In his judgment in *Anderson* v *Smith & Anor* op cit, Justice Nader has argued eloquently in favour of such an extension.