Novel damages claims in toxic torts: medical monitoring and fear of future disease

By Penelope Watson

Toxic torts litigation is a predictable consequence of the massive industrialisation of the developed world, coupled with heightened expectations of accountability and consumer safety. According to the US Environmental Protection Agency (EPA), billions of pounds of hazardous chemicals are emitted into the air each year.[1] Nearly 20% of the US population, (approximately 40 million people), live within four miles of a hazardous waste site on the EPA's National Priority List, while 80% live near some type of hazardous waste site.[2]

TOXIC TORTS

Toxic tort cases frequently arise in an environmental law context, and involve personal injury and related harms resulting from exposure to, or ingestion of, toxic substances,[3] such as pharmaceutical, industrial and agricultural products. They may be claims brought by individuals or classes.[4] Well-known cases in the US and elsewhere have focused on harm arising from asbestos, lead, Bendectin, diethylstilboestrol (DES), thalidomide, tobacco, various pesticides and herbicides, Agent Orange, benzene, formaldehyde,[5] silicon breast implants, and fen-phen, among others. Toxic tort litigation, while common in the US, is in a fledgling state in Australia, largely because of the less-developed nature of mass torts, class and representative actions. This article considers how certain common law concepts of injury and damages have been adapted in the US in the context of toxic torts, to determine whether there is scope for similar development in Australia.

Claims for harm arising from hazardous exposure to toxic substances can be brought at common law based in nuisance, trespass, negligence, battery, and strict liability,[6] as well as pursuant to specific statutory regimes.[7] While the tort causes of action are familiar, their application to toxic injury fact situations is frequently problematic, requiring re-thinking of standard concepts such as causation, limitation periods, harm, and damages. Toxic tort injuries are clearly distinguished from the traditional traumatic injury paradigm normally associated with tort,[8] as seen for example in motor vehicle and many industrial accidents. Toxic torts may involve injury arising from genetic or biochemical disruption, often with very long latency periods of from 10 to 30 years, with no clear or direct causal chain. Exposure to toxins may increase the risk of contracting disease, but does not normally produce any immediately observable condition or symptoms.[9] Increasingly since the 1980s in the US, not only actual disease victims but also those exposed to toxins without detectable symptoms (post-exposure/pre-symptom or PE/PS)[10] have been seeking redress for increased risk of disease,[11] fear of disease,[12] lost quality of life[13] and, most successfully, medical monitoring costs.

MEDICAL MONITORING

Standard personal injury damages assessment includes future medical needs, both treatment and diagnostic. This falls under the head of 'specific needs created'[14] by the wrongdoing, for which damages are awardable. It is predicated on recognised physical or mental injury being present. Medical monitoring is different. Plaintiffs seeking damages for medical monitoring do not normally base this claim on emotional illness or anxiety, nor on physical consequences flowing from the exposure. Instead, 'medical monitoring is...intended to provide healthy plaintiffs with diagnostic examinations for the latency period of exposure-related diseases in the hope that early detection and treatment of the disease will be beneficial to the victim.'[15] Medical monitoring claims are frequently coupled with a separate claim for fear of disease, which is discussed below.

The 1987 case, *Ayers v Township of Jackson*,[16] illustrates a common scenario. Residents were exposed to toxic pollutants that had been permitted to leach into an aquifer supplying drinking water. None of the plaintiffs sought recovery for specific illness related to the exposure, but all sought damages for impairment of quality of life, emotional distress, enhanced risk of disease, and medical monitoring. The trial jury allowed all but the 'enhanced risk' claim. On intermediate appeal only the 'impairment of quality of life' ground was upheld. The New Jersey Supreme Court re-instated the jury award for medical monitoring, concluding that:

> '...the cost of medical surveillance is a compensable item of damages where the proofs demonstrate, through reliable expert testimony...the significance and extent of exposure to chemicals, the toxicity...the seriousness of the diseases for which the individuals are at risk, the relative increase in the chance of onset of disease in those exposed, and the value of early diagnosis, that such surveillance... is reasonable and necessary.'[17]

In California, the Supreme Court handed down a landmark toxic tort decision in *Potter v Firestone Tire and Rubber Company*,[18] in 1993. The medical monitoring and fear of disease aspects have been cited, followed, and distinguished hundreds of times since, in many states. It, too, concerned the contamination of drinking water, in this instance by industrial solvents, cleaning fluids, oils and liquids from Firestone's tyre manufacturing plant, dumped into the Crazy Horse municipal landfill. The plaintiffs were four residents whose private drinking wells were polluted. Two of the substances were known to be human carcinogens, and others were suspected carcinogens. Firestone knew that this dumping violated Californian law, and for most of the period it also violated the company's internal policy prohibiting disposal of liquid waste at Crazy Horse. >>

At trial, Firestone was held liable for intentional infliction of emotional distress because of its 'outrageous conduct',[19] as well as negligence. The four plaintiffs were awarded $800,000 for fear of cancer; $142,975 for the present value of future medical monitoring costs; $269,500 for psychiatric illness and treatment costs; $108,000 for disruption of their lives; and $2.6 million in punitive damages.[20] The award was reversed in regard to medical monitoring by the Court of Appeal,[21] but affirmed in all other respects.

On appeal, the California Supreme Court re-instated the medical monitoring damages, decided that fear of cancer claims require plaintiffs to demonstrate that they are 'more likely than not' to develop cancer as a result of exposure, did not resolve 'immune system'[22] claims, and was supportive of punitive damages where violation of environmental laws occurs. In allowing medical monitoring, the Supreme Court adopted the analysis in *Miranda v Shell Oil Co*,[23] holding that the cost of medical monitoring is a compensable item of damages if the plaintiff can demonstrate, through reliable medical expert testimony, that the need for future monitoring is a reasonably certain consequence of the plaintiff's toxic exposure, and that the recommended monitoring is reasonable.[24] Such expenditures, which would not have been necessary but for the wrongful exposure to contaminants, constituted 'detriment proximately caused' by the negligent disposal of those substances.[25]

Reasonableness and necessity of monitoring are assessed in terms of the determinative factors in *Ayers*;[26] that is, significance and extent of exposure, toxicity, seriousness of the disease risked, and relative increase in chances of onset. These should be compared with (a) the plaintiff's chances of developing the disease had he/she not been exposed; (b) the chance of members of the public at large developing the disease; and (c) the clinical value of early detection and diagnosis.[27] Medical monitoring costs are limited to those going beyond preventive medical care and check-ups to which ordinary prudent members of the general public should submit.[28] 'If additional or different tests are necessitated as a result of the toxic exposure caused by the defendant, then the defendant bears full responsibility for their costs.'[29]

Courts and commentators differ as to whether medical monitoring is a separate tort, or an aspect of damages. In 1997 the US Supreme Court decided *Metro-North Commuter Railroad Co v Buckley*.[30] The issue was whether PE/PS plaintiffs could recover medical monitoring costs in a *Federal Employers' Liability Act* ('FELA') case, brought by a pipefitter exposed to asbestos, against his employer. The Court decided that there was not 'sufficient support in the common law'[31] to uphold the claim. It was '...troubled...by the potential systemic effects of creating a new, full-blown, tort law cause of action...The reality is that competing interests are at stake...'[32]

The California Supreme Court, referring to its own decision, said[33] in 2003 that *Potter* recognises 'not a separate tort but simply an item of damages that cannot be awarded until liability is established under a traditional tort theory...*Potter* simply specified for the medical monitoring context the traditional requirements that a plaintiff prove causation of damage.'[34] Alternatively, medical monitoring could be analysed as a re-definition of the concept of harm or injury in negligence to fit PE/PS plaintiffs. Given that a mere possibility of future harm is not sufficient to constitute injury, then the actual exposure or ingestion, or else the creation of the need for medical surveillance, constitutes the injury.

The suitability of medical monitoring claims for class action was considered recently and rejected in *Lockheed Martin Corporation v the Superior Court of San Bernadine County, Roslyn Carillo et al*,[35] the first such case to come before the Californian Supreme Court. The plaintiffs were residents using drinking water contaminated by the defendant's manufacturing operations, who sought certification of a 'medical monitoring' class, and a 'punitive damages' class, both defined as persons exposed to a long list of chemicals in specific dosages over a specified period. The plaintiffs wanted establishment of a court-supervised fund for medical monitoring. Although the Court rejected the application, the Opinion contains useful statements of principle on class certification, and discusses and endorses the Court's earlier rulings in *Potter*.

FEAR OF DISEASE

In *Potter*, one component of the award was for the plaintiffs' fear of developing cancer in the future, as a result of their exposure to carcinogens. Their fear was held to be reasonable, despite the inability to prove a causal link between the contamination and symptoms with sufficient certainty. This type of claim is an emotional distress claim, in the absence of detectable present physical injury. The Supreme Court held that the elements that must be proved in support of a fear of cancer claim are:

> '(1) as a result of the defendant's negligent breach of a duty owed to the plaintiff, the plaintiff is exposed to a toxic substance which threatens cancer; and 2) the plaintiff's fear stems from a knowledge, corroborated by reliable medical or scientific opinion, that it is *more likely than not* [emphasis added] that the plaintiff would develop the cancer in the future due to toxic exposure. Under this rule a plaintiff must do more than simply establish knowledge of a toxic ingestion or exposure and a significant increased risk of cancer. The plaintiff must further show that, based upon reliable medical or scientific opinion, the plaintiff harbors a serious fear that the toxic ingestion or exposure was of such magnitude and proportion as to likely result in the fear of cancer.'[36]

Nearly all states in the US recognise a right to recover for negligent infliction of emotional distress.[37] Recovery is limited, however, by various common law tests or factors designed to repel spurious or trivial claims, and prevent a flood of litigation. One of these is the 'physical impact' test from *Consolidated Rail Corp v Gottshall*,[38] requiring a plaintiff to have 'contemporaneously sustained a physical impact (no matter how slight) or injury due to the defendant's conduct.'[39] Others resemble the limits imposed at various stages during the development of nervous shock claims in the UK and Australia. In *Metro-North*,[40] a workplace asbestos case, the US Supreme Court considered the limits of the physical impact test from *Gottshall*, holding that it 'does not include a contact that amounts to no more than an exposure...to a substance

that poses some future risk of disease and which contact causes emotional distress only because the worker learns he may become ill after a substantial period of time.'[41]

What plaintiffs must prove for emotional distress claims varies across jurisdictions in the US. Some require physical impact or detectable disease, others require proof of actual exposure to the disease-causing agent, others proof that disease is more likely than not. For example, in another asbestos employment case[42] in which *Metro-North* was applied, the plaintiff failed in his fear of disease claim because he was unable to show physical impact. The Court was required to apply federal law, but stated that the result would likely have been different under state law.[43] The Louisiana Supreme Court has at times departed from the normal rule requiring physical consequences, where there is 'the especial likelihood of genuine and serious distress...which serves as a guarantee that the claim is not spurious.'[44]

Fear of disease claims for exposure to HIV have also been brought, based on *Potter*. These present different problems to carcinogen exposure, because HIV can be conclusively identified or eliminated within a relatively short space of time following the exposure. With HIV, the plaintiff's fear is that s/he may already have contracted HIV, which is verifiable, whereas cancer claims are about enhancement of risk for the future, and cannot be verified at, or soon after, the time of exposure. Examples of HIV cases include *Kerins v Hartley*,[45] in which an HIV-positive doctor operated on the plaintiff; and *Majca v Beekil*,[46] two consolidated Illinois cases. In one, the plaintiff cut her hand on a scalpel caked with dried blood and mucus while emptying a wastebasket in a doctor's office. The doctor who had used the scalpel subsequently died of an AIDS-related illness; in the other, the plaintiff received dental treatment from an HIV-positive dental student. The Illinois court in *Majca* concluded that, without proof of actual exposure to HIV, a claim for fear of contracting AIDS is 'too speculative to be reasonably cognizable'.[47] In this context, the courts can justifiably require a more stringent test than for cancer, because the available medical testing is different. Both plaintiffs in *Majca* failed to prove actual exposure, although had they been able to do so, damages would have been recoverable, even had later tests proved negative. This was because negative results 'cannot erase an individual's genuine fear...during the period between actual exposure and the eventual receipt of HIV negative test results more than six months later'.[48] Therefore, recovery of damages during that 'window of anxiety' is possible, normally limited to about six months.[49]

Californian law regarding emotional distress was summarised in *Potter*.[50] Parasitic damages may be recovered for emotional distress consequent upon physical injury.[51] There is no independent tort of negligent infliction of emotional distress, and thus no duty to avoid negligently causing emotional distress to another. Damages for emotional distress are recoverable only if the defendant has breached some other duty owed to the plaintiff; therefore, the appropriate tort is negligence, an essential element of which is duty of care.[52] In *Potter*, the relevant breach of duty was Firestone's violation of waste disposal laws and those prohibiting contamination of underground water: Firestone owed a duty of care and compliance to any person who might foreseeably come into contact with its hazardous waste. The *Potter* Court also endorsed previous authority[53] that had established that physical injury is not a prerequisite for recovering damages for serious emotional distress where there exists some guarantee of genuineness in all the circumstances.[54]

WOULD IT WORK IN AUSTRALIA?

Claims for personal injury in NSW are dealt with under the *Civil Liability Act* 2002 (NSW), except in relation to intentional acts done with intent to cause injury or death; claims covered by the *Dust Diseases Tribunal Act* 1989 (NSW); injury resulting from smoking or other use of tobacco products; and most but not all claims brought under Motor Accidents or Workers' Compensation statutes.[55] Dust diseases and tobacco-related diseases are toxic injuries. Dust diseases including asbestosis, asbestos-related carcinoma, pneumoconiosis and silicosis, are regulated by statute, but the common law still applies to injury caused by use of tobacco, although not to passive smoking claims.[56]

Harm is defined as 'harm of any kind, including... (a) personal injury or death...personal injury includes... (b) impairment of a person's physical or mental condition, and (c) disease'[57] resulting from negligence, however pleaded.[58] In terms of an action seeking medical monitoring expenses, it is at least arguable that 'impairment' of a person's physical condition could be achieved by toxic exposure. >>

The problem would be one of proof where there were no detectable changes or symptoms. For this to be successful, an argument along the lines of damage to the 'immune system,'[59] as put in *Potter,* would need to be accepted, an unlikely prospect in the present climate. In such a scenario, no damages for non-economic loss would be awardable because non-detectable impairment would fall short of '15% of a most extreme case'.[60]

Where actual 'disease' is proved, damages for medical monitoring would be awardable as a standard aspect of consequential losses and new needs created, but medical monitoring *Potter*-style assumes no present physical injury. In the HIV needle stick scenario, where there is physical injury, general damages for pain and suffering and loss of enjoyment of life would be awardable for foreseeable emotional distress consequent[61] upon negligent injury, assuming normal fortitude,[62] but the physical injury from an accidental needle stick would again fall short of the '15% of a most extreme case'[63] requirement. Once a positive test for HIV has been obtained, physical impairment with severe consequences is provable, and the damages issue would then be one of assessing the plaintiff's prognosis and future contingencies.[64]

These problems may be avoided by bringing the claim in battery,[65] since intentional acts causing personal injury are excluded from coverage by the Act. In the US, anti-smoking campaigners have been quite successful in establishing that the contact needed for battery can be made out by contact with, or ingestion of, environmental cigarette smoke (passive smoking),[66] which is of course a carcinogen. In HIV cases concerning intentional medical or dental procedures performed by infected practitioners, the patient's consent would be vitiated by the practitioner's HIV status, thus establishing battery.[67] The position is less clear where the direct contact required for battery is negligently inflicted.[68] In pollution cases, it seems unlikely that intent could be proved unless recklessness was held to be sufficient.

Part 3 of the Act deals with mental harm, and allows recovery for both consequential and pure mental harm. Section 31 restates the common law in relation to damages for pure mental harm. Thus, the plaintiff must suffer from a 'recognised psychiatric illness' rather than mere grief, sorrow, anxiety or distress falling short of illness.[69] The difficulties involved in distinguishing between '(compensable) psychiatric injury and (non-compensable) mental distress' have been the subject of much judicial comment, most recently in *Tame v New South Wales.*[70]

Section 32 (1) provides that 'A person (the defendant) does not owe a duty of care to another person (the plaintiff) to take care not to cause the plaintiff mental harm unless the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken.' The section contemplates pure as well as consequential mental harm. It is not limited to a duty not to cause mental harm or shock by imperilling others closely connected to the plaintiff (bystander cases).[71] The wording of the section supports the construction that 'section 32 will also apply in relation to claims for pure mental harm that are not bystander cases; such as where the plaintiff suffers mental harm through fear of injury to themselves…'[72] Thus, toxic exposure victims who exhibit 'mental impairment', defined for the purposes of pure mental harm as 'recognized psychiatric illness,'[73] will be able to recover in NSW without needing to prove physical illness or nervous shock. No 'exemplary or punitive damages, or damages in the nature of aggravated damages',[74] may be awarded.

It is clear that in NSW, as in California, there is no tort of intentional infliction of pure mental distress. The US, however, has the *Restatement of Torts (Second)*[75] which provides that: (1) 'One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm results from it, for such bodily harm.' The closest common law jurisdictions outside the US come to this is *Wilkinson v Downton*,[76] a separate tort allowing recovery for intentional infliction of harm, where physical illness is present along with emotional injury. This has been considered recently in Australia in *Carrier v Bonham*[77] and by the House of Lords,[78] which declined to dispense with the requirement of physical harm or recognisable psychiatric illness.

The Queensland Court of Appeal in *Carrier* interpreted the concept of intention, referred to in *Wilkinson* as 'calculated', to mean 'likely to have that effect', 'objectively likely to happen'.[79] McMurdo P went further and said that the 'principle of trespass' of which *Wilkinson* is evidence is now but part of 'a single tort of failing to use reasonable care to avoid damage however caused'.[80] This may be somewhat sweeping and unsupported by authority at present, but could have interesting implications for toxic tort litigation in future. Intentionally inflicted personal injury falls outside the scope of the *Civil Liability Act* 2002 (NSW), with attendant benefits in the calculation of damages. ■

Notes: **1** See Paul J Komyatte, 'Medical Monitoring Damages: An Evolution of Environmental Tort law', 23 Colo. Law. 1533 (1994), 9 (citing US General Accounting Office,' Air Pollution: EPA's Strategy and Resources May Be Inadequate to Control Air Toxics' (Washington, D.C.: GAO/RCED-91-143, June 1991). **2** Komyatte, *Ibid.* **3** Laurie Alberts, 'Comment: Causation in Toxic Tort Litigation: "Which Way Do We Go Judge?"', (2001) *12 Vill. Env. L.J.* 33, 33. **4** See, for example, *Lockheed Martin Corporation v The Superior Court of San Bernadine County, Roslyn Carillo et al,* SO88458 (Ct. App. 4/2 E025064, San Bernardino County Super. Ct.No. RCV31496) (Supreme Court of California) (application for certification of class, filed 3/3/03). **5** Alberts, above n 3, 34. **6** *Rylands v Fletcher* (1866) LR 1 Ex 265; abolished as a separate tort in Australia and subsumed into the tort of negligence in *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, 547 (Mason CJ, Deane, Dawson, Toohey, Gaudron JJ) **7** Eg, *Dust Diseases Tribunal Act* 1989 (NSW); *Workers' Compensation Act* 1987 (NSW). **8** Edward Christie, 'Toxic Tort Disputes: Distinctive Characteristics Require Special Preparation for Trial', (1992) 22 *QLSJ* 279. **9** Edward Christie, 'Toxic Tort Disputes: Proof of Causation and the Courts', (1992) 9 *EPLJ* 302, 302. **10** Andrew A Klein, ' Re-thinking Medical Monitoring', Spring, (1998) 64 *Brooklyn L.Rev.*1, 3. **11** Eg, *Gideon v Johns-Manville Sales Corp.*, 761 F. 2d 1129 (5th Cir.)1985); *Brafford v Susquehanna Corp.*, 586 F.Supp. 14

(D. Colo. 1984); cf *Sterling v Velsicol Chem. Corp.*, 647 F. Supp. 303, 322 (W.D.Tenn. 1986), rev'd, 855 F. 2d 1188, 1205 (6th Cir. 1988); see generally Klein, above n 10, 3. **12** Eg, *Sterling*, 855 F. 2d at 1188; *Jackson v Jones-Manville Sales Corp.*, 781 F. 2d 394, 413 (5th Cir. 1986); *Potter v Firestone and Tire Rubber Co.*, 863 P. sd 795, 818 (Cal.1993); see Klein, above n 10, 3. **13** Eg, *Thompson v National R.R. Passenger Corp.*, 621 F. 2d 814 (6th Cir. 1980); *Kurncz v Honda N. Am., Inc.*, 166 F.D.R. 386 (W.D. Mich.1996). **14** *Teubner v Humble* (1963) 108 CLR 491 (Windeyer J). **15** Carey C Jordan, 'Comment, Medical Monitoring in Toxic Tort Cases: Another Windfall for Texas Plaintiffs?', 33 *Hous. L. Rev.* 473, 483 (1996). **16** 525 A. 2d 287 (NJ 1987). **17** *Ayers, Ibid*, 312. **18** *Potter v Firestone Tire and Rubber Co.*, 863 P. 2d 795, 818 (Cal.1993) ('*Potter*'). **19** *Restatement (Second) of Torts* (1965), s46 provides that: (1) 'One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm results from it, for such bodily harm.' **20** See generally, Richard C Coffin, 'California Supreme Court Issues Opinion in *Potter v Firestone Tire and Rubber Company*, Supreme Court No. S018831', Dec 1993, *http://www.bcltlaw.com/articles/ ad_1293.html*, at 22 June 2005. **21** Intermediate appellate court, below state Supreme Court level. **22** Claims based on alleged impairment of the immune system and cellular damage that does not cause clinical symptoms; the issue being whether this constitutes 'physical injuries' for which parasitic damages for emotional distress should be awardable. **23** (1993) 17 Cal. App. 4th 1561. Slip Opinion at 63-64; see Coffin, above n 20, 5. **24** Coffin, above n 20, 5. **25** *Potter*, above n 18, 1005 & nfn.24, quoting Civ. Code, 3333. **26** *Ayers*, above n 16. **27** Coffin, above n 18, 5. **28** *Potter*, above n 16, Slip Opinion at 72. **29** *Potter, Ibid*, 1012, fn 31). **30** 521 U.S. 424, 117 S. Ct. 2113 (1997) ('*Metro-North*'). **31** *Metro-North, Ibid*, 2124. **32** *Metro-North, Ibid.* **33** *Lockheed*, above n 2. **34** *San Diego Gas & Electric Co v Superior Court* (1996) 13 Cal. 4th 893, fn 18, citing *Potter*, above n 16, 1006-07; endorsed in *Lockheed*, above n 2. **35** Above n 2, ('*Lockheed*'); see O'Melveny & Myers LLP, 'California Supreme Court Poisons the Water for Medical Monitoring Class Actions,' 6 March 2003, *http://www.omm.com/webdata/content/publications/ client_alert_class_action_2003_03*, at 22/06/05. **36** *Potter*, above n 18, Slip Opinion 47-48. **37** *Consolidated Rail Corp v Gottshall* 114 S. 2396, 2405 (1994) (US Supreme Court) ('*Gottshall*'). **38** *Ibid.* **39** *Gottshall*, 114 S. Ct., 2406. **40** *Metro-North*, above n 30. **41** *Metro- North, Ibid*, 432. **42** *Dragon v Cooper/T Smith Stevedoring Co*, No. 98-CA-1375, 1999 WL 23226 (La.Ct.App. 9 January 1999) ('*Dragon*'); the relevant law was the *Jones Act*, to which FELA case law applies. **43** *Dragon, Ibid*, 4-5. **44** *Moresi v State, Department of Wildlife and Fisheries* 567 So.2d 1095-96 (La. 1990). **45** 27 Cal. App. 4th 1062 [No. BO 65917, Second Dist., Div Two – Aug 23, 1994]. **46** 701 N.E.2d 1084 (Ill. 1998) ('*Majca*'). **47** *Majca, Ibid*, 1090. **48** *Majca, Ibid.* **49** See *Faya v Almarez* 620 A.2d 327, 337 & n. 9 (md. 1993). **50** *Potter*, above n 18. **51** *Potter, Ibid*, Slip Opinion, 16. **52** *Potter, Ibid*, Slip Opinion, 22. **53** *Burgis v Superior Court* (1922) 2 Cal. 4th 1064, 1074, 1079; *Molien v Kaiser Foundation Hospitals* (1980) 27 Cal. 3d 916, 925-26. **54** *Potter*, above n 18, Slip Opinion, 25-26. **55** *CLA*, s3B (1). **56** See NSW, *Parliamentary Debates, (Hansard)*, Legislative Council, 19 Nov 2002, 6946. **57** *CLA*, Part 1A Negligence, Division 1, s5. **58** *CLA*, s5A (1). **59** Above n 22. **60** *CLA*, s16 (3). **61** *CLA*, s27. **62** *CLA*, s32. **63** *CLA*, s16 (1). **64** See eg, *Malec v JC Hutton* (1990) 169 CLR 638. **65** See generally, Christopher J McAuliffe, 'Comment: Resurrecting an Old Cause of Action for a New Wrong: Battery as a Toxic Tort', Winter 1993, 20 *B.C. Envtl. Aff. L. Rev.* 265 **66** See eg, Ezra, 'Smoker Battery: An Antidote to Second Hand Smoke' May 1990, (4) 63 *Sthern Calif L.R.* **67** *Chatterton v Gerson* [1981] QB 432, 443; see also *Rogers v Whitaker* (1992) 175 CLR 479. **68** Where the fault element in battery is negligence rather than intent, the *Civil Liability Act* 2002 (NSW) may be attracted. See *Williams v Milotin* (1957) 97 CLR 465 and cf *Letang v Cooper* [1965] 1 QB 232 (Court of Appeal, England). **69** *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383, 394-5 (Windeyer J); *Hinz v Berry* [1970] 2 QB 40, 42 (Lord Denning). **70** (2002) 211 CLR 317, 414 – 7 [287] – [294] (Hayne J) ('*Tame*'). **71** Reflecting the common law on nervous shock, as amended by the *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW), s4, with the added requirement of 'normal fortitude' and deletion of the shock requirement. **72** Dominic Villa, *Annotated Civil Liability Act* 2002 (NSW), 2004, 187. **73** *CLA*, s31. **74** *CLA*, Division 6, s21. **75** *Restatement*, above n 19, s46. **76** (1897) 2 QB 57('*Wilkinson*'). **77** *Carrier v Bonham* [2001] QCA 234 ('*Carrier*'). **78** *Wainwright v Home Office* [2003] UKHL 53; see also *Wong v Parkside NHS Trust* [2001] EWCA Civ 1721. **79** *Carrier*, above n 71 (McMurdo P). **80** *Carrier, Ibid.*

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