Managing Liability for Bystander Psychiatric Injury in a Post-Hill v Van Erp Environment

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1. Introduction

The High Court of Australia has had the opportunity of considering liability for psychiatric injury suffered as the result of the death, injury or imperilment of another ("bystander recovery") on only four occasions, twice in the 1930s,[1] once in the 1970s[2] and once in the 1980s.[3] The last of those occasions, *Jaensch v Coffey*,[4] represented a confluence of reasoning not only in relation to liability for nervous shock, but also in relation to liability for negligence in general.

This case stood at the crossroads of two different methods for the determination of the existence of a duty of care. It was decided at a time when Lord Wilberforce's two tier test from *Anns v Merton London Borough Council*[5] was the prevailing test not only in this country[6] but also England,[7] New Zealand[8] and Canada.[9]

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1 *Bunyan v Jordan* (1937) 57 CLR 1; *Chester v Waverley Corporation* (1939) 62 CLR 1.

2 *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383.

3 *Jaensch v Coffey* (1984) 155 CLR 549.

4 (1984) 155 CLR 549.

5 [1978] AC 728. This test held that a duty of care arose where there was a relationship of "proximity" or "neighbourhood" between the parties, in the sense that damage to the plaintiff was reasonably foreseeable, and where there was no policy considerations to negative, limit or reduce a duty in the circumstances: *ibid* at 751-752.

6 See, eg, *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 44 (per Mason J, with whom Stephen and Aiken JJ concurred).

7 See, eg, *Junior Books Ltd v Veitchi Ltd* [1983] 1 AC 520 at 545-547.

8 See, eg, *Scott Group Ltd v McFarlane* [1978] 1 NZLR 553 at 572-575 (per Woodhouse J), 583-584 (per Cooke J); *Takaro Properties Ltd v Rowling* [1978] 2 NZLR 314 at 323-324 (per Woodhouse J), cf 332-335 (per Richardson J).

9 See, eg, *Kamloops (City) v Nielsen* (1984) 10 DLR (4th) 641 at 662-663 (Supreme Court of Canada).

This approach was evident in the judgments of Gibbs CJ and Murphy J in *Jaensch*. *Jaensch* was also the first case in which Deane J propounded his concept of proximity as the unifying rationale of negligence, and in which Brennan J pronounced his opposition to the concept of proximity in such a "broad sense". The fifth judge, Dawson J, delivered a judgment that focused mainly on the current state of nervous shock authorities without seeking to venture into the question of the appropriate method for determining the existence of a duty of care.

Since *Jaensch*, the approach to determining duty of care in Australia has undergone several changes. The majority of the High Court not only adopted Deane J's proximity concept,[10] but developed the concept so that the way the relationship of proximity was characterised could in an appropriate case affect the relevant standard of care,[11] exclude the existence of a duty,[12] or affect the character or content of the duty.[13] However, the court changed direction in *Hill v Van Erp*,[14] the first negligence case to be decided by the court following the retirement of the two chief proponents of proximity, Deane J and Mason CJ. The notion of proximity as the unifying theme of negligence cases was abandoned. Instead, a majority of the court[15] indicated that greater emphasis would be placed on identifying, by means of reasoning by analogy, induction and deduction and an assessment of competing policy considerations, the elements additional to reasonable foreseeability (if any) required for the finding of duty. Thus, for example, the existence of a duty of care in relation to erroneous statements will depend on questions of whether there was an assumption of responsibility and reliance rather than whether the presence of those factors gives rise to a relevant relationship of proximity between the parties.

A pertinent question, therefore, in an environment in which a majority of the court now favour the identification of the appropriate limitations (if any) in addition to foreseeability, is whether the limits to bystander recovery for psychiatric injury that emerged from *Jaensch* remain unaffected, and what the appropriate limits ought to be.

2. Limitations to bystander recovery emerging from Jaensch v Coffey

Jaensch involved the claim for nervous shock by the wife of a motorcycle police

10 See, eg, *Cook v Cook* (1986) 162 CLR 376 (per Mason, Wilson, Deane and Dawson JJ); *Australian Safeways Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 (per Mason, Wilson, Deane and Dawson JJ); *Hawkins v Clayton* (1988) 164 CLR 539 (per Mason CJ and Wilson, Deane and Gaudron JJ); *Gala v Preston* (1991) 172 CLR 243 (per Mason CJ and Deane, Gaudron and McHugh JJ); *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 (per Mason CJ and Deane, Dawson, Toohey and Gaudron JJ); *Bryan v Maloney* (1995) 182 CLR 609 (per Mason CJ and Deane and Gaudron JJ).

11 *Cook v Cook* (1986) 162 CLR 376.

12 *Gala v Preston* (1991) 172 CLR 243.

13 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520.

14 (1997) 71 ALJR 487.

15 Ie, Brennan CJ and Dawson, Toohey, McHugh and Gummow JJ. Gaudron J continued to support the concept of proximity as envisaged by Deane J.

officer who was involved in a collision with a car driven by the defendant. The plaintiff travelled with police to the hospital and there saw her husband in the casualty ward waiting to be taken into the operating theatre. Although her husband subsequently recovered, the plaintiff subsequently developed psychiatric symptoms.

It is possible to discern different views in the judgments concerning the appropriate limitations for bystander recovery. However, in the case at hand this did not matter because Mrs Coffey's claim fell within all of the various limitations.

(a) "Relational proximity": the relationship between the plaintiff and the primary victim

Gibbs CJ approved of a limitation based on the closeness of the relationship between the plaintiff and person killed, injured or imperilled (the "victim"), which he took from Lord Wilberforce's judgment in *McLoughlin v O'Brian*.[16] Indeed, he suggested that it was the limit of greatest importance. By contrast, Deane J thought that the closeness of the relationship should only be a matter of reasonable foreseeability and did not figure in whether the relevant relationship of proximity was established or not. That approach is consistent with the notion of proximity as a control on the foreseeability of the defendant. The factors he identified as relevant to proximity, such as physical, circumstantial and causal proximity (as well as the concepts of reliance, assumption of responsibility and expectation later recognised as relevant in other contexts) all relate to adjudging the closeness of the relationship between the plaintiff and defendant. On the other hand, the notion of a "relational proximity" relates only to the closeness of the relationship between the plaintiff and the victim. Relational proximity therefore involves a different frame of reference from those proximity factors identified by Deane J. If the role of proximity is viewed as an overriding control on an untrammelled test of reasonable foreseeability, and operated by characterising certain relationships as being so close that a defendant should contemplate the plaintiff as one likely to be injured by his or her act, then those factors taken into account when evaluating whether that relationship was sufficiently close had to relate to the plaintiff and the defendant, not one of those parties and a third party.[17]

Brennan J saw the relationship between the plaintiff and the victim as only one factor relevant to foreseeability and the question whether as a matter of fact the plaintiff could establish that his or her psychiatric injury was caused by the defendant's conduct.[18] Dawson J took a conservative line that since *Hambrook v Stokes Bros*[19] it had been established that a plaintiff could recover where he or she apprehended some danger or harm to another, at least where that other was a member of the plaintiff's family. No more was required here since the victim was the plaintiff's husband.[20]

16 [1983] 1 AC 410.
17 See also *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 497.
18 (1984) 155 CLR 549 at 568-570.
19 [1925] 1 KB 141.
20 (1984) 155 CLR 549 at 612.

(b) Physical proximity

Physical proximity, in the sense of a closeness both in space and time, between the defendant's conduct and the plaintiff's injury was one of the factors identified by Deane J as within the embrace of his proximity control on foreseeability. It encompassed not only the accident itself but also the immediate aftermath, which extended up to and including immediate post accident treatment, perhaps at hospital.[21] Dawson J also noted that the authorities no longer required the plaintiff to be present at the scene of the accident, but could include presence at hospital.[22]

By contrast, Gibbs CJ reserved his opinion on the correctness of a physical proximity requirement,[23] while Brennan J saw separation in time and distance between the defendant's conduct and the plaintiff's injury merely as a factor that may make it difficult to prove the elements of causation and reasonable foreseeability.[24]

(c) Means of perceiving the accident

The question of limiting claims to those where the plaintiff witnessed the accident or its aftermath with his or her unaided senses was largely left open, Gibbs CJ and Murphy J making no comment and Deane J expressly declining to express an opinion, being satisfied that no difficulty arose where as here and in *Hambrook* the psychiatric injury arose from a combination of what the plaintiff saw or heard and what was told.[25] Dawson J agreed.[26]

Indeed, Deane J observed that it was somewhat difficult to discern an acceptable reason why any rule based on public policy should preclude recovery for psychiatric injury sustained by a wife and mother who was so devastated by being told on the telephone that her husband and children had all just been killed that she was unable to attend the scene while permitting recovery for the reasonably, but perhaps less readily, foreseeable psychiatric injury sustained by a wife who attended at the scene of the accident or its aftermath at the hospital when her husband had suffered serious but not fatal injuries.[27]

Only Brennan J stressed the necessity of perception by the plaintiff of the distressing phenomenon.[28]

(d) Causal proximity

"Causal proximity" was another factor identified by Deane J as being within the

21 *Ibid* at 607-608.
22 *Ibid* at 612, citing *Benson v Lee* [1972] VR 879; *McLoughlin v O'Brian* [1983] 1 AC 410.
23 *Ibid* at 555.
24 *Ibid* at 570.
25 *Ibid* at 608-609.
26 *Ibid* at 613.
27 *Ibid* at 608-609.
28 *Ibid* at 567.

ambit of his concept of a proximity control. However, he did not elaborate on the meaning of "causal proximity" beyond describing it as "the closeness or directness of the relationship between the particular act or cause of action and the injury sustained."[29] He saw the lack of causal proximity as the explanation for why a duty of care should not arise in the case of a person suffering psychiatric injury from subsequent contact with the victim away from the scene of the accident and its aftermath, such as the nursing or care of a close relative during a period subsequent to immediate post accident treatment.[30]

By contrast, Brennan J saw the exclusion of a claim by a spouse who is worn down, and who suffers psychiatric injury, as a result of caring for a tortiously injured husband and wife as being grounded in an absence of "shock".[31]

(e) Shock-induced

Although "nervous shock" long ago fell out of medical usage, Brennan J still saw some value in the expression as a term of art to indicate the aetiology of compensable psychiatric illness.[32] He asserted that the notion of psychiatric illness induced by shock was a compound, rather than a simple, idea, its elements being on the one hand psychiatric illness and on the other shock which causes it. His Honour explained:

> I understand "shock" in this context to mean the sudden sensory perception – that is, by seeing, hearing or touching – of a person, thing or event, which is so distr essing that the perception of the phenomenon affronts or insults the plaintiff's mind and causes a recognizable psychiatric illness.[33]

The other judges were more equivocal on the issue: Gibbs CJ and Murphy and Dawson JJ only referred to the relevant damage as "nervous shock" without elaboration,[34] while Deane J referred to the differing medical opinion at the time regarding the need for a shock[35] but on the whole used more general language without definitely supporting a shock requirement.[36]

(f) Normal standard of susceptibility

Brennan J expressly stated that unless a plaintiff's extraordinary susceptibility to psychiatric illness induced by shock was known to the defendant, the existence of a duty of care owed to the plaintiff was to be determined upon the assumption that he

29 *Ibid* at 584-585.
30 *Ibid* at 606-607.
31 *Ibid* at 565; see further section (e) below.
32 *Ibid* at 560.
33 *Ibid* at 567.
34 *Ibid* at 552 per Gibbs CJ, at 558 per Murphy J, at 612 per Dawson J.
35 *Ibid* at 600-601.
36 See, eg, *ibid* at 587, 593, cf 592.

or she was of a normal standard of susceptibility.[37] However, of the other judges, Gibbs CJ assumed without deciding that psychiatric injury was not compensable unless an ordinary person of normal fortitude in the position of the plaintiff would have suffered some shock,[38] Murphy J expressed no definite view,[39] Deane J alluded to the fact that the courts below had found that any susceptibility on the part of the plaintiff was not such as to prevent a finding that she was "a person of normal fortitude"[40] and Dawson J merely referred to the trial judge's findings that there was no force in the submission that the plaintiff's mental injury could be explained by reference to an abnormal susceptibility on her part.[41]

3. The English position

By contrast with the Australian position, the factors required in addition to foreseeability now appear to have been settled in England. Like Australia, nervous shock cases have been considered by the highest court on only four occasions, although three of those cases, *McLoughlin v O'Brian*,[42] *Alcock v Chief Constable of South Yorkshire Police*[43] and *Page v Smith*[44] were decided in the 1980s and 1990s.

McLoughlin featured two leading judgments. Lord Wilberforce sought to trace the development of recovery for nervous shock and held that three elements were inherent in any claims: the class of persons whose claims should be recognised; the proximity of such persons to the accident; and the means by which the shock was caused. In relation to the first, the law had recognised the claims of only the closest of family ties, ie, of parent and child, or husband and wife. Regarding the second, closeness in time and space was required, but it extended as far as the accident's immediate aftermath, ie the time the victim remained in the state in which he or she was left by the accident. The third element required perception by the plaintiff by his or her own senses, there being "no case in which the law has compensated shock brought about by communication by a third party".[45]

This view may be contrasted with that of Lord Bridge. His Lordship held that the first hurdle that a plaintiff faced was to establish that he or she was suffering not merely grief, distress or any other normal emotion but rather a

37 *Ibid* at 568, approving of the statement by Lord Wright in *Bourhill v Young* [1943] AC 92 at 110.
38 *Ibid* at 556.
39 *Ibid* at 557.
40 *Ibid* at 609-610. Earlier, his Honour referred to the "qualities of sang-froid and fortitude (`the customary phlegm': *Bourhill v Young*) which some later members of the Bench have thought to be expected of ordinary members of the public": *ibid* at 593.
41 *Ibid* at 613. In the Full Court below, Wells J (with whom Mitchell ACJ and Cox J concurred) rejected normal fortitude had the status of a rule of law or precondition to recovery and was instead merely relevant to measuring whether the relevant risk was foreseeable: see (1983) 33 SASR 254 at 286-287.
42 [1983] 1 AC 410.
43 [1992] 1 AC 310.
44 [1996] AC 155.
45 [1983] 1 AC 410 at 421-422.

'positive' psychiatric illness. The plaintiff then must establish the necessary chain of causation between his or her psychiatric illness and the death or injury negligently caused by the defendant, which no doubt was to be determined by the judge on the basis of the evidence of psychiatrists. Finally, the psychiatric illness caused by the defendant's negligence had to be reasonably foreseeable. Factors such as the closeness of the relationship with the victim, proximity to the accident and means by which the shock was caused merely informed the reasonable foreseeability question.[46]

In *Alcock* there was general agreement with the requirements suggested by Lord Wilberforce that the plaintiff be physically proximate to the accident (which extends to the immediate aftermath of the accident) and that the plaintiff must perceive the accident or its aftermath with his or her own sight or hearing.[47] However, Lords Keith and Oliver thought that the class of plaintiff in the sense of the relationship between the plaintiff and victim should be left as a matter of reasonable foreseeability rather than being limited to particular relationships[48] whereas other judges were prepared to prescribe a relationship involving love and affection comparable to that of a normal spouse, parent or child of the victim.[49] Three judges nevertheless acknowledged the possible claim of an unrelated bystander witnessing a catastrophe.[50]

When such a claim by an unrelated bystander came before the Court of Appeal in *McFarlane v EE Caledonia Ltd*,[51] however, it was dismissed on the grounds of a failure to show close ties of love and affection between the plaintiff and the victim. This limitation later gained the imprimatur of the three Law Lords in the majority in *Page*.[52] Accordingly, in England it would seem that a plaintiff seeking to recover for psychiatric injury suffered as a result of death, injury or imperilment of another must establish three preconditions:

(1) a relationship with the victim involving close ties of love and affection such as that expected of a normal relationship between spouses or parents and children;
(2) close proximity in terms of time and space to the accident;
(3) perception of the accident or its aftermath by his or her sight or hearing.

46 *Ibid* at 443.
47 This latter requirement operating to exclude the claim of a person who witnessed the accident by simultaneous television coverage.
48 [1992] 1 AC 310 at 397-398 per Lord Keith, at 415-416 per Lord Oliver.
49 *Ibid* at 403 per Lord Ackner, at 422 per Lord Jauncey.
50 *Ibid* at 397 per Lord Keith, at 403 per Lord Ackner, at 415-416 per Lord Oliver.
51 [1994] 2 All ER 1.
52 Per Lord Lloyd, with whom Lords Ackner and Browne-Wilkinson concurred. Lord Ackner by his general agreement with Lord Lloyd's judgment may have therefore resiled from the wider view that he expressed in *Alcock*.

4. An American comparison

It is instructive to consider how United States courts have handled liability for psychological harm, or "emotional distress" as it is more broadly described, and to recognise the influence that it may have had on at least English law. The American response may be examined in terms of two approaches: impact/zone of danger rules and foreseeability.

(a) "Impact" and "Zone of Danger" rules

The initial move from a blanket denial of claims for emotional distress for many American courts was the imposition of a requirement that to recover for emotional distress the plaintiff must have suffered a contemporaneous physical impact. A necessary consequence was a denial of claims by unendangered bystanders. Such a requirement never found root in Anglo-Australian courts, having been dismissed out of hand at an early stage.[53] It also fell into disrepute in the United States as the rule's obvious shortcomings as a reliable screen for legitimate claims were exposed as extreme instances of its application arose.[54]

A requirement that the plaintiff be located in the zone of physical danger before there could be recovery for mental injury was adopted by many United States jurisdictions as a compromise between the artificiality of a physical impact requirement and what was thought to be an unbridled liability. This position was represented in the *Restatement (Second) of Torts*[55] and still prevails in many jurisdictions.[56] This rule conferred a right to recovery to a limited number of ultimately uninjured bystanders. Nevertheless, the approach attracted criticism, including the argument that as a test premised on a fear of physical injury it was no less artificial than the

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53 *Coultas v Victorian Railways Commissioners* (1886) 12 VLR 895 at 897 (Vic FC) (expressly not considered by the Privy Council on appeal (1888) 13 App Cas 222 at 226); *Dulieu v White & Sons* [1901] 2 KB 669 at 675 (per Kennedy J).

54 See, eg, *Christy Bros Circus v Turnage* 38 Ga App 581, 144 SE 680 (1928) (sufficient impact found where circus horse excreted onto victim's lap); *Porter v Delaware Lackawanna Western Railroad Co* 73 NJL 405, 63 A 860 (1906) (dust in the eye of plaintiff sufficient impact); *Morton v Stack* 122 Ohio St 115, 170 NE 869 (1930) (inhalation of smoke sufficient impact); *Freedman v Eastern Massachusetts Street Railway Co* 299 Mass 246, 12 NE 2d 739 (1938) (plaintiff's own wrenching of her shoulder sufficient impact); *Deutsch v Schein* 597 SW 2d 141 (1980) (Ky) (X-rays sufficient impact); *Hess v Philadelphia Transportation Co* 358 Pa 144, 56 A 2d 89 (1948) (electric shock sufficient impact); *Zelinsky v Chimics* 196 Pa Super 312, 175 A 2d 351 (1961) (trivial jolt or jar sufficient impact: "any degree of physical impact, however slight" was sufficient).

55 *Restatement (Second) of Torts* 1965 §436. The *Restatement* is a non-binding but, for some courts persuasive, collection of principles compiled by committees comprising prominent lawyers including judges and academics.

56 See, eg, *Bovsun v Sanperi* 61 NY 2d 219, 461 NE 2d 843 (1984)(NY); *Rickey v Chicago Transit Authority* 98 Ill 2d 546, 457 NE 2d 1 (1983)(Ill); *Keck v Jackson* 122 Ariz 114, 593 P 2d 668 (1978)(Ariz); *Guilmette v Alexander* 128 Vt 116, 259 A 2d 12 (1969)(Vt); *James v Harris* 729 P 2d 986 (1986)(Colo); *Garrett v City of New Berlin* 122 Wis 2d 223, 362 NW 2d 137 (1985)(Wis); *Wetham v Bismarck Hospital* 197 NW 2d 678 (1972)(ND).

discredited impact approach[57] and in a large number of jurisdictions has now been abandoned in favour of an approach to bystander recovery based on reasonable foreseeability. Apart from a brief flirtation with the rule by a number of English judges,[58] this again was a rule of limitation that did not find favour in Anglo-Australian law.

(b) Reasonable foreseeability and the Dillon legacy

(i) The Californian experience

The first case to permit recovery by an unendangered bystander, on the basis of an unbridled foreseeability test, was the majority decision of the Supreme Court of California in *Dillon v Legg*[59] in 1968. Since that decision over half of the United States jurisdictions have abandoned the impact and zone of danger requirements and allowed the claim of an unendangered bystander, although the states do not speak with a common voice as to the essential characteristics of a compensable claim.

A variety of elements have been referred to, including the plaintiff's relationship with the victim, the means by which the distress is caused, the plaintiff's proximity to the accident in space and or time, the degree of injury suffered by the plaintiff, and the degree of peril to the victim. The cases differ also as to the significance of such elements, that is whether they are simply factors to be taken into account together with other circumstances when determining whether the plaintiff's distress was reasonably foreseeable or whether they should be regarded as requirements, the absence of one or more of which operates to preclude the plaintiff from succeeding. Those jurisdictions adopting the former attitude might conveniently be referred to as applying a "liberal" test of foreseeability while those jurisdictions supporting the latter interpretation may be referred to as having adopted an "arbitrary" or "formulistic" test of foreseeability.

This divergence of opinion concerning the malleability of the foreseeability test bears some similarity to the application, or misapplication, of a foreseeability test defined in terms of possibility by courts in Australia and England. This manipulation, or even mutilation, of the test of reasonable foreseeability by unstated considerations

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57 See, eg, *Dillon v Legg* 69 Cal Rptr 72, 441 P 2d 912 at 915 (1968)(Cal); *Toms v McConnell* 45 Mich App 647, 207 NW 2d 140 at 144 (1973)(Mich).

58 See *Bourhill v Young* [1943] AC 92 at 98 per Lord Thankerton, at 102 per Lord Russell, at 104 Lord Macmillan; *King v Phillips* [1953] 1 QB 429 at 435-436 per Singleton LJ, at 443 per Hodson LJ.

59 441 P 2d 912 (1968). This case was later cited with approval by Lords Bridge and Scarman in *McLoughlin v O'Brian* [1983] 1 AC 410. Texas may have adopted the foreseeability approach as early as 1890 but the case law between that time and the acceptance of *Dillon v Legg* in *Landreth v Reed* 570 SW 2d 486 (1978) is confused: see, eg, *Hill v Kimball* 76 Tex 210, 13 SW 59 (1890) (foreseeability); *Gulf, Colorada & Santa Fe Railway v Hayter* 93 Tex 239, 54 SW 944 (1900) (foreseeability); *Houston Electric Co v Dorsett* 145 Tex 95, 194 SW 2d 546 (1946) (zone of danger); *Dave Snelling Lincoln-Mercury v Simon* 508 SW 2d 923 (1974) (recovery allowed under both zone of danger and foreseeability).

was once considered by Lord Denning in terms of the test being difficult to determine since it depended upon the person's powers of observation and the scope of his or her or imagination and one judge may credit him or her with more foreseeability than another.[60] It was one of the motivations for Deane J to remove such elements to be considered separately as the relevant control operating on foreseeability in a given class of case.[61]

The recent history of recovery for emotional distress in California alone makes an interesting study. In *Dillon* the defendant drove through an intersection and struck the plaintiff's infant daughter as she was lawfully crossing the street. The accident was witnessed by the plaintiff and her other infant daughter, and although it was not made entirely clear in the complaint, it seemed that the second daughter was closer to the collision than the plaintiff, who was not within the zone of physical danger. By a bare 4-3 majority the Supreme Court of California dismissed the defendant's motion for summary judgment based upon the fact that the plaintiff did not satisfy the zone of danger requirement that had been adopted by California only five years before in *Amaya v Home Ice, Fuel & Supply Co*.[62] As one judge later remarked,[63] there was a sense of inevitability concerning the decision in *Dillon*. When *Amaya* went before the Supreme Court, Tobriner J (who was to later write the majority judgment in *Dillon*) had to excuse himself because he had been newly promoted to the Supreme Court bench and had written the opinion in the court below. The defendant's appeal to the Supreme Court was upheld by a majority comprising three active judges and a retired judge sitting pro tem, with three active judges dissenting on the grounds propounded below by Tobriner J. It came of no surprise, therefore, when faced with a similar fact situation in *Dillon* the balance in the court shifted.

Tobriner J (with whom Peters, Mosk and Sullivan JJ concurred), observed that the case at hand exposed the "hopeless artificiality" of the zone of the danger rule, since it would allow recovery by the sister but deny it for the mother merely because of a happenstance that the sister was a few yards closer to the accident. Further, having held that impact was not necessary for recovery, the zone of danger concept must inevitably collapse because the only reason for the requirement of presence in that zone lay in the fact that one within it will fear the danger of impact.[64]

In Tobriner J's view, duty was to be determined by foreseeability, adjudicated only upon a case-by-case basis. *Guidelines* could, however, be suggested, namely (1) whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it; (2) whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance

60 *King v Phillips* [1953] 1 KB at 441, citing as examples the differing views as to the extent of reasonable foreseeability among those on the benches in *Hambrook v Stokes Bros* [1925] 1 KB 141 and *Chester v Waverley Corporation* (1939) 62 CLR 1 respectively.

61 *Jaensch v Coffey* (1984) 155 CLR 549 at 592-593.

62 59 Cal 2d 295, 29 Cal Rptr 33, 379 P 2d 513 (1963) (hereinafter referred to as *Amaya*).

63 See Mosk J in *Thing v La Chusa* 48 Cal 3d 644, 257 Cal Rptr 865, 771 P 2d 814, 836 (1989).

64 *Ibid* at 915.

of the accident, as contrasted with learning of the accident from others after its occurrence; and (3) whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.[65] All these elements, though, shaded into each other, and the fixing of obligation, intimately tied into the facts, depended upon each case. In light of these factors the court was to determine whether the accident and harm was *reasonably* foreseeable.[66] Problems should be solved by the application of the general rules of negligence that applied to other types of injury, not by the creation of exceptions to them. As Tobriner J eloquently remarked, "legal history shows the artificial islands of exceptions, created from the fear that the legal process will not work, easily do not withstand the waves of reality and, in time, descend into oblivion."[67]

The three judges in the minority, including Traynor CJ who was the author of the majority judgment in *Amaya*, cautioned that the *Dillon* majority's certainty would evaporate into arbitrariness and that inexplicable distinctions would appear. They drew attention to questions such as how close must the relationship be between the plaintiff and the victim; how near must the plaintiff have been to the scene of the accident and how soon must shock have been felt; indeed what was the magic in the plaintiff's being present at the scene at all.[68]

The minority's reservations were to prove prophetic. Confusion rather than clarity followed in the wake of *Dillon*. However flexible Tobriner J had intended his guidelines to be, lower courts in California began applying them strictly and mechanically as a means of guarding against what were perceived to be unwarranted extensions of liability. That led to arbitrary and inconsistent results, the antithesis of Tobriner J's original ideal.[69]

Indeed, the Supreme Court managed to confuse itself. In *Ochoa v Superior Court*

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65 *Ibid* at 920.

66 *Ibid* at 921.

67 *Ibid* at 925.

68 *Ibid* at 926.

69 In relation to sensory perception compare, eg, *Nazaroff v Superior Court* 80 Cal App 3d 553 at 566 (1978) (mother running to a pool and seeing her neighbour pulling her son out – r ecovery allowed); *Archibald v Bravin* 275 Cal App 2d 253 at 256 (1969) (mother quickly on the scene after her 13 year old son was injured by a gun powder explosion – r ecovery allowed) with, eg, *Hathaway v Superior Court* 112 Cal App 3d 728 at 736 (1980) (mother and father rushing outside of their house to where their 6 year old son had been electrocuted in the yard - recovery denied); *Parsons v Superior Court* 81 Cal App 3d 506 at 512 (1978) (parents coming upon the wreckage of their daughter's car "before the dust had settled" - recovery denied). Similarly, compare *Austin v Regents of University of California* 89 Cal App 3d 354 at 358 (father present in delivery room aware of death of baby by his own observation - recovery allowed) with *Justus v Atchison* 19 Cal 3d 564 at 585 (father present in delivery aware of death of baby because the doctor told him so - recovery denied). In relation to close relationship compare, lower courts read into Tobriner J's judgment a close blood or marriage relationship as a threshold requirement for recovery: see, eg, *Trapp v Schuyler Construction* 149 Cal App 3d 1140 at 1142 (1983) (first cousin and constant playmate - recovery denied); *Kately v Wilkinson* 148 Cal App 3d 576 at 584 (1983) (accident involving best friend who was a "filial member" of the family - recovery denied); *Drew v Drake* 110 Cal App 3d 555 at 557-558 (1980); (long term de facto spouses - recovery denied).

of Santa Clara County[70] the plaintiffs visited their 13 year old son, who was an inmate of Juvenile Hall, and saw his health deteriorating while he was left untreated. The boy eventually died of bilateral pneumonia and the plaintiffs alleged that as a consequence they suffered extreme mental and emotional distress. The majority judgment, written by Broussard J and concurred with by Mosk (who had been part of the majority in *Dillon*), Caus, Reynoso and Jirrard JJ, purported to follow *Dillon* and advocated a flexible approach to reasonable foreseeability, but in the course of doing so introduced an arbitrary requirement: "We are satisfied that when there is observation of the defendant's conduct and the child's injury and contemporaneous awareness the defendant's conduct or lack thereof is causing harm to the child, recovery is permitted."[71] For this reason, Bird CJ, while concurring in the result, chided the majority for, on the one hand, rejecting as arbitrary the requirement of sudden occurrence which had come to be read into the second guideline (or, in Anglo-Australian terms, a "shock" requirement), but at the same time introducing a new rule that recovery be permitted when there is "observation of the conduct and the injury and contemporaneous awareness", which was equally arbitrary.[72]

If the majority judgment in *Ochoa* is viewed as having introduced an arbitrary requirement into the *Dillon* formula more by accident than by design, the same cannot be said of the majority judgment of the Supreme Court in *Elden v Sheldon*.[73] In a judgment written by Mosk J (the only survivor from both *Dillon* and *Ochoa*), with which Lucas CJ, Panelli, Arguelles, Eagleson and Kaufman JJ agreed), the court found in *Dillon* a recognition that while foreseeability of risk was the chief element in determining whether the defendant owed a duty of care, policy considerations could dictate that a cause of action should not be sanctioned no matter how foreseeable the risk. Accordingly, the claim by a long term de facto spouse was rejected on the basis of policy reasons which favoured the marital relationship.[74] The sole dissenting voice was that of Broussard J, the author of the opinion in *Ochoa*, who thought that "one need barely scratch the surface" of the policies relied upon by the majority "to discover their hollowness".[75]

The *Dillon* ideal of an untrammelled foreseeability test as the sole criterion for liability was finally formally abandoned in California in *Thing v La Chusa*[76] by a majority of the Supreme Court which comprised four of the six judges in the majority in *Elden*.[77] Mindful of the opportunity to provide guidance in the field, the majority declared that while the court again found itself divided, they would "resolve some

70 703 P 2d 1 (1985).
71 *Ibid* at 8.
72 *Ibid* at 22-23. The seventh judge, Grodin J purported to agree with both the majority and Bird CJ.
73 758 P 2d 582 (1988).
74 *Ibid* at 586-588. These reasons included the State's interest in promoting the marital relationship, issues of privacy and proof of the stability and significance of the relationship including questions of sexual fidelity and emotional and economic ties.
75 *Ibid* at 590.
76 771 P 2d 814 (1989).
77 Viz Eagleson J (who wrote the judgment) and Lucas CJ, Panelli and Arguelles JJ.

of the uncertainty over the parameters of the negligent infliction of emotional distress action, uncertainty that has troubled lower courts, litigants, and, of course, insurers."[78]

Drawing a thread through the court's previous decisions upholding recovery for emotional distress, particularly the majority decision in *Ochoa*, the majority prescribed three preconditions for liability: (1) the plaintiff had to be closely related to the injured victim, which the majority limited to relatives residing in the same household or parents, siblings, children and grandparents of the victim "absent exceptional circumstances"; (2) the plaintiff had to be present at the scene of the injury-producing event at the time it occurred and be then aware that it was causing injury to the victim; and (3) as a result the plaintiff had to suffer serious emotional distress, that is a reaction beyond that which would be anticipated in a disinterested witness and which was not an abnormal response to the circumstances.[79] The majority opined that "there are clear judicial days on which a court can foresee forever ... but none on which that foreseeability alone provides a socially and judicially acceptable limit on recovery of damages for [emotional distress]."[80] They were of the view that abstract "foreseeability" did not warrant continued reliance on the assumption that the limits of liability would become any clearer if lower courts were permitted to continue approaching the issue on a "case-to-case" basis.[81] They balanced their avowedly arbitrary approach, which would deny recovery to some victims whose injury was very real, against imposing liability out of proportion to culpability and the importance to the administration of justice of clear guidelines under which litigants and trial courts could resolve disputes.[82]

The case featured two strong dissenting judgments. Broussard J, who had been the sole dissenting voice in *Elden*, declared that he was in favour of following the mandate of *Dillon*, maintaining that foreseeability and duty determined liability with a view toward a policy favouring reasonable limitations on liability and that there was no reason why these general rules of tort law should not apply to emotional distress cases. He considered that the majority's approach did not simply comprise

78 771 P 2d 814 (1989) at 815.

79 *Ibid* at 829-830.

80 *Ibid* at 830.

81 *Ibid* at 829.

82 *Ibid* at 827. A concurring judgment was delivered by Kaufman J (another member of the *Elden* majority) who interestingly suggested a wholesale reappraisal of the wisdom of permitting bystander recovery, and advocated a return to the pre-*Dillon* position of the zone of danger approach. In so doing, he criticised the majority approach, commenting that the majority "freely - one might say also cheerfully" acknowledged that its position was arbitrary but nowhere considered the cost of such institutionalized caprice not only for the individuals involved, but to the integrity of the judiciary as a whole. On the other hand, he thought that two decades of adjudication under the inexact guidelines created by *Dillon* had created a body of case law marked by even greater confusion and inconsistency of result: *ibid* at 831. Instead, Kaufman J thought that the universality of emotional distress rendered it inherently unsuitable for legal protection and accordingly there should be no bystander recovery at all; to succeed the plaintiff must be in the zone of danger and suffer emotional distress as the result of fears for his or her own safety: *ibid* at 835-836.

a "bright line" rule that rationally limited liability but was arbitrary and would lead to unjust results. The requirements were exactly the "mechanical rules of thumb" that *Dillon* had explicitly admonished courts not to create.[83] The second dissenting judgment was delivered by Mosk J, who since joining with Tobriner J in his seminal judgment in *Dillon* had trod an intriguing track that had taken him to penning the majority judgment in *Molien v Kaiser Foundation Hospitals*,[84] which was a decision favouring a foreseeability test adjudicated on a case-by-case basis; concurring in the majority judgment in *Ochoa*, which intentionally or unintentionally introduced an arbitrary requirement in relation to observing and being aware of the injury; and being the author of the majority judgment in *Elden*, which had arbitrarily foreclosed the claim of a defacto spouse for "policy reasons". Now, his Honour expressed agreement with the views of Broussard J and berated the majority for reciting "a monotonous inventory of cases with which they find fault." He added that "for the past three decades apparently all the courts in tort cases have been out of step except for the current majority." He concluded in relation to the majority's "wholesale criticism of past opinions of this court and of the Courts of Appeal, some prevailing for three decades" that "such callous disregard for the doctrine of stare decisis does not constructively serve the judicial process, nor does it contribute to the guidance of the bench and bar."[85]

In the result, California now pursues a formulistic approach which firstly prescribes a defined class of relationship with the victim, more precisely defined than the English approach. The second requirement of being present at the scene of the injury producing event and then being aware that it is causing injury is arguably a more relaxed requirement than the shock element contemplated by the *Dillon* majority. The *Thing* majority drew on the majority decision in *Ochoa*, which either intentionally or unintentionally introduced this new element, and which itself involved emotional distress inflicted as a result of the combined effect of the mother witnessing the deteriorating condition of her son over a period of time rather than a single distress-producing incident. The final element of serious emotional distress would appear to include the notion of normal susceptibility, which has been recognised by judges in both Australia and England.

(ii) Other States

The Californian Supreme Court decision in *Dillon* spawned recognition of unendangered bystander claims in other state jurisdictions. There is, however, no universal response to the problem: the divisions that arose in the Californian experience were mirrored both within and across jurisdictions.

Some states merely cited *Dillon* and the factors it discussed without elaboration

83 *Ibid* at 839-841.

84 167 Cal Rptr 831, 616 P 2d 813 (1980), a judgment with which Bird CJ and Tobriner J amongst others concurred.

85 *Ibid* at 839.

in upholding claims for emotional distress.[86] Prima facie, therefore, those states would also support the case-by-case foreseeability test inherent in the *Dillon* judgment.

Other states by comparison are avowedly liberal in their approach. In *Paugh v Hanks*[87] the Supreme Court of Ohio by a 6-1 majority adopted the three guidelines set out in *Dillon* as factors to be taken into account by courts assessing the degree of foreseeability of emotional injury. The majority rejected the use of these elements as exclusionary tools: "These factors are by no means exclusive, and the mere failure of a plaintiff to satisfy all of them should not preclude an aggrieved party from recovery. Thus, the term `factors' should be underscored to alleviate any misconception that any factors are requirements." Instead, the purpose of these factors was to assist and guide the determination of whether the serious emotional injury was reasonably foreseeable to the defendant at the time the accident took place.[88]

In fact, the majority went further than the court in *Dillon* in this area since they were prepared to recognise a claim of emotional distress that was "serious", without accompanying physical harm.[89] The majority recognised that freedom from the negligent infliction of serious emotional distress was entitled to independent legal protection, and asserted that the determination of both seriousness and reasonable foreseeability had to be accomplished on a case-by-case basis, there being no fixed or immutable rule capable of resolving all the cases of this kind.[90]

The same view was expressed by the Supreme Judicial Court of Maine in *Culbert v Sampson's Supermarkets Inc*.[91] After adopting "serious mental distress" as the threshold for compensable damage and the "three-factor test advanced in *Dillon v Legg* for determining whether an injury was reasonably foreseeable", the court warned that "it should be remembered that since the imposition of liability is ultimately a factual determination which must be made on a case by case basis, the *Dillon* test should not be applied formulistically to bar arguably valid claims."[92] Similar

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86 See, eg, *D'Amicol v Alverez Shipping Co Inc* 326 A 2d 129 (1973)(Conn); *Entex Inc v McGuire* 414 So 2d 437 at 444 (1982)(Miss).

87 451 NE 2d 759 (1983) (plaintiff suffering emotional distress, including an anxiety neurosis with depressive features, as a result of cars on three separate occasions leaving a nearby highway exit ramp and crashing into her house or yard where her children normally played).

88 *Ibid* at 766. In the later case of *Burris v Grange Mutual Companies* 545 NE 2d 83 (1989) a four judge majority purported to apply the approach in *Paugh* but then seemed to proceeded to manipulate the foreseeability test by excluding the claim of a plaintiff who had been informed of the death of another rather than being at the scene of the accident: *ibid* at 91-92; cf the two judge minority who favoured an untrammelled foreseeability test: *ibid* at 94.

89 California took this step 12 years after *Dillon* in *Molien v Kaiser Foundation Hospitals* 616 P 2d 813 (1980), and this was reflected in the criteria prescribed by the majority in *Thing v La Chusa* 771 P 2d 814 (1989).

90 451 NE 2d 759 (1983) at 767.

91 444 A 2d 433 (1982) (plaintiff alleging she suffered anxiety and emotional upset as a result of seeing her son commence to choke and gag on foreign matter in the baby food that she was spoon-feeding him).

92 *Ibid* at 437.

statements have been made by the Supreme Courts of North Carolina[93] and Alaska.[94]

Other states have professed to support the case-by-case "guidelines" approach, but in more equivocal terms.[95]

In contrast, a number of jurisdictions, like California following the judgment in *Thing*, have had overt recourse to policy considerations and as a result are admittedly formulistic in their approach to bystander recovery. In the Louisiana case of *Lejeune v Rayne Branch Hospital*,[96] the Supreme Court noted that the approach to determining whether a duty of care was owed in accordance with the Louisiana Civil Code involved an assessment of policy considerations, including social, moral and economic elements.[97] Notwithstanding the additional complication of that state's Civil Code, the court's comments in relation to the fixing of limits to liability are of general relevance:

> Administrative boundaries or guidelines imposed jurisprudentially at the outset will facilitate application by the lower courts, ensure that there is no open-ended exposure of tortfeasors, and ensure as well that a policy of limited exposure to serious mental pain and anguish damages sustained by a limited class of claimants will be permitted.[98]

The court prescribed four limits to liability, involving the plaintiff's proximity to the scene (view the accident or injury-causing event, or come upon the accident scene soon thereafter and before substantial changes occur in the victim's condition); the peril to the victim (such harm that it can reasonably be expected that one in the plaintiff's position would suffer serious mental anguish from the experience); degree of injury to the plaintiff ("serious" distress that is both severe and debilitating) and the plaintiff's relationship with the victim (either such rapport between the victim and the plaintiff as to make the causal connection between the defendant's conduct and the shock understandable, or a more closely defined group such as spouses, children, parents and siblings, without finally deciding).[99]

A similar formulistic approach was adopted by the Supreme Court of Florida in

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93 *Johnson v Ruark Obstetrics and Gynaecology Associates* 395 SE 2d 85 at 98 (1990).

94 *Tommy's Elbow Room Inc v Kavorkian* 727 P 2d 1038 at 1043 (1986); *Croft v Wicker* 737 P 2d 789 at 792 (1987).

95 See, eg, *Barnhill v Davis* 300 NW 2d 104 at 106-108 (1981)(Iowa); *Kinard v Augusta Sash & Door* 336 SE 2d 465 at 467 (1985)(SC); *James v Lieb* 221 Neb 47, 735 NW 2d 109 at 114-115 (1985); *State v Eaton* 710 P 2d 1370 at 1376, 1378 (1985)(Nev).

96 556 So 2d 559 (1990) (plaintiff arriving at hospital where her comatose husband was a patient to discover, by what she saw and was told, that he had shortly before been bitten by a rat on his face and leg).

97 Viz, floodgates arguments, the possibility of fraud, problems of proof, exposure to an endless number of claims, and economic burdens on industry.

98 556 So 2d 559 (1990) at 569.

99 *Ibid* at 570. The court decided to leave "for another day" a final decision concerning delineation of the relevant relationship. This decision was to be made for the court by the Louisiana legislature which amended the Civil Code soon after *Lejuene*. Article 2315.6 confirmed the court's decision regarding the imposition of limitations upon the plaintiff's proximity to the scene, peril to victim and degree of injury suffered by the plaintiff, even adopted the terms used by the court. In relation

Champion v Gray,[100] where the court replaced the impact requirement with a rule that damages should only be granted for emotional distress when it led to a significant discernible physical injury, the plaintiff had an especially close emotional attachment to the victim and the plaintiff was directly involved in the event causing the injury, seeing it or hearing it or arriving at the scene while the victim was still there.[101] The court declared: "The pure foreseeability test, espoused by some, might lead to claims that we are unwilling to embrace in emotional trauma cases ... We recognize that any limitation is somewhat arbitrary, but in our view is necessary to curb the potential of fraudulent claims, and to place some boundaries on the indefinable and unmeasurable psychic claims."[102]

Some other states, while not as explicit, have been no less formulistic or arbitrary in their approaches by the language used.[103] There are also cases that use language similar to that of *Dillon* but which appear on close analysis to favour an arbitrary prescription of necessary requirements.[104] Two cases expressed the view that in practice it did not matter whether the elements identified in *Dillon* were regarded as policy considerations imposing limitations on the scope of reasonable foreseeability or as factors bearing on the determination of reasonable foreseeability itself.[105] However, it is evident from subsequent cases that those states now treat the elements as being exclusionary bars to recovery.[106]

It seems that some States have, like California, migrated from an avowedly liberal attitude to one which is, to some extent, formulistic. Hawaii was the second state after California to recognise the claim of an unendangered bystander, first in relation to property damage[107] and shortly after in relation to an injury to another person.[108] The court in these cases, in the former by a 3-2 majority and unanimously in the latter and both in judgments authored by Richardson CJ, held that the interest

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to the class of plaintiff, the article provides for recovery by (1) the spouse, child or children, and grandchild or grandchildren of the injured person, or either the spouse, the child or children, or grandchild or grandchildren of the injured person; (2) the father and mother of the injured person, or either of them; (3) the brothers and sisters of the injured person or any of them; and (4) the grandfather and grandmother of the injured person, or either of them.

100 478 So 2d 17 (1985).

101 *Ibid* at 20.

102 *Ibid* at 20. Competing policy considerations were also considered by the Supreme Court of Wyoming in *Gates v Richardson* 719 P 2d 193 at 195-198 (1986) and the Supreme Court of Rhode Island in *D'Ambra v United States of America* 338 A 2d 524 at 528-531 (1975) in the course of the determination of the preconditions that must be satisfied for recovery.

103 See *Portee v Jaffee* 417 A 2d 521 at 526-528 (1980)(NJ); *Ramirez v Armstrong* 100 NM 538, 673 P 2d 822 at 826 (1983).

104 See *Landreth v Reed* 570 SW 2d 486 at 489 (1978)(Tex); *Versland v Caron Transport* 671 P 2d 583 at 588 (1983)(Mont).

105 *Dziokonski v Babineau* 380 NE 2d 1295 at 1302 (1978)(Mass); *Corso v Merrill* 406 A 2d 300 at 305 (1979)(NH).

106 See, eg, *Ferriter v Daniel O'Connell's Sons Inc* 413 NE 2d 690 at 697 (1980)(Mass); *Wilder v City of Keene* 557 A 2d 636 at 639 (1989)(NH).

107 *Rodrigues v State of Hawaii* 472 P 2d 509 (1970).

108 *Leong v Takasaki* 520 P 2d 758 (1974).

in freedom from negligent infliction of serious mental distress was entitled to independent legal protection. Liability fell to be determined by the application of general tort principles including foreseeability of serious mental distress, that is where a reasonable person, normally constituted, would be unable to adequately cope with the mental distress engendered by the circumstances of the case.[109] A year later, in a case involving a plaintiff who was located in California and conduct causing the death of the plaintiff's daughter and granddaughter which occurred in Hawaii, a four judge majority of the Supreme Court, in a judgment against which Richardson CJ strongly dissented, imposed an arbitrary requirement that the plaintiff must be located within a reasonable distance from the scene of the accident.[110] Subsequently, however, the Supreme Court, led by Justice (later Chief Justice) Lum attempted to restore an approach to liability that depended upon the application of general tort principles including an untrammelled foreseeability test, while at the same time seeking to confine the operation of the arbitrary geographical limitation.[111]

In Pennsylvania, Tobriner J's dicta in *Dillon* was cited by the Supreme Court in *Sinn v Burd*[112] with the view being expressed that "we are confident that the application of the traditional tort concept of foreseeability will reasonably circumscribe the tortfeasor's liability in such cases."[113] Seven years later, in a judgment written by the same judge, the now Chief Justice Nix, a majority of the court was of the view that the passage of time and the span of distance mandated a cut-off point for liability.[114]

Finally, in *Hunsley v Giard*[115] the Supreme Court of Washington unanimously held that foreseeability provided the boundary of the defendant's liability. The court declined to draw an absolute boundary around the class of persons whose peril may stimulate the mental distress, it being a jury question bearing on the reasonable reaction to the event. Subsequently, in *Gain v Carroll Mill Company Inc*,[116] a six judge majority of the Supreme Court concluded:

> Unless a reasonable limit on the scope of defendant's is imposed, defendants would be subject to potentially unlimited liability to virtually anyone who suffers mental distress caused by the despair anyone suffers upon hearing of the death or injury of a loved one. We conclude that mental suffering by a relative who is not present at the scene of the

109 *Rodrigues v State of Hawaii* 472 P 2d at 520-521; *Leong v Takasaki* 520 P 2d at 765-766.

110 *Kelley v Kokua Sales and Supply Ltd* 532 P 2d 673 at 676 (cf Richardson CJ at 678).

111 See *Campbell v Animal Quarantine Station* 632 P 2d 1066 at 1068-1069 (a unanimous judgment with which Richardson CJ among others agreed); *Masaki v General Motors Corporation* 780 P 2d 566 at 575-576 (1989).

112 404 A 2d 672 (1979).

113 *Ibid* at 684; see also at 686.

114 See *Mazzagatti v Everingham* 516 A 2d 672 at 676 (1986); and *Brooks v Decker* 516 A 2d 1380 at 1382 (1986) handed down 15 days later.

115 87 Wash 2d 424, 553 P 2d 1096 (1976).

116 787 P 2d 553 (1990) (father and brother of a state trooper killed in a motor accident seeing film on the evening news of the accident and able to confirm that their son and brother was the victim when they saw his vehicle and identified the licence plate number).

injury-causing event is unforeseeable *as a matter of law*. We reach this conclusion after balancing the interest of the injured party to compensation against the view that a negligent act should have some end to its consequences.[117]

This decision was criticised by the three judge minority, which included the author of the *Hunsley* judgment, Brachtenbach J, and one of the concurring judges from that case, Utter J, on the basis that the majority had sought to impose restrictions which were not permissible under the general language adopted in *Hunsley*. Treating foreseeability as a matter of law was itself uncertain, and if it were properly treated as a matter of fact, it was simply wrong to suppose that no reasonable person could anticipate that a father and a brother would suffer emotional distress upon learning of the death of a victim. Putting aside concerns about unlimited liability without artificial boundary, their Honours preferred to continue with a faith in trial courts and juries to dispense appropriate justice, rather than creating an unjust artificial rule based on some unsupported fear.[118]

4. Australian trends

In the period since *Jaensch* a number of trends have emerged in the decisions of lower Australian courts, although in some cases there have been strong expressions of opposing views.

While it could not be said to have attracted universal support in *Jaensch*, Brennan J's view regarding the necessity for shock, in the sense of the sudden sensory perception of a distressing phenomenon, has been treated by subsequent judges as representing the law in Australia.[119] Similarly, while again there was equivocation among the other judges in *Jaensch* in relation to a requirement that the plaintiff must be of a normal standard of susceptibility, Brennan J's argument for such a requirement has been supported by some later judges as stating the law.[120] This,

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117 *Ibid* at 557.

118 *Ibid* at 558-559. Michigan also appears to have moved from an initially liberal position (*Toms v McConnell* 45 Mich App 647, 207 NW 2d 140 at 144-145 (1973)) to a formulistic one (*Gustafson v Faris* 67 Mich App 363, 241 NW 2d 208 at 211 (1976); *Wargelin v Sisters of Mercy Health Corporations* 149 Mich App 75, 385 NW 2d 732 at 735 (1986)). In Connecticut, the Supreme Court in *Maloney v Conroy* 545 A 2d 1059 at 1063-1064 (1988) held that "whatever may be the situation in other contexts" no "bystander claim" would be allowed in the case of medical malpractice, for the policy reason of the detrimental impact on medical treatment including the curtailment of the visitation of patients which would otherwise follow. The Supreme Court made no reference to the apparently liberal approach adopted in *D'Amicol v Alverez Shipping Co Inc* 326 A 2d 129 (1973)(Conn).

119 See, eg, *Campbelltown City Council v Mackay* (1988) 15 NSWLR 501 at 503-504, 519; *Anderson v Smith* (1990) 101 FLR 34 at 50; *Delaney v FS Evans & Sons Pty Ltd* (1985) 124 LSJS 170 at 179; *Spence v Percy* [1992] 2 Qd R 299 at 313, 319; *Commonwealth v Dinnison* (1995) 56 FCR 389 at 402; *Reeve v Brisbane City Council* [1995] 2 Qd R 661 at 675-676.

120 See, eg, *Stergiou v Stergiou* (1987) 4 MVR 435 at 436 (ACT Sup Ct); *Miller v Royal Derwent Hospital Board of Management* (1992) Aust Torts Reports 81-175 at 61,499 (Tas Sup Ct); *Wodrow v The Commonwealth* (1993) Aust Torts Reports 81-260 at 62,727-62,728 (Fed Ct).

however, has not been a universally held view.[121]

In *Jaensch*, Deane J himself suggested that physical proximity was a more arbitrary, and less attuned both to legal principle and considerations of public policy, than causal proximity.[122] Nevertheless, some courts had difficulty understanding exactly what was meant by the term "causal proximity" and how it differed from "proximate cause" or causation in fact.[123] Moreover, of two appeal court decisions dealing with claims of the type Deane J suggested were explained by an absence of causal proximity, namely psychiatric injury resulting from long term care of a tortiously injured loved one, one followed Deane J's dictum in denying recovery,[124] but in the other, only one judge followed this course.[125] The other two judges denied liability on the basis of lack of physical proximity.[126]

In *Coates v Government Insurance Office of New South Wales*[127] Kirby P noted that there was no binding Australian authority prescribing limitation of liability by drawing lines that were neither rational nor manageable such as presence at the event or its aftermath, "whatever that may mean", relationship between the plaintiff and the victim, and direct perception of the event.[128] The artificiality of the cut-off is demonstrated by the range of meanings assigned to it by different courts: "There will always be conflict as to what the `immediate aftermath' was and how far it extended in time and medium".[129] There is also Australian authority extending recovery beyond the marital or parent-child paradigm to such relationships as siblings,[130] girlfriend-boyfriend[131] and co-workers.[132] Even Brennan J's guideline of "special significance" is capable of being interpreted more widely than the limitation of relationships adopted in England, for example.

There is a clear line of Australian judgments demonstrating latitude in relation to the plaintiff's means of perceiving the accident. To the extent that Lord Wilberforce in *McLoughlin* remarked that there was "no case in which the law has compensated

121 *Chapman v Lear* (unreported, Qld SC, GN Williams J, 8 April 1988, at 9); *Petrie v Dowling* [1992] 1 Qd R 284 at 287 (Qld SC). In *Chiaverini v Hockey* (1993) Aust Torts Reports 81-223 at 62,257-62,259 the New South Wales Court of Appeal omitted any reference to a requirement of normal sensitivity in its list of "principles to be derived from the common law cases".

122 (1984) 155 CLR 549 at 607.

123 This is well demonstrated in the judgments of the judges of the Court of Appeal of British Columbia in *Beecham v Hughes* (1988) 52 DLR (4th) 625, esp at 662-664 per Taggart JA, with whom Carrothers JA agreed, at 666 per Lambert JA; *Rhodes v Canadian National Railway* (1991) 75 DLR (4th) 248, esp at 264-265 per Wallace JA, with whom Macfarlane JA agreed, at 295 per Taylor JA, with whom Wood JA agreed. For a detailed analysis of these judgments, see the author's article, "Proximity as a Determinant of Duty: the Nervous Shock Litmus Test" (1995) 21 Mon ULR 159.

124 *Andrewartha v Andrewartha (No 1)* (1987) 44 SASR 1.

125 *Spence v Percy* [1992] 2 Qd R 299 at 310 (per Shepherdson J).

126 Ie, Williams and de Jersey JJ.

127 (1996) 15 NSWLR 1.

128 *Ibid* at 11.

129 *Ibid*.

130 *Quayle v State of New South Wales* (1995) Aust Torts Reports 81-367.

131 *Kohn v State Government Insurance Commission* (1976) 15 SASR 255.

132 *Mount Isa Mines Ltd v Pusey* (1971) 125 CLR 303.

shock brought about by communication by a third party"[133] he was in error, for there was even at that time a body of Australian authority to the contrary.[134] Later Australian cases have strengthened this trend.[135] In *Coates v Government Insurance Office of New South Wales*[136] Kirby P saw a limitation to direct perception as being tied to 19th century notions of the damage being compensated and "hopelessly out of contact with the modern world of telecommunications." Instead, the significant issue was the directness of the plaintiff's emotional involvement in an accident or emotional involvement.[137] Similarly, in *Reeve v Brisbane City Council*[138] Lee J held that a close relationship could be strong enough to outweigh any absence of proximity or perception.[139]

5. An Australian response to recovery for psychiatric injury?

Following *Hill v Van Erp* the focus in a given category is upon the identification of the factors (if any) in addition to foreseeability that are required for the existence of a duty of care, without the need to force any such analysis into the fiction of proximity in the sense of a unifying theme of negligence cases. This identification of elements includes an assessment of competing policy considerations.

In the case of psychiatric injury, it is apparent from the cases in not only this country but overseas that constraints on recovery have been motivated by factors such as fears regarding the genuineness of claims; fears of opening the floodgates to a flood of litigation, thereby clogging the courts and exposing the defendant to a liability out of proportion to fault; and a need for certainty in the law. The first of these concerns is a product of 19th century suspicion of mental injury: in more enlightened times there ought to be greater faith in psychiatric medicine and those who practice it when it comes to proof of legitimate claims and disclosure of bogus claims.

The second concern should also be capable of being allayed by an appropriate definition of the type of injury regarded as compensable. The strict controls on

133 [1983] 1 AC 410 at 421-422.

134 See *Brown v Mt Barker Soldiers' Hospital Incorporate* [1934] SASR 128; *Andrews v Williams* [1967] VR 831; *Gannon v Gray* [1973] Qd R 411; *Kohn v State Government Insurance Commission* (1976) 15 SASR 255; *Tsanaktsidis v Oulianoff* (1980) 24 SASR 500. His Lordship's comments cannot be interpreted as only referring to English authority since he relied on Australian and Canadian authorities in addition to English cases in supporting the other limits he proposed. In any event, even if he were only referring to English authority he overlooked *Schneider v Eisovitch* [1960] 2 QB 430.

135 *Petrie v Dowling* [1992] 1 Qd R 284; *Coates v Government Insurance Office of New South Wales* (1996) 15 NSWLR 1 at 11 (per Kirby P); *Reeve v Brisbane City Council* [1995] 2 Qd R 661; *Quayle v State of New South Wales* (1995) Aust Torts Reports 81-367; *Pham v Lawson* (unreported, SA SC(FC), 25 March 1997, per Lander and Bollen JJ).

136 (1996) 15 NSWLR 1.

137 *Ibid* at 11.

138 [1995] 2 Qd R 661.

139 *Ibid* at 674.

recovery regarded by the California Supreme Court in *Thing* as necessary for certainty were in a climate in which the damage that attracted compensation, "emotional distress" included not only long-lasting, pathological effects but also the immediate and instinctive emotional reaction to a traumatic event.[140] In Australia, it is clear than only pathological reactions are compensable.[141] While emotional reactions are ubiquitous, pathological reactions, in which an individual is unable to recover psychiatric homeostatic equilibrium, are comparatively rare.[142]

The quest for certainty is understandable, but ought to be balanced against the capricious distinction between otherwise equally meritorious claims that is likely to follow from arbitrary barriers. The answer, in an area where the damage and circumstances are less certain than, for example, commercial dealings, may be to seek only such degree of certainty as is practicable.[143] This may involve something less than the "bright lines" of liability favoured by some American courts including the California Supreme Court.

There appears to be continuing support in Australia for the imposition of a "shock" requirement, despite its obvious origins in 19th century medical theories of aetiology of the relevant damage. There is no such consensus on a requirement that the plaintiff be of a normal standard of susceptibility. In the absence of a medically recognised definition of the attributes of a "normal person", which means any decision in this regard can only be a purely intuitive one by the judge concerned, the lack of universal endorsement of the limit is not only understandable but also justified.[144]

In contrast to the restrictions on recovery that have now been adopted by courts in England and those American jurisdictions pursuing a formulistic approach to liability, the trend among Australian courts is towards focusing instead on the emotional involvement of the plaintiff in the accident or imperilment of the victim. Absence from the scene, lack of direct perception or remoteness or absence of relationship with the victim alone will not be fatal to a plaintiff's claim. As Lander J of the Full Court of South Australia recently held, with the concurrence of Bollen J:

> The existence of the duty of care becomes less likely as all of the matters which are important for its existence become more remote. So that if the relative was not at the scene or does not attend at the scene then there is less likelihood of the determination of a duty of care as that person has less direct involvement in space and time and therefore less direct perception of the injuries suffered by the person for whom that relative cares.

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140 See the definition of "emotional distress" by the Supreme Court of Hawaii in *Leong v Takasaki* 520 P 2d 758 at 766-767 (1974).

141 *Mount Isa Mines Ltd v Pusey* (1971) 125 CLR 383 at 394.

142 See further the discussion in the author's article, "Identifying the Compensable Damage in `Nervous Shock' Cases" (1996) 5 TLJ 67.

143 *McLoughlin v O'Brian* [1983] 1 AC 410 at 442 (per Lord Bridge).

144 See further the discussion in the author's article "Susceptibilities to Nervous Shock: Dispensing with the Mythical `Normal Person'" (1997) 1 *Macarthur Law Review* 107.

After stating that it was a matter of degree, his Honour concluded:

> It is a matter of common sense when the stage is reached that a court must say there can be no duty of care in a given case because the involvement of the person who suffered the nervous shock is not sufficiently close in terms of relationship, involvement or perception.[145]

In the succinct words of another judge, "the strength of one aspect ... may supply deficiencies created by the absence or weakness of another."[146]

This "compendium" approach[147] to the relevant factors is more akin to Tobriner J's ideal in *Dillon*. When combined with a definition of the damage regarded as worthy of compensation which itself serves as a limitation on the number of potential claims and a safeguard against opening the floodgates, it embraces a flexibility that enables courts to avoid unjust and capricious denial of recovery by otherwise meritorious claimants who suffer the misfortune of falling foul of arbitrary "bright line" barriers.

145 *Pham v Lawson* (unreported, SA SC(FC), 25 March 1997, at para 104-105).

146 See Lee J in *Reeve v Brisbane City Council* [1995] 2 Qd R 661 at 674.

147 Cf the holistic approach taken by Lambert JA in the British Columbian case *Beecham v Hughes* (1988) 52 DLR (4th) 625, particularly his statement at 666 that: "I would not put the entire emphasis on `causal proximity', to the exclusion of `temporal proximity', `geographical proximity', or `emotional proximity'. I would try to balance them all. A close but foreseeable emotional bond, as between a parent and child, may compensate, in the determination of the composite answer on liability, for a more remote causal proximity, as where the parent is not present when the child is injured."