Before the High Court

When the Telephone Rings: Restating Negligence Liability for Psychiatric Illness

Tame v Morgan and *Annetts v Australian Stations Pty Ltd*

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> The suggested rule is ... hopelessly out of contact with the modern world of telecommunications. If any judge has doubts about this, he or she should wander through the city streets and see the large number of persons linked by mobile telephones to the world about them. Inevitably such telephones may bring, on occasion, shocking news, as immediate to the senses of the recipient as actual sight and sound of the catastrophe would be. This is the reality of the world in which the law of nervous shock must now operate.[1]

In December 2001, the High Court of Australia will hear two cases which raise many fundamental issues relating to liability in negligence for causing psychiatric illness — or nervous shock, for the traditionalists. This will be the first opportunity the Court has had to review this area of law since its ground-breaking decision in *Jaensch v Coffey*[2] seventeen years ago. The two cases — *Tame v Morgan*[3] and *Annetts v Australian Stations Pty Ltd*[4] — involve very different fact situations, but the link between them is that the psychiatric injury for which the plaintiffs are claiming damages was caused, so it is alleged, by news communicated by telephone. In days gone by, when most people lived in small communities, relatives were usually close at hand and came swiftly to the accident scene: but as Kirby P so graphically demonstrates, the present reality is often very different.

Annetts, in point of time the second of the two cases to reach the High Court, provides the perfect illustration. Sixteen-year-old James Annetts had left his

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1 *Coates v Government Insurance Office of New South Wales* (1995) 36 NSWLR 1 at 11 (Kirby P) (hereinafter *Coates*).

2 (1984) 155 CLR 549.

3 Sub nom *Morgan v Tame* (2000) 49 NSWLR 21 (CA), on appeal from *Tame v Morgan* (1998) Aust Torts Reports 65,199 (Garling DCJ) (hereinafter *Tame*). References are to the Court of Appeal report unless the contrary is stated. The High Court granted special leave on 6 April 2001: *Tame v Morgan* S120/2000 (6 April 2001).

4 (2000) 23 WAR 35, on appeal from [2000] WASC 104 (Heenan J, 28 April 2000) (hereinafter *Annetts*). References are to the Full Court report unless the contrary is stated. The High Court heard the application for special leave on 1 June 2001, and referred it to the Full Bench to be heard at the same time as *Tame v Morgan*: *Annetts v Australian Stations Pty Ltd* P97/2000 (1 June 2001).

family home in Binya in New South Wales to go and work as a jackaroo on the defendant's cattle station in Flora Valley, about 40 kilometres south-east of Halls Creek, in the Kimberley District in the far north of Western Australia. Before he left home, his mother telephoned the wife of the defendant's station manager for information about the conditions under which he would be living, and was told that he would be working under constant supervision, that he would be sharing a room with other men, and that his meals would be cooked for him and he would be well looked after. But after only seven weeks, James was sent to work alone as a caretaker at a remote location 100 kilometres away from Flora Valley. After seven weeks of this, it appears that he could stand it no more. On 3 December 1986, his employers learnt that he and Simon Amos, another teenager employed by them on another station, were missing. Three days later, a police officer in Griffith, New South Wales, telephoned James' parents and told them the news. Mr Annetts collapsed and Mrs Annetts had to take over the telephone conversation. In January 1987 James' parents visited Halls Creek and were shown some of their son's belongings, including a hat covered in blood. In the months that followed, they telephoned police at Halls Creek on a number of occasions, and made several further visits there in an effort to obtain more information. On 26 April 1987, Mr Annetts received another fateful telephone call. The vehicle driven by James had been found bogged in the desert. Later the same day, he was told that two sets of remains had been discovered. He flew back to Halls Creek and identified James' skeleton from a photograph. James had died on or about 4 December 1986 from dehydration, exhaustion and hypothermia, but his parents did not learn of this until nearly five months later.

Annetts is thus the classic secondary victim case — one where the plaintiff's psychiatric injury stems from witnessing, or in this case hearing about, the death or injury of another. On the assumption that some facts pleaded by the plaintiffs were true and the defendant had admitted others, the court was asked to determine whether the defendant owed the plaintiffs a duty of care. Difficulties with the pleaded facts loom large in the Full Court judgments of Malcolm CJ and Ipp J: in particular, they found it impossible to decide whether the psychiatric injury was alleged to have been caused by the initial news of James' disappearance, or the news of his death five months later coupled with all that had happened in the intervening period, and so decided to examine both hypotheses. At first instance Heenan J found that psychiatric injury was foreseeable but the requirements of proximity were not satisfied. On appeal the Full Court was not prepared to go as far. In its view, though grief and distress were foreseeable in the circumstances (whichever hypothesis was adopted), psychiatric injury was not.

Tame is in many ways very different — in particular, despite some puzzling statements made in argument during the special leave hearing, it is clearly a primary victim case — but one factor that provides a link with *Annetts* is that the psychotic depressive illness suffered by Mrs Tame allegedly stemmed from a telephone call informing her that a police officer had recorded on a P4 road accident report form that she had a blood alcohol reading of 0.14, almost three

times the legal limit.[5] The accident was not her fault, and she eventually received compensation from the other driver's insurance company for the personal injury she suffered. She had not been drinking: indeed, she had hardly touched alcohol for many years and had an abhorrence of drinking and driving. It was the other driver's blood alcohol reading which had been mistakenly entered against her name. Mrs Tame learnt of her alleged blood alcohol reading during a phone conversation with her solicitor, whom she had consulted to voice her concern about the non-payment of medical accounts for counselling and therapy following the accident. The solicitor, having obtained a copy of the P4 from the insurance company, rang her to ask if she had been drinking at the time of the accident. She was horrified, and indignantly denied it. She immediately phoned the police and Constable Morgan told her that it was a mistake and had already been corrected — though not, unfortunately, in time to prevent the insurance company getting an uncorrected copy. But, in her solicitor's words, from that time onwards she seemed to change. She became obsessed by the mistake, feeling shame and guilt, and thought the entry on the P4 was the reason behind the delays in bill payments. Doctors who gave evidence diagnosed her as suffering from a psychotic depressive illness stemming from the impact of the police mistake on a vulnerable personality.

Mrs Tame sued Constable Morgan and the State of New South Wales, alleging that it was vicariously liable for the police officer's negligence. She succeeded before Garling DCJ, but the Court of Appeal held unanimously that the defendants did not owe her a duty of care, inter alia because such harm would not have been foreseeable to a person of normal fortitude. Mrs Tame therefore applied for special leave to appeal to the High Court. In April 2001 the High Court granted special leave, and two months later referred the special leave application in *Annetts* to the Full Bench to be heard at the same time. These two cases give Australia's final appeal court a perfect opportunity to review many of the fundamental issues involved in the law of liability for psychiatric damage as it affects both primary and secondary victims.[6]

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5 The police officer concerned was in fact Acting Sergeant Beardsley, not Constable Morgan, a fact which became clear during the trial. 'Despite the reasoning of the trial judge, it remains unclear whether a verdict was entered in Constable Morgan's favour, as it should have been. Surprisingly, Morgan became an appellant. He remains one, destined perhaps to enter the law reports in relation to something that never involved him directly': *Tame*, above n3 at 36 (Mason P).

6 For comment on these and other recent cases see Des Butler, 'Voyages in Uncertain Seas with Dated Maps: Recent Developments in Liability for Psychiatric Injury in Australia' (2001) 9 *TLJ* 14.

1. *The World of Psychiatric Damage: Some Jurisdictional Differences*

At the time of the High Court's previous leading decision in *Jaensch v Coffey*[7] in 1984, English and Australian approaches to such cases were substantially in harmony. Though in earlier times Australia was perhaps slower to expand the limits of liability,[8] by the 1980s it had clearly caught up. The twin cases of *McLoughlin v O'Brian*[9] and *Jaensch v Coffey* each recognised that the aftermath principle, under which courts had held that secondary victims who suffered shock through viewing the aftermath of an accident to a close relative could recover damages, extended not only to the accident scene itself but also to the hospital during the period of immediate post-accident treatment. This development suggested that the closeness of the relationship played a greater part than geographical proximity in findings that psychiatric injury was foreseeable and that a duty of care was owed. These cases were also important in recognising that foresight of psychiatric harm alone was not enough. Other 'proximity factors' were also involved.

Since that time the English courts, faced with a series of cases arising out of mass disasters, and in particular the Hillsborough soccer tragedy of 1989, in which 95 people were crushed to death and several hundred injured at the FA Cup semi-final as the result of a police decision to open a barrier to speed up admission to the ground,[10] have moved to hold the line against further expansion. 'Thus far and no further' is the current catchcry.[11] Fears of unlimited liability have led the House of Lords to refuse compensation both to relatives of the dead and injured and to police officers on duty on the day. In the relatives' case, *Alcock v Chief Constable of South Yorkshire Police*,[12] while the House of Lords showed an encouraging willingness to consider the closeness of the actual relationship, rather than limit recovery to parents and spouses, it ruled out any question of a duty being owed to those who saw it as it happened on television or learnt of it by any other means than personal perception at the accident scene or its aftermath. Further, it placed a narrow interpretation on the aftermath concept by holding that anyone who did not arrive at the accident scene or the hospital bed within two hours of the accident was too late — this, according to Lord Wilberforce in *McLoughlin v O'Brian*, being 'upon the margin of what the process of logical progression would allow'.[13] Two first instance decisions allowing recovery to parents told of the deaths of their sons

7 Above n2.

8 For example, compare *Chester v Waverley Corporation* (1939) 62 CLR 1 with *Hambrook v Stokes Bros* [1925] 1 KB 141.

9 [1983] 1 AC 410.

10 Note also *McFarlane v EE Caledonia Ltd* [1994] 2 All ER 1 and *Hegarty v EE Caledonia Ltd* [1997] 2 Lloyd's Rep 259, arising out of the Piper Alpha disaster in 1988, in which 164 men were killed in an explosion on a North Sea oil rig.

11 *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455 at 500 (Lord Steyn)(hereinafter *White*).

12 [1991] 1 AC 310 (hereinafter *Alcock*).

13 Above n9 at 419.

were repudiated.[14] Having refused the claims of the relatives, the House of Lords felt that it would not be just to admit those of the police officers. In *White v Chief Constable of South Yorkshire Police*,[15] the majority rejected arguments that some of the plaintiffs were owed a duty as rescuers, and refused to recognise that the duty of employers to provide a safe working environment for employees extended to psychiatric as well as physical injury. Lords Steyn and Hoffmann were both clearly concerned with the problem of expanding liability any further. Lord Steyn said that 'we do not live in Utopia: we live in a practical world where the tort system imposes limits to the classes of claims that rank for consideration'[16] and that 'the only sensible general strategy for the courts is to say thus far and no further',[17] leaving any expansion or development to Parliament. For Lord Hoffmann, 'in this area of the law, the search for principle was called off in *Alcock*', and their Lordships were 'now engaged, not in the bold development of principle, but in a practical attempt, under adverse conditions, to preserve the general perception of the law as a system of rules which is fair between one citizen and another'.[18]

In between these two cases, the House of Lords considered a rather different case involving a primary victim. In *Page v Smith*,[19] the plaintiff was involved in a very minor road accident. Though he suffered no personal injury, it aggravated the chronic fatigue syndrome from which he had periodically suffered and as a result he was unable to work again. On an orthodox approach to the case, the fact that psychiatric injury was not foreseeable would seem to rule out any duty of care being owed, and this was the approach taken by the Court of Appeal. In the House of Lords, however, Lord Lloyd of Berwick, with the concurrence of two other members of the court, held that the law imposed a less onerous test on primary victims — those who were 'directly involved in the accident, and well within the range of foreseeable physical injury'.[20] In such cases, foreseeability of any form of physical injury was enough to establish a duty of care. Moreover, rules which limited the ambit of secondary victim liability, such as the presumption that the plaintiff was a person of ordinary fortitude, and the requirement to view the circumstances of the accident with hindsight, were inapplicable. This was a somewhat surprising development, in view of the lack of previous authority for some of the propositions advanced.[21] Though it might be seen as a well-meaning

14 *Hevican v Ruane* [1991] 3 All ER 65; *Ravenscroft v Rederiaktiebolaget Transatlantic* [1991] 3 All ER 73, reversed [1992] 2 All ER 470n.

15 Above n11. The later pages of the Appeal Cases report, but not the title page, refer to the case as *Frost v Chief Constable of South Yorkshire Police*, by which name it was known in the Court of Appeal: see [1998] QB 254. Mr Frost was not one of the six police plaintiffs by the time the case came to trial. Perhaps, like Mr Morgan, his name is destined to be linked in the law reports with legal developments in which he played only a very minor role: see n5 above.

16 Id at 491.

17 Id at 500.

18 Id at 511.

19 [1996] 1 AC 155.

20 Id at 184.

21 See, for example, Peter Handford 'A New Chapter in the Foresight Saga: Psychiatric Damage in the House of Lords' (1996) 4 *Tort L Rev* 5.

attempt to extend liability to deserving persons who had actually been within the area of personal danger, the definition of primary victims in such terms had the potential to narrow the law. In *Alcock*, Lord Oliver of Aylmerton had classified other kinds of participants, such as rescuers and involuntary participants, as primary victims.[22] Lord Lloyd made no mention of rescuers, but in *White* the majority held that they were owed no duty unless they too were within the area of physical danger — a much narrower approach than that adopted in previous lower court cases.[23] Lord Goff of Chieveley, dissenting in *White*, provided a detailed exposure of the flaws in Lord Lloyd's analysis.[24] In his view, anything Lord Lloyd said about secondary victim liability was obiter only, and the judgment should be regarded merely as an attempt to open the door a little wider to primary victims.

Lord Lloyd's version of the distinction between primary and secondary victims caused much controversy in subsequent lower court cases.[25] It has probably survived *White*, but only just. Lord Griffiths, dissenting, referred shortly to *Page v Smith* as 'a sensible development of the law'.[26] Of the majority judges, Lord Steyn also endorsed it,[27] but Lord Hoffmann, who had supported a more orthodox view of the law in the Court of Appeal in *Page v Smith*, refused to commit himself. Lord Browne-Wilkinson simply agreed with the majority judgments, so his view is not clear. Some encouragement that the issue is not finally resolved may be derived from the Lords' latest consideration of the matter, in the context of a strikeout application, in *W v Essex County Council*,[28] a claim by parents of young children abused by a fifteen year old boy placed with them in foster care by the local authority. Lord Slynn of Hadley, giving the judgment of the court, said that the categorisation of those claiming to be primary and secondary victims is not finally closed and remains to be developed in different factual situations.[29]

The generally conservative approach of the English courts is mirrored in Scotland. In *Robertson v Forth Road Bridge Joint Board*,[30] for example, the Court of Session, anticipating the decision in *White*, refused to open up a new category of duty not to cause psychiatric injury owed by employers to their employees. Canadian courts also have maintained a generally cautious attitude to invitations to widen the ambit of the duty of care to accommodate new kinds of claim.[31] In a recent intermediate appeal court decision, *Devji v District of Burnaby*,[32] the

22 Above n12 at 407–408.

23 For example, *Chadwick v British Railways Board* [1967] 1 WLR 912.

24 Above n11 at 468–481.

25 For example, *Frost v Chief Constable of South Yorkshire Police*, above n15; *Young v Charles Church (Southern) Ltd* (1997) 39 BMLR 146; *Chief Constable of West Yorkshire v Schofield* (1998) 43 BMLR 28; *Hunter v British Coal Corporation* [1999] QB 140; *Cullin v London Fire and Civil Defence Authority* [1999] PIQR P314. See Chris Hilson, 'Nervous Shock and the Categorisation of Victims' (1998) 6 *Tort L Rev* 37.

26 *White*, above n11 at 463.

27 Id at 497.

28 [2000] 2 WLR 601.

29 Id at 607.

30 1995 SC 364. See M J M Bogie, 'A Shocking Future: Liability for Negligently Inflicted Psychiatric Illness in Scotland' [1997] *Jur Rev* 39.

parents and sisters of a young man who died in a motor cycle accident suffered psychiatric injury on learning of the death and attending hospital to view the body. The British Columbia Court of Appeal refused to extend the aftermath principle beyond the previously accepted limits, or to recognise claims based on the receipt of shocking news where direct perception was lacking. The court placed much stress on the maintenance of the existing limits as determined by earlier precedents.[33] The Supreme Court of Canada has not yet had to consider the issue of psychiatric damage.

In other parts of the world, however, courts have maintained a much more positive attitude to such claims. Australia is at the forefront. The leading judgment of Deane J in *Jaensch v Coffey* has set the standard for subsequent cases, and in a number of respects seems rather more enlightened than the recent English authorities. So, for example, the aftermath is the period of 'immediate post-accident treatment', but is not necessarily to be measured by hours or minutes. Causal proximity is the preferred rationale, rather than physical proximity in the sense of space and time. A Queensland first instance judge suggested that if the aftermath had no temporal connotation, shock suffered by a mother as the result of her daughter's death, after three years in a coma, was compensable,[34] but the Full Court held that the aftermath concept as outlined by Deane J did not extend to cases where there was a significant time lapse.[35] Even so, there are cases which show that the aftermath of the accident clearly extends beyond the limits set by the English cases.[36]

Perhaps even more significantly, Deane J was not prepared to insist on direct perception at the accident scene or its aftermath as the only possible indicator of sufficient proximity. He refused to rule out the possibility that psychiatric injury induced by being told of an accident to a close relative might be enough to found a duty of care:

> [T]he question whether the requirement of proximity precludes recovery in a case where reasonably foreseeable psychiatric injury is sustained as a consequence of being told about the death or accident remains, in my view, an open one. It is somewhat difficult to discern an acceptable reason why a rule based on public policy should preclude recovery for psychiatric injury sustained by a wife and mother who

31 Note however a series of Canadian decisions showing some willingness to compensate plaintiffs whose suffering may not amount to a recognisable psychiatric illness: see Nicholas Mullany & Peter Handford, 'Moving the Boundary Stone by Statute — The Law Commission on Psychiatric Illness' (1999) 22 *UNSWLJ* 350 at 362–365.

32 (2000) 180 DLR (4th) 205.

33 Particularly *Rhodes v Canadian National Railway* (1990) 75 DLR (4th) 248, a five-judge decision of the same court on the limits of the aftermath principle.

34 *Spence v Percy* (1990) Aust Torts Reports 68,032.

35 *Spence v Percy* (1991) Aust Torts Reports 69,072.

36 For example, *Orman v Harrington* (SA Supreme Court, Mullighan J, 30 April 1990) (plaintiff who did not visit daughter until the day after the accident recovered damages). Note also *Woods v Lowns* (NSW Supreme Court, Badgery-Parker J, 9 February 1995) — the reported version (1995) 36 NSWLR 344, on appeal sub nom *Lowns v Woods* (1996) Aust Torts Reports 63,151, does not deal with the psychiatric injury issue.

> is so devastated by being told on the telephone that her husband and children have all been killed that she is unable to attend at the scene while permitting recovery for the reasonably, but perhaps less readily, foreseeable psychiatric injury sustained by a wife who attends at the scene of the accident or its aftermath at the hospital when her husband has suffered serious but not fatal injuries.[37]

Though Brennan J expressed a narrower view,[38] it was Deane J's view that has influenced a line of decisions holding that there can be recovery for psychiatric injury caused by distressing news of an accident to a loved one, even in the absence of direct perception at the accident scene or its aftermath. Queensland primary judges have recognised a duty to a mother told of her daughter's death by a nurse at the hospital to which she had been taken,[39] and to a wife told that her husband had been run over by a bus at the bus depot where he worked,[40] and a New South Wales District Court judge has held that family members could recover for shock suffered following an Aboriginal death in custody,[41] though the judgment does not really consider the issues involved. More recently, several appellate courts have pronounced in favour of recognising a duty of care in a 'told only' situation. The South Australian Full Court and the Queensland Court of Appeal have both granted recovery to fathers told of their children's death in road accidents.[42] On the other hand, in *Annetts*, Ipp J of the Western Australian Full Court insisted on direct perception,[43] influenced by Brennan J, the English Hillsborough cases and an obiter dictum of Windeyer J in an older High Court case, *Mount Isa Mines Ltd v Pusey*.[44] The New South Wales Court of Appeal has considered the matter on several occasions. In *Coates v Government Insurance Office of New South Wales*,[45] where two children suffered psychiatric injury solely as a result of receiving news of their father's death in a car crash, Kirby P said that the rule was out of date,[46] as the passage quoted at the head of this article shows. His views were obiter, because the court held that the plaintiffs could recover under the New South Wales nervous shock statute[47] — but are nevertheless significant. The other members of the court said that the question remained an open one,[48] a view repeated by the court more than once since,[49] but in its latest decision the influence of *Annetts* has produced a more cautious response.[50]

37 *Jaensch v Coffey*, above n2 at 608–609.

38 Id at 567.

39 *Petrie v Dowling* [1992] 1 Qd R 284.

40 *Reeve v Brisbane City Council* [1995] 2 Qd R 661.

41 *Quayle v State of New South Wales* (1995) Aust Torts Reports 62,792.

42 *Pham v Lawson* (1997) 68 SASR 124; *Hancock v Wallace* [2001] QCA 227.

43 Above n4 at 61.

44 (1970) 125 CLR 383 at 407

45 Above n1.

46 Id at 8–11.

47 *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) s4.

48 *Coates*, above n1 at 5 (Gleeson CJ) and 23 (Clarke JA).

49 See *Knight v Pedersen* [1999] NSWCA 333 at [24] (the Court); *Tame*, above n3 at 30–31 (Spigelman CJ).

50 See *Gifford v Strang Patrick Stevedoring Pty Ltd* [2001] NSWCA 175 at [40] (Hodgson JA). Ipp AJA (visiting from Western Australia), was one of the members of the court.

In these and other ways, the Australian courts have shown themselves much more prepared than their counterparts in England to recognise the existence of a duty not to cause psychiatric injury in novel situations.[51] But the Australians are by no means alone in this respect. The Irish courts, for example, have provided a similarly progressive response to the need to develop the law. It is often forgotten that it was an Irish judge who was the first to repudiate the old rule of non-recovery for nervous shock,[52] and modern judges have followed in his footsteps. The Irish courts have adopted a more rational approach to the aftermath problem than the English courts;[53] they have granted recovery to a mother informed by telephone of an accident to her children (though she subsequently went to the hospital);[54] and they have recognised that employers owe their employees a duty to protect them from psychiatric injury,[55] something the House of Lords refused to do in *White*.[56] The last of these decisions, though only at Circuit Court level, was arrived at after a full examination of the authorities by a judge who, in another capacity, is the joint author of Ireland's leading torts text.[57] Judge McMahon commented that the divergence in approach between Ireland and England was becoming increasingly obvious and was perhaps inevitable.[58] Another Irish author[59] suggests that the Irish and Australian decisions are broadly in line, with the Irish judges prepared to decide cases on broad principles of foreseeability in the spirit of Lord Bridge's judgment in *McLoughlin v O'Brian*,[60] a judgment which it appears is now not representative of English law.

No less important is the recent decision of South Africa's highest court, the Supreme Court of Appeal, in *Barnard v Santam Bpk*.[61] As in *Annetts*, the news that caused psychiatric injury was imparted by means of a telephone call. Following the death of a young teenager in a road accident, a doctor at the hospital telephoned the child's father with the sad news, and the father told the child's mother, who suffered psychiatric injury. There was no question of aftermath: the mental injury suffered by the mother was occasioned purely and simply as a result of communication of the news from the doctor via her husband. Yet the court did not

51 For example, compare *Mount Isa Mines Ltd v Pusey*, above n44 at 404 (Windeyer J) with *White*, above n11 on the issue of the alleged employer duty, discussed by Peter Handford, 'Psychiatric Injury in the Workplace' (1999) 7 *Tort L Rev* 126; compare *FAI General Insurance Co Ltd v Lucre* [2000] NSWCA 346 with *Greatorex v Greatorex* [2000] 1 WLR 1970, discussed by Peter Handford, 'Psychiatric Damage where the Defendant is the Immediate Victim' (2001) 117 *LQR* 397.

52 *Bell v Great Northern Railway Co of Ireland* (1890) 26 LR Ir 428, rejecting the decision of the Privy Council in *Victorian Railways Commissioners v Coultas* (1888) 13 App Cas 222. The Irish Court of Appeal had anticipated *Bell* in *Byrne v Great Southern & Western Railway Co of Ireland* (1884) unfortunately unreported but cited in *Bell* by Palles CB.

53 *Mullally v Bus Eireann* [1992] ILRM 722.

54 *Kelly v Hennessy* [1995] 3 IR 253.

55 *Curran v Cadbury (Ireland) Ltd* [2000] 2 ILRM 343.

56 Above n11.

57 Bryan McMahon & William Binchy, *Law of Torts* (3rd ed, 2000).

58 *Curran v Cadbury (Ireland) Ltd*, above n55 at 360.

59 G Kelly, *Post Traumatic Stress Disorder and the Law* (2000) at 16–18.

60 Above n9.

61 1999 (1) SA 202.

find the lack of direct perception an impediment. Departing from earlier case law denying compensation to what it labelled 'hearsay victims',[62] the court unanimously held that in the circumstances the injury was foreseeable. This finding depended primarily on the closeness of the relationship between the primary victim and the traumatised person. The court was influenced by Australian authorities, particularly the statements of Kirby P in *Coates v Government Insurance Office of New South Wales*,[63] and it carefully examined but ultimately discarded all the standard policy objections. In *Annetts*, Ipp J downplayed the significance of the decision, saying that in South Africa the law of negligence was based on the Roman *Lex Aquilia*, under which foreseeability was limited only by causation and public policy and proximity played no role.[64] The views of a judge trained in the South African system are entitled to great respect; and yet the *Barnard* decision relies heavily on Australian authorities and seems perfectly in tune with developments in various parts of the common law world. Nor is it only in relation to means of communication that some courts have been prepared to break down the barriers. In Singapore, for example, the High Court has rejected the alleged requirement of sudden shock, granting recovery to a plaintiff for the consequences of watching her daughter linger on in hospital after negligent surgery until she died three months later.[65] There is a little-known decision from the Isle of Man to the same effect.[66] Such cases would receive short shrift in England in the post-*Alcock*[67] era;[68] but this may simply be another reason for not paying too much heed to the English authorities.

Finally, we should note an important decision from New Zealand. Though it was once thought that the no-fault accident compensation scheme[69] left no room for common law nervous shock claims, it has now been established that this is not so, and both primary and secondary victim claims have arisen phoenix-like from the ashes.[70] Though New Zealand courts have not yet dealt with some of the novel situations encountered by courts in Australia, Ireland, South Africa and elsewhere, the recent decision of the Court of Appeal in *Van Soest v Residual Health Management Unit*[71] is of great interest. The majority held that it was not enough to show that mental suffering to a secondary victim was reasonably foreseeable, in the absence of other proximity requirements, but this provoked a strongly worded dissent from Thomas J, who echoed the words of Lord Oliver in *Alcock*[72] that the present state of the law is neither satisfactory nor logically defensible, and suggested that many past plaintiffs had failed where they deserved to succeed. He

62 *Waring & Gillow Ltd v Sherborne*, 1904 TS 340.
63 Above n1.
64 Above n4 at 60.
65 *Pang Koi Fa v Lim Djoe Phing* [1993] 3 SLR 317.
66 *Ward v Ballaughton Estate (1975) Ltd* (1989) 1987–1989 MLR 428.
67 Above n12.
68 Note however *Kralj v McGrath* [1986] 1 All ER 54.
69 For the current legislation, see *Accident Insurance Act* 1998 (NZ).
70 *Queenstown Lakes District Council v Palmer* [1999] 1 NZLR 549.
71 [2000] 1 NZLR 179.
72 Above n12 at 418.

was in favour of abandoning rules dependent on the geographical, temporal and relational proximity of the plaintiff to the accident and accepting reasonable foreseeability as the sole test of liability for psychiatric injury.

2. *A New Approach?*

There are many others who would argue that the present state of the law of psychiatric damage is accurately described in the words of Lord Oliver.[73] This criticism could certainly be levelled at the current English law, and the comments of Lords Steyn and Hoffmann in *White*, quoted above,[74] show that they are acutely aware of this. In the wake of the first Hillsborough case,[75] the English Law Commission undertook an intensive inquiry, and their report, published in 1998,[76] recommended a statutory scheme removing most of the current impediments to recovery in cases where there are close ties of relationship between the primary and the secondary victim. However, the House of Lords decision in the second Hillsborough case[77] set limits to the common law that were almost certainly not anticipated by the Law Commission.

In Australia, as shown above, many of the rules have been much less restrictively interpreted, and Lord Oliver's sentiments may therefore not command such ready acceptance. However, should the High Court decide that the time is ripe for a restatement of the basis of Australian psychiatric damage law, there are a number of possible alternative positions that could be adopted. Two proposals, each widely differing from the other, are now well documented. What they share is a conviction that the distinctions made by current doctrines are indefensible. Where they diverge is in what they propose should be done. Professor Jane Stapleton has suggested that the only possible solution is to abolish recovery for psychiatric injury altogether.[78] The alternative proposal advocates the stripping out of most of the current proximity restrictions, relying instead on foreseeability of psychiatric harm as the major criterion of whether a duty of care should be recognised, but (a qualification sometimes not sufficiently appreciated) subject to policy limitations in appropriate cases.[79]

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73 See, for example, Vivien Pickford & Louise Dunford, 'Nervous Shock Under English Law: Neither Satisfactory Nor Logically Defensible?' (1996) 4 *JLM* 176; Harvey Teff, 'Liability for Negligently Inflicted Psychiatric Harm: Justifications and Boundaries' [1998] *CLJ* 91; Louise Bélanger-Hardy, 'Negligence, Victimes Indirectes et Préjudice Moral en Common Law: Les Limites à la Réparation se Justifient-elles?' (1998) 36 *Osgoode Hall LJ* 399; Donal Nolan, 'Taking Stock of Nervous Shock' (1999) 10 *King's College LJ* 112.

74 Text to nn16–18.

75 *Alcock*, above n12.

76 Law Commission, *Liability for Psychiatric Illness* Law Com No 249 (1998).

77 *White*, above n11.

78 Jane Stapleton, 'In Restraint of Tort' in Peter Birks (ed), *The Frontiers of Liability* (1994) vol 2, 83.

79 Mullany & Handford, *Tort Liability for Psychiatric Damage* (1993) at 64, 84, 312. See also Mullany & Handford, above n31, especially at 389–390.

Professor Stapleton's conclusion is one to which she has been driven by the unsatisfactory state of the current law, especially in England, and the lack of acceptable alternatives, but it seems most unlikely that any court of final appeal, after a century of advances in psychiatric medicine, as a result of which we have come to accept much more readily that certain traumatic events can have serious consequences for the human psyche, will put the clock back to 1888[80] and hold that damage arising from mere sudden terror unaccompanied by physical injury, but occasioning only a nervous or mental shock, is to be non-compensable.[81] The same might be said of the slightly less extreme alternative of abolishing secondary victim compensation and requiring all successful plaintiffs to be in the zone of physical danger and in fear for their own safety,[82] which would only take the law back as far as 1925.[83] A minority of United States jurisdictions are still prepared to endorse this alternative,[84] and it has been strongly advocated in more than one recent decision,[85] but this goes against the trend in favour of increasing recognition of secondary victim recovery.[86]

The case for proceeding in the opposite direction and removing unsatisfactory control mechanisms is that foreseeability can very often produce a satisfactory outcome without all the additional rules. It has to be remembered that no plaintiff can recover damages without establishing that some recognisable psychiatric illness has been suffered, and showing that it was caused by the defendant's breach of duty. The courts then have to make a determination whether psychiatric injury was foreseeable in the circumstances of the case. *Annetts*[87] is really a very good illustration of how this can work to produce the result the judges consider to be correct. In the Full Court, both Malcolm CJ and Ipp J came to the conclusion that,

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80 *Victorian Railways Commissioners v Coultas*, above n52.

81 Note however that the *Coultas*-based 'impact rule' has been retained in four United States jurisdictions (Arkansas, Georgia, Kentucky and Oregon), and retained subject to modifications in two others (Florida and Indiana): see *Wood v National Computer Systems Inc* 814 F 2d 544 (Ark 1987); *OB-GYN Associates of Albany v Littleton* 386 SE 2d 146 (Ga 1989); *Wilhoite v Cobb* 761 SW 2d 625 (Ky 1989); *Hammond v Central Lane Communications Center* 816 P 2d 593 (Or 1991); *RJ v Humana of Florida Inc* 652 So 2d 360 (Fla 1995); *Shuamber v Henderson* 579 NE 2d 452 (Ind 1991).

82 See Mullany & Handford, above n79 at 102.

83 That is, prior to the decision in *Hambrook v Stokes Bros*, above n8.

84 At least 17 in 2000 (Alabama, Arizona, Colorado, Delaware, District of Columbia, Idaho, Illinois, Maryland, Minnesota, Missouri, New York, North Dakota, Oklahoma, South Dakota, Utah, Vermont and Virginia).

85 For recent examples of jurisdictions affirming the zone of danger rule in preference to full bystander recovery, see *Johnson v Rogers* 763 P 2d 771 (Utah 1988); *Williams v Baker* 572 A 2d 1062 (DC 1990); *Asaro v Cardinal Glennon Memorial Hospital* 799 SW 2d 595 (Mo 1990), discussed in J Matye, 'Bystander Recovery for Negligent Infliction of Emotional Distress in Missouri' (1991) 60 *UMKC L Rev* 169; *Carlson v Illinois Farmers Insurance Co* 520 NW 2d 534 (Minn 1994); *Leo v Hillman* 665 A 2d 572 (Vt 1995); *Nielson v AT & T Corporation* 597 NW 2d 434 (SD 1999). See also *Consolidated Rail Corporation v Gottshall* 512 US 532 (1994), affirming this rule for the purposes of the *Federal Employers Liability Act*. According to the reporter, the majority reasoned that this rule was 'the only common-law test that exhibits both significant historical support and continuing vitality sufficient to inform the Court's determination of the federal question of what constitutes FELA "negligence" in this context': (1994) 129 L Ed 2d 427 at 434.

though it was possible to foresee that the initial telephone call (according to the first scenario) or the whole sequence of events leading up to the communication of the news of James' death (the alternative interpretation) would cause distress and a deep sense of loss and grief, it was not reasonably foreseeable that the plaintiffs would suffer a psychiatric illness.[88] The same goes for *Tame*[89] — adopting the 'normal fortitude' test as part of the foreseeability issue, the Court of Appeal came to the conclusion that it was not reasonably foreseeable that the mistake on the form would cause psychiatric illness to Mrs Tame.[90] In each case, the additional proximity requirements ratified by the two courts buttressed this conclusion, but it would have been the same without them.

The above approach now has the reasoned support of Thomas J of the New Zealand Court of Appeal,[91] and the thinking of the South African Supreme Court of Appeal is very similar, to judge from its most recent decision.[92] It is not very different from the statutory scheme proposed by the English Law Commission for those with 'a close tie of love and affection': according to the Commission's draft bill:

> A person (the defendant) owes a duty to take reasonable care to avoid causing another person (the plaintiff) to suffer a recognisable psychiatric illness as a result of the death, injury or imperilment of a third person (the immediate victim) if it is reasonably foreseeable that the defendant's act or omission might cause the plaintiff to suffer such an illness.[93]

The defendant must not be taken to have owed the duty unless the requirements of causation and close ties are satisfied.[94] It will be recalled that Deane J approved the proposition that 'the most important explanation of nervous shock resulting from injury to another is the existence of a close, constructive and loving relationship with that person (a 'close relative') and that it is largely immaterial

86 By 2000, 27 states had adopted the bystander principle (Alaska, California, Connecticut, Hawaii, Iowa, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Washington, West Virginia, Wisconsin and Wyoming). For the most recent recognitions, see *Lejeune v Rayne Branch Hospital* 556 So 2d 559 (La 1990); *Johnson v Ruark Obstetrics and Gynecology Associates PA* 395 SE 2d 85 (NC 1990); *Heldreth v Marrs* 425 SE 2d 157 (WVa 1992); *Bowen v Lumbermen's Mutual Casualty Co* 517 NW 2d 432 (Wis 1994) (especially significant, since it marks the abandonment of the zone of danger rule by the first jurisdiction to adopt it); *Clohessy v Bachelor* 675 A 2d 852 (Conn 1996); *Ramsey v Beavers* 931 SW 2d 527 (Tenn 1996).

87 Above n4.

88 Id at 40–41 (Malcolm CJ), 54–56 (Ipp J).

89 Above n3.

90 Id at 28 (Spigelman CJ), 46 (Mason P).

91 *Van Soest v Residual Health Management Unit*, above n71.

92 *Barnard v Santam Bpk*, above n61.

93 Above n76 at 128 (cl 2(2)).

94 Id at cl 2(3). The duty is not imposed if the court is satisfied that its imposition would not be just and reasonable because of any factor by which the defendant owed no duty of care to the immediate victim, voluntary assumption of risk by the immediate victim, or involvement by the plaintiff in conduct illegal or contrary to public policy: cl 2(4).

whether the close relative is at the scene of the accident or how he or she learns of it'.[95] In general terms, the message of the nervous shock statutes of New South Wales and the two Territories[96] is very similar: given an act, neglect or default by which any other person is killed, injured or put in peril, mental or nervous shock sustained by a very close relative such as a parent or spouse is compensable. There are no other restrictions. It is as though Parliament accepted, more than 50 years ago, that in such cases psychiatric injury is clearly foreseeable.

3. *The Major Issues*

The High Court may well be reluctant to accept foreseeability of psychiatric injury as the only or substantially the only control on liability for damage to the mind, preferring instead to provide a restatement of the control mechanisms that are to apply in such cases in addition to the foreseeability test. If this is the route taken, there are still many positive outcomes that can be hoped for. There is a sense in which the overall results of the two cases do not matter — except of course to the parties — providing the court takes this golden opportunity to outline a rational approach to act as a basis for the future.

A. Tame v Morgan

Dealing first with issues chiefly relevant to the appeal in *Tame*,[97] given that this is a primary victim case it would be highly desirable for the court to issue a resounding declaration that *Page v Smith*[98] is no part of Australian law, and that in all psychiatric injury cases the ultimate test is whether or not psychiatric injury was foreseeable in the circumstances. Lord Lloyd may have been trying to soften the hurdle to be surmounted by those within the sphere of physical danger (though it is questionable whether this was the appropriate case in which to do it, or even whether chronic fatigue syndrome is properly classifiable as a psychiatric injury);[99] but his rigid exclusion from the more favourable primary victim regime of anyone not within the zone of physical danger has had unfortunate consequences for rescuers, involuntary participants, employees and others.[100] As Spigelman CJ firmly stated,[101] it is the Court of Appeal in *Page v Smith*, the minority judgments in the House of Lords in that case, and the dissenting judgment of Lord Goff in *White*[102] that should be taken as representative of Australian law.

95 *Jaensch v Coffey*, above n2 at 600.

96 *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) s4; *Law Reform (Miscellaneous Provisions) Act* 1955 (ACT) s24; *Law Reform (Miscellaneous Provisions) Act* 1956 (NT) s25.

97 Above n3.

98 Above n19.

99 See D Mendelson, *The Interfaces of Medicine and Law: The History of the Liability for Negligently Caused Psychiatric Injury (Nervous Shock)* (1998) at 269–272.

100 See above text to nn19–24. As an example of the dangerous consequences of flirtation with the English approach, see *Cleary v Congregation of the Sisters of the Holy Family at Nazareth* (Qld Supreme Court, Lee J, 23 December 1996). Note also the ambiguous statements of the same judge in *FAI General Insurance Co Ltd v Curtin* (1997) Aust Torts Reports 64,479 at 64,499 (Lee J).

101 *Tame*, above n3 at 24–25.

This said, the outcome is likely to turn on whether it remains appropriate in psychiatric injury cases to apply the normal fortitude test.[103] Leading judges have said on many occasions that what it is proper for the reasonable person to foresee must depend on a normal standard of susceptibility, unless the defendant knows different. 'The test of a plaintiff's extraordinary susceptibility, if unknown to the defendant, would in effect make him an insurer.'[104] Although Windeyer J has objected that 'the idea of a man of normal emotional fibre, as distinct from a man sensitive, susceptible and more easily disturbed emotionally and mentally, is I think imprecise and scientifically inexact',[105] this view has not generally found favour. Unless Australian courts are prepared to endorse Lord Lloyd's view that there is no need to apply this test in the case of a primary victim[106] — so applying an alternative test for primary victims which, it has just been suggested, is most undesirable — the ordinary fortitude test is likely to defeat Mrs Tame's claim, as it did in the Court of Appeal.[107] Though it could perhaps be argued that the law does not adopt the same attitude in ordinary personal injury cases — the rule being that you take the plaintiff as you find him, or her — if the law regards psychiatric injury cases as different from personal injury cases it is difficult to pick and choose among the consequences of this categorisation process. Otherwise, the only possible arguments for Mrs Tame would seem to be that Garling DCJ in fact applied the correct test (though there is no real evidence in the judgment to support this), or that the Court of Appeal's finding to the contrary did not give proper weight to the expert medical evidence.[108]

B. Annetts v Australian Stations

Lord Wilberforce suggested 20 years ago that three elements were inherent in any secondary victim nervous shock claim: the class of persons who could recover, proximity to the accident, and the means of communication.[109] The first of these is unlikely to be controversial, since there could be no closer family relationship than that between parents and children. Moreover, *Jaensch v Coffey*[110] shows that the Australian approach to this issue, which emphasises the strength of the individual relationship rather than listing relationships by category, is satisfactory, and the House of Lords in *Alcock*[111] has now adopted a generally similar stance. But the other two elements are central to the *Annetts* case.

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102 Above n11.

103 See Mullany & Handford, above n31 at 402 n324.

104 *Bourhill v Young* [1943] AC 92 at 110 (Lord Wright). See also *Jaensch v Coffey*, above n2 at 556 (Gibbs CJ), 568 (Brennan CJ).

105 *Mount Isa Mines Ltd v Pusey* (1970), above n44 at 405.

106 *Page v Smith*, above n19 at 189.

107 *Tame*, above n3 at 25–26 (Spigelman CJ), 44–46 (Mason P). The court again applied this test in *AMP General Insurance Co v Roads and Traffic Authority of New South Wales* [2001] NSWCA 186 at [116]–[123] (Heydon JA), [188] (Davies JA).

108 See the transcript of the special leave application in *Tame*, above n3: <http://www.austlii.edu.au/ au/other/hca/transcripts/2000/S120/1.html>.

109 *McLoughlin v O'Brian*, above n9 at 422.

110 Above n2, especially at 600 (Deane J).

111 Above n12.

Ipp J's second possible scenario was that psychiatric damage resulted not from the initial telephone call but from the cumulative effect of five months of uncertainty, several visits to Halls Creek, numerous telephone calls, and the final discovery and identification of the remains. If this is the correct interpretation, some sort of case could perhaps be made for extending the aftermath principle to cover it. However, this argument is probably unlikely to succeed. Although the leading judgment of Deane J in *Jaensch v Coffey*[112] suggests that causal proximity, rather than physical proximity in space and time, was the preferred rationale, the aftermath concept is still limited to the period of 'immediate post-accident treatment'. It is to be hoped that the High Court will disclaim the inflexible approach of the English courts, which seemingly require the plaintiff to appear at the scene or the hospital within two hours of the accident,[113] and instead apply the notion of 'immediate post-accident treatment' in the more flexible manner exemplified by *Jaensch v Coffey* itself and the Irish decision of *Mullally v Bus Eirann*.[114] However, it is hard to see how cases where there is a 'significant time lapse' can rationally be brought within the aftermath principle as so defined. In cases such as *Annetts*, where the accident happens in a remote location, the time problem is compounded by distance and uncertainty. The situation resembles the Canadian case of *Rhodes v Canadian National Railway*,[115] where the plaintiff's son was killed in a train crash in Alberta. The plaintiff, who heard about the crash in British Columbia, endured many hours of anxiety before learning that her son was among the victims, and as the result of a chapter of accidents it took her eight days to get to the scene of the accident. The British Columbia Court of Appeal held that the concept of causal proximity ought to be taken to exclude indirect injury such as that caused by visiting the scene eight days later. While this court undoubtedly took a narrow approach to the concept of causal proximity, it is going to be hard for the High Court to stretch the aftermath concept far enough to accommodate the facts of *Annetts*.

The real problem with the aftermath concept is that the courts have been trying to make it do too much.[116] Over and over again, they have strained to make it accommodate deserving fact situations, in the belief that this was the only road to recovery. This is because of the traditional authorities which have ruled that shock caused by hearing about an accident, as opposed to perceiving it with one's own senses, is irrecoverable.[117] Deane J's seminal judgment in *Jaensch v Coffey*[118] marked the beginning of the end of this as an inflexible rule. Deane J showed how the requirement of personal perception had not in fact enjoyed unqualified support,

112 Above n2 at 606–608.

113 *McLoughlin v O'Brian*, above n9 at 419 (Lord Wilberforce); *Alcock*, above n12 at 397 (Lord Keith of Kinkel), 405 (Lord Ackner), 417 (Lord Oliver of Aylmerton).

114 Above n53.

115 Above n33.

116 See Mullany & Handford, above n79 at 149–152.

117 For example, *Hambrook v Stokes Brothers*, above n8 at 152 (Bankes LJ), 159 (Atkin LJ), 165 (Sargant LJ); *King v Phillips* [1953] 1 QB 429 at 441 (Denning LJ); *McLoughlin v O'Brian*, above n9 at 422–423 (Lord Wilberforce); *Mount Isa Mines Ltd v Pusey*, above n44 at 407 (Windeyer J).

118 Above n2.

and refused to bar recovery where shock was suffered due to the combined effect of what was told and what was seen. He concluded that the question whether recovery for reasonably foreseeable psychiatric injury sustained as a result of being told about an accident to another remained open.[119] Since then, a number of Australian cases have taken the bold step and recognised liability for communication-caused nervous shock[120] — something that three Australian legislatures in effect accepted 50 years ago.[121] The same proposition is now supported by the important decision of the highest South African appeal court in *Barnard v Santam Bpk.*[122] It is true that the Full Court in *Annetts* adopted a more conservative stance,[123] but it was mindful of its role as an intermediate appeal court dealing with an unusual set of facts, and was quite clearly passing the baton to the High Court to take the lead in this matter. It is submitted that the court should accept that opportunity and, by adopting the logic of Kirby P in the case quoted at the head of this article,[124] recognise that in the 21st century shocking news is likely to travel quickly far and wide, and that if psychiatric damage is reasonably foreseeable in the circumstances, the fact that it is communicated by word of mouth, telephone or some other modern means should be no barrier.

If this is accepted, we can examine the cases anew. Aftermath cases are not all the same. Some involve relatives who know of the accident coming to the scene or the hospital within a very short time.[125] Some involve the identification of the body of a person already known to be dead,[126] or the ongoing stresses of caring for the grievously injured[127] — though the law has not generally recognised a duty in these two classes of case.[128] And then there are the uncertainty cases — cases

119 Id at 608, quoted above text to n37.

120 See *Petrie v Dowling*, above n39; *Reeve v Brisbane City Council*, above n40; *Pham v Lawson*, above n42; *Hancock v Wallace*, above n42; note also *Coates*, above n1 at 8–11 (Kirby P).

121 Above n96. Liability for communication-caused shock to parents or spouses is clearly recognised: see, for example, *State Rail Authority of New South Wales v Sharp* [1981] 1 NSWLR 240; *Coates*, above n1. Note also *Hanley v Keary* (ACT Supreme Court, Master Hogan, 28 January 1992), where a wife informed of her husband's death recovered under the ACT statute, but their children were not entitled to recover at common law. It is not clear why Mr and Mrs Annetts were not advised to proceed under the New South Wales statute. The action was begun in New South Wales, but transferred to Western Australia under the cross-vesting legislation on the application of the defendant with the plaintiffs' consent. The plaintiffs sustained mental or nervous shock in New South Wales, and there is nothing in the statutory provisions to suggest that the accident had to happen there rather than elsewhere. However, it could perhaps be argued that the statutory claim is parasitic on a finding of liability to the immediate victim and that as far as any claim by James was concerned the breach of duty and resulting damage took place in Western Australia.

122 Above n61.

123 Above n4 at 63.

124 *Coates*, above n1.

125 For example, *Boardman v Sanderson* [1964] 1 WLR 1317; *Storm v Geeves* [1965] Tas SR 252; *Benson v Lee* [1972] VR 879; *Scrase v Jarvis* (1998) Aust Torts Reports 65,037, on appeal [2000] Qd R 92 (accident scene); *McLoughlin v O'Brian*, above n9; *Jaensch v Coffey*, above n2; *De Francheschi v Storrier* (1988) 85 ACTR 1; *Mullally v Bus Eireann*, above n53 (hospital).

126 For example, *Butcher v Motor Accidents Board* (1984) Victorian Motor Accidents Cases 83,138; *Hevican v Ruane*, above n14; *Pippos v Craig* [1993] 1 VR 603; *Taylor v Somerset Health Authority* [1993] 4 Med LR 34; *Devji v District of Burnaby*, above n32. Compare cases where the plaintiff was not permitted to see the body: *Chapman v Lear* (Qld Supreme Court, Williams J, 8 April 1988); *Ravenscroft v Rederiaktiebolaget Transatlantic*, above n14.

where the scale of the disaster,[129] or the remote location (as in *Annetts*),[130] or some other factor[131] means that relatives endure for hours, days or months the agony of not knowing what has happened to a loved one: whether they were involved or escaped injury, whether they are alive or dead. Hitherto, the law has not dealt well with such cases.

It is suggested that a more desirable approach would be to consider the individual situation, and to ask whether in the circumstances psychiatric injury was foreseeable, keeping artificial exclusionary rules to a minimum. In the traditional aftermath cases where plaintiffs suffer psychiatric injury as a result of what they see at the scene or the hospital, the courts are likely to continue to make the same sorts of distinctions that they presently do by reference to the concept of 'immediate post-accident treatment'. Likewise, they may well continue to rule out any question of a duty in cases where mental damage is caused by having to identify the body of someone already known to be dead. They may adopt the same attitude in cases of suffering caused by later events, away from the accident and the aftermath, such as caring for the victim, but again these should be seen as a separate problem.[132] Cases where psychiatric injury results solely from being told about the happening of an accident — such as *Reeve v Brisbane City Council*,[133] or *Annetts*[134] if one assumes that the shock was caused by the immediate impact of the initial telephone call — are different again. Australian courts have shown that foreseeability can provide rational answers in such circumstances, and *Annetts* itself indicates that the answer will not always be the recognition of a duty. Finally, there are the uncertainty cases, such as *Alcock*,[135] *Rhodes v Canadian National Railway*[136] and *Annetts* itself, assuming the parents' psychiatric injury resulted from the cumulative effect of all that happened between December 1986 and April 1987. Surely, there is little that is more likely to disturb the balance of the mind and possibly cause long-term psychiatric consequences than uncertainty about the fate of a loved one, continuing over an extended period. If the medical and other evidence testifies that such injury has been suffered, and that this was how it was caused, cannot the situation be recognised for what it is, and the principles of foreseeability be applied?

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127 For example, *Pratt and Goldsmith v Pratt* [1975] VR 378; *Spence v Percy*, above n35.

128 Note however the cases cited above nn65–66 and 68.

129 For example, *Alcock*, above n12; note also *Singh v London Underground Ltd* (English Queen's Bench Division, John Peppitt QC, 24 April 1990) (King's Cross underground station fire). Even these important examples pale into insignificance when compared with recent events in New York and Washington, where on 11 September 2001 commercial airliners hijacked by terrorists were flown into the World Trade Centre Towers and the Pentagon, causing the collapse of the former and major damage to the latter: as I write, thousands of relatives and loved ones are enduring the agony of not knowing the fate of those caught up in these disasters.

130 Above n4. See also the example discussed by Mullany & Handford, above n79 at 151.

131 For example, *Rhodes v Canadian National Railway*, above n33; *Tranmore v T E Scudder Ltd* [1998] EWCA 1895.

132 See also below text to nn143–145.

133 Above n40.

134 Above n4.

135 Above n12.

136 Above n33.

C. Sudden Shock

Judgments in each of the cases rely on the principle that there must be a 'sudden shock' as a criterion of the existence of a duty in psychiatric injury cases.[137] It is remarkable how this requirement has crept into the law over recent years. In Australia, there is hardly any authority before Brennan J in *Jaensch v Coffey*[138] suggested that psychiatric injury had to be 'shock-induced', rather than one 'induced by mere knowledge of a distressing fact'. This judgment undoubtedly influenced the House of Lords in *Alcock*.[139] Prior to this, no English case had identified sudden shock as a separate ingredient of liability.[140] It is not at all clear that Brennan J's limitation was supported by other members of the court,[141] and it does not sit comfortably with the facts of the case itself — Deane J tells us that '[f]or a few days Mrs Coffey coped well',[142] and that the first symptoms of her illness did not begin to emerge until about a week later.

It seems that the situation which caused Brennan J to impose this limitation was one where psychiatric injury resulted from events subsequent to the accident, such as a spouse worn down by caring for a tortiously injured husband or wife, or a parent made distraught by the wayward conduct of a child.[143] English and Australian cases have hardly ever recognised a duty of care in this situation,[144] and Deane J too was careful to exclude it, at least 'on the present state of the law'.[145] But it seems unwarranted to elevate this rather special situation into a general rule. Unfortunately, this is what has happened: a number of recent authorities involving other kinds of facts deny recovery on this ground,[146] and Mason P in *Tame* and Ipp J in *Annetts* can now be added to their number.[147]

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137 *Tame*, above n3 at 46–49 (Mason P); *Annetts*, above n4 at 40 (Malcolm CJ), 52–54 (Ipp J). Note also *AMP General Insurance Co v Roads and Traffic Authority of New South Wales*, above n107 at [158] (Heydon JA), [188] (Davies JA).

138 Above n2 at 564–567 (Brennan J).

139 Above n12 at 396 (Lord Keith), 401 (Lord Ackner), 416–417 (Lord Oliver).

140 See H Teff, 'The Requirement of 'Sudden Shock' in Liability for Negligently Inflicted Psychiatric Damage' (1996) 4 *Tort L Rev* 44.

141 Deane J, in the course of a long judgment, does not impose any requirement that psychiatric injury must be shock-induced. Gibbs CJ, Murphy and Dawson JJ do not deal with the issue.

142 *Jaensch v Coffey*, above n2 at 588.

143 Id at 565.

144 See, for example, *Pratt and Goldsmith v Pratt*, above n127; *Spence v Percy*, above n35; *Andrewartha v Andrewartha* (1987) 44 SASR 1; *Anderson v Smith* (1990) 101 FLR 34; see also *Beecham v Hughes* (1988) 52 DLR (4th) 625. Compare the cases cited above nn 65–66 and 68.

145 *Jaensch v Coffey*, above n2 at 606. He had earlier referred to psychiatric literature suggesting that psychiatric illness could result from mental stress during a period of constant association with and care of a badly injured spouse or other relative: id at 601.

146 Australian authorities include *Campbelltown City Council v Mackay* (1989) 15 NSWLR 501; *Chiaverini v Hockey* (1993) Aust Torts Reports 62,254; *Pham v Lawson*, above n42; *Davis v Scott* (1998) 71 SASR 361 (the appeal to the High Court sub nom *Scott v Davis* (2000) 74 ALJR 1410 turned on issues of vicarious liability). English authorities include *Calascione v Dixon* (1993) 19 BMLR 97; *Taylor v Somerset Health Authority*, above n126; *Taylorson v Shieldness Produce Ltd* [1994] PIQR P329; *Sion v Hampstead Health Authority* [1994] 5 Med LR 170.

147 See above n137. In *Annetts* at first instance (above n2), Heenan J refers to the sudden shock rule but does not succeed in disentangling it from other rules such as communication and aftermath.

However, not all judges have been prepared to go along with this. Once again, Kirby P is in the forefront. In *Campbelltown City Council v Mackay*,[148] it was argued that a long catalogue of sad consequences, including psychiatric illness, the birth of a stillborn child and marriage breakdown, all flowed from the events of a particular night when the walls of the plaintiffs' 'dream home' began to crack. Kirby P emphasised the importance of recognising the reality of how psychiatric disorders occur:

> [P]sychiatric injury ... is very unlikely to result from the single impact upon the psyche of the claimant of an isolated event. Since the tort of nervous shock was fashioned, there have been substantial advances in the understanding of human psychology. It is highly artificial to imprison the legal cause of action for psychiatric injury in an outmoded scientific view about the nature of its origins. The causes of action at common law should, in my opinion, be released from subservience to 19th century science. ... [P]sychological injury is a ... complex process. It is rarely (if ever) explicable as the result of an isolated shock.[149]

Similar statements were made by Henry LJ when *White* was in the English Court of Appeal,[150] and in the House of Lords the requirement was expressly rejected by Lord Goff,[151] the only member of the court to deal with the issue. The English Law Commission had earlier presented detailed arguments for abandoning the requirement,[152] and the South African Supreme Court of Appeal has now rejected it as 'outmoded and misleading'.[153] Further evidence of the undesirability of this rule is that there seems to be no consistency in its application. It has been affirmed in some kinds of psychiatric damage cases[154] but not required in others.[155]

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148 Above n146.

149 Id at 503–504. Note also *Buljabasic v Ah Lam* (NSW Court of Appeal, Mason P, Priestley & Powell JJA, 3 September 1997).

150 *Frost v Chief Constable of South Yorkshire Police*, above n15 at 271. One case that seems to deny the need for 'sudden shock' is *Tredget v Bexley Health Authority* [1994] 5 Med LR 178; compare *Tan v East London and City Health Authority* [1999] Lloyd's Rep Med 389.

151 *White*, above n11 at 489.

152 Above n76 at paras 5.28–5.33.

153 *Barnard v Santam Bpk*, above n61 at 205 (English version of headnote). See also at 208–209 (Van Heerden AHR).

154 See *Alcock*, above n12; *Palmer v Tees Health Authority* [1999] Lloyd's Rep Med 351 at 360 (Stuart-Smith LJ) (secondary victim); *Hegarty v EE Caledonia Ltd*, above n10 (plaintiff in fear for own safety); *Frost v Chief Constable*, above n15 at 270 (Henry LJ), but contrast *White*, above n11 at 489 (Lord Goff) (rescuers and employees); *Campbelltown City Council v Mackay*, above n146 (damage to property); *Chiaverini v Hockey*, above n146 (statutory liability).

155 For example, stress at work: see *Gillespie v Commonwealth* (1991) 104 ACTR 1 (no liability on facts); *Johnstone v Bloomsbury Health Authority* [1992] QB 333; *Petch v Customs and Excise Commissioners* [1993] ICR 789 (no liability on facts); *Wodrow v Commonwealth of Australia* (1993) 45 FCR 52 (no liability on facts); *Walker v Northumberland County Council* [1995] 1 All ER 737; *Gallagher v Queensland Corrective Services* [1998] QSC 150; *Zammit v Queensland Corrective Services Commission* [1998] QSC 169; *Midwest Radio Ltd v Arnold* (1999) EOC 79,181 (no liability on facts); *State of New South Wales v Seedsman* [2000] NSWCA 119. In England, it seems that plaintiffs who fall within the area of reasonably foreseeable physical injury are not affected by the sudden shock rule: see above n76 at para 2.62 n177.

It is noteworthy that while Mason P in *Tame* affirmed the previous line of authorities requiring a 'sudden sensory perception',[156] Spigelman CJ refused to decide the appeal on this ground. Though there was intermediate appellate authority, both in New South Wales and elsewhere, which could be followed, there was no binding authoritative pronouncement by the High Court. His judgment clearly indicates that it is for the High Court now to rule on the issue.[157] Likewise, in *Annetts*, Ipp J adopted a generally conservative attitude to the sudden shock issue and affirmed the case law upholding this requirement.[158] Malcolm CJ's short judgment also affirms the sudden shock authorities, though without going into the matter in any detail.[159] Like Spigelman CJ, he was clearly of the view that the outstanding issues should be settled by Australia's highest tribunal: 'Given the current state of authorities it is not for this Court as an intermediate appellate court to extend the scope of the liabilities for psychiatric injury or nervous shock any further than the authorities to date have indicated.'[160] It is to be hoped that the High Court takes up the challenge, and adopts the enlightened and medically aware view already championed by Kirby J.

D. Other Issues

Some issues of psychiatric damage law, like the duty to rescuers and employees, are not directly involved in the present appeals — though it is not beyond possibility that they may be the subject of comment. It is not unknown for leading judgments in this area to contain obiter dicta on particular issues which have proved valuable — or sometimes inconvenient — in later cases.[161] In addition, the courts below have raised what might be called characterisation issues, such as whether the ordinary fortitude test is relevant only to foreseeability[162] or also to proximity,[163] and whether sudden shock is a matter of duty or an aspect of causation.[164] As to the latter, the matter could be easily settled by abandoning the requirement, but if this is not to happen it would be good to have an authoritative view.

4. Duty of Care Generally — A New Era?

Enough has been said to show that these two appeals raise issues of crucial importance, and might settle not only the details but also the basis on which psychiatric damage law is now to rest. But it is quite possible that they might be the occasion for a much more fundamental reassessment of the law of negligence generally. It is never easy to predict such developments: for example, when

156 *Tame*, above n3 at 46–49.
157 Id at 29–32.
158 Above n4 at 52–54.
159 Id at 40.
160 Ibid.
161 For example, Windeyer J in *Mount Isa Mines Ltd v Pusey*, above n44; Deane J in *Jaensch v Coffey*, above n2; Lords Keith, Ackner and Oliver in *Alcock*, above n12.
162 *Annetts*, above n4 at 51–52 (Ipp J).
163 *Tame*, above n3 at 25 (Spigelman CJ).
164 *Annetts*, above n4 at 54 (Ipp J).

proceedings were initiated in *Donoghue v Stevenson*[165] it is unlikely that anyone could have forecast that May Donoghue's adventures with a snail would usher in the modern era of negligence law. Nearer our own time, I N Duncan Wallace,[166] writing shortly before the House of Lords decision in *Anns v Merton London Borough Council*,[167] forecast that it might be the occasion for the English courts to recognise liability for pure financial loss, but this prophecy was confounded by Lord Wilberforce's classification of the defective building as 'material physical damage'.[168] These caveats notwithstanding, it is suggested that the High Court may be poised to recognise a new phase of development in negligence law. It has recently abandoned proximity as the unifying conception of duty of care,[169] and currently adheres to no united theory.[170] Some of its members have adopted general tests of their own,[171] others pursue the path of incrementalism.[172] Canadian and New Zealand courts still retain the *Anns* two-stage test of duty;[173] the English courts have abandoned it,[174] but have replaced it with the threefold *Caparo* test[175] which expressly recognises not only foreseeability and proximity but also policy elements — the *Anns* two-step has become the *Caparo* waltz. Will the forthcoming appeals be the occasion for the High Court to adopt some new initiative — hopefully, one concurred in by all or most members of the court, rather than another collection of individual approaches seemingly lacking much in the way of common ground? We will soon know.

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165 [1932] AC 562.

166 I N Duncan Wallace, 'From Babylon to Babel, or a New Path for Negligence?' (1977) 93 *LQR* 16.

167 [1978] AC 728.

168 Id at 759. It could be argued that Duncan Wallace merely saw further into his crystal ball than most people. Thirteen years later the House of Lords recognised that the loss in such cases was indeed economic — but firmly denied any duty of care in such cases other than that already accepted under *Hedley Byrne & Co Ltd v Heller & Partners* [1964] AC 465: see *Murphy v Brentwood District Council* [1991] 1 AC 398.

169 See *Hill v Van Erp* (1997) 188 CLR 159; *Pyrenees Shire Council v Day* (1998) 192 CLR 330.

170 See *Perre v Apand Pty Ltd* (1999) 198 CLR 180.

171 Id at 198, 200–201 ('protection of legal rights') (Gaudron J); id at 275, 284–286 (the three-stage *Caparo* test: see below n175) (Kirby J).

172 Id at 193–194 (Gleeson CJ); id at 208–218 (McHugh J); id at 252–254 (Gummow J); id at 300–303 (Hayne J); id at 325–326 (Callinan J).

173 See *Hercules Managements Ltd v Ernst & Young* (1997) 146 DLR (4th) 577 at 586–587 (La Forest J); *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 at 294 (Cooke P); see also S Todd (ed), *The Law of Torts in New Zealand* (2nd ed, 1997) at 154–158.

174 See *Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] AC 210 at 240 (Lord Keith); *Leigh & Sillavan Ltd v Aliakmon Shipping Co Ltd* [1986] AC 785 at 815 (Lord Brandon of Oakbrook); *Curran v Northern Ireland Co-ownership Housing Association Ltd* [1987] AC 718 at 724 (Lord Bridge); *Yuen Kun-Yeu v Attorney-General of Hong Kong* [1988] AC 175 at 190–194 (Lord Keith).

175 *Caparo v Industries plc v Dickman* [1990] 2 AC 605.