DAMAGES FOR INJURED FEELINGS IN AUSTRALIA

BY
P. R. HANDFORD*

The common law has always had a healthy distrust for claims based upon injured feelings, mental distress, anxiety, "nervous shock", and for any other non-pecuniary claim. However, as Dr Handford points out, the rigidity of the common law is weakening and claims for injured feelings are now recognised in both tort and contract. The author decries the fact, though, that the protection the law offers for injured feelings is scattered through various areas and progress only occurs on a case-by-case basis with little or no assistance from general principles. The author thus suggests that the common law might look to the Civil Law model as a useful guide in this area.

I. INTRODUCTION

To what extent is it possible to recover damages for injured feelings in Australia, whether in a tort action or in an action for breach of contract? Generally, it might be thought that, when compared with personal injury, property damage or economic loss, injuries to feelings would usually be fairly low on the priority list of injuries which are deserving of compensation. The Australian law appears to mirror this order of priorities in that the occasions on which damages for injured feelings may be recovered are rather limited.

In this respect the Australian position is fairly typical of the attitude to this problem taken by common law systems. This attitude may usefully be contrasted with the rather different stance taken by civil law systems, which generally recognise a fundamental division between "material damage" (injuries of substance, such as property damage or economic loss) and "moral damage" (injuries to personality or feelings).[1] In most civil law countries, therefore, there is a well-developed right to

recover for injuries to the feelings of all sorts. French law is a good example. Moral damage, as recognised in France, covers a variety of injuries, not just bodily harm, but also injuries to honour, to reputation, and to feelings, invasion of privacy, and interferences with family and similar relationships.[2]

This contrast between common law and civil law systems is perhaps over-simplified. Not all common law systems have such a limited right of recovery for injury to the feelings. In the United States, especially, the scope of tort law in this area is much wider, since most United States jurisdictions recognise the important torts of intentional infliction of emotional distress and invasion of privacy,[3] both of which involve injury to the feelings and both of which are unknown elsewhere in the common law world.[4] Likewise, not all civil law systems allow recovery for moral damage to the same extent as French law, and in Germany in particular the right to recover for injured feelings is much more limited and much closer to the common law.[5] In general, however, the comparison holds good.

This contrast in attitudes offers an appropriate basis for a study of the Australian law on damages for injured feelings since Australian law, in general, faithfully reflects the common law position. It follows that, where there is a lack of Australian authority on particular points, authorities from England and from other common law jurisdictions can usually be relied on as stating the Australian position. However, as will be seen, on certain issues the standpoint taken by Australian law is quite distinctive.

II. THE GENERAL POSITION

The common law has always denied recovery for injured feelings where that is the only loss suffered by the plaintiff. The leading statement of the common law attitude was made by Lord Wensleydale in *Lynch* v. *Knight*:[6]

> Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone.

More than a century later the position remains basically the same. Various reasons for denying liability have been put forward: that such damage is too "remote" and would not ordinarily and naturally result from the defendant's conduct; the difficulties of proof, and of measuring the damages; that to recognise such liability would engulf the courts in a flood of litigation; and that there would be a danger of false claims succeeding. These are all arguments which are traditionally put forward in situations in which it is sought to recognise a new area of liability,[7] and they can be found in cases in other areas in which an extension of liability is contemplated, such as economic loss and pre-natal injury.[8] As regards injury to the feelings, the prohibition against recovery at one time operated even if some physical injury or illness ("nervous shock") resulted from the infliction of injured feelings. Thus in *Victorian Railway Commissioners* v. *Coultas*,[9] a nervous shock case in which the plaintiffs appealed from the Victorian courts to the Privy Council, these arguments are relied on to deny liability. According to Sir Richard Couch, delivering the Privy Council judgment, there could be no recovery for injured feelings and therefore there could be no recovery for the physical consequences of such an injury. His judgment contains what is probably the most important Australian statement of the

reasons for denying such claims:

> Damages arising from mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot under such circumstances, their Lordships think, be considered a consequence which, in the ordinary course of things, would flow from the negligence... If it were held that they can, it appears to their Lordships that it would be extending the liability for negligence much beyond what that liability has hitherto been held to be. Not only in such a case as the present, but in every case where an accident caused by negligence had given a person a serious nervous shock, there might be a claim for damages on account of mental injury. The difficulty which now often exists in case of alleged physical injuries of determining whether they were caused by the negligent act would be greatly increased, and a wide field opened for imaginary claims. The learned counsel for the respondents was unable to produce any decision of the English Courts in which, upon such facts as were proved in this case, damages were recovered... It is remarkable that no precedent has been cited of an action similar to the present having been maintained or even instituted, and their Lordships decline to establish such a precedent.[10]

However, by way of exception to the general rule, the law will recognise injured feelings as something worthy of compensation in a few particular instances. Some of these exceptional cases are ancient causes of action which were first admitted for special reasons of one sort or another and were not then seen as remedies for injured feelings. In other cases there is something else apart from injured feelings which guarantees the genuineness of the claim. It may be that the injured feelings result in some physical injury or illness. The law has now moved forward from the position stated in *Victorian Railway Commissioners* v. *Coultas*[11] and has recognised that such loss is worthy of compensation. Alternatively, it may be that some other tort, possibly, but not necessarily, the infliction of personal injury, has been committed. The latter possibility was recognised even in *Lynch* v. *Knight*.[12] Lord Wensleydale, having made the statement quoted above, went on to add:

> ...though where a material damage occurs, and is connected with it, it is impossible a jury, in estimating it, should altogether overlook the feelings of the party interested.[13]

The law of tort thus recognises a number of particular instances in which compensation for pain and suffering and injured feelings *is* given, which will be discussed in turn:

1. The torts of battery, assault and false imprisonment, which cover, among other things, injured feelings;
2. Compensation for pain and suffering and injured feelings which *accompany* physical injury;
3. Compensation where physical injury or illness *results from* injured feelings;
4. Torts involving injury to family relationships, which again involve injured feelings;
5. Injured feelings accompanying other torts — the principle of "parasitic damage".

Compensation for injured feelings in cases of breach of contract was always more limited than in tort. There were very few instances where such compensation was allowed, and the leading example, the action for breach of promise of marriage, involved a cause of action that was in form a breach of contract but was in fact

much more like a tort. Very recently, however, the law of contract has developed a much more general right to compensation for injured feelings, and it may well be that the law of contract is now nearer a general principle of liability for injured feelings than is the law of tort.

We will now deal, first, with the instances of liability for injured feelings in tort, and secondly, with the instances in contract.

III. TORT

1. Battery, Assault and False Imprisonment

The torts of battery, assault and false imprisonment have been recognised since the earliest days of the common law.[14] For many years there was some confusion about the nature of assault and it was sometimes regarded as simply an attempted battery. Hawkins, for example, obviously took this view, since he said that, "Every battery involves an assault".[15] Today, however, it has become clear that assault is a tort involving causing an apprehension of physical contact in the mind of another.[16] Though a battery may often follow closely upon an assault, either tort may be committed without the other.

In the twelfth and thirteenth centuries when the English common law courts were attempting to impose a measure of public order it is easy to see why they should create the remedy of battery for unlawful bodily contacts. At first sight it is less easy to see why causing an *apprehension* of immediate bodily contact should be wrongful. However, what seems to have happened is that the courts recognised that it would be a defence to battery that a man had struck another who was about to strike him,[17] and this policy of outlawing threats of violence led to the recognition of a remedy against the making of such threats even where they were not eventually carried out.[18] It should be borne in mind that, in the period under consideration, the civil and criminal law of wrongs had not become separated, and battery, assault and false imprisonment were all crimes as well as torts, all performing the function of promoting public order. Thus in Australia today, there are crimes, as well as torts, of battery, assault and false imprisonment.[19]

In order to determine to what extent these three torts give compensation for injured feelings we need to make a closer analysis of the interests which they protect.[20] Battery, first of all, involves any unlawful contact with the person of another: "The least touching of another in anger is a battery."[21] Clearly then, the contact may be either harmful or offensive, and a contact of the latter character obviously offends the feelings rather than any other sort of interest. Among the examples of offensive battery to be found in the cases are, spitting in a person's face,[22] cutting his hair,[23] kissing him or her without consent,[24] removing an emblem from the person of another[25] and — an Australian example — laying a hand on a person's arm and excluding him from a meeting.[26] The potentiality of this type of battery for redressing injuries to feelings is readily apparent. It is also clear that battery may be committed although a person is ignorant of it at the time it takes place because the injury to feelings is just as real when the plaintiff does not discover what happened until later.[27]

Assault, since it involves causing an apprehension of harm in the mind of another, obviously cannot be committed unless the plaintiff is aware of what is occurring at the time and so, in this respect, is unlike battery. Any threatening gesture which creates the necessary apprehension is sufficient, and the cases cover everything from swinging an axe[28] to pointing a pistol. The gun cases are interesting in showing the importance of creating apprehension: not only is it assault to point a loaded firearm at another but also to point an *unloaded* firearm, if the other believes it to be loaded;[29] or to use a toy pistol, if the other believes it to be real.[30] Other cases emphasise the need for the plaintiff to be put in fear.[31] The courts, however, have imposed some limitations on the conception of assault. One limitation, though rather artificial, is the rule that mere words are insufficient to constitute assault, there must be some threatening *gesture*.[32] This limitation seems to owe its origin to the desire of the courts to limit the claims with which they had to deal.[33] Another limitation, more in keeping with the essential nature of assault, is the rule that the defendant must have had the present ability to execute his purpose,[34] that is, the threat must be of *immediate* contact. Both these limitations seem to have been ignored in a recent Australian case which is without parallel in any other common law jurisdiction.[35] The defendant uttered threats of violence to the plaintiff over the telephone and was sued for assault. The defendant pleaded that mere words did not constitute assault, and that there was no apprehension of immediate harm, but the court held that the matters alleged were capable in law of constituting an assault. The court said that threats by telephone were not *mere* words, and that the threats need not be of immediate harm. Certainly there is no reason why words, in appropriate circumstances, should not constitute assault, but to jettison the need for an apprehension of *immediate* contact strikes at the very nature of assault.

The importance of apprehension as the essence of the tort indicates that, once again, we have a tort that gives redress for injury to the feelings. In some ways the injury to feelings here is rather unusual, involving as it does only a very temporary emotion, an apprehension of immediate contact, which speedily fades away when it becomes clear that the threat is not going to be carried out. Indeed some have questioned whether there is any longer a justification for the existence of a tort of assault, now that crime and tort are separate bodies of law, since the public order argument cannot justify the existence of a civil remedy, as opposed to a criminal offence. In most cases damages for assault are very low.[36] In a few cases, however, larger sums have been awarded: here, perhaps, the courts are endorsing the victim's decision to sue rather than retaliate. Larger-than-average sums have thus been awarded where retaliation would not be prudent, as in cases of assault with a deadly weapon,[37] and where it would not be seemly, as in a case where assault was committed in a church.[38]

The most important points about false imprisonment are that the confinement must be total, so there must be no reasonable means of escape,[39] and that it must be without consent. An important Australian case, *Robinson* v. *Balmain New Ferry Co.*,[40] deals with the issue of consent, holding that false imprisonment is not committed when the plaintiff is prevented from departing from premises without complying with a reasonable condition under which he entered them. The precise interest protected is a matter of some dispute. An old English case holds that there is

no false imprisonment unless the plaintiff is conscious of the confinement at the time it happens,[41] but this is dissented from by a later English case, *Meering* v. *Grahame-White Aviation Co.*,[42] in which the plaintiff recovered damages although he was seemingly unaware of his imprisonment until some time later. Atkin, L.J., justifying this, said that his captors might be boasting elsewhere about his imprisonment,[43] and an Australian commentary, accepting this, has suggested that the interest primarily protected by false imprisonment is one in reputation.[44] However, another Australian commentator is of the opinion that Atkin L.J.'s justification is misconceived and that the real basis of the tort is injury to feelings, which is not lessened by the fact that the plaintiff does not learn what happened until later.[45] If this latter view is correct, then once again we have a tort remedy involving injury to the feelings.

These three torts, battery, assault and false imprisonment, all of which were evolved by the law at an early period for the purpose of maintaining public order, protect a plaintiff against mental pain and suffering and injury to his feelings. Though in the vast majority of cases the conduct will be intentional, the law for many years required no overt mental element, and some thought that these torts were torts of strict liability.[46] It is now clear that negligence at least is required[47] but the Australian courts have rejected an English attempt[48] to go further and confine these torts to intentional conduct.[49] Furthermore, though in England it is now settled that the burden of proof rests on the plaintiff,[50] the Australian courts retain the older view that the defendant must disprove the existence of fault.[51]

2. Pain, Suffering and Injured Feelings Accompany Physical Injury

For as long as it has existed the law of tort has been awarding damages to plaintiffs who suffer physical personal injury due to the fault of another. The tort of battery, already dealt with, is obviously capable of dealing not only with minor contacts causing injury to feelings but also with cases of substantial personal injury. Where a case fell outside the limits of battery, because of the requirement, made clear by the eighteenth century, that in battery, as in all trespass torts, damage had to be directly inflicted,[52] the law would usually manage to remedy personal injury by an action on the case for negligence.[53] Eventually, in 1833, the law recognised that the action on the case for negligence was appropriate to cover all cases of unintended but negligent personal injury, whether directly or indirectly inflicted,[54] and ever since then the action for negligence has been the appropriate tort remedy for redress of carelessly caused personal injury.[55]

For many years damages in personal injury claims were assessed by a jury. It is clear that, although the awards were never formally broken down into categories, a jury in assessing the damages would take into account not only purely pecuniary losses such as lost earnings and medical expenses, but also losses of a non-pecuniary nature such as pain and suffering.[56] Today in most jurisdictions personal injury damages are usually assessed by judges and not juries,[57] and ever since *Phillips* v. *London & South Western Railway Company*[58] in 1879 it has been accepted practice to distinguish between various heads of damages under which the plaintiff may recover. Thus today, apart from pecuniary losses, such as those mentioned above, the plaintiff may recover for various heads of non-pecuniary loss. These include loss

of "amenities", that is, loss of the capacity to enjoy life, loss of expectation of life, and, most importantly for present purposes, pain and suffering.[59]. Pain and suffering includes both physical pain and mental anguish, and so the law is allowing recovery for damage which would not be recoverable if it was the only loss suffered; it is allowed only because physical injury is also inflicted, and is therefore "parasitic" upon such physical injury. Parasitic damages for mental suffering in other situations will be dealt with in Section 5 below.

The courts do not automatically award compensation for pain and suffering. There must be clear evidence of reasonably prolonged suffering. Compensation will be given for pain and suffering both past and future, though Windeyer J. in *Skelton* v. *Collins*[60] questioned the value of compensation for past pain and suffering because damages could not provide recompense for it. The level of the award, if determined by a jury, which will have little experience of other cases, may be fortuitous; but where this function is performed by judges it is clear that a sort of unofficial tariff operates, and information as to awards in comparable cases is readily available.

It is clear from leading Australian cases on damages such as *Skelton* v. *Collins*[61] and *Sharman* v. *Evans*[62] that pain and suffering must be assessed subjectively; an unconscious plaintiff incurs no pain and suffering because he does not experience it. These cases also extend the subjective approach to damage for loss of amenities, in contrast to the view of English courts.[63] The House of Lords in *Benham* v. *Gambling*[64] recognised that compensation for loss of expectation of life could be obtained on behalf of plaintiffs who had died as the result of their injuries, at the suit of their estate, and this perhaps unfortunate development caused all Australian jurisdictions to insert in their legislation allowing actions to survive for the benefit of deceased plaintiffs' estates a provision limiting the compensation obtainable in such cases to pecuniary loss.[65] In Australia, then, though not in England, compensation for pain and suffering is available only in actions by living plaintiffs, and not in actions on behalf of deceased persons' estates.

In most civil law countries personal injury gives rise to rights of action not only to the victim himself but also to his relatives who suffer loss as a consequence of the original injury. In France, and in many countries, this right of recovery is quite general and covers both pecuniary and non-pecuniary loss.[66] In common law countries, by contrast, the task of the law is seen to be to compensate the accident victim, and if the relatives have rights to sue then they are exceptional in nature.[67] The admitted exceptions to this general principle are usually confined to financial loss. This is true of the action given to a parent deprived of his child's services by the defendant's negligence, and the action given to an employer likewise deprived of the services of his employee: the latter cause of action being recognised on a wider basis in Australia than in England.[68] The action given to a husband[69] for loss of his wife's consortium extends beyond purely financial loss to matters such as companionship,[70] but the leading Australian case, *Toohey* v. *Hollier*,[71] has made it clear that companionship is regarded as a material loss and that the courts are not granting recovery for injured feelings. Fatal Accidents Act actions are likewise usually confined to financial loss. Nowhere in the original English Act of 1846[72] was it stated that recovery was to be so confined and indeed the Act was based on

Scottish law which allowed claims for "solatium" that is injured feelings, in such cases, but the House of Lords in *Blake* v. *Midland Railway Co.*[73] held that the right of action was confined to financial loss and this limitation was accepted by all Australian jurisdictions. South Australia and the Northern Territory have now amended their legislation so as to allow relatives to recover for injured feelings.[74] The rights to recover is confined to particular relationships — husband and wife; parent and child — and the amount recoverable is limited by statute. By contrast, however, a recent report in Victoria advises against a similar extension.[75]

3. Physical Injury or Illness Resulting from Injured Feelings

As mentioned in the preceding section of this article, at one time the law not only denied recovery for injured feelings and mental distress but also refused to allow claims for physical injury or illness resulting from such distress. *Victorian Railway Commissioners* v. *Coultas*,[76] the major Australian case repudiating liability, did so on the basis that injured feelings were too remote, and so the physical consequences must also be too remote. The court did not adopt a suggestion made by the defendants that there had to be "impact", that is, contemporaneous physical injury, the situation considered in the previous section, but this principle was adopted by other courts in most common law jurisdictions in the succeeding next few years.

Eventually, however, at about the beginning of the present century, the tide began to turn and the courts began to recognise that there could be liability where mental distress resulted in substantial physical injury or illness, "nervous shock" as lawyers generally, and perhaps rather unscientifically, term it. This liability was recognised both in cases of shock caused by intentional conduct and in cases of shock caused by negligence. The first case recognising liability for shock caused by intentional conduct was *Wilkinson* v. *Downton*,[77] where the defendant's false statement, made as a practical joke, caused the plaintiff to suffer long-term damage. Wright J. held that the defendant had "wilfully done an act calculated to cause physical harm to the plaintiff — that is to say, to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her."[78] This new liability was accepted by other common law jurisdictions: in Australia the first case to recognise liability based on *Wilkinson* v. *Downton*[79] was *Johnson* v. *Commonwealth*[80] where a wife suffered shock as a result of the defendants unlawfully and forcibly removing her husband from their home and imprisoning him. A few years later in *Bunyan* v. *Jordan*[81] the High Court of Australia also recognised the *Wilkinson* v. *Downton*[82] principle, though they held it not to be made out on the facts of the case before them. As far as shock resulting from negligence is concerned, four years after *Wilkinson* v. *Downton*,[83] in *Dulieu* v. *White & Sons*,[84] the English courts abolished the impact rule and held that there could be liability in negligence for nervous shock. Again courts in other jurisdictions followed suit: Australia, when the High Court eventually recognised the new liability in *Chester* v. *Waverley Corp.*,[85] was in fact one of the last jurisdictions to do so.

Today liability for nervous shock is well established. Although early cases such as *Dulieu* v. *White & Sons*[86] attempted to confine recovery to persons who were within the area of physical danger, and suffered shock through fear for their own safety, this requirement was eventually abandoned and recovery was allowed to persons

outside that area who suffered shock through fear for the safety of someone else.[87] In such cases, the only risk to the plaintiff is the risk of shock, and *The Wagon Mound (No. 1)*[88] definitively stated that the test of liability for shock was foreseeability of injury by shock, a test which has been endorsed by all the subsequent cases, notably *Mount Isa Mines Ltd* v. *Pusey*[89] in the High Court and *McLoughlin* v. *O'Brian*[90] in the House of Lords. *McLoughlin* v. *O'Brian*[91] shows how far liability based on this principle now extends. It was already clear that there would be liability to anyone who foreseeably suffered shock through viewing an accident, or near-accident, at least where that person was related to the accident victim.[92] An Australian case, *Benson* v. *Lee*,[93] had extended this to a person who, though not present when the accident occurred, came onto the scene a few minutes later.[94] *McLoughlin* v. *O'Brian*[95] now goes even further by holding that a mother who suffered shock through seeing her injured children in hospital a few hours after the accident was owed a duty of care.

So far, this area of liability may seem only indirectly relevant to the topic of this paper, because although the harm suffered results from the infliction of emotional distress, the plaintiff is recovering for that resulting harm and not for emotional distress alone; the cases are simply cases of physical harm caused by shock rather than by impact. However, in the United States, where similar causes of action were recognised at about the same time, both in cases involving intention and in cases of negligence, the courts have gradually refined these actions until they reached the point where the occurrence of resulting physical harm became irrelevant and liability was being imposed simply for emotional distress.[96] To take first of all the intentional infliction of emotional distress resulting in physical harm, the early cases, starting with *Hickey* v. *Welch*,[97] the American *Wilkinson* v. *Downton*,[98] imposed two requirements similar to those imposed by Wright J. The Court said that physical consequences must be likely to result, and must actually occur. In other words, the test of liability for physical harm resulting from emotional distress is not the likelihood of emotional distress but the likelihood of physical harm; though there need not be impact, liability depends on the likelihood of it. From about 1930, however, the courts begin to state the test in terms of a likelihood of mental distress, rather than of physical harm, and to abandon the need for consequent physical harm,[99] and by the early 1950s the tort of intentional infliction of emotional distress was firmly established.[100] In the negligence cases the same progression can be seen happening, although rather more slowly. For a long time American courts required plaintiffs to prove that the nervous shock which they suffered resulted from a reasonable fear of physical injury, so they had to be in the zone of physical danger, and mere bystanders were unlikely to recover.[101] However, beginning with *Dillon* v. *Legg*[102] in 1968, some American courts have begun to reject the "zone of danger" approach, saying that it was impossible to rely on it after having rejected the impact rule, and that the proper test of liability is whether nervous shock was reasonably foreseeable.[103] Under this formulation actual nervous shock must still result. However, for some years prior to *Dillon* v. *Legg*[104] the United States courts had recognised two exceptional groups of cases where there was liability in negligence for mental distress alone — cases involving the negligent transmission of telegraph messages and the negligent mishandling of dead bodies[105] — and decisions in the last

few years from several jurisdictions have suggested that the time has now come to recognise a general duty not to cause mental distress by negligence.[106]

In other common law jurisdictions, and notably in Australia, the law has not made nearly so much progress in these directions. As regards the intentional infliction of nervous shock, the law still follows Wright J. in *Wilkinson* v. *Downton*[107] and requires that the defendant's act be calculated to cause physical harm and that physical harm should result. The fact that there do not seem to have been any *Wilkinson* v. *Downton*[108] cases either in Australia or elsewhere since 1937 may explain this lack of progress. Turning to negligence, although the law has advanced one stage further than *Wilkinson* v. *Downton*[109] by abandoning the need for a likelihood of physical impact and now holds that the test of liability for shock is foreseeability of injury by shock, shock must still result in order for liability to exist; to use more modern terminology, the mental distress which the plaintiff suffers must result in some "recognisable psychiatric illness".[110] There is no question of recognising any duty of care in negligence in relation to mere mental distress, not even in relation to the two special groups of cases in which liability has been accepted in the United States for some years. *Owens* v. *Liverpool Corp.*[111] in which a hearse containing the coffin of a relative was overturned, to the distress of mourners following in another vehicle, might have been the first of a series of cases on the negligent mishandling of dead bodies, but it was condemned by the House of Lords in *Bourhill* v. *Young*.[112]

4. Injury to Family Relationships

In Section 2 above, mention was made of various actions which lie for negligent interference with family relationships: a parent's action for loss of services, and a husband's action for loss of consortium, which includes services. The law also recognised various actions for *intentional* interference with family relationships, as follows:

(a) An action for the enticement away of a wife or child, lying at the suit of a husband or parent. In most common law jurisdictions the wife was also granted an action for the enticement away of the husband,[113] but in Australia the wife's action has not been recognised.[114]
(b) An action for the harbouring of a wife or child, actionable at the suit of a husband or parent. Again the wife had no cause of action.[115]
(c) An action for the seduction of a daughter, lying at the suit of a parent.
(d) An action for damages for adultery, criminal conversation as it was called, lying at the suit of a husband. Again a wife had no cause of action.

The basis of all these actions was the loss of services suffered by the husband or parent who is the plaintiff: an idea based on the mediaeval notion that a man had a sort of proprietary right in his wife and children. So stated, the loss contemplated by the action is basically economic: but, as society's views of family relationships changed, the services element became less and less important and in the end was really a legal fiction; either the law would presume services or it would find them established on the basis of the most trivial acts.[116] More and more, then, the actions were seen as providing redress not for interference with a proprietary or pecuniary interest but for interference with a family relationship, which of course primarily

affects the feelings. In the contemporary context, therefore, these actions, in fact if not in form, gave a remedy for mental distress.

Once this had become apparent there was a general movement in the direction of abolishing these actions. Following the lead of England in 1970,[117] South Australia in 1972 abolished the actions for enticement, harbouring and seduction.[118] The action for criminal conversation had long before been transferred to divorce jurisdictions, where it was called an action for damages for adultery,[119] and it finally perished when matrimonial offences as grounds for divorce were replaced by breakdown of marriage.[120]

5. Injured Feelings as "Parasitic Damage"

The position as so far stated, then, is that the scope of recovery for pain and suffering and injured feelings in Australia, as in other common law countries, is extremely narrow. Only a few torts directly cover such damage. In the case of assault, battery and false imprisonment, they were not evolved with injured feelings in mind, and in the case of the family relationship torts they are being abolished because it is becoming apparent that they involve injury to feelings.

Where injured feelings produce long-term physical consequences, the law provides a remedy, but for the physical consequences and not for the injured feelings alone. This leaves us with damages for injured feelings awarded as "parasitic" damages when some other wrong has been committed, and we have already dealt with the extent to which damages for pain and suffering and injured feelings may be awarded in cases where personal injury has been suffered.

This principle of parasitic damage in fact applies not only in cases involving personal injury but in virtually all torts. Once it is established that a recognised tort has been committed the law will commonly award damages, not only to vindicate the interest which the tort in question primarily protects, but also to compensate the plaintiff for injured feelings which he may have suffered as a result of the tort. As mentioned in connection with personal injury, the origins of this practice are somewhat obscure, but can probably be ascribed to the fact that the assessment of damages was for a long period in the hands of juries, who looked at the real and not the legal injury.[121] What is clear is that damages for injured feelings are only being awarded because some other wrong has been committed; no damages would be available if injured feelings was the only wrong suffered, and therefore such damages are truly "parasitic". In *Spartan Steel & Alloy* v. *Martin & Co.*,[122] an English case in which the plaintiffs sought to recover damages for pure economic loss on the basis that it was parasitic upon property damage,[123] the Court of Appeal attempted to discredit the notion of parasitic damage, an attitude echoed by later Australian cases.[124] Certainly the notion of parasitic damage has been little used in negligence cases outside the personal injury cases mentioned earlier; but in other areas of the law, particularly those involving liability for intentional conduct, the idea of parasitic damage is much too firmly established to be overthrown by the Court of Appeal's decision which did not consider these other authorities.

A brief analysis of the cases in which parasitic damages for injured feelings have been awarded will show the scope and range of the concept. To take first of all torts

to the person: we know that battery, assault and false imprisonment can all protect merely dignitary interests, but it is more common to find that the harm in such cases is substantial physical harm or inconvenience and that damages for mental distress are tacked on to the main award. Thus in battery, damages can be awarded for injured feelings resulting from a harmful contact,[125] and in false imprisonment damages can be awarded for humiliation and indignity.[126] The position in cases of negligently caused personal injury has already been dealt with.

Turning to torts to proprietary interests, we might expect that in this area the courts would not be very ready to allow ancillary damages for mental disturbance but in fact such damages are awarded in a number of cases. They are therefore available where there is an intentional invasion of interests in land, at least where it is direct, so the tort of trespass to land lies.[127] For indirect invasions, which are dealt with by the tort of nuisance, damages are limited to physical inconvenience and are not available for mental distress.[128] There are also cases where mental distress damages were awarded for negligent interference with property.[129] As to goods, the scope for damages for mental distress seems more limited; there is a dispute as to whether the tort of trespass to goods covers merely dignitary interests,[130] and there are no English or Australian cases in which courts have awarded damages for mental distress in an action for conversion.

The tort of defamation protects the reputation, not the feelings, but, except in those jurisdictions which have abolished the distinction between libel and slander,[131] actual damage has to be proved in certain cases of slander. It is clear that damages for mental distress can be recovered where the defamation is actionable without proof of damage.[132] Where proof of damage is required, there is dispute: some authorities, including the leading Australian case,[133] hold that the damage recoverable is limited to the actual damage suffered, whereas others, including the leading Australian treatise,[134] feel that this is too narrow a view and that damages for mental suffering should be allowed.

We have already dealt with the torts that protect interests in domestic relations. In these torts it was recognised that consequential damages for mental distress were allowable.[135] It has been suggested earlier that it eventually became apparent that the primary interest protected by these torts also involved injury to feelings. Dealing finally with torts involving economic loss, it might again be thought that this is an area where damages for mental suffering would not often be envisaged but the authorities hold that damages for injured feelings can be recovered on the commission of most of the intentional torts involving economic loss.[136] There is, however, no suggestion that damages for injured feelings are available where economic loss is caused negligently, a cause of action that in any case has only recently been recognised.[137]

The American writer, Thomas Atkins Street, writing in 1906, was probably the first person to draw attention to the potentialities of the parasitic damage principle. He said that the treatment of any element of damage as parasitic belongs essentially to a transitory stage of legal evolution and that what is today recognised as parasitic will tomorrow be recognised as an independent basis of liability.[138] He was writing of mental distress and as far as the United States is concerned his phrophecy came true; but the same has not yet happened in Australia or elsewhere in the common law world.[139]

IV. CONTRACT

In contrast to a quite considerable number of situations in which damages for injured feelings were in fact recoverable in tort, the position in contract until very recently was that, with one exception, no damages for injured feelings could be recovered. The leading case was *Addis* v. *Gramophone Co.*[140] in which a dismissed employee failed to obtain damages for his distress at the harsh and humiliating manner of his dismissal and the judgments in this case seemed to suggest that since contract damages are limited to the purpose of putting the plaintiff in the position he would have been in if the contract had been duly performed, it is unlikely that there will be many instances in which mental distress damages would be recoverable. Certainly there were cases in which, in actions for breach of contract, damages were recovered for physical injury[141] or physical inconvenience,[142] but there were none allowing damages for mental pain and suffering. The one exception above referred to is the action for breach of promise of marriage. This, though in form an action for breach of contract, was in fact more like a tort action, which is what it would be in most civil law countries. It was similar to the torts affecting domestic relations considered earlier and has now been abolished for the same reasons which caused those torts to be abolished.[143] In particular, the measure of damages was totally unlike any other action for breach of contract, including not only the loss of the worldly advantage which would have been gained, which would be consistent with contract damages, but also injured feelings.[144]

In the last ten years there has been a fundamental revolution in contract damages. As a result, damages for injured feelings are now fairly freely available in contract actions and indeed one might say that injured feelings as something worthy of redress are now given more open recognition in contract than in tort.[145] The start of this revolution was the English case of *Jarvis* v. *Swan Tours*[146] in which a solicitor recovered damages for the injured feelings resulting from a disappointing holiday. Since the major benefit to be expected from such a contract is non-pecuniary in nature, the situation in this case is probably not typical of the majority of commercial contracts, and indeed the possibility of recovery in contract being confined to exceptional situations such as this was hinted at by the Court of Appeal which suggested that mental distress damages were recoverable in a "proper" case, one example of which would be a holiday. However in *Cox* v. *Philips Industries*[147] an employee got damages for non-pecuniary loss caused by breach of his contract of employment, surely not, as the court in that case admitted, a contract to provide entertainment or enjoyment; and in the latest English case, *Heywood* v. *Wellers*,[148] where a solicitor's client recovered for mental distress caused by his breach of contract, the Court of Appeal rejected any previous policy limitation on the types of case in which mental distress damages would be granted and held that such damages were available in any case in which such loss could be reasonably contemplated.

It is questionable whether the law in Australia has gone as far as this. *Athens-MacDonald Travel Service Pty Ltd* v. *Kazis*[149] was an Australian holiday case prior to *Jarvis* v. *Swan Tours*.[150] The South Australian Supreme Court, in accordance with the older law, allowed the plaintiff damages for physical inconvenience but not for mental distress as such, although the court admitted that all inconvenience has

some mental element. More recently, however, *Falko* v. *James McEwan & Co. Pty Ltd*[151] recognised the English authorities to the extent of saying that *in a proper case* damages could be awarded in contract for mental distress, but also said that such cases were still an exception to the general rule applying to ordinary commercial contracts. In such contracts, of which the case before them was an example, the ordinary purchaser or customer could not expect to recover damages for injury to his feelings. The court made this limitation in spite of having *Heywood* v. *Wellers*[152] cited to them. The Australian courts, so far, are therefore adhering to the original limitation proposed in *Jarvis* v. *Swan Tours*.[153]

V. CONCLUSION

The Australian law on damages for injured feelings, indeed the common law position considered as a whole, is, therefore, a thing of shreds and patches:[154] a collection of rather miscellaneous areas of liability which in most instances were not created for the deliberate purpose of giving damages for injured feelings. The contrast with the orderly appearance of the civil law, and its clean-cut division between material damage and moral damage, is plain to see. Maybe this difference is an inevitable consequence of the way in which the two bodies of law have been built up. The typical common law development on a case-by-case basis often produces an untidy, if not unsatisfactory, result, and is unlikely to result in the order and precision which can be brought about by a Code which sets out general principles in a logical sequence. Nevertheless, it may be that one day a court in England or Australia will gather together the scattered instances of liability into a more general principle, though sometimes such attempts are not looked upon favourably in subsequent cases. Or perhaps the courts will see fit to extend liability so that the law moves closer to the United States or the civil law model.

* LL.B. (Birmingham), LL.B., Ph.D. (Camb.); Barrister of the Middle Temple; Barrister and Solicitor, High Court of Australia, Victoria and Western Australia; Lecturer in Law, University of Western Australia. Australia.

FOOTNOTES

1 See *e.g.*, M. Amos & F. P. Walton (F. H. Lawson, A. E. Anton & L. N. Brown, eds), *Introduction to French Law* (3rd ed. 1967) 209. The distinction is handed down from Roman law, and is based on the distinction between the *actio legis Aquiliae* (injuries of substance) and the *actio injuriarum* (injuries to feelings). This distinction is still basic to the law of delict in uncodified civil law systems such as Scotland and South Africa: see D. M. Walker, *The Law of Delict in Scotland* (1966); R. G. McKerron, *The Law of Delict* (7th ed. 1971).

2 For a detailed account of the ambit of moral damage in French law: H. & L. Mazeand and A. Tunc, *Responsabilite Civile* (6th ed. 1965) Chap. 3, sect. 2.

3 See *e.g.*, W. L. Prosser, *Handbook of the Law of Torts* (4th ed. 1971) 49-62, 802-818. On intentional infliction of emotional distress, see also P. R. Handford "Intentional Infliction of Mental Distress — Analysis of the Growth of a Tort" (1979) 8 *Anglo-Am. L. Rev.* 1; on invasion of privacy, see also the pioneering article by S. D. Warren and L. D. Brandeis, "The Right to Privacy" (1890) 4 *Harv. L. Rev.* 193; and H. Kalven, "Privacy in Tort Law — Were Warren and Brandeis Wrong?" (1966) 31 *Law & Con. Prob.* 326.

4 Nowhere else have *the courts* recognised such a tort. In various jurisdictions suggestions have been made that such a tort should be created by statute: see *e.g.,* Australian Law Reform Commission, Report No. 11, *Unfair Publication: Defamation and Privacy* (1979).
5 P. R. Handford, "Moral Damage in Germany" (1978) 27 *I.C.L.Q.* 849.
6 [1861] 9. H.L.C. 577, 598; 11 E.R. 854, 863.
7 These arguments also have adherents in civil law systems. See *e.g.,* G. Ripert, *Le Prix de la Douleur,* D. 1948 chron. 1; P. Esmein, *La Commercialisation du Dommage Moral,* D. 1954 chron. 113; A. Tunc, 1961 *Riv. Trim Dr. Civ.* 676; A. Tunc, *La Securite Rouliere* (1966) paras 47-50.
8 As to economic loss, see *e.g., Simpson and Company* v. *Thomson, Burrell* (1877) 3 App. Cas. 279, 289-290; *Weller & Co.* v. *Foot and Mouth Disease Research Institute* [1966] 1 Q.B. 569, 585; *Spartan Steel & Alloys Ltd* v. *Martin & Co. (Contractors) Ltd* [1973] 1 Q.B. 27, 38.
9 (1888) 13 App. Cas. 222.
10 *Id.,* 225-226.
11 *Ibid.*
12 Note 6 *supra.*
13 *Id.,* 598; 863.
14 The first assault case to be found in the Year Books occurs in 1348: *I. de S. et ux* v. *W. de S.* (1348) Y.B. 22 Ass. 99, pl. 60 Milsom, working from the Plea Rolls, traces battery back to 1237 and assault to 1255: S. F. C. Milsom, "Trespass from Henry III to Edward III" (1958) 74 *L.Q.R.* 195, 407 and 561, 207.
15 W. Hawkins, *Pleas of the Crown* (3rd ed. 1739) vol. i, 134. For an argument that assault in the criminal law *is* merely attempted battery: R. M. Perkins, "An Analysis of Assault and Attempts to Assault" (1962) 47 *Minn. L. Rev.* 71.
16 This is the conclusion reached in the leading analysis: J. W. C. Turner, "Assault at Common Law" (1939) *Camb. L.J.* 56, reprinted in *The Modern Approach to Criminal Law* (1945) 344.
17 See *Chapelyn of Greye's Inn's Case* (1400) Y.B. 2 Hen. IV 8, pl. 40, where the court justified retaliation before the actual striking of the blow by saying, "Perhaps it will come too late afterwards".
18 P. R. Handford, "Tort Liability for Threatening or Insulting Words" (1976) 54 *Can. B.R.* 563, 564-566.
19 C. Howard, *Criminal Law* (3rd ed. 1977) 121-148; Criminal Code (Qld) s.245 (assault and battery) s.355 (false imprisonment); Criminal Code (W.A.) s.222 (assault and battery), s.333 (false imprisonment).
20 For a good discussion of the elements of the torts of battery and assault: F. A. Trindade, "Intentional Torts: Some Thoughts on Assault and Battery" (1982) 1 *O.J.L.S.* 211.
21 *Cole* v. *Turner* (1704) Holt, K.B. 108; 90 E.R. 958.
22 *R.* v. *Cotesworth* (1704) 6 Mod. 172; 87 E.R. 928; *Alcorn* v. *Mitchell* 63 Ill. 553 (1872).
23 *Forde* v. *Skinner* (1830) 4 Car. & P. 239; 172 E.R. 687.
24 See *Alcorn* v. *Mitchell* note 22 *supra.*
25 *Humphries* v. *Connor* (1864) 17 Ir. C.L.R. 1.
26 *Kohan* v. *Stanbridge* (1916) 16 S.R. (N.S.W.) 576.
27 For a justification of the rule on this basis, see *Restatement of Torts* 2d. para. 18 comment (d). It has, however, been suggested that the rule is limited to harmful batteries: C. E. Carpenter, "International Invasion of Interest of Personality" (1934) 13 *Ore. L. Rev.* 227 and 275, 232.
28 As in the early case of *I. de S. et ux* v. *W. de S.* (1348) Y.B. 22 Ass. 99, pl. 60.
29 *Brady* v. *Schatzel* [1911] Q.S.R. 206, following *R.* v. *St. George* (1840) 9 Car. & P. 483; 173 E.R. 921, and not following *R.* v. *Cleary* (1870) 9 S.C.R. (N.S.W.) 75; *McClelland* v. *Symons* [1915] V.L.R. 157.
30 *R.* v. *Everingham* (1949) 66 W.N. (N.S.W.) 122.
31 *R.* v. *Hamilton* (1891) 12 N.S.W.L.R. 111; *R.* v. *McNamara* [1954] V.L.R. 137.
32 Hawkins, *Pleas of the Crown* (3rd ed.) i, 134; *R.* v. *Meade and Belt* (1823) 1 Lewin 184; 168 E.R. 1006; though see *R.* v. *Wilson* [1955] 1 W.L.R. 493, 494 *per* Lord Goddard C.J. On this subject generally, see P. R. Handford, note 18 *supra,* 566-573.
33 W. L. Prosser, note 3 *supra,* 40.
34 *Stephens* v. *Myers* (1830) 4 Car. & P. 349; 172 E.R. 735; on which see J. W. C. Turner, note 16 *supra,* 63.
35 *Barton* v. *Armstrong* [1969] 2 N.S.W.R. 451,
36 For details see P. R. Handford, note 18 *supra,* 566 n. 13.
37 *E.g., Bruce* v. *Dyer* (1966) 58 D.L.R. 2d 211, affd. (1970) 8 D.L.R. 3d 592n.
38 *Inglefield* v. *Merkel* (1873) 9 N.S.R. 188.
39 *Bird* v. *Jones* (1845) 7 Q.B. 742.

40 [1910] A.C. 295, on appeal from the High Court decision *sub nom. Balmain New Ferry Co.* v. *Robertson* (1906) 4 C.L.R. 379.
41 *Herring* v. *Boyle* (1834) 6 Car. & P. 496; 172 E.R. 1335.
42 (1919) 122 L.T. 44.
43 *Id.*, 54.
44 H. Luntz, A. D. Hambly & R. Hayes, *Torts: Cases and Commentary* (1980), 788-819.
45 J. G. Fleming, *The Law of Torts* (5th ed. 1977) 27-28.
46 As to this, see J. H. Baker, *An Introduction to English Legal History* (2nd ed. 1979) 340-342.
47 *Holmes* v. *Mather* (1875) L.R. 10 Ex. 261; *Stanley* v. *Powell* [1891] 1 Q.B. 86.
48 *Letang* v. *Cooper* [1965] 1 Q.B. 232.
49 *Williams* v. *Milotin* (1957) 97 C.L.R. 465; *McHale* v. *Watson* (1964) III C.L.R. 384; *Venning* v. *Chin* (1974) 10 S.A.S.R. 299.
50 *Fowler* v. *Lanning* [1959] 1 Q.B. 426.
51 *McHale* v. *Watson* (1964) 111 C.L.R. 384; *Venning* v. *Chin* (1974) 10 S.A.S.R. 299. On the matters dealt with in this paragraph, see F. Trindade, "Some Curiosities of Negligent Trespass to the Person — A Comparative Study" (1971) 20 *I.C.L.Q.* 706; R. Bailey, "Trespass, Negligence and *Venning* v. *Chin*" (1976) 5 *Adel. L.R.* 402.
52 See *Scott* v. *Shepherd* (1773) 2 Wm. Bl. 892; M. Pritchard, *Scott* v. *Shepherd (1773) and the Emergence of the Tort of Negligence* (Selden Society Lecture 1976); S. F. C. Milsom, *Historical Foundations of the Common Law* (2nd ed. 1981) 283-313, 392-402.
53 One of the first such cases is *Mitchil* v. *Alestree* (1676) 1 Vent. 295; 86 E.R. 190.
54 *Williams* v. *Holland* (1833) 10 Bing. 112; 131 E.R. 848; see M. Pritchard, "Trespass, Case and the rule in *Williams* v. *Holland*" [1964] *Camb. L.J.* 234.
55 Though battery remains an available alternative where the injury is direct: see citations at note 51 *supra*.
56 See F. Bohlen, "Right to Recover for Injury Resulting from Negligence without Impact" (1902) 41 *American Law Register (N.S.)* 141, reprinted in F. Bohlen, *Studies in the Law of Tort* (1926) 252.
57 But jury trial in personal injury cases still takes place in N.S.W., where it is mandatory on the application of either party in any case other than a running-down case (Supreme Court Act 1970 (N.S.W.), s.86) and where in a running-down case it is mandatory if both parties apply (s.87); and in Victoria, where it is available at the request of either party (Supreme Court Rules (Vic), O. 36 R. 7).
58 (1879) 5 C.P.D. 280.
59 See generally H. Luntz, *Assessment of Damages for Personal Injury and Death* (1974) 93-107 (non-pecuniary loss generally) and especially, 96-98 (pain and suffering).
60 (1966) 115 C.L.R. 94, 132.
61 *Ibid.*
62 (1977) 138 C.L.R. 563.
63 *Wise* v. *Kaye* [1962] 1 Q.B. 638; *H. West and Son Ltd* v. *Shepard* [1964] A.C. 326.
64 [1941] A.C. 157.
65 See Common Law Practice Act 1867 (Qld) s.15D (added 1972); Survival of Causes of Action Act 1940 (S.A.) s.3; Administration and Probate Act 1935 (Tas.) s.27 (added 1943); Law Reform (Miscellaneous Provisions) Act 1941 (W.A.) s.4(2). In the other jurisdictions, non-pecuniary damages are recoverable in cases where the death is not caused by the tort in question: Law Reform (Miscellaneous Provisions) Act 1944 (N.S.W.) s.2; Administration and Probate Act 1958 (Vic.) s.29; Law Reform (Miscellaneous Provisions) Ord. 1955 (A.C.T.) s.5; Law Reform (Miscellaneous Provisions) Ord. 1956 (N.T.) s.6.
66 See *e.g.*, M. Amos & F. P. Walton, note 1 *supra*, 209-10.
67 *Pratt* v. *Pratt* [1975] V.R. 378 is the leading Australian authority denying liability to relatives. On this topic generally, see P. R. Handford, "Relatives' Rights and *Best* v. *Samuel Fox*" (1979) 14 *U.W.A.L. Rev.* 79.
68 Contrast *Inland Revenue Commissioners* v. *Hambrook* [1956] 2 Q.B. 641, confining the action to domestic servants, with *Commissioner for Railways (N.S.W.)* v. *Scott* (1958-1959) 102 C.L.R. 392, *Sydney City Council* v. *Bosnich* (1968) 89 W.N. (Pt. 1) (N.S.W.) 168, allowing it to all employees.
69 But not available to a wife: *Best* v *Samuel Fox & Co. Ltd* [1952] A.C. 716, except in South Australia, where it has been extended to a wife by statute: Wrongs Act 1936 - 1975 (S.A.) s.33.
70 Note 59 *supra*, 304-306.
71 (1955) 92 C.L.R. 618.
72 Fatal Accidents Act 1846 (U.K.).
73 (1852) 21 L.J.Q.B. 233.
74 Wrongs Act 1936 - 1975 (S.A.) s.23A (added in 1940); Compensation (Fatal Injuries) Ordinance 1974 (N.T.) s.10F. See note 59 *supra*, 296-299.

75 Victorian Chief Justice's Law Reform Committee, *Report on Survival of Causes of Action for Personal Injury and Matters Related to Claims for Wrongful Death* (1982).
76 (1888) 13 A.C. 222: see text accompanying notes 9-11 *supra*.
77 [1897] 2 Q.B. 57.
78 *Id.*, 58-59.
79 Note 77 *supra*.
80 (1927) 27 S.R. (N.S.W.) 133.
81 (1937) 57 C.L.R. 1.
82 Note 77 *supra*.
83 *Ibid.*
84 [1901] 2 K.B. 669.
85 (1939) 62 C.L.R. 1.
86 [1901] 2 K.B. 669.
87 The first case to allow recovery in such a situation was *Hambrook* v. *Stokes Bros.* [1925] 1 K.B. 141.
88 [1961] A.C. 388, 426 *per* Viscount Simonds.
89 (1970) 125 C.L.R. 383.
90 [1982] 2 ALL E.R. 298.
91 *Ibid.*
92 *E.g., Storm* v. *Geeves* [1965] Tas. S.R. 252; *Hinz* v. *Berry* [1970] 2 Q.B. 40; *Cf. Boardman* v. *Sanderson* [1964] 1 W.L.R. 1317 (hearing accident).
93 [1972] V.R. 879.
94 *Hambrook* v. *Stokes Bros.* note 87 *supra*, is not dissimilar; and *Mount Isa Mines Ltd* v. *Pusey* (1970) 125 C.L.R. 383 recognises liability to a non-relative rescuer who suffered shock through seeing the results of the accident.
95 Note 90 *supra*.
96 Note 3 *supra*.
97 91 Mo. App. 4 (1901).
98 [1897] 2 Q.B. 57.
99 *Wilson* v. *Wilkins* 25 S.W. 2d 428 (1930) (Ark.); *Barnett* v. *Collection Service Co.* 242 N.W. 25 (1932) (Iowa).
100 *Restatement of Torts* 2d, para. 46 (which first appeared in this form in 1948); *State Rubbish Collectors Ass'n* v. *Siliznoff* 240 P. 2d (1952) 282.
101 *Battalla* v. *State* 219 N.Y.S. 2d. 34 (1961) (N.Y.); *Amaya* v. *Home Ice, Fuel & Supply Co.* 379 P. 2d 513 (1963) (Cal.); *Niederman* v. *Brodsky* 261 A. 2d 84 (1970) (Pa.).
102 69 Cal. Rptr. 72 (1968).
103 For similar cases, see *Hughes* v. *Moore* 197 S.E. 2d 214 (1973) (Va.); *D'Ambra* v. *U.S.* 338 A. 2d 524 (1975) (R.I.); *Dziokonski* v. *Babincau* 380 N.E. 2d 1295 (1978) (Mass.); *Sinn* v. *Burd* 404 A. 2d 672 (1979) (Pa.); *Corso* v. *Merrill* 406 A. 2d 300 (1979) (N.H.).
104 See note 102 *supra*.
105 See W. L. Prosser, note 3 *supra*, 328-330.
106 *Rodrigues* v. *State* 472 P. 2d 509 (1970) (Haw.) was the initial case; other examples include *Wallace* v. *Coca-Cola Bottling Plants Inc.* 269 A. 2d 117 (1970) (Me.); *Montinieri* v. *Southern New England Telephone Company* 398 A. 2d 1180 (1978) (Conn.); *Molien* v. *Kaiser Foundation Hospitals* 616 P. 2d 813 (1980) (Cal.).
107 [1897] 2 Q.B. 57.
108 *Ibid.*
109 *Ibid.*
110 *Hinz* v, *Berry*, note 92 *supra*, 42 *per* Lord Denning M.R. *Cf. Mount Isa Mines Ltd* v. *Pusey* note 94 *supra*, 394-395 *per* Windeyer J.; *McLoughlin* v. *O'Brian* note 90 *supra*, 301 *per* Lord Wilberforce; 312 *per* Lord Bridge.
111 [1939] 1 K.B. 394.
112 [1943] A.C. 82.
113 *Gray* v. *Gee* (1923) T.L.R. 429.
114 *Wright* v. *Cedzich* (1930) 43 C.L.R. 493.
115 *Winchester* v. *Fleming* [1958] 1 Q.B. 259.
116 *Carr* v. *Clarke* (1818) 2 Chit. 260 (making a cup of tea).
117 Law Reform (Miscellaneous Provisions) Act 1970 (U.K.).
118 Statutes Amendment (Law of Property and Wrongs) Act 1972 (S.A.).
119 Divorce and Matrimonial Causes Act 1857 (U.K.) ss. 33, 59. This statute was adopted in all Australian jurisdictions between 1860 and 1873; see for example Divorce and Matrimonial Causes Ordinance 1863 (W.A.), in which the equivalent provisions are ss. 30 and 64.

120 In England, see Law Reform (Miscellaneous Provisions) Act 1970 (U.K.) (following reform of divorce by the Divorce Reform Act 1969). In Australia, see Family Law Act 1975 (Cth) s.120; the jurisdiction over actions for damages for adultery became federal as a result of the Matrimonial Causes Act 1959 (Cth) s.44.
121 Note 56 *supra.*
122 [1973] Q.B. 27.
123 As had successfully been done in *Seaway Hotel* v. *Cragg* (1960) 21 D.L.R. 2d 264.
124 *E.g., French Knit Sales* v. *Gold* [1972] 2 N.S.W.L.R. 132.
125 *E.g., Lane* v. *Holloway* [1968] 1 Q.B. 379 (though on the facts no damages for mental distress were awarded because of provocation).
126 *Childs* v. *Lewis* (1924) 40 T.L.R. 870.
127 *E.g., Bennett* v. *Allcott* (1787) 2 T.R. 166 100 E.R. 90 (seduction of plaintiff's wife); in Australia, see *Waters* v. *Maynard* (1924) 24 S.R. (N.S.W.) 618.
128 See *Thompson-Schwab* v. *Costaki* [1956] 1 W.L.R. 335.
129 *E.g., Batty* v. *Metropolitan Property Realisations* [1978] Q.B. 554 (wife awarded damages for injury to peace of mind due to imminent collapse of defective house).
130 *Everitt* v. *Martin* (1953) 72 N.Z.L.R. 298 suggests a need for actual damage. *Contra*, H. Street, *Law of Torts* (6th ed. 1976) 31.
131 N.S.W. Qld, Tas, A.C.T.
132 See *e.g., Goslin* v. *Corry* (1844) 7 Man. & G. 342; 135 E.R. 143; *Ley Hamilton* (1935) 153 L.T. 384, 386 *per* Lord Atkin.
133 *Albrecht* v. *Patterson* (1886) 12 V.L.R. 821.
134 J. G. Fleming, note 45 *supra*, 525.
135 Enticement and harbouring; *Lough* v. *Ward* [1945] 2 All E.R. 338: seduction; *Murray* v. *Kerr* [1918] V.L.R. 409, 412 *per* Irvine C.J.: adultery; *Butterworth* v. *Butterworth* [1920] P. 126.
136 Deceit; *Mafo* v. *Adams* [1970] 1 Q.B. 548, 558 *per* Widgery L.J.; *Doyle* v. *Olby (Ironmongers)* [1969] 2 Q.B. 158, 170 *per* Winn L.J.; conspiracy; *Quinn* v. *Leathem* [1901] A.C. 495; *Huntley* v. *Thornton* [1957] 1 W.L.R. 321: interference with contract; *Pratt* v. *British Medical Association* [1919] 1 K.B. 244: infringement of copyright; *Moore* v. *News of the World* [1972] 1 Q.B. 441: but not injurious falsehood; *Fielding* v. *Variety* [1967] 2 Q.B. 841, 850 *per* Lord Denning M.R.
137 *Caltex Oil* v. *Dredge "Willemstad"* (1976) 136 C.L.R. 529.
138 T. A. Street, *Foundations of Legal Liability*, i, (1906) 470.
139 Note, however, what has happened in the field of economic loss. Damage formerly admitted as parasitic: *Seaway Hotels* v. *Cragg* (1960) 21 D.L.R. 2d 264, has now been recognised in its own right: *Caltex Oil* v. *Dredge "Willemstad"* note 137 *supra*. See text and notes 122-123, 137 *supra.*
140 [1909] A.C. 488.
141 *E.g., Godley* v. *Perrey* [1960] 1 W.L.R. 9.
142 *E.g., Hobbs* v. *London & South-Western Rly.* (1875) L.R. 10 Q.B. 111; and see *Athens-MacDonald Travel Service* v. *Kazis* [1970] S.A.S.R. 264, text and note 149 *infra.*
143 See Law Reform (Miscellaneous Provisions) Act 1970 (U.K.); Marriage Act Amendment Act 1977 (Cth) s.21.
144 *Quirk* v. *Thomas* [1916] 1 K.B. 516.
145 On damages for mental distress in actions for breach of contract, see B. S. Jackson, "Injured Feelings Resulting from Breach of Contract" (1977) 26 *I.C.L.Q.* 502; P. H. Clarke, "Damages in Contract for Mental Distress" (1978) 52 *A.L.J.* 626.
146 [1973] Q.B. 233; followed, *Jackson* v. *Horizon Holidays* [1975] 1 W.L.R. 1468. See also *Diesen* v. *Sampson* [1971] S.L.T. 49 (failure of photographer to turn up to take photographs).
147 [1976] 3 All E.R. 161.
148 [1976] Q.B. 446.
149 [1970] S.A.S.R. 264.
150 Note 146 *supra.*
151 [1977] V.R. 447.
152 Note 148 *supra.*
153 Note 146 *supra.*
154 W. S. Gilbert, *The Mikado* (1885).