Jaensch v Coffey - [1984] HCA 52

HIGH COURT OF AUSTRALIA

Gibbs C.J., Murphy, Brennan, Deane and Dawson JJ.

MICHAEL DAVID JAENSCH v. VICKI LORRAINE COFFEY
(1984) 155 CLR 549
20 August 1984

Negligence

Negligence—Duty of care—Nervous shock—Motor accident—Serious injury caused by negligence of driver—Nervous shock suffered by wife after seeing husband in hospital and being told of the seriousness of his injuries—Whether duty of care owed by negligent driver to wife—Foreseeability of injury—Whether sole determinant of duty—Proximity.

Decisions

GIBBS C.J. I have had the advantage of reading the judgment prepared by my brother Deane. I agree with his conclusion and, in general, with his reasons. I can therefore express my own views quite shortly.

2. The respondent developed a psychiatric illness, characterised by anxiety and depression, because of what she saw and heard at the hospital to which her husband was admitted with serious injuries caused by the negligent driving of the appellant. Before the law had reached its present stage of development, the respondent would have had no right to recover damages from the appellant. She was not herself physically injured in the collision, and was not within the area of potential danger arising as a result of the appellant's negligence. She did not see or hear the accident, or its aftermath at the scene of the collision. The shock and fear (apparently well founded) that her husband might die, which caused her psychiatric illness, were caused partly by what she saw, and partly by what she was told, at the hospital on the night of the accident and on the following day. As the law relating to damages for what is somewhat crudely called "nervous shock" has limped on with cautious steps, to use the metaphor suggested by Windeyer J. in Mount Isa Mines Ltd. v. Pusey (1970) 125 CLR 383, at pp 395, 403, the old and irrational limitations on the right to recover damages for an injury of this kind have one by one been removed. Finally, in McLoughlin v. O'Brian (1983) 1 AC 410 , the House of Lords, taking one short step onward from Benson v. Lee (1972) VR 879 (and see Gannon v. Gray (1973) QdR 411) has held that a plaintiff was entitled to recover damages for nervous shock from a defendant whose negligent driving had caused a road accident in which the plaintiff's daughter was killed and her husband and other children were injured, notwithstanding that the plaintiff had been two miles from the scene of the accident when it occurred and did not hear of the accident until about two hours later, and did not see its consequences until she then went to the hospital. It was submitted on behalf of the appellant that we should not follow this decision. With all respect, however, the decision is part of the logical progression of the development of the law already evidenced in the earlier authorities and was correct in principle.

3. The first question for decision in cases such as McLoughlin v. O'Brian and the present is whether the plaintiff was owed a duty of care, and it was not in contest in either case that if the defendant did owe the plaintiff a duty to drive his vehicle with reasonable care he failed to fulfil that duty. The submission on behalf of the respondent in the present case was that in order to succeed she had to establish no more than that the appellant could have reasonably foreseen that his act of negligent driving might cause some sort of psychiatric illness to persons of a class of which she was one. In other words, it was submitted that foreseeability is the only test of the existence of the duty. There is high authority in support of that view. In The Wagon Mound (No. 1) (1961) A.C. 388, at p. 426, their Lordships endorsed the statement of the law made by Lord Denning in King v. Phillips (1953) 1 QB 429, at p 441 : "there can be no doubt since Bourhill v. Young ((1943) AC 92) that the test of liability for shock is foreseeability of injury by shock." There are also some decisions of this Court in which it appears to have been suggested that foreseeability is the sole criterion of liability for negligence. In those cases, however, the question whether a duty of care existed went without saying, because the existence of a duty in cases of that kind was well established by earlier

authority, and the remarks of the judges were directed only to the question whether the conduct of the defendant satisfied the requisite standard of care and not to the question whether a duty of care existed. Foreseeability is relevant to the three different questions that may arise in an action for negligence - whether there was a duty of care; if so, whether the defendant was negligent; and whether the defendant was liable for the kind of damage that resulted from the negligence - and this sometimes tends to lead to confusion.

4. The statement of basic principle by Lord Atkin in Donoghue v. Stevenson (1932) AC 562, at p 580 , does not make liability for negligence depend solely on a failure to take reasonable care to avoid acts or omissions which it can reasonably be foreseen will be likely to injure someone. The duty is owed not to the world, but to one's neighbour, i.e., to "persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question." The principle, which is one of proximity as well as of foreseeability, was stated in the following words by Lord Wilberforce in Anns v. Merton London Borough (1978) AC 728, at pp 751-752 :

> "First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter - in which case a prime facie duty of care arises."

However, the particular circumstances of the case may require some qualification to be placed on the principle and accordingly Lord Wilberforce stated, at p.752, a second question, namely, "whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise". This view was in substance accepted by Mason J. in Wyong Shire Council v. Shirt (1980) 146 CLR 40, at p 44. Many examples could be given of cases in which foreseeability, although necessary to establish the existence of a duty of care, is not sufficient for that purpose. One such case is that of damages for negligent words which cause financial loss. The law, which at first did not allow recovery in such a case, now permits recovery, but by no means in every case where the loss was foreseeable; the principle, the limits of which are not yet fully defined, is complex and detailed: see Hedley Byrne &Co. Ltd. v. Heller &Partners Ltd. (1964) AC 465 and L. Shaddock &Associates Pty. Ltd. v. Parramatta City Council (1981) 55 ALJR 713 . Another case is that where the damage caused by some negligent physical act is solely economic. In Caltex Oil (Australia) Pty. Ltd. v. The Dredge "Willemstad" (1976) 136 CLR 529, although the members of this Court gave different reasons why the plaintiff in that case should recover, all recognized that the fact that the loss was foreseeable was not enough to make it recoverable: see at pp. 555, 573-574, 590, 604, 606. In Junior Books Ltd. v. Veitchi Ltd. (1983) 1 AC 520, where the House of Lords dealt with the same question, all of their Lordships recognized the importance of proximity in deciding it: see at pp. 533, 535, 539, 545, 551. A third example is that of the advocate who cannot be sued for negligence in the conduct of a trial, although the consequences of such negligence are readily foreseeable: see Rondel v. Worsley (1969) 1 AC 191 and Saif Ali v. Sydney Mitchell &Co. (1980) AC 198 . In all these cases policy has played a part in shaping the rule. In Dorset Yacht Co. v. Home Office (1970) AC 1004 Lord Diplock, at p 1 060, gives other examples of acts or omissions which give rise to no legal liability although the loss or damage which those acts or omissions caused was readily foreseeable.

5. Notwithstanding the statement in The Wagon Mound (No. 1) to which I have referred, and to other expressions of a similar opinion which may be found in the authorities, I respectfully agree

with the observation of Lord Wilberforce in McLoughlin v. O'Brian, at p 420, that "foreseeability does not of itself, and automatically, lead to a duty of care".

6. In McLoughlin v. O'Brian, although all of their Lordships agreed in the result, there was a difference of opinion as to the part played by policy in the formulation of the rule governing the recovery of damages for nervous shock. With all respect I consider that the view of Lord Wilberforce is realistic and correct. He said, at p.420, that "foreseeability must be accompanied and limited by the law's judgment as to persons who ought, according to its standards of value or justice, to have been in contemplation". In forming its judgment on such a matter the court is not at large, or free to indulge its own individual notions, but must be guided by existing legal principles and by analogies that may be drawn from decided cases. On the other hand, the court is not necessarily constrained to follow earlier decisions when they appear to be out of accord with contemporary principles. For example, the decision in Chester v. Waverley Corporation (1939) 62 CLR 1 , which cannot be justified either on the ground that shock in that case was not reasonably foreseeable or on the ground that the requisite proximity was lacking, should no longer be followed.

7. Lord Wilberforce pointed out in McLoughlin v. O'Brian, at p 422, that in deciding on the limits that should be placed upon the extent of admissible claims for nervous shock it is necessary to consider three elements: "the class of persons whose claims should be recognised; the proximity (in time and space) of such persons to the accident; and the means by which the shock is caused." I would agree that these are the relevant elements, and I incline to think that the first is of the greatest importance. Where the relationship between the person killed or physically injured and the person who suffers nervous shock is close and intimate, not only is there the requisite proximity in that respect, but it is readily defensible on grounds of policy to allow recovery. There are cases in which persons who do not stand in any such relationship have been held entitled to recover, including the case of rescuers (Chadwick v. British Railways Board (1967) 1 WLR 912) and that of fellow employees (Mount Isa Mines Ltd. v. Pusey) but they do not now fall for consideration. I would with respect reserve my opinion as to the correctness of some of Lord Wilberforce's comments on the other elements and in particular on his statements that there must be a close proximity in space as well as in time (see p.422) and that "the shock must come through sight or hearing of the event or of its immediate aftermath" (see at p. 423). The law must continue to proceed in this area step by cautious step.

8. In the present case there was a very close relationship, both legal and actual, between the respondent and her husband. She was notified of the accident, and went to the hospital, as soon as practicable on the evening when it occurred. She personally perceived the aftermath of the accident, although not at the scene but at the hospital. The fact that, in addition, she was informed by those on duty at the hospital of her husband's condition cannot in my opinion defeat her claim. She was, in my opinion, a "neighbour" of the appellant within Lord Atkin's principle; it was foreseeable that a person in her position would suffer nervous shock, and there is no reason of policy why her claim should not succeed.

9. A final question arises. The respondent had, before her marriage, led an unhappy and deprived life and had suffered much abuse during her childhood. In consequence she had an exceptional predisposition to anxiety and depression. However the learned trial judge held that her predisposition was controlled and that she was a person of normal fortitude. It may be assumed (without deciding) that injury for nervous shock is not recoverable unless an ordinary person of normal fortitude in the position of the plaintiff would have suffered some shock. The findings of the learned trial judge make it right to infer that this has been established in the present case. In those

circumstances the fact that the respondent was predisposed to shock is no answer to her claim. There is no reason why the principle of such cases as Watts v. Rake (1960) 108 CLR 158 should not apply: see also Mount Isa Mines Ltd. v. Pusey, at pp 405-406 ; Benson v. Lee, at p 881; and Gannon v. Gray, at p 414.

10. I agree that the appeal should be dismissed.

MURPHY J. Where a person suffers personal injury through the defendant's negligence, and the spouse of that person, who was not a witness to the occurrence of the injury, suffers damage as a result of shock caused by learning of or witnessing the person's injuries or treatment, should the defendant be liable for the damage to the spouse? The general development of the law, both common law and statute, suggests liability (see Storm v. Geeves (1965) Tas SR 252 ; Mount Isa Mines Ltd v. Pusey (1970) 125 CLR 383 ; Benson v. Lee (1972) VR 879 and McLoughlin v. O'Brian (1983) AC 410). In Caltex Oil (Australia) Pty Ltd v. The Dredge "Willemstad" (1976) 136 CLR 529, 606, I observed that persons causing damage by breach of duty should be liable for all the loss unless there are acceptable reasons of public policy for limiting recovery. In South Australia the old common law rule that damages are not recoverable for nervous shock (Victorian Railways Commissioners v. Coultas (1888) 13 AC 222) has been superseded (see Wrongs Act 1936-1975 (S. A.) s.28).

2. In New South Wales, the Law Reform (Miscellaneous Provisions) Act 1944 extends liability to cover injury arising from nervous or mental shock caused to other persons where a person is killed, injured or put in peril, but limits it to members of the person's family and further limits it, except in the case of a parent or spouse, to cases where the person is killed, injured or put in peril within the sight or hearing of the family member. Similar laws apply in the Australian Capital Territory and the Northern Territory. There is no such limitation in South Australia. If there were, the plaintiff would be able to recover in these circumstances. The Court should not adopt a view of public policy more restrictive of recovery than has been adopted by those Australian legislatures which have dealt with the subject.

Abnormal predisposition to shock or "nervous injury".

3. The accident to her husband was only a contributing factor to the condition for which the plaintiff seeks damages. Mrs Coffey was already in an extremely vulnerable state because of circumstances having nothing to do with the defendant. It is not a rational distribution of social costs to place the whole burden on the defendant, which really means on his insurers and therefore on the motoring public. Nevertheless, if liability extends to "normal" persons, it must also extend to predisposed persons, who at least should be able to recover where a "normal" person would have recovered and to the same extent. Should their recovery be limited to the damage which would have been suffered by a person not predisposed, or should recovery be for all the damage suffered? Or should liability arise only where a person not predisposed would have suffered injury, but the damages not be limited to what such a person would have suffered, but extend to what the plaintiff suffered?

Implications of welfare State on personal injury law.

4. Early negligence law evolved when there was practically no social welfare, but in Australia it should now be developed consistently with the existence of a fairly comprehensive national medical and hospital scheme and social security benefits. Federal social welfare legislation provides for invalid pensions and various benefits for those unemployed or sick. Medical and hospital costs, at

least to the extent that they might be payable or recoverable under the national scheme, should not continue to be a head of damages in personal injury claims. Alteration of the common law to allow for orders for those costs as they arise (as occurs in some jurisdictions) may be an advance on the present system, which requires estimation at the trial of all those costs. In an efficient system, operating against the background of a National Health Scheme, they should not be claimable (either at common law or under statutory compensation schemes).

5. A coherent system to deal with assistance to personal injury victims will not be advanced by a proliferation of further remedies under schemes which aim at providing for medical and hospital costs which would otherwise be covered under the National Health Scheme, and which displace, in whole or part, provisions for invalid pensions and other national social security benefits. Regrettably this case of aftermath nervous shock falls to be determined as if those social welfare laws and the national health scheme did not exist.

6. In the absence of legislation limiting recovery, I am not satisfied that there are acceptable reasons of public policy for limiting recovery here.

7. The appeal should be dismissed.

BRENNAN J. Mrs Coffey had had an unhappy life until she met and married her husband, Allan. It was a happy marriage, and a baby was born to them in February 1979, a few months before Allan's accident. He was a policeman in Adelaide. In the early evening of 2 June 1979 he was on duty riding his motorcycle when he collided with a motor vehicle driven by Mr Jaensch. Mr Jaensch's careless driving was the sole cause of the collision. Allan was seriously injured. He was taken by ambulance to the Royal Adelaide Hospital. Two police officers brought the news to Mrs Coffey. She was at home, away from the scene of the accident. The police brought her to the hospital where she saw Allan in the casualty section in severe pain. She waited while Allan was taken to the operating theatre. As he was being wheeled back from the theatre "his hip popped out again". He was taken back to the theatre. After he emerged again, he complained repeatedly of pain in his stomach. Again he was taken to the theatre and a tear in his liver was found. Mrs Coffey did not know why he had been taken to the theatre on this occasion. She stayed at the hospital and saw what was happening to Allan until a doctor advised her to go home to sleep. He told her that Allan was "pretty bad". She went to stay with friends. At 5.30am a doctor rang. He said, "Allan is in intensive care now. We don't know how he is going to be but we will keep in contact". At 8.30am she had a call from the intensive care unit. She was told that there had been a change for the worse and she was asked to get up to the hospital as quickly as possible. When she arrived at the hospital, a doctor told her that Allan had kidney problems and that his liver was damaged. She stayed much of the day. She saw Allan with "all these tubes coming out of him". She said she was "scared that he was going to die and that all my security had been washed down the drain and I was just so scared and so resentful to the other person that caused the accident". Bollen J., who said that she "needed the security of a safe and affectionate relationship", believed that statement. When Mrs Coffey left the hospital that evening, she thought Allan was going to die. She first realized that Allan would survive three to four weeks after the accident.

2. After her experience at the hospital, Mrs Coffey suffered severe anxiety and depression. Her psychiatric condition caused gynaecological problems and a hysterectomy was later performed. Bollen J. found "that the things which she saw and heard on the night of 2nd/3rd June, 1979 and during 3rd June after she had gone to the hospital in response to a telephone call at about 8.30 a.m. caused her psychiatric illness - anxiety and depression". Although Mrs Coffey's early life had

predisposed her to anxiety and depression, his Honour found that she "was a person of normal fortitude". His Honour also found that "the wrong-doer could foresee that a wife, hearing of the accident, would go to hospital, wait at the end of the telephone and suffer mental shock at what she saw and heard". These findings were made in an action in the Supreme Court of South Australia brought by Mrs Coffey against Mr Jaensch. She recovered a judgment for $37,563.16 damages in negligence for nervous shock and damages for loss of consortium and interest. Judgment was entered for a total amount of $48,003.16. An appeal was brought to the Full Court of the Supreme Court, but the award of general damages for nervous shock was left undisturbed. The appellant, Mr Jaensch, appeals to this Court, contending that he owed no duty of care to Mrs Coffey and that he is not liable in damages for negligence occasioning nervous shock.

3. A century ago psychiatric illness, without more, was not a form of harm or damage for which damages for negligence could be recovered: Victorian Railways Commissioners v. Coultas (1888) 13 App Cas 222 . But at least for the last half-century "neurasthenic breakdown amounting to psychiatric illness" has been held to be "without more ... a form of harm or damage sufficient for the purpose of any action on the case in which damage is the gist of the action, ... supposing that the other ingredients of the cause of action are present": per Dixon J. in Bunyan v. Jordan (1937) 57 CLR 1, at p 16. The term "nervous shock" has been used to describe that form of damage, although the term may not be an accurate medical description of the range of psychiatric illnesses which it is intended to cover - "any recognizable psychiatric illness" was the description used by Lord Denning M.R. in Hinz v. Berry (1970) 2 QB 40, at p 42, and cited by Windeyer J. in Mount Isa Mines Ltd. v. Pusey (1970) 125 CLR 383, at p 394, and that description must be right. Compensation is awarded for the disability from which the plaintiff suffers, not for its conformity with a label of dubious medical acceptability. The term "nervous shock" is useful nevertheless as a term of art to indicate the aetiology of a psychiatric illness for which damages are recoverable in an action on the case when the other elements of the cause of action are present. Thus Walsh J. in Pusey's Case (at p.414) referred to "all forms of mental or psychological disorder which are capable of resulting from shock" (emphasis added). It will be necessary to consider presently the aetiology of nervous shock, but first the other elements of the cause of action should be mentioned.

4. A plaintiff must prove that a psychiatric illness for which damages are claimed has been caused by the defendant's act or omission: Chapman v. Hearse (1961) 106 CLR 112, at p 122. Reasonable foreseeability of the damage is insufficient if the chain of causation is interrupted. A defendant is not liable if a novus actus intervenes between the defendant's conduct and the damage complained of: McKew v. Holland &Hannen &Cubitts (1969) 3 All ER 1621, at p 1623.

5. A plaintiff must also prove that an act or omission which caused the plaintiff's psychiatric illness was done or omitted in breach of a duty of care owed by the defendant to the plaintiff. Where the psychiatric illness is caused by perceiving the consequences of the defendant's carelessness - typically a physical injury inflicted on another - it is not sufficient for the plaintiff to prove that the defendant has failed in his duty of care to that other. He must prove that the defendant's carelessness was in breach of a duty owed to the plaintiff. The respective duties of care owed to the plaintiff and to the other person and the causes of action arising from their breach are independent one of the other. It is now settled law that the duty owed to one is not to be regarded as secondary to or derived from the duty owed to the other: see per Lord Wright in Hay or Bourhill v. Young (1943) AC 92, at p 108 and Scala v. Mammolitti (1965) 114 CLR 153, at p 159.

6. Reasonable foreseeability determines the existence of the duty of care and the measure of

damages recoverable for its breach. In Bourhill v. Young Lord Russell of Killowen said, at p 101:

> " In considering whether a person owes to another a duty a breach of which will render him liable to that other in damages for negligence, it is material to consider what the defendant ought to have contemplated as a reasonable man. This consideration may play a double role. It is relevant in cases of admitted negligence (where the duty and breach are admitted) to the question of remoteness of damage, i.e., to the question of compensation not to culpability, but it is also relevant in testing the existence of a duty as the foundation of the alleged negligence, i.e., to the question of culpability not to compensation."

Referring to this passage of his Lordship's speech, the Judicial Committee in Overseas Tankship (U. K.) Ltd. v. Morts Dock &Engineering Co.Ltd. (The Wagon Mound.) (No.1) (1961) AC 388 said, at p 426 :

> " We have come back to the plain common sense stated by Lord Russell of Killowen in Bourhill v. Young (1943) A.C.92, 101. As Denning L.J. said in King v. Phillips (1953) 1 QB 429, 441 : 'there can be no doubt since Bourhill v. Young that the test of liability for shock is foreseeability of injury by shock.'"

In Mount Isa Mines Ltd. v. Pusey, the criterion of reasonable foreseeability was applied in determining the existence of a duty owed to a plaintiff who had suffered a psychiatric illness as the result of going to the aid of fellow employees who had sustained gruesome burning injuries: see per Barwick C.J. at pp.389-390, McTiernan J. at p.391, Menzies J. at p.392, Windeyer J. at pp. 395,397,402 and Walsh J. at pp.413-415. The criterion of reasonable foreseeability is not a narrow test. In Chapman v. Hearse this Court said, at pp 120-121:

> " ... one thing is certain and that is that in order to establish the prior existence of a duty of care with respect to a plaintiff subsequently injured as the result of a sequence of events following a defendant's carelessness it is not necessary for the plaintiff to show that the precise manner in which his injuries were sustained was reasonably foreseeable; it is sufficient if it appears that injury to a class of persons of which he was one might reasonably have been foreseen as a consequence. As far as we can see the test has never been authoritatively stated in terms other than those which would permit of its general application and it would be quite artificial to make responsibility depend upon, or to deny liability by reference to, the capacity of a reasonable man to foresee damage of a precise and particular character or upon his capacity to foresee the precise events leading to the damage complained of."

7. It follows that a defendant whose carelessness has caused damage to a plaintiff and who could reasonably have foreseen that his carelessness was liable to cause some damage "can only escape liability if the damage can be regarded as differing in kind from what was foreseeable" (per Lord Reid in Hughes v. Lord Advocate (1963) AC 837, at p 845). Prior to The Wagon Mound (No.1), the formulation of the test of foreseeability was influenced by the judgments in In re Polemis and

Furness, Withy &Co. (1921) 3 KB 560 so that it was often expressed in terms of what the defendant ought to anticipate as the reasonable and probable consequences of his conduct. For example, in Thompson v. Bankstown Corporation (1953) 87 CLR 619, Dixon C.J. and Williams J. said, at p 630 :

> " In a passage in his opinion in Bourhill v. Young ((1943) AC 92, at p 104), Lord Macmillan says 'The duty to take care is the duty to avoid doing or omitting to do anything the doing or omitting to do which may have as its reasonable and probable consequence injury to others, and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed.' This passage was cited and used as the test by Lord Thankerton and by Lord Macmillan himself in Glasgow Corporation v. Muir ((1943) A.C.448, at pp. 454,457). Lord Macmillan's phrase 'the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed', has, as the opinions in the two cases seem to show, no meaning very different from Lord Atkin's description in M'Alister (or Donoghue) v. Stevenson ((1932) A.C.562, at p. 580), viz. 'persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question'."

8. Then, in Chapman v. Hearse, at p 120, this Court left open the question whether foreseeability is restricted to foreseeability of those consequences which, after the event, can be characterized as "reasonable and probable". Now it has been held by the House of Lords (Hughes v. Lord Advocate), the Judicial Committee (The Wagon Mound (No.2): Overseas Tankship (U.K.) Ltd. v. The Miller Steamship Co. Pty. (1967) AC 617) and by this Court (Wyong Shire Council v. Shirt (1980) 146 CLR 40) that the test of foreseeability is not so restricted. The present rule in negligence is stated by Lord Reid in C.Czarnikow Ltd. v. Koufos (1969) 1 AC 350, at pp 385-386 :

> " The defendant will be liable for any type of damage which is reasonably foreseeable as liable to happen even in the most unusual case, unless the risk is so small that a reasonable man would in the whole circumstances feel justified in neglecting it."

As Mason J. pointed out in Shirt's Case, at p.45, his Lordship must be understood to be using the expression "liable to happen" so as to include an event which may be described as a very improbable result. Nowadays it is neither possible nor necessary to embrace the judgments in re Polemis (as Evatt J. did in Chester v. Waverley Corporation (1939) 62 CLR 1, at p 29) in order to uphold the recovery of damages for nervous shock which, though a foreseeable consequence, is not a natural and probable consequence of the defendant's careless conduct.

9. Applying Lord Reid's statement of the principle to cases where a plaintiff seeks damages for negligence occasioning nervous shock, it is not necessary for a plaintiff to prove that a reasonable man in the defendant's position could foresee that any particular psychiatric illness might be caused by his conduct; it suffices that he could have foreseen that his conduct might cause some recognized psychiatric illness induced by shock. In Mount Isa Mines Ltd. v. Pusey, Walsh J. said (at p 414):

" ... for the purposes of the present case the statement in The 'Wagon Mound' (No.1) ((1961) A.C., at p.426) that the test of liability for shock is foreseeability of injury by shock may be accepted. It treats 'injury by shock' as a distinct kind of injury. Its acceptance means that all forms of mental or psychological disorder which are capable of resulting from shock are to be regarded as being, for the purposes of the foreseeeability test of liability, damage of the same kind. If, therefore, some form of mental illness or neurosis was foreseeable, as Skerman J. found, and in my view properly found, the respondent satisfied the requirements of that test. He proved that the damage which he suffered was of a kind which was foreseeable."

It is not necessary that the precise events leading to the administration of the shock should be foreseeable. It is sufficient that shock and a psychiatric illness induced by it are reasonably foreseeable.

10. When a duty of care is found to exist, owed either to a plaintiff or to a class of persons of whom he is one, the plaintiff must prove its breach. This calls for an assessment of the act or omission by which the plaintiff's damage was caused. That assessment is made by reference to the standard of the notional reasonable man, as Mason J. explained in Shirt's Case, at pp.47-48:

" In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position."

11. When a plaintiff suffers a psychiatric illness induced by his perception of the physical consequences of the defendant's breach of a duty of care owed to a third person, he is not likely to have difficulty in proving the defendant's breach of any relevant duty of care owed to him. Thus, in Mount Isa Mines Ltd. v. Pusey Walsh J. said, at p 411:

" There can be no remaining question as to the existence of a relevant duty or as to the breach of it if, in addition to the findings that there was a breach of a duty owed by the appellant to Kuskopf and Docherty" - the two servants of the defendant who had suffered burning injuries - "and that this was a cause of the injuries to them, two further propositions were established, namely, (1) that it was foreseeable that if injury was thus caused to those servants or either of them other persons in the building such as the respondent might go to investigate and to render assistance; and (2) that it was

> foreseeable that such a person going to the scene might suffer an injury of the kind for which the respondent sued and which he proved to have been caused, in fact, by the incident in question."

It is not necessary here to consider the case where the plaintiff suffers nervous shock caused by his perception of the physical consequences to a third person of the defendant's conduct and the third person is owed no relevant duty of care.

12. A broadening of the test of foreseeability and a readier judicial acceptance of the foreseeability of shock-induced psychiatric illness have combined to expand the scope of a defendant's liability beyond what it was thought to be half a century ago. Liability for negligence occasioning nervous shock has not been readily accepted, perhaps because the courts found evidence of psychiatric illness and of its aetiology to be too vague to warrant a finding of a causal relationship between psychiatric illness and careless conduct. Curial wariness of vague notions is, as Sir Owen Dixon said, perhaps the "reason that scorn of the law is more widespread among psychiatrists than anatomists" (Jesting Pilate (1965) p.18). The courts have insisted on proof of a demonstrable and readily-appreciable cause of psychiatric illness - the cause itself being a result of the defendant's careless conduct - before damages for negligence occasioning psychiatric illness are awarded. A plaintiff may recover only if the psychiatric illness is the result of physical injury negligently inflicted on him by the defendant or if it is induced by "shock". Psychiatric illness caused in other ways attracts no damages, though it is reasonably foreseeable that psychiatric illness might be a consequence of the defendant's carelessness. The spouse who has been worn down by caring for a tortiously injured husband or wife and who suffers psychiatric illness as a result goes without compensation; a parent made distraught by the wayward conduct of a brain-damaged child and who suffers psychiatric illness as a result has no claim against the tortfeasor liable to the child.

13. The foreseeability of shock-induced psychiatric illness has gained a more ready acceptance by Australian courts during the last half-century. The change in approach is manifest when Chester v. Waverley Corporation is compared with Mount Isa Mines Ltd. v. Pusey. In Chester v. Waverley Corporation, a mother suffered "severe nervous shock" when, in her presence and sight, the dead body of her 7-year old son was found in and taken from a water-filled trench which the defendant corporation had dug in a road and had carelessly failed to fence. Her action failed. In Mount Isa Mines Ltd. v. Pusey, the trial judge found that the defendant employer ought to have foreseen the possibility of an employee suffering an injury within the broad category of psychiatric illness when going to the rescue of other employees in the same building who suffered gruesome burning injuries as the result of negligence on the parts of both the employer and the injured employees. There the award of damages was upheld. In both cases this Court's decision turned upon whether, on the facts of the case, the causing of the plaintiff's psychiatric illness by shock was reasonably foreseeable by the defendant (see, in Chester's Case, Latham C.J. at p.10, Rich J. at p.11, Starke J. at pp.13-14 and Evatt J. at p.29; in Pusey's Case, at pp.389- 390,391,395 - where Windeyer J. uses the phrase "set off by shock" - and pp.402,414).

14. A similar change is to be seen in the approach of English courts, although a criterion of reasonable foreseeability has been accepted throughout. In Bourhill v. Young the plaintiff's action failed because their Lordships were of the opinion that, in the circumstances, the defendant could not reasonably have foreseen that the collision would put persons in the plaintiff's position in danger of suffering injury by shock (see per Lord Thankerton at p.99, Lord Russell of Killowen at p.102, Lord Macmillan at p.105, and Lord Wright at p.111; Lord Porter at p.119 speaks of foresight of "emotional injury ... as a result of .. negligent driving" although he had referred at p.117 to the

reasonable anticipation of "emotional disturbance or shock"). The plaintiff's claim was rejected on the facts, as Lord Wilberforce acknowledged in McLoughlin v. O'Brian (1983) 1 AC 410, at p 418. I n McLoughlin v. O'Brian the House of Lords accepted that it was reasonably foreseeable that the plaintiff, whose husband and children were injured in a motor car accident - one child was injured fatally - might suffer psychiatric illness caused by shock by seeing them grievously injured in hospital shortly after the accident. The fact that the plaintiffs in Pusey's Case and in McLoughlin v. O'Brian succeeded no doubt reflects the broadening of the legal criterion of reasonable foreseeability and the contemporary acceptance of the foreseeability of shock-induced psychiatric illness. The success of the plaintiffs in those cases is a salutary reminder that questions of law and questions of fact must be kept within their proper areas of discourse and that it is a fallacy to limit the scope of a cause of action by too ready a rejection of the sufficiency of the evidence tendered in proof of an element of that cause of action.

15. In cases of negligence occasioning nervous shock, as in cases of negligence occasioning physical injury, the "essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen" (The Wagon Mound (No.1), at p.426). The distinction in principle between the two classes of cases, however, depends on the kind of damage that the reasonable man should foresee. Where a plaintiff is entitled to damages for negligence occasioning nervous shock, some recognizable psychiatric illness induced by shock must be reasonably foreseeable.

16. The notion of psychiatric illness induced by shock is a compound, not a simple, idea. Its elements are, on the one hand, psychiatric illness and, on the other, shock which causes it. Liability in negligence for nervous shock depends upon the reasonable foreseeability of both elements and of the causal relationship between them. It is not surprising that Lord Macmillan noted in Bourhill v. Young, at p 103, that:

> " ... in the case of mental shock there are elements of greater subtlety than in the case of an ordinary physical injury and these elements may give rise to debate as to the precise scope of legal liability."

I understand "shock" in this context to mean the sudden sensory perception - that is, by seeing, hearing or touching - of a person, thing or event, which is so distressing that the perception of the phenomenon affronts or insults the plaintiff's mind and causes a recognizable psychiatric illness. A psychiatric illness induced by mere knowledge of a distressing fact is not compensable; perception by the plaintiff of the distressing phenomenon is essential. If mere knowledge of a distressing phenomenon sufficed, the bearers of sad tidings, able to foresee the depressing effect of what they have to impart, might be held liable as tortfeasors.

17. The capacity of a phenomenon to cause a person who perceives it to suffer a psychiatric illness depends in part upon the distressing aspects of the phenomenon which are manifest to be perceived by anybody and in part upon any special significance which the phenomenon may have for the person who perceives it. Thus a runaway lorry rushing around a bend has a special significance for a mother who knows her children to be there; she is more likely than another bystander to be shocked by the sight of the runaway lorry: see Hambrook v. Stokes Bros. (1925) 1 KB 141 . Of course a psychiatric illness may be induced by shock when a distressing phenomenon is perceived by a plaintiff for whom it has no special significance. Thus in Dulieu v. White &Sons. (1901) 2 KB 669 , where it was held that a plaintiff could recover for "a severe shock" if she proved that it was caused

by the negligent driving of a pair-horse van into her husband's public house where she was behind the bar, it was not thought necessary that the plaintiff should allege and prove that she was more susceptible than other occupants of the public house to the sight of the entry of the pair-horse van. No doubt it is true to say that the more distressing and dramatic an event, the more likely it is to cause shock to those who perceive it. The scene of a road accident where an injured victim is to be seen is usually more distressing and dramatic, more inherently shocking, than the scene in a hospital ward where the victim is recovering from his injuries. There is, however, no legal principle which precludes a plaintiff from relying on phenomena other than the scene of an accident or, as in Hambrook v. Stokes Bros., the scene of a potential accident. A temporal extension beyond the actual occurrence of an accident was accepted by Lush J. in Benson v. Lee (1972) VR 879, who allowed a claim based upon "direct perception of some of the events which go to make up the accident as an entire event, and this includes ... the immediate aftermath ..." (at p. 880). But I know of no principle which precludes a plaintiff from relying on any phenomenon which is a reasonably foreseeable result of the defendant's carelessness. It is a question of fact whether it is reasonably foreseeable that the sudden perception of that phenomenon might induce psychiatric illness.

18. Nowadays it is accepted by the community and by the courts that the sudden perception of a distressing phenomenon might induce psychiatric illness in some people, although the mechanics of the causal relationship involved is not fully understood even by those in whose field of expertise that subject lies. It is not surprising that there is great scope for differences of opinion as to the foreseeability of the inducing of a psychiatric illness by the sudden perception of a distressing phenomenon. Moreover, it is generally recognized that what will induce a psychiatric illness in one person may leave another unaffected. Some people are naturally more robust - or less sensitive - than others. Yet reasonable foreseeability is an objective criterion of duty, and a general standard of susceptibility must be postulated. At least to that extent it is possible to confine consideration of the question whether it is reasonably foreseeable that the perception of a particular phenomenon might induce in the plaintiff a psychiatric illness. Some general guidelines apply. The first guideline is this: the question "whether there is duty owing to members of the public who come within the ambit of the act, must generally depend on a normal standard of susceptibility" (per Lord Wright in Bourhill v. Young, at p 110). Unless a plaintiff's extraordinary susceptibility to psychiatric illness induced by shock is known to the defendant, the existence of a duty of care owed to the plaintiff is to be determined upon the assumption that he is of a normal standard of susceptibility. Secondly, if it is reasonably foreseeable that the phenomenon might be perceived by a person or class of persons for whom it has a special significance - for example, the parent of a child injured in a road accident who comes upon the scene - the question whether it is reasonably foreseeable that the perception of the phenomenon by that person or a member of that class might induce a psychiatric illness must be decided in the light of the heightened susceptibility which the special significance of the phenomenon would be expected to produce.

19. Plaintiffs who have been present at the scene of an accident have recovered, especially where the injured third person is a spouse, child or sibling of the plaintiff: see Dulieu v. White &Sons., where the plaintiff was shocked by the event itself; Storm v. Geeves (1965) Tas SR 252 , where the victim's brother and sister were at the scene; and Hinz v. Berry, where Mrs Hinz looked immediately at the scene of disaster when a car ran into her husband and children, injuring them all and fatally injuring her husband. Rescuers have recovered when they come to the scene of an accident to render assistance to the injured, for it was foreseeable that they would come to the scene and their arrival there was treated as being a result of the defendant's careless conduct: see Mount Isa Mines Ltd. v. Pusey; Chadwick v. British Railways Board (1967) 1 WLR 912 . The law treats a rescuer's response to the victim's injury as the natural and probable consequence of the conduct which causes the

injury: "The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences" (per Cardozo J. in Wagner v. International Ry.Co. (1921) 232 NY 176, at p 180). Similarly, parents who have been quickly summoned to the scene of a child's accident have recovered: for example, the mothers in Storm v. Geeves and Benson v. Lee, and a father in Boardman v. Sanderson (Keel and Block Third Party) (1964) 1 WLR 1317 . If rescuers' and parents' responses are so commonplace and expected that their attendance at the scene may properly be found to be the reasonably foreseeable result of inflicting an injury on the original victim, the response of one spouse in coming immediately to the other spouse in his or her distress must be similarly regarded. There is no difference in principle between the compassionate and immediate response of a rescuer, a parent or a spouse to a victim's cry of distress. The defendant's infliction of injury upon the victim is the summons to the rescuer, parent or spouse to attend the victim, and that attendance can properly be found to be the result, and the reasonably foreseeable result, of the defendant's conduct. The range of foreseeability in the case of rescuers is well stated by Evatt J. in the second of the "subsidiary principles" set out in Chester v. Waverley Corporation (at p 44):

> " The secondary duty is cast upon A because a reasonable person in his position would have foreseen the probability of injury being sustained (a) by those who are already present at or in the immediate vicinity of the scene of the actual or apprehended casualty, and (b) by those who will also be brought to the scene for the purpose either of preventing the casualty altogether, or of minimizing its injurious consequences, or in the course of a search to discover and rescue or aid any person who is feared on reasonable grounds to have been injured in the casualty."

20. It would be an exceptional case if it could be found that the attendance of other persons at the scene of an accident is the result of the defendant's negligence. However foreseeable it may be that passers-by will stop or that morbid curiosity will bring others to the scene, it is difficult to envisage a case where their attendance at the scene and their perception of it could fairly be regarded as the result of the defendant's conduct. Unless their attendance at and perception of the scene is shown to be a result, and a reasonably foreseeable result, of the defendant's conduct, they are not entitled to recover damages for psychiatric illness induced by sudden perception of it. That is, however, a question of fact.

21. When the scene of an accident is left behind, and the perception of some later phenomenon induces a psychiatric illness in a plaintiff, the factual difficulties in the way of establishing negligence occasioning nervous shock are greatly increased though the principles are unchanged. The occurrence or existence of the later phenomenon, its sudden perception by the plaintiff and the inducing of the plaintiff's psychiatric illness must be proved to be the results, and the reasonably foreseeable results, of the defendant's conduct. But the separation in time and distance of the later phenomenon from the immediate consequences of the defendant's conduct may make it difficult to prove the elements of causation and reasonable foreseeability as they apply in cases of nervous shock. The cry of distress which summons a rescuer, spouse or parent to the scene of an accident may lose some of its urgency as time passes after the initial injury; later visits by a spouse or parent to the injured person in hospital may not be so distressing as to induce psychiatric illness in a spouse or parent of a normal standard of susceptibility - especially if the injured person's condition and treatment proceed without dramatic fluctuations. It may not be reasonably foreseeable that the

perception of the injured spouse or child in hospital might induce a psychiatric illness. Of course, what is too remote to be treated as a consequence in one case may be clearly within the chain of causation in another; what is not reasonably foreseeable in one case may be reasonably foreseeable in another.

22. These are all questions of fact, but they are questions of impression and degree which cannot be directly proved by evidence of what is too remote and what is not, of what is reasonably foreseeable and what is not. They are matters of judgment for the jury or, where there is no jury, for the judge. Hence Lord Wright, in Bourhill v. Young, in answer to the question where the thing is to stop, replied (at p 110) that "it should stop where in the particular case the good sense of the jury or of the judge decides".

23. The stopping point is not to be defined as a proposition of law, nor are new principles to be invented to stop the thing going too far. In McLoughlin v. O'Brian, the House of Lords was much exercised by the scope of the cause of action, some of their Lordships asserting that limits should be placed judicially upon it (see per Lord Wilberforce at p.421; Lord Edmund-Davies at pp.426-428). Others of their Lordships denied the propriety of curtailing a cause of action to satisfy judicial policy (see per Lord Scarman at p.430; Lord Bridge of Harwich at pp.441-443), while Lord Russell of Killowen did not deny that notions of judicial policy could be relevant in an appropriate case but found that the facts of the case did not raise any issue of judicial policy (at p.429). In my opinion, the exigencies of proof of the elements of the cause of action impose the appropriate limits upon the scope of the remedy. Those limits are likely to be at once more flexible and more stringent than limits imposed by legal rules which might be devised to give effect to a judicial policy of restraining the remedy within what are thought to be acceptable bounds.

24. In McLoughlin v. O'Brian (at p 422) Lord Wilberforce thought that the existing law recognizes the claims of parent and child or husband and wife but denies the claims of the ordinary bystander. His Lordship suggested that cases "involving less close relationships" should be carefully scrutinized and the claim judged in the light of other factors. The criteria of causation and reasonable foreseeability based on normal standards of susceptibility are more easily satisfied in the case of parent and child or husband and wife. Those criteria also furnish the framework of principle within which the courts determine whether a particular claim by a bystander or by a plaintiff in "a less close relationship" with a physically injured victim is to be allowed. In Australia, the categories of claimants are not closed. In the present case, it is unnecessary to do more than recall what Windeyer J. said in Pusey's Case, at p.404:

> " There seems to be no sound ground of policy, and there certainly is no sound reason in logic, for putting some persons who suffer mental damage from seeing or hearing the happening of an accident in a different category from others who suffer similar damage in the same way from the same occurrence. The supposed rule that only relatives can be heard to complain is apparently a transposition of what was originally a humane and ameliorating exception to the general denial that damages could be had for nervous shock. Close relatives were put in an exceptional class. ... What began as an exception in favour of relatives to a doctrine now largely abandoned has now been seen as a restriction, seemingly illogical, of the class of persons who can today have damages for mental ills caused by careless conduct."

In McLoughlin v. O'Brian Lord Wilberforce acknowledged that, although close proximity to the accident in time and space is necessary, a plaintiff might recover when he comes from nearby and very soon upon the scene. I would regard those considerations to be relevant to the finding of facts, but not to be principles limiting liability. The question whether a plaintiff comes to the scene of an accident as rescuer (and may recover) or out of mere curiosity (so that he may properly be regarded as the author of his own shock) can be decided by reference to the currently accepted principles. Persons "of whom it could be said that one could expect nothing else than that he or she would come immediately to the scene - normally a parent or a spouse" (persons whom Lord Wilberforce would hold to be entitled to recover) are accommodated within those principles. I do not find it desirable as a matter of policy or permissible as a technique of judicial development of the law to create new criteria of limitation upon the scope of the cause of action in negligence causing psychiatric illness. The thing will stop where good sense in the finding of facts stops it. In each case where causation is established, the question of fact is whether it was reasonably foreseeable by the defendant that his conduct might bring about a phenomenon the sudden perception of which by the plaintiff or by a class of which the plaintiff is a member might induce a psychiatric illness, assuming the plaintiff or the members of that class to be of a normal standard of susceptibility. Of course, the room for judgment is manifest as it always is in the evaluation of facts, but that provides no warrant for introducing new criteria to limit liability. I would agree, with respect with Burbury C.J. who said in Storm v. Geeves, at pp 261-262:

> " It can now I think be taken to be clear that the limits of liability for injury by nervous shock are to be determined only by a proper judicial application of the general test of reasonable foreseeability of that kind of injury in all the circumstances of the particular case."

25. If authority established that there are restrictive criteria of liability in addition to causation and reasonable foreseeability, the scope of the cause of action would have to be more narrowly stated. In McLoughlin v. O'Brian Lord Wilberforce said, at p 420, that "foreseeability does not of itself, and automatically, lead to a duty of care". And Lord Edmund-Davies said that he could not accept the approach that reasonable foreseeability is the sole test of liability. He added, at p.426:

> " It is true that no decision was cited to your Lordships in which the contrary has been held, but that is not to say that reasonable foreseeability is the only test of the validity of a claim brought in negligence."

Both of their Lordships referred to what Lord Reid had said in McKew v. Holland &Hannen &Cubitts and to what Lord Wilberforce had said in Anns v. Merton London Borough (1978) AC 728 , at p 752. Lord Reid's speech, however, was not concerned with reasonable foreseeability as the criterion of a duty of care; he was pointing out, as this Court pointed out in Chapman v. Hearse, that liability in negligence does not extend to consequences that are not caused, in the eye of the law, by the defendant's act or omission. The context makes that clear (at p.1623):

> " His unreasonable conduct is novus actus interveniens. The chain of causation has been broken and what follows must be regarded as caused by his own conduct and not by the

> defender's fault or the disability caused by it. Or one may say that unreasonable conduct of the pursuer and what follows from it is not the natural and probable result of the original fault of the defender or of the ensuing disability. I do not think that foreseeability comes into this. A defender is not liable for a consequence of a kind which is not foreseeable. But it does not follow that he is liable for every consequence which a reasonable man could foresee. What can be foreseen depends almost entirely on the facts of the case, and it is often easy to foresee unreasonable conduct or some other novus actus interveniens as being quite likely."

Lord Wilberforce's speech in Anns, however, was concerned with the criterion of reasonable foreseeability in torts which have developed from the general conception expressed by Lord Atkin in Donoghue v. Stevenson (1932) AC 562. In Anns, Lord Wilberforce said (at pp 751-752):

> " Through the trilogy of cases in this House - Donoghue v. Stevenson (1932) AC 562 ,

Hedley Byrne &Co.Ltd. v. Heller &Partners Ltd.

> (1964) AC 465 , and Dorset Yacht Co.Ltd. v. Home Office (1970) AC 1004 , the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter - in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise: see Dorset Yacht case (1970) A.C. 1004, per Lord Reid at p. 1027. Examples of this are Hedley Byrne's case (1964) A.C. 465 where the class of potential relied upon the correctness of

statements made, and Weller &Co. v. Foot and

> Mouth Disease Research Institute (1966) 1 QB 569 ; and (I cite these merely as illustrations, without discussion) cases about 'economic loss' where, a duty having been held to exist, the nature of the recoverable damages was limited: see SCM. (United Kingdom) Ltd. v.

W.J.Whittall &Son Ltd. (1971) 1 Q.B.337 and Spartan Steel &Alloys Ltd. v. Martin & Co. (Contractors) Ltd. (1973) QB 27 ."

The "sufficient relationship of proximity or neighbourhood" to which his Lordship refers in the first stage of the approach is Lord Atkin's well-known neighbour principle, as Lord Devlin explained in Hedley Byrne, at p.524:

> " What Lord Atkin called ((1932) A.C.562, at p. 580) a 'general conception of relations giving rise to a duty of care' is now often referred to as the principle of proximity. You

> must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. In the eyes of the law your neighbour is a person who is so closely and directly affected by your act that you ought reasonably to have him in contemplation as being so affected when you are directing your mind to the acts or omissions which are called in question."

26. The second stage of the approach is derived from cases all of which, except for Dorset Yacht, are cases of economic loss. In Dorset Yacht, in the passage of Lord Reid's speech to which Lord Wilberforce refers, his Lordship distinguished negligence causing economic loss from negligence causing property damage: "causing economic loss is a different matter". It is erroneous, of course, to treat all cases of negligence causing economic loss as a sub-species of a general tort of negligence the elements of which are common to all torts involving negligence. Lord Atkin's general conception of relations giving rise to a duty of care has informed the development of various branches of the law but the elements of the several categories of negligence are not identical. In truth, as Lord Reid observed, "where negligence is involved the tendency has been to apply principles analogous to those stated by Lord Atkin" in Donoghue v. Stevenson (emphasis added). The evolution of new categories of negligence was explained by Lord Devlin in Hedley Byrne, at pp 524-525:

> " What Lord Atkin did was to use his general conception to open up a category of cases giving rise to a special duty. It was already clear that the law recognised the existence of such a duty in the category of articles that were dangerous in themselves. What Donoghue v. Stevenson (1932) A.C.562 did may be described either as the widening of an old category or as the creation of a new and similar one. The general conception can be used to produce other categories in the same way. An existing category grows as instances of its application multiply until the time comes when the cell divides."

27. As new categories of negligence grow out of the general conception, they are found to contain one or more different elements from other categories grown from the common stock. When negligent misrepresentation causing economic loss was recognized as a category of negligence in Hedley Byrne, reasonable foreseeability of economic loss was held not to be enough to establish a duty of care: a further special relationship between the parties was required. When the category of negligent conduct causing economic loss was recognized in Caltex Oil (Australia) Pty. Ltd. v. The Dredge "Willemstad" (1976) 136 CLR 529, reasonable foreseeability that a particular person would be likely to suffer economic loss as a consequence of negligence was required. What will suffice to establish a duty of care in one category of negligence is not necessarily enough in another. Lord Atkin's general conception of relations giving rise to a duty of care, the neighbour principle, cannot be taken as a universal statement of the criterion of duties of care in the several categories of negligence where different kinds of damage are in issue. In Dorset Yacht, Lord Diplock, after citing the well-known passage from Lord Atkin's speech, cautioned against treating Lord Atkin's general conception as a universal proposition (at p. 1060):

> " Used as a guide to characteristics which will be found to exist in conduct and relationships which give rise to a legal duty of care this aphorism marks a milestone in

> the modern development of the law of negligence. But misused as a universal it is manifestly false. The branch of English law which deals with civil wrongs abounds with instances of acts and,
> more particularly, of omissions which give rise to no legal liability in the doer or omitter for loss or damage sustained by others as a consequence of the act or omission, however reasonably or probably that loss or damage might have been anticipated."

In Anns, Lord Wilberforce's approach "in two stages" to the establishing of a duty of care takes, as its first stage, Lord Atkin's general conception; the second stage takes those further elements which are appropriate to the particular category of negligence and which confine the duty of care within narrower limits than those which would be defined by an unqualified application of the neighbour principle. And so, in Shirt's Case, where an ambiguous sign misled a water skier about the depth of water in part of a lake and the water skier suffered personal injury by falling in the shallows, Mason J. thought it appropriate to adopt the two stage approach, saying (at p.44):

> " According to Lord Atkin's statement of principle in Donoghue v. Stevenson ((1932) AC 562, at p 580), as it has been refined in later decisions, prima facie a duty of care arises on the part of a defendant to a plaintiff when there exists between them a sufficient relationship of proximity, such that a reasonable man in the defendant's position would foresee that carelessness on his part may be likely to cause damage to the plaintiff (Home Office v. Dorset Yacht Co.Ltd ((1970) A.C.1004, at pp. 1027, 1034, 1054,1060); Anns v. Merton London Borough Council ((1978) AC 728, at pp 751-752). It has not been suggested that there were present in the instant case any considerations which negated the duty."

28. A similar approach to the general conception as the first of two stages was taken by Lord Roskill in Junior Books Ltd. v. Veitchi Ltd. (1983) 1 AC 520, at pp 545-547 . If proximity is understood as no more than the neighbour principle, the question in the present case is whether there are any considerations which, on moving to Lord Wilberforce's second stage, negate the duty of care which would arise by application of the criterion of reasonable foreseeability. There are none. In Caltex Oil Stephen J. said, at p.572:

> " Reasonable foreseeability on its own, while no doubt providing adequate limitation of liability in the general run of duty situations in negligence, has been recognized as inadequate in certain specific duty situations; for instance in nervous shock the recognized test, that of reasonable foreseeability of injury by nervous shock, introduces a further control in that the precise kind of damage suffered must have been foreseeable."

Apart from the elements of nervous shock, which distinguish this category of negligence from other categories of negligence causing personal injury, no special element restricting the cause of action has been hitherto admitted in this Court. The limitations suggested by Lord Wilberforce in McLoughlin v. O'Brian, in my respectful opinion, are appropriately taken into account by the general principles of causation and reasonable foreseeability. There are no other elements which might preclude a duty of care arising where the kind of damage caused by a defendant's conduct is

shock-induced psychiatric illness and that kind of damage is reasonably foreseeable. I would regard the contrary view expressed in Pratt &Goldsmith v. Pratt (1975) VR 378, at p 386, as erroneous.

29. It remains to apply these principles to the facts as found in the present case. Mrs Coffey's psychiatric illness was caused by seeing her husband in the Royal Adelaide Hospital some time after the accident, not by seeing him on the roadway immediately after the accident. No special principle governs the cases where the relevant phenomenon is set in a hospital rather than on a roadway, nor is there a special principle applicable when the relevant phenomenon is perceived hours rather than minutes after the careless act or omission produced its first consequences. Allan's movement by ambulance to the hospital and the lapse of time before Mrs Coffey saw him might have provided an opportunity for other people to intervene so that his appearance in the hospital would not fairly be regarded as the result of the defendant's carelessness or the reasonably foreseeable result of it. But Allan was taken from the scene of the accident directly to a hospital for treatment of his injuries, Mrs Coffey was quickly summoned to him there, and nothing untoward was shown to have intervened to exacerbate Allan's distressing appearance. In those circumstances, there is no reason why the resolution of the case should be governed by considerations different from those which would apply if she had been summoned to the scene of the accident. Liability cannot rationally be made to depend upon a race between a spouse and an ambulance; it must depend upon what the spouse perceives, its effect upon her, and whether her perceptions and their effect are the reasonably foreseeable results of the defendant's careless conduct. It was certain that Allan would have to be taken to hospital and treated there for his injuries. His treatment is not shown to be out of the ordinary for the injuries he sustained. Mrs Coffey's presence at the hospital was the result of the defendant's infliction of injuries on her husband. It was reasonably foreseeable that Mrs Coffey would be at the hospital to observe Allan and what happened to him that night. On the assumption that Mrs Coffey was of a normal standard of susceptibility ("of normal fortitude", as Bollen J. put it), was it reasonably foreseeable that what she might see and hear that night would be such an affront or insult to her mind that she might suffer a psychiatric illness? Bollen J. answered that question in Mrs Coffey's favour. It is a question of fact and, although an affirmative answer to that question was not beyond argument, the answer given by Bollen J. makes good sense and I do not think it should be disturbed.

30. The appeal should be dismissed.

DEANE J. It is an incident of human society that action or inaction by one person may have a direct or indirect effect on another. Unless there be more involved than mere cause and effect however, the common law remains indifferent. A person's action or inaction may be a cause of another's injury or discomfort; unless there be some particular relationship, personal or proprietary right or other added element, the common law imposes no liability to make payment of compensation or other damages. In a society where material success, commonly measured in comparative terms, is accepted as a legitimate objective and the preservation of individual freedom of action or speech is acknowledged as a legitimate goal, the law must be so restrained if it is to be attuned to social standards and reality. If material success were to be accompanied by legal liability to all who have suffered emotional chagrin or physical or material damage as a consequence or along the way, it would be largely self-destructive. In that regard, the common law has neither recognized fault in the conduct of the feasting Dives nor embraced the embarrassing moral perception that he who has failed to feed the man dying from hunger has truly killed him.

2. The closest that the common law has come to providing a general remedy in respect of injurious conduct is the modern law of negligence with its hypothetical "neighbour" and associated test of

"reasonable foreseeability". The common law duty to a "neighbour" has, however, scant in common with its New Testament equivalent; both priest and Levite ensured performance of any common law duty of care to the stricken traveller when, by crossing to the other side of the road, they avoided any risk of throwing up dust in his wounds (cf. Dorset Yacht Co. Ltd. v. Home Office (197O) AC 1OO4, at p 1O6O). In Donoghue v. Stevenson (1932) AC 562, at p 58O , the common law duty of care was defined, for the purposes of the law of negligence, as the duty to take reasonable care when it can be reasonably foreseen that one's "acts or omissions" are likely to injure one's "neighbour". A "neighbour" was identified as being, in the view of the common law, a person who is "so closely and directly affected by my act that I ought reasonably to have (him or her) in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question" (at p. 58O). The significance of the requirement contained in the words "so closely and directly affected ... that" is that they constitute a control upon the test of reasonable foreseeability of injury. Lord Atkin was at pains to stress (at pp.580-582) that the formulation of a duty of care merely in the general terms of reasonable foreseeability would be too wide unless it were "limited by the notion of proximity" which was embodied in the restriction of the duty of care to one's "neighbour". He traced that notion of proximity to the judgments of Lord Esher M.R. and A.L. Smith L.J. in Le Lievre v. Gould (1893) 1 QB 491, at pp 497,504 but added an important explanation or qualification. The references to "proximity" in Le Lievre v. Gould had been couched in terms of physical proximity. Lord Atkin pointed out that physical proximity was but one facet of the proximity requirement that constituted an overriding control of the test of reasonable foreseeability in the law of negligence: the notion of proximity should "be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person" (at p.581 and see per Lord Macmillan, at p.619).

3. The notions of reasonable foreseeability and of proximity of relationship which were enunciated in Lord Atkin's speech in Donoghue v. Stevenson are related. The fact that an act of one person can be reasonably foreseen as "likely to injure" another is an indication, and, as will be seen, sometimes an adequate indication, that the requirement of "proximity" is satisfied. At the same time, the overall proximity of the relationship between the person or property of the plaintiff and that of the defendant or between the allegedly negligent act and its effect may be relevant on the question whether injury to the plaintiff was reasonably foreseeable. Lord Atkin's "restricted reply" to the common lawyer's question "who is my neighbour?" was not, however, couched in the unqualified terms of reasonable foreseeability which would, in the context, have served merely to provide a diversionary circuity of reasoning. The "neighbour" requirement ("this necessary qualification": at p. 582) was a substantive and independent one which was deliberately and expressly introduced to limit or control the test of reasonable foreseeability. As explained and expanded in terms of "proximity" ("the relation being so close that the duty arises" and "so close as to create a duty": at pp. 582 and 599, underlining added), it differed in nature from the test of reasonable foreseeability in that it involved both an evaluation of the closeness of the relationship and a judgment of the legal consequences of that evaluation. The proposition to be found in the writings of some eminent jurists that Lord Atkin's "neighbour" or "proximity" requirement was an exercise in tautology (see, e.g., Professor Stone, The Province and Function of Law, (1946), pp.181-182; Professor Morison, "A Re-examination of the Duty of Care", Modern Law Review, vol. 11 (1948), 9, at pp.12-13 and 33 and Professor Winfield, Select Legal Essays (1952), pp.70ff. and cf. per Windeyer J., Hargrave v. Goldman (1963) 110 CLR 40, at p 63 and per Mahoney J.A., Minister for Environmental Planning v. San Sebastian Pty. Ltd. (1983) 2 NSWLR 268, at pp 326-327) is, as Professor Morison points out, based on the premise that Lord Atkin's overriding requirement of proximity involved no more than the notion of reasonable foreseeability. As I have indicated, that is a premise which I am quite unable to accept.

4. The more than fifty years which have passed since the decision in Donoghue v. Stevenson have been marked by an apparent general ascendancy of the test of reasonable foreseeability in the law of negligence, at least in cases involving physical damage to person or property. Other restraints and requirements have tended to be eclipsed or overshadowed. Not without some disagreement (see, e. g., Caterson v. Commissioner of Railways (1973) 128 CLR 99, at pp 101-102), the requirement that it be reasonably foreseeable that injury was "likely" has been discarded and reasonable foreseeability of a mere (but "real") risk of injury to another, regardless of its likelihood, has been accepted as the appropriate foreseeability test (see C. Czarnikow Ltd. v. Koufos (1969) 1 AC 350, at pp 385-386, 389 ; The Wagon Mound (No. 2) (1967) 1 AC 617, at pp 642-643). "Consequently, when we speak of a risk of injury as being 'foreseeable' we are not making any statement as to the probability or improbability of its occurrence, save that we are implicitly asserting that the risk is not one that is far-fetched or fanciful" (per Mason J., Wyong Shire Council v. Shirt (1980) 146 CLR 40, at p 47). Reasonable foreseeability has also displaced "directness" as the "effective test" for determining questions of the extent of recoverable damage (The Wagon Mound (No. 1) (1961) A.C. 388, at p 426 ; Mount Isa Mines Ltd. v. Pusey (1970) 125 CLR 383, at p 397). In the context of the conclusion in The Wagon Mound (No. 1) that the damage was not reasonably foreseeable, more prominence was understandably given in their Lordships' reasons to the restrictive effect of the decision, namely, the imposition of the requirement that compensation be limited to damage which was reasonably foreseeable. The expansive effect of the decision was, however, of at least equal importance from the viewpoint of principle in that it removed the requirement of "directness" as an independent overriding control of recoverable damages for foreseeable injury. Overall, one cannot but be conscious of the emergence of a common, although mistaken, tendency to see the test of reasonable foreseeability as a panacea and, what is of more importance for present purposes, to refer to it as if it were, from the viewpoint of principle, the sole determinant of the existence of a duty of care.

5. Given the circumstances of a particular case, the question whether a common law duty of care exists is a question of law. It is inevitable that, in cases falling within some closely settled areas of the law of negligence such as cases involving ordinary physical injury to an employee in an accident at his place of work or to one user of a public road involved in a collision with another, it will have been established in previous cases that the relationship between the parties necessarily possesses the requisite degree of proximity. In at least most other cases involving ordinary physical injury to a person or his property as a consequence of the direct impact of an act of the other party, it will have been established in previous cases that if the risk of injury was reasonably foreseeable, any proximity requirement is satisfied (cf. per Jacobs J., Caltex Oil (Australia) Pty. Ltd. v. The Dredge "Willemstad" (1976) 136 CLR 529, at p 597). The result has been that, in cases involving direct physical damage to person or property, separate reference to any notion of proximity has come to be commonly regarded as either unnecessary or as being appropriately formulated in terms of being satisfied if the physical injury sustained was of a kind which was reasonably foreseeable. This approach is unobjectionable provided that one does not lose sight of the fact that reasonable foreseeability of injury was propounded by Lord Atkin in Donoghue v. Stevenson as constituting, on its own, no more than an incomplete determinant of a common law duty of care in the sense that such a duty of care will not be owed to a particular plaintiff unless the requirement of proximity in the relationship between plaintiff and defendant with respect to the relevant act and injury is satisfied. The fact that, as a practical matter, any separate requirement of proximity is commonly disregarded in cases where no issue is raised about it does not establish that it has been discarded as a matter of principle. All that that fact establishes is that, in such cases, the requirement of proximity is not a subject of dispute. Even in such cases however, one tends to find a deliberate qualification in

more carefully worded judgments of any equation between reasonable foreseeability and a duty of care. Thus, in Wyong Shire Council v. Shirt (at p 44), Mason J., in a judgment with which Stephen and Aickin JJ. expressed full agreement, described the duty of care which "arises on the part of a defendant to a plaintiff" when the test of reasonable foreseeability is satisfied as but a "prima facie" one. It would seem clear enough that his Honour's description of the "duty of care" as "prima facie" indicated acceptance of the existence of requirements or limitations whose operation may preclude the existence of a duty of care (see his Honour's judgment in The Dredge "Willemstad" Case, at pp. 590-593 and that of Stephen J. at pp.573-576). What can properly be read from Mason J's remarks is that, to adapt and qualify words used by Lord Reid in the Dorset Yacht Co. Case (at p.1027), the time has come when an equation between reasonable foreseeability of injury and a duty of care under the law of negligence can be accepted in cases involving ordinary physical injury unless there be "some justification or valid explanation for its exclusion". That approach corresponds generally with that adopted by Lord Wilberforce in the oft-cited passage from his judgment in Anns v. Merton London Borough (1978) AC 728, at pp 751-752 . Upon analysis, it reflects an acceptance, rather than a denial, of the existence of overriding limitations upon the test of reasonable foreseeability.

6. It is not and never has been the common law that the reasonable foreseeability of risk of injury to another automatically means that there is a duty to take reasonable care with regard to that risk of injury (cf. per du Parcq L.J., Deyong v. Shenburn (1946) KB 227, at p 233 ; Edwards v. West Herts. Group Hospital Management Committee (1957) 1 WLR 415, at pp 420, 422 ; and per Lord Reid, McKew v. Holland and Hannen and Cubitts (Scotland), Ltd. (1969) 3 All ER 1621, at p 1623). Reasonable foreseeability on its own indicates no more than that such a duty of care will exist if, and to the extent that, it is not precluded or modified by some applicable overriding requirement or limitation. It is to do little more than to state a truism to say that the essential function of such requirements or limitations is to confine the existence of a duty to take reasonable care to avoid reasonably foreseeable injury to the circumstances or classes of case in which it is the policy of the law to admit it. Such overriding requirements or limitations shape the frontiers of the common law of negligence. They may apply to preclude altogether the existence of a duty of care in particular circumstances (see, e.g., Rondel v. Worsley (1969) 1 AC 191) or to limit the content of any duty of care or the class of persons to whom it is owed (see, e.g., Hedley Byrne &Co. Ltd. v. Heller and Partners Ltd. (1964) AC 465) or the type of injury to which it extends (see, e.g., Best v. Samuel Fox &Co. Ltd. (1952) AC 716 and, generally, the discussions in the judgments in The Dredge "Willemstad" Case and L. Shaddock &Associates Pty. Ltd. v. Parramatta City Council (1981) 55 ALJR 713).

7. One searches in vain in the cases for an authoritative statement abrogating Lord Atkin's requirement of "proximity" of relationship. To the contrary, one finds, in cases in the comparatively uncharted areas of the law of negligence, repeated reference to proximity as a touchstone for determining the existence and content of any common law duty of care to avoid reasonably foreseeable injury of the type sustained (see, e.g., The Dredge "Willemstad", at pp.574-575 and 592-593; Hedley Byrne v. Heller, at pp 524-525; Dorset Yacht Co. Ltd. v. Home Office, at pp 1054-1055; Scott Group Ltd. v. McFarlane (1978) 1 NZLR 553, at pp 574, 584 ; Junior Books Ltd. v. Veitchi Co. Ltd. (1983) 1 AC 520, at pp 533, 539 ff., 545-547). The requirement of a relationship of "proximity" in that broad sense should, in my view, be accepted as a continuing general limitation or control of the test of reasonable foreseeability as the determinant of a duty of care. The outcome of the present appeal largely turns upon the extent to which that requirement operates to preclude a common law duty of care arising in cases involving injury in the form of nervous shock sustained by a person by reason of actual or apprehended physical injury to another. That question must be approached in the context of what is involved in the notion of a relationship of "proximity".

8. While use of the term "proximity" has been properly criticized as "apt to mislead" (see Grant v. Australian Knitting Mills, Ltd. (1936) AC 85, at p 104), it has been too widespread in judgments of authority in the law of negligence for it to be practicable to avoid it altogether. One must, however, remain conscious of the fact that the terms "proximity" and "relationship of proximity" have been used in such judgments to convey a variety of different meanings and of the need to distinguish between: their use to designate no more than a consideration relevant to whether there was a reasonably foreseeable risk of injury or a breach of any duty of care; their use, particularly in modern judgments (see, e.g., Anns v. Merton London Borough Council, at p 751; Wyong Shire Council v. Shirt, at p 44), to refer merely to the circumstance that there is a reasonable foreseeability of injury to another; and their use in the broader sense in which Lord Atkin used them, namely, as designating a separate and general limitation upon the test of reasonable foreseeability in the form of relationships which must exist between plaintiff and defendant before a relevant duty of care will arise. It is in the last-mentioned sense that the terms are ordinarily used in this judgment.

9. Lord Atkin did not seek to identify the precise content of the requirement of the relationship of "proximity" which he identified as a limitation upon the test of reasonable foreseeability. It was left as a broad and flexible touchstone of the circumstances in which the common law would admit the existence of a relevant duty of care to avoid reasonably foreseeable injury to another. It is directed to the relationship between the parties in so far as it is relevant to the allegedly negligent act of one person and the resulting injury sustained by the other. It involves the notion of nearness or closeness and embraces physical proximity (in the sense of space and time) between the person or property of the plaintiff and the person or property of the defendant, circumstantial proximity such as an overriding relationship of employer and employee or of a professional man and his client and causal proximity in the sense of the closeness or directness of the relationship between the particular act or cause of action and the injury sustained (cf. the "signposts or guidelines or relevant considerations" referred to by Cooke J. in Rutherford v. Attorney-General (1976) 1 NZLR 403, at p 411). The identity and relative importance of the considerations relevant to an issue of proximity will obviously vary in different classes of case and the question whether the relationship is "so" close "that" the common law should recognize a duty of care in a new area or class of case is, as Lord Atkin foresaw, likely to be "difficult" of resolution in that it may involve value judgments on matters of policy and degree.

10. This does not mean that there is scope for decision in a particular case by reference to what Jacobs J. called (H.C. Sleigh Ltd. v. South Australia (1977) 136 CLR 475, at p 514) "individual predilections ungoverned by authority" or that it is a proper or sensible approach to the requirement of proximity for it to be treated as a question of fact to be resolved merely by reference to the particular relationship between a plaintiff and defendant in the circumstances of a particular case. The requirement of a "relationship of proximity" is a touchstone and a control of the categories of case in which the common law will admit the existence of a duty of care and, given the general circumstances of a case in a new or developing area of the law of negligence, the question whether the relationship between plaintiff and defendant with reference to the allegedly negligent act possessed the requisite degree of proximity is a question of law to be resolved by the processes of legal reasoning by induction and deduction. The identification of the content of the criteria or rules which reflect that requirement in developing areas of the law should not, however, be either ostensibly or actually divorced from the considerations of public policy which underlie and enlighten it. "What Lord Atkin did was to use his general conception to open up a category of cases giving rise to a special duty. ... The general conception can be used to produce other categories in the same way. An existing category grows as instances of its application multiply until the time

comes when the cell divides" (per Lord Devlin, Hedley Byrne v. Heller, at pp 524-525 and see, e.g., per Nield J., Sharpe v. E.T. Sweeting &Son Ltd. (1963) 1 WLR 665, at pp 670-676).

11. The general framework of common law negligence was expounded in Donoghue v. Stevenson in the context of a case involving physical injury in the form of personal illness (gastro-enteritis aggravated by shock). As explained by Lord Atkin, the components of an action in negligence in such a case are a duty of care, determined by reference to the related tests of reasonable foreseeability and proximity, breach of that duty of care and damage. In the context of subsequent development and refinement, those components can be stated, in a form appropriate to the circumstances of the present case, as being: (i) a relevant duty owed by the defendant to the plaintiff to take reasonable care resulting from the combination of: (a) reasonable foreseeability of a real risk that injury of the kind sustained by the plaintiff would be sustained either by the plaintiff, as an identified individual, or by a member of a class which included the plaintiff, (b) existence of the requisite element of proximity in the relationship between the parties with respect to the relevant act or omission and the injury sustained, and (c) absence of any statutory provision or other common law rule (e.g., that relating to hazards inherent in a joint illegal enterprise) which operates to preclude the implication of such a duty of care to the plaintiff in the circumstances of the case; (ii) a breach of that duty of care in that the doing of the relevant act or the doing of it in the manner in which it was done was, in the light of all relevant factors, inconsistent with what a reasonable man would do by way of response to the foreseeable risk (see Wyong Shire Council v. Shirt, at pp 47-48; The Wagon Mound (No. 2), at pp 641-643 and Schiller v. Mulgrave Shire Council (1972) 129 CLR 116, at pp 131-132); and (iii) injury (of a kind which the law recognizes as sounding in damages) which was caused by the defendant's carelessness and which was within the limits of reasonable foreseeability.

12. This generalized formulation of the ingredients of a cause of action in negligence is obviously a superficial one and fails to take account of serious difficulties and uncertainties such as those that are liable to arise in the case of a mere omission or in a case involving multiple or successive causes of injury or intervening acts (see, e.g., the discussion in Hoffmueller v. Commonwealth (1981) 54 FLR 48, at pp 60 ff). In confining it to cases involving physical injury, I have left to another day the question whether all actions in negligence, including actions involving purely economic injury (cf. Junior Books Ltd; The Dredge "Willemstad" Case and L. Shaddock &Associates Pty. Ltd. v. Parramatta City Council), can properly be accommodated in that or some other framework structured on the test of reasonable foreseeability (see Johns Period Furniture Pty. Ltd. v. Commonwealth Savings Bank (1980) 24 SASR 224, at pp 228 ff.). It may be that, in any such comprehensive framework, the requisite "proximity" of relationship, under that or some more appropriate name such as the phrase "the requisite duty relationship" which is used on some occasions in this judgment, should be seen as an anterior general requirement which must be satisfied before any duty of care to avoid reasonably foreseeable injury will arise. The above formulation is, however, adequate for the purposes of the present case where the carelessness took the form of a positive act, where any intervening acts were clearly foreseeable as at least likely (cf. Dorset Yacht Co. Case, at pp.1027ff.) and where the injury sustained was injury of a type which the courts have, after an initial denial, accepted as sounding in damages.

13. In Victorian Railways Commissioners v. Coultas (l888) 13 App Cas 222 , it was held by the Judicial Committee of the Privy Council that liability in negligence did not extend to injury consequent upon nervous or mental shock which was unaccompanied by "actual physical injury". That decision must, however, be viewed in the context of the limited knowledge of mental illness in l888. It was rejected even by contemporary authority (see, e.g., per Palles C.B., Bell v. The Great

Northern Railway Co. of Ireland (1890) 26 LR Ir 428, at pp 439-442; Sir Frederick Pollock, Law of Torts, 4th ed. (1895), at pp 46-47; Wilkinson v. Downton (1897) 2 QB 57, at pp 60-61 ; Dulieu v. White &Sons (1901) 2 KB 669, at pp 676-678 ; but cf. Mitchell v. Rochester Ry. Co. (1896) 45 NE 354) and has not been good law for many years. As Windeyer J. pointed out in Mount Isa Mines Ltd. v. Pusey (at p 395), it has "been regularly by-passed by courts" (see, also, Storm v. Geeves (1965) Tas SR 252, at pp 254-256). It is now the settled law in this country that there is a distinction, for the purposes of the law of negligence, between mere grief or sorrow which does not sound in damages and forms of psychoneurosis and mental illness (which lawyers have imprecisely termed "nervous shock") which may (see, e.g., Bunyan v. Jordan (1937) 57 CLR 1, at p 16 ; Chester v. Waverley Corporation (1939) 62 CLR 1, at pp 8-9, 11, 13 and 21 and, generally, Mount Isa Mines Ltd. v. Pusey). Any doubt in that regard would, in any event, have been removed for the purposes of the present case by the provisions of s.28(1) of the Wrongs Act 1936-1975 (S.A.) which provides that, in any action for injury to the person, the plaintiff shall not be debarred from recovering damages merely because the injury complained of arose wholly or in part from mental or nervous shock.

14. In issue in the present appeal is the liability of the appellant, Mr. Jaensch, to the respondent, Mrs. Coffey, for psychiatric injury which she suffered consequent upon her husband being involved in a motor vehicle accident. Mrs. Coffey obtained an order for damages from the learned trial judge (Bollen J.) in the Supreme Court of South Australia. That order was confirmed on appeal to the Full Court ((1983) 33 S.A.S.R. 254)). The present appeal is from the judgment and orders of the Full Court in that regard.

15. The accident in which Mrs. Coffey's husband was injured occurred in the early evening and involved a collision between a car being driven by Mr. Jaensch and a motor cycle which Mr. Coffey, who was a traffic constable on duty, was riding. It is common ground that the accident was caused by the appellant's negligence. Mr. Coffey was severely injured. Mrs. Coffey did not attend the scene of the accident but was taken, shortly afterwards, to the hospital where she saw her husband in obvious pain both before and between no less than three occasions when he was taken to the operating theatre that night. Among the injuries sustained by Mr. Coffey was a tear in the liver. When the respondent left the hospital late on the night of the accident, it was with the knowledge that her husband was "pretty bad". The following morning, at 5.3O a.m., the respondent was informed by telephone that her husband was in intensive care. At 8.3O a.m., she was advised that he had "had a change for the worse" and requested to "get up to the hospital as quickly as possible". Mr. Coffey had acute kidney problems as well as the damaged liver. The respondent stayed at the hospital all day not knowing whether her husband would survive. Mr. Coffey's condition did, however, gradually improve over the following weeks. He was discharged from hospital between six and seven weeks after the accident.

16. For a few days Mrs. Coffey coped well. Some six days after the accident however, the first symptoms of an anxiety depressant state began to emerge. Serious psychiatric illness, involving admission on one occasion to a psychiatric ward at Royal Adelaide Hospital, followed. Mrs. Coffey's relationship with her husband and their four month's old child was affected. More than a year later, she experienced internal pain and uterine bleeding which eventually led to a hysterectomy. This was diagnosed as being caused by stress and anxiety. The appellant does not contest the learned trial judge's finding that the things seen and heard by Mrs. Coffey on the day of the accident, and on the next day, caused her psychiatric illness and the later internal pain and bleeding.

17. The judgments in the courts below contain helpful analyses of the authorities relating to the question of liability in negligence for nervous shock. Both the learned trial judge and the members of the Full Court approached the case in accordance with the ordinary principles of the law of negligence and recognized that the primary question for the trial judge was to be posed in terms of reasonable foreseeability. They reached the conclusion that it was reasonably foreseeable by someone in the appellant's situation that the wife of a person seriously injured in an accident caused by his negligent driving might be called to the hospital and might suffer injury by nervous shock. They held that Mrs. Coffey was prima facie entitled to a verdict against the appellant and that there was nothing in either principle or the particular facts which altered that prima facie position. As they frankly acknowledged however, the path which led them to their conclusion was obscured by the shadows cast by a number of previous decisions including the decision of this Court in Chester v. Waverley Corporation.

18. In Chester's Case, the Court held, by majority, that the respondent local council was not liable in negligence for nervous shock suffered by a mother as a result of seeing the body of her seven year old son being recovered from a water-filled trench which the council had excavated in a public street and negligently failed to fence or otherwise render safe. The case was decided after cases such as Hambrook v. Stokes (1925) 1 KB 141 and Owens v. Liverpool Corporation (l939) 1 KB 394 had recognized that psychiatric illness resulting from shock was an injury capable of sounding in damages for the purposes of the law of negligence. The decision in Chester was expressed to turn on the question of reasonable foreseeability. It was held by the majority (Latham C.J., Rich and Starke JJ.) that, on the facts of the case, a finding was not open that harm to the plaintiff of the kind suffered was reasonably foreseeable: "it cannot be said that such damage (that is, nervous shock) resulting from a mother seeing the dead body of her child should be regarded as 'within the reasonable anticipation of the defendant'. 'A reasonable person would not foresee' that the negligence of the defendant towards the child would 'so affect' a mother" (per Latham C.J., at p 10, using phraseology taken from Donoghue v. Stevenson and Re Polemis). Examination of the majority judgments discloses, however, that Latham C.J. and Rich J. were openly influenced in their decision by policy considerations, particularly a "floodgates" fear of countless actions (see at pp.7-8 (Latham C.J.) and p.11 (Rich J: "the law must fix a point where its remedies s short of complete reparation for the world at large, which might appear just to a logician who neglected all the social consequences which ought to be weighed on the other side")). While such considerations may well be relevant to an overriding proximity requirement, they have little bearing on the question whether a risk of injury was reasonably foreseeable. In the only dissenting judgment, Evatt J. rejected the proposition that it was not reasonably foreseeable that a mother seeing the body of her drowned child taken from a water-filled trench might suffer injury in the form of nervous shock. His Honour adverted, however, to considerations of public policy ("the risk of too wide an extension of liability in cases where proof is beset with special difficulties": at p.43) and accepted (at p.44) what can accurately be described as an operative proximity limitation upon the ordinary test of reasonable foreseeability. The relevant duty of care to avoid action which might cause injury by way of nervous shock to those not subjected to risk of direct physical injury was, his Honour said, owed only to those already present at or in the immediate vicinity of the scene of the actual or apprehended casualty and those "who will be brought to the scene for the purpose either of preventing the casualty altogether, or of minimizing its injurious consequences, or in the course of a search to discover and rescue or aid any person who is feared on reasonable grounds to have been injured in the casualty" (underlining added). In other words, the relevant duty of care was seen by Evatt J. as being owed only to those who are already in the vicinity of the accident or who are brought, and could reasonably have been foreseen as being likely to be brought, to the scene of the accident to render comfort, aid or assistance.

19. The judgments of the majority in Chester's Case have not worn well with time. The proposition upon which those judgments is based is no longer, if it ever was, acceptable. It is simply out of accord with medical knowledge and human experience to deny that it is reasonably foreseeable that the shock suffered by a mother on seeing the body of her infant child, whom she was seeking, raised from the bottom of a water-filled trench might well be such as to cause psychoneurosis or mental illness. It must now be accepted that the conclusion of Evatt J. is, on the facts in Chester, plainly to be preferred to that of the majority. Even if Evatt J.'s judgment is accepted in its entirety however, it affords little comfort to Mrs. Coffey in the present case. Evatt J. limited the relevant duty of care to a duty owed to those who were either in the vicinity of the accident or who subsequently came to the scene of the accident. Mrs. Coffey did not go to the scene of the accident. As would be expected in a modern city with fast ambulance services, she went to the hospital to which her injured husband had been taken. Two questions arise. The first is: does the fact that Mrs. Coffey was not at the scene of the actual accident have the consequence that the risk of injury to her was not reasonably foreseeable? The second is: does the requirement of proximity or some other operative limitation or control upon the ordinary test of reasonable foreseeability preclude recovery by Mrs. Coffey of damages for the injury which she sustained?
As has been said, both the learned trial judge and the
Full Court of the Supreme Court held that the risk of injury by nervous shock to Mrs. Coffey was reasonably foreseeable. In my view, that finding was correct. It is reasonably foreseeable that the negligent driving of a vehicle on a public road is liable to cause physical injury to another user of the road and mental illness, in the form of nervous shock, to a loving spouse who is caught up in the immediate consequences of the accident and the worry and uncertainty of urgent post-accident medical treatment and surgery. The fact that a husband or wife goes straight to the hospital where his or her injured spouse is being, or has been, taken rather than to the actual scene of the accident cannot rationally be said to have the effect that the relevant risk of injury by way of nervous shock can no longer be regarded as having been reasonably foreseeable. For that matter, it is easy to envisage circumstances, such as an injury to the spinal cord caused in a bloodless accident, in which the shock sustained by involvement in the aftermath of the accident on attendance at the hospital would render insignificant any shock which was or would have been sustained by prior attendance at the scene of the accident. Indeed, the present would appear to be such a case in that the more serious injuries sustained by Mr. Coffey, namely the injuries to his liver and kidneys, were only identified after he had been taken to hospital. If the scope of the duty of care of a user of the highway is to be limited as extending only to other users of the highway and those persons who actually attend the scene of an accident, it must be on some basis other than a genuine or realistic consideration of reasonable foreseeability. It follows that the answer to the first of the above questions is that the fact that Mrs. Coffey sustained nervous shock at the hospital rather than at the scene of the accident cannot rationally be seen as having the consequence that the risk of such injury to her was not reasonably foreseeable. I turn to the consideration of the second and more difficult question, namely, whether the requirement of proximity or some other overriding limitation operates to confine the class of persons to whom a duty of care in respect of a reasonably foreseeable risk of injury in the form of nervous shock is owed.

20. The changes and developments in views about liability for nervous shock which are to be found in cases during the last hundred years are, to a large extent, to be explained by reference to increasing knowledge of the nature of mental injury and illness caused by shock: the law, "marching with medicine but in the rear and limping a little" has "cautious step by cautious step" (per Windeyer J., Mount Isa Mines Ltd. v. Pusey, at pp 395 and 403) come to accept that mental illness occasioned by nervous shock is as much a real injury caused to a person as conventional bodily damage

sustained as a result of physical impact. While one can find, in some reported cases, support for the view that reasonable foreseeability of injury by nervous shock necessarily gives rise to a duty of care (see, e.g., the judgment of Burbury C.J., Storm v. Geeves, at pp 262ff.), the actual attempts to identify classes of persons to whom that duty can be owed, which one finds in such cases, indicate the influence of what have been described as "subterranean" restraints. In most cases however, one finds the clear approach that the duty of care in nervous shock cases is restricted by external limitations upon the ordinary test of reasonable foreseeability. If the relevant cases had merely involved decisions of courts of first instance on questions of fact, one could, perhaps, seek to reconcile the actual decisions with the view that "the only rational and satisfactory test is one based on reasonable foreseeability" simpliciter by stressing that each decision must be viewed "in the circumstances of the particular case" (see Professor A.L. Goodhart, "The Shock Cases and Area of Risk", Modern Law Review, vol.16 (1953), 14, at pp.23-24). The critical cases were, however, mainly decisions of appellate courts on a question of law, namely, the question whether the common law recognized a relevant duty of care in ascertained circumstances. Unless one is to mutilate reasonable foreseeability to accord with operative but concealed considerations of policy, it must be acknowledged that the decided cases strongly support the view that the requirement of a relationship of proximity operates to impose particular criteria which must be satisfied by a plaintiff before a duty of care in respect of a reasonably foreseeable injury in the form of nervous shock will be held to have arisen in his or her favour. The requirement does not so operate in cases, such as Donoghue v. Stevenson itself, where mental injury or illness results from, or is associated with, conventional bodily injury caused to the affected person by actual physical impact or ordinary physical reaction. The limiting effect of the requirement is restricted to cases involving what may conveniently be called "mere psychiatric injury", that is to say, psychoneurosis and mental illness which is not the adjunct of ordinary bodily injury to the person affected.

21. The denial by the Privy Council, in Coultas, of any liability in negligence for mere psychiatric injury was openly based on policy considerations; in particular, a "floodgates" fear of a multitude of imaginary claims. Even on the qualities of sang-froid and fortitude ("the customary phlegm": Hay or Bourhill v. Young (1943) AC 92, at p 117) which some later members of the Bench have thought are to be expected of ordinary members of the public (see, e.g., per Denning L.J., King v. Phillips (19 53) 1 QB 429, at p 442), it could hardly be seriously suggested that mental injury was not reasonably foreseeable as being liable to be sustained by a person in the predicament of the terrified Mrs. Coultas as she sat trapped in a buggy in the path of the oncoming train. The refusal of the courts in subsequent cases to follow the Privy Council's decision did not, however, involve rejection of the view that the effect of applicable overriding limitations upon the test of reasonable foreseeability was to limit the existence and scope of any duty of care in cases of nervous shock. To the contrary, one finds clear recognition of such limitations in the case which is generally accepted as having established liability in negligence for mere psychiatric injury, Dulieu v. White &Sons.

22. Mrs. Dulieu was the first of a trio of pregnant women whose misfortunes have played a significant part in the development of liability for negligently caused nervous shock. Her statement of claim alleged that she was behind the bar of her husband's public-house "when the defendants by their servant so negligently drove a pair-horse van as to drive it into the said public-house". It was alleged that Mrs. Dulieu in consequence sustained a severe shock, serious illness and gave premature birth to an abnormal child. The case came before the Kings Bench Division (Kennedy and Phillimore JJ.) on a point of pleading in the nature of a demurrer. It was held that the statement of claim disclosed a good cause of action. As had the Privy Council in Coultas however, Kennedy J. made clear his acceptance of an overriding proximity requirement, based on considerations of public policy, on liability for "nervous shock occasioned by negligence and producing physical injury".

The requirement enunciated by Kennedy J. (at p.675) was that the shock must arise "from a reasonable fear of immediate personal injury to oneself". For his part, Phillimore J. found it unnecessary to admit the existence of any general duty of care. He placed particular reliance upon the fact that Mrs. Dulieu had been in "her home, where she had a right, and on some occasions a duty, to be" (at p.685), having already commented that it "may be (I do not say that it is so) that a person venturing into the streets takes his chance of terrors" (at p.684).

23. In the case involving the second of the pregnant women (Hambrook v. Stokes Bros. (1925) 1 KB 141), the English Court of Appeal (Bankes and Atkin L.JJ.; Sargant L.J. dissenting) rejected the limitation propounded by Kennedy J. in Dulieu and accepted that liability in negligence existed even though the shock had been caused by fear of injury to Mrs. Hambrook's children rather than by fear of injury to herself. The duty of care was not, however, identified by reference to an unqualified test of reasonable foreseeability. Overriding proximity criteria were again recognized as requiring to be satisfied. Bankes L.J. confined the decision to "cases where the facts are indistinguishable in principle from the facts of the present case" and where the shock resulted from what the person who sustained the injury "either saw or realized by her own unaided senses, and not from something which someone told her, and that the shock was due to a reasonable fear of immediate personal injury either to herself or to her children" (at p.152). Atkin L.J. envisaged the relevant duty of care as being restricted to one who was in "sight or sound of the accident" (at p.159).

24. The third of the unfortunate trio was Mrs. Bourhill. She is doomed to celebrity in the pages of the Law Reports, in language thought acceptable in another era, as the pregnant "fishwife". Her action failed because it was held by the House of Lords (Sc.) that the injury in the form of shock which she sustained was not, as a matter of law, within the limits of what was reasonably foreseeable. The circumstances of the case were that Mrs. Bourhill was in the process of being laden with her fish basket within some fifteen metres of the point of impact of a fatal collision and that, according to her evidence which had apparently been accepted by the Lord Ordinary in Scotland, the effect of the sudden noise of the crash was that she was reduced to "a pack of nerves" and did not know whether she was "going to get it or not". The case was, however, conducted in the House of Lords (see at p.97) on the basis that Mrs. Bourhill's injury in the form of nervous shock had not resulted from any fear of physical injury to herself. Be that as it may, examination of the speeches in Bourhill v. Young discloses the continued acceptance of external limitations upon the ordinary test of reasonable foreseeability. In that regard, three things should be mentioned: (i) the judgments of a majority of their Lordships confirmed the rejection in Hambrook v. Stokes Bros. of any rigid overriding rule restricting liability in negligence for pure nervous shock to shock arising from fear for one's own safety (see at pp.99,111 and 118 but cf. at pp.103, 105); (ii) one finds in the judgments an implicit (explicit in the case of Lord Porter, at p.119) acceptance of a refinement of the ordinary test of reasonable foreseeability of injury which has subsequently received general acceptance: in the case of mere psychiatric injury, the requirement of reasonable foreseeability will not be satisfied unless injury in that particular form, as distinct from personal injury generally (cf. per Atkin L.J., Hambrook v. Stokes Bros., at pp 157-158 and per Singleton L.J., King v. Phillips, at p 437), was reasonably foreseeable (see King v. Phillips, at p 441; The Wagon Mound (No.1) at p 426; Mount Isa Mines Ltd. v. Pusey, at p 402); and (iii) the judgments support the view that, at least in the case of mere nervous shock sustained as a result of an accident on the highway, there is an operative proximity requirement restricting any relevant duty of care to a duty to persons within the area within which physical injury might have been sustained: "persons on the highway or in premises adjoining the highway" (per Lord Russell of Killowen (at p.102) and Lord MacMillan (at p.104) both quoting Lord Jamieson in the Scottish Court of Session (1941) S.C. 395, at p. 429 ; and see also per Lord Thankerton and per Lord Porter at pp.98-99 and p.117 respectively). Upon analysis, there

is a degree of tension between (ii) and (iii) in that, if the relevant foreseeability requirement in a case involving mere psychiatric injury is a requirement of reasonable foreseeability of injury in that form, it is somewhat difficult to see any rational basis for a proximity requirement limiting liability for such injury to liability to those within the area of possible physical injury in the conventional sense. To the contrary, an inflexible overriding limitation in that particular form would plainly be liable to lead to results that do not, at least in a contemporary context, lie well either with the ordinary processes of legal reasoning or with common sense. It seems to me, with due respect, that that is well illustrated by the case of King v. Phillips.

25. In King v. Phillips, the English Court of Appeal upheld a finding of the trial judge (McNair J.) that a taxicab driver who had negligently backed his vehicle into a small boy riding his tricycle was not liable in negligence to the child's mother who, on hearing him scream, had suffered injury in the form of nervous shock when she looked out the window of her home and saw the tricycle under the cab. The basis of the decision of both McNair J. and a majority (Singleton and Hodson L.JJ.) of the Court of Appeal was the existence of a proximity requirement which operated to preclude recovery by reason of the fact that the mother's observations had been from the window of her home which was some six houses up a street from the intersection where the accident occurred where she was not within the area of potential physical danger. The rationale of a rule which determines the entitlement of a mother to recover damages for nervous shock, sustained as a result of her observation from the window of her home of an accident involving the possible death of her child according to whether she was herself within the area of potential physical danger remains unexplained in the judgments. The judgment of Denning L.J. demonstrates that an acceptable explanation of the denial of liability in the particular case is not to be found by reference to the ordinary test of reasonable foreseeability simpliciter. His Lordship, in an effort to accommodate that test to what had been said and decided in Hambrook v. Stokes Bros. and Bourhill v. Young, was driven to conclude that it was reasonably foreseeable that a mother would suffer nervous shock on seeing a runaway lorry enter a street in which she thought her children would be whereas it was not foreseeable that a mother would suffer nervous shock when, on hearing her small boy scream, she looked out the window of her home and saw his tricycle under a car and was unable to see any sign of him: the basis of the perceived distinction was, apparently, the difference between "the terrifying descent of the runaway lorry" and "the slow backing of the taxicab" (at p.442).

26. The reported Australian cases since 1939 when Chester v. Waverley Corporation was decided have tended to isolate that decision by treating it as confined to its particular facts. Reference should first be made to the decision of this Court in Mount Isa Mines Ltd. v. Pusey. That was a case involving mere nervous shock sustained by the plaintiff who went to the aid of a fellow employee who had been horribly burned when testing a switchboard in the premises in which both were employed. The plaintiff had not seen the accident but went to the scene immediately after its occurrence and became involved in its immediate aftermath. He was not related to the injured employee. He was held to be entitled to recover damages from the employer who had negligently failed to take reasonable steps to avoid the reasonably foreseeable occurrence of an incident such as that in which the fellow employee had been burnt. The decision in the case must, however, be understood in the context of the relationship of employer and employee and of the specific issues which had been raised by the notice of appeal: in that context, the case was seen by all members of the Court as turning on the limited issue whether it had been reasonably foreseeable that there was a risk of injury by mere nervous shock to an employee in the position of the plaintiff (see 125 C.L.R. at pp.388-389, 391, 392-393, 401 and 410). While the case may, upon proper analysis, lend support for a general proposition that an employer is liable for damages in respect of nervous shock sustained by an employee at his place of employment in circumstances where the employer has

failed to take reasonable steps to avoid a reasonably foreseeable risk of injury in that form, Pusey is not authority for any such unqualified proposition in a case where the proximity involved in the relationship of employer and employee is not to be found. No such special pre-existing relationship between plaintiff and defendant existed in any of the other three Australian cases to which specific reference should be made at this stage. They are Storm v. Geeves, Benson v. Lee (1972) VR 879 and Pratt and Goldsmith v. Pratt (1975) VR 378 .

27. In the Tasmanian case of Storm v. Geeves, Burbury C.J. awarded damages for mere nervous shock to a mother who had not been within any area of physical risk but who had arrived at the scene of the accident in which her child had been mortally injured within seconds of its occurrence. His Honour also found that a duty of care to avoid mere psychiatric injury had existed in favour of a brother of the injured child who had been at the scene of the accident. In Benson v. Lee, Lush J. of the Supreme Court of Victoria found in favour of a mother who had been in her home some 100 metres - more than the distance in King v. Phillips - from the scene of an accident in which her child had been injured and had run to the scene of the accident after being informed of it by another child. In Pratt, a Full Court of the Victorian Supreme Court (Adam, Starke and Crockett JJ.) found against a mother who had sustained injury in the form of nervous shock as a result of observing the pitiable state of her daughter some "substantial" period ("some weeks, if not months") after the occurrence of the accident: it was only after such a period "that there first occurred the events that were causally connected with the mother's subsequent neurasthenic condition" (at p.382). In the course of their joint judgment, Adam and Crockett JJ. indicated what they saw as the then established proximity limitations upon the ordinary test of reasonable foreseeability in cases involving mere psychiatric injury caused by negligent driving of a vehicle on the highway in terms which lie well with what had been said by Evatt J. in his dissenting judgment in Chester's Case (see above). Their Honours said (at p.386):

> " In our view, it is still the law that, while reasonable foreseeability is essential to any liability for negligence, such foreseeability by itself does not in all situations impose a duty of care. In the case of the driver of a vehicle on the highway, his duty does not, save in exceptional circumstances, extend beyond road users in the neighbourhood or persons who are themselves on or who have property adjacent to the roadway. Policy and reasons of humanity have extended by way of exceptional cases the primary duty to take care to those injured in the course of rescue attempts or the like: Chapman v. Hearse (1961) 106 CLR 112; (1962) ALR 379; Chadwick v. British Railways Board, (1 967) 1 WLR 912; (1967) 2 All ER 945; The Law of Torts 4th ed. (1971) Fleming p 157. Likewise, these considerations have dictated that relatives of an accident victim suffering harm by reason of nervous shock should have a cause of action if their shock not only is foreseeable by the tortfeasor, but also the relative is in sufficient proximity to the tortfeasor's carelessness. ... But beyond this the law has not yet gone nor do we think it is for us to attempt to take it" (underlining added).

The statement, in the last sentence of the above passage, that "beyond this the law has not yet gone" now requires qualification, at least in so far as the law of England is concerned, in the light of the recent case of McLoughlin v. O'Brian (1983) 1 AC 410 where the plaintiff, whose husband and two children had been injured and whose third child had been killed in a road accident, was unanimously held by the House of Lords to be entitled to recover damages from the negligent driver for nervous shock sustained when she went to the hospital some two hours after the accident had occurred and there learned of her child's death and saw her husband and the two other children, injured and

covered in mud and oil. The plaintiff had been at her home some two miles from the scene of the accident and had not been told of it until almost two hours after it had occurred.

28. All of their Lordships in McLoughlin recognized the relevance, at least to foreseeability, of what were called "proximity factors" - presence at the scene, direct observation of the accident and a close relationship with the victim. There was, however, disagreement between them on the question of underlying principle. Lord Scarman and Lord Bridge of Harwich were of the view that liability for mere psychiatric injury falls to be determined by reference to the test of reasonable foreseeability "simpliciter" but refined to require foreseeability of injury in that particular form. Lord Russell of Killowen confined his brief comments largely to the particular facts but appears not to have been prepared to accept any overriding limitation upon the ordinary test of reasonable foreseeability in nervous shock cases involving negligent use of a public road. Lord Wilberforce rejected the proposition that liability falls to be determined by reference to an unfettered test of reasonable foreseeability and acknowledged the existence of applicable proximity limitations, based on policy considerations, which confine the class of persons to whom a duty to avoid mere psychiatric injury is owed. He expressly identified (at p.420) those overriding limitations with Lord Atkin's "neighbour principle in Donoghue v. Stevenson" and commented that that principle was "saying that foreseeability must be accompanied and limited by the law's judgment as to persons who ought, according to its standards of value or justice, to have been in contemplation". Lord Edmund-Davies stated (at p.426) that he did not accept the approach that reasonable foreseeability of injury to the plaintiff through nervous shock was necessarily the sole test of liability but found it unnecessary to go beyond deciding that no overriding limitation based upon considerations of policy operated to exclude liability in the case before the House.

29. The general approach of Lord Wilberforce in McLoughlin, namely, that liability in negligence for mere psychiatric injury does not fall to be determined by reference merely to a test of reasonable foreseeability, is plainly that which accords with the overwhelming weight of prior authority. In any field of law however, there may arise the rare "landmark" case in which a court, usually a final appellate court, concludes that the circumstances are such as to entitle and oblige it to reassess the content of some rule or set of rules in the context of current social conditions, standards and demands and to change or reverse the direction of the development of the law. In such a case, the judicial function may be seen to impinge, albeit in a subordinate role in that it remains subject to being overridden by legislative action, upon the function of the legislature and it is at least possible that judicial method and ability are liable to be exposed as wanting. The reassessment of the content of the particular rule or rules of law in such a case is, nonetheless, an unavoidable concomitant of the proper performance of the judicial function if the law is not to lose contact with the social needs which justify its existence and which it exists to serve. Even in such a case, however, the distinction between the judicial and legislative functions should never be forgotten and any reassessment of the content of relevant rules should be approached with due regard to existing authority and established principle (see, generally, per Windeyer J. in Pusey, at p.396 and per Lord Edmund-Davies in McLoughlin, at pp.426-428). McLoughlin would appear to have been such a landmark case for the United Kingdom. It is arguable that the present should be seen as such a case for Australia. At the least, the present case requires, in the light of the speeches in McLoughlin, reassessment of the effect of the operation of a proximity requirement or other overriding control to limit liability in negligence for mere psychiatric injury sustained by a person as a result of actual or threatened injury to another in a road accident.

30. Despite the advances in knowledge of mental illnesses since the majority decision in Chester v. Waverley Corporation, much remains unexplained and uncertain even among experts. Expert

opinion is available to support a number of differing (at least as regards matters of emphasis) propositions as to the likely causes of mere psychiatric injury consequent upon an accident involving actual or threatened serious physical injury to another. They include: 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 whether the close relative is at the scene of the accident or how he or she learns of it (see, e.g., D.J. Leibson, "Recovery of Damages for Emotional Distress Caused by Physical Injury to Another", Journal of Family Law, vol. 15 (1976-77) 163, at p.196); that genuine nervous shock can be caused to a person caught up in a disaster in which neither that person or any one in a pre-existing relationship with him or her is physically injured or threatened (see, e.g., Raphael, Singh and Bradbury, "Disaster: The Helpers' Perspective", Medical Journal of Australia, (1980), 2: pp.445-447); that there is no necessary correlation between psychiatric illness caused by nervous shock and the severity of the "shock" (see, e.g., Parker, "Accident Litigant with Neurotic Systems", Medical Journal of Australia, (1977), 2:3l8, at p.320 but cf. N.T. Sidley, "Proximate Cause and Traumatic Neurosis", Bulletin of The American Academy of Psychiatry and the Law, vol. 11, (1983), p.197, at pp.200-202). There is continued expert support for the Freudian view which emphasized the importance of the element of sudden fright or surprise in neurosis following trauma (see E.K. Madruga, "Some Legal Aspects of Post-Traumatic Neurosis" in Obilos, Ballus, Monclus, and Pujo (eds.) Biological Psychiatry Today (1979), p.1549). There is also strong expert support for the proposition that there is a real - and foreseeable - risk that psychiatric illness may result from mental stress during the period consequent upon bereavement, particularly conjugal bereavement, or during a period of constant association and care of a badly injured spouse or other close relative independently of any shock sustained at the time of the actual death or injury. While it must now be accepted that any realistic assessment of the reasonably foreseeable consequences of an accident involving actual or threatened serious bodily injury must, in an appropriate case, include the possibility of injury in the form of nervous shock being sustained by a wide range of persons not physically injured in the accident, the outer limits of reasonable foreseeability of mere psychiatric injury cannot be identified in the abstract or in advance. Much may depend upon the nature of the negligent act or omission, on the gravity or apparent gravity of any actual or apprehended injury and on any expert evidence about the nature and explanation of the particular psychiatric injury which the plaintiff has sustained. That being so, it is not possible to define with precision the practical effect of the conscious alteration of the common law which would be involved in acceptance of the proposition that reasonable foreseeability simpliciter should be accepted as the determinant of liability for nervous shock. What is clear, however, is that that conscious alteration of the law would be much more far reaching and less discriminating than that effected by legislation in those Australian jurisdictions where legislative action was taken to overcome the effect of the majority decision in Chester.

31. Section 4(1) of the Law Reform (Miscellaneous Provisions) Act 1944 (N.S.W.) provides:

> "The liability of any person in respect of injury caused after the commencement of this Act by an act, neglect or default by which any other person is killed, injured or put in peril, shall extend to include liability for injury arising wholly or in part from mental or nervous shock sustained by -
>
> (a) a parent or the husband or wife of the person so killed, injured or put in peril; or

(b) any other member of the family of the person so killed, injured or put in peril where such person was killed, injured or put in peril within the sight or hearing of such member of the family."

Similar legislative provision has been made in the Australian Capital Territory (Law Reform (Miscellaneous Provisions) Ordinance 1955 (A.C.T.), s.24) and the Northern Territory (Law Reform (Miscellaneous Provisions) Ordinance 1956 (N.T.), s.25). Of particular relevance for present purposes is the limited scope of the liability for nervous shock arising from the death, injury or peril of another which those provisions were intended to impose or confirm. Except in the case of a parent or spouse, that liability is limited to a member of the family who was in sight or hearing of the accident. It does not, in any case, extend to cover liability in respect of nervous shock sustained as a consequence of the death, injury or peril of the person whose negligence caused the accident.

32. If liability in negligence for nervous shock caused by the death, injury or peril of another in a road accident fell to be determined by reference to an unqualified test of reasonable foreseeability, there would be no proper basis for excluding liability on the part of the injured person, his or her estate or his or her compulsory third party insurer for mere psychiatric injury which was sustained by another as a result of the self-inflicted death, injury or peril of the negligent person in circumstances where the risk of such psychiatric injury was reasonably foreseeable (cf. Bourhill v. Young's Executor (1941) SC 395, at p 399). Nor, on an unqualified test of reasonable foreseeability, would there be any rational basis for excluding liability to a close relative or friend who has no contact with the accident or its immediate aftermath but who suffers reasonably foreseeable nervous shock by reason of constant social contact, as loyal nurse or companion, with the injured victim. It is conceivable that, if left to develop by analogy and logical necessity on a case by case basis, the common law in Australia may eventually change to the extent that it comes to recognize liability in some or all of such cases. It has not, however, recognized any such liability up to now. These are but two examples of types of case in which judicial abrogation of the operation of a proximity requirement or any other special control to limit liability for nervous shock would, unless the law were to revert to strict and rigid general notions of causation and remoteness of damage which were discarded in the wake of the Wagon Mound Cases or to the narrow approach to reasonable foreseeability which, apparently, enjoys some lingering support in at least some United States jurisdictions (see, e.g., Dillon v. Legg (1968) 29 ALR (3d) 1316, at p 1326: "excluding the remote and unexpected"; Hathaway v. Superior Court of Fresno County (1981) 169 Cal Rptr 435; Yandrich v. Radic (1981) 433 A 2d 459), involve the peremptory imposition of liability where the law, up to now, has recognized none. What, one is led to ask, is the pressing demand of principle or policy which necessitates the unqualified destruction of any such overriding limitation upon reasonable foreseeability? The answer, for this country, is that there is none. In so far as principle is concerned, both general principle and the general framework of the law of negligence allow, as has been seen, room for the operation of special overriding rules to exclude, in certain areas, the implication of a duty of care by reference to the ordinary test of reasonable foreseeability and recognize the requirement of proximity as a general overriding requirement of the law of negligence which may operate, in an appropriate case, to preclude or confine the prima facie duty to take reasonable care to avoid a reasonably foreseeable risk of injury to another. In so far as policy is concerned, the arguments for and against the removal of any overriding control of the test of reasonable foreseeability in cases of mere psychiatric injury are finely balanced and, as Lord Scarman pointed out in McLoughlin (at pp.430-431), more appropriate for legislative than judicial consideration. While the present case does call for a reassessment of the effect of the operation of the requirement of proximity and any other overriding control upon the test of reasonable foreseeability in cases of

mere nervous shock, neither principle nor considerations of public policy require or justify the conclusion that no such requirement or control is operative in such cases. In that regard, it is relevant to note that Lord Scarman and Lord Bridge of Harwich appear, in their speeches in McLoughlin, not to have excluded completely the possibility that some overriding limitation on reasonable foreseeability might be appropriate in addition to the general refinement that, in cases of mere psychiatric injury, risk of injury in that particular form must have been reasonably foreseeable. Lord Scarman (at p.431) confined his statement that "common law principle requires the judges" to apply an "untrammelled" reasonable foreseeability test to "circumstances where it is appropriate". Lord Bridge (at p.441) appears to have restricted his acceptance of an unqualified foreseeability test in cases of mere psychiatric injury to cases where such injury is caused by the death, injury or apprehended injury of someone other than the person whose negligence was responsible for the accident, that is to say, of someone who was, in any event, a "negligent tortfeasor". Once mere psychiatric injury is accepted as sounding in damages for the purposes of the law of negligence and as being, in an appropriate case, reasonably foreseeable in the relevant sense, the duty of care in respect of a foreseeable risk of mere psychiatric injury is an independent and primary duty owed to the person at risk of such injury (see, per Barwick C.J. and Taylor J., Scala v. Mammolitti (1965) 114 CLR 153, at pp 155-156 and 159, and per Windeyer J., Pusey, at p 408). That being so, the function performed by any rule confining the existence of a duty of care to avoid such injury to the case where there has been some breach of a duty of care owed to some other person to avoid ordinary bodily injury is that of an overriding control of the test of reasonable foreseeability.

33. The limitations upon the ordinary test of reasonable forseeability in cases of mere psychiatric injury are conveniently stated in negative form. Two of them have already been mentioned. The first of those is that reasonable foreseeability of risk of personal injury generally will not suffice to give rise to a duty of care to avoid psychiatric injury unassociated with conventional physical injury: a duty of care will not arise unless risk of injury in that particular form was reasonably foreseeable. The other is that, on the present state of the law, such a duty of care will not exist unless the reasonably foreseeable psychiatric injury was sustained as a result of the death, injury or peril of someone other than the person whose carelessness is alleged to have caused the injury; there is no need to consider here whether this limitation should be more widely stated as excluding such a duty of care unless the carelessness was in any event wrongful in the sense that it involved a breach of a duty of care owed to the person who suffered or was at risk of physical injury (cf., e.g. a case where a defence of volenti non fit injuria is available against that person and see, generally, Scala v. Mammolitti, at pp 158-159). Both are satisfied in the present case and it is unnecessary to determine whether each or either of them is properly to be seen as part of the requirement of proximity of relationship or as constituting some other and special controlling rule based on policy considerations. As at present advised, I am inclined to see them as necessary criteria of the existence of the requisite proximity of relationship in the sense that, for policy reasons, the relationship will not be adjudged as being "so" close "as" to give rise to a duty of care unless they be satisfied. What is of critical importance for the purposes of the present appeal is the identification of the content of any further criteria included in the general line of demarcation which can, in the light of the cases, properly be drawn "between what is and is not a sufficient degree of proximity" in cases of mere psychiatric injury (cf. per Stephen J., The Dredge "Willemstad", at p.576). I turn to that question of identification.

34. The decisions involving mere psychiatric injury are obviously not all reconcilable. Some, such as Chester v. Waverley Corporation and King v. Phillips, are best seen as out of accord with preferable authority and as no longer acceptable even in relation to their own facts. The three more recent Australian decisions to which particular reference has been made - Storm v. Geeves, Benson

v. Lee and Pratt - fall readily into an overall perspective and, with the guidance of what has been said and decided in other cases and in other jurisdictions, enable the identification of the area in which the boundary lies between what will and what will not satisfy the overriding requirement of proximity at least in cases involving mere psychiatric injury sustained as a result of carelessness in the use of a public road. The decided cases have been largely confined to circumstances where the psychiatric injury resulted from direct sensory observation at the scene of the apprehended or actual injury. The successful plaintiffs in cases involving those circumstances have included persons who have suffered psychiatric injury as a result of apprehended physical injury to themselves (see, e.g., Bell v. The Great Northern Railway Co; Dulieu v. White) and persons who have suffered such injury as a result of apprehended or actual physical injury to a son or daughter (see, e.g., Hambrook v. Stokes Bros.; Benson v. Lee), to some other close relative such as a brother (Storm v. Geeves), or to a stranger (Chadwick v. British Railways Board (1967) 1 WLR 912). While the relationship of the plaintiff with the threatened or injured person (e.g. that of spouse, parent, relative, rescuer or uninvolved stranger) may well be of critical importance on the question whether risk of mere psychiatric injury was reasonably foreseeable in the particular case, the preferable view would seem to be that a person who has suffered reasonably foreseeable psychiatric injury as the result of contemporaneous observation at the scene of the accident is within the area in which the common law accepts that the requirement of proximity is satisfied (cf. per Atkin L.J., Hambrook v. Stokes Bros., at pp 158-159) regardless of his particular relationship with the injured person. There was, as has been seen, at one time strong judicial support in the United Kingdom for the view that the requirement of proximity in a case involving mere psychiatric injury could not be satisfied unless the plaintiff was within the "area of physical risk" (see King v. Phillips). Such a restrictive view is not, in my view, supported by considerations of principle, fairness or policy. It has not been, and should not be, accepted in this country (see Benson v. Lee; Storm v. Geeves). Indeed, it has now been emphatically rejected in the United Kingdom (see McLoughlin v. O'Brian). Nor do the cases support the approach that the requirement can only be satisfied by a plaintiff who saw or heard the actual accident: both common sense and authority support the conclusion that the requirement of proximity of relationship may be satisfied by a plaintiff who has suffered psychiatric injury as a result of what he or she saw or heard in the aftermath of the accident at the scene (Benson v. Lee, esp. at p 880; Storm v. Geeves; Chadwick v. British Railways Board).

35. On the other hand, it would seem reasonably clear that the requisite duty relationship will not, on the present state of the law, exist in a case where mere psychiatric injury results from subsequent contact, away from the scene of the accident and its aftermath, with a person suffering from the effects of the accident. An example of psychiatric injury suffered as a result of such post-accident contact is that which may result from the contact involved in the nursing or care of a close relative during a period subsequent to immediate post-accident treatment (see, e.g., Pratt).

36. There are at least two possible rationales of the distinction, for the purposes of the requisite duty relationship, between cases where psychiatric injury was sustained as a result of direct observation at the scene of the accident and its aftermath and cases where the psychiatric injury was sustained from subsequent contact, away from the scene of the accident and its aftermath, with a person suffering from the effects of the accident. One such rationale lies in considerations of physical proximity, in the sense of space and time, between the accident and its immediate aftermath on the one hand and the injury on the other. The other lies in considerations of causal proximity in that in the one class of case the psychiatric injury results from the impact of matters which themselves formed part of the accident and its aftermath, such as the actual occurrence of death or injury in the course of it, whereas, in the other class of case, the psychiatric injury has resulted from contact with more remote consequences such as the subsequent effect of the accident upon an injured person. The

choice between one or other or a combination of these two distinct rationales may obviously be of importance in the more precise identification of any essential criteria of the existence of the requisite duty relationship. On balance, I have come to the conclusion that the second, which justifies the line of demarcation by reference to considerations of causal proximity, is to be preferred as being the less arbitrary and the better attuned both to legal principle and considerations of public policy. It has been said in many cases that the general underlying notion of liability in negligence is "a general public sentiment of moral wrongdoing for which the offender must pay" (see, e.g., Donoghue v. Stevenson, at p 580; The Dorset Yacht Co. Case, at p 1038; The Dredge "Willemstad" Case, at p 575). A requirement based upon logical or causal proximity between the act of carelessness and the resulting injury is plainly better adapted to reflect notions of fairness and common sense in the context of the need to balance competing and legitimate social interests and claims than is a requirement based merely upon mechanical considerations of geographical or temporal proximity.

37. Two factors arguably militate against including the present case within the area in which the requisite duty relationship exists. The first factor is that Mrs. Coffey sustained psychiatric injury at the hospital and not at the scene of the collision. The second is that she sustained it as a result of the combined effect of what she there saw and heard.

38. It has already been seen that the requirement of proximity in a case of mere psychiatric injury is satisfied where injury was sustained as a result of observation of matters involved in the aftermath of a road accident at the actual place of collision. The facts constituting a road accident and its aftermath are not, however, necessarily confined to the immediate point of impact. They may extend to wherever sound may carry and to wherever flying debris may land. The aftermath of an accident encompasses events at the scene after its occurrence, including the extraction and treatment of the injured. In a modern society, the aftermath also extends to the ambulance taking an injured person to hospital for treatment and to the hospital itself during the period of immediate post-accident treatment. It would, in my view, be both arbitrary and out of accord with common sense to draw the borderline between liability and no liability according to whether the plaintiff encountered the aftermath of the accident at the actual scene or at the hospital to which the injured person had been quickly taken. Indeed, as has been mentioned, in some cases the true impact of the facts of the accident itself can only occur subsequently at the hospital where they are known. In the present case, as in McLoughlin, the aftermath of the accident extended to the hospital to which the injured person was taken and persisted for so long as he remained in the state produced by the accident up to and including immediate post-accident treatment. Mrs. Coffey sustained her psychiatric injury by reason of what she saw and heard at the hospital while her husband was under such treatment. Her psychiatric injuries were the result of the impact upon her of the facts of the accident itself and its aftermath while she was present at the aftermath of the accident at the hospital. That being so, she was not, in my view, precluded from recovering damages for those injuries by reason of the fact that she did not attend at the actual scene of the collision. What, then, is the effect of the fact that her nervous shock was caused by what she was told, as well as by what she observed, at the hospital? One can point to a number of judicial statements to the
effect that a person "who suffers shock on being told of an accident to a loved one cannot recover damages from the negligent party on that account" (per Denning L.J., King v. Phillips (at p 441) and see Hambrook v. Stokes Bros., at pp 152 and 159). A requirement that the plaintiff must have perceived the peril or injury by his or her "own unaided senses" (Hambrook, at p.152) has not, however, enjoyed unqualified support either in the United Kingdom or Australia (see, e.g., Schneider v. Eisovitch (1960) 2 QB 43 O; Andrews v. Williams (1967) VR 831) and the 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 is so devastated by being told on the telephone that her husband and children have all just 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 at its aftermath at the hospital when her husband has suffered serious but not fatal injuries. It is unnecessary to pursue the question here however since the authorities plainly indicate that the overriding limitation upon the test of reasonable foreseeability does not preclude recovery in a case, such as the present, where the psychiatric injury was sustained as a result of the combined effect of what a plaintiff himself or herself observed and what he or she was told while at the scene of the accident or its aftermath. Thus, in Hambrook v. Stokes Bros. (at p 159), Atkin L.J. indicated that Mrs. Hambrook would be precluded from recovering damages only if it appeared that her psychiatric injury had been "in no way caused" by her own observation but "solely (by) the report of the injury" made to her by a third person and it is apparent that the plaintiff's psychiatric injuries in each of Benson v. Lee and Storm v. Geeves resulted from the combined effect of the report of the accident and their own subsequent observations of its aftermath. Indeed, while the question was not raised in argument and it is unnecessary to express a concluded view upon it, the position would appear to be that, provided that psychiatric injury resulted from what was seen or heard at the scene of the accident or its aftermath, the fact that the injury was subsequently, and reasonably foreseeably, aggravated as a result of being told of the deterioration or death of the person injured will neither preclude recovery nor require apportionment between different causes (see, per Windeyer J., Pusey, at p. 407 and note the helpful discussion in the article by P.G. Heffey, "The Negligent Infliction of Nervous Shock In Road and Industrial Accidents" in The Australian Law Journal, vol.48 (1974) 196, at pp.204-211). It follows that neither the requirement of proximity of relationship nor any other control upon the test of reasonable foreseeability operated, in the circumstances of the present case, to preclude the existence of a common law duty of care owed to Mrs. Coffey in respect of the psychiatric injury which she sustained.

39. There remains to be considered a separate submission that the verdict in Mrs. Coffey's favour should be set aside on the ground that the injury she sustained, while caused by what she saw and heard at the hospital, can be explained only by reference to an abnormal susceptibility on her part to such injury. This submission was rejected by both the learned trial judge and the Full Court. It can be shortly disposed of for the reason that the factual basis for it is not to be found either in the evidence or in the findings of the courts below. By reason of previous events in her life, Mrs. Coffey was more than usually dependant on both her husband and the stability of her marriage with the consequence that she was more than usually predisposed "to neurotic upset, anxiety and depression". That dependence and resulting predisposition were not however sufficient to prevent the finding, which was made, that she was "a person of normal fortitude" or to warrant a conclusion that the injury by nervous shock which she sustained was either beyond the limits of reasonable foreseeability or was other than the reasonably foreseeable result of Mr. Jaensch's breach of the duty of care which he owed her. The fact that such injury may have been more likely or more severe in Mrs. Coffey's case than in the case of a person of a different disposition does not absolve the defendant of liability in negligence in respect of it (see, generally, Storm v. Geeves, at pp 268-269; Pusey, at pp 390, 406; Benson v. Lee, at p 881; Brice v. Brown (1984) 1 All ER 997 and note the discussion by White J. in Donjerkovic v. Adelaide Steamship Industries Pty. Ltd. (1980) 24 SASR 347, at p 358).

40. It should be stressed, at the risk of undue repetition, that the fact that the requisite duty relationship in a case of mere psychiatric injury may be satisfied by a plaintiff who is not a close

relative of the injured person should not be seen as indicating that the relationship between the plaintiff and the injured person will be unimportant on the prior question of reasonable foreseeability of injury in that form. In many, if not most, cases of mere psychiatric injury, the major difficulty in the path of the plaintiff is that of showing that there was, as a matter of law, a reasonable foreseeability of injury in that form to a class of persons of which he or she was a member. The factors which will be relevant on that question cannot be precisely identified in the abstract since much will depend on the nature of the particular act or omission or on the gravity or apparent gravity of the particular accident and its aftermath. It would, however, require unusual circumstances for a finding to be open that psychiatric injury sustained by a plaintiff by reason of mere uninvolved observation of apprehended or actual injury to a person who was not a close relative came within the range of reasonable foreseeability in the sense that the plaintiff came within the class of person to whom injury of that kind could reasonably have been foreseen (see Chapman v. Hearse (1961) 106 CLR 112, at p 121). The position may, of course, be quite different in the case of a stranger who is actively and foreseeably involved in an accident or its aftermath in a role such as that of a rescuer (see Chadwick v. British Railways Board).

41. Brief mention should be made of two other matters. First, what has been written above in relation to the class of case in which the common law recognizes a relevant duty of care on the part of a user of a public road to avoid mere psychiatric injury by use of the road for conventional purposes may prove to be inapplicable to, or may require modification in its application to, other situations in which a more or less extensive duty of care may be recognized (cf. Mount Isa Mines Ltd. v. Pusey; Brown and Another v. The Mount Barker Soldiers' Hospital Incorporated (1934) SASR 128 ; Wilkinson v. Downton; Bunyan v. Jordan). Second, there is no provision in the statute law of South Australia corresponding to s.4(1) of the Law Reform (Miscellaneous Provisions) Act 1944 (N.S.W.) (see above) and it is unnecessary to consider the question whether such legislative provisions, where they are to be found, should be construed as being intended to have a limiting, as well as an ameliorating, effect on the common law (cf. Scala v. Mammolitti, at pp 158-160; Pusey, at p 408).

42. The appeal should be dismissed.

DAWSON J. The comprehensive examination of the authorities by both Brennan J. and Deane J. in their judgments makes it possible for me to state my conclusion shortly.

2. Development of the law in this country and elsewhere has made it plain that the views expressed in Victorian Railways Commissioners v. Coultas (1888) 13 App Cas 222 no longer represent the law and that the decision of this Court in Chester v. Waverley Corporation (1939) 62 CLR 1 must be confined to its own facts. It is now clear that damages are recoverable in a variety of circumstances for mental injury caused by nervous shock as a result of negligence. Those circumstances include, in my view, the circumstances of this case.

3. The basic test of liability in negligence for nervous shock is whether injury of that kind was reasonably foreseeable in all the circumstances of the particular case: Overseas Tankship (U.K.) Ltd. v. Morts Dock &Engineering Co. Ltd. (The Wagon Mound (No. 1) (1961) AC 388 ; Chapman v. Hearse (1961) 106 CLR 112, at pp 120-121 . Whether that is the sole test or whether there is some other limit upon the recovery of damages for nervous shock which is based upon conceptions of public policy - referred to by Deane J. in this case as the proximity test - remains a matter of controversy. See McLoughlin v. O'Brian (1983) 1 AC 410 . But it is not necessary, in my view, to settle that controversy for the purpose of deciding this appeal. It is now established that it is no bar

to liability that the nervous shock is caused not by the plaintiff's fear for his or her own safety but by the apprehension of some danger or harm to another, at least where that other is a member of the plaintiff's family: Hambrook v. Stokes Bros. (1925) 1 KB 141 . Nor is it any longer necessary that the plaintiff should be present at the accident which results in the nervous shock. It is sufficient if the plaintiff observes the consequences: Storm v. Geeves (1965) Tas SR 252 ; Mount Isa Mines Ltd. v. Pusey (1970) 125 CLR 383 . Moreover, those consequences need not be observed at the scene of the accident. They may be observed as part of the aftermath and the aftermath may extend to the journey by ambulance to a hospital and to the scene at the hospital itself: Benson v. Lee (1972) VR 879 ; McLoughlin v. O'Brian.

4. These extensions of the law upon this subject may merely be in recognition of the fact that

> "... the limits of liability for injury by nervous shock are to be determined only by a proper judicial application of the general test of reasonable foreseeability of that kind of injury in all the circumstances of the particular case.": Storm v. Geeves per Burbury C. J. at pp 261-262.

See also McLoughlin v. O'Brian per Lord Bridge of Harwich at pp 439-443. Such an approach flows from the decision in The Wagon Mound (No. 1).

5. On the other hand, there appear to be strictures upon liability for the infliction of nervous shock which are not readily explicable in terms of foreseeability and which may be seen to be the result of the application of policy considerations.

6. For example, if no action will lie in negligence against a defendant who carelessly injures himself and thereby inflicts nervous shock upon the plaintiff, there would seem to be a limit imposed which is outside the test of foreseeability. Similarly, the test of foreseeability may be thought to have a limited application if, as appears to be accepted, there is no liability for shock brought about by communication by a third party and not by the sight or sound of an accident or its consequences.

7. It is the existence of strictures of this kind that lend support to the view that, in order to be compensable, nervous shock must not only be reasonably foreseeable; it must also fall within bounds set as a matter of policy. See McLoughlin v. O'Brian per Lord Wilberforce at pp 420-422.

8. However, as I see no need in this case to decide between competing views, I am content to express my agreement that the events which caused nervous shock to the plaintiff were part of the aftermath of the accident resulting from the defendant's negligence. I agree with the view expressed by Deane J. that the fact that those events were a combination of the plaintiff's own observations and what she was told by others does not preclude the recovery of damages. I also agree with Deane J. that, having regard to the findings of the trial judge, there is no force in the submission that the plaintiff's mental injury can be explained by reference to an abnormal susceptibility on her part.

Orders

Appeal dismissed with costs.

I would dismiss the appeal.

Cited by:

Tsiragakis v Mallet [2025] VSCA 134 (17 June 2025) (Beach, Kennedy and Kaye JJA)

22. The judge also observed that a duty may exist where there is both a close family relationship and a proximity to the aftermath, albeit not to an objectively distressing aftermath (citing *Jaensch* ; and *King v Philcox* (‘*King*’)). [16]

Tsiragakis v Mallet [2025] VSCA 134 (17 June 2025) (Beach, Kennedy and Kaye JJA)

99. However, those decisions have been confined to cases where the plaintiffs are close relatives or spouses. The reason why such very close relationships might attract a duty of care again turns on the application of the principles we have already identified. For example, in *King* , Nettle J considered that each of the considerations he had cited from the judgment of Deane J in *Jaensch* favoured the recognition of a duty of care. [86] These critically included that it was reasonably foreseeable that close relatives of a motor accident victim might come to the aftermath of an accident and suffer mental harm. [87]

Tsiragakis v Mallet [2025] VSCA 134 (17 June 2025) (Beach, Kennedy and Kaye JJA)

78. The example of ‘special significance’ provided by Brennan J was the decision of *Hambrook* (which the applicant also cited) where a mother succeeded in a claim for psychiatric injury even though she was not present when her child was injured by a lorry, but saw the runaway lorry shortly after parting from her children. The runaway lorry had a ‘special significance’ for a mother who knows her children to have been in the vicinity. [65]

via

[65] Ibid .

Tsiragakis v Mallet [2025] VSCA 134 (17 June 2025) (Beach, Kennedy and Kaye JJA)

87. Turning next to ‘aftermath’, the judge correctly had regard to the decision of *Jaensch* . In that case, a policeman was riding his motor cycle when he collided with a motor vehicle driven negligently by the defendant. The policeman was seriously injured and taken to hospital. The policeman’s wife, Mrs Coffey, who was not at the scene of the accident, was brought to the hospital where she saw her husband in obvious severe pain. She was told that he was ‘pretty bad’ and she subsequently suffered psychiatric injury. As particularly described by Deane J, she sustained this injury by reason of ‘what she saw and heard at the hospital while her husband was being treated’. [74]

via

[74] *Jaensch* (1984) 155 CLR 549, 608 ; [1984] HCA 52 .

Tsiragakis v Mallet [2025] VSCA 134 (17 June 2025) (Beach, Kennedy and Kaye JJA)

21. The judge noted that the duty alleged must encompass a duty to avoid psychiatric harm to a person who did not perceive the event, but witnessed some of the aftermath of the event. [7] S he noted that the authorities provided guidance, though the categories of cases in which a duty exists are not closed. She identified categories of cases where duties had been imposed despite the absence of any direct threat to the injured person. She considered that the cases where the duty had been imposed could be roughly categorised as: [8]

> (a) where the plaintiff is in proximity to a particularly traumatic aspect of the accident or its aftermath (citing *Mount Isa Mines Ltd v Pusey* (‘*Pusey*’);[9] *Caffrey v AAI Ltd* (‘*Caffrey*’);[10] *FAI General Insurance Co Ltd v Lucre* (‘*Lucre*’);[11] and *Shipard v Motor Accidents Commission* (‘*Shipard*’)); [12] and
>
> (b) where there is a close family relationship between the victim of the negligent act and the plaintiff (citing *Tame v New South Wales* (‘*Tame*’);[13] *Gifford v Strang Patrick Stevedoring Pty Ltd* (‘*Gifford*’);[14] and *Jaensch v Coffey* (‘*Jaensch*’)). [15]

via

[15] (1984) 155 CLR 549; [1984] HCA 52 (‘ *Jaensch*’).

Tsiragakis v Mallet [2025] VSCA 134 (17 June 2025) (Beach, Kennedy and Kaye JJA)

> *Tame v New South Wales* (2002) 211 CLR 317, applied; *Jaensch v Coffey* (1984) 155 CLR 549 ; *King v Philcox* (2015) 255 CLR 304; *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383; *Wicks v State Rail Authority (NSW)* (2010) 241 CLR 60; *Caffrey v AAI Ltd* [2019] QSC 7; *FAI General Insurance Co Ltd v Lucre* (2000) 50 NSWLR 261; *Homsi v Homsi* (2016) 51 VR 694; *Bass v Permanent Trustees Co Ltd* (1999) 198 CLR 334, considered.

Tsiragakis v Mallet [2025] VSCA 134 -
Tsiragakis v Mallet [2025] VSCA 134 -
Tsiragakis v Mallet [2025] VSCA 134 -
Tsiragakis v Mallet [2025] VSCA 134 -
Tsiragakis v Mallet [2025] VSCA 134 -
Tsiragakis v Mallet [2025] VSCA 134 -
Tsiragakis v Mallet [2025] VSCA 134 -
Tsiragakis v Mallet [2025] VSCA 134 -
Tsiragakis v Mallet [2025] VSCA 134 -
Tsiragakis v Mallet [2025] VSCA 134 -
Tsiragakis v Mallet [2025] VSCA 134 -
Tsiragakis v Mallet [2025] VSCA 134 -
Tsiragakis v Mallet [2025] VSCA 134 -
Tsiragakis v Mallet [2025] VSCA 134 -
Tsiragakis v Mallet [2025] VSCA 134 -
Tsiragakis v Mallet [2025] VSCA 134 -
Tsiragakis v Mallet [2025] VSCA 134 -
Tsiragakis v Mallet [2025] VSCA 134 -
Tsiragakis v Mallet [2025] VSCA 134 -
Tsiragakis v Mallet [2025] VSCA 134 -
Mallonland Pty Ltd v Advanta Seeds Pty Ltd [2024] HCA 25 -
QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2023] HCA 15 -
Minister for the Environment v Sharma [2022] FCAFC 35 -
Khan v R [2022] NSWCCA 47 -
Zaghloul v Bayly [2021] WASCA 125 (19 July 2021) (Murphy, Mitchell and Vaughan JJA)

112. In ***Tame*** , Gleeson CJ also referred to Brennan J's observations in ***Jaensch v Coffey*** . In seeking to identify an objective criterion of duty of care to avoid mental harm Gleeson CJ put 'to one side cases where a defendant knows, or ought to know, of the peculiar susceptibility of a plaintiff'. [111] His Honour stated:

> The variety of degrees of susceptibility to emotional disturbance and psychiatric illness has led courts to refer to 'a normal standard of susceptibility' as one of a number of 'general guidelines' in judging reasonable foreseeability. This does not mean that judges suffer from the delusion

> that there is a 'normal' person with whose emotional and psychological qualities those of any other person may readily be compared. It is a way of expressing the idea that there are some people with such a degree of susceptibility to psychiatric injury that it is ordinarily unreasonable to require strangers to have in contemplation the possibility of harm to them, or to expect strangers to take care to avoid such harm. Such people might include those who, *unkn own to a defendant*, are already psychologically disturbed. [112] (emphasis added)

Zaghloul v Bayly [2021] WASCA 125 (19 July 2021) (Murphy, Mitchell and Vaughan JJA)

Jaensch v Coffey [1984] HCA 52 ; (1984) 155 CLR 549

Zaghloul v Bayly [2021] WASCA 125 (19 July 2021) (Murphy, Mitchell and Vaughan JJA)

110. For example, in ***Jaensch v Coffey*** [105] Brennan J (as his Honour then was) observed that it was generally recognised that what will induce a psychiatric illness in one person may leave another unaffected. Some people are naturally more robust - or less sensitive - than others. Nevertheless, as reasonable foreseeability was an objective criterion, a general standard of susceptibility was to be postulated. His Honour endorsed a 'normal standard of susceptibility' [106] but in so doing noted an exception:

> *Unless a plaintiff's extraordinary susceptibility to psychiatric illness induced by shock is known to the defendant*, the existence of a duty of care owed to the plaintiff is to be determined upon the assumption that he is of a normal standard of susceptibility. [107] (emphasis added)

via

[105] ***Jaensch v Coffey*** [1984] HCA 52; (1984) 155 CLR 549, 568.

Zaghloul v Bayly [2021] WASCA 125 -
Zaghloul v Bayly [2021] WASCA 125 -
Zaghloul v Bayly [2021] WASCA 125 -
Parkes Shire Council v South West Helicopters Pty Ltd [2019] HCA 14 -
Osborne Park Commercial Pty Ltd v Miloradovic [2019] WASCA 17 (30 January 2019) (Murphy JA, Mitchell JA, Beech JA)

Jaensch v Coffey [1984] HCA 52 ; (1984) 155 CLR 549

Osborne Park Commercial Pty Ltd v Miloradovic [2019] WASCA 17 -
Ibrahimi v Commonwealth of Australia [2018] NSWCA 321 (19 December 2018) (Meagher and Payne JJA, Simpson AJA)

199. Thirdly, the primary judge correctly rejected the appellants' case relying on *Louns v Woods.* F or one thing, there are various impediments to identifying any "established category of duty" from that decision. It restates the general principle that the common law does not impose a duty to assist a person in peril. That principle was only held, by majority, not to govern the case because of the physical, circumstantial and causal proximity between the parties. Those concepts, and some of the considerations underlying them, have been substantially overtaken since they were advocated by Deane J in *Jaensch v Coffey* (1984) 155 CLR 549 at 584.

South West Helicopters Pty Ltd v Stephenson [2017] NSWCA 312 (07 December 2017) (Basten, Leeming and Payne JJA)

117. The common law of tort was uncompromising in its approach to death. Any cause of action enjoyed by an injured party was extinguished on death; nor did death give rise to a cause of action in others who may have been dependent on the deceased. Those principles have been reversed by statute. However, the common law until quite recently (and well after the Warsaw Convention and the Hague Protocol) resisted claims for "nervous shock" suffered by relatives upon the death of a loved one. As explained by Gibbs CJ in *Jaensch v Coffey* [73] in 1984:

> "As the law relating to damages for what is sometimes crudely called 'nervous shock' has limped on with cautious steps ... the old and irrational limitations on the right to recover damages for an injury of this kind have one by one been removed. Finally, in *McLoughlin v O'Brian*, [74] the House of Lords ... has held that a plaintiff was entitled to recover damages for nervous shock from a defendant whose negligent driving had caused a road accident in which the plaintiff's daughter was killed and her husband and other children were injured, notwithstanding that the plaintiff had been two miles from the scene of the accident when it occurred and did not hear of the accident until about two hours later, and did not see its consequences until she then went to the hospital."

In similar circumstances, the wife of the injured driver was able to recover in *Jaensch* .

via

73. (1984) 155 CLR 549 at 552 ; [1984] HCA 52 .

South West Helicopters Pty Ltd v Stephenson [2017] NSWCA 312 (07 December 2017) (Basten, Leeming and Payne JJA)

2 Elizabeth Bay Road Pty Ltd v The Owners — Strata Plan No 73943 (2014) 88 NSWLR 488 ; [2014] NSWCA 409 Aéro-Club de l'Aisne v Klopotowska (1970) 24 RFDA 195 Agtrack (NT) Pty Ltd v Hatfield (2005) 223 CLR 251 ; [2005] HCA 38 Air Link Pty Ltd v Paterson (2005) 223 CLR 283 ; [2005] HCA 39 Anderson Group Pty Ltd, The v Tynan Motors Pty Ltd (2006) 65 NSWLR 400 ; [2006] NSWCA 22 Australian Securities Commission v Marlborough Gold Mines Ltd (1993) 177 CLR 485 ; [1993] HCA 15 Azzopardi v Bois [1968] VR 183 Brodie v Singleton Shire Council (2001) 206 CLR 512 ; [2001] HCA 29 Bywater Investments Ltd v Commissioner of Taxation of the Commonwealth of Australia (2016) 260 CLR 169 ; [2016] HCA 45 Cauchi v Air Fiji (2005) Tonga LR 154 ; [2005] TOSC 7 Chester v Council of the Municipality of Waverley (1939) 62 CLR 1 ; [1939] HCA 25 Clark (Inspector of Taxes) v Oceanic Contractors Inc [1983] 2 AC 130 Commissioner of Taxation of the Commonwealth of Australia v Scully (2000) 201 CLR 148 ; [2000] HCA 6 Coverdale v West Coast Council (2016) 259 CLR 164 ; [2016] HCA 15 CSR Timber Products Pty Ltd v Weathertex Pty Ltd (2013) 83 NSWLR 433 ; [2013] NSWCA 49 De Sales v Ingrilli (2003) 212 CLR 338 ; [2002] HCA 52 ; [2003] HCA 16 Demanes v United Air Lines 348 F Supp 13 (CD Cal 1972) Dinov v Allianz Australia Insurance Ltd (2017) 96 NSWLR 97 ; [2017] NSWCA 270 Disley v Levine [2002] 1 WLR 785 ; [2001] EWCA Civ 1087 Edwards v Endeavour Energy (No 4) [2013] NSWSC 1899 El Al Israel Airlines Ltd v Tseng 525 US 155 (1999) Endeavour Energy v Precision Helicopters Pty Ltd [2015] NSWCA 169 Endeavour Energy v Precision Helicopters Pty Ltd (No 2) [2015] NSWCA 357 Fellowes (or Herd) v Clyde Helicopters Ltd [1997] AC 534 Fitness First Australia Pty Ltd v Fenshaw Pty Ltd (2016) 92 NSWLR 128 ; [2016] NSWCA 207 Gifford v Strang Patrick Stevedoring Pty Ltd (2003) 214 CLR 269 ; [2003] HCA 33 Glen v Korean Airlines Co Ltd [2003] QB 1386 ; [2003] EWHC 643 (QB) Grein v Imperial Airways Ltd [1937] 1 KB 50 Gulf Air Company GSC v Fattouh (2008) 251 ALR 183 ; [2008] NSWCA 225 Hambrook v Stokes Brothers [1925] 1 KB 141 Heli-Aust Pty Ltd v Cahill (2011) 194 FCR 502 ; [2011] FCAFC 62 Herd v Clyde Helicopters Ltd [1996] SLT 976 Holmes v Bangladesh Biman Corporation [1989] AC 1112 Hunter Douglas Australia Pty Ltd v Perma Blinds (1970) 122 CLR 49 ; [1970] HCA 63 J Blackwood & Son Ltd v Skilled Engineering Ltd [2008] NSWCA 142 Jaensch v Coffey (1984) 155 CLR 549 ; [1984] HCA 52 Johnson Estate v Pischke [1989] 3 WWR 207 King v American Airlines Inc 284 F 3d 352 (2d Cir 2002) Kostas v HIA Insurance Services Pty Ltd (2010) 241 CLR 390 ; [2010] HCA 32 Laroche v Spirit of Adventure

(UK) Ltd [2009] QB 778 Lazarus v Independent Commission Against Corruption (2017) 94 NSWLR 36 ; [2017] NSWCA 37 Meandarra Aerial Spraying Pty Ltd v GEJ & MA Geldard Pty Ltd [2013] 1 Qd R 319 ; [2012] QCA 315 Mexico City Aircrash of October 31, 1979, In re; Haley v Western Airlines Inc 708 F 2d 400 (9th Cir 1983) Milich v Council of the City of Canterbury (No 2) [2012] NSWSC 450 Minister for Immigration and Multicultural and Indigenous Affairs, Re; Ex parte Lam (2003) 214 CLR 1 ; [2003] HCA 6 Mount Beauty Gliding Club Inc v Jacob (2004) 10 VR 312 ; [2004] VSCA 151 Muller v Dalgety & Co Ltd (1909) 9 CLR 693 ; [1909] HCA 67 Ortet v Georges (1975) 30 RFDA 490 Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound) [1961] AC 388 Povey v Qantas Airways Ltd (2005) 223 CLR 189 ; [2005] HCA 33 Public Transport Commission of New South Wales v J Murray-More (NSW) Pty Ltd (1975) 132 CLR 336 ; [1975] HCA 28 R v Hughes (2000) 202 CLR 535 ; [2000] HCA 22 R v Khazaal (2012) 246 CLR 601 ; [2012] HCA 26 Roadshow Films Pty Ltd v iiNet Ltd (2012) 248 CLR 42 ; [2012] HCA 16 Scala v Mammolitti (1965) 114 CLR 153 ; [1965] HCA 63 Seward v The "Vera Cruz" (1884) 10 App Cas 59 Sheather v Country Energy (2007) Aust Torts Rep 81901 ; [2007] NSWCA 179 Sidhu v British Airways plc [1997] AC 430 Smith v London and South Western Railway Company (1870) LR 6 CP 14 Société Mutuelle d'Assurance Aériennes v Gauvain (1 967) 21 RFDA 436 South Pacific Air Motive Pty Ltd v Magnus (1998) 87 FCR 301 ; [1998] FCA 1107 Sout hgate v Commonwealth of Australia (1987) 13 NSWLR 188 Stephenson v Parkes Shire Council (2014) 291 FLR 319 ; [2014] NSWSC 1758 Stephenson v Parkes Shire Council (No 2) [2015] NSWSC 719 Stott v Thomas Cook Tour Operators Ltd [2014] AC 1347 ; [2014] UKSC 15 Sulewski v Federal Express Corporation 933 F 2d 180 (2d Cir 1991) Sydney Water Corporation v Turano (2009) 239 CLR 51 ; [2009] HCA 42 Technical Products Pty Ltd v State Government Insurance Office (Queensland) (1989) 167 CLR 45 ; [1989] HCA 24 Tiufino v Warland (2000) 50 NSWLR 104 ; [2000] NSWCA 110 Trust Company of Australia Ltd v Skiwing Pty Ltd (2006) 66 NSWLR 77 ; [2006] NSWCA 185 Trustees of the Sydney Grammar School v Winch (2013) 83 NSWLR 80 ; [2013] NSWCA 37 United Airlines Inc v Sercel Australia Pty Ltd (2012) 289 ALR 682 ; [2012] NSWCA 24 Winkfield, The [1902] P 42 Workers' Compensation Board of Queensland v Technical Products Pty Ltd (1988) 165 CLR 642 ; [1988] HCA 49

South West Helicopters Pty Ltd v Stephenson [2017] NSWCA 312 -
South West Helicopters Pty Ltd v Stephenson [2017] NSWCA 312 -
South West Helicopters Pty Ltd v Stephenson [2017] NSWCA 312 -
South West Helicopters Pty Ltd v Stephenson [2017] NSWCA 312 -
South West Helicopters Pty Ltd v Stephenson [2017] NSWCA 312 -
South West Helicopters Pty Ltd v Stephenson [2017] NSWCA 312 -
Hananeia v Secretary, Attorney-General's Department [2016] FCAFC 36 (11 March 2016) (Gilmour, Barker & Bromberg JJ)

130. Causation principles developed by the common law address the attribution of responsibility to a wrongdoer. Ordinarily, there is a distinction drawn between factual causation and legal causation. The purpose of the former is to determine whether the wrongdoing was a necessary condition of the harm (the "but for" test): *March* at 515 (Mason CJ). The purpose of the latter is to determine, in the specific case, whether the wrongdoer should be held responsible: *March* at 515 (Mason CJ). So, where the wrongdoing satisfies the "but for" test of factual causation, on the basis of principles determined largely by reference to policy considerations, courts will then proceed to determine whether the wrongdoer should be held responsible: *March* at 515 (Mason CJ); see also *Jaensch v Coffey* (1984) 155 CLR 549 at 554–555 (Gibbs CJ) . It is in that context, and in determining legal causation, that issues of foreseeability of damage and the relevance and consequence of an intervening cause are resolved.

Hananeia v Secretary, Attorney-General's Department [2016] FCAFC 36 (11 March 2016) (Gilmour, Barker & Bromberg JJ)

150. An appropriate assessment needed to be made as to what part of the harm suffered by Mr Hananeia was as a result of his travelling to, and his first attendance at, the Sari Club. In relation to any harm suffered as a result of that event, the terrorist act needed to be weighed with the first decision. The weighing up process needed to take into account the extent to

which the first decision was itself a consequence of the terrorist act. It would, in my view, be relevant in that respect to take into account that a foreseeable consequence of a terrorist act constituted by an explosion in or adjacent to a public place is that immediately after the explosion bystanders may travel to and attend at the site of the explosion. That may be the result of shock, panic, or a reflex reaction. It may be driven by a humanitarian motivation to rescue or assist. It may simply be driven by curiosity. In my view, Parliament would have been aware of the foreseeability of that range of possible reactions. If foreseeable, I consider that there is nothing in the policy or purpose of the AVTOP scheme that would deny ascribing to the terrorist act some responsibility for a bystander's attendance: c.f. the observations of Brennan J at 569–570 of *Jaensch* in relation to the foreseeability of the attendance of various classes of persons at the scene of a car accident, and the observations of Deane J at 605–606.

Waller v James [2015] NSWCA 232 (13 August 2015) (Beazley P, McColl and Ward JJA)

199. Similarly, in *Chapman v Hearse* [1961] HCA 46; 106 CLR 112 at 120 it was held that it was unnecessary for the plaintiff to prove that the precise manner of sustaining the injury was foreseeable. See also *Nader v Urban Transit Authority of NSW* (1985) 2 NSWLR 501 at 504. This is so unless the particular risk is so small that a defendant would be justified in neglecting it: *Jaensch v Coffey* [1984] HCA 52; 155 CLR 549 at 562-3 .

Waller v James [2015] NSWCA 232 -
Waller v James [2015] NSWCA 232 -
Anwar v Mondello Farms Pty Ltd [2015] SASCFC 109 (10 August 2015) (Kourakis CJ; Gray and Stanley JJ)

96. The operation of s 33 of the Act narrows the circumstances in which a defendant is to be held liable for the infliction of consequential mental harm. As the judgment in *Tame* makes clear, prior to the enactment of s 33, a plaintiff could recover for mental harm which resulted from physical harm where it was reasonably foreseeable that the defendant's negligence would expose the plaintiff to the risk of physical harm. A plaintiff did not have to establish that the defendant owed him or her a further and separate duty of care in respect of any psychiatric injury suffered as a sequalae of the plaintiff's physical injury. [45] Section 33 of the Act now makes it harder for a plaintiff to recover damages for consequential mental harm. First, the statutory test enshrined in s 33 is now stricter than the test by which liability for pure mental harm, let alone consequential harm, was established at common law. Secondly, s 33 confines the existence of a duty of care not to cause mental harm to circumstances where a reasonable person in the defendant's position would have foreseen that a person of normal fortitude in the plaintiff's position might, in the circumstances of the case, suffer a psychiatric illness. It requires as a necessary, but not sufficient, condition for finding the existence of a duty of care that normal fortitude be considered as an aspect of reasonable foreseeability.

via

[45] *Jaensch v Coffey* [1984] HCA 52, (1984) 155 CLR 549 at 565 ; *Sutherland Shire Council v Heyman* [1985] HCA 41, (1985) 157 CLR 424 at 495 ; *Campbelltown City Council v Mackay* (1989) 15 NSWLR 501 at 511.

State of New South Wales v McMaster [2015] NSWCA 228 -
State of New South Wales v McMaster [2015] NSWCA 228 -
Anwar v Mondello Farms Pty Ltd [2015] SASCFC 109 -
King v Philcox [2015] HCA 19 (10 June 2015) (French CJ, Kiefel, Gageler, Keane and Nettle JJ)

16. In 1983, the Full Court of the Supreme Court of South Australia in *Coffey v Jaensch* [26] held that a woman who suffered nervous shock after seeing her husband in hospital following a motor accident and being told that he might not survive, could recover damages. This Court

affirmed that decision on appeal in *Jaensch v Coffey* [27] . In his Second Reading Speech for the Bill which became the *Wrongs Act Amendment Act* 1986 (SA), the Attorney-General for South Australia described the Bill as limiting the range of persons entitled to claim for nervous shock. He did not refer to the decision of the High Court but cited that of the Full Court as having extended the law beyond cases in which[28]:

> "nervous shock is suffered by a person in the proximity of injury or peril caused to a third party by the negligence of another".

The proposed amendment was evidently not intended to affect the common law as stated in *Jaensch v Coffey* but "to prevent any further expansion of this head of damage" [29]. Section 35A (1)(c) was the precursor of s 53 . It precluded recovery for mental harm or nervous shock arising from a "motor accident" except in favour of a person physically injured in the accident, a person who was a driver or passenger of or in a motor vehicle involved in the accident, a person "who was, when the accident occurred, present at the scene of the accident" [30] , or "a parent, spouse or child of a person killed, injured or endangered in the accident"[31] . The term "motor accident" was defined as "an incident in which injury is caused by or arises out of the use of a motor vehicle"[32]. Unlike s 4 of the *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW), s 35A(1)(c) was expressly directed to the limitation of liability. That was its purpose, as appeared from the Second Reading Speech [33] , and that was its operation, as appeared from its text.

King v Philcox [2015] HCA 19 (10 June 2015) (French CJ, Kiefel, Gageler, Keane and Nettle JJ)

49. The requirement of presence at the scene is not, as the respondent argued, an arbitrary limit upon the recovery of damages to be strictly confined in its effect. Rather, it is a limitation upon the recovery of damages which reflects an intelligible legislative choice to limit the extent of liability for the consequences of a defendant's negligence. The exclusion of liability effected by s 53(1)(a) of the Act is an informed and rational response to issues thrown up by the case law [86] as to where the law should best draw the line to limit indeterminate liability and unreasonable or disproportionate burdens upon defendants and those who are obliged, under private or public insurance arrangements, to defray the cost of meeting those burdens. The exclusion reflects a balancing of interests [87] , the rationale of which is readily intelligible. Arguments as to whether the line drawn by the legislation accords with the latest stage in the ongoing development [88] of the common law by the courts are beside the point; it is wrong to characterise the exclusionary line drawn by the legislation as arbitrary, so as to justify reading the expression "present at the scene" as meaning no more than in the same place as the accident.

via

[86] *Chester v Waverley Corporation* (1939) 62 CLR 1 at 44; [1939] HCA 25; *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 411; [1970] HCA 60; *Jaensch v Coffey* (1984) 155 CLR 549 at 564570 , 590591 ; *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 at 400405 ; *Tame v New South Wales* (2002) 211 CLR 317 at 381 [192]; [2002] HCA 35.

King v Philcox [2015] HCA 19 (10 June 2015) (French CJ, Kiefel, Gageler, Keane and Nettle JJ)

86. In terms of induction, the considerations which emerge from the decided cases include whether the mental condition to be guarded against is limited to a condition in the nature or the result of a sudden nervous shock [123] ; whether it is limited to mental harm suffered as the result of presence at the scene of the accident or its aftermath [124] ; any pre-existing relationships between the defendant and the victim and the defendant and the plaintiff [125] ; and the nature of the relationship between the victim and the plaintiff [126] . In effect, they are the considerations adumbrated in s 33 of the CL Act , on which the trial judge based her decision, and, although s 33 does not purport to be an exhaustive prescription of relevant

considerations, it is not suggested that there are any others which arise from the facts of this case.

via

[124] *Jaensch* (1984) 155 CLR 549 .

King v Philcox [2015] HCA 19 (10 June 2015) (French CJ, Kiefel, Gageler, Keane and Nettle JJ)

87. In terms of deduction, there is little in point of principle to distinguish between this case and *Jaensch*. In *Jaensch* it was recognised that the causal proximity between a motor accident which caused physical injury to a victim and the psychiatric injury suffered by the victim's wife when she later learned of and saw some of the effects of the physical injury was such that a duty was owed to the victim's wife to take reasonable care to guard against the kind of mental harm which she suffered [127] . Here, the causal proximity between the motor accident and the respondent's mental harm is comparable to, if not closer than, that in *Jaensch* . In this case, the respondent was present at the scene of the accident in the aftermath of the accident and, although he was not then aware of his brother's involvement, his presence at the scene of the accident was later determined to have been causative of his condition.

via

[127] *Jaensch* (1984) 155 CLR 549 at 606-609 .

King v Philcox [2015] HCA 19 (10 June 2015) (French CJ, Kiefel, Gageler, Keane and Nettle JJ)

16. In 1983, the Full Court of the Supreme Court of South Australia in *Coffey v Jaensch* [26] held that a woman who suffered nervous shock after seeing her husband in hospital following a motor accident and being told that he might not survive, could recover damages. This Court affirmed that decision on appeal in *Jaensch v Coffey* [27] . In his Second Reading Speech for the Bill which became the *Wrongs Act Amendment Act* 1986 (SA), the Attorney-General for South Australia described the Bill as limiting the range of persons entitled to claim for nervous shock. He did not refer to the decision of the High Court but cited that of the Full Court as having extended the law beyond cases in which[28]:

> "nervous shock is suffered by a person in the proximity of injury or peril caused to a third party by the negligence of another".

The proposed amendment was evidently not intended to affect the common law as stated in *Jaensch v Coffey* but "to prevent any further expansion of this head of damage"[29]. Section 35A (1)(c) was the precursor of s 53 . It precluded recovery for mental harm or nervous shock arising from a "motor accident" except in favour of a person physically injured in the accident, a person who was a driver or passenger of or in a motor vehicle involved in the accident, a person "who was, when the accident occurred, present at the scene of the accident" [30] , or "a parent, spouse or child of a person killed, injured or endangered in the accident"[31] . The term "motor accident" was defined as "an incident in which injury is caused by or arises out of the use of a motor vehicle"[32]. Unlike s 4 of the *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW), s 35A(1)(c) was expressly directed to the limitation of liability. That was its purpose, as appeared from the Second Reading Speech [33] , and that was its operation, as appeared from its text.

via

[27] (1984) 155 CLR 549; [1984] HCA 52 .

King v Philcox [2015] HCA 19 (10 June 2015) (French CJ, Kiefel, Gageler, Keane and Nettle JJ)

91. Certainly there are some differences but, in terms of physical and temporal proximity, those differences are neither substantial nor particularly significant. As the decided cases show, the requisite degree of temporal proximity as between accident and mental harm need not be as close as it might in the absence of a close or any relationship between accident victim and claimant [135] . Furthermore, this case may appropriately be characterised as one where the claim is based on "direct perception of some of the events which go to make up the accident as an entire event [including] the immediate aftermath" [136] or where psychiatric injury results from the combined effect on a claimant of a report of an accident and the claimant's later observation of the aftermath [137] .

via

[135] *Jaensch* (1984) 155 CLR 549 at 555 per Gibbs CJ ; *Pham v Lawson* (1997) 68 SASR 124 at 144, 148 per Lander J; see also *Annetts* , reported with *Tame* (2002) 211 CLR 317; *Gifford* (2003) 214 CLR 269.

King v Philcox [2015] HCA 19 (10 June 2015) (French CJ, Kiefel, Gageler, Keane and Nettle JJ)

35. In *HoinvilleWiggins* , the Court was concerned with the construction of s 77(a)(ii) of the *Motor Accidents Act* 1988 (NSW) ("the MAA"), a close analogue of s 53(1)(a) of the Act . The plaintiff, having been told of a motor vehicle accident involving a pedestrian nearby, went to the scene and administered mouth to mouth resuscitation to the pedestrian until it became apparent that the pedestrian had died. The plaintiff claimed damages for nervous shock. Section 77(a)(ii) of the MAA provided that no damages for psychological or psychiatric injury shall be awarded in respect of a motor vehicle accident except in favour of a person who was, inter alia, present at the scene of the accident "when the accident occurred". The primary judge held that the plaintiff was not present at the scene of the accident when the accident occurred. This conclusion was upheld on appeal. Of s 77(a)(ii) of the MAA , Giles JA, with whom Mason P and Stein JA agreed, said [68] :

> "The words 'when the accident occurred' mean that it is not enough that [the plaintiff] came to the scene of the accident after the accident had occurred, as might have happened in 'rescuer' cases at common law. The [plaintiff] argued that the accident included what she described as its aftermath, and extended to her attendance to minister to the pedestrian. For the notion of aftermath she referred to *Benson v Lee* [69] ; *McLoughlin v O'Brian* [70] and *Jaensch v Coffey* [71] . The passages were to do with recovery at common law of damages for nervous shock suffered not only by a plaintiff who saw or heard the accident, but also by a plaintiff who saw or heard events at the scene of the accident after its occurrence or even at a hospital during immediate post-accident treatment. They distinguished between the accident and its aftermath. Section 77 limits this common law position, because the plaintiff must have been present at the scene of the accident and must have been present at the scene of the accident when the accident occurred ... The aftermath was never part of the accident and (at least for the purposes of s 77(a)) seeing or hearing the aftermath no longer founds recovery of damages.
>
> > ... The accident occurred when the opponent's motor vehicle struck the pedestrian, whether or not the pedestrian's death was immediate, and the [plaintiff's] presence in the classroom, unaware of the accident until Ms Kelly told her of it, was not presence at the scene of the accident at that time."

via

[71] (1984) 155 CLR 549 at 606608 ; [1984] HCA 52 .

King v Philcox [2015] HCA 19 -
King v Philcox [2015] HCA 19 -
King v Philcox [2015] HCA 19 -
King v Philcox [2015] HCA 19 -
King v Philcox [2015] HCA 19 -
King v Philcox [2015] HCA 19 -
King v Philcox [2015] HCA 19 -
King v Philcox [2015] HCA 19 -
King v Philcox [2015] HCA 19 -
King v Philcox [2015] HCA 19 -
Angeleska (known as Slaveska) v State of Victoria [2015] VSCA 140 -
King v Philcox [2015] HCA 19 -
King v Philcox [2015] HCA 19 -
King v Philcox [2015] HCA 19 -
King v Philcox [2015] HCA 19 -
King v Philcox [2015] HCA 19 -
King v Philcox [2015] HCA 19 -
King v Philcox [2015] HCA 19 -
King v Philcox [2015] HCA 19 -
King v Philcox [2015] HCA 19 -
Swick Nominees Pty Ltd v Leroi International Inc (No 2) [2015] WASCA 35 -
Swick Nominees Pty Ltd v Leroi International Inc (No 2) [2015] WASCA 35 -
Electro Optic Systems Pty Ltd v State of New South Wales [2014] ACTCA 45 -
Philcox v King [2014] SASCFC 38 (11 April 2014) (Gray, Sulan and Parker JJ)

Wicks v State Rail Authority of New South Wales (2010) 241 CLR 60; *Jaensch v Coffey* (1984) 155 CLR 549 ; *Wicks v State Rail Authority* (NSW) (2010) 241 CLR 60 ; *Thompson v Australian Capital Television PL* (19 94) 54 FCR 513; *Hoinville-Wiggins v Connelley* [1999] NSWCA 263, considered.

Philcox v King [2014] SASCFC 38 -
Philcox v King [2014] SASCFC 38 -
Philcox v King [2014] SASCFC 38 -
Crouch and Lyndon (a Firm) v IPG Finance Australia Pty Ltd [2013] QCA 220 -
Trustees of the Sydney Grammar School v Winch [2013] NSWCA 37 -
JS v Graveur [2012] QCA 196 -
Aytugrul v The Queen [2012] HCA 15 -
Carter v Walker [2010] VSCA 340 -
Carter v Walker [2010] VSCA 340 -
Miller v Miller [2009] WASCA 199 (06 November 2009) (McLure JA, Buss JA, Newnes JA)

57. Mason CJ, Deane, Gaudron and McHugh JJ, in their joint reasons, reviewed ***Smith*** , ***Progress & Properties*** and ***Jackson*** . They then said it was necessary to take account of developments affecting the concept of the duty of care since those cases were decided:

> Commencing with ***Jaensch v Coffey*** ((1984) 155 CLR 549), this Court, in a series of decisions, has accepted that a relevant duty of care will arise under the common law of negligence only in a case where the requirement of a relationship of proximity between the plaintiff and the defendant has been satisfied: see ***Sutherland Shire Council v Heyman*** ((1985) 157 CLR 424, at pp 46 1 462, 506 507); ***Stevens v Brodribb Sawmilling Co Pty Ltd*** ((1986) 160 CLR 16, at pp 30, 50 52); ***San Sebastian Pty Ltd v The Minister*** ((1986) 162 CLR 340, at pp 354 355); ***Cook v Cook*** ((1986) 162 CLR 376, at pp 381 - 382). The requirement of proximity constitutes the general determinant of the categories of case in which the common law of negligence recognises the existence of a duty to take reasonable care to avoid a reasonably foreseeable and real risk of injury. In determining whether the requirement is satisfied in a particular category of case in a developing area of the law of negligence, the relevant factors will include policy considerations (252 253).

Mason CJ, Deane, Gaudron and McHugh JJ observed that where, as in the case before them, the parties are involved in a joint criminal enterprise, those factors will include the appropriateness and feasibility of seeking to define the content of a relevant duty of care (253). The onus lies on the party who alleges that, as a result of special and exceptional circumstances, 'the ordinary relationship of a driver towards a passenger is transformed into one which lacks the requisite relationship of proximity to give rise to a relevant duty of care' (254). According to their Honours, in the case before them, it was necessary to examine the relationship between the respondent and Gala with a view to ascertaining whether there was 'a relationship of proximity such as to give rise to a relevant duty of care' by Gala to the respondent (254). They then held that the circumstances of the case before them could not sustain a relationship of proximity which would generate a duty of care:

> The joint criminal activity involving the theft of the motor vehicle and its illegal use in the course of a spontaneously planned 'joy ride' or adventure gave rise to the only relevant relationship between the parties and constituted the whole context of the accident. That criminal activity was, of its nature, fraught with serious risks. The consumption by the participants, including the first appellant, of massive amounts of alcohol for many hours prior to the accident would have affected adversely the capacity of a driver to handle the motor vehicle competently. Despite the surprising conclusion of the primary judge, each of the parties to the enterprise must be taken to have appreciated that he would be encountering serious risks in travelling in the stolen vehicle when it was being driven by persons who had been drinking heavily and when it could well be the subject of a report to the police leading possibly to their pursuit and/or their arrest. In the special and exceptional circumstances that prevailed, the participants could not have had any reasonable basis for expecting that a driver of the vehicle would drive it according to ordinary standards of competence and care.
>
> In this situation the parties were not in a relationship of proximity to each other such that the first appellant, as the driver of the vehicle, had a relevant duty of care to the respondent, as a passenger in the vehicle. In the circumstances just outlined, it would not be possible or feasible for a court to determine what was an appropriate standard of care to be expected of the first appellant as the driver of the vehicle. To conclude that he should have observed the ordinary standard of care to be expected of a competent driver would be to disregard the actual relationship between the parties as we have described it. To seek to define a more limited duty of care by reference to the exigencies of the particular case would involve a weighing and adjusting of the conflicting demands of the joint criminal activity and the safety of the participants in which it would be neither appropriate nor feasible for the courts to engage (254 255).

Miller v Miller [2009] WASCA 199 (06 November 2009) (McLure JA, Buss JA, Newnes JA)

Jaensch v Coffey [1984] HCA 52 ; (1984) 155 CLR 549

Miller v Miller [2009] WASCA 199 -
Miller v Miller [2009] WASCA 199 -
New South Wales v West [2008] ACTCA 14 -
Imbree v McNeilly [2008] HCA 40 -
Imbree v McNeilly [2008] HCA 40 -
Kirkland-Veenstra v Stuart [2008] VSCA 32 (29 February 2008) (Warren CJ, Maxwell P and Chernov JA)

87. Nothing said in *Annetts* purported to limit what was said in *Jaensch* . The present case is, in its material aspects, on all fours with *Jaensch* . The appellant came upon her deceased husband just after he had committed suicide. She directly perceived the aftermath, and suffered a sudden shock. The absence of a pre-existing relationship with the respondent is therefore immaterial.

Kirkland-Veenstra v Stuart [2008] VSCA 32 (29 February 2008) (Warren CJ, Maxwell P and Chernov JA)

78. As the submission for the appellant pointed out, it has been established in Australia since the decision of the High Court in *Jaensch v Coffey* [72] that a close relative of a person who is injured or dies through the fault of another can recover damages for pure psychiatric injury, even though the relative –

(a) was not present when the injury was sustained or the death occurred; and

(b) had no pre-existing relationship with the wrongdoer.

via

[72] (1984) 155 CLR 549 ('*Jaensch*').

Kirkland-Veenstra v Stuart [2008] VSCA 32 -
Kirkland-Veenstra v Stuart [2008] VSCA 32 -
Kirkland-Veenstra v Stuart [2008] VSCA 32 -
Kirkland-Veenstra v Stuart [2008] VSCA 32 -
Kirkland-Veenstra v Stuart [2008] VSCA 32 -
Kirkland-Veenstra v Stuart [2008] VSCA 32 -
Kirkland-Veenstra v Stuart [2008] VSCA 32 -
Kirkland-Veenstra v Stuart [2008] VSCA 32 -
New South Wales v Rogerson [2007] NSWCA 346 (18 December 2007) (McColl JA at 1; Handley JA at 2; Hoeben J at 44)

11 I am also unable to accept the Judge's finding (p11) that Mr Marsh could or should have reasonably foreseen that his remarks were likely to cause psychiatric harm to the plaintiff. They were strangers, he made his remarks in good faith, and he was not aware of the plaintiff's special sensitivity about his brother. "[T]he bearers of sad tidings" are not liable as tortfeasors: *Jaensch v Coffey* [1984] HCA 52; (1984) 155 CLR 549, 567 per Brennan J .

New South Wales v Rogerson [2007] NSWCA 346 -
Gittani Stone Pty Ltd v Pavkovic [2007] NSWCA 355 -
Fitzpatrick v Job t/as Jobs Engineering [2007] WASCA 63 (20 March 2007) (Steytler P)

Jaensch v Coffey (1984) 155 CLR 549

Fitzpatrick v Job t/as Jobs Engineering [2007] WASCA 63 -
Seltsam Pty Ltd v Mcneill [2006] NSWCA 158 (26 June 2006) (Handley JA at 1; Tobias JA at 8; Bryson JA at 9)

31 In many negligence cases, including cases where a consumer or user of a product claims against the manufacturer of the product, reasonable foreseeability ascertained in this way establishes the existence of a duty of care. There may be some reason of policy why it does not; see *Jaensch v Coffey* (1984) 155 CLR 549 at 583 (Deane J); at 553-554 (Gibbs CJ); and *Shirt v Wyong Shire Council* [1978] 1 NSWLR 631 (Glass JA) at 640 referring to *Home Office v Dorset Yacht Co. Ltd* [1970] AC 1004: but there is none in this case. There have been expressions of less than complete satisfaction with Mason J's test of foreseeability; see *Tame v State of New South Wales* (2002) 211 CLR 317 at 351-357 [96-108] (McHugh J) and at 429 [331] (Callinan J). As the judgment of Mason J. was concurred in by Stephen and Aickin JJ it is authoritative, notwithstanding the view expressed by Wilson J. at 52 - 53; and see Murphy J. at 49. The judgment of Mason J. remains authoritative: *Julia Farr Services Inc v Hayes* [2003] NSWCA 37, 25 NSWCCR 138 at [2] and [3] (Spigelman CJ).

Seltsam Pty Ltd v Mcneill [2006] NSWCA 158 -
Talbot & Olivier (A Firm) v Witcombe [2006] WASCA 87 (26 May 2006) (Steytler P)
Jaensch v Coffey (1984) 155 CLR 549
Kirika v Zurich Australian Insurance Ltd

Talbot & Olivier (A Firm) v Witcombe [2006] WASCA 87 -
Harriton v Stephens [2006] HCA 15 -
Dowthwaite Holdings Pty Ltd v Saliba [2006] WASCA 72 -
Commonwealth of Australia v Smith [2005] NSWCA 478 -
Neindorf v Junkovic [2005] HCA 75 -
Forder v Hutchinson [2005] VSCA 281 -
Berrigan Shire Council v Ballerini [2005] VSCA 159 (22 June 2005) (Callaway, Chernov and Nettle, Jj.A)

29. I also do not overlook that foreseeability is not a sufficient basis for the

imposition of a duty to guard against a particular risk - it is plain that it is not [15] - and that there is also some uncertainty as to whether *Saroukas* would be decided today as it was thirteen years ago. The course of authority has not been consistent:

1) In the passage from Gleeson, C.J.'s judgment in *Saroukas* which is set out above, there is reference to "the necessary relationship and proximity". It resonates with the centrality which the High Court at the time accorded to the concept of proximity. [16]

2) Later, in *Sullivan v Moody,* the majority of the High Court said that:

"...Notwithstanding the centrality of that concept, for more than a century, in this area of discourse, and despite some later decisions in this Court which emphasised that centrality, it gives little practical guidance in determining whether a duty of care exists in cases that are not analogous to cases in which a duty has been established. It expresses the nature of what is in issue, and in that respect gives focus to the inquiry, but as an explanation of a process of reasoning leading to a conclusion its utility is limited. The present appeals provide an illustration of the problem. To ask whether there was a relationship of proximity ... might be a convenient short-hand method of formulating the ultimate question in the case, but it provides no assistance in deciding how to answer the question. That is so, whether it is expressed as the ultimate test of a duty of care, or as one of a number of stages in an approach towards a conclusion on that issue." [17]

3) In *Pyrenees Shire Council v Day* [18] Kirby, J. proposed the adoption of the three part test [19] of reasonable foreseeability, proximity and whether it is fair, just and reasonable, and his Honour reprised that conception in *Romeo v Conservation Commission of the Northern Territory* [20] .

4) Later, in *Sullivan v Moody [21]* , all members of the High Court except Kirby, J. rejected that idea, saying:

"What has been described as the three-stage approach of Lord Bridge of Harwich in *Caparo Industries Plc v Dickman* does not represent the law in Australia. Lord Bridge himself said that concepts of proximity and fairness

lack the necessary precision to give them utility as practical tests, and 'amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope'. There is a danger that judges and practitioners, confronted by a novel problem, will seek to give the *Caparo* approach a utility beyond that claimed for it by its original author. There is also a danger that, the matter of foreseeability (which is often incontestable) having been determined, the succeeding questions will be reduced to a discretionary judgment based upon a sense of what is fair, and just and reasonable as an outcome in the particular case. The proximity question has already been discussed. The question as to what is fair, and just and reasonable is capable of being misunderstood as an invitation to formulate policy rather than to search for principle. The concept of policy, in this context, is often ill-defined. There are policies at work in the law which can be identified and applied to novel problems, but the law of tort develops by reference to principles, which must be capable of general application, not discretionary decision-making in individual cases."

5) In *Crimmins v Stevedoring Industry Finance Committee* [22] McHugh, J. with whom Gleeson, C.J. agreed, said that there is no longer any general test for determining whether a duty of care exists and that the correct approach now is to commence by ascertaining whether the case comes within a factual category where duties of care have been held to arise. His Honour added, however, that while a statutory authority may frequently be held to owe a duty of care because the facts of the case fall within one of those categories, it is not enough to look for factual similarities in decided cases. In novel cases it is necessary to examine the precedent cases to reveal their bases in "principle and policy" and thus to determine whether fact A in the instant case is truly analogous to fact B in the precedent case.

6) More recently, in *Graham Barclay Oysters Pty Ltd v Ryan* [23], Gleeson, C.J. spoke in terms of the "the total relationship between the parties". On one view of the matter, "the total relationship between the parties" is proximity by another name.

7) More recently still, in *Swain v Waverley Municipal Council,* McHugh, J stated that the identification of a duty of care is dependent upon a "fact-value complex" in which are inherent "questions of fairness, policy, practicality, proportion, expense and justice". [24] With respect that looks like the test of "fair, just and reasonable" advocated by Kirby, J. in *Romeo* and rejected by the majority in *Sullivan v Moody* .

via

[16] *Jaensch v Coffey* (1984) 155 C.L.R. 549 at 584.

Tomisevic v Menzies Wagga Southern Pty Ltd [2005] NSWCA 178 -
Tomisevic v Menzies Wagga Southern Pty Ltd [2005] NSWCA 178 -
Dorothy Vesna Skea v NRMA Insurance Limited ABN 11 000 016 722 [2005] ACTCA 9 (24 March 2005)

106. In *Jaensch v Coffey* , Deane J said at 587 :

> *It is now the settled law in this country that there is a distinction, for the purposes of the law of negligence, between mere grief or sorrow which does not sound in damages and forms of psychoneurosis and mental illness (which lawyers have imprecisely termed "nervous shock") which may: see, e.g.,* Bunyan v. Jordan; Chester v. Waverley Corporation *and, generally,* Mount Isa Mines Ltd. v. Pusey. [Footnotes omitted.]

Dorothy Vesna Skea v NRMA Insurance Limited ABN 11 000 016 722 [2005] ACTCA 9 -
Dorothy Vesna Skea v NRMA Insurance Limited ABN 11 000 016 722 [2005] ACTCA 9 -
Dorothy Vesna Skea v NRMA Insurance Limited ABN 11 000 016 722 [2005] ACTCA 9 -
Dorothy Vesna Skea v NRMA Insurance Limited ABN 11 000 016 722 [2005] ACTCA 9 -
Dorothy Vesna Skea v NRMA Insurance Limited ABN 11 000 016 722 [2005] ACTCA 9 -
Dorothy Vesna Skea v NRMA Insurance Limited ABN 11 000 016 722 [2005] ACTCA 9 -
Dorothy Vesna Skea v NRMA Insurance Limited ABN 11 000 016 722 [2005] ACTCA 9 -
Maddalena v CSR Ltd [2004] WASCA 231 -
Maddalena v CSR Ltd [2004] WASCA 231 -
Miller v Paua Nominees Pty Ltd [2004] WASCA 220 -
Miller v Paua Nominees Pty Ltd [2004] WASCA 220 -
Cubbon, Cubbon and Bates v Roads and Traffic Authority of NSW [2004] NSWCA 326 -
Cubbon, Cubbon and Bates v Roads and Traffic Authority of NSW [2004] NSWCA 326 -
Harriton v Stephens [2004] NSWCA 93 -
Harriton v Stephens [2004] NSWCA 93 -
Cattanach v Melchior [2003] HCA 38 -
Gifford v Strang Patrick Stevedoring Pty Ltd [2003] HCA 33 -
Gifford v Strang Patrick Stevedoring Pty Ltd [2003] HCA 33 -
Gifford v Strang Patrick Stevedoring Pty Ltd [2003] HCA 33 -
Gifford v Strang Patrick Stevedoring Pty Ltd [2003] HCA 33 -
Gifford v Strang Patrick Stevedoring Pty Ltd [2003] HCA 33 -
Gifford v Strang Patrick Stevedoring Pty Ltd [2003] HCA 33 -
State of New South Wales v Napier [2002] NSWCA 402 -
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 (05 December 2002) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

240. The development of an approach, hinted at by me in *Pyrenees* [206] , may provide an answer. The statements I made there acknowledged that the verbal attempts at identifying particular criteria for distinguishing cases where a duty of care existed (and where it did not) had failed; that candid policy evaluation was uncongenial to Australian judges or considered inappropriate; and that liability should therefore be imposed where it was judged that a reasonable person in the defendant's position *could* have avoided damage by exercising reasonable care and was in such a relationship to the plaintiff that he or she *ought* to have acted to do so [207] . Despite its overt circularity, this formulation might at least offer a return to the substance of Lord Atkin's speech in *Donoghue v Stevenson* . It might afford a broad formula that poses a factual (or jury) question and avoids the chaos into which other attempted formulae have lately led the law.

via

[207] cf *Jaensch v Coffey* (1984) 155 CLR 549 at 607 ; McHugh, "Neighbourhood, Proximity and Reliance", in Finn (ed), *Essays on Torts*, (1989) 5 at 38; Corbett, "A Reformulation of the Right to Recover Compensation for Medically Related Injuries in the Tort of Negligence", (1997) 19 *Sydney Law Review* 141 at 148-149.

Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54 -
Tame v New South Wales [2002] HCA 35 (05 September 2002) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

216. In *Jaensch v Coffey* , Brennan J expressed the view, referred to above, that perception "by seeing, hearing or touching" a sufficiently distressing person, thing or event is a prerequisite to recovery for negligently inflicted psychiatric harm. His Honour said that a psychiatric illness induced by "mere knowledge of a distressing fact is not compensable; perception by the plaintiff of the distressing phenomenon is essential" [217] . On this question, Gibbs CJ expressly reserved his position [218] . Murphy J appeared to be of the view that "learning of", rather than witnessing, a spouse's injuries or treatment would be sufficient to found liability [219] . Deane J doubted the need for direct perception, saying [220] :

> "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 is so devastated by being told on the telephone that her husband and children have all just 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 at its aftermath at the hospital when her husband has suffered serious but not fatal injuries."

Dawson J did not conclusively accept that there can be no liability for "shock" brought about by third party communication rather than by the sight or sound of an accident or its consequences [221] . Indeed, *Jaensch v Coffey* did not directly raise the issue; it was accepted that Mrs Coffey directly perceived the aftermath of her husband's accident.

via

[217] (1984) 155 CLR 549 at 567.

Tame v New South Wales [2002] HCA 35 (05 September 2002) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

263. The way in which some of these matters have been reflected in decided cases may be illustrated by reference to *Jaensch v Coffey* [300] and, in particular, the reasons of Deane J. *Jaensch v Coffey* decided that a road user owed a duty of care to avoid psychiatric injury to the wife of another road user where the psychiatric injury was sustained as a result of the plaintiff seeing her physically injured husband in hospital. Several features of those facts are notable. First, behind the event found to have brought on the plaintiff's psychiatric injury was an event, the road accident, brought about by the defendant's breach of a duty of care owed to another. Secondly, the plaintiff and the injured road user were related. Thirdly, the event found to trigger the plaintiff's injury (seeing her husband in hospital) was an event closely related in time (but not place) to the road accident of which the defendant's negligence was a cause. Various features of those facts were fastened upon as sufficiently establishing a relationship warranting a finding of the existence of a duty of care.

via

[300] (1984) 155 CLR 549 .

Tame v New South Wales [2002] HCA 35 (05 September 2002) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

267. If mechanical considerations of geographical or temporal proximity are rejected, and I consider that they should be, rules of propinquity like the "danger zone", and rules requiring direct impact of events upon the senses of the plaintiff, must likewise be discarded. Indeed, the actual decision in *Jaensch v Coffey* , that Mrs Coffey could recover, denies the continued application of any such rules. Yet a distinction was drawn in that case between events

forming part of the aftermath of the accident, and more remote events [304] . The drawing of that kind of distinction may suggest that the place and time at which the injury is said to have its origin is not irrelevant, but Deane J described its relevance as being found in considerations of *logical* or *causal* proximity [305] , not *physical* proximity.

Tame v New South Wales [2002] HCA 35 (05 September 2002) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

206. No other member of the Court in *Jaensch v Coffey* expressly adopted the requirement of "sudden shock". The remarks of Deane J [200] (with whom Gibbs CJ agreed generally) are inconclusive and neither Murphy J nor Dawson J directly considered the issue. Subsequent authority in the House of Lords has identified "sudden shock" as a distinct and necessary element of liability [201] . So too trial and intermediate appellate courts in Australia have treated the remarks of Brennan J as authoritative [202] . However, in the absence of acceptance by a majority of this Court of the need to establish "sudden shock", it is not a settled requirement of the common law of Australia.

Tame v New South Wales [2002] HCA 35 (05 September 2002) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

39. Ipp J said:

> "The essential question, however, is whether (to paraphrase Brennan J in *Jaensch v Coffey* [22]) the respondent should have foreseen that the breach of duty on its part might result in a sudden sensory perception on the part of the appellants of a phenomenon so distressing that a recognisable psychiatric illness would be caused thereby."

Tame v New South Wales [2002] HCA 35 (05 September 2002) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

105. This statement should not be seen as laying down a simple factual issue, as it often is. Lord Wilberforce in *Anns v Merton London Borough Council* [75] and Deane J in *Jaensch* [76] , for example, seem to have regarded reasonable foreseeability as raising a mere factual issue . Lor d Wilberforce thought that reasonable foreseeability was the equivalent of proximity and would create a duty unless negatived by policy factors. That proposition assumes that policy factors have no part to play in reasonable foreseeability. Deane J thought that both reasonable foreseeability and proximity were necessary to establish a duty of care. But I think it is arguable that the notion of reasonable foresight in Lord Atkin's speech in *Donoghue v Stevenson* [77] is, and was intended to be, a compound conception of fact and value. What is foreseeable is a question of fact – prediction, if you like. But reasonableness is a value. At least in some situations, policy issues may be relevant to the issue of reasonable foresight because reasonableness requires a value judgment.

Tame v New South Wales [2002] HCA 35 (05 September 2002) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

60. In *Jaensch v Coffey* , Brennan J pointed out that the "normal fortitude rule" was not a universal rule determinative of foreseeability but that, where the question is whether it is foreseeable that members of the general public might suffer psychological or psychiatric injury, the answer "must generally depend on a normal standard of susceptibility" [41] . His Honour expressly acknowledged that the "normal fortitude rule" does not apply when "a plaintiff's extraordinary susceptibility to psychiatric illness ... is known to the defendant" [42] . Further, his Honour allowed a qualification to the rule in the case of persons for whom the phenomenon in question has special significance. Thus, in his Honour's view:

> "if it is reasonably foreseeable that the phenomenon might be perceived by a person or class of persons for whom it has a special significance – for example, the parent of a child injured in a road accident who comes upon the scene – the question whether it is reasonably foreseeable that the perception of the phenomenon by that person or a member of that class might induce a psychiatric illness must be decided in the light of the heightened susceptibility which the special significance of the phenomenon would be expected to produce." [43]

via

[43] (1984) 155 CLR 549 at 568-569 .

Tame v New South Wales [2002] HCA 35 (05 September 2002) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

216. In *Jaensch v Coffey* , Brennan J expressed the view, referred to above, that perception "by seeing, hearing or touching" a sufficiently distressing person, thing or event is a prerequisite to recovery for negligently inflicted psychiatric harm. His Honour said that a psychiatric illness induced by "mere knowledge of a distressing fact is not compensable; perception by the plaintiff of the distressing phenomenon is essential" [217] . On this question, Gibbs CJ expressly reserved his position [218] . Murphy J appeared to be of the view that "learning of", rather than witnessing, a spouse's injuries or treatment would be sufficient to found liability [219] . Deane J doubted the need for direct perception, saying [220] :

> "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 is so devastated by being told on the telephone that her husband and children have all just 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 at its aftermath at the hospital when her husband has suffered serious but not fatal injuries."

Dawson J did not conclusively accept that there can be no liability for "shock" brought about by third party communication rather than by the sight or sound of an accident or its consequences [221] . Indeed, *Jaensch v Coffey* did not directly raise the issue; it was accepted that Mrs Coffey directly perceived the aftermath of her husband's accident.

via

[221] (1984) 155 CLR 549 at 612-613 .

Tame v New South Wales [2002] HCA 35 (05 September 2002) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

250. "Neighbourhood" [275] , "proximity" [276] , the socalled "tripartite" test said to be derived from Lord Bridge's speech in *Caparo Industries Plc v Dickman* [277] , "vulnerability" [278] , "general reliance" [279] are all different attempts that have been made to identify a satisfactory means of describing or defining the circumstances in which a duty of care should be found to exist. At least some of these tests have now been rejected [280] as either being insufficiently informative or being inadequate to provide coherence in this area of the law. None has proved to be an allembracing explanation for the way in which the law has developed and is

developing. But despite these difficulties, what has not been rejected is a more fundamental proposition. As five members of the Court have recently held [281] , foresight of harm does *not* suffice to establish the existence of a duty of care. Or, to put the same proposition in another way, the common law does *not* provide a remedy for all who suffer negligently inflicted harm, even if the actor could reasonably foresee that carelessness may cause harm of the kind which in fact is suffered. The common law confines recovery to those to whom a duty of care is owed. That is why "the major problem for any general statement of a negligence principle [is] ... that there are large areas in which careless conduct causing injury to innocent parties is not actionable."[282]

via

[276] *Jaensch v Coffey* (1984) 155 CLR 549 at 606607 per Deane J .

Tame v New South Wales [2002] HCA 35 (05 September 2002) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

269. One important thread in the reasons of Deane J in *Jaensch v Coffey* is the recognition that, in earlier decisions [306] , it had been suggested that liability for psychiatric injury would be denied if events or causes other than the defendant's negligent act had, or might have had, some causative effect in the onset of the plaintiff's injury. As Deane J said [307] :

> "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 is so devastated by being told on the telephone that her husband and children have all just 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 at its aftermath at the hospital when her husband has suffered serious but not fatal injuries."

Because Mrs Coffey's injury was found to have been brought about by matters said to be part of the accident and its aftermath, the causal link between the events which were found to have caused the injury and the negligent act was held to be sufficiently close to warrant recovery.

Tame v New South Wales [2002] HCA 35 (05 September 2002) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

139. As these judgments indicate, the case was argued and decided in the Western Australian courts on the basis that the employer's liability was governed by the special rules that usually determine whether a person is liable for the negligent infliction of pure nervous shock [92] . But those rules do not apply to and do not govern this case. They are concerned with situations where the parties have no pre-existing relationship and where, before the suffering of nervous shock, there was no duty on the defendant to take care to avoid injury to the plaintiff. They are concerned with the issue whether the plaintiff was the defendant's "neighbour" [93] in Lord Atkin's sense and whether the defendant owed a duty of care to the plaintiff. In the paradigm case of their application, the duty to take care to avoid inflicting nervous shock on the plaintiff coincides with the breach of a duty owed to a third party. In most cases calling for the application of the special rules, the third party will also suffer injury. But it is not necessary that a third party be in danger or suffer injury [94] . On the current state of authority, it is enough that, although there is no pre-existing duty or relationship, the defendant ought reasonably to have foreseen that his or her conduct might cause nervous shock to the plaintiff. In cases where there is no existing relationship between the defendant and the person sustaining nervous shock, however, English [95] and Australian [96] authority requires the plaintiff to prove more than the reasonable foreseeability of

nervous shock to the plaintiff. It is unnecessary in this case to examine those additional requirements or the special rules or to determine whether and, if so, to what extent, they represent the current law. They do not apply where the defendant is already under a duty to take reasonable care to avoid injury to the plaintiff.

via

[96] *Jaensch v Coffey* (1984) 155 CLR 549 .

Tame v New South Wales [2002] HCA 35 (05 September 2002) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

362. Ipp J was of the opinion that to ground liability there must be a sudden shock. The modern basis for this is to be found, in this country, in the judgment of Brennan J in *Jaensch* [377] :

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

Brennan J said [378] :

> "I understand 'shock' in this context to mean the sudden sensory perception – that is, by seeing, hearing or touching – of a person, thing or event, which is so distressing that the perception of the phenomenon affronts or insults the plaintiff's mind and causes a recognizable psychiatric illness. A psychiatric illness induced by mere knowledge of a distressing fact is not compensable; perception by the plaintiff of the distressing phenomenon is essential. If mere knowledge of a distressing phenomenon sufficed, the bearers of sad tidings, able to foresee the depressing effect of what they have to impart, might be held liable as tortfeasors."

What his Honour says in that passage is consistent with the approach of Windeyer J in *Pusey* [379] . Ipp J pointed out, that the same or a similar view had been adopted in England in *White v Chief Constable of South Yorkshire Police* [380] , *Alcock v Chief Constable of South Yorkshire Police* [381] and in Canada in *Rhodes v Canadian National Railway* [382] .

via

[379] In *Jaensch v Coffey* (1984) 155 CLR 549 at 609 , Deane J also refers to *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 407 per Windeyer J.

Tame v New South Wales [2002] HCA 35 (05 September 2002) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

200. Analysis by the courts may assist in assessing the reasonable foreseeability of the relevant risk. The criterion is one of *reasonable* foreseeability. Liability is imposed for consequences which the defendant, judged by the standard of the reasonable person, ought to have foreseen [181] . Of course, this can sometimes lead to sharply divided views in assessing the evidence. The application of that criterion by this Court in *Bunyan v Jordan* [182] and *Chester v Waverley Corporation* [183] led in each case to a denial of recovery for "nervous shock". The result in *Chester* , looked at today, perhaps shows that the determination of what ought reasonably to have been foreseen may differ from one age to the next. However, because the criterion is an objective one [184] , what is postulated is a general (and contemporary)

standard of susceptibility. It is in that context that references in judgments of this Court [185] to hypothetical "ordinary" or "reasonable" standards of susceptibility to psychiatric harm are to be understood.

via

[185] See, eg, *Bunyan v Jordan* (1937) 57 CLR 1 at 14, 15, 17 ; *Jaensch v Coffey* (1984) 155 CLR 549 at 568.

Tame v New South Wales [2002] HCA 35 (05 September 2002) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

107. Thus neighbour = person closely and directly affected = proximity. In my opinion, Deane J arguably erred in *Jaensch* when he said [82] that the neighbour requirement was "a substantive and *independent* one which was deliberately and expressly introduced to limit or control the test of reasonable foreseeability" (emphasis added). It is true that reasonable foreseeability is not at large. You come under a duty only in respect of acts and omissions that you can reasonably foresee may affect your neighbours – persons who are directly and closely affected by your acts. But that is not a ground for regarding proximity as a factor that is independent of reasonable foreseeability.

Tame v New South Wales [2002] HCA 35 (05 September 2002) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

91. Subsequently, a number of the Justices in *Jaensch v Coffey* [49] , expressly or impliedly, approved the principle that, in determining the question of reasonable foreseeability, the court looks to a person of normal fortitude. Brennan J said [50] :

> "Unless a plaintiff's extraordinary susceptibility to psychiatric illness induced by shock is known to the defendant, the existence of a duty of care owed to the plaintiff is to be determined upon the assumption that he is of a normal standard of susceptibility."

Tame v New South Wales [2002] HCA 35 (05 September 2002) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

200. Analysis by the courts may assist in assessing the reasonable foreseeability of the relevant risk. The criterion is one of *reasonable* foreseeability. Liability is imposed for consequences which the defendant, judged by the standard of the reasonable person, ought to have foreseen [181] . Of course, this can sometimes lead to sharply divided views in assessing the evidence. The application of that criterion by this Court in *Bunyan v Jordan* [182] and *Chester v Waverley Corporation* [183] led in each case to a denial of recovery for "nervous shock". The result in *Chester* , looked at today, perhaps shows that the determination of what ought reasonably to have been foreseen may differ from one age to the next. However, because the criterion is an objective one [184] , what is postulated is a general (and contemporary) standard of susceptibility. It is in that context that references in judgments of this Court [185] to hypothetical "ordinary" or "reasonable" standards of susceptibility to psychiatric harm are to be understood.

via

[184] A point made by Brennan J in *Jaensch v Coffey* (1984) 155 CLR 549 at 568.

Tame v New South Wales [2002] HCA 35 (05 September 2002) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

303. On the exiguous facts which found the question presented for separate decision, I would hold that the defendant did owe each plaintiff a duty to act with reasonable care not to cause psychiatric injury to a parent of reasonable or ordinary fortitude. It must now be accepted that there are circumstances in which a parent, of reasonable or ordinary fortitude, may suffer psychiatric injury on account of the death of a child. The treatment of *Chester v Waverley Corporation* [323] in *Jaensch v Coffey* requires that conclusion. As Deane J said in *Jaensch v Coffey* [324]:

> "It must now be accepted that the conclusion of Evatt J is, on the facts in *Chester*, plainly to be preferred to that of the majority."[325]

Further, the same conclusion can be reached by another path.

Tame v New South Wales [2002] HCA 35 (05 September 2002) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

363. I would, with respect, adopt the definition of Brennan J in *Jaensch* of "shock" as a "sudden sensory perception ... by seeing, hearing or touching ... of a person, thing or event". As always however some questions of degree will be involved. As Windeyer J said in *Pusey* [383], circumstances alter cases. I would therefore read the dictum of Windeyer J that I have quoted as being subject to a qualification that an intention to cause nervous shock, will not be a necessary requirement in a communication case, when the "bad news" is especially horrific, and it is conveyed to, and in respect of persons in a special "bilateral" relationship or relationships as here existed. For the purposes of this case it is not necessary to seek to define which relationships will suffice. As has often been said, particularly in this field of tort law, and other similarly exceptional fields, of pure economic loss and negligent misstatement, the common law should only proceed incrementally.

Tame v New South Wales [2002] HCA 35 -
Tame v New South Wales [2002] HCA 35 -
Tame v New South Wales [2002] HCA 35 -

Tame v New South Wales [2002] HCA 35 -
Tame v New South Wales [2002] HCA 35 -
Tame v New South Wales [2002] HCA 35 -

circumstances in which the common law would admit the existence of a relevant duty of care to avoid reasonably foreseeable injury to another". More will be said of that later. Matheson J reached the conclusion "that the necessary relationship of proximity was not proved" [6] .

via

[5] (1984) 155 CLR 549 at 584.

Sullivan v Moody [2001] HCA 59 -
Sullivan v Moody [2001] HCA 59 -
AMP v RTA & Anor [2001] NSWCA 186 (02 August 2001) (Spigelman CJ, Heydon JA and Davies AJA)

120 In *Jaensch v Coffey* (1984) 155 CLR 549 at 568 , before enunciating that rule, Brennan J said:

> "reasonable foreseeability is an objective criterion of duty, and a general standard of susceptibility must be postulated. At least to that extent it is possible to confine consideration of the question whether it is reasonably foreseeable that the perception of a particular phenomenon might induce in the plaintiff a psychiatric illness."

> If it follows from the fact that reasonable foreseeability is an objective criterion of duty that a plaintiff's mental trauma must be foreseeable in a person of normal susceptibility, it must also follow that where the mental trauma of a plaintiff is caused by the suicide, induced by mental trauma, of a third person the mental trauma of that third person is only reasonably foreseeable by the defendant if the third person is assumed to be a person of normal susceptibility and mental trauma in such a person is reasonably foreseeable.

AMP v RTA & Anor [2001] NSWCA 186 -
AMP v RTA & Anor [2001] NSWCA 186 -
AMP v RTA & Anor [2001] NSWCA 186 -
AMP v RTA & Anor [2001] NSWCA 186 -
AMP v RTA & Anor [2001] NSWCA 186 -
AMP v RTA & Anor [2001] NSWCA 186 -
AMP v RTA & Anor [2001] NSWCA 186 -
AMP v RTA & Anor [2001] NSWCA 186 -
AMP v RTA & Anor [2001] NSWCA 186 -
AMP v RTA & Anor [2001] NSWCA 186 -
AMP v RTA & Anor [2001] NSWCA 186 -
AMP v RTA & Anor [2001] NSWCA 186 -
Ashrafi Persian Trading Co Pty Ltd v Ashrafinia [2001] NSWCA 243 -
Carrier v Bonham [2001] QCA 234 -
Carrier v Bonham [2001] QCA 234 -
Gifford v Strang Patrick Stevedoring Pty Ltd [2001] NSWCA 175 (14 June 2001) (Handley and Hodgson JJA, Ipp AJA)

42 And in Jaensch v. Coffey (1983-4) 155 CLR 549 at 567 , Brennan, J. said this:

> *A psychiatric illness induced by mere knowledge of a distressing fact is not compensable; perception by the plaintiff of the distressing phenomenon is essential. If mere knowledge of a distressing phenomenon suffice, the bearers of sad tidings, able to foresee the depressing effects of what they have to impart, might be held liable as tortfeasers.*

Gifford v Strang Patrick Stevedoring Pty Ltd [2001] NSWCA 175 (14 June 2001) (Handley and Hodgson JJA, Ipp AJA)

51 To satisfy these requirements, the trial judge held that she had to establish a recognisable or demonstrable psychological or psychiatric illness, amounting to more than grief, sadness or bereavement: see Swan v. Williams (Demolition) Pty. Ltd. (1987) 9 NSWLR 172 at 184-5 and 193-4, and Coates v. GIO (NSW) (1995) 21 MVR 169 at 170. He also held that the widow had to show that this illness was caused by shock or a sudden sensory perception, and that it was insufficient that it be caused by the experience of coping with the sequelae of the incident: see Campbelltown City Council v. McKay (1989) 15 NSWLR 501 at 503, 507-8 ; Alcock v. Chief Constable of South Yorkshire Police [1992] 1 AC 310 at 400, 401 ; Jaensch v. Coffey (1984) 155 CLR 549 at 565 ; and Chiaverini v. Hockey (1993) Aust. Tort Reps. 81-223.

Gifford v Strang Patrick Stevedoring Pty Ltd [2001] NSWCA 175 -
Gifford v Strang Patrick Stevedoring Pty Ltd [2001] NSWCA 175 -
Gifford v Strang Patrick Stevedoring Pty Ltd [2001] NSWCA 175 -
Hancock v Nominal Defendant [2001] QCA 227 (08 June 2001) (McMurdo P, Davies JA and Byrne J,)

54. The leading case in this country is *Jaensch v Coffey* . [59] In that case a wife who suffered psychiatric injury because of what she saw and was told at the hospital to which her husband had been admitted with serious injuries caused by the negligent driving of another was held to be entitled to recover damages for that injury from that other person notwithstanding that she did not see or hear the accident or visit the accident scene. Its facts are therefore similar to those in *McLoughlin* and Gibbs CJ saw *McLoughlin* as part of the logical progression of the development of the law.[60] However this case was arguably an extension of *McLoughlin* bec ause the injury in this case was caused, in part, by what the plaintiff was told at the hospital as well as by what she saw there.

via

[59] (1984) 155 CLR 549 . In view of the way in which the law has developed in this area since *Mo unt Isa Mines Limited v Pusey* (1970) 125 CLR 383 I do not propose to discuss it further here.

Hancock v Nominal Defendant [2001] QCA 227 (08 June 2001) (McMurdo P, Davies JA and Byrne J,)

52. The third is that their Lordships did not see the third control mechanism – that the plaintiff must directly perceive the incident or its aftermath rather than hear about it from a third person – as part of foreseeability. [55] Instead they saw it as something required as a matter of policy to limit the duty of care which would otherwise arise from the application of the foreseeability principle.

via

[55] Contrast Brennan J in *Jaensch* at [59] below.

Hancock v Nominal Defendant [2001] QCA 227 (08 June 2001) (McMurdo P, Davies JA and Byrne J,)

44. In the first of these cases, *McLoughlin v O'Brian* , a wife and mother who neither saw nor heard the accident in which one of her children was killed and her husband and other children were injured, nor went to the accident scene, was permitted to recover damages for psychiatric injury because, having come upon them at the hospital soon after the accident when they were in much the same condition as they were immediately after the accident, she was said to come within the "aftermath doctrine". Lord Wilberforce, whose views were substantially adopted in the second and third of those cases, after summarizing the previous law, stated three matters [32] which, he said, determined and thereby limited in such a case the scope of the duty which might otherwise arise from the doctrine of foreseeability. [33] Th ese were the class of persons whose claims should be recognized, that is, the closeness of the

tie between the person injured or killed and the plaintiff; the proximity in time and space to the accident, that is, the closeness to the accident of the event which was the immediate cause of the psychiatric injury; and the means by which the psychiatric injury is caused, that is, whether by seeing or hearing the event or its immediate aftermath or by seeing it reproduced on television or hearing of it on the radio or from some other person. Both the second and third of these encompasses the so-called aftermath doctrine which the House of Lords incrementally extended in that case. But Lord Wilberforce said that the "shock" [34] must come through sight or hearing of the event or its immediate aftermath, not merely through being told about it by a third party. [35]

via

[34] Which his Lordship appeared to equate with psychological injury of a particular kind rather than "a compound" the elements of which are psychiatric illness induced by a sudden sensory perception of a distressing event by seeing, hearing or touching: *Jaensch v Coffey* (1984) 155 CLR 549 at 566 – 567 per Brennan J .

Hancock v Nominal Defendant [2001] QCA 227 (08 June 2001) (McMurdo P, Davies JA and Byrne J,)

36. The phrase "sudden sensory perception" adopted by Mr Douglas in his submissions derives from the judgment of Brennan J (as his Honour then was) in *Jaensch v Coffey* [27] where, after saying that the notion of psychiatric illness induced by shock is a compound idea the elements of which are psychiatric illness and shock which causes it, his Honour said:

> "I understand 'shock' in this context to mean the sudden sensory perception – that is, by seeing, hearing or touching – of a person, thing or event which is so distressing that the perception of the phenomenon affronts or insults the plaintiff's mind and causes a recognizable psychiatric illness. A psychiatric illness induced by mere knowledge of a distressing fact is not compensable; perception by the plaintiff of the distressing phenomenon is essential."

Hancock v Nominal Defendant [2001] QCA 227 (08 June 2001) (McMurdo P, Davies JA and Byrne J,)

74. Since *Jaensch* the question has also been considered twice by single judges of Supreme Courts. In *Petrie v Dowling* [83] the plaintiff's daughter, who had been riding a bicycle, was killed as a result of the negligent driving of the defendant. The plaintiff was initially informed that her daughter had been in an accident and had received gravel rash and concussion and been taken to hospital. She went to the casualty section of the hospital where she was bluntly informed that her daughter had died. She recovered damages for her psychiatric injury as a result of being so informed. The learned trial judge recognized that, unlike the cases to which he had been referred, this was one in which the plaintiff's injury was caused solely by something said to her and not by something seen or by a combination of things seen and heard. However his Honour adopted what Deane J had said in *Jaensch* as to the difficulty in discerning a reason for distinguishing between being told on the telephone and being at the scene of the accident or its aftermath in terms of liability.

Hancock v Nominal Defendant [2001] QCA 227 (08 June 2001) (McMurdo P, Davies JA and Byrne J,)

58. Murphy J thought that any restriction on recovery should be based on policy considerations and that the court should not adopt a view of public policy more restrictive of recovery than had been adopted by the Australian legislatures which had dealt with the matter;[68] that is that in the case of parents and spouses recovery should be limited only by foreseeability and causation but that in the case of other relatives it should be limited also by a requirement that the accident occur within the sight or hearing of the plaintiff. [69]

via

[69] *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) s 4(1) ; *Law Reform (Miscellaneous Provisions) Ordinance* 1955 (ACT) s 24; *Law Reform (Miscellaneous Provisions) Ordinance* 1956 (NT) s 25. These sections were intended, in each case to extend liability, overcoming the effect of *Chester v Waverley Municipal Council* (1939) 62 CLR 1. See also Deane J in *Jaensch* at 611.

Hancock v Nominal Defendant [2001] QCA 227 (08 June 2001) (McMurdo P, Davies JA and Byrne J,)
Jaensch v Coffey (1984) 155 CLR 549 , considered

Hancock v Nominal Defendant [2001] QCA 227 -
Hancock v Nominal Defendant [2001] QCA 227 -
Hancock v Nominal Defendant [2001] QCA 227 -
Hancock v Nominal Defendant [2001] QCA 227 -
Hancock v Nominal Defendant [2001] QCA 227 -
Hancock v Nominal Defendant [2001] QCA 227 -
Hancock v Nominal Defendant [2001] QCA 227 -
Hancock v Nominal Defendant [2001] QCA 227 -
Hancock v Nominal Defendant [2001] QCA 227 -
Hancock v Nominal Defendant [2001] QCA 227 -
Hancock v Nominal Defendant [2001] QCA 227 -
Hancock v Nominal Defendant [2001] QCA 227 -
Hancock v Nominal Defendant [2001] QCA 227 -
Hancock v Nominal Defendant [2001] QCA 227 -
Hancock v Nominal Defendant [2001] QCA 227 -
Hancock v Nominal Defendant [2001] QCA 227 -
Hancock v Nominal Defendant [2001] QCA 227 -
Hancock v Nominal Defendant [2001] QCA 227 -
Hancock v Nominal Defendant [2001] QCA 227 -
Hancock v Nominal Defendant [2001] QCA 227 -
Hancock v Nominal Defendant [2001] QCA 227 -
Hancock v Nominal Defendant [2001] QCA 227 -
Hancock v Nominal Defendant [2001] QCA 227 -
O'Doherty v Birrell [2001] VSCA 44 -
FAI General Insurance Co Ltd v Lucre [2000] NSWCA 346 (29 November 2000) (Mason P, Meagher and Giles JJA)

5 (In the form stated by Deane J in this passage, it would preclude a duty of care even if the plaintiff were put in fear of imminent physical harm. As Doyle CJ points out in *Shipard v Motor Accident Commission* (1997) 70 SASR 240 at 245, it is unlikely that Deane J intended such an unqualified preclusionary rule, because elsewhere in *Jaensch* he refers with apparent approval to *Dulieu v White* [1901] 2 KB 69. That was the case in which the plaintiff suffered nervous shock because she apprehended physical injury to herself as a consequence of the negligent driving of a "pair-horse van".) 6 Deane J's dictum was a step, but not an essential step (see at 602-3), in his reasoning towards the conclusion that foreseeability alone does not establish a duty of care in relation to pure psychiatric injury. *Jaensch* showed that liability in this area rests upon additional foundations (see generally *Morgan v Tame* (2000) 49 NSWLR 21). 7 Judicial and academic commentators have read *Jaensch* as a decision in which Deane J alone supported the immediate victim exclusion in his reasons (see, eg *Shipard* at 245-6). Gibbs CJ agreed "in general" with the reasons of Deane J (see at 551). Dawson J acknowledged the possibility of the correctness of the immediate victim exclusion (at 612). The other justices said nothing about it. 8 In the present case the learned trial judge declined to follow Deane J's dictum. 9 He also rejected the guidance of two interstate decisions one of which had followed Deane J in *obiter dicta* (*Harrison v State Government Insurance Office (Qld)* (1985) ATR ¶80-723 (Vasta J)) the other of which had applied the immediate victim exclusion (*Klug v The Motor Accidents Board* (1991) ATR ¶81-134 (Zeeman J)). Judge Garling distinguished those cases on the basis that in them the negligent driver was the spouse or de facto spouse of the plaintiff, whereas, in the present case, the plaintiff was unknown to the negligent driver. He also emphasized the

foreseeability of the psychiatric injury suffered by the respondent in a case such as the present, stating that he was not prepared to exclude a duty of care on policy reasons. He cited the decision of the Full Court of the Supreme Court of South Australia in *Shipard* . 10 I cannot agree with the reasons offered for distinguishing *Harrison* and *Klug* . Nevertheless, I too would decline to follow Deane J's dictum. I have concluded that there was a duty of care in the present case. 11 Although mentioned by Deane J and relied upon by the appellant, s 4(1) of the Law Reform (Miscellaneous Provisions) Act 1944 (with its reference to injury caused by an act, neglect or default by which *"any other person is killed, injured or put in peril"*) does not establish or entrench the immediate victim exclusion. The section does not purport to restrict the continuing development of the common law of Australia, so long as consistent with its terms (see *Coates v Government Insurance Office of New South Wales* (1995) 36 NSWLR 1). As Deane J recognised, the section did no more than recognise the common law as it was perceived at the time by the New South Wales Parliament. 12 Reasons of principle, policy and precedent can be offered to justify the law's present insistence upon something more than reasonable foreseeability to generate a duty of care. Nevertheless, this is an area where logic is in extremely short supply. This said, I do not think that the principled exposition and development of the common law can sustain drawing the line represented by the immediate victim exclusion. 13 The mere fact that the death, injury or peril is that of the defendant (or the defendant's deceased) cannot justify invariable rejection of a claim for damages for negligently inflicted psychiatric injury. I agree with Zeeman J in *Klug* (at 69,274) that the exclusion cannot be supported in principle. See also *Churchill v Motor Accidents Insurance Board* (Supreme Court Tasmania, unreported 2 December 1993, noted (1993) 2 Tas SR (NC) N30) where Green CJ doubted Deane J's dictum, saying:

FAI General Insurance Co Ltd v Lucre [2000] NSWCA 346 (29 November 2000) (Mason P, Meagher and Giles JJA)

5 (In the form stated by Deane J in this passage, it would preclude a duty of care even if the plaintiff were put in fear of imminent physical harm. As Doyle CJ points out in *Shipard v Motor Accident Commission* (1997) 70 SASR 240 at 245, it is unlikely that Deane J intended such an unqualified preclusionary rule, because elsewhere in *Jaensch* he refers with apparent approval to *D ulieu v White* [1901] 2 KB 69. That was the case in which the plaintiff suffered nervous shock because she apprehended physical injury to herself as a consequence of the negligent driving of a "pair-horse van".) 6 Deane J's dictum was a step, but not an essential step (see at 602-3), in his reasoning towards the conclusion that foreseeability alone does not establish a duty of care in relation to pure psychiatric injury. *Jaensch* showed that liability in this area rests upon additional foundations (see generally *Morgan v Tame* (2000) 49 NSWLR 21). 7 Judicial and academic commentators have read *Ja ensch* as a decision in which Deane J alone supported the immediate victim exclusion in his reasons (see, eg *Shipard* at 245-6). Gibbs CJ agreed "in general" with the reasons of Deane J (see at 551). Dawson J acknowledged the possibility of the correctness of the immediate victim exclusion (at 612). The other justices said nothing about it. 8 In the present case the learned trial judge declined to follow Deane J's dictum. 9 He also rejected the guidance of two interstate decisions one of which had followed Deane J in *obiter dicta* (*Harrison v State Government Insurance Office (Qld)* (1985) ATR ¶80-723 (Vasta J)) the other of which had applied the immediate victim exclusion (*Klug v The Motor Accidents Board* (1991) ATR ¶81-134 (Zeeman J)). Judge Garling distinguished those cases on the basis that in them the negligent driver was the spouse or de facto spouse of the plaintiff, whereas, in the present case, the plaintiff was unknown to the negligent driver. He also emphasized the foreseeability of the psychiatric injury suffered by the respondent in a case such as the present, stating that he was not prepared to exclude a duty of care on policy reasons. He cited the decision of the Full Court of the Supreme Court of South Australia in *Shipard* . 10 I cannot agree with the reasons offered for distinguishing *Harrison* and *Klug* . Nevertheless, I too would decline to follow Deane J's dictum. I have concluded that there was a duty of care in the present case. 11 Although mentioned by Deane J and relied upon by the appellant, s 4(1) of the Law Reform (Miscellaneous Provisions) Act 1944 (with its reference to injury caused by an act, neglect or default by which *"any other person is killed, injured or put in peril"*) does not establish or entrench the immediate victim exclusion. The section does not purport to restrict the continuing development of the common law of Australia, so long as consistent with its terms (see *Coates v Government Insurance Office of New South Wales* (1995) 36 NSWLR 1). As Deane J recognised, the section did no more than recognise the common law as it was perceived at the time by the New South Wales Parliament. 12 Reasons of

principle, policy and precedent can be offered to justify the law's present insistence upon something more than reasonable foreseeability to generate a duty of care. Nevertheless, this is an area where logic is in extremely short supply. This said, I do not think that the principled exposition and development of the common law can sustain drawing the line represented by the immediate victim exclusion. 13 The mere fact that the death, injury or peril is that of the defendant (or the defendant's deceased) cannot justify invariable rejection of a claim for damages for negligently inflicted psychiatric injury. I agree with Zeeman J in *Klug* (at 69,274) that the exclusion cannot be supported in principle. See also *Churchill v Motor Accidents Insurance Board* (Supreme Court Tasmania, unreported 2 December 1993, noted (1993) 2 Tas SR (NC) N30) where Green CJ doubted Deane J's dictum, saying:

FAI General Insurance Co Ltd v Lucre [2000] NSWCA 346 -
FAI General Insurance Co Ltd v Lucre [2000] NSWCA 346 -
FAI General Insurance Co Ltd v Lucre [2000] NSWCA 346 -
FAI General Insurance Co Ltd v Lucre [2000] NSWCA 346 -
Modbury Triangle Shopping Centre Pty Ltd v Anzil [2000] HCA 61 -
Annetts v Australian Stations Pty Ltd [2000] WASCA 357 (21 November 2000) (Malcolm CJ, Pidgeon J, Ipp J)

69 I shall first deal with the normal fortitude test. In ***Morgan v Tame*** (at 63,873) Spigelman CJ said:

> "In *Jaensch v Coffey* Gibbs CJ at 556 expressly accepted a test of 'ordinary person of normal fortitude'. Brennan J provided a more extensive analysis of the test, to which he referred in terms of 'normal standards of susceptibility' at 568, 570 - 571, 572 and 578. I interpret Murphy J's reference at 557 to a

(Page 25)

> 'normal person' to be supportive of the test. Deane J at 610 refers to the test with implicit approval.
>
> The Full Court of the Federal Court and the Court of Appeal of the Supreme Court of Queensland applied this line of authority in, respectively, *Wodrow v Commonwealth of Australia* (1993) 45 FCR 52 at 72 - 73 and *Mid-West Radio Ltd v Arnold* (1999) EOC 92-970 at [28] to [29] . Although Windeyer J doubted the proposition and treated the issue as open in *Mount Isa Mines Ltd v Pusey* at 405 - 406, his Honour's obiter comments have not been adopted. (See also at 417 per Walsh J). ...
>
> This Court should follow the majority reasoning of the High Court in *Bunyan v Jordan* [(1936-1937) 57 CLR 1 at 14, 16 - 17 and 18] and *Jaensch v Coffey* ."

Mason P (at 63,887) observed that the "normal standard of susceptibility" test remained "part of the touchstone for liability for pure psychiatric illness". His Honour relied on the same authorities as Spigelman CJ. Handley JA agreed with Spigelman CJ and Mason P. Their Honours dealt with this test as part of the question whether the psychiatric injury suffered was reasonably foreseeable. I would follow the same approach.

The requirement of sudden shock

Annetts v Australian Stations Pty Ltd [2000] WASCA 357 (21 November 2000) (Malcolm CJ, Pidgeon J, Ipp J)

12 I am indebted to Ipp J for drawing attention to the relevance in the present context of the warnings expressed by Rich J in ***Chester v Waverley Municipality*** (1939) 62 CLR 1 at 10 - 11 . Additional reasons for rejecting the adoption of reasonable foreseeability as the sole criterion for the existence of a duty of care were stated by Brennan J in ***Sutherland Shire Council v Heyman*** (1985) 157 CLR 424 at 481. 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. Such liability is dependent upon the existence of an independent duty of care and reasonable foreseeability of harm constrained by the tests of "normal fortitude" and "sudden shock". As to the requirement of "normal fortitude" see ***Bunyan v Jordan*** (1937) 57 CLR 1 at 14 per Latham CJ; and at 16 - 17 per Dixon J; ***Jaensch v Coffey*** , *supra* , at 556, 568 and 570 - 572 per Brennan J; at 557 per Murphy J and 610 per Deane J, as cited by Spigelman CJ in ***Morgan v Tame*** , *supra* , at 63,873; and by Mason P at 63,887. In that case, Handley JA agreed with both Spigelman CJ and Mason P. As to the requirement of "sudden shock" see ***Jaensch v Coffey*** , *supra* , at 566 - 567 per Brennan J; and the authorities referred to by Spigelman CJ in ***Morgan v Tame*** , *supra* , at 63,877; and Mason P at 63,889. Handley JA agreed with Spigelman CJ and Mason P in this respect. To the authorities there cited, Ipp J has added ***Mount Isa Mines Ltd v Pusey*** (1970) 125 CLR 383 at 407 per Windeyer J. In my opinion, with respect, ***Morgan v Tame*** was correctly decided and this Court should apply the law as stated in that case.

Annetts v Australian Stations Pty Ltd [2000] WASCA 357 (21 November 2000) (Malcolm CJ, Pidgeon J, Ipp J)

93 In the circumstances, I consider that the remarks of Deane J in ***Jaensch v Coffey*** (to which reference is most often made in connection with proximity in claims for psychiatric injury) remain of fundamental importance. His Honour (at 584 - 585) referred to the concept of proximity as discussed by Lord Atkin in ***Donoghue v Stevenson*** [1932] AC 562 and observed that:

> "[Proximity] involves the notion of nearness of closeness and embraces physical proximity (in the sense of space and time) between the person or property of the plaintiff and the person or property of the defendant, circumstantial proximity such as an overriding relationship of employer and employee or of a professional man and his client and causal proximity in the sense of the closeness or directness of the relationship between the particular act or cause of action and the injury sustained."

(Page 34)

He then stated (at 606):

> "[T]he requisite duty relationship will not, on the present state of the law, exist in a case where mere psychiatric injury results from subsequent contact, away from the scene of the accident and its aftermath, with a person suffering from the effects of the accident."

Deane J explained that the element of proximity was a requisite of liability and stressed that there has to be "causal proximity" between the act of carelessness and the resulting injury. Accordingly, where the psychiatric injury results from contact with more remote consequences - such as the subsequent effect of the accident upon an injured person - the necessary element of proximity will not be established (see, particularly, at 606 -608). Thus, as the respondent in ***Jaensch v Coffey*** sustained psychiatric injury as a result of the combined effect of what she saw at the hospital where her husband was in intensive care (that being part of "the aftermath" of the accident) and what she was told, the element of proximity was present. His Honour regarded the aftermath as including the journey by ambulance to hospital and the scene at the hospital itself.

99 In ***FAI General Insurance Co Ltd v Curtin*** (1997) A Tort Rep 64,479, the Queensland Court of Appeal again accepted that proximity

(Page 36)

was a necessary ingredient of a duty of care to avoid psychiatric injury caused by negligence. In ***Chiaverini v Hockey*** , the New South Wales Court of Appeal (Meagher, Handley and Sheller JJA) applied the test of proximity as explained by Deane J in ***Jaensch v Coffey*** . In ***Buljabasic v Ah Lam,*** unreported; C of A; SCt of NSW; No 40417196; 3 September 1997, the New South Wales Court of Appeal once more applied the principles expressed by Deane J in regard to the "aftermath"; thus where the injury was caused by matters that occurred a day or two after the accident, the plaintiff's claim failed. In ***Pham v Lawson*** , Lander J (with whom Cox J, on this issue, and Bollen J agreed), after referring to the various judgments in ***Jaensch v Coffey*** , said (at 144):

> "[T]hose judgments establish that a duty of care will be owed by the tortfeasor to the spouse of an injured person where that spouse has suffered nervous shock and consequent psychiatric illness in circumstances where the spouse was not present at the time of the accident and did not attend the scene of the accident but was later told of the consequences of the accident in relation to her spouse and attended at the hospital and perceived for herself some of the consequences. ...
>
> The existence of the duty of care becomes less likely as all of the matters which are important for existence become more remote. So that if the relative was not at the scene or does not attend at the scene then there is less likelihood of the determination of a duty of care as that person has less direct involvement in space and time and therefore less direct perception of the injuries suffered by the person for whom that relative cares.
>
> It is a matter of degree. It is a matter of common sense when the stage is reached that a court must say that there can be no duty of care in a given case because the involvement of the person who suffered the nervous shock is not sufficiently close in terms of relationship, involvement or perception."

Annetts v Australian Stations Pty Ltd [2000] WASCA 357 (21 November 2000) (Malcolm CJ, Pidgeon J, Ipp J)

> "The notion of psychiatric illness induced by shock is a compound, not a simple, idea. Its elements are, on the one hand, psychiatric illness and, on the other, shock which causes it. Liability in negligence for nervous shock depends upon the reasonable foreseeability of both elements and of the causal relationship between them." (See also at 572.)

75 While counsel for the appellants addressed the need for the appellants to have been injured by a "shock", counsel for the respondent did not. He submitted that the question of sudden shock had nothing to do with the existence of a duty of care. He argued that the question whether psychiatric injury stemmed from a sudden isolated assault on the sensory systems went to "the distinct issues of the nature of actionable damage, to causation, and to the aetiology of disorder". He said: "Those are matters entirely distinct from the duty of care." I do not accept these submissions. The passages

> from the judgment of Brennan J in ***Jaensch v Coffey*** to which I have referred establish that the question whether a plaintiff suffers psychiatric injury through shock forms part of the inquiry whether the psychiatric injury was reasonably foreseeable. Of course, the requirement of the injury being induced by shock may be part of the issues identified by counsel for the respondent, but that is not presently relevant.

Annetts v Australian Stations Pty Ltd [2000] WASCA 357 -
Annetts v Australian Stations Pty Ltd [2000] WASCA 357 -
Annetts v Australian Stations Pty Ltd [2000] WASCA 357 -
Annetts v Australian Stations Pty Ltd [2000] WASCA 357 -
Annetts v Australian Stations Pty Ltd [2000] WASCA 357 -
Annetts v Australian Stations Pty Ltd [2000] WASCA 357 -
Annetts v Australian Stations Pty Ltd [2000] WASCA 357 -
Annetts v Australian Stations Pty Ltd [2000] WASCA 357 -
Annetts v Australian Stations Pty Ltd [2000] WASCA 357 -
Annetts v Australian Stations Pty Ltd [2000] WASCA 357 -
Annetts v Australian Stations Pty Ltd [2000] WASCA 357 -
Annetts v Australian Stations Pty Ltd [2000] WASCA 357 -
Annetts v Australian Stations Pty Ltd [2000] WASCA 357 -
Annetts v Australian Stations Pty Ltd [2000] WASCA 357 -
Annetts v Australian Stations Pty Ltd [2000] WASCA 357 -
Annetts v Australian Stations Pty Ltd [2000] WASCA 357 -
Annetts v Australian Stations Pty Ltd [2000] WASCA 357 -
Annetts v Australian Stations Pty Ltd [2000] WASCA 357 -
Annetts v Australian Stations Pty Ltd [2000] WASCA 357 -
Annetts v Australian Stations Pty Ltd [2000] WASCA 357 -
Annetts v Australian Stations Pty Ltd [2000] WASCA 357 -
Annetts v Australian Stations Pty Ltd [2000] WASCA 357 -
Annetts v Australian Stations Pty Ltd [2000] WASCA 357 -
Annetts v Australian Stations Pty Ltd [2000] WASCA 357 -
Annetts v Australian Stations Pty Ltd [2000] WASCA 357 -
Annetts v Australian Stations Pty Ltd [2000] WASCA 357 -
Annetts v Australian Stations Pty Ltd [2000] WASCA 357 -
Hunter Area Health Service v Marchlewski [2000] NSWCA 294 (26 October 2000) (Mason P, Stein and Heydon JJA)

> *It is submitted on behalf of Roman that the issue of Roman not being of "normal fortitude", is not relevant for liability in calculating general damages: Jaensch v Coffey [(1984) 155 CLR 549] per Gibbs J at 556. I concur with that submission. Calculation of pain and suffering in general damages must take into account the appalling way in which Roman was treated in relation to the issue of the non-re-ventilation of Maria and the pressure, as submitted on his behalf, that Maria not be re-ventilated because of the cost to the Hospital. The fact that Roman is a difficult person is not to the point. The depression from which he suffered before the injury would probably have resolved. It is in my view now unlikely to ever resolve. The agonies through which Roman has had to continue through the Coroner's inquest and subsequent legal proceedings, including the fact that the police and hospital contended to the Coroner that there was no fault on the part of the hospital.*

Hunter Area Health Service v Marchlewski [2000] NSWCA 294 -
The Queen v Robert James Moffat [2000] NZCA 252 -
Owen v Residual Health Management Unit [2000] NZCA 163 -
Morgan v Tame [2000] NSWCA 121 (12 May 2000)

> 2 No duty of care is owed to a plaintiff unless a person of normal fortitude would suffer psychiatric injury by the negligent act or omission of the defendant unless the defendant has knowledge of any particular susceptibility of the plaintiff. *Bunyan v Jordan* (1936) 36 SR(NSW) 350; (1936-1937) 57 CLR 1, *Barnes v Commonwealth* (1937) 37 SR(NSW) 511, *Levi v Colgate-Palmolive Pty Ltd* (1941) 41 SR(NSW) 48, *Bourhill v Young* [1943] AC 92, *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383, *Jaensch v Coffey* (1983-1984) 155 CLR 549 , *Woodrow v Commonwealth of Australia* (1993) 45 FCR 52, *Midwest*

Radio Ltd v Arnold (1999) EOC 92-970, *McLoughlin v O'Brian* [1983] 1 AC 410, *Page v Smith* [1994] 4 All ER 522; [1996] AC 155 discussed.

Morgan v Tame [2000] NSWCA 121 (12 May 2000)

1 Causes of action for pure psychiatric illness are distinct from claims based upon physical injury. *Barnes v Commonwealth* (1937) 37 SR(NSW) 511, *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383, *Jaensch v Coffey* (1983-1984) 155 CLR 549 , *Commonwealth of Australia v McLean* (1996) 41 NSWLR 389 applied. *Page v Smith* [1996] AC 155, *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455 discussed.

Morgan v Tame [2000] NSWCA 121 (12 May 2000)

50. The second element - the need for direct perception - was expressly left open in other judgments in *Jaensch v Coffey* (Gibbs CJ at 555 , Murphy J at 556 and Deane J at 608-609). It was regarded as open by this Court in *Coates v Government Insurance Office of NSW* (1995) 36 NSWLR 1 per Gleeson CJ at 5B and Clarke JA at 23B -C. Kirby P rejected it as a relevant restriction at 8E-11E. A majority of the Full Court of South Australia has agreed with Kirby P in *Pham v Lawson* (1996-1997) 68 SASR 124 per Lander J at 148, Bollen J agreeing at 125 and Cox J not deciding at 125.

State of New South Wales v Seedsman [2000] NSWCA 119 (12 May 2000) (Spigelman CJ, Mason P and Meagher JA)

164 In my judgment in ***Morgan v Tame*** I explain why, in my opinion, the common law of Australia generally requires proof of a sudden shock or affront to the senses, before admitting a claim for the negligent infliction of pure psychiatric illness. Fleming, **The Law of Torts** 9th ed ,1998 at p177 cites ***G illespie*** and ***Walker*** as authorities for the proposition that the requirement that there be a *"shock"* in the sense of a sudden sensation is not applicable to independent duties like employers' duties. I respectfully agree. Like Deane J in ***Jaensch v Coffey*** (1984) 155 CLR 549 at 597 I think that ***Mount Isa Mines Ltd v Pusey*** (1970) 125 CLR 383 may, upon proper analysis, lend support for a general proposition that an employer is liable for damages in respect of nervous shock sustained by an employee at his or her place of employment in circumstances where the employer has failed to take reasonable steps to avoid a reasonably foreseeable risk of injury in that form. (I note that a different interpretation of the *ratio decidendi* in ***Pusey*** was taken in ***White*** by Lord Hoffmann (at 507). Contrast Lord Goff at 485.)

Morgan v Tame [2000] NSWCA 121 (12 May 2000)

19. This Court should follow the majority reasoning of the High Court in *Bunyan v Jordan* and *Jaensch v Coffey.* There is no occasion to revisit the reasoning of this Court in *Bunyan v Jordan, Levi v Colgate-Palmolive* and *Barnes v Commonwealth.*

Morgan v Tame [2000] NSWCA 121 (12 May 2000)

154 (2) The traditional position conceded by the respondent sits uneasily with cases where liability for "pure" nervous shock has been found without the requirement of a sudden assault on the nervous system. These cases seem, however to be distinguishable on the basis that the particular relationship between the parties contained additional factors which established the necessary "proximity" to give rise to a duty of care (see ***Jaensch*** at 611). I include ***Barnes v Commonwealth*** (1937) SR(NSW) 504 (discussed above) and ***Furniss v Fitchett*** [1958] NZLR 396. Most importantly, there are several occupational stress cases where the employer's general duty to provide a safe system of work has been sufficient to generate a duty even in the absence of the usual control factors in nervous shock cases. This is no longer the law in England (see ***White***). I discuss this matter at further length in my judgment in ***State of New South Wales v Seedsman*** [2000] NSWCA 119.

Morgan v Tame [2000] NSWCA 121 -
Morgan v Tame [2000] NSWCA 121 -
Morgan v Tame [2000] NSWCA 121 -
Morgan v Tame [2000] NSWCA 121 -
Morgan v Tame [2000] NSWCA 121 -
Morgan v Tame [2000] NSWCA 121 -
Morgan v Tame [2000] NSWCA 121 -
Morgan v Tame [2000] NSWCA 121 -
Morgan v Tame [2000] NSWCA 121 -
Morgan v Tame [2000] NSWCA 121 -
Morgan v Tame [2000] NSWCA 121 -
Morgan v Tame [2000] NSWCA 121 -
Morgan v Tame [2000] NSWCA 121 -
Morgan v Tame [2000] NSWCA 121 -
State of New South Wales v Seedsman [2000] NSWCA 119 -
Morgan v Tame [2000] NSWCA 121 -
Morgan v Tame [2000] NSWCA 121 -
Morgan v Tame [2000] NSWCA 121 -
Morgan v Tame [2000] NSWCA 121 -
State of New South Wales v Seedsman [2000] NSWCA 119 -
Morgan v Tame [2000] NSWCA 121 -
Morgan v Tame [2000] NSWCA 121 -
Morgan v Tame [2000] NSWCA 121 -
Morgan v Tame [2000] NSWCA 121 -
Morgan v Tame [2000] NSWCA 121 -
Morgan v Tame [2000] NSWCA 121 -
Morgan v Tame [2000] NSWCA 121 -
Hollis v Vabu Pty Limited (T/as Crisis Couriers) [1999] NSWCA 334 -
Hollis v Vabu Pty Limited (T/as Crisis Couriers) [1999] NSWCA 334 -
Hollis v Vabu Pty Limited (T/as Crisis Couriers) [1999] NSWCA 334 -
Mahlo v Westpac Banking Corporation Ltd [1999] NSWCA 358 -
Perre v Apand Pty Ltd [1999] HCA 36 (12 August 1999) (Gleeson Cj,gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

256. Adherents to this second view regard the foregoing considerations as mere "labels" which add little to legal analysis[325]. If this means that courts should recognise that the determination of liability depends on a pragmatic assessment, growing out of a thorough and detailed examination of all of the facts of the particular case, doing so without more would simply return the law to its basic question: ought there to be a legal obligation in the given facts[326]? Such an analysis would have the advantage of recognising more candidly that the underlying notion of liability in negligence at common law rests on a community sense of an obligation of one person to recompense another for wrongdoing [327]. The best that could be done, upon this approach, would be to hold that courts, having abandoned the strict exclusionary rule, would draw upon "pockets of case law" [328] for guidance from analogous cases decided in the past. Or they would compile a check-list from previous cases setting out the kinds of considerations which have tended to support the conclusion that a duty of care exists in law and those which point to the opposite conclusion[329].

via

[327] cf *Jaensch v Coffey* (1984) 155 CLR 549 at 607.

Perre v Apand Pty Ltd [1999] HCA 36 (12 August 1999) (Gleeson Cj,gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

232. It is not enough to say that this Court's approach, in any development of the ambit of liability, should be cautious and incremental [271] . Of course it should. It is necessary to express the content of the approach which is proper and the criteria that will distinguish (so far as possible) a cautious increment that conforms to legal authority from an incautious one which would take the law beyond its acceptable boundary. That boundary is set, ultimately, by the answer to the question: ought the alleged tortfeasor to be under a legal obligation to observe care for the protection of the plaintiff against the incidence of the risk which has in fact ensued[272]? Inescapably, the answer to that question will reflect "a general public sentiment of moral wrongdoing for which the offender must pay" [273] . But in the hope of affording better guidance, and a higher measure of predictability, than is offered by such a tautologous formula, the courts have developed first rules and categories and more recently approaches and methodologies to yield the law's response.

via

[273] *Jaensch v Coffey* (1984) 155 CLR 549 at 607 per Deane J citing *Donoghue v Stevenson* [1932] AC 562 at 580 per Lord Atkin; cf McHugh, "Neighbourhood, Proximity and Reliance", in Finn (ed), *Essays on Torts* (1989) 5 at 38; *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 417.

Perre v Apand Pty Ltd [1999] HCA 36 (12 August 1999) (Gleeson Cj,gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

330. Often (but not always) a negligent act or omission will cause physical consequences in a limited area or to a limited group of people - those who can be described as neighbours or proximate. Lord Atkin said of his famous statement of the "neighbour" principle [432] that:

> "This appears to me to be the doctrine of *Heaven v Pender* [433] , as laid down by Lord Esher (then Brett MR) when it is limited by the notion of proximity introduced by Lord Esher himself and A L Smith LJ in *Le Lievre v Gould* [434] . Lo rd Esher says: 'That case established that, under certain circumstances, one man may owe a duty to another, even though there is no contract between them. If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property.' So A L Smith LJ: 'The decision of *Heaven v Pender* [435] was founded upon the principle, that a duty to take due care did arise when the person or property of one was in such proximity to the person or property of another that, if due care was not taken, damage might be done by the one to the other.' I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act."

But, as the cases decided since *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [436] and *M utual Life & Citizens' Assurance Co Ltd v Evatt* [437] show, the search for a criterion or criteria that will identify a relationship between plaintiff and defendant as one that is sufficiently "proximate" to hold the defendant liable for pure economic loss sustained by the plaintiff because of the defendant's negligence is attended by great difficulty. And although the "relationship of proximity" may be a useful description of the result of the decision whether, in particular circumstances, the defendant owed a duty to the plaintiff not to cause pure economic loss, it is only in that sense that the relationship of proximity "remains the general conceptual determinant and the unifying theme of the categories of case in which the common law of negligence recognises the existence of a duty to take reasonable care to avoid a reasonably foreseeable risk of injury to another" [438] . As five members of the Court said in *Burnie Port Authority v General Jones Pty Ltd* [439] :

"It is true that the requirement of proximity was neither formulated by Lord Atkin nor propounded and developed in cases in this Court as a logical definition or complete criterion which could be directly applied as part of a syllogism of formal logic to the particular circumstances of a particular case [440] . As a general conception deduced from decided cases, its practical utility lies essentially in understanding and identifying the *categories* of case in which a duty of care arises under the common law of negligence rather than as a test for determining whether the circumstances of a particular case bring it within such a category, either established or developing [441] ."

Statements to similar effect are to be found in *Hill v Van Erp* [442] . To search, in these circumstances, for a single unifying principle lying behind what is described as a relationship of proximity is, then, to search for something that is not to be found.

via

[441] See, generally, *Jaensch v Coffey* (1984) 155 CLR 549 at 585 ; *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 53 ; *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 at 524-525 .

Perre v Apand Pty Ltd [1999] HCA 36 -
Perre v Apand Pty Ltd [1999] HCA 36 -
Perre v Apand Pty Ltd [1999] HCA 36 -
Perre v Apand Pty Ltd [1999] HCA 36 -
Perre v Apand Pty Ltd [1999] HCA 36 -
Perre v Apand Pty Ltd [1999] HCA 36 -
Perre v Apand Pty Ltd [1999] HCA 36 -
Hoinville-Wiggins v Connelly [1999] NSWCA 263 (27 July 1999) (Mason P, Stein and Giles JJA)

23 Close connection in space and time is required. The words "when the accident occurred" mean that it is not enough that she came to the scene of the accident after the accident had occurred, as might have happened in "rescuer" cases at common law. The claimant argued that the accident included what she described as its aftermath, and extended to her attendance to minister to the pedestrian. For the notion of aftermath she referred to *Benson v Lee* (1972) VR 879 at 880, *McLoughlin v O'Brian* (1983) AC 410 at 422, and *Jaensch v Coffey* (1984) 155 CLR 549 at 606-8 . The passages were to do with recovery at common law of damages for nervous shock suffered not only by a plaintiff who saw or heard the accident, but also by a plaintiff who saw or heard events at the scene of the accident after its occurrence or even at a hospital during immediate post-accident treatment. They distinguished between the accident and its aftermath. Section 77 limits this common law position, because the plaintiff must have been present at the scene of the accident and must have been present at the scene of the accident when the accident occurred; the additional requirement that the plaintiff suffer injury in the accident underlines these spatial and temporal requirements. The aftermath was never part of the accident and (at least for the purposes of s 77(a)) seeing or hearing the aftermath no longer founds recover of damages.

Midwest Radio Ltd v Arnold [1999] QCA 20 -
Midwest Radio Ltd v Arnold [1999] QCA 20 -
Scrase v Jarvis [1998] QCA 441 (22 December 1998)

18. Existence of reasonable foreseeability does not, of itself, establish liability. It must be shown also that there existed the requisite degree of "proximity" between the first appellant and Kerryn: see, for example, *Jaensch v. Coffey* (1984) 155 CLR 549 and *Bryan v. Maloney* (1995) 182

CLR 609 at 617.

Scrase v Jarvis [1998] QCA 441 -
Scrase v Jarvis [1998] QCA 441 -
Romeo v Conservation Commission of The Northern Territory [1998] HCA 5 -
Pyrenees Shire Council v Day [1998] HCA 3 (23 January 1998) (Brennan Cj,toohey, McHugh, Gummow and Kirby JJ)

241. Several suggestions have been made for the approach which courts should take in deciding whether to find a duty of care and, if so, what its scope should be:

1. One approach would be to accept that the attempts to dissect Lord Atkin's famous speech in *Donoghue v Stevenson* [317] have failed. They have certainly introduced undue complexities without the merit of compensating precision and predictability. Upon this view, each of the elements of "foreseeability", "proximity" and policy evaluation are, properly understood, inseparable components of the attempt by the common law to answer a single question. That question may be stated as whether the relationship of the parties is such as to make it reasonable to impose upon the one a duty of care to the other [318] . Upon this view, a defendant should only be liable for damage where a reasonable person in the defendant's position could have avoided the damage by exercising reasonable care and was in such a relationship to the other that that person ought to have acted to do so[319]. This formulation may be condemned as tautologous. Yet it may state what, ultimately, the other concepts of "foreseeability", "proximity" and policy are struggling to express at the price of introducing distinctions which, in Lord Hoffmann's words, are not always "visible to the naked eye" [320] . The closest that any member of this Court has come to expressing such a bedrock idea is Deane J. In *Jaensch v Coffey* [321] he suggested that the underlying notion of liability in negligence was "a general public sentiment of moral wrongdoing for which the offender must pay" [322] . C learly enough, Deane J did not consider that this single criterion would afford adequate guidance to the imposition of a duty of care. Hence his repeated explorations of the notion of "proximity" as affording the "ultimate" criterion [323] . However, the obvious overlap of the components of the alternative tests suggests that a single concept exists, although it has so far proved impossible to define.

2. The second approach is the two-stage one expressed in *Anns.* It has certain attractions which even its critics acknowledge[324]. Not least, in the context of the failure of public authorities to exercise statutory powers reposed in them, it has created an "increased sensitivity in all jurisdictions ... towards the relationship of public authorities and the communities they serve"[325]. *Anns* gav e the debates about the duty of care a broad conceptual structure and rightly acknowledged the part which the policy of the law inescapably plays in fixing the outer boundary of liability to an action in negligence [326] . However, the weaknesses of the *Anns* approach included the excessive work assigned to the notion of foreseeability of harm. That notion will not of itself automatically lead to a duty of care at law [327] . Something more is necessary. Relevant to that something more is the existence of a relationship between the parties which is such as to make it the duty of the one to act so as to avoid the risk of reasonably foreseeable damage to the other [328] .

3. Whatever the defects of "proximity" (and its common alter-ego "reliance") as universal indications of the existence of a duty of care, and however resistant the word "proximity" has proved to precise definition, the concept is nonetheless useful as an elaboration of the equally opaque notion of the neighbour relationship expressed in *Donoghue v Stevenson* [329] . Whereas *Anns* treated

proximity and foreseeability as substantially synonymous[330], differentiation of the concepts in *Caparo* [331] reflects the long history of the common law that the mere foreseeability of the risk of harm to another is insufficient, of itself, to impose a legal duty to act so as to avoid the consequences to that other. The other merit of the *Caparo* formulation is that it makes it plain that the duty of satisfying the policy criteria (that it is "fair, just and reasonable that the law should impose a duty" [332]) is upon the party asserting the duty. This is where the onus would normally lie for those seeking to render another liable to them in law. It is important to emphasise that the third element is in addition to the foreseeability of harm and the existence of a "proximate" or "neighbour" relationship. It is not open to a court, absent those pre-conditions, to create a duty of care simply because, in the opinion of the court, fairness, justice or reasonableness suggests that one should exist[333].

via

[321] (1984) 155 CLR 549 .

Pyrenees Shire Council v Day [1998] HCA 3 -
Pyrenees Shire Council v Day [1998] HCA 3 -
Pyrenees Shire Council v Day [1998] HCA 3 -
Pyrenees Shire Council v Day [1998] HCA 3 -
FAI General Insurance v Curtin [1997] QCA 241 (08 August 1997) (Macrossan CJ. Lee J. Fryberg J.)

Coffey (1983-4) 155 C.L.R. 549 ; Chester v. Waverley Corporation (1939)

FAI General Insurance v Curtin [1997] QCA 241 -
Hill v Van Erp [1997] HCA 9 (18 March 1997) (Brennan CJ; Dawson, Toohey, Gaudron, McHugh and Gummow JJ)

[126] See, for example, *Jaensch v Coffey* (1984) 155 CLR 549 at 583-585 ; *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 495 ; *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 52-53 ; *San Sebastian Pty Ltd v The Minister* (1986) 162 CLR 340 at 355 ; *Cook v Cook* (1986) 162 CLR 376 at 381-382 ; *Hawkins v Clayton* (1988) 164 CLR 539 at 545, 576 ; *Gala v Preston* (1991) 172 CLR 243 at 252-253 ; *Bur nie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 542-543 ; *Bryan v Maloney* (1995) 182 CLR 609 at 617.

Hill v Van Erp [1997] HCA 9 (18 March 1997) (Brennan CJ; Dawson, Toohey, Gaudron, McHugh and Gummow JJ)

[62] See *Jaensch v Coffey* (1984) 155 CLR 549 at 585.

Hill v Van Erp [1997] HCA 9 (18 March 1997) (Brennan CJ; Dawson, Toohey, Gaudron, McHugh and Gummow JJ)

[57] (1984) 155 CLR 549 at 578-587 .

Hill v Van Erp [1997] HCA 9 (18 March 1997) (Brennan CJ; Dawson, Toohey, Gaudron, McHugh and Gummow JJ)

[219] (1984) 155 CLR 549 at 584-585 .

Hill v Van Erp [1997] HCA 9 (18 March 1997) (Brennan CJ; Dawson, Toohey, Gaudron, McHugh and Gummow JJ)

[123] *Jaensch v Coffey* (1984) 155 CLR 549 at 584 per Deane J .

Hill v Van Erp [1997] HCA 9 (18 March 1997) (Brennan CJ; Dawson, Toohey, Gaudron, McHugh and Gummow JJ)

[132] *Bryan v Maloney* (1995) 182 CLR 609 at 618. See also *Jaensch v Coffey* (1984) 155 CLR 549 at 578 ; *Su therland Shire Council v Heyman* (1985) 157 CLR 424 at 503.

Hill v Van Erp [1997] HCA 9 -
Esanda Finance Corporation Ltd v Peat Marwick Hungerfords [1997] HCA 8 -
Hill v Van Erp [1997] HCA 9 -
Hill v Van Erp [1997] HCA 9 -
R v Morrison; ex parte West [1996] QCA 328 -
Bale v Seltsam Pty Ltd [1996] QCA 288 (23 August 1996) (Fitzgerald P. McPherson JA. Helman J.)

> See, for example, Jaensch v. Coffey (1984) 155 C.L.R. 549 , 583- 586 ; Bennett v. Minister for Community Welfare (1992) 176 C.L. R. 408 ; Medlin v. State Government Insurance Commission

Bale v Seltsam Pty Ltd [1996] QCA 288 -
Bryan v Maloney [1995] HCA 17 (23 March 1995) (Mason CJ; Brennan, Deane, Toohey and Gaudron JJ)
9 Jaensch v. Coffey (1984) 155 CLR at 578 ; Sutherland Shire Council v. Heyman (1985) 157 CLR at 503 .

Bryan v Maloney [1995] HCA 17 (23 March 1995) (Mason CJ; Brennan, Deane, Toohey and Gaudron JJ)
4 Sutherland Shire Council v. Heyman (1985) 157 CLR at 441 per Gibbs CJ and see also at 495, 501 ; Caltex Oil (Australia) Pty. Ltd. v. The Dredge "Willemstad" (1976) 136 CLR 529 at 572-574 ; Jaensch v. Coffey (1984) 155 CLR 549 at 581-582 .

Bryan v Maloney [1995] HCA 17 -
Bryan v Maloney [1995] HCA 17 -
Bryan v Maloney [1995] HCA 17 -
Bryan v Maloney [1995] HCA 17 -
Bryan v Maloney [1995] HCA 17 -
Burnie Port Authority v General Jones Pty Ltd [1994] HCA 13 -
Burnie Port Authority v General Jones Pty Ltd [1994] HCA 13 -
Burnie Port Authority v General Jones Pty Ltd [1994] HCA 13 -
Christopher, Christopher, Garnier, Garnier, Aki & Daniel v Motor Vessel 'Fiji Gas' [1993] QCA 22 (26 February 1993) (Pincus JA. McPherson JA. Thomas J.)

> Subsequent decisions in the High Court have, in our opinion, not been such as to encourage reliance on the proximity test and have tended to support the view expressed by McHugh J.A. in Finn "Essays on Torts" at p.36; there his Honour described the doctrine as "a legal rule without specific content". In discussing the notion of proximity in Jaensch v. Coffey (1984) 155 C.L.R. 549 at 584 , Deane J. remarked, speaking of Lord Atkin's treatment of the subject:

Dietrich v The Queen [1992] HCA 57 -
Gala v Preston [1991] HCA 18 (28 May 1991) (Mason C.j., Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ)
1. A defendant's liability in negligence relates to the damage which the plaintiff has actually suffered, and to no other: The Wagon Mound (No.1), at p 425; Sutherland Shire Council v. Heyman (1985) 157 CLR 424, at pp 486-487 . 2. A defendant's liability for that damage arises from an act done or an omission made by the defendant (the relevant act or omission) which is a cause of the damage suffered: Chapman v. Hearse (1961) 106 CLR 112, at p 122. However, an omission cannot be said to be a cause of damage unless the defendant was under a duty to act to avoid or prevent the damage and the omission is a breach of that duty: East Suffolk Rivers Catchment Board v. Kent (194 1) AC 74 ; Jaensch v. Coffey (1984) 155 CLR 549 , at p 578 ; Sutherland Shire Council v. Heyman, at pp 476-481. 3. A defendant's liability for damage does not extend to damage caused by the relevant act or omission unless the possibility of causing that damage or damage of the same kind was reasonably foreseeable at the time when the relevant act was done or the relevant omission made: Bolton v. Stone (1951) AC 850, at p 858 ; Hughes v. Lord Advocate (1963) AC 837 ; Mount Isa Mines Ltd. v. Pusey (1970) 125 CLR 383, at pp 390, 392-393, 401-403, 413-414 ; Jaensch v. Coffey, at pp 562-563. 4. A defendant is liable if, and because, a reasonable person in the defendant's position foreseeing the possibility of causing the damage suffered or damage of the same kind would not have done the relevant act or made the relevant omission: Blyth v. The Birmingham Waterworks Company (18 56) 11 Ex 781 (156 ER 1047); Heaven v. Pender (1883) 11 QBD 503, at p 509 ; Donoghue v. Stevenson (19 32) AC 562, at pp 580-581 ; Fardon v. Harcourt-Rivington (1932) 146 LT 391, at pp 392,393 ; Bolton v. Stone, at pp 866-869. That is the foundation not only of every duty of care in torts of negligence but

of the standard of care required to discharge the duty: Vaughan v. Menlove (1837) 3 Bing (NC)468, at p 475 (132 ER 490, at p 493). The standard of care is fixed by reference to the steps which the hypothetical reasonable person would take to avoid or prevent the possibility of the occurrence of the foreseeable damage: Glasgow Corporation v. Muir (1943) AC 448, at p 457 ; Wyong Shire Council v. Shirt (1980) 146 CLR 40, at p 45 ; Jaensch v. Coffey, at pp 562-563. 5. A legal duty does not always arise when the facts show that the kind of damage suffered by the plaintiff was reasonably foreseeable by the defendant. Elements in addition to reasonable foreseeability of damage are required to give rise to a duty of care to avoid or prevent damage other than physical damage to the person or to the property of the plaintiff; similarly, additional elements are required where the act or omission of the defendant amounts to a representation to the plaintiff on which the plaintiff relies in doing an act or abstaining from acting whereby the relevant damage is caused: Hedley Byrne and Co. Ltd. v. Heller and Partners Ltd. (1964) AC 465 ; Shaddock and Associates Pty. Ltd. v. Parramatta City Council (No.1) (1981) 150 CLR 225, at pp 230-231 ; Mutual Life and Citizens' Assurance Co. Ltd. v. Evatt (1968) 122 CLR 556, at pp 568-570 ; Jaensch v. Coffey, at pp 574-576; San Sebastian Pty. Ltd. v. The Minister (1986) 162 CLR 340, at p 369. Again, there may be special features of the circumstances in which the relationship between the plaintiff and the defendant exists which preclude the arising of a duty of care or modify the standard of care otherwise required to discharge the duty: Rootes v. Shelton (1967) 116 CLR 383, at p 389 ; The Insurance Commissioner v. Joyce (1948) 77 CLR 39, at p 59 ; Cook v. Cook (1986) 162 CLR 376, at pp 391-394 .

Gala v Preston [1991] HCA 18 -
Hawkins v Clayton [1988] HCA 15 -
Hawkins v Clayton [1988] HCA 15 -
Hawkins v Clayton [1988] HCA 15 -
Cook v Cook [1986] HCA 73 -
Cook v Cook [1986] HCA 73 -
San Sebastian Pty Ltd v The Minister [1986] HCA 68 (25 November 1986) (Gibbs C.j., Mason, Wilson, Brennan and Dawson JJ)

12. For my part, I understand Lord Atkin's general conception of proximity in a different way: see Jaensch v. Coffey (1984) 155 CLR 549 , at pp 574-575 . It is the neighbour test which, being applied to cases of acts causing damage to person or property, is satisfied by reasonable foreseeability of loss. When that simple test is too wide for application in other categories of case, there must be further and particular propositions of law by which to determine whether, in the instant case, a duty of care exists. I beg leave to doubt whether proximity, if it is understood as having a wider connotation than reasonable foreseeability of loss, will prove to be a unifying rationale of particular limiting propositions of law. The particular propositions have not hitherto revealed a common element. If it should appear that the particular propositions can be subsumed within the generic description of proximity, then the stage will be set for a further simplification and development of the law of negligence. Until that stage is reached, I would find in foreseeability of loss the unifying rationale of the occasions when the law recognizes the existence of duties of care and I would find the appropriate limitations in particular propositions of law, applicable to differing classes of case. The propositions of law which express the appropriate limitations for each class will be devised having regard, no doubt, to factors of the kind to which Deane J. referred in Sutherland Shire Council (at p.595; p.55).

San Sebastian Pty Ltd v The Minister [1986] HCA 68 -
Stevens v Brodribb Sawmilling Co Pty Ltd [1986] HCA 1 (13 February 1986) (Mason, Wilson, Brennan, Deane and Dawson JJ)

3. Where a duty of care exists under the common law of negligence, it requires the taking of reasonable care to avoid a reasonably foreseeable and real risk of injury. That being so, a relevant duty of care will have existed in a particular case only if there was reasonable foreseeability of a real risk that injury of the kind sustained would be sustained by a member or members of a class which included the particular plaintiff. If the common law duty of care were an unqualified one owed to the world at large, reasonable foreseeability of injury of the kind sustained by a plaintiff would be the sole determinant of the existence of a relevant duty of care- it would be both a sufficient and the exclusive criterion of whether a particular defendant owed a relevant duty of care to a particular plaintiff. It is, however, plain that that is not, and has never been, the common

law. Some effective additional limit or "control mechanism" must be recognized as applying to at least some categories of case (see Caltex Oil (Australia) Pty. Ltd. v. The Dredge "Willemstad" (1976) 136 CLR 529, at p 574 ; Jaensch v. Coffey (1984) 58 ALJR 426 , at pp 428 and 441 ; Candlewood Navigation Corporation Ltd. v. Mitsui Osk Lines Ltd. (1985) 59 ALJR 763, at p 769).

Stevens v Brodribb Sawmilling Co Pty Ltd [1986] HCA 1 -
Sutherland Shire Council v Heyman [1985] HCA 41 (04 July 1985) (Gibbs C.j., Mason, Wilson, Brennan and Deane JJ)

26. Reliance has always been an important element in establishing the existence of a duty of care. It has been suggested that liability in negligence is largely, if not exclusively, based on the plaintiff's reliance on the defendant's taking care in circumstances where the defendant is aware or ought to be aware of that reliance (Reiter, "Contracts, Torts, Relations and Reliance" in Reiter and Swan (Eds), Studies in Contract Law (1980) p.235, at pp.310-311). Be this as it may, the concept of proximity as explained by Stephen J. in Caltex Oil (Australia) Pty. Ltd. v. The Dredge "Willemstad" (1976) 136 CLR 529, at pp 574-575 and Deane J. in Jaensch v. Coffey (1984) 58 ALJR 426 , at p 442 (but cf. Leigh &Sillivan Ltd. v. The Aliakmon Shipping Co. Ltd. (1985) 2 WLR 289, at p 327) involves in most cases a degree of reliance (see Junior Books Ltd. v. Veitchi Ltd. (1983) 1 AC 520, at p 546). And it has certainly been an influential factor in setting limits to the far-ranging effect of the foreseeability doctrine and in confining the class of persons to whom a duty of care may be owed. It is natural, therefore, that the plaintiff's foreseeable and reasonable reliance on the defendant's statement has been a constant feature of the cases in which a defendant has been held liable for economic loss sustained as a result of negligent misstatement (Hedley Byrne &Co. Ltd. v. Heller &Partners Ltd. (1964) AC 465, at pp 486, 496, 502-503, 514 ; Ministry of Housing and Local Government v. Sharp (1970) 2 QB 223, at p 268 ; Dutton v. Bognor Regis Urban District Council (1972) 1 QB 373, at pp 394-395, 405 ; Scott Group Ltd. v. McFarlane (1978) 1 NZLR 553, at p 576). And in Shaddock &Associates Pty. Ltd. v. Parramatta City Council (No. 1) (1981) 150 CLR 225 , reliance by the plaintiff on the information provided by the defendant local authority which was aware or ought to have been aware of that reliance was an important, if not vital, element in the authority's liability for negligent misstatement (see pp.231, 252-253, 255).

Sutherland Shire Council v Heyman [1985] HCA 41 -
Sutherland Shire Council v Heyman [1985] HCA 41 -
Sutherland Shire Council v Heyman [1985] HCA 41 -
Papatonakis v Australian Telecommunications Commission [1985] HCA 3 -
Hackshaw v Shaw [1984] HCA 84 -