Viability of a Psychiatric Injury Claim for Bystanders Who Witnessed and Rescuers Who Attended the Sea World Helicopter Accident

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This article considers important potential legal consequences from the helicopter tragedy in January 2023 in which four people were killed. The event raises legal issues including the viability of potential claims for psychiatric injury for those who unwittingly observed the horrible events or who provided rescue efforts, acknowledging that, at this time, no fault has yet been established in any individual. As will be shown, the law in the United Kingdom (UK) has proceeded along a path with respect to these claims that has arguably become untenable and indefensible. The High Court of Australia has not considered claims for psychiatric claims for more than 20 years, presenting our Court with an opportunity, if one arose, to set our law on a different path than the UK example.

I. Introduction

On 2 January 2023, Sea World Helicopters were operating short joyride flights in and around the Gold Coast Broadwater. They would take off and land within Sea World theme park grounds. A collision occurred as one of the aircraft came in to land (arriving aircraft), and another commenced take off (departing aircraft). The collision occurred about 40 metres above the ground. The main rotor blades of the departing aircraft entered the cabin of the arriving aircraft, and the departing aircraft broke apart in mid-air. The pilot and three passengers of that aircraft were all killed, and other passengers seriously injured. The pilot of the arriving aircraft was able to land that craft safely. He and two of his passengers were seriously injured. The accident occurred during peak tourist season, and there were hundreds of people in the vicinity. Some were lining up for their opportunity to take a joyride; others were simply observing while enjoying a day at the theme park. Others were involved in recreational activity in the area. The Broadwater is of course a publicly accessible waterway, and many were out enjoying the water on that summer day. Individuals in the area became unwitting observers to the tragedy. Some observers attempted to provide assistance and support to victims until professional help arrived.

The Australian Transport Safety Bureau has issued a Preliminary Report into the collision.[1] Importantly, that Report contains no analysis or findings. These will be in the Final Report. It is not concerned with blame or fault, if any. It mainly consists of important factual information providing a basis for further inquiry. It noted that the aircraft were operated by very experienced, licensed pilots. Both aircraft were registered and there was no record of any outstanding maintenance issues required on either. The Preliminary Report notes that the accident occurred in uncontrolled airspace. This meant that communication between aircraft took place on a common traffic advisory frequency. It was standard that the pilot of a departing aircraft taking off would make a taxi call prior to take off, and another while newly airborne. A pilot of an arriving aircraft would also make a call prior to descent. A record of calls made to this frequency on the day was available. However, the location where the calls were recorded from was several kilometres away from Sea World. This made it possible that not all calls (particularly at low altitude) would be picked up by recordings. The preliminary report indicated there was a record of the arriving aircraft having made a newly airborne call and a descent call. However, there was no record

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[1] Australian Transport Safety Bureau, *Mid-air Collision Involving Eurocopter EC130B4, VH-XH9, and Eurocopter EC130B4, VH-XKQ* (AO-2023-001, 7 March 2023) Preliminary.

of the departing aircraft having made a taxi call. The pilot of the arriving aircraft stated that he did not hear such a call. *The Report stresses this does not necessarily mean no such call was made,* given the recording limitations.

Obviously, at this point, it is not known whether anyone was at fault in relation to the accident. The Final Report will likely be instructive here. This article is thus based on a hypothesis – assume that at least one party or organisation, whether it be a pilot or pilots, their employer/s, those who designed the facility, aircraft manufacturer etc is found negligent. Again, this is purely conjecture on my part. But assuming that at least one of them is at fault, the question arises as to their liability, if any, for psychiatric injury that might be suffered by those who unwittingly observed the tragic events or who assisted in rescuing victims. Of course, if there is negligence, there will likely be claims for personal injury from whose directly impacted, such as passengers. However, the focus of this article is the question whether onlookers who observed the events or rescuers who assisted might have a claim. It is a question of some complexity, and a "yes" answer would be (literally)(and to use the much over-used word) "unprecedented" in Australia.[2]

This article must first explain briefly the law relating to psychiatric injury as it has developed over time. Obviously, in the past the law referred to these types of claims as "nervous shock". However, the article will take its lead from the most recent detailed High Court of Australia treatment of the situation, and refer to such claims as relating to psychiatric injury.[3] The term "nervous shock" had and has no basis in psychiatry,[4] it being a legal term of art (only). The article is structured as follows. Part II will succinctly discuss important case law from the United Kingdom. Part III critiques the way in which the law in this area has developed in that jurisdiction. Part IV considers development of the law in Australia. Our country's case and statute law in this area has obviously been influenced (and is still influenced) by that of the United Kingdom, but in material respects the law of the two jurisdictions in this area has diverged. The High Court of Australia has not considered "nervous shock" in depth in nearly 20 years, so the views of current members on the law in this area are not known. The discussion will place some emphasis on cases pertinent to claims by onlookers to tragic events, and claims by rescuers. It will then assess in Part V, given those precedents, the likelihood that onlookers to the tragedy and rescuers might have a psychiatric injury claim, after clarifying a relevant choice of law issue. Of course, mere shock is not sufficient for such a claim. Claimants would need to show they had a recognised psychiatric illness,[5] and that this had been caused by their observation of, or assistance in response to, the events of 2 January. These are not necessarily easy to prove. For space reasons, I do not dwell on those matters here.[6] Part VI concludes.

II. Development of Psychiatric Injury Claims – United Kingdom

The law has traditionally been slow to recognise claims by those suffering psychiatric injury as a result of another's negligence. It did recognise claims for intentional infliction of emotional harm,[7] but where the harm arose from mere negligence, the law has been wary.[8] There was originally a thought that mental suffering was punishment by a divine authority for sinful behaviour.[9] In more modern times, there have

[2] Peter Handford, *Tort Liability for Mental Harm* (Thomson Reuters, 3rd ed, 2017) 345.

[3] *Tame v New South Wales* (2002) 211 CLR 317.

[4] It does not appear in the American Psychiatric Association's *Diagnostic and Statistical Manual V* (2013), typically regarded as the most authoritative source in this area. That Manual recognises post-traumatic stress disorder (PTSD) and acute stress disorder (for a condition experienced for a maximum of one month after the distressing event).

[5] *Hinz v Berry* [1970] 2 QB 40, 42 (Lord Denning), 44 (Lord Pearson), 46 (Sir Gordon Willmer); *McLoughlin v O'Brian* [1983] 1 AC 410, 431 (Lord Bridge); *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, 409 (Lord Oliver); *Tame v New South Wales* (2002) 211 CLR 317, 329 (Gleeson CJ), 382 (Gummow and Kirby JJ).

[6] For an extremely comprehensive treatment of the entire topic see Handford, n 2.

[7] *Wilkinson v Downton* [1897] 2 QB 57.

[8] In *Lynch v Knight* (1861) 9 HLC 577, 590 Lord Wensleydale claimed that law did not value and could not pretend to address mental pain or anxiety.

[9] VE Nolan and E Ursin, "Negligent Infliction of Emotional Distress: Coherence Emerging from Chaos" (1982) 31 *Hastings Law Journal* 583, 604.

been traditional floodgates concerns, of the possibly open-ended nature and scope of such liability,[10] even if such fears are typically unfounded.[11] There has been concern with contrived or "imaginary" claims.[12] It has been suggested that, at the sub-conscious level, the possibility of compensation for psychiatric injury might act as a bar to rehabilitation.[13] It may give rise to liability disproportionate to the degree of fault on the defendant's part.[14] It has been noted that showing that the shocking event caused the psychiatric injury might be difficult.[15]

A major theme in the cases has been a felt need to impose "control mechanisms" on such claims, to keep them within strict confined limits. In an early example of this, the Privy Council (on appeal from Victoria) denied a claim by a plaintiff who suffered psychiatric injury owing to the negligent operation of gates at a railway crossing, such that she feared death or personal injury. The Privy Council held that psychiatric injury unrelated to "actual physical injury" was too remote.[16] Of course, all cases are products of their time, and there has been developing knowledge of psychiatric injuries. It was later recognised that the psychiatric injury itself could amount to actual physical injury,[17] to the extent this remained a requirement. The plaintiff must demonstrate they have suffered a recognised psychiatric injury; mere shock or distress is not sufficient.[18]

A narrow view of the potential for psychiatric injury claims was also evident in *Dulieu v White & Sons*.[19] There the pregnant plaintiff suffered a nervous reaction when a vehicle operated by the defendant crashed into a bar in which she was working. On a demurrer action, one member of the Court of Appeal held that in order to make a psychiatric injury claim, the plaintiff would have to have a reasonable fear of personal injury to themselves.[20] A majority of the Court of Appeal in another case would soon overturn this position. In *Hambrook v Stokes Bros*,[21] Bankes and Atkin LLJ held that it was irrelevant whether the psychiatric injury arose from fear of personal injury to the plaintiff or not.[22] As Atkin LJ put it, "I see no reason for excluding the bystander in the highway who receives injury in the same way from apprehension of or the actual sight of injury to a third party".[23] The reference to "exclusion" here

[10] *McLoughlin v O'Brian* [1983] 1 AC 410, 421–422 (Lord Wilberforce); *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, 494 (Lord Steyn); [1998] UKHL 45; David Ipp et al, *Review of the Law of Negligence: Final Report* (Commonwealth of Australia, 2002) 135.

[11] AL Goodhart, "The Shock Cases and Area of Risk" (1953) 16 *Modern Law Review* 14, 24: "the fear that recognition of shock as a cause of action may give rise to a large number of unjustifiable claims cannot be supported by experience"; David Oughton and John Lowry, "Liability to Bystanders for Negligently Inflicted Psychiatric Harm" (1995) 46 *Northern Ireland Legal Quarterly* 18, 31–32.

[12] *Victorian Railways Commissioners v Coultas* (1888) 13 App Cas 222, 226 (Sir Richard Couch, for the Council).

[13] *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, 494 (Lord Steyn); [1998] UKHL 45. An expert study found little evidence of this, with most symptoms lingering after legal settlement of such claims: MJ Tarsh and C Royston, "A Follow-up Study of Accident Neurosis" (1985) 146 *British Journal of Psychiatry* 18.

[14] *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, 494; [1998] UKHL 45; Christian Witting, "A Primer on the Modern Law of 'Nervous Shock'" (1998) 22 *Melbourne University Law Review* 62, 79.

[15] *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, 494; [1998] UKHL 45; *McLoughlin v O'Brian* [1983] 1 AC 410, 421 (Lord Wilberforce). Lord Wilberforce added that some of the concerns about overly wide liability for psychiatric injury could be adequately addressed. In the same case, Lord Bridge agreed that the number of claims and quantum of damages was manageable (441).

[16] *Victorian Railways Commissioners v Coultas* (1888) 13 App Cas 222, 225.

[17] H Teff, "Liability for Negligently Inflicted Psychiatric Harm: Justifications and Boundaries" (1998) 57(1) *Cambridge Law Journal* 91, 101: "there is mounting evidence from medical research that post-traumatic stress disorder involves psycho-physiological abnormalities and that psychiatric injury commonly entails physical damage to the nervous system."

[18] *Jaensch v Coffey* (1984) 155 CLR 549, 559–560 (Brennan J).

[19] *Dulieu v White & Sons* [1901] 2 KB 669.

[20] *Dulieu v White & Sons* [1901] 2 KB 669, 675 (Kennedy J).

[21] *Hambrook v Stokes Bros* [1925] 1 KB 141.

[22] *Hambrook v Stokes Bros* [1925] 1 KB 141, 151 and 157, respectively.

[23] To like effect *Owens v Liverpool Corp* [1939] 1 KB 394, 400 (McKinnon LJ, for the Court of Appeal).

is to deny them a cause of action in relation to injury to a third party, while permitting one if the feared or actual injury were to the plaintiff themselves. Courts began to reject reasoning based on fears of imaginary claims; faith was expressed in the justice system to weed out unmeritorious claims.[24]

A narrow view was again evident in the House of Lords decision in *Bourhill v Young*.[25] There the plaintiff was alighting a tram. About 15 metres away, a motorcyclist collided with a motor vehicle, and the motorcyclist was killed. The plaintiff did not see the accident, but heard it. She saw quantities of the motorcyclist's blood on the road. She did not experience fear of injury to herself. She developed a condition as a result of what she heard, and her observations of the scene of the accident. She brought a claim against the motorcyclist's estate, arguing that he owed her a duty of care not to cause her injury, including mental injury. All members of the Court rejected the claim.

The House found that the defendant could not have reasonably foreseen that someone such as the plaintiff would suffer psychiatric injury as a result of his negligent driving.[26] She was some distance away from the scene of the accident. She was not visible to the defendant, being on the other side of the tram at the time of the accident. The principle was expressed that a driver should not be expected to anticipate injury to others "as mere spectators".[27] Members of the Court alluded to the fact that the plaintiff feared no injury to herself as being relevant,[28] despite the earlier Court of Appeal decision in *Hambrook* which suggested this was not determinative. The Court considered whether a person or "normal standard of susceptibility" would likely suffer psychiatric injury as a result of what the plaintiff here witnessed.[29]

In *McLoughlin v O'Brian*,[30] the House of Lords accepted that a woman who did not see an accident in which one of her daughters was killed and other family members seriously injured could claim for psychiatric injury against the defendant who caused the death and injury through negligent driving. She suffered the reaction after visiting family members in hospital two hours after the event. Even as it did so, it sought to limit the scope of liability for psychiatric injury. Lord Wilberforce stated:

> Because shock in its nature is capable of affecting so wide a range of people (there is) a real need for the law to place some limitation upon the extent of admissible claims. It is necessary to consider three elements inherent in any claim: the class of persons whose claims should be recognised; the proximity of such persons to the accident, and the means by which the shock is caused. As regards the class of persons, the possible range is between the closest of family ties – of parent and child, or husband and wife – and the ordinary bystander. Existing law recognises the claims of the first; it denies that of the second, either on the basis that such persons must be assumed to be possessed of fortitude sufficient to enable them to endure the calamities of modern life, or that defendants cannot be expected to compensate the world at large. In my opinion these positions are justifiable … it should follow that other cases involving less close relationships must be very carefully scrutinised. I cannot say that they should never be admitted. The closer the tie (not merely in relationship, but in care), the greater the claim for consideration.[31]

By this time, the English law had accepted proximity as a general control mechanism for liability in negligence. Lord Wilberforce added that the case should consider the proximity to the scene in time and place, and the nature of the accident.[32] There the plaintiff saw her family in hospital within two hours of the accident, and this was considered to meet the proximity test.

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[24] *Hambrook v Stokes Bros* [1925] 1 KB 141, 158 (Atkin LJ); *Dulieu v White & Sons* [1901] 2 KB 669, 681 (Kennedy J).

[25] *Bourhill v Young* [1942] AC 92.

[26] *Bourhill v Young* [1942] AC 92, 98–99 (Lord Thankerton), 102 (Lord Russell), 105 (Lord Macmillan), 111 (Lord Wright), 116 (Lord Porter).

[27] *Bourhill v Young* [1942] AC 92, 116 (Lord Porter).

[28] *Bourhill v Young* [1942] AC 92, 102 (Lord Russell), 105 (Lord Macmillan); compare 111 (Lord Wright).

[29] *Bourhill v Young* [1942] AC 92, 110 (Lord Wright).

[30] *McLoughlin v O'Brian* [1983] 1 AC 410.

[31] *McLoughlin v O'Brian* [1983] 1 AC 410, 421–422. On the need for closeness see also *Hinz v Berry* [1970] 2 QB 40, 42: "damages can be given for nervous shock caused by the sight of an accident, at any rate to a *close relative*" (Lord Denning) (emphasis added).

[32] *McLoughlin v O'Brian* [1983] 1 AC 410, 422.

Lord Bridge questioned the status quo which apparently generally excluded bystanders unrelated to the person injured from successfully claiming for psychiatric injury caused by their exposure. He noted an earlier case where a rescuer had successfully claimed for the mental injuries he suffered while helping strangers injured in an accident.[33] His claim against the defendant who caused the strangers injury was successful. Lord Bridge suggested there was no difference in principle between a rescuer and a mere spectator who did not perform any rescue operations but observed the accident and its aftermath.[34] These were obiter comments, but suggested a more favourable view of the potential claim by onlookers (not being close family members) for psychiatric injury caused by injuries they saw caused to others, than was apparent in the judgment of Lord Wilberforce. Lord Scarman agreed with Lord Bridge,[35] and Lord Keith criticised attempts to formulate rules in the abstract based on the relationship between the plaintiff and those injured or killed.[36] In this way, he was closer to the view of Lord Bridge than Lord Wilberforce on point. These remarks of Lord Keith were eerily prescient, bearing in mind the next major psychiatric injury case the House of Lords was to consider nearly 10 years later, involving the tragic crush at a football stadium. As will be seen, the House of Lords took a different view on these matters than what a majority had suggested in *McLoughlin*.

In *Alcock v Chief Constable of South Yorkshire Police*[37] the House of Lords considered legal implications of the Hillsborough football stadium disaster. As a result of admitted police negligence, too many football fans were allowed entry into the stadium. A crush occurred, resulting in the death of 96 individuals and injury to others. The plaintiffs in *Alcock* were either family members or friends of victims. Some witnessed the events from elsewhere in the stadium, some were just outside the stadium and saw it on television. Others watched a live broadcast of the disaster. Others heard about it from the media or friends. They argued they were owed a duty of care by the defendant to not cause them psychiatric injury, and the case focused primarily on the question of the existence or otherwise of such a duty. A unanimous House of Lords found that a duty of care was not owed to the plaintiffs in this regard.[38]

The House stated that, in cases of psychiatric injury, something more than reasonable foreseeability of injury was required in order to establish a duty of care. This was due to "floodgates" or unlimited liability concerns. The something more was "proximity". The Court viewed this as an application of Lord Atkin's neighbour test – persons who were so closely and directly affected by the defendant's actions that they ought to have had them in contemplation as being so affected when considering their actions/omissions.[39] Proximity comprised various elements, including the "closeness" between the primary victim of the negligence and the one claiming damages for psychiatric injury, and the "closeness" in terms of time and space between the events and the one claiming for such injury. For instance, whether they were present at the events or not, whether they were an "active" party in relation to the events (eg a rescuer) or a "mere" "passive" observer. The House freely admitted that the law in this area was not entirely logical, deductive or satisfactory.[40] It was again explained based on the need for control mechanisms to avoid the spectre of limitless liability.[41]

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[33] *Chadwick v British Railways Board* [1967] 1 WLR 912. As to claims by onlookers see Oughton and Lowry, n 11.

[34] *McLoughlin v O'Brian* [1983] 1 AC 410, 442–443.

[35] *McLoughlin v O'Brian* [1983] 1 AC 410, 429.

[36] *McLoughlin v O'Brian* [1983] 1 AC 410, 429.

[37] *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310.

[38] *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 (Lord Keith, Lord Ackner, Lord Oliver, Lord Jauncey and Lord Lowry). Lord Lowry merely expressed agreement with all other judgments.

[39] *Donoghue v Stevenson* [1932] AC 562, 580–581 (Lord Atkin).

[40] *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, 418 (Lord Oliver); similarly *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, 500; [1998] UKHL 45 where Lord Steyn agreed the law here was a "patchwork quilt or distinctions which are difficult to justify". In the same case, Lord Hoffmann lamented that "in this area of the law, the search for principle was called off in *Alcock*. No-one can pretend that the existing law, which your Lordships have to accept, is founded upon principle" (511).

[41] *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, 417 (Lord Oliver).

The Court applied statements of Lord Wilberforce in *McLoughlin* regarding the class of persons to whom a duty to avoid psychiatric injury was owed. In particular, where a relationship involves the "closest of family ties" between plaintiff and the one injured, it was likely a duty would be owed. The House stated that the class should not depend entirely on the category of relationship; rather, it was about the foreseeability of psychiatric injury to someone in the situation of the plaintiff.[42] The category of relationship was an indicator of typical closeness or otherwise. Previous cases had only recognised parent/child and spousal relationships as having the required "closeness".[43] The Court dismissed the claims of plaintiffs who lost brothers, a brother in law, and a grandson. Some of these plaintiffs were at the ground and saw what occurred; others saw it on television. The Court stated these were not typically relationships sufficient to place the plaintiff in a case to whom a duty was owed.[44] They had not led evidence of an unusually close relationship.

Further on proximity, the court considered claims of other plaintiffs. In one case, their child was killed. In another, their fiancé was killed. The court considered these were relationships within the class of individuals to whom a duty to avoid injury by psychiatric injury was typically owed. However, they failed another aspect of proximity – these plaintiffs were not at the ground. They "merely" observed what occurred on television, and the Court noted the television coverage did not, in accordance with the relevant code of practice, identify particular victims. This meant they failed the "proximity" test.[45] And for Lord Oliver, plaintiffs Harrison and Alcock also failed the "time and space" element of proximity. Both were at the ground and witnessed the events whereby their brother/brother in law were killed. However, "their perception of the actual consequences of the disaster to those to whom they were related was … gradual".[46]

These elements of proximity in the context of psychiatric injury were well summarised by Lord Oliver in terms of five points:

- there must be a marital or parental relationship between the plaintiff and primary victim;
- the injury for which damages are claimed must arise from the sudden and unexpected shock to the plaintiff;
- plaintiff was either personally present at the accident scene or in the vicinity and witnessed the aftermath shortly after the accident;
- plaintiff's injury was caused from witnessing the death or extreme danger to the primary victim; *and*
- there was proximity to the "event" – physical closeness to the event, temporal closeness between the event and the plaintiff's perception of it, and close relationship between the plaintiff and primary victim.[47]

The Court countenanced in obiter the possibility that an onlooker unrelated and unknown to the victims could bring an action for psychiatric injury in relation to what they observed. This was not necessary to decide, because all of the plaintiffs in the case before the Court were related or friends with those killed or physically injured. The Court opined such claims would not typically succeed because of the lack of reasonable foreseeability, but could not be ruled out entirely.[48]

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[42] *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, 397 (Lord Keith), 415–416 (Lord Oliver), 422 (Lord Jauncey).

[43] *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, 420 (Lord Jauncey): "parents and spouses have been held entitled to recover for shock caused by fear for the safety of their children or the other spouse. No remoter relative has successfully claimed in the United Kingdom."

[44] *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, 398 (Lord Keith), 406 (Lord Ackner), 416 (Lord Oliver).

[45] *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, 398.

[46] *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, 417.

[47] *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, 411.

[48] *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, 397 (Lord Keith), 403 (Lord Ackner). Lord Oliver agreed it was possible a mere bystander could bring a successful claim for psychiatric injury if the "circumstances (were) of such horror as would be likely to traumatise even the most phlegmatic spectator" (416).

In contrast, in the later *White* decision, Lord Steyn regarded *Alcock* as reflecting "settled law that bystanders at tragic events, even if they suffer foreseeable psychiatric harm, are not entitled to recover damages", for "compelling" policy reasons.[49] And the Court of Appeal in *McFarlane v EE Caledonia Ltd*[50] rejected a psychiatric injury claim by a plaintiff who witnessed explosions and fires on an oil rig resulting in the death of 167 individuals. His friends and co-workers were among the dead. He saw some attempting to jump more than 100 feet into the sea or climbing down the rig's supports, a lifeboat crashing into the sea, and victims on fire, from a platform approximately 100 metres away. This occurred over the course of nearly two hours. The Court of Appeal found no duty was owed because there was a lack of close relationship between the plaintiff and the primary victims and because reaction to horrific events was "subjective".[51]

In *Alcock*, the House did not disturb prior precedents where the plaintiff obtained compensation after suffering psychiatric injury in relation to "rescue". Lord Oliver distinguished between primary and secondary sufferers of psychiatric injury, a distinction subsequently accepted by other members of the House of Lords.[52] It was easier for primary victims to obtain such compensation, because they could readily establish "proximity". These were individuals directly involved in the event as a participant.[53] Secondary victims were not so involved, and would often find it difficult to demonstrate they were proximate enough to the events.[54] Rescuers were in the first category. It has been seen as being reasonably foreseeable that, in the event of an accident, some will provide assistance to those injured,[55] and that these "Good Samaritans" may themselves suffer psychiatric injury from what they witnessed.[56]

However, these sentiments came to nothing in *White v Chief Constable of South Yorkshire Police*,[57] where the House rejected psychiatric injury claims of some police officers who attended the Hillsborough stadium disaster to provide assistance, and thereby admittedly suffered psychiatric injury. It was suggested it would be "very rare" that psychiatric injury to rescuers would be reasonably foreseeable.[58] Lord Steyn suggested a further limit on the ability of rescuers to successfully claim for psychiatric injury – the event must have presented actual or apprehended danger to the rescuer.[59] Lord Hoffmann stated it was difficult to distinguish between "rescuers" and "bystanders" who might have provided some assistance and support. And it would appear strange to the casual observer that family members of

[49] *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, 493; [1998] UKHL 45.

[50] *McFarlane v EE Caledonia Ltd* [1994] 2 All ER 1.

[51] *McFarlane v EE Caledonia Ltd* [1994] 2 All ER 1, 14 (Stuart-Smith LJ, with whom Ralph Gibson and McCowan LJJ agreed).

[52] *Page v Smith* [1996] AC 155, 167 (Lord Keith), 184 (Lord Lloyd)(with whom Lords Ackner and Browne-Wilkinson agreed).

[53] *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, 407.

[54] *Page v Smith* [1996] AC 155, 167 (Lord Keith). A further consequence of the primary/secondary distinction was articulated by Lord Lloyd (with whom Lords Ackner and Browne-Wilkinson agreed). Lord Lloyd claimed that in respect of primary victims, it was only necessary to demonstrate it was reasonably foreseeable that they might suffer *physical* injury as a result of the defendant's negligence. This was all that was required, because the class of primary victims was necessarily small and limited. In contrast, secondary victims, the potential class of victims was much larger. As a result, reasonable foreseeability that the plaintiff might suffer *psychiatric* injury was necessary. It was also necessary to demonstrate the reasonable foreseeability of injury to a person of normal fortitude or "ordinary phlegm" (189). He also indicated that, in secondary victim cases, the use of knowledge gained by "hindsight" was acceptable (197). This case appeared to adopt a different way to distinguish primary and secondary victims than that articulated by Lord Oliver in *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310. Lord Lloyd (with whom Lords Ackner and Browne-Wilkinson agreed) seemed to equate primary victims with those outside the range of foreseeable physical injury (187).

[55] *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, 421 (Lord Jauncey); *Wagner v International Railway Co*, 232 NY 176, 180 (1921) (Cardozo J): "danger invites rescue. 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. It recognises them as normal."

[56] For example, *Chadwick v British Railways Board* [1967] 1 WLR 912. There the plaintiff's husband rendered assistance to victims of a railway disaster that occurred near their home. He subsequently died. His widow obtained compensation for the psychiatric injury caused to her husband by his exposure to the tragic events.

[57] *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455; [1998] UKHL 45.

[58] *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, 484 (Lord Goff); [1998] UKHL 45.

[59] *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, 499 (Lord Steyn); [1998] UKHL 45.

victims were denied compensation for psychiatric injury (*Alcock*) if police officers were subsequently able to make such claims.[60] He added that police officers had to expect to see harrowing events as part of their job.[61]

The House would subsequently alter the requirement that it be reasonably foreseeable that the plaintiff might suffer psychiatric injury as a result of the defendant's negligence. Rather, it was sufficient that it was reasonably foreseeable that the plaintiff might suffer *physical injury* as a result of the defendants' negligence.[62] If this were the case, a duty of care was owed with respect to psychiatric injury as well. The current status of this principle is unknown. In a subsequent decision,[63] two Law Lords appeared to accept it;[64] two seemed to criticise,[65] and the fifth agreed with judgments on both sides of the divide.[66]

Subsequent cases have also insisted on a close temporal connection between the defendant's negligence and the plaintiff's psychiatric injury, as an aspect of proximity. For example, in a case where the primary victim was injured at work due to her employer's negligence, her daughter suffered psychiatric injury at seeing her mother die three weeks later. The Court decided too much time had elapsed between the defendant's negligence and the plaintiff's injury.[67] Similarly, where a hospital negligently treated and failed to diagnose the primary victim patients, and as a result they died months later, family members of the primary victims could not recover for the psychiatric injury they suffered in seeing the primary victims' health declining, and their subsequent death. This was because the long delay between the negligence and the distressing events, and because the condition was not caused by a "sudden shock", but rather a gradually unfolding series of events.[68] In the latter case, the Court of Appeal criticised the law it felt compelled to apply,[69] and in one case expressly requested the Supreme Court reconsider the law in this area,[70] which it has agreed to do.

III. Criticism – United Kingdom Law

With great respect, the state of the law in this area in the United Kingdom is in disarray. There are no shortage of critics.[71] Leading torts scholar Donal Nolan pulls no punches:

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[60] *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, 510 (Lord Hoffmann); [1998] UKHL 45.

[61] *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, 510 (Lord Hoffmann); [1998] UKHL 45.

[62] *Page v Smith* [1996] AC 155, 187 (Lord Lloyd) (with whom Lords Ackner and Browne-Wilkinson agreed). The position is not entirely clear. In *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455; [1998] UKHL 45 Lord Griffiths (463) and Lord Hoffmann (509) appeared to agree with this approach; Lord Goff (474–475) and Lord Steyn (492) criticised it. Lord Browne-Wilkinson agreed with Lord Steyn and Lord Hoffmann.

[63] *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455; [1998] UKHL 45.

[64] *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, 463 (Lord Griffiths), 509 (Lord Hoffmann); [1998] UKHL 45.

[65] *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, 474–475 (Lord Goff), 492 (Lord Steyn); [1998] UKHL 45.

[66] Lord Browne-Wilkinson agreed with the judgment of Lord Steyn and Lord Hoffmann (*White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, 462; [1998] UKHL 45).

[67] *Taylor v A Novo (UK) Ltd* [2014] QB 150 (CA).

[68] *Paul v Royal Wolverhampton NHS Trust* [2023] QB 149.

[69] "It is hard to see why the gap in time between the negligence and the horrible event caused by it should affect the defendant's liability to a close relative witnessing the primary victim's death" (*Paul v Royal Wolverhampton NHS Trust* [2023] QB 149, 179 (Sir Geoffrey Vos MR, with whom Nicola Davies LJ agreed); to like effect Underhill LJ (184) (CA)).

[70] *Paul v Royal Wolverhampton NHS Trust* [2023] QB 149, 185 (Underhill LJ, with whom Nicolas Davies LJ agreed).

[71] Jane Stapleton, "In Restraint of Tort" in Peter Birks (ed), *The Frontiers of Liability* (OUP, 1984) Vol 2 calls the rules regarding psychiatric injury the "silliest" and an "embarrassment to the law", calling for liability for such injury to be abolished due to the unsatisfactory nature of the rules (95–96); Teff, n 17; Stephen Bailey and Donal Nolan, "The Page v Smith Saga: A Tale of Inauspicious Origins and Unintended Consequences" (2010) 69(3) *Cambridge Law Journal* 495; Nicholas Mullany, "Psychiatric Damage in the House of Lords – Fourth Time Unlucky: Page v Smith" (1995) 3(2) JLM 112; Paula Case, "Now You See It, Now You Don't: Black Letter Reflections on the Legacies of White v Chief Constable of South Yorkshire Police" (2010) 18 Tort L Rev 33, 42 refers to it as "shambolic"; Law Commission, *Liability for Psychiatric Illness* (1998) recommended major statutory reforms (none of which occurred).

> All that is certain now is that the law on nervous shock (in the United Kingdom) is a shocking mess. Complexity and confusion are the order of the day, and in their wake come inconsistency and therefore injustice. In (White) the current House of Lords made it clear that rather than clearing the mess up, they were content to push it around the floor. Any serious clean up must now be done by Parliament. For those who have to try and pick their way through the clutter, the nightmare continues.[72]

Perversely, the distinctions that the UK law currently makes in the area of psychiatric injury claims have absolutely no basis in actual psychiatry. The American Psychiatric Association's *Diagnostic and Statistical Manual*[73] relevantly explains PTSD as arising from exposure to actual or threatened death or serious injury through:

- directly experiencing the traumatic event/s;
- witnessing, in person, the events as it occurred to others;
- learning the traumatic event occurred to a close family member or friend; or
- experiencing repeated or extreme exposure to aversive details of the traumatic events (including rescuers).

Specifically, the fundamental psychiatric injury expert-written document makes *no distinction* between sudden shock and gradual realisation, *does not distinguish* between primary and secondary victims, and *does not* require rescuers to reasonably apprehend personal danger in order to recover. A person *does not* need to be at the scene or the immediate aftermath of the scene or its consequences in order to meet the definition of PTSD.[74] Respectfully, might the law not defer to expertise in other fields here?

To their credit, the judges freely admit themselves the law is not based on principle, is not logical and is not satisfactory.[75] To their great discredit, they refuse to do anything about it, insisting that Parliament is the only one that can fix the mess. Parliament has not done so. My own view is that what courts have created, courts can mend. Of course, it is very much to be regretted that UK law, typically such a source of wisdom and experience upon which Australian law heavily draws, has descended into this mess. Primarily, it has been the attempt by the courts to articulate control mechanisms on reasonable foreseeability in this area, because of the fear of floodgates and unlimited liability, that has got it into difficulties. In the early cases, there were demands that the plaintiff had to suffer, or at least fear, physical injury to themselves in order to claim. These were eventually discarded. It applied a narrow interpretation of what a negligent defendant could reasonably foresee by way of injury to another. The most damaging attempt has been its engagement of the concept of "proximity". Through this mechanism, it has rejected claims by family members of those killed through the negligence of another based on assessments that, apart from parent/child and spouses, familial relationships are not "close enough". Similarly, those that do not personally witness, but see on television or through other media, or through family/friends about what happened, will struggle to successfully sue. This can fly in the face of expert medical opinion,[76] and is contrary to the *Diagnostic and Statistical Manual* definition of PTSD.

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[72] Donal Nolan, "Taking Stock of Nervous Shock" (1999) 10 *King's College Law Journal* 112, 119.

[73] American Psychiatric Association, *Diagnostic and Statistical Manual V* (2013) Exhibit 1.3–1.4.

[74] See similarly *International Classification of Diseases ICD-11 Version*: 2023 (World Health Organisation) 6B40 definition of post-traumatic stress disorder includes exposure to an event (sudden or long-lasting) of an extremely threatening or horrific nature. It includes directly experiencing, witnessing or hearing about such an event.

[75] *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, 511; [1998] UKHL 45: "in this area of the law, the search for principle was called off in *Alcock* … no one can pretend that the existing law, *which your Lordships have to accept*, is founded upon principle" (Lord Hoffmann) (emphasis added). With great respect, it is simply not correct to assert that judges in the highest UK court "have to accept" the existing law. The House of Lords was not bound by its previous decisions: *Practice Statement of 1966*. This certainly applies now to the Supreme Court. An example is *Murphy v Brentwood District Council* [1991] 1 AC 398, where the House of Lords overruled its previous decision in *Anns v Merton London Borough Council* [1978] AC 728.

[76] Danuta Mendelson, "The Defendants' Liability for Negligently Caused Nervous Shock in Australia – Quo Vadis" (1992) 18 *Monash University Law Review* 16, 42 indicating that current medical research into psychiatric disorders suggests that sometimes hearing of the tragic events or seeing images of them may be just as psychologically damaging as being present at the scene; Des Butler, "Gifford v Strange and the New Landscape for Recovery for Psychiatric Injury in Australia" (2004) 12 *Torts Law Journal* 108, 123; *Coates v Government Insurance Office (NSW)* (1995) 36 NSWLR 1, 10–11 (Kirby P, dissenting): "the rule of actual

Those who suffer through a "gradual realisation" of a distressing situation, rather than a "sudden shock", will generally not succeed in the United Kingdom. One judge in *Alcock* pointed out the crush went on "too long" and because the realisation that their family members were possibly dead was gradual not sudden, this thwarted the claim. This occurred recently again in *Paul v Royal Wolverhampton NHS Trust*.[77] Where there is a long(ish) time between the negligent acts and the plaintiff's psychiatric injuries, they are unlikely to be able to recover, even if causation and reasonable foreseeability can be proven. The law is engaged in essentially arbitrary hair-splitting, that is not principled, and which does it (and most especially the unfortunate victims) no justice.[78] The distinction finds no support in the *Diagnostic and Statistical Manual.*

The UK law draws a sharp distinction between so-called primary psychiatric injury victims and secondary victims. In the first case, it is only necessary to reasonably foresee *physical* injury in order to attract a duty of care to avoid causing psychiatric injury. In the latter case, *psychiatric* injury must be reasonably foreseeable in order to attract a duty of care. Hindsight is apparently available in respect of the second kind of case in assessing reasonable foreseeability, but not the first. The secondary victim must demonstrate exposure to the event would have caused psychiatric injury to a person of ordinary fortitude, but the primary victim need not. It can be hard to distinguish primary and secondary victims, and the distinction has been criticised.[79] There are (apparently) different views as to where the line should be drawn between primary and secondary victims. In *Alcock* it was suggested to be based on the level of "participation" (itself unclear)[80] in the distressing event.[81] In *Page* it was suggested to be based on whether physical injury to them was reasonably foreseeable (ie whether the plaintiff was in the "zone of danger").[82] These are not consistent, and will lead to different results. Rescuers and onlookers are particularly difficult to categorise. The distinction has been trenchantly criticised elsewhere, Teff calling it an "embarrassment to the legal process (and) … the substantive law".[83] The Law Commission effectively called for the distinction to be abolished.[84] Mullany says the reference to persons of ordinary fortitude is inconsistent with the so-called "egg shell skull principle" that defendants take victims as they find them.[85] Use of hindsight has been criticised.[86]

At times, the Court appeared to countenance (in obiter) the possibility that rescuers or onlookers might be able to claim for psychiatric injury caused by what they saw, as "secondary victims". But when

perception is in part a product of 19th century notions of psychology and psychiatry. In part, it was intended as a shield of policy against expanding the liability of wrongdoers for the harm they caused. And in part, it was a reflection of 19th century modes of communicating information." He concluded the rule was hopelessly out of date for modern times.

[77] *Paul v Royal Wolverhampton NHS Trust* [2023] QB 149.

[78] Teff, n 17, 107–108: "by treating contingent features – such as sudden shock, spatial proximity, time and means of perception – as determinants, they encourage invidious distinctions which defy medical understanding of how psychiatric conditions arise … in several … cases, relatives attending on declining hospitalised accident victims have been denied a remedy. Continued insistence on a single shocking event … insult(s) the intelligence and produce(s) untenable distinctions." The Law Commission explained that the distinction between trauma based on a sudden shock and that relating to a more gradually occurring situation had no medical basis (68) and recommended that the shock/suddenness requirement be abolished (73): Law Commission, n 71; Jane Swanton, "Issues in Tort Liability for Nervous Shock" (1992) 66 ALJ 495, 500: "many people think that the law's concentration on a single shocking episode is artificial and unrealistic"; James Rendall, "Nervous Shock and Tortious Liability" (1962) 2 *Osgoode Hall Law Journal* 291, 306: "it may be questioned whether it is any more shocking to see one's child struck by a speeding vehicle than to see him run into slowly and remorselessly."

[79] Chris Hilson, "Nervous Shock and the Categorisation of Victims" (1998) 6 Tort L Rev 37; Witting, n 14, 68.

[80] Tan Keng Feng, "Liability for Psychiatric Illness – The English Law Commission" (1999) 7 Tort L Rev 165, 171.

[81] *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, 407 (Lord Oliver).

[82] *Page v Smith* [1996] AC 155, 187 (Lord Lloyd); Nolan, n 72, 116: "the physical risk approach is not so much a slippery slope as a perpendicular precipice."

[83] Teff, n 17, 93.

[84] Law Commission, n 71, 80.

[85] Mullany, n 71, 118.

[86] Mullany, n 71, 116.

confronted with an actual case of it, the House of Lords discovered new hurdles to place in front of plaintiffs in such situations, which they could not overcome. It required that such individuals must face actual or apprehended danger themselves. Justices commented on difficulties distinguishing between rescuers and mere onlookers, and apparently used the fact that grieving and suffering victims were denied compensation in *Alcock* to justify denying suffering police officers in *White* compensation. Of course, two wrongs don't make a right. And it is not clear any more whether the defendant must be able to reasonably foresee physical injury to the plaintiff, or whether the defendant must be able to reasonably foresee psychiatric injury to the plaintiff, in order that a duty of care be owed in relation to psychiatric injury.

Thankfully, in this area of the law, Australian has departed materially from some of the principles of the UK case law, though there are similarities. To the extent there was statutory reform in Australia in this area, some of these reforms embrace (or re-embrace) aspects of the UK approach, as we will see, so awareness of the UK authorities provides necessary background and context, as well as an example of what not to do (with respect). And that jurisdiction continues to provide useful case law to consider. Given the lack of recent High Court of Australia decisions in this area, it is not known what the current Court's views are, and the extent (if any) to which they might utilise some of the UK principles. It is to consideration of the leading Australian cases that the article now turns.

IV. Development of Psychiatric Injury Claims – Australia

The High Court considered such a claim in *Chester v Council of the Municipality of Waverley*.[87] There a boy aged seven drowned in a trench excavated by the council. It had filled with water. The site was inadequately secured. The plaintiff was the boy's mother. He was missing from home, and she went to look for him. She was present when his body was recovered from the water. She suffered a psychiatric condition due to what she saw, and brought a claim for this injury against the defendant based on their negligence. A majority of the High Court (Latham CJ Rich and Starke JJ, over the notable dissent of Evatt J) rejected the plaintiff's claim. All judges made extensive use of UK precedents discussed above.

Latham CJ said that the defendant did not owe the plaintiff a duty of care to prevent her from suffering psychiatric injury. He articulated floodgates concerns if plaintiffs who witnessed a distressing event could successfully claim against the person who caused the event. He concluded it was not reasonably foreseeable that a mother who saw the dead body of her child would develop a psychiatric injury. His conclusion was stark:

> Death is not an infrequent event, and even violent and distressing deaths are not uncommon. It is … not a common experience of mankind that the spectacle, even of the sudden and distressing death of a child, produces any consequence of more than a temporary nature in the case of bystanders or even of close relatives who see the body after death has taken place.[88]

Rich and Starke JJ agreed that it was not reasonably foreseeable that someone such as the plaintiff would develop psychiatric injury from witnessing what she saw.[89] Evatt J (dissenting) held that it was reasonably foreseeable by the defendant that a child may be killed or injured if they entered the trench, and that parents might come to look for the child. If their child had drowned, it was quite foreseeable that parents might suffer a psychiatric disorder as a result. Referring to the judgment of Atkin LJ in *Hambrook*, he said it was possible that the duty might extend to bystanders and that it was not necessarily limited to parent/child and spouses.[90] Evatt J rejected the argument that the plaintiff had to show that witnessing such an event would cause psychiatric injury to someone of "ordinary firmness and mental stability".[91]

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[87] *Chester v Council of the Municipality of Waverley* (1939) 62 CLR 1.

[88] *Chester v Council of the Municipality of Waverley* (1939) 62 CLR 1, 10.

[89] *Chester v Council of the Municipality of Waverley* (1939) 62 CLR 1, 11 (Rich J), 13–14 (Starke J).

[90] *Chester v Council of the Municipality of Waverley* (1939) 62 CLR 1, 30, 41.

[91] *Chester v Council of the Municipality of Waverley* (1939) 62 CLR 1, 30. Evatt J also rejected the decision in *Victorian Railways Commissioners v Coultas* (1888) 13 App Cas 222 as being based on the erroneous proposition that bodily or physical injury could

In *Mount Isa Mines Ltd v Pusey*, the plaintiff witnessed co-workers suffer severe electrical burns at work, from which they later died. The plaintiff had provided assistance at the scene to one of those injured. He later developed a psychiatric injury. The accident was caused by the defendant employer's negligence. The plaintiff sued the defendant for the psychiatric injury he suffered. The High Court found in his favour. It was reasonably foreseeable that if a worker were injured, that another worker might witness it, and might thereby suffer emotional injury.[92] It was not necessary that the defendant foresee the precise injury suffered; it was sufficient they could foresee that kind of injury.[93] Windeyer J explained that originally, the limit of the class of persons who could sue for such injury to family members was a humane exception to the general non-availability of such claims. As the cases progressed, it had now become an arbitrary limit. Windeyer J said there was no logical reason to limit such claims to family members. He recognised that employees could be able to make such a claim. This was part of a broader principle that those other than relatives could genuinely suffer psychiatric injury as a result of observing injury or danger to another. This was foreseeable.[94] Walsh J agreed it was not necessary that the claimant be a relative of the original victim in order to successfully claim for psychiatric injury as a result of having witnessed the accident.[95] The High Court has recently re-confirmed that an employer owed a duty of care to employees not to cause them psychiatric injury.[96]

In *Jaensch v Coffey*[97] the High Court held that the driver of a vehicle owed a duty of care to the wife of a motorcyclist with whom the driver collided. The wife did not witness the accident, but attended to the hospital shortly after the accident and observed her husband with serious injuries. She was told her husband's condition was bad. The next day she was told it had worsened and advised to attend the hospital as soon as possible. He survived, but she suffered psychiatric injury as a result of the accident. All members of the Court found in her favour.

Deane J (with whom Gibbs CJ agreed)[98] wrote the leading judgment. He rejected the reasoning of the majority in *Chester*, favouring the view of Evatt J.[99] It was reasonably foreseeable that a parent, upon seeing the body of their dead child being taken from a waterway, would suffer psychiatric injury.[100] He adopted "proximity" as alternative wording to elucidate Lord Atkin's "neighbour" principle in *Donoghue v Stevenson*. He said that it comprised physical proximity (space and time) between the plaintiff and the defendant, circumstantial proximity (eg relationship of employer/employee), and causal proximity (directness of relationship between the act and the injury sustained).[101]

Deane J referred to the "control factors" identified in *McLoughlin* regarding psychiatric injury, particularly presence at the scene, direct observation of the accident and close relationship with the victim. Deane J questioned these, in light of advances in medical evidence that suggested, for instance, that presence at the scene was "immaterial" compared with being told about it, and that the onset of psychiatric injury

not include mental injury (48). The view of Evatt J would be vindicated in later United Kingdom (*McLoughlin v O'Brian* [1983] 1 AC 410, 422, 430–431, 439) and Australian (*Jaensch v Coffey* (1984) 155 CLR 549) decisions. The case and the broader context is discussed in Gideon Haigh's *The Brilliant Boy: Doc Evatt and the Great Australian Dissent* (Scribner, 2021).

[92] *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383, 389 (Barwick CJ), 411 (Walsh J).

[93] *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383, 390 (Barwick CJ), 402 (Windeyer J), 414 (Walsh J).

[94] *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383, 404–405.

[95] *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383, 416–417 (Walsh J).

[96] *Kozarov v Victoria* (2022) 273 CLR 115.

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

[98] *Jaensch v Coffey* (1984) 155 CLR 549, 551.

[99] Dawson J was of a similar view (*Jaensch v Coffey* (1984) 155 CLR 549, 611).

[100] *Jaensch v Coffey* (1984) 155 CLR 549, 590.

[101] *Jaensch v Coffey* (1984) 155 CLR 549, 584–585. On differences between use of proximity in Australia and the United Kingdom see Prue Vines, "Proximity as Principle or Category: Nervous Shock in Australia and England" (1993) 16 *University of New South Wales Law Journal* 458.

often occurred independently of the "close relationship" articulated in *McLoughlin*.[102] Relevantly here, this led Deane J to the following conclusion:

> 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, regardless of his particular relationship with the injured person.[103]

Deane J said this did not mean that the existence of a relationship between the plaintiff and the primary victim was irrelevant. It went to the question of reasonable foreseeability and proximity. It would be an "unusual" case where psychiatric injury caused to a plaintiff by mere uninvolved observation or apprehended or actual injury to a person who was not a close relative would be reasonably foreseeable to the defendant who caused the injury to the primary victim.[104]

Brennan J never accepted proximity as a control mechanism, stating that there were other features of such cases, including the need to prove facts in such cases, that were sufficient in this regard.[105] Brennan J emphasised the importance of a "shock", implying something that happened quickly, rather than gradually, and emphasised the importance of the plaintiff's perception of the shocking event, in determining whether or not their psychiatric injury was reasonably foreseeable.[106] These remarks led to psychiatric injury claims being denied in Australia, where there was a time lapse between the distressing event and the plaintiff's perception of it.[107] Kirby J criticised this principle.[108] Brennan J also adopted the "normal fortitude" requirement in relation to reasonable foreseeability.[109] Gibbs CJ assumed without deciding this was correct.[110]

Though *Jaensch v Coffey* remains good law, some of its reasoning no longer represents the law in Australia. Specifically, the High Court would turn against notions of "proximity" in determining whether or not a duty of care should exist in special cases (typically pure economic loss and psychiatric injury) involving alleged negligence.[111]

In *Tame v New South Wales*[112] the High Court considered a case of psychiatric injury brought by parents of a young man who had gone to work for the defendant at a remote cattle station. The defendant assured the parents at the time their son was engaged that he would be supervised at all times. He was not, and was sent to work alone at a remote property. He was found dead in the desert after a months-long search, and his parents suffered a psychiatric disorder. The Court found the defendant owed the plaintiffs a duty of care to prevent psychiatric injury, and had breached it. This precedent extended the law in Australia, because the claim was not based on having witnessed a tragic event or its immediate aftermath, and was

[102] *Jaensch v Coffey* (1984) 155 CLR 549, 600–601.

[103] *Jaensch v Coffey* (1984) 155 CLR 549, 606.

[104] *Jaensch v Coffey* (1984) 155 CLR 549, 610; Gibbs CJ took a similar position, stating that the closeness of the relationship between the plaintiff and the primary victim was an important consideration (555). Brennan J stated it would be an "exceptional case" if onlookers could establish they were owed a duty of care by the defendant who caused the primary injury. According to the reasoning of Brennan J, this was because their attendance at the scene and observation of the accident could not be shown to be the result of the defendant's conduct (570). He indicated the categories of claimant were not closed (572). He said the overriding question was whether it was reasonably foreseeable by the defendant that their conduct would cause those such as the plaintiff a psychiatric injury (572)(arguably, this is somewhat different to his formulation at 570).

[105] *Jaensch v Coffey* (1984) 155 CLR 549, 571.

[106] *Jaensch v Coffey* (1984) 155 CLR 549, 566–568.

[107] *Anderson v Smith* (1990) 101 FLR 34; *Spence v Percy* [1992] 2 Qd R 299.

[108] *Campbelltown City Council v Mackay* (1989) 15 NSWLR 501, 504: "sadly for lawyers, shackled with their nineteenth-century notions of 'nervous shock', psychological injury is a much more complex process. It is rarely (if ever) explicable as a result of an isolated 'shock'."

[109] *Campbelltown City Council v Mackay* (1989) 15 NSWLR 501, 568.

[110] *Campbelltown City Council v Mackay* (1989) 15 NSWLR 501, 556.

[111] *Hill v Van Erp* (1997) 188 CLR 159, 176–177 (Dawson J), 210 (McHugh J), 237 (Gummow J); *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 194 (Gleeson CJ), 301 (Hayne J). Proximity retains currency in the United Kingdom: *Caparo Industries Plc v Dickman* [1990] 2 AC 605; *Robinson v Chief Constable of West Yorkshire Police* [2018] AC 736; [2018] UKSC 4.

[112] *Tame v New South Wales* (2002) 211 CLR 317.

not based on a sudden shock, but events which unfolded over many months. The High Court rejected some of the policy-based restrictions that the UK courts had placed on recovery for psychiatric injury, such as a need for "sudden shock" or "direct perception",[113] reiterating the importance of reasonable foreseeability of harm to the plaintiff as the basis for the duty.[114] These types of factors would be relevant, however, in assessing whether the plaintiff's injury was reasonably foreseeable in the circumstances.[115]

It was emphasised that the need to prove facts to support the claim, including the existence of a psychiatric disorder and that it was caused by the distressing events, and that those events were caused by the defendant's negligence, provided adequate control mechanisms in relation to such claims.[116] A majority of the Court also determined it was not necessary for the plaintiff to demonstrate in cases of psychiatric injury that a person of "normal fortitude" would have suffered it upon being exposed to the relevant events.[117] No member of the Court applied the distinction between primary and secondary victims espoused in UK law.[118]

Regarding the need for any relationship between the plaintiff and the defendant, Gaudron J said that, unless the plaintiff directly perceived the event, there would have to be "special features" of the relationship between the plaintiff and the defendant in order to say that plaintiff's psychiatric injuries were reasonably foreseeable.[119] McHugh J took a similar view, but found that the relationship between employer/employee had been recognised as sufficient to create a duty of care in the defendant employer to avoid psychiatric injury to the employee.[120] Obviously, this could be extended to family members of the employee, and this occurred in a later case.[121] Hayne J discussed requirements in other cases of a relationship between the plaintiff and the primary victim. Acknowledging this had been used as a control mechanism to limit claims, he opined they were difficult to define and apply, led to drawing of boundaries that were illogical and unjust. The boundaries were unrelated to the nature of the injury suffered or the way in which it may be caused.[122] In contrast, Callinan J took the view that the UK courts had taken, insisting that there be a "special or close relationship" between the defendant, plaintiff and primary victim.[123] Such relationships might include employer, employee and co-workers and relationships such as parent/child. He indicated the classes of relationship in which such a duty would be owed were not closed.

This case was decided at a time of heightened public debate on a so-called "insurance crisis" partly caused by tort. The Commonwealth commissioned an inquiry with a view to major reforms to tort law, including that relating to psychiatric injury. The *Review of the Law of Negligence: Final Report*[124] recommended

[113] *Tame v New South Wales* (2002) 211 CLR 317, 333 (Gleeson CJ), 344 (Gaudron J), 380 (Gummow and Kirby JJ), 408 (Hayne J); compare 439 (Callinan J).

[114] *Tame v New South Wales* (2002) 211 CLR 317, 333 (Gleeson CJ).

[115] *Tame v New South Wales* (2002) 211 CLR 317, [18] (Gleeson CJ), [66] (Gaudron J), [225] (Gummow and Kirby JJ).

[116] *Tame v New South Wales* (2002) 211 CLR 317, 334 (Gleeson CJ), 383 (Gummow and Kirby JJ); similarly Mullany, n 71, 118–119.

[117] *Tame v New South Wales* (2002) 211 CLR 317, 333 (Gleeson CJ), 343 (Gaudron J), 380 (Gummow and Kirby JJ), 349–351 (McHugh J), 410 (Hayne J), 439 (Callinan J) dissenting on point.

[118] McHugh J criticised it and said it had never been accepted in Australia (*Tame v New South Wales* (2002) 211 CLR 317, 350).

[119] *Tame v New South Wales* (2002) 211 CLR 317, 340–341 (Gaudron J).

[120] *Tame v New South Wales* (2002) 211 CLR 317, 365–366 (McHugh J).

[121] *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269. Though that case did involve a claim by a close personal relation of the injured worker (his children), McHugh J specifically noted that, in order to meet the "neighbour" requirement to establish a duty of care was owed to avoid causing psychiatric injury, it was not necessary to show that the plaintiff was a close personal relation of the primary victim. He instanced a case where the only connection between the primary victim and the plaintiff was that they were in each other's presence as in some cases being sufficient to give rise to a duty of care to avoid causing such injury (290).

[122] *Tame v New South Wales* (2002) 211 CLR 317, 405.

[123] *Tame v New South Wales* (2002) 211 CLR 317, 439.

[124] Ipp et al, n 10, 144.

statutory reforms. Specifically, it favoured re-introduction of an "normal fortitude" requirement, and provided a list of factors to assist in determining whether or not the test was met. The factors included whether the event caused a sudden shock, whether the plaintiff was at the scene or observed the events later, whether the plaintiff witnessed the events with "unaided senses", and the relationship between plaintiff and defendant, and plaintiff and the primary victim.[125] This was a significant change to what the High Court had decided in *Tame*.[126] Obviously, the Commonwealth lacks direct constitutional power with respect to torts. States and territories all took steps to implement the Ipp Reforms, however there was significant disparity in how they did so. Most jurisdictions enacted similar provisions limiting actions for psychiatric injury, by reintroducing the "normal fortitude" test, affirming the question of "sudden shock" as a relevant factor to be considered, considering whether the plaintiff was physically at the scene of the events, and affirming the importance of the relationship between plaintiff and the primary victim, and the existence of any relationship between plaintiff and defendant.[127] Significant barriers were placed in the way of rescuers seeking compensation for psychiatric injury.[128] However, Queensland did not enact these provisions. This means the common law, as espoused in cases such as *Tame*, *Gifford*, *Jaensch*, and *Pusey*, continues to apply in that jurisdiction. This is potentially noteworthy given that Sea World is located in Queensland. This raises an issue of the relevant law to be applied to the accident, to which the article now turns.

V. Application of Law to Sea World Accident

A. Choice of Laws Issue – Applicable Statutory Law

A potential complication arises, in that different jurisdictions in Australia have implemented civil liability legislation which differs in material respects in relation to damages for psychiatric injury. At one extreme, the *Civil Liability Act 2003* (Qld) contains no specific provision regarding such claims. In contrast the *Civil Liability Act 2002* (NSW) specifies significant limits on the circumstances in which such a claim can be brought, and relevant factors for the court to consider. For example, it limits compensation to those who witness the event or who are a close family member of a victim, it embraces the notion of "normal fortitude" applied in the United Kingdom but not by the High Court of Australia, embraces the notion of "sudden shock", and specifically considers the relationship between plaintiff and primary victim, and plaintiff and defendant. Queensland's legislation has no equivalent.

Obviously, Sea World is located in Queensland so the initial response would be that the *Civil Liability Act 2003* (Qld) would be the relevant statute to apply. It is necessary to refer here to choice of law rules on point – the High Court has clarified that, both in respect of torts involving multi-state elements[129] and international elements,[130] the law of the place of the wrong is to be applied. This is relevant because some of the primary victims of the Sea World disaster were from interstate and overseas, and because it is likely some of the bystanders and/or rescuers were similarly so placed. They might wish to argue that the law of a jurisdiction other than Queensland should apply.

At this point, it is not known whether there has been a "wrong" (in the sense of negligence). As a result, it cannot be said where the wrong (if any) occurred. Let us assume (for the purposes of discussion only) that the wrong (or a wrong) is determined by the court in the way in which the pilot or pilots operated

[125] Ipp et al, n 10, 144.

[126] Nicole Seeto, "Shock Rebounds, Tort Reform and Negligently Inflicted Psychiatric Injury" (2004) 26 *Sydney Law Review* 293, 297 stating the *Civil Liability Act 2002* (NSW) (based on the Ipp reforms) "reintroduces the notion of geographical and temporal proximity rejected as irrational and arbitrary by the High Court in *Tame* and *Annetts*".

[127] *Civil Liability Act 2002* (NSW) s 32(2); *Wrongs Act 1958* (Vic) s 72(2); *Civil Liability Act 2002* (WA) s 5S(2); *Civil Liability Act 1936* (SA) s 33(2); *Civil Liability Act 2002* (Tas) s 34(2) (factors confined to sudden shock and the extent of pre-existing relationship between plaintiff and defendant); *Civil Law (Wrongs) Act 2002* (ACT) s 34(2).

[128] Prue Vines, Mehera San Roque and Emily Rumble, "Is 'Nervous Shock' Still a Feminist Issue? The Duty of Care and Psychiatric Injury in Australia" (2010) 18 Tort L Rev 9, 14.

[129] *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503.

[130] *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491.

the aircraft. This wrong will have been committed in Queensland (at no point did the aircraft on these journeys venture outside Queensland), so Queensland law will be applied. If the wrong is held to be the way in which aircraft take-offs and landings were managed at the venue, this would also have occurred in Queensland, so Queensland law will be applied. Matters would be more complicated if the wrong were held to be negligent aircraft manufacture. In this case, it is likely the court would apply the law of the place of manufacture, wherever in the world this might be. This is where the wrong (negligent manufacture) would have occurred. Thus, Queensland law would not apply. For the purposes of further discussion, it will be assumed that the wrong (if any is shown to have occurred) has taken place in Queensland, so Queensland law will be applied. Of course, this law will be applied to all matters of substance (in contrast to procedure), including matters relevant to damages (if any).[131]

As noted above, Queensland's civil liability statute does not make specific provision limiting claims for psychiatric injury. Thus, general common law principles will be applied to resolve the dispute, with marginal impact by the statutory civil liability regime (eg, a possible argument that some plaintiffs were engaged in dangerous recreational activity).[132] This would seemingly be most applicable to those who were in the relevant helicopters, rather than those on the ground, with whom this article is concerned, so this matter will not be discussed further.

B. Whether Onlookers Who Suffer Psychiatric Injury as a Result of Seeing the Helicopter Accident Have a Claim against Those Whose Negligence Caused It

Assume now that a person at Sea World that day witnessed the distressing helicopter accident. Assume that they can demonstrate that (1) they now suffer a psychiatric condition and that (2) it was caused by witnessing the events of that day. Assume they were not related to and did not know any of the primary victims. Assume they are not within the definition of "rescuers". The question is whether they were owed a duty of care by the defendant/s whose negligence caused the accident. The common law and not statute governs the matter, given Queensland law is applicable. Such a claim is novel. Peter Handford notes that no Commonwealth decision to date has permitted recovery by onlookers perceiving distressing events.[133]

In *Mount Isa Mines v Pusey*, Windeyer J accepted in principle that a person might suffer psychiatric injury from witnessing distressing events, and that this was not limited to events involving the plaintiff's family members. In that case, it involved a co-worker. The case was not purely an onlooker one, because the plaintiff rendered assistance to one of the primary victims, and could thus argue they were a rescuer. The accident also occurred during employment. This made it easier to demonstrate that psychiatric injury to one employee was a reasonably foreseeable possibility due to negligence causing injury to another employee. Walsh J took a similar position. This case would provide some support to the plaintiff's claim.

In *Jaensch*, Deane J opined it would be an unusual case where an onlooker unrelated to the primary victim would be able to succeed in a psychiatric injury claim against the defendant who caused the injury to the primary victim. This is because of the difficulty they would have in demonstrating the injury to them was reasonably foreseeable by the defendant. The *Tame* decision is of limited assistance, because it did not involve a situation where a plaintiff directly observed a distressing event. This was also the case in *Gifford*, although there the judgment of McHugh J suggests the right of recovery for psychiatric injury is not limited to family members of the primary victim. Thus, there is limited support in the Australian case law for such a claim, and it has never been successful.

The UK precedents are ambiguous on this point. In *Hambrook*, Atkin LJ held there was no reason to exclude onlookers from a possible claim for psychiatric injury. It was countenanced by all members of the Court of Appeal in *Owens*. In *McLoughlin*, Lord Bridge (with whom Lord Scarman agreed) wondered why onlookers could not potentially have a claim for such injury, given it was available to rescuers. Three judges in *Alcock* suggested the possibility of onlookers making a successful claim. However, the

[131] *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503.

[132] *Civil Liability Act 2003* (Qld) ss 17–19.

[133] Handford, n 2, 345.

House of Lords denied in *Bourhill v Young* that onlookers could be owed such a duty of care, as did the Court of Appeal in *McFarlane v EE Caledonia Ltd*. In the United Kingdom, onlookers are likely to be *secondary victims* (at least if the definition from *Alcock* is applied, it is less clear if the *Page* definition is applied – it might depend on how close they were to the area of impact). Control mechanisms such as "close relation" have typically been applied to secondary victim claims, making recovery unlikely in the case of an onlooker who is not related to the primary victims.

In those states which did legislate reforms to psychiatric injury, it will be less likely that an onlooker could successfully make a claim. This is on the assumption that the onlooker did not know any of the primary victims. This is because these statutes regard as one relevant factor in determining whether or not a duty of care is owed to prevent psychiatric injury is the nature of the relationship between the plaintiff and the primary victim.[134] Obviously, if none existed, this would count against the claim, though of course it does not preclude it.

In Queensland, the question will be whether it is reasonably foreseeable that an onlooker to a distressing event, a stranger to the primary victims of the event, would or might suffer a psychiatric injury as a result of observing it. It would not be likely to cause psychiatric injury to a person of ordinary fortitude, given *Tame*. In my opinion, it is reasonably foreseeable that someone who observed a distressing event might suffer a psychiatric injury as a result. Specifically, it is reasonably foreseeable that if I operate a helicopter negligently or design it negligently, that it may crash. It will often impact the ground, and it will often be that people are in the vicinity. They will observe the accident, which is likely to be serious, given the helicopter will have fallen from altitude. We have much greater awareness of mental injury today, and we know that whether or not the one claiming mental injury as a result of what they observed knew the primary victim or not is not really a defensible discriminator in terms of likelihood of psychiatric injury. The *Diagnostic and Statistical Manual*, in describing PTSD, recognises that it might be suffered by someone who directly experiences a traumatic event or witnesses it occurring to others. Neither is conditioned by a requirement that the person suffering knew those being directly impacted by the event.[135] Again, the claimant will be subject to formidable proof obligations, including demonstrating they have a recognised psychiatric injury and that it was caused by the defendant's negligence. The floodgates are unlikely to open.

C. Could Rescuers Who Suffered Psychiatric Injury as a Result Claim against Those Whose Negligence Caused It?

Media reports of the events of 2 January have indicated that some members of the public in the immediate vicinity of the accident rendered whatever assistance they could until professional services arrived. We might refer to these individuals as "rescuers". Assume that such rescuer has now (1) a recognised psychiatric condition; and (2) can show it was caused by their efforts on that day. Do they have a claim for their injuries against the defendant whose negligence caused it?

As discussed above, the single judge English decision in *Chadwick v British Railways Board*[136] provides support for a claim by a rescuer for psychiatric injury. The possibility was countenanced in obiter in *Alcock*. However, in fairness it must be acknowledged the House of Lords was much less sympathetic to rescuer claims when actually confronted with them in *White*. These were professionals, rather than regular individuals, and this may be relevant, at least according to Lord Hoffmann. Lord Goff said such injury to rescuers was unlikely to be reasonably foreseeable. And recall that Lord Steyn there indicated rescuers could only bring a claim for psychiatric injury sustained through their heroism if they perceived danger to themselves. (With respect) thankfully, there is no sign this approach will be applied in Australia.[137]

[134] For example *Civil Liability Act 2002* (NSW) s 32(2)(c).

[135] American Psychiatric Association, n 73, Exhibit 1.3–1.4, A1 and A2.

[136] *Chadwick v British Railways Board* [1967] 1 WLR 912.

[137] Handford, n 2, 903.

The leading Australian case regarding rescuers is *Mount Isa Mines v Pusey*. Recall there that the plaintiff did attempt to "rescue" one of the victims. His psychiatric injury claim against the employer who negligently caused the injury to the primary victims was successful. Further, in *Wicks v State Rail Authority (NSW)*[138] the court held that rescuers (police officers in that case) were owed a duty of care by the defendant to not cause them psychiatric injury. It was reasonably foreseeable that if the defendant caused primary victims some injury through negligence, others might try to provide assistance to the primary victims, and thereby suffer injury themselves. The case turned primarily on the interpretation of a New South Wales statute that limited recovery for mental harm to those who witnessed victims being killed, injured or in peril, or close family members of a victim (the second of these limbs clearly did not apply). One would have thought this provision posed difficulties for the plaintiffs. However, the High Court read the provision "generously", holding that it should not be assumed that the killing, injury or peril only took place over a few minutes; it might continue for some hours, including during periods in which rescue was being attempted. Similar provision is made in respect of liability for mental harm currently in New South Wales and Victoria. The Tasmanian provision includes mental harm suffered during the "aftermath", which is more generous to rescuers. The South Australian provision only permits recovery if the plaintiff was at the scene when the accident occurred. Again, Queensland makes no specific statutory provision, so *Wicks* is of limited relevance here.

On the authority of *Pusey*, it is considered likely the rescuers would have a claim, if they can meet the evidentiary requirements. It is reasonably foreseeable that if a defendant is negligent and causes the primary victim injury, Good Samaritans will try to assist them. The High Court has recognised this.[139] In the process of doing so, they may themselves suffer psychiatric injury. The *Diagnostic and Statistical Manual* specifically recognises the possibility that a person who experiences repeated or extreme exposure to trauma (expressly giving rescuers as an example) might suffer PTSD.[140] As Cardozo J noted:

> Danger invites rescue. 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. It recognises them as normal. It places their effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperilled victim; it is a wrong also to his rescuer.[141]

At one level, the High Court decision in *New South Wales v Fahy* was a rescue case.[142] There a police officer who suffered psychiatric injury after attending a scene where a victim had been stabbed brought a case against her employer. The officer provided medical assistance to the stabbing victim and communicated with his family. She argued it had breached a duty not to cause her psychiatric injury. The case failed because a majority of the Court did not accept that the employer had breached that duty by, for example, failing to ensure police did not work alone.[143] The court did *not* deny that rescuers could be owed a duty of care by others not to cause them psychiatric harm. That case is readily distinguishable from the current circumstances, where it is submitted that a finding of a breach of duty of care is more likely, given that a catastrophic, unexpected accident occurred. The case also involved a professional trained in dealing with situations of great trauma. It could be argued to be *less* reasonably foreseeable that such a professional would suffer psychiatric injury upon being exposed to a traumatic event than in the case of an ordinary individual without such specialist training.[144] Thus, this case presents no hurdles

[138] *Wicks v State Rail Authority (NSW)* (2010) 241 CLR 60.

[139] *Chapman v Hearse* (1961) 106 CLR 112, 121 (Dixon CJ Kitto Taylor Menzie and Windeyer JJ) (the court rejected an argument that the defendant whose negligent driving caused an accident, resulting in the attendance of a doctor at the scene. While seeking to provide assistance to the victim of the accident, the doctor was himself run over and killed. The High Court unanimously held the defendant owed a duty of care to the doctor because it was reasonably foreseeable that, in the event of an accident, those in the vicinity would seek to provide assistance).

[140] American Psychiatric Association, n 73, Exhibit 1.3–1.4, A4.

[141] *Wagner v International Railway Co*, 133 NE 437 (NY, 1921).

[142] *New South Wales v Fahy* (2007) 232 CLR 486.

[143] *New South Wales v Fahy* (2007) 232 CLR 486 (Gummow, Hayne, Callinan and Heydon JJ; Gleeson CJ, Kirby and Crennan JJ dissenting).

[144] "The respondent had been a police officer for three … years. Her experience and training could reasonably be expected to have enabled her to perform alone the tasks that she did, in the presence of, and for the medical practitioners, for the ten minutes

to a claim for psychiatric injury by a rescuer in the Sea World incident, at least to the extent they were regular individuals, and not specialist rescuers such as paramedics.

VI. Conclusion

The Sea World helicopter tragedy raises important legal issues regarding the extent, if any, to which Australian law permits onlookers to a traumatic event, and those who attempt to rescue victims, to claim for psychiatric injury, on the assumption they can prove they have such an injury and it was caused by the event. Australian authorities have not generally recognised such a claim. The UK law has placed very significant hurdles around any claim for psychiatric injury, and it is submitted a claim by onlookers or rescuers for such injury in that jurisdiction would today be unlikely to succeed, for a range of reasons. These are primarily policy-induced control mechanisms that have left the law in that jurisdiction in this area in disarray. Australian law has adopted a different course, but it remains an unknown whether we would recognise such a claim. To date, claims have been limited to family members of victims, or co-workers. This article has considered it should be regarded as being reasonably foreseeable by a defendant that, if their negligence causes a traumatic event, onlookers and rescuers called to provide support and assistance would or might suffer psychiatric injury, for which they should be compensated.

required, without suffering a psychiatric illness" (*New South Wales v Fahy* (2007) 232 CLR 486, 559 (Callinan and Heydon JJ)). The justices might have, but did not, note the possible application of a voluntary assumption of risk defence in such circumstances.