
Wilkinson v Downton: New work for an old tort to do?

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The Supreme Court of the United Kingdom recently reconfirmed in Rhodes v OPO [2015] UKSC 32 the continued existence and viability of a claim for intentionally caused emotional injury, recognised in the classic case of Wilkinson v Downton. Previously, the continued existence of the principle had been doubted in that jurisdiction, as is currently the case in Australia. This article considers the recent UK decision in light of previous cases in that jurisdiction, considers the current position in Australia and North America, some parameter issues, and possible future uses of this tort.

In 1897, English law recognised the existence of a tort cause of action for the intentional infliction of emotional injury in the decision of *Wilkinson v Downton*¹ (*Wilkinson*). This was not a principle that had been known to the common law prior to the decision, and in fact a Privy Council decision shortly before *Wilkinson* had appeared to close the door to actions for “nervous shock”.² The principle was accepted and applied in subsequent cases in the United Kingdom and in Australia, and a similar tort was recognised in the United States and Canada. The explosive growth of the tort of negligence since the 1930s had caused some to wonder about, or doubt, the continued viability and utility of the *Wilkinson* claim as a separate claim of its own. Specifically, had the principle of negligence subsumed the *Wilkinson* action, or should it do so? Did the “intention” aspect of *Wilkinson* suggest that such doctrine remained separate, or should remain separate, from the stream of negligence? Further, was there any need to consider further development of *Wilkinson*, given that claims that might otherwise be brought within the principle might in more recent times find statutory remedies?

A recent United Kingdom Supreme Court decision confirms the continued existence of the action as a valuable one in its own right, logistically separate from a negligence action. The first part of this article will chart developments in this area in the United Kingdom, Australia and North America. The second part of this article considers some issues concerning the parameters of the tort, including whether it should retain independent status or be subsumed into negligence, and what type of injury would qualify for compensation. Lastly, the article considers specific instances where the tort might have important “work to do” in the future.

DEVELOPMENTS TO DATE

United Kingdom

The old forms of action, abolished in the mid-19th century, had required that a distinction be drawn between trespass and actions on the case. Traditionally, that line involved considerations of whether the injury caused to the plaintiff was direct (trespass), or indirect (case). At this time, damages for emotional injury were not available.³ Some have explained this as an example of the law’s patriarchal

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¹ *Wilkinson v Downton* [1897] 2 QB 57.

² This is the traditional way in which the law has referred to a mental injury arising from a distressing event, but its use has been increasingly criticised: Handford P, Mullany N and Mitchell P, *Mullany and Handford’s Tort Liability for Psychiatric Damage* (2nd ed, Lawbook Co, 2006) 29. Such words will only be used in this article to quote accurately others who have done so.

³ *Victorian Railway Commissioners v Coultas* (1888) 13 App Cas 222 (PC); *Lynch v Knight* (1861) 9 HLC 577; 11 ER 854, 598: “mental pain and anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone”. Others argued there should be no distinction in principle, in terms of recoverability, between psychiatric injury and physical injury: *Brown v John Watson Ltd* [1915] AC 1, 14; *Owens v Liverpool Corporation* [1939] 1 KB 394, 400; *Bourhill v Young* [1943] AC 92, 103 (Lord Macmillan).



nature, downplaying the “emotional” (stereo)typically associated with women.⁴ Others see it as part of a general trend of increasing sophistication in the law of tort, at one time being merely concerned with physical injury:

The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilisation, made it clear to men that only a part of the pain, pleasure and profit of life lay in physical things. Thoughts, emotions and sensations demanded legal recognition, and the beautiful capacity for growth which characterises the common law enabled the judges to afford the requisite protection ...⁵

The law recognised the tort of assault, essentially involving a threat to a plaintiff by a defendant who apparently had the means to imminently carry out the threat. This was actionable without the defendant carrying out their threat to cause (physical) harm. Other torts reflected damage to non-physical injuries, such as injury to personal enjoyment of property (nuisance), injury to reputation (defamation), and others. In this limited way, the common law recognised that emotional injury could ground a tortious action.

The well-known facts of *Wilkinson* involved a practical joke played on Mrs Wilkinson. Her husband had gone to the horse races for the day. Mr Downton thought it would be funny to tell Mrs Wilkinson that her husband had been injured on the way home from the meeting, and that she should go to him immediately with pillows. None of this was true, but Mrs Wilkinson believed it. She incurred travel costs as a result, and suffered a nervous injury as a result of the worry and stress caused to her by Mr Downton’s false words. Her hair turned white.

Wright J said that the current case was “without precedent”.⁶ There was some equivalent reasoning to the wording adopted by Wright J in *Wilkinson* in some commercial case law of that era.⁷ He stated what would become recognised as the “principle” of the case:

The defendant has ... wilfully done an act calculated to cause physical harm to the plaintiff – that is to say, to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her. That proposition without more appears to me to state a good cause of action, there being no justification alleged for the act.⁸

Wright J decided that the defendant’s actions here met the requirements of the cause of action he outlined in the above paragraph. Specifically, he found that it was so calculated because such statement was so likely to produce such a consequence on a typical person that an intention to cause such an effect could be imputed.⁹ He also found the damage caused was not too remote.¹⁰ In

⁴ Prosser W, “Intentional Infliction of Mental Suffering: A New Tort” (1939) 37 Mich Law Rev 874, 876: “it is not difficult to discover in the earlier opinions a distinctly masculine astonishment that any woman should ever be so silly as to allow herself to be frightened or shocked into a miscarriage”; Graycar R, “Before the High Court: Women’s Work: Who Cares?” (1992) 14 Syd LR 86; Conaghan J, “Gendered Harms and the Law of Tort: Remediating Sexual Harassment” (1996) 16 Oxford J Legal Stud 407; Vines P, San Roque M and Rumble E, “Is Nervous Shock Still a Feminist Issue? The Duty of Care and Psychiatric Injury in Australia” (2010) 18 Tort L Rev 9, 19: “a hierarchy that privileges physical injury over emotional harm is more likely to be disproportionately detrimental to women”.

⁵ Warren S and Brandeis L, “The Right to Privacy” (1890) 4 Harv L Rev 193, 195.

⁶ *Wilkinson v Downton* [1897] 2 QB 57, 61.

⁷ In the 1889 decision of *Mogul Steamship Co Ltd v McGregor, Gow & Co* (1889) 23 QBD 598, it was acknowledged that “intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person’s property or trade is actionable if done without just cause or excuse” (613 (Bowen LJ)); see also 608 (Lord Esher). Bowen LJ’s comments were supported and quoted in *Allen v Flood* [1898] AC 1: Lord Halsbury LC acknowledged that the intentional procurement of a violation of individual rights without just cause was actionable (74), as did Lord Ashbourne (114) and Lord Morris (157). Recently in *Rhodes v OPO* [2015] UKSC 32, members of the Court cited *Mogul Steamship*, then stating it “would have been familiar to Wright” in the context of *Wilkinson*: [40] (Lady Hale and Lord Toulson, with whom Lords Clarke and Wilson agreed). Wright J also referred to the “wilful infringement of a legal right or breach of a legal duty without matter of legal justification or excuse” in his judgment in *Allen v Flood*, 63.

⁸ *Wilkinson v Downton* [1897] 2 QB 57, 58-59.

⁹ *Wilkinson v Downton* [1897] 2 QB 57, 59. This approach to the understanding of “calculated” was confirmed in *Wong v Parkside Health NHS Trust* [2001] EWCA Civ 1721, [12]: “The defendant must have intended to violate the claimant’s interest in his freedom from such harm. The conduct complained of has to be such that that degree of harm is sufficiently likely to result that the defendant cannot be heard to say that he did not ‘mean’ to do so. He is taken to have meant it to do so by the

discussing another case, he described the case here as one involving an illness that was a “direct and natural consequence” of the defendant’s conduct.¹¹

In subsequent decisions, the principle of *Wilkinson* was affirmed, but modified. The courts continued to suggest the need for physical injury, as well as the emotional injury, in order to obtain a remedy.¹² “Mere” emotional distress was insufficient.¹³ Later, it was accepted that physical harm or “recognised psychiatric illness” was sufficient.¹⁴ It was applied to broader contexts, including stalking-type behaviour.¹⁵

Some difference of opinion arose as to whether the *Wilkinson* action was regarded as more akin to a trespass action, or was an action on the case, which generally today is represented by the tort of negligence.¹⁶ This was perhaps inevitable, given some apparent confusion on this matter in the decision itself.¹⁷ The judgment appears to draw on concepts traditionally drawn from both the area of trespass (an act or statement “calculated”¹⁸ or intended to cause injury, reference to “direct” injury),¹⁹ and case (actual injury,²⁰ not strictly required in trespass actions, but required in case actions, and reference to whether harm was “too remote”).²¹

On one view this does not matter, since the forms of action were formally abolished more than a century ago. However, in another sense it does matter because of the differences in circumstances when trespass actions and actions on the case are viable. In trespass, no actual damage need be suffered by the plaintiff. However, if they do suffer damage as a result, they are entitled to all such damages. Remoteness is not relevant.²² In negligence, only foreseeable losses can be compensated. Obviously, negligence requires the existence of a duty of care and its breach, while trespass does not.²³ There is some suggestion that while recovery for psychiatric injury in negligence requires the provenance of a recognised psychiatric injury, something less than this will suffice in order to successfully bring a claim for intentional infliction of an emotional injury.²⁴

combination of the likelihood of such harm being suffered as the result of his behaviour, and his deliberately engaging in that behaviour” (Hale LJ, for the Court). The Court also here identified the action as being one on the case: [12]. On intention generally in tort, see Devereux J, “Known Knowns and Known Unknowns: The Mysteries of Intentional Torts against the Person” (2014) 22 Tort L Rev 134.

¹⁰ *Wilkinson v Downton* [1897] 2 QB 57, 59.

¹¹ *Wilkinson v Downton* [1897] 2 QB 57, 60.

¹² *Dulieu v White and Sons* [1901] 2 KB 669, 682 (Phillimore J); *Janvier v Sweeney* [1919] 2 KB 316, 322 (Bankes LJ), 328 (AT Lawrence J); *Khorasandjian v Bush* [1993] QB 727, 735 (Dillon LJ, with whom Rose LJ agreed).

¹³ *Khorasandjian v Bush* [1993] QB 727 (Dillon LJ, with whom Rose LJ agreed); *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310, 401 (Lord Ackner).

¹⁴ *Wong v Parkside Health NHS Trust* [2001] EWCA Civ 1721, [12] (Hale LJ, for the Court).

¹⁵ *Khorasandjian v Bush* [1993] QB 727 (overturned only so far as the decision relates to issues of private nuisance in *Hunter v Canary Wharf Ltd* [1997] AC 655).

¹⁶ Peter Handford writes that at one time, the distinction between trespass and case was made on the basis that the former involved direct harm and the latter involved indirect harm (eg *Reynolds v Clarke* (1795) 1 Str 634; 93 ER 747). This distinction broke down when courts began to accept actions on the case involving direct harm (eg *Williams v Holland* (1833) 10 Bing 112; 131 ER 848); Handford P, “Intentional Negligence: A Contradiction in Terms?” (2010) 32 Syd LR 29, 35-39.

¹⁷ Lunney M, “Practical Joking and its Penalty: *Wilkinson v Downton* in Context” (2002) 10 Tort L Rev 168 at 186.

¹⁸ *Wilkinson v Downton* [1897] 2 QB 57, 58.

¹⁹ *Wilkinson v Downton* [1897] 2 QB 57, 60.

²⁰ *Wilkinson v Downton* [1897] 2 QB 57, 59.

²¹ *Wilkinson v Downton* [1897] 2 QB 57, 60.

²² “The intended consequences of a tort can never be too remote”: *Battista v Cooper* (1976) 14 SASR 225, 230.

²³ In the Australian context, such differences matter because many of the provisions of the civil liability legislation limiting the right to obtain compensation only apply to cases of negligence, as opposed to cases other than negligence: see for discussion Handford P, “Intention, Negligence and the Civil Liability Acts” (2012) 86 ALJ 100.

²⁴ For example, Maxwell P in *Giller v Procopets* (2008) 24 VR 1; [2008] VSCA 236.

In *Wong v Parkside Health NHS Trust*²⁵ (*Wong*), the Court of Appeal identified that the action was one on the case.²⁶ In *Wainwright v Home Office*²⁷ (*Wainwright*), Lord Woolf CJ in the Court of Appeal denied that the *Wilkinson* action was on the case, finding that it was closer to trespass than negligence.²⁸ Woolf CJ also agreed with the formulation of the tort in terms of “extreme and outrageous conduct intentionally or recklessly causing harm”, provided bodily harm resulted.²⁹ Buxton LJ denied that the *Wilkinson* principle was a case of trespass.³⁰ On appeal, Lord Hoffmann (with whom all other Lords agreed) took a similar position to Buxton LJ, finding that *Wilkinson* had “nothing to do” with trespass to the person.³¹ Lord Hoffmann suggested that *Wilkinson* had largely been subsumed into the law of negligence. He explained the *Wilkinson* decision as largely a response to the difficulties caused by the Privy Council decision in *Victorian Railway Commissioners v Coultas*³² (*Coultas*), which had denied a claim for psychiatric injury. It followed that since negligence law now recognised such claims, “that leaves *Wilkinson v Downton* with no leading role in the modern law”.³³ He claimed that by the time of *Janvier v Sweeney*³⁴ (*Janvier*) in 1919, the law had been able to “comfortably accommodate” *Wilkinson* in the law of nervous shock caused by negligence.³⁵ Elsewhere he questioned the need for a recognised psychiatric injury.³⁶ At this point, the principle of *Wilkinson* as a separate identifiable cause of action appeared dead in English law.

Wilkinson appears to have gained a new lease on life in the recent United Kingdom Supreme Court decision of *Rhodes v OPO*³⁷ (*Rhodes*). The case involved very sad facts. James Rhodes, an accomplished musician, wished to publish memoirs of his life. The memoirs included graphic accounts of occasions when Mr Rhodes suffered horrific sexual and emotional abuse, its long-term impact, and his significant lifetime achievement in the face of such revolting childhood abuse. There

²⁵ *Wong v Parkside Health NHS Trust* [2001] EWCA Civ 1721.

²⁶ *Wong v Parkside Health NHS Trust* [2001] EWCA Civ 1721, [12] (Hale LJ, for the Court).

²⁷ *Wainwright v Home Office* [2001] EWCA Civ 2081, [48]-[49] (with whom Mummery LJ agreed, [56]).

²⁸ This position is also taken by Wotherspoon S, “Resuscitating the *Wilkinson v Downton* Tort in Australia” (2011) 85 ALJ 37, 50. In the United States context, see Fraker R, “Reformulating Outrage: A Critical Analysis of the Problematic Tort of IIED” (2008) 61 *Vanderbilt Law Review* 983, 1008: “intentional infliction of emotional distress becomes a clearer doctrine when treated as analogous to assault”. Lord Denning in *Letang v Cooper* [1965] 1 QB 232, 239 (with whom Danckwerts LJ agreed) stated that the past distinction between trespass and case was obsolete, and that the distinction was now between actions where the defendant acted intentionally (trespass) or unintentionally (negligence). A similar view was taken by the High Court in *Williams v Milotin* (1957) 97 CLR 465, 470 (Dixon CJ, McTiernan, Williams, Webb and Kitto JJ), at least to the effect that if the defendant’s conduct had been shown to be intentional, “the action could have been brought in trespass and not otherwise”; see also *New South Wales v Lepore* (2003) 212 CLR 511; [2003] HCA 4, 602-603 (Gummow and Hayne JJ) (“intentional infliction of harm cannot be pleaded as negligence”); but see *Stingel v Clark* (2006) 226 CLR 442; [2006] HCA 37 at 452 (Gleeson CJ, Callinan, Heydon and Crennan) (“trespass to the person might be intentional or unintentional”). Clearly intention is an element of the *Wilkinson* action, placing it in the trespass realm rather than the negligence realm.

²⁹ *Wainwright v Home Office* [2001] EWCA Civ 2081, [49]; this is similar to the concept as applied in United States and Canadian law, and a formulation to which the Court in the recent decision of *Rhodes* did not object.

³⁰ *Wainwright v Home Office* [2001] EWCA Civ 2081, [72]. This is the position taken by Watson P, “Searching the Overfull and Cluttered Shelves: *Wilkinson v Downton* Revisited” (2004) 23 U Tas LR 264, 289: “an action based on *Wilkinson* is not trespass”; and Witting C, “Tort Liability for Intended Mental Harm” (1998) 21 UNSWLJ 55, 61, referring to the “action on the case for the intentional infliction of mental harm”.

³¹ *Wainwright v Home Office* [2004] 2 AC 406; [2003] UKHL 53, [47].

³² *Victorian Railway Commissioners v Coultas* (1888) 13 App Cas 222.

³³ *Wainwright v Home Office* [2004] 2 AC 406; [2003] UKHL 53, [41].

³⁴ *Janvier v Sweeney* [1919] 2 KB 316.

³⁵ *Wainwright v Home Office* [2004] 2 AC 406; [2003] UKHL 53, [40]. This is despite the fact that it was only in 1932 when English law recognised a generalised duty of care as integral to the law of negligence: *Donoghue v Stevenson* [1932] AC 562. Prior to this, recognition of a duty of care was based on categories. It is unlikely that the facts of *Wilkinson v Downton* (Mrs Wilkinson and Mr Downton were not in an established category) would have fitted one of the categories in which a duty of care would be found to be owed.

³⁶ *Hunter v Canary Wharf Ltd* [1997] AC 655, 707.

³⁷ [2015] UKSC 32.

was no dispute about the truthfulness of the account. His ex-wife sought to prevent publication of the book, due to the possible effect that publication of it would have on their child. Her claims included a *Wilkinson* claim that Mr Rhodes, in publishing the book, would have committed the tort of intentional infliction of emotional harm on their son. She also brought a claim based on negligence, but the courts below had found that there was no claim here for negligence. This forced the Supreme Court to consider whether a *Wilkinson* claim was possible in the absence of a negligence claim, or whether, as suggested in *Wainwright*, *Wilkinson* had effectively been subsumed into the law of negligence, such that a finding here that there was no negligence action was effectively fatal to a claim based on *Wilkinson* reasoning. All members of the Court confirmed the continued existence of a *Wilkinson* claim, quite independently of a claim in negligence. Everything that the members of the Court said about the parameters of the doctrine was obiter, since none of them found that the principle applied to the present case. They rejected the application for an injunction to prevent publication of the book.

Lady Hale and Lord Toulson (with whom Lords Clarke and Wilson agreed) (the first joint reasons) stated there could be good reasons of social policy for distinguishing between cases where a person causes another physical or psychological injury or illness by deliberately telling them a false story (*Wilkinson*), and cases involving the careless passing on of information (negligence).³⁸ The first joint reasons expressed disagreement with the views of Lord Hoffmann in *Wainwright*, that the decision in *Wilkinson* was purely explicable by the Privy Council decision in *Coultas*, that Wright J had invented a concept of “imputed intention” to get around the negligence issue, and that by the time of the *Janvier* decision in 1919 the facts of *Wilkinson* could be comfortably fitted within negligence. They concluded that Lord Hoffmann’s reasoning “shows the pitfalls of interpreting a decision more than a century earlier without a full understanding of jurisprudence and common legal terminology of the earlier period”.³⁹ *Coultas* was not binding on Wright J. Negligence law at the time of *Janvier* did not permit a claim for psychiatric injury through fear of harm to another person, only for harm to oneself.⁴⁰ They found there were principled reasons for differentiating between negligence and intent, because they involved “very different fault elements”.⁴¹ The notion of imputed intention was part of the mainstream of legal thought at the time.⁴²

The first joint reasons found that three elements were required for a *Wilkinson* action to succeed:

- (a) a conduct element – requiring words or conduct directed at the claimant for which there was no justification or excuse;⁴³
- (b) a mental element – requiring an intention⁴⁴ to cause at least severe mental or emotional distress;⁴⁵ and
- (c) the consequence element – requiring physical harm or recognised psychiatric illness.⁴⁶

Lord Neuberger (with whom Lord Wilson agreed) (second joint reasons) made some interesting general observations. They wondered whether it was desirable to develop one rule that was equally

³⁸ *Rhodes v OPO* [2015] UKSC 32, [42].

³⁹ *Rhodes v OPO* [2015] UKSC 32, [62].

⁴⁰ *Rhodes v OPO* [2015] UKSC 32, [62]–[63].

⁴¹ *Rhodes v OPO* [2015] UKSC 32, [63].

⁴² *Rhodes v OPO* [2015] UKSC 32, [62].

⁴³ The first joint reasons expressly left open whether future courts might adopt the terminology of “extreme, flagrant or outrageous” conduct which had gained currency in Canada (*Rhodes v OPO* [2015] UKSC 32, [88]), as did the second joint reasons: [110].

⁴⁴ Here the first joint reasons accepted that such intention could be “inferred” (*Rhodes v OPO* [2015] UKSC 32, [81]) (without elaborating on the precise circumstances in which such an inference could be made), but rejected the language of an intention “imputed” by law, as a vestige of a previous age: [81]. Recklessness would be insufficient: [87]. Compare the view of Handford P, “*Wilkinson v Downton* and Acts Calculated to Cause Physical Harm” (1985) 16 UWALR 31, 40 as to what wilful conduct encompasses recklessness.

⁴⁵ The first joint reasons expressed that the concept of severe mental or emotional distress “should not be understated”: *Rhodes v OPO* [2015] UKSC 32, [87].

⁴⁶ *Rhodes v OPO* [2015] UKSC 32, [88].

applicable to distressing words and actions.⁴⁷ They accepted the existence of the *Wilkinson* principle as a standalone principle,⁴⁸ but insisted that it be kept within manageable bounds given the importance of freedom of expression.⁴⁹ They were wary of being overly prescriptive in setting out the requirements of the principle, given the range of different scenarios to which it could be applied, being content to allow the law to develop in this area in the typical common law manner, although they also acknowledged the need for clarity in the law.⁵⁰

Having said that, they indicated the elements that might be necessary to establish a *Wilkinson* claim:

- (a) the statement was untrue⁵¹ or was a threat or insult;
- (b) it was gratuitous;⁵²
- (c) there was an intention on the defendant's part to cause the claimant distress,⁵³ which is the primary purpose, and the distress caused must be significant;⁵⁴ and
- (d) the statement must be directed to the plaintiff.⁵⁵

The second joint reasons concluded that it was not necessary for the plaintiff to demonstrate they had suffered a recognised psychiatric disease.⁵⁶ So while the first joint reasons and second joint reasons expressed their tests differently, there is a broad similarity in approach, with perhaps the key difference being whether the plaintiff must show they suffered a recognised psychiatric disease and/or physical harm. The most important take-out message from *Rhodes*, however, may be that the death knell for *Wilkinson* that *Wainwright* seemed to sound has been silenced by the United Kingdom Supreme Court.

Australia

The principle of *Wilkinson* was accepted by the High Court in *Bunyan v Jordan*⁵⁷ (*Bunyan*). The plaintiff relied on the *Wilkinson* principle when she alleged she suffered an emotional injury after overhearing her employer state that he was going to shoot himself or someone, and apparently had a gun in his possession. The claim was denied on the facts because the words were not directed to the

⁴⁷ *Rhodes v OPO* [2015] UKSC 32, [103].

⁴⁸ *Rhodes v OPO* [2015] UKSC 32, [104].

⁴⁹ *Rhodes v OPO* [2015] UKSC 32, [104].

⁵⁰ *Rhodes v OPO* [2015] UKSC 32, [104].

⁵¹ This test would be relevant if what was stated was presented as factual. Obviously, a threat or an insult cannot be "true".

⁵² Their Lordships were conscious of the limitations of such a concept here, particularly its possible uncertainty. They suggested it could be something like the "outrageous, flagrant or extreme" behaviour contemplated by the Canadian and United States courts; they were concerned that the doctrine not enter into territory regulated by the law of defamation, or limit the normal give and take of voluntary human discourse, where strongly worded opinions were sometimes expressed, or criticisms made.

⁵³ Their Lordships clearly contemplated something like inferred intention here, stating that "there are statements (and indeed actions) where consequences or potential consequences are so obvious that the perpetrator cannot realistically say that those consequences were unintended": [112]. Recklessness was not sufficient: [113].

⁵⁴ *Rhodes v OPO* [2015] UKSC 32, [114].

⁵⁵ *Rhodes v OPO* [2015] UKSC 32, [115].

⁵⁶ *Rhodes v OPO* [2015] UKSC 32, [114]-[119]. Lords Neuberger and Wilson thought that this was the position of Lord Hoffmann in *Wainwright v Home Office* [2004] 2 AC 406; [2003] UKHL 53: "Like Lord Hoffmann in *Wainwright*, I consider that there is much to be said for the view that the class of potential claimants should not be limited to those who can establish that they suffered from a recognised psychiatric illness": [116]. This view of Lord Hoffmann's opinion is untenable, with respect: "the claimants can build nothing on *Wilkinson v Downton* ... It does not provide a remedy for distress which does not amount to a recognised psychiatric injury": *Wainwright*, [47] (with whom all other Lords agreed).

⁵⁷ *Bunyan v Jordan* (1937) 57 CLR 1.

plaintiff; an intention on the defendant's part to injure the plaintiff could not be established. It could not reasonably have been expected that a person hearing what the defendant said and did would suffer an emotional injury as a result.⁵⁸

The High Court decision in *Northern Territory v Mengel*⁵⁹ (*Mengel*) did not directly address the question of *Wilkinson* liability beyond acknowledging its existence.⁶⁰ However, relevantly here, members of the High Court recognised the continued utility of recognising both intention and negligence as separate heads upon which tort liability could settle.⁶¹ The particular case concerned the tort of misfeasance in public office. The Court recognised that this tort, in common with other torts such as intimidation, conspiracy, inducing breach of contract and interference with trade or business relations, contained an intent requirement.⁶²

There was speculation as to whether the decision of the House of Lords in *Wainwright*, casting doubt on the continued viability of *Wilkinson* as a separate cause of action (as noted above), a decision that the United Kingdom Supreme Court recently turned against, would be applied in Australia.⁶³ Serious doubt was cast on the continuing utility of *Wilkinson* in Australia in *Magill v Magill*⁶⁴ (*Magill*). Citing *Wilkinson* and *Janvier*, Gummow Kirby and Crennan JJ stated that:

Subsequent developments in Anglo-Australian law recognise these cases as early examples of recovery for nervous shock, by reference to an imputed intention to cause physical harm, a cause of action later subsumed under the unintentional tort of negligence.⁶⁵

In *Monis v The Queen*,⁶⁶ two of the Justices referred to *Wilkinson*; one expressly left open the question of the extent to which the doctrine retained independent status;⁶⁷ the other appeared to accept the continued existence of the doctrine.⁶⁸

These views in *Magill*, criticised by scholars⁶⁹ and not necessarily shared by Gleeson CJ,⁷⁰ mirrored the view reached by Lord Hoffmann for the Court in *Wainwright*, suggesting the death of *Wilkinson* as a separate and independent legal principle.

⁵⁸ *Bunyan v Jordan* (1937) 57 CLR 1, 11-12 (Latham CJ), 15 (Rich J), 17 (Dixon J) and 18 (McTiernan J); Evatt J agreed that the *Wilkinson* principle was part of Australian law, but dissented on the basis that it gave the plaintiff a good cause of action on the facts: 18.

⁵⁹ *Northern Territory v Mengel* (1995) 185 CLR 307.

⁶⁰ *Northern Territory v Mengel* (1995) 185 CLR 307, 347 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ).

⁶¹ "The recent trend of legal development, here and in other common law countries, has been to the effect that liability in tort depends on either the intentional or the negligent infliction of harm": *Northern Territory v Mengel* (1995) 185 CLR 307, 341 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ); with whom Deane J agreed, 368.

⁶² *Northern Territory v Mengel* (1995) 185 CLR 307, 342-343; to like effect Brennan J, 356, and Deane J, 370.

⁶³ After discussing *Wainwright* and what McPherson JA said in *Carrier v Bonham* [2002] 1 Qd R 474; [2001] QCA 234, Des Butler said "it may be, therefore, that Australian courts should also take the view that the rule enunciated in *Wilkinson* was a creature of its time and is of limited utility today": Butler D, "A Tort of Invasion of Privacy in Australia?" (2005) 29 MULR 339, 367. Professor Butler was speaking before three members of the High Court in *Magill v Magill* (2006) 226 CLR 551; [2006] HCA 51 seemed to accept this position.

⁶⁴ *Magill v Magill* (2006) 226 CLR 551; [2006] HCA 51, 589.

⁶⁵ This is similar to the view of *Wilkinson v Downton* expressed by Gummow and Kirby JJ in *Tame v New South Wales* (2002) 211 CLR 317; [2002] HCA 35, 376. Gummow and Kirby JJ also agreed with the traditional distinction in this area between recognised psychiatric injuries, and other forms of emotional disturbance: 382.

⁶⁶ *Monis v The Queen* (2013) 249 CLR 92; [2013] HCA 4.

⁶⁷ *Monis v The Queen* (2013) 249 CLR 92; [2013] HCA 4, [223] (Hayne J).

⁶⁸ *Monis v The Queen* (2013) 249 CLR 92; [2013] HCA 4, [242] (Heydon J).

⁶⁹ S Wotherspoon, n 28, 48-49. Peter Handford, the leading scholar in this area, has stated that the *Wilkinson* doctrine is not based on negligence: Handford, n 44, 40; Handford, n 16, 58: "the words calculated to cause physical harm must imply at least recklessness rather than mere negligence"; Reaume D, "The Role of Intention in the Tort of *Wilkinson v Downton*" in Neyers JW, Chamberlain E and Pitel SGA (eds), *Emerging Issues in Tort Law* (Hart Publishing, 2007) 533-534; compare Yeo S, "Comparing the Fault Elements of Trespass, Action on the Case and Negligence" (2001) 5 *Southern Cross University Law Review* 142, 153 says that *Wilkinson* is a negligence case (and so applauds attempts to subsume *Wilkinson* into the general

The *Wilkinson* action continued, and continues, to be recognised at State appellate level. It was recognised in the Queensland Court of Appeal,⁷¹ New South Wales Court of Appeal,⁷² and Victorian Court of Appeal.⁷³ In *Nationwide News Pty Ltd v Naidu*⁷⁴ (*Nationwide News*), Spigelman CJ rejected the suggestion of three Justices in *Magill* that *Wilkinson* had been subsumed into the law of negligence.⁷⁵ He confirmed there was good sense in maintaining a distinction between intentional acts and negligent acts; the former was not confined by a test of foreseeability and did not involve reasonableness.⁷⁶ The civil liability legislation, limiting the amount of compensation available to plaintiffs, was often directed only to negligence actions.⁷⁷ Spigelman CJ agreed the *Wilkinson* action was confined to cases where the plaintiff suffered a recognised psychiatric condition.⁷⁸ He found recklessness would be sufficient to satisfy the *Wilkinson* intention aspect.⁷⁹

In *Giller v Procopets*⁸⁰ (*Giller*), Maxwell P rejected the need to show physical harm as a signifier of psychological harm as “anachronistic”.⁸¹ He also rejected labels such as “nervous shock” and “recognised psychiatric illness” in the context of attempts to limit liability in this area and in negligence.⁸² For Maxwell P, it was not necessary in order for a plaintiff to recover here that they show they had suffered a recognised psychiatric injury.⁸³ Maxwell P said the focus should be on the nature and extent of the plaintiff’s injury caused by the defendant’s intentional conduct,⁸⁴ subject to a limit of reasonable foreseeability.⁸⁵ Ashley JA found that the plaintiff still needed to show either

mainstream of negligence law). Mark Lunney has also expressed agreement with subsumption: “when the critics of *Coultas* prevailed and the law of negligence in England allowed recovery for physical manifestations of nervous shock four years after *Wilkinson*, the cause of action it created became redundant”: Lunney, n 17, 184.

⁷⁰ Gleeson CJ said that *Wilkinson v Downton* [1897] 2 QB 57 and *Janvier v Sweeney* [1919] 2 KB 316 would now probably be explained on the basis of “negligence, or intentional infliction of personal injury”: *Magill v Magill* (2006) 226 CLR 551; [2006] HCA 51, 562. Hayne and Heydon JJ did not address the issue.

⁷¹ *Carrier v Bonham* [2002] 1 Qd R 474; [2001] QCA 234: there McPherson JA argued that the distinction between intentional and negligent acts should be abolished: “it no longer matters whether the act was done intentionally or negligently or partly one and partly the other. What matters is whether the consequences of the conduct, whether foreseen or not, were reasonably foreseeable and are such as should have been averted or avoided. What we really have now is not two distinct torts of trespass and negligence, but a single tort of failing to use reasonable care to avoid damage however caused”: [27].

⁷² *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 471; [2007] NSWCA 377.

⁷³ *Giller v Procopets* (2008) 24 VR 1; [2008] VSCA 236; *Carter v Walker* (2010) 32 VR 1; [2010] VSCA 340.

⁷⁴ *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 471; [2007] NSWCA 377.

⁷⁵ *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 471; [2007] NSWCA 377, [72]. In *Carter v Walker* (2010) 32 VR 1; [2010] VSCA 340, [271], all members of the Victorian Court of Appeal (Buchanan Ashley and Weinberg JJA) similarly found there were good reasons for distinguishing intentional from negligent torts.

⁷⁶ *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 471; [2007] NSWCA 377, [74].

⁷⁷ *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 471; [2007] NSWCA 377, [70].

⁷⁸ *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 471; [2007] NSWCA 377, [73].

⁷⁹ *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 471; [2007] NSWCA 377, [80].

⁸⁰ *Giller v Procopets* (2008) 24 VR 1; [2008] VSCA 236.

⁸¹ *Giller v Procopets* (2008) 24 VR 1; [2008] VSCA 236, [31].

⁸² *Giller v Procopets* (2008) 24 VR 1; [2008] VSCA 236, [31].

⁸³ JA Neave said it was “arguable” that such a control mechanism was unnecessary in the context of the *Wilkinson* tort (*Giller v Procopets* (2008) 24 VR 1; [2008] VSCA 236, [462]), but did not decide ([471]). This mirrors the position reached by the Scottish Law Commission in its *Report on Damages for Psychiatric Injury* (No 196, 2004); see also *Mason v Westside Cemeteries Ltd* (1996) 135 DLR (4th) 361, 379-380: “it is difficult to rationalise awarding damages for physical scratches and bruises of a minor nature but refusing damages for deep emotional distress which falls short of a psychiatric condition”. Francis Trindade agreed that it ought not be necessary for a plaintiff in this situation to show “nervous shock”; he said that severe mental distress alone was (or should be) sufficient: Trindade F, “The Intentional Infliction of Purely Mental Distress” (1986) 6 Oxford J Legal Stud 219, 227.

⁸⁴ *Giller v Procopets* (2008) 24 VR 1; [2008] VSCA 236, [31].

⁸⁵ *Giller v Procopets* (2008) 24 VR 1; [2008] VSCA 236, [34].

physical injury or recognised psychiatric injury.⁸⁶ Neave JA suggested that the concept of “extreme and outrageous conduct” might operate as a sensible control on the availability of damages in the *Wilkinson* context.⁸⁷

As a result, the current Australian position on the status of *Wilkinson* as an independent tort is murky. Members of the High Court, taking on board the House of Lords decision in *Wainwright*, had been suggesting the doctrine was no longer to be considered as an independent cause of action. However, some judges in State courts clearly did not accept this. And given the United Kingdom’s highest court has appeared to grant *Wilkinson* a reprieve as an independent cause of action, future steps by Australia’s highest court in this area are hard to predict.

North America

Early in the 20th century, American courts recognised that a person who suffered emotional injury from the intentional actions of another might have an action against that person.⁸⁸ American scholars have proven influential in this area.⁸⁹ The *Restatement (Third) of Torts* confirms that a person who, by extreme and outrageous conduct, intentionally or recklessly causes severe emotional harm is liable for it, and for any bodily harm caused.⁹⁰ This cause of action does not require bodily injury.⁹¹ The concept of “outrageous conduct” has not been defined, but it clearly means something more than mere insult or indignity.⁹² The tort of intentional infliction of emotional distress is recognised in all 50 American states.⁹³ This is similar to the action in Canada, permitted for acts or statements that are extreme, flagrant or outrageous, calculated to produce harm, and in fact causing harm.⁹⁴ Fears that

⁸⁶ *Giller v Procopets* (2008) 24 VR 1; [2008] VSCA 236, [164].

⁸⁷ *Giller v Procopets* (2008) 24 VR 1; [2008] VSCA 236, [477].

⁸⁸ *Hickey v Welch* 91 Mo App 4 (1901). At this time, physical injury was necessary.

⁸⁹ At a time when the First *Restatement* did not recognise a *Wilkinson* claim as a standalone tort, and did not permit recovery without physical injury, Calvert Magruder pushed the boundaries in 1936 when he suggested that a claim would/should be recognised where “one who without just cause or excuse, and beyond all the bounds of decency, purposely causes a disturbance to another’s mental and emotional tranquillity of so acute a nature that harmful physical consequences might be not unlikely to result, is subject to liability in damages for such mental and emotional disturbance even though no demonstrable physical consequences actually ensue”: Magruder C, “Mental and Emotional Disturbance in the Law of Torts” (1936) 49 Harv L Rev 1034, 1058. These words were to prove influential in the drafting of the Second *Restatement*, largely mirrored in this context in the Third; see also Prosser, n 4.

⁹⁰ *Restatement (Third) of Torts*, s 104; this is largely unchanged from the wording of the *Restatement (Second) of Torts*. The first *Restatement* (1934) only permitted a “parasitic” claim for emotional injury; in other words, the plaintiff would have to show the defendant had committed another tort; intentional infliction of emotional injury was not a standalone tort.

⁹¹ *Barnett v Collection Service Co* 242 NW 25 (1932): “the rule seems to be well-established where the act is wilful or malicious, as distinguished from being merely negligent, that recovery may be had for mental pain, though no physical injury results”. Handford explains that the American law evolved here; originally physical injury was required, but this requirement was relaxed by the 1930s: Handford P, “*Wilkinson v Downton*: Pathways to the Future?” (2012) 20 Tort L Rev 145, 149-151; Handford P, “Intentional Infliction of Mental Distress: Analysis of the Growth of a Tort” (1979) 8 *Anglo-American Law Review* 1, 15-16. See also Marrs S, “Mind Over Body: Trends Regarding the Physical Injury Requirement in Negligent Infliction of Emotional Distress and ‘Fear of Disease’ Cases” (1992) 28 *Tort Trial and Insurance Practice Law Journal* 1, 4: “the modern judicial trend is to abolish the physical manifestation requirement and permit a general negligence cause of action for the infliction of serious emotional distress without regard to whether the plaintiff suffered any physical injury or illness as a result”.

⁹² Rapp G, “Defense against Outrage and the Perils of Parasitic Torts” (2010) 45 *Georgia Law Review* 107, 134-135; Calvert Magruder said that “against a large part of the frictions and irritations and clashing of temperaments incidental to participation in a community life, a certain toughening of the mental hide is a better protection than the law could ever be”: Magruder, n 89, 1035. Interestingly, David Ibbetson recounts that Justinian’s *Institutes* recognised four specific delicts, one of which was injuria, translated as “outrageous behaviour”: Ibbetson D, *A Historical Introduction to the Law of Obligations* (Oxford University Press, 1999) 6.

⁹³ R Fraker, n 28, 1000.

⁹⁴ *High Parklane Consulting Inc v Royal Group Technologies Ltd* 44 CCLT (3d) 169 (Ontario Supreme Court, 2007), [31] (Perell J); *Rehemtulla v Vanfed Credit Union* 29 CCLT 78 (British Columbia Supreme Court, 1984), [52] (McLachlin J, as she then was).

recognition of such a tort would create an unmanageable flood of litigation did not materialise.⁹⁵ An act is “calculated” to cause harm in Canada if the actor wishes to produce the consequences that follow from it, or the consequences are known to be substantially certain to follow.

This cause of action is subject to the United States Constitution, the First Amendment to which protects freedom of speech. This means that conduct that would otherwise amount to extreme and outrageous conduct causing severe emotional harm may not be actionable, for instance the conduct of a protest near a funeral where offensive signs were paraded, because of the protesters’ constitutional right to free speech.⁹⁶

In summary, the three jurisdictions studied are in quite different places concerning the status of the *Wilkinson* action. In the United Kingdom the action was virtually killed off, before being resurrected earlier this year. In Australia, members of the High Court have suggested it should be killed off as an independent action, but some justices in some State courts have disagreed. In the United States and Canada, such an action is available for outrageous behaviour causing severe emotional distress, and it is not necessary to show a recognised psychiatric illness in order to obtain compensation, as has been required elsewhere. Fears of a flood of litigation in this area have not materialised.

PARAMETERS OF THE TORT

Before considering the future uses for the tort, logically the issue must first be resolved as to whether *Wilkinson* should remain as a stand-alone tort or whether it should be subsumed into negligence. As indicated above, the House of Lords had suggested in 2004 in *Wainwright* that the action ought to be seen as now subsumed by the law of negligence. However, in 2015 the Supreme Court has reasserted the independent nature of the *Wilkinson* action. Members of the Australian High Court in *Tame v New South Wales*,⁹⁷ *Mengel* and *Magill* suggested that the tort should now be considered to be part of the law of negligence, but this was never a majority position in any single case. The *Restatement (Third) of the Law of Torts*, and the Canadian common law, recognise the *Wilkinson*-type action as an independent action. Perhaps this question can be seen as a mere subset of the larger question of whether there is any purpose in preserving the distinction between intentional and unintentional torts, the question asked and answered by McPherson JA in *Carrier v Bonham*⁹⁸ (*Carrier*).

This is a distinction that the law has long made. Intentional wrongs have been recognised as legal wrongs for many centuries. Criminal law, which grew out of the law of tort, places great emphasis on whether acts were intended or not. The fact that an act was intended, as opposed to the mere fact that the act was committed, typically renders the act much more serious in the eyes of the criminal law. Most fundamentally, the question of intention separates the fundamental concepts of murder and manslaughter. It is natural that the law should have the need to assess the relative gravity of conduct, and the fact that an act was intended, or not intended, is surely an important factor in this regard. Elsewhere in the law of obligations, intention, specifically the intention to create legal relations, helps determine legal rights and consequences.

Specifically in this area of personal injury, there is inherent sense that the actions of a person that were intentional may well be visited by a larger damages payout for any injury (ie because the requirement of foreseeability does not apply, or because of limits to recovery under relevant civil liability legislation in Australia for negligence claims) than if the acts were merely negligent. And in some cases, recovery may be possible for damage caused by intended acts where it is not possible for

⁹⁵ Rapp, n 92, 136.

⁹⁶ *Snyder v Phelps* 562 US 443 (2011); Jaffe E, “Sticks and Stones May Break My Bones but Extreme and Outrageous Conduct Will Never Hurt Me: The Demise of Intentional Infliction of Emotional Distress Claims in the Aftermath of *Snyder v Phelps*” (2011) 57 *Wayne Law Review* 473; Anastopoulou C and Crooks D, “Where’s the Outrage? ‘Outrageous’ Conduct in Analyzing the Tort of Intentional Infliction of Emotional Distress in the Wake of *Snyder v Phelps*” (2013) 19 *Texas Wesleyan Law Review* 667.

⁹⁷ *Tame v New South Wales* (2002) 211 CLR 317; [2002] HCA 35.

⁹⁸ *Carrier v Bonham* [2002] 1 Qd R 474; [2001] QCA 234.

unintended acts, because a duty of care does not exist.⁹⁹ To the extent that the law does and should reflect a level of moral blameworthiness for particular actions, there is a natural distinction between intentional acts and unintentional acts. An intentional wrong act would, all other things being equal, attract greater moral opprobrium than an unintentional wrong act. This sense was recognised by the Scottish Law Reform Commission, in its recommendation that the *Wilkinson* action should remain as an independent action, and the United Kingdom Supreme Court's recent finding that there were "good reasons of social policy"¹⁰⁰ for treating separately cases where a person deliberately does something which causes another injury, and where the actions are merely negligent – the actions involving "very different fault elements".¹⁰¹

In summary, the basis of the *Wilkinson* action should remain an intention on the defendant's part to cause the plaintiff a serious emotional injury. The court would be prepared to infer the existence of such an intention on the defendant's part based on the likelihood of their conduct causing such a harm. The author agrees with the requirement in the first joint reasons in *Rhodes* that the defendant's conduct must be without justification or excuse, which is not considered to require amplification here. It is debatable whether a requirement that the conduct be "outrageous" is necessary or advantageous, given other control mechanisms in this area, discussed below.

There has been some difference of opinion regarding whether the plaintiff bringing a *Wilkinson* claim must show they suffered a physical injury. Wright J in *Wilkinson* noted the plaintiff had suffered physical harm, in deciding she was entitled to compensation. Immediately after noting that the defendant had done a wilful act calculated to cause physical harm, and that the plaintiff had in fact suffered physical harm, he said that those propositions stated a good cause of action. These comments suggested that it might be necessary for a plaintiff wishing to bring a *Wilkinson* claim to show they had in fact suffered physical harm, as well as the psychiatric injury for which they claimed. This is sometimes described as the "parasitic" nature of recovery for psychiatric injury, dependent on the commission of another tort in order that it could be compensated. United States case law abandoned the requirement of physical injury in this context. In the United Kingdom there was apparently a gradual relaxation, with the Court of Appeal stating in 1993 that physical injury was required,¹⁰² but by 2001 stating that either physical harm or recognised psychiatric injury was required.¹⁰³ In *Rhodes*, the highest court in the United Kingdom reconfirmed that physical harm or recognised psychiatric illness was required for a *Wilkinson* action.¹⁰⁴ The question has not been considered in any detail in the (limited) Australian case law.

The law should not require that a person seeking compensation for a psychiatric injury show that they suffered a physical injury.¹⁰⁵ The author agrees with the view of Maxwell P in *Giller* that such a requirement is "anachronistic". It can suggest an ongoing suspicion regarding claims of emotional

⁹⁹ The High Court of Australia has used the denial of a duty of care as a control mechanism in relation to liability for negligence in a number of recent cases: *Hunter and New England Local Health District v McKenna* (2014) 253 CLR 270; [2014] HCA 44; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540; [2002] HCA 54.

¹⁰⁰ *Rhodes v OPO* [2015] UKSC 32, [42] (Lady Hale and Lord Toulson, with whom Lords Clarke and Wilson agreed). Lord Neuberger (with whom Lord Wilson agreed) did not specifically address the question, but agreed that *Wilkinson* was a cause of action independent of the law of negligence.

¹⁰¹ *Rhodes v OPO* [2015] UKSC 32, [63].

¹⁰² *Khorasandjian v Bush* [1993] QB 727, 735 (Dillon LJ, with whom Rose LJ agreed). This mirrored the view in *Dulieu v White and Sons* [1901] 2 KB 669, 673 (Kennedy J: "mental pain unaccompanied by any injury to the person cannot sustain an action") and 683 (Phillimore J); and by the Privy Council in *Victorian Railways Commissioner v Coultas* (1888) 13 Appeal Cases 222, 225 (Sir Richard Couch, for the Council).

¹⁰³ *Wong v Parkside Health NHS Trust* [2001] EWCA Civ 1721, [12] (Hale LJ for the Court); see also *Page v Smith* [1996] AC 155, 181 (Lord Browne-Wilkinson) and 197 (Lord Lloyd) (in relation to a requirement of either physical or psychiatric injury); *White v Chief Constable of South Yorkshire* [1999] 2 AC 455, 463 (Lord Griffiths).

¹⁰⁴ *Rhodes v OPO* [2015] UKSC 32, [88] (Lady Hale and Lord Toulson, with whom Lords Clarke and Wilson agreed); at [116] Lord Neuberger (with whom Lord Wilson agreed) doubted whether a recognised psychiatric condition was necessary.

¹⁰⁵ This view is shared by others who have also criticised this requirement: "once one identifies the intention to cause emotional distress as what makes the defendant's conduct wrong, it seems artificial to say that liability flows only from causing actual

injury; the law seems to feel “safer” dealing with the physical, rather than the emotional.¹⁰⁶ The need for a physical injury has not been considered by other Australian courts in this space, but there are good reasons to deny the need for a physical injury. That requirement may reflect the law’s past “awkwardness” in relation to emotional injury. Obviously there has been a long struggle in the law to recognise this kind of injury; there has been a lack of awareness and understanding of emotional injury; there has undoubtedly been the typical concern with floodgate consequences if damages for emotional injury were claimable; proving causation may be more problematic in this space than a simple infliction of physical injury, and the law needs to be able to weed out spurious claims.¹⁰⁷ The law has always been very comfortable dealing with physical injury. As a result, it is understandable that in the past, it required a claimant for psychiatric injury to show they suffered physical injury. It finds a sibling in the past reluctance to award compensation for economic loss suffered independently of physical injury. Some of the reasons for this reluctance overlap with those enumerated above in the context of psychiatric injury. The law eventually jettisoned the requirement, in order for economic loss to be claimed, that the plaintiff suffered physical injury (or property damage).¹⁰⁸ It must do the same here.

Neither should the law require that a person wishing to bring a *Wilkinson* action show they suffered a “recognised psychiatric injury”.¹⁰⁹ To clarify, the comments here are necessarily confined in nature. It cannot be argued here that the concept should be entirely stricken from the law of tort, because some of the civil liability legislation has embraced this concept in relation to unintentional wrongs.¹¹⁰ Comments regarding the need for a recognised psychiatric injury are thus necessarily mainly confined to the *Wilkinson* context, because the civil liability legislation may not cover such a claim, as it is an intent-based tort.¹¹¹ The comments in this article could also apply to those jurisdictions which do not use the concept of “recognised psychiatric illness” to limit liability in negligence, for example Queensland,¹¹² Victoria,¹¹³ and the Northern Territory.¹¹⁴

physical injury”: Reaume D, “Indignities: Making a Place for Dignity in Modern Legal Thought” (2003) 28 *Queen’s Law Journal* 61, 72; F Trindade, n 83, 230: “it should not be necessary that the mental distress produce physical harm or nervous shock in order to be labelled ‘serious’ (and be actionable under *Wilkinson*)”.

¹⁰⁶ Vines, San Roque and Rumble, n 4, 9: “psychiatric injury has been marginalised as a form of harm”.

¹⁰⁷ In *Tame v New South Wales* (2002) 211 CLR 317; [2002] HCA 35, 381, Gummow and Kirby JJ articulated four reasons for the distinction made in the law between psychiatric and physical injury: (a) psychiatric harm is less objectively observable than physical injury and therefore more likely to be trivial or fabricated and is more captive to shifting medical theories and conflicting expert evidence; (b) litigation in respect of purely psychiatric harm is likely to operate in an unconscious disincentive to rehabilitation; (c) permitting full recovery for purely psychiatric harm risks indeterminate liability; and (d) liability for purely psychiatric harm may impose an unreasonable or disproportionate burden on defendants.

¹⁰⁸ *Hedley Byrne and Co Ltd v Heller and Partners Ltd* [1964] AC 465.

¹⁰⁹ Peter Handford points out that although this phrase is commonly used, it is unclear by whom the particular psychiatric injury must be “recognised”: Handford, Mullany and Mitchell, n 2, 37.

¹¹⁰ *Civil Liability Act 2002* (NSW) s 31; *Civil Liability Act 1936* (SA) s 53(2); *Civil Liability Act 2002* (WA) s 5T; *Civil Liability Act 2002* (Tas) s 33; *Civil Law (Wrongs) Act 2002* (ACT) s 35.

¹¹¹ *Civil Liability Act 2002* (NSW) s 3B; *Wrongs Act 1958* (Vic) s 28C(2)(a); *Civil Liability Act 2002* (WA) s 3A (if the acts are also “unlawful”); and *Civil Liability Act 2002* (Tas) s 3B excludes intentional acts intended to cause injury from the operation of the legislation, including limits on compensation for mental harm; there is some debate regarding whether these provisions would apply to a *Wilkinson* claim: see Handford, n 23, 110 and 116. With respect, this author believes that “intent” in these provisions could include the kind of inferred intent relevant in *Wilkinson* claims, but accepts that learned authors have expressed other views.

¹¹² The Queensland legislation does not contain specific provisions in relation to mental harm.

¹¹³ The Victorian legislation uses the concept of “significant injury”, rather than recognised psychiatric injury: *Wrongs Act 1958* (Vic) s 28LE.

¹¹⁴ *Personal Injuries (Liabilities and Damages) Act 2003* (NT).

The English courts have required a “recognised psychiatric injury” in the *Wilkinson* context (and the negligence context, for that matter),¹¹⁵ and they largely continue to do so. Recently in *Rhodes* four members of the United Kingdom Supreme Court reiterated the need for a “recognised psychiatric illness” as an alternative to physical harm.¹¹⁶ Two members suggested it may not be necessary for the plaintiff to show they suffered a recognised psychiatric illness.¹¹⁷ This issue was not directly addressed by the High Court in *Bunyan*. Two members of the Court acknowledged that the plaintiff suffered a “neurasthenic condition”,¹¹⁸ or nervous breakdown, and that this would be sufficient injury for a *Wilkinson* claim, provided other elements were met (on the facts, they were not). It is difficult to translate the language of “neurasthenic condition” to that of “recognised psychiatric injury”; psychology does not recognise any more the concept of a “neurasthenic condition”. In the related area of a claim in negligence, and recognising that the principle ought not necessarily be the same,¹¹⁹ members of the High Court indicated in *Tame* that a “recognised psychiatric illness” (a phrase also adopted in some civil liability legislation)¹²⁰ would be required in order to obtain compensation for negligence,¹²¹ and mental distress was not sufficient. The reasoning for this assertion will be explored shortly. The lower Australian courts have divided on the point, with Spigelman CJ in *Nationwide News* agreeing that a recognised psychiatric injury was required.¹²² In *Giller* three positions were taken; Maxwell P said a recognised psychiatric injury should not be required,¹²³ Neave JA left the matter open,¹²⁴ and Ashley JA found it was required.¹²⁵ The American¹²⁶ and Canadian¹²⁷ positions are that recognised psychiatric injury is not required.

¹¹⁵ *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310, 397 (Lord Keith), 399 (Lord Ackner), 416 (Lord Oliver), 419 (Lord Jauncey); *White v Chief Constable of South Yorkshire* [1999] 2 AC 455, 491: “the law cannot compensate for all emotional suffering even if it is acute and truly debilitating” (Lord Steyn).

¹¹⁶ *Rhodes v OPO* [2015] UKSC 32, [88] (Lady Hale and Lord Toulson, with whom Lords Clarke and Wilson agreed); *Wainwright v Home Office* [2003] UKHL 53, [47] (Lord Hoffmann, for the Court).

¹¹⁷ *Rhodes v OPO* [2015] UKSC 32, [116] (Lord Neuberger, with whom Lord Wilson agreed). It is noted that Lord Wilson agreed with both judgments, although on this point they are contradictory. Lord Wilson’s view on this precise point is thus not entirely clear.

¹¹⁸ *Bunyan v Jordan* (1937) 57 CLR 1, 15 (Rich J), 16 (Dixon J).

¹¹⁹ In fact, the Scottish Law Commission concluded that while proof of a recognised psychiatric injury should be necessary in cases of negligence, it should not be required in the context of an intention-based *Wilkinson* claim: Scottish Law Commission, n 83, [3.7]. This difference in approach is magnified by the civil liability legislation passed by each Australian State and Territory (except NT) in the early 2000s, which often purports to limit liability for mental harm to cases of “recognised psychiatric illness” (see below). However, these provisions do not generally apply to intentional acts.

¹²⁰ For example, *Civil Liability Act 2002* (NSW) s 31; *Civil Liability Act 2002* (WA) s 5T; *Civil Liability Act 2002* (Tas) s 33; *Civil Liability Act 1936* (SA) s 53(2) and (3); and *Civil Law (Wrongs) Act 2002* (ACT) s 35 confine liability to cases where the plaintiff can demonstrate they have suffered a recognised psychiatric illness. Note, however, that the NSW, WA and Tas provisions do not apply to cases of *intentional* wrongdoing causing intended physical injury: *Civil Liability Act 2002* (NSW) s 3B; *Civil Liability Act 2002* (WA) s 3A; *Civil Liability Act 2002* (Tas) s 3B. The Victorian provision confines liability for non-economic harm to “significant injury” (but again, intentional acts are excluded from the limitation): *Wrongs Act 1958* (Vic) ss 28LE and 28C(2)(a). The Queensland Act does not contain specific provisions limiting recovery for non-economic loss: *Civil Liability Act 2003* (Qld).

¹²¹ *Tame v New South Wales* (2002) 211 CLR 317; [2002] HCA 35, 329 (Gleeson CJ), 339 (Gaudron J), 382 (Gummow and Kirby JJ); McHugh J (349) and Callinan J (439) used the phrase “nervous shock”, which is typically equated to a recognised psychiatric illness (eg *Hinz v Berry* [1970] 2 QB 40, 42-43: “Damages are ... recoverable for nervous shock, or to put it in medical terms, for any recognisable psychiatric illness caused by the breach of duty by the defendant”). Hayne J recognised that Australian law had rejected claims for mental distress falling short of psychiatric illness, while acknowledging the expert opinion that the difference between the two was one of degree rather than kind (415), and acknowledging that little attention had been given to identifying the basis upon which a distinction between psychiatric injury and mental distress should be made: 416.

¹²² *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 471; [2007] NSWCA 377, [73].

¹²³ *Giller v Procopets* (2008) 24 VR 1; [2008] VSCA 236, [31].

¹²⁴ *Giller v Procopets* (2008) 24 VR 1; [2008] VSCA 236, [471].

¹²⁵ *Giller v Procopets* (2008) 24 VR 1; [2008] VSCA 236, [164] (or physical injury).

¹²⁶ The *Restatement (Third) Law of Torts* allows recovery for “severe emotional harm”.

The articulation of the justification for the distinction between psychiatric injury and emotional distress occurred most fully in the judgment of Gummow and Kirby JJ in *Tame*. Their Honours recited some rationales for treating psychiatric injury differently from physical injury, including the familiar floodgates concern and that liability for psychiatric harm could pose an “unreasonable” or disproportionate burden on defendants, as well as speculation that litigation for psychiatric harm could provide a disincentive for rehabilitation, and that psychiatric injury was more likely to be trivial or fabricated, and was more captive to shifting medical theories and expert evidence.¹²⁸ They pointed out, with respect correctly, that some of these arguments could also be used to deny liability for physical injury.¹²⁹ They make clear that compensation for grief, sorrow, fright, distress or embarrassment are part of the ordinary incidents of life, and they should not be compensable in the law of tort.¹³⁰ The author agrees that to some extent, a person in a society must be hardened and resilient in the face of rudeness, hurtful words, rough language, insensitivity or lack of consideration by others. Not every slight or hurt feeling is, or should be, compensable. The trick for the law is being able to distinguish in this area between claims that warrant compensation, and those that don’t, and articulating a coherent basis upon which such distinction can be made.

In this light, it is understandable to some extent that Gummow and Kirby JJ used these arguments to justify maintaining the distinction between psychiatric injury and emotional distress.¹³¹ They found that the requirement to establish a recognised psychiatric illness reduced the scope for indeterminate liability or increased litigation. It restricted recovery for disorders capable of objective determination, and was based on a distinction that was principled, not pragmatic or idiosyncratic.¹³²

As the author has argued elsewhere, assertions that adoption of a particular principle have opened, or will open, the floodgates to litigation must be carefully considered, and where possible supported by evidence, rather than simple assertion. Courts scrupulously require evidence to support allegations; it is curious that in some cases judges make statements about the law, or the effect of legal principles upon practice, without supporting evidence. Gummow and Kirby JJ did not offer evidentiary support for their assertion that it was necessary to maintain the distinction between psychiatric injury and emotional distress in order to “reduce the scope for indeterminate liability or increased litigation”.

If we look for evidence, we might consider the experience of the United States. For approximately 50 years, the *Restatement (Second)* and now the *Restatement (Third) of the Law of Torts* has permitted recovery for “severe emotional harm”. Scholars from that jurisdiction have written that fears of

¹²⁷ *Mason v Westside Cemeteries Ltd* (1996) 135 DLR (4th) 361, 379-380: “it is difficult to rationalise awarding damages for physical scratches and bruises of a minor nature but refusing damages for deep emotional distress which falls short of a psychiatric condition”.

¹²⁸ *Tame v New South Wales* (2002) 211 CLR 317; [2002] HCA 35, 381; the Privy Council had referred to difficulties showing a causal link between the defendant’s actions and the plaintiff’s injuries, and the potential for imaginary claims: *Victorian Railways Commissioners v Coultas* (1888) 13 App Cas 222, 226 (Privy Council, on appeal from Victoria); see also for a consideration of policy factors, *White v Chief Constable of South Yorkshire* [1999] 2 AC 455, 493-494 (Lord Steyn).

¹²⁹ *Tame v New South Wales* (2002) 211 CLR 317; [2002] HCA 35, 382. See also Prosser, n 4, 875: “mental suffering is scarcely more difficult of proof, and certainly no harder to estimate in terms of money, than the physical pain of a broken leg, which never has been denied compensation; nor is there any physiological reason for regarding ‘physical pain’ as any less a mental phenomenon. The same courts have been entirely willing to allow large sums as damages for shock, fright, humiliation and other forms of mental anguish itself, whenever they accompany a slight physical injury”.

¹³⁰ *Tame v New South Wales* (2002) 211 CLR 317; [2002] HCA 35, 382: “emotional harm of that nature may be evanescent or trivial”. Perhaps at (or beyond) the logical limit of this principle, a father was denied a claim as representative of his two teenage daughters who were killed at the Hillsborough football stadium disaster on the basis that the fear and terror they must have felt in the moments before their death were “normal human emotions” for which damages were not available: *Hicks v Chief Constable of South Yorkshire* [1992] 2 All ER 65.

¹³¹ *Tame v New South Wales* (2002) 211 CLR 317; [2002] HCA 35, 382: “many of these concerns recede if full force is given to the distinction between emotional distress and a recognised psychiatric illness”. While President of the New South Wales Court of Appeal, Kirby P had criticised the “scarcely delineated distinction made between grief and suffering following tragic news and psychological or psychiatric injury”: *Coates v Government Insurance Office (NSW)* (1995) 36 NSWLR 1, 12.

¹³² *Tame v New South Wales* (2002) 211 CLR 317; [2002] HCA 35, 382.

indeterminate liability as a result have failed to materialise.¹³³ The actual experience, as opposed to assumption, has been that the tort has been little used in that country, and is certainly not being used to compensate spurious claims. Further, the retention of the word “severe” to describe the emotional harm compensated by the tort has been sufficient to deal with the concern expressed by Gummow and Kirby JJ in *Tame* that fleeting grief, sorrow, fright, distress or embarrassment not be compensated in this context. It is unlikely that fleeting distress would qualify as “severe” harm. It is unlikely that such conduct would qualify as “extreme and outrageous”. Both are required in order for a plaintiff to recover in the United States. American law takes into account the need to weed out claims based on “mere” rudeness, insensitivity, lack of consideration etc.

Further, to the extent that the need to demonstrate a “recognised psychiatric injury” is, in effect, a control mechanism to limit negligence claims due to fear of a flood of litigation, concern about such a flood may be more limited in the context of a Wilkinson claim, where proof of intention is required.¹³⁴

Further, some courts have appeared to proceed on the assumption that there is a clear, easy to make distinction between mere emotional distress, on the one hand, and a recognised psychiatric illness on the other.¹³⁵ Others have a different view. Windeyer J in *Mount Isa Mines v Pusey*¹³⁶ (*Mount Isa Mines*) acknowledged that severe mental distress could be the starting point of a lasting disorder of mind or body (“nervous shock”) for which damages could be available. The distinction has been criticised in New Zealand,¹³⁷ and this was the view reached by the Scottish Law Commission¹³⁸ and by learned authors in this area.¹³⁹

The UK Law Commission, in its 1998 report *Liability for Psychiatric Illness*, concluded that “the distinction between what constitutes mere mental distress and symptoms that amount to a recognisable psychiatric illness is not clear”.¹⁴⁰ The Report noted that several medical consultees to the report had commented on these difficulties, and one had said that the overlap between mental health and illness

¹³³ Rapp, n 92, 136; Delgado R, “Words that Wound: A Tort Action for Racial Insults, Epithets and Name-Calling” (1982) 17 *Harvard Civil Rights – Civil Liberties Law Review* 133, 171. Peter Handford makes the same point: “If this attitude (against allowing claims for ‘mere’ emotional distress) is due to the traditional fears – the difficulties of proof, the likelihood of a flood of false claims and trivial litigation – then the reply would be that in jurisdictions where the intentional causing of mental distress is actionable this has not occurred”: Handford, n 44, 59. Handford recommends that Australia permit claims for intentional infliction of mental distress: 63.

¹³⁴ This was the position taken by Lord Neuberger (with whom Lord Wilson agreed) in *Rhodes v OPO* [2015] UKSC 32. Their Lordships did not believe that demonstration of a recognised psychiatric injury ought to be required for a successful *Wilkinson* claim, and sought to distinguish cases brought in negligence where such a requirement had been articulated: [117]–[119]. See also Butler, n 64, 374: “as an intentional tort, there is no need for the considerations associated with negligence, which require limitation of claims to recognisable psychiatric illnesses. Accordingly, it is submitted that proof of emotional distress, embarrassment or humiliation should be sufficient to ground the tort”.

¹³⁵ In *Hinz v Berry* [1970] 2 QB 40, Lord Denning found that the law allowed recovery for nervous shock if the plaintiff had suffered a recognised psychiatric illness caused by the defendant, distinguishing this from cases involving grief or sorrow over the death of a loved one, financial worries, life changes or issues with children, all of which were not compensable.

¹³⁶ *Mount Isa Mines v Pusey* (1970) 125 CLR 383, 394.

¹³⁷ *Van Soest v Residual Health Management Unit* [2000] 1 NZLR 179, 203 described the requirement of recognised psychiatric injury as “arbitrary” and favouring recovery for mental and emotional suffering beyond ordinary human experience (Thomas J).

¹³⁸ Scottish Law Commission, n 83, [3.7]: “in the case of intentional wrongdoing, we now think that the defender should normally be liable for the harm he intended to cause: this should include distress, anxiety, grief, anger etc, whether or not this amounts to a medically recognised mental disorder”.

¹³⁹ Francis Trindade said that it ought not be necessary for a plaintiff in this situation to show “nervous shock”; he said that severe mental distress alone was (or should be) sufficient: Trindade, n 83, 227; Mullany N and Handford P, “Moving the Boundary Stone by Statute: The Law Commission on Psychiatric Illness” (1999) 22 UNSWLJ 350, 368–373; Goldney R and Connolly J, “A Note on the Delineation of Nervous Shock: Normal Reaction or Recognised Psychiatric Illness?” (2012) 19 *Psychiatry, Psychology and Law* 605, 610: “the distinction between normal emotional reactions and psychiatric illness is not as clear cut as either psychiatrists or lawyers would wish ... the delineation of a formal psychiatric diagnosis is no longer necessary”.

¹⁴⁰ Law Commission (UK), *Liability for Psychiatric Illness* (No 249, 1998) [3.27].

was such a large grey area that it was not suitable to bear the burden the law placed upon it.¹⁴¹ The Report contains a footnote alluding to submissions by experts to the work of the Commission, including a statement by the British Medical Association that “there is no sudden cut-off point where grief and other distresses suddenly become psychiatric illnesses”.¹⁴² Care must be taken with the use of the American Psychiatric Association’s *Diagnostic Statistical Manual of Mental Disorders* (DSM-5) for this purpose; for example, a suggestion that a condition appearing in the Manual is a “recognised psychiatric condition”, but one which does not, is not. The Manual makes clear that it is not designed to be used in a “cookbook” fashion and its purpose is to guide professional judgment in the field of psychiatry, and is not to provide bright lines in law.¹⁴³

Having acknowledged that, the DSM-5 does not use the concept of “recognised psychiatric illness” or injury. One might have expected that if any document in the mental health field was to be the source of the meaning of “recognised psychiatric illness”, it would be the primary guidelines issued by the American Psychiatric Association. The fact the guidelines do not use the concept the law uses is instructive in itself. The guidelines in the DSM-5 use the concept of a “mental disorder”. This is defined as a:

Syndrome characterised by clinically significant disturbance of an individual’s cognition, emotional regulation or behaviour that reflects a dysfunction in the psychological, biological or developmental processes underlying mental functioning. Mental disorders are usually associated with significant distress or disability in social, occupational or other important activities.¹⁴⁴

The DSM-5 clarifies that most of the disorders identified in the Manual are “mental disorders”. Some of the mental disorders included in the DSM-5 that might be relevant for current discussion include acute stress disorder,¹⁴⁵ post-traumatic stress disorder,¹⁴⁶ depressive disorders,¹⁴⁷ social anxiety disorder,¹⁴⁸ panic disorder,¹⁴⁹ and generalised anxiety disorder.¹⁵⁰ The DSM-5 includes within its list of disorders conditions such as anti-social personality disorder,¹⁵¹ histrionic personality disorder,¹⁵² narcissistic personality disorder,¹⁵³ and avoidant personality disorder.¹⁵⁴ Considering the diagnostic criteria for such disorders, it would be difficult to say that they are “recognised psychiatric illnesses” or injuries. In other words, reference to the DSM-5 does not support the use by the law of the term “recognised psychiatric illness”. The fact that a mental disorder appears in the DSM-5 ought

¹⁴¹ Law Commission (UK), n 140 [3.27].

¹⁴² Law Commission (UK), n 140 [3.27] (contained in footnote 79). The Commission also quoted Mahendra to the effect that “the distinction between normal grief and pathological psychiatric illness following bereavement is clearer in the eyes of the law than to doctors”: Mahendra B, “Nothing but the Whole Tort” (1996) 146 NLJ 1022; and McCullough M et al, “Post Traumatic Stress Disorder: Turning the Tide without Opening the Floodgates” (1995) 35 *Medical Science Law* 287: “sadness and unhappiness shade into reactive depression and illness”; and another submission to the Commission by Telford, Rowlands and Wright that “there is no general agreement inside or outside psychiatry about the definition of a psychiatric case”, n 83, [3.27].

¹⁴³ American Psychiatric Association, *Diagnostic Statistical Manual of Mental Disorders: DSM-5* (American Psychiatric Publishing, 5th ed, 2013) 25.

¹⁴⁴ American Psychiatric Association, n 143, 20.

¹⁴⁵ American Psychiatric Association, n 143, 280-286.

¹⁴⁶ American Psychiatric Association, n 143, 271-280.

¹⁴⁷ American Psychiatric Association, n 143, 160-168.

¹⁴⁸ American Psychiatric Association, n 143, 202-208.

¹⁴⁹ American Psychiatric Association, n 143, 208-217.

¹⁵⁰ American Psychiatric Association, n 143, 222-226.

¹⁵¹ American Psychiatric Association, n 143, 659-663.

¹⁵² American Psychiatric Association, n 143, 667-669.

¹⁵³ American Psychiatric Association, n 143, 669-672. Diagnostic criteria include: having a grandiose sense of self-importance; pre-occupation with fantasies of unlimited success, power, brilliance, beauty or ideal love; believes they are special and unique; requires excessive admiration; has an unreasonable sense of entitlement; is interpersonally exploitative; lacks empathy; often envies others or believes others are envious; and shows arrogant attitudes.

¹⁵⁴ American Psychiatric Association, n 143, 672-675. Diagnostic criteria include: avoiding occupational activities involving significant interpersonal contact due to fear of criticism, disapproval or rejection; unwillingness to get involved with people

not be interpreted to mean that it is, for the purposes of the law, a “recognised psychiatric illness”, given some of the disorders listed, and the DSM-5 definition of mental disorder (a concept which is critical to its content), states that mental disorders are often accompanied by significant distress. In this light, it is difficult to accept the assumption of the law of a major, workable distinction between recognised psychiatric illness and mere distress.¹⁵⁵

Psychologists consulted for the purposes of this article have suggested that, rather than the law attempting to distinguish between these two conditions in terms of liability, it would be better to focus on how (if at all) the defendant’s actions have affected the plaintiff’s “functionality”, and that consideration of the time at which the defendant’s actions occurred, and when any change in the plaintiff’s functionality took place, can assist in relation to issues of causation. Many of the descriptions of the mental disorders in DSM-5 in fact refer to changes in a person’s functionality in determining whether a disorder exists.

In conclusion here, the law should abandon its insistence that a person claiming for emotional injury show that they have suffered a “recognised psychiatric injury” or illness, as opposed to mere emotional distress. Such concepts are meaningless in the profession from which they purport to be drawn. The law should treat as being relevant to whether the plaintiff has suffered an injury to which the law should provide redress, that the injury of which they complain is recognised in the DSM-5 as a mental disorder. Note that the view is that this is a relevant factor, but not a conclusive factor, given the care with which the legal system must treat the content of the DSM-5. The law should take on board changes to the plaintiff’s functionality, and the time at which such change (if any) occurred, in relation to the defendant’s action about which complaint is made. None of this is countered by arguments that some claiming mental injury are malingerers or are imagining things, or the floodgates will open to unmanageable claim levels.

APPLICATION OF THE (INDEPENDENT) TORT

This final section considers possible application of *Wilkinson* to some factual scenarios. These are considered to highlight the unsuitability of subsuming a *Wilkinson* claim into the law of negligence. These applications are broad enough to avoid needing to develop a separate tort of harassment, as has sometimes been suggested.¹⁵⁶ It should also be acknowledged that some of the conduct described below may involve a breach of the criminal law, or be actionable on other tortious grounds. Of course, this does not influence whether a civil claim ought to be recognised in this context, and there are numerous examples where both tort and criminal law can apply to a given set of facts, not surprising given the origins of the criminal law. Further, occasionally a person might have a remedy for the breach of more than one tort on one given set of facts.

Acts or statements intending to cause the victim emotional distress

The recent litigation involving Man Monis,¹⁵⁷ later to become infamous for even graver deeds, is useful in demonstrating the kind of situation where a *Wilkinson* claim would be appropriate and useful. Monis sent letters to the parents of Australian soldiers killed in Afghanistan. As well as making general statements about war, Monis made highly inflammatory comments about the dead soldiers. For example, he accused them of being murderers of innocent civilians. He compared their sons to pigs. He claimed their sons’ bodies were “contaminated”, and claimed that Adolf Hitler and the dead

unless certain of being liked; shows restraint within intimate relationships due to fear of being shamed; preoccupied with criticism or rejection in social situations; inhibited in new interpersonal relationships due to feelings of inadequacy; views self as socially inept; and is unusually reluctant to take personal risks.

¹⁵⁵ In *White v Chief Constable of South Yorkshire* [1999] 2 AC 455, 491, Lord Steyn acknowledged the great difficulty in distinguishing between recognised psychiatric injury and “extreme grief”. He noted the symptoms were substantially similar and equally severe, but concluded that “the law cannot compensate for all emotional suffering even if it is acute and truly debilitating”.

¹⁵⁶ *Khorasandjian v Bush* [1993] QB 727; Townshend-Smith R, “Harassment as a Tort in English and American Law: The Boundaries of *Wilkinson v Downton*” (1995) 24 *Anglo-American Law Review* 299; Lee ML, “The Need for a Tort of Harassment” (2001) 5 *Southern Cross University Law Review* 189.

¹⁵⁷ *Monis v The Queen* (2013) 249 CLR 92; [2013] HCA 4.

soldiers were equivalent in “moral merit”. Needless to say, the families were already struggling with the death of their sons while on active duty overseas; receipt of these letters undoubtedly worsened their grief and caused them further distress. There was nothing negligent about what Monis did; he considered what he wanted to say, and said it. He would surely have understood the emotional impact that the letters would have on grieving parents.

The case was not one where the family sought civil compensation for the injury they suffered as a result of receiving the letters. It involved a question of whether Monis had committed an offence against the *Criminal Code 1995* (Cth) by using a postal service to send a menacing, harassing or offensive message and, if so, whether he had a constitutional defence on freedom of political communication. However, at least two of the judges were alive to the parallels between the facts of this case and a *Wilkinson* claim. Hayne J expressly left open consideration of whether *Wilkinson* remained an independent claim,¹⁵⁸ and of course it was not necessary to decide that point in the case.

Heydon J seemed to accept the continued existence of the *Wilkinson* claim as an independent cause of action, and asked “why cannot the law protect them (the family) from harm which is intentionally caused not by a prank (6referencing the facts of *Wilkinson*) but by a deadly serious allegation ... calculated to cause emotional harm”.¹⁵⁹ He also alluded to a human being’s right to dignity as being a fundamental human right, and a source of all others.¹⁶⁰

The author endorses the view of Heydon J. It is not clear whether the parents suffered a “recognised psychiatric injury”, but it is submitted the law of tort should provide them with a remedy for the emotional distress they undoubtedly suffered as a result of receiving these letters. Hearing unsubstantiated allegations that their sons were murderers, having their sons compared with animals and with an insane person responsible for the deaths of millions, and being told their sons’ bodies were contaminated would be highly distressing. It is surely well beyond the rudeness/hurtful words/lack of consideration/temporary slight that must be accepted as part of everyday life. The law of tort provides compensation for victims of battery, although the actual injury may be relatively slight. The kind of damage suffered by the victims in the Monis scenario is likely to be much more long-lasting in its impact. It makes no sense to compensate the slight physical injury, but effectively ignore the emotional one. As indicated, this conclusion is reached without knowing whether the victims suffered a “recognised psychiatric injury”, because in the author’s view, it should not be necessary.¹⁶¹

It is beyond the scope of the article to consider further, but it should be conceded that the common law *Wilkinson* claim for words causing distress would be subject to a defence based on the implied freedom of political communication that the Australian High Court has recognised in recent years.¹⁶² The common law must yield to the implied freedom.¹⁶³ Indeed, in a recent case involving intentional infliction of emotional distress in the United States, the Supreme Court dismissed the claim

¹⁵⁸ *Monis v The Queen* (2013) 249 CLR 92; [2013] HCA 4, [223].

¹⁵⁹ *Monis v The Queen* (2013) 249 CLR 92; [2013] HCA 4, [242].

¹⁶⁰ *Monis v The Queen* (2013) 249 CLR 92; [2013] HCA 4, [247]; D Reaume, n 105; Harper FV and McNeely MC, “A Re-Examination of the Basis for Liability for Emotional Distress” [1938] *Wi L Rev* 426 refer to the “interest in seclusion” (446) and “interest in personal dignity and self-respect” (451); Calvert Magruder talked of the “interest in mental tranquility”: Magruder, n 89, 1049; Samuel Warren and Louis Brandeis referred to the right “to be let alone”: Warren and Brandeis, n 5, 193.

¹⁶¹ It should be noted that any civil claim for compensation here *may* be subject to a constitutional argument being made that the offensive words were part of an implied freedom of political communication. The word “may” is necessary because as presently constructed, the Australian implied freedom of political communication is a freedom from interference. Usually, the “interferences” litigated have been statutory ones. However, the High Court has found that the common law must also yield to the implied freedom: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 556 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

¹⁶² See, eg *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

¹⁶³ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 556 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

based on First Amendment free speech grounds.¹⁶⁴ There the defendants had picketed near the funeral of a soldier and engaged in highly offensive and hurtful speech about the soldier, which became known to the soldier's family. It is not necessary for current purposes to resolve the conflict that may arise in some cases between the right that a person might otherwise have to bring a claim for emotional distress, and the freedom of communication defence that the defendant may have in that particular situation.

An obvious field of behaviour that could be addressed by recognition of a tort of intentional infliction of emotional harm would be bullying. One context in which this could occur would be the workplace, to take the facts of *Wong*. Another is social media. The exponential rise in the use of social media has also unfortunately increased the opportunities for bullying behaviour; in some cases the viciousness of behaviour has been exacerbated by the fact that the perpetrator might enjoy some anonymity online. In the most tragic cases, prolonged cyberbullying has ultimately led to the suicide of victims, demonstrating the emotional harm that such behaviour can cause.¹⁶⁵ The posting of such nasty material online may not be actionable under criminal law and/or statute, or under another civil wrong. Recognition of the tort of intentional infliction of emotional harm might assist in this context.

Another field of behaviour that might be addressed by recognition of such a harm would be personal harassment, which is not remedied by the criminal law or other existing torts. The facts of *Khorasandjian v Bush*¹⁶⁶ or *Grosse v Purvis*¹⁶⁷ would provide examples. This commonly involves ex-partners or others who have had a serious falling out, or deluded "fans" of public figures. It might include the unpleasant following of the victim in public places, being in a public place near the victim's home or work, unwelcome phone or email contact etc. Such behaviour can emotionally impact the victim in a way that might warrant legal remedy.

Surely, there is nothing that is negligent about bullying or personal harassment.

Invasion of privacy

There is clear potential for a *Wilkinson* action to seek compensation for a wrong seen as a breach of privacy. This was specifically noted by Gummow and Hayne JJ in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*¹⁶⁸ (*ABC v Lenah Game Meats*). Referring to the four invasions of privacy recognised by United States tort law,¹⁶⁹ they noted that some or all of these invasions would be actionable under existing principles of Australian tort law, including "the intentional infliction of harm to the individual based on *Wilkinson v Downton*".¹⁷⁰

A tort of privacy has not typically been recognised by the common law.¹⁷¹ An equitable action for breach of confidence in situations involving relationships of trust and confidence, is possible in some

¹⁶⁴ *Snyder v Phelps* 562 US 443 (2011).

¹⁶⁵ See further Langos C, "Cyberbullying: The Shades of Harm" (2015) 22 *Psychiatry, Psychology and Law* 106; Kift S, Campbell M and Butler D, "Cyberbullying in Social Networking Sites and Blogs: Legal Issues for Young People and Schools" (2009) 20 *Journal of Law, Information and Science* 60.

¹⁶⁶ *Khorasandjian v Bush* [1993] QB 727.

¹⁶⁷ *Grosse v Purvis* [2003] QDC 151.

¹⁶⁸ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; [2001] HCA 63.

¹⁶⁹ These are: (a) intentional intrusion upon the solitude or seclusion of another that is highly offensive to a reasonable person of ordinary sensibility; (b) appropriates to their own use the benefit or name or likeness of another; (c) publicises matter concerning the private life of another that is highly offensive to a reasonable person and not of legitimate concern to the public; and (d) publicises a matter concerning another placing that person in a false light which is highly offensive to a reasonable person and the publisher knew of or recklessly disregarded the falsity of the matter: *Restatement (Second) Law of Torts*, s 652A. The *Restatement (Third) Law of Torts* is not yet complete and does not contain up-to-date provisions in this area.

¹⁷⁰ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; [2001] HCA 63, 255, with whom Gaudron J agreed: 231.

¹⁷¹ *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479; *Home Office v Wainwright* [2001] EWCA Civ 2081, [57] (Mummery LJ), [111] (Buxton LJ); see, for extended discussion, Butler, n 63.

cases. The tort of nuisance or trespass to land may be appropriate in some cases.¹⁷² A right to privacy has been recognised in international human rights instruments,¹⁷³ including one to which Australia is a signatory.¹⁷⁴ At least in the United Kingdom, recognition of a right to privacy in the European Convention on Human Rights has blunted the need for development of a common law tort of breach of privacy,¹⁷⁵ even if the action for breach of confidence has come to approximate such a tort, at least in that jurisdiction.¹⁷⁶

The High Court was asked in *ABC v Lenah Game Meats* to recognise a right to privacy. Gleeson CJ expressed some reservations about recognising this new tort,¹⁷⁷ deciding the case on breach of confidence grounds.¹⁷⁸ However, he noted that the foundation of privacy rights was human dignity,¹⁷⁹ as Gummow and Hayne JJ quoted United States authorities referring to “personal distress” and “emotional suffering” as the basis of the claim.¹⁸⁰ He agreed the test of whether disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities was a useful test of what was private.¹⁸¹ Gummow and Hayne JJ suggested that the common law might at some stage develop a tort of privacy, at least for individuals. The basis of the claim would be protection of the interests of the individual in leading “a secluded and private life”.¹⁸² Kirby J left open whether the court should accept a tort of invasion of privacy.¹⁸³ Callinan J said the “time was ripe” for consideration of a common law tort of privacy, but did not finally determine whether it should be part of the common law.¹⁸⁴

In 2003, a Queensland District Court decision recognised a right of privacy.¹⁸⁵ The case involved stalking-like behaviour by the defendant, including loitering at or near the plaintiff’s home or work, following her to shopping malls, repeated offensive phone calls, and offensive and insulting language towards the plaintiff and her friends. Skoien SJDC referred to the American authorities regarding the tort of privacy and found that a cause of action was available involving (a) a willed act by the defendant; (b) which intrudes on the privacy or seclusion of the plaintiff; (c) in a manner considered highly offensive to a reasonable person of ordinary sensibilities; and (d) which causes the plaintiff detriment in the form of mental, physiological or emotional harm or distress, or which hinders or

¹⁷² An action for private nuisance has traditionally required interference with a property interest: *Hunter v Canary Wharf Ltd* [1997] AC 655, overturning *Khorasandjian v Bush* [1993] QB 727 where it had been decided that a property interest was not necessary (the *Wilkinson* aspect of *Khorasandjian* was not overturned in *Hunter*).

¹⁷³ *Universal Declaration of Human Rights* (1948) GA res 217A(III), Art 12; *Convention for the Protection of Human Rights and Fundamental Freedoms* (European Convention on Human Rights) (1950) ETS 5; 213 UNTS 222, Art 8.

¹⁷⁴ *International Covenant on Civil and Political Rights* (1966) 999 UNTS 171; 6 ILM 368; [1980] ATS 23, Art 17.

¹⁷⁵ *Wainwright v Home Office* [2003] UKHL 53, [34] (Lord Hoffmann, for the Court).

¹⁷⁶ *Douglas v Hello! Ltd [No 1]* [2001] QB 967, [126] (Sedley LJ); *Wainwright v Home Office* [2003] UKHL 53, [29]: “the common law of breach of confidence has reached the point at which a confidential relationship has become unnecessary. As the underlying value protected is privacy, the action might as well be renamed invasion of privacy” (Lord Hoffmann, for the Court); Butler, n 63, 352.

¹⁷⁷ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; [2001] HCA 63, 226.

¹⁷⁸ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; [2001] HCA 63, 230.

¹⁷⁹ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; [2001] HCA 63, 226.

¹⁸⁰ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; [2001] HCA 63, 256.

¹⁸¹ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; [2001] HCA 63, 226.

¹⁸² *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; [2001] HCA 63, 258, with whom Gaudron J agreed: 231.

¹⁸³ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; [2001] HCA 63, 278.

¹⁸⁴ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; [2001] HCA 63, 328.

¹⁸⁵ *Grosse v Purvis* [2003] QDC 151.

prevents the plaintiff from doing an act she or he is otherwise lawfully entitled to do.¹⁸⁶ A right of privacy was also recognised by Hampel J in *Doe v Australian Broadcasting Corporation*.¹⁸⁷

Most cases of invasion of privacy have involved serious, considered actions, as opposed to negligence.

CONCLUSION

The United Kingdom Supreme Court has apparently resurrected the *Wilkinson* action for intentional infliction of emotional harm, when a decade ago the United Kingdom's highest court suggested its demise. Given that Australian sentiment towards jettisoning the stand-alone principle drew support from that earlier United Kingdom case, it is hard to predict which way the Australian High Court might go when next asked to adjudicate a *Wilkinson*-type claim.

It has been argued that Australian law should continue to embrace the *Wilkinson* claim as an independent cause of action conceptually separate from negligence. Its intention basis is fundamental, and there is sense in the law of tort maintaining a distinction between acts or omissions that were intentional, and those that were not intentional. It applies to wrongful or unjustified conduct intended to cause the plaintiff severe emotional distress. In this context, at least, the law should not require that the claimant demonstrate they have suffered a "recognised psychiatric injury". The arguments for its retention are unconvincing. Fears that departing from such a requirement will open the familiar "floodgates" have not materialised in the United States. Arguments that a distinction between a recognised psychiatric illness on the one hand, and mere distress on the other, cannot be clearly and logically made are not supported by the Manual psychiatrists use in this area. It is long past time that the law grapple with the difficulties it seems to have with psychological injury, as opposed to physical injury. This does not mean that a person has a remedy for every slight, rudeness or lack of consideration. The fact that a person is suffering from a mental disorder contained in the DSM-5, and that it developed near the time when the defendant did the actions complained of, would be important evidence.

The article has highlighted examples of factual scenarios where the principle reflected in this ancient tort can help with remedies for 21st century problems, such as cyberbullying (and bullying more generally), personal harassment and invasions of another's privacy. Mrs Wilkinson's perseverance in obtaining a remedy for herself in 1897 can and should assist those suffering severe emotional distress at the hands of another well into the 21st century, through means that the good Mrs W could never have envisaged.

¹⁸⁶ *Grosse v Purvis* [2003] QDC 151, [444].

¹⁸⁷ *Doe v Australian Broadcasting Corporation* [2007] VCC 281; the Court left the matter open in *Giller v Procopets* (2008) 24 VR 1; [2008] VSCA 236.