
Is “nervous shock” still a feminist issue? The duty of care and psychiatric injury in Australia

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The traditional approach to duty in nervous shock cases required more hurdles to be met than in cases of ordinary physical injury. The feminist critique of these cases demonstrated that these hurdles were created by gendered stereotypes and patriarchal reasoning. The High Court's changed requirements in Tame v New South Wales; Annetts v Australian Stations Pty Ltd (2002) 211 CLR 317 raise the question whether the feminist critique has been rendered obsolete. The article considers some of the previous feminist literature and a quantitative analysis of nervous shock cases in order to examine this question. While women continue to be the majority of claimants in this area, the article emphasises that this is less significant than the fact that the way psychiatric harm is regarded is affected by a gendered way of thinking which permeates our society. Noting that the changes to the requirements in Tame; Annetts and other recent cases still do not put psychiatric harm on exactly the same footing as other personal injury cases, and that the legislative changes created by the various Civil Liability Acts emphasise this and in many cases revert to the previous approach, the authors conclude that the feminist critique still has much to offer this area of law.

INTRODUCTION

The action for negligently caused “nervous shock” or psychiatric harm has now been available for over 100 years.¹ The recognition of this category has been problematic to the law, as exemplified by the fact that extra relation to psychiatric harm, and feminist analysis of law has been important in illuminating this. This article seeks to consider whether the changes in the law in Australia in this new century mean that feminist analysis of law has done its job and has nothing further to contribute.

A number of significant feminist legal theory articles have contributed to the analysis of nervous shock or psychiatric harm cases.² This article uses this literature to consider the recognition of psychiatric harm as a compensable type of harm through a quantitative and qualitative analysis of cases in the Australian jurisdictions between 1885 and 2008, including those decided under the Civil Liability Acts which were passed in all the Australian jurisdictions after 2002.³

The fundamental point is that psychiatric injury has been marginalised as a form of harm. This marginalisation has in part occurred because these were injuries seen to afflict women (the majority of plaintiffs have been and continue to be women) and because this interacted with the fact that the control mechanisms articulated in relation to nervous shock, while ostensibly neutral, played out in

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¹ *Victorian Railways Commissioners v Coultas* (1886) 12 VLR 895; (1888) 13 App Cas 222.

² Chamallas M and Kerber L, “Women, Mothers and the Law of Fright: A History” (1990) 88 Mich L Rev 814; Bender L, “Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power and Responsibilities” [1990] Duke LJ 848; Bender L, “A Lawyer’s Primer on Feminist Theory and Tort” (1988) 38 J Leg Ed 3; Finley L, “A Break in the Silence: Including Women’s Issues in a Torts Course” (1989) 1 Yale JL & Feminism 41; Handsley E, “Mental Injury Occasioned by Harm to Another: A Feminist Critique” (1996) 14 Law & Ineq 391.

³ *Civil Law (Wrongs) Act 2002* (ACT); *Civil Liability Act 2002* (NSW); *Personal Injuries (Liabilities and Damages) Act* (NT); *Personal Injuries (Civil Claims) Act* (NT); *Civil Liability Act 2003* (Qld); *Personal Injuries Proceedings Act 2002* (Qld); *Civil Liability Act 2002* (SA); *Civil Liability Act 2002* (Tas); *Wrongs Act 1958* (Vic); *Civil Liability Act 2002* (WA).



gendered ways. The fact that the early cases of nervous shock, often involving miscarriage brought on by “shock”, are now seen as the foundation line of cases dealing with “pure” psychiatric harm, is significant in this context.

As said above, the traditional approach to the duty of care in nervous shock cases required more hurdles to be met than in cases of ordinary physical injury. In 2002 the High Court in *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317 (*Tame; Annetts*) “mainstreamed” the requirements for nervous shock cases, thus raising the question whether this mainstreaming meant that the arguments of feminist scholars no longer applied to the reasoning processes in these cases. One commentator said after this case:

The Australian High Court thus leads the common law world in recognising that psychiatric injuries are as real as physical injuries and that the rights to recover should depend essentially on whether such injuries are reasonably foreseeable, freed from artificial and outdated policy restrictions imposed because of a perceived need for additional limits.⁴

However, he went on to say, “Australian legislatures, however, do not necessarily take the same view”.⁵ He was referring to the fact that the tort reform process in Australia has given rise to the various Civil Liability Acts,⁶ many of which changed the law in relation to pure psychiatric harm, again raising the question whether the feminist arguments remain pertinent. This article attempts to answer these questions, arguing that the apparent “mainstreaming” of claims for pure psychiatric harm has not diminished the importance of the argument that those distinctions that remain or which have been reinstated can best be understood as flowing from the particular history of nervous shock as a claim that was traditionally associated with women.

The next part of the article discusses the legal requirements as they were in 2002 and the changes created by *Tame; Annetts* in that year and by the civil liability legislation. In discussing this case and some others an attempt is made to highlight some of the factors which feminist analysis of the area has illuminated. This is followed by a feminist analysis – first considering some empirical data in relation to cases brought between 1885 and 2008; and then revisiting some of the feminist theory which discussed the history of nervous shock cases in a way which particularly focuses on the history of nervous shock in Australia. This is particularly important because much of the feminist analysis is North American. The final part of the article provides a conclusion.

THE LEGAL REQUIREMENTS

Until the *Tame; Annetts* case in 2002, the Australian position was that a plaintiff would succeed in a claim for nervous shock where it is reasonably foreseeable that the result of the negligent act to the victim could be a recognisable psychiatric illness (going beyond grief or sorrow)⁷ for a person of normal fortitude in the position of the plaintiff; and the plaintiff is in a requisite relationship (typically one of parent or spouse) with the victim, *or* was a rescuer, *or* feared for themselves *or* was involved in the accident; and the psychiatric illness was the result of a sudden sensory perception by the plaintiff of the actual accident or its immediate aftermath.⁸

⁴ Handford P, *Mullany and Handford's Tort Liability for Psychiatric Damage* (2nd ed, Lawbook Co, Sydney, 2006) at [1.180].

⁵ Handford, n 4.

⁶ *Civil Law (Wrongs) Act 2002* (ACT); *Civil Liability Act 2002* (NSW); *Civil Liability Act 2002* (Tas); *Civil Liability Act 2002* (SA); *Wrongs Act 1958* (Vic); *Civil Liability Act 2002* (WA).

⁷ The insistence on the distinction between psychiatric harm and mere mental distress or “grief and sorrow” does not exist in the United States. While this distinction probably helps to keep the floodgates closed, the fact that the distinction does not really exist in psychiatry makes it problematic.

⁸ This was the situation in *Jaensch v Coffey* (1984) 155 CLR 549 and was well accepted, although both *McLoughlin v O'Brian* [1983] 1 AC 410 in England and *Jaensch v Coffey* in Australia extended the “presence” requirement to include presence at the aftermath of an accident, including the hospital. See generally, Handford, n 4.



A plaintiff in a nervous shock case therefore had to overcome greater hurdles than did a plaintiff claiming for physical injury, who merely had to prove that some injury was foreseeable; this was particularly true in regard to the characterisation of the duty of care.⁹

In 2002 *Annetts* and *Tame*¹⁰ were heard together in the High Court. It is worth considering these cases in some detail. Mr and Mrs Annetts’ 16-year-old son James was employed by the defendant on a cattle station in the Kimberley region of Western Australia. Although the defendant had agreed with the parents that he was to be fully supervised, James was sent to work alone as a caretaker on another cattle station. After a month, a police officer telephoned Mr Annetts and told him his son was missing and was believed to have run away with another boy. The Annetts travelled from their home in New South Wales to Western Australia some nine times over four months until they were informed by telephone that their son’s vehicle had been found. They then had to identify a skeleton in a photograph as being that of their son. As Gleeson CJ said (at [35]): “The process by which the applicants became aware of their son’s disappearance, and then his death, was agonizingly protracted, rather than sudden.” Heenan J in the Supreme Court of Western Australia found against the Annetts because they did not suffer a sudden sensory perception within the requirements of the law – that is, they were not present at the incident which caused their son’s death and therefore could not meet the legal requirements. The Full Court subsequently dismissed the parents’ appeal.

Mrs Tame was in a car accident where the other driver was at fault. In the accident report the police erroneously recorded his blood alcohol reading of 0.14 as hers. They corrected the error within three months on the form but not before the mistake had been passed on to the insurer. When the insurer paid her claims for back and leg injuries but began to balk at extensive physiotherapy claims, Mrs Tame became very anxious about the delay and spoke to her solicitor who told her about the mistake. The police told her immediately that it was a mistake and she received a formal assurance that the mistake had been rectified and an apology. However, Mrs Tame continued to think the delay in payment was due to the mistake on the form and developed an obsession that other people might think the accident was due to her drunkenness. She was diagnosed as suffering from psychotic depression and the psychiatric evidence was that her inability to accept that the mistake had been rectified was part of her illness. Mrs Tame won in the District Court but her claim was rejected in the New South Wales Court of Appeal.

The judges in the High Court were unanimous in their view that the appeal of Mrs Tame should be dismissed, and the appeal of the Annetts allowed.¹¹ Their general approach was to say that the limitations on liability for pure psychiatric harm that had been used in the past – sudden shock, direct perception, and normal fortitude – should not be seen as limitations in themselves, but rather as matters relevant to the reasonable foreseeability of the harm. Although ostensibly the test was changed to a simpler one of reasonable foreseeability of the harm, the previous tests remained in a less powerful form. Thus sudden shock, direct perception and normal fortitude did not vanish as legal requirements. They were rather transmuted into aspects of reasonable foreseeability of harm.

Gleeson CJ’s view, which was shared by all the judges, was that the employers of the Annetts’ son were already in a relationship with them that made the psychiatric injury reasonably foreseeable. In their judgment Gummow and Kirby JJ made the following observation regarding the distinction between psychiatric (mental) and physical (bodily) harm (at [192]):

Authorities have isolated four principal reasons said to warrant different treatment of the two categories of case. These are (i) that psychiatric harm is less objectively observable than physical injury and is therefore more likely to be trivial or fabricated and is more captive to shifting medical theories and

⁹ *Donoghue v Stevenson* [1932] AC 562; *Chapman v Hearse* (1961) 106 CLR 112.

¹⁰ *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317.

¹¹ Note that after *Page v Smith* [1996] 1 AC 155 the English approach to psychiatric harm differed sharply from that elsewhere in that it emphasised the distinction between primary victims, like Mrs Tame, and secondary victims, like the Annetts. In England the test for primary victims is foreseeability of some kind of injury alone, while for secondary victims it requires foreseeability of psychiatric harm to a person of normal fortitude and the special factors such as proximity in time and space, etc. Other jurisdictions, including Australia, require that foreseeability of psychiatric harm be established for both primary and secondary victims.



conflicting expert evidence, (ii) that litigation in respect of purely psychiatric harm is likely to operate as an unconscious disincentive to rehabilitation, (iii) that permitting full recovery for purely psychiatric harm risks indeterminate liability and greatly increases the class of persons who may recover, and (iv) that liability for purely psychiatric harm may impose an unreasonable or disproportionate burden on defendants.

They answered these concerns by emphasising the distinction between mere grief and sorrow on the one hand and psychiatric harm on the other, and the requirements of the tort of negligence to establish duty, breach and causation and a lack of remoteness of damage. They rejected the rigidity of the control mechanisms used in the past because they impeded the emergence of a coherent body of case law. They also held that normal fortitude is simply a way to assist the determination of reasonably foreseeable harm. McHugh J took a slightly different tack which was significant for *Tame*. He said the plaintiff had to prove reasonable foreseeability of injury caused by shock and that if reasonableness is given its rightful place then the normal fortitude test can be maintained. He found Mrs Tame extra-susceptible when a person of normal fortitude would not have been affected.

It might be argued that *Annetts* demonstrates that the High Court, by de-emphasising the importance of the requirements of sudden sensory perception and normal fortitude, has finally acknowledged that the close family relationships which are the foundations of many nervous shock cases make nervous shock in such situations very foreseeable. These relationships are of such a type that psychiatric harm may be precisely the kind of harm that is clearly foreseeable. Such recognition, however, would appear to open the floodgates to litigation in a way which is unjustifiable if one does not regard psychiatric harm as real. Prima facie, the High Court appears to have come to that level of acknowledgment, but it is significant that all the judges emphasised two things – the fact that the negligence occurred in the context of an employer-employee relationship and the fact that Mr and Mrs Annetts had clearly and forcibly presented themselves to the employer as people who were deeply concerned about the safety and conditions under which their son worked, and that they had actually been given assurances by the employer which the employer breached. Thus two things existed in this case which made foreseeability very easy to prove: the antecedent relationship created by the parents' contacting of the employer, and the employment of a 16 year old. It is the prior relationship of the Annetts with their son's employer that ultimately gives them their remedy.

Thus, the High Court's recognition of liability in this case does not necessarily show a sudden understanding of the primacy of personal and non-commercial relationships and their effects on the mind of a plaintiff. And it is also arguable that the removal of the extra requirements (or at least their reduced importance) beyond reasonable foreseeability – sudden sensory perception/direct perception, presence at the scene and normal fortitude – has more to do with the court's desire for purity of legal doctrine¹² than their conversion to a feminist appreciation of the place of relationships in society.¹³

The interaction between duty of care and the employment context was also explored by the High Court in *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 (*Koehler*), which concerned a plaintiff who was employed three days a week as a merchandising representative of Cerebos. Her contract was terminated and she was given a new contract, which dramatically increased her workload. She could not perform her duties to her own satisfaction and repeatedly complained to management (orally and in writing) that the work had to be changed or she should be given more time, or have help to do it. However, no changes were made. All her complaints were about the work, not suggestions that it was affecting her health. After five months she developed a psychiatric illness of which her work was a

¹² Gummow and Kirby JJ said (at [191]): "Moreover, the emergence of a coherent body of case law is impeded, not assisted, by such a fixed system of categories. Rigid distinctions of the type required by the 'direct perception' rule inevitably generate exceptions and new categories, like the 'immediate aftermath' qualification, as the inadequacies of the recognised categories become apparent and 'hard cases' are accommodated ... As the categories and exceptions proliferate, the reasoning and outcomes in the cases become increasingly detached from the rationale supporting the cause of action."

¹³ The view that a feminist view necessarily emphasises our interconnectedness has been debated in relation to tort law: see eg Bender, n 2 (1988); Finley, n 2; McClain L, "Atomistic Man Revisited: Liberalism, Connection and Feminist Jurisprudence" (1992) 65 South Calif L Rev 1171. Argument against this idea comes from other feminists, eg MacKinnon C, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, Cambridge, Mass, 1987) who argues that this interconnectedness merely reflects the position of women as oppressed.



cause. She argued that there was a breach of her employer’s common law and contractual duty to provide a safe system of work, and a breach of the *Occupational Safety and Health Act 1984* (WA). At trial the Commissioner found that she had developed complex fibromyalgia syndrome and major depressive illness. He also found her workload excessive and that her injury was foreseeable and that therefore the employer had breached its duty to ensure that all reasonable steps were taken to provide a safe system of work. The Full Court of the Western Australian Supreme Court held on appeal that the employer could not reasonably have foreseen psychiatric injury.

The High Court agreed with the Full Court that the appeal should fail. The joint judgment given by McHugh, Gummow, Hayne and Heydon JJ, although it decided the matter at the level of breach of duty, took the opportunity to consider the employer’s duty of care. They noted that this must be considered within the context of the employer’s contractual and statutory obligations, including anti-discrimination legislation. For this reason they rejected the proposition in *Hatton v Sutherland* [2002] 2 All ER 1 that the only question to be considered is whether this kind of harm to this particular employee was reasonably foreseeable. However, they held that a reasonable person in the position of the employer would not have foreseen the injury because, first, she agreed to perform the duties and secondly, they had no reason to suspect a risk of psychiatric injury. This latter point emphasises a view of what is reasonable that refuses to see ordinary emotional responses to situations of stress such as unmanageable jobs. The judges saw the first point as of limited significance, but emphasised that where the appellant has entered into a contract, insistence upon performance of a contract cannot be in breach of a duty of care. This applied despite the fact that this was a contract more or less forced on the employee at a time when work was scarce. They took the view that an employer is entitled to assume that an employee considers he or she is able to do the job when he or she enters into the contract. (This seems strange since most contracts of employment do not arise until an employer has determined this for themselves as it is assumed that an applicant for a job will present themselves as suitable even if they are not.) The obligations between the parties are then fixed unless they are varied in the contract. Despite the repeated complaints of the plaintiff, the court took the view that there was no indication of vulnerability in her. Her complaints were more likely to suggest an industrial relations problem than the risk of psychiatric illness (at [41]). The judges repeatedly emphasise the “objective” or formal elements of the case. These could also be characterised as public rather than private or emotional – the formal terms of the contract itself rather than its known circumstances, treating her complaints as likely to be industrial rather than personal if anything, and so on. The court ignored the fact that a complaint that one cannot do the work or it is impossible implicitly contains in it the possibility that trying to do the work will be stressful and harmful to the plaintiff; and they appeared to assume the existence of freedom of contract in a situation where the contractual arrangements were clearly highly artificial and coercive. To say that in such a situation psychiatric harm is not reasonably foreseeable suggests a court which continues to privilege physical injury over psychiatric harm and what they see as rational over the irrational. The emphasis in *Koehler* on the need to consider contractual and statutory obligations in considering the duty of care in relation to psychiatric injury in the workplace means that again the commercial context of this case is the dominant determinant of the outcome.

In *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 the High Court re-emphasised the approach taken in *Tame; Annetts* when they allowed the children of an employee of the defendant’s who was crushed to death to recover, even though they had not witnessed the accident but were told about it later. The emphasis on *reasonable* foreseeability is significant. In *Tame; Annetts*, Gleeson CJ referred to reasonableness as at the “heart of the law of negligence” (at [14]). The significance of the focus on reason and reasonableness in tort law has been a controversial and oft-discussed subject of feminist analysis, as is discussed below. Essentially, despite the fact that the emphasis on reasonable foreseeability has been applied by the High Court across all the categories of negligence, it is clear that the court continues to regard a nervous shock action as one which should be distinguished from ordinary negligence actions for personal injury, and for which special tests are needed. The requirement is not for foreseeability of personal injury (which might include physical or



mental harm) but for foreseeability of nervous shock. Thus, despite the rhetoric of the court that the distinction between psychiatric and physical injury has little basis, they continue to emphasise it.¹⁴ Gleeson CJ said (at [5]):

It was observed that many medical practitioners would regard it as unscientific to distinguish psychiatric injury from any other form of personal injury. It may equally be said that economists would regard it as unscientific to distinguish between damage to property and other forms of economic harm. That does not mean that there is no legally relevant difference.

Similarly Gummow and Kirby JJ's rejection of special limiting devices within the category of nervous shock does not mean that nervous shock is not still being treated as a separate category with particular issues. The limiting devices have merely been moved under the umbrella of reasonable foreseeability; they have not been abolished. While the treatment of psychiatric harm has been brought closer to the way physical injury is dealt with, the continued insistence that psychiatric harm must specifically be foreseeable (and the range of criteria that can assist in determining this foreseeability) means that it remains in a separate category from physical injury post- *Tame; Annetts*.

The separateness of the category has also been re-emphasised in the civil liability legislation enacted since 2002. In a number of jurisdictions the action has been restricted and separated off again from the normal tests for personal injury.¹⁵ Only Queensland, Western Australia and the Territories allow the common law full play.¹⁶ The other jurisdictions all emphasise that it must be foreseeable that a person of normal fortitude would suffer a recognised psychiatric illness if reasonable care is not taken.¹⁷ That is, they re-place normal fortitude in a central place, contrary to the position in *Tame; Annetts*. In these jurisdictions the court also must have regard to factors including whether or not there was sudden shock, whether the plaintiff witnessed a person being killed, injured or put in danger, the nature of the relationship between the plaintiff and that person, and whether there was a pre-existing relationship between the plaintiff and the defendant. These factors are recognisable as the factors used before *Tame; Annetts*, but as they are only to be considered they do not absolutely preclude liability in the same way that the common law may have before that case. These provisions are therefore in line with *Tame; Annetts*. However in New South Wales, Tasmania and Victoria, where a plaintiff suffers pure mental harm arising wholly or partly from shock, he or she cannot recover damages unless he or she witnessed the victim being injured or put in danger (or in Tasmania, the immediate aftermath) and they are in a close relationship (defined as family in New South Wales and Tasmania but not in Victoria).¹⁸ This prevents most rescuers from being able to claim for psychiatric harm because of the impact of seeing injured or dead people within the course of the rescue. The statutory reforms regarding employer-employee claims have further restricted plaintiffs' ability to recover for psychiatric harm.¹⁹

¹⁴ See *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317 at [259] (Hayne J); at [46] (Gaudron J). According to Callinan J (at [308]), "Psychiatric illness is different from physical injury in one respect at least. Usually the traumatic physical injury has occurred, and the effect of it, except perhaps for some soft tissue injuries, can be objectively verified and measured by skilled physical examination, modern pathology and radiology. Despite many advances in the diagnosis of psychiatric illness, whether, and the extent to which it exists in a particular patient will almost invariably depend, in some measure at least, upon the reliability of the patient's own utterances"; and further (at [334]), "Nervous shock cases, as with economic torts, do stand in a separate category from cases of torts involving physical injury ... because, although susceptibility to psychiatric injury may vary from person to person, everyone knows, and can foresee, that physical trauma will inevitably cause physical injury."

¹⁵ *Civil Liability Act 2002* (NSW), s 32; *Civil Liability Act 2002* (Tas), s 34; *Civil Liability Act 2002* (SA), s 33; *Wrongs Act 1958* (Vic), s 72;

¹⁶ *Civil Liability Act 2002* (WA), s 5S; *Civil Law (Wrongs) Act 2002* (ACT), s 34; *Law Reform (Miscellaneous Provisions) Act* (NT), s 25; no relevant provision in Queensland.

¹⁷ *Civil Law (Wrongs) Act 2002* (ACT), s 34(1); *Civil Liability Act 2002* (NSW), s 32(1); *Civil Liability Act 2002* (Tas), s 34(1); *Civil Liability Act 2002* (SA), s 33(1); *Wrongs Act 1958* (Vic), s 72(1); *Civil Liability Act 2001* (WA), s 5S(1).

¹⁸ *Civil Liability Act 2002* (NSW), s 30.

¹⁹ Note eg that the *Civil Liability Act 2002* (NSW) does not apply to employer-employee claims (s 3B); and the *Workers Compensation Act 1987* (NSW), s 151P, provides: "No damages for psychological or psychiatric injury are to be awarded in



An example of the restrictive nature of these provisions and their effect is seen in the case of *Burke v New South Wales* [2004] NSWSC 725. The plaintiff in this case brought action to attempt to recover damages for mental harm caused as a result of his best friend’s death in the 1997 Thredbo landslide. While the case was complicated by the expiration of the limitation period for recovery, the nervous shock claim was unsuccessful for a number of reasons. Master Malpass ruled that Burke’s proximity to the site was not sufficiently immediate to fall within the statutory provision of “witness[ing] at the scene, the victim being killed, injured or put in peril”.²⁰ This was despite Burke’s police statement in which he testified that he had been approximately 500 m away from his friend’s place of residence – where he had just left his friend – at the time of the landslide, and gave evidence that he “knew that there had been a large landslide” upon hearing and observing another lodge give way. He provided further evidence that he knew within half an hour that his friend had been within one of the destroyed lodges at the time of the landslide. Interestingly, Malpass M also states (at [47]) that “the plaintiff cannot now be regarded as a credible or reliable witness”, chiefly because of his conscious or subconscious contamination of his recollection of the events due to what Burke’s psychiatrist describes as “survivor guilt”. This discrediting of the plaintiff’s evidence based largely on the mental harm which the judge ruled him unable to recover for is an excellent example of the unique difficulty of proving mental harm – and would seem to hark back to the seemingly dismissive way the courts have historically treated plaintiffs with nervous shock claims.

In *Wicks v Railcorp* [2007] NSWSC 1346 two male police officers present at the aftermath of the Waterfall train disaster were denied damages for the post-traumatic stress disorder they suffered as a result of seeing victims “in the process of dying ... [and victims] continuing to suffer progressive injury” (at [21]). The statutory constraints were clear. Associate Justice Malpass found (at [80]-[81]):

In the present case, the plaintiffs were exposed to the post-accident wreckage and carnage. In that sense, what they saw was the aftermath of the accident, which exposed them to the damaged train and the passengers that had either been killed or injured.

On behalf of the plaintiffs, it is contended that, during their presence at the scene of the derailment, they witnessed passengers being put in peril. In my view, this contention lacks evidentiary support. Accordingly, even if a different view were to have been taken as to the meaning of “the scene”, the claims would still fail.

The case of *Wicks*, perhaps more than that of *Burke*, exposes the largely artificial and theoretical distinction made between mental harm suffered at the scene and that suffered at a distance somewhat removed from the immediate injury or death of the victim. The assumption that a reasonable person would foresee injury to a person immediately witnessing a train accident – and not to the persons involved in the rescue of injured passengers from that accident – must be challenged. Feminist analysis discredits these artificial distinctions as throwbacks to the highly gendered way in which the principles governing nervous shock cases originally developed; this is further discussed below.

The fact that a different set of rules arose, was somewhat mitigated by the courts and then arose again in legislation for cases where psychiatric harm is suffered compared with those where physical injury is suffered is significant. For the courts to say that the tests are the same – reasonable foreseeability of harm – is disingenuous when there is such an emphasis on the different nature of psychiatric harm. Despite a greater acceptance of the validity of claims for mental or psychiatric injury, the law continues to see the distinction between physical harm and psychiatric harm as one worth maintaining. Why these concepts remain in the law is a matter on which feminist analysis continues to be illuminating.

FEMINIST ANALYSIS OF NERVOUS SHOCK

This section of the article considers some of the statistical and demographic issues that can be discerned from a study of 264 cases involving psychiatric harm claims in Australia from 1885 to 2008.

respect of an injury except in favour of (a) the injured worker, or (b) a parent, spouse, brother, sister or child of the injured or deceased person who, as a consequence of the injury to the injured person or the death of the deceased person, has suffered a demonstrable psychological or psychiatric illness and not merely a normal emotional or cultural grief reaction.”

²⁰ *Civil Liability Act 2002* (NSW), s 30(2)(a).



It then considers how feminist analysis has contributed to our understanding of these cases and why this continues to be useful. The argument made here is that, statistically and demographically, psychiatric harm actions appear to involve women more than men; however, it is more important to consider the extent to which the reasoning process, and particularly the way psychiatric harm is regarded, is affected by, and in turn contributes to, a (masculine) gendered way of thinking which continues to permeate our society.

Statistical and demographic issues

A study of 266 cases involving psychiatric harm claims between 1885 and 2008²¹ in Australia was carried out to investigate statistical patterns that might reveal the gendered nature of the tort. This study was motivated by the need to investigate the basic claim that this is a cause of action that is predominantly brought by females. If the view existed that psychiatric harm is more likely to be suffered by females because of their greater social conditioning to value relationships, or their greater amount of time spent caring for children, then it would follow that a higher number of females would bring actions in respect of both primary and secondary claims. The data gathered revealed a preponderance of female claimants, but not as high a preponderance as might have been expected. As Table 1 shows, 114 of the cases were brought by solely female claimants; 92 were brought by solely male claimants; five were brought by women and their children; and 55 cases were brought jointly by male and female claimants. Thus, while claims involving at least one female plaintiff comprised 65% of the statistical survey, cases with solely female claimants made up just 42% of the surveyed cases. Conversely, solely male claimants represented just 35% of the surveyed claimants, supporting the hypothesis that psychiatric injury is likely to be less complained of by males – and that they are consequently less likely to attempt to recover damages for it.

TABLE 1 Gender composition of plaintiffs in nervous shock cases, 1885-2008

Plaintiff	Successful (No)	Successful (%)	Unsuccessful (No)	Unsuccessful (%)	Total (No)	Total (%)
Male	52	57	40	43	92	100
Female	79	69	35	31	114	100
Male and children	0		0		0	
Female and children	3	60	2	40	5	100
Male and female	38	69	17	31	55	100
Total		65		35		100

Interestingly, male plaintiffs are also less likely to be able to recover, with a 57% chance of success. Plaintiffs are on average successful 65% of the time, with solely female claimants and joint male and female claimants having a 69% chance of success.

The study also gathered data on the relationship between the plaintiff and the victim whose injury or death provoked the nervous shock, and the plaintiff's success rate. Of the female plaintiffs, 55 brought the action because of physical injury to themselves, 29 brought the cases due to their status as mothers (that is, for nervous shock due to the injury/death of a child) and 20 brought their claim because of injury or death of their husband. Another six women brought claims for nervous shock due to the injury or death of their own mother. Only two cases were brought by women in regard to the injury of a person with whom they did not share an intimate or family relationship. One woman brought action in regard to a colleague's injury; one in regard to a friend's injury. On the other hand,

²¹ All reported cases for the period. Each case decided is counted only once even if there is more than one decision on it: thus, a case which begins in the Supreme Court and is heard three times culminating in the High Court is counted as one.



65 of the males brought actions based on physical injury to themselves, 9 brought an action due to their status as fathers and 11 brought a case due to the injury or death of their wife.

Within this small group of cases, there is already evidence of a greater number of female plaintiffs involved in nervous shock claims, which confirms some previous literature.²² Further, females are more likely than males to claim compensation for psychiatric harm due to the injury or death of children²³ and a much higher proportion of employment-related claims were brought by male plaintiffs – 21 as opposed to the 13 brought by women.

What can we conclude from this? Certainly the historical association of women with this tort can in part be explained by the clear pattern of greater involvement with children in women’s lives.²⁴ For instance, the tort’s requirement of actual sight, hearing or presence at an accident and the far greater involvement of women in childcare necessarily created a statistical likelihood that women would bring such actions. The division of domestic labour and childcare within families has remained strongly gendered regardless of whether or not the mother is in the paid workforce.²⁵ The number of sole parents who are female is also significantly higher than the number of sole parents who are male.²⁶ If the assumption is made that increased time with children leads to an increase in emotional involvement in those children, it could be posited that the impact of their death or injury would be greater on those undertaking the majority of their care – namely, mothers. This assumption also suggests that this impact will be emotional, and indeed that it may catastrophically damage the psyche of a person who has been spending many intimate hours with the child. This is borne out by data showing that not only do more women seek damages relating to the death or injury of their child, but that they are marginally more successful than men in seeking to recover for the same loss by a margin of 69% to 67%.

It is notable that the vast majority of “hard cases” in this area – that is, cases which changed the law in the highest courts of the jurisdiction, or which have provoked legislative change – involved women and their relationship with their children.²⁷ At the same time, it is quite clear that fathers are also enormously affected by the injury or death of their children. It is interesting to note that the success rate in cases where both genders are represented and in which there is a familial relationship with the victim is much higher (80%) than either the average success rate for cases overall (65%), or those cases in which the plaintiff is related to the victim and only one gender is represented (71%).

²² The ratio of female plaintiffs to male plaintiffs in 301 cases in early 20th century United States cases was 5:1 in a study carried out by Smith HW, “Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli” (1944) 30 Va L Rev 193, cited in Chamallas and Kerber, n 2 at 846. The current authors have been able to find no other studies of these ratios.

²³ In relation to claims for themselves, 31 of the females and seven of the males brought claims arising out of sexual assault; and 17 of the males and nine of the females’ claims arose out of employment.

²⁴ The Australian Bureau of Statistics estimates that there were 5.3 million mothers in Australia in 2000. At this time there were at least 1.75 million males who were fathers with children less than 15 years old. Of these, 93% were employed or looking for work; 83% were employed full time. Of the fathers with young children, few were likely to be unpartnered or spend significant time with the children. In June 1999, 27% of fathers compared with 68% of mothers used job-sharing or other family-friendly arrangements to care for children under 12 years old. This implies that a higher proportion of employed fathers than employed mothers had partners who stayed at home to care for children. Regardless of their employment status, mothers generally spend at least twice as much time on childcare as fathers. In 2000, 86% of one-parent families had a female parent: *Australian Social Trends 2001*, <http://www.abs.gov.au> viewed 29 February 2008.

²⁵ Time use studies have repeatedly shown that women continue to perform the majority of childcare tasks within a family, as well as spending more time on their own with children: Craig L, *Time to Care: A Comparison of How Couple and Sole Parent Households Allocate Time to Work and Children* (Social Policy Research Centre Discussion Paper No 133, June 2004) divides childcare activities into four different categories: physical care, child-related travel, interactive care and passive childcare. Across all categories mothers spend substantially more time with their children than fathers, and much of the time fathers spend with their children is in the company of the mother. See also Craig L, *A Cross-national Comparison of the Impact of Children on Adult Time* (Social Policy Research Centre Discussion Paper No 137, February 2005).

²⁶ In 2000 there were 549,100 one-parent families in Australia. In 86% of these families the parent was female: see Craig, n 25 (2004) p 8.

²⁷ *Victorian Railways Commissioners v Coultas* (1888) 13 App Cas 222; *Hambrook v Stokes Bros* [1925] 1 KB 141; *Chester v Waverley Corp* (1939) 62 CLR 1; *Bourhill v Young* [1943] AC 92; *King v Phillips* [1953] 1 QB 429; *McLoughlin v O’Brian* [1983] 1 AC 410.



This can be seen here in Table 2. Of the 40 cases in this category, 26 have been brought by parents in regard to the death or injury of their child. In this subcategory, the success rate is an even higher rate of 88%. This is perhaps not only indicative of the legal system's preference for an understanding of human relationships that prioritises established categories (as discussed below), but also of the historical evolution of the tort as one primarily concerned with the reaction of mothers to their children's death or injury. However, as discussed above, joint male and female plaintiffs are overwhelmingly more successful than either of these two categories. The growing number of men seeking to recover with their spouses for their children's death does perhaps indicate an evolution in the roles of parents and greater emotional involvement by fathers in the lives of their children.

TABLE 2 Success rates in cases where plaintiff is related to victim, by gender

Plaintiff	Successful	Unsuccessful	Total
Male	65%	35%	100%
Female	67%	33%	100%
Male and children	0%	0%	0%
Female and children	60%	40%	100%
Male and female	80%	20%	100%
Total	71%	29%	100%

Psychiatric harm is not a feminist issue just because it is an injury suffered predominantly by women. What is as important for feminist theorists is that the early predominance of women means that issues of particular concern to women, and issues traditionally culturally identified as predominantly feminine – such as the early “nervous shock” itself being connected to hysteria – lie at the heart of this cause of action, and that in this area we can identify some of the processes of reasoning that create a situation where the fact that something is identified as female or female-specific reduces its authenticity in the eyes of society and the law.

Feminist legal theory and the history of nervous shock

There are a number of reasons why feminist legal scholars (who are characterised here as theorists who analyse the role of law and legal practice in creating, reinforcing and perpetuating gendered hierarchies) have focused on the development of the law relating to “nervous shock”; these include the tort's historical development, and the statistical and demographic reasons for considering it to be in some way peculiarly or specifically about women. But beyond these reasons are arguments about the concepts at work in the tort, which help us to understand the ways in which law perceives and constructs rationality, the mind and the place of women and men in society.

In order to consider whether the changes after 2002 have made feminist analysis obsolete it is necessary to revisit the way in which the feminist analysis of nervous shock cases has been useful and illuminating. Analysis of both the history and more recent cases reveals the complex and sometimes contradictory ways in which gender and gendered identity are constructed within tort law. As is often the case in law, a category of harm which in some respects appears to create a category of compensable harm to the advantage of female plaintiffs, carries with it risks as courts attempt to distinguish between deserving and undeserving plaintiffs.²⁸ At the same time, the claim that there is

²⁸ Welke B, “Unreasonable Women: Gender and the Law of Accidental Injury 1970-1920” (1994) 19 Law & Soc Inquiry 369 points to the potentially problematic consequences for women that flow from what looks like, and in some cases is, a beneficial attention to gender on these early personal injury claims: “[B]ecause the law is premised on a narrow image of what constituted ‘ladylike’ conduct and a debilitating image of women's nature, all this came at an immediate cost to some women and a long-term cost to all women.” This problematic entrenching or, as Welke puts it, reification of gender norms via case law is discussed in greater detail below.



more to a feminist analysis of the tort than whether women win or lose, does not diminish the fact that a hierarchy that privileges physical injury over emotional harm is more likely to be disproportionately detrimental to women.

A consideration of the history and contemporary treatment of the tort shows that feminist issues are raised in complex ways by it. The feminist critiques of the nature of legal reasoning, of rationality, of the mind-body split, of the private-public divide are all relevant to the tort in ways which go well beyond the simple matter of whether claims are predominantly made by men or women. While the privileging of men over women, and masculine over feminine, has been and remains an entrenched characteristic of Western culture (and many other cultures), the mechanisms by which this occurs are not always explicit, nor do they always function in predictable or consistent ways. Feminist critiques of tort law tend to turn around a number of key issues or themes,²⁹ all of which are relevant, to a greater or lesser extent, to “nervous shock” cases. These include the valuing of women’s work for damages purposes,³⁰ the nature of the reasonable person,³¹ and the recognised types of harm.³² Some critiques also turn on the nature of legal reasoning³³ and ideas about rationality.³⁴

The fear of the imaginary

The range of situations in which plaintiffs have recovered compensation for negligently caused psychiatric harm extends from those where the psychiatric harm follows a physical injury to the self, as in *Donoghue v Stevenson* [1932] AC 562,³⁵ to those where the only injury suffered is mental. It is most important to note that in contemporary cases, echoing the early case of *Victorian Railways Commissioners v Coultas* (1888) 13 App Cas 222,³⁶ the legal difficulties raised by seeking compensation for mental suffering are only seen to arise when the claim involves mental suffering only (or where the only physical suffering follows the mental injury). Where a person has been physically injured,³⁷ their entitlement to recover damages for mental harm (including simple distress) which is consequential to the physical injury is seen as relatively unproblematic and such claims are not characterised as actions for nervous shock but simply as actions for physical injury. Thus, if a

²⁹ An excellent overview of feminist theory in relation to tort law is by Conaghan J, “Tort Law and the Feminist Critique of Reason” in Bottomley A (ed), *Feminist Perspectives on the Foundational Subjects of Law* (Cavendish Press, London, 1996). An overview of American feminist scholarship in tort law is offered by Bender L, “An Overview of Feminist Torts Scholarship” (1993) 78 Cornell L Rev 575. Conaghan revisits the broad and varied nature of feminist analysis of many of the foundational concepts of tort law in Conaghan J, “Tort Law and Feminist Critique” (2003) 56 Current Leg Prob 175, a response to Schwartz G, “Feminist Approaches to Tort Law” (2001) 2 Theo Inq L 175. A more general consideration of feminist legal theory is offered by Graycar R and Morgan J, *The Hidden Gender of Law* (2nd ed, Federation Press, Sydney, 2002).

³⁰ For example, Graycar R, “Damaged Awards: The Vicissitudes of Life as a Woman” (1995) 3 TLJ 160; Graycar R, “Women’s Work: Who Cares?” (1992) 14 Syd LR 86.

³¹ Bender, n 2 (1988); Finley, n 2; Forell C, “Essentialism, Empathy and the Reasonable Woman” (1994) 4 Univ Ill Law Rev 769; Allen H, “One Law for All Reasonable Persons?” (1988) 16 Int J Soc L 419; Martyn R, “A Feminist View of the Reasonable Man: An Alternative Approach to Liability in Negligence for Personal Injury” (1994) 23 Anglo-Am L Rev 334; Parker W, “The Reasonable Person: A Gendered Concept?” (1993) 23 VUW L Rev 105.

³² Goodzeit CA, “Rethinking Emotional Distress Law: Prenatal Malpractice and Feminist Theory” (1994) 63 Fordham L Rev 175; Handsley, n 2.

³³ See eg Pateman C, *The Sexual Contract* (Polity Press, Cambridge, 1988); Smart C, *Feminism and the Power of Law* (Routledge, London, 1989); MacKinnon C, “Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence” (1983) 7(3) *Signs* 635.

³⁴ For example, Lloyd G, *The Man of Reason: “Male” and “Female” in Western Philosophy* (Methuen, London, 1984).

³⁵ See also *Kavanagh v Akhtar* (1998) 45 NSWLR 588; *Nader v Urban Transit Authority (NSW)* (1985) 2 NSWLR 501; *Commonwealth v McLean* (1996) 41 NSWLR 389 and many others.

³⁶ The Privy Council held that Mrs Coultas’ “severe nervous shock”, caused by her terror when a negligent railway crossing gatekeeper allowed her buggy onto the track so that a collision with a train was only narrowly avoided, was too remote from the gatekeeper’s wrong.

³⁷ There is a small number of cases where compensation has been given for psychiatric harm caused by property damage, but this article does not consider them, largely because they are relatively few. See *Attia v British Gas plc* [1988] QB 304 and *Campbelltown City Council v Mackay* (1989) 15 NSWLR 501, which take different approaches.



physical injury is incurred, plaintiffs may recover for mere grief or sorrow if it is consequential, while if the mental injury stood alone it would be regarded as uncompensable.

Psychiatric harm as compensable damage is something the courts have resisted. The reasons lie in concerns about fraud and spurious claims, many of which have deeper roots which are explored below. While more contemporary cases and legislation may use the term “mental injury” or “psychiatric harm”, “nervous shock” has been and continues to be the term traditionally used to refer to psychiatric harm in the legal domain. In the 1800s for a time the terminology “nerves” and “nervous” was used by psychiatrists to refer to biological illnesses which we would now regard as psychiatric.

However, “this [terminology] was a massive duplicity, a century-long deception of the public to the effect that illness meant a disorder of the nerves when in fact the brain was meant”.³⁸ Thus, early in the 19th century, medical practitioners saw mental injury as a form of physical injury. In the late 19th century medical science began to argue that “nervous shock” was essentially psychological in origin and it began to be treated as separate from physical injury. At the same time, the concept of psychiatric harm itself raised questions about the validity of injuries to the mind, particularly if that injury was seen to involve a primarily emotional component. Early psychiatry referred to “hysteria” (from “hysteros”, the Greek term for uterus), which was a form of mental illness suffered by women, arising from their very femininity. “Hysteria” was a recognised illness, but at the same time, because it was suffered by women it was regarded as of little validity, or “imaginary”. It carries connotations of overreaction to imagined horrors. Further, it was an illness regarded as especially susceptible to being faked, as Foucault observes:

Often hysteria was perceived as the effect of an internal heat that spread throughout the entire body, an effervescence, an ebullition ceaselessly manifested in convulsions and spasms. Was this heat not related to the amorous ardour with which hysteria was so often linked, in girls looking for husbands and in young widows who had lost theirs?³⁹

These attitudes of early psychiatry, regarding mental injury suffered by women as of little importance, coupled with clear suspicions that it was often “dissimulated”, find their correspondence in the case law. The fear of fakery has been one of the major hurdles in the way of acceptance of the action for psychiatric harm caused by negligence, as Gummow and Kirby JJ noted in *Tame; Annetts*.⁴⁰ *Coultas* (and other cases) demonstrates clearly the fear that claims for psychiatric harm could be fraudulently foisted on defendants. The view of women as hysterical victims has had paradoxical results; on the one hand, it leads to a view that women are necessarily likely (and therefore foreseeably likely) to suffer nervous shock. However, on the other hand, nervous shock or psychiatric or emotional harm is regarded as irrational (and therefore unreal) and therefore something for which compensation should not lie. This led to cases deciding that emotional harm on its own could not be compensated.⁴¹

The term “nervous shock” was coined by a surgeon called John Erichsen in 1866.⁴² He meant by this a physical impact which injured the central nervous system through “concussion of the spine”. The first legal use of the term “nervous shock” was in 1886 in *Coultas*, which saw the definition of nervous shock as an essentially psychological injury adopted by counsel.⁴³ This case, and two other significant ones which followed, were all cases involving pregnant women. In *Victorian Railways Commissioners v Coultas* (1888) 13 App Cas 222 the Privy Council held that Mrs Coultas could not

³⁸ Shorter E, *A History of Psychiatry* (John Wiley & Sons, New York, 1997) p 116; Hare E, “The History of ‘Nervous Disorders’ from 1600 to 1840, and a Comparison with Modern Views” (1991) 159 *Brit J of Psychiatry* 37.

³⁹ Foucault M, *Madness and Civilisation* (Random House, New York, 1965) p 140.

⁴⁰ See text above at 11.

⁴¹ For example, in *Coultas* the court accepted physical harm (the miscarriage) as evidence of the psychiatric harm’s existence.

⁴² Mendelson G, “Posttraumatic Stress Disorder as Psychiatric Injury in Civil Litigation” (1995) 2(1) *PPL* 53.

⁴³ In *Victorian Railways Commissioners v Coultas* (1886) 12 VLR 895 the railway gatekeeper had invited the plaintiffs to cross a level crossing as the train was about to appear and a collision was narrowly avoided. Mrs Coultas suffered from a range of symptoms as a consequence of her fright, including shock, a miscarriage and physical injury. The medical evidence agreed that



recover because this would be too great an extension of liability (at 225-226):

[I]n every case where an accident caused by negligence had given a person a serious nervous shock there might be a claim for damages on account of mental injury. The difficulty which often now exists in case of alleged physical injuries of determining whether they were caused by the negligent act would be greatly increased, and a wide field opened for imaginary claims.

The reference to “imaginary claims” shows the extent of the concern that the judges had about the likelihood that claims would not be genuine. The Privy Council did go so far as to say that impact per se was necessary to establish the genuineness of the claim in nervous shock, as the defendant had argued, but this did not prevent this “impact rule” developing a life of its own. This requirement was particularly popular in the United States in cases from the 1880s, as Oliver Wendell Holmes Jr argued that the impact rule operated to prevent fraudulent claims.⁴⁴ Related to this rule was the “zone of danger” rule. In *Dulieu v White & Sons* [1901] 2 KB 669, a woman suffered nervous shock as a consequence of the defendant’s driving a pair-horse van into the building where she was. As a result, she gave premature birth to a child who was born intellectually disabled. The court held that she was entitled to recover because she was in the “zone of danger”, fearing injury to herself.⁴⁵

In England, the case of *Hambrook v Stokes Bros* [1925] 1 KB 141 (*Hambrook*) removed the zone of danger rule. In a decision that was vitally important for Australian law, the English Court of Appeal removed the requirement that the plaintiff needed to be in danger, but relied instead on a different kind of geographical proximity. In *Hambrook*, a mother suffered psychiatric injury after she saw a driverless truck coming down a hill out of control and feared that it might have injured her children who were further up the hill out of sight. As it turned out, her fear was well founded. The Court of Appeal set the limitation that the shock must be caused by the plaintiff’s unaided senses. After *Hambrook* it seemed that even mere bystanders could recover in such circumstances, but this was rejected in *Bourhill v Young* [1943] AC 92 and *King v Phillips* [1953] 1 QB 429, cases which both held that psychiatric injury to a mere bystander was unforeseeable.

All these special rules were designed to alleviate the concern of the law that psychiatric harm was unreal, and could be fraudulent. For example, Chamallas and Kerber quote an article about traumatic neurosis that was frequently drawn on by American courts in their analysis of shock cases:⁴⁶

Males venture into places of peril as much as females and so are as frequently exposed to [trivial impacts or psychic stimuli]. But the male is usually the breadwinner; his thoughts are distracted from his experience by the tasks of his job, and further he has much to lose and little to gain by developing a neurosis. The female is usually at home, has more time to ponder upon the experience, and more to gain and less to lose from developing symptoms. The independent post-accident psychological forces conducing to neurosis are apt to be more potent in her case.

This analysis emphasises the fraudulent nature of a strong reaction to a traumatic event. Essentially, the underlying argument of the analysis is that the male will respond minimally because of the importance of his rational and important public role, whereas the female at home has nothing to do, and thus spends more time pondering. The analysis also seems to imply that she may deliberately develop an imaginary psychiatric illness and then sue for it. The view of the role of the female at home is interesting. This analysis implies that domestic work is not work: indeed, it does not seem to exist at all in this analysis. The female is seen as having something to gain (although the nature of this benefit is not specified) from developing these symptoms and perpetrating a fraud on the system.

There were times when sympathy outweighed the fear of the imaginary, as in the legislative response to the Australian case of *Chester v Waverley Corp* (1939) 62 CLR 1 (*Chester*). There the

she suffered from “nervous shock”. A jury awarded her damages and the defendant’s appeal was rejected by the Full Court of the Supreme Court of Victoria. However, the Privy Council held that she could not recover because this would be too much of an extension of liability.

⁴⁴ The history of the rules used in the United States to bolster concerns about the imaginary or unreal nature of psychiatric harm and its gendered effect is considered in the now classic article by Chamallas and Kerber, n 2.

⁴⁵ The zone of danger approach has remained influential in the United States in some jurisdictions, although in California and other States it is no longer a requirement.

⁴⁶ Chamallas and Kerber, n 2 at 848, quoting Smith W and Solomon H, “Traumatic Neuroses in Court” (1943) 30 Va L Rev 87.



High Court (Evatt J dissenting) rejected a claim by a mother for nervous shock after she saw her son, for whom she had been searching for hours, dragged dead from a council trench. The rejection seemed too harsh to many, and New South Wales and the Territories enacted legislation to remediate it. This legislation⁴⁷ provided that where there was liability for injury to or putting a person in peril, that liability could be extended to liability for nervous shock sustained by a parent or spouse of the victim, or any other family member of the victim who saw or heard the accident. It took a long time for the common law to catch up to this recognition of the power of relationships, and after it did, the legislature enacted the civil liability legislation to rein the law in again.

The development of psychoanalysis which took the view that mental injury arose from “unconscious conflicts over long-past events, especially of a sexual nature”⁴⁸ (a view which was uncomfortable for many, and less precise than the law liked) was dominant in 20th century psychiatry until a wave of medical research encouraged a shift towards ways of dealing with mental illness such as electro-convulsive shock treatment and drug treatment that were based on the idea of a biological basis of mental illness. In the 1970s this view flowered, particularly as drug therapy became more effective due to increased research into neurotransmitters in the brain.⁴⁹ Throughout this time, the legal view of psychiatric harm was fairly sceptical. However, as psychiatry was perceived to become more and more scientifically based and as it developed identification systems which appeared to be more consistent, legal resistance lessened. In 1983, in *McLoughlin v O’Brian* [1983] 1 AC 410 at 421, Lord Wilberforce, in rejecting the argument that the extension of nervous shock cases “may lead to a proliferation of claims, and possibly fraudulent claims”, quoted Prosser:⁵⁰

The reluctance of the courts to enter this field even where the mental injury is clearly foreseeable, and the frequent mention of the difficulties of proof, the facility of fraud, and the problem of finding a place to stop and draw the line, suggest that here it is the nature of the interest invaded and the type of damage which is the real obstacle.

Today, two major diagnostic tables are influential in legal cases. Shorter observes, “In the 1960s, the discipline began to wake up to the importance of getting the diagnosis right”.⁵¹ This led to the new and scientific *Diagnostic and Statistical Manual of Mental Disorders*⁵² in the United States and the World Health Organisation’s *International Classification of Diseases*,⁵³ which is influential in the United Kingdom and Europe. Since negligence is an action on the case, it is impossible to bring an action unless damage can be proved. It is thus critical to establish the psychiatric injury.⁵⁴ This has been easier to do since psychiatry developed systematic diagnostic manuals, but the courts continue to have some level of scepticism.

Nervous shock and the mind-body distinction

The characterisation of psychiatric or mental harm as entirely distinct from physical injury can be seen in the cases right from the beginning, as in *Coultas*, and is maintained, despite rhetoric to the contrary, in *Tame; Annetts*. In 1861 in the famous case of *Lynch v Knight* (1861) 9 HL Cas 576; 11 ER 854 Lord Wensleydale observed (at 598) that “Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone”.

⁴⁷ *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) and its equivalents. Now overtaken by the *Civil Liability Act 2002* (NSW).

⁴⁸ Shorter, n 38, p 145.

⁴⁹ At the same time there also developed an anti-psychiatry movement, with some arguing that mental illness was a cultural construct and that psychiatric illness was a myth: see Laing RD, *The Divided Self* (Pantheon Books, New York, 1960); Foucault, n 39; Szasz T, *The Myth of Mental Illness* (Harper & Row, New York, 1961); Goffman E, *Asylums* (Penguin, New York, 1961).

⁵⁰ Prosser D, *Torts* (4th ed, West Publishing, St Paul, 1971) p 276.

⁵¹ Shorter, n 38, p 145.

⁵² American Psychiatry Association, *Diagnostic and Statistical Manual of Mental Disorders-III* (American Psychiatry Association, Washington DC, 1980); *DSM III-R* (1987); *DSM-IV* (1994); *DSM-IV-TR* (2000).

⁵³ World Health Organisation, *The ICD-10 Classification of Mental and Behavioural Disorders: Clinical Descriptions and Diagnostic Guidelines* (World Health Organisation, 1992).

⁵⁴ See Butler D, “Identifying the Compensable Damage in ‘Nervous Shock’ Cases” (1997) 5(1) TLJ 67.



The polarisation of physical and mental harm in our society stems from Western liberal philosophy’s separation of body and mind and the related separation between rationality and irrationality.⁵⁵ In this context the mind-body split emphasises the body as “real” and the mind as “unreal”. Injuries to the mind are characterised as wounded feelings, and emotional reactions are neither rational nor directly observable. The reluctance to compensate for emotional anxiety or pain reflects the suspicion that they are therefore “unreal”. “Hysteria” (which, for a long time, was a significant psychiatric diagnosis) carries connotations of overreaction to imagined horrors. In contrast, physical injury is seen as real and observable and seemingly harder to fake.

This perceived polarisation of the mind and body led to concern about psychiatric harm as a compensable category of harm. Paradoxically, the psychiatric harm was only regarded as real if it was accompanied by physical harm; that so many of the early cases concerned what were seen to be shock-induced miscarriages points to this tendency. The effect of the physical harm was to validate the psychiatric harm. However, by the 1960s the law was beginning to recognise that injuries to the mind were real. In his famous remark in *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383, Windeyer J said (at 395):

Law, marching with medicine but in the rear and limping a little, has today come a long way since the decision in [*Coultas*] ... An illness of the mind set off by shock is not the less an injury because it is functional, not organic, and its progress is psychogenic.

While judges have frequently said that the distinction between ordinary physical injury and psychiatric injury is illusory,⁵⁶ the law maintained the distinction by continuing to insist on separate tests for each category, for a long time emphasising the “shock” and other specific requirements such as sudden sensory perception. Where the shock requirement was not met, the courts frequently refused to give compensation.⁵⁷ The shock requirement operated as a way of ensuring that the causal link between the accident and the psychiatric harm was clear in a world where it was not seen as obvious that a victim’s physical injury could cause mental harm to their loved ones – since this mental injury was possibly unreal.⁵⁸

English law continues to maintain the requirement that there must be a “shock” causing the psychiatric injury.⁵⁹ However, the requirement was not so absolute in Australia.⁶⁰ A number of courts and judges in Australia have felt able to dispense or deal robustly with the requirement.⁶¹ The view

⁵⁵ Descartes first proposed this separation between body and mind, drawing to some extent on Christianity’s separation of body and soul: Descartes, *Meditation VI*.

⁵⁶ This was so as early as 1914 in *Brown v John Watson Ltd* [1915] AC 1 at 14 (Lord Shaw); in *Bourhill v Young* [1943] AC 92 at 103 Lord Macmillan said: “The distinction between mental shock and bodily injury was never a scientific one.” See also *R v Miller* [1954] 2 QB 282; *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383; and *Aboushadi v CIC Insurance* (1996) Aust Torts Reports 81-384 at 63,339 (Handley JA). Gummow and Kirby JJ in *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317 observed (at [183]): “Advances in the capacity of medicine objectively to distinguish the genuine from the spurious, and renewed attention to the need to establish breach, causation and a recognisable psychiatric illness that is not too remote, indicate the need for re-accommodation of the competing interests which are in play in ‘nervous shock’ cases.”

⁵⁷ See eg *Pratt v Pratt* [1975] VR 378 where the mother was refused compensation for nervous shock incurred after some weeks or months of caring for her daughter who was catastrophically brain-damaged in a car accident.

⁵⁸ Shock is no longer regarded by psychiatrists as necessary for all psychiatric injuries. It does continue to be noted in the DSM-IV as a stressor for post-traumatic stress disorder, but not for other illnesses. There is nothing about sudden sensory perception that is necessarily connected to all the possible definitions of psychiatric harm which are accepted in manuals such as the DSM-IV. It may be required for post-traumatic stress disorder, but it is certainly not necessary for psychotic depression, for example.

⁵⁹ *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 at 398 (Lord Keith); at 400 (Lord Ackner); at 411 (Lord Oliver).

⁶⁰ See Butler D, “Nervous Shock at Common Law and Third Party Communications” (1996) 4(2) TLJ 120; and Butler D, “A Kind of Damage: Removing the ‘Shock’ from ‘Nervous Shock’” (1997) 5(3) TLJ 255. Clearly Brennan J in *Jaensch v Coffey* (1984) 155 CLR 549 thought so (at 565), but Deane J, while recognising that that was the orthodox position, left some leeway (at 608), and Gibbs CJ left it open (at 555). Murphy J did not discuss it.

⁶¹ For example, in *Coates v Government Insurance Office (NSW)* (1995) 36 NSWLR 1 where there was merely the passing of information to two children that their father had been killed in a car accident, Kirby P, in dissent, regarded the significance of the information to the hearer as more important than the mode of discovery. He argued that advances in psychiatry were a



taken in these cases placed “greater emphasis on the significance of the message for the plaintiff than the means of its conveyance or perception”.⁶² This recognises one of the fundamental lessons of the second wave of feminism, that, as Handsley says, “connection is an important part of the *female* experience”.⁶³ She goes on to say:

[Connection] is described here as part of the *human* experience because it is my belief that men experience it too; the difference is only that women are encouraged to experience and cultivate it whereas men are discouraged from the same.⁶⁴

Although the High Court appears to have come to the same conclusion, it is arguable whether there has really been a shift in the level to which they have recognised the power of relationships to cause mental injury and the extent to which that injury is real. In *Tame* they emphasise actual knowledge and objectivity in their treatment of foreseeability and in *Annetts* and *Koehler* they emphasise factors in the commercial and public environments, in particular, the significance of the context of employment. The continued insistence on reasonable foreseeability of a recognised (or recognisable) psychiatric harm is a tighter requirement than the foreseeability of any injury which is all that is required where physical injury is at issue and indicates that reservations remain about the reality of psychiatric harm.

Cases such as *Annetts* and the previously mentioned statutory reforms introduced in the early 2000s expose the legal system’s understanding of relationships chiefly in terms of its ability to categorise them. For example, in New South Wales, those plaintiffs seeking to recover for the death or injury of a loved one must have possessed a relationship with the victim that falls within strictly defined categories of relationship even though this approach to relationships seems increasingly out of touch in a society where the proportion of non-family households is rising rapidly⁶⁵ and in which relationships increasingly defy traditional categories and may be maintained through long-distance communication and, indeed, through virtual reality. Whereas reasonable foreseeability alone may allow loved ones who fall outside these categories to recover, these statutory provisions will not. Furthermore, this categorical approach is at odds with the feminist valuing of “connection ... as part of the human experience”⁶⁶ which would seem to encourage an approach in which the quality of the relationship between the plaintiff and the victim – as perhaps informed and influenced by any existing family relationship between them – would be valued and considered in examining reasonable foreseeability.

Psychiatric harm and the rational/irrational distinction

As already noted, *Tame*; *Annetts*, *Gifford v Strang* and *Koehler* emphasise that “[t]he touchstone of liability remains reasonableness of conduct”.⁶⁷ Their emphasis on reasonableness means that the concept of rationality continues to be central to the judges’ view of the tort. Closely connected to the mind-body split in the Western liberal tradition is the bipolar distinction between the rational and the irrational, which in turn is closely imitated in law in the distinction between the reasonable and the

reason to dispense with this requirement, noting that the rules about perception reflected 19th century views about psychology and 19th century ways of communicating. Kirby P’s lead was followed by the District Court of New South Wales in *Quayle v New South Wales* (1995) Aust Torts Reports 81-367. Similarly Lee J in *Reeve v Brisbane City Council* [1995] 2 Qd R 661 regarded actual perception as not necessary for liability. The plaintiff did not see the body of her dead husband for some days after she was informed of the accident at work in which he was killed. She did not go to the scene, and only saw him at the funeral parlour some days later. In *Petrie v Dowling* [1992] 1 Qd R 284 the plaintiff was informed that her daughter had been in an accident. At the hospital she tried to make light of it and said to the Sister, “She isn’t dead, is she?” The Sister replied, “I’m afraid so.” She was held able to recover damages, as actual perception of the accident was not required of her.

⁶² Butler, n 60 (1996) at 131.

⁶³ Handsley, n 2 at 465, fn 323 (emphasis in original).

⁶⁴ Handsley, n 2 at 465, fn 323 (emphasis in original).

⁶⁵ The Australian Bureau of Statistics breakdown of the 2006 census showed an increase in non-family households from 22.7% in 1996 to 28.3% in 2006: Australian Bureau of Statistics, *Population Overview* (2006), [http://www.abs.gov.au/ausstats/subscriber.nsf/LookupAttach/2070.0Publication29.01.096/\\$File/20700_Population_overview.pdf](http://www.abs.gov.au/ausstats/subscriber.nsf/LookupAttach/2070.0Publication29.01.096/$File/20700_Population_overview.pdf) viewed 29 February 2008.

⁶⁶ Handsley, n 2 at 465, fn 323.

⁶⁷ *Tame v New South Wales*; *Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317 at 383. See text above at 13.



unreasonable. The various products of the mind themselves are divided into the rational and the irrational. From this viewpoint the rational is the product of logical thought derived from observation, and the irrational includes things like emotions and feelings and is therefore somehow “tainted” by the body. Western liberalism has viewed the rational or the reasonable as the domain of men, as characteristic of men and as a valuable characteristic in itself. Indeed, this view of the differences between men and women can be traced back to Aristotle. “Men”, he said, “are by nature more fitted to rule than women.”⁶⁸ Men were seen as rational beings who used their minds to reach universal laws by processes of “pure” logic such as syllogism and dispassionate observation. This rationality was the opposite of, and unsullied by, emotion, imagination and the irrational, which were the domain of women.

Feminists and philosophers of science have critiqued this view of rationality (which continues to dominate Western thought) as unreal.⁶⁹ It is not possible for an observer to observe phenomena without some choices being made. Further, the rationality and neutrality of the Western liberal tradition can be seen to be male,⁷⁰ and therefore not universal as it is claimed.⁷¹ Psychological and philosophical views of reason are no longer so confident that rationality and irrationality are polar opposites, or even that they exist along a continuum.⁷² Similarly, the very concepts of sanity and insanity are no longer used in ordinary psychiatric discourse.

Negligence has been said to be “the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do”.⁷³ Case law says that the reasonable man is the “man of ordinary prudence”.⁷⁴ He is rational, thoughtful but ordinary. He “is presumed to be free both from over-apprehension and from over-confidence”.⁷⁵ He is a universal and objective standard against which any person may be measured. In its incarnation as “the reasonable person” feminists have been able to show that far from being entirely objective and universal, in fact the reasonable person is a man. Indeed, judges have referred to him as “the man on the Clapham omnibus”,⁷⁶ or the “man on the Bondi tram”.⁷⁷ Feminist legal theorists have shown that the “reasonable man”, far from being universal and the emanation of pure reason, uses masculine language and exhibits masculine characteristics. The use of the term “reasonable man” to include women was assumed for a long time, until it became clear that what it really did was “universalize ... particular features of masculinity, as if they were genuinely representative of both sexes”.⁷⁸ The shift to the terminology of the “reasonable person” does not appear to have solved the problem. Rather, it has operated simply to hide the masculine nature of the construct.

⁶⁸ Aristotle, *Politics*, Bk I, xii, 1259a37.

⁶⁹ See eg Antony LM and Witts C (eds), *A Mind of One's Own: Feminist Essays on Reason and Objectivity* (Westview Press, Boulder, 1993); and Harding S and Hintikka M (eds), *Discovering Reality: Feminist Perspectives on Epistemology, Metaphysics, Methodology and Philosophy of Science* (D Reidel Publishing, Dordrecht, 1983).

⁷⁰ See eg Lloyd, n 34.

⁷¹ For example, in *Re Haynes* [1904] 4 WAR 209, the female applicant's application to do the examination to become a legal practitioner in Western Australia was refused on the grounds that the word “person” in the *Legal Practitioners Act 1893* (WA) did not include women; that the universal word “person” in fact meant “man”. The various Acts Interpretation Acts of the Australian jurisdictions have now established that the word “person” does include women, but the need for such legislation establishes the falsity of the claim of the law to be at all times universal, neutral and unbiased in its application.

⁷² See eg Suber P, “Legal Reasoning after Post-modern Critiques of Reason” (1997) 3 *Legal Writing* 21.

⁷³ *Blyth v Birmingham Waterworks Co* (1856) 11 Ex 781 at 784; 156 ER 1047 (Alderson B).

⁷⁴ *Vaughan v Menlove* (1837) 3 Bing NC 468; 132 ER 490.

⁷⁵ *Glasgow Corp v Muir* [1943] AC 448 at 457 (Lord Macmillan).

⁷⁶ *Hall v Brooklands Auto Racing Club* [1933] 1 KB 205 at 224 (Greer LJ).

⁷⁷ *Papatonakis v Australian Telecommunications Commission* (1985) 156 CLR 7 at 36 (Deane J).

⁷⁸ Grosz E, “Philosophy” in Gunew S (ed), *Feminist Knowledge, Critique and Construct* (Routledge, London, 1990), quoted in Martyn, n 31. Also see above n 2.



Since it is clear that there is no real person who embodies the reasonable person, the question thus becomes: how do we, and in particular, judges, decide what a reasonable person is, or what reasonable behaviour is? Where do we reach to give substance to this standard? The answer must be that the judge must reach for her or his own view of what constitutes appropriate behaviour. While this view will be mediated by her or his knowledge of other cases which have decided this, the judge must ultimately make a decision based on her or his own standards. Some feminist writers have argued that this will always lead to the judge's own view determining the outcome; but it is not so simple. The judge's view will be mediated by all the cases he or she has read and that will offer some restraint; however, in a society where judges have overwhelmingly been male over the centuries this is unlikely to lead to a real consideration of the position of women. The concern is less with individual judges' judgments than with the collective power of hundreds of years of judgments coloured by masculinity.

The concept of the reasonable person is transmuted in the nervous shock arena to the "person of normal fortitude". In the earliest cases, it appears that the judges thought that a person of normal fortitude would not have a miscarriage as a result of a serious fright, in the same way that in World War I soldiers who suffered "shellshock" (the psychiatric harm arising from the psyche being overwhelmed by fear) were regarded as abnormal, lacking in courage and weak. In *Bourhill v Young* [1943] AC 92 we see an example of the view that people should not be overwhelmed by such events. There a pregnant woman heard an accident about 15 m away from her in which a cyclist was killed, and she immediately afterwards saw his blood on the road. She developed a psychiatric illness and later miscarried. Lord Porter was quite robust about this (at 117):

The driver of a vehicle, even though careless, is entitled to assume that the ordinary frequenter of the streets has sufficient fortitude to endure such incidents as may from time to time be expected to occur in them, and is not to be considered negligent to one who does not possess the customary phlegm.

And in *Chester v Waverley Corp* (1939) 62 CLR 1, the majority view was expressed by Latham CJ this way (at 10):

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

In *Jaensch v Coffey* (1984) 155 CLR 549, the plaintiff was the wife of a motor cyclist who was very seriously injured. She did not see or hear the accident, but saw him at the hospital where she was told he was in a critical condition and quite reasonably feared that he might die. She developed a psychiatric illness, and, in an interesting reflection of past links of psychiatric illness with gynaecological problems, we are told that, as a consequence, she had to have a hysterectomy. Mrs Coffey was regarded as a possibly extra-susceptible plaintiff, but the situation in which she found herself was one where a person with normal fortitude would still have been affected. The trial judge found that, despite the presence of factors which might predispose her to psychological problems, she did react like a normal person. Gibbs CJ said that "[i]t may be assumed (without deciding) that injury for nervous shock is not recoverable unless an ordinary person of normal fortitude in the position of the plaintiff would have suffered some shock" (at 556). Brennan J said (at 568-569):

[R]easonable foreseeability is an objective criterion of duty, and a general standard of susceptibility must be postulated. At least to that extent it is possible to confine consideration of the question whether it is reasonably foreseeable that the perception of a particular phenomenon might induce in the plaintiff a psychiatric illness ... Unless a plaintiff's extraordinary susceptibility to psychiatric illness induced by shock is known to the defendant, the existence of a duty of care owed to the plaintiff is to be determined upon the assumption that he is of a normal standard of susceptibility.

Since *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317 the test of normal fortitude is part of the level of foreseeability that is required of the defendant. It is also related to the issue of proportionality between the act of the defendant and the damages they pay for the damage done to the plaintiff. Essentially, while defendants are held responsible for the harm caused, this responsibility is limited by the notion of reasonable foresight.

The case of Mrs Tame is extreme. Such a case creates the misleading impression that it is easy to dismiss some psychiatric harm as unreasonable and unforeseeable. In her case, it is arguable that



physical harm would also have been unforeseeable, given the nature of the wrong done, and that treating psychological and physical harm as one would have sufficiently determined the outcome in terms of foreseeability without the need for recourse to extra-susceptibility as a special point. The question of who is extra-susceptible is not one that can be determined simply; what is now known about the nature of emotion and of reason suggests that they are both of the mind and of the body. For example, it is now known that hormones and other physical responses contribute to emotional responses and that in turn emotional responses create physical changes in the body, such as the identifiable link between “fight or flight” responses and adrenaline surges in the body, among other things. Emotion is about feelings; it is thus not associated with rationality but it is not entirely divorced from reasoned thought either. There is a considerable body of literature about heuristic⁷⁹ thought and the way in which human beings mix emotion and logic to develop thought.

In the legal arena a great deal of this intermingling of emotion and logic is done by the use of words, words being manipulable and allowing for connotation, metaphor and a range of emotional shades.⁸⁰ It is arguable that the great value of the test of reasonable foreseeability is its ability to incorporate more than the merely rational, and that too great an emphasis on rationality imposes unnecessary and unreal constraints on liability for nervous shock. McHugh J in *Tame; Annetts* (at [105]) implicitly recognises this when he says “reasonableness is a value” but the remainder of the judges insist on “objectivity” in their view of reasonableness. There are obviously good reasons for maintaining a view of the plaintiff which is objective in the sense that the defendant does not know and need not know specific subjective things about them. However, care must be taken that, in emphasising “objectivity”, its other connotation of “not involving or recognising emotion” does not come into play. Failure to incorporate recognition of both logic and emotion in the objective consideration of reasonable foreseeability is inherently dangerous.

The public-private distinction and the “good” mother

Another classic dualism in Western thought that has affected the treatment of nervous shock cases is the public-private divide, an area which has been the subject of much feminist critique. In the legal domain, the public and private spheres have been traditionally treated as separate areas where the public arena is an area where the law can intervene, and the private is one where it cannot. As O’Donovan observes:⁸¹

“Public” may be used to denote State activity, the values of the marketplace, work, the male domain or that sphere of activity which is regulated by law. “Private” may denote civil society, the values of family, intimacy, the personal life, home, women’s domain or behaviour unregulated by law.

Private matters such as sexuality, relationships, personality, intimacy, reproduction and children have been regarded traditionally as matters irrelevant to law, and areas into which the law’s writ does not run. The consequences of this can be seen in the well-known saying that “An Englishman’s home is his castle”; it is not accidental that it refers to “Englishman” rather than “Englishwoman”. These are all primarily matters that disparately affect women. The way that this divide operated to exclude women is exemplified by the fact that the concept of a legal person for centuries included a corporation but did not include a married woman. Possibly the most prominent example of this public-private divide is the area of domestic violence. Originally as a matter of law and later as a

⁷⁹ Heuristic thought involves characteristically human leaps, rules of thumb etc and can be contrasted with the way a computer reasons, algorithmically, step-by-step. See eg Suppes P, “Heuristics and the Axiomatic Method” in Groner R, Groner M and Bischof W, *Methods of Heuristics* (Lawrence Erlbaum Associates, Hillsdale, New Jersey, 1983) p 82; Dörner D, “Heuristics and Cognition in Complex Systems” in Groner, Groner and Bischof, n 79, p 89; Sharp L, “Cognitive Heuristics and the Law: An Interdisciplinary Approach to Better Judicial Decision-making” (1995) 20 *Bulletin of the Australian Society of Legal Philosophy* 71 at 86.

⁸⁰ See eg Boyle J, “The Politics of Reason: Critical Legal Theory and Local Social Thought” (1985) 133(4) *U Penn L Rev* 685; Unger R, *Knowledge and Politics* (Collier Macmillan, New York, 1975); Goodrich P, *Legal Discourse* (St Martins Press, New York, 1987) and the extensive feminist literature on the subject, including Gilligan C, *In a Different Voice* (Harvard University Press, Cambridge, Mass, 1982); Harding and Hintikka, n 69.

⁸¹ O’Donovan K, *Sexual Divisions in Law* (Weidenfeld & Nicolson, London, 1985) p 3.



matter of policy, the law did not interfere between husband and wife, as exemplified by the traditional legal view that there was no need for consent by the wife to sex in marriage.⁸² The traditional legal view of the husband and wife was said by Blackstone to be: “husband and wife are one, to wit, the husband”:

The very being or legal existence of the woman is suspended during marriage, or at least is incorporated and consolidated into that of the husband; under whose wind, protection and *cover*, she performs everything; and it is therefore called in our law-french a *feme covert*, *faemina viro co-operta*; and it is said to be *covert-baron*, or under the protection and influence of her husband, her *baron*, or lord; and her condition during her marriage is called her *coverture*.⁸³

This view, which meant that a married woman could not keep her own wages, make a will, make a contract, sue or be sued, gave way to the Married Women’s Property Acts⁸⁴ in the United Kingdom and Australia in the 1880s and 1890s and to various other changes to the position of women in the law. However, it remains true to say that until relatively recently the private domain was quite unregulated. As Morgan says:

Women have been historically associated with the private world of the family, which has traditionally been unregulated (or private) while men have been associated with the public world of work, the world of regulation. Put simply, even simplistically, to leave the family private – unregulated by the state – is to hand power over to men.⁸⁵

However, as Morgan points out, the private domain is not entirely unregulated, and indeed the regulation around it necessarily impacts on the private domain.

One reason that the public-private distinction is significant in the area of nervous shock is that one of the by-products of the public-private distinction as it has operated in law is to emphasise a certain kind of family (that is, nuclear) and a certain kind of mother and wife – one that cares solely for her children and husband. Thornton points out that “conventionally a ‘public woman’ was a prostitute, a figure of derision, in contrast to a ‘public man’, a figure of approbation who acted in and for the universal good”.⁸⁶ This is related to the wife-whore dualism: while the “virtuous” wife works in the home and the private sphere, the “immoral” whore or prostitute enters the public sphere. As such, the natural domain of woman was seen as the private domain, while men were supposed to be out in public. Relegating women to the private sphere made them invisible; it also contributed to stereotypes of women as weak, irrational and emotional.

Another reason that the public-private distinction is significant in relation to nervous shock was that emotion was regarded as part of the private domain. Once the legal system began to deal with emotional issues, such as the emotional bonds between women and children, these matters, which the legal system regards as essentially private, come out into the public domain where they “do not belong”. In nervous shock cases in the early 20th century this is demonstrated by floodgates arguments and arguments about the unreliability of evidence about emotional issues and bonds. This is still seen today, in examples such as Callinan J’s view in *Tame; Annetts* (at [308]) that the existence of psychiatric harm ultimately depends on having to take the word of the person claiming to suffer it:

Despite many advances in the diagnosis of psychiatric illness, whether, and the extent to which it exists in a particular patient will almost invariably depend, in some measure at least, upon the reliability of the patient’s own utterances.

It is significant that many of the cases involve women in their roles as mothers. In *Bourhill v Young* [1943] AC 92 the court held that the plaintiff could recover if she was within the zone of

⁸² That view was overturned in Australia in *R v L* (1991) 103 ALR 577.

⁸³ Blackstone, Sir William, *Commentaries on the Laws of England in Fourteen Books* (4th ed, Cooley T (ed), Callahan & Co, Chicago, 1899) Vol 1, p 31.

⁸⁴ 27 UK 1882; New South Wales 1879 (42 Vict No 11); Victoria 1884 (48 Vict No 828); Queensland 1890 (54 Vict No 9); South Australia (then including the Northern Territory) 1884 (46 and 47 Vict No 300); Western Australia 1982 (55 Vict No 20); Tasmania 1935 (26 Geo V No 90); what is now the Australian Capital Territory was then part of New South Wales.

⁸⁵ Morgan J, “Sexual Harassment and the Public/Private Dichotomy” in Thornton M (ed), *Public and Private: Feminist Legal Debates* (Oxford University Press, Melbourne 1995) p 96.

⁸⁶ Thornton M, “The Cartography of Public and Private” in Thornton, n 85, p 13.



physical risk. However, in *Bourhill* the plaintiff was a pregnant woman who heard, but could not see, an accident which took place some 15 m away from her. Even though the court accepted that the shock caused the stillbirth of her child, because she did not fear for her own safety she could not recover damages, as the court could not accept that the woman’s feelings for the child could foreseeably lead to psychiatric harm.

However, in *Hambrook v Stokes Bros* [1925] 1 KB 141 at 151 Bankes LJ was scornful of the “zone of danger” test, basing his analysis on “the good mother”:

Assume two mothers crossing this street at the same time when this lorry comes thundering down, each holding a small child by the hand. One mother is courageous and devoted to her child. She is terrified, but thinks only of the damage to the child, and not at all about herself. The other woman is timid and lacking in the motherly instinct. She is also terrified, but thinks only of the damage to herself and not at all about her child. The health of both mothers is seriously affected by the mental shock occasioned by the fright. Can any real distinction be drawn between the two cases? Will the law recognise a cause of action in the case of the less deserving mother, and none in the case of the more deserving one? Does the law say that the defendant ought reasonably to have anticipated the non-natural feeling of the timid mother, and not the natural feeling of the courageous mother? I think not.

Thus the consideration of motherly behaviour shaped the law. Chamallas and Kerber⁸⁷ argue that the early cases of nervous shock did recognise that this was a gendered harm, which women were more likely to suffer, but that later analysis began to ignore this. They note both the dualism of physical and emotional harm (discussed above) and that much of the analysis of the cases of nervous shock arises from the way that motherhood is constructed. Unfortunately, the use of the mother-love paradigm disadvantages women, even though it allows them to recover damages. The majority of cases rely on the close physical presence of mothers to their children in order to found a case of nervous shock.⁸⁸ This derives from a view of the “good” mother as the major, if not sole, carer of her children, physically as well as emotionally present, and caring for the children instead of wage-earning. It also assumes that it is unusual for mothers to be wage-earners, when the fact is that historically the vast majority of women have had paid work (*and* been the major carers for the children). It also ignores the fact that the link between mothers and children (as between fathers and children) is emotional, not based on mere physical proximity.

The treatment of women as mothers and as defined by their sex raises some of the most central issues of feminist theory. Early feminists, drawing on liberal theory, argued for equality of treatment for women – for women to be treated like men. Other feminists, such as Irigaray, who emphasises the special nature of women and challenges both patriarchy and biological determinist theories,⁸⁹ have argued that this is impossible. Irigaray insists on the separation of womanhood from motherhood. Irigaray’s theory of “different voice” is interesting because she directly critiques psychoanalysis’s treatment of women and sexuality as ignoring the patriarchal order and therefore misunderstanding women. On the other hand, Gilligan’s work draws on developmental psychology to suggest that there is something distinctive about women’s voice as an empirical matter.⁹⁰ In turn she is criticised by MacKinnon who says any such voice is merely the voice of the oppressed.⁹¹ It is striking, however, when considering the nervous shock cases, how rarely female voices are considered or heard, and how, as plaintiffs, they are regarded as self-serving and unreliable, or even “fraudulent”, as seen above.

⁸⁷ Chamallas and Kerber, n 2.

⁸⁸ For example, *King v Phillips* [1953] 1 QB 429; *Hambrook v Stokes Bros* [1925] 1 KB 141; *Storm v Geeves* [1965] Tas SR 252; *Hinz v Berry* [1970] 2 QB 40.

⁸⁹ See Whitford M, “Luce Irigaray’s Critique of Rationality” in Griffiths M and Whitford M, *Feminist Perspectives in Philosophy* (Macmillan, London, 1988), discussed in Lloyd G, “Maleness, Metaphor and the Crisis of Reason” in Antony and Witts, n 69.

⁹⁰ Gilligan, n 80.

⁹¹ MacKinnon, n 13.



Some feminist theorists, such as Bender,⁹² have argued that the male standard has been the chief standard used in determining what is foreseeable as psychiatric harm. That is, that psychiatric harm is not likely to happen because a person of normal fortitude would not suffer it. Bender and others contend that the person of normal fortitude has been constructed by (male) judges and therefore is unemotional and mentally “tough”, as illustrated by the remarks of Lord Porter in *Bourhill v Young* and Latham CJ in *Chester*, both quoted above. As Bender has pointed out, the rate at which mothers have been held not to foreseeably suffer from nervous shock suggests that mothers have, or should have, “a high degree of robustness”. *Chester* exemplifies the early narrow treatment of psychiatric harm. In that case a mother had been searching for her child for several hours. Ultimately he was found drowned in a ditch which council workers had failed to fence off. The majority held that the mother could not recover because it was not foreseeable that she might suffer psychiatric harm. Hocking and Smith note:⁹³

[T]he majority judgments fully illustrate the inherent lack of legal weight accorded women’s work in caring for family members. However, it also illustrates, through the powerful dissenting judgment of Evatt J, that certain members of the judiciary have always possessed the insight and humanity which feminist jurisprudence has criticised as lacking in so many male judges.

Although she was not allowed to recover, the mother in *Chester* has become almost iconic and Evatt J’s judgment (at 16-17, 25) has become the most powerful view of her:

There was evidence that from the moment when the plaintiff discovered that her child was missing she searched for him without intermission ...

Like most mothers placed in a similar situation, she was tortured between the fear that he had been drowned and the hope that either he was not in the trench at all, or that, if he was, a quick recovery of his body and the immediate application of artificial respiration might save him from death. [He described her as “In this agonized and distracted state of mind” and quoted from William Blake, and then went on] ...

So far as the argument rests upon the contention that no other parents would have suffered shock and illness from the ordeal undergone by Mrs Chester. I think this is a mere assertion and is contradicted by all human experience. I think that only “the most indurate heart” could have gone through the experience without serious physical consequences.

Later this view of “the good mother” allowed the extension of the position where a person could be compensated to the situation where the mother did not see the children until the aftermath of the accident as in *McLoughlin v O’Brian*, where the mother came to the hospital to be told one child had been killed and her husband and other children were severely injured; similarly in *Petrie v Dowling* [1992] 1 Qd R 284, where the “good mother” perception was used to extend to recovery on being told of her daughter’s death. By that time feminist critiques of the artificiality of the sudden sensory perception test had begun to have purchase. Once this had occurred, this principle could be extended to apply to both mother and father in *Annetts*. Arguably, this can be viewed as reflective of society’s changing perception of the relationships of both mother and father with their children, and the emotional bonds generated in both men and women. However, despite the reduced emphasis on normal fortitude in *Tame*; *Annetts*, the legislation has re-emphasised it, making Bender’s remarks of continuing pertinence. The “good mother” is also mentally tough.

Weaving it all together

The area of psychiatric harm or “nervous shock” is on the “wrong” side of each of the dualisms discussed – on the side of the mind, the irrational, and the private domain, where patriarchal law has traditionally favoured the body, the rational and the public domain, each of these areas being the domain of men. Because they have been the domain of men, men have shaped them and fitted the law onto their own templates. Because “nervous shock” cases have been more often brought by women and the idea of psychiatric harm is seen as weak, feminine, of the irrational mind or emotions rather than masculine, of the body and of the rational mind, it has been extremely difficult for the women

⁹² Bender L, “Changing the Values in Tort Law” (1990) 25 Tulsa LJ 759.

⁹³ Hocking BA and Smith A, “From Coultas to Alcock and Beyond: Will Tort Law Fail Women?” (1995) 11 QUTLJ 120 at 132.



(and men – because, of course, men are also capable of emotion) who have suffered this kind of injury to have the injury recognised and the cause of action vindicated. Why? Because the law’s preference for the provable, the rational and the physical, bodily harm makes it hard to prove the existence of an emotional harm, and because the need to demonstrate a causal link between the harm and a wrong is difficult in these cases, due to the plethora of variables known to affect one’s state of mind. The requirement of a reasonably foreseeable mental illness is itself paradoxical when it is clear that mental illness is, by definition, abnormal.

All these areas of feminist concern interact in relation to cases of nervous shock. It can be seen that the concept of the good mother interacts with the concept of the private domain and the concept of fraudulent claims for imaginary harms. While we no longer see these concepts themselves discussed in the cases, their ghosts linger in comments about the dangers of simply allowing recovery for pure psychiatric harm, how easy it is to dissemble and how much the plaintiff’s word must be relied on for that. The fact that back pain must be reported by the plaintiff in a case of personal injury damages, and the plaintiff’s word is all the evidence there is, does not seem to create the view that we should have a special category of negligence for back pain, but psychiatric harm is still seen as a special case, and the legislation takes us back to a situation where psychiatric harm requires extra hurdles.

Patriarchy’s treatment of women as “hysterical”, and of feelings as “irrational”, is spectacularly illuminated in the still not quite concluded debate about whether mental harm is as valid as physical harm and whether they can be valued the same way. Thus, even where it is a man whose mental illness is being considered, he is also affected by patriarchal attitudes to mental illness and irrationality, which are inclined to see both qualities as undesirable weaknesses. Similarly illuminated by feminist analysis are the ideas of the “normal” and “good” mother and the foreseeability of her reaction to her child’s death or injury and the public-private distinction and the consequences of the intervention of the public sphere (through the law) on typically private matters of emotion and the mind. All these factors show that nervous shock cases are peculiarly useful in illuminating feminist issues in the domain of tort law and that this continues to be so.

CONCLUSION

This article has attempted to show in the Australian context that the reasons nervous shock is a feminist issue are complex and that feminist issues have not been entirely resolved by the changes in the common law created by the cases; and that many of the factors which feminist analysis most seriously challenged have been reintroduced in the civil liability legislation. It has shown that women are statistically more likely than men to be the plaintiff in a nervous shock claim, both in claims in respect of themselves and in claims as parents. The cultural and stereotypical assignment of gender roles issues is another contributing factor – the early development of a connection between nervous shock and miscarriage is significant in this. Even now, women do the majority of childcare and therefore are the people most likely to be harmed in the nervous shock scenario involving injured children. Women are encouraged to be interested in emotion and feelings and therefore are also more likely than men to notice or be willing to state that there is a problem.

Although the High Court in *Tame; Annetts and Koehler* did change the requirements for nervous shock cases, it is not clear that it did this entirely for reasons that undermine the feminist critique, nor that the concept of psychiatric harm as a real injury has been completely accepted. The emphasis on the employer-employee relationship allowed the Annetts to put themselves on the privileged side of the dualisms of public and private, rational and irrational, and thereby win their case. Mrs Koehler’s psychiatric harm was seen as her problem because she had voluntarily entered into a contract of employment. The fact that the rules were changed largely in the context of an employer-employee relationship suggests that it is easier to recognise harm within the context of such a “public” relationship than it is to look at the pure relational harm which springs out of the private relationship of parent and child or even the private life of the individual’s mind. The continuing emphasis on the requirement that reasonable foreseeability of psychiatric harm be shown rather than any personal harm in itself shows that the physical-mental distinction still has significant power in the law of negligence and that feminist critiques continue to have value in this category of negligence. This is reinforced by



the legislative schemes which have reinstated the law which applied before *Tame*; *Annetts* and which amply demonstrate that psychiatric harm remains likely to be seen as fraudulent or imaginary and that allowing a duty of care to arise in respect of it is something to be vigilantly guarded against. The continuing distrust of and special requirements to establish the cause of action for negligently causing nervous shock have their roots in a gendered approach to categories of harm which continues to sustain cultural responses to psychiatric harm. The feminist critique has not yet been rendered obsolete.

