Corrective Justice and the Law Relating to Damages for Negligently Inflicted Psychiatric Injury: A Principled Explanation for the "Close and Loving Relationship" Consideration

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The duty of care in cases of negligently inflicted psychiatric injury has long been limited using a number of mechanisms, all with the intention of ensuring that the ambit of liability remains within manageable bounds. These limiting mechanisms, now known in Australia as "considerations" relevant to an overriding test of reasonable foreseeability, have commonly been criticised as lacking in principled foundations, leading to a number of calls for their abandonment. This article extends these arguments, contending that the court's consideration of whether the plaintiff and a person seriously injured or killed were in a close and loving relationship can also be understood on normative grounds. In particular, the court's consideration of this factor can be regarded as principled from the perspective of Aristotelian corrective justice.

Keywords: *pure mental harm; nervous shock; loss of a loved one; close and loving relationship consideration*

I. Introduction

A. Ongoing Tension between Principle and Pragmatism

In developing the law regarding claims for damages for negligently inflicted psychiatric injury, courts have long had to balance seemingly competing concerns in searching for an approach to the duty of care which is both principled, and at the same time workable. Courts considering cases of this kind have commonly sought to develop the law along principled lines, only to impose limitations on liability for policy reasons. These limitations[1] – which would inevitably be criticized in later cases as unprincipled – have frequently been imposed due to the courts' concerns that an approach without limitation of some kind beyond the test of reasonable foreseeability will result in the opening of the floodgates of litigation, in liability becoming indeterminate, and in an unfair burden being placed on defendants.[2]

In *Tame v New South Wales* (*Annetts*),[3] the notions of "normal fortitude", "direct perception", and "sudden shock" as pre-requisites to establishing a duty of care were abandoned. Gummow and Kirby JJ

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[1] For example, the requirement for impact, the requirement for the plaintiff to have directly perceived an event or its immediate aftermath, the requirement for the plaintiff to have been in a close and loving relationship with the person injured or killed, and the requirement for the plaintiff to be a person of normal fortitude.

[2] See generally *Victorian Railways Commissioners v Coultas* (1888) 13 App Cas 222; *Dulieu v White & Sons* [1924] All ER Rep 110; *Chester v Municipality of Waverley* (1939) 62 CLR 1; *Bourhill v Young* [1942] 2 All ER 396; *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383; *Jaensch v Coffey* (1984) 155 CLR 549; *Tame v New South Wales* (2002) 211 CLR 317; [2002] HCA 35; *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269; [2003] HCA 33.

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

described these control mechanisms as "unsound in principle" and as operating in "an arbitrary and capricious manner".[4] A majority of the High Court in *Annetts* agreed that liability in cases involving psychiatric injury was not limited only to those in which the plaintiff could establish that they had suffered a sudden shock, or where the plaintiff could establish that they had directly perceived a phenomenon or its immediate aftermath.[5] However, having held that these factors were not determinative of liability, the majority held that these factors were relevant in determining whether psychiatric injury was reasonably foreseeable in the circumstances.[6] This finding was subsequently affirmed by the High Court in *Gifford v Strang Patrick Stevedoring Pty Ltd* (*Gifford*).[7]

The approach taken by the High Court in *Annetts*, which is the current common law position in Australia, considers the *Donoghue v Stevenson*[8] test of reasonable foreseeability to be the central question when determining the existence of a duty of care, with a number of considerations being relevant to this overriding question, namely:

(1) whether the plaintiff directly perceived injury or death to another through sight or hearing or whether the plaintiff was in a close and loving relationship with a person injured or killed;
(2) whether the plaintiff suffered a sudden shock;
(3) whether, in the absence of particular knowledge of peculiar susceptibility to psychiatric injury, the plaintiff was a person of normal fortitude; and
(4) whether there was a pre-existing relationship between the parties which meant that the defendant should have had the plaintiff in contemplation.

None of these considerations are essential, although their presence or absence may affect the central question of reasonable foreseeability. The plaintiff must also establish that they have sustained a recognisable psychiatric illness as a result of the defendant's negligence.[9]

However, despite reaching a position might be regarded as principled, concerns persist about this approach. At around the same time the High Court was handing down its judgment in *Annetts*, a public debate commenced regarding the law of negligence in the context of perceived rises in insurance premiums and what was referred to as an "insurance crisis".[10] In 2002, the Honourable David Ipp[11] was appointed Chairperson of a panel of experts which was asked to examine methods for the reform of the

[4] *Tame v New South Wales* (2002) 211 CLR 317, 380 [190]; [2002] HCA 35. Gummow and Kirby JJ further stated that "the 'nervous shock' cases predicate elusive distinctions with no root in principle and which are foreign to the merits of the litigation": *Tame v New South Wales* (2002) 211 CLR 317; [2002] HCA 35.

[5] *Tame v New South Wales* (2002) 211 CLR 317, 333 [18] (Gleeson CJ), 340 [51] (Gaudron J), 390 [213], 394 [225] (Gummow and Kirby JJ); [2002] HCA 35.

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

[7] *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269, 276 [8] (Gleeson CJ), 287–288 [45]–[46] (McHugh J), 394 [65] (Gummow and Kirby JJ), 303–304 [97]–[98] (Hayne J), 308 [117] (Callinan J); [2003] HCA 33. For further discussion of *Gifford*, see DA Butler, "Gifford v Strang and the New Landscape for Landscape for Recovery for Psychiatric Injury in Australia" (2004) 12 *Torts Law Journal* 108; D Mendelson, "The Modern Australian Law of Mental Harm: Parochialism Triumphant" (2005) 13(2) JLM 164.

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

[9] See *Hinz v Berry* [1970] 2 QB 40, 42–43 (Denning MR); *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383, 394 (Windeyer J).

[10] For example, see DA Butler, "A Comparison of the Adoption of the Ipp Report Recommendations and Other Personal Injuries Liability Reforms" (2005) 13 *Torts Law Journal* 203, 203–204; P Handford, *Mullany and Handford's Tort Liability for Psychiatric Damage* (Lawbook Co, 2nd ed, 2006) 427; DA Butler, *Damages for Psychiatric Injuries* (Australian Legal Monographs, Federation Press, Sydney, 2004); Butler, n 7, 113–114; Mendelson, n 7, 169–170. Also see Martin Allcock, "A Corrective Justice Justification for Considering the Response of the Hypothetical Person of an 'Ordinary Level of Susceptibility' when Assessing Reasonable Foreseeability in Cases Involving Negligently Inflicted Psychiatric Injury" (2019) 26 *Tort Law Review* 60, 63.

[11] At the time the report was released, the Honourable David Ipp was Acting Judge of the Court of Appeal, New South Wales Supreme Court, and Justice of the Supreme Court Western Australia. Other panel members were: Professor Peter Cane, Professor of Law in the Research School of Social Sciences at the Australian National University (currently Director of Research ANU College of Law), Associate Professor Donald Sheldon, Surgeon and Chairman of the Council of Procedural Specialists, and Mr Ian Macintosh, Mayor of Bathurst City Council in New South Wales and Chairman of the New South Wales Country Mayors Association.

common law in order to limit liability in negligence.[12] In its report,[13] the Ipp Panel recommended that in relation to claims of negligently inflicted psychiatric injury, the primary objective of limiting liability would be promoted by legislative enactment of the common law principles as stated by the High Court in *Annetts*.[14]

Six of the eight jurisdictions in Australia subsequently enacted legislation which alters the common law position in the relevant jurisdictions, generally in line with the Ipp Panel's recommendations.[15] The legislation which is most similar to the common law is the legislation enacted in Western Australia. Section 5S(1) of the *Civil Liability Act 2002* (WA) provides:

> A person (the ***defendant***) does not owe a duty of care to another person (the ***plaintiff***) to take care not to cause the plaintiff mental harm unless the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken.

Section 5S(2) further provides:

> For the purpose of the application of this section in respect of pure mental harm, the circumstances of the case include the following:
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> (a) whether or not the mental harm was suffered as the result of a sudden shock;
> (b) whether the plaintiff witnessed, at the scene, a person being killed, injured or put in peril;
> (c) the nature of the relationship between the plaintiff and any person killed, injured or put in peril;
> (d) whether or not there was a pre-existing relationship between the plaintiff and the defendant.[16]

The civil liability legislation enacted in the other jurisdictions is substantially similar to the Western Australian (WA) legislation in form and effect,[17] with two primary exceptions. The first is that the legislation enacted in New South Wales, Victoria, South Australia, and Tasmania all contain additional temporal and relationship limitations on recovery which go beyond the central test of reasonable foreseeability seen in s 5S(1) of the WA legislation.[18] The second is that the Tasmanian legislation contains a truncated list of matters to be taken into account when determining the overriding test of reasonable foreseeability when compared to the WA Act.[19]

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[12] See Commonwealth of Australia, Review of the Law of Negligence, *Final Report* (2 October 2002) (Ipp Report), Terms of Reference. The Terms of Reference for the panel stated that: "[t]he award of damages for personal injury has become unaffordable and unsustainable as the principal source of compensation for those injured through the fault of another" (ix). Further, it was "desirable to examine a method for the reform of the common law with the objective of limiting liability and quantum of damages arising from personal injury and death" (ix). The continued expansion of common law liability was accordingly seen as undesirable and in need of limitation. For a critical analysis of the circumstances leading to the political pressure to undertake such an examination of the law of negligence, see P Underwood, "Is Mrs Donoghue's Snail in Mortal Peril?" (2004) 12 *Torts Law Journal* 39.

[13] Ipp Report, n 12.

[14] Ipp Report, n 12, 144. Although not explicitly stated in the Ipp Report, it seems reasonable to presume that the panel regarded legislative enactment of the principles in *Tame* and *Annetts* as likely to result in the prevention of further expansion of the ambit of liability. Also see Allcock, n 10, 63.

[15] These are *Civil Liability Act 2002* (WA), *Civil Liability Act 2002* (NSW), *Wrongs Act 1958* (Vic), *Civil Law (Wrongs) Act 2002* (ACT), *Civil Liability Act 1936* (SA) and *Civil Liability Act 2002* (Tas). Civil liability legislation was enacted in Queensland and the Northern Territory but does not contain any provisions affecting the extent of liability in relation to claims for pure mental harm, which are accordingly still governed by the common law in these jurisdictions.

[16] Also see Allcock, n 10, 21.

[17] *Civil Liability Act 2002* (NSW) s 31(1), (2); *Wrongs Act 1958* (Vic) s 72(1), (2); *Civil Law (Wrongs) Act 2002* (ACT) s 34(1), (2); *Civil Liability Act 1936* (SA) s 33(1), (2); *Civil Liability Act 2002* (Tas) s 34.

[18] For example, s 30 of the legislation in New South Wales legislation applies in cases where mental harm arises in connection with another person being killed, injured or put in peril, and restricts the classes of plaintiffs to those who can establish they witnessed at the scene the victim being killed, injured or put in peril, or that they are a close member of the family of the victim: *Civil Liability Act 2002* (NSW). The Victorian, South Australian, and Tasmanian legislation place similarly worded additional limitations on recovery: see *Wrongs Act 1958* (Vic) s 73; *Civil Liability Act 1936* (SA) s 53; *Civil Liability Act 2002* (Tas) s 32.

[19] *Civil Liability Act 2002* (Tas) s 34 provides that the only matters relevant to the central question of reasonable foreseeability are whether the plaintiff suffered a sudden shock and whether there was a pre-existing relationship between the plaintiff and

B. Divergent Approaches

The issue of the closeness of the relationship between the plaintiff and the person seriously injured or killed in the determination of the duty of care in cases of negligently inflicted psychiatric injury takes on differing levels of importance in Australia than it does when compared to the United Kingdom. For example, while the courts in Australia at common law have taken an approach which makes the test of reasonable foreseeability of psychiatric injury the overriding test of the existence of a duty of care – a position reflected in the majority of civil liability regimes across the country – the same cannot be said of the courts in the United Kingdom. In the United Kingdom, a number of arbitrary limitations on liability have been retained at common law due to persisting fears of indeterminate liability if foreseeability is to be the sole determinant of the duty of care. The question of the duty of care includes not only a test of reasonable foreseeability, but "secondary" victims[20] must also satisfy a number of additional tests. In *Alcock v Chief Constable of South Yorkshire Police*,[21] the House of Lords held that the plaintiffs were required to establish sufficient proximity between their psychiatric injury and the defendant's negligence in addition to having to establish that psychiatric injury to them was reasonably foreseeable.[22] This requires plaintiffs who are classified as secondary victims in the United Kingdom to establish that: (1) they have a relationship characterised by close ties of love and affection with the person seriously injured or killed; (2) they were at the scene of the accident or its immediate aftermath; (3) they directly perceived the accident or its immediate aftermath; and (4) that they are a person of normal fortitude.[23] Most importantly, these are all requirements of liability *in addition* to the test of reasonable foreseeability.

Some members of the High Court of Australia have given an indication that it is desirable to seek to continue to try to identify a principled solution to the duty issue in cases involving pure psychiatric injury[24] although this has not been universal.[25] Though the High Court in *Annetts* removed many of the previous unprincipled control mechanisms, there nonetheless remain concerns expressed by some of the members of the High Court relating to fears of indeterminate liability and an unfair burden being placed on defendants, as well as fears of the floodgates of litigation opening.[26] For example, Gleeson CJ regarded the caution displayed by the courts regarding the boundaries of liability in negligence in relation to both financial harm and mental harm as justified.[27] His Honour made further comments in this

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the defendant. Also see Allcock, above n 10, 64; Martin Allcock, "Corrective Justice and Kantian Right as a Mechanism to Reconcile Substantially Clashing Interests in Cases of Negligently Inflicted Psychiatric Injury" (2015) 40 *Australian Journal of Legal Philosophy* 17, 21.

[20] See *Page v Smith* [1995] 2 All ER 736.

[21] *Alcock v Chief Constable of South Yorkshire Police* [1991] 4 All ER 907. The 10 plaintiffs in this case were a number of individuals closely related to loved ones killed in the Hillsborough football stadium disaster in 1989. There was a variation in the particular circumstances of each plaintiff's case. Relationships with deceased loved ones included children, grandchildren, siblings, and a fiancé. The circumstances of each plaintiff becoming aware of the disaster and the death of their loved one also varied. In two cases, plaintiffs were at the ground at the time of the accident and saw the events unfolding. Others only became aware of the disaster after watching scenes on television or after hearing news reports on the radio. Plaintiffs also discovered the deaths of their loved ones in a variety of ways. One plaintiff identified the body of their loved one later that night, and another early the next morning. Others were informed of the deaths on the following day. Of those who identified the bodies of their loved ones, all were in a horrific state due to the crushing injuries they had sustained.

[22] *Alcock v Chief Constable of South Yorkshire Police* [1991] 4 All ER 907, 914 (Lord Keith), 918 (Lord Ackner), 926 (Lord Oliver), 933 (Lord Jauncey), 937 (Lord Lowry).

[23] *Alcock v Chief Constable of South Yorkshire Police* [1991] 4 All ER 907.

[24] See, eg, *Tame v New South Wales* (2002) 211 CLR 317, 368 (Gummow and Kirby JJ); [2002] HCA 35; *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269, 277 [13] (Gleeson CJ), 279 [18], 281 [27] (McHugh J), 294 [65] (Gummow and Kirby JJ); [2003] HCA 33. This effectively means that the ambit of liability be defined by the concept of "reasonableness" rather than by specific controlling factors: see Hon D Herrington, "Theory of Negligence Advanced in the High Court of Australia" (2004) 78 ALJ 595, 595.

[25] See, eg, the judgments of Gleeson CJ, Hayne, and Callinan JJ in *Tame v New South Wales* (2002) 211 CLR 317; [2002] HCA 35; *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269; [2003] HCA 33.

[26] See judgments of Gleeson CJ, Hayne, and Callinan JJ in *Tame v New South Wales* (2002) 211 CLR 317; [2002] HCA 35; *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269; [2003] HCA 33.

[27] *Tame v New South Wales* (2002) 211 CLR 317, 332 [15]; [2002] HCA 35.

vein in *Gifford*,[28] stating that he considered an untrammelled test of foreseeability as likely to place an unreasonable burden on human activity.[29] Similar concerns were expressed in *Annetts* by Hayne J and by Callinan J[30] who both gave further voice to these concerns in *Gifford.*[31]

In many ways, the law in relation to negligently inflicted psychiatric injury can be considered "a patchwork quilt of distinctions which are difficult to justify".[32] There have been a number of responses to this regrettable state of affairs, each of which is potentially problematic. One response has been to call for the relaxation of the rules of liability, leaving reasonable foreseeability as the only guiding principle.[33] Another response has been to argue that the existing clear but arbitrary rules should be maintained and that any expansion should be left to Parliament.[34] Leaving liability simply to the test of reasonable foreseeability based on mere predictability has the potential to lead to too many claims. On the other hand, maintaining clear although ultimately arbitrary rules result in the law acting in an unprincipled and unjust manner, and in the potential denial of meritorious claims. Each of these suggestions has the potential to lead to results which may bring the law into disrepute and ought to be treated with caution.[35] It might be thought that this is simply a result of the complexity of the subject matter and that this is a reality which ought to be accepted. This appears to be the position taken by Lord Steyn in *White v Chief Constable of the South Yorkshire Police*[36] in which he stated emphatically that: "In reality there are no refined analytical tools which will enable the courts to draw lines by way of compromise solution in a way which is coherent and morally defensible."[37]

The orthodox position taken by judges in the leading cases is that the goals of principle and pragmatism are inherently inconsistent; that a principled approach cannot be pragmatic; and that a pragmatic approach cannot be principled. The received wisdom in cases involving negligently inflicted psychiatric injury is that the history of litigation in this area reveals this and generally asserts that the courts have never come close to establishing a principled approach to this area of law. Underlying this type of perspective are the assumptions that no principled and pragmatic approach is possible due to the complexity of the issues involved, and that the best that can be done is to insist on clear and predictable, if arbitrary, limits on the general test of reasonable foreseeability.[38] This type of approach has been particularly pronounced in the United Kingdom where the search for principle in cases of negligently inflicted psychiatric injury has all but been abandoned in favour of unprincipled but pragmatic limitations on the ambit of liability.[39]

This article considers one of the factors taken into consideration by the courts in both Australia and the United Kingdom, namely whether the plaintiff and the person seriously injured or killed were in

[28] *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269; [2003] HCA 33.

[29] *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269, 276 [8]–[9]; [2003] HCA 33.

[30] See *Tame v New South Wales* (2002) 211 CLR 317, 406 [260] (Hayne J), 420–421 [3]–[8] (Callinan J); [2002] HCA 35.

[31] See *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269, 304 [99] (Hayne J), 307–308 [115] (Callinan J); [2003] HCA 33.

[32] See *White v Chief Constable of the South Yorkshire Police* [1999] 1 All ER 1, 38 (Lord Steyn).

[33] See, eg, N Mullany and P Handford, *Tort Liability for Psychiatric Damage* (The Law Book Co, 1993) 64, 84, 312; Handford, n 10; P Handford, "Psychiatric Injury: The New Era" (2003) 11 Tort L Rev 13.

[34] The only sensible strategy as far as Lord Steyn was concerned was for the courts to say "thus far and no further": *White v Chief Constable of the South Yorkshire Police* [1999] 1 All ER 1, 39. Also see Allcock, n 10, 80.

[35] See Allcock, n 10, 81.

[36] *White v Chief Constable of the South Yorkshire Police* [1999] 1 All ER 1.

[37] *White v Chief Constable of the South Yorkshire Police* [1999] 1 All ER 1, 39. Also see Allcock, n 10, 81.

[38] See *White v Chief Constable of South Yorkshire Police* [1999] 1 All ER 1, 30 [g]–[j], 48 [h]–[j] (Lord Steyn); *Tame v New South Wales* (2002) 211 CLR 317, 329 [6] (Gleeson CJ); [2002] HCA 35.

[39] For example, see the comments of Lord Hoffman in *White v Chief Constable of South Yorkshire Police* [1999] 1 All ER 1, where it was stated: "It seems to me that in this area of the law, the search for principle was called off in *Alcock v Chief Constable of the South Yorkshire Police* [1991] 4 All ER 907, [1992] 1 AC 310. No one can pretend that the existing law, which your Lordships have to accept, is founded upon principle. … Consequently your Lordships are now engaged, not in the bold development of principle, but in a practical attempt, under adverse conditions, to preserve the general perception of the law as system of rules which is fair between one citizen and another": 48 [h]–[j]. Also see Allcock, n 10, 81; Allcock, n 19, 25.

a close and loving relationship. It will be argued that rather than being an unprincipled limitation on liability which ought to be abandoned in the search for a principled approach, the court's consideration of whether the plaintiff and a person seriously injured or killed were in a close and loving relationship can be understood on normative grounds. In particular, it will be contended that the court's consideration of this factor can be regarded as principled from the perspective of Aristotelian corrective justice, when considered as a non-determinative part of an overriding test of reasonable foreseeability.

Any substantive claim regarding whether the law can be considered principled must be underpinned by theory. For this reason, Part II of this article considers Ernest Weinrib's theory of corrective justice, applied to the legal doctrines within the law of negligence by Allan Beever. Part III considers both scientific and common understandings of the causes of mental disorders, relating this evidence to the theoretical approach presented in Part II, and to the relevant legal tests for the existence of a duty of care. Part IV fleshes out the normative considerations relevant to the close and loving relationship test, and makes the substantive argument that consideration of this aspect of the relationship between the plaintiff and the person seriously injured or killed is normatively justified in particular circumstances.

II. Corrective Justice Theory of Negligence

A. Weinrib's Theory of Corrective Justice and Beever's Principled Approach

This article uses Weinrib's theory of corrective justice, and Beever's extension of this theory, to assess the question of whether particular rules of law can be considered to be principled.[40] Some of the key aspects of both perspectives are briefly considered in the first section of this Part.[41] The second section of this Part will consider the application of these perspectives to the law relating to negligently inflicted psychiatric injury.

According to Weinrib's theory, the defendant's legal obligation to pay compensation to the plaintiff is also a moral responsibility which arises due to the defendant's breach of the norm against injuring.[42] The normative basis for this perspective is Aristotle's conception of corrective justice.[43] According to this perspective, justice is conceptualized as an equality of normative holdings between two particular individuals; injustice is any disruption of this normative equality resulting in an inequality of normative holdings between these two particular individuals.[44] The judge's role is to restore the pre-existing normative equality between the two individuals who are the subject of the particular dispute.[45]

Aristotelian corrective justice can be conceptualized as a framework for justice in interpersonal dealings. However, this conception does not supply a complete account of the normativity which this conception

[40] See E Weinrib, "The Special Morality of Tort Law" (1989) 34 *McGill Law Journal* 403; E Weinrib, *The Idea of Private Law* (OUP, 1992); A Beever, *Rediscovering the Law of Negligence* (Hart Publishing, 2007); A Beever, *Forgotten Justice: Forms of Justice in the History of Legal and Political Theory* (OUP, 2013); A Beever, *A Theory of Tort Liability* (Hart Publishing, 2016).

[41] It is recognized that Weinrib's and Beever's rights-based perspectives are considered controversial among many tort theorists, who regard the adherence to formalism and doctrine by rights theorists such as Weinrib and Beever as an imperfect reflection of what judges actually do in real cases: see, eg, P Vines, "Rediscovering the Law of Negligence (Book Review)" (2008) 16 *Torts Law Journal* 182, 182; P Cane, "Rights in Private Law" in D Nolan and A Robertson, *Rights and Private Law* (Hart Publishing, 2012) 40; C Witting, "The House that Dr Beever Built: Corrective Justice, Principle and the Law of Negligence" (2008) 71(4) *Modern Law Review* 621, 635–637; M Lunney, "Counterfactuals and Corrective Justice: Legal History and Allan Beever's Rediscovering the Law of Negligence" (2009) 17 *Torts Law Journal* 219, 224–233. For a description of some of the most common criticisms levelled at these theories, and defence of the theories themselves, see M Allcock, "In Defence of Weinrib's and Beever's Interpretive Theories of Negligence" (2017) 24 *Torts Law Journal* 125.

[42] Weinrib, *The Idea of Private Law*, n 40, 2; Weinrib, "The Special Morality of Tort Law", n 40, 408–410.

[43] See Aristotle, *The Nicomachean Ethics of Aristotle* (David Ross trans, OUP, 1925) [trans of: *Ethica Nicomachea*]. Aristotle's conception of corrective justice regards justice in interpersonal dealing to be a "moral virtue".

[44] Aristotle, n 43, [1131^{b}14], 114–115; E Weinrib, "Corrective Justice in a Nutshell" (2002) 52 *University of Toronto Law Journal* 349, 349.

[45] Aristotle, n 43, [1132^{a}2], 115.

presupposes.[46] Consequently, Weinrib supplements the Aristotelian conception of corrective justice with the Kantian conception of right in order to address this gap.[47] Weinrib argues that the normative equality referred to by Aristotle can be conceived of as referring to an equality of free wills, based on the Kantian conception of right.[48] According to the concept of right, private law is regarded as the public manifestation of the free wills of mankind.[49] Kantian right in this context is understood as "the juridical manifestation of self-determining agency".[50] According to this account, an equality of free wills means that the free actions of one must be consistent with the free actions of others. Where this is not the case, the law justifiably intervenes to undo the resulting wrong.[51]

Weinrib explains Kant's concept of right as "the sum of conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom".[52] The duty of care in negligence should be characterised in terms of this antecedent equality between the parties. Any disturbance of this equality by the defendant's act of negligence is a wrong to the plaintiff.[53] The duty of care in negligence, along with the obligation to compensate arising out of the breach of this duty by the defendant, should be seen as "the juridical reflex of [that] antecedent obligation not to wrong".[54]

According to this perspective, the extent of one's right to freedom is only limited by the existence of the rights of others. The purpose of the law of negligence is the maintenance of the notional equality between the parties, reflected in the defendant's freedom of action and the plaintiff's freedom from interference. The parties' respective rights to freedom – of interference with bodily integrity and of movement and action – are treated as being of equal importance by the concept of right.[55] According to this perspective, Kant's concept of right gives rise to two particular rights, namely, the right to bodily integrity, and the right to external objects of the will.[56] The law of negligence arises in order to give effect to the right to bodily integrity, with the right to bodily integrity imposing a correlative duty of care on others to not interfere with this right.[57]

Beever applies Weinrib's theory to the law of negligence. He argues that the law protects bodily integrity not because the right to bodily integrity is the basis for the law, but because it protects something more

[46] Indeed, Weinrib comments that Aristotle's notion of corrective justice is concerned only with form, being "devoid of a specific content": EJ Weinrib, "Toward a Moral Theory of Negligence Law" (1983) 2(1) *Law and Philosophy* 37, 40.

[47] Weinrib, for one, does not regard Kantian right as "true" per se, rather considering a Kantian notion of agency as being "presupposed" by corrective justice: Weinrib, *The Idea of Private Law*, n 40, xvii, xix.

[48] "This perspective allows one to follow the development of the law from its normative beginnings in the will of individuals, all the way to its legal consequences in the manifestation of justice in legal institutions": Weinrib, *The Idea of Private Law*, n 40, 84–85; EJ Weinrib, "The Gains and Losses of Corrective Justice" (1994) 44 *Duke Law Journal* 277, 279, 282–289; Beever, Forgotten Justice, n 40, 152–157.

[49] Weinrib, *The Idea of Private Law*, n 40, 100.

[50] Weinrib, *The Idea of Private Law*, n 40, 81. Weinrib argues that Kant extended Aristotle's notions of corrective justice back to the concept of free purposiveness, stating: "the equality of corrective justice acquires its normative force from Kantian right … [with self-determining agents being] … duty-bound to interact with each other on terms appropriate to their equal status. Implicit in corrective justice's relationship of doer and sufferer are the obligations incumbent in Kantian legal theory on free beings under moral laws": Weinrib, *The Idea of Private Law*, n 40, 83–84.

[51] EJ Weinrib, "Corrective Justice" (1992) 77 *Iowa Law Review* 403, 421–424; Weinrib, n 48, 279. The principal matter of importance for Weinrib is whether actions are consistent "with the freedom of all persons": EJ Weinrib, "Right and Advantage in Private Law" (1989) 10 *Cardozo Law Review* 1283, 1291. Also see Allcock, n 19, 31.

[52] Weinrib, *The Idea of Private Law*, n 40, 95, quoting I Kant, *Metaphysics of Morals* (Mary Gregor trans, Cambridge University Press, 1991) 56 [230]. Weinrib describes this concept as a notion of "equal membership in the kingdom of ends": Weinrib, n 46, 40.

[53] Weinrib, "The Special Morality of Tort Law", n 40, 409.

[54] Weinrib, "The Special Morality of Tort Law", n 40. Also see Allcock, n 10, 70; Allcock, n 19, 30.

[55] Weinrib, *The Idea of Private Law*, n 40, 9; Beever, *Forgotten Justice*, n 40, 152–157. Peter Cane regards this aspect of Weinrib's *Idea of Private Law* as "difficult to the point of obscurity": P Cane, "Corrective Justice and Correlativity in Private Law" (1996) 16 *Oxford Journal of Legal Studies* 471, 487.

[56] Weinrib, *The Idea of Private Law*, n 40, 128.

[57] Weinrib, *The Idea of Private Law*, n 40.

fundamental, namely, the right to control the use of one's body.[58] According to Beever, the commitment to "equal maximum freedom" in Kant's *Metaphysics of Morals* gives rise to one principal right: the right to freedom, or the right to "independence from being constrained by another's choice".[59] Beever applies Weinrib's perspective to the law of negligence generally, and to the particular doctrines of law within this area of law.[60] This perspective[61] weaves the normative discussion of the Kantian concept of right operating within a framework of corrective justice into some of the most fundamental doctrinal aspects of the law of negligence, contending that these features of the law can be understood in normative terms. In relation to the existence and normative limits of the duty of care, Beever argues that his perspective is exemplified in two well-known and important negligence cases: *Donoghue v Stevenson*,[62] and *Palsgraf v Long Island Railroad Co*.[63]

B. Application of Weinrib's and Beever's Theories to Cases of Negligently Inflicted Psychiatric Injury – The Right to Physical and Psychological Integrity

I have argued elsewhere that a right to physical and psychological integrity exists in Australia,[64] and, following the exploration of the normative limits of this right, suggested an approach to liability which reflects the extent of this right.[65] I have argued where a person (or the general community, judged against the standard of the reasonable person) has a limited ability to appreciate the risk of a particular type of injury – say injury *x* – as a result of a particular type of action – say action *y* – there will be a limit to the extent to which a normative connection can be made between the defendant's purposive action – action *y* – and the plaintiff's injury – injury *x*. Where injury is caused in such circumstances, it might be argued that the actor was negligent. However, where as a matter of community understandings and expectations the risk of injury to the plaintiff was not appreciable, a normative connection will not be able to be made between the defendant's actions and plaintiff and the plaintiff's resulting injury. In such circumstances it can be concluded that the actor was not morally responsible for causing the plaintiff's injury.[66]

As to the normative limits of the right to physical and psychological integrity, I have argued that in order to determine the extent to which the right to psychological integrity exists, it is of normative significance that the ability of the ordinary member of the community to appreciate the risk of particular

[58] Beever argues that the law protects against actions which put one's body to the purposes of another without consent: see A Beever, "What Does Tort Law Protect?" *Singapore Journal of Legal Studies* forthcoming (pages 10 and 11 of original manuscript).

[59] Beever, n 58. Also see Allcock, n 10, 71; Allcock, n 19, 35–36.

[60] See Beever, *Rediscovering the Law of Negligence*, n 40; Beever, *Forgotten Justice*, n 40; Beever, *A Theory of Tort Liability*, n 40.

[61] Beever calls this the "Principled Approach".

[62] *Donoghue v Stevenson* [1932] AC 562 (*Donoghue*). More specifically, Beever is referring to Lord Atkin's judgment in *Donoghue* (580).

[63] *Palsgraf v Long Island Railroad Co* 162 NE 99 (NY, 1928) (*Palsgraf*). Beever refers specifically to Cardozo J's judgment in *Palsgraf* (101).

[64] See M Allcock, "Corrective Justice and Kantian Right as a Mechanism to Reconcile Substantially Clashing Interests in Cases of Negligently Inflicted Psychiatric Injury" (2015) 40 *Australian Journal of Legal Philosophy* 17. I noted in this article that explicit comment has been made by a number of judges and scholars regarding the existence of such a right: see, eg, *Tame v New South Wales* (2002) 211 CLR 317, 374 [170], 379 [185] (Gummow and Kirby JJ), 411 [275] (Hayne J); [2002] HCA 35; *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269, 300–301 [88] (Gummow and Kirby JJ); D Mendelson, "Legal and Medical Aspects of Liability for Negligently Occasioned Nervous Shock: A Current Perspective" (1995) 39(6) *Journal of Psychosomatic Research* 721, 724, 732; P Bell, "The Bell Tolls: Toward Full Tort Recovery for Psychic Injury" (1984) 36(3) *University of Florida Law Review* 333, 341.

[65] See Allcock, n 64.

[66] This is consistent with both Weinrib's and Beever's conceptions of negligence based on corrective justice. Particularly, this is consistent with Weinrib's conception of negligence as involving "conduct and choice": Weinrib, n 46, 37, 58. In this regard, Weinrib states: "negligence … can accommodate the absence of liability where there is no act in the technical tort sense of a manifestation of the will … Under the Kantian approach lies the view that moral personality is marked by the capacity to form and advance a conception of the good …. Liability should not be visited on actions that cannot plausibly be regarded as instances of the exercise of this capacity": Weinrib, n 46.

kinds of injury as a result of particular actions is limited in some circumstances, but relatively developed in others. In particular, I have contended that the general community has a relatively good ability to appreciate the risk of psychiatric injuries in two particular archetypal circumstances, namely (1) as a result of the death or injury of a loved one in unexpected or distressing circumstances, and (2) as a result of witnessing a particularly horrific accident involving another person, even whether that other person is a complete stranger. This is important because it suggests that the point at which the norm against injuring is set will demand more of defendants in these two archetypal circumstances. The crux of my contention on this point is that the reasonable person standard reflects the point at which it can be said that normative connection between the defendant's actions and the plaintiff's resulting injury can be established.[67]

In the language of Lord Atkin, only when it is adjudged that those in the general community have the ability to appreciate the risk of particular injury to another by specific actions can it be concluded that the defendant ought to have had that other in mind as one who was so closely and directly affected by the defendant's acts that the defendant ought to have had that other in contemplation when directing their mind to the acts in question. In this context, the objective reasonable person standard against which the defendant's actions are judged when considering the issue of duty can be characterised as an attempt to establish the necessary normative connection between the defendant's wrongful act and the particular plaintiff in question.

I consequently concluded that an overall picture emerges of the shape of the law which is consistent with Weinrib's and Beever's theories so far as the elements of duty of care are concerned. The overriding test in relation to the existence of a duty of care consistent with this theory is the *Donoghue v Stevenson*[68] test of reasonable foreseeability, informed by a mechanism which takes into account community understandings and expectations in relation to the risks of psychiatric disorders as a result of exposure to specific types of trauma. The mechanism I proposed is to consider in relation to both the duty and remoteness tests: *whether the risk of psychiatric disorder suffered by the plaintiff was appreciable as a matter of community understandings and expectations, that is, by those in the community with no special education or training.* This approach attempts to establish the necessary normative connection between the defendant's wrongdoing and the plaintiff and their resulting injury.[69]

The remainder of this article is dedicated to arguing that when considered in the context of the community understandings mechanism outlined above, the court's consideration of whether the relationship between the plaintiff and the person injured or killed is not arbitrary, but instead is normatively justified. The basis for this argument is that consideration of this aspect of the factual matrix, where present, is of central relevance to the question of whether the ordinary member of the community can be considered to have been able to appreciate the risk of mental injury to the defendant, and therefore to whether the defendant was morally responsible for causing the plaintiff's injury.

The following Part of this article considers common understandings of the causes of mental disorders, with a particular focus on injury caused by the loss of a loved one in unexpected and distressing circumstances. It will be argued that the ordinary member of the community has long been able to appreciate the risk of mental injury as a result of the loss of a loved one in such circumstances. It will further be argued that for this reason, consideration of this aspect of the factual matrix is normatively justified in such circumstances.

III. Scientific and Common Understandings of the Risk of Psychiatric Injury due to the Death of a Loved One

The determination of whether a right to physical and psychological integrity existed at a particular point in time is a normative question. However, in order to make this determination, a range of

[67] See Allcock, n 64.

[68] *Donoghue v Stevenson* [1932] AC 562.

[69] See Allcock, n 64.

non-normative pieces of evidence can be drawn upon. Modern scientific understandings of the causes of mental disorders are considered first in this Part. However, by itself, evidence of scientific knowledge is likely to be insufficient in attempting to determine common understandings. To simply equate common understandings with scientific understandings would be to ignore the reality that understandings of scientific knowledge throughout the general community generally lag behind scientific understandings. The common law, being reactive by nature, also generally follows behind science.[70] As such, following the consideration of scientific understandings, sociological and historical evidence is also drawn upon in order to provide an indication of common understandings of the causes of mental disorders.[71]

A. Medical Understandings of the Relationship between Mental Injury and the Loss of a Loved One

By modern scientific understandings, the association between the loss of a loved one in unexpected and distressing circumstances and mental injury is well known. However, it would be incorrect to characterize this knowledge as recent. Mental disorders have long been associated in medical understandings with the loss of a loved one, for instance a child, in tragic and unexpected circumstances. In particular, it has long been understood that losing a child has the potential to result not just in grief and suffering but in lasting psychiatric illness. The subject of pathological mental distress has been written about since the keeping of written records.[72] Writing 500 years before the birth of Christ, Hippocrates described a condition called melancholia which was characterised by symptoms very similar to Freud's melancholia and to modern understandings of depression.[73] A similar condition was also written about by medical practitioners in both Ancient Greece and Ancient Rome.[74] In 1621, a condition called melancholy was also outlined by Robert Burton which was similar in nature.[75]

In the modern era, the work of Freud has been particularly influential, particularly in the early to middle part of the 20th century. In his important work *Mourning and Melancholia* published in 1917, Freud discussed the two related conditions of mourning and melancholia, which he argued were both associated with experiencing the loss of a loved one.[76] Mourning, considered by Freud to be a normal reaction to such a loss, was distinguished from melancholia, which although also was precipitated in some circumstances by loss of a loved one, was considered psychogenic in nature and consequently pathological.[77] Describing the symptoms of melancholia, Freud stated:

> The distinguishing mental features of melancholia are a profoundly painful dejection, cessation of interest in the outside world, loss of the capacity to love, inhibition of all activity, and a lowering of the self-regarding feelings to a degree that finds utterance in self-reproaches and self-revilings, and culminates in a delusional expectation of punishment.[78]

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[70] Allcock, n 64, 395. Windeyer J's comments in *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 ring particularly true in this context, that the "law, march[es] with medicine but in the rear and limping a little" (395).

[71] It is recognised that the task of assessing general community understandings at any point in time is fraught with danger. Unless reliable empirical research has been conducted on the particular topic of concern at the particular time and place of interest, one can do little other than review the available historical evidence and make relevant inferences. This is likely also to be more difficult to do reliably the further back one goes in time. In recognition of this legitimate concern, attempts will be made wherever possible to consider evidence from a range of differing sources so that the inferences made can be strengthened as much as possible. It should also be kept in mind that any conclusions reached on the basis of inferential reasoning alone are unlikely to be as strong as arguments based on empirical research, and as such, are likely to always be subject to further confirmation.

[72] AV Horwitz and JC Wakefield, "The Age of Depression" (2005) *Public Interest* 39, 41.

[73] Horwitz and Wakefield, n 72.

[74] Horwitz and Wakefield, n 72.

[75] See R Burton, *The Anatomy of Melancholy* (London, 1621) sections 1, 2 and 3 of the first partition, cited in Horwitz and Wakefield, n 72, 42–43.

[76] S Freud, "Mourning and Melancholia" in LG Fiorini, T Bokanowski and S Lewkowicz, *On Freud's "Mourning and Melancholia"* (Karnac Books, 2009) 43–44.

[77] Freud, n 76.

[78] Freud, n 76, 44.

The features of mourning were almost identical, except that there was no loss of self-regard in those simply mourning, and the unpleasant symptoms associated with mourning were expected to pass with time.[79] Freud's psychoanalytic theory, the dominant theory in psychiatry in the early and middle of the 20th century, posited that traumatic experience triggers psychological processes in individuals.[80] According to Freud, the melancholic patient was considered to fall into "delusional self-accusations and self-aspersions" as a result of this condition, which at the time was called "the delusion of moral inferiority".[81]

The phenomenon of grief started to be studied systematically in the 1940s when Lindemann provided an account of the symptoms of grief experienced by survivors of the Cocoanut Grove Fire.[82] Lindemann described grief as a process involving typical symptoms and a predictable course, a finding which was subsequently supported by the work of other researchers such as Pollock,[83] Clayton,[84] Glick,[85] Parkes,[86] Parkes and Weiss,[87] and Raphael.[88] By the 1980s there were a number of models which attempted to explain the bereavement process. The psychoanalytic model was based on Freudian theory and held that the grieving process involved surrendering the tie with a loved object, a process which was intensely painful.[89] Other theoretical perspectives also shed light on this process.

Interpersonal and attachment theory models placed emphasis on the nature of the particular relationship with the deceased person, and the social meaning of the disruption of this relationship caused by the death of the loved person.[90] Crisis theory at this time held that bereavement involved the disruption of the person's emotional homeostasis which could magnify pre-existing personality issues and problematic ways of coping.[91] By contrast, cognitive and behavioural theories understood the process of bereavement from the perspective of how one structured the world in one's own mind, focusing principally on psychological processes.[92]

Research by Bowlby and Parkes and by Kubler-Ross by this time presented perhaps the most influential models of grief, with each suggesting that grief was experienced in stages.[93] Research had by this time further shown that the particular relationship that existed with the deceased had a large effect on the particular difficulties experienced following bereavement, as did the nature of the death.[94] In particular,

[79] Freud, n 76.

[80] S Freud, *Selected Papers on Hysteria* (Nervous and Mental Diseases Monograph Series, 1920); G Mendelson, "The Concept of Post-traumatic Stress Disorder: A Review" (1987) 10 *International Journal of Law and Psychiatry* 45, cited in D Mendelson, *The Interfaces of Medicine and Law: The History of the Liability for Negligently Caused Psychiatric Injury (Nervous Shock)* (Ashgate Dartmouth, 1998) 116.

[81] S Radó, "The Problem of Melancholia" (1928) 9 *International Journal of Psycho-Analysis* 420, 421.

[82] E Lindemann, "Symptomatology and Management of Acute Grief" (1944) 101 *American Journal of Psychiatry* 141, cited in M Osterweis, F Solomon and M Green (eds), *Bereavement: Reactions, Consequences, and Care* (National Academy Press, 1984) 48.

[83] GH Pollock, "Mourning and Adaptation" (1961) 42 *International Journal of Psychoanalysis* 341.

[84] PJ Clayton, L Desmarais and G Winokur, "A Study of Normal Bereavement" (1968) 125 *American Journal of Psychiatry* 168.

[85] IO Glick, CM Parkes and R Weiss, *The First Year of Bereavement* (Basic Books, 1975).

[86] CM Parkes, "The First Year of Bereavement" (1970) 33 *Psychiatry* 422; CM Parkes, *Bereavement* (Tavistock, 1972).

[87] CM Parkes and RS Weiss, *Recovery from Bereavement* (Basic Books, 1983).

[88] B Raphael, "Preventive Intervention with the Recently Bereaved" (1977) 34 *Archives of General Psychiatry* 1450; B Raphael, *The Anatomy of Bereavement* (Basic Books, 1983). See Osterweis, Solomon and Green (eds), n 82, 48.

[89] Osterweis, Solomon and Green (eds), n 82, 58.

[90] Osterweis, Solomon and Green (eds), n 82, 59.

[91] Osterweis, Solomon and Green (eds), n 82.

[92] Osterweis, Solomon and Green (eds), n 82.

[93] J Bowlby and CM Parkes, "Separation and Loss Within in Family" in EJ Anthony and CJ Koupernik (eds), *The Child in His Family: International Yearbook of Child Psychiatry and Allied Professions* (Wiley, 1970) 197–216; E Kubler-Ross, *On Death and Dying* (Tavistock, 1970).

[94] Osterweis, Solomon and Green (eds), n 82, 37.

it was known that those who were in ambivalent relationships – that is, relationship which were not consistently loving and supportive – and those who were unable to function well independently were less likely to cope following spousal bereavement.[95]

By the time of the turn of the 20th century, research had further established the link between the loss of a loved one in distressing and unexpected circumstances and the onset of PTSD,[96] depression,[97] and complicated grief syndrome.[98] The fourth edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV) had been published in 1994, and included a new disorder named "acute stress disorder" in addition to PTSD.[99] In 2013, a category of disorders called "Trauma- and Stressor-Related Disorders" would eventually be included in the *Diagnostic and Statistical Manual of Mental Disorders 5* (DSM-5).[100] It was also known by this time that there are a number of specific circumstantial factors that are particularly strongly related to the onset of psychiatric disorders due to the death of a loved one. In particular, it was well known at the time that loss of a loved one is most strongly related to the onset of psychiatric injury when the loss is unexpected, complicated, or perceived as unfair.[101] It was also known that there are a number of factors which impact upon the level of psychopathology suffered following the death of a loved one, including the suddenness of the death and the level of preparedness for the death.[102] Moreover, by this time, it was well understood that deaths involving particularly distressing circumstances, such as deaths caused through violence, are strongly associated with the onset of mental disorders.[103]

B. Common Understandings of the Relationship between Mental Injury and the Loss of a Loved One

So, if by scientific understandings the relationship between the loss of a loved one in sudden and unexpected circumstances has long been established, what of the understandings of ordinary members of the community who do not possess this expert knowledge? It might be assumed that common understandings would lag behind scientific understandings, however, there is evidence which suggests otherwise. While medical researchers have been concerned with developing understandings of the precise mechanisms of injury and the characteristics of injury itself, understanding of this type of evidence is not strictly necessary in order to appreciate the risk of particular kinds of injuries as a result of exposure to particular types of trauma.

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[95] Parkes and Weiss, n 87, cited in Osterweis, Solomon and Green (eds), n 82, 37.

[96] MJ Horowitz, "Stress-response Syndromes: A Review of Posttraumatic Stress and Adjustment Disorders" in JP Wilson and B Raphael (eds), *International Handbook of Traumatic Stress Syndromes* (Plenum Press, 1993) 56–57; S Zisook, Y Chentsova-Dutton and SR Schucter, "PTSD following Bereavement" (1998) 10(4) *Annals of Clinical Psychiatry* 157, 161–162.

[97] See ML Bruce et al, "Depressive Episodes and Dysphoria Resulting from Conjugal Bereavement in a Prospective Community Sample" (1990) 147 *American Journal of Psychiatry* 608; PJ Clayton, "Bereavement and Depression" (1990) 51 *Journal of Clinical Psychiatry* 34; S Zisook and S Schuster, "Uncomplicated Bereavement" (1993) 54 *Journal of Clinical Psychiatry* 365, cited in LC Barry, SV Kasl and HG Prigerson, "Psychiatric Disorders among Bereaved Persons: The Role of Perceived Circumstances of Death and Preparedness for Death" (2002) 10(4) *American Journal of Geriatric Psychiatry* 447, 447.

[98] See HG Prigerson et al, "Complicated Grief and Bereavement-related Depression as Distinct Disorders: Preliminary Empirical Validation in Elderly Bereaved Spouses" (1995) 152 *American Journal of Psychiatry* 22; HG Prigerson, AJ Bierhals and PK Maciejewski, "Traumatic Grief as a Distinct Disorder from Bereavement-related Depression and Anxiety: Replication Study" (1996) 153 *American Journal of Psychiatry* 1484, cited in Barry, Kasl and Prigerson, n 97, 447.

[99] Barry, Kasl and Prigerson, n 97, 447.

[100] *Diagnostic and Statistical Manual of Mental Disorders V* (DSM-5) (American Psychiatric Association, 5th ed, 2013).

[101] Horowitz, n 96, 56–57; Zisook, Chentsova-Dutton and Schucter, n 96, 161–162.

[102] See Barry, Kasl and Prigerson, n 97, 448. Also see N Breslau et al, "Trauma and Posttraumatic Stress Disorder in the Community: The 1996 Detroit Area Survey of Trauma" (1998) 55 *Archives of General Psychiatry* 626, 628, 630–632.

[103] See SA Murphy et al, "Changes in Parents' Mental Distress after the Violent Death of an Adolescent or Young-adult Child: A Longitudinal Prospective Analysis" (1999) 23 *Death Studies* 129; LM Range and NM Niss, "Long-term Bereavement from Suicide, Homicide, Accidents and Natural Deaths" (1990) 14 *Death Studies* 423; SA Murphy et al, "PTSD among Bereaved Parents following the Violent Deaths of Their 12 to 28 Year-Old Children: A Longitudinal Prospective Analysis" (1999) 12 *Journal of Traumatic Stress* 273, cited in Barry, Kasl and Prigerson, n 97, 454.

Indeed, the pain of losing a child has seemingly been well known to ordinary members of the community throughout human history, from the time of antiquity through to modern times. Grief over the loss of a loved one was known in ancient Greece as *lupé* and *penthos*, and the outward manifestation of grief – mourning – was often accompanied by lamentation and acts of ritual such as sobbing, tearing at one's hair, and the beating of one's chest.[104] Like those in modern society, the ancient Greeks spoke of being "in mourning" – *en penthei* – following the death of a loved one, giving recognition to the idea that following such a death, there was a period during which one would suffer the emotional pain of grief.[105] For example, in *Republic*, Plato in the 4th century BC spoke of being "in misfortune and mourning and lamentation".[106]

There are many examples of prominent philosophers and writers from the ancient world discussing the particular subject of the death of a child. Greek playwright Euripides famously stated in the 5th century BC, "What greater pain can mortals bear than this, to see their children die before their eyes".[107] Extensive literature exists going back to the time of antiquity concerning the loss of a child, including consolation letters, works of poetry, and books on how to cope with the emotional pain of this painful experience. The Greek philosopher Crantor, who lived in the 4th century BC, is widely regarded as the originator of the consolation letter, letters commonly written in the ancient world to those suffering emotional pain resulting from the death of a loved one. One of his most famous works was titled *On Grief*, a letter written to Hippocoles, a friend who was grieving the death of his son.[108]

The Roman philosopher Cicero was another who is well known to have written about parental grief in the ancient world, writing about his daughter Tullia's death in 45BC. Cicero was devastated by Tullia's death, and expressed the idea that this grief was a disease of the mind.[109] Other well-known examples of consolation letters written in the ancient world are those written by the Greek philosopher Plutarch to his wife following the death of their son, and by Roman philosopher Seneca to his friend who was grieving the loss of his infant son.[110] These letters all tell of the awful pain suffered by parents resulting from the death of a child, despite the writers invariably imploring the grieving parent not to show excessive grief because death was an inevitable part of life.[111]

Literature from the middle ages shows that parental grief resulting from the loss of a child was also well understood in the Muslim world. A large number of books were written between the 13th and 16th centuries in Syria and in Egypt which were guidebooks for parents coping with the loss of a child.[112] These consolation manuals contained practical advice to parents, and were made up of hadith.[113] The popularity of such books has been attributed to the large numbers of child deaths which took place during this period of time due to the Black Plague.[114] Although these manuals, like the early Greek and Roman consolation letters, recommend that parents remain steadfast in the face of their loss, they nonetheless recognise the significant emotional pain suffered by parents in this situation, recommending that parents show patience during this time in order to avoid contradicting the wishes of God.[115]

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[104] D Konstan, *The Emotions of the Ancient Greeks: Studies in Aristotle and Classical Literature* (University of Toronto Press, 2006) 244.

[105] Konstan, n 104, 252.

[106] Konstan, n 104.

[107] See RW Byard, *Sudden Death in the Young* (CUP, 2010) 1.

[108] AJ Catalano, *A Global History of Child Death* (Peter Lang AG, 2014) 114.

[109] Catalano, n 108.

[110] See Plutarch, "Consolation to His Wife"(PH de Lacy and B Einarson trans, Harvard University Press and William Heinemann, 1959) 575–605 [trans of: "Consolatio ad Uxorem", *Moralia*, Vol 7], cited in Catalano, n 108, 114–115.

[111] Catalano, n 108, 114–115.

[112] Catalano, n 108, 115.

[113] Hadith are early Islamic teachings attributed to Prophet Muhammad: see Catalano, n 108, 115.

[114] Catalano, n 108, 115.

[115] Catalano, n 108.

Poetry telling of parental grief was also common in Europe in the Middle Ages and into the early years of the renaissance. There are many examples of consolation poetry from Germany in the time of Martin Luther.[116] One of the common purposes of this literature was to assist grieving parents in letting go of their lost children, and to reduce their worries as to their children's ultimate fate in the afterlife.[117] There are also examples of grief poetry in other parts of Europe at this time.[118] There are also numerous English and American examples from the 18th and 19th century of grief poetry,[119] and the genre has continued through to modern times.[120]

Newspaper articles telling of the terrible grief suffered by parents after losing a child sadly have also been common in the newspapers from the turn of the 20th century onwards.[121] These articles – with titles which reveal the sad nature of their contents, such as "Very Youthful Sportsmen. Brothers of Twelve and Six. The Younger Shot Dead",[122] "The Victim's Parents. Receiving the News",[123] and "Sydney Family. Tragic Death of Two Members"[124] – tell of numerous deaths of children and the unbounded grief of their parents, not uncommonly resulting in lasting mental disorders.[125] The subject of parental bereavement following the death of a child has also been relatively common in popular literature in the period from the middle of the 20th century onwards. Examples of literary works during this period in which parental grief following the death of a child is a central theme includes "Death Be Not Proud (P.S.)" by John J Gunther

[116] Catalano, n 108, 117–118. Luther himself experienced the loss of two children in the early 16th century, writing to a friend of his anguish: Catalano, n 108.

[117] Catalano, n 108.

[118] A series of poems totalling 19 separate elegies titled Laments was written by Polish poet Jan Kochanowski and published in 1580, written as a result of his great pain due to the death of his two and half year old daughter. Another example, this one from the 17th century, is R Herrick's, "Epitaph upon a Child that Died" in Arthur Quiller-Couch (ed), *The Oxford Book of English Verse* (1919): Catalano, n 108, 117–118.

[119] See, eg, E Prentiss, *Stepping Heavenward* (Warne, 1869); TL Cuyler, *The Empty Crib* (R Carter, 1873), N Adams, *Agnes and the Key of Her Little Coffin* (SK Whipple and Co, 1857), WH Holcombe, *Our Children in Heaven* (JB Lippincott and Co, 1870), and ES Phelps Ward, *Gates Ajar* (Boston, Fields, Osgood, 1868), cited in Catalano, n 108, 116. Other famous 19th century examples of poetry on the subject parental grief includes W Wordsworth, "We Are Seven"; EW Wilcox, "When Baby Souls Sail Out"; HC Andersen, "The Angel"; HW Longfellow, "The Open Window": see <http://www.litscape.com/themes/life_and_death/Death_Of_Child_Poetry.html>.

[120] See, eg, B Crooker, *The Lost Children* (Heyek Press, 1989); P Eyetinge, "A Silent House" in W Simonds and B Katz Rothman, *Centuries of Solace: Expressions of Maternal Grief in Popular Literature* (Temple University Press, 1992): Catalano, n 108, 120–121. For a review of a number of examples of consolation literature from the 20th century, see W Simonds and B Katz Rothman, *Centuries of Solace: Expressions of Maternal Grief in Popular Literature* (Temple University Press, 1992). Two examples of grief literature were referred to by Evatt J in *Chester v Municipality of Waverley* (1939) 62 CLR 1, 17, 18. These were William Blake's poem "The Little Girl Found" published in his 1794 collection of poetry entitled *Songs of Innocence and of Experience*, and *Such is Life*, the fictional diary of Tom Collins written in 1897 by Joseph Furphy.

[121] "Very Youthful Sportsmen. Brothers of Twelve and Six. The Younger Shot Dead", *Bendigo Independent*, 21 May 1900, 6; "Town Tattle. A Sad Trial", *Bunyip*, 4 August 1905, 2; "James Connors' Death", *Northern Star*, 23 October 1907, 4; "The Kembla Disaster", *South Coast Times and Wollongong Argus*, 1 August 1908, 8; "In Memorium. The Kembla Disaster", *Illawarra Mercury*, 31 July 1908, 5; "In Memorium", *Mornington and Dromana Standard*, 28 November 1908, 2; "Fatal Case of Tetanus", *Darling Downs Gazette*, 26 August 1909, 5; "The Victim's Parents. Receiving the News", *Daily News*, 14 June 1910, 4; "Woodlupine Murder", *Daily News*, 18 May 1911, 10; "Obituary", *Horsham Times*, 14 May 1912, 5; "Tramway Fatality", *Daily Telegraph*, 22 March 1913, 10; "Death of a Child at Home Rule", *Mudgee Guardian and North-Western Representative*, 20 February 1913; "Sad Fatality. Kalgoorlie Boy Killed. On Fingall Gold Mine", *Sun*, 13 December 1914, 8; "The Value of a Life", *Northern Champion*, 7 June 1916, 3; "Obituary", *Warracknabeal Herald*, 1 May 1917, 4; "Shocking Accident", *Northern Star*, 15 February 1917, 8; "Sydney Family. Tragic Death of Two Members", *Week*, 8 March 1929, 11; "Alma. In Loving Memory of Little Alma Williams of Doolbe", *Maryborough Chronicle, Wide Bay and Burnett Advertiser*, 20 April 1922; "A Sad Death", *Armidale Chronicle*, 24 January 1923, 4.

[122] *Bendigo Independent*, n 121.

[123] *Daily News*, n 121, 4.

[124] *Week*, n 121, 11.

[125] Other examples include: "Mystic Sense in Nature", *West Gippsland Gazette*, 19 May 1925, 2; "Babes in the Wood", *Brisbane Courier*, 16 April 1926, 6; "Parents' Grief. Tragedy of Poolamacca Station. Father's Story", *Sun*, 31 December 1926, 7; "Parents'

(1949),[126] "Ordinary People" by Judith Guest (1982),[127] "Poems of Mourning" by Peter Washington (1998),[128] and "Rare Bird: A Memoir of Loss and Love" by Anna Whiston-Donaldson (2014).[129]

The subject has also been a relatively common theme in 20th and early 21st century cinema and popular music. Films which take this subject as a central theme include "Europa '51'" (1952),[130] "Obsession" (1976),[131] "Sophie's Choice" (1982),[132] "The Accidental Tourist" (1988),[133] "The Sweet Hereafter" (1997),[134] "Babel" (2006),[135] and "Rabbit Hole" (2010).[136] Well-known examples of popular songs dealing with this subject include Eric Clapton's 1991 hit song "Tears in Heaven", Paul Simon's 1972 single "Mother and Child Reunion", and Led Zeppelin's 1979 song "All My Love".

The advent of the Internet in more recent times has seen a large number of websites developed to cater for the diverse interests of users. Among these are the many websites which have been developed dedicated to the topic of parental bereavement, typically offering advice about how to understand and lessen the pain of parental grief.[137] These websites, perhaps modern versions of the consolation literature developed in earlier centuries, also commonly provide chat-rooms for users to find support from others with similar experiences, and further information regarding professional services available.

Grief. Tragedy of Poolamacca Station. The Father's Story", *Richmond River Express and Casino Kyogle Advertiser*, 3 January 1927; "A Sad Accident", *Observer*, 10 December 1927, 39; "Shotgun. Found in Waterhole. Williamtown Murder. Two Men Charged", *Daily Examiner*, 19 June 1928, 4; "Bunderberg and Preventive Medicine", *Register*, 31 January 1928, 8; "Trapped in Flames. Four Children Burned. Pitiful Station Fatality. Parents Grief-Stricken", *Maryborough Chronicle, Wide Bay and Burnett Advertiser*, 19 December 1929; "Parents' Grief. Baby Sisters Killed. Driver's Version", *Evening News*, 24 January 1929, 14; "Missing Child. Death From Exposure", *Daily Advertiser*, 2 June 1932, 1; "Child's Tragic Death. Diptheria Cases at Dubbo", *National Advocate*, 10 June 1933, 5; "The Right of the Road. Children and Motor Accidents. Parents' Grief and Anxiety", *Age*, 1 October 1935, 11; "Child's Death. Remarkable Story. Tragedy at Perth. Father Charged With Murder", *Daily Examiner*, 29 September 1936, 5; "Child in Convulsions. Coogee Tragedy", *West Australian*, 10 December 1937, 6; "Brother Succumbs. Parents Brief Stricken", *Armidale Express and New England General Advertiser*, 11 May 1938; "Touching Memorial of Avoca. A Mother's Love That is Carved in Stone", *Weekly Times*, 1 July 1939, 9.

[126] JJ Gunther, *Death Be Not Proud (P.S.)* (Harper Perennial Modern Classics, 1949) (the author tells of his grief following the death of his son due to a malignant brain tumour).

[127] J Guest, *Ordinary People* (Penguin Books, 1982) (tells of the grief of losing a son).

[128] P Washington, *Poems of Mourning* (Everyman's Library, 1998) (collection of poems talking about mourning, including those discussing the grief of losing a child).

[129] A Whiston-Donaldson, *Rare Bird: A Memoir of Loss and Love* (Convergent Books, 2014) (portrays the grief of parents due to the loss of their 12-year-old son who drowned in a flood). Numerous other examples can be found of this nature, some of which are: A Sebold, *The Lovely Bones* (Little, Brown & Co, 2002) (tells of the grief of losing a 14-year-old daughter to homicide), G Jurgensen, *The Disappearance: A Primer of Loss* (WW Norton & Co, 1994) (author tells of her grief over the loss of her two young daughters in a car accident with a drunk driver), S Deraniyagala, *Wave* (Knopf, 2013) (author's grief following the deaths of her parents, her husband, and her two sons in a tsunami in Sri Lanka in 2004), and J Didion, *Blue Nights* (Knopf, 2011) (account of a mother's grief as a result of the death of her daughter).

[130] Tells of a mother's grief after the death of her young son.

[131] Tells of a man's grief after the deaths of his wife and daughter. See <https://mubi.com/lists/films-about-grief-and-loss>.

[132] Tells of a mother's grief after losing her two children in the holocaust.

[133] Tells of a father's grief over the death of his son.

[134] Grief over the loss of a child.

[135] Parents' grief over the death of a child by suicide.

[136] Parents' grief over the death of their son in a car accident. Numerous other examples exist, including: "Don't Look Now" (1973) (parents' grief over the death of their daughter by drowning), "Ordinary People" (1980) (grief over the loss of a child and an older brother in an accident), "The Virgin Suicides" (1999) (parents' grief over the deaths by suicide of their daughters), "Monster's Ball" (2001) (grief of a father after the suicide of his son), "21 Grams" (2003) (grief over the death of a husband and a daughter in an accident), "Still Walking" (2008) (parents' and brother's grief over the loss of their son and brother), and "Welcome to the Rileys" (2010) (parents' grief over the death of their teenage daughter): see <http://www.tasteofcinema.com/2015/20-great-movies-about-loss-and-grief/>; <https://mubi.com/lists/films-about-grief-and-loss>.

[137] See, eg, <http://www.stillbornandstillbreathing.com>; <http://grievingparents.com>; <http://www.thelaboroflove.com>; <https://myforeverchild.com>; <https://www.compassionatefriends.org>;<https://healgrief.org>; <http://www.griefspeaks.com>; <http://www.belovedhearts.com/Grief_Center/Grief_Support_Center.htm>; <https://www.bereavedparentsusa.org/>; <http://bereavementireland.com>; <https://www.griefwatch.com/death-of-a-child>; <www.griefandsympathy.com/grieving-loss-child.

The topic of mental disorders caused by grief as a result of losing a spouse has also been a common topic in the popular culture. Indeed, there are many examples in the 20th and early 21st centuries of popular literature in which unbridled grief suffered due to the loss of a spouse is a central theme.[138] Considering the popularity of the loss of a spouse as a theme in literature in the 20th and early 21st centuries, it is not surprising that this subject has also commonly been an important subject in cinema. Films in which this theme has been used include "No End" (1985),[139] "Truly, Madly, Deeply" (1990),[140] "Ghost" (1990),[141] "Three Colours Blue" (1993),[142] and "21 Grams" (2003).[143] As with newspaper articles on the sad topic of parents' grief following the loss of a child, there are numerous examples of similar articles in the press telling of the mental breakdown of a husband or a wife following the death of a spouse.[144] This melancholy collection of articles often includes examples of spouses suiciding following the death of their wife or husband.[145]

There is also evidence from popular culture – including literature, and cinema – which appears to indicate that it has long been appreciated that the loss of a parent is typically accompanied by significant emotional torment. It has been argued above that accounts of the emotional pain of grief were common

html>; <https://www.copefoundation.org/>; <https://grievingdads.com/>; <http://www.childbereavementuk.org/>; <www.recover-from-grief.com>.

[138] See, eg, W Faulkner, *As I Lay Dying* (Vintage, 1930) (tells of the grief of the loss of a wife and a mother); J Agee, *A Death in the Family* (Vintage, 1957) (grief of a family over the death of a husband and father); CS Lewis, *A Grief Observed* (Faber and Faber, 1961) (tells of the author's grief following the death of his wife); P Washington, *Poems of Mourning* (Everyman's Library, 1998) (collection of poems discussing mourning, including the grief of losing a spouse); J Didion, *The Year of Magical Thinking* (Vintage, 2005) (grief over the death of the author's husband); D Hall, *The Best Day the Worst Day: Life with Jane Kenyon* (Mariner Books, 2005) (grief over the loss of a spouse); D Plante, *The Pure Lover: A Memoir of Grief* (Beacon Press, 2009) (grief over the loss of a spouse); C Reid, *A Scattering* (Arete, 2009) (grief over the death of a wife); KR Jamison, *Nothing Was the Same* (Knopf, 2009) (account of grief due the death of the author's husband); JC Oates, *A Widow's Story: A Memoir* (Harper Collins, 2007) (the author tells of her grief after the death of her husband of 46 years); F Goldman, *Say Her Name* (Grove Press, 2011); A Tyler, *The Beginner's Goodbye* (Knopf, 2012); Deraniyagala, n 129; K Green, *Bough Down* (Siglio, 2013). See <http://whatsyourgrief.com/32-books-about-death-and-grief>.

[139] Tells of a wife's grief after the death of her husband.

[140] Grief over the loss of a spouse.

[141] A husband grieves over the death of his wife.

[142] Tells of a wife and mother's grief over the loss of her husband and daughter in an accident.

[143] Grief over the death of a husband and a daughter in an accident. Numerous other examples exist, including the following: "Shadows of Forgotten Ancestors" (1965) (tells of a man's grief after the death of his lover), "Dialogue With a Woman Departed" (1971) (tells of filmmaker's grief over the death of his wife), "Last Tango in Paris" (1972) (grief suffered by husband after the death by suicide of his wife), "Obsession" (1976) (tells of a man's grief after the deaths of his wife and daughter), "The Green Room" (1978) (grief over the death of a wife), "Birth" (2004) (tells of a wife's grief after the death of her husband), "Things We Lost in the Fire" (2007) (grief over the loss of a wife), and "A Single Man" (2009) (grief over the death of a spouse). See <http://www.imdb.com/list/ls073523869/>.

[144] See, eg, "Cruel Fate's Merciless Torture of Westralian Family", *Truth*, 5 October 1930, 9; "'Wanted to See her Son' Woman Found Drowned. Evidence at Inquest", *Telegraph*, 16 August 1932, 10; "Echo of R101 Disaster. Tragedy Recalled", *Singleton Argus*, 4 November 1932, 2; "Supreme Court. Civil Sittings", *Townsville Daily Bulletin*, 9 August 1934, 9; "He Left Estate of £30,000. Grief Stricken Man's Suicide Note", *Newcastle Sun*, 18 February 1935, 7; "Suicide's Estate Worth £30,000. 'Life a Dull Affair'", *Recorder*, 19 February 1935, 1; "Estate of Suicide Valued at £30,000. Found Dead at Office", *News*, 18 February 1935, 7; "Estate Valued at £30,000. Left by Sydney Business Man", *Age*, 19 February 1935, 13; "Society Woman's Death. Found Gassed in Her Flat", *Truth* (Sydney), 4 July 1937, 1; "Wanders about with Cut Throat", *Gippsland Times*, 13 March 1939, 1; "Suicide Verdict in Hospital Balcony Case", *Barrier Daily Truth*, 23 January 1943, 3; "Three Children and Father Found Dead. Woman Severely Hurt", *Argus*, 21 January 1944, 5; "Fatal Poisoning. Inquest into Widow's Death", *West Australian*, 14 November 1946, 3; "Widow Wins Two Verdicts", *Newcastle Morning Herald and Miners' Advocate*, 3 October 1952, 5; "When a Spouse Dies", *Australian Women's Weekly*, 19 February 1969, 37.

[145] See, eg, *Truth*, n 144; *Newcastle Sun*, n 144; "Death of Wife. Frantic Husband's Suicide. Pitiful Case", *Examiner*, 22 October 1935, 7; *Truth* (Sydney), n 144 (suicide of woman following death of her husband); *Gippsland Times*, n 144 (man's attempted suicide following the death of his wife); *Barrier Daily Truth*, n 144 (man suicides following wife's death); *Argus*, n 144 (man's murder-suicide of himself and his three children following nervous breakdown caused by wife's death); "Grim Tragedy at West Tamar", *Army News*, 22 January 1944, 3; "Fatal Poisoning. Inquest into Woman's Death", *West Australian*, 14 November 1946, 3 (suicide of woman due to mental condition caused partly by the death of her husband).

in ancient Greece. Importantly, these included accounts of grief due to the loss of a parent.[146] Like the themes of grief following the death of a spouse and parental bereavement following the death of a child, the theme of grief following the death of a parent has appeared relatively commonly in popular literature and cinema. In "Hamlet", William Shakespeare famously considered the emotional torment of the lead character following his father's death. Twentieth and early 21st century literature which shares this theme includes "A Very Easy Death" by Simone De Beauvoir (1964),[147] "Motherless Daughters: The Legacy of Loss" by Hope Edelman (1994),[148] "Extremely Loud and Incredibly Close" by Jonathan Safran Foer (2005),[149] and "Epilogue: A Memoir" by Will Boast (2014).[150] Films which consider this theme include "Misunderstood" (1966),[151] "Babel" (2006),[152] "Ponette" (2008),[153] "Departures" (2008),[154] and "Beginners" (2010).[155]

It is also notable in terms of common understandings that there have been many newspaper articles throughout the 20th century telling of the terrible suffering of those who had lost a parent. Many articles can be found in the Australian newspapers outlining the suicides of adult children due to the grief of the death of a parent, particularly in the early 20th century.[156] Articles can also be found reporting on children dying as a result of their grief.[157]

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[146] One well-known example is the Greek tragedy "Electra" written by Sophocles in the 4th century BC. In this play, Electra mourns the death of her father Agamemnon who has been murdered by his wife and her lover Aegisthus: see Konstan, n 104, 248–249. It has been argued that subsequent interpretations of Electra, such as "Elektra" by Hugo von Hofsmannsthal, 'Elektra' by Richard Strauss, and "Mourning Becomes Electra" by Eugene O'Niell, have treated Electra's mourning for her father to be more than ordinary grief, instead considering it to be pathological melancholia due to an inability to overcome the pain of this loss: Konstan, n 104, 251–252.

[147] S De Beauvoir, *A Very Easy Death* (Pantheon, 1964) (grief over the death of a parent).

[148] H Edelman, *Motherless Daughters: The Legacy of Loss* (Da Capo Press, 1994) (tells of the ongoing emotional pain of living without a mother).

[149] JS Foer, *Extremely Loud and Incredibly Close* (Mariner Books, 2005) (grief over the loss of a father in the 9/11 attacks on the World Trade Centre).

[150] W Boast, *Epilogue: A Memoir* (Liveright, 2014) (grief over the death of a father). Other examples include: D Eggers, *A Heartbreaking Work of Staggering Genius* (Vintage Books, 2001) (grief over the death of both parents), P Roth, *Patrimony: A True Story* (Simon & Schuster, 1991) (grief over the loss of a father), D Rieff, *Swimming in a Sea of Death: A Son's Memoir* (Simon & Schuster, 2007) (tells of the author's mother's death due to cancer), R Barthes, *The Mourning Diary* (Hill and Wang, 2010 (Eng trans)) (discusses the author's mourning of his mother after her death in 1977), M O'Rourke, *The Long Goodbye* (Riverhead Books, 2011) (grief as a result of the death of the author's mother due to cancer), C Strayed, *Wild: From Lost to Found on the Pacific Crest Trail* (Knopf, 2012) (discusses the author's grief following the death of her mother), Deraniyagala, n 129 (author's grief following the deaths of her parents, her husband, and her two sons in a tsunami in Sri Lanka in 2004), M Hainey, *After Visiting Friends: A Son's Story* (Scribner, 2013) (grief over the loss of a father), H Macdonald, *H is for Hawk* (Jonathan Cape, 2014) (grief over the death of the author's father): see <http://whatsyourgrief.com/32-books-about-death-and-grief>.

[151] Tells of a young boy's grief over the death of his mother.

[152] Grief over the death of a mother by suicide.

[153] Grief over the loss of a parent in early childhood.

[154] Grief over death of father.

[155] Grief over loss of a father. See <http://www.tasteofcinema.com/2015/20-great-movies-about-loss-and-grief/>; <https://mubi.com/lists/films-about-grief-and-loss>.

[156] See "A Daughter's Grief. Suicide After Father's Death", *Daily Advertiser*, 13 May 1924, 2; "A Daughter's Grief. Suicide Near Father's Grave", *Observer*, 25 December 1926, 42; "Young Lady's Grief. Lost Interest in Life", *Telegraph*, 14 February 1927, 4; "Schoolgirl's Death. Apparent Case of Suicide. Grief for Dead Mother", *Mercury*, 8 March 1929, 10; "Jump to Death. Son's Grief", *Wagga Wagga Express*, 24 January 1931, 14; "Suicide Pact. Whole Family Wiped Out. Father and Daughters Grieved at Mother's Death", *Longreach Leader*, 4 June 1932, 12; "Son's Suicide. Grief at Father's Death. Minmi Tragedy Inquiry", *Newcastle Morning Herald and Miners' Advocate*, 25 June 1935, 2; "'Grief over Loss of Father.' Inquest on Man Who Fell from Hotel Canberra", *Telegraph*, 25 October 1937, 9; "Committed Suicide. Two Sussex Brothers. Feared Insanity. Grief for Dead Mother", *Armidale Express and New England General Advertiser*, 7 October 1938.

[157] One example published in the Adelaide *Advertiser* on 28 August 1925 simply states: "After attending the funeral of her father at Arncliffe on Wednesday, Mrs Webster became weak and unstrung and died at 2 am from shock": see, eg, "A Grief Stricken Daughter. Death from Shock", *Advertiser*, 28 August 1925, 17. Others discuss the nature of grief in young children, offering advice and assistance or warning of the risk of pathological grief processes arising in certain circumstances: see, eg, "Grief of Bereaved

IV. What is the Normative Significance of This Discussion?

The evidence considered above has important ramifications from the perspective of the corrective justice presented in this article. Principally, this discussion demonstrates that it has long been understood by those in the general community that there is a serious and appreciable risk of mental harm resulting from the death of a loved one in sudden and unexpected circumstances. This is important because if the sphere of liability is determined by the risk that the defendant ought reasonably to be able to appreciate, then liability ought to be extended to such cases. The importance of this argument is that the court's consideration of whether the plaintiff and the person seriously injured or killed is normatively justified, at least from the perspective of Weinrib's and Beever's corrective justice theories. In particular, it can be argued that rather than regarding this aspect of the test of duty laid down in *Annetts* as being an arbitrary limiting mechanism, this factor can be more accurately characterised as a principled consideration which attempts to establish the normative connection between the defendant's actions and the plaintiff's injury in cases involving the loss of a loved one as a result of the defendant's negligence.

With this in mind, the common law position regarding duty of care outlined by the majority in *Annetts* and confirmed by the Court in *Gifford* does not represent a sort of "half-way house" between an arbitrary approach consisting of a test of reasonable foreseeability limited by a number of control mechanisms on the one hand, and a principled approach limited only by the test of reasonable foreseeability on the other. Rather, the approach taken by the courts in *Annetts* and *Gifford* can be considered a principled approach to the law in cases of claims for damages for negligently inflicted psychiatric injury. Furthermore, the Court's consideration of whether the plaintiff and the person seriously injured or killed can be characterised as an attempt by the law to identify situations in which the risk of harm to the plaintiff will be more appreciable to the hypothetical ordinary reasonable person. Importantly, this is how a number of the judges in the High Court in *Annetts* and *Gifford* characterised this consideration.

The crucial factual aspect in both *Annetts* and *Gifford* was that none of the plaintiffs in either case had directly perceived the accident which resulted in the death of their loved one. This was disregarded by the Court in both cases on the basis that because of the closeness of the relationship between each of the plaintiffs and their deceased loved one, psychiatric injury to each of the plaintiffs was reasonable foreseeable. In particular, the reasoning of Gleeson CJ, Gaudron, Gummow and Kirby JJ in *Annetts* showed that the relationship between the plaintiffs and their son was the most important factor in the finding by these judges that psychiatric injury to the plaintiffs was reasonably foreseeable, making the lack of direct perception and sudden shock in the circumstances unimportant. In finding that neither considerations were requirements of a duty of care, Gleeson CJ stated:

> The process by which the applicants became aware of their son's disappearance, and then his death, was agonisingly protracted, rather than sudden. And the death by exhaustion and starvation of someone lost in the desert is not an "event" or "phenomenon" likely to have many witnesses. But a rigid distinction between psychiatric injury suffered by parents in those circumstances, and similar injury suffered by parents who see their son being run down by a motor car, is indefensible.[158]

Gleeson CJ concluded his judgment by stating:

> No one would doubt the foreseeability of psychiatric injury to the appellants if they had seen their son being run over by a car, or trampled by a stock horse. The circumstances of his disappearance and death were such that injury of that kind was more, rather than less, foreseeable.[159]

Similarly, Gaudron J held that the direct perception rule was not determinative in relation to the question of who could make a claim for negligently inflicted psychiatric injury, as such a requirement would be contrary to the principles enunciated in *Donoghue v Stevenson*.[160] The notion of direct perception

should 'Run Its Natural Course'", *Canberra Times*, 29 March 1977, 1; "Children Coping with Bereavement", *Canberra Times*, 20 August 1983, 12; "Helping Children Cope with Grief", *Canberra Times*, 11 July 1992, 20; "Bereavement Educator to Visit", *Times*, 2 August 1994, 2.

[158] *Tame v New South Wales* (2002) 211 CLR 317, 337 [36]; [2002] HCA 35.

[159] *Tame v New South Wales* (2002) 211 CLR 317, 338 [39]; [2002] HCA 35.

[160] *Donoghue v Stevenson* [1932] AC 562.

as a requirement in addition to reasonable foreseeability, for Gaudron J, produced "anomalous and illogical consequences",[161] limiting "the categories of possible plaintiffs other than in conformity with the principle recognised in *Donoghue v Stevenson*".[162] Her Honour regarded the classes of plaintiff as being restricted to those who could either satisfy the direct perception rule, or those who could show "some special feature of the relationship between that person and the person whose acts or omissions are in question such that it may be said that the latter should have the former in contemplation as a person closely and directly affected by his or her acts".[163] Having stated that the law had not yet progressed to a stage to identify precisely when such a relationship would be said to arise, her Honour held that such a relationship arose in relation to the claims of Mr and Mrs Annetts.[164]

Gummow and Kirby JJ also considered the loving relationship between the plaintiffs and their son to be significant in this case. Their Honours held that the lack of direct perception and the lack of a sudden shock did not affect the existence of the duty of care, as it was reasonably foreseeable that the plaintiffs would suffer a recognisable psychiatric illness if something happened to their son.[165] This was especially the case considering the defendants had assumed a responsibility to look after the plaintiffs' son.[166] Their Honours regarded the control mechanisms which had arisen over the years as "artificial constrictions on the assessment of reasonableness" which were not adapted to identifying meritorious claims due to their inherent inflexibility.[167] They were unsound in principle, and as such, had "operated in an arbitrary and capricious manner",[168] creating "elusive distinctions with no root in principle and which are foreign to the merits of the litigation".[169] Their Honours found that the direct perception consideration was not a pre-condition to recovery, stating that this would be to "transform a factor that favours finding a duty of care in some cases into a general prerequisite for a duty in all cases".[170] The direct perception rule lacked any principled foundation as well as any "apparent logic or legal merit" and lead to arbitrary results.[171]

So too in *Gifford*, none of their Honours considered that the plaintiffs' lack of direct appreciation of the actual death of their father was significant enough to result in the denial of their claim, even in the absence of specific assurances provided by the defendants to the plaintiffs.[172] Central to this finding was the closeness of the relationship which was commonly known to ordinarily exist between a parent and a child, and the appreciable risk of harm which would result to one due to the death of the other. It was on this basis that Gleeson CJ found that it was reasonable to require employers to have in contemplation the risk of psychiatric injury to the children of employees.[173] McHugh and Hayne JJ went further, each finding that reasonable foreseeability of psychiatric injury extended to all those who were in a close and loving relationship with the employee in question.[174] Gummow and Kirby JJ also found the close relationship between the parties – along with the fact that the defendant directly controlled the conditions

[161] *Tame v New South Wales* (2002) 211 CLR 317, 340 [51]; [2002] HCA 35.

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

[163] *Tame v New South Wales* (2002) 211 CLR 317, 340–341 [52]; [2002] HCA 35.

[164] *Tame v New South Wales* (2002) 211 CLR 317, 341 [54]; [2002] HCA 35.

[165] *Tame v New South Wales* (2002) 211 CLR 317, 397 [236]; [2002] HCA 35.

[166] *Tame v New South Wales* (2002) 211 CLR 317, 397 [237]; [2002] HCA 35.

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

[168] *Tame v New South Wales* (2002) 211 CLR 317, 380 [190]; [2002] HCA 35.

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

[170] *Tame v New South Wales* (2002) 211 CLR 317, 394 [225]; [2002] HCA 35.

[171] *Tame v New South Wales* (2002) 211 CLR 317, 393–394 [222]–[223]; [2002] HCA 35.

[172] As there were in *Tame v New South Wales*.

[173] *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269, 277 [10]–[11]; [2003] HCA 33.

[174] *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269, 281 [27] (McHugh J), 304 [98], 305 [101] (Hayne J); [2003] HCA 33.

experienced by Mr Gifford, and that the plaintiffs had no way of protecting themselves from the risk of psychiatric harm[175] – to be an important factor indicating a finding in the plaintiffs' favour.[176]

It is also notable that Gleeson CJ and McHugh J explicitly referred to general community expectations in assessing whether it was reasonable to require the defendants to have the risk of psychiatric injury to the claimants in mind. In finding that psychiatric injury to the claimants was reasonably foreseeable, Gleeson CJ was of the view that psychiatric injury to the claimants upon learning of the death of their father was "not beyond the 'common experience of mankind'".[177] Similarly, McHugh J referred both the experiences of those on the judiciary and those in the general community in finding that psychiatric injury to the claimants was reasonably foreseeable. His Honour stated:

> The collective experience of the common law judiciary is that those who have a close and loving relationship with a person who is killed or injured often suffer psychiatric injury on learning of the injury or death, or on observing the suffering of that person. Actions for nervous shock by such persons are common. *So common and so widely known is the phenomenon that a wrongdoer must be taken to have it in mind when contemplating a course of action affecting others*. Accordingly, for the purpose of a nervous shock action, the neighbour of a wrongdoer in Lord Atkin's sense includes all those who have a close and loving relationship with the person harmed. They are among the persons who are likely to be so closely and directly affected by the wrongdoer's conduct that that person ought reasonably to have them in mind when considering if it is exposing the victim to a risk of harm.[178]

There are some important ramifications which flow from this discussion. The first is a general claim that it challenges the orthodox position that there are only two defensible approaches to the duty of care in relation to claims of negligently inflicted psychiatric injury; namely a principled but not pragmatic approach relying only on a test of reasonable foreseeability on the one hand, or a pragmatic but unprincipled approach relying on clear although arbitrary lines of liability, on the other. Instead, this discussion furthers the argument that an approach relying on an overriding test of reasonable foreseeability supplemented by a common understandings mechanism is principled from the perspective of Weinrib's theory of corrective justice. As such, this approach is a direct challenge to Lord Steyn's claim in *White v Chief Constable of the South Yorkshire Police*[179] that "In reality there are no refined analytical tools which will enable the courts to draw lines by way of compromise solution in a way which is coherent and morally defensible."[180]

The second is a more specific claim that the consideration of whether the plaintiff was in a close and loving relationship with the person seriously injured or killed when considering whether psychiatric injury to the plaintiff was reasonably foreseeable is normatively justified from the perspective of Weinrib's theory. Consideration of this aspect of the factual matrix forms a coherent part of the overall question of whether psychiatric injury to the plaintiff was reasonably foreseeable when taken into account as part of the question of *whether the risk of psychiatric disorder suffered by the plaintiff was appreciable as a matter of community understandings and expectations, that is, by those in the community with no special education or training.* The rather melancholy evidence presented in this article makes a good case that ordinary members of the community have long known the risk to mental health as a result of the loss of a loved one in sudden and unexpected circumstances. As a result, it is strongly arguable that this aspect of the factual matrix – where it is present – can be considered to be a strong indicator in the mind of most ordinary members of the community of the presence of a real risk of psychiatric injury to the plaintiff.

It is important to note that it is well known that psychiatric injury can be caused in ways which do not involve serious injury to or death of a loved one, such as when one is exposed to scenes of horror. In such

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[175] *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269; [2003] HCA 33.

[176] *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269, 301 [90]; [2003] HCA 33.

[177] *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269, 276–277 [10]; [2003] HCA 33: referring to the judgment of Latham CJ in *Chester v Municipality of Waverley* (1939) 62 CLR 1, 10.

[178] *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269, 288[47]; [2003] HCA 33 (emphasis added).

[179] *White v Chief Constable of the South Yorkshire Police* [1999] 1 All ER 1.

[180] *White v Chief Constable of the South Yorkshire Police* [1999] 1 All ER 1, 39. This argument is more fully laid out in Allcock, n 64.

cases, there is a real risk of psychiatric injury resulting from exposure to trauma involving distressing scenes, and this risk is present regardless of the relationship between the person seriously injured or killed and the person exposed to these scenes.[181] As such, the consideration of whether the plaintiff was in a close and loving relationship with the person seriously injured or killed cannot be considered to be a *requirement* of liability, as part of a principled approach to the duty of care. Such a requirement would unjustly deny liability to those who have suffered reasonably foreseeable psychiatric injury in circumstances such as those involving exposure to scenes of horror. The common understandings mechanism takes this into account, as it is arguably commonly understood by those with no special education or training regarding the causes of mental disorders that there is a real risk of psychiatric injury in such cases. As such, in circumstances where the plaintiff is not in a close and loving relationship with the person seriously injured or killed, it will be justified in principle to consider whether the plaintiff was directly exposed to scenes of horror.

The third ramification flowing from this discussion is that the approach to the consideration of whether the plaintiff was in a close and loving relationship with the person seriously injured or killed taken by High Court in the leading cases of *Annetts*[182] and in *Gifford*[183] is consistent with Weinrib's corrective justice theory. As such, the approach to the close and loving consideration taken in these cases can be considered principled, as it is coherent and morally defensible. In neither case did the plaintiffs' lack of direct exposure to the death of their loved ones affect the finding that psychiatric injury to the plaintiffs was reasonably foreseeable. And in both cases, this finding was based almost entirely on the close and loving nature of the relationship between the plaintiffs and their deceased loved one.

The finding that the direct perception rule was not a requirement for liability but instead was a consideration going to an overriding test of reasonable foreseeability was also principled. This flexible finding allowed the direct perception consideration to play a relevant and appropriate part in the determination of whether the risk of psychiatric injury to the claimant was appreciable as a matter of community understandings and expectations. The direct perception consideration will be particularly relevant to what is just between the parties where the claimant has suffered psychiatric injury due to the death or injury of a stranger. In such cases, the risk of psychiatric injury to the claimant will ordinarily be much less appreciable as a matter of community understandings and expectations in the absence of the claimant being directly exposed to traumatic scenes of horror. On the other hand, the risk of such injury will ordinarily be much more appreciable at this level where there is such exposure. As such, it is appropriate to take into account the direct perception consideration in cases involving death or injury to a stranger.[184]

However, to take the direct perception rule into consideration where there is a close and loving relationship between the claimant and the person injured or killed is not just. In such cases, the very fact of the close and loving relationship will ordinarily make the direct perception consideration largely, if not completely, irrelevant. The existence of such a relationship ordinarily results in the risk of psychiatric injury being readily appreciable due to mere knowledge of the unexpected and distressing death of a loved one. The fact situation in *Annetts* itself is a good example of this, where the risk of injury to the claimants was readily appreciable at a community understandings level despite the lack of direct perception of any particular event. As such, the direct perception consideration in the form indicated by the High Court in *Annetts* is principled and morally justifiable.

The fourth ramification flowing from the discussion in this article is that to the extent that the various pieces of civil liability legislation enacted following the Ipp Report make the nature of the relationship between the plaintiff and the person seriously injured or killed a non-determinative consideration relevant to an overriding test of reasonable foreseeability, this aspect of the legislation can be considered to be normatively justifiable. Civil liability regimes in which this is the case include the *Civil Liability*

[181] I have previously made this argument in Allcock, n 64, 58–61. This argument will be explored in much greater depth in future publications.

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

[183] *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269; [2003] HCA 33.

[184] See Allcock, n 64, 58–61.

Act 2002 (WA),[185] the *Civil Liability Act 2002* (NSW),[186] the *Wrongs Act 1958* (Vic),[187] the *Civil Law (Wrongs) Act 2002* (ACT),[188] the *Civil Liability Act 1936* (SA),[189] and the *Civil Liability Act 2002* (Tas).[190] However, the legislation enacted in New South Wales, Victoria, South Australia, and Tasmania all contain additional temporal and relationship limitations on recovery which go beyond the central test of reasonable foreseeability. For example, s 30 of the New South Wales legislation applies in cases where mental harm arises in connection with another person being killed, injured or put in peril, and restricts the classes of plaintiffs to those who can establish they witnessed at the scene the victim being killed, injured or put in peril, or that they are a close member of the family of the victim. The Victorian, South Australian, and Tasmanian legislation place similarly worded additional limitations on recovery.[191] On one hand the allowing of claims in circumstances where the plaintiff is a close member of the family of the victim is normatively justifiable, as has been argued in this article. On the other, the allowing of claims in only the two circumstances identified in s 30 of the New South Wales legislation in cases where mental harm arises in connection with another person being killed, injured or put in peril disallows claims by those who may have suffered reasonably foreseeable psychiatric in circumstances other than the two identified in that section.

V. Conclusion

In determining the duty of care in cases of negligently inflicted psychiatric injury involving injury or death to a third party, the law regards the nature of the relationship between the plaintiff and the person seriously injured or killed to be a relevant "consideration", both under common law, and now pursuant to the various civil liability regimes enacted in Australia. Of particular relevance to the court in considering this aspect of the factual matrix in any particular case is whether the relationship between the plaintiff and the person seriously injured or killed in the circumstances was of a close and loving nature. This consideration – along with a number of other non-determinative considerations such as whether the whether the plaintiff directly perceived injury or death to another through sight or hearing, whether the plaintiff suffered a sudden shock, whether, in the absence of particular knowledge of peculiar susceptibility to psychiatric injury, the plaintiff was a person of normal fortitude, and whether there was a pre-existing relationship between the parties which meant that the defendant should have had the plaintiff in contemplation – is relevant to an overriding test of reasonable foreseeability.

Orthodox understandings relating to this area of law have tended to take one of two positions regarding the test for duty of care in cases involving serious injury or death to third parties. The first has been an unapologetic acceptance that due to the complexities of scientific questions of causation in relation to psychiatric injury, the law ought to retain clear, if arbitrary, lines of liability. The underlying objective of such an approach, which would retain clear limits on liability on top of a test of reasonable foreseeability in the test to establish a duty of care, has been to keep the law within manageable limits. This type of approach has found favour in the United Kingdom. The second position which has been advocated for has been an approach which would treat psychiatric injury in the same way as physical injury, with the only limit on liability being the test of reasonable foreseeability. It has previously been argued that this is the more principled approach.

This article has sought to challenge these orthodox understandings. It has been argued that the court's consideration of whether the plaintiff and the person seriously injured or killed were in a close and loving relationship, when taken into account as a non-determinative factor relevant to an overriding test

[185] Section 5S(1), (2).

[186] Section 31(1), (2).

[187] Section 72(1), (2).

[188] Section 34(1), (2).

[189] Section 33(1), (2).

[190] Section 34.

[191] See *Wrongs Act 1958* (Vic) s 73; *Civil Liability Act 1936* (SA) s 53; *Civil Liability Act 2002* (Tas) s 32.

of reasonable foreseeability, can be regarded as principled from the perspective of Weinrib's corrective justice theory of negligence. A large body of scientific and historical evidence has been drawn upon, as well as evidence from the worlds of literature, cinema, music, and the news, in order to make the argument that the risk of mental injury as a result of the loss of a loved one in sudden and distressing circumstances has long been appreciated by the general community. In light of this evidence, it has been argued that this factor can be considered to be a coherent and morally justifiable consideration when considered in relation to an overriding test of reasonable foreseeability, from the perspective of Weinrib's and Beever's corrective justice theories. It has further been argued that this principled approach to the close and loving relationship consideration is consistent with the current approach to the duty of care in the leading cases of *Annetts*[192] and in *Gifford*,[193] and with some, though not all, of the civil liability regimes enacted into law following the publication of the Ipp Report shortly after the turn of the 21st century.

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

[193] *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269; [2003] HCA 33.