Homsi v Homsi - [2016] VSC 354

IN THE SUPREME COURT OF VICTORIA Not Restricted

AT MELBOURNE
COMMON LAW DIVISION

S CI 2014 04840

IMAN HOMSI (by her Litigation Guardian SALIMEH ADAMS) Plaintiff

v

THE ESTATE OF MAHMOUD HOMSI Defendant

JUDGE:	J FORREST J
WHERE HELD:	Melbourne
DATE OF HEARING:	13 May 2016 (supplementary written submissions on 27 May 2016)
DATE OF JUDGMENT:	28 June 2016
CASE MAY BE CITED AS:	Homsi v Homsi
MEDIUM NEUTRAL CITATION:	[2016] VSC 354

NEGLIGENCE – Duty of care – Motor vehicle accident caused solely by negligence of defendant, son of the plaintiff - Duty to avoid injury to oneself - Psychiatric injury of mother after learning of son's death – Loss and damage – Whether duty of care owed by son to mother – Immediate victim and secondary victim – Whether sufficient proximity between accident and psychiatric reaction of plaintiff – Section 93 *Transport Accident Act 1986* – *Kuhl v Zurich Financial Services Australia Ltd*, *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288, King v Philcox* and formulation of the duty of care – *Dulieu v White & Sons* – *Mount Isa Mines Ltd v Pusey, Jaensch v Coffey, Annetts v Australian Stations Pty Ltd*, *Gifford v Strang Patrick Stevedoring Pty Ltd* and claims for psychiatric injuries involving immediate and secondary victims.

PROCEDURE – Pleadings – Application to strike out statement of claim – Whether facts alleged in statement of claim sufficient to found duty of care.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr J Mighell QC with Mr D Purcell	Nowicki Carbone
For the Defendant	Mr J Ruskin QC with Mr D Oldfield	Transport Accident Commission

HIS HONOUR:

Introduction

1. In June 2010 the defendant, Mahmoud Homsi, died in a transport accident. The vehicle he was driving collided with another vehicle in Melville Road, Pascoe Vale South. The accident was solely due to Mahmoud's negligence.

2. The plaintiff, Mahmoud's mother, Iman Homsi, learnt by telephone of her son's death soon after it occurred. She has suffered a severe psychiatric reaction and has not worked since Mahmoud's death.

3. The question to be resolved is whether, in these circumstances, Mahmoud owed his mother a duty of care. The question is novel and I have decided that the answer is no.

This application

4. On 31 July 2015, Associate Justice Ierodiaconou referred the following question for determination pursuant to r 47.04 of the *Supreme Court (General Civil Procedure) Rules 2005* :

> Whether the late Mahmoud Homsi owed the plaintiff a duty to take reasonable care in the driving of his vehicle to ensure that he did not suffer serious injury or death as a result of the driving of the vehicle.

The background facts

5. Iman was born on 15 March 1966. She is now 50 years of age. Mahmoud was 26 years of age at the time of his death.

6. Mahmoud was not living with his mother; however it was not in issue, for the purpose of this application, that there was a close relationship between mother and son.

7. The accident occurred in the following circumstances: on 25 June 2010, Mahmoud's vehicle veered onto the wrong side of Melville Road and collided with a vehicle driven by Mr Jose Jipson. The accident resulted in the deaths of Mahmoud and Mr Jipson's daughter, who was a passenger in Mr Jipson's vehicle.

8. In December 2012, the Transport Accident Commission granted Iman a serious injury certificate pursuant to s 93 of the *Transport Accident Act 1986* (‘**the Act**’) which acknowledges that Iman has suffered a severe psychiatric reaction to Mahmoud’s death. [1]

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[1] I have used the expression ‘psychiatric injury’ in these reasons. It assumes a recognisable psychiatric injury and can be equated with the statutory expression ‘mental harm’ in Part XI of the *Wrongs Act 1958* .

The Act and the common law

9. Before traversing the various decisions upon which the parties relied, it is helpful to outline, in brief, the operation of the Act in tort claims.

10. The Act commenced in December 1986 and sets out a scheme of compensation for persons who suffered injury or death as a result of a transport accident.[2] It is not necessary to examine the no-fault aspect of the scheme. Rather, for the purpose of this application, it is Part 6 which provides for legal rights outside the Act .

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[2] Section 1.

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11. Pausing here, legislative intervention in limiting claims for damages in tort is now commonplace. As Keane J recently observed (in the context of the South Australian *Civil Liability Act 1936*): [3]

> Legislative measures which deny the remedy of damages in certain cases of negligently inflicted personal injury are now familiar measures, taken in the public interest to preserve the general availability of the remedy by ensuring the viability and affordability of arrangements to meet the costs involved: such measures should not be given an artificially narrow operation. Given the unmistakable intention of s 53(1)(a) of the Act to cut back common law rights on a selective basis, it would be out of place to insist upon an artificial construction in order to preserve common law rights. As was said by Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ in *Australian Securities and Investments Commission v DB Management Pty Ltd*:
>
> > It is of little assistance, in endeavouring to work out the meaning of parts of [a legislative] scheme, to invoke a general presumption against the very thing which the legislation sets out to achieve.[4]

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[3] *King v Philcox* (2015) 255 CLR 304 (‘*King* ’).

[4] Ibid 326 [42].

12. Notwithstanding the heading of the Division, s 93 provides that damages can only be recovered in respect of the injury or death of a person as a result of a transport accident in accordance with the terms of this section. [5] It has been established by a series of decisions of the Court of Appeal that a claimant seeking damages arising out of a transport accident has no right and no cause of action unless one of the s 93 serious injury gateways has been accessed. [6]

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[5] Section 93(1).

[6] See *Wilson v Nattrass* (1995) 21 MVR 41, 55, 59; *Swannell v Farmer* [1999] 1 VR 299, [19], [22]; *Dodoro v Knighting* (2004) 10 VR 277, [23]; *Millard v State of Victoria* [2006] VSCA 29, [32]; *Primary Health Care Limited v Giakalis* (2013) 38 VR 165, 175 [40] -179 [55].

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13. It is also accepted that once a gateway has been accessed, a claimant has a right to recover damages in accordance with the common law, as modified by the provisions of the Act: for example, s 93(7), which provides for thresholds and caps in relation to claims for pain and suffering and pecuniary loss damages.

14. However, consistent with the observations of Keane J, the legislative prescription in this State is wider than just restricting the quantum of damages. A 2013 amendment to s 93 is of particular relevance to this case:

> (2A) A person who is injured as a result of a transport accident may not recover damages from a person indemnified by the Commission under section 94(1) or from the Commission in respect of a vehicle to which section 96 applies if –
>
> (a) the injury is nervous shock or other mental injury; and
>
> (b) the person was not directly involved in the accident and did not witness the transport accident; and
>
> (c) the mental injury or nervous shock was suffered as a result of the injury or death or another person who was directly involved in the transport accident; and
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> (d) the transport accident was caused –
>
> (i) in the course of the other person referred to in paragraph (c) committing, or intending to commit suicide; or
>
> (ii) solely or predominantly by the negligence of the other person referred to in paragraph (c).

15. This provision did not last long. It was repealed on 19 April of this year by the *Transport Accident (Amendment) Act* 2016,[7] which had retrospective application and, in effect, rendered s 93(2A) nugatory.

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[7] Section 5 *Transport Accident (Amendment) Act 2016.*

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16. There is one other matter I should mention here. The Act does not contain provisions restricting recovery for claims involving 'mental harm' as recommended by the Ipp report. [8] So, in Victoria, unlike the position in some states (e.g. *Civil Liability Act 1936* (SA) and *Civil Liability Act 2002* (NSW)), common law principles govern questions related to recovery of damages for psychiatric injury in transport accident cases. [9]

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[8] Commonwealth of Australia, Review of the Law of Negligence Final Report dated September 2002. See *King* (2015) 255 CLR 304 [18] – [20] and ss 54 and 69 of the *Wrongs Act 1958* .

[9] The mental harm provisions contained in Part XI of the *Wrongs Act* 1958 apply to certain relationships, e.g. doctor/patient; occupier's liability, but not employer/employee.

The alleged duty

17. Each of the parties had a different version of how the duty should be expressed.

18. For Iman, it was said that Mahmoud:

> owed her a duty of care in the driving of his vehicle to ensure that he did not suffer injury or death and that, as a consequence of his negligent driving and breach of the duty owed, she suffered psychiatric injury, loss and damage.

19. For Mahmoud, it was said that Iman's allegations should be properly understood as Mahmoud owing:

> ...a duty to prevent the infliction of self-harm and thereby to avoid causing psychiatric injury to a person to whom he or she should have reasonably have in contemplation.

20. In recent years, the High Court has emphasised the importance of the formulation and identification of the alleged duty of care. In *Kuhl v Zurich Financial Services Australia Ltd* [10] French CJ and Gummow J said as follows:

> Two things must be said as to the formulation of a duty of care and its scope and content. First, there is an inherent danger in an action in negligence to look first to the

cause of damage and what could have been done to prevent that damage, and from there determine the relevant duty, its scope and content.

...

The second point is that the formulated duty must neither be so broad as to be devoid of meaningful content, nor so narrow as to obscure the issues required for consideration.[11]

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[10] (2011) 243 CLR 361 .
[11] Ibid 370 [19], [21].

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21. The Court relevantly said:

> Cases that involve the duty of a solicitor to his or her client to exercise professional skill in accordance with the retainer, the duty of a motorist towards other users of the road, or the duty owed by an occupier of land to an entrant with respect to the condition of the premises, ordinarily involve no real controversy over the scope and content of the duty of care; these are considered at the 'high level of abstraction' spoken of by Glass JA in *Shirt v Wyong Shire Council*. But where the relationship falls outside of a recognised relationship giving rise to a duty of care, or the circumstances of the case are such that the alleged negligent act or omission has little to do with that aspect of a recognised relationship which gives rise to a duty of care, *a duty formulated at too high a level of abstraction may leave unanswered the critical questions respecting the content of the term 'reasonable' and hence the content of the duty of care*. These are matters essential for the determination of this case, for without them the issue of breach cannot be decided. The appropriate level of specificity when formulating the scope and content of the duty will necessarily depend on the circumstances of the case.[12]

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[12] Ibid 371-372 [22] (emphasis added).

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22. Applying this principle to the versions proffered by the parties, Mahmoud's formulation cannot be accepted. It is postulated at too high a level of abstraction; it contains an irrelevant and potentially misleading expression – 'the infliction of self-harm' – and does not appropriately identify the persons to whom the duty is said to be owed. This distracts from the real issue in this case: the negligent driving of Mahmoud and whether that gives rise to a duty of care to his close relatives who suffer psychiatric injury as a result.

23. That is not to say that some of the consequences of a finding of the duty of care, as suggested by Mahmoud, may not be relevant when considering questions of policy.

24. That said, I also think Iman's proposal requires slight alteration. The appropriate way to formulate the asserted duty of care is as follows: did Mahmoud owe Iman a duty of care in the driving of his motor vehicle to ensure that he did not suffer injury or death that may result in psychiatric injury to his close relatives and, particularly, Iman?

25. After identifying the question, the next step is to determine the approach to be adopted in its resolution. This was addressed recently by Nettle J in *King* , where his Honour said:

> This Court has not before had to determine whether a duty of care is owed in the circumstances presented by this case. *Wicks* made passing reference to the issue of duty of care owed to those present at the aftermath of an accident but did not deal with it in detail. *Jaensch v Coffey*, *Tame* and *Gifford v Strang Patrick Stevedoring Pty Ltd* all provide relevant guidance, *but the issue cannot be properly decided by reference only to the nature of the relationship between the victim of an accident and the claimant, or the victim and the defendant. As Deane J concluded in Jaensch, the question of whether a duty of care is owed in particular circumstances falls to be resolved by a process of legal reasoning, by induction and deduction by reference to the decided cases and, ultimately, by value judgments of matters of policy and degree. Although the concept of "proximity" that Deane J held to be the touchstone of the existence of a duty of care is no longer considered determinative, it nonetheless "gives focus to the inquiry". It does so by directing attention towards the features of the relationships between the parties and the factual circumstances of the case, and prompting a "judicial evaluation of the factors which tend for or against a conclusion" that it is reasonable (in the sense spoken of by Gleeson CJ in Tame) for a duty of care to arise*. That these considerations may be tempered or assisted by policy considerations and value judgments is not, however, an invitation to engage in "discretionary decision-making in individual cases". Rather, it reflects the reality that, although "[r]easonableness is judged in the light of current community standards", and the "totality of the relationship[s] between the parties" must be evaluated, it is neither possible nor desirable to state an "ultimate and permanent value" according to which the question of when a duty arises in a particular category of case may be comprehensively answered. [13]

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[13] *King* (2015) 255 CLR 304, 336 [80] (emphasis added). See also *Wicks v State Rail Authority (NSW)* (2010) 241 CLR 60 ('*Wicks*').

Analysis

26. There are two fundamental reasons why Mahmoud does not owe Iman a duty of care, being that:

(a) there is no authority in this country which supports the proposition that a negligent tortfeasor owes a duty of care as asserted by Iman; and

(b) in any event, there are powerful policy grounds for refusing to recognise such a duty.

27. Before I explain my reasons for reaching this conclusion, I will endeavour to set out where the law currently stands in relation to claims for psychiatric injury arising out of the tortious acts of others.

28. First, it has long been accepted that negligently inflicted psychiatric injury sustained by a person and accompanied by physical injury is recoverable under the common law. Where the law has progressed slowly is in cases solely involving psychiatric injury, which involves the application of different principles. [14] As Windeyer J recognised in *Pusey* in 1970, tort cases alleging psychiatric injury are not new:

> they turn simply on whether the circumstances in which damages are recoverable for a particular kind of harm caused by a tort.[15]

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[14] *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383, 395 ('*Pusey*'); *Tame v State of New South Wales* (2002) 211 CLR 317 [87] ('*Tame and Annetts*').

[15] Ibid.

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29. Second, the test of reasonable foreseeability alone is insufficient to found a duty of care in psychiatric injury cases. [16] There must be something additional which the law recognises as being relevant to the imposition of a duty and which is not compromised by policy considerations.

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[16] See *Tame and Annetts* (2002) 211 CLR 317, 331 ; *King* (2015) 255 CLR 304 [29] .

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30. Third, since the turn of the 20th century, with the decision in *Dulieu v White & Sons* ,[17] the common law has recognised that a driver of a vehicle owes a duty 'to use reasonable and proper care and skill so as not to injure either persons lawfully using the highway, or property adjoining the highway, or persons who, like the plaintiff, are lawfully occupying that property' and that the duty extends to a case where the plaintiff only suffers psychiatric injury.[18]

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[17] (1901) 2 KB 669 ('*Dulieu*').

[18] Ibid 671-672. Contrast the earlier decision of the Privy Council in *Victorian Railway Commissioners v Coultas* (1888) 13 App. Cas. 222.

31. The facts in *Dulieu,* although ancient, are instructive. The plaintiff and her husband ran a public house in Bethnal Green. The defendant was the employer of the driver of a horse drawn van which left the road and ended up in the living quarters of the pub. Mrs Dulieu, who was pregnant, was terrified and, as a consequence, gave birth prematurely to a child with a gross mental disability. The strike out application by the employer was dismissed by two judges of the King's Bench Division.

32. Subject to one 'notable exception' to which I will return, it has been repeatedly held in this country, since *Pusey*, that psychiatric injury caused by direct perception of harm to oneself (or to a close family member) as a result of the tortious action of another is recoverable. For the purpose of this exercise, I will refer to the plaintiff in this type of case as the 'immediate victim'. [19]

[19] See *FAI General Insurance Co Ltd v Lucre* (2000) 50 NSWLR 261 ('*Lucre*').

33. As Windeyer J observed in *Pusey*:

> Courts have come – slowly, cautious step by cautious step – to give damages for mental disorders resulting from a man's seeing another person hurt, without himself having suffered physical injury or been in any peril of physical harm. A mother, or other near relative, who actually sees a child or other loved one hurt or killed or in imminent danger of being hurt or killed may suffer in mind and sometimes indirectly in body, as the result of the shock. That this may happen is within the range of reasonable foresight. [20]

[20] *Pusey* (1970) 125 CLR 383, 403.

34. In the same year as *Pusey* was decided, Lord Denning MR said:

> The law at one time said that there could not be damages for nervous shock: but for these last 25 years, it has been settled that damages can be given for nervous shock caused by the sight of an accident, at any rate to a close relative. [21]

[21] *Hinz v Berry* (1970) 2 QB 40, 42.

35. The difficult issue is the point at which one draws the line in terms of immediate victim recovery. This is illustrated by the following passage from the judgment of Lord Robertson in *Bourhill v Young*: [22]

> At the debate a case was figured of a window cleaner at work on the outside of a window high above the street who carelessly loses his grip and falls down, and is impaled upon spiked railings. If such an occurrence were to be witnessed by a pregnant woman looking out of the window of a house situated on the opposite side of the street, she might well suffer a nervous shock with most serious consequences. But I am unable to hold that window cleaners rest under a duty of care towards opposite householders not to allow themselves to fall down in the possible view of the householders. Any such duty would evidently extend, if it existed, to the case of all possible spectators, and I do not think that it could be limited logically to cases of nervous shock received through the medium of sight. If a window cleaner actually fell upon a passer-by, or so near to him that he feared for his bodily safety, the case would be different. The difference is not easy to state in terms of strict logic, but to my mind it has a solid and substantial existence. There must be an end at some reasonable point to the legal consequences of a careless act - there must be a limit at some reasonable point to the extent of the duty of care towards third parties which rests upon everyone in all his actings. [23]

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[22] [1941] SC 395 ('*Bourhill*'). This was the decision at first instance which was affirmed by the House of Lords in *Hay (or Bourhill) v Young* [1943] AC 92.

[23] Ibid 399.

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36. In the seminal Australian decision of *Jaensch v Coffey,* Brennan J set the limit to the 'immediate victim' test, as follows:

> It would be an exceptional case if it could be found that the attendance of other persons at the scene of an accident is the result of the defendant's negligence. However foreseeable it may be that passers-by will stop or that morbid curiosity will bring others to the scene, it is difficult to envisage a case where their attendance at the scene and their perception of it could fairly be regarded as the result of the defendant's conduct. Unless their attendance at and perception of the scene is shown to be a result, and a reasonably foreseeable result, of the defendant's conduct, they are not entitled to recover damages for psychiatric illness induced by sudden perception of it. That is, however, a question of fact. [24]

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[24] (1984) 155 CLR 549, 570 ('*Jaensch*').

37. Subsequently, *Shipard v Motor Accident Commission* [25] was decided by the South Australian Full Court in 1997. The case involved a collision between a prime mover driven by Mr Shipard and a motor cycle ridden by Mr Young, which was insured by the defendant. Mr Young died in the accident. Mr Shipard suffered no physical injury, but alleged nervous shock and post-traumatic stress disorder as a result of witnessing the collision.

[25] (1997) 70 SASR 240 ('*Shipard*').

38. The insurer defendant brought a strike out application on the basis that Mr Shipard could not recover damages for nervous shock sustained as a result of witnessing the self-inflicted death, injury or peril of a negligent driver. The application was dismissed by the Master. The insurer appealed, arguing that Mr Shipard should only be able to recover damages for nervous shock if he suffered bodily harm in the collision, or if he apprehended immediate physical harm or injury to himself. In dismissing the appeal, Doyle CJ (with whom Lander and Bleby JJ agreed) said:

> This is not simply a case in which the plaintiff has suffered nervous shock as a consequence of the self-inflicted death of Mr Young. Mr Shipard, although he suffered no bodily injury, was within the area of risk of bodily injury in the collision that occurred. Moreover, Mr Shipard was aware that the collision was about to occur, and saw it happen immediately adjacent to him. In the language of the House of Lords in *Page v Smith*, he was a primary victim.
>
> Determining whether the required element of proximity exists involves a careful consideration of the relevant policies in the light of the facts of the case. Drawing a line to either include or exclude the possibility of a duty of care in a case such as this one involves a careful exercise, and may finish up involving drawing distinctions not explicitly dealt with by Deane J. First, a distinction between primary and secondary victims. Secondly, a distinction between primary victims who suffer physical injury and those who do not.
>
> In my opinion the plaintiff is entitled to have that exercise done on the basis of facts clearly found, rather than on the basis of factual hypotheses. The pleadings in the present case are not, in my opinion, as precise as they might be, but they lie in an area in which the necessary precision may be difficult to achieve. [26]

[26] Ibid 247-248. The reference to Deane J is to his Honour's reasons in *Jaensch* analysed in [42] below.

39. In 2000, in the New South Wales case of *Lucre* ,[27] a negligently driven motor vehicle collided with a truck driven by the plaintiff. The car and its driver (who died as a result of the collision) were crushed under the truck. The plaintiff, having rung 000, climbed out of the truck and stepped into the car. He endeavoured to assist the driver, who had a faint pulse and died soon afterwards. The plaintiff's claim was confined to psychiatric injury.

[27] (2000) 50 NSWLR 261 .

40. The primary judge in the District Court held that a duty of care was owed by the driver to the plaintiff. This conclusion was upheld by the Court of Appeal (Mason P, Meagher J and Giles JA). Mason P delivered the leading judgment and conducted an extensive review of the authorities. His Honour concluded:

> In my view, what distinguished the respondent from the "mere bystander" was the immediacy of his involvement in the accident that caused the death that caused the psychiatric injury. That immediacy is quite obvious in both time and space. But there is a deeper connexion stemming from those circumstances. According to the laws of physics, the vehicle under the control of the respondent contributed directly to the death of the deceased. This distinguished the respondent from a bystander, even one who was a passenger in his truck. This circumstance and the inquiries that inevitably ensued from it (both official and informal) were so clearly capable of generating a sense of unresolved anxiety and guilt that it is reasonable, fair and just to impose a duty of care upon the deceased. One does not need to be a psychiatrist to understand the reality of the respondent's reaction. Like the trial judge, I would emphasise the foreseeability of this reaction in these circumstances. It is a foreseeability that far outstrips the law's undemanding test of foreseeability of damage.[28]

[28] Ibid 267.

41. It follows that Australian law recognises that in certain circumstances an immediate victim who suffers psychiatric injury alone will be owed a duty of care by a negligent motorist. Those circumstances will, as Brennan J noted, vary from case to case. What is abundantly clear is that there must be a close physical proximity between the event and the psychiatric reaction of the plaintiff. It is not necessary to explore where the line is to be drawn – indeed, it may not be possible. For present purposes, what is important is the necessity for immediate physical proximity to the tortious event or its aftermath. [29]

[29] See the dissenting judgment of Evatt J in *Chester v The Council of the Municipality of Waverley* (1939) 32 CLR 1, 14 .

42. I should now refer to the notable exception I mentioned earlier (at [32] above). In *Jaensch* , Deane J said as follows:

> The limitations upon the ordinary test of reasonable foreseeability in cases of mere psychiatric injury are conveniently stated in negative form. Two of them have already been mentioned. The first of those is that reasonable foreseeable risk of personal injury generally will not suffice to give rise to a duty of care to avoid psychiatric injury unassociated with conventional physical injury: the duty of care will not arise unless risk of injury in that particular form was reasonably foreseeable. *The other is that, on the present state of the law, such a duty of care will not exist unless the reasonably foreseeable psychiatric injury was sustained as a result of the death, injury or peril of someone other than the person whose carelessness is alleged to have caused the injury*; there is no need to consider here whether this limitation should be more widely stated as excluding such a duty of care unless the carelessness was in any event wrongful in a sense that it involved a breach of duty of care owed to the person who suffered or was at risk of physical injury: cf., e.g., a case where a defence of volenti non fit injuria is available against that person... [30]

[30] (1984) 155 CLR 549, 604 (emphasis added).

43. This passage (and particularly the italicised part) has been understood by some (and argued in some cases, including *Shipard* and *Lucre*) to mean that there is no duty of care in an immediate victim case. [31] Such an interpretation does not sit comfortably with references in the judgment of Deane J, with apparent approval, to *Dulieu* [32] nor to what was actually said in *Bourhill*.[33] As Mason P said in *Lucre* :

> Contrary to Deane J's apparent understanding, Lord Robertson [in *Bourhill*] was saying the very opposite of a general immediate victim exclusion. He was acknowledging that a duty of care would extend to a passer-by put in fear for personal safety by the falling window-cleaner, but not to the startled observer watching at a distance. I would offer the same respectful criticism of Lord Ackner's approach to *Bourhill* in *Alcock v Chief Constable of South Yorkshire Police*. [34]

[31] See *Lucre* (2000) 50 NSWLR 261, 263 .

[32] Ibid [59] .

[33] Ibid 595.

[34] (2000) 50 NSWLR 261, 265 .

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44. Mason P's conclusion is generally (but not totally) consistent with what was said by Doyle CJ in *Shipard* :

> In my opinion it is clear, as counsel for the defendant acknowledged, that Deane J did not intend to deny that a duty of care could be owed, not to cause nervous shock, by one who kills or injures himself or herself, or puts himself or herself in peril, if as well that person's carelessness caused another person to suffer physical harm or, at the least, fear imminent physical harm as a result of the carelessness of the first person. [35]

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[35] (1997) 70 SASR 240, 245 (citations omitted and emphasis added).

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45. Returning to *Lucre* , Mason P also said: [36]

> Nevertheless, this is an area where logic is in extremely short supply. This said, I do not think that the principled exposition and development of the common law can sustain drawing the line represented by the immediate victim exclusion.
>
> The mere fact that the death, injury or peril is that of the defendant (or the defendant's deceased) cannot justify invariable rejection of a claim for damages for negligently inflicted psychiatric injury.[37]
>
> ...
>
> There is no reason in principle or logic why a primary tortfeasor, who may even have acted intentionally as well as negligently, should escape liability to another who suffers psychiatric injury simply because no third party was also injured. Take the present situation. The application of Deane J's dictum might see liability turning upon whether or not the deceased was the only occupant of the vehicle that careered into the respondent's truck.[38]

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[36] (2000) 50 NSWLR 261, 264 .

[37] Ibid 264.

[38] Ibid 265.

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46. Indeed, subsequently in *Tame and Annetts* , the High Court accepted that recovery was not limited to direct perception – i.e. immediate victim – recovery. [39] Last year in *King* , Keane J said: [40]

> *While it is true that the common law has recognised that a plaintiff's presence at the aftermath of an accident may found a claim for damages for mental harm*, the plain intention of s 53(1)(a) of the Act is to deny the recovery of damages to persons who in those circumstances would have been entitled to recover damages for harm. Nettle J also said:[41]
>
> *For once it is accepted that it is reasonably foreseeable that a close relative of a motor accident victim might suffer mental harm as a consequence of what he or she sees and learns at the aftermath of the accident, it is beside the point that, in a given case, such a close relative may happen upon the scene of the aftermath in a statistically unlikely manner. Subject to considerations of reasonableness remaining to be mentioned, it is enough that it is reasonably foreseeable that a close relative may arrive at the aftermath of the accident and suffer mental harm to recognise the existence of a duty to take reasonable care to guard against such close relatives suffering mental harm.*

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[39] (2002) 211 CLR 317, 340-341 [52], 333 [18], 338 [40] ; see also *Gifford* (2003) 214 CLR 269, 275 [5] .
[40] *King v Philcox* (2015) 255 CLR 304, 326 [42] (emphasis added).
[41] Ibid 338 [85].

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47. Accepting, as I do, the correctness of the statement of principle in *Lucre* (as affirmed, at least in part, by the High Court), I repeat that it is clear that a duty of care arises in an immediate victim case when there is close or immediate physical proximity between the plaintiff and the tortious event occasioned by the negligence of the defendant which gives rise to the psychiatric injury. Such a duty is not negated by the fact that, as in *Lucre* , the basis for the plaintiff's psychiatric injury may be the plight of the defendant, as opposed to fear of harm on the part of the plaintiff. But what is essential to establishing the duty is the immediate or close physical proximity of the plaintiff to the event or its aftermath.

48. It is not necessary to refer in any detail to a series of English decisions which support the necessity for physical proximity in an immediate victim case. [42]

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[42] *Page v Smith* (1996) 1 AC 155; *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310.

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49. I was also provided with a number of North American decisions concerning recovery by immediate victims who sustained psychiatric injury. Save for observing that similar issues and considerations have arisen in those cases, I think it unnecessary to delve into that area of jurisprudence. [43]

[43] e.g. in the Supreme Court of British Columbia in *Cady v Fowler* (1992) CAN LII 961 (BCSC), Lamperson J, following an earlier decision of *Beauchamp v Hughes* (1998) 27 BCLR (2D), concluded: 'that a person cannot recover damages for psychiatric or emotional illness resulting from the death, injury or peril of the tortfeasor himself; cf *Lucre* (2000) 50 NSWLR 261.

50. Fourth, it is now clearly established in this country that the duty of care in psychiatric injury cases extends beyond that to an immediate victim. Family members who suffer psychiatric injury as a result of a negligently inflicted injury to a close relative, but who do not witness the event, may be owed a duty of care by the tortfeasor. This has been described as the duty owed by the negligent party to a 'secondary victim' – the primary victim being the person killed or suffering serious bodily injury.

51. The slow development of the recognition of the rights of a secondary victim in this country was noted by Gibbs CJ in *Jaensch* :

> As the law relating to damages for what is somewhat crudely called "nervous shock" has limped on with cautious steps, to use the metaphor suggested by Windeyer J in *Mt Isa Mines Ltd v Pusey*, the old and irrational limitations on the right to recover damages for injury of this kind have one by one been removed. [44]

[44] (1984) 155 CLR 549, 552 .

52. The decisions of the High Court on recovery of damages for negligent inflictions of psychiatric injury in secondary victim cases are known to all tort students: *Pusey*, [45] *Jaensch* [46] and *Tame and Annetts* . [47] There are also a number of decisions in the High Court which deal with the Australia-wide implementation of the recommendations of the Ipp Report and their effect on claims for psychiatric injuries involving secondary victims: *Wicks* ,[48] *Gifford v Strang Patrick Stevedoring Pty Ltd* ,[49] and *King* .

[45] (1970) 125 CLR 383 .
[46] (1984) 155 CLR 549 .
[47] (2002) 211 CLR 317 (' *Annetts* ').
[48] (2010) 241 CLR 60 .
[49] (2003) 214 CLR 269 (*'Gifford'*).

53. In *Pusey,* the duty was owed by the employer to the fellow employee of the badly injured worker who witnessed the aftermath of the electrocution of a fellow worker. Mr Pusey said his workmate 'just burnt up' and that he helped him to the ambulance and subsequently learnt of his death. [50]

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[50] *Pusey* (1970) 125 CLR 383, 387 .

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54. In *Jaensch,* the duty was owed by the driver to the wife, of the primary victim injured by his negligence, who went to the hospital to visit her seriously ill husband.

55. In *Tame and Annetts* , it was owed to the mother of a young jackaroo (who learnt of his death by telephone) who died as a result of the negligence of his employer defendant.

56. In *Gifford* , the father of three teenage children was crushed to death by a forklift driven negligently by a fellow employee of the defendant. The children did not witness the accident but were told of it later the same day. Gleeson CJ concluded that the relationship between the children and their father was sufficient to found a duty of care:

> Where there is a class of person, such as children, who are recognised, by the law, and by society, as being ordinarily in a relationship of natural love and affection with another class, their parents, then it is not unreasonable to require that an employer of a person in the second class, whose acts or omissions place an employee at risk of physical injury, should also have in contemplation the risk of consequent psychiatric injury to a member of the first class. [51]

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[51] *Gifford* (2003) 214 CLR 269, 277 [12] ; see also 281 [27] (McHugh J).

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57. The current position at common law in relation to secondary victim cases was recently restated in *King* (in discussing the effect of s 33 of the *Civil Liability Act (SA)*), where the plurality said of the infliction of psychiatric injury upon a secondary victim that:

> At common law, as under s 33, the existence of a duty of care not to cause another person pure mental harm is dependent upon a number of variables which inform the foreseeability of risk. Section 33 does not prescribe any particular pre-existing relationship. It does not require the plaintiff to have witnessed at the scene a person being killed, injured or put in peril. It does not require a sudden shock. It does require that the defendant has in contemplation a person of normal fortitude in the plaintiff's position. Having regard to the variables which can be taken into account for the purpose of determining the existence of the duty of care, it cannot be said that the conclusion reached by the Full Court in this case was wrong. *This Court has considered the extent of the common law duty of care not to cause mental harm to a person connected with the primary victim in*

decisions which have necessarily focussed upon the particular relationships between the victim and the plaintiff. To say that a duty of care is owed to a parent, spouse, child, fellow employee or rescuer of a victim is not to say that it cannot be owed to the sibling of a victim. The terms of s 33 are consistent with that approach for they include, as one of the circumstances relevant to the foreseeability that is a necessary condition of the duty of care, "the nature of the relationship between the plaintiff and any person killed, injured or put in peril". A sibling relationship is a circumstance of that character. Whether it is a close or loving relationship or a distant one may go to the question of causation more than the existence of a duty of care, but it is not necessary to explore that issue further for the purposes of this case. [52]

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[52] *King* (2015) 255 CLR 304, 322 [29].

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58. It is important, also, to recognise that the duty of care owed by a road user to the secondary victim is separate to that owed to the injured or deceased person. Brennan J, in *Jaensch*, said:

> The respective duties of care owed to the plaintiff and to the other person and the causes of action arising from their breach are independent one of the other. It is now settled law that the duty owed to one is not to be regarded as secondary to or derived from the duty owed to the other. [53]

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[53] (1984) 155 CLR 549, 560.

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59. However, in each of the secondary victim cases, one constant is the presence of an established pre-existing duty between the tortfeasor and the primary victim, which gives rise to the discreet duty owed to the secondary victim: in *Pusey* and *Tame and Annetts* and *Gifford* by an employer; in *Jaensch* and *King* by a road user. [54]

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[54] See *King* (2015) 255 CLR 304, 341-342 [98].

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60. Returning now to why the duty asserted by Iman cannot be sustained.

61. Hopefully, it has become apparent that I consider that the common law recognises that a negligent driver of a motor vehicle owes a duty not to cause psychiatric injury to those in the immediate vicinity of an accident or its aftermath occasioned by his or her lack of care. The common law also

recognises a discrete duty in relation to psychiatric injury sustained by close relatives (or those in some other relevant relationship, such as fellow employees or rescuers) of a person injured or killed by a tortfeasor's negligence. Such a duty is dependent upon an established and pre-existing duty of care being owed by the tortfeasor to the primary victim.

62. But the common law goes no further. Even accepting that the categories are never closed, [55] the common law does not recognise a general duty on the part of the driver of a motor vehicle (or, for that matter, any person who does not take sufficient care for his or her safety) not to cause psychiatric injury to a close relative as a result of injury to himself or herself. The relationship between mother and son and foreseeability that the mother would suffer psychiatric injury as a result of the harm, injury or death is insufficient to found a duty of care on the part of the son.

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[55] *Jaensch* (1984) 155 CLR 549, 571 .

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63. In *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* ,[56] the High Court said:

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[56] (2014) 254 CLR 185 ('*Brookfield*') .

> The existence of a relevant duty of care is a necessary condition of liability in negligence. As this Court said in *Sullivan v Moody*:
>
> > A defendant will only be liable, in negligence, for failure to take reasonable care to prevent a certain kind of foreseeable harm to a plaintiff, in circumstances where the law imposes a duty to take such care.
>
> ...
>
> Much legal reasoning in relation to novel cases can proceed by way of analogy, as McHugh J pointed out in *Crimmins v Stevedoring Industry Finance Committee*. The advantage of the analogical approach appears from an observation by Professor Cass Sunstein quoted by McHugh J:
>
> > [A]nalogical reasoning reduces the need for theory-building, and for generating law from the ground up, by creating a shared and relatively fixed background from which diverse judges can work. Thus judges who disagree on a great deal can work together far more easily if they think analogically and by reference to agreed-upon fixed points.
>
> Reasoning by analogy should be conducive to coherence in the development of the law. Concerns about coherence may also inform the determination of the existence or non-existence of a duty of care in particular classes of case. As the Court said in *Sullivan v Moody*, the problems in determining the duty of care "may [sometimes]

concern the need to preserve the coherence of other legal principles, or of a statutory scheme which governs certain conduct or relationships".[57]

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[57] Ibid 199 [19], 201-202 [25] (French CJ).

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64. As far as I can tell, there is no path of analogous reasoning which can sustain the duty asserted by Iman. It is out of left field. To apply the words of Nettle J in *King* , there is no process of deduction or induction from the decided cases which enables a conclusion that such a duty exists. [58]

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[58] (2015) 255 CLR 304, 336 [80] .

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65. Iman also relied upon the amendments to the Act to include s 93(2A), which I have set out at [14]. In her written submissions, the following appears:

> It is submitted that the introduction of s 26 of the Amending Act reflects acknowledgement by the legislature that such a cause of action was maintainable prior to the Act being so amended. If, as the Defendant submits, as a matter of law such an action cannot be maintained, then there would be no need for the amendment to the Act .

66. I have set out the provisions of s 93(2A) of the Act at [14]. The section provided that there can be no recovery of damages where:

> (a) there is a psychiatric injury to the plaintiff; and
>
> (b) the plaintiff was not directly involved in the accident and did not witness the accident; and
>
> (c) the psychiatric injury is a result of the injury or death of another; and
>
> (d) was caused solely or predominantly by the negligence of that other person.

Putting to one side the fact that the section has now been repealed, I do not see how the existence of a legislative provision which might imply the existence of a duty as postulated by Iman can assist in determining whether the duty truly arises at common law. There may be many reasons why the legislature decided to insert such a provision – not the least being an abundance of caution as to where the common law might progress over time. Ultimately, the question must be whether, having regard to the principles set out by the High Court and intermediate appellate courts, the Court is satisfied that such a duty exists.

67. So, to summarise: Iman was not at the scene of the accident. She did not witness the death of her son. She was not an immediate victim: nor was there any pre-existing established relationship which would give rise to a secondary victim duty. Of course, if Mr Jipson's negligent driving had caused Mahmoud's death, then he would, consistent with *Jaensch* and *Tame and Annetts* , have owed Iman a duty of care in relation to psychiatric injury. But that was not the case. There is no authority which supports the proposition that Mahmoud owed his mother a duty of care to avoid causing injury to himself which may result in psychiatric injury to Iman.

68. Even if the existence of duty as postulated was arguable, there are powerful policy reasons which militate against its imposition. In *Sullivan v Moody*, the High Court said:

> But the fact that it is foreseeable, in the sense of being a real and not far-fetched possibility, that a careless act or omission on the part of one person may cause harm to another does not mean that the first person is subject to a legal liability to compensate the second by way of damages for negligence if there is such carelessness, and harm results. If it were otherwise, at least two consequences would follow. First, the law would subject citizens to an intolerable burden of potential liability, and constrain their freedom of action in a gross manner. Secondly, the tort of negligence would subvert many other principles of law, and statutory provisions, which strike a balance of rights and obligations, duties and freedoms. A defendant will only be liable, in negligence, for failure to take reasonable care to prevent a certain kind of foreseeable harm to a plaintiff, in circumstances where the law imposes a duty to take such care. [59]

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[59] (2001) 207 CLR 562, 576 [42] .

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69. In *Cattanach v Melchior*, McHugh and Gummow observed that the policy of the law is not unchangeable, as follows:

> First, the general considerations advanced by the appellants have not, as in the contract and disposition of property cases, matured into a coherent body of legal doctrine. No doubt that is not a fatal obstacle. The policy of the law cannot be static. Yet the novelty of the outcome for the present case of the appellants' submissions calls for a more careful scrutiny than would be required where there was a developed body of legal principle directly relevant. [60]

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[60] (2003) 215 CLR 1, 30 [64] .

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70. Part of this exercise is to consider the consequences were a duty as that contended by Iman to be recognised. As Gleeson CJ stated in *Cole v South Tweed Heads Rugby League Football Club Ltd*:

The consequences of the appellant's argument as to duty of care involve both an unacceptable burden upon ordinary social and commercial behaviour, and an unacceptable shifting of responsibility for individual choice. The argument should be rejected. [61]

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[61] (2004) 217 CLR 469, 478 [18].

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71. Returning to this case, if the duty as alleged by Iman exists, then:

(a) A driver who killed himself and other passengers as a result of culpable driving would not only be liable to the dependants of relatives of those that he or she killed in the driving of the car but also to the driver's close relatives.

(b) The parents of a young man who runs onto the road and is struck by a motor vehicle whose driver exercises reasonable care but cannot avoid the collision would be able to recover damages from their son for their psychiatric injury.

72. No crystal ball is required to envisage the raft of claims which could be brought by relatives of negligent drivers and other road users for psychiatric injury. I acknowledge that floodgates arguments are often met with scepticism – but that should not be the case here. To hold that such a duty exists would almost certainly unlock a large number of claims against a driver who, through his or her own fault, was seriously injured or killed. Even allowing for limitation periods, there is reality in the floodgates argument.

73. There is another consequence: undoubtedly, in this State, the Transport Accident Commission levies premiums and makes forward estimates on the basis of the law as it stands. Whilst of course a Court must allow for a changing legislative and common law landscape, I would be surprised if this class of claim had ever been factored into the Commission's commercial predictions. I accept, readily, that the law must not shirk from holding that a duty exists if the factors discussed by Nettle J in *King* compel such a conclusion. However, questions of policy and financial implications remain relevant in this analysis.

74. Then there is the potential 'knock on' effect. If a duty is owed by a road user to avoid injury to himself or herself, then one might rhetorically ask why that proposition should not hold good for any other person in the community who by his or her own fault suffers serious injury or death which is productive of foreseeable psychiatric injury to a relative. Three diverse examples suffice:

- The heroin user who unintentionally overdoses.
- The hang glider who, through lack of care, collides with a cliff.
- The farmer who puts himself in a position of danger when attacked by a bull in the cattle yard.

75. In each of these situations, could it be seriously asserted that the injured person or deceased owed a duty of care to his or her relatives to avoid injury or death which results in psychiatric harm to a close relative?

76. The second policy reason which militates against the imposition of the duty is that of the potential interference with family relationships.

77. In *Greatorex v Greatorex* ,[62] the plaintiff, a fire officer, went to the scene of a transport accident in the course of his employment. His son had negligently driven his vehicle and collided with an oncoming vehicle. The plaintiff suffered post-traumatic stress disorder as a result of seeing his son's injuries and instituted proceedings against him for damages.

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[62] [2000] 1 WLR 1970 .

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78. I pause here to interpolate that in Australia, and particularly given the facts and decision in *Lucre* , such a duty would, absent policy considerations, be arguable.

79. In that case, Cazalet J canvassed the English and Australian authorities, including *Jaensch* —particularly the judgment of Deane J. It is, however, his Honour's analysis of the relevant policy considerations which is of relevance here:

> That takes me to a related point which in my view is of some importance. Home life involves many instances of a family member causing himself injury through his own fault. Should the law allow one family member B to sue another family member A or his estate in respect of psychiatric illness suffered as a result of B either having been present when the injury was sustained or having come upon A in his injured state? ... To allow a cause of action in this type of situation is to open up the possibility of a particularly undesirable type of litigation within the family involving questions of relative fault as between its members. Issues of contributory negligence might be raised, not only where the self-inflicted harm is caused negligently but also where it is caused intentionally. To take an example, A, while drunk, seriously injures himself. B, his wife, suffers nervous shock. What if A raises by way of defence the fact that he had drunk too much because B had unjustifiably threatened to leave him for another man or had fabricated an allegation of child sexual abuse against him? Should the law of tort concern itself with this kind of issue?[63]
>
> ...
>
> Further, where a family member suffers psychiatric harm as a result of the self-inflicted injuries of another family member, the psychiatric illness in itself may well have an adverse effect upon family relationships which the law should be astute not to exacerbate by allowing litigation between those family

members. In my judgment, to permit a cause of action for purely psychiatric injury in these circumstances would be potentially productive of acute family strife.[64]

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[63] Ibid 1985.
[64] Ibid 1985-1986.

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80. His Honour concluded that there was no duty owed by a person to a family member who suffers psychiatric injury as a result of a self-inflicted injury:

> Mr Eklund submits that any decision that there should be civil liability to a secondary victim who suffers psychiatric harm in consequence of a primary victim's self-inflicted injuries is better left to Parliament than taken by the courts. It seems to me that there is substance in this submission. There is ample support in the authorities to which I have referred for the argument that Parliament is the best arbiter of what the public interest requires in this difficult field of law.[65]

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[65] Ibid 1986-1987.

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81. I accept the thrust of these observations. Even though there are situations where litigation between family members is common (transport accidents being one of them), the concept of being able to sue a close relative for the failure to protect himself or herself from harm is a totally different proposition.

82. Ultimately, there are powerful policy considerations which count against the common law expanding the duty as contended by Iman: even if Iman fell within the immediate victim category – i.e. witnessed the death of her son – whether she would be able to establish a duty on his part is, at the very least, debateable. It is not necessary to pursue this consideration further.

Conclusion

83. There is no such duty as alleged by Iman. The statement of claim should be struck out and the proceeding dismissed.