CASE COMMENTARY

Duty to Avoid Injury to Oneself and Thereby Psychiatric Injury to Others

Homs v Homsi [2016] VSC 354, J Forrester J

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Tortious liability for causing foreseeable mental harm to others is a complex category of tort law. It continues to evolve as plaintiffs devise novel arguments to test the parameters of what used to be known as pure psychiatric injury law. In *Homs v Homsi* [2016] VSC 354, J Forrester J was called upon to rule on whether a mother could sue her deceased son for driving negligently and causing his own death and thereby causing her mental harm. Forrester J declined to permit recovery but in the course of his judgement helpfully analysed the current state of mental harm law in Australia, reviewed the circumstances in which relatives are able to sue one another for mental harm caused by self-injury, and articulated a range of policy considerations in relation to indeterminate liability for defendants. His judgement provides an important opportunity to reflect on the directions in which mental harm law should evolve to arrive at a rapprochement between plaintiffs' reasonable aspirations for recovery and ensuring that the liability of defendants is not unreasonably wide.

Key words: damages; foreseeable risks; mental harm; psychiatric injury; tortious liability.

Introduction

In June 2010, 26-year-old Mahmoud Homsi (**Mahmoud**) was driving a vehicle negligently. It collided with another vehicle, resulting in his death. Mr Homsi's 44-year-old mother, Iman Homsi (**Iman**), learned of her son's death shortly afterwards by a telephone call.¹ As a consequence she suffered a severe psychiatric reaction and became unable to work thereafter. In December 2012, the Transport Accident Commission granted Iman a serious injury certificate pursuant to section 93 of the *Transport Accident Act 1986* (Vic), which acknowledged that she had

suffered a serious psychiatric reaction to her son's death.

She sued and the question referred for determination to the Supreme Court by Ierodiaconou AJ was whether the late Mahmoud owed his mother a duty to take reasonable steps to ensure that he did not suffer serious injury or death as a result of the driving of his vehicle. The answer provided by Forrester J in *Homs v Homsi* [2016] VSC 354 was in the negative; this precluded Iman from suing for mental harm. This case commentary reviews the ramifications of the decision in the context of potential actions for the indirect psychiatric

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effects of negligence in driving, including where the negligence of a driver results in first the driver's death and then deleterious consequences for others related to the driver.

Mental Harm Litigation

Litigation for pure psychiatric injury (that is psychiatric injury not occurring as a result of physical injury) – latterly known as mental harm litigation – is a complex area of tort law; it requires proof of a duty of care, breach of the duty and consequential injury, and is also replete with policy considerations. Such considerations have been invoked to delimit potentially indeterminate liability for defendants given the complex issues of foreseeability of the relevant harm to both primary and secondary victims and the diffuse nature of the harm that can be suffered by plaintiffs.

It has been accepted for more than three decades that some categories of persons are in a particular position of psychiatric vulnerability and thus deserving of eligibility for compensation for mental harm if a close relative is injured or killed by negligent conduct. Thus in the important Australian High Court decision of *Jaensch v Coffey* (1984) 155 CLR 549, Gibbs CJ accepted the following:

Where the relationship between the person killed or physically injured and the person who suffers nervous shock is close and intimate, not only is there the requisite proximity in that respect, but it is readily defensible on grounds of policy to allow recovery. (at 555)

In the breakthrough decision for plaintiffs of *Tame v New South Wales* (2002) 211 CLR 317, the plurality of the Australian High Court developed the law in important ways. They rejected the proposition that plaintiffs had to prove separately that they had suffered a 'nervous shock', that there was a familial relationship with the primary victim, that they were in the physical proximity of the primary victim or that the plaintiff was a person of 'normal fortitude'. However, the Court

accepted that all such matters remained relevant to whether there was a duty of care on the part of the defendant to the plaintiff. Civil liability reforms, however, reinstated the 'normal fortitude' requirement. Thus s32 of the *Civil Liability Act 2002* (NSW) provides that:

- (1) 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.
- (2) For the purposes of the application of this section in respect of pure mental harm, the circumstances of the case include the following:
 - (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.

Subsequent litigation has continued to explore the parameters of defendants' liability, focusing upon issues of foreseeability, including when defendants are responsible for injuries occurring outside the immediate proximity of plaintiffs who are not related to primary victims,² and when plaintiffs – although present in the aftermath of an accident – only come later to appreciate that it involved a family member.³ A high point for plaintiffs was the decision of the High Court in *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269, wherein an employer was held to owe a duty of care to

three teenage children who did not witness but were adversely psychiatrically affected by the death of their father at work, which occurred by the negligence of his employer. Chief Justice Gleeson concluded:

In its capacity as an employer, the respondent was under a duty of care towards the father of the appellants. ... The relationship of parent and child is important in two respects. First, it goes to the foreseeability of injury. That a child of the age of the various appellants might suffer psychiatric injury in consequence of learning, on the day, of a terrible and fatal injury to his or her father, is not beyond the 'common experience of mankind.' ... as a class, children form an obvious category of people who might be expected to be at risk of the kind of injury in question. 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.⁴ (at [10]–[11])

Another complex scenario of foreseeability occurs where a person kills or injures himself or herself by negligent conduct at work or in a motor vehicle and thereby sets in train events which cause mental harm to his or her family members, whether or not present at the time of the accident. It was this aspect of the law upon which J Forrest J gave guidance in *Homsi v Homsi* [2016] VSC 354.

Justice Forrest's Analysis of the Principles

Justice Forrest addressed a number of policy considerations relevant to whether or not liability should be imposed upon a driver who causes his own death by negligence and thereby causes psychiatric harm to family members. He noted the following observation of Keane J in *King v Philcox*⁵:

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. (at [11])

He concluded that this means that a claimant seeking damages arising out of a transport accident in Victoria has no right or cause of action unless one of the s93 'serious injury gateways' has been accessed.

He regarded a 2013 amendment to the Act as important:

(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

(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).

The provision was repealed on 19 April 2016 by amendments which had retrospective operation. This means that in Victoria – in contrast, for instance, with South Australia

and New South Wales— common law principles govern questions related to the recovery of damages for psychiatric injury in transport accident cases.

This left the formulation of the duty of care owed by the driver fundamental to the determination of the case. 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.

For Mahmoud (in essence for the insurer), 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 who he or she should have reasonably had in contemplation while he was driving his motor vehicle.

Justice Forrest rejected the formulation offered on behalf of Mahmoud, determining it to be

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. (at [22])

However, he also did not accept the formulation offered on behalf of Iman, deciding instead that the question was whether Mahmoud owed his mother 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, his mother. Therefore at the heart of his analysis was an assessment of whether a driver (or probably any other person) owes a duty to themselves to avoid injury or death to avoid adverse effects for others.

He found that Mahmoud did not offer his mother a duty of care because:

- (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. (at [26])

He took the opportunity to set out the law in relation to claims for psychiatric injury arising from the tortious acts of others:

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. 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.’

Second, the test of reasonable foreseeability alone is insufficient to found a duty of care in psychiatric injury cases. *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.* (at [28]-[29])

Third, since the turn of the twentieth century, with the decision in *Dulieu v White & Sons* [1901] 2 KB 669 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 (at [30]).

Justice Forrest accepted that in general 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 (at [32]). He observed that a difficult issue is where the line should be drawn in terms of recovery by immediate victims – persons who see accidents occur and are traumatised by the experience. Importantly, Lord Robertson in *Bourhill v Young* [1941] AC 395 at 399; aff [1943] AC 92 commented:

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.

He identified the decision of the High Court in *Jaensch v Coffey* (1984) 155 CLR 549 at 570 as authoritative in this respect, where 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.

Justice Forrest accepted 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, these circumstances varying from case to case. However, he also asserts the following:

What is abundantly clear is that there must be a close physical proximity between the event and the psychiatric reaction of the plaintiff.... For present purposes, what is important is the necessity for immediate physical proximity to the tortious event or its aftermath. (at [41])

Having regard to the reasoning in *Tame v State of New South Wales* (2002) 211 CLR 317, *Lucre* (2000) 50 NSWLR 261, and *King v Philcox* (2015) 255 CLR 304, he concluded that it had become clear under Australian law that the duty of care in psychiatric injury cases extends beyond 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. (at [50])

Thus, for instance, in *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383, a duty was found to be owed by an employer to the fellow employee of a badly injured worker who witnessed the aftermath of the electrocution of a fellow worker. Similarly, in *Jaensch v Coffey* (1984) 155 CLR 549, the duty was owed by the driver to the wife of the primary victim injured by the driver’s negligence. In *Annetts v Australian Stations* (2002) 211 CLR 317, the duty was found to be owed to the mother of a young jackaroo who died as a result of the negligence of his employer. Similarly, in *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269, the High Court found that the relationship between teenage children and a father who was crushed to death by a forklift driven negligently by a fellow employee of the defendant was such that

the defendant should have had in contemplation the risk of consequent psychiatric injury to the deceased man's children.

Similarly, in *Philcox v King*,⁶ which discussed the South Australian version of civil liability legislation (s33 of the Civil Liability Act), French CJ and Keifel and Gageler JJ observed:

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. (at 322 [29], emphasis added)

Justice Forrest noted that in all of the secondary victim cases a constant was the presence of an established pre-existing duty

between the tortfeasor and the primary victim, which in turn was found to give rise to a discrete duty to the secondary victim. He concluded 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, as well as a discrete duty in relation to psychiatric injury to close relatives, fellow employees or rescuers of a person killed or injured 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' (at [61]). However, he found that Iman for legal purposes was not in an 'established relationship' with Mahmoud for the purposes of there being a duty to a secondary victim.

The key aspect of his decision was that he found that the common law does not go further; in particular, it does not recognise a general duty on the part of the driver of a motor vehicle not to cause psychiatric injury to a close relative as a result of injury to himself or herself (at [62]). He held: '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' (at [62]).

Taking into account that Iman was not at the scene of the accident and thus did not witness the death of her son, he concluded that there was no authority for the proposition that Mahmoud owed his mother a duty to avoid causing injury to himself which may have then resulted in psychological injury to Iman.

Focussing on the issue of the public policy considerations bearing upon whether a duty of care should be found, Kaye J observed that if the duty of care as alleged by Iman were found to exist (contrary to his analysis), 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. (at [71])

His Honour commented that a crystal ball was not required to envisage a 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. (at [72])

He expressed doubt that the Transport Accident Commission would have factored the potential for such claims into its commercial predictions. He also identified a risk of a '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. (at [74])

Justice Forrest also identified a second public policy reason for holding against a duty of care being recognised by the law: the potential interference with family relationships. He accepted the thrust of the decision of Cazalet J in *Greator v Greator* [2000] 1 WLR 1970 where the plaintiff was a fire officer who attended 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. Cazalet J expressed grave reservations about the entitlement of a family member to recover for psychiatric injury arising from the negligently self-inflicted injuries of a family member:

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? ...

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. (at 1985)

Forrest J commented:

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. (at [81])

He concluded that there were 'powerful policy considerations' which counted 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, debatable.' (at [82])

The outcome was a decision on two bases that there was no duty of the kind alleged by Imam; her statement of claim was struck out and the proceeding was dismissed.

Australian Authority on Intrafamilial Litigation

There is a line of Australian authority on the issue of family members not being able to take actions in tort where their injuries arises from injury or death caused by the negligence of a family member. However, how this line of authority is evolving and is far from clear. For instance, Kirby J in *Harrington v Stephens* (2006) 226 CLR 391 at [129] (in dissent) observed:

it is not unknown in Australia for children to sue their parents in tort. Australian law does not recognise any principle of parental immunity in tort. Thus, actions against parents by their children are not uncommon in the context of motor vehicle accidents. It has been held that children even enjoy a right of action against their mothers in respect of pre-natal injuries sustained as a

result of the mother's negligent driving. There is no evidence that such proceedings have resulted in any disintegration of the family.

In *Lynch v Lynch* (1991) 25 NSWLR 411, the New South Wales Court of Appeal held that a mother owed a duty of care not to cause injury to her own foetus, at least where she is covered by compulsory insurance that will indemnify her for liability. In *Lynch* the child was born disabled as a result of injuries sustained by the pregnant mother when she lost control of a truck she was driving and crashed into a bank.

However, in *Harrison v State Government Insurance Office (Qld)* (1985) Aust Tort Reports 80-723, a decision of the Supreme Court of Queensland, the claimant was a passenger in a car driven by her husband which was involved in a collision caused by his negligence. Her husband was seriously injured and later died from his injuries. The claimant suffered minor physical injuries but suffered psychiatric illness as a result of the trauma of the accident and her concern for her husband's injuries.

Vasta J held that the claimant's psychiatric illness was reasonably foreseeable but that this was not the sole test for determining liability for negligence. He distinguished between the claimant's claim for damages for nervous shock which came from the major emotional trauma which she had experienced as a primary victim of the collision on the one hand, and that which flowed from her concern for her husband and her realisation that he had sustained shocking injuries on the other. Following Deane J's observations in *Jaensch v Coffey* (1984) 155 CLR 549, which suggested that a claim based solely upon negligence which results in harm to a tortfeasor and then indirect psychiatric harm to his wife could not be successful, he held that the claim in respect of the latter, if launched separately, would have been doomed to failure.

Similarly in *Dwyer v Dwyer* (1969) 90 WN (Pt 2) (NSW) 86 at 88, Wallace P –

giving the judgment of the Court of Appeal of New South Wales – in effect stated that a wife owes no duty to her husband not to injure herself.

Further, in *Kohn v State Government Insurance Commission* (1976) 5 SASR 225 at 256, Bray CJ observed: ‘A man or his representatives can hardly be legally responsible for the injurious effect of his own death’. In addition, in *Klug v Motor Accidents Insurance Board* [1991] Aust. Tort Reports 81-134, a decision of the Supreme Court of Tasmania, the claimant was a passenger in a car which was being driven by his wife and which was involved in a collision as a result of her negligence. His wife was killed and the claimant claimed damages for psychiatric injury arising not from the accident itself but from the death of his wife. Zeeman J dismissed the claim, saying (at p69, 274):

As a matter of principle it might be thought that the plaintiff ought not to be denied damages for his psychiatric injury merely because of the fact that it is the product of the death of the tortfeasor. A possible basis for denying relief is that there existed no duty of care on the part of the tortfeasor not to injure herself and that the damages are the product of such injury (cf. *Dwyer v Dwyer* (1969) 90 WN (Pt 2) (NSW) 86 at 88). I do not find that persuasive. There appears to be no reported case where a plaintiff was permitted to recover or denied damages for psychiatric injuries solely resulting from the death of or injury to the tortfeasor. Certainly I was not referred to any such case. Uninstructed by authority I would have thought such a claim to be maintainable if otherwise it satisfied the legal pre-requisites for liability to exist. However I must accept that this area of the law is governed by policy considerations which limit the availability of a remedy. The dictum of Deane J in *Jaensch v Coffey* (*supra*) to which I have referred, whilst acknowledging that the common law in Australia may change to recognise liability in a case such as the present, ought to be followed by me, sitting at first instance. It requires the plaintiff's claim for damages for his psychiatric injury to be denied upon the basis that it falls into a category which is

not compensatable by reason of policy considerations.

Ramifications of the *Homs* Decision

There are many scenarios in which negligence on the part of a person results in injury or death to them and secondary mental harm consequences to others. In some of those scenarios the secondary harm is readily foreseeable and tortious exposure is appropriate for them as defendants. This includes where close relatives see a negligent incident take place or its immediate aftermath. Another scenario is where they learn of what has occurred shortly afterwards – as occurred with the parents of James Annetts after his body was discovered, he having left the property where he was working as a jackaroo. The categories of who such persons should be can be the subject of sensible disagreement; in *Homs*'s case, the mother was held not to be in an ‘established relationship’ sufficient to found a duty of care on the part of the son (at [62]) – but, of course, she was the mother of the deceased man and it was reasonably foreseeable that the death of her son insofar as it was caused by negligence might well cause her mental harm. Had his death been caused by the negligence of someone other than her son, she would have an entitlement to recovery.

J Forrest J would have been loathe to permit Iman to recover (notionally) against her son even had she been a primary victim. It is arguable that his discomfort in permitting close relatives to sue one another (especially on the basis of the negligence of one relative toward another, or toward themselves with foreseeable risk of harm to their relatives) generated in him too great a disinclination to permit capacity to sue. Many difficult issues in this respect arise, however. It is undoubtedly the case that it is uncomfortable to have spouses suing each other or parents their children or children their parents – but, as Kirby J observed, there can be good public policy reasons for permitting legal recourse. After all, it is hardly unknown for relatives to

behave harmfully, irresponsibly or unethically towards one another, even though it is more than apparent that such conduct would have deleterious consequences. To preclude actionability for negligent conduct towards themselves or their relatives merely because of consanguinity is to go too far. The challenge is to formulate categories of such scenarios where as a matter of policy the law should decline to permit recovery, leaving recovery otherwise open.

The decision of J Forrest J was that in the circumstances of the case Mahmoud's mother could not sue him (his insurer) for failing to take proper care of himself and as a result causing her mental harm. This outcome was not legally surprising. However, there are a great many scenarios where others are foreseeably adversely affected by a person's failure to take proper care, a result of which is their own death but also harm to those close to them. An example is where inattentive driving causes the death of the driver but also of another which in turn has deleterious mental harm consequences for others. This category of cases is unlikely to be affected by the reasoning in *Homsy*.

At the heart of the decision of J Forrest J is a disinclination, as he put it, to open the floodgates for indeterminate liability for defendants when their negligence causes mental harm for a wide range of others. This floodgates spectre or, put another way, anxiety about the unfairness of indeterminate

liability for tortfeasors is a crucial driver in the evolution of tort law generally and mental harm law in particular. A challenge both for the law and the general community is to identify where the limits of compensable blameworthiness for negligent conduct should lie so that plaintiffs can be fairly compensated while not unreasonably placing the burden upon defendants. The issue is partly about what is financially feasible, but it is also about how the law categorises culpability and the limits of responsibility not to cause harm to others. While these are truly 'big questions', they are ones which need to be grappled with further as more is learned about the foreseeable consequences of irresponsible conduct, including the interdependence of mind and body, and as tortious liability is titrated accordingly.

Notes

1. Compare how Mr Annetts learned of his son's death similarly by telephone in Western Australia in *Annetts v Australian Stations* [2000] 211 CLR 317.
2. See *Wicks v State Rail Authority* [2010] HCA 22.
3. See *King v Philcox* [2015] HCA 19.
4. See too 281 [27] per McHugh J.
5. [2015] HCA 19; (2015) 255 CLR 304 at 326 [42].
6. [2015] HCA 19 at [29].