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Mental Trauma in New Zealand:

What actions are available under the common law?

What are the requirements of these actions?

What should the requirements be?

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1 Introduction.

Until recently, with the introduction of no fault accident compensation legislation in New Zealand in 1974 and successive legislation has restricted any civil actions for personal injury, including mental trauma, by prohibiting many common law claims. As a result, the common law relating to personal injury in New Zealand has stagnated for the last twenty years and there is little case law relating to civil actions for mental trauma.

However, with the introduction of the Accident Rehabilitation and Compensation Insurance Act 1992 ("ARCIA"), cover for personal injury is less comprehensive than in previous legislation. As a result, it is now possible and necessary to canvass all causes of action available to victims suffering mental trauma, who would otherwise (under ARCIA) receive no form of compensation.

The purpose of this paper is to identify what common law actions are available to victims who suffer mental trauma, what the requirements of such actions are, and the direction that the law should take.

The paper is in three parts. Part one analyses ARCIA to determine what "mental trauma"[1] is covered, and what is not. It identifies three separate categories of mental trauma, each of which is treated differently by ARCIA. Then the arguments are discussed that enable a victim who suffers mental trauma to circumvent section 14, the statutory bar in ARCIA that prevents much civil litigation. Part two focuses on the common law requirements for claiming damages for the differing categories of mental trauma defined in part one. Part three focuses on the direction that the law should take in New Zealand. It is conclude that the law should be liberalised to include all the types of mental trauma identified in the paper.

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[1]Mental trauma is used in this paper as a generic term to describe all forms of mental consequences a person may suffer.

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2 The Accident Rehabilitation and Compensation Insurance Act 1992 (ARCIA).

2.1 What ARCIA covers.

Unlike previous legislation, ARCIA does not provide comprehensive cover for personal injury suffered in New Zealand. The Act now has a more restrictive meaning of "personal injury" which limits those who are eligible for cover under ARCIA.

Personal injury is defined in section 4 as "the death of, or physical injuries to, a person, and any mental injury suffered by the person which is an outcome of those physical injuries to that person, and has the extended meaning assigned to it by section 8(3) of this act."

Section 8(3)[2] extends cover to personal injury which is mental or nervous shock suffered by a person as an outcome of any sexual offence committed against the person that is listed in the first schedule of the Act.

Section 3 defines mental injury as "a clinically significant behavioural, psychological, or cognitive dysfunction."

There are a range of mental conditions which do not fall within the above definitions, and are therefore not covered by ARCIA. These include transient emotional reactions (such as embarrassment, anger, humiliation) and more serious mental trauma (such as mental or nervous shock).[3] Also any mental trauma that does not accompany injury, with the exception of section 8(3), will not give rise to cover under ARCIA.[4]

Previous legislation used the term "nervous shock" in relation to sexual offences, but had a broader meaning for other accidents, encapsulating all "mental consequences."[5] The courts interpreted the previous legislation consistently with this definition.[6]

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[2]See Appendix one.

[3]Mental or nervous shock that relates to s 8(3) will be covered, and any that becomes so serious to fit within the category of s 3, so long as there are accompanying physical injuries.

[4]Even here arguably those who suffer from humiliation etc because of the sexual offence committed against them will not be entitled to compensation under ARCIA for it will meet the required threshold of nervous shock as defined in the Act.

[5]The Accident Compensation Act 1982.

[6]In *ACC* v *E* [1991] NZAR 116: Greig J made it clear that "personal injury" extended to the mental as well as physical consequences of an accident; This was reaffirmed in *Accident Compensation Corporation* v *E* [1992] 2 NZLR 426, 433: The court stating that there could be "no other construction" of the statute.

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However, section 8(3) of ARCIA refers to "mental or nervous shock," while section 3 uses "mental injury." This creates a presumption that the two types of trauma have different meanings for the purposes of ARCIA.

Accordingly, by implication these three sections have categorised mental trauma arising from personal injury into three types:

1. Mental injury as defined in section 3.
2. Mental or nervous shock, as defined in section 8(3).
3. Transient emotional trauma which does not fall into the above two categories.

2.2 Common law actions for mental trauma allowed by the Act.

By virtue of section 14[7] ARCIA restricts those people who can bring a civil action for damages for personal injury. This section bars proceedings for damages arising directly or indirectly out of personal injury covered by ARCIA.

Only mental injuries that are the outcome of the physical injuries suffered by a person come within the definition of "personal injury." Therefore, a damages action is not barred in respect of a mental injury alone that is not the outcome of a physical injury.

However, as section 14 bars proceedings directly or indirectly arising out of personal injury, it is necessary to establish the cause of the mental trauma to circumvent section 14. The following sets out where a common law action for damages for mental trauma can be undertaken, and why such actions are not prohibited by section 14.

2.2.1 Exemplary damages for mental injury.

Since *Donselaar* v *Donselaar*,[8] it has been settled law that the accident compensation legislation does not prohibit a common law action for exemplary damages, regardless of the type of injury giving rise to those damages, physical or mental, except where the victim is dead.[9] ARCIA does not prevent such an action, as exemplary damages is aimed at punishing the conduct of the defendant. The more outrageous the conduct, the higher the damages.[10] Therefore section 14 has no bearing on such actions.

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[7]See Appendix One.
[8][1982] 1 NZLR 97.
[9]Section 3(2) of the Law Reform Act 1936.
[10]As an award of exemplary damages is relative to the conduct of the defendant and not the impact on the victim, an award may in some cases not be proportional to the harm suffered by the victim.

2.2.2 Mental trauma arising out of property damage.

Section 14 states that the section has no application to proceedings arising from any damage to property. [11] Therefore any mental trauma that is a consequence of property damage can be pursued in a civil claim.[12]

2.2.3 Secondary victim's mental trauma.

The following are examples of where pure mental trauma claims are possible:[13]

a) Where close family members witness or see the aftermath of horrific injuries to a loved one.[14]

b) Employees witnessing horrific injuries to fellow employees.[15]

c) Rescuers becoming involved in horrific scenes.[16]

All of the above are examples of secondary victims suffering mental trauma, which may be actionable so long as the trauma suffered is considered a recognised psychiatric illness.[17]

Section 14 can prevent civil claims by secondary victims where the mental trauma arises directly or indirectly from the injury, or death of another person, the primary victim. [18] Under a literal reading of section 14,[19] the secondary victim is caught by the words "any person" and by the phrase "whether by that person or any other person."[20] As a result such a sufferer is not covered under ARCIA and is also prohibited from pursuing a claim for damages from the tortfeasor.

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[11]Section 14 also expressly states that the bar does not apply to proceedings relating to or arising from an express term of contract or an unjustified dismissal or personal grievance arising out of a contract. Mental trauma arising out contract is beyond the scope of this paper and not discussed at all.
[12]*Attia* v *British Gas Plc* [1988] QB 304: is an example of a victim suffering mental trauma as a result of damage to property.
[13]J Miller, D Rennie "Common law Damages" *Accident Compensation* (Brooker and Friend, Wellington, 1994) 2A D1.3.02.
[14]*McLoughlin* v *O'Brian* [1983] 1 AC 410.
[15]*Mount Isa Mines* v *Pusey* (1970) 125 CLR 383.
[16]*Chadwick* v *British Railways Board* [1967] 1 WLR 912.
[17]"Recognised psychiatric illness" has replaced the traditional term of "nervous shock." Most countries are reluctant to award damages for transient emotional trauma, at least when it stands alone. Also the distinction between primary and secondary victims is not straight forward. Both these issues are discussed in part two and three.
[18]See Appendix One.
[19]See Appendix One.
[20]R Tobin, "Nervous Shock: The Common Law; Accident Compensation?" [1994] NZLJ 282, 287.

For example, in *McLoughlin* v *O'Brian*, mental injury suffered by a mother (the secondary victim) arose out of the personal injuries suffered by her family (the primary victims). It was the impact on her mind of those injuries that led directly to her own trauma.[21] A damages action by the mother may be barred in New Zealand, since her trauma arose out of the primary victim's injuries (which are covered under ARCIA), in spite of the fact that her mental trauma may not be "personal injury" and therefore not covered by ARCIA.

However, there are situations where the nervous shock suffered by a secondary victim does not arise out of the primary victim's injuries or death, but from the negligent or intentional action of the defendant that resulted in the primary victim's injuries. In these cases the cause of the mental trauma is the incident itself, and not the injuries. An example of such a situation is where a person has witnessed a high speed car crash, and it is the defendant's extremely dangerous driving, the near misses that occurred before the accident happened, the noise perhaps, that results in the mental trauma, not the injuries or deaths of the primary victims. In such situations, section 14 would not apply.[22]

Moreover, as the long title suggests, ARCIA is designed to rehabilitate and compensate those who suffer personal injury. Where an injury falls outside the definition of personal injury, the provisions of ARCIA must not apply. Hence words of qualification must be read into section 14(1), so that only the person who has suffered the primary injury, or any person claiming on their behalf, will be bound by the bar in section 14, thus allowing secondary victims to pursue a common law remedy even if the secondary victim's mental trauma is caused by the primary victim's injuries.[23]

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[21] Above n 20

[22] *Chadwick* v *British Railways Board* [1967] 1 WLR 912 is a case on point. However it is important to show that the trauma sustained is from the accident and not others injuries, which perhaps would be a problem for Mr Chadwick under section 14, despite the fact his trauma did not arise out of his own injuries.

[23] Above n 20.

2.2.4 Primary Victims.

1. Employees' mental stress claims.

In *ACC* v *E*,[24] an employee suffered a mental breakdown as a result of attending a high pressure management training course. This was covered under the Accident Compensation Act 1982 (ACC). However, under ARCIA it was deliberately excluded from the definition of "personal injury" in section 4, and "employment related disease" in section 7(4).[25] An employee is therefore not prohibited from suing his or her employer, or the organisers of such a course, for damages.

2. Assault and battery where there is no physical injury.

A threat to cause physical harm which results in mental trauma only falls outside the definition of "personal injury" in section 4. This is because there is no physical injury for the mental injury to be an outcome of. Therefore an action for damages if not barred. Similarly a battery that results only in discomfort and not physical injury would fall outside section 14 for the same reason.

Examples of the above:[26]

a. A threat to stab a person with a syringe containing the AIDS virus.
b. An unauthorised body search by a police officer would be a battery if there was no physical injury, but resultant mental trauma.
c. Batteries through exposure to noise, lasers and heat where there is no physical injury.[27]

3. Mental trauma that is not the outcome of physical injuries.

ARCIA only covers mental injuries which are an outcome of physical injury. Therefore, a damages action is not barred for a mental injury that is not a consequence of the physical injury. Hence, if a person who suffers both physical and mental injuries can show that the mental injury sustained was not as a result of the physical injuries, but from the defendants conduct in causing the accident, it should not be barred by section 14, as the mental trauma arose out of the accident

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[24]Above n 6.
[25]See Appendix One.
[26]Above n 13, 2A D1. 3. 02.
[27]*Iversen* v *Zendel* Unreported, 10 December 1992, High Court Auckland, CP2171/91.

itself and not the physical injury received.[28] The persuasiveness of this argument will depend on the incident itself. The more horrifying the incident, the stronger the argument.

Also, if the mental trauma is of a lesser degree than what is required by section 3, then, regardless of whether or not the mental trauma is an outcome of a physical injury, a damages action will not be barred.[29]

4. Prior Mental Trauma.

Any mental trauma, including mental injury of the kind defined in section 3, which occurred prior to physical injury would not be subject to the bar in section 14. This is because in these circumstances the mental trauma cannot be an outcome of the physical injury. An example would be a victim's terror of what was about to happen before an accident actually occurred.

5. Contemporaneous Mental Trauma.

Any mental trauma, including mental injury of the kind defined in section 3, which is contemporaneous with the physical injury but did not arise indirectly or directly out of physical injury will not be barred by section 14. This sort of trauma will occur where the mental trauma suffered arose out of the incident itself and not the physical injuries, as discussed previously.

6. Subsequent Mental Trauma.

If it can be shown that the trauma suffered is not an outcome of the physical injury, but occurs because of the terrifying nature of the incident or from subsequent brooding about the incident (as opposed to brooding about the physical injury) then proceedings will not be barred by section 14.

7. Sex Crime Situations.

(a) Mental trauma that amounts to transient emotional reactions, (such as humiliation, anger or fear caused by the sexual crime) that do not meet the

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[28]Above n 8: illustrates a possible scenario where such an argument would need to be run to circumvent section 14.

[29]For instance nervous shock that does not fall within section 8(3) or transient emotional trauma.

threshold of nervous shock required by section 8(3) would not be "personal injury." Therefore a damages action would not be barred.

(b) Arguably, mental injury that is of the more serious type in section 3 (clinically significant behavioural function) that is an outcome of a sexual crime, and not of physical injuries should not be barred as section 8(3) only applies to the lesser trauma of "mental or nervous shock."

(c) A claim for all three types of trauma could be made for the offenders behaviour which occurred before the actual sex crime was committed. Moreover a claim for prior, contemporaneous, and subsequent trauma resulting from conduct that is not part of what is required for the commission of the offence would not be barred by section 14.

(d) Any mental trauma suffered from an attempted sexual crime, apart from attempted sexual violation (as this is the only attempt referred to in the first schedule) could also be the subject of a damages action.[30]

3 Common law today in New Zealand.

In recent years very little personal injury litigation has taken place in New Zealand. This is a direct consequence of prior accident compensation legislation under which cover was provided by legislation and any common law right to claim damages was barred. Hence the common law with respect to personal injury litigation is in its infancy in comparison to other jurisdictions.

However, as illustrated above, under ARCIA there are number of situations where a victim may not be covered, and can still have the right to bring a common law action. It is therefore necessary to not only determine whether a sufferer of mental trauma is covered by ARCIA, but also whether the victim has a cause of action under the common law.

The following are the possible causes of action a mental trauma victim may bring in New Zealand and the requirements they need to satisfy to succeed. The type of tort used will depend on the type of mental trauma suffered and the way it was inflicted.

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[30] There are other possible situations which are specific to sexual offences, but are not listed. For further information see above n 13, 2A D1.3. 02.

3.1 Intentional Torts.

3.1.1 Assault and Battery.

An assault is an "intentional or negligent act which causes the plaintiff to apprehend the imminent infliction upon him or her of a battery"[31]and a battery is "the direct, intentional, or negligent application of force to the person of another."[32]

In those instances suggested earlier where there is no physical injury or the mental trauma is an outcome of the act itself and not the injury, an action is possible for each of the three categories of mental trauma. Trespass actions such as assault and battery are actionable without proof of damage.[33]

The only controversy with these torts is whether the conduct causing the assault or battery can be negligently inflicted, or intentional. Fleming insists that a trespass to the person can only be committed by an intentional action.[34] This interpretation is supported by Tipping J in *Dehn* v *Attorney General* [35]where it was held that proof of an intentional application of force is necessary for a successful action in battery. In light of recent developments with the tort of negligence for mental trauma, this interpretation will be the prevailing view, as any negligently inflicted trauma would be caught by the tort of negligence.

3.1.2 Intentional Infliction of Emotional Distress.

The tort of intentional infliction of emotional distress originates from *Wilkinson* v *Downton*,[36] where the proposition was "that doing an act 'calculated' to cause physical harm is actionable if physical harm results."[37] [38] In *Tucker* v *News Media Ownership Ltd*,[39] the Court of Appeal approved the following test:

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[31]SMD Todd *The law of Torts in New Zealand* (The Law Book Co Ltd, Sydney, 1993) 87-88.
[32]Above n 31.
[33]Above n 13, D1.6.05.
[34]JG Fleming *The Law of Torts* (8 ed, The Law Book Co Ltd, Sydney, 1992) 25.
[35][1988] 2 NZLR 564, 583.
[36][1897] 2 QB 57.
[37]NJ Mullany and PR Handford *Tort Liability for Psychiatric Damage* (The Law Book Co Ltd, Sydney, 1993) 284.
[38]*Stevenson* v *Basham* [1922] NZLR 225; this case introduced this tort into New Zealand.
[39][1986] 2 NZLR 716, 732.

> [O]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is liable for such emotional distress provided that bodily harm results from it.[40]

This test requires emotional distress to manifest itself into some sort of physical harm before damages can be awarded. This requirement of physical harm was reiterated in *Bradley* v *Wingnut Films Ltd*,[41] where Gallen J stated that a plaintiff had to establish "something more than a transient reaction, however initially severe. This must translate into something physical and having a duration which is more than merely transient."[42] Thus, only damages for mental trauma as defined in section 3 and mental or nervous shock as defined in section 8(3) would be recoverable under this tort.

There is some debate over whether the tort is confined to intentional or reckless acts, or if it also includes negligently caused injury. However despite the blurring of the lines between this tort and the tort of negligence in other jurisdictions, it would appear that the two torts are closely related, but distinct. This tort requires that the defendant intended to cause, or was reckless as to, the immediate consequences, (such as fright or horror), and that the physical harm which results can be regarded as "intended or likely,"[43] a higher threshold than merely foreseeable, as in negligence.[44] The few cases in New Zealand that refer to this tort draw a similar distinction.[45]

In all cases in which *Wilkinson* v *Downton* has been applied, they all involve shock or shock related injuries. However, the test for this tort does not require the damage to be shock induced. Thus, a victim who suffers from mental trauma, which has slowly accumulated over time, may well succeed under this tort, provided it can be shown that it was intended or likely to result.

3.2 Tort of Negligence for Mental Trauma.

New Zealand courts have not awarded damages for a pure mental trauma action in negligence for many years. However as suggested earlier, as ARCIA no longer prevents such actions being brought in all cases, this is likely to change.

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[40] Heuston and Buckley *Salmond and Heuston on the Law of Torts* (18 ed, Sweet and Maxwell, 1981) 33.
[41] [1993] 1 NZLR 415.
[42] Above n 41, 421.
[43] This is the modern interpretation of "calculated" as used in *Wilkinson* v *Downton*.
[44] Above n 37, 290.
[45] Above n 38, n 41.

There are two broad areas of liability in negligence for mental trauma:

1. Where a defendant has negligently injured or imperilled the plaintiff and he or she suffers mental trauma; *the primary victim.*

2. Where a person suffers mental trauma as a result of the defendant negligently injuring or imperilling someone other than the plaintiff; *the secondary victim.*

The following analysis of the present situation is based on proceedings for strike outs, accident compensation claims, and obiter from other actions, which import the latest developments in English law.

The discussion revolves around what is required to establish a duty of care to both primary and secondary victims, and what forms of mental trauma will entitle a victim to damages. The other elements required to satisfy the tort of negligence are no different to a standard negligence action.[46]

3.2.1 Primary Victims.

A duty of care for nervous shock to the primary victim has long been recognised by the courts in situations where the plaintiffs shock was induced by the plaintiffs fear of injury to himself or herself.[47]

In such situations the duty is dependent on the kind of damage (psychiatric injury in the form of a shock) being reasonably foreseeable as a real risk, and if it is, whether a reasonable person would guard against that risk.[48]

For primary victims the traditional foreseeability test of negligence determines the duty of care. However, as discussed in part three, the distinction between what constitutes a primary victim and secondary victim can be somewhat arbitrary.

3.2.2 Secondary Victims.

For a long time, the common law only recognised claims by primary victims as actionable. Nevertheless, in limited circumstances, secondary victims can recover damages for nervous shock.

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[46]Causation, standard and breach etc, although occasionally a case deals with mental trauma actions, under the guise of remoteness, as opposed to whether a duty of care is owed.
[47]*Dulieu* v *White* [1901] 2 KB 669.
[48]*Donoghue* v *Stevenson* [1932] AC 562; *Bolton* v *Stone* [1951] AC 850; *The Wagon Mound No 1* [1961] AC 388; *The Wagon Mound No 2* [1963] 1 AC 617.

The English cases of *Mcloughlin* v *O'Brian*[49] and *Alcock* v *Chief Constable of South Yorkshire Police*,[50] require, in addition to foreseeability, a further "proximity" requirement to be satisfied.

For a duty of care to be owed to a "nervous shock" victim under *Alcock* the following must be satisfied:[51]

1. *Foreseeability of the harm.* (The traditional test in negligence); and

2. *A further element of proximity which is determined by the following three elements*:

    1. *Class of persons whose claims should be recognised.*

       This includes primary victims, and those with a close family tie to primary victims through a relationship of love and affection, rescuers, and in exceptional circumstances by-standers.

    2. *Proximity of such persons to the accident, in time and space.*

       The secondary victim must be close in both time and space, but does not necessarily have to be within sight or hearing of the accident, he or she can also be within the immediate aftermath of the accident.

    3. T*he means by which the shock is caused.*

       The means by which the shock is caused must be through sight or hearing of the accident, or its immediate aftermath.[52]

       In order for the proximity requirement to be met, all three of these factors must be satisfied. It is not enough to simply satisfy one of them.

This test can be used for primary victims, but in such cases all the elements of proximity will be satisfied. Thus, the test simply reverts to the foreseeability of mental harm to the plaintiff.

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[49]Above n 14.
[50][1992] 1 AC 310.
[51]The following elements and meanings are what this author has distilled from the various articles and cases on nervous shock. Naturally, the law in this area is far from settled in any jurisdiction. Even in *Alcock*, the proximity requirements are left open ended, for possible future scenarios.
[52]The court has left it open as to whether a simultaneous television broadcast, where the victims are identifiable, as to whether the "means" element would be satisfied.

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This test has been cited with approval in *Iversen* v *Zendel*,[53] *Kingi* v *Partridge*,[54] *McDonnel* v *Wellington AHB*[55] and *Boe* v *Hammond*.[56] However, as all these decisions relate to strike out applications,[57] the *Alcock* test cannot yet be considered accepted law in New Zealand. Indeed, Cooke P in *Mouat* v *Clarke Boyce*[58] stated that the *Alcock* decision is really one where the incidences of duties of care were limited for policy reasons. This suggests that New Zealand ultimately may not follow the *Alcock* test.

3.2.3 The type of mental trauma actionable.

The law of negligence has always allowed a claim for mental injury as defined in section 3, and mental and nervous shock in section 8(3). These have been traditionally known as "nervous shock" claims.

The *Alcock* decision reiterates the traditional stance on what type of mental trauma may found an action for damages. A plaintiff must suffer a "recognised psychiatric illness," (at least for plaintiffs who are secondary victims) and it must also be "shock induced." Hence a plaintiff suffering from a psychiatric illness caused by the accumulation over a period of time of more gradual assaults on the nervous system has no cause of action,[59] nor any plaintiff that only suffers lesser mental harm, such as grief, fear, anxiety, vexation, and distress, (ie transient emotional trauma).[60]

However, in New Zealand, recent developments suggest that a claim in negligence for transient emotional trauma may succeed, even where there is no other recoverable damage.

In *Boustridge* v *Attorney General*,[61] the plaintiff sought damages for mental anguish, anxiety, and distress, which the plaintiff sustained as a result of administering mouth to mouth resuscitation to a bleeding accident victim, who was later reported by the defendant to be HIV positive (the accident victim in fact was not). Blanchard J

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[53] Above n 27.
[54] Unreported, 2 August 1983, High Court, CP2171/91.
[55] Unreported, 16 December 1993, High Court, CP250/93.
[56] Unreported, 26 May 1995, High Court, M3/93.
[57] However the *McDonnell* claim is still being proceeded with, after a strike out application was dismissed by the courts.
[58] [1992] 2 NZLR 559, 569.
[59] Above n 50, 401.
[60] Above n 50, 401.
[61] Unreported, 29 September 1993, High Court, HC 54/93.

thought the plaintiff had a tenable cause of action, on the basis that the defendant owed a duty of care to make reasonable inquiries to verify whether the victim was HIV positive.

A more persuasive authority is *Mouat* v *Clark Boyce*,[62] in which the respondent cross appealed an award of $25,000 in damages to the appellant for her distress. The defendant argued that mental distress is not recoverable in a tort action. The court rejected this argument, with Cooke P stating:[63]

> [W]hen the plaintiff has a cause of action for negligence, damages for distress, vexation, inconvenience and the like are recoverable both in tort and contract, at least if reasonably foreseeable consequences of the breach of duty.

Cooke P did add that in this case it was not necessary to decide if mental trauma of this type was sufficient on its own for a negligence action, as the plaintiff had suffered other recoverable damage.

However Richardson J was more forthright:[64]

> [W]here there is a duty of care to the plaintiff, the scope of damages recoverable is essentially a question of remoteness of damage which turns on whether the particular harm was reasonably foreseeable consequence of the particular breaches of duty which have been established. And public policy concerns which emphasise the often temporary and relatively trivial nature of the harm and the risks of falsification cannot justify leaving the burden of the loss with the innocent victim where the claim is adequately proved.

There is therefore a strong indication that New Zealand courts may not accept the traditional policy justifications for limiting negligence claims in mental trauma only to "recognised psychiatric illnesses." So long as a duty of care is established, then a plaintiff may perhaps be able to recover for all three categories of mental trauma identified.

Where the victim suffers both physical and mental injuries, and receives compensation under ARCIA for the physical injury, but is not prohibited from pursuing a common law action for mental trauma as the trauma did not arise out of the physical injury. The fact the law is unclear as to whether mental trauma of a lesser degree is actionable by

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[62] Above n 58.
[63] Above n 58, 568.
[64] Above n 58, 573.

itself is no obstacle, as the victim has suffered other recoverable damage, the physical injury, but he or she is simply prohibited by section 14 from pursuing common law damages for the physical injury.

3.3 Damages for Mental Trauma in Equity.

Another option in some circumstances may be to recover damages for mental trauma suffered on the grounds of a breach of a fiduciary relationship. The law in relation to fiduciary obligations is developing rapidly. There is a possibility that in situations such as *McDonnel*,[65] where a Hospital was sued for negligence, that a claim for a breach of fiduciary duty could also be brought for mental trauma suffered.

It has been held that a fiduciary relationship exists where:[66]

1. the fiduciary has scope for the existence of some discretion of power; and
2. the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and
3. The beneficiaries particular vulnerable to or at the mercy of the fiduciary holding the discretion or power.[67]

Traditionally, a breach of fiduciary obligations has involved the fiduciary having gained a personal advantage or a conflict of interest, but it would seem from this test these are requirements are no longer mandatory.

Damages may be available in equity for pure emotional distress. In *McCaskell* v *Bensemann*[68] it was held that if a fiduciary relationship can be established in a given situation, a breach of it, affecting a reasonably foreseeable interest of being free from mental harm, will suffice for recovery in equity. In that case damages were awarded for pure emotional damage arising from a breach of a fiduciary obligation. Recovery did not depend on proximity requirements or upon any other recoverable damage.

Furthermore, Cooke P in *Mouat* v *Clark Boyce* noted that there were many tort, contract, and statutory cases in New Zealand in which foreseeable distress had been an

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[65] Above n 55.
[66] *Frame* v *Smith* [1987] 2 SCR 99, 137.
[67] *DHL International (NZ) Ltd* v *Richmond* (1993) 4 NZBLC 103; the Court of Appeal endorsed the analysis of fiduciary relationships that was undertaken by the Supreme Court of Canada.
[68] [1989] 3 NZLR 75.

ingredient of the damages award and stated that "there appears to be no solid ground for denying that equitable compensation can likewise extend so far."[69]

However, it appears that the difference between compensation in equity and tort is narrowing, with many of the factors used to limit liability in tort, being slowly introduced into equitable damages. [70] Therefore, as claims proliferate, there may well be a development of similar restrictions as currently imposed in negligence, particularly for secondary victims of mental trauma. This is alluded to by Cooke P in *Mouat*, where his Honour would limit this head of recovery within the framework of equitable compensation, not only to those cases where it is foreseeable, but also where it is not excluded by any considerations of policy.[71]

4 The future development of the common law.

4.1 Intentional Infliction of emotional harm.

The tort of intentional infliction of emotional harm has been superseded by the development of negligence for psychiatric harm, as it will generally be easier to satisfy the requirements of the tort of negligence. Nevertheless, there are times as suggested earlier when it may be preferable to invoke this tort. The tort as it currently stands is very limited in the situations a victim may recover. However the tort may found actions in New Zealand in the following areas.

4.1.1 Mental distress alone.

The tort is currently limited to emotional distress that manifests itself physically, but this requirement should no longer be necessary for the following reasons.

This approach has been adopted in America for some time, with the *Restatement of Torts* in 1965 endorsing the view that there is liability if a person, by extreme and outrageous conduct, intentionally or recklessly causes severe emotional distress to another.[72] Nearly all States have accepted this proposition.[73] The "extreme and

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[69] Above n 58, 569.
[70] C Rickett and T Gardner "Compensating for Loss in Equity: The Evolution of a Remedy" (1994) 24 VULWR 19, 48.
[71] Above n 70, 41.
[72] Above n 37, 298.
[73] Above n 37, 298.

outrageous conduct" is required to found an action. This acts as a controlling device to limit liability.

While commonwealth jurisdictions have refused to accept such an extension, the time has come, particularly in New Zealand, to accept that damages for transient emotional trauma on its own is recoverable. However the requirement of extreme and outrageous conduct should not be imposed. This tort should remain a restitutionary remedy, with the award of damages reflecting the extent of the injury suffered. Not another a tort that focuses on the conduct of the defendant, a remedy that is already available in New Zealand in the form of exemplary damages.

New Zealand courts appear to be moving towards the award of damages for mental trauma of the lesser type described (ie humiliation, anger etc), even when there is no other recoverable damage.[74] Thus the logical progression of this tort is to remove the requirement of physical harm, which was essentially imposed to limit the numbers of plaintiffs who could recover.

Moreover, as the tort is essentially use in primary victim situations, there is no need to restrict the liability of the defendant by extreme and outrageous conduct, for the focus is still on the primary victim. The floodgates argument is therefore irrelevant. The logic for extending the liability to this sort of harm is stronger than for negligence claims, for here the act that caused the harm was intentional, or at the very least recklessly performed.

4.1.2 Liability to Secondary Victims.

As indicated earlier, liability for psychiatric harm has been extended to cover secondary victims in negligence cases.[75] Thus, in principle, if there is liability when the initial act is negligent, there must be liability when the act is intentional.

There are cases in other jurisdictions where the scope of shock liability flowing from an intentional act was thought to be at least as wide as in negligence. Bray CJ has stated:[76]

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[74] Above n 58, n 63, n 64.
[75] *Alcock* v *Chief Constable of S Yorkshire* [1992] 1 AC 392.
[76] *Battista* v *Cooper* (1976) 14 SASR 225, 230.

> In my opinion, an intentional tortfeasor is liable, not only for the injury caused directly to his victim, but to [sic] the injury indirectly caused to those connected with his victim or those witnessing the injury to the victim.

While the extension of such liability to secondary victims is logical, there are no cases in common law where the tort has been invoked by truly secondary victims. The reality would be that in instances where someone suffers psychiatric illness, as a result of what was inflicted upon the primary victim, the tort will be limited by the same factors as in negligence.[77] Thus, a victim is better off pursuing a claim in negligence, for he or she does not have to meet the higher threshold of "likely or intended" as required by this tort. Nevertheless, it is a viable alternative action to negligence, which may in some instances result in recoverable damages that would otherwise be excluded under a negligence action. This is because the intentional conduct may be interpreted as not requiring the secondary victim proximity requirements of negligence to be satisfied.

4.2 Tort of Negligence for Mental Trauma.

4.2.1 New Zealand's approach to the duty of care.

The problematic area of liability for the test of negligence has almost always been seen as the question of whether the defendant owed the plaintiff a duty of care.[78] In contrast, the legal principles applicable to the other central elements of the tort of negligence are relatively non-problematic, being applied in the same way to psychiatric illness as to physical injury.[79]

New Zealand has adopted the two stage approach in *Anns* v *Merton London Borough Council*[80] for determining if a duty of care is owed. In that case it was held that to determine whether a duty of care was owed, it is necessary to consider:[81]

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[77]If the factors used to limit negligence did not apply, then this tort would in many instances be easier to recover damages than in negligence.
[78]An exception is *Attia* v *British Gas Plc* [1988] QB 304, where the Court of Appeal found it more convenient to analyse the issues in terms of remoteness of damage.
[79]English Law Commission *Liability For Psychiatric Illness - Consultation Paper No 137* (London, 1995) 8.
[80][1978] AC 728.
[81]*South Pacific Manufacturing Co Ltd* v *New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282, 305.

1. the degree of proximity or relationship between the alleged wrongdoer and the person who has suffered damage. This is not simply a question of foreseeability as between parties, but involves a degree of analogy with cases in which duties are already established; and
2. whether there are any policy considerations which tend to negative or restrict the existence of a duty of care.

This test has since been abandoned in many other jurisdictions, including England, on the premise that in novel situations a duty of care should not be held to exist purely on the basis of foreseeability, and then deem not to exist if there is a valid reason for exclusion on policy grounds.[82] This has led to the development of more complicated requirements for establishing a duty of care in novel situations. However the Privy Council in *Invercargill City Council* v *Hamlin*[83] accepted that New Zealand courts may take a different path to English case law, if justified by valid policy reasons. In *Hamlin* the Court of Appeal refused to follow the House of Lords decision in *Murphy* v *Brentwood District Council,*[84] a decision that overruled the *Ann's* approach to determining whether a duty of care exists.

While the *Hamlin* decision is primarily concerned with a Local Council's liability in negligence for economic loss, the case is extremely useful in the area of mental trauma, for it means that New Zealand courts, by showing how differing conditions prevail in New Zealand (ie policy reasons), can take a different approach to the duty of care owed to mental trauma victims. Thus the door is open for the courts to make the tort of negligence less restrictive, in the knowledge that the Privy Council will probably accept such a view, even though it maybe contrary to English case law.[85]

4.3 The development of the Tort.

The English Law Commission's consultation paper "Liability for Psychiatric Illness" encapsulates the present law into the following propositions:[86]

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[82]Above n 37, 76.
[83][1996] 1 NZLR 513.
[84][1991] 1 AC 398.
[85]Even if the Privy Council is abolished, this line of reasoning would be the most justifiable for expanding a differing path of the tort of negligence.
[86]Above n 79, 9.

1. The plaintiff must have suffered a recognised psychiatric illness that, at least where the plaintiff is a secondary victim, must be shock-induced.
2. It must have been reasonably foreseeable that the plaintiff might suffer a psychiatric illness as a result of the defendant's negligence.
3. The plaintiff can recover if the foreseeable psychiatric illness arose from a reasonable fear of immediate physical injury to himself or herself.
4. Where the defendant has negligently injured or imperilled someone other than the plaintiff and the plaintiff, as a result, has foreseeably suffered a shock-induced psychiatric illnesses, the plaintiff can recover if he or she can establish the requisite degree of proximity in terms of:
   a) The class of persons whose claims should be recognised and;
   b) The closeness of the plaintiff to the accident in time and space and:
   c) The means by which the shock is caused.

It is under these propositions that the analysis of the development of this tort is undertaken.[87]

4.3.1 The plaintiff must have suffered a recognised psychiatric illness that, at least where the plaintiff is a secondary victim, must be shock-induced.

Traditionally, all awards for mental trauma under the tort of negligence have been limited to a recognised psychiatric illness, whereby the lesser mental harm (category three) of fear, anxiety etc are not recoverable. In the past the types of illness that have qualified for this cause of action have included "reactive depression,"[88] "pathological grief,"[89] "hysterical personality disorder,"[90] and "post traumatic stress disorder."[91] Over time, these types of illnesses have become accepted by society as being truly debilitating, often more so than physical injuries. Moreover, with the advancement of

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[87]The English law commission list three further propositions that relate to mental injury suffered as a result of property damage, communication of bad news, and miscellaneous situations, which are not discussed as they are beyond the scope of this paper.
[88]*Hevican* v *Ruane* [1991] 3 ALL ER 65, 67.
[89]Above n 50, 365.
[90]*Brice* v *Brown* [1984] 1 ALL ER 997, 1004.
[91]Above n 50, 365; This is the most common type of illness that is claimed for.

medical science in the field of mental trauma generally, the courts today will award damages to a victim of such illnesses.

As stated earlier, New Zealand courts seem to be ready to accept that damages are recoverable on their own for the lesser mental trauma which other jurisdictions still exclude. This approach has been adopted in a few controversial cases in Canada and Australia,[92] which reveals a cross-jurisdictional dissatisfaction with what is arguably an unnecessary limitation on the range of permissible claims.

There are a number of reasons why the law has refused to award damages for transient mental trauma. First, it was suggested that the law cannot put a value on such an injury,[93] but today much more is known about the effects of emotions on the body, and doctors can, with a considerable degree of precision, identify various forms of emotional distress and their effects.[94] Moreover the difficulty of valuing the injury is a poor rationale for denial when such damages are routinely awarded for pain and suffering which are consequent upon the commission of some other wrong.[95]

Other traditional arguments such as the problems of proof, that the damage is too remote, and the danger of false claims succeeding, are very difficult to sustain in light of the developments in medical knowledge; "psychiatry may arguably not be an 'exact science' but it is capable of uncovering simulation."[96] Claims such as these may well require extensive evidence from expert and lay witnesses, but this is the court's role. Simply because it may lengthen litigation cannot be a basis to deny a victim the right to recover damages for mental trauma which was caused by another's negligence.

Many judges have alluded to the fact that transient emotional trauma is something that is experienced by any normal person when someone is killed or injured, and as such damages should not be recoverable. However this argument is flawed in that it forgets the basic premise behind the action, that there has been an actionable tort committed.

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[92]Above n 37, 18.
[93]*Lynch* v *Knight* (1861) 11 ER 854, 855.
[94]Above n 37, 24-42.
[95]*Mcdermott* v *Ramadanovic Estate* (1988) 27 BCLR 45, 53: There are numerous examples in New Zealand where awards for pain and suffering are made, in contract, tort and equity: Eg *Mouat* v *Clark Boyce* [1992] 2 NZLR 559; *Gabolinscy* v *Hamilton City Corporation* [1975] 1 NZLR 150, damages were awarded for ill health resulting from the subsidence of a house.
[96]Above n 37, 43.

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This makes the mental trauma suffered different from a person who suffers the same mental trauma which is as a result of a blameless accident.

Most of these arguments are simply indirect ways of restating the traditional floodgates argument, which in most other areas of law has been rejected as a basis for limiting claims. Far too often, judges focus on the type of injury suffered by the victim, and not on the actionable tort committed. They use the type of harm to control the extent of liability. To use the damage sustained to limit liability is an irrelevant consideration. If it must be limited, then it is more appropriate that it be limited to the situations where the duty of care is owed. By allowing victims to recover for these lesser degrees of mental trauma, victims can get compensation for harm suffered as a consequence of another's negligence.

Moreover, it must be remembered, particularly in New Zealand, that awards for harm of this nature would only be modest. It is very unlikely that in New Zealand the quantifying of awards would ever be undertaken by juries. By maintaining this within the judges domain, they have the ability to assess relativity, and keep the awards within practical bounds. The courts by making practical awards, would not encourage thousands of potential litigants, as for most, the cost of litigation would not be worthwhile.

A further policy reason that New Zealand at least should take this step, is that under ACC, victims were entitled to compensation for mental consequences of an accident. Now, Parliament has clearly indicated that under the present no fault legislation cover is limited. Thus, there is a history in New Zealand of being able to receive compensation for mental trauma, which the courts interpreted and accepted as equitable. Hence it would seem that the common law should now step into the void and allow damages to be recovered in those situations where mental trauma alone has occurred through the negligence of another. Such an interpretation does not interfere with Parliamentary sovereignty, for the common law is not providing comprehensive cover, but only in those situations where fault can be attributed. The common law is simply adapting to meet the needs of society which has a tradition of state welfare.

This argument is not that dissimilar to what was put forward in *Hamlin*[97] to justify a different path being taken in New Zealand.

It is important that all forms of mental trauma is actionable, because "if the courts intend to persist with the requirement of a recognised psychiatric illness, then the existence of this damage and not the way [in] which it was brought about or the catalyst behind its development, [which] is what should really matter,"[98] will govern who can claim under negligence for mental trauma.

The requirement that the harm should be shock induced should also be eliminated, although there are very few situations where the harm is not as a result of sudden assault on the nervous system. By maintaining this requirement, the law is creating anomalies, and to get around them, courts are having to justify awards with spurious arguments that bring the law into disrepute. If indeed the harm suffered is a foreseeable consequence of one's negligence, should it matter whether that harm was shock induced, or was a gradual accumulation over a period of time? It is the duty of care owed that should determine liability not the manner in which it was inflicted. The argument that gradually inflicted harm is something that we all cope with again overlooks the fact that a tort has been committed, and the harm suffered is a consequence of it.

Where the harm accumulates much later on, a duty of care may actually be owed to the plaintiff, but liability may well be defeated under the head of remoteness. This would seem to be the approach advocated by Richardson J in *Mouat*:[99] where a duty of care is owed, then the scope of damages recoverable is essentially a question of remoteness of damage.

Eliminating the requirement of the harm having to be shock induced is not only appropriate as a matter of principle but would make the quantifying of damages easier, as the courts would no longer have to decide what part of the mental trauma is compensateable and what is not.

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[97] Above n 83.
[98] Above n 37, 24.
[99] Above n 58.

4.3.2 It must have been reasonably foreseeable that the plaintiff might suffer a psychiatric illness as a result of the defendant's negligence.

It is now clear that foreseeability is required not only of the plaintiff but also of the kind of damage suffered or, if more than one type of damage is inflicted, of each kind of damage. Therefore, when considering whether a duty of care is owed, the plaintiff must establish that the chain of causation between the defendants negligence and the psychiatric illness, considered ex post facto in the light of all that has happened, was reasonably foreseeable by the reasonable person.[100] Thus, for psychiatric injury, it has to be reasonably foreseeable that the plaintiff would suffer injury by nervous shock as a result of the accident, and that such reasonable foreseeability was necessary for recovery in nervous shock cases. Most cases require foreseeability of shock generally, of some kind of psychiatric damage, and that the precise nature of that damage need not be foreseeable.[101]

In applying this reasonable foreseeability test, and in the absence of special knowledge by the defendant, the plaintiff is to be assumed to be a person of normal disposition and phlegm, or of reasonable fortitude.[102] Once it has been established that a person of reasonable fortitude might foreseeably have suffered psychiatric illness, the normal "eggshell skull" rule of remoteness of damage applies, so that a plaintiff can recover for the full extent of the illness, even if there was a predisposition to mental illness or disorder.[103] This is essentially in line with other actions in negligence and should therefore be maintained.

However in *Page* v *Smith*,[104] the plaintiff had been directly involved in a car collision, and did not sustain any resulting physical injury, but alleged that he suffered from a shock-induced psychiatric illness.[105] On appeal to the House of Lords, the majority decided that, as the plaintiff was within the range of foreseeable physical injury, he should be regarded as a primary victim and that for such victims it was not necessary to show reasonable foreseeability on the part of the defendant that the plaintiff would

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[100]Above n 14, 432.
[101]Above n 37, 71.
[102]Above n 79, 14.
[103]Above n 79, 14.
[104][1995] 2 WLR 644.
[105]A recurrence of myalgic encephalomyelitis.

suffer injury by nervous shock. It was sufficient to show that the defendant could reasonably foresee some bodily injury to the plaintiff as a result of the accident.[106]

This decision draws a distinction between nervous shock suffered by primary victims and secondary victims. Now not only those who suffer nervous shock on top of bodily injury are to be regarded as primary victims, but also those who do not suffer bodily injury ought to be regarded as primary victims if they are within the range of foreseeable physical injury. Furthermore the House of Lords stated that the control mechanisms developed by the courts to contain claims for nervous shock are only applicable to secondary victims.

On the surface, this decision may seem to be a logical progression of the law. However this distinction between primary and secondary victims creates problems. How do you determine whether a plaintiff is within the range of foreseeable physical injury? As discussed earlier, a primary victim will always satisfy the current proximity requirements. This new distinction creates the problem of who falls within the "range of foreseeable physical injury." Moreover, a secondary victim cannot currently recover damages for psychiatric illness where the defendant injures or kills him or herself, for the law only awards damages as a result of an injury or death to someone other than the defendant.[107] However, now if the person claiming such an injury can show they are within the range of foreseeable physical injury, thus becoming a primary victim, they are entitled to recover damages for the mental trauma suffered.

Hence, this so called development should not stand. It simply creates further anomalies and complicates an area of law, which is already in a state of disarray.

4.3.3 The plaintiff can recover if the foreseeable psychiatric illness arose from a reasonable fear of immediate physical injury to himself or herself.

This has become accepted law in most jurisdictions since *Dulieu* v *White*[108] overruled *Victoria Railways* v *Coultas*.[109] The only real problem now is as a result of *Page* v *Smith*,[110] for it eliminates the application of the proximity requirements to the primary

[106] P Cane "Nervous Shock and Negligent Conduct" (1996) 112 LQR 22, 23.
[107] *Jaensch* v *Coffey* (1984) 155 CLR 549, 604; *Alcock* v *Chief Constable of South Yorkshire Police* [1992] AC 310, 407; *Page* v *Smith* [1995] 2 WLR 644, 647.
[108] Above n 47.
[109] (1888) 13 App CAS 222.
[110] Above n 104.

victim, and now, if a plaintiff can show that they are 'within the range of foreseeable physical injury,' a test that casts a wider net than "reasonable fear of immediate physical injury to a plaintiff," they can recover. However for the reasons suggested earlier, this development should not be followed, and the current status quo maintained.

4.3.4 Where the defendant has negligently injured or imperilled someone other than the plaintiff and the plaintiff, as a result, has foreseeably suffered a shock-induced psychiatric illness, the plaintiff can recover if he or she can establish the requisite degree of proximity in terms of:

a) The class of persons whose claims should be recognised; and
b) The closeness of the plaintiff to the accident in time and space; and
c) The means by which the shock is caused.

For some time, there was a debate as to whether the additional proximity requirements were necessary over and above the reasonable foreseeability requirement. Despite being heavily criticised, it has been accepted by most jurisdictions, including New Zealand. However, in New Zealand acceptance of this test has only be endorsed by lower courts.

The discussion here firstly critiques these requirements, then suggests how the New Zealand courts should approach the duty question.

a) The class of persons whose claims should be recognised.

The type of person who falls within this class is the primary victim, (whose inclusion is self explanatory), rescuers, fellow workers, those persons with a tie of love and affection to the primary victim and possibly also bystanders in exceptional circumstances. Each is considered in turn.

Rescuers.

The inclusion of rescuers is commonly justified by the policy consideration that "it is in the interest of all community members that rescue operations be encouraged by the courts, and this necessitates the granting of relief for loss sustained in the process."[111] The contentious issue with respect to rescuers is how long after the accident before

[111] Above n 37, 109.

they cease to be rescuers (the time and space requirement of proximity)? But as discussed later, it is consider that this requirement should be eliminated.

Bystanders.

The traditional stance has been to deny bystanders the right to recover damages for mental trauma on the basis that such persons must be presumed to be possessed of sufficient fortitude to endure the calamities of modern life, or alternatively that the defendants cannot be expected to compensate the world at large.[112]

However *Alcock,* while conceding that a mere bystander will ordinarily not be able to recover, left the door open for situations where there were exceptional circumstances. A bystander may recover "if the circumstances of catastrophe occurring very close to him were particularly horrific."[113] Nevertheless to date there has been no case where such a person has been able to recover.

Persons with a tie of love and affection to the primary victim.

Recovery for shock induced psychiatric illness has not been expressly limited to those with a parental or marital relationship with the primary victim, but in almost all reported cases, this has been the situation, with the exception of rescuers and involuntary participants.[114]

Alcock stipulated that the crucial factor was the quality of the relationship. The relationship was to be proved by reference to the strength of the bonds of love and affection between the parties, not by reference to a particular blood or marital tie.[115] It was accepted that the class of plaintiffs could not be tightly defined; to draw a line between one degree of relationship and another would be arbitrary and illogical.[116]

This requirement is clearly aimed at restricting liability (the floodgates argument), and as such there may be some validity to it. However the courts need to more liberal in accepting what will satisfy it. So long as a victim can prove such bonds exist, then even a good friend should be able to recover damages. Nevertheless the courts, while

[112] *Bourhill* v *Young* [1943] AC 92, 117; *McLoughlin* v *O'Brian* [1983] 1 AC 410, 422.
[113] Above n 50, 397.
[114] Involuntary participants involves a situation where someone was involved in the incident, but did not fear harm for themselves, but others around them. For an example see *Dooley* v *Cammel Laird & Co Ltd* [1951] 1 Lloyds Rep 271.
[115] Above n 50, 415.
[116] Above n 50, 422.

accepting the idea in principle, seem to be reluctant to impose liability beyond marital or parental relationships.

b) The closeness of the plaintiff to the accident in time and space.

This requires the plaintiff to be close to the accident in time and space, which is always satisfied when the plaintiff is at the scene of the accident. The courts extended this idea to include the situation where the plaintiff is involved in the immediate aftermath. The plaintiff is required to have "a direct perception of some of the events which go to make up the accident as an entire event, and this includes seeing the immediate aftermath of the accident."[117]

It is this "immediate aftermath doctrine" that creates many of the difficulties and anomalies in mental trauma claims. In *McLoughlin* the immediate aftermath covered the hospital where the injured relatives were taken after the accident. At the time of the accident the plaintiff was at her home. An hour or so afterwards she was informed of the accident and taken to the hospital, where she was informed that her youngest child was dead. She was allowed to recover damages for her mental trauma. However in *Alcock* a brother-in-law was taken to the mortuary some eight hours later and this was thought not to be part of the immediate aftermath.[118] While in yet another case, a widow who went to the hospital within an hour of death and 20 minutes later was told of her husbands death by a doctor, failed to recover damages as the judge held that the facts did not fall within the immediate aftermath, rather the shock was brought about by being told of the death.

There really is no consensus as to how far the immediate aftermath extends. Does it include:[119]

1. A plaintiff who sees the victim before immediate treatment is carried out, or is it sufficient to view the effects of the accident as the victim lies in a hospital bed after treatment or surgery?
2. A plaintiff who goes to the scene, but cannot get close enough to see what is happening and is told later that a relative has been killed or injured?

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[117] Above n 14, 422.
[118] The brother-in-law also failed by not being within the requisite class of persons.
[119] Above n 37, 150; many more examples are provided of situations where the law is unclear.

3. A plaintiff who is informed that a relative is killed, but is too overcome with grief and shock to go to the scene at all?

The difficulties and resulting injustices that this doctrine creates by having to determine whether the immediate aftermath includes a plaintiff or not, are insurmountable.

It is unnecessary to have such restrictions on liability. The 'class of persons' restricts liability to persons of a close tie of love and affection. This in itself eliminates the floodgates argument. So long as this is satisfied, then someone should be able to claim. Any problem in time, or consequent injury, can be dealt with under the head of remoteness, with the usual foreseeability test. By retaining such a requirement, it simply brings the law into disrepute, as it leads to arbitrary decision making.

c) The means by which the shock is caused.

In *McLoughlin* it was held that the shock must come through the sight or hearing of the event or its immediate aftermath, and that there could not be liability where the plaintiff's shock resulted from being told of the accident by a third party.[120] This position was reinforced in *Alcock*.[121] Plaintiffs have been able to recover where there is a combination of personal perception and third party communication.

This requirement, like the aftermath doctrine, has been questioned by courts and commentators alike as it creates ludicrous anomalies about whom may recover damages. In *Schneider* v *Eisovitch*[122] a plaintiff who was rendered unconscious in a car accident in which her husband was killed, and was told of her husbands death when she regained consciousness in the hospital, was allowed to recover damages for the psychiatric illness she sustained. Yet this would appear to be inconsistent with the denial of damages to a person who suffers shock on hearing the death or injury without being at the scene.[123]

Another area which creates problems under this requirement is learning of an event through a medium of television or radio. In *Alcock*, while generally denying liability by television as not falling within personal perception of the accident, the opinion was expressed that the witnessing of an actual injury to the primary victim on simultaneous

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[120] Above n 14, 423.
[121] Above n 50, 398, 400-401, 411, 417, 418.
[122] [1960] 2 QB 430.
[123] Above n 79, 27.

television might in some cases be the equivalent of personally perceiving it.[124] It must be remembered that in many cases television would provide a more graphical picture of the carnage that took place and would have a greater impact on the mind, than if one was actually present at the event. Naturally the fear is of unlimited claims. However this forgets that the mental injury suffered must be foreseeable and the plaintiff must still fall within the requisite class of persons.

The problem with limiting liability to shock through sight or hearing, is that it trivialises the impact of orally induced shock (shock induced by being told about the incident). There are many instances where people have suffered severe mental trauma as a consequence of being told about what happened to the primary victim and yet are denied the right to recover damages. There is not the same scepticism today of the medical professions ability to determine if someone has in fact suffered trauma, thus the floodgates objection no longer has the validity it perhaps once had.

This requirement, like the previous one, should be eliminated, for it again creates some arbitrary distinctions, with little justification. Foreseeability and the class of persons is sufficient to limit liability, while making the law less complex and more reputable by providing those who suffer the right to recover damages.

4.3.5 New Zealand's Approach.

In light of *Hamlin*,[125]with the retention of the *Ann's*[126] two stage approach to the duty of care, there is an ideal opportunity for the courts in New Zealand to adopt a sensible comprehensive attitude to the law of negligence for mental trauma victims.

The first stage requires foreseeability and a degree of analogy with cases in which duties are already established. This enables a New Zealand court to look to other cases, and to the tests used (such as the *Alcock*[127] test) for guidance, without accepting these tests as being conclusive in all scenarios.

It is consider that the *Alcock* test of proximity should not be adopted, because as discussed, the last two elements create more problems than they solve. The "class of persons" element of proximity should be employed by the courts to assist in

[124]Above n 50, 405, 417, 386-387.
[125]Above n 83.
[126]Above n 80.
[127]Above n 50.

determining whether mental trauma was reasonably foreseeable, but not made a prerequisite of liability. Arguably all the proximity test establishes is whether it is foreseeable that the plaintiff is owed a duty of care. By not making proximity a prerequisite, the court with respect to bystanders, involuntary participants and rescuers can consider each claim on their merits, and thus avoid having to overcome the anomalies the proximity test creates for such victims. Often the requirements of time and space, and how the shock was communicated will be of assistance in establishing if the plaintiff is owed a duty of care, but not determinative of the duty.

Therefore the first stage of the *Ann's* approach allows New Zealand courts to avoid the problems in other jurisdictions, whereby some victims can recover, while more deserving plaintiffs are denied.

Moreover, the second stage of the *Ann's* approach focuses on pure policy considerations that may restrict a duty of care. This enables New Zealand courts to develop law that reflects the relevant policy considerations, if any, that are important to New Zealand, and not those that apply in other jurisdictions. This is particularly important in New Zealand owing to a history of state welfare. The legislation reflects this history, and often many of the policy reasons put forward to negate or support situations where a duty of care should be recognised, revolve around the purpose of the legislation and the defendants role in that purpose.[128] The classic example is whether imposing liability in such a situation would result in a better, more efficient and accountable organisation, or would the imposition of a duty of care be a hindrance to its function. The persuasiveness of such an argument is clearly dependent on the legislation.

The traditional argument against the reasonable foreseeability test, the inclusion of transient emotional trauma and the removal of the requirement of it being shock induced is the expansion in the scope of liability to mental trauma victims. However, firstly, commentators seem to forget that it is reasonable foreseeability of the plaintiff suffering mental trauma, not simply of the plaintiff, which is a totally different test.

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[128] *Prince* v *The Attorney General* Unreported 15 July 1996, High Court Auckland, CP127/95, 16 -20; this case provides and example of the type of policy considerations that are argued for and against a duty of care, particularly when a member of the public sector is being sued for negligence causing the mental trauma. The legislation and its provisions were persuasive factors as to whether a duty of care was recognised.

Secondly the approach this paper advocates will result in a duty of care being recognised in more situations, but this is a natural progression that is in alignment with the development of medical science in the mental trauma field. But, more importantly while in many situations there may be an acknowledgment of liability, such as for transient emotional trauma, the reality is that there will be little or no damages awarded, particularly in New Zealand which is still far from the litigious "sue for anything society" of many other jurisdictions. Finally, in light of Richardson J's approach in *Mouat*, despite the increased recognition of those situations where a duty of care is owed, many claims will still be defeated by the negligence element of remoteness, where the trauma sustained is too remote to be compensateable.

Moreover, in those instances where the scope of liability has been expanded, primarily by legislation, there has not been a significant increase in litigation despite the widening the class of people who could claim and lowering the threshold of mental trauma required.[129]

The floodgates argument in New Zealand is weaker than most other jurisdictions. While ARCIA is not as comprehensive as its predecessors, a lot of mental trauma is covered under this Act. Therefore through section 14, many sufferers are prohibited from pursuing a civil action for damages. Moreover, as a result of practical awards, it will not be worthwhile pursuing such an action through the courts if the damage suffered is minor. Hence New Zealand can eliminate the need for mental trauma to be shock induced, and award damages for all three categories discussed, for there will not be an avalanche of litigation.

By adopting the above approach, retaining foreseeability as the primary cornerstone of the duty of care but using the other tests as ways of establishing whether a duty of care is owed, New Zealand can provide an equitable justice system in this area. Particularly to those who under ARCIA and the *Alcock* test are left stranded without an avenue to pursue.[130]

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[129] Above n 79, 104.

[130] This paper does not discuss whether this approach to the civil law is better than an overhauled ARCIA, as it is outside the scope of the paper. However in light of New Zealand's past history, the better option may still be a major overhaul of ARCIA.

5 Conclusion.

ARCIA today is limited in the cover it provides for people who suffer mental trauma. However as discussed, many of these people are not barred by section 14 from pursuing a civil claim for damages for mental trauma. Indeed, the restrictive nature of ARCIA, has bestowed upon the legal profession a duty when advising clients, to explore all possible causes of action available to victims of mental trauma.

As indicated there are a number of causes of action available to a victim of mental trauma under common law and equity. The type of tort used will depend on how the mental trauma was inflicted. The problem in New Zealand as a result of the no-fault legislation of the past twenty years, is the common law is in its infancy in this area. While arguably this is a problem, it is also an advantage, for it allows the Judiciary in New Zealand to analyse the developments of the law in other jurisdictions over this period, its associated problems, and then develop the law in a manner that reflects the policy considerations relevant to New Zealand's society

As suggested the law should be liberalised, so as all forms of mental trauma discussed are actionable. The floodgate fear of expanding the scope of liability to include all forms of mental trauma claims is unsubstantiated in most overseas jurisdictions. Moreover this fear is of less significance in New Zealand because of section 14 of ARCIA, the statutory bar that prohibits many common law actions.

The common law approach advocated in this paper is not one that seeks to open the door to a flood of mental trauma claims. It is one that will provide a fair and equitable compensation to victims of mental trauma, by eliminating those requirements of the current tests that create the anomalies and injustices.

There are still a number of hurdles that a claimant must overcome before being entitled to damages. But by liberalising the law in the way suggested, it provides those victims of mental trauma, who are currently left with no cover under ARCIA and cannot satisfy the present common law requirements, the opportunity to recover damages for mental trauma which is attributable to the fault of another person.

Appendix One. Relevant Sections of ARCIA.

(These have been abridged for convenience).

4. Definition of "personal injury" -(1) For the purposes of this Act, "personal injury" means the death of, or physical injuries to, a person, and any mental injury suffered by that person which is an outcome of those physical injuries to that person.

8. Cover for personal injury occurring in New Zealand-(1) This Act shall apply in respect of personal injury occurring in New Zealand.

(2) Cover under this Act shall extend to personal injury which-

(a) Is caused by an accident to the person concerned;

(3) Cover under this Act shall also extend to personal injury which is mental or nervous shock.....which is within the description of any offence listed in the first schedule of the Act.

(4) For the purposes of subsection (3) of this section, it is irrelevant that-

(a) No person can be or has been charged with or convicted of the offence; or

(b) The alleged offender is incapable of forming criminal intent.

14. Application of Act excludes other rights-(1) No proceedings for damages arising directly or indirectly out of the personal injury covered by this Act or personal injury by accident covered by the Accident Compensation Act 1972 or the Accident Compensation Act 1982 that is suffered by any person shall be brought in any Court in New Zealand independently of this Act, whether by that person or any other person, and whether under any rule of law or any enactment.

(3) Nothing in this section shall apply to proceedings relating to or arising from,-

(a) Any damage to property; or

(b) Any express term of any contract or agreement; or

(c) The unjustifiable dismissal of any person or any other personal grievance arising out of a contract of employment.

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