Susceptibilities to Nervous Shock: Dispensing with the Mythical 'Normal Person'

Des Butler*

One of the devices currently utilised by courts in Australia and England to limit recovery for psychiatric injury or 'nervous shock' caused by negligence is the notion that the reaction of the plaintiff is adjudged against the standard of a 'normal person', a person of a 'normal' susceptibility to psychiatric injury. Absent knowledge of a particular susceptibility, a defendant is regarded as only liable for psychiatric injury that might be expected to be suffered by a 'normal person'.

This article examines the historical basis of the 'normal person' requirement and its present day support, including the recent House of Lords decision in Page v. Smith and the judgment of Brennan J in Jaensch v. Coffey. A medical perspective is provided which reveals that the notion of a 'normal person' in the sense of a determined degree of susceptibility to traumatic stress is without medical validity. In light of this proposition, the various interpretations of the requirement are assayed, leading to the conclusion that the requirement is a test without specific content.

The proposition is advanced that the question of susceptibility is better dealt with by careful application of other negligence principles, including whether the risk of injury was foreseeable in the sense of not being far-fetched or fanciful, the fixing of the relevant standard and adjudging whether it has been breached, determination of whether the injury was in fact caused by the defendant's conduct, relevant defences, and assessment of damages.

All the world is queer save thee and me,
and even thou art a little queer
– Robert Owen

The history of the doctrine of 'nervous shock', or recovery for psychiatric injury, inflicted by negligence has been marked by a suspicion of the damage alleged to be suffered, and of the sufferer, and fears that recognition of a claim in a given case could lead to the opening of the floodgates to a multitude of claims. One means used to meet those concerns has been the reliance by some judges on the notion of a 'normal person' standard against which to measure claims: if the defendant's conduct was such that it is considered that a 'normal person' in the circumstances would not have been affected as the plaintiff was affected, then the defendant is adjudged to have owed no duty of care to the plaintiff. Despite the significance of the concept as an exclusionary device - indeed for one adjudged to be particularly susceptible to psychiatric injury it may be an insurmountable obstacle[1] – there is variability in approaches to its application. This variability was evident even in the most recent psychiatric injury case to reach the House of Lords, *Page v. Smith*.[2]

1. The 'normal person' requirement

Even before an action for 'nervous shock' per se was first recognised a little over 100 years ago,[3] causes of action involving damage in the nature of psychological harm proceeded on the basis that the reaction of the plaintiff had to be 'reasonable'. Thus, for example, recovery for damages for slander was premised upon special damage not depending upon the peculiarities of the particular individual,[4] liability instead being adjudged according to the

* LLB (Hons), Senior Lecturer-in-Law, Faculty of Law, Queensland University of Technology.

1 See N Mullany and P Handford, *Tort Liability for Psychiatric Damage*, Sydney, Law Book Co, 1993) at 227.

2 [1995] 2 All ER 736.

3 *Byrne v. Great South and Western Railway Company* (Unreported, Irish Common Pleas Division 1883, Irish Court of Appeal February 1884); *Bell v. Great Northern Railway Company of Ireland* (1890) 26 LR Ir 428.

4 *Allsop v. Allsop* 1865 H&N 534 at 539; 157 ER 1292 at 1294.

reaction expected from an 'ordinary' or 'reasonable' person.[5] This notion of no recovery unless the plaintiff possessed an 'ordinary strength' translated easily to cases of psychiatric injury.[6] In the early English case *Dulieu v. White & Sons*, involving a claim for nervous shock resulting from a pair-horse van being negligently driven into a pub while the plaintiff was serving behind the bar, Phillimore J mooted a distinction between experienced and cool citizens who were the 'ideal vir constans' and, for example, inexperienced and elderly countrywomen at Charing Cross, a duty being owed only to the latter with respect to incidents that would affect both. He suggested, without deciding, that a person venturing into the streets at hours of crowded traffic might be regarded as taking his or her chances: if he or she were not fit for the streets at hours of crowded traffic he or she should not go there.[7] Subsequently, a succession of judges supported the view that a duty of care will be owed only where harm might be expected of a person of a normal standard of susceptibility, unless the defendant knows or ought to know of the plaintiff's unusual susceptibility or vulnerability.[8]

In the House of Lords the requirement was first endorsed by Lords Wright and Porter in *Bourhill v. Young*,[9] holding at a time when duty of care was determined by reference to what a reasonable person would anticipate or foresee, that reasonable foreseeability assumed that the plaintiff was of a normal standard of health or susceptibility.[10] As Lord Porter remarked:

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5 Lynch v. Knight (1861) 9 HLC 577 at 592-594; 11 ER 854 at 861.

6 See, eg, *Cooper v. Caledonian Railway Company* 1902 SC 880 at 882 ('mind of ordinary strength'); *Ross v. Glasgow* 1919 SC 174 at 178 ('reasonable person with average nerves'); *Walker v. Pitlochry Motor Company* 1930 SC 565 at 569 ('normal persons'). In *Bunyan v. Jordan* (1937) 57 CLR 1 at 17 Dixon J cited *Allsop* in support of a denial of liability where there would be no lasting harm to a person of ordinary nerves and normal sensibilities.

7 [1901] 2 KB 669 at 685. This contrasted with the position in relation to those in their homes, where at least all persons of tender susceptibility would be expected to harbour and to whom a duty would be owed regardless of their vulnerability.

8 See, eg, *Walker v. Pitlochry Motor Company* 1930 SC 565 at 569 (per Lord Mackay); *Bunyan v. Jordan* (1936) 36 SR (NSW) 350 at 354-355 (per Jordan CJ); (1937) 57 CLR 1 at 14 (per Latham CJ), 18 (per McTiernan J).

9 [1943] AC 92.

10 [1943] AC at 109 (per Lord Wright), 117 (per Lord Porter). It was on this ground that their Lordships challenged the decision in Owens v. Liverpool Corporation [1939] 1 KB 394, which upheld the claims of plaintiffs who witnessed a collision imperil the coffin containing the body of their relative. Lord Wright suggested that the particular susceptibility there went beyond the range of normal expectancy or reasonable foreseeability (at 110) and Lord Porter considered that the Court of Appeal was not justified in thinking that the driver should have anticipated any injury to the plaintiffs as mere spectators (at 116).

> The driver of a car or vehicle, even though careless, is entitled to assume that the ordinary frequenter of the street has sufficient fortitude to endure such incidents as may from time to time be expected to occur in them, including the noise of a collision and the sight of injury to others, and is not to be considered negligent towards one who does not possess the customary phlegm.[11]

Lord Wright also accepted that the criterion of reasonable foreseeability did not extend beyond people of ordinary health or susceptibility and did not take into account the peculiar susceptibilities or infirmities of those affected which the defendant neither knew of nor could reasonably be taken to have foreseen. Nevertheless, he declined to lift the veil on precisely what was meant by 'an ordinary standard of susceptibility':

> This, it may be said, is somewhat vague. That is true, but definition involves limitation which it is desirable to avoid further than is necessary in a principle of law like negligence which is widely ranging and is still in the stage of development. It is here, as elsewhere, a question of what the hypothetical reasonable man, viewing the position, I suppose ex post facto, would say it was proper to foresee. What danger a particular infirmity that would include must depend on all the circumstances, but generally, I think, a reasonably normal condition, if medical evidence is capable of defining it, would be the standard. The test of the plaintiff's extraordinary susceptibility, if unknown to the defendant, would in effect make him an insurer. The lawyer likes to draw fixed and definite lines and is apt to ask where the thing is to stop. I should reply it should stop where in the particular case the good sense of the jury or of the judge decides.[12]

This dicta was subsequently endorsed by Lord Bridge in *McLoughlin v. O'Brian*,[13] and the notion of a 'normal fortitude' requirement received a measure of acceptance without detailed consideration in the House in *Alcock v. Chief Constable of South Yorkshire Police*[14] before finally being treated

[11] n 10 at 117.

[12] n 10 at 110.

[13] [1983] AC 410 at 436. See also Lord Wilberforce at 417 and Lord Russell at 429 who noted that the trial court had been asked to assume that the plaintiff's condition had been caused by shock and not by grief and that the plaintiff was of reasonable fortitude.

[14] Lord Ackner in discussing the claim of a stranger suggested that such a person could succeed if in the circumstances a 'reasonably strong-nerved person' would be shocked: [1992] 1 AC 310 at 403, while Lord Oliver would not exclude the claim of a bystander in circumstances likely to traumatise 'even the most phlegmatic' spectator: id at 416. In the court below Parker and Stocker LLJ accepted that duty of care depended upon the plaintiff being a person of sufficient fortitude or customary phlegm: id at 363, 371, 374.

as binding by the House of Lords in *Page v. Smith*[15] and two Court of Appeal decisions.[16]

In Australia, in *Jaensch v. Coffey* Brennan J expressly stated that unless a plaintiff's extraordinary susceptibility to psychiatric illness induced by shock was known to the defendant, the existence of a duty of care owed to the plaintiff was to be determined upon the assumption that he or she was of a normal standard of susceptibility, approving of the statement by Lord Wright in *Bourhill v. Young*.[17] However, of the other judges, Gibbs CJ assumed without deciding that psychiatric injury was not compensable unless an ordinary person of normal fortitude in the position of the plaintiff would have suffered some shock,[18] Murphy J expressed no definite view,[19] Deane J alluded to the fact that the courts below had found that any susceptibility on the part of the plaintiff was not such as to prevent a finding that she was 'a person of normal fortitude'[20] and Dawson J merely referred to the trial judge's findings that there was no force in the submission that the plaintiff's mental injury could be explained by reference to an abnormal susceptibility on her part.[21] Some lower courts have since interpreted *Jaensch v. Coffey* as having assumed without finally deciding that the plaintiff cannot recover unless an ordinary person of normal fortitude in his or her position would have suffered mental harm, and that for this reason there is

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[15] At least in the case of non-participant witnesses. Lord Ackner [1995] 2 All ER 736 at 742 and the dissenting Lords Keith (id at 741) and Jauncey (id at 749) argued in support of the rule applying whether the plaintiff was a participant or non-participant. On the other hand, Lord Lloyd (who gave the leading majority judgment) held that there was 'no need' to impose a requirement of the plaintiff being a person of 'ordinary phlegm' in the case of a participant victim (id at 759, cf 767 where his Lordship considered that even if the requirement applied it was satisfied in the case at hand). Lord Browne-Wilkinson did not express a view on the issue but generally agreed with Lord Lloyd.

[16] *Attia v. British Gas Plc* [1988] 1 QB at 311, 316; *McFarlane v. EE Caledonia Ltd* [1994] 2 All ER 1 at 9, 14.

[17] (1984) 155 CLR 549 at 568.

[18] n 17 at 556.

[19] n 17 at 557.

[20] n 17 at 609-610. Earlier, his Honour referred to the 'qualities of sang-froid and fortitude ("the customary phlegm": Bourhill v. Young) which some later members of the Bench have thought to be expected of ordinary members of the public': at 593.

[21] n 17 at 613. In the Full Court below, Wells J (with whom Mitchell ACJ and Cox J concurred) rejected normal fortitude had the status of a rule of law or precondition to recovery and was instead merely relevant to measuring whether the relevant risk was foreseeable: see (1983) 33 SASR 254 at 286-287.

currently a divergence between the law in Australia and in England.[22] Other cases, however, have been prepared to treat the dicta of Brennan J as representing the present law in this country.[23]

Even if a 'normal person' requirement were regarded as binding, an important corollary to the proposed rule is that while a person who is adjudged to be susceptible will be unable to recover where a person of 'normal' susceptibility would not have suffered mental harm, a susceptible person will nevertheless recover in circumstances where it is considered a person normally constituted in the position of the plaintiff would be affected.[24]

Also, few courts have explored the kinds of circumstances in which the defendant will be taken to have notice of a plaintiff's abnormal susceptibility to mental harm or at least have reason to believe that the plaintiff is

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[22] *Chapman v. Lear* (unreported, Qld SC, GN Williams J, 8 April 1988, at 9); *Petrie v. Dowling* [1992] 1 Qd R 284 at 287 (Qld SC). In *Chiaverini v. Hockey* (1993) Aust Torts Reports ¶81-223 at 62,257-62,259 the New South Wales Court of Appeal omitted any reference to a requirement of normal sensitivity in its list of 'principles to be derived from the common law cases'.

[23] See, eg, *Stergiou v. Stergiou* 1987 4 MVR 435 at 436 (ACT Sup Ct); *Miller v. Royal Derwent Hospital Board of Management* (1992) Aust Torts Reports ¶81-175at 61,499 (Tas Sup Ct); *Wodrow v. The Commonwealth* (1993) Aust Torts Reports ¶81-260 at 62,727-62,728 (Fed Ct). In several United States jurisdictions a comparable rule is supported in the sense that the requisite damage 'serious mental distress' is defined as being where 'a reasonable person normally constituted would be unable to adequately cope': *Rodrigues v. State of Hawaii* 472 P 2d 509 at 520 (1970) (Haw); *Leong v. Takasaki* 520 P 2d 758 at 765 (1974) (Haw). For cases applying this definition, see, eg: *Culbert v. Sampson's Supermarkets Inc* 444 A 2d 433 at 437 (1982) (Me); *Sinn v. Burd* 404 A 2d 672 at 683 (1979) (Pa); *Paugh v. Hanks* 451 NE 2d 759 at 765 (1983) (Ohio); *Bass v. Nooney Company* 646 SW 2d 765 at 773 (1983) (Miss); *Lejeune v. Rayne Branch Hospital* 556 So 2d 559 at 570 (1990) (La); *Thing v. La Chusa* 771 P 2d 814 at 830 (1989) (Cal). Other jurisdictions have applied a variety of rules requiring a normal standard of susceptibility: see, eg, *Portee v. Jaffee* 417 A 2d 521 at 528 (1980) (NJ) ('reaction to be expected of normal persons'); *Gammon v. Osteopathic Hospital of Maine Inc* 534 A 2d 1282 at 1285 (1987) (Me) ('reasonably... expected to befall the ordinarily sensitive person'); *Payton v. Abbott Labs* 437 NE 2d 171 at 181 (1982) (Mass) ('unless... defendant knew or should have known of special factors... degree of emotional distress which a reasonable person, normally constituted would have experienced'); *Hughes v. Moore* 197 SE 2d 214 at 219 (1973) (Va) ('reaction to be expected of a normal person ... absent a specific knowledge by the defendant of a plaintiff's unusual sensitivity'); *Hunsley v. Giard* 553 P 2d 1096 at 1103 (1976) (Walsh SC): ('reaction of a normally constituted person, absent defendant's knowledge of some peculiar characteristic or condition of the plaintiff').

[24] *Storm v. Geeves* [1965] Tas SR 252 at 269; *Mount Isa Mines Ltd v. Pusey* (1971) 125 CLR 383 at 405 (per Windeyer J); *Benson v. Lee* [1972] VR 879 at 881; *Jaensch v. Coffey* (1984) 155 CLR at 557 (per Nurphy J); *Galt v. British Railways Board* (1983) 133 NLJ 870; *Brice v. Brown* [1984] 1 All ER 997 at 1006; *Chapman v. Lear* (unreported, Qld SC, GN Williams J, 8 April 1988).

abnormally sensitive, let alone had occasion to determine such a case.[25] The archetypal example might be of a person causing an accident within the confines of a psychiatric hospital: to a certain extent this example might be caught by the scenario posed by a Scottish judge of an invalid lying in a critical condition where silence is requested and there is 'gross neglect' by the defendant of the warnings so provided.[26] A possible justification for the decision in *Owens v. Liverpool Corporation*,[27] which upheld the claims for nervous shock by members of a funeral party witnessing a collision with a hearse which imperilled a coffin that contained the body of their relative, might include reference to the expected vulnerability of mourners, particularly close family, at a funeral. In the United States it has been suggested that persons visiting loved ones in hospital may be expected to be vulnerable to distress,[28] at least where the loved one is terminally ill or on life support.[29]

It might be suggested that members of the mass media routinely come into contact with persons in a vulnerable state, for example through the loss of or injury to a loved one or through being involved in a distressing incident themselves. In Australia as much is recognised by paragraph 9 of the current Journalists' Code of Ethics, which states that journalists must 'respect private grief and personal privacy and shall have the right to resist compulsion to intrude on them.' A clear illustration of the media intruding upon a plaintiff of known susceptibility is provided by the New York case *Galella v. Onassis*[30] which involved a photographer who pursued a prolonged course of harassment of Jacqueline Onassis and her children, including such acts as ambushing them from behind bushes, intruding on them at public and private functions and generally following them around. In finding the photographer liable the judge commented that Mrs. Onassis and her children were people who had a special fear of startling movements, violent activity, crowds and other hostile behaviour as a consequence of the

[25] See *Walker v. Northumberland County Council* [1995] 1 .All ER 737 (QBD) where it was held that a council could not reasonably foresee that the plaintiff's workload would lead to him suffering mental illness but ought to have foreseen that there was a risk that on his return to work exposure to the same workload could lead to him suffering a second mental illness.

[26] See Lord Mackay in *Walker v. Pitlochry Motor Company* 1930 SC 565 at 569.

[27] [1939] 1 KB 394.

[28] *Maloney v. Conroy* 545 A 2d 1059 at 1064 (1988) (Conn SC).

[29] *Strachan v. John F Kennedy Memorial Hospital* 507 A 2d 718 (1986) (NJ).

[30] 353 F Supp 196 (1973) (USDC for NY, Cooper CJ).

assassination of both her first husband, John F Kennedy and her brother in law Senator Robert F Kennedy and that that particular susceptibility was a matter of common knowledge to virtually every citizen.[31]

Other instances that may be postulated include survivors of traumatic experiences who are interviewed or debriefed concerning the incident, such as the survivors of the collision between the aircraft carrier HMAS *Melbourne* and HMAS *Voyager*, especially those who in the immediate aftermath might reasonably be expected to be susceptible to any suggestion that the tragedy was the consequence of their act or omission.[32] Also, a doctor or therapist may be well positioned to know of the particular vulnerabilities of his or her patient, as in the New Zealand case of a doctor who wrote a letter regarding the paranoia of his patient which he knew would have an adverse effect upon her mental health if its contents were to become general knowledge, as it did by virtue of being produced in court,[33] the Maine case of the psychotherapist who began living with her patient's lesbian lover[34] and the Californian case of a psychologist who while treating two mothers for psychological problems that they were having with their sons sexually molested the boys.[35]

2. A medical perspective

Modern medical literature supports the proposition that the aetiology (causation) of trauma involves the interaction of three elements: individual factors, principally those which preceded the event; the traumatic event itself (the 'stressor') and the role the person played in the event; and the recovery environment that followed the event, including the availability

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[31] n 30 at 218.

[32] See *Miller v. Royal Derwent Hospital Board Management* (1992) Aust Torts Reports ¶81-175 where the plaintiff's psychological trauma was partly attributed to the feelings of guilt that resulted from an interview by a police constable which made the plaintiff feel that she was being blamed for the death of an intellectually disabled boy who had been in her care.

[33] *Furniss v. Flichett* [1958] NZLR 396.

[34] *Rowe v. Bennett* 514 A 2d 802 (1986) (Me).

[35] *Marlene F v. Affiliated Psychiatric Medical Clinic Inc* 770p 2d 278 esp at 282 (1989) (Cal) where the Supreme Court held that the psychologist clearly knew or should have known in each case that his sexual molestation of the child would directly injure and cause fear and emotional distress to his other patient, the mother as well as to the parent-child relationship that was also under his care.

and use of social supports.[36] There are a wide variety of factors personal to an individual that may figure in the aetiology of psychiatric symptoms. Generally the very young and the very old have more difficulty in coping with traumatic events than those who experience them during mid-life. A likely explanation is that young children have not yet developed adequate coping mechanisms to deal with the physical and emotional effects of traumatic events, while older people are inclined to have more rigid coping mechanisms and be less able to develop flexible approaches in dealing with the effects of stressors.[37] Good physical health has been said to enhance a person's resistance to stress;[38] conversely poor physical health may affect the ability to cope. For example, the effects of the stressor may be enhanced by physical disabilities characteristic of late life, particularly disability of the neurological or cardiovascular systems, such as decreased cerebral circulation, failing vision, palpitations, and arrhythmias.[39] A pre-existing psychiatric disorder, personality disorder, developmental disorder or some more serious condition, may also increase the impact of a stressor.[40]

Previous trauma,[41] particularly trauma in childhood,[42] may make a

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[36] See, eg, B Green, 'Identifying Survivors at Risk: Trauma and Stressors across Events' in JP Wilson and B Raphael (ed), *International Handbook of Traumatic Stress Syndromes*, New York, Plenum Press, 1993 (Hereinafter referred to as *International Handbook*) at 135; JD Kinzie 'Post-Traumatic Stress Disorder' in HI Kaplan and BJ Sadock (ed), *Comprehensive Textbook of Psychiatry*, 5th ed, Baltimore: Williams & Wilkins, 1989 hereinafter referred to as *Comprehensive Textbook V*), 1002-1003; N Parker 'Accident Litigants with Neurotic Symptoms' (1977) 2 *Medical Journal of Australia* 318 at 320-321; BL Green, JD Lindy and MC Grace, 'Post-traumatic Stress Disorder: Toward DSM-IV' (1985) 173 *Journal of Nervous and Mental Disease* 406 at 407; JL Herman, *Trauma and Recovery* London, Pandora, 1992 at 58.

[37] NC Andreasen, 'Post traumatic Stress Disorder' in *Comprehensive Textbook of Psychiatry*, 3rd ed, Baltimore, Williams & Wilkins, 1980 (hereinafter referred to as *Comprehensive Textbook III*), 1519-1520.

[38] See, eg, RJ Shepherd 'Employee Health and Fitness: The State of Art' (1983) 12 *Preventative Medicine* 644; JT Mitchell and A Dyregrov, 'Traumatic Stress in Disaster Workers and Emergency Personnel: Prevention and Intervention' in *International Handbook* at 909.

[39] Andreasen n 37 at 1520.

[40] n 37 D Tomb, 'The Phenomology of Post Traumatic Stress Disorder' (1994) 17 *Psychiatric Clinics of North America* 237 at 246-247.

[41] Tomb n 40 at 246-247; BA van der Kolk, 'The Trauma Spectrum: The Interaction of Biological and Social Events in the Genesis of the Trauma Response' (1988) 1 *Journal of Traumatic Stress* 273 at 281; B Raphael and JP Wilson, 'Victims of Disaster' in *International Handbook*, 108; M. Horowitz, 'Stress Response Syndromes: A Review of Post-Traumatic Stress and Adjustment Disorders' in *International Handbook*, 56. See n 36.

[42] GW Brown, TO Harris and J Peto, 'Life Events and Psychiatric Disorders: Nature of Causal Link' (1973) 3 *Psychological Medicine* at 159; Green, Lindy and Grace (1985) 173 *Journal of Nervous and Mental Disease* at 407; Kinzie in *Comprehensive Textbook V*, 1002.

person vulnerable to later stressors, particularly if the prior trauma is still to be resolved. For some, however, exposure to a previous traumatic event may make for greater resilience to stress - a form of 'stressor inoculation'.[43] Pre-incident stress education or training may also assist an individual in coping with stress: knowing what to expect and what to do may lessen feelings of helplessness and may enhance cognitive and practical mastery of the stressor and thus reduce terror and prevent dissociation.[44] Nevertheless some researchers believe that in situations which are chronic, broad spectrum or complex, mere education or training alone may have little or no effect on the stress thereby produced.[45] This may also be the case where the stressor has special significance for the individual, including the death of a co-worker or deaths of children.[46] A person's personality traits may be an important factor in coping with stress.[47] A person's sense of control and self esteem may be significant in some cases.[48] An inability to handle anger in an adaptive way has also been identified as predisposing a person to post traumatic stress disorder.[49] A person's coping style and the significance of the event to him or her are also individual characteristics affecting the way a traumatic event is processed.[50]

An accepted psychological approach assumes that psychopathology and normality are a matter of degree, not kind. It is a relevant rather than an absolute state. Predisposition to an emotional disorder is on a continuum, similar to, for example, the gradation of intellectual capacity.[51] The point

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[43] Horowitz in *International Handbook*, 57; Raphael and Wilson, "Victims of Disaster' in *International Handbook*, 108. See n 36.

[44] Raphael and Wilson in *International Handbook*, 108; Mitchell and Dyregrov in *International Handbook*, 908. Dissociation is a process whereby a part of the individual's consciousness becomes separated from the main stream and operates independently without contact with the main stream. See n 36.

[45] Mitchell and Dyregrov in *International Handbook*, 908. See n 36.

[46] T Williams, 'Trauma in the Workplace' in *International Handbook*, 927. See n 36.

[47] Horowitz in *International Handbook* at 49, see n 36. Brown, Harris and Peto (1973) 3 Psychological Medicine at 159; JJ Platt and SD Husband, 'Post Traumatic Stress Disorder in Forensic Practice' (1986) 4 *American Journal of Forensic Psychology* 29 at 48.

[48] Mitchell and Dyregrov in *International Handbook*, 908. See n 36.

[49] BA Singer, 'Psychological and Forensic Considerations in the Treatment of Post-Traumatic Stress Disorder' (1983) 1 *American Journal of Forensic Psychology* 3 at 5-6; Platt and Husband (1986) 4 *American Journal of Forensic Psychology* at 48.

[50] Green, Lindy and Grace n 36 at 407.

[51] BA Singer, 'Psychological and Forensic Considerations in the Treatment of Post Traumatic Stress Disorder (1983) 1 *American Journal of Forensic Psychology* 3 at 4; F Hocking, 'Human Reactions to Extreme Environmental Stress' (1965) *Medical Journal of Australia* 477 at 477-478.

on the continuum at which a stimulus by quality or quantity or both becomes trauma to a person varies widely. Some individuals can better withstand stresses and vicissitudes of life than others: each person has his or her own breaking point.[52] An often cited example is that of combat soldiers: though all soldiers on the firing line experience fear for their lives and may see cruel and abhorrent spectacles, only a small percentage of soldiers develop neuroses.[53] While research has shown that as stressors increase in severity, a greater proportion of people may be expected to have difficulty coping,[54] the notion of a 'normal person' to whom a specific level of susceptibility to traumatic stress may be ascribed is medically unsustainable.

3. 'Normal susceptibility': a test without specific content

The relevance of individual factors has been reflected at law, there being numerous cases dealing with plaintiffs having an increased vulnerability to psychiatric injury through age,[55] physical condition,[56] and pre-existing

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[52] JT Shurley, 'Types of Psychiatric Disabilities Following Trauma' (1967) 3 *Lawyers' Medical Journal* at 258; HW Smith and HC Solomon, 'Traumatic Neuroses in Court' (1943) 30 *Virginia Law Review* 87 at 90; Brown, Harris and Peto (1973) 3 *Psychological Medicine* at 162; Andreasen in *Comprehensive Textbook III*, 1519, see n 36. Tomb n 40 at 246-247; Herman, 58.

[53] See, eg, Smith and Solomon (1943) 30 *Virginia Law Review* at 121.

[54] Herman, 57; Hocking (1965) *Medical Journal of Australia* at 481; Smith and Solomon (1943) 30 *Virginia Law Review* at 90; Green, Lindy and Grace n 26 at 407.

[55] See, eg, Owens v. Liverpool Corporation [1939] 1 KB 394 (aged plaintiff); Mortiboys v. Skinner [1952] 2 Lloyd's Rep 95 (63 year old plaintiff); Turbyfield v. Great Western Railway Company (1938) 54 TLR 221 (infant plaintiff); Storm v. Geeves [1965] Tas SR 252 (infant plaintiff); Duwyn v. Kaprielian (1978) 94 DLR (3d) 424 (four month old plaintiff); Mellor v. Moran (1995) 2 MVR 461 (9 year old plaintiff); Nader v. Urban Transit Authority of New South Wales (1985) 2 NSWLR 501 (10 year old plaintiff); Hanley v. Keary (unreported, ACT SC, 28 January 1992) (6 year old and 3 year old plaintiffs); Coates v. Government Insurance Office of New South Wales (unreported, NSWCA, 15 February 1995) (14 year old and 11 year old plaintiffs).

[56] See, eg, *Victorian Railways Commissioners v. Coultas* (1888) 13 App Cas 222 (pregnant plaintiff); *Campbell v. James Henderson Ltd* [1915] 1 SLTR 419 (pregnant plaintiff); *Brown v. Glasgow Corporation* 1922 SC 527 (pregnant plaintiff); *Hogan v. City of Regina* [1924] 2 WWR 307 (pregnant plaintiff); *Hambrook v. Stokes Bros* [1925] 1 KB 141 (pregnant plaintiff); *Bourhill v. Young* [1943] AC 92 (pregnant plaintiff); *Brown v. Hubar* (1974) 3 OR (2d) 448 (plaintiff with weak heart); *Galt v. British Railways Board* (1983) 133 NLJ 870 (plaintiff with a weak heart).

psychological conditions.[57] With individual factors playing such a significant role, the problem posed for the law seeking to determine the limits of liability for trauma is whether the general objective pattern of conduct according to which members of the community are entitled to carry on their activities demands conformity by prospective plaintiffs to objective and external standards of susceptibility.[58] However, despite the prominence accorded to the 'normal person' or 'normal susceptibility' test by courts in England and some Australian judges, an insuperable objection remains regarding its legitimacy as a limitation of liability: it is, ultimately, a test without specific content.

3.1 Normal fortitude as part of the reasonable foreseeability test

In *Bourhill v. Young* Lords Wright and Porter justified the normal fortitude standard by reference to the reasonable foreseeability criterion: a reasonable person could only be expected to have in mind people of reasonably normal condition. An unusually susceptible person was supposed to be beyond any range of normal expectancy or of reasonable foreseeability.[59]

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[57] See, eg, *Dooley v. Cammell Laird & Co Ltd* [1951] 1 Lloyd's Rep 271 (pre-existing neurasthenia); *Mortiboys v. Skinner* [1952] 2 Lloyd's Rep 95 (pre-existing nervous condition); *Batchelor v. Rederij A&L Polder* [1961] 1 Lloyd's Reps 247 (pre-existing post-traumatic hysterical pseudo-dementia); *Chadwick v. British Railways Board* [1967] 1 WLR 912 (previous psychoneurotic symptoms 16 years before); *Gannon v. Gray* [1973] Qd R 411 (personality disposed to depression); *Duwyn v. Kaprielian* [1978] 94 DLR (3d) 424 (hypersensitivity from previous traumatic experience); *Brice v. Brown* [1984] 1 All ER 997 (hysterical personality disorder derived from traumatic childhood); *Miller v. Royal Derwent Hospital Board of Management* (1992) Aust Torts Reports ¶81-175 (previous traumatic experiences); *Jaensch v. Coffey* (1994) 155 CLR 549 (dependent personality predisposing to neurotic upset, anxiety and depression); *Chapman v. Lear* (unreported, Qld SC, 8 April 1988) (post-traumatic stress disorder from previous experiences during Vietnam War); *Loffo v. Giang* (unreported, NSWCA, 13 December 1990) (pre-existing paranoid schizophrenic illness); *Gillespie v. The Commonwealth* (1991) 104 ACTR 1 affirmed (1993) Aust Torts Reports ¶81-217 (pre-existing anxiety and depression and pre-existing personality factors).

[58] See also J Fleming, *Law or Torts,* 8th ed, Law Book Co, Sydney, 1944 at 165. Apart from anything else, such a requirement would be consistent with the law's approach to the issue of a defendant's idiosyncrasies which are generally excluded from consideration of the demands of reasonable care in the circumstances when determining whether there has been a breach of duty.

[59] [1943] AC at 110 (per Lord Wright), 117 (per Lord Porter); see also *McLoughlin v. O'Brian* [1983] AC 410 at 436-437 (per Lord Bridge); *Page v. Smith* [1995] 2 All ER 736 at 742 (per Lord Ackner). In the High Court, see *Bunyan v. Jordan* (1937) 57 CLR 1 at 14 (per Latham CJ), 17 (per Dixon J) and *Chester v. Waverley Corporation* (1939) 62 CLR 1 at 10 (per Latham CJ), 13 (per Starke J). To the extent that Brennan J in *Jaensch v. Coffey* proposed as his first 'guideline' to the objective criterion of reasonable foreseeability that unless a plaintiff's extraordinary susceptibility to psychiatric illness is known, the existence of a duty is to be determined upon the assumption that the plaintiff is of a normal standard of susceptibility, that guideline may be seen as being founded within the foreseeability test: (1984) 155 CLR at 568. See also *Brown v. Hubar* (1974) 3 OR (2d) 488 and, in the United States, *Payton v. Abbott Labs* 437 NE 2d 171 at 181 (1982) (Mass); *Lejeune v. Rayne Branch Hospital* 556 So 2d 559 at 572 (1990) (La).

This may suggest that susceptibility is a matter 'within' the foreseeability test in the sense that the relevant question is whether the defendant should reasonably foresee that a person of normal susceptibility might suffer psychiatric injury in the particular circumstances. The meaning properly assigned to foreseeability, however, is 'not far-fetched or fanciful'.[60] Accordingly, treating normal susceptibility in this fashion relegates the issue to an undemanding test which is easily satisfied. As Lord Ackner held in *Page v. Smith*, in the case of a minor car accident caused by the defendant failing to give way when turning out of a side road but resulting in no physical injury:

> The risk of injury by nervous shock was clearly foreseeable. A person of 'normal fortitude', whatever that imprecise phrase may mean, could well have been terrified by the event and the resultant assault on his or her nervous system could well have caused a post-traumatic neurosis of one kind or another.[61]

In other words, there may be few cases where it is far-fetched or fanciful that a person of normal fortitude could suffer psychiatric injury in the circumstances.

Indeed, the fallacy of treating susceptibility as part of a foreseeability test is that harm to an abnormally susceptible person may in fact be very much foreseeable.[62] Lord Justice-Clerk Aitchison in the Court of Session in *Bourhill v. Young's Executor* remarked, 'the fact that a woman may be pregnant and susceptible to shock arising from the crash of a collision is an easily foreseeable fact: it might almost be described as an obvious fact.'[63] In *Chadwick v. British Transport Commission* Waller J observed that 'the community is not formed of normal citizens, with all those who are less susceptible or more susceptible to stress to be regarded as extraordinary.

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[60] *Wagon Mound No. 2* [1967] AC 617; *Wyong Shire Council v. Shirt* (1980) 146 CLR 40.

[61] [1995] 2 All ER at 742. See also Lord Lloyd at 767 ('when cars collide at 30 miles per hour, the possibility that those involved will suffer nervous shock, resulting in some form of psychiatric illness, is not something to be brushed aside') and the approach of Woolf LJ in *Attia v. British Gas Plc* [1988] 1 QB 304 at 316.

[62] See developments in relation to physical injury following *Haley v. London Electricity Board* [1965] AC 778 the House of Lords took cognizance of the fact that statistics showed that at least 1 in 500 Britons were registered as blind and the common knowledge and experience of ordinary people that blind persons made their way alone with their white sticks along busy footpaths, in order to hold that a duty of care was owed to blind persons on city streets.

[63] 1941 SC 395 at 438.

There is an infinite variety of creatures, all with varying susceptibilities.'[64] Society is made up of all sorts and conditions of men and women: the average person in the street is not necessarily the average person.[65]

Windeyer J in *MIM v. Pusey* also expressed misgivings about a rule that denied recovery to a plaintiff regarded as susceptible to psychiatric injury when a similar occurrence would not harm a person regarded as emotionally and mentally normal.[66] One of those misgivings was that a rule restricting duty to those of a normal standard of susceptibility may be thought difficult to reconcile with the egg-shell skull rule, pursuant to which it has long been recognised that tortfeasors take their victims as they find them. Indeed, it has been suggested that the egg-shell skull rule is in fact an illustration of a foreseeability test of remoteness of damage in that it does no more than recognise that the possession by the plaintiff of special proclivities capable of enlarging the lesser harm which would be suffered by others is always foreseeable as a possibility notwithstanding that the particular proclivity and the way in which it worked itself out in producing the special harm may not have been foreseeable even as possibilities.[67]

This paradox may be resolved in the area of psychiatric injury in the same manner as it was resolved in relation to physical injury: the purpose of duty is recognised as being concerned with the limitation of the scope of liability rather than the extent of recovery of an individual plaintiff. As such, extraneous policy considerations may serve to limit an otherwise untrammelled foreseeability test for the purposes of determining the existence of a duty of care, whereas greater latitude is permissible with respect to the extent of recovery once such a duty is recognised as being owed. Put another way, once a plaintiff navigates the narrow channel of establishing that, absent special knowledge, a person of normal fortitude may have

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[64] [1967] 1 WLR 912 at 922.

[65] See Evatt J in *Chester v. Waverley Corporation* (1939) 62 CLR 1 at 26, citing with approval AL Goodhart, *Essays in Jurisprudence and the Common Law,* Cambridge: Cambridge University, 1931 at 126-127.

[66] (1970) 125 CLR 383 at 406, citing in support *Dooley v. Cammell Laird & Co* [1951] 1 Lloyd's Rep 271 where the plaintiff's pre-accident neurasthenia was disregarded when determining liability.

[67] *Havenaar v. Havenaar* [1982] 1 NSWLR 626 at 630 (per Glass JA).

suffered mental harm, he or she reaches the 'open sea' of recovery for the full loss.[68]

If that is so, however, for the purposes of determining duty the requirement of 'normal susceptibility' operates *outside* rather than *inside* the foreseeability test and is no longer measured by whether or not it is far-fetched or fanciful. It follows that to constitute a legitimate limiting device, there must be some mechanism by which a plaintiff in a given case can be adjudged to be of normal susceptibility or not.

3.2 Leaving susceptibility to the jury

Some cases have evaded defining the mechanism by treating the question of normal susceptibility as one to be left to the jury.[69] Some United States courts have indicated their comfort at leaving such a determination to an inscrutable verdict of a jury as representatives of a cross-section of the community who are considered best placed to decide the circumstances in which society should recognise a claim.[70] The obvious practical deficiency of this approach in modern Australia and England is that most psychiatric injury cases are tried without a jury. In any event, as normal fortitude is proferred as a control on foreseeability as a determinant of the existence of a duty of care, it is a question of law and properly therefore a matter for the determination of the trial judge, not a jury.

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[68] See, eg, *Owens v. Liverpool Corporation* [1939] KB 294 at 400-401; *Bourhill v. Young* [1943] AC 92 at 109-110; *Mount Isa Mines v. Pusey* (1971) 125 CLR 383 at 390 (per Barwick CJ), 406 (per Windeyer J); *Benson v. Lee* [1972] VR 879 at 881; *Taylor v. Weston Bakeries Ltd* [1976] 1 CCLT 158 at 162 (Sask DC); *Loffo v. Giang* (unreported, New South Wales Court of Appeal, 13 December 1990 (per Meagher JA); *Wodrow v. The Commonwealth* (1993) Aust Torts Reports ¶81-260 at 62,727-62,728. For examples of the application of this approach to cases of physical injury see, eg, *Smith v. Leech Brain & Co Ltd* [1962] 2 QB 405; *Levi v. Colgate-Palmolive Pty Ltd* (1941) 41 SR (NSW) 48 at 52, affirmed High Court (1941) 65 CLR 663n; *Beavis v. Apthorpe* (1964) 80 WN (NSW) 852 at 857. In practice, though, odd results may still follow, especially where the defendant admits liability and the case proceeds on the matter of assessment of damages only: whereas measurement against a standard of normal susceptibility is relevant when liability is in issue, such measurement has no place when liability is admitted. It is possible, therefore, for the issue of normal fortitude to stand as a disincentive for a defendant to admit liability, with a possible consequence of a prolongation of litigation.

[69] This approach was alluded to by Lord Wright in *Bourhill v. Young* [1943] AC 92 at 110 by his reference to the thing stopping where the good sense of the jury decides.

[70] See, eg, *Rodrigues v. State of Hawaii* 472 P 2d 509 at 521 (1970) (Haw); *D'Ambra v. United States of America* 338 A 2d 524 at 529 (1975) (RI); *Hunsley v. Giard* 553 P 2d 1096 at 1103 (1976) (Wash); *Payton v. Abbott Labs* 437 NE 2d 171 at 181 (1982) (Mass); *Bass v. Nooney Company* 646 SW 2d 765 at 773 (1983) (Mo); *Paugh v. Hanks* 451 NE 2d 759 at 767 (1983) (Ohio).

3.3 Subjective approaches to susceptibility

Other courts have chosen to duck the identification of the relevant mechanism by being satisfied that whatever the meaning of normal susceptibility, there was no suggestion or at least insufficient evidence that the particular plaintiff before them was abnormally sensitive to psychiatric injury.[71] Essentially, therefore, for these courts the argument proceeded as follows:

1. P is not abnormally sensitive.
2. Duty requires normal susceptibility.

(Therefore) P is owed a duty.

where P represents the particular plaintiff and it is assumed that any other requirements for the existence of a duty of care are satisfied. If premise 1 were altered to read that P *is* abnormally sensitive, then a different conclusion would follow.

Administratively this is an attractive approach, particularly when coupled with the requirement supported by Kneipp J in *Petrie v. Dowling* that it is for the defendant to point to clear evidence that the plaintiff was abnormally sensitive to psychiatric illness.[72] Such a test would enable the court to place reliance upon psychiatric evidence as to the psychological makeup of the plaintiff and would be able to decide whether on the balance of probabilities the onus had been discharged by the defendant in showing that any predisposition prevented the finding that the plaintiff was a person of normal fortitude.[73] However, if the requirement of normal fortitude is founded on the notion that a defendant is entitled to expect an objective standard of fortitude amongst the community, this argument, which is based

[71] See, eg, *Mount Isa Mines Ltd v. Pusey* (1971) 125 CLR 383 at 391 (per McTiernan J), 405 (per Windeyer J), 417 (per Walsh J); *McLoughlin v. O'Brian* [1983] AC 410 (plaintiff assumed to be of normal fortitude); *Jaensch v. Coffey* (1984) 155 CLR 549 at 556 (per Gibbs CJ), 609 (per Deane J), 613 (per Dawson J.); *Petrie v. Dowling* [1992] 1 Qd R 284 at 287; *Hevican v. Ruane* [1991] 3 All ER 65 at 66; *Ravenscroft v. Rederiaktiebólaget Transatlantic* [1991] 3 All ER 73 at 76.

[72] [1992] 1 Qd R 284 at 287, citing *Watts v. Rake* (1960) 108 CLR 158 which Gibbs CJ in *Jaensch v. Coffey* (1984) 155 CLR 549 at 556 stated applied equally to cases of psychiatric injury.

[73] See *Jaensch v. Coffey* (1984) 155 CLR 549 where there was evidence that the plaintiff was more than usually dependent on both her husband and the stability of her marriage with the consequence that she was more than usually predisposed to neurotic upset, anxiety and depression but where that dependence and resulting predisposition were not considered sufficient to prevent the finding that she was a person of normal fortitude: see, eg, Deane J at 610.

on the subjective condition of the particular plaintiff goes no way toward answering the relevant question. It also provides no direction for the resolution of future cases.

3.4 Objective approaches to susceptibility

As an objective, rather than subjective, question the normal susceptibility requirement would ask not whether the particular plaintiff is or is not abnormally sensitive to psychiatric injury but rather whether a hypothetical person with a normal standard of susceptibility in the position of the plaintiff would suffer psychiatric injury.[74] The argument, may be summarised as follows:

1. P is not abnormally sensitive
2. Duty requires normal susceptibility
3. Someone of normal susceptibility in P's position may suffer psychiatric harm.

(Therefore) P is owed a duty.

So argued, premise 1 may appear to be superfluous. Indeed, on this occasion altering premise 1 to read that P *is* abnormally sensitive does not alter the validity of the conclusion. This inference reflects the corollary to the normal susceptibility requirement, noted above as supported by ample authority, that a susceptible person will nevertheless recover in circumstances where a person normally constituted in the position of the plaintiff would be affected.

Lord Wright in *Bourhill v. Young* adopted the standard of 'a reasonably normal condition, *if medical evidence is capable of defining it*' (emphasis added). However, as already seen, medical literature supports the view that, psychologically speaking, there is no such thing as a 'normally' constituted individual in the sense of having conformity to some fixed standard of

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[74] See, eg, *Barnes v. The Commonwealth* (1937) 37 SR (NSW) 511 at 515; *Powlett v. University of Alberta* [1934] 2 WWR 209 at 228 (Alb SC (AD)); *Boardman v. Sanderson* [1964] 1 WLR 1317 at 1321; *Vana v. Tosta* (1967) 66 DLR (2d) 97 at 101 (Can SC); *Taylor v. Weston Bakeries Ltd* [1976] 1 CCLT 158 at 162 (Sask DC); *Brice v. Brown* [1984] 1 All ER 997 at 1007; *Stergiou v. Stergiou* (1987) 4 MVR 435 at 437 (ACT SC); *Chapman v. Lear* (unreported, Qld SC, GN Williams J, 8 April 1988); *Loffo v. Giang* (unreported, NSW CA, 13 December 1990, per *Meagher JA); McFarlane v. EE Caledonia* [1994] 2 All ER 1 at 9,14. In the United States, see, eg, Portee v. Jaffee 417 A 2d 521 (1980) (NJ); *Strachan v. John F Kennedy Memorial Hospital* 507 A 2d 718 at 742 (1986) (NJ); *Bass v. Nooney* 646 SW 2d 765 at 774 (1983) (Mo).

vulnerability. Thus, even now, 50 years after *Bourhill v. Young*, psychiatric medicine is unable to define what constitutes a 'normal condition' in the sense that Lord Wright intended it: it is not possible to set up any concrete attributes that may be ascribable to the 'normal' person.[75] Lord Wright suggested that the determination should be left to the 'good sense of the jury or of the judge.'[76] Without a medically supportable definition, therefore, at heart an objective approach descends, overtly or covertly, to the level of an intuitive value judgment by the trial judge (or jury) of how the illusionary normal person would have reacted.

This conclusion stands despite varied attempts at accretion of aids to the determination of the objective test. Some courts have held that the hypothetical 'normal' person should not be divorced from the context in which the particular plaintiff finds him or herself.[77] This is, in effect, a combined objective-subject test. The attributes of the particular plaintiff help inform whether a person of normal vulnerability might be affected in the circumstances. In *The Rigel* the court took into account the reaction expected from an experienced sailor, as the plaintiff was, to witnessing a ship looming through the fog toward the plaintiff's lightship,[78] rather than the reaction of a 'reasonable person' which might be thought to also embrace an inexperienced cadet or lay visitor to the lightship. Similarly, in *Wodrow v. The Commonwealth*, which involved an allegation by an officer of the Department of Defence that he suffered psychological harm after being reprimanded, Gallop and Ryan JJ held that those who serve in the Defence Force or in the Department of Defence must expect on occasions to be reminded of their duties in stern, unequivocal terms and those who are unduly sensitive to plain-spoken criticism or exhortations to improve performance by their supervisors are not well suited to employment in the defence of the nation whether in times of war or peace.[79] This approach may support the view that the issue is not one of a hypothetical reasonable

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[75] See also *Wallace v. Kennedy* (1908) 16 SLT 485 at 486; *Walker v. Pitlochry Motor Company* 1930 SC 565 at 569. In *Mount Isa Mines Ltd v. Pusey* (1971) 125 CLR 383 at 406 Windeyer J stated: 'The idea of a man of normal emotional fibre as distinct from a man sensitive, susceptible and more easily disturbed emotionally and mentally is I think imprecise and scientifically inexact.'

[76] *Bourhill v. Young* [1943] AC 92 at 110.

[77] See the expectations of a reasonable defendant are no longer those of a reasonable person on the Clapham Omnibus divorced from the setting in which the defendant finds him or herself.

[78] [1912] P 99 at 103, 106.

[79] (1993) Aust Torts Reports ¶81-260 at 62, 717.

person in a vacuum but rather the fortitude of a reasonable member of the Defence Forces which is relevant in such a case.[80]

This approach has the advantage of being able to be informed to some extent by medical knowledge. For instance, where the plaintiff has special pre-incident training or education, like that given to emergency workers, the degree of susceptibility expected would not be that of a normal member of the public but rather the normal susceptibility of an emergency worker who has been pre-trained. Such an approach might be considered to exclude, for example, a claim by an ambulance officer for psychological trauma alleged to have been suffered from operations associated with a car accident, which the officer is expected to encounter as part of his or her normal daily duties but which would be affronting for other members of the wider community. Even so, it has been mentioned that there may be some occurrences which no amount of pre-incident education or training can enable emergency workers to overcome. In such a case it could be successfully argued that a plaintiff with the normal susceptibility expected of an emergency worker ought to recover.

Similarly, as already noted the plaintiff's age may have some relevance to psychological trauma. An objective-subjective approach might involve adjudging the reaction of, for example, an infant plaintiff not by the standards of the reaction of an ordinary adult but rather the normal susceptibilities of an infant of the plaintiff's age. In *Duwyn v. Kaprielian*[81] the defendant negligently backed his car into the door of a parked car, denting it and breaking the window so that glass was scattered throughout the interior. No one in the car was physically injured but the four month old infant plaintiff who had been sitting on his grandmother's lap in the front seat later developed a behavioural disorder. The other plaintiff, his mother, was shortly on the scene and became hysterical. The Ontario Court of Appeal held that the infant plaintiff was entitled to compensation, deciding that his age and 'undoubted increased susceptibility to emotional trauma because of it' did not mean that he was not of a normal standard of susceptibility so as to put the risk of injuring one such as him beyond the limits of foreseeability.[82] By contrast, it was held that a person of normal

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[80] See also *Wigg v. British Railways Board* [1986] *The Times*, 4 February (reasonably experienced traindriver); *Ross v. Glasgow* 1919 SC 174 at 178 (average nerves of a citizen of Glasgow with common knowledge of operation of tramway cars).

[81] (1978) 94 DLR (3d) 424.

[82] n 81 at 439-440. See *Mellor v. Moran* (1985) 2 MVR 461 (increased vulnerability of an infant plaintiff).

standard of susceptibility in the position of the mother would not have sustained mental injury and that her particular hypersensitivity was to account for the injury that she sustained.[83] Such observations regarding the expected increased susceptibility of an infant might apply with equal force to the claim by a person of advanced years.[84]

Nevertheless, these contextual considerations cannot disguise the base issue. While to some degree it involves a better informed value judgment, it is a value judgment nonetheless. Whether, for example, an ambulance officer with the normal susceptibility of a pre-trained and educated emergency worker might suffer psychological harm from a particular incident remains an intuitive decision. If a 'normal' officer might be expected to cope with 'run of the mill' car accidents, but may still be regarded as being 'normal' if they suffer psychological harm following a catastrophe or an incident involving the death of a co-worker, it is a matter of intuitive judgment in the cases between those extremes as to whether a particular reaction is 'normal' or not.

Moreover, it may beget further, difficult questions. For instance, how much and what type of pre-incident training and education qualifies a hypothetical emergency worker as being of 'normal susceptibility'? How are previous experiences, which are a factor in the aetiology of trauma, but which will differ from emergency worker to emergency worker, to be taken into account? At what age would a person not be adjudged by a normal standard of susceptibility but instead be adjudged by the the normal standard of susceptibility expected of an infant or aged person?

Some courts have relied on the circumstances as informing their judgment regarding the 'normalcy' of the plaintiff's reaction. Thus, if particular conduct has been carried on for a period of time without adverse effect, some judges draw the inference that a person of normal susceptibility would not be deleteriously affected by the conduct and consequently a person who was adversely affected suffered only by virtue of his or her idiosyncracies. For example, where there was a 20 year history of initiation practices at a university, in which first year students were subjected to a

[83] n 81 at 442. There was, in addition, some doubt as to whether the mother had suffered the requisite damage in the form of a recognisable psychiatric illness: id at 443.

[84] See *Mortiboys v. Skinner* [1952] 2 Lloyd's Rep 95. If this were the case, there may be ramifications for the original example mooted by Phillimore J in *Dulieu v. White of* an elderly country woman at Charring Cross. In part, that example is premised on an old person being of greater susceptibility, but would be of lesser effect if the standard were that of the normal susceptibility of an aged person.

range of sometimes humiliating activities,[85] but which had only ever resulted in one student suffering a slight physical injury, the psychiatric condition sustained might more easily be attributed to the unusual susceptibility of the particular plaintiff.[86] Similarly, where there was no evidence that a council had previously encountered mental illness in any of its area officers or middle managers carrying heavy workloads, an English judge held that the council was not liable for an area social services manager who suffered stress-induced mental illness.[87] Whatever its veracity in these cases, this solution falls on the absence of utility: not all conduct has a track record that may serve as a yardstick to the potential for causing psychological harm. Indeed, most accidents, like motor vehicle accidents, involve single instances of defendant misconduct rather than conduct by a defendant over a prolonged period.

A related reliance on the circumstances of a case involves the recognition of categories of case in which it is accepted that a person of normal vulnerability might suffer psychological harm. This approach is consistent with cases which have not addressed a requirement of normal fortitude on the part of the plaintiff as being in issue.[88] Likewise, the *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW), s4 and its progeny in the Australian Capital Territory and Northern Territory, which permits recovery for nervous shock by the parent or spouse of a person killed, injured or imperilled, and by other relatives who see or hear the person killed, injured or imperilled, make no reference to the plaintiff needing to be of a normal standard of susceptibility. Even those cases adopting the common law meaning of 'nervous shock' for the purposes of s4 have not referred to such a requirement.[89] One interpretation of these decisions may be that they support liability being determined regardless of the plaintiff's susceptibility

[85] See the facts in *Powlett v. University of Alberta* [1934] 2 WWR 209.

[86] As indicated by Ewing J in his dissent in *Powlett v. University of Alberta* [1934] 2 WWR 209 at 228. The three judges in the majority, however, held that the University Board had breached its duty of care to the student by unofficially condoning the initiation practices, without discussion of whether a person of ordinary vulnerability would have suffered harm affected the existence of that duty.

[87] Walker v. Northumberland County Council [1995] 1 All ER 737 at 752 (although the council was held liable for a second mental illness resulting from the manager being assigned the same workload on his return from recuperating after his first mental illness).

[88] See, eg, *Anderson v. Smith* (1990) 101 FLR 34; *Spence v. Percy* [1992] 2 Qd R 299; *Klug v. Motor Accidents Insurance Board* (1991) Aust Torts Reports ¶81-134.

[89] See, eg, *Swan v. Williams (Demolition) Pty Ltd* (1987) 9 NSWLR 172 (CA); *Government Insurance Office of New South Wales v. Maroulis* (unreported, NSW CA, 6 April 1990).

to trauma. However, an alternative interpretation is that in the circumstances of these cases, which largely dealt with the death, injury or peril of a loved one, it is implicit in the circumstances that a person of normal fortitude may suffer the requisite damage.

This approach does not take into account that duty is fashioned according to the circumstances in which the defendant finds him or herself and as such may not be amenable to generic descriptions.[90] It also suffers the defect of the absence of an obvious syllogism for the determination of a novel case. As such it may amount to no more than a de facto recourse to an intuitive value judgment approach applied to cases which have common characteristics.

A measure of judges making value judgments is inherent in the court system. For example, whether to admit particular evidence or to permit a particular question to be put to a witness may involve a value judgment by the judge. The difficulty with a value judgment being built in to the rules which may determine the existence of a duty of care in a given case is that such a test is apt to lead to arbitrary decisions allowing or denying recovery, involving a capricious selection between otherwise meritorious claims. A value judgment by a judge may not accord with the value judgment of another judge regarding the same circumstances, as occurred in *Page v. Smith*, where Lords Ackner and Lloyd considered that it was not far-fetched or fanciful that psychiatric injury could be suffered in circumstances where the plaintiff was involved in a minor collision causing no physical injury, not even a bruise from his seat belt,[91] while Lords Keith and Jauncey dissented, intuitively deciding that a 'normal person' would not have suffered psychiatric injury in such a case.[92] Indeed, on appeal other judges might

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[90] *Loffo v. Giang* (unreported, NSWCA, 13 December 1990).

[91] [1995] 2 All ER at 742 (per Lord Ackner), 767 (per Lord Lloyd). Lord Lloyd in fact held that in the case of a 'primary victim' who suffers psychiatric injury from his or her participation in the traumatic event (as opposed to a secondary victim like a bystander), it is inappropriate to ask whether the plaintiff was of 'ordinary phlegm', as in the case of physical injury. Such a control device was unnecessary 'since the number of potential claimants is limited by the nature of the case': id at 760. In any event, as noted, his Lordship thought it satisfied. The third judge in the majority, Lord Browne-Wilkinson, did not specifically address the validity of the 'normal fortitude' requirement, but otherwise agreed with Lord Lloyd.

[92] n 91 at 742 (per Lord Keith), 751-752 (per Lord Jauncey). See also *Owen v. Liverpool Corporation* where the trial judge was prepared to hold that an experienced and cool citizen may suffer psychiatric injury by the imperilment of a coffin containing the corpse of a relative, a finding which the Court of Appeal was not prepared to disturb. In *Bourhill v. Young*, though, that conclusion was criticised by Lord Wright as going beyond the range of normal expectancy: [1943] AC 92 at 110.

substitute their own value judgments for the value judgment of the trial judge.[93] In other words, different opinions regarding the response of a notional person of normal fortitude may vary widely and give the appearance that the law is acting capriciously.

A judge's view of the expectations of normalcy may even be out of kilter with community sentiment. In *Chester v. Waverley Corporation*[94] Latham CJ took a robust approach to the question of the normal person requirement, holding that since death was not an infrequent event and even violent and distressing deaths were not uncommon, it was 'not a common experience of mankind' that a mother of normal susceptibility witnessing the body of her dead son being dragged from a water filled trench would suffer more than consequences of a temporary nature.[95] This conclusion was directly challenged in that case by the dissenting judge Evatt J, who declared that to say that other parents in the position of the plaintiff would not have suffered mental injury was 'mere assertion' and was 'contradicted by all human experience'.[96] A confirmation that the views of Latham CJ and others in the majority of the High Court were out of step with the expectations of the community is the fact that shortly after the decision the New South Wales Parliament took steps specifically designed to overcome the denial of the claim by one in Mrs Chester's position by enacting the *Law Reform (Miscellaneous Provisions) Act* 1944.

3.5 An inefficacious determinant

If the concept of normal fortitude operates within the undemanding foreseeability test, it is likely to be easily established and ill-suited to the role of a control device advocated for it by some judges. To properly fulfil that role, the requirement must operate outside the foreseeability test, and as a control on that test. However, in this incarnation the concept is devoid

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[93] See, eg, *Attia v. British Gas Plc* where the trial judge held that since the loss of possessions from various causes such as burglary and fire happens to a large proportion of the population, the ordinary householder endures such incidents without suffering mental illness but was criticised in the Court of Appeal who held that it was readily foreseeable that intense distress amounting to a psychiatric illness could result from a person having their home destroyed by a fire: [1988] 1 QB 304 at 316-317 (per Woolf LJ), 320 (per Bingham LJ).

[94] (1939) 62 CLR 1 at 10.

[95] n 94 Starke J at 13.

[96] n 94 at 25.

of medically sustainable meaning and, despite additional considerations that might narrow the focus, the test resolves to intuitive, value laden decision-making. As such it is manifestly inappropriate to perpetuate any pretext that can operate as an efficacious determinant of duty. The requirement ought to be abandoned, permitting the recognition of a duty of care regardless of the standard of susceptibility of the plaintiff.[97]

4. An alternative approach

In place of an illusory 'normal person' test, the question of varying susceptibilities can be adequately addressed by careful application of the other elements of the cause of action, including whether the particular risk was foreseeable in the proper sense of not far-fetched or fanciful, the setting of the relevant standard of care and determination of whether it was breached, relevant defences, notions of legal causation and assessment of damages.

A risk that was far-fetched or fanciful and therefore not foreseeable may be an explanation for the suggestion in the physical injury context by Denning LJ in *Board v. Thomas Hedley & Co Ltd*,[98] in the course of deciding that a laundry soap manufacturer was obliged to discover all letters of complaint about a product, that 'the product would, I think, be dangerous if it might affect normal users adversely, or even if it might adversely affect other users who had a higher degree of sensitivity than the normal, *so long as they were not altogether exceptional'* (emphasis added). There is no reason why a similar application could not exclude some cases of psychiatric injury: if the reaction is 'altogether exceptional' such that the risk of it occurring is far-fetched or fanciful, liability would properly be rejected on the basis of a failure to satisfy the reasonable foreseeability test.

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[97] As far back as *Lynch v. Knight* (1861) 9 HLC 577 at 600; 11 ER 854 at 863 Lord Wensleydale differed from the majority by suggesting that the possible infirmities of human nature ought to be recognised; in *Bell v. Great Northern Railway Company of Ireland* (1890) 26 LR (Ir) 428 at 438 Palles CB opined that proof that the plaintiff was of an unusually nervous disposition would not have been material since persons whether nervous or strong-minded are entitled to be carried by railway companies without unreasonable risk of danger, while in *Wilkinson v. Downtown* [1897] 2 QB 57 at 59 Wright J treated the question as being open; and in *Chester v. Waverley Corporation* (1939) 62 CLR 1 at 26 Evatt J reasoned that since it was foreseeable that persons of all sorts and conditions may be found among eyewitnesses of an accident, the duty was owed to all members of all categories. Indeed, rather than limit the duty to those who are not easily susceptible to psychiatric injury, it was more logical to contend that if a reasonable person would foresee that only persons peculiarly susceptible would suffer in the circumstances, a duty was owed at least to the class of persons peculiarly susceptible: id at 27.

[98] [1951] 2 All ER 431 at 432.

In relation to breach of the relevant standard, reference might again be made to a case dealing with susceptibility in a physical context. In *Haley v. London Electricity Board*[99] the House of Lords treated any concerns regarding the burden that might be imposed upon the functions of society by recognising a duty to avoid the risk of physical injury to blind persons walking on city streets as a factor relevant to the determination of the relevant standard of care. It might be thought that recognition of duty irrespective of susceptibility to psychiatric injury may result, *inter alia*, in the imposition of impediments to a functioning society. For example, if a newspaper or television broadcaster were to be held liable to every person who was susceptible to being psychologically disturbed by what they read or saw in the news, the potential liability might serve as a disincentive to engage in newspaper or television news activities to the detriment of the wider community. However, the existence of a duty of care does not automatically mean the existence of liability: if the newspaper or television broadcaster has exercised the care of a reasonable person in the circumstances there will be no breach, particularly if the standard of care in the circumstances is fixed at an appropriate level perhaps easily achievable.

In *Bourhill v. Young* Lord Wright justified his stance on normal fortitude by reference to his supposition that in the case of bleeders, the blind and the deaf no duty was owed to due to the lack of foreseeability of individual peculiarities. In *Haley* Lord Hodson attacked this reasoning as unsatisfactory at least in the case of the blind and deaf due to the large number of persons thus afflicted who foreseeably frequent city streets.[100] It might be surmised that someone who knew he or she was a 'bleeder', like someone who knew they were liable to suffer psychological reactions in response to the slightest stressor, but who nevertheless ventured into what was for them a place of risk might be viewed as being contributorily negligent or even, in an extreme case, *volens* to the risk. Not all persons with a particular susceptibility to psychiatric injury know they have that special proclivity: the first they know may be when they are actually confronted by a traumatic event. In such a case the defences of *volenti* and contributory negligence will have little room for operation. On the other hand, where an individual does have that knowledge, perhaps because the plaintiff has been undergoing treatment for a psychiatric condition, a *fortiori* a psychiatric condition attributed to certain conduct and recognised as likely to recur if the plaintiff again subjects him or herself to similar conduct, the defences will have greater relevance.

[99] [1965] AC 778.

[100] [1965] AC at 802-803.

Several judges have advocated a greater focus on the application of the principles of legal causation as capable of functioning as an effective control on the extent of liability for psychiatric injury.[101] It has been said that in some cases individuals may be so susceptible to psychiatric injury that, the relevant issue is one of whether the defendant's conduct caused the plaintiff's damage in the first place. This attitude may be found in the dissenting judgment of Davie JA in the British Columbia case *Enge v. Trerise*.[102] In that case an attractive and narcissistic 16 year old girl was involved in a motor vehicle accident and sustained a head wound which resulted in a large scar on her forehead. Thereafter she displayed a marked schizophrenic condition, becoming preoccupied with the scar and believing that people were talking about her. There was evidence that the plaintiff was suffering from a latent schizophrenic condition prior to the accident. Davie JA sought to distinguish between an event that 'precipitated' a mental disorder in medical terms from one which 'caused' the disorder in the terms of the law. An accident might play an important part in the development of a disorder without amounting to a legal cause of that disorder.[103] Here the plaintiff's excessive vanity abnormally exaggerated the importance of the disfigurement and her disordered mind attached an irrational meaning to the scar. There could be no liability for an irrational reaction to the consequences of an negligent act when that reaction was caused by an extraneous mental disorder. [104]

A strong advocate of this approach to excessive susceptibility to mental injury has been Mahoney JA of the New South Wales Court of Appeal. In *Hoffmueller v. The Commonwealth*[105] where the plaintiff was involved in a trivial motor vehicle accident but later developed a post-traumatic psychoneurosis, there was evidence that the plaintiff was of an obsessional

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[101] See, eg, Brennan J in *Jaensch v. Coffey* (1984) 155 CLR at 572; Lord Bridge in *McLoughlin v. O'Brian* [1983] 1 AC at 431-432; *Ravenscroft v. Rederiaktiebolaget Transatlantic* [1991] 3 All ER at 77, 86 advocating causation and reasonable foreseeability as sufficient controls on the extent of liability. Causation was treated as the determining factor in the recent psychiatric injury case concerning the Maralinga atomic tests *Dingwell v. Commonwealth of Australia* (unreported, Fed Ct, Foster J, 18 May 1994).

[102] (1960) 26 DLR (2d) 529 (BC CA).

[103] n 102 at 532-534.

[104] n 102 at 534. The majority, on the other hand, thought there was sufficient evidence for the injury to conclude that the plaintiff's mental disorder had been caused by the accident: id at 542-543 (per Coady JA), 549-550 (per Sheppard JA)

[105] (1981) 54 FLR 48.

type of personality vulnerable to upsets and that the probability was that sooner or later some incident would have triggered a change in his state of balance. Mahoney JA pointed out in his dissenting judgment that the term 'cause' embraced three distinct kinds of relationships: (1) where C is the physical cause of E; (2) where C is the interpersonal cause of E, that is when a person does something following the acts or suggestions of another and (3) where C is merely the occasion of E, that is C is the trigger for E.[106] He thought that cause in the third sense was well suited to the field of psychiatry where for example a person who exhibited persecution paranoia projected or seized upon any perceived slight as the cause of his or her anxiety and as giving rise to his or her symptoms. When a person with a pre-existing vulnerability, such as that of the plaintiff's, reached a stage where he or she was apt to 'decompensate', that is shows symptoms, the symptoms are a function of the existing anxieties and the injury was merely the 'coathanger' on which they rest: the pre-existing anxiety developed to the stage where the accident did not contribute to but was rather the occasion or setting for the onset of the symptoms which the underlying tensions would have produced in any event.[107] As such the accident was not the legal cause of the resulting conditions, except in the exceptional case where the defendant did an act which was intended to precipitate the symptoms or perhaps acts knowing of the possibility that the symptoms may be precipitated or carelessly disregarding that they may be.[108] The majority, though, disagreed and held that the evidence was all one way, clearly establishing a causal relationship between the trauma of the mental and physical experience of being subjected, albeit in a minor way, to a motor vehicle collision and the resulting neurotic symptoms.[109] Glass JA was satisfied that the precipitating factor or trigger caused or contributed to the result upon the 'but for' test of causation and that it was no answer that the plaintiff was predisposed to a condition which the accident precipitated.[110]

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[106] n 105 at 60.

[107] n 105 at 62.

[108] n 105 at 63. His Honour held that even if causation were to be assumed he did not think that the ordinary reasonable person should be held to foresee that there are about him or her those having paranoid persecution conditions or an obsessional personality such that his or her acts may become the occasion for the onset of the symptoms of their conditions (id at 64), although this is perhaps a less than compelling argument given the undemanding interpretation now applied to the foreseeability test.

[109] n 105 at 51 (per Reynolds JA), 52 (per Glass JA).

[110] n 105 at 52.

Mahoney JA again found himself dissenting on the basis of his interpretation of the meaning of legal causation in *Nader v. Urban Transit Authority of New South Wales*,[111] where a 10 year old boy fell or jumped out of a bus and struck his head against a bus stop pole. While in hospital recovering from his minor physical injuries, the plaintiff exhibited symptoms of a condition known as Ganser Syndrome, a hysterical response to his parents' overprotective stance and their refusal to allow him to have the treatment that would have prevented the syndrome, due to various factors including tension in the family, the father's unemployment and the parents' belief that compensation could be obtained. Mahoney JA viewed the case as one where the defendant's wrong had merely provided the occasion for the onset of the boy's symptoms and, reiterating the comments he made in *Hoffmueller v. The Commonwealth*, held that only physical causation of symptoms, or in some cases interpersonal causes, constituted legal causation.[112] By contrast, McHugh JA pointed out that every necessary member of the groups of conditions jointly sufficient to produce the injury was at law the cause of the injury, which led to the short hand but more practical 'but for' test.[113] Thus, while it could be said that the plaintiff had focused on the parental conflict or the overprotectiveness of his parents as the occasion for the onset of his symptoms, they were simply some of the conditions which were jointly sufficient with the accident to produce the consequence of the Ganser Syndrome. While it was true that the condition could not have arisen without the conduct of the parents, it was equally true that it would not have arisen 'but for' the accident.[114]

Mahoney JA, however, carried his views as part of an unanimous decision in *Loffo v. Giang*.[115] There the plaintiff was driving through a shopping centre when the car ahead of him attempted to reverse into a parking space and gently bumped the plaintiff's car, causing minor damage to an indicator light. There was no question of anyone suffering physical injury but following the impact the two drivers were conversing when they

[111] [1985] 2 NSWLR 501.

[112] n 111 at 514-521. In fact, *Nader* represented an extension of his Honour's approach in *Hoffmueller*. In *Hoffmueller* the plaintiff had a pre-existing condition which when triggered by the occasion resulted in decompensation, whereas in Nader a boy without pre-existing susceptibility was involved in an accident which provided the occasion for the development of the disorder.

[113] n 111 at 531.

[114] n 111 at 532. Samuels JA similarly found no difficulty with causation. Both he and McHugh JA also held that the case was an appropriate setting for an application of the egg shell skull rule: id at 504, 536-537.

[115] Unreported, NSWCA, 13 December 1990.

were surrounded by a group of bystanders largely comprising Vietnamese people who began talking to each other in their native tongue. The plaintiff had an existing acute paranoid schizophrenic illness and the effect of being surrounded by the crowd speaking in a foreign language caused him to decompensate. Although all three judges of the Court of Appeal agreed that the plaintiff was not entitled to compensation, each reached that conclusion by a different route. Mahoney JA saw the situation as one where the collision was merely the occasion for the onset of the plaintiff's symptoms rather than being the legal cause.[116] Priestley JA saw the answer in an analogy drawn to a variation of the egg shell skull concept: if following a minor traffic accident a driver with an egg shell skull bumped his head on the door lintel as he or she was getting out of his or her car and thereby broke his or her skull, most courts would readily answer that the other person involved in the traffic accident did not cause the broken skull. In the same way the exacerbation of the plaintiff's mental illness began after the accident but not because of any negligent act of the defendant.[117] Finally, Meagher JA approached the question on a perhaps more conventional ground[118] by holding that a person of normal fortitude would not have suffered mental illness in the circumstances and that accordingly no duty of care arose. As such the egg shell skull rule, which only applied once a breach of a duty of care was established, was not relevant.[119] The Mahoney JA-Meagher JA divergence well illustrates different approaches that may be applied on the same facts to the issue of an unusually susceptible plaintiff.

Thus, the approach of Mahoney JA which treats cases of decompensation as lacking legal causation cannot yet be said to enjoy widespread support. Indeed on the occasions on which he has relied on this approach, the other members of the bench have applied different principles, on two occasions leaving him in the minority.[120] Nevertheless, recently the

[116] n 115 at 4 of the unreported judgment.

[117] n 115 at 11 of the unreported judgment.

[118] Given the approach of Brennan J in *Jaensch v. Coffey* (1984) 155 CLR 549 at 556 and the other cases discussed above regarding the need for a normal standard of susceptibility.

[119] n 115 at 15 of the unreported judgment. The facts of this case equate to an example postulated by Lord Jauncey in *Page v. Smith* [1995] 2 All ER 736 at 749 to justify his intuitive (his Lordship described it as 'common sense') application of the normal fortitude test to deny the claim of a plaintiff psychologically harmed following a collision of 'moderate severity' in which no one was physically injured.

[120] See *Nader v. Urban Transit Authority of NSW* (1985) 2 NSWLR 501 at 532 where McHugh JA referred to the defendant not being assisted by Mahoney JA's view regarding causation in *Hoffmueller v. Commonwealth* 'even if, having regard to the majority decision, it represents the law.'

Full Court of the Federal Court in *Wodrow v. The Commonwealth* employed the Mahoney JA approach as being one of a number of reasons for denying liability where a member of the Department of Defence suffered a stress related psychological reaction after being reprimanded by his superiors. The court held that the plaintiff had failed to establish causation since his obsessional personality and pre-existing personality traits had developed to such a stage that the issuing of the reprimand did not contribute to but was rather the occasion for the onset of the symptoms which the underlying disease of the plaintiff's personality would have produced in any event.[121]

The High Court confirmed in *March v. E & MH Stramare Pty Ltd*[122] that causation is now to be determined by applying common sense to the facts of each particular case. As Deane J explained, the question whether conduct is a 'cause' of injury remains to be determined by a value judgment involving ordinary notions of language and common sense.[123] This approach relegated the 'but for' test to the role of a useful aid in all except rare circumstances for eliminating matters which could not be causes of the plaintiff's harm; the 'but for' test was rejected as the exclusive test of causation. Arguably, this approach to causation assists the advocates of the Mahoney JA approach. It might be argued, as McHugh JA argued in *Nader*, that in a case where the accident merely precipitates or triggers a pre-existing condition that nevertheless the condition would not have been suffered *but for* the accident. However, where it can be said that the pre-existing condition was apt to produce symptoms at any time, and the defendant merely provided a convenient occasion for that to occur, a common sense value judgment on the circumstances of the case may conclude that the defendant's conduct did not constitute the relevant cause.

Even if the defendant's conduct is adjudged to have interacted with the plaintiff's particularly vulnerable personality, but the defendant's conduct was on a common sense value judgment an effective cause and more than a mere trigger or occasion for the plaintiff's psychiatric condition, the plaintiff's susceptibility may form an important influence on the assessment

[121] (1993) Aust. Torts Reports ¶81-260 at 62,732-62,733. As already seen in section 5.2.2 above it was also held that there was no duty because the reprimand would not have affected an 'ordinary normal person' in the plaintiff's position as a member of the defence force.

[122] (1991) 171 CLR 506; see also *Bennett v. Minister of Community Welfare* (1992) 176 CLR 408. A useful analysis of these cases is provided in A Palmer, 'Causation in the High Court' (1993) 1 *Torts Law Journal* 9.

[123] (1993) 171 CLR at 524; see also Mason CJ (with whom Toohey and Gaudron JJ agreed) at 516.

of damages. The application of the general rule that tortfeasors must take their victims as they find and cannot escape liability on the grounds that the plaintiff suffered greater loss than others in his or her position is tempered by the rule that in assessing damages the court must take into account vicissitudes, that is the chance that the psychiatric condition would have been suffered in any event in the future.[124] In *Dooley v. Cammell Laird & Co Ltd*[125] the plaintiff's pre-existing neurasthenia was treated as a reason for confining the award of damages to the aggravation of that condition only. Similarly, in *Chapman v. Lear*[126] the plaintiff was compensated for only the aggravation of his pre-existing post traumatic stress disorder which was of a limited duration of about three years following the accident involving his son, and was awarded no damages for the later psychiatric symptoms that totally disabled him.[127]

5. Conclusion

Every person has his or her own breaking point and will bring to the process of working through traumatic stress different attributes and experiences. Much reliance in the past, though, has been place upon the dictum of Lord Wright in *Bourhill v. Young* where his Lordship asserted that liability 'must generally depend on a normal standard of susceptibility'.[128] Less emphasis has been placed on his Lordship's subsequent remark on the same page that 'generally, I think, a reasonably normal condition, *if medical evidence is capable of defining it*, would be the standard.'[129] (emphasis added) Medical literature indicates that the notion of a person being of 'a normal standard of susceptibility' is medically invalid. Indeed, it might be said that

[124] *Batchelor v. Rederij A&L Polder* [1961] 1 Lloyd's Reps 247 at 250; *Donjerkovic v. Adelaide Steamship Industries Pty Ltd* (1980) 24 SASR 347 at 355; *Faulkner v. Keffalinos* (1970) 45 ALJR 80; see *Pipikos v. W Brown & Sons Pty Ltd* [1970] SASR 508. See also *Bradford Kendall Foundries Pty Ltd v. Ryder* (unreported, NSW CA, 4 June 1987) where it was held that in the particular circumstances the plaintiff's alleged pre-existing nervousness was 'at the very outer edge of matters that were significant in the injury' and therefore it was of no matter that the trial judge did not take that condition into account when making allowance for vicissitudes.

[125] [1951] 1 Lloyd's Rep 271.

[126] Unreported, Qld SC, GN Williams J, 8 April 1988.

[127] See also *Spence v. Percy* [1992] 2 Qd R 299 at 318; see *Loffo v. Giang* (unreported, NSWCA, 13 December 1990 per Meagher JA at 15).

[128] [1943] AC 92 at 110.

[129] n 128.

the 'normal' fact is that people are not 'normal': the average person in the street is not average. This fact has attracted expression by a handful of judges[130] and provoked Windeyer J in *MIM v. Pusey* to wonder at the difference between any insistence on a normal susceptibility on the one hand for the finding of a duty of care while on the other hand for the purposes of the eggshell skull rule recognising that the defendant is obliged to take his or her victim regardless of the victim's particular susceptibilities. Such a distinction might be justified on the basis that on the one hand the issue of susceptibility has relevance as a control device, selecting from the collection of possible claimants one for whom the law is prepared to compensate, whereas the other is relevant only to an individual so selected.

The essential point, though, prevails through that justification, namely that a test of 'normal fortitude' is meaningless. It is a pseudo test devoid of content suggesting a charade of a principled adjudication pursuant to which a judge may intuitively include or exclude the plaintiff from the class of potentially worthy claims, on the basis of his or her predilections or perceptions of how a 'normal person' would have reacted in the circumstances. Individual factors that may affect the aetiology of trauma in a particular case should properly be regarded as having a bearing on the question of foreseeability, the fixing of the relevant standard and determining whether that standard has been breached and defences such as ` and contributory negligence, in an appropriate case. A focus on the common sense value judgment of legal causation and the rules relating to the assessment of damages are also effective means for disposing of a person considered particularly susceptible, a person for whom predisposing individual factors played the dominant role recovering only a small amount of damages or no damages. In this way the law relating to psychiatric injury can retain an essential flexibility of dealing with cases wide ranging both in circumstance and in degrees of prior susceptibility without the pretext of deferring or conforming to an artificial, amorphous and medically invalid standard such as that of a 'normal person'.

[130] See, eg, Evatt J in *Chester v. Waverley Corporation* (1939) 62 CLR 1 at 26; *Chadwick v. British Transport Commission* [1967] 1 WLR 912 at 922; *Mount Isa Mines Limited v. Pusey* (1970) 125 CLR 383 at 406.