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Deepa Kansra Ph.D.
Rights for Well-Being

Taking Account of Psychological Harm

An agenda for human rights law and psychology.

Posted August 16, 2022

 Reviewed by Devon Frye



KEY POINTS

- Violence against the physical and psychological well-being of persons is a human rights violation.
- Human rights cases have addressed psychological harms such as mental violence, mental abuse, psychological suffering, distress, etc.
- Courts seek expert opinions from psychologists during trials, making "clinical psychological knowledge" an integral part of the justice outcomes.
- Law and psychology share a common interest in shaping the discourses on suffering and justice.

Justice for human rights violations involves taking into account psychological harm caused to individuals and communities. Justice for psychological harm is specifically grounded in four



- Law and psychology share a common interest in shaping the discourses on suffering and justice.

Justice for human rights violations involves taking into account psychological harm caused to individuals and communities. Justice for psychological harm is specifically grounded in four considerations:

1. that harm to human persons can be both physical and psychological
2. that even in the absence of physical injuries, psychological harm can constitute a human rights violation
3. that those causing psychological harm ought to be accountable
4. that claims for justice for harm are supported by human rights principles

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rights, well-being, and state responsibility.

Psychological Harm

"Psychological harm" has many labels. In human rights cases, it has been addressed as mental violence, mental abuse, psychological suffering, moral suffering, mental distress, psychological discomfort, emotional injury, mental and psychosocial afflictions, etc. Suffering, according to Harvard researcher Tyler VanderWeele, might be understood as the undesired experience, of considerable intensity or duration, of a negative physical or affective state. Physical suffering will often involve an experience of pain, and psychological suffering some form of sadness, fear, or anger ([VanderWeele](#), 2019).

International and domestic rules empower victims to seek justice. The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power provides "victims who have suffered harm, including emotional suffering are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered" (1985). And judicial courts are em-

9. Mental Harm

Term of Reference

1. ***Inquire into the application, effectiveness and operation of common law principles applied in negligence to limit liability arising from personal injury and death, including:***
 - (a) ***the formulation of duties and standards of care;***

Types of mental harm

9.1 The basic rule for determining whether a person owes another a duty to take care to avoid personal injury or death is whether the person can reasonably be expected to have foreseen that the other would suffer harm if care was not taken (paragraph 7.4).

9.2 Personal injury may be either physical or mental. Mental harm may be consequential on physical injury (as where depression is suffered as a result of an injury to the body), or it may stand alone (as where a person suffers anxiety as a result of witnessing traumatic events). In this Report, harm of the former type is called 'consequential mental harm' and harm of the latter type is called 'pure mental harm'.

9.3 Under current law, if a person suffers negligently-caused physical harm for which another is held liable, the person may also recover damages for mental harm consequential on the physical harm. In effect, the test of liability for consequential mental harm is the same as the test of liability for the physical harm on which it is consequential.

9.4 For various reasons, the law has made it harder for people to recover damages for negligently-caused pure mental harm than for negligently-caused physical harm (and consequential mental harm). Perhaps the most important of these reasons are: (a) the existence and extent of mental harm may be difficult to diagnose objectively and to prove for legal purposes; (b) the number of people who may suffer pure mental harm as a result of a single act of negligence may be greater and less easy to foresee than the number of people who may suffer physical harm as a result of a single act of negligence; and (c) because resources are limited, it is more important to compensate people for physical harm than for pure mental harm.

Pure mental harm

Recognised psychiatric illness

9.5 There is another very important difference between the current law's treatment of consequential mental harm on the one hand, and pure mental harm on the other. The law adopts a more restrictive definition of mental harm for the purposes of compensating for pure mental harm than for the purposes of compensating for consequential mental harm. The rule is that pure mental harm will attract compensation only if the harmed person has suffered a 'recognised psychiatric illness' (or 'condition'). This rule has the effect that expert evidence is normally required to establish whether damages are recoverable for pure mental harm. (We will return to this issue in paragraphs 9.40-9.41.) By contrast, any mental harm may attract compensation if it is consequential on physical harm. (We will return to this issue in paragraphs 9.34-9.39.)

9.6 The law draws the distinction between psychiatric illness and other mental harm because, it is said, medicine also draws that distinction. However, current law gives no guidance as to how it is to be established, for legal purposes, that a person is suffering from a psychiatric illness. It often seems to be assumed that whether someone is suffering from a mental illness is a purely medical question. However, the concept of illness is, to some extent, a social construction, and the catalogue of mental illnesses is not closed. For instance, post-traumatic stress disorder has been recognised as a mental illness only for about the past 25 years. A diagnostic tool that is frequently used in legal contexts is DSMIV — the *Diagnostic and Statistical Manual of Mental Disorders*. However, this publication was intended as a tool for use in clinical contexts, and not for forensic purposes. Indeed, the introduction to the *Manual* warns against its use in legal contexts.¹

9.7 As a result of its consultations, the Panel has reached the conclusion that the lack of suitable forensic criteria of mental illness is a serious cause of dissatisfaction with the current law amongst various interested groups. For this reason, the Panel recommends that a panel of experts, including experts in forensic psychiatry and psychology, be appointed to develop a set of guidelines, for use in legal contexts, for the assessing whether a person has suffered a recognised psychiatric illness. These guidelines should be given formally-recognised status.

¹ There is a useful discussion of this issue in the judgment of Hayne J in *Tame v New South Wales* [2002] HCA 35, [285]-[297].

Recommendation 33

A panel of experts (including experts in forensic psychiatry and psychology) should be appointed to develop guidelines, for use in legal contexts, for assessing whether a person has suffered a recognised psychiatric illness.

The duty to take care to avoid causing pure mental harm

9.8 The rules governing liability to pay damages for negligently-caused pure mental harm have changed considerably in the past century as medical understanding of the mind has developed and as social attitudes to mental illness have changed. For present purposes, it is not necessary to trace these changes. It is only necessary to discuss current Australian law on this topic. The High Court has very recently given detailed consideration to this area of the law in *Tame v New South Wales* and *Annetts v Australian Stations Pty Ltd* [2002] HCA 35, which were both claims for pure mental harm.

9.9 One of the claims (*Tame*) concerned a woman who suffered pure mental harm as a result of learning of a false statement in a police report to the effect that she had been driving under the influence of alcohol. The other claim (*Annetts*) involved parents who suffered mental harm as a result of learning, after a long wait for reliable information, that their 16-year old son had died in tragic circumstances.

9.10 The claim in *Tame* failed for three main reasons: first, (in the words of Gummow and Kirby JJ), the plaintiff's reaction was 'extreme and idiosyncratic' (para [233]) and not such as a person of 'normal fortitude' would have suffered; secondly, the possibility of conflict between the duty of police to investigate crime and a common law duty not to cause suspects mental harm by making false statements; and, thirdly, the imposition of liability for negligence in such a situation would generate incoherence between the law of negligence and the law of defamation.

9.11 The claim in *Annetts* succeeded. The Court observed that the parents were in a 'special relationship' with the defendant based on an undertaking made by the defendant (the son's employer) to the parents to take quasi-parental care of their son. It was foreseeable, so the Court held, that persons of normal fortitude would suffer mental harm as a result of what the parents had been through.

9.12 It is important to note that the issue in these cases was whether the defendant owed a duty to the plaintiff to take care not to cause the plaintiff mental harm. The issue was not whether the defendant had taken reasonable

care, nor did it concern the extent of liability for mental harm. If a person owes no duty to take care to avoid causing another mental harm, the person cannot be liable for mental harm caused to the other even if it was the result of the person's negligence. As noted earlier, the basic rule is that a person owes a duty to take care to avoid causing another personal injury (including consequential mental harm) or death if the person could reasonably be expected to have foreseen that if care was not taken, the other might be injured. However, traditionally this rule has not applied to pure mental harm. At various times, the law has said that a duty to avoid causing mental harm would be imposed only in relation to harm caused by 'shock'; that this duty was owed only to persons who were physically near to the scene of the 'shocking' events at the time they occurred, or who witnessed their 'immediate aftermath'; and that the duty was owed only to those who witnessed the shocking events or their aftermath with 'their own unaided senses'. All of these preconditions for the existence of a duty to take care to avoid causing mental harm were jettisoned, as *preconditions*, in *Tame/Annetts*.

9.13 The fundamental proposition which *Tame/Annetts* seems to establish is that reasonable foreseeability of mental harm is the only *precondition* of the existence of a duty of care. It also establishes, however, that a duty of care to avoid mental harm will be owed to the plaintiff only if it was foreseeable that a person of 'normal fortitude' might suffer mental harm in the circumstances of the case if care was not taken. This test does not require the plaintiff to be a person of normal fortitude in order to be owed a duty of care. It only requires it to be foreseeable that a person of normal fortitude in the plaintiff's position might suffer mental harm. In this sense, being a person of normal fortitude is not a precondition of being owed a duty of care.

9.14 The phrase 'the circumstances of the case' includes matters such as whether or not the mental harm was suffered as the result of a sudden shock; whether the plaintiff was at the scene of shocking events, or witnessed them or their aftermath; whether the plaintiff witnessed the events or their aftermath with his or her own unaided senses; whether or not there was a pre-existing relationship between the plaintiff and the defendant (as in *Annetts*); the nature of the relationship between the plaintiff and any person killed, injured or put in peril; and so on. None of these factors represents a precondition of being owed a duty of care. But they are all relevant to deciding whether the defendant ought to have foreseen that a person of normal fortitude might suffer a recognised psychiatric illness if care was not taken. That is, they are relevant to whether the defendant owed the plaintiff a duty of care.

9.15 The basic idea underlying the approach of the High Court in *Tame/Annetts* is that people vary in terms of psychological vulnerability, and

that as a general rule, it is unreasonable to expect others to take greater precautions than would be necessary to protect the normally vulnerable (that is, people of 'normal fortitude'). It is essential to understand that while the incidence of various mental illnesses in the general population may be relevant to the concept of 'normal fortitude', this concept is ultimately a legal, not a scientific, one. It is no more scientific than the concept of the reasonable person. It has a significant evaluative element, and its function is to allocate legal responsibility for mental harm rather than to assist in the diagnosis of mental illness for clinical or epidemiological purposes.

9.16 In fact, the law takes the same attitude to physical vulnerability. People vary in terms of physical vulnerability, but a person (the defendant) will owe another (the plaintiff) a duty to take care not to cause the plaintiff physical harm only if the defendant ought to have foreseen that a person of normal physical vulnerability might suffer harm if care was not taken.²

9.17 Physical and mental harm are treated similarly in another respect, too. In a well-known English case a motor mechanic who had sight in only one eye lost the sight of the other eye when a piece of metal flew into it.³ The issue was whether the plaintiff's employer was negligent in not providing him with goggles. The employer knew that the plaintiff had the sight of only one eye; and it was held that even if it would not have been negligent not to provide goggles for a worker who had the sight of both eyes, it was negligent not to provide them for a worker who was known to have sight in only one eye. This was because loss of the sight of an eye is a much more serious harm to a person with sight in only one eye than to a person who has the sight of both eyes. In determining how serious the consequences of the materialisation of a risk might be for a particular person, it is obviously relevant to consider how vulnerable the person is. The reasonable person cannot normally be expected to take precautions to protect the abnormally vulnerable. But it may be reasonable to expect such precautions of a person who knows (or ought to know) about the vulnerability. In *Tame/Annetts* it was similarly said that a person might owe a duty of care to someone who was abnormally vulnerable psychologically, even if no duty would be owed to a normally vulnerable person, if the person knew that the other was abnormally vulnerable.

9.18 The law about liability for mental harm on the one hand, and physical harm on the other, is similar in a third important respect. In determining the extent of liability for harm caused by negligence in breach of a duty of care, the

² *Levi v Colgate-Palmolive Pty Ltd* (1941) 41 SR (NSW) 48.

³ *Paris v Stepney Borough Council* [1951] AC 367.

rule is that the defendant must 'take the plaintiff as found'. This means that the defendant is liable for all the harm suffered by the plaintiff even if it is greater than would have been suffered by a person of normal physical or mental vulnerability. In relation to physical harm, this rule is sometimes called the 'egg-shell skull rule'; and in relation to mental harm, the 'egg-shell personality rule'. The High Court in *Tame/Annetts* confirmed that the 'take-as-found' rule applies to liability for mental harm. In other words, a plaintiff's abnormal vulnerability is taken into account in determining the extent of liability even though it is ignored both in relation to duty of care (as in *Tame*) and standard of care (as in *Paris v Stepney Borough Council*),⁴ unless it was known (or ought to have been known) to the defendant. This means that provided a duty was owed to an abnormally vulnerable person and the duty was breached, the person may recover damages for harm which the normally vulnerable person would not have suffered.

Should there be further restrictions on liability for pure mental harm?

9.19 It would seem, therefore, that Australian law has now reached the point where the basic principles governing liability for mental harm are essentially the same as those governing liability for physical harm. The common underlying idea is that what people can reasonably be expected to foresee, and the care that they can reasonably be expected to take, must be judged relative to the normally vulnerable plaintiff. The abnormally vulnerable are entitled only to the same care as the normally vulnerable unless the defendant knew (or ought to have known) that the plaintiff in particular was abnormally vulnerable. The question that this raises in the context of the Panel's Terms of Reference is whether the current state of the common law imposes satisfactory limits on liability for mental harm. In practical terms, the question is whether liability for pure mental harm should be subject to preconditions of the sort that existed before *Tame/Annetts* was decided.

9.20 Under s 4 of the New South Wales *Law Reform (Miscellaneous Provisions) Act 1944* (and similar legislation in the Australian Capital Territory and the Northern Territory), a parent or spouse of a person killed, injured or put in peril by the wrong of another may recover for 'mental or nervous shock' resulting from the wrong. In addition, any other member of the person's 'family' may recover if the person was killed, injured or put in peril 'within the sight and hearing' of the family member. At the time it was enacted, this provision probably extended, rather than restricted, the scope of common law

4 [1951] AC 367.

liability for mental harm. Now, however, the common law is wider than this provision in important respects.

9.21 Under s 141 of the New South Wales *Motor Accidents Compensation Act 1999*, damages for pure mental harm can be awarded 'in respect of a motor accident' only in favour of (a) a person who suffered 'injury' in the accident *and* was either the driver of or a passenger in a car 'involved in the accident' or was present at the scene when the accident occurred; or (b) a parent, spouse, brother, sister or child of a person killed or injured in the accident.

9.22 More recently, it has been proposed (in clause 69 of a consultation draft of the Civil Liability Amendment (Personal Responsibility) Bill 2002 (NSW)) that in relation to an incident in which a person is killed or injured through the fault of another, only a 'bystander' or a 'close relative of the victim' may recover damages for pure mental harm.

9.23 It should be noted that these provisions only deal with cases where pure mental harm is suffered by one person as a result of the imperilling, injuring or killing of another. They do not deal, for instance, with the sort of case that was the subject of the claim in *Tame* (as opposed to *Annetts*) or with 'workplace stress' claims. There are no existing statutory provisions that impose limitations, additional to those developed in *Tame/Annetts*, on liability for pure mental harm in cases of work-related stress (for instance).

9.24 Leaving this issue aside, in assessing such provisions it needs to be borne in mind that an important reason why such limitations on liability have been abandoned by the common law is that they appear to many to be arbitrary and unprincipled, and that their only aim and effect is to limit the potential number of claims for pure mental harm. This is a particular problem when the limitations in question are imposed by the common law which, it is widely thought, should be based on 'reason' and 'principle', not pragmatism or political considerations. It is just such a principled basis of liability for pure mental harm that the High Court sought and found in *Tame/Annetts*. The problem of 'arbitrariness' is not so great when such limitations are imposed by statute because they can be justified on grounds of distributive and social justice to which courts generally are wary of appealing. But this may not remove the perception that such limitations are essentially arbitrary and, to that extent, unfair.

9.25 Nevertheless, it would be possible further to limit liability for pure mental harm, in cases where harm is suffered by one person as a result of another being imperilled, injured or killed, by requiring the former to be in a particular relationship with the latter, such as that of parent, child or spouse. A

difficulty with this approach (from the point of view of principle) is that it may not be possible to specify all the desired relationships in terms of existing legal definitions and without resorting to an evaluative concept such as 'close relationship'. Such evaluative concepts are undesirable in this context because they necessitate the forensic examination and assessment of the nature and quality of intimate human relationships in a way that may bring the law into disrepute.

9.26 It might also be argued that the 'list of eligible relationships' approach imposes unnecessarily restrictive limitations on liability for pure mental harm in light of the emphasis that is now placed by the common law on the concept of the person of normal fortitude, coupled with the increased emphasis on reasonableness in Recommendation 28 (about standard of care). These should have the effect of significantly limiting the scope of liability for mental harm in a way that is both principled and consistent with the objectives of the Terms of Reference.

9.27 Because of the difficulty of justifying a list of relationships in a principled way, the Panel does not recommend such a list. However, we understand that governments may think that legislation enacting such a list would be desirable. For that purpose, we suggest that the following list might be appropriate to specify the required relationship between the person imperilled, injured or killed and the person who suffered pure mental harm as a result of that person being imperilled, injured or killed:

- (a) A parent, or a person who stands *in loco parentis*, to the person imperilled, injured or killed.
- (b) The husband or wife of, or any person living on a *bona fide* domestic basis with, the person imperilled, injured or killed at the time of the relevant events.
- (c) A natural, half or step sister or brother of the person imperilled, injured or killed.
- (d) A natural, adopted or step son or daughter of the person imperilled, injured or killed.

9.28 Whether or not a legislative list of relationships is enacted for cases in which a person suffers pure mental harm as a result of another being imperilled, injured or killed, the Panel is of the opinion that the objectives of the Terms of Reference would be promoted by a legislative statement of what we consider to be the current state of the law about when a duty is owed to

take care to avoid causing pure mental harm. That statement would embody the following principles:

- (a) There can be no liability for pure mental harm (that is, mental harm that is not a consequence of physical harm suffered by the mentally-harmed person) unless the mental harm consists of a recognised psychiatric illness.
- (b) A person (the defendant) does not owe another (the plaintiff) a duty to take care not to cause the plaintiff pure mental harm unless the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances, suffer a recognised psychiatric illness if reasonable care was not taken.
- (c) For the purposes of (b), the circumstances of the case include matters such as:
 - (i) whether or not the mental harm was suffered as the result of a sudden shock;
 - (ii) whether the plaintiff was at the scene of shocking events, or witnessed them or their aftermath;
 - (iii) whether the plaintiff witnessed the events or their aftermath with his or her own unaided senses;
 - (iv) whether or not there was a pre-existing relationship between the plaintiff and the defendant; and
 - (v) the nature of the relationship between the plaintiff and any person killed, injured or put in peril.

Recommendation 34

The Proposed Act should embody the following principles:

- (a) There can be no liability for pure mental harm (that is, mental harm that is not a consequence of physical harm suffered by the mentally-harmed person) unless the mental harm consists of a recognised psychiatric illness.**
- (b) A person (the defendant) does not owe another (the plaintiff) a duty to take care not to cause the plaintiff pure mental harm unless the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances, suffer a recognised psychiatric illness if reasonable care was not taken.**
- (c) For the purposes of (b), the circumstances of the case include matters such as:**
 - (i) whether or not the mental harm was suffered as the result of a sudden shock;**
 - (ii) whether the plaintiff was at the scene of shocking events, or witnessed them or their aftermath;**
 - (iii) whether the plaintiff witnessed the events or their aftermath with his or her own unaided senses;**
 - (iv) whether or not there was a pre-existing relationship between the plaintiff and the defendant; and**
 - (v) the nature of the relationship between the plaintiff and any person killed, injured or put in peril.**

Mental harm resulting from breach of a contractual duty

9.29 In *Annetts*, one of the factors that weighed in favour of the imposition of a duty of care was that the incidents that gave rise to the mental harm took place against the background of a pre-existing relationship between the plaintiffs and the defendant. This partly explained the parents' reaction and justified the finding that the defendant ought to have foreseen that parents of normal fortitude might suffer a recognised psychiatric illness if the employer did not take care of their son as the employer had undertaken to do. The relationship in this case was not contractual; but a contract can provide the

basis for imposing on one contracting party a duty to take care not to cause pure mental harm to the other contractor. Claims for pure mental harm resulting from workplace stress fall into this category: the duty of care owed by the employer to the employee to take care to avoid causing the employee pure mental harm is one aspect of the employer's general duty of care to employees.

9.30 An important question that was left open in *Annetts* is whether the normal fortitude test applies in cases where the duty to take care to avoid causing the other contracting party pure mental harm is contractual. In the United Kingdom it has been held that special rules that limit liability for pure mental harm do not apply to cases where an employee sues the employer for pure mental harm resulting from a breach of the employer's contractual duty of care.⁵ In the Panel's view, this position is undesirable and hard to justify as a matter of principle. Consistently with Recommendation 2, we can see no reason why plaintiffs who can found their claims for damages for negligently-caused pure mental harm on a contract should be better off in this respect than plaintiffs who must found their claims on a non-contractual duty. We therefore recommend that it be expressly provided that the rules about when a duty of care to avoid pure mental harm arises are the same regardless of whether the claim for damages for pure mental harm is brought in tort, contract, under a statute (subject to express provision to the contrary) or any other cause of action.

Recommendation 35

The Proposed Act should embody the following principle:

The rules about when a duty to take reasonable care to avoid pure mental harm arises are the same regardless of whether the claim for pure mental harm is brought in tort, contract, under a statute (subject to express provision to the contrary) or any other cause of action.

The nature of the claim for pure mental harm

9.31 The claim for pure mental harm is an independent claim. Even in cases in which the harm occurs as a result of the imperilling, injuring or killing of another and where the claim in respect of mental harm is made against the person who was responsible for the injury, death or peril, the liability for mental harm is based on a duty owed to the person who suffers the mental

5 *Sutherland v Hatton* [2002] IRLR 263.

harm. It is not dependent or built on a duty owed to the person injured, killed or imperilled.

9.32 Nevertheless, it has been proposed (in sub-clause 69(3) of the consultation draft of the Civil Liability Amendment (Responsibility) Bill 2002 (NSW)) that, where a plaintiff claims damages for pure mental harm arising out of an incident in which another was injured (or killed) — and where any damages awarded to the injured person (or his or her estate) would be reduced for contributory negligence on the ground that the person injured or killed was intoxicated — any damages awarded to the plaintiff for mental harm should be reduced by the same proportion.

9.33 Although this provision might seem hard to justify from the point of view of the person claiming damages for pure mental harm, from the defendant's point of view it might be thought only fair. Why should the defendant be required to pay full compensation for the mental harm suffered by the plaintiff when it can be said to be partly the fault of the person imperilled, injured or killed? The Panel therefore recommends a general provision to the effect that in a claim for damages for pure mental harm arising out of an incident in which a person was injured, killed or put in peril, any damages awarded should be reduced by the same proportion as any damages recoverable from the defendant by the injured person (or his or her estate) would be reduced.

Recommendation 36

The Proposed Act should embody the following principle:

In an action for damages for negligently-caused pure mental harm arising out of an incident in which a person was injured, killed or put in peril as a result of negligence of the defendant, any damages awarded shall be reduced by the same proportion as any damages recoverable from the defendant by the injured person (or his or her estate) would be reduced.

Consequential mental harm

9.34 The current law is that if a person suffers mental harm consequential on physical harm, damages for the mental harm may be recovered regardless of whether the mental harm amounts to a recognised psychiatric illness, provided the defendant owed the plaintiff a duty to take care to avoid causing *physical harm*. In many cases, consequential mental harm gives rise only to a claim, and an award of damages, for non-economic loss (typically 'pain and suffering and

loss of amenities'). We are not concerned with such cases here. We will consider such awards in our examination of the assessment of damages for personal injury in Chapter 13. Here we focus on cases where consequential mental harm gives rise to a claim for damages for economic loss, such as loss of income and the cost of care.

9.35 The fundamental issue to which such claims for special damages for consequential mental harm give rise is whether they should be subject to the same requirements as attach to claims for damages for pure mental harm, namely that (a) the mental harm must constitute a recognised psychiatric illness; and (b) the circumstances of the case must be such that the defendant ought to have foreseen that a person of normal fortitude might suffer a recognised psychiatric illness if reasonable care was not taken. The importance of this issue is most obvious in cases where the plaintiff suffers no permanent physical impairment — that is, where the only continuing effects of the negligence are mental rather than physical. Cases involving soft-tissue injuries provide widely-cited examples.

9.36 The Panel's considered opinion is that (a) damages for economic loss resulting from the negligent infliction of mental harm should be awarded only in respect of recognised psychiatric illness, even if the mental harm is consequential on physical injury; and (b) such damages should be recoverable only if the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances, suffer a recognised psychiatric illness if reasonable care was not taken. In our view, the distinction between damages for non-economic loss and damages for economic loss is very important in this context. It seems unfair that a person who suffers consequential mental harm should be able to recover potentially very large amounts of damages for economic as well as non-economic loss, when a person who suffers precisely the same harm but without the accompanying physical harm should recover nothing for economic loss. The link between mental and physical harm does not seem sufficient to support this difference of treatment, especially in cases where the physical harm causes no permanent physical impairment.

9.37 It is important to note that the effect of our proposal is that in order to recover economic-loss damages for consequential mental harm, the plaintiff must establish that the defendant owed the plaintiff a duty to take care to avoid inflicting mental harm, as well as a duty to avoid inflicting physical harm. This duty in relation to mental harm is separate from, and independent of, the duty in relation to physical harm.

9.38 The question whether the defendant owed the plaintiff an independent duty to take care to avoid inflicting consequential mental harm would be

determined by reference to all the relevant circumstances, including the physical injuries in fact suffered by the plaintiff.⁶ That is, the question to be asked is: was it foreseeable, in the light of all the relevant circumstances, including the physical injuries in fact suffered by the plaintiff, that if care was not taken a person of normal fortitude, in the position of the plaintiff, might suffer consequential mental harm?

Recommendation 37

The Proposed Act should embody the following principles:

- (a) Damages for economic loss resulting from negligently-caused consequential mental harm are recoverable only if:**
 - (i) the mental harm consists of a recognised psychiatric illness; and**
 - (ii) the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances, suffer a recognised psychiatric illness if reasonable care was not taken**
- (b) In determining the question of foreseeability in (a)(ii), the test is whether it was foreseeable, in the light of all the relevant circumstances, including the physical injuries in fact suffered by the plaintiff, that if care was not taken a person of normal fortitude, in the position of the plaintiff, might suffer consequential mental harm.**

9.39 If this Recommendation is implemented, it will promote the objectives of the Terms of Reference in a very significant way. Damages for economic loss resulting from consequential mental harm can be very large, even in cases where the plaintiff has suffered no permanent physical impairment. It is important, in the Panel's opinion, that claims for consequential mental harm should not be treated as parasitic on the associated claim for physical harm, and thereby be freed from the constraints that attach to other claims for mental harm. As a matter of principle, the Panel believes that the distinction drawn between physical and mental harm should be applied to consequential as well as to pure mental harm.

6 Similarly, in determining whether the defendant owed the plaintiff a duty to take care to avoid inflicting pure mental harm as a result of imperilling, injuring or killing another, the question of foreseeability of mental harm has to be assessed in the light of all relevant circumstances including the nature of the actual events from which the mental harm allegedly resulted. To this extent, the existence of a duty of care is decided with the benefit of hindsight.

Expert Evidence

9.40 To the extent that the law awards damages for mental harm only if it constitutes a recognised psychiatric illness, expert evidence is needed to determine whether the mental harm suffered satisfies this criterion. In any case in which damages are claimed for negligently-caused mental harm, expert evidence may also be needed in order to determine whether the harm was in fact a result of the negligence. Our consultations suggest that there is considerable dissatisfaction in relation to expert evidence relating to mental harm. We have recommended the establishment of an expert panel to develop guidelines for the assessment of mental illness in legal contexts. This will address some of the dissatisfaction. However, the general concerns about the quality and impartiality of expert evidence, which were addressed in paragraphs 3.70-3.79, have been voiced by some with increased force in this context.

9.41 We noted, in paragraph 9.6, the reservations expressed in the introduction to DSMIV based on the distinction between clinical and forensic psychiatry. The Panel's considered opinion is that this distinction is of great importance in the context of ensuring that expert psychiatric evidence is of high quality and relevance. We therefore recommend that the expert panel appointed to develop guidelines for the assessment of mental illness should also be instructed to develop options for a system of training and accreditation of forensic psychiatric experts.

Recommendation 38

The expert panel referred to in Recommendation 33 should be instructed to develop options for a system of training and accreditation of forensic psychiatric experts.

