

COMMON LAW CLAIMS FOR MENTAL HARM
– A REFRESHER AND SOME THOUGHTS ON
CAUSATION

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Introduction

Psychiatric injury, or mental harm claims are very familiar to all personal injury lawyers. Not just consequential mental harm, but pure mental harm is absolutely accepted today as a legitimate basis for a personal injury claim.

Still, there are hurdles to be overcome by plaintiffs in bringing such a claim and the law regarding this particular type of injury continues to develop and intrigue.

Pure mental harm as a compensable injury in NSW – a brief history

Liability for pure mental harm has ebbed and flowed in the last century.

In 1888, the Privy Council in *Victorian Railways Commissioners v Coultas*¹ determined that there was no liability at all for pure “nervous shock” without physical injury. Following this, what seem now to be callous decisions of Australian courts flowed.²

One of the difficulties perceived by the Courts prior to the recognition of pure mental harm as compensable injury was the difficulty in establishing causation.

The *Law Reform (Miscellaneous Provisions) Act 1944 (LRMPA)* supported that damages for injury were not precluded merely because that injury consisted of “mental or nervous shock”³; and extended liability for injury to mental or nervous shock sustained by a parent, husband or wife of the person killed or put in peril, or any other family member, where the person was killed, injured or put in peril *within the sight or hearing* of such a family member.

In *Jaensch v Coffey* (1984) 58 ALJR 426; (1984) 54 ALR 417 the High Court moved away from earlier decisions such as *Coultas*. Famously, the Court (with different focuses on concepts of proximity and foreseeability) held that damages for pure mental harm were recoverable in “aftermath” situations – that is, where relatives had not heard or seen the victim being injured or killed, but had arrived later (or at the hospital). Deane J’s leading judgment⁴ regarding the potential ability for relatives to recover even where they had merely heard of the shock event from others (not the case for Mrs Coffey) paved the way for further developments.

¹ (1888) 13 App Cas 222

² Eg. *Chester v Waverley Corporation* (1939) 62 CLR 1, in which a mother who had witnessed her 7 year old’s drowned body being pulled from a trench full of water. The High Court held that a duty was not owed to her (as opposed to her son), as her psychiatric injury was not foreseeable.

³ See, now, s.29 *Civil Liability Act*.

⁴ At 608.

From here the law continued to expand and in 2002 the High Court handed down its decision in *Tame v State of New South Wales*⁵. In *Tame*, whilst ultimately the plaintiff failed to establish that her injury was reasonably foreseeable, the High Court confirmed the “egg-shell skull” rule and found that once it is established that a person of normal fortitude would have suffered psychiatric illness as a result of the defendant’s action, the defendant must take the plaintiff as they find them and compensate for all damage, even though that particular plaintiff might have suffered an injury over and above what would be expected of a person of normal fortitude⁶.

The majority held that the law no longer required that in order to successfully make a claim for pure mental harm, a plaintiff must experience *sudden shock*, nor that they must *directly perceive* the person being killed, injured or put in peril.⁷

In enacting the mental harm provisions in the *Civil Liability Act*⁸ the legislature has sought to reign in the capacity for claims for mental harm and the particular provisions are discussed below. However, the High Court⁹ has stated that the CLA does not act to replace common law rights and that the common law has a continuing role to play.¹⁰

Basic Principles

A case in which damages are sought for mental harm is governed (with some exceptions of course¹¹) by the *Civil Liability Act (2002) (CLA)*.

For every case, it is important to go back to the basics of the CLA:

1. Duty of care and breach of duty – s. 5B
2. Causation – s. 5D
3. Damage – Part 2 (not covered in this paper).

5B General principles (*duty and breach*)

- (1) A person is **not negligent** in failing to take precautions against a risk of harm unless:
- (a) the risk was **foreseeable** (that is, it is a risk of which the person knew or ought to have known), and
 - (b) the risk was **not insignificant**, and

⁵ (2002) 211 CLR 317. Where police, after Mrs Tame was involved in a MVA, accidentally recorded her as having a blood alcohol reading of 0.14 (it was in fact 0.00), which mistake took some time to correct and Mrs Tame alleged she had suffered a psychiatric (depressive-psychotic) illness as a result of the stress. The decision was handed down together with *Annetts v Australian Stations Pty Limited*.

⁶ The requirement of a “sudden shock” was also rejected by the Court.

⁷ In *Annetts*, the parents of the victim who had died had an agonising wait of months before discovery of his body and confirmation of his death was available.

⁸ Which came into force in December 2002, three months after *Tame* was handed down.

⁹ *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269.

¹⁰ See *Wicks v State Rail Authority (NSW)* (2010) 241 CLR 60.

¹¹ See s. 3B – broadly, intentional tort, dust diseases, some aspects of MVA claims and workers compensation.

(c) in the circumstances, a **reasonable person in the person's position would have taken those precautions**.

(2) In determining whether a reasonable person would have taken precautions against a risk of harm, **the court is to consider** the following (amongst other relevant things):

- (a) the probability that the harm would occur if care were not taken,
- (b) the likely seriousness of the harm,
- (c) the burden of taking precautions to avoid the risk of harm,
- (d) the social utility of the activity that creates the risk of harm.

5D General principles (*causation*)

(1) A determination that negligence caused particular harm comprises the following elements:

- (a) that the negligence was a necessary condition of the occurrence of the harm (***factual causation***)¹², and
- (b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (***scope of liability***).

(2) In determining in an exceptional case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be accepted as establishing factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

(3) If it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the negligent person had not been negligent:

- (a) the matter is to be determined subjectively in the light of all relevant circumstances, subject to paragraph (b), and
- (b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.

(4) For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

Comment – duty, breach and causation

The provisions of s.5B tie in with those in Part 3, in the sense that requirements of foreseeability and “not insignificant” harm are reflected in the notions of persons of normal fortitude (s.32) and recognised psychiatric illness (s.31).

¹² That is, the link between any negligence and the harm allegedly caused – because you can have a negligent action that results in no harm, or harm that occurs but with no fault attaching.

Causation is of course not difficult to establish in mental harm claims where there is no apparent pre-existing condition and the injury is obvious (Mrs Chester's experience in the 1930s probably provided one such example). The difficulties arise where there is a pre-existing mental health issue.

The High Court in *March v E & MH Stramare Pty Ltd* (1991) CLR 506 applied "common sense causation" in preference to the simplistically labelled "but for" test as the exclusive for causation. As Peter Handford comments¹³:

"The criterion for determining whether a breach of duty to take care caused damage was now to be based on general considerations including the drawing of inferences from established facts and the assessment of alleged causative factors from the standpoint of material contribution, necessitating a value judgment involving ordinary notions of language and common sense, and downplaying the role traditionally afforded to the "but for" test."

Concluding what, in terms of treatment, care and other loss (eg. economic loss) is a tricky process and needs to be drawn out carefully from treating records and addressed directly by experts and the onus is of course on the plaintiff to prove causation.¹⁴

The same principles apply to mental harm claims; and there is nothing special about psychiatric injury, from a breach, or causation perspective. Except that there is. The CLA does not treat any other injury – gynaecological, vascular, orthopaedic – specially. But mental harm is treated differently, with the unique provisions set out in Part 3 of the CLA with the "big ticket" sections being 30, 31, 32 and 33. I discuss selected provisions below.

Specific CLA affecting psychiatric injury - Part 3 Civil Liability Act¹⁵

27 – Definitions

Consequential mental harm means mental harm that is a consequence of a personal injury of any other kind.

Mental harm means impairment of a person's mental condition.

Personal injury includes impairment of a person's mental condition

Pure mental harm means mental harm other than consequential mental harm.

Section 30 Limitation on recovery for pure mental harm arising from shock

¹³ *Tort Liability for Mental Harm* (3rd ed.) by P Handford at [7.570]

¹⁴ Section 5E CLA.

¹⁵ NSW, Victoria, South Australia and Tasmania all enacted provisions, following the IPP report, that narrowed the scope of claims for mental harm. The ACT and WA's mental harm provisions are not as restrictive and the NT and Qld have no mental harm provisions. Thus there is no national unity in the area of psychiatric injury.

(1) This section applies to the liability of a person (***the defendant***) for pure mental harm to a person (***the plaintiff***) arising wholly or partly from mental or nervous shock in connection with another person (***the victim***) being killed, injured or put in peril by the act or omission of the defendant.

(2) The plaintiff is not entitled to recover damages for pure mental harm unless:

- (a) the plaintiff **witnessed, at the scene**, the victim being killed, injured or put in peril, or
- (b) the plaintiff is a **close member of the family** of the victim.

(3) Any damages to be awarded to the plaintiff for pure mental harm are to be reduced in the same proportion as any reduction in the damages that may be recovered from the defendant by or through the victim on the basis of the contributory negligence of the victim.

(4) No damages are to be awarded to the plaintiff for pure mental harm if the recovery of damages from the defendant by or through the victim in respect of the act or omission would be prevented by any provision of this Act or any other written or unwritten law.

(5) In this section:

close member of the family of a victim means:

- (a) a parent of the victim or other person with parental responsibility for the victim, or
- (b) the spouse or partner of the victim, or
- (c) a child or stepchild of the victim or any other person for whom the victim has parental responsibility, or
- (d) a brother, sister, half-brother or half-sister, or stepbrother or stepsister of the victim.

spouse or partner means:

- (a) a husband or wife, or
- (b) a de facto partner,

but where more than one person would so qualify as a spouse or partner, means only the last person to so qualify.

Comment

Unlike the LRMPA provision (s.4(1)), s.30 is an *excluding* section, specifically precluding plaintiffs who do not meet qualifications. The crux of the provision is that to be entitled to damages for pure mental harm, you need to be one of two things - a close relative or to have witnessed the event that endangered, injured or killed the victim.

The wording of s.30(2)(a) implies that the *incident* causing harm must be actually witnessed (rather than the aftermath of that action), but this issue was dealt with in *Wicks v State Rail Authority (NSW)* (2010) 241 CLR 60, where the plaintiffs were police officers who had attended and assisted at the Waterfall rail disaster and alleged resultant PTSD. The High Court overturned the Court of Appeal's decision that the plaintiffs had not, in terms of s.30(2), witnessed, at the

scene, the victim/s being killed, injured or put in peril, because by the time they had arrived the precipitating event (the crash) had ended.¹⁶

Instead, in *Wicks*, the Court unanimously preferred a more liberal interpretation of the legislation. It found, without reference to extrinsic material including the Ipp Report¹⁷, that it is not the case that all cases of death, injury or peril are events that begin and end in an instant and further, that the psychiatric injury need not be related to a particular victim. In this case, the consequences of the derailment played out over time and some passengers remained “in peril” for significant periods.

The other class of plaintiff, “close family member” (30(2)(b)), is limited. It is narrower than that contemplated in the LRMPA. It is narrower than common law contemplations. In *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 McHugh J¹⁸ said:

*“The collective experience of the common law judiciary is that those who have a **close and loving relationship** with a person who is killed or injured often suffer a psychiatric injury on learning of that injury or death, or on observing the suffering of that person....They are among the persons who are likely to be so closely and are directly affected by the wrongdoer’s conduct that the person ought reasonably to have taken them in mind when considering if it is exposing the victim to a risk of harm”*

The purpose of s.30 of the CLA was to act to limit the class of people who might otherwise be entitled to compensation for nervous shock, by virtue of being owed a duty of care and satisfying s.32 and *prima facie* grandparents, cousins, aunts and uncles are excluded.

With the limited number of personal injury actions that make it to judicial determination this is a difficult one to predict, but with the ever increasing “blended family” and the increasing acceptance of unique and non-traditional family model. It is an area to watch and annexed to this paper is a short discussion of two particular groups – cousins, and those with parental responsibility.

So too is the possible expansion of the concept of a parent or person with “parental responsibility” in light of high rates divorce and re-partnering. For a step-parent (or, particularly, an ex step-parent) to establish that they fall within s. 30, there may be some work to do. Day to day roles, decision-making and the like would require close examination.

Section 31 Pure mental harm — liability only for recognised psychiatric illness

There is no liability to pay damages for pure mental harm resulting from negligence unless the harm consists of a recognised psychiatric illness.

¹⁶ See *Shehan v State Rail Authority* (2009) Aust Torts Rep 82-028

¹⁷ *Wicks v State Rail Authority (NSW)* (2010) 241 CLR 60 at [41].

¹⁸ At [47]

Comment

There is still a notable distinction between claims for consequential mental harm, and those for pure mental harm and the fact of pure mental harm damages only flowing from *recognised psychiatric* illness illustrates the point.

As the Chief Justice of South Australia observed recently¹⁹:

The difference arises out of the common human experience, which is also well known to courts in personal injury actions, that psychological and psychiatric conditions are not uncommon sequelae of physical injuries which require surgical intervention and/or interferes with working capacity or daily living activities.

Usually by the time a matter gets as far as a hearing this issue of whether there is a recognised psychiatric illness is fairly certain (thus there is not a large number of cases that grapple with the distinction).

There is no settled concept of what in fact constitutes a recognised psychiatric illness. Most commonly the relevant Diagnostic and Statistical Manual is used by experts, but it is not necessarily the only source of identification.

In *Flight Centre v Louw* [2011] NSWSC 132 – the court found that the impairment to the plaintiffs' mental state due to a highly disappointing holiday experience - "*inconvenience, distress and disappointment*" - was mental harm, but not such that it could be classified as a recognised psychiatric illness (nor did they overcome the 15% threshold for non-economic loss set by s.16).

Section 32 Mental harm — duty of care

(1) A person (***the defendant***) does not owe a duty of care to another person (***the plaintiff***) to take care not to cause the plaintiff mental harm unless the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken.

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

- (a) whether or not the mental harm was suffered as the result of a sudden shock,
- (b) whether the plaintiff witnessed, at the scene, a person being killed, injured or put in peril,

¹⁹ *Anwar v Mondello Farms Pty Ltd* [2015] SASCF 109; per Kourakis CJ at [3] - regarding the SA equivalent of s.32

- (c) the nature of the relationship between the plaintiff and any person killed, injured or put in peril,
- (d) whether or not there was a pre-existing relationship between the plaintiff and the defendant.

(3) For the purposes of the application of this section in respect of consequential mental harm, the circumstances of the case include the personal injury suffered by the plaintiff.

(4) This section does not require the court to disregard what the defendant knew or ought to have known about the fortitude of the plaintiff.

Comment

Bear in mind that s.32 does not state that the plaintiff themselves must be a person of normal fortitude. This is a mistake sometimes made by legal practitioners (eg *Hollier v Sutcliffe* [2010] NSWSC 279).

Further, how a person of "ordinary fortitude" would have responded will depend entirely on the circumstances of each case. In *Tame* the High Court found that consideration of the question was an application of the ordinary foreseeability test. The CLA does separate the notion, but in essence the question is what is foreseeable in the circumstances. An "unusually sensitive" victim cannot recover damages unless the defendant knew, or ought to have known of that unusual sensitivity.²⁰

Section 33 Liability for economic loss for consequential mental harm

A court cannot make an award of damages for economic loss for consequential mental harm resulting from negligence unless the harm consists of a recognised psychiatric illness.

Comment

This provision is sometimes overlooked, but often irrelevant. In cases of consequential mental harm the economic loss component of the claim will arise from the other (physical) injury and it is logical that if the mental harm alleged is not significant enough to be a recognised psychiatric illness, it should not result in an inability to work.

Defendant's burden - the reversal of onus where pre-existing injury alleged

The plaintiff must prove, on the balance of probabilities, that the harm he has suffered would not have occurred but for the defendant's negligence: *Strong v Woolworths Ltd* (2012) 285 ALR 420 at [18].

²⁰ *Bourhill v Young* [1943] AC 92 at 110, a principle affirmed in many decisions thereafter.

Where there is an admission of breach, the plaintiff will usually have no difficulty in establishing, on the balance of probabilities, that (at least some form of) harm was caused by the negligence of the defendant.

However, if a defendant wishes to suggest that a pre-existing condition was the cause of, or a significant contributor to, the plaintiff's injury/disability, an evidentiary onus is cast on it: *Watts v Rake* (1960) 108 CLR 158; *Purkess v Crittendon* (1960) 114 CLR 164.

In *Varga v Galea* [2011] NSWCA 76, McColl JA explained (at [51]) this, as follows:

"A defendant who alleges that a plaintiff suffered from a pre-existing condition which may have had an adverse impact on his or her future whether or not the immediate injury in question had occurred, bears an evidential burden to show that the plaintiff's condition would have deteriorated in any event regardless of the accident."

In *Seltsam v Ghaleb* [2005] NSWCA 208 Ipp JA (at [96]) Ipp JA (with Mason P agreeing)²¹ discussed the evidentiary shift to the defendant to establish these matters with evidence **sufficiently precise and definite** – using the words of Windeyer J in *Purkess v Crittendon* – to displace the inference that the harm suffered by the plaintiff was caused by the defendant's negligence.

In *Glen v Sullivan* [2015] NSWCA 191, the Court of Appeal (Sackville AJA with Beazley P and Ward JA agreeing) found that the defendant insurer bore the onus of adducing evidence to support a finding that the aspect of plaintiff's psychiatric condition allegedly caused by the accident had resolved and ongoing issues were caused by her pre-existing psychiatric condition. Importantly, the Court found that such evidence must be significantly probative, not a mere raising of doubt. Once such probative evidence was established, only then did the onus fall back on the plaintiff to establish the causal connection.²²

Thus, it is necessary for a defendant, in order to defeat the claim on causation, to do more than raise suspicions or questions about pre-existing causative events/issues. Evidence of significant probative value on the issue of the connection between the plaintiff's pre-existing condition, and the extent to which it accounts for the existing disabilities giving rise to damages, must be adduced.

The Court of Appeal's recent decision in *Metro North Hospital and Health Service v Pierce* [2018] NSWCA 11 confirms that a rigorous standard is required.

²¹ At [100].

²² This issue was considered recently again by the Court of Appeal in *Metro North Hospital and Health Service v Pierce* [2018] NSWCA 11, where the defendant LHD established (using the reverse onus) that the plaintiff had pre-existing progressively degenerative epilepsy, nevertheless the plaintiff proved that certain (lack of) treatment had materially contributed to the increased burden of the disease.

Some tips for lawyers bringing or defending claims for damages for mental harm

1. If the claim is professional negligence, has there been compliance with **UCPR 31.36**?

Has expert psychiatric evidence been served with respect to causation and (in general terms) damage? If the plaintiff has not complied with r.31.36 and the claim appears unmeritorious, a defendant may consider making an issue of this matter. If the plaintiff appears unable to comply, there may be grounds for a strike out application²³ or at the very least the basis of a robust discussion around early commercial settlement.

2. Examine **treating records** carefully. Do the records support the plaintiff's claim? Further, with the identification of mental illness increasing in the community, it is increasingly likely that plaintiffs may have a history of mental health issues and a question for expert psychiatrists may be something like: *given the plaintiff's history, is it more likely than not that the treatment recommended by (plaintiff's expert) would have been required in any case?*
3. **Subpoena Medicare** (through the Department of Human Services) for past treating and PBS record – often the best way to establish whether there is anything in the plaintiff's history that is inconsistent with what they have alleged/revealed, and:
 - If there is helpful information in them, **provide them to the expert** for comment – do they alter an opinion?; and
 - If the information benefits your position, **serve it!** Reduce admissibility complaints later through service early on.
4. Will the defendant allege a **pre-existing condition** caused or contributed to the injury and damage? If so, bear in mind the reverse onus. Mental harm claims themselves don't often sound in substantial damages in terms of treatment, because recommendations are often fairly limited, but they can have a large impact on non-economic loss²⁴ and naturally, a claim in which causation is not able to be established will fail.
5. **Get good expert evidence:**
 - **Brief a good expert**, particularly in cases of pure mental harm – their report could of course make or break the case. A senior, respected physician is also likely to come out well from the a conclave. An expert's report that is logical and

²³ However, the basis for this should be carefully considered: *Salzke v Khoury* [2009] NSWCA 195 – reports are not evidence and don't have to prove a *prima facie* case, they merely have to *support* the plaintiff's case on breach, causation and the general nature of damages [69].

²⁴ Recent examples of high NEL assessments in pure mental harm claims are: *Lee v Carlton Crest Hotel* [2014] NSWSC 1280 and *McManus v Murrumbidgee Local Area Health Networks* [2016] NSWSC 1347 (50 and 60% respectively).

makes sense is more likely to be persuasive. For example, in *LC by his litigation guardian KS v Australian Capital Territory* [2017] ACTSC 324 per Burns J at [57]:

*I prefer the evidence given by Dr Raftos to that given by Dr Spain because the evidence given by Dr Raftos accords with **logic and common sense**, and, with respect, aspects of the evidence of Dr Spain do not. For example, I find Dr Spain's reliance on the assurances given by the plaintiff in the Emergency Department **mystifying** in the circumstances demonstrated by the evidence.*

- Provide a **detailed statement of assumptions** but ensure assumptions are consistent with treating records and do not rely too heavily on what your client instructs you occurred. You don't want an aspect of an opinion being rejected due to it being based on an assumption that is ultimately disproved.
 - **Conference the expert.** Don't be shy about drawing their attention to particular issues. Ensure they understand the need to refer to records and **provide reasons** for their opinion on diagnosis, and whether that diagnosis is attributable to the defendant's negligence.
 - In terms of **causation**, a detailed history becomes crucial. The essential questions are: When did the symptom/s begin? What was the triggering event? Have these continued, or changed? And if yes, or no, why?
6. Pay attention to **what comes out of expert psychiatrists' report** – often the histories taken by expert psychiatrists are far more detailed and broad than other treating or expert doctors. Eg. a psychiatrist will often comment on relationships and employment issues, perhaps inconsistent with an aspect of the claim.
 7. **Serve reports and records** at least 28 days before the hearing – see UCPR 31.28. As a precaution, and to avoid any allegation of surprise, delay, or an application for adjournment, serve **all treating records** (despite 31.28 referring to "hospital records" only) on which the defendant intends to rely in plenty of time.
 8. If acting for a defendant in a personal injury action, focus less on a raft of **pro-forma requests** for particulars, but rather, hone in on the real issues of the case that are in dispute.
 9. Where cases appear out of control, **make offers**: see the enormous potential ramifications of ongoing offers in *Chaina v Presbyterian Church (NSW) Property Trust* (No 25) [2014] NSWSC 518.

Final musings

Psychiatric injury has often been greeted with a scepticism that contrasts sharply with the sympathy generated by physical harm, but often “an injured mind is far more difficult to nurse back to health than an injured body and is arguably more debilitating and disruptive of a greater number of aspects of human existence.”²⁵

That scepticism is evident in case law, and particularly in the various pieces of legislation governing mental harm.

With the growth of social media we appear to have somewhat of a social media-induced mental health crisis. There are all sorts of statistics emerging about, particularly, teenagers and the growth of depression and anxiety in this generation. Furthermore, teenagers are more likely to seek help today, whether from school counsellors or other mental health professionals. It will be interesting to see what effect this growth of pre-existing psychiatric history has on claims in the coming years.

Further, how the law continues to treat claims for mental harm as the science of the brain evolves is fascinating, and an area ripe for development into the future.

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²⁵ *Tort Liability for Mental Harm*, above n.14, at

Addendum – Other familial plaintiffs? – s.30(5)

Cousins

The “close member of the family” provision causes consternation. What about culturally less common situations – eg. where several generations, cousins and the like live together and think of each other as siblings? What about a cousin in that context? As far as I know there is no authority on this question.

McHugh J in *Gifford v Strang Patrick Stevedoring Pty Ltd* considers the person with a "close and loving relationship" with a person killed or injured. In *Bird v the Commonwealth of Australia* (1988) 165 CLR 1 the High Court, in considering the Commonwealth workers' compensation legislation¹⁸, stated:

“Moreover, it is well to remember that employee's compensation legislation, such as the Act and the Regulations, is remedial in its character "and, like all such Acts, should be construed beneficially" (*Bist v. London and South Western Railway Co.* (1907) AC 209, at p 211). The "established principle" was correctly identified by Fullagar J. in the course of his dissenting judgment in *Wilson v. Wilson's Tile Works Pty. Ltd.* (1960) 104 CLR 328, at p 335: "where two constructions of a Workers' Compensation Act are possible that which is favourable to the worker should be preferred". If a person or a case falls within the general spirit of such remedial legislation, and there are two possible interpretations, the courts ought not to construe the Act so as to exclude that person or case.”

By contrast, the CLA is not remedial at its heart. Section 30 of the CLA is a limiting, rather than an expansive provision (as was s.4 LRMPA). Where a family member does not fit strictly within the provisions of s.30, the plaintiff will of course bear the onus of proving the closeness (or the “close and loving” quality as per *Gifford v Strang*) of the relationship.

Indeed, section 33 of the Interpretation Act 1987 states that:

When interpreting an Act, a construction that promotes the purpose or object underlying the act or statutory rule shall be preferred to a construction that would not promote that purpose or object.

In *Wicks* the Court¹⁹ found that the legislation's Second Reading speech contained no useful statement about why s.30 took the form that it did (and the September 2002 Negligence Final Report suggested a wording that was not ultimately adopted thus it is also unhelpful in interpreting the section.

Section 101 of the *Succession Act 2006*, defines “brother or sister” as being two people who have one or both parents in common.

Other legislative definitions of the family unit include the following section 3 of the *Children and Young Persons (Care And Protection) Act 1998 (NSW)* - includes a definition of “kin” as meaning “a person who shares a cultural, tribal or community connection with the child or young person that is recognised by that child or young person's family or community.”

In response to a cousin who attempts to overcome the threshold by making an argument as to their sibling-like relationship with the victim, the sorts of arguments one would see are:

- The purpose of s.30 of the CLA was to restrict the operation of s.32.
- The terms of brother and sister are not ambiguous and do not require extraneous material in order to define them.
- If the legislature had intended the relationships which might satisfy the definition of brother/sister to a relationship to be broadly interpreted, a more expansive definition such as those used in other legislation would have been used.
- The definition of a parent in the section is wider than birth parents, while a similarly expansive definition is not provided in the case of siblings.
- To provide an extended definition of a sibling such that it could be met by having a brother or sister like relationship would possibly include good friends, or others sharing a close relationship who would satisfy the foreseeability test in *Gifford*, leaving s.30 no work to do.

Naturally, each claim will turn on its facts.

Parental responsibility

Another area of interest is that of the person with “parental responsibility” pursuant to section 30(5)(a). The term is defined in s.61B of the *Family Law Act* as meaning:

“...all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.”²⁶

The sorts of matters which fall within the term “parental responsibility” are decisions relating to major long term issues as defined in s.4 and s.65DAC of the *Family Law Act* as including:

- The child’s education (both current and future)
- The child’s religious and cultural upbringing
- The child’s health
- The child’s name.

These definitions connote some sort of formality, longevity and permanency about the role.

Section 30(5)(a) requires the plaintiff to be a person “with parental responsibility” for the victim and the word “with” denotes possession and currency of possession.

The purpose of s.30 of the CLA was to act to limit the class of people who might otherwise be entitled to compensation for nervous shock, by virtue of being owed a duty of care and satisfying s.32. Thus, for a step-parent to establish that they fall within section 30, there may be some work to do.

²⁶ Definitions reflected in *Children and Young Persons (Care and Protection) Act 1998 (NSW)*, and the *Adoption Act 2000 (NSW)*