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A Corrective Justice Justification for Considering the Response of the Hypothetical Person of an “Ordinary Level of Susceptibility” when Assessing Reasonable Foreseeability in Cases Involving Negligently Inflicted Psychiatric Injury

Martin Allcock*

The law has long been concerned with limiting recovery for pure psychiatric injury in negligence in order to prevent liability to plaintiffs who are unusually susceptible to this type of injury. The justifications provided by courts for this concern have often centred on the idea that holding a defendant liable to such a plaintiff will be unreasonable. However, there is a gap in the reasoning of the courts and in the scholarly literature as to the potential theoretical justifications for measuring the reasonableness of the defendant’s conduct against the effect of that conduct on the hypothetical person of an “ordinary level of susceptibility”. This article attempts to address this gap, arguing that measuring the reasonableness of the defendant’s conduct in this way in relation to an overriding test of reasonable foreseeability can be explained pursuant to Allan Beever’s corrective justice theory of negligence.

INTRODUCTION

The law has long been concerned with limiting recovery for pure psychiatric injury in negligence in order to prevent liability to plaintiffs who are unusually susceptible to mental harm. The notion of the plaintiff who is of ordinary fortitude – one who possesses the “customary phlegm”¹ – is a hypothetical construct which has arisen as a limitation on recovery in order to exclude from liability those plaintiffs who are particularly predisposed to psychiatric illness caused by a shocking event.² It has been argued that the law’s concern with establishing that the plaintiff is a person of normal fortitude may have originated from the belief commonly held by neuropsychiatrists at around the end of the 19th century that only those predisposed to suffering neurosis would later go on to suffer that condition.³ However, those views changed following the World War I when medical professionals took notice of the psychological effects of traumatic stress of those not considered predisposed to such injuries.⁴

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¹ See *Bourhill v Young* [1943] AC 92, 117 (Lord Porter).

² See, eg Danuta Mendelson, “The Defendant’s Liability for Negligently Caused Nervous Shock in Australia – Quo Vadis” (1992) 18 *Monash University Law Review* 16, 19; Peter Handford, *Mullany and Handford’s Tort Liability for Psychiatric Damage* (Lawbook, 2nd, 2006) 315–316; Des Butler, “Susceptibilities to Nervous Shock: Dispensing with the Mythical ‘Normal Person’” (1997) 1 *Macarthur Law Review* 107, 107–114.

³ See Mendelson, n 2, 19, 56.

⁴ See Danuta Mendelson, *The Interfaces of Medicine and Law: The History of the Liability for Negligently Caused Psychiatric Injury (Nervous Shock)* (Ashgate Dartmouth, 1998) 94, which tracks the development of legal principles relating to the recovery

Liability in circumstances where the defendant cannot predict the result of their actions seems to be contrary to the law's concern with promoting reasonable conduct.⁵ Indeed, application of the consideration has often been justified by courts on the grounds that it assists in some way in assessing the reasonableness of the defendant's conduct. The connection between the hypothetical plaintiff of "ordinary fortitude" and the concept of reasonableness is long established, having been made by the earliest courts considering cases involving psychiatric damage. The beginnings of what is sometimes referred to as the normal fortitude consideration can be found in *Spade v Lynn and Boston Railroad Co*,⁶ where the Court was of the view that it was not reasonable to hold a defendant liable for causing harm to those who were peculiarly sensitive and likely to suffer injury as result of a relatively benign event, unless some type of notice had been previously provided to the actor in question as to that peculiar vulnerability.

Three years later in *Dulieu v White & Sons*, Phillimore J referred approvingly to these comments, finding that a duty between users of the highway was owed only to those of a so-called "normal" level of susceptibility – to someone between "an inexperienced and elderly country woman ... [and] an experienced and cool citizen, the ideal *vir constans*". This suggested the duty of care on the roads was perhaps limited to only those steady enough to withstand the terrors they may face when going there.⁷ Early scholarly justifications for the consideration reflected this understanding. Writing in 1915 in relation to the interest in personality protected by law, American legal scholar Roscoe Pound noted that psychiatric injury in the absence of impact was "a new problem of modern law". He saw the courts' concerns with identifying impact or physical injury as reflecting a desire to attach something tangible or observable to the cause of action in order to dispel fears that plaintiffs would make dishonest reports of psychiatric injury. For Pound, the relevance of the reaction of a person of ordinary fortitude was justified by reference to a balancing of individual interests with wider social interests.⁸

In the Scottish Court of Session in *Walker v Pitlochry Motor Co*, Lord Mackay took a similar position to Phillimore J, finding that one could expect a much greater immunity from interference with this interest when in one's home when compared, for example, to when in the streets.⁹ Lord Mackay was of the view that this difference was justified by the finding that individuals had a choice about whether going into the street which did not exist with respect to one's home. Finding that the general duty of those in traffic "ought to be measured by the standard of normal persons", his Lordship held that unless provided with adequate notice of the plaintiff's unusual susceptibility or sufficient reason to the contrary, those on the streets were "entitled to expect normality".¹⁰

Early Australian case law reflected similar concerns. Nearly a decade after *Walker*, Latham CJ, Dixon and McTiernan JJ in the High Court in *Bunyan v Jordan* used the ordinary person standard to deny the action of a plaintiff who was vulnerable to psychiatric injury.¹¹ Their Honours found that while psychiatric injury to the plaintiff might be expected to a person who knew the plaintiff to be highly sensitive, such injury would not be expected to a person of ordinary disposition. Yet despite these early examples, the normal fortitude consideration has often subsequently been attributed to the judgments of Lords Wright

of damages for negligently inflicted psychiatric injury against developments in psychiatric medicine. Medical professionals at this time referred to a condition called "shell-shock", which afflicted some soldiers who had been at the battlefield during World War I: see, eg CS Myers, "A Contribution to the Study of Shell Shock" (1915) *Lancet* 316, cited in Bessel A van der Kolk, Lars Weisaeth and Onno van der Hart, "History of Trauma in Psychiatry" in Bessel A van der Kolk and Alexander C McFarlane (eds), *Traumatic Stress: The Effects of Overwhelming Experience of Mind, Body, and Society* (Guilford Publications, 2007) 48.

⁵ Handford, n 2, 315–316; Butler, n 2, 107–114.

⁶ *Spade v Lynn & Boston Railroad Co*, 47 NE 88 (1897).

⁷ *Dulieu v White & Sons* [1901] 2 KB 669, 684. The Latin phrase *vir constans* roughly translates to *the steady man*.

⁸ Roscoe Pound, "Interests of Personality" (1915) 28 *Harvard Law Review* 343, 361–362.

⁹ *Walker v Pitlochry Motor Co* (1930) SC 565, 569.

¹⁰ *Walker v Pitlochry Motor Co* (1930) SC 565, 569.

¹¹ *Bunyan v Jordan* (1937) 57 CLR 1, 14 (Latham CJ), 16 (Dixon J), 18 (McTiernan J). Notably, Dixon J (at 16) explicitly referred to Pound, n 8, in determining the extent of the defendant's duty of care in cases where the plaintiff was unusually sensitive to psychiatric injury.

and Porter in *Bourhill v Young*,¹² a case in which the plaintiff, a pregnant woman, suffered psychiatric injury as a result of her perception of a traffic accident in which the defendant was killed. As a result of the suggestion that the plaintiff was unusually sensitive to such an injury, Lord Wright considered that the reasonableness of the defendant's conduct should be measured against an objective standard:

This [an ordinary standard of susceptibility], 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.¹³

Lord Porter took a similar position, commenting that the defendant was entitled to expect the plaintiff to be of a disposition which was not uncommon in the community. His Lordship stated:

It is not every emotional disturbance or every shock which should have been foreseen. The driver of a car or vehicle even though careless is entitled to assume that the ordinary frequenter of the streets 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.¹⁴

The normal fortitude doctrine in the form indicated by Lords Wright and Porter – both arguably consistent with Phillimore J's conception of a hypothetical "normal" level of susceptibility – appeared to be a consideration relevant to an overriding test of reasonable foreseeability, rather than a matter of independent importance. That is, this form of the test did not seem to bar actions by unusually susceptible plaintiffs, instead simply measuring the reasonableness of the defendant's actions by reference to a common or general level of susceptibility when determining whether the plaintiff had been wronged.

The dicta of Lords Wright and Porter in *Bourhill* subsequently were considered with approval on a number of occasions in the superior courts in the United Kingdom in the latter part of the 20th century.¹⁵ Australian courts also considered these comments in a number of important cases. In *Mount Isa Mines Ltd v Pusey*, Windeyer J took a slightly different view of the form of the test incorporating the reference to a person of ordinary fortitude. Rather than conceiving of the standard of the person of ordinary fortitude as a yardstick by which to measure the reasonableness of the defendant's actions, Windeyer J understood the consideration as a requirement barring an action in negligence unless the plaintiff could show that they were actually a person of ordinary mental fortitude. The only exception to this position was where it was found that the defendant knew or ought to have known about the plaintiff's unusual susceptibility.¹⁶ Having taken this view, Windeyer J questioned the validity of the rule in this form.¹⁷ In a number of subsequent Australian cases, the normal fortitude conception was referred to or applied in a form which appeared to be consistent with the dicta of Lords Wright and Porter.¹⁸

¹² *Bourhill v Young* [1943] AC 92.

¹³ *Bourhill v Young* [1943] AC 92, 110.

¹⁴ *Bourhill v Young* [1943] AC 92, 117.

¹⁵ See, eg *McLoughlin v O'Brian* [1983] 1 AC 410, 436–437 (Lord Bridge); *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, 403 (Lord Ackner), 416 (Lord Oliver); *McFarlane v EE Caledonia Ltd* [1994] 2 All ER 1, 14 (Stuart-Smith LJ), 14 (McCowan LJ), 14 (Ralph Gibson LJ); *Page v Smith* [1996] AC 155, 169 (Lord Keith), 177 (Lord Jauncey); *Vernon v Bosley* [1997] 1 All ER 557, 583–584. The law in England was altered fundamentally in *Page*, where the House of Lords made a distinction between primary and secondary victims, finding that secondary victims (ie, those suffering psychiatric injury as a result of injury or death to a third party) were required to satisfy the arbitrary limitations on liability outlined in *Alcock*. By contrast, it was unnecessary for primary victims to satisfy the normal fortitude rule: *Page v Smith* [1996] 1 AC 155, 180 (Lord Lloyd).

¹⁶ *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383, 405.

¹⁷ *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383, 405.

¹⁸ That is, as a matter relevant to an overriding test of reasonable foreseeability: see, eg *Jaensch v Coffey* (1984) 155 CLR 549, 556 (Gibbs CJ), 557 (Murphy J), 564–572 (Brennan J), 609–610 (Deane J), 613 (Dawson J); *Loffo v Giang* (1990) 13 MVR 59, 65 (Meagher JA); *Wodrow v Commonwealth* (1993) 45 FCR 52, 72 (Gallop and Ryan JJ); *Midwest Radio Ltd v Arnold* [1999] QCA 20, [29] (McPherson JA and Williams J); *Tame v New South Wales* (2002) 211 CLR 317, [16] (Gleeson CJ), [61] (Gaudron J), [201] (Gummow and Kirby JJ).

The current common law position in Australia with respect to the normal fortitude concept is set out by the High Court in *Tame v New South Wales*. In *Tame*, the High Court abandoned the normal fortitude rule as an independent requirement of liability, holding that the overriding test of duty in cases involving pure psychiatric injury is the test of reasonable foreseeability. As such, it is not a separate requirement of liability that the plaintiff must establish that they are actually a person of ordinary or normal fortitude.¹⁹ Consequently, a psychiatrically vulnerable plaintiff may still successfully claim damages for psychiatric injury, for example, in circumstances where injury to the plaintiff is nonetheless foreseeable due to the defendant's particular knowledge of the plaintiff's vulnerability. Another example is where injury to the vulnerable plaintiff is nonetheless foreseeable due to the nature of the incident itself, such as the unexpected and distressing death of a child resulting from the defendant's negligence. On the facts, the High Court in *Tame* held that the plaintiff was not owed a duty of care by the defendant as it was not reasonably foreseeable that she would suffer psychiatric injury in the circumstances of the case, particularly given that the causative event itself was relatively mild.²⁰

While the normal fortitude rule as an independent requirement of liability was abandoned at common law in Australia in *Tame*, legislative intervention in the law of negligence in the 21st century has appeared to breathe life back into it. At around the same time the High Court was handing down its judgment in *Tame*, a public debate commenced regarding the law of negligence in the context of perceived rises in insurance premiums and what was referred to as an "insurance crisis".²¹ The Hon David Ipp²² was subsequently appointed Chairperson of a panel of experts which was asked to examine methods for the reform of the common law in order to limit liability in negligence.²³

In its Report, the Ipp Panel recommended that in relation to claims of negligently inflicted psychiatric injury, the primary objective of limiting liability would be promoted by legislative enactment of the common law principles as stated by the High Court in *Tame* and the case heard simultaneously with *Tame*, *Annetts v Australian Stations Pty Ltd*.²⁴ The Ipp Panel's outline of the common law principles laid

¹⁹ *Tame v New South Wales* (2002) 211 CLR 317, [16] (Gleeson CJ), [61] (Gaudron J), [201] (Gummow and Kirby JJ). McHugh J [118]–[119], Hayne J [273]–[275] and Callinan J [334] disagreed on this issue, each holding that normal fortitude was indeed a separate requirement of liability.

²⁰ *Tame v New South Wales* (2002) 211 CLR 317, [29] (Gleeson CJ), [55] (Gaudron J), [232] (Gummow and Kirby JJ), [119]–[120] (McHugh J), [298]–[300] (Hayne J), [331]–[335] (Callinan J). Gleeson CJ [25]–[26], Gaudron J [57], McHugh J [124]–[126], Gummow and Kirby JJ [231], and Hayne J [298]–[300], also held that it would be inconsistent with the duties imposed on police officers to investigate the possible commission of crimes simultaneously to impose on police officers a duty of care not to cause psychiatric injury to those who they were investigating.

²¹ See, eg Justice I Callinan, "Problems in Insurance Law" (2002) 25 *University of New South Wales Law Journal* 859; Rob Davis, "The Tort Reform Crisis" (2002) 25 *University of New South Wales Law Journal* 865; Peter Handford, "Limitation of Actions and Tort Reform" (2002) 25 *University of New South Wales Law Journal* 871. See also JJ Spigelman, "Negligence and Insurance Premiums: Recent Changes in Australian Law" (2003) *Bar News* 10, 10–12; Peter Underwood, "Is Mrs Donoghue's Snail in Mortal Peril?" (2004) 12 *Torts Law Journal* 39, 39–42; Des Butler, "A Comparison of the Adoption of the Ipp Report Recommendations and Other Personal Injuries Liability Reforms" (2005) 13 *Torts Law Journal* 203, 203–204; EW Wright, "National Trends in Personal Injury Litigation: Before and After 'Ipp'" (2006) 14 *Torts Law Journal* 233; David Ipp, "The Politics, Purpose and reform of the Law of Negligence" (2007) 81 *ALJ* 456.

²² At the time the report was released, the Hon David Ipp was Acting Judge of the Court of Appeal, NSW Supreme Court, and Justice of the WA Supreme Court. Other panel members were: Professor Peter Cane, Professor of Law in the Research School of Social Sciences at the ANU (currently Director of Research ANU College of Law), Associate Professor Donald Sheldon, Surgeon and Chairman of the Council of Procedural Specialists, and Mr Ian Macintosh, Mayor of Bathurst City Council and Chairman of the NSW Country Mayors Association.

²³ See *Review of the Law of Negligence Final Report* (2002) (Ipp Report) ix, "Terms of Reference": "The award of damages for personal injury has become unaffordable and unsustainable as the principal source of compensation for those injured through the fault of another. It is desirable to examine a method for the reform of the common law with the objective of limiting liability and quantum of damages arising from personal injury and death." The continued expansion of common law liability was accordingly seen as undesirable and in need of limitation. For a critical analysis of the circumstances leading to the political pressure to undertake such an examination of the law of negligence, see Underwood, n 21.

²⁴ Ipp Report, n 23, 144. Although not explicitly stated in the Ipp Report, it seems reasonable to presume that the panel regarded legislative enactment of the principles in *Tame; Annetts* as likely to result in the prevention of further expansion of the ambit of liability.

down by the High Court in *Tame* and the principles actually enunciated by the High Court in that case differ with respect to the normal fortitude consideration.²⁵ Curiously, unlike the High Court in *Tame*, the Ipp Panel regarded “normal fortitude” as an independent requirement for a duty of care to be owed.²⁶ As a result of the Ipp Report, all States enacted some form of civil liability legislation. However, only Western Australia, New South Wales, Victoria, the Australian Capital Territory, South Australia, and Tasmania enacted civil liability legislation affecting claims for mental harm.²⁷ Each of these pieces of legislation repeated the Ipp Panel’s error with respect to the normal fortitude consideration in Recommendation 34.²⁸

The legislation which is most similar to the common law is the legislation enacted in Western Australia. Section 5S(1) of the *Civil Liability Act 2002* (WA) provides:

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.

Section 5S(2) further provides:

For the purpose of the application of this section in respect of pure mental harm, the circumstances of the case include the following:

- (a) whether or not the mental harm was suffered as the result of a sudden shock;
- (b) whether the plaintiff witnessed, at the scene, a person being killed, injured or put in peril;
- (c) the nature of the relationship between the plaintiff and any person killed, injured or put in peril;
- (d) whether or not there was a pre-existing relationship between the plaintiff and the defendant.

The civil liability legislation enacted in the other jurisdictions is substantially similar to the Western Australian legislation in form and effect,²⁹ with two primary exceptions. The first is that the legislation enacted in New South Wales, Victoria, South Australia, and Tasmania all contain additional temporal and relationship limitations on recovery which go beyond the central test of reasonable foreseeability seen in s 5S(1) of the Western Australian legislation.³⁰ The second is that the Tasmanian legislation contains a truncated list of matters to take into account when determining the overriding test of reasonable foreseeability when compared to the Western Australian Act.³¹

²⁵ See, eg Peter Handford, “Limiting Liability for Mental Harm: Back to the Future?” (2010) 18 Tort L Rev 5.

²⁶ It is also notable that the Ipp Panel’s view that the plaintiff was required to suffer a “recognised psychiatric illness” was also narrower than the High Court’s epithet of “recognisable psychiatric illness”: see Ipp Report, n 23, Recommendation 34(a), (b); *Tame v New South Wales* (2002) 211 CLR 317, [7] (Gleeson CJ), [44] (Gaudron J), [193] (Gummow and Kirby JJ), [261], [285] (Hayne J). For discussion on this point see Des Butler, “Gifford v Strang and the New Landscape for Recovery for Psychiatric Injury in Australia” (2004) 12 *Torts Law Journal* 108, 116–117; Peter Handford, “Psychiatric Injury – The New Era” (2003) 11 Tort L Rev 1, 13.

²⁷ *Civil Liability Act 2002* (WA); *Civil Liability Act 2002* (NSW); *Wrongs Act 1958* (Vic); *Civil Law (Wrongs) Act 2002* (ACT); *Civil Liability Act 1936* (SA); *Civil Liability Act 2002* (Tas). Civil liability legislation was also enacted in Queensland and NT. However, as these pieces of legislation did not affect claims for mental harm, the common law still governs such claims in these jurisdictions: see *Civil Liability Act 2003* (Qld); *Personal Injuries (Liability and Damages) Act 2003* (NT).

²⁸ See *Civil Liability Act 2002* (WA) s 5S(1); *Civil Liability Act 2002* (NSW) s 32(1); *Wrongs Act 1958* (Vic) s 72(1); *Civil Law (Wrongs) Act 2002* (ACT) s 34(1); *Civil Liability Act 1936* (SA) s 33(1); *Civil Liability Act 2002* (Tas).

²⁹ *Civil Liability Act 2002* (NSW) s 31(1), (2); *Wrongs Act 1958* (Vic) s 72(1), (2); *Civil Law (Wrongs) Act 2002* (ACT) s 34(1), (2); *Civil Liability Act 1936* (SA) s 33(1), (2); *Civil Liability Act 2002* (Tas) s 34.

³⁰ For example, *Civil Liability Act 2002* (NSW) s 30 applies in cases where mental harm arises in connection with another person being killed, injured or put in peril, and restricts the classes of claimants to those who can establish they witnessed at the scene the victim being killed, injured or put in peril, or that they are a close member of the family of the victim. The Victorian, South Australian, and Tasmanian legislation place similarly worded additional limitations on recovery: see *Wrongs Act 1958* (Vic) s 73; *Civil Liability Act 1936* (SA) s 53; *Civil Liability Act 2002* (Tas) s 32.

³¹ *Civil Liability Act 2002* (Tas) s 34 provides that the only matters relevant to the central question of reasonable foreseeability are whether the plaintiff suffered a sudden shock and whether there was a pre-existing relationship between the plaintiff and the defendant.

Despite wide judicial consideration of the relevance of the reactions of the hypothetical person of an “ordinary level of susceptibility” in relation to the question of liability – as well as in Australia and England, the issue has received judicial attention in Canada³² and Ireland³³ – there has been little discussion by judges as to why it is appropriate to assess reasonableness in this way.³⁴ Similarly, while much has been written by legal scholars interested in this issue,³⁵ there is also a gap in the research literature as to the theoretical justifications for considering the defendant’s conduct in light of the reactions of the hypothetical person of an ordinary level of susceptibility. It is this gap which this article attempts to address. In the next section I argue that the assessment of reasonable foreseeability in cases of psychiatric injury by reference to the effect of the defendant’s conduct on a hypothetical person of an ordinary level of susceptibility is crucial in ensuring that corrective justice is achieved between the parties. I further argue that measuring the defendant’s conduct in this way is particularly important in cases where the plaintiff has a pre-existing vulnerability to psychiatric injury, as defendants who are factually responsible for causing injury to such plaintiffs may not in all cases be morally responsible for doing so.

CORRECTIVE JUSTICE EXPLANATION FOR CONSIDERING REASONABLENESS OF THE DEFENDANT’S CONDUCT BY REFERENCE TO REACTIONS OF A PERSON OF AN ORDINARY LEVEL OF SUSCEPTIBILITY

In this section I provide a brief explanation of the important and relevant features of Beever’s corrective justice theory of negligence. This is followed by analysis and argument as to how, considering the reasonableness of the defendant’s conduct by reference to the effect of that conduct on a person of an ordinary level of susceptibility, is consistent with this perspective. A number of questions spring to mind when considering the potential theoretical justifications for considering the reasonableness of the defendant’s conduct in this way. The most obvious is why the law should limit liability in this manner. That is, why should the law not allow liability in all situations where the plaintiff has suffered a recognised psychiatric illness as a result of another’s actions, regardless of whether the plaintiff is particularly vulnerable to that particular form of injury. A related issue is also then raised which relates to the nature of the connection between the concept of “reasonableness” – an almost universal judicial justification for the consideration – and the objective assessment of the reactions of a person of an “ordinary level of susceptibility”. In this section, I argue that measuring the defendant’s conduct in this way can be understood from the perspective of the requirements of corrective justice, particularly in the form advanced by Allan Beever.³⁶ I further contend that measuring the defendant’s conduct in this way is important in order to set the norm against injuring at a point which treats the parties’ respective rights as being of equal value in the eyes of the law. I further argue that this is particularly important in cases where the plaintiff has a pre-existing vulnerability to psychiatric injury.

³² See *Devji v District of Burnaby* [2000] 2 WWR 12.

³³ See *Fletcher v Commissioners of Public Works* [2003] 1 IR 465. For further discussion of this point, see Handford, n 2, 315.

³⁴ Perhaps the one Australian exception to this point is *Tame v New South Wales* (2002) 211 CLR 317, [5]–[16] (Gleeson CJ), [109]–[113], [170]–[202] (Gummow and Kirby JJ). This case is discussed further below.

³⁵ See, eg Vivien Pickford and Louise Dunford, “Nervous Shock under English Law: Neither Satisfactory nor Logically Defensible” (1996) 4 JLM 176; Butler, n 2; Ian Freckelton, “Compensability for Psychiatric Injury: Opportunity for Modernisation and Reconceptualisation” (2001) 9 JLM 137; Peter Hunt, “Liability for Psychiatric Injury Extended” (2002) 40(10) *Law Society Journal* 62; Chris Tennant, “Definition of Psychological Trauma: Psychiatric and Legal Approaches” (2003) 77 ALJ 369; JJ Spigelman, “Negligence and Insurance Premiums: Recent Changes in Australian Law” (2003) 11 *Torts Law Journal* 291; Butler, n 26; Handford, n 2; Danuta Mendelson, “Defendants’ Liability for Pure Mental Harm to Third Parties in Australia: Still a Work in Progress” (2009) 17 JLM 165.

³⁶ Beever’s theory is based on Ernest Weinrib, *The Idea of Private Law* (OUP, 1995, 2012). As such, Weinrib’s work will on occasion be drawn upon in order to explain Beever’s perspective.

As a preliminary matter, it should be noted that corrective justice is commonly regarded as an important underlying justification for the law of negligence. This notion of justice has been advanced as a justification underpinning the law of negligence by courts in Australia,³⁷ the United Kingdom,³⁸ the United States,³⁹ and Canada.⁴⁰ Further confirmation of the importance of corrective justice in the United Kingdom is its explicit mention by the UK Law Commission.⁴¹ Similarly, corrective justice is explicitly mentioned as one of the primary principles underlying tort law in the Restatement (Third) of Torts (Liability for Physical and Emotional Harm) in the United States.⁴² Having argued this, courts have not typically demonstrated a sophisticated understanding of corrective justice. When corrective justice has been mentioned by courts, it has often been only in the broadest of circumstances, with limited or even no discussion of the nuances of the concept, beyond a brief consideration of the relevant case law.⁴³ As such, discussion of corrective justice by courts has not often had a large impact on decision making. In Australia, corrective justice has occasionally been referred to positively by a judge in the majority;⁴⁴ however on other occasions it has been treated positively only by a judge in dissent,⁴⁵ or has indeed received unfavourable treatment by a judge in the majority.⁴⁶

³⁷ See *Esanda Finance Corp Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241, 284, 298 (McHugh J); *Perre v Apand Pty Ltd* (1999) 198 CLR 180, [91], [103], [151] (McHugh J); *Cattanach v Melchior* (2003) 215 CLR 1, [176]–[177] (Kirby J), [301] (Callinan J); *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* [2003] VSC 27, [1105], [1209], [1342] (Gillard J); *Harriton v Stephens* (2004) 59 NSWLR 694, [106], [143] (Mason P); *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515, [106] (McHugh J); *Noor Al Houda v Bankstown Airport* (2005) 189 FLR 14, [227]–[228] (Hoeben J); *Imbree v McNeilly* (2008) 236 CLR 510, [160] (Kirby J); *Gumms Ltd v Alishah [No 4]* [2010] TASSC 24, [55], [58] (Porter J); cf *Harriton v Stephens* (2005) 226 CLR 52, [271]–[275] (Crennan J).

³⁸ See *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, 502 (Lord Hoffmann); *Macfarlane v Tayside Health Board* [2000] 2 AC 59 (Lord Steyn); *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15, [2] (Lord Steyn); *Chester v Afshar* [2004] UKHL 41, [21]–[22] (Lord Steyn); *Godden v Kent & Medway Strategic Health Authority* [2004] EWHC 1629 (QB), [16] (Gray J); *X v Hounslow London Borough Council* [2009] EWCA Civ 286, [40] (Sir Anthony Clarke MR); *VL (a Child) v Oxfordshire County Council* [2010] EWHC 2091 (QB), [37] (Mackay J); *Montgomery v Lanarkshire Health Board* [2010] CSOH 104, [162] (Lord Bannatyne); *Macdonald v Aberdeenshire Council* [2013] CSIH 83, [34] (Lady Paton).

³⁹ See *Bugosh v IU North America Inc*, 971 A 2d 1228, 1235 (Saylor J) (Pa, 2009); *Helpin v Trustees, University of Pennsylvania*, 10 A 3d 267, 279 (Saylor J) (Pa, 2010); *Migliori v Airborne Freight Corp*, 690 NE 2d 413, 416 (Fried J) (Mass, 1998); *Shelby County Health Care Corp v Baumgartner*, 2011 WL 303249, 17 (Kirby J) (Tenn Ct App, 2011); *Royal Indemnity Co v Factory Mutual Insurance Co*, 786 NW 2d 839, 851 (Baker J) (Iowa, 2010).

⁴⁰ See *Lahey Estate v Craig* [1992] 123 NBR (2d) 91 (McLellan J) (NB QB Trial Division); *Walsh v Mobil Oil Canada* *Walsh v Mobil Oil Canada* [2012] ABQB 527 (Romaine J) (Alberta, QB); *Whiten v Pilot Insurance Co* [2002] 1 SCR 595 (LeBel J in dissent); *Clements (Litigation Guardian of) v Clements* [2012] 2 SCR 181; *Fiala v Cechmanek* [2001] 201 DLR (4th) 680.

⁴¹ See Law Commission (UK), *Damages for Personal Injury: Non-Pecuniary Loss*, Report No 257 (2008) [3.24], referred to with approval in *Heil v Rankin* [2001] QB 272; [2000] EWCA Civ 84 (Lord Woolf MR).

⁴² See § 6.

⁴³ For example, Kirby J's comments regarding corrective justice in *Cattanach v Melchior* (2003) 215 CLR 1, [176]–[177] were limited to referring to the general notion of “the compensable principle required by ‘corrective justice’”, and to providing a general warning that judges should be cautious when referring to “such contestable considerations”. Callinan J's comments in the same case were also limited to stating: “a negligent person should pay further the ends of corrective justice”. These examples are typical of the Australian experience.

⁴⁴ See *Imbree v McNeilly* (2008) 236 CLR 510, [183], where Kirby J agreed with the majority of Gummow, Hayne and Keifel JJ that the plaintiff's appeal should succeed. See also *Perre v Apand Pty Ltd* (1999) 198 CLR 180, [91], [103], [151], in which McHugh J was in agreement with the majority of Gleeson CJ, Gaudron, Gummow, Kirby and Callinan JJ that the respondent owed the appellants a duty of care; *Cattanach v Melchior* (2003) 215 CLR 1, [181] (Kirby J), [302] (Callinan J), in the majority with McHugh and Gummow JJ that damages were recoverable for the costs of raising a child.

⁴⁵ See, eg *Harriton v Stephens* (2004) 59 NSWLR 694, [106], [143] (Mason P dissenting).

⁴⁶ See *Harriton v Stephens* (2004) 59 NSWLR 694, [38] (Spigelman CJ); [321]–[336] (Ipp JA). Spigelman J considered corrective justice too broad a concept to justify imposing liability, while Ipp JA did not consider negligence law to be founded on corrective justice. See also *Harriton v Stephens* (2005) 226 CLR 52, [271]–[275], where Crennan J, in the majority with Gleeson CJ, Gummow and Heydon JJ, rejected corrective justice as being sufficient to identify compensable damage.

The experience in the United Kingdom is similar.⁴⁷ While in some instances corrective justice has been referred to by individual judges approvingly without caveat,⁴⁸ this concept has often been mentioned as a relevant function of the law of negligence which is trumped by more important considerations, such as distributive justice.⁴⁹ As in Australia, judges in the United Kingdom explicitly mentioning corrective justice have referred to this concept in only the broadest of senses.⁵⁰ The cases in the United States are similar to the extent that corrective justice has on occasion received positive treatment, but this has often been by a judge in dissent,⁵¹ or corrective justice has been trumped by supposedly more important considerations.⁵² Here too corrective justice has also been mentioned only in the broadest of senses.⁵³ The exception to this general position relates to the law in Canada, where corrective justice has not only received positive treatment from lower court judges⁵⁴ and dissenting judges in superior courts,⁵⁵ but has also – on two occasions at least – had a more pronounced effect on the outcomes of superior court cases.⁵⁶

Explanation of the Theoretical Background

Given the relevance of corrective justice to the law of negligence at a theoretical level, it is significant that consideration of the effect of the defendant's actions on the hypothetical person of an ordinary level of susceptibility in relation to an overriding test of reasonable foreseeability (ie, in the form indicated by High Court in *Tame*) is understandable from the perspective of this form of interpersonal justice. In order to present argument about the consistency between measuring the reasonableness of the defendant's conduct in this way and Beever's corrective justice theory of negligence, it is first necessary to provide a brief account of the core aspects of this theory.

Beever's *Rediscovering the Law of Negligence*⁵⁷ and *A Theory of Tort Liability*⁵⁸ together present a coherent theory of negligence based on Aristotelian corrective justice and Kantian right. This theory

⁴⁷ See *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, 502 (Lord Hoffmann); *Macfarlane v Tayside Health Board* [2000] 2 AC 59 (Lord Steyn); *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15, [2] (Lord Steyn); *Chester v Afshar* [2004] UKHL 41, [21]–[22] (Lord Steyn); *Godden v Kent & Medway Strategic Health Authority* [2004] EWHC 1629 (QB), [16] (Gray J); *X v Hounslow London Borough Council* [2009] EWCA Civ 286, [40] (Sir Anthony Clarke MR); *VL (a Child) v Oxfordshire County Council* [2010] EWHC 2091 (QB), [37] (Mackay J); *Montgomery v Lanarkshire Health Board* [2010] CSOH 104, [162] (Lord Bannatyne); *Macdonald v Aberdeenshire Council* [2013] CSIH 83, [34] (Lady Paton).

⁴⁸ See, eg *Chester v Afshar* [2004] UKHL 41, [21]–[22] (Lord Steyn); referred to with approval in the Scottish case of *Montgomery v Lanarkshire Health Board* [2010] CSOH 104, [162] (Lord Bannatyne).

⁴⁹ See *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, 502 (Lord Hoffmann); *Macfarlane v Tayside Health Board* [2000] 2 AC 59 (Lord Steyn); *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15, [2] (Lord Steyn); *Godden v Kent & Medway Strategic Health Authority* [2004] EWHC 1629 (QB), [16] (Gray J); *X v Hounslow London Borough Council* [2009] EWCA Civ 286, [40] (Sir Anthony Clarke MR); *VL (a Child) v Oxfordshire County Council* [2010] EWHC 2091 (QB), [37] (Mackay J); *Macdonald v Aberdeenshire Council* [2013] CSIH 83, [34] (Lady Paton).

⁵⁰ For example, in *Macfarlane v Tayside Health Board* [2000] 2 AC 59, a “wrongful life” case, Lord Steyn's consideration of corrective justice as a concept was limited to stating that “it requires somebody who has harmed another without justification to indemnify the other”, and on this basis that it required the plaintiffs to be compensated in that case. Little more discussion of this concept was provided.

⁵¹ See *Bugosh v IU North America Inc*, 971 A 2d 1228, 1235 (Saylor J) (Pa, 2009); *Helpin v Trustees, University of Pennsylvania*, 10 A 3d 267, 279 (Saylor J) (Pa, 2010).

⁵² See, eg, *Migliori v Airborne Freight Corp*, 690 NE 2d 413, 416 (Fried J) (Mass, 1998);

⁵³ See *Shelby County Health Care Corp v Baumgartner*, 2011 WL 303249, 17 (Tenn Ct App, 2011), where Kirby J's consideration of corrective justice was limited to stating that she regarded damages as being an instrument of corrective justice. See also *Royal Indemnity Co v Factory Mutual Insurance Co*, 786 NW 2d 839, 851 (Iowa, 2010), where Baker J alluded to general “corrective justice concerns” in coming to his decision.

⁵⁴ See *Lahey Estate v Craig* [1992] 123 NBR (2d) 91 (McLellan J) (NB QB Trial Division); *Walsh v Mobil Oil Canada* [2012] ABQB 527.

⁵⁵ See *Whiten v Pilot Insurance Co* [2002] 1 SCR 595 (LeBel J in dissent).

⁵⁶ See *Clements v Clements* [2012] 2 SCR 181; *Fiala v Cechmanek* [2001] 201 DLR (4th) 680 (Alberta Court of Appeal).

⁵⁷ Allan Beever, *Rediscovering the Law of Negligence* (Hart, 2007).

⁵⁸ Allan Beever, *A Theory of Tort Liability* (Hart, 2016).

regards the imposition of legal liability as the legal instantiation of a moral obligation of the defendant to provide the claimant with a remedy such as compensation.⁵⁹ The moral obligation to provide the claimant with a remedy arises due to the failure by the defendant to comply with the norm against injuring others. Beaver's theory is based on Weinrib's *Idea of Private Law*,⁶⁰ which itself incorporates the Aristotelian concept of corrective justice,⁶¹ as well as Immanuel Kant's concept of purposivity.⁶² As such, each of these must be considered where relevant in order to fully explain the relevance of the ordinary fortitude consideration from the perspective of Beaver's corrective justice theory.

Weinrib presents a formalist understanding of private law which does not rely on external justifications for the law's existence. According to Weinrib the law of negligence is to be understood as something which is not merely an expression of the rule of official authority but as a phenomenon which is deeply connected to human nature, being reflective of profound moral norms.⁶³ When each element of the private law relationship is normatively related, they can each be justified as parts of a coherent whole. This then not only makes the law more intelligible, but also crucially provides these elements with normative force.⁶⁴ On the other hand, when a justificatory consideration does not possess this normative force it is considered arbitrary and unjustified.⁶⁵ When a private law relationship is coherent, every aspect of that legal relationship possesses normative force, making distinctions between claimants only for reasons of principle and justice.

The source of the moral obligation to impose liability on a particular defendant in Beaver's principled approach is Aristotle's *Nicomachean Ethics*,⁶⁶ coupled with the legal theory developed by Immanuel Kant.⁶⁷ The Aristotelian concept of corrective justice originates from Aristotle's discussion of moral virtue in Book V of *Ethica Nicomachea*.⁶⁸ Aristotle regarded justice as a state which existed between particular individuals when neither was holder of more or less than what they are normatively entitled to hold in relation to each other; that is, when a state of equality existed between them.⁶⁹ By contrast, injustice was regarded by Aristotle as a state in which parties' holdings were not equal, where one was holder of more than they were entitled to and the other the holder of less.⁷⁰ By virtue of the correlative link between the parties – a central aspect of this perspective – the gain by the first was necessarily at the expense of the second. The role of the judge from this theoretical perspective was then to restore the pre-existing equality between the parties.⁷¹

⁵⁹ See, eg Beaver, n 57, 42; Ernest Weinrib, "The Special Morality of Tort Law" (1989) 34 *McGill Law Journal* 403, 404, 406; Weinrib, n 36, 2.

⁶⁰ See Weinrib, n 36.

⁶¹ See Aristotle, *The Nicomachean Ethics of Aristotle* (David Ross trans, OUP, 1925) [trans of: *Ethica Nicomachea*], in which Aristotle discusses his conception of "rectificatory justice".

⁶² See Immanuel Kant, *Metaphysics of Morals* (Mary J Gregor trans, CUP, 1991) [trans of: *Metaphysik der Sitten* (first published in 1797)].

⁶³ Weinrib, n 36, 1. Weinrib, for one, does not regard Kantian right as "true" per se, rather considering a Kantian notion of agency as being "presupposed" by corrective justice. This means that Weinrib is not concerned with whether the law *really is law*, but instead with whether the law can be morally justified in the context of the relationship between the relevant parties: Weinrib, n 36, xvii, xix.

⁶⁴ Weinrib, n 36, 39.

⁶⁵ Weinrib, n 36, 39.

⁶⁶ See Aristotle, n 61.

⁶⁷ I Kant, *The Metaphysical Elements of Justice: Part 1 of the Metaphysics of Morals* (J Ladd trans, Bobbs-Merrill, 1965); Ernest Weinrib, "Corrective Justice" (1992) 77 *Iowa Law Review* 403, 423.

⁶⁸ See Aristotle, n 61, 109–122.

⁶⁹ Aristotle, n 61, 111, 114; Ernest Weinrib, "Corrective Justice in a Nutshell" (2003) 52(4) *University of Toronto Law Journal* 349, 349.

⁷⁰ Aristotle, n 61, 111, 114; Weinrib, n 69, 349.

⁷¹ Aristotle, n 61, 115.

Like Weinrib, Beaver supplements his theory with the Kantian concept of right.⁷² This he does because while providing a suitable framework for justice in interpersonal dealings, Aristotle's rectificatory justice does not provide the necessary normative content required to enliven this concept.⁷³ Here Beaver refers to Weinrib's use of Kant's concept of right to argue that justice in interpersonal dealings requires an equality of free wills.⁷⁴ Weinrib takes the position that each person within a system of private law based on the Kantian concept of right has the right to freedom of action and the right to freedom from interference, to the extent that these rights are consistent with the rights of others pursuant to a universal law of freedom.⁷⁵ One of the most important aspects of this idea is that the concept of right constrains free and purposive action in the name of freedom itself. This is a crucial aspect of the theories of both Weinrib and Beaver, in that the parties' respective interests are treated as being of equal importance by the concept of right.⁷⁶

Weinrib discusses the place of Kantian right within his theory in *The Idea of Private Law* outlining Kant's notion of law as an "idea of reason" which has its genesis in the free wills of mankind and then emanates into its public confirmation as law.⁷⁷ Kantian right in this context is understood as "the juridical manifestation of self-determining agency".⁷⁸ It is important to understand that according to this interpretivist perspective, the "distinct" questions of the existence of the morality of corrective justice on the one hand, and the phenomenon of law itself on the other, are considered inseparable. This is because interpretivists such as Weinrib and Beaver regard normativity and coherence as being necessary parts of private law, which is to say that such accounts attempt to present the law in a normatively coherent light. As explained by Stavropoulos, "interpretivism builds moral investigation into the metaphysical one. The moral explanation that it offers assumes no nonmoral prior account of grounds [of law] and leaves no residual question about whether legal obligations have moral force".⁷⁹ Indeed, interpretive accounts such as Beaver's regard accounts of the law which do not regard normative coherence as a necessary ground of law as providing an incomplete explanation of the law.⁸⁰

Weinrib argues that an equality of free wills means that the free actions of one must be consistent with the free actions of others. Where this is not the case, the law justifiably intervenes to undo the resulting wrong.⁸¹ The principal matter of importance for Weinrib is whether actions are consistent "with the

⁷² Beaver does this by incorporating Weinrib's discussion of Kantian right (Weinrib, n 36, Ch 4) into his own theory: see Beaver, n 57, 63.

⁷³ Weinrib comments that Aristotle's notion of corrective justice is concerned only with form, being "devoid of a specific content": Ernest J Weinrib, "Toward a Moral Theory of Negligence Law" (1983) 2(1) *Law and Philosophy* 37, 40.

⁷⁴ This perspective allows one to follow the development of the law from its normative beginnings in the will of individuals, all the way to its legal consequences in the manifestation of justice in legal institutions: Weinrib, n 73, 84–85; Ernest J Weinrib, "The Gains and Losses of Corrective Justice" (1994) 44 *Duke Law Journal* 277, 279, 282–289; Allan Beaver, *Forgotten Justice: Forms of Justice in the History of Legal and Political Theory* (OUP, 2013) 152–157.

⁷⁵ Weinrib, n 67, 421–424; Weinrib, n 74, 279. This is a view which is, in some ways, quite similar to Fletcher's nonreciprocity of risk principle. According to the nonreciprocity of risk principle, all individuals in society are entitled to "the maximum amount of security compatible with a like security for everyone else": George P Fletcher, "Fairness and Utility in Tort Theory" (1972) 85(3) *Harvard Law Review* 537, 550. For a criticism of Fletcher's principle of nonreciprocity of risk, see generally Jules L Coleman, "Justice and Reciprocity in Tort Theory" (1975) 14 *Western Ontario Law Review* 105.

⁷⁶ Weinrib, n 36, 9; Beaver, n 74, 152–157.

⁷⁷ Weinrib, n 36, 100.

⁷⁸ Weinrib, n 36, 81. Weinrib (83–84) argues that Kant extended Aristotle's notions of corrective justice back to the concept of free purposiveness, stating: "the equality of corrective justice acquires its normative force from Kantian right ... [with self-determining agents being] ... duty-bound to interact with each other on terms appropriate to their equal status. Implicit in corrective justice's relationship of doer and sufferer are the obligations incumbent in Kantian legal theory on free beings under moral laws".

⁷⁹ Nicos Stavropoulos, "Legal Interpretivism" in Edward N Zalta (ed), *Stanford Encyclopedia of Philosophy* (Stanford University, Summer 2014 ed, 2014) <<https://plato.stanford.edu/archives/sum2014/entries/law-interpretivist/>>.

⁸⁰ For further discussion of this point, see Martin Allcock, "In Defence of Weinrib's and Beaver's Interpretive Theories of Negligence" (2017) 24 *Torts Law Journal* 125, 144–146.

⁸¹ Weinrib, n 67, 421–424; Weinrib, n 74, 279.

freedom of all persons”.⁸² Weinrib explains Kant’s concept of right as “the sum of conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom”.⁸³ Weinrib argues that the duty of care in negligence should be characterised in terms of this antecedent equality between the parties. Any disturbance of this equality by the defendant’s act of negligence is a wrong to the claimant.⁸⁴ The duty of care in negligence, along with the obligation to compensate arising out of the breach of this duty by the defendant, should be seen as “the juridical reflex of [that] antecedent obligation not to wrong”.⁸⁵ The court’s task in this process is to consider the connection between the parties and the moral dimensions of that relationship, and to intervene in order to attempt to undo the harm done to the claimant by the defendant.⁸⁶ One of the most important aspects of this idea is that the concept of right constrains free and purposive action in the name of freedom itself. This is a crucial aspect of the theories of both Weinrib and Beever in that the parties’ respective rights to freedom – of interference with bodily integrity and of movement and action – are treated as being of equal importance by the concept of right.⁸⁷ Moreover, these rights are reflected in the private law.

The concept of right expresses itself in a number of ways in such a system. Weinrib argues that in relation to the law of negligence, right expresses itself as a right to bodily integrity.⁸⁸ The right to bodily integrity places others under a correlative duty not to interfere with this right, with a breach of this duty being seen as “incompatible with the equality of the interacting parties as free purposive beings”.⁸⁹ The law of negligence is considered to arise as a result of the existence of the right to bodily integrity.⁹⁰ Considered from the opposite perspective, the right to freedom from interference gives rise to a community-wide norm against injuring. When the norm is breached – that is, when a person’s right to bodily integrity has been interfered with – the law intervenes to restore the pre-existing normative equality between the parties.⁹¹ In relation to the law of negligently inflicted psychiatric injury, it has further been argued that the concept of right expresses itself as a right to physical and psychological integrity.⁹²

The right to physical and psychological integrity places others under a correlative duty not to interfere with this right, with a breach of this duty being seen as “incompatible with the equality of the interacting parties as free purposive beings”.⁹³ Beever develops this perspective in *A Theory of Tort Liability*⁹⁴

⁸² Weinrib, n 36, 94; Ernest J Weinrib, “Right and Advantage in Private Law” (1989) 10 *Cardozo Law Review* 1283, 1291.

⁸³ Weinrib, n 36, 95, quoting Kant, n 62, 56 [230]. Weinrib describes this concept as a notion of “equal membership in the kingdom of ends”: Weinrib, n 73, 40.

⁸⁴ Weinrib, n 59, 409.

⁸⁵ Weinrib, n 59, 409.

⁸⁶ Weinrib, n 59, 409–410. Coleman, although initially taking a contrary view (see, eg Jules Coleman, “Corrective Justice and Wrongful Gain” (1982) 11 *Journal of Legal Studies* 421, 425), also regards the notion of correlativity as central to liability in negligence: Jules Coleman, “The Mixed Conception of Corrective Justice” (1992) 77 *Iowa Law Review* 427, 438; Ernest J Weinrib, “Correlativity, Personality, and the Emerging Consensus on Corrective Justice” (2001) 2 *Theoretical Inquiries in Law* 107, 126–133. Other negligence theorists have also advanced theories of negligence which embrace a notion of correlativity similar to that outlined by Weinrib: see, eg Arthur Ripstein, *Equality, Responsibility, and the Law* (CUP, 1999). See also Weinrib, “Correlativity ...” (above) at 141, for comment upon the similarities between Ripstein’s “principle of reciprocity” and Weinrib’s “juridical conception of corrective justice”.

⁸⁷ Weinrib, n 36, 9; Beever, n 74, 152–157. Cane regards this aspect of Weinrib’s *Idea of Private Law* as “difficult to the point of obscurity”: Peter Cane, “Corrective Justice and Correlativity in Private Law” (1996) 16 *Oxford Journal of Legal Studies* 471, 487.

⁸⁸ Weinrib, n 36, 128. Another way right expresses itself is the right to “external objects of the will”, relevant to other aspects of private law such as contract law and property law.

⁸⁹ Weinrib, n 36, 128.

⁹⁰ The second right, being the right to “external objects of the will”, is reflected in the law of property and contract. In relation to this second kind of right, Weinrib states that this includes the rights to own property and the rights to have contracts performed: Weinrib, n 36, 128.

⁹¹ Weinrib, n 59, 409.

⁹² See Martin Allcock, “Corrective Justice and Kantian Right as a Mechanism to Reconcile Substantially Clashing Interests in Cases of Negligently Inflicted Psychiatric Injury” (2015) 40 *Australian Journal of Legal Philosophy* 17, 39–58.

⁹³ Weinrib, n 36, 128.

⁹⁴ Beever, n 58, 19.

arguing that the law protects bodily integrity not because the right to bodily integrity is the basis for the law but because it protects something more fundamental, the right to control the use of one's body.⁹⁵ According to this perspective, the commitment to "equal maximum freedom" in Kant's *Metaphysics of Morals* gives rise to one principal right: the right to freedom, or the right to "independence from being constrained by another's choice".⁹⁶ Beever explains: "The innate right generates an entitlement to be free of constraint imposed by the choices of others." According to this understanding the right cannot be violated unless the choices of one person are constrained by the actions of another, with this amounting to moral constraint of the will of the other.⁹⁷ This is the sense in which this perspective views *wrongs*.

As mentioned above, Beever's interpretive perspective does not regard private law and the morality of corrective justice as separable concepts, and as such, the moral wrong of this nature is also considered a legal wrong. Consequently, a crucial aspect of liability according to these theories is that interference with the right to bodily integrity is considered a moral and therefore a legal wrong, obligating the defendant to compensate the plaintiff.⁹⁸ That is, the norm against injuring gives rise to a legally enforceable right which if interfered with results in an obligation to pay compensation.

Weinrib and Beever argue that as the basis of liability is moral wrongdoing, only actions which are purposive, by an actor possessing free will, are sufficient to justify the imposition of liability.⁹⁹ In order for action to be the result of free will it is required to be "purposive". Weinrib considers that a demarcating line may be drawn between purposive activity, which results from a purposive being exercising free will, and merely passive activity, which is the product of a sequence of events which does not.¹⁰⁰ Weinrib argues that only actions that are the result of purposive activity are required to be consistent with the freedom of others. Actions that are the result of merely passive activity do not result in injustice (justifying the law's intervention), as they do not impinge upon the free will of others.¹⁰¹

The notion of Kantian right underpinning Weinrib's theory (on which Beever's perspective is based) has particular application to cases of negligence involving complex questions of causation because of the distinction it makes between "action" and "mere behaviour". Weinrib argues that the distinction between misfeasance and nonfeasance is based upon the relationship between the parties, so far as that relationship relates to the risk created by one resulting in injury to the other. According to this perspective, only where one has participated in the creation of risk to another can one be guilty of misfeasance.¹⁰²

Weinrib gives two examples to further explain this idea. The first is in relation to person "A", the driver of a car who does not press the brakes and consequently runs over a pedestrian causing them injury. The second is in relation to person "B", a person who sees another person struggling not to drown in a pool and who does not throw that person a rope which is nearby. In a simple analysis of these situations, it might be said that both are cases of "failing to act"; A fails to press the brakes of his or her car and B fails to throw the rope to the drowning person. This is mistaken according to Weinrib, as this analysis does not consider the relationship between the parties, particularly in relation to the origins of the risk which ultimately results in injury.

⁹⁵ Beever argues that the law protects against actions which put one's body to the purposes of another without consent: see Allan Beever, "What Does Tort Law Protect?" (forthcoming) *Singapore Journal of Legal Studies* (10–11 of original manuscript).

⁹⁶ Beever, n 95.

⁹⁷ Beever, n 95.

⁹⁸ Weinrib, n 59, 409.

⁹⁹ Weinrib, "The Case for a Duty to Rescue" (1980) 90 *Yale Law Journal* 247, 251–258. Beever, n 57, 75, adopts this view.

¹⁰⁰ Weinrib, n 36, 89.

¹⁰¹ Weinrib, n 36, 88–89. This aspect of Weinrib's theory is consistent with Coleman's conception of negligence based on corrective justice to the extent that Coleman is of the view that wrongdoing by the defendant requires human agency: see Jules L Coleman, *Risks and Wrongs* (OUP, 1992) 335, where Coleman argues that a defendant can accordingly defeat a claimant's claim in negligence where they can establish that their actions are not the result of human agency. For a critique of Coleman's *Risks and Wrongs*, see generally George P Fletcher, "Corrective Justice For Moderns" (1992) 106 *Harvard Law Review* 1658, esp 1666–72, where Fletcher opines that Coleman entirely disregards the Aristotelian understanding of corrective justice.

¹⁰² Weinrib, n 99, 251–258, describes this as the relationship of risk between the parties.

In the case of A, the parties are related prior to the pedestrian suffering injury, with A creating the risk of injury to the pedestrian. B, on the other hand, is not so related to the drowning person, having no relationship with that person in terms of the creation of risk. Weinrib argues that person A is guilty of misfeasance, whereas person B is only guilty of nonfeasance.¹⁰³ The crucial part of these examples is that a normative connection can be made between injurer A's actions and the injury suffered by the pedestrian, but cannot be made between person B's failure to throw the rope to the drowning person and the drowning person's injury. This is because person A participated in the creation of the risk which ultimately resulted in the injury to the pedestrian, whereas B played no part in the creation of the risk to the drowning person. That is not to say that B has not committed some kind of moral wrong in failing to assist the drowning person. This is simply to argue that as B has not participated in the creation of risk to the drowning person, B's failure to throw the rope to the drowning person has not interfered with the drowning person's right to physical and psychological integrity.¹⁰⁴

How is Measuring the Defendant's Conduct in Light of the Reactions of the Hypothetical Person of an Ordinary Level of Susceptibility Consistent with this Theoretical Explanation?

The most important reason to consider whether a person who was not psychiatrically vulnerable would have suffered psychiatric injury when considering whether psychiatric injury was reasonably foreseeable in the circumstances is that this question assists in the determining whether the defendant was morally responsible for causing the plaintiff's psychiatric injury. Assessing the defendant's conduct in this way is necessary to ensure the defendant's actions are measured against an objective standard. This is particularly important in the context of claims for pure psychiatric injury because there is a real risk in such cases that defendants will be held liable for causing psychiatric harm to another in circumstances where they may not be morally responsible for causing this harm, despite perhaps being factually responsible for doing so. Likewise, there is also a risk that a psychiatrically vulnerable plaintiff who has suffered a reasonably foreseeable psychiatric injury may have their claim denied because of that vulnerability, notwithstanding the defendant perhaps being morally responsible for causing the plaintiff's harm. The reason for this is that scientific and community knowledge regarding the risks of mental disorders as a result of particular actions is not generally as advanced as knowledge relating to physical disorders, and this affects the extent to which it can be concluded that a defendant was able to appreciate the risk of injury by his or her actions. This is particularly important in cases where the plaintiff has a pre-existing vulnerability to psychiatric injury, as the risk of such an injury to the plaintiff may well be less appreciable to others, unless particular knowledge of this vulnerability is possessed.

Negligence cases involving pure psychiatric damage have been, and continue to be, treated with particular caution by courts for a combination of reasons. In particular, claims involving psychiatric injury are not inherently limited in time and space in the same way that claims involving physical injury generally are. While the causal mechanisms involved in relation to physical injuries generally result in risk of injury from a defendant's actions being limited to a particular time and physical place,¹⁰⁵ meaning that in practice, the number of claims of negligence in relation to physical injury is generally inherently limited,¹⁰⁶ the same cannot generally be said of claims involving psychiatric injuries. By comparison,

¹⁰³ The situation involving person A, even though initially considered a case of "failing to act", is regarded as misfeasance "masquerad[ing] as non-feasance". This situation is accordingly described as "pseudo non-feasance": Weinrib, n 99, 253–254.

¹⁰⁴ That is to say, corrective justice should not be considered the *only* form of morality which may be said to affect the parties concerned. Rather, corrective justice is considered the *only* form of morality existing between the individuals concerned relating to the *norm against injuring*.

¹⁰⁵ In order for a defendant to cause a physical injury to another person, they generally have to be close to that person, both in time and in space. This is not necessarily the case in relation to all physical diseases, such as diseases of the lung, which can manifest at a time far removed from exposure to the agent which causes the disease. Physical injuries such as broken bones or diseases of the lung also have a tangible quality which psychiatric injuries generally do not possess. Some Australian jurisdictions have enacted legislation governing claims relating to dust diseases: see, eg *Dust Diseases Tribunal Act 1989* (NSW); *Dust Diseases Act 2005* (SA).

¹⁰⁶ See *Tame v New South Wales* (2002) 211 CLR 317, [265] (Hayne J) for further discussion of this point.

psychiatric injuries can be caused in a myriad of circumstances, and unlike most physical injuries, may be caused even when the phenomenon causally responsible for the injury is not close in time and space to the resulting psychiatric injury itself.¹⁰⁷ In combination, these factors arguably have a significant bearing on the extent to which it might be concluded that a defendant who is factually responsible for causing psychiatric harm to a plaintiff is also morally and legally responsible for causing that harm.¹⁰⁸

One of the strongest reasons for the argument that considering the effect of the defendant's actions on the hypothetical person of an "ordinary level of susceptibility" is concerned with distinguishing between moral and legal responsibility on the one hand and simple factual responsibility on the other, is the strong connection between the consideration and the question of the reasonableness of the defendant's actions.¹⁰⁹ Areas of liability which do not base liability on the reasonableness of the defendant's actions – commonly known as strict liability regimes – are generally concerned simply with factual and legal causation. These regimes, such as the State and Territory-based workers' compensation schemes in Australia, discard the notion of fault and require plaintiffs only to establish that they have suffered injury, as well as some connection between the injury and the plaintiff's employment.¹¹⁰

Strict liability schemes such as these are based on ideas which are inconsistent with the concept of moral responsibility for causing harm, instead often being concerned with wider economic imperatives. By way of example, the British workers' compensation scheme – which has served as an inspiration in part for many similar schemes around the world¹¹¹ – was brought into existence with two principal aims; the first, to recognise that workers were entitled to reasonable compensation where they were injured while in the course of their employment, and the second, to recognise that the costs of industrial accidents should be absorbed into the costs of production of industry.¹¹²

By contrast, making liability dependant on fault, that is, on the idea that the defendant's actions have fallen short of a standard which is considered reasonable, implies a failing on the defendant's part to comply with a standard of behaviour expected in the general community. Beever argues that the failure to behave reasonably can be understood as a moral failing in the sense that the defendant has breached the norm against injuring, thereby wrongly interfering with the plaintiff's right to bodily integrity. Beever

¹⁰⁷ Katter calls this the "ripple effect", ie, "the propensity to manifest at one or more removes from the direct effect of the negligence": Norman Katter, "Who Then in Law is My Neighbour?" Reverting to First Principles in the High Court of Australia" (2004) 12 Tort L Rev 85, 86. For an example, see Butler's examination of the potential for people's mental well-being to be affected by the mass media: Des Butler, "Mass Media Liability for Nervous Shock: A Novel Test for Proximity" (1995) 3 *Torts Law Journal* 1, 5, 13.

¹⁰⁸ See Allcock, n 92, 40–47.

¹⁰⁹ See *Spade v Lynn and Boston Railroad Co*, 47 NE 88 (1897); *Walker v Pitlochry Motor Co* (1930) SC 565, 569 (Lord Mackay); *Bourhill v Young* [1943] AC 92, 110 (Lord Wright), 117 (Lord Porter); *Jaensch v Coffey* (1984) 155 CLR 549, 568 (Brennan J); *Loffo v Giang* (1990) 13 MVR 59, 65 (Meagher JA); *Tame v New South Wales* (2002) 211 CLR 317, [16] (Gleeson CJ), [61] (Gaudron J), [201] (Gummow and Kirby JJ).

¹¹⁰ Workers' compensation regimes were introduced in Australia in the early 20th century inspired by the *Workmen's Compensation Act 1897* (UK). In chronological order they were: *Workers' Compensation Act 1900* (SA); *Workers' Compensation Act 1902* (WA); *Workers' Compensation Act 1905* (Qld); *Workmen's Compensation Act 1910* (NSW); *Workers' Compensation Act 1910* (Tas); *Workers' Compensation Act 1914* (Vic); *Workmen's Compensation Act 1920* (NT); *Workmen's Compensation Ordinance 1946* (ACT). The Commonwealth also introduced a regime for its employees in 1912: *Commonwealth Workmen's Compensation Act 1912* (Cth). For further discussion see Safe Work Australia, "Comparison of Workers' Compensation Arrangements in Australia and New Zealand" (2010) 7–26. Although these regimes have all been the subject of significant amendment over the 20th and early 21st century, workers' compensation systems remain operative in all of these Australian jurisdictions.

¹¹¹ Workmen's compensation schemes were adopted in the US in the early 20th century based in part on the British scheme. New York was the first state to adopt workmen's compensation laws in 1910, followed in 1911 by California, Illinois, Kansas, Massachusetts, New Hampshire, New Jersey, Nevada, Ohio, Washington and Wisconsin. Most other states adopted such legislation, the last being Mississippi in 1948. New Zealand also brought into effect its own workers' compensation legislation in 1900, and Canada did the same in 1902: Lawrence M Friedman and Jack Ladinsky, "Social Change and the Law of Industrial Accidents" (1967) 67(1) *Columbia Law Review* 50, 70; Stefan A Riesenfeld, "Contemporary Trends for Industrial Accidents Here and Abroad" (1954) 42(4) *California Law Review* 531, 533; Michael L Perlin, "The German and British Roots of American Workers' Compensation Systems: When is an 'Intentional Act' 'Intentional'?" (1985) 15 *Seton Hall Law Review* 849, 849.

¹¹² Perlin, n 112, 865. A similar intention underpins the many US schemes: see *Protectu Awning Shutter Co v Cline*, 16 So 2d 342, 343 (Fla, 1951), quoted in *Morris v Hermann Forwarding Co*, 113 A 2d 513, 514 (NJ, 1955), cited in Perlin, n 112, 849.

relates the *Donoghue v Stevenson*¹¹³ test of reasonable foreseeability in negligence to the interpersonal morality of Aristotelian corrective justice and Kantian right. This objective standard is regarded by Beever as being “not merely consistent with corrective justice” but as being, in fact, *required* by corrective justice. This test sometimes benefits plaintiffs (such as when the defendant does not possess the ability to exercise reasonable care) and at other times benefits defendants (such as when the defendant possesses more than sufficient ability to exercise reasonable care).¹¹⁴ To allow the extent of the plaintiff’s rights to be determined by the peculiarities of the defendant is, according to Beever, “incompatible with the formal equality of the parties imbedded in the law”; an objective standard on the other hand, treats the parties equally as it “mediates between the interests of the parties”.¹¹⁵ As such, the objective standard – determined by an assessment of the reasonableness of the defendant’s actions – reconciles the parties’ respective interests, and ensures the parties are treated in a way which is consistent with the notion of equality central to the Aristotelian concept of corrective justice.

The crucial aspect of the consideration from the perspective of Beever’s theory is that moral responsibility for causing harm requires the defendant to create an unreasonable risk of psychiatric injury to another, which itself requires an ability on the defendant’s part to appreciate the risk of harm to another.¹¹⁶ And because moral responsibility is determined by reference to a community wide norm, it must be based on community understandings and expectations.¹¹⁷ As such, the defendant’s actions must arguably be considered in light of whether an ordinary member of the community would have been able to appreciate the risk of psychiatric injury to the plaintiff in the circumstances.¹¹⁸ Where as a matter of community understandings and expectations it can be concluded that an ordinary person in the defendant’s position could not have appreciated the risk of psychiatric injury to the plaintiff, the defendant will not be found to be morally and legally responsible for causing the harm in question, though they may be factually responsible for doing so. In Beever’s words:

If the unreasonable risk created by the defendant is to a person other than the plaintiff, then the defendant’s negligence did not wrong the plaintiff, despite the fact that the plaintiff was injured. We say that the defendant did not owe the plaintiff a duty of care. Similarly, if the injury suffered by the plaintiff was not a foreseeable consequence of the defendant’s negligence, then the plaintiff was also not wronged, though he was injured. We say that the plaintiff’s injury was too remote.¹¹⁹

The consideration of the reasonableness of the defendant’s actions by reference to a person of an “ordinary level of susceptibility” arguably plays a crucial role in distinguishing between moral responsibility and mere factual responsibility by setting the norm at a point which treats the parties’ respective interests as being of equal importance, a central requirement of this form of corrective justice. If the norm was to be set at the subjective level of the plaintiff who was predisposed to psychiatric injury, this would preference plaintiffs’ rights to physical and psychological integrity at the expense of defendants’ rights to freedom of action and movement.

Importantly, judicial consideration of the issue reflects this perspective. While the preceding theoretical discussion is relatively abstract, it is important to note that these theoretical ideas are thematically reflected in many of the important cases in which this issue has been considered. This is particularly the case in relation to the concern often expressed by courts that any other approach might impose too high a burden on freedom of movement and action by individuals and companies going about their ordinary

¹¹³ *Donoghue v Stevenson* [1932] AC 562, 580.

¹¹⁴ Beever, n 57, 79.

¹¹⁵ Beever, n 57, 81. As explained by Beever, n 57, 83, an objective standard “sets the rights and duties of the parties, not by reference to the defendant alone (as does the subjective standard), nor by reference to the plaintiff alone (as does strict liability) ... but by reference to a hypothetical person who embodies a standard universalisable across the community as a whole”. This view accords with the perspective advanced by Weinrib, n 73, 51.

¹¹⁶ See Beever, n 57, 132.

¹¹⁷ For further discussion of the point, see Allcock, n 92, 47–58.

¹¹⁸ See Allcock, n 92, 47–58.

¹¹⁹ Beever, n 57, 132.

business.¹²⁰ Indeed, sentiments reflecting the corrective justice understanding of the relevance of the effect of the defendant's actions on the hypothetical person of an ordinary level of susceptibility to the question of reasonable foreseeability outlined above can be found in the earliest of cases considering the issue of peculiarly sensitive plaintiffs. In *Spade v Lynn and Boston Railroad Co*,¹²¹ the Court referred to the effect of vulnerable plaintiffs on ordinary life, stating:

Not only the transportation of passengers and the running of trains, but the general conduct of business and of the ordinary affairs of life must be done on the assumption that persons who are liable to be affected thereby are not peculiarly sensitive and are of ordinary physical and mental strength.¹²²

Making the clear implication that an alternative approach would place too high a burden on business and the ordinary affairs of life, the Court was of the view that reasonable conduct did not require taking into consideration plaintiffs who were peculiarly vulnerable unless this sensitivity was known to the actor in question:

If, for example, a traveller is sick or infirm, delicate in health, specially nervous or emotional, liable to be upset by slight causes, and thereby requiring precautions which are not usual or practicable for travellers in general, notice should be given, so that, if reasonably practicable, arrangements may be made accordingly and extra care be observed. But, as a general rule, a carrier of passengers is not bound to anticipate or to guard against an injurious result which would only happen to a person of peculiar sensitiveness.¹²³

Clearly, the Court in *Spade* regarded a rule attuned to especially nervous individuals a threat to the efficient running of the railways. American legal scholar Roscoe Pound similarly conceived of the rule as effecting a balancing of interests in this way. The relevance of the reaction of a person of "ordinary fortitude" was, for Pound, justified by reference to a balancing of individual interests with wider social interests:

the individual interest of the actor – that is, his interest in the free exercise of his faculties – must be weighed as well as the social interest against imposture and the practical difficulties of proof and reparation.¹²⁴

According to this understanding, while the law exists to protect interests such as individual interests in personality, the unusually sensitive plaintiff's individual interest ought to give way in circumstances where wider social interests were negatively affected. In Pound's view:

Where he exercises his faculties for purposes recognized by law and, so far as he could reasonably foresee, does nothing that would work an injury, the individual interest of the unduly sensitive or abnormally nervous must give way.¹²⁵

Considering the issue of the unusually susceptible plaintiff, Lord Wright in *Bourhill*, brought together the idea that judging the defendant's actions by reference to their effects on a person of ordinary susceptibility seeks to distinguish between the defendant who is morally responsible and the defendant who is not, and the argument that a rule unrelated to the concept of fault which judges the defendant's actions by the subjective traits of the particular plaintiff would place too high a burden on defendants in cases involving peculiarly sensitive plaintiffs. This his Lordship did with the following deceptively simple statement: "The test of the plaintiff's extraordinary susceptibility, if unknown to the defendant, would in effect make the defendant an insurer."¹²⁶ The insurer, exposed to liability to all in relation to whom a relevant contractual relationship exists, agrees to accept liability regardless of moral blameworthiness. This is ordinarily done, of course, with the insurer receiving a commercial benefit, a benefit which does not exist for the ordinary defendant in a negligence action. The defendant in a negligence action, if judged against

¹²⁰ See eg, the comments by Gleeson CJ, Gaudron J, and Gummow and Kirby JJ in the current leading common law case considering this issue *Tame v New South Wales* (2002) 211 CLR 317. This is discussed further below.

¹²¹ *Spade v Lynn & Boston Railroad Co*, 47 NE 88 (1897).

¹²² *Spade v Lynn and Boston Railroad Co*, 47 NE 88 (1897).

¹²³ *Spade v Lynn and Boston Railroad Co*, 47 NE 88 (1897).

¹²⁴ Pound, n 8, 361–362.

¹²⁵ Pound, n 8, 361–362.

¹²⁶ *Bourhill v Young* [1943] AC 92, 405–406.

the subjective traits of the plaintiff, will accordingly be burdened with liability which would be out of proportion with the rights of the plaintiff.

Significantly, comments reflecting the corrective justice justification for the relevance of the effect of the defendant's actions on the hypothetical person of an ordinary level of susceptibility to the question of reasonable foreseeability were also made in the leading Australian case of *Tame*, which involved a claim made by a psychiatrically vulnerable plaintiff against the State of New South Wales. The plaintiff alleged that she suffered psychiatric injury as a result of the negligence of a police officer in wrongly recording her blood alcohol level in a motor vehicle accident report. The police officer noticed his error and corrected it around a month later. The plaintiff was notified about the error on the accident report and became obsessed with it. She was subsequently diagnosed with a psychiatric disorder which was caused by the administrative error. The High Court held that the plaintiff was not owed a duty of care by the defendant, as it was not reasonably foreseeable that she would suffer psychiatric injury in the circumstances of the case, particularly given that the causative event itself was relatively mild.¹²⁷ This was not to say that a psychiatrically vulnerable plaintiff could never recover; rather, this particular plaintiff's action was denied because in the circumstances of the case, psychiatric injury to her was not reasonable foreseeable.

In rejecting the notion that the same general principles of the law of negligence should apply in all types of case, Gleeson CJ stated the law was concerned "not only with the compensation of injured plaintiffs, but also with the imposition of liability upon defendants and the effect of such liability upon the freedom and security with which people may conduct their ordinary affairs" and that an "intolerable burden" would be placed on business and private activity if there was a general duty not to cause reasonably foreseeable financial harm.¹²⁸ Mrs Tame's case was advanced as a good example of the "unacceptable burden on ordinary behaviour" that would result if a general duty were recognised requiring people to take care not to cause emotional disturbance to other people.¹²⁹ While finding that the normal fortitude rule was not valid as a discrete requirement of liability, Gleeson CJ regarded the reference to "a normal standard of susceptibility" as:

a way of expressing the idea that there are some people with such a degree of susceptibility to psychiatric injury that it is ordinarily unreasonable to require strangers to have in contemplation the possibility of harm to them, or to expect strangers to take care to avoid such harm.¹³⁰

His Honour held that the denial of the plaintiff's claim was not based on the application of an inflexible rule requiring the plaintiff to show that she was a person of ordinary fortitude; rather, the plaintiff's susceptibility to psychiatric harm was simply a relevant issue to be considered in relation to the question of whether psychiatric injury to her was reasonably foreseeable.¹³¹ Thus, his judgment reflected the corrective justice concern for treating the parties' respective interests as being of equal importance in the eyes of law.

Gaudron J's judgment also reflected these concerns. Her Honour similarly considered the plaintiff's unusual susceptibility to be a matter which was relevant to the question of reasonable foreseeability, rather than a matter which was determinative of liability. Her Honour stated:

To say that "normal fortitude" is not and cannot be the sole criterion of foreseeability, is not to deny that, ordinarily, "normal fortitude" will be a convenient means of determining whether a risk of psychiatric injury is foreseeable.¹³²

Gummow and Kirby JJ's judgment reflected similar concerns. Their Honours characterised the law of negligence with respect to psychiatric injury as reflecting the attempt to accommodate competing

¹²⁷ *Tame v New South Wales* (2002) 211 CLR 317, [29] (Gleeson CJ), [55] (Gaudron J), [232] (Gummow and Kirby JJ), [119]–[120] (McHugh J), [298]–[300] (Hayne J), [331]–[335] (Callinan J).

¹²⁸ *Tame v New South Wales* (2002) 211 CLR 317, [5].

¹²⁹ *Tame v New South Wales* (2002) 211 CLR 317, [7].

¹³⁰ *Tame v New South Wales* (2002) 211 CLR 317, [16].

¹³¹ *Tame v New South Wales* (2002) 211 CLR 317, [29].

¹³² *Tame v New South Wales* (2002) 211 CLR 317, [62].

interests struggling for legal protection, referring in this context to the competing interests of plaintiffs in their own bodily and psychological security, and the interests of defendants in their freedom of action.¹³³ Portraying the law in this light, they referred to *The Province and Function of Law* in which Professor Stone observed:

The apparent anomalies and illogicalities of this subject are overt signs of a substantial clash of interests. Full support of the claim to nervous integrity might not only subject defendants being mulcted in damages on false claims, thus infringing their interests of substance. It would also tend to inhibit freedom of action generally, thus prejudicing claims to free motion and locomotion.¹³⁴

Gummow and Kirby JJ considered the capacity of the law to accommodate these competing interests, noting that at each stage of the development of the modern tort of negligence, limitations were imposed on a growing field of liability in order to “minimise false claims and avoid indeterminate liability”.¹³⁵ Their Honours stated that the competing interests in nervous shock cases needed to be re-accommodated, noting that these interests must be given direct attention.¹³⁶ Their Honours regarded the promotion of reasonable conduct as one of the functions of the law of negligence,¹³⁷ and that the concept of reasonableness was central to balancing the interests of the parties. They stated:

it is the assessment ... respecting reasonableness of conduct that reconciles the plaintiff’s interest in protection from harm with the defendant’s interest in freedom of action. So it is that the plaintiff’s integrity of person is denied protection if the defendant has acted reasonably.¹³⁸

Consistent with the theoretical argument presented above, Gummow and Kirby JJ were of the view that the extent of the plaintiff’s interests was intimately intertwined with whether it was reasonable to expect the defendant to appreciate the risk of injury to the plaintiff. Their Honours stated:

protection of ... integrity [of person] expands commensurately with medical understanding of the threats to it. Protection of mental integrity from the unreasonable infliction of serious harm, unlike protection from transient distress, answers the “general public sentiment” underlying the tort of negligence that, in the particular case, there has been a wrongdoing for which, in justice, the offender must pay.¹³⁹

While finding the normal fortitude test as an independent requirement of liability to be unsound, it was in this light that Gummow and Kirby JJ regarded the reference to a normal standard of susceptibility as being of use in considering what the hypothetical reasonable person was able to perceive in terms of the level risk to the plaintiff when assessing the question of reasonable foreseeability.¹⁴⁰ Importantly, in finding that the reactions of the hypothetical person of an ordinary level of susceptibility were relevant to the overriding question of whether injury to the plaintiff was reasonably foreseeable, the judgments of those in the majority with respect to this issue were consistent with corrective justice, being principally concerned with assessing the morality of the defendant’s actions and with attempting to balance the interests of the parties.

Interestingly, despite being in the minority with respect to the normal fortitude issue and finding that the normal formal test was an independent requirement of liability, McHugh J also made comments showing a concern for treating the parties’ respective interests equally. In particular, his Honour gave consideration to the potential effect on defendants’ freedom of movement as a result of liability to peculiarly vulnerable plaintiffs which were consistent in many ways with the corrective justice perspective advanced in this article. Referring to the burden being placed on defendants by the law of negligence, McHugh J stated that the concept of reasonableness operated to ensure that the defendant could act “on the basis that there

¹³³ *Tame v New South Wales* (2002) 211 CLR 317, [170].

¹³⁴ *Tame v New South Wales* (2002) 211 CLR 317, [170], referring to Stone, *The Province and Function of Law* (1946) 512.

¹³⁵ *Tame v New South Wales* (2002) 211 CLR 317, [179].

¹³⁶ *Tame v New South Wales* (2002) 211 CLR 317, [183].

¹³⁷ *Tame v New South Wales* (2002) 211 CLR 317, 379.

¹³⁸ *Tame v New South Wales* (2002) 211 CLR 317, 379.

¹³⁹ *Tame v New South Wales* (2002) 211 CLR 317, [185].

¹⁴⁰ *Tame v New South Wales* (2002) 211 CLR 317, [197], [202]–[203]. As such, their Honours regarded the normal fortitude consideration as an independent element of liability to be unsound ([188]).

will be a normal reaction to his or her conduct”.¹⁴¹ His Honour referred to the burden on freedom of movement that would result if a higher standard than normal fortitude were adopted:

To insist that the duty of reasonable care in pure psychiatric illness cases be anchored by reference to the most vulnerable person in the community – by reference to the most fragile psyche in the community – would place an undue burden on social action and communication. To require each actor in Australian society to examine whether his or her actions or statements might damage the most psychiatrically vulnerable person within the zone of action or communication would seriously interfere with the individual’s freedom of action and communication. To go further and require the actor to take steps to avoid potential damage to the peculiarly vulnerable would impose an intolerable burden on the autonomy of individuals.¹⁴²

In light of this concern, McHugh J regarded the normal fortitude test as setting a point at which “a reasonable compromise [was reached] between victims and actors”.¹⁴³ This consideration struck “a fair balance between the need for compensation for victims of shock and the right of the individual to avoid liability for actions that ordinary persons would not see as likely to give rise to psychiatric illness”.¹⁴⁴ McHugh J further stated:

To repudiate the normal fortitude test then is to repudiate the touchstone of the common law doctrine of negligence – reasonable conduct. To repudiate it also ignores the right of citizens in a free society not to have their freedom of action and communication unreasonably burdened. Most motor vehicle accidents could be avoided if cars were driven at a speed less than 10 km per hour. But to impose such a standard of care on drivers would unreasonably hamper the speed of travel, increase congestion on the roads and burden the economy with unnecessary increases in the cost of transporting goods and persons. In the law of nervous shock, as in other areas of negligence law, the notion of reasonableness should condition the duty to exercise reasonable care for the safety of others.¹⁴⁵

As such, despite the inconsistency between McHugh J’s view of the normal fortitude test as an independent requirement of liability and the theoretical justification for considering the reasonableness of the defendant’s actions by reference to a person of an ordinary level of susceptibility advanced in this article, his Honour’s reasons for referring to a person of “normal fortitude” were also based on an attempt to treat the parties’ interests as being of equal value in the eyes of the law; a concern central to corrective justice.

It is also important to point out that the way that the assessment of the reasonableness of the defendant’s actions in accordance with the finding in *Tame* varies when the defendant has particular knowledge of the plaintiff’s special vulnerability to psychiatric injury is also explicable from the perspective of Beever’s corrective justice theory.¹⁴⁶ In a situation where a defendant has caused injury to an unusually susceptible plaintiff through actions which would not likely have injured a person of ordinary susceptibility and the plaintiff was unknown to the defendant, it will ordinarily be difficult to conclude that the defendant was morally responsible for causing the plaintiff’s harm. As the defendant has little or no ability to inform him or herself about the plaintiff’s susceptibility and to moderate his or her actions accordingly, the hypothetical normal fortitude standard in relation to the test of reasonable foreseeability in this type of situation will make clear the defendant’s lack of moral culpability for causing the plaintiff’s harm.

This is how the consideration was relevant to the decision in *Tame*. The plaintiff in *Tame* was unknown to the defendant, and so the norm against injuring was set by reference to the hypothetical person of ordinary fortitude when considering the reasonableness of the defendant’s conduct. It was against

¹⁴¹ *Tame v New South Wales* (2002) 211 CLR 317, [109]. This would not be the case where the defendant had knowledge of the plaintiff’s susceptibility.

¹⁴² *Tame v New South Wales* (2002) 211 CLR 317, [99].

¹⁴³ *Tame v New South Wales* (2002) 211 CLR 317, [112].

¹⁴⁴ *Tame v New South Wales* (2002) 211 CLR 317, [112].

¹⁴⁵ *Tame v New South Wales* (2002) 211 CLR 317, [113].

¹⁴⁶ See *Spade v Lynn and Boston Railroad Co*, 47 NE 88 (1897); *Walker v Pitlochry Motor Co* (1930) SC 565, 569 (Lord Mackay); *Jaensch v Coffey* (1984) 155 CLR 549, 568–589 (Brennan J); *Wodrow v Commonwealth* (1993) 45 FCR 52, 72–73 (Gallop and Ryan JJ); *Tame v New South Wales* (2002) 211 CLR 317, [16] (Gleeson CJ), [61] (Gaudron J), [201] (Gummow and Kirby JJ).

this standard that the defendant's actions were found to be reasonable.¹⁴⁷ According to the theoretical understanding presented in this article, the plaintiff's action did not fail simply because she was found to be a person who was unusually vulnerable to psychiatric injury; rather, her action failed because the defendant did not by his actions breach the norm against injuring, in this case measured by reference to community wide standards.¹⁴⁸

It is also consistent with the application of the consideration in *Jaensch v Coffey*,¹⁴⁹ in which the plaintiff's action succeeded despite there being some evidence that the plaintiff was vulnerable to psychiatric injury. In *Jaensch*, the plaintiff suffered psychiatric injury as a result of witnessing her husband's injuries sustained after a motor vehicle accident caused by the negligence of the defendant. The plaintiff's husband was taken to hospital after suffering serious injuries in the accident and there the plaintiff witnessed her husband in an injured state. She did not know whether he would recover from his injuries and subsequently developed anxiety and depression as a result of what she saw and was told at the hospital, particularly fearing he might die. In these circumstances, the High Court found that the plaintiff was owed a duty of care by the defendant on the basis that psychiatric injury to her was reasonably foreseeable.¹⁵⁰ As in *Tame*, the plaintiff in *Jaensch* was unknown to the defendant and so the norm against injuring was again set by reference to community standards and expectations, to the ordinary person. However, unlike in *Tame*, the defendant's actions in *Jaensch* were found to have breached the norm against injuring. Even though there was suggestion that the plaintiff in *Jaensch* was vulnerable to the particular injury she suffered, the defendant was nonetheless found to be negligent, this being on the basis that psychiatric injury to a person of average susceptibility was reasonably foreseeable in the circumstances.¹⁵¹

On the other hand, where the plaintiff's unusual susceptibility *is* known to the defendant, the law determines the reasonableness of the defendant's actions by reference to the possible effect of those actions on the *particular plaintiff* in question. In this way, the point at which the norm against injuring is set is shifted, justified on the basis that the moral situation existing between the parties concerned has been altered by this knowledge. In such a circumstance, it is arguably appropriate to measure the reasonableness of the defendant's actions by reference to the possible effects of the defendant's actions on the particular plaintiff, shifting from an objective to a subjective standard. This is justified from the perspective of corrective justice as the defendant may be morally culpable for causing the plaintiff's harm in such a situation despite the risk of harm perhaps not being appreciable to a person who was not aware of the plaintiff's unusual vulnerability.

In other words, the defendant's knowledge of the plaintiff's particular vulnerability changes the *normative relationship* existing between the parties, which means that assessing reasonableness by reference to a person of ordinary susceptibility will no longer treat the parties' respective interests as equal. This is because the defendant may by his or her knowledge have been able to appreciate the risk of injury to the plaintiff by his or her actions, notwithstanding that there may have been little or no risk of injury as a result of those actions to an ordinarily robust person in the circumstances. Setting the norm in such a circumstance by reference to community standards and expectations would arguably unfairly preference the interests of the defendant at the expense of those of the plaintiff.

This is understandable and explicable from the perspective of Weinrib's and Beever's theories. Shifting the point at which the norm against injuring is set in these circumstances from an objective to a subjective standard is necessary in order to treat the parties' respective interests as equally important in the eyes of

¹⁴⁷ *Tame v New South Wales* (2002) 211 CLR 317, [29] (Gleeson CJ), [55] (Gaudron J), [232] (Gummow and Kirby JJ), [119]–[120] (McHugh J), [298]–[300] (Hayne J), [331]–[335] (Callinan J).

¹⁴⁸ See, eg Allcock, n 92, 47–58.

¹⁴⁹ *Jaensch v Coffey* (1984) 155 CLR 549.

¹⁵⁰ *Jaensch v Coffey* (1984) 155 CLR 549, 555–556 (Gibbs CJ), 557–558 (Murphy J), 578 (Brennan J), 611 (Deane J), 612 (Dawson J).

¹⁵¹ *Jaensch v Coffey* (1984) 155 CLR 549, 555–556 (Gibbs CJ), 557–558 (Murphy J), 578 (Brennan J), 611 (Deane J), 612 (Dawson J).

the law. Were the norm to remain to be set by reference to the possible effects of the defendant's actions on a person of average robustness in such a situation, the interests of the defendant would be given preferential treatment at the expense of the interests of the plaintiff. The norm set at such a point would allow a defendant to escape liability in circumstances where the defendant may be morally culpable for causing the plaintiff's harm.

Suppose, for instance, that the defendant in *Tame* was actually aware of the plaintiff's special vulnerability to psychiatric injury. In such circumstances, the norm would arguably require more of the defendant than when the defendant was not aware in order that the parties' interests be treated as being of equal value by the law. In this situation, given that due to this knowledge the defendant could perhaps have appreciated that there was a risk of psychiatric injury to the plaintiff as a result of carelessly completing the relevant administrative form, it might be argued that the defendant breached the norm against injuring and a finding of negligence against the defendant would have been justified.

This discussion has important ramifications. Despite the concerns which have been expressed about assessing reasonableness by reference to the hypothetical personal of an "ordinary level of susceptibility", this assessment can be understood as a principled aspect of the law of negligence with respect to cases involving pure psychiatric injury. This is of no small significance, particularly as this consideration has often been regarded as an arbitrary restriction with no normative content.¹⁵² The law in relation to negligently inflicted psychiatric injury has been described as "a patchwork quilt of distinctions which are difficult to justify".¹⁵³ There have been a number of responses to this regrettable state of affairs, each of which is potentially problematic. One response has been to suggest relaxing the rules of liability in such claims, leaving reasonable foreseeability to be the only guiding principle.¹⁵⁴ Another response has been to argue that the existing clear but arbitrary rules should be maintained and that any expansion should be left to Parliament.¹⁵⁵ Leaving liability simply to the test of reasonable foreseeability based on mere predictability has the potential to lead to too many claims. On the other hand, maintaining clear although ultimately arbitrary rules results in the law acting in an unprincipled and unjust manner, and in the potential denial of meritorious claims. Each of these suggestions has the potential to lead to results which may bring the law into disrepute and therefore ought to be treated with caution.

Judges and academics have lamented the state of the law when a particular rule or limitation on liability has resulted in arbitrary and unfair distinctions being drawn between claimants.¹⁵⁶ However, judges attempting to determine rules in difficult cases have on occasion indicated an unapologetic acceptance that principle should not be the sole determinant of the duty of care in such cases, arguing that pragmatic matters should play a clear part in limiting the ambit of liability.¹⁵⁷ Underlying this type of perspective

¹⁵² There is some controversy as to whether the normal or ordinary fortitude concept reflects underlying medical realities relating to the causation of psychiatric illness, eg, it has been argued that the concept does not reflect medical reality as every person's susceptibility to psychiatric injury is different. This point has been made by the judiciary, and by legal scholars, see, eg *Chadwick v British Transport Commission* [1967] 1 WLR 912, 922 (Waller J); Butler, n 2, 119–121; Des Butler, "An Assessment of Competing Policy Considerations in Cases of Psychiatric Injury Resulting from Negligence" (2002) 10 *Torts Law Journal* 1, 3; cf Mendelson, n 2, 24–25, 56–59. The consideration has also been criticised on the basis that it lacks "specific content". The argument here is that interpreted as a consideration operating within an overriding test of reasonable foreseeability, the consideration is too easy to satisfy. However, as a requirement operating outside of the test of reasonable foreseeability, it lacks a satisfactory mechanism for determining who is and who is not a person of normal fortitude: see Butler, n 2, 121; Butler, n 26, 111.

¹⁵³ See *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, 500[B] (Lord Steyn).

¹⁵⁴ See, eg N Mullany and P Handford, *Tort Liability for Psychiatric Damage* (Lawbook, 1993) 64, 84, 312; Handford, n 2; Handford, n 26.

¹⁵⁵ The only sensible strategy as far as Lord Steyn was concerned was for the courts to say "thus far and no further": *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, 491[D]–[E], 500[A]–[E].

¹⁵⁶ See, eg *Alcock v Chief Commissioner of South Yorkshire Police* [1992] 1 AC 310, 418 (Lord Oliver); *Coates v Government Insurance Office (NSW)* (1995) 36 NSWLR 1, 11 (Kirby P); *Campbelltown City Council v McKay* (1988) 15 NSWLR 501, 503, (Kirby P); *Tame v New South Wales* (2002) 211 CLR 317, [190] (Gummow and Kirby JJ). Academic literature in this vein includes: Peter Handford, "Compensation for Psychiatric Injury: The Limits of Liability" (1995) 2(1) *Psychiatry, Psychology & Law* 37; Nicholas Mullany, "Psychiatric Damage in the House of Lords – Fourth Time Unlucky" (1995) 3 *JLM* 112; Des Butler, "A 'Kind of Damage': Removing the 'Shock' From 'Nervous Shock'" (1997) 5 *Torts Law Journal* 255.

¹⁵⁷ See, eg, the approach taken by the House of Lords in *Alcock v Chief Commissioner of South Yorkshire Police* [1992] 1 AC 310.

is the assumption that no approach which is simultaneously principled and pragmatic is possible due to the complexity of the issues involved, and the resulting view that the best that can be done is to insist on clear and predictable, if arbitrary, limits on the general test of reasonable foreseeability.¹⁵⁸

This type of perspective has been particularly pronounced in England where the search for principle in cases of negligently inflicted psychiatric injury has all but been abandoned in favour of unprincipled but pragmatic limitations on the ambit of liability.¹⁵⁹ In response to this sorry state of affairs it might be thought that this is simply an inevitable result of the complexity of the subject matter and therefore a reality which ought to be accepted. This appears to be the position taken by Lord Steyn when he stated in *White v Chief Constable of the South Yorkshire Police*: “In reality there are no refined analytical tools which will enable the courts to draw lines by way of compromise solution in a way which is coherent and morally defensible.”¹⁶⁰

In Australia the High Court has indicated that the search for principle is still a worthwhile pursuit¹⁶¹ although Hayne J indicated during his time on the High Court that the search for potential new methods to reign in an untrammelled test of reasonable foreseeability should not be abandoned.¹⁶² As the High Court’s decision in *Tame* demonstrates, assessing the reasonableness of the defendant’s conduct by reference to the effect of that conduct on a hypothetical person of an ordinary level of susceptibility acts as a limitation on liability specifically in relation to its effect on the overriding test of reasonable foreseeability. Notwithstanding this limiting effect, the present analysis demonstrates that reference to the reactions of the hypothetical person of an “ordinary level of susceptibility” when assessing the overriding test of reasonable foreseeability can be understood as a principled limitation on liability, which is a significant challenge to these orthodox positions.

So where does this leave us in Australia now that six of the eight jurisdictions have enacted civil liability legislation which seemingly incorporates an independent requirement that psychiatric injury be reasonably foreseeable to a person of normal fortitude? Whether the courts will interpret the legislation as requiring this as an independent prerequisite to liability is not completely clear. It also may well be that normal fortitude is not considered a strict requirement in cases where the defendant has particular knowledge of the plaintiff’s special vulnerability to psychiatric harm. Nonetheless, it is arguable on the basis of the analysis in this article that if the State And Territory legislatures are concerned that the civil liability legislation be principled, there is a good case for amending the civil liability legislation in order to make it clear that normal fortitude should be relevant only as a consideration relevant to an overriding question of reasonable foreseeability, and not as a strict requirement in all cases.

CONCLUSION

Consideration of whether injury was foreseeable to a person of an ordinary level of susceptibility has long been part of the common law of negligence with respect to claims of pure psychiatric injury. In particular, this issue has long been understood as playing a part in the assessment of the reasonableness of the defendant’s actions, this being of particular importance in cases where the plaintiff has a pre-existing vulnerability to psychiatric injury. However, beyond regarding the consideration of this issue

¹⁵⁸ See *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, 491[D]–[E], 500[A]–[F] (Lord Steyn), 511[A]–[C] (Lord Hoffmann); *Tame v New South Wales* (2002) 211 CLR 317, [6] (Gleeson CJ).

¹⁵⁹ See, eg *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, 511[A]–[C] (Lord Hoffmann): “It seems to me that in this area of the law, the search for principle was called off in *Alcock v Chief Constable of the South Yorkshire Police* [1991] 4 All ER 907, [1992] 1 AC 310. No one can pretend that the existing law, which your Lordships have to accept, is founded upon principle ... Consequently your Lordships are now engaged, not in the bold development of principle, but in a practical attempt, under adverse conditions, to preserve the general perception of the law as system of rules which is fair between one citizen and another.”

¹⁶⁰ *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, 500[D]–[E].

¹⁶¹ See, eg *Tame v New South Wales* (2002) 211 CLR 317, 368 (Gummow and Kirby JJ); *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269, [13] (Gleeson CJ), [18], [27] (McHugh J), [65] (Gummow and Kirby JJ), [97] (Hayne J).

¹⁶² See, eg *Tame v New South Wales* (2002) 211 CLR 317, [272]; *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269, [99].

as relevant in some way to the question of reasonableness, there is a gap in the reasoning of courts and in the scholarly literature as to the theoretical justifications for its relevance. This article has attempted to address this gap, suggesting that consideration of whether injury was foreseeable to a person of an ordinary level of susceptibility in relation to the overriding test of reasonable foreseeability can be understood as playing a part in seeking to balance the interests of the parties, ensuring that corrective justice is achieved between them.

It has been contended that based on Beever's corrective justice theory of negligence, the consideration of this issue plays an important role in setting the norm against injuring in cases of negligently inflicted psychiatric injury at a point which treats the parties' respective rights as being of equal value in the eyes of the law. This is of particular importance in cases where the plaintiff has a pre-existing vulnerability to psychiatric injury, because it is in relation to such plaintiffs that there is an increased likelihood of injury as a result of a defendant's actions when compared to the general community. It has been argued that the consideration of this issue seeks to distinguish between moral responsibility and mere factual responsibility for causing psychiatric injury. It does this by setting the norm against injuring at the level of community understandings and expectations of risk, unless the defendant has particular knowledge of the plaintiff's vulnerability. As such, the assessment of the reasonableness of the defendant's actions is consistent with an evaluation of the defendant's moral culpability for causing the plaintiff's injury.

It has further been argued that this theoretical explanation is consistent with a number of important judicial justifications of the consideration. Most notably, this explanation is consistent with the comments of Gleeson CJ, Gaudron J, and Gummow and Kirby JJ in the leading case of *Tame*.¹⁶³ In *Tame*, their Honours expressed the point of view that the consideration of this issue plays an essential role in balancing the interests of the parties in a way which protects the plaintiff's physical integrity only so far as is consistent with the maintenance of the defendant's freedom of action and movement. The theoretical explanation advanced in this article is also consistent with the way that the consideration adjusts the assessment of reasonableness by reference to the subjective level of the plaintiff in cases where the defendant has particular knowledge of the plaintiff's pre-existing vulnerability. In such cases, the adjustment of the point at which the norm is set is justified for reasons of principle, this being necessary in order to set the norm at a point which treats the parties' respective interests as being equally valuable. It has been argued that this conclusion is of particular significance, given that this is a principled justification for the consideration of the reactions of the hypothetical person of an "ordinary level of susceptibility" when considering the reasonableness of the defendant's actions. It has also been argued that there is good reason to amend the civil liability legislation to make it clear that the normal fortitude consideration is not an independent requirement of liability, particularly in cases where the defendant has particular knowledge of the plaintiff's special vulnerability to psychiatric harm.

¹⁶³ *Tame v New South Wales* (2002) 211 CLR 317.