**Gideon Haigh’s Brilliant Boy and nervous shock claims - have the shackles come off?[[1]](#footnote-1)**

Gideon’s book, The Brilliant Boy, records important legal history that has perhaps taken the younger members of this audience by surprise (I still count myself in that bracket, if only just). We thank Gideon for exploring the tortured history of nervous shock claims in Australia.

What else does this brilliant book shine a light on? To my mind, it shines a light on something equally as important to all of us here - the role that activist solicitors, courageous counsel and dissentient judges have in our community to advance, from time to time, the common law and to promote, if that’s the right word, the law of tort, too often derided.

Justice Evatt certainly met derision, when it came to his role in expanding the common law in nervous shock cases. His brother, a barrister and brother’s instructing solicitor, faced the same wrath.

But Evatt was ahead of his time, as Gideon has so well set out.

We still see today, however, a skepticism of some nervous shock claims.

But are times a-changing? Keogh J in his recent decision, *O'Connor v Comensoli* [2022] VSC 313, in a claim for damages arising from psychiatric injury from childhood sexual abuse, assessed the non-economic loss damages component at $525,000, even more than Plaintiff’s counsel sought.

The book also shines a light on how the law grapples - like the medical profession and society generally - with mental health. When one thinks back to older family or friends talking about returned soldiers from World War II having “shell shock” in hushed tones, it seems that only a generation ago our society perhaps didn’t like speaking about, didn’t like confronting, mental health and psychiatric injury in a way that we might be better at now, but are probably yet to grapple with fully.

Our own profession is arguably yet to grapple fully with the issue either. We know now something of the risks of vicarious trauma from advocating for the plights of our clients and something about bullying in our own workplace.

The High Court case of *Kozarov* is arguably another movement forward in nervous shock’s development. Or is it? A case handed down yesterday might have the answer.

Before I look at that case, I want to talk about a few other concepts and cases.

**Recognisable psychiatric injury**

Under the *Wrongs Act*, for claims involving pure psychiatric injury, plaintiffs face a series of hurdles.

One is a 10% or more Whole Person Impairment under The Guide to the Evaluation of Psychiatric Impairment for Clinicians, to obtain non-economic loss damages, often the most significant damages component of a claim.

But another barrier, perhaps overlooked in some cases, is the need to establish that, for a duty of care to arise, a person of normal fortitude would have suffered a recognised psychiatric injury if care were not taken, modifying the eggshell scull principle. Moreover, to obtain any award for economic loss damages, the person themselves must have suffered a recognised psychiatric injury.

In a wonderful paper by Corinna Lagerberg, *Reassessing the Damage Requirements for Pure Mental Harm Claims under the Wrongs Act*, the author points out that the inclusion of “recognised psychiatric injury” in the *Wrongs Act* was not based on great learnings and statistical analysis, but on the intuition of the Ipp Panel about ways to deal with its concern for opening floodgates. It also took from an old House of Lords case of *Hinz v Berry* [1970] 2 QB 40, think “it was bluebell time in Kent”, on the same issue. *Hinz* referred to a “recognisable” psychiatric injury requirement for nervous shock claims, mere grief reaction not being enough to establish nervous shock. The fight seems silly 50 odd years hence, as the facts involved a woman who witnessed a car run into her husband, who lay dying, and many of her eight children, who were strewn about the road.

The author contrasts Victoria’s position to Canada’s, citing *Saadati v Moorhead* [2017] 1 SCR 543, which has now removed this threshold and focussed instead on “disturbance that is ‘serious and prolonged and rise[s] above the ordinary annoyances, anxieties and fears’ experienced by all members of society”. This is now Canada’s means of assessing an entitlement to damages for nervous shock. In other words, the Court focussed on consequences of injury to the plaintiff, rather than medical diagnoses for those injuries, taking a ‘we are lawyers, not doctors’ approach.

If a more minor physical injury is compensable, why not a more minor mental disturbance in the absence of a recognised psychiatric injury? Should they not be treated the same when assessing reasonable conduct of one’s neighbours?

**Nervous shock claims of family members**

Another area sometimes overlooked is the mental injuries sustained by family members of primary victims who have suffered severe injury. Such people are often referred to as “secondary victims”.

Experience tells us that, if there has been significant trauma to one member of the family, this can affect the whole family in a raft of ways. But often we don’t see these claims, focussing only on the primary victim.

Sexual abuse victims could be an example. What affect does the abuse have on parents, spouses or children of the victim? Are there intergenerational victims? Are they even able to bring claims? As with the High Court’s case of *Tame*, the parents suffering psychiatric injury from the death of their son working remotely as a jackaroo, the *Wrongs Act* extends a cause of action for nervous shock to family members of a primary victim. There is no longer a need to witness the incident. Psychiatric injury to family members needs only to be reasonably foreseeable. How far this goes remains to be seen.

The recent decision of McDonald J in *RWQ v The Catholic Archdiocese of Melbourne & Ors* [2022] VSC 483 shows that at least some reforms enabling victims to sue for historical abuse are not limited to the primary victim. That case looked at the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic), which removes the so-called *Ellis* defence, enabling one to sue unincorporated entities, traditionally not legal entities capable of being sued. One would imagine changes to limitation periods extend to secondary victims too.

**Transport accidents**

Secondary victim claims should not be forgotten in transport accidents either.

In *Biggs v O'Connor* [2021] VSC 826, Keogh J looked at a secondary victim’s claim arising from a motor bike accident. The Plaintiff’s husband was a pillion passenger of Mr O’Connor, the defendant. The husband was killed in the accident. The defendant was affected by alcohol at the time and the husband had been drinking with the defendant before the ride. The defendant said that the deceased husband had voluntarily assumed the risk that led to his death by riding pillion with a drunk driver. It said that his wife’s claim must also fail.

His Honour, citing a long line of authority, said it was wrong to focus on whether the driver owed a duty to the deceased or whether the deceased had voluntarily assumed the risk of injury. A secondary victim’s cause of action had to be considered in its own right. The defendant owed members of the primary victim’s family a duty of care to protect them against the risk of psychiatric injury, which the driver breached when driving under the influence of alcohol.

So, while it might be possible to bring home a defence against a primary victim for their own role in the events, a secondary victim may well have a more straightforward case. Who would have thought?

**Koehler and Kozarov revisited**

I had intended today to compare and contrast these two decisions. But a few members of the Bar brought my attention to yesterday’s Court of Appeal decision. I won’t reveal how my comparison of these cases compared to the learned judges’! But surely I cannot lead you astray now.

The decision I am referring to is *Bersee v State of Victoria* [2022] VSCA 231.

By way of reminder, *Koehler* was a case where a sale’s rep’s workload increased and she went off work, first thinking it was physical illness, but then realising it was psychiatric, caused by stress from her increased workload. The High Court said that her psychiatric injuries were not reasonably foreseeable to the employer, as there were no signposts of psychiatric injury while she worked.

On the other hand, *Kozarov* concerned a prosecutor who was working on cases of an horrific kind. The employer knew that this work involved an inherent risk of psychiatric injury from the outset of employment, and did not act reasonably in responding to the risk or in accordance with its own risk management policies. *Kozarov* succeeded.

In yesterday’s case, the plaintiff was an accomplished high school teacher. He suffered from a debilitating psychiatric injury caused by his teaching.

In 2014, he lost a part-time support teacher and his class numbers increased. He first sought treatment from his GP for stress in late 2014. However, he made no complaints to management until May 2015.

The trial judge held that the school was entitled to proceed on the basis that the plaintiff was coping with his workload until he complained to them in May 2015. At this time, the plaintiff was offered further assistance from the employer. Plans were put in place for him to take extended leave in 2016, but he could not continue and finished work in late 2015.

The trial judge relied on *Koehler* and looked to identifying warning signs of psychiatric injury which might enliven a duty of care. The judge accepted that, by May 2015, injury was reasonably foreseeable, but that the school responded appropriately. Before then, the employer was entitled to proceed on the basis that the plaintiff could do the work he was assigned, with nothing to suggest otherwise.

On appeal, the plaintiff pointed to *Kozarov* and said that the duty of care existed from the outset of employment, moving away from the need to identify particular warning signs.

While the defendant accepted that a duty of care existed throughout employment generally, it submitted that a relevant duty was not enlivened until May 2015, as there was no foreseeable risk of injury.

The Court of Appeal found that *Kozarov* did not change the principles espoused in *Koehler*. They were two ends of the same spectrum. In *Kozarov*, the risk of injury to the plaintiff was well understood by the employer from the outset of her employment because of the particular prosecuting work she was required to do. She did not have to point to particular events in the context of her case and did not have to show signs of psychiatric injury for a duty of care to be enlivened. But in this case, like *Koehler*, there was nothing particular about this teacher’s work that made psychiatric injury reasonably foreseeable in the absence of complaints or other signposts of psychiatric injury. Once injury became foreseeable from complaint, the employer acted reasonably.

The plaintiff lost his appeal.

So, it seems that one must consider in employment cases of this sort, first, the nature of employment and inherent risks to a person’s mental health from their job or even discrete tasks, and, if it is not inherently dangerous, then whether there were particular events or warning signs alerting the employer to a risk of psychiatric injury of a plaintiff. If that can be established, then one turns to whether there was a reasonable response by the employer to the risk of harm.

**Summing up**

As with so many areas of the law and medicine, there is much scope for interesting legal development, as the community’s understanding of psychiatric illness and its risks grow.

We are lucky indeed to be tort lawyers.

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1. Speech delivered to the Victorian Bar with Gideon Haigh, chaired by Patrick Over of counsel, on 27 October 2022. [↑](#footnote-ref-1)