SUPREME COURT OF QUEENSLAND

CITATION:	*Lisle v Brice & Anor* [2001] QCA 271
PARTIES:	**JANINE LISLE** (plaintiff/respondent) **v** **NEIL WILLIAM BRICE** (first defendant/second appellant) **MMI GENERAL INSURANCE** (ACN 000 122 850) (second defendant/first appellant)
FILE NO/S:	Appeal No 7616 of 2000 DC No 4754 of 1996
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	20 July 2001
DELIVERED AT:	Brisbane
HEARING DATE:	16 May 2001
JUDGES:	McMurdo P, Thomas JA, Williams JA Separate reasons for judgment of each member of the Court, each concurring as to the order made.
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	TORTS – NEGLIGENCE - FATAL ACCIDENTS LEGISLATION – ESSENTIALS OF CAUSE OF ACTION – where respondent's husband injured in car crash and developed a depression type illness committing suicide three years later – where deceased was predisposed to depression – where other stressors in addition to the accident – whether principles of causation apply to a Lord Campbell's Act action – whether principles of remoteness and the test of reasonable foreseeability apply to a Lord Campbell's Act action – whether the egg shell skull rule applies to Lord Campbell's Act actions *Supreme Court Act* 1995 (Qld), s 17 *Bonnington Castings Ltd v Wardlaw* [1956] AC 613, considered *Chapman v Hearse* (1961) 106 CLR 112, considered *Chappel v Hart* (1998) 195 CLR 232, applied *Commonwealth of Australia v McLean* (1996-97) 41 NSWLR 389, cited *Cotic v Gray* (1981) 124 DLR (3rd) 641, considered

Fitzgerald v Penn (1954) 91 CLR 268, applied
Haber v Walker [1963] VR 339, considered
Harding v The Council of the Municipality of Lithgow (1937) 57 CLR 186, cited
Hughes v Lord Advocate [1963] AC 837, cited
Kavanagh v Akhtar (1998) 45 NSWLR 588, cited
Kupke v The Corporation of the Sisters of Mercy [1996] 1 Qd R 300, cited
Mahony v J Kruschich (Demolitions) Pty Ltd (1985) 156 CLR 522, considered
March v E. & M. H. Stramare Pty Ltd (1991) 171 CLR 506, applied
Medlin v State Government Insurance Commission (1995) 182 CLR 1, considered
M'Kew v Holland & Hannen & Cubitts [1970] SC(HL) 20, considered
Morgan v Tame (2000) 49 NSWLR 21, cited
Murdoch v British Israel World Federation [1942] NZLR 600, distinguished
Nader v Urban Transit Authority of New South Wales (1985) 2 NSWLR 501, cited
NSW Insurance Ministerial Corporation v Myers (1995) 21 MVR 295, considered
Overseas Tankship UK (Ltd) v Morts Dock and Engineering Co Ltd ('The Wagon Mound') [1961] AC 388, considered
Pigney v Pointers Transport Services Ltd (1957) 1 WLR 1121, distinguished
Richters v Motor Tyre Service Proprietary Limited [1972] Qd R 9, considered
Seward v Owner of the "Vera Cruz" (1884) 10 App Cas 59, considered
Swami v Lo (1980) 1 WWR 379, cited
Telstra Corporation Limited v Smith (1998) ATR 81-487, considered
Versic v Connors (1969) 90 WN (Pt 1) NSW 33, cited
Victorian Railways Commissioners v Speed (1928) 40 CLR 434, cited
Watts v Rake (1960) 108 CLR 158, considered
Wright v Davidson (1992) 88 DLR (4th) 698, cited
Zavitsanos v Chippendale (1970) 2 NSWR 495, considered

COUNSEL: R J Douglas SC with K Holyoak for the appellants
C Newton for the respondent

SOLICITORS: McInnes Wilson for the appellants
Carter Capner for the respondent

[1] **McMURDO P:** I agree with the reasons for judgment of Williams JA and with his proposed order.

[2] **THOMAS JA:** In this case we are holding a motorist liable to pay damages for the support of the wife and children of a man who committed suicide three years after suffering relatively minor physical injuries in a motor accident. We are, in what seems a small way, once more extending the boundaries of foreseeability and liability.

[3] It is with some misgiving that I agree with the reasons of Williams JA which explain why such a result follows according to current legal authority. I respect such authority. I hope I may be pardoned however for drawing attention to some considerations that are sometimes overlooked by courts when making rulings in cases involving damages for personal injuries.

[4] The rules currently embraced by our system include:

1. A reduced level of causation necessary to sustain a claim[1].
2. The rule, epitomised in *Watts v Rake*[2], that a defendant "must take his victim as he finds him and pay damages accordingly".
3. Relaxation of control devices such as remoteness of damage to stem the arguable endlessness of the consequence of every human act.
4. Common use of hindsight, despite frequent disavowal, in concluding that virtually anything that has happened was reasonably foreseeable.
5. Ever-increasing levels of damage, aided by the methodology of economic rationalism, unalleviated by collateral benefits actually received[3], and aggravated by the inclusion of heads of damage that a claimant does not suffer[4] assessed at "commercial" rates.

These are some of the tools that increasingly permit unrealistic results in such cases, in both liability and quantum. Today it is commonplace that claimants with relatively minor disabilities are awarded lump sums greater than the claimant (or defendant) could save in a lifetime. The generous application of these rules is producing a litigious society and has already spawned an aggressive legal industry. I am concerned that the common law is being developed to a stage that already inflicts too great a cost upon the community both economic and social.

[5] In a compensation-conscious community citizens look for others to blame. The incentive to recover from injury is reduced. Self-reliance becomes a scarce commodity. These are destructive social forces. Also much community energy is wasted in divisive and non-productive work. A further consequence is the raising of costs of compulsory third party, employer's liability, public risk and professional indemnity insurance premiums. These costs are foisted upon sectors of the public and in the end upon the public at large. I would prefer that these problems be rectified by the development of a more affordable common law system, but in recent times its development has been all in one direction – more liability and more damages.

[6] I express these concerns in this particular case because authority constrains me to participate in pushing the boundaries further when I think that the time has already

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1 The substantial lowering of the principles of causation previously recognised is discussed in *Wylie v ANI Corporation Ltd* [2000] QCA 314, paras [43-48], and in *Hawthorne v Thiess Contractors Pty Ltd & Anor* [2001] QCA 223, paras [10-12]; cf *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506, 509-516.

2 (1960) 108 CLR 158.

3 *National Insurance Co of New Zealand Ltd v Espagne* (1961) 105 CLR 569; Fleming, J, *The Law of Torts* 9th ed LBC, Sydney, 1998 pp 274 - 281.

4 *Griffiths v Kerkemeyer* (1977) 139 CLR 161.

been reached when courts should be seriously re-considering the formulation of firmer control devices than those that currently exist. I fear we are developing a creature we can no longer control.

[7] The present case involves the responsibility of a third party for the consequences of self-harm by an injured person. Unlike our system, some civilised legal systems regard the person who commits suicide as responsible for his own death, notwithstanding that acts of others may help explain why he did so. As Williams JA has pointed out, the American authorities generally preclude recovery in this situation. Our system however permits causation to be found when such a death is not the direct and proximate result of the accident. In the present case certain other problems beset Mr Lisle's life which almost certainly contributed to his demise. These included a violent physical altercation with his neighbour (1998), an altercation and assault involving the police, and his business stresses. The physical altercations were described as "no less stressors" than the 1995 car accident. There is more than one view open as to whether the "common sense test"[5] should tell us that the infliction of a relatively minor physical injury upon Mr Lisle in 1995 is more responsible for causing the unhappy final event than these subsequent events or his own act.

[8] In the present circumstances it would have been open to the learned trial judge to have found that the chain of connection had been broken and to have declined to find that the 1995 accident was a substantial contributing cause of the 1998 suicide. However as Williams JA has pointed out the learned trial judge made a thorough review of relevant matters and did not expose any legal or factual error. The tests to be applied are imprecise and leave such scope for the individual fact-finder that it is impossible for the Court of Appeal to set aside the trial judge's finding of liability to the deceased's dependants in the given circumstances.

[9] I agree with Williams JA that in a claim for damages for dependency the issue of reasonable foreseeability must be satisfied just as it must be in a case where a plaintiff unsuccessfully attempts suicide and then seeks additional damages for the further damage he does to himself. In short I conclude that the view expressed in the dissenting judgment of Hudson J in *Haber v Walker*[6] should now be accepted. But what is it that needs to have been reasonably able to be foreseen? In this case it is a necessary pre-condition of liability that the defendant could reasonably foresee that his negligent driving might result in the train of events that in fact occurred, namely that someone might be injured who might commit suicide in consequence of the injury and whose dependants might therefore suffer loss[7]. This is an attenuated and surprising example of reasonable foresight, but according to current approaches it was open to the learned trial judge to hold that this was reasonably foreseeable.

[10] In these circumstances I agree with the order proposed by Williams JA.

[11] **WILLIAMS JA:** The respondent is the widow of Timothy John Lisle, deceased. On 6 July 1995 the deceased received personal injuries in a motor vehicle collision which was caused by the negligent driving of the second appellant whose vehicle was insured pursuant to the provisions of the *Motor Accident Insurance Act* 1994

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5 *March v Stramare Pty Ltd* (1991) 171 CLR 506.

6 [1963] VR 339.

7 Cf *Versic v Conners* [1969] 1 NSWLR 481, 482 which discusses the raft of facts upon which a foreseeability finding should be based.

with the first appellant. The deceased's physical injuries were relatively minor (a whiplash type injury) but he developed symptoms of depression within a few weeks. By February 1996 he was diagnosed with major depression. That condition persisted despite treatment until he committed suicide by hanging on 28 October 1998, 3¼ years after the motor vehicle accident.

[12] The deceased had commenced an action in the District Court seeking damages for personal injury arising out of the accident, but that had not been determined as at the date of his death. Thereafter the claim was amended pursuant to an order of a judge of the District Court to include a claim by the respondent for damages for herself and two children of the marriage pursuant to the statutory provision commonly referred to as Lord Campbell's Act. The matter proceeded to trial and judgment was given for the respondent both with respect to the estate claim and the claim for loss of dependency.

[13] At trial the first appellant admitted liability with respect to the accident. The principal issues litigated centered on the appellants' responsibility for the death of the deceased. Whilst it was admitted that the deceased sustained some personal injuries in the accident, it was contended that his death by suicide was neither caused by the motor vehicle accident, nor reasonably foreseeable by the second appellant as a consequence thereof. The learned trial judge made detailed findings, and found for the respondent.

[14] The contentions of the appellants on appeal can be summarised as follows:

(a) the principle of remoteness of damage applies to a Lord Campbell's Act action;

(b) the finding that foreseeability was irrelevant because the deceased was vulnerable was erroneous;

(c) death as an injury, on the facts, was not foreseeable. The "eggshell" skull rule is irrelevant.

The argument addressed to the Court canvassed the applicability of the principles relating to causation and remoteness in the circumstances of the claim in question. It should be noted that there was no appeal with respect to the estate claim, and no appeal with respect to quantum if the respondent succeeded on the claim for loss of dependency.

[15] Because liability for the collision was admitted, and because no evidence could be called from the deceased, there is little, if any, evidence as to the nature of the collision. The record book contains a number of references in reports of doctors to statements made by the deceased to them as to the circumstances of the accident. Each side on appeal was content to refer to those passages as indicating the nature of the collision.

[16] The deceased was travelling as a passenger in a utility being driven by his brother-in-law south-bound along the Bruce Highway near the Big Pineapple, Nambour. The vehicle had been in the left-hand lane but moved into the right-hand lane to allow a four-wheel drive and caravan being driven by the second appellant to merge from the left. The four-wheel drive crossed in front of the utility, apparently intending to make a U-turn. A collision occurred with the speed of the utility being approximately 60 kph. Despite the fact the deceased was wearing a seat belt his head hit the dashboard; he had a choking feeling or of being smothered. The deceased said on a number of occasions he was unsure whether he

lost consciousness, but was unable to recall the precise impact. The utility was "written off".

[17] On the basis of that material it is clear that the collision was reasonably severe and would have constituted a life threatening experience to a person involved in it. The impact was of such a nature that quite serious injuries, even death, could have been occasioned to occupants of the utility.

[18] The learned trial judge made a number of findings of fact which are relevant for present purposes. He was satisfied that the deceased was not suffering from depression before the accident, but "had a pre-existing vulnerability to psychological problems". Some weeks after the accident the deceased was suffering from depressive symptoms and was diagnosed in February 1996 with depression. There was also a specific finding that it "was unlikely that the depression would have occurred but for the deceased's accident-caused injuries". Findings were also made that "although there were other stressors prior to the suicide, the said accident continued to be a material contributing factor to his depression" and the "depression was the cause of his suicide on 28 October, 1998".

[19] The learned trial judge also made a finding that "the deceased did not suffer a head injury in the accident". In the circumstances I do not take that finding to convey more than that the deceased did not suffer any prolonged unconsciousness or any brain damage as a result of what happened in the accident. I do not take the finding as negating the propositions that the deceased's head hit the dashboard, that he was dazed or stunned to some extent, that he has no recollection of precise impact, and that he experienced some sort of choking sensation.

[20] In expressing those findings the learned trial judge referred to "other stressors prior to the suicide". Such matters were not made the subject of specific findings, but the evidence from the doctors refers to two altercations involving physical violence and pressures associated with the deceased's business. One assault involved a neighbour, the other involved the police. The medical evidence tends to suggest that each of those incidents could have caused more ongoing stress, and each was capable of causing a clinical depressed mood.

[21] The deceased had invented a nut cracker for breaking open macadamia nuts. He and other family members were in the business of manufacturing the nut cracker and selling it. At the time of the accident the point had just been reached where they were getting significant orders. As a result of the whiplash injury the learned trial judge found that the deceased "lost an immediate ability to carry on with the tasks expected of him in the business of making nut crackers". Prior to the accident the business had been his "prime interest in life" and thereafter he "did not get as involved in the business". It appears that because of his inability to control the business as he had before the accident the deceased developed concerns about other family members becoming responsible for it. At least one of the doctors considered the "booming business" a stressor.

[22] After considering relevant authorities, to which I will subsequently refer, the learned trial judge concluded, as already noted, that "the depression would not have occurred but for the deceased's accident-caused injuries". His Honour then referred to authorities dealing with the issue of remoteness and then observed that the "facts of the present case add a gloss to the principles discussed". Ultimately that led to his Honour stating:

> "In the present case, I am not satisfied that the suicide would have happened in any event. Certainly, once the accident occurred, there were other stressors in the deceased's life which contributed to his depression. The fact that there are voluntary acts of the plaintiff, or other stressors intervening, does not prevent the initial negligence of the first defendant in the present case from being a cause of the injury or death. The question is whether the suicide is or is not, for the purposes of the law, caused by the motor vehicle accident . . .
> I have held that the accident which involved the deceased contributed in a material way to the depression. The suicide was a result of that depression. . . . I am not satisfied 'that had there been no accident he would eventually and prematurely have been incapacitated by the seeds of disability within him'; . . . I am satisfied that the said accident continued to contribute to his depression as his disinterest in being involved in the business occurred immediately after the accident and seemed to be a concern for him. He recognised this with statements such as 'not wanting to be a burden' to others.
> The deceased was vulnerable psychologically. The said accident precipitated his depression and continued to contribute to it in a material way. Liability for the accident has been admitted. I am satisfied that the accident was a cause of the deceased's suicide. Relying on the evidence of the lay witnesses referred to previously, his pre-accident disposition and post-accident disposition to which they refer, it is clear as a matter of commonsense that the subject accident continued to contribute to his depression. Given his vulnerable personality, any lack of foreseeability does not prevent the plaintiff from recovering. In that event, the plaintiff has a valid cause of action against the defendants."

[23] The critical statutory provision in question is s 17 of the *Supreme Court Act* 1995, which is in these terms:

> "Whensoever the death of a person shall be caused by a wrongful act neglect or default and the act neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured and although the death shall have been caused under such circumstances as amount in law to crime."

Subsequent provisions of the legislation provide that every such action is to be for the benefit of the dependants of the deceased. Those statutory provisions are the Queensland equivalent of what is commonly referred to in the English legal world as Lord Campbell's Act. The cause of action provided for by that legislation has been described as "new in its species, new in its quality, new in principle, in every way new"; per Lord Blackburn in *Seward v Owner of the "Vera Cruz"* (1884) 10 App Cas 59 at 70. (See also *Victorian Railways Commissioners v Speed* (1928) 40 CLR 434 at 438, *Harding v The Council of the Municipality of Lithgow* (1937) 57 CLR 186 at 191, 193 and 194, and *Kupke v The Corporation of the Sisters of Mercy* [1996] 1 Qd R 300 at 304 ff.)

[24] Notwithstanding that, it seems clear that the term "caused" in the statutory provision carries the meaning attributed to that term in other branches of the law. In *Bonnington Castings Ltd v Wardlaw* [1956] AC 613 at 620, Lord Reid referred to the principle that a plaintiff "must prove not only negligence or breach of duty but also that such fault caused or materially contributed to his injury". That was taken up by Mason CJ (Toohey and Gaudron JJ agreeing) in *March v E. & M. H. Stramare Pty Ltd* (1991) 171 CLR 506 at 514 where he said:

> " . . . the law's recognition that concurrent or successive tortious acts may each amount to a cause of the injury sustained by a plaintiff is reflected in the proposition that it is for the plaintiff to establish that his or her injuries are 'caused or materially contributed to' by the defendant's wrongful conduct . . . Generally speaking, that causal connexion is established if it appears that the plaintiff would not have sustained his or her injuries had the defendant not been negligent".

That then led to his Honour saying at 515:

> "The common law tradition is that what was the cause of a particular occurrence is a question of fact which 'must be determined by applying common sense to the facts of each particular case' . . . It is beyond question that in many situations the question whether Y is a consequence of X is a question of fact. . . . Commentators subdivide the issue of causation in a given case into two questions: the question of causation in fact – to be determined by the application of the 'but for' test – and the further question whether a defendant is in law responsible for damage which his or her negligence has played some part in producing . . . It is said that, in determining this second question, considerations of policy have a prominent part to play, as do accepted value judgments . . . However, this approach to the issue of causation (a) places rather too much weight on the 'but for' test to the exclusion of the 'common sense' approach which the common law has always favoured; and (b) implies, or seems to imply, that value judgment has, or should have, no part to play in resolving causation as an issue of fact."

That reflects much of what was said by Dixon CJ, Fullagar and Kitto JJ in *Fitzgerald v Penn* (1954) 91 CLR 268 at 277. That approach to causation was confirmed by the High Court in *Chappel v Hart* (1998) 195 CLR 232. In my view those authorities define the appropriate test of causation for a claim made pursuant to Lord Campbell's Act.

[25] But not all loss or damage established to have been caused by applying that common sense test will give rise to a legal liability; at this stage what Mason CJ called in *March* at 515 the second question comes into play. The starting point here must be the statement of Dixon CJ, Kitto, Taylor, Menzies and Windeyer JJ in *Chapman v Hearse* (1961) 106 CLR 112 at 122 where they said:

> "In effect, the argument of the respondent proceeded upon the basis that if the ultimate damage was 'reasonably foreseeable' that circumstance would conclude this aspect of the matter against the appellant. But what this argument overlooks is that when the question is whether damage ought to be attributed to one of several 'causes' there is no occasion to consider reasonable foreseeability on the part of the particular wrongdoer unless and until it appears that the negligent act or omission alleged has, in fact, caused the damage

> complained of. As we understand the term 'reasonably foreseeable' is not, in itself, a test of 'causation'; it marks the limits beyond which a wrongdoer will not be held responsible for damage resulting from his wrongful act".

That was taken up by Gibbs CJ, Mason, Wilson, Brennan and Dawson JJ in *Mahony v J Kruschich (Demolitions) Pty Ltd* (1985) 156 CLR 522 at 528 where it was said:

> "A negligent tortfeasor does not always avoid liability for the consequences of a plaintiff's subsequent injury, even if the subsequent injury is tortiously inflicted. It depends on whether or not the subsequent tort and its consequences are themselves properly to be regarded as foreseeable consequences of the first tortfeasor's negligence. A line marking the boundary of the damage for which a tortfeasor is liable in negligence may be drawn either because the relevant injury is not reasonably foreseeable or because the chain of causation is broken by a novus actus interveniens . . . But it must be possible to draw such a line clearly before a liability for damage that would not have occurred but for the wrongful act or omission of a tortfeasor and that is reasonably foreseeable by him is treated as the result of a second tortfeasor's negligence alone".

[26] As it was put by Mason CJ (Toohey and Gaudron JJ agreeing) in *March* at 510:

> "Just as *Chapman v Hearse* rejected reasonable foresight as a test of causation, so *M'Kew* and *Mahony* rejected it as an exclusive criterion of responsibility".

The second reference therein is to *M'Kew v Holland & Hannen & Cubitts* [1970] SC (HL) 20. McHugh J expanded on that point in *March* at 535 where he said:

> "Damage will be a consequence of the risk if it is the kind of damage which should have been reasonably foreseen. However, the precise damage need not have been foreseen. It is sufficient if damage of the kind which occurred could have been foreseen in a general way: *Hughes v Lord Advocate* [1963] AC 837. But the 'scope of the risk' test enables more than foreseeability of damage to be considered. As Fleming points out (Law of Torts, 7th ed. (1987) p 193), it also enables allowance to:
>
> > 'be made to such other pertinent factors as the purpose of the legal rule violated by the defendant, analogies drawn from accepted patterns of past decisions, general community notions regarding the allocation of 'blame' as well as supervening considerations of judicial policy bearing on accident prevention, loss distribution and insurance'."

[27] In the light of those statements it is obvious that the trial court has to look for factors indicating where the line limiting the extent of recovery should be drawn. That is the line which would indicate the point beyond which the damage was too remote to give rise to an entitlement to recover from the tortfeasor. Frequently that will involve assessing the significance of some intervening act whether of the injured party or some third person. This is the issue dealt with by the High Court in *Medlin v State Government Insurance Commission* (1995) 182 CLR 1. At 6-7, Deane, Dawson, Toohey and Gaudron JJ relevantly said:

> "For the purposes of the law of negligence, the question whether the requisite causal connexion exists between a particular breach of duty

> and particular loss or damage is essentially one of fact to be resolved, on the probabilities, as a matter of common sense and experience. And that remains so in a case such as the present where the question of the existence of the requisite causal connexion is complicated by the intervention of some act or decision of the plaintiff or a third party which constitutes a more immediate cause of the loss or damage. In such a case the 'but for' test, while retaining an important role as a negative criterion which will commonly (but not always) exclude causation if not satisfied, is inadequate as a comprehensive positive test. If, in such a case, it can be seen that the necessary causal connexion would exist if the intervening act or decision be disregarded, the question of causation may often be conveniently expressed in terms of whether the intrusion of that act or decision has had the effect of breaking the chain of causation which would otherwise have existed between the breach of duty and the particular loss or damage. The ultimate question must, however, always be whether, notwithstanding the intervention of the subsequent decision, the defendant's wrongful act or omission is, as between the plaintiff and the defendant and as a matter of commonsense and experience, properly to be seen as having caused the relevant loss or damage. Indeed, in some cases, it may be potentially misleading to pose the question of causation in terms of whether an intervening act or decision has interrupted or broken a chain of causation which would otherwise have existed. An example of such a case is where the negligent act or omission was itself a direct or indirect contributing cause of the intervening act or decision."

[28] Thus in *Medlin* the plaintiff, a university professor, was entitled to recover economic loss where he voluntarily retired early from his position, a decision made in the light of the effects his injuries were having on his own perceived capacity to function at an appropriate level, though his employer was satisfied with his performance.

[29] The reasoning in the authorities to which I have referred, and the principles to be deduced therefrom, have been applied in a number of recent cases; it is sufficient to mention only by name *Nader v Urban Transit Authority of New South Wales* (1985) 2 NSWLR 501, *Morgan v Tame* (2000) 49 NSWLR 21, *Zavitsanos v Chippendale* [1970] 2 NSWR 495, *Commonwealth of Australia v McLean* (1996) 41 NSWLR 389, *Kavanagh v Akhtar* (1998) 45 NSWLR 588, *Versic v Conners* (1969) 90 WN (Pt 1) NSW 33 and *Telstra Corporation Limited v Smith* [1998] Aust Torts Reports 81-487.

[30] Given the arguments addressed to the Court in this case, it is necessary to determine whether the principles derived from cases such as *Chapman*, *Mahony* and *Medlin* apply to a claim brought pursuant to Lord Campbell's Act and if so where the line defining remoteness should be drawn given the facts of this case. If those principles apply, was the suicide too remote a consequence to be an event for which the appellants were responsible?

[31] The learned trial judge here clearly adopted the commonsense approach to the issue of causation. There was ample medical evidence to support his finding that the accident caused – "contributed in a material way to" – the depression. As he put it,

"the depression would not have occurred but for the deceased's accident-caused injuries". There was also ample evidence to support the finding that the depression continued throughout the period up to the suicide. Again, in the light of the medical evidence, and applying the commonsense test, the findings that the "depression was the cause of his suicide" and that "the accident was a cause of the deceased's suicide" were clearly open on the evidence. I can see no reason for setting aside those findings.

[32] Factually this case is very similar to the situation considered by the Victorian Full Court in *Haber v Walker* [1963] VR 339. In that case the injuries sustained by the deceased in the accident were more serious than here, and the suicide occurred 17 months later. The jury found that the death of the deceased was caused by the accident, but that the death of the deceased by hanging was something which the defendant could not reasonably be expected to have foreseen. The majority, Lowe and Smith JJ concluded that once it was established that the death was caused by the wrongful act, default or neglect of the defendant it was not necessary to prove that the deceased's death by suicide was reasonably foreseeable by the defendant. Hudson J strongly dissented. He concluded that the reasoning in *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd* ('The Wagon Mound') [1961] AC 388 applied and, the right of action given by the statute being subject to the requirements of the common law, it followed that the death must be shown to have been a consequence of the negligence which was reasonably foreseeable. The end result was that the dependency claim consequent upon the death by suicide succeeded.

[33] A similar issue was considered by Wanstall ACJ in *Richters v Motor Tyre Service Proprietary Limited* [1972] Qd R 9. There the woman in question received quite severe personal injuries and, whilst conscious at the scene of the accident, had observed her injured husband and knew of his death shortly thereafter. She developed a state of morbid depression and took her own life some 2 years and 2 months after the accident. The relevant claim was by her estate for damages for loss of expectation of life. The learned judge concluded, on the assumption that the death was caused by the accident, that the evidence did not warrant a finding that the defendants ought reasonably to have foreseen that if, by their negligence they injured her and killed her husband, she would in consequence take her own life. His Honour, as he pointed out, was not dealing with a Lord Campbell's Act claim, but he considered the reasoning in *Haber v Walker*. That led him at 22 to make the observation that he felt "there is much cogency in the dissenting view of Hudson J" that the foreseeability test was clearly relevant to such a claim. That assisted him in concluding that the foreseeability test was also clearly relevant to an estate claim. Because the evidence did not establish foreseeability the claim failed.

[34] There have been a number of other cases in which judges in Australia have had to consider issues of causation and remoteness where death (or attempted death) by suicide has followed the sustaining of injuries negligently caused.

[35] Begg J in *Zavitsanos v Chippendale* [1970] 2 NSWR 495 was concerned with a situation where the plaintiff's husband was knocked down by a car on 8 November 1967 and suicided by gunshot on 3 January 1968, some 65 days later. It was accepted that the deceased sustained significant physical injuries which led to a state of "mental depression which was the cause of the deceased taking his own life". There was a suggestion that the deceased was vulnerable in that regard. The learned trial judge held on the evidence that the plaintiff had not established that the

defendant was negligent, but he went on to consider the other issues raised at the trial. At 499-500, his Honour said:

> "I think the evidence justifies the following conclusions that the death was caused because the deceased shot himself wishing to bring about his own death, that this desire to end his life was the immediate cause of his death, that his state of mind at the time was the result of an anxiety depression, that this anxiety depression resulted from the physical injuries and accordingly the death resulted from or was caused by those initial injuries.
>
> I am therefore of the opinion that there is little difficulty in coming to the conclusion that the death was causally related to the accident . . .
>
> . . . In my opinion in considering whether the death was 'caused' by the accident foreseeability in the instant case plays no part".

That last observation indicated an acceptance of the reasoning of the majority in *Haber v Walker*. But his Honour went on to say that if foreseeability was relevant the suicide "would be foreseeable as understood in light of *Versic v Conners* [1969] 1 NSWR 481 and *Hughes v Lord Advocate* [1963] AC 837"; the type of injury, type of occurrence, was foreseeable. Then his Honour went on at 500:

> "Some further consideration however must be given to the question of causation because in this case it has been submitted that the voluntary act of the deceased in killing himself was a *novus actus interveniens* which broke the chain of causation. In dealing with that question the High Court in *Hearse v Chapman* said that it is 'very much a matter of circumstance and degree'.
>
> One can well imagine cases where a suicide is far removed in time from the original injuries and where it is proved to have been induced by a number of additional factors the chain of causation may well be broken. Emotion or romantic overtones, financial loss, even criminal activity by a deceased may have played a part in the ultimate decision to end his life.
>
> In the present case no such factors are pointed to. Death followed within 65 days of the accident and the evidence is devoid of any other specific causes suggestive of the onset of the acute depression".

Because negligence was not proved the plaintiff failed, but it seems that if negligence had been proved she would have recovered for her loss of dependency.

[36] Though the facts in *NSW Insurance Ministerial Corporation v Myers* (1995) 21 MVR 295 were more complicated than those here, the plaintiff recovered. In March 1988 the plaintiff suffered severe injuries when the semi-trailer in which he was travelling as a passenger overturned. Thereafter he developed depression. That was followed by the breakdown of his second marriage, problems with access to the children of his first marriage, and alcohol abuse. Then in August 1992, some 4 years and 5 months after the accident, he attempted suicide by taking an overdose of pills. He was left thereafter with brain damage and quadriplegia. He sued alleging that the negligence which caused his initial injuries was also the cause of his brain damage and quadriplegia. He succeeded at trial. The Court of Appeal upheld the decision, applying tests derived from *March* and *Medlin*. Relevantly, Mahoney JA said at 296-297:

> "To adapt the facts of the present case, the negligence may cause injuries to the plaintiff which make him deeply depressed and that depression may lead him to do what depressed persons are apt to do, namely, to attempt suicide.
>
> In cases of this kind, voluntary actions are interposed between the motor vehicle negligence and the attempted suicide. The plaintiff's own voluntary acts are, of course, interposed as a necessary step in the flow of events from the negligence to the attempted suicide. Voluntary acts of third parties may be involved. In the present case, the submissions suggested that, because of the injuries caused to him by the motor vehicle negligence, the plaintiff's conduct deteriorated, his wife and family separated from him, these things caused or increased his depression, and his depression led him to attempt suicide.
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> . . .
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> If it was the plaintiff's family circumstances alone which led to his attempting suicide, the motor vehicle negligence would be put aside."

Cole JA (with whom Meagher JA agreed) said at 303 that it was open to the trial judge, applying the "but for" test to find that the motor vehicle accident was a cause of the suicide attempt. He then went on to consider whether or not there were intervening circumstances which had broken that relationship. Again he considered it relevant to question whether the intervening causes were themselves a consequence of the original negligence. He came to the conclusion there was no basis for interfering with the decision of the trial judge. The issues considered by the Court of Appeal were matters relevant to the question of remoteness.

[37] The final Australian case is *Telstra Corporation Limited v Smith* [1998] Aust Torts Reports 81-487, another decision of the New South Wales Court of Appeal. There the plaintiff received personal injuries when he fell into an uncovered manhole the responsibility of the defendant, who was held to have been negligent in not ensuring the manhole was adequately barricaded. The plaintiff sustained some physical injuries which appear to have been relatively minor. The learned trial judge found that the plaintiff was a "fragile person before the accident". He then found that consequent upon the accident and the physical injuries thereby caused the plaintiff became "gravely damaged" in that he developed major depression. That then led to an attempt to commit suicide which left the plaintiff with "brain damage". The time lapse between the original accident and the attempted suicide is not stated in the reasons. The learned trial judge held on the balance of probabilities that the relevant chain of causation had been established and the plaintiff recovered for all his injuries including the brain damage. On appeal Rolfe AJA (with whom Priestley and Sheller JJA agreed) relevantly said:

> "The appellant submitted that the injuries suffered by the plaintiff as a consequence of his suicide attempts were too remote to be compensable. In particular, the appellant submitted that such injuries were not such as the appellant could reasonably have foreseen.
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> . . .
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> It was submitted by the appellant that his Honour's finding was erroneous in that it failed to deal with the issue of remoteness of damage in terms of foreseeability, and it ignored other independent causes for the attempted suicide.

> . . .
> . . . I consider that there was acceptable evidence that the suicide attempt was causally related to the negligence of the appellant, and his Honour was correct in so finding.
> It was clearly foreseeable that if the appellant, during the course of carrying out work in relation to the manhole, left it uncovered and unguarded on or adjacent to a public footpath, a member of the public, such as the respondent, might fall into it and thereby suffer personal injuries. It is not the law that for those injuries to be compensable, the appellant must be able to foresee each and every injury the respondent might suffer. It is the law that the injuries for which the appellant must compensate the respondent are those which are causally related to the negligence. Thus, the initial injuries may be comparatively minor, but they may have quite devastating and long term physical and/or mental consequences. . . . This is merely a consequence of the requirement that the negligent party must take the injured party as he, she or it finds him or her.
> The matter for the Court in each case is whether the plaintiff has established that the various consequences or sequelae of the physical injuries are causally related to the injuries sustained by the defendant's negligence. In each case the plaintiff must prove, on the balance of probabilities, that looked at from a commonsense viewpoint the matters, in respect of which compensation is sought, are causally related to the injuries in this sense."

Being a claim in negligence the court approached the question of remoteness by applying *Chapman* and *Mahony*. Thus the plaintiff retained his verdict.

[38] Reference was also made in the course of argument to decisions in other jurisdictions on comparable facts. Some (for example *Murdoch v British Israel World Federation* [1942] NZLR 600 and *Pigney v Pointer's Transport Services Ltd* [1957] 1 WLR 1121) were decided when suicide was a crime and thus insanity had to be proved in order to recover civilly, and also before *The Wagon Mound*; in consequence I do not find them of material assistance in the present circumstances. The Canadian cases (*Swami v Lo* [1980] 1 WWR 379, *Cotic v Gray* (1981) 124 DLR (3d) 641, and *Wright v Davidson* (1992) 88 DLR (4th) 698) are also, in my view, of little assistance. Canadian law on the issues of causation and remoteness has not developed along the same lines as the law for Australia laid down by the High Court. The plaintiff succeeded in *Cotic*; in the other two cases the plaintiff failed because the suicide was regarded as an intervening act resulting from the plaintiff's irrational reaction to his injuries. The American authorities (citation is not necessary) are generally against recovery in this situation; there the courts still apply the test of "proximate cause" and in consequence the conclusion has almost invariably been reached that the death was not the direct and proximate result of the accident. Such reasoning cannot stand in the light of the High Court authorities to which I have referred above.

[39] It is immediately obvious that there is a marked division of judicial opinion as to whether or not remoteness is relevant in a Lord Campbell's Act action. Interestingly the cases are all one way where the dependency claim was brought consequent upon death by suicide (Lowe and Smith JJ in *Haber*, and Begg J in *Zavitsanos*). On the other side one has the dissenting reasoning of Hudson J in *Haber* and the obiter comment by Wanstall ACJ in *Richters*. Herron CJ in *Versic v*

Conners at 35 also appears to have favoured the approach taken by Hudson J, though again his observations were obiter. But in my view one cannot ignore the two recent cases involving attempted suicide: *Myers* and *Smith*. Because the plaintiff in each of those cases survived the suicide attempt, albeit with more severe injuries, the action was simply one in negligence and the court had to apply the tests derived from *Chapman*, *Mahony* and *Medlin*. But in my view it would be irrational to subject a claim for greater damages consequent upon a failed suicide to the test of remoteness, but not apply the same potentially limiting considerations to a dependency claim consequent upon a successful suicide. I have already held that the test for causation should be the same in each (indeed there was no submission here to the contrary), and it would be illogical not to apply the associated principles limiting the extent of liability for damage caused by the tortious conduct. The learned trial judge in this case accepted that, for the plaintiff to recover, the death by suicide must have been a consequence of the negligence of the defendant which was reasonably foreseeable.

[40] Whilst the authorities to which I have referred establish that reasonable foreseeability is not an exclusive criterion for remoteness, counsel for the appellants only directed submissions to foreseeability; it was said that on the facts of this case the death of the deceased was not foreseeable by the second appellant. It is clear on the authorities that the precise damage need not have been foreseen; it is sufficient if the type of damage is foreseen in a general way (*March* at 535, *Hughes v Lord Advocate*, and *Versic v Connors* sufficiently establish that proposition). Injuries sustained in consequence of the negligence of another, particularly where the incident is a severe motor vehicle collision creating a life-threatening situation, may result in the injured party developing psychiatric illness, particularly depression. Experience, particularly over recent years, has shown that post-traumatic stress syndrome is a not uncommon sequelae of injuries sustained in a motor vehicle accident. The foresight of a reasonable person in this day and age must encompass the possibility, perhaps even the likelihood, of psychiatric illness – depression – following on from physical injuries sustained as a result of negligence.

[41] In that regard the principle that tortfeasors must take victims as they find them is relevant. In most of the cases involving comparable facts to which I have referred there was some antecedent vulnerability to depression; that was also the case here. The fact that such vulnerability causes the depression to become manifest at an earlier point of time or to be more severe is irrelevant when it comes to the assessment of damages; the tortfeasor is responsible for the injury actually sustained once it is established that injury of that type was foreseeable.

[42] Then, as Mahoney JA observed in *Myers* at 296, the depressed person may "do what depressed persons are apt to do, namely, to attempt suicide". If depression is foreseeable then it is difficult to conclude that suicide as a result of that depression is not foreseeable. Unless the evidence points to some other factor as being a more significant cause, but for it the suicide would not have occurred, the tortfeasor will be liable. Such an approach is consistent with the reasoning in *Myers, Smith* and *Versic*. In the instant case the learned trial judge concluded that the proper test was whether "on the day in question it was reasonably foreseeable that negligent driving might result in the train of events which did in fact occur". That was an appropriate way of formulating the test. Unfortunately his Honour did not expressly state that applying that test the death was foreseeable, but such a conclusion is implicit in his reasoning and findings. Indeed on the whole of the evidence such a conclusion was inescapable. The matter of greater concern was whether or not the subsequent

stressors which were found to have been present constituted intervening factors which made the death too remote a consequence of the negligence. That is the issue addressed at length by the learned trial judge. In the light of the authorities to which I have referred his conclusion cannot be attacked.

[43] Ultimately, whether the claim be for greater damages because of additional injuries sustained on a suicide attempt or for loss of dependency consequent upon a suicide, findings of fact will determine whether or not the plaintiff recovers. The court would have to consider issues of causation and remoteness and make findings of fact with respect to those issues. In theory it is easy to envisage circumstances entitling the plaintiff to succeed, just as it is easy to envisage situations where, often because of events occurring after the initial negligence and before the suicide or attempted suicide, the plaintiff would fail. Provided the trial judge addressed the issues and the findings were open on the evidence there would be no basis for an appellate court interfering with the conclusions reached.

[44] Here counsel for the appellant made much of the statement by the learned trial judge: "Given his vulnerable personality, any lack of foreseeability does not prevent the plaintiff from recovering". Taken in isolation that statement could be regarded as applying an inappropriate test. But taken in context it appears that the learned trial judge was saying no more than that the appellant cannot succeed merely because the foreseeable injuries had more serious consequences than might ordinarily have been expected, such more serious consequences being due to the deceased's vulnerable personality. Looked at in that light there was, in my view, no error in the reasoning of the learned trial judge.

[45] In his careful and thorough reasons for judgment the learned trial judge addressed all the relevant issues and made findings of fact which were clearly open on the evidence. The findings made established that the death was caused by the negligence of the second defendant and was not too remote a consequence thereof.

[46] Whilst I generally sympathise with the sentiments expressed by Thomas JA in his reasons, it follows that the appeal should be dismissed with costs.