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In mourning of bereavement damages

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In most Australian jurisdictions, bereavement is not compensable in an action for wrongful death. Unless such loss can be shown to amount to a recognised psychiatric injury, it is also precluded from recovery in the law of negligence. But why must a plaintiff demonstrate some reaction to the death of a loved one that transcends mere grief before the civil law will compensate his or her loss? Are Australian jurisdictions unusual in precluding such awards, and can this exclusion be rationalised with the compensation of non-pecuniary loss (including bereavement) in other areas of the law?

Introduction and outline

In *Baker v Bolton*, Lord Ellenborough declared that the 'death of a human being cannot be complained of as an injury'.[1] Despite widespread criticism,[2] this rule has survived for more than two centuries in England and Wales,[3] and the High Court of Australia recently recognised its 'continued existence' as part of the common law in this country.[4] Prior to legislative qualification, the rule in *Baker v Bolton* had two consequences: first, it precluded the survival of a cause of action in tort law to a deceased person's estate (the 'first limb'); secondly, it prohibited the vesting of any cause of action directly in the dependants of a person wrongfully killed, in respect of any loss whatsoever, pecuniary or non-pecuniary (the 'second limb').

Both limbs of the rule in *Baker v Bolton* have since been tempered by statute. 'Survival of actions' legislation permits certain causes of action to subsist for the benefit of a deceased person's estate,[5] significantly curtailing

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1 (1808) 1 Camp 493.

2 See, eg, F B Tiffany, *Death by Wrongful Act: A Treatise*, West Publishing Co, 1855; *Osborn v Gillett* (1873) LR8Ex 88 at 94 per Bramwell B; W S Holdsworth, 'The Origin of the Rule in *Baker v Bolton*' (1916) 32 LQR 431; *Rose v Ford* [1937] AC 826; [1937] 3 All ER 359; (1937) 106 LJKB 576; 157 LT 174 per Lord Wright.

3 *Admiralty Commissioners v SS Amerika (Owners)* [1917] AC 38; [1916–17] All ER Rep 177; (1916) 86 LJP 58; 116 LT 34.

4 *Barclay v Penberthy* (2012) 246 CLR 258; 291 ALR 608; [2012] HCA 40; BC201207490 at [26]–[27]. The rule also survives at common law in Canada (*Canadian Pacific Railway Co v Robinson* (1888) 14 Can SCR 105; *Driver v Coca Cola* (1961) 27 DLR (2d) 20), and New Zealand (S Todd, *The Law of Torts in New Zealand*, 4th ed, Thomson Brookers, 2005, p 975).

5 In Australia, see: Civil Law (Wrongs) Act 2002 (ACT) s 15; Compensation to Relatives Act 1897 (NSW) s 6C; Law Reform (Miscellaneous Provisions) Act (NT) s 5; Succession Act 1981 (Qld) s 66; Survival of Causes of Action Act 1940 (SA) s 2; Administration and Probate Act 1935 (Tas) s 27; Administration and Probate Act 1958 (Vic) s 29; Law Reform

the reach of the first limb,[6] and statutes modelled on the Fatal Accidents Act 1846 (UK) (Lord Campbell's Act) allow certain relatives of persons wrongfully killed to recover damages in their own right (a 'wrongful-death case'), substantially narrowing the scope of second limb.[7] However, the second limb has not been entirely erased; Lord Campbell's Act and its progeny did not specify the heads of damage available in wrongful-death cases, and early case law limited these heads to pecuniary loss.[8]

While many common-law jurisdictions have since introduced damages for various forms of non-pecuniary loss in cases of wrongful death,[9] the majority of Australian states and territories (South Australia and the Northern Territory being the exceptions)[10] continue to restrict recovery in such cases to pecuniary loss, and there does not appear to be any particular desire for reform in the remaining states. In 1978, the Law Reform Commission of Western Australia recommended the introduction of an award for 'loss of assistance and guidance',[11] but the Western Australia Parliament rejected this recommendation on the grounds that it would be difficult to administer, could cause offence, and was not available in most other Australian jurisdictions.[12] More recently, the New South Wales Law Reform Commission recommended against introducing a statutory award for grief or bereavement in wrongful-death cases, on the basis that grief:

(Miscellaneous Provisions) Act (WA) s 4. See also: The Law Reform (Miscellaneous Provisions) Act 1934 (UK); Law Reform Act 1936 (NZ) s 3(1).

6 However, damages for non-pecuniary loss do not typically survive for the benefit of the estate.

7 In Australia, see: Civil Law (Wrongs) Act 2002 (ACT) Pt 3.1; Compensation to Relatives Act 1897 (NSW) s 3; Compensation (Fatal Injuries) Act (NT) s 7; Civil Proceedings Act 2011 (Qld) s 64; Civil Liability Act 1936 (SA) s 23; Fatal Accidents Act 1934 (Tas); Wrongs Act 1958 (Vic) s 16; Fatal Accidents Act 1959 (WA). In Canada, see: Fatal Accidents Act, RSA 2000, cF-8; Fatal Accidents Act, RSM 1987, cF50; Fatal Accidents Act, SNB 2012, c104; Fatal Accidents Act, RSNL 1990, cF-6; Fatal Injuries Act, RSNS 1989, c29; Fatal Accidents Act, RSO 1990, cF-3; Fatal Accidents Act, RSPEI, cF-5; Fatal Accidents Act, RSS 1978, cF-11. In the United States, 'the omission of the common law has been corrected in every state by statutes colloquially known as "wrongful death acts." Most of these are modelled more or less closely on the English Act. In a few states a single statutory provision by express terms or by interpretation performs both the function of survival statutes . . . and the function of death statutes'. American Law Institute, *Restatement (Second) of Torts* (1979) § 925 cmt (a).

8 *Gillard v Lancashire & Y R Co* (1848) 12 LT 356; *Blake v Midland Railway* (1852) 18 QB 93; 118 ER 35; *Taff Vale Railway Company v Jenkins* [1913] AC 1 at 4 per Lord Haldane. As Baron Pollock explained, in *Franklin v South Eastern Railway* [1843–60] All ER Rep 849; (1858) 3 H & N 211; 157 ER 448, Lord Campbell's Act did not give rise to a 'Scottish-style solatium', merely damages for economic loss. The same approach was taken in Australia. See *Woolworths Ltd v Crotty* (1942) 66 CLR 603 at 618; [1943] ALR 100; (1942) 16 ALJR 302; BC4300043 per Latham CJ, and is now enshrined in statute.

9 By and large non-pecuniary awards are statutory, although a number of US states award a form of solatium at common law. The meaning of the term bereavement, solatium, and the various categories of non-pecuniary loss that have been or may be adopted in wrongful-death cases, are discussed in the following section. The approaches adopted in other common law jurisdictions are discussed in the third section.

10 Compensation (Fatal Injuries) Act (NT) s 10(3)(f); Civil Liability Act 1936 (SA) ss 28–29.

11 Law Reform Commission of Western Australia, *Fatal Accidents*, Project No 66, 1978, at [4.12].

12 Western Australia, Parliamentary Debates, Legislative Council, 22 March 1984, p 6464 (Mr J M Berinson, Attorney-General).

> has never been recognised as compensable harm in NSW and there has been no identified problem which would justify changing the established approach. Furthermore, there are problems inherent in determining who should be entitled to an award and the terms on which it should be available. Finally, the direct and indirect costs that would be associated with this new cause of action are not justified, given the lack of any compelling reason for its introduction.[13]

That there is no 'identified problem' might be explicable on the basis that awards for grief or bereavement are likely to be comparatively small,[14] and thus so outweighed by the value of awards for pecuniary loss as to escape the notice or interest of those who might benefit from them. It might also be that the Australian public favours the exclusion of non-pecuniary loss in cases of wrongful death, or that the majority of Australian states and territories, and New South Wales in particular,[15] are simply reluctant to consider any expansion of tortious liability so soon after reforms that pushed the law resolutely in the opposite direction. The view might also be taken that damages for bereavement 'ought to be a very low priority in any legal system which still denies adequate compensation for loss of income to so many of those injured in accidents or crippled by disabling illness'.[16] Whatever the case, and while the problems associated with the established approach may be insufficiently acute to warrant recommendations of reform by law-reform commissions, a number of difficulties are created by the continued rejection of damages for non-pecuniary loss in wrongful-death cases. These difficulties are worthy of further analysis. They are generated by (at least) three overarching tensions in the law, which form the foundations of this article.

The first tension results from the differential treatment afforded to non-pecuniary loss in personal injury cases, on the one hand, and wrongful-death cases, on the other. This distinction seems arbitrary,[17] and the rejection of non-pecuniary loss in death claims would appear to be founded, among other things, on fears of exaggerated or imaginary claims and assumptions regarding the likely cost and frequency of such claims.[18] The majority of common-law jurisdictions have now rejected this distinction, and

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13 New South Wales Law Reform Commission, *Compensation to Relatives*, Report No 131, 2011, p 69 [4.20].

14 The current maximum award in South Australia is $10,000 (Civil Liability Act 1936 (SA) ss 28(1)(b) and 29(1)(b)). See also: Law Commission, *Claims for Wrongful Death*, 1997, Consultation Paper No 148, at [2.64], [3.127], [3.138]; *Report on Personal Injury Litigation — Assessment of Damages*, 1973, Law Com No 56, at [175]. In contrast, amounts in Canada can be significantly higher. See Government of Alberta, Justice and Solicitor General, *Review of Damage Amounts under Section 8 of the Fatal Accidents Act*, Discussion Paper, 2012, p 7.

15 W V H Rogers, 'Non-Pecuniary Loss', paper presented at RIAD conference on European Trends and Developments in Personal Injury Claims — Risks and Opportunities for Legal Protection Insurers, Vienna, Austria, 27–28 October 2005, p 3 <http://www.riad-online.net/fileadmin/documents/homepage/events/ past_events/Vienna/Vortrag%20Rogers%20281005.pdf> (accessed 10 November 2014).

16 P Cane, *Atiyah's Accidents, Compensation and the Law*, 8th ed, Cambridge University Press, 2013, p 89.

17 H McGregor, 'Personal Injury and Death' in *International Encyclopedia of Comparative Law*, XI (2), A Tunc (Ed), Kluwer Academic Publishers, 1986, at [9-47].

18 Law Commission, *Claims for Wrongful Death*, 1997, Consultation Paper No 148, at [3.1.31].

a similar trend may be discerned in other legal families. No evidence suggests that these reforms have resulted in any notable increase in direct or indirect costs.

The second tension is created by developments in the law of negligence that allow claimants to recover damages in respect of recognised psychiatric illnesses brought about in circumstances comparable with those giving rise to a wrongful-death case.[19] The result of these developments is that, in most Australian jurisdictions, persons bereaved by the wrongful death of a loved one may only recover civil damages to the extent that their loss manifests itself as a demonstrable and recognised psychiatric illness. The dichotomy between mere emotional harm and recognised psychiatric illness in negligence cases has since been enshrined by statute in most Australian states and territories,[20] effectively foreclosing any opportunity for courts to re-examine the suitability of this distinction (although not, perhaps, the precise boundaries between different categories or degrees of mental harm, or the associated evidential requirements).[21] Given the fundamental importance attached to the distinction between recognised psychiatric injury and emotional harm, it is curious that little 'explicit attention has been given to identifying the basis upon which the distinction . . . is to be made, beyond noting that it is only the former which is to be compensable'.[22] In fact, this distinction is attended by numerous practical and conceptual difficulties, and it suffers from no shortage of judicial and academic criticism.[23] The purpose of this article is not to rehash these criticisms, or to call for the reform of negligence law in this area (although a strong case along these lines may well be made). However, many of the arguments for and against the exclusion of damages for emotional harm in negligence apply with equal force to wrongful death cases. Moreover, given that the boundary between emotional harm and recognised psychiatric injury is ultimately a matter of proof, to be determined on a case-by-case basis, it is possible that plaintiffs may, in certain cases, be able to frame their grief in such a way as to obtain compensation in the law of negligence for a loss that would not be compensable in a wrongful-death case. This possibility may have consequences for the utilisation and cogency of both causes of action.

The third tension is generated by the introduction of awards for

19 *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 394 per Windeyer J; [1971] ALR 253; (1970) 45 ALJR 88; BC7000100; *Jaensch v Coffey* (1984) 155 CLR 549 at 587; 54 ALR 417; 58 ALJR 426; BC8400506; *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317; 24 NSWCCR 385; [2002] HCA 35; BC200205111 at [44] per Gaudron J, [193] per Gummow and Kirby JJ, [285] per Hayne J; *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269; 198 ALR 100; [2003] HCA 33; BC200303072 at [58], [88], [92] per Gummow and Kirby JJ.

20 Queensland and the Northern Territory are exceptions. See: Civil Law (Wrongs) Act 2002 (ACT) ss 32–36; Civil Liability Act 2002 (NSW) s 31; Workers Compensation Act 1987 (NSW) s 151AD(2); Civil Liability Act 1936 (SA) s 53(2); Civil Liability Act 2002 (Tas) s 33; Wrongs Act 1958 (Vic) ss 72–74; Civil Liability Act 2002 (WA) ss 5Q–5T.

21 See, eg, *Giller v Procopets* (2008) 24 VR 1; 40 Fam LR 378; [2008] VSCA 236; BC200810874 at [31] per Maxwell P; *Whayman v Motor Accidents Insurance Board* [2003] TASSC 149; BC200308292 at [27] per Cox CJ; *Van Soest v Residual Health Management Unit* [2000] 1 NZLR 179 at [83] per Thomas J.

22 *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317; 24 NSWCCR 385; [2002] HCA 35; BC200205111 at [292] per Hayne J.

23 See below nn 50–64.

non-pecuniary loss under certain state criminal compensation schemes and,[24] more recently, by the introduction of similar payments at the federal level for victims of overseas terrorism.[25] In addition to primary victims, these awards are available to close family members who have lost loved ones as a result of certain violent crimes (or specified terrorist events).[26] The existence of these awards does not sit well with the suggestion that there are 'problems inherent in determining who should be entitled' to bereavement damages.[27] Moreover, given that a wrongful-death case may be triggered by an intentional wrong, the only reason for treating bereavement differently under criminal compensation schemes would appear to be the fact that the causal wrong has been — or could potentially be — prosecuted criminally as a 'violent' crime.[28] This distinction is problematic. For one thing, a person bereaved by homicide may now recover compensatory damages for non-pecuniary loss in a criminal court or administratively, but not — alternatively and arguably more appropriately — at his or her own suit in a civil court. For another thing, bereaved persons may now be compensated for non-pecuniary loss by the state, but not (in many cases) by the person who actually caused the death.[29] These are curious outcomes, given that compensation is often seen as the primary aim of modern tort law,[30] and that the primary aims of criminal law (deterrence and punishment)[31] are not served at all if the perpetrator is not called upon to contribute to the loss. From a broader public policy perspective, the introduction of criminal compensation awards for bereavement might also indicate general public support for the compensation of injuries of this nature.[32] No evidence suggests that this support is confined to criminal cases.

This article argues that these tensions would be eased considerably by the introduction of bereavement damages in civil claims for wrongful-death, in all remaining Australian states and territories, regardless of whether death is caused intentionally or unintentionally. Alternatively, and at the very least, it is argued that bereavement damages should be introduced in New South Wales, Queensland and Victoria — where bereavement damages are currently awarded to the victims of certain violent crimes — in all civil cases in which death is caused intentionally or recklessly.

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24 See Victims Rights and Support Act 2013 (NSW) ss 34–37; Victims of Crime Assistance Act 2009 (Qld) s 49(f); Victims of Crime Act 2001 (SA) s 20(1)(c) and the Victims of Crime Assistance Act 1996 (Vic) s 13(2)(c).

25 Social Security Amendment (Supporting Australian Victims of Terrorism Overseas) Act 2012 (Cth) s 1061PAA(4).

26 See, eg, Victims Rights and Support Act 2013 (NSW) s 15.

27 New South Wales Law Reform Commission, above n 13.

28 See, eg, Victims Rights and Support Act 2013 (NSW) s 19.

29 However, some schemes may require contributions to be made by the criminal party. See, eg, Victims Rights and Support Act 2013 (NSW) s 15(c).

30 See, in particular, M Tilbury, 'Reconstructing Damages' [2003] 27 *MULR* 697 at 698–9; H Luntz, *Assessment of Damages for Personal Injury and Death*, 4th ed, LexisNexis, 2003; C Sappideen and P Vines (Eds), *Fleming's the Law of Torts*, 10th ed, Thomson Reuters, 2011, p 3.

31 See, eg, A Dnes, 'Criminal Law and Torts' in *Criminal Law and Economics*, N Garoupa (Ed), 3rd ed, Edward Elgar Publishing, 2009, pp 111–23.

32 Law Commission, above n 18, at [3.138].

The nature of the loss (what is 'bereavement'?)

Various heads of damage for non-pecuniary loss in wrongful-death cases are (or have been) recognised in several common law jurisdictions.[33] These heads may serve one or more underlying purpose.[34] One purpose (which may be reflected in awards for 'loss of consortium', 'loss of society', or 'loss of assistance and guidance') is to compensate for the non-pecuniary benefits that loved ones would have received had the deceased person survived. Another purpose is to provide some consolation for the emotional impact of death itself. Cane would classify the first of these objects as 'compensation as substitute', and the second object as 'compensation as solace'.[35] Other possible purposes include punishment for the wrongdoing, or 'public recognition' of that wrongdoing.[36]

These various purposes may be served by discrete heads or subheads of damage, or they may be conflated under a single head of damage.[37] The Compensation (Fatal Injuries) Act 1938 (NT), which identifies 'loss of consortium' and 'solatium' as distinct considerations in the calculation of an overall damages award, provides an example of the former model.[38] Solatium is not defined in the Act, but case law appears to have confined this subhead to compensation for 'sorrow' or 'grief'.[39] An example of the latter model is provided by the Civil Liability Act 1936 (SA), which simply provides for an award of 'solatium'.[40] Again, this term is not defined in the Act, but South Australian courts have adopted a definition that encompasses both (or either) of the first of the two purposes outlined above.[41] Thus, in *Rafferty v Barclay*, Mayo J referred to a claim for:

> a sum by way of solatium for the suffering caused to the plaintiff by and consequent upon the death of the deceased. [This sum] includes loss of his society and the suffering endured by the plaintiff contemporaneously with, and after, her husband's death.[42]

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33 See below nn 113–141.

34 The Law Commission, above n 18, at [3.127] has recognised:

> at least five distinct purposes which an award of bereavement damages *might be seen* to serve. These are: (a) Compensating relatives for their mental suffering (that is, their grief and sorrow, both immediate upon the deceased's death and continuing). (b) Compensating relatives for the non-pecuniary benefits which they would have enjoyed (that is, the loss of the care and guidance of the deceased, and/or the loss of society with the deceased). (c) Providing practical help for the relatives. (d) Symbolising public recognition that the deceased's death was wrongful. (e) Punishing the tortfeasor who caused the wrongful death.

35 Above n 16, pp 408–9. Note, however, that in Cane's view 'compensation for lost amenities is often wholly or partly solace for what has been lost'.

36 Above n 34.

37 In addition to the examples discussed here, see also the discussion of non-pecuniary awards in various Canadian jurisdictions, below nn 120–23.

38 Compensation (Fatal Injuries) Act 1938 (NT) s 10(3)(c) and (f).

39 *Cook v Cavenagh* (1981) 10 NTR 35 at 37 per Muirhead J.

40 Civil Liability Act 1936 (SA) ss 28 and 29.

41 *Gigney v Duffy* [1942] SASR 76 at 81 per Angas Parsons J; *Taverner v Swanbury* [1944] SASR 194 at 198 per Reed J; *Jeffries v Commonwealth* [1946] SASR 106 at 108–9 per Napier CJ.

42 [1942] SASR 147 at 156 (parenthesis added).

Section 1A of the Fatal Accidents Act 1976 (UK) provides that, in a wrongful-death case, damages may be awarded for 'bereavement'. This term is not defined in the Act. However, in its 1999 report on *Claims for Wrongful Death*, the English Law Commission recommended clarifying in the explanatory memorandum to the UK Act that 'the function of bereavement damages is to compensate, in so far as a standardised award of money can, grief, sorrow and the loss of the non-pecuniary benefits of the deceased's care, guidance and society'.[43] This recommendation does not appear to have been adopted, and neither there does there appear to have been any significant judicial examination of the content of bereavement damages by English or Welsh courts.

It is notable that none of the non-pecuniary awards examined above are intended to serve punitive or vindicatory purposes;[44] while the precise nature or scope of the non-pecuniary loss envisaged may vary between jurisdictions, it is clear that the purpose of those awards is invariably compensatory. However, even purely compensatory damages for non-pecuniary loss can be problematic in the context of wrongful death. Drawn too loosely, there is a danger that awards for non-pecuniary loss can 'act as a black box concealing the true nature of the interest for whose invasion redress is sought',[45] or that the boundaries between pecuniary and non-pecuniary loss may be blurred, creating the risk of double recovery.[46] These concerns alone do not preclude damages for all forms of non-pecuniary loss in wrongful-death cases, but they do highlight the need to define the nature of the loss envisioned, and the purpose of its corresponding head of damage, with sufficient clarity. To this end, it is submitted that 'bereavement' is a more suitable appellation than 'solatium'. The latter is burdened by various conflicting historical interpretations and usages,[47] and, as noted above, disagreement exists as to the precise content of solatium as a head of damage in Australia (and elsewhere). However, accepting the risk (albeit manageable) of double counting, a narrower definition may be preferable to that proposed by the English Law Commission. For present purposes, therefore, the term bereavement is not intended to encompass the loss of non-pecuniary benefits such as guidance, counsel or advice (compensation as substitute). Rather, this term is intended to refer exclusively to the state of emotional loss that follows the death of a loved one (compensation as solace),[48] and to denote the head of damage awarded in recognition of that loss. So defined, it is not difficult to distinguish bereavement from pecuniary loss or to articulate bereavement as a *sui generis* head of damage that is circumscribed by the circumstances of its occurrence (ie, the wrongful death of a loved one). As will be seen, this conception of

43 Law Commission, above n 18, at [6.7].

44 Ibid, at [3.1.34]–[3.1.38].

45 E Descheemaeker, 'Solatium and Injury to Feelings: Roman Law, English Law and Modern Tort Scholarship' in *Iniuria and the Common Law*, E Descheemaeker and H Scott (Eds), Hart Publishing, 2013, pp 67, 95.

46 Ibid. This danger is more likely to materialise in relation to damages that acknowledge the loss of non-pecuniary benefits, than damages that reflect the emotional impact of death itself.

47 See, eg, Descheemaeker, above n 45, pp 68–74.

48 The *Macquarie Dictionary* states that a person is 'bereaved' when he or she is made 'desolate through loss, especially by death'.

bereavement also lies at the heart of non-pecuniary damages for wrongful death in most Romanic civilian countries.

Bereavement and pure psychiatric injury

Of course, even if the preceding arguments are accepted, the fact remains that the common law has historically rejected damages for emotional harms in all claims arising out of death. The bare fact that no actionable right presently exists is not itself problematic, as the nature of the right would become apparent once enshrined in the applicable wrongful-death statute (as it is currently in South Australia and the Northern territory). However, if an argument that bereavement should be compensable in all remaining Australian jurisdictions is to be made, the primary reasons underpinning the common law's general rejection of emotional harms must be identified and addressed. The purpose of analysing these reasons is not to make a case for the removal of the distinction between pure psychiatric injury and emotional harm (such as bereavement) in negligence law, but rather to consider afresh whether these reasons support the exclusion of bereavement damages in wrongful death law. Gummow and Kirby JJ identified two such reasons in *Tame* (albeit as they bear upon secondary victims in the law of negligence):

> Grief and sorrow are among the 'ordinary and inevitable incidents of life'; the very universality of those emotions denies to them the character of compensable loss under the tort of negligence. Fright, distress or embarrassment, without more, will not ground an action in negligence. Emotional harm of that nature may be evanescent or trivial.[49]

While this view is orthodox,[50] it is debatable whether the 'universality' of emotional harms, or the fact that some emotional harms may be temporary or trivial, offer principled bases for distinguishing between these and other categories of loss. In unqualified terms, the notion that grief and sorrow are 'universal' is uncontentious. Most people will experience grief and sorrow at some stage in their lives, and almost all people are likely to experience feelings of fright, distress or embarrassment. It may also be accepted that harms of the latter type 'may be evanescent or trivial'. However, drawn in such broad terms, and divorced from the wrongful conduct of another party, physical harm could equally be described as 'universal'.[51] All but the most cloistered members of society are likely to suffer some form of physical injury at some stage in their life, and certain forms of physical injury, such as broken bones or infection, might also be described as ordinary, if not inevitable, 'incidents of daily life'. However, the law does not deny recovery for all physical injuries on the basis that these particular manifestations of physical

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49 *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317; 24 NSWCCR 385; [2002] HCA 35; BC200205111 at [193]–[194].

50 See, eg, *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 at 416G; [1991] 4 All ER 907; [1991] 3 WLR 1057; (1991) 8 BMLR 37.

51 Indeed, similar reasoning was adopted by Gummow and Kirby JJ in *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317; 24 NSWCCR 385; [2002] HCA 35; BC200205111 at [192]: The 'concerns underlying [the principal reasons for rejecting psychiatric harm] . . . apply, to varying degrees, in cases of purely physical injury, yet it is not suggested that they justify denying a duty of care in that category of case'.

harm are universal, or that certain kinds of physical injury may be evanescent or trivial; all indirect physical injuries that are wrongfully caused are notionally compensable provided, inter alia, that the damage pleaded is substantial (not trivial) — a question of fact to be determined on a casuistic basis. No reason in principle seems to exist as to why emotional harms should be treated differently in this regard.

In truth, the common law's general rejection of damages for emotional harm probably has more to do with practical concerns regarding difficulties of proof, valuation, fabricated claims and unlimited liability than it does the 'universality' of emotional harm as such.[52] There may be merit to these concerns in respect of some forms of emotional harms, such as wounded feelings, affliction, embarrassment or fright. However, as the English Law Commission has concluded:

> it can readily be presumed that those close to the deceased will in fact suffer grief and distress on his or her death. Concern at the prospect of unlimited liability can be addressed by confining the availability of the award to a limited class of claimants, most sensibly those in respect of whom the presumption is most easily made.[53]

With respect, this would not be an unreasonable evidential burden to impose upon a defendant. Rebuttable presumptions as to damage, while uncommon, are not unknown to the common law.[54] In cases of breach of contract, for example, 'the law assumes that a plaintiff would at least have recovered his or her expenditure had the contract been fully performed'.[55] This presumption applies despite the fact, as McHugh J has observed, that 'there is no a priori reason for thinking that a plaintiff would have recovered the expenditure incurred if the contract had been fully performed'.[56] If a presumption of loss is appropriate in such circumstances, then a similar presumption would seem all the more appropriate in respect of bereavement, which, as a matter of common sense and experience, does ordinarily occur following the death of a loved one. In the rare case in which a person within the specified class of claimants does not, in fact, suffer any distress or grief (if, for example, he or she is estranged from the deceased, or is too young to experience such emotions), this presumption would not be onerous to rebut. As to the categories of person to which this presumption ought to apply, these should be

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52 *Claims for Wrongful Death*, 1997, Consultation Paper No 148, at [3.138].

53 Ibid. A similar recommendation was made by Professor Mark Lunney in his response to the New South Wales Law Reform Commission's Report on *Compensation to Relatives*, Report No 131, 2011, p 69. However, it should be acknowledged that rebuttable presumptions as to love and affection between family members have not been well received in England, where they were a feature of *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310; [1991] 4 All ER 907; [1991] 3 WLR 1057; (1991) 8 BMLR 37.

54 Similar presumptions may be applied to questions of 'reasonableness'. In a private nuisance action, for example, it is presumed that property damage is unreasonable, regardless of location, unless it can be shown that it was the result of a reasonable and natural use of land (*St Helen's Smelting v Tipping* [1865] UKHL J81 per Lord Westbury).

55 *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64; 104 ALR 1; 66 ALJR 123; BC9102617 at [38] per Mason CJ and Dawson J.

56 Ibid, at [14].

consistent with the categories of persons entitled to bereavement damages under the criminal compensation schemes examined in the penultimate part of this article.

If it is accepted that bereavement may 'readily be presumed' in certain circumstances, then concerns as to the possibility of fabricated or imaginary claims dissolve in kind. However, even if this presumption is not accepted, it must surely be conceded that bereavement is qualitatively distinguishable from other forms of emotional harm, not least because it could rarely, if ever, be described as 'trivial'. Both of these conclusions are consistent with the current policy of the law, which eschews out-dated and (arguably) gendered distinctions between mental and physical harm,[57] notions of 'abnormal grief', and suspicions as to the veracity of claims for mental illness.[58] It is true that the law of negligence insists upon an immutable distinction between 'emotional distress and a recognisable psychiatric illness', and that its acceptance of the latter is premised, in large part, upon its absolute rejection of the former.[59] However, the pragmatic balance struck by the law of negligence between emotional harm and psychiatric injury neither denies the existence of different categories of mental harm in other areas of the law, nor gainsays the statutory compensation of specific forms of mental harms in appropriate cases.

Indeed, and perversely, the continued rejection of damages for bereavement in wrongful-death cases might actually place further pressure on the already laden requirement that, in a negligence action for pure psychiatric injury, secondary victims must demonstrate a 'recognised psychiatric illness'. There is increasing support for the view that no 'clear line distinguishes "psychiatric illness" from other (lesser) types of mental distress',[60] and growing scepticism as to the role played by mental health professionals in adjudicating this line.[61]

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57 R Graycar, 'Teaching Torts as if the World Really Existed: Reflections on Harold Luntz's Contribution to Australian Law School Classrooms' (2003) 27 *MULR* 677. See also H Luntz, D Hambly, K Burns, J Dietrich and N Forster, *Torts: Cases and Commentary*, 7th ed, LexisNexis Butterworths, 2013, p 123.

58 *Coates v GIO of NSW* (1995) 36 NSWLR 1; 21 MVR 169; BC9504217 at [12] (CA) per Kirby P. See also *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317; 24 NSWCCR 385; [2002] HCA 35; BC200205111 at [192].

59 *Tame*, ibid.

60 *Giller v Procopets* (2008) 24 VR 1; 40 Fam LR 378; [2008] VSCA 236; BC200810874 per Maxwell P. See also the comments of Hayne J in *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317; 24 NSWCCR 385; [2002] HCA 35; BC200205111 at [286]. The DSM also warns that:

> the use of DSM-5 categories should be informed by an awareness of the risks and limitations of its use in forensic settings. When DSM-5 categories, criteria and textual descriptions are employed for forensic purposes, there is a risk that diagnostic information will be misused or misunderstood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis.

Diagnostic and Statistical Manual of Mental Disorders, 5th ed, American Psychiatric Publishing, 2013, p 25 (*DSM*).

61 However, several judges have rejected the suggestion that the DSM is the final word on the matter. See, eg, *Whayman v Motor Accidents Insurance Board* [2003] TASSC 149; BC200308292 at [27] per Cox J; *Van Soest v Residual Health Management Unit* [2000] 1 NZLR 179 at [83] per Thomas J; *R v Lawrence* [2005] NSWCCA 91; BC200501719 at [23] per Spigelman CJ.

According to Handley J, 'it is a matter of concern that the common law has effectively delegated law making powers to professionals in the psychiatric branch of medicine, and it is also a matter of concern that the body of delegated legislation should have grown so rapidly from 1968 to 1994'.[62] McHugh has similarly warned that:

> The new DSM ['Diagnostic and Statistical Manual of Mental Disorders'] approach of using experts and descriptive criteria in identifying psychiatric diseases has encouraged a productive industry. If you can describe it, you can name it; and if you can name it, then you can claim that it exists as a distinct 'entity' with, eventually a direct treatment tied to it. Proposals for new psychiatric disorders have multiplied so feverishly that the DSM itself has grown from a mere 119 pages in 1968 to 886 pages in the latest edition; a new and enlarged edition, DSM(V), is also already in the planning stages. Embedded within these hundreds of pages are some categories of disorder that are real; some that are dubious, in the sense that they are more like the normal responses of sensitive people than psychiatric 'entities'; and some that are purely the inventions of their proponents.[63]

If this is correct, then it seems reasonable to suppose that bereaved persons might be able to frame their grief in such a way as to attain compensation in the law of negligence for a loss that is not recognised in wrongful-death law. This would undermine the cogency of both causes of action. Surely it would be better, if grief is to be compensated, that this should occur openly and deliberately as an outcome of a wrongful-death action, rather than inadvertently through the gradual expansion of the DSM.

That there is no compensation for non-pecuniary losses in wrongful-death cases might also lead to a number of undesirable practices, such as the awarding of a 'disguised solatium . . . by way of a more generous assessment for material loss'.[64] This practice may be more prevalent in jury trials (now rare in Australia), but there is no reason to suppose that it does not also occur, to some extent, in judge-only trials.[65] There does not appear to have been any specific research conducted on this point, at least in an Australian context. Were such research to be undertaken, it could well challenge a number of our commonly held assumptions regarding the measurement of damages generally.

Comparative approaches to non-pecuniary loss in civil death claims

Among other things, the preceding analysis demonstrates that neither logic nor principle necessitate the wholesale rejection of damages for bereavement (howsoever defined). This conclusion is supported by the fact that damages of this nature may be awarded in numerous other jurisdictions including, significantly, a number of common law jurisdictions. Moreover, there would

62 *Commonwealth of Australia v Smith* [2005] NSWCA 478; BC200511378 at [20].

63 P R McHugh, *The Mind has Mountains, Reflections on Society and Psychiatry*, Johns Hopkins University Press, 2006, p 51 (parenthesis added). The *DSM* V runs to 947 pages: above n 60.

64 McGregor, above n 17, at [9-43].

65 In addition to adopting generous estimates of future benefit loss, judges may increase awards by applying a lower percentage discount for contingencies and vicissitudes.

appear to be an overarching global trend towards the liberation of non-pecuniary loss generally in civil cases. In 1986, McGregor identified three broad categories of approach, which demarcate the extent to which non-pecuniary loss is recognised in the private law of three overarching legal traditions:

(1) total rejection of non-pecuniary loss in injury and death claims (the Sino-Soviet approach);
(2) total acceptance of non-pecuniary loss in injury and death claims (the general civil approach); and
(3) acceptance in injury claims and rejection in death claims (the general common law approach).[66]

In the years since McGregor outlined these categories, the relevant domestic laws of various countries comprised within them have changed, in some instances significantly.[67] The categories are also highly generalised, and the approach adopted within each is far from uniform. Civil-law countries, for example, are often subdivided by legal historians into the Romanic, Germanic and Scandinavian legal families,[68] and the 'general civil approach', outlined above, primarily reflects the former. Thus, the civil codes of France,[69] Belgium,[70] Spain[71] and Portugal[72] have all been interpreted broadly so as to permit compensation for non-pecuniary loss in cases of wrongfully caused death, regardless of whether death was caused negligently or intentionally. A core purpose of the non-pecuniary award — often referred to as *dommage moral* ('moral damage') — in each of these jurisdictions is to provide solace for grief and sorrow,[73] although other purposes may also be served.[74] Until

66 McGregor, above n 17, at [9-35]–[9-44].

67 In researching the following section the author has relied heavily on the commentary and materials compiled in B Winiger, H Koziol, B Koch and R Zimmermann (Eds), *Digest of European Tort Law*, *Vol 2: Essential Cases on Damage*, De Gruyter, 2011. Any errors are the author's alone.

68 B Dölemeyer, *Legal Families*, 2010, EGO (European History Online) at <http://ieg-ego.eu/en/threads/crossroads/legal-families#LegalFamilyLegalSystem> (accessed 10 November 2014). D Tamm, 'The Danes and their Legal Heritage' in *Danish Law in a European Perspective*, B Dahl, T Melchior, and D Tamm (Eds), 2nd ed, Thomson, 2002, pp 41, 43.

69 The *Code Civil* [Civil Code] (France), art 1382, has been interpreted broadly in this regard, although not without criticism. (See S Galand-Carval, 'Non-Pecuniary Loss Under French Law' in *Damages for Non-Pecuniary Loss in a Comparative Perspective*, W V Horton Rogers (Ed), Springer, 2001, pp 92–3.) Not only is dommage moral (or 'prejudice d'affection') compensable in cases of wrongful death, but the category of persons entitled to recover has also been interpreted broadly. See *Cour de cassation* [French Court of Cassation], Chambre civile [Supreme Court, Civil Division], 13 February 1923, in H Capitant, Y Lequette and F Terré, *Grands arrêts de la jurisprudence civile* [Major judgments in civil jurisprudence], 12th ed, Dalloz, 2008, vol 2, no 183.

70 The *Code Civil* [Civil Code] (Belgium) is identical to the French, and has been interpreted broadly so as to allow compensation for non-pecuniary loss on proof by the plaintiff. See *Cour de cassation* [Belgian Court of Cassation], 17 March 1881, reported in Pas (1881) I, p 163.

71 See, eg, Sentencia del Tribunal Supremo [Judgment of the Spanish Supreme Court], 30 November 2007, reported in RJ (2007), p 8458.

72 Article 496(2)CC of the Civil Code (Portugal) provides that various family members of a person wrongfully killed are entitled to non-pecuniary damages.

73 Ibid.

recently, the position in Italy was more nuanced; non-pecuniary losses were only compensable if brought about by an illicit act proscribed by statute, which was punishable under the Italian Penal Code.[75] However, in 2003, a landmark decision of the Italian Court of Cassation determined that non-pecuniary damages may be awarded under Art 2059CC of the Italian Civil Code (damages for non-patrimonial loss) for any tortious infringement of a personal interest protected by the Italian Constitution.[76] The precise purpose or purposes served by this award (compensation as substitute, compensation as solace, or both) remains uncertain.[77]

In contrast, countries within (or influenced by) the Germanic legal family typically adopt approaches that are more comparable, in many respects, with the general common-law approach.[78] In Germany itself, for example, non-pecuniary loss is contemplated by s 253II of the Bürgerliches Gesetzbuch (BGB) in respect of all injuries to body, health, freedom or sexual-determination. However, the Bundesgerichtshof (Federal Court of Justice) has determined that s 823I of the BGB, which provides the basis for liability in such cases, does not extend to 'deeply felt grief' in cases of wrongful death:[79]

> The general view is that damages for pain and suffering are only available in respect of loss in the form of nervous shock which has the degree of severity of an illness. This does not necessarily mean that psychological impairment can only represent an infringement of a right protected by S 823 I BGB when it has the degree of severity of an illness. On the contrary, any form of invasion of the plaintiff's general bodily condition such as the infliction of worry and discomfort is sufficient for there to be damage to the plaintiff's health . . . However, the law at present denies recovery for mental pain in so far as this is not a consequence of the effects of the injury to the (plaintiff's own) body or the (plaintiff's own) health.[80]

It would appear that in Germany, therefore, non-pecuniary damages for mental harm are only available when such harm is consequential to a personal injury suffered by the plaintiff (as per the general common law approach). Until recently, Austrian courts adopted a similarly narrow interpretation of s 1327 of the Allgemeines bürgerliches Gesetzbuch (AGBG), the effect of which was to

74 See, eg, Sentencia del Tribunal Supremo [Judgment of the Spanish Supreme Court], 22 February 2001, reported in RJ (2001), p 2242.

75 N Coggiola, B G Tedeschi and M Graziadei in Winiger et al, above n 67, pp 539–41.

76 Corte di Cassazione [Italian Court of Cassation], no 8827, 31 May 2003 reported in Giur It (2003), 29. See also Corte di Cassazione, no 26972, 11 November 2008 reported in Resp Civ Prev (2009), p 38.

77 Coggiola et al, above n 75, p 541.

78 The legal system of the Netherlands represents an amalgam of Romanic and Germanic influence. However, in respect of non-pecuniary loss the approach adopted in the Netherlands is more consistent with the latter; Arts 6:107-108 of the Burgerlijk Wetboek bars 'third parties' from claiming damages as a result of the death of (or injury to) another party. See M H Wissink and W H van Boom, 'Non-Pecuniary Loss under Dutch Law' in *Damages for Non-Pecuniary Loss in a Comparative Perspective*, W V H Rogers (Ed), Springer, 2001, p 161. See also *Hoge Raad* [Supreme Court of the Netherlands] [2002] NJ 2002 at 240.

79 Bundesgerichtshof, BGHZ 56 (1971), NJW, p 163.

80 Ibid. However, parents can claim for loss of potential support from a child under ss 844 and 845 of the BGB.

exclude damages for non-pecuniary loss in dependency claims.[81] However, in 2001 the Oberster Gerichtshof (the Austrian Supreme Court) acknowledged that this interpretation created unsatisfactory anomalies in the law, not least because, applying this approach, emotional damage was compensable 'in the case of damage to a thing under particular circumstances, but not when a loved one is killed'.[82] As such, the Austrian Supreme Court ruled that bereavement may constitute general damage under ss 1323 and 1234 of the AGBG, provided that death is caused by 'gross fault'.

Intention or gross negligence is also a requisite for the recovery of damages for non-pecuniary loss in wrongful-death cases in the Scandinavian countries. In Norway[83] and Denmark,[84] this requirement is an explicit statutory requirement. In both instances, the purpose of the award is to compensate for the grief caused by the loss of a relative.[85] The position in Sweden is more complex, although the end result is similar;[86] while the Swedish Supreme Court has identified fault as but one of several factors that may be taken into account in determining whether damages may be awarded for non-pecuniary loss in cases of wrongful death,[87] the 'strongest argument for compensation is with intentional crimes'.[88] However, intention is not necessarily essential under the Skadeståndslagen 1972 (Sweden);[89] according to Håkan Andersson, 'various scenarios of motives and other circumstances that refer to the sphere of the tortfeasor could also become relevant' in future cases.[90] First and foremost, non-pecuniary damages serve to compensate the 'emotional distress and suffering caused'.[91]

What, then, of the Sino-Soviet approach? Since the categories outlined above were identified by McGregor, the USSR has dissolved, as has much of its influence over the Eastern Bloc; and while some former Soviet republics and satellite states (including the Czech Republic and Slovakia)[92] continue to

81 McGregor, above n 17, at [9-42] n 138.

82 OGH ZVR 2001/73. Winiger, et al, above n 67, pp 504–5.

83 Skadeserstatningsloven 1969 (Norwegian Compensation Act) § 3–5, states as follows: 'a person who deliberately or in a grossly negligent manner has caused another person's death may be liable to pay compensation for non-pecuniary loss' (translation by Bjarte Askeland, in Winiger et al, above n 67, p 577).

84 Erstatningsansvarsloven 2005 (Danish Liability for Damages Act), § 26, states as follows: 'A person who intentionally or by gross negligence causes the death of another person may be ordered to pay compensation to the deceased's closest next of kin' (translation located on the Danish Patients Compensation Service website: <http://patienterstatningen.dk/en/Love-og-Regler/Lov-om-klage-og-erstatningsadgang/Behandlingsskader.aspx> (accessed 10 November 2014). Fault also plays a role in the calculation of damages in Denmark; § 26(2) states that in 'the assesment of whether compensation must be paid . . . and in determining the amount of such compensation, particular consideration must be given to the nature of the wrongdoer's actions and to the suffering or offence that it must be assumed was inflicted on the closest next of kin'.

85 B Askeland in Winiger et al, above n 67, p 578; V Ulfbeck and K Siig in Winiger et al, above n 67, p 576.

86 Skadeståndslagen, Law No 1972:207, Ch 5 s 2.

87 H Andersson in Winiger et al, above n 67, pp 581–4.

88 Ibid.

89 Ibid.

90 Ibid, p 583.

91 Ibid, p 586.

92 As part of the Austro-Hungarian Empire, Czechoslovakia inherited the Austrian Civil Code

reject non-pecuniary loss in all instances of personal injury and death, others (including Bulgaria,[93] Estonia,[94] Hungary,[95] Latvia,[96] Lithuania,[97] Romania,[98] and Poland)[99] have moved away from the Sino-Soviet approach, towards approaches more comparable with civil law countries. As a result, some of these countries now provide damages for non-pecuniary loss in personal injury cases (but reject damages for non-pecuniary loss in wrongful-death cases),[100] while others also recognise non-pecuniary loss (including grief and sorrow) in death claims. Lithuania provides an example of the latter; non-pecuniary damages may now be recovered in that jurisdiction for negligently caused death (at least in the context of medical negligence) provided that the plaintiff's suffering was extreme and sufficiently causally related to the wrongdoing of the defendant.[101] In Bulgaria, grief and distress may also be compensated if, on the facts, this loss is consequential to a recognised primary loss, including death.[102]

Given the historical links between many former Soviet countries and the civil-law tradition, the rejection of the Sino-Soviet approach may represent

(ABGB), which remained in force until 1950. The AGBG was replaced during the Soviet era by the first joint Civil Code of Czechoslovakia, subsequently revised in 1964, which sought to 'destroy the base of bourgeois civil law' (M Jurová, 'The Influence of Harmonisation on Civil Law in the Slovak Republic' (2008) *Juridica International* XIV, 166 at 167). Following the dissolution of Czechoslovakia into the independent nation states of Slovakia and the Czech Republic in 1994, Slovakia retained the 1964 Code, whereas the Czech Republic re-enacted a Code based on the AGBG (Civil Code of the Czech Republic). Section 442 of the Czech Civil Code does not recognise non-pecuniary loss in cases of wrongful death (see Ústavni souf (Constitutional Court of the Czech Republic, 4 May 2005, reported in P1 ÚS 16/04, 265/2005 Coll). In the result, while the law in the Czech Republic and Slovakia is now markedly different in many respects, both systems continue to deny damages for non-pecuniary loss in death claims.

93 In Bulgaria, both the meaning of the term 'damage', and the scope of compensable harm, has fallen to the courts to determine (Ordinance N 2/30.11.1984 of the Plenary of the Supreme Court). Article 45 of the Law of Obligations and Contracts (Bulgaria) states that every 'person must redress the damage he has guiltily caused to another person'. Article 52 of the same Law states that compensation 'for a personal tort shall be determined *ex aequo et bono* by the court'. Whether damage is recoverable is therefore determined on a casuistic basis, albeit subject to ordinary rules of proof. Thus, where a son was unable to demonstrate that he had actually suffered grief on the death of his mother, he was unable to recover moral damages (Decision N 131/30.03.1995 on criminal case N 47/95). See also M Stoyanova, 'Personal Injuries under the Bulgarian Law and Jurisprudence' at <http://www.lider-lab.sssup.it/docs/sistemi_paese/Bulgaria_Personal_Injuries.pdf> (accessed 10 November 2014).

94 Law of Obligations Act 2002 (Estonia) § 134(3).

95 Hungarian Civil Code § 84; BH 2001 no 110, (Hungarian Supreme Court decision) Legf Bír Pfv III 21.795/1998 sz.

96 Civil Law of Latvia 1937 (restored 1992) Art 1635.

97 Civil Code of the Republic of Lithuania Art 6.250.

98 Romanian Civil Code 2011 Art 998.

99 Polish Civil Code Art 446 CC. For a an analysis of this provision, and the categorisation of damages available in cases of wrongful death in Poland, see T Mróz and U Drozdowska, 'The Dynamics of the Damage Concept in the Civil Law Change — Selected Issues' (2011) 26 *Studies in Logic, Grammar and Rhetoric* 163 at 174.

100 This is the case in Estonia, for example (Riigikohus (Civil Chamber of the Supreme Court) (2008) 3-2-1-19-08).

101 *AD v Panevžys Region Hopsital*, Lietuvos Aukšiausiasis Teismas [Lithuanian Supreme Court], Civil Case no 3-K-3-92/2009, 2 March 2009.

102 See above n 93. See also K Tanev in Winiger et al, above n 67, p 654.

realignment, rather than revolution.[103] It is also far from certain that the Sino-Soviet approach ever truly represented the law in some (if not all) of those countries. In Bulgaria, for example, it may be that most 'of the ideas of the civilian tradition were kept, although garnished with several ideological patterns',[104] following the seizure of power by the Soviets. In contrast, other former satellite states, such as Estonia, have found it harder to realign their domestic private law following the collapse of communism. According to Irene Kull:

> Through intensive discussions in the early 1990s, it became evident that the mere reintroduction of the old draft statutes from the 1940s would not serve the needs of the society and that the goal should be to create a new, modern, comprehensive civil code. Specifically, in the field of contracts and noncontractual obligations it was impossible to follow the old law. Influences from Soviet law were quite strong.[105]

A thorough review of the current law in former Soviet republics, and indeed countries influenced by Chinese legal principles, is beyond the scope of this article. However, it may be accepted that the influence of the strict Sino-Soviet approach to non-pecuniary loss in death claims has diminished considerably, and that many former Soviet republics have migrated to approaches more comparable with civil-law countries.

Of course, and as McGregor acknowledges, not all legal systems fit comfortably within the categories outlined above. The 'mixed legal systems' of Scotland and South Africa share roots in both the civilian tradition (via the *jus commune*) and the common law legal tradition, and the approaches taken in these jurisdictions reflect this mixed ancestry.[106] For example, while much of the Scots law of negligence has developed in tandem with English law, Scots law has also long recognised that close relatives of a deceased person may recover damages in reparation for his or her loss,[107] including a solatium for 'wounded feelings and affliction'.[108] The precise origins of solatium in Scots law are uncertain, and some confusion may still remain as to whether this remedy is rooted in the Roman law's *actio injuriarum*, an action for 'affront' that required intent to injure (*animus iniuriandi*).[109] However, general opinion would appear to favour the conclusion that '*actio injuriarum* is a misnomer for our action of damages for culpably caused death or personal

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103 C Takoff, 'The Present State of Harmonisation of Bulgarian Private Law, and Future Perspectives' (2008) XIV *Juridica International* 118 at 118.

104 Ibid.

105 'Reform of Contract Law in Estonia: Influences of Harmonisation of European Private Law' (2008) XIV *Juridica International* 122 at 123.

106 Wrongful-death law in South Africa is rooted in 'German customary law and subsumed under the umbrella of Aquilian liability': M Loubser, 'Law of Delict' in *Introduction to the Law of South Africa*, C V der Merwe and J D Plessis (Eds), Kluwer Law International, 2004, p 275.

107 *Blacks v Caddell* (1804) Mor 13905 (Court of Session); (1812) 5 Pat 567 (House of Lords).

108 *Brown v MacGregor* 26 Feb 1813 FC, 233 (Lords Meadowbank and Pitmilly). Solatium may be awarded even if no pecuniary loss has been suffered. See *Don v Brown* (1844) 6 D 534; *Elder v Croall* (1849) 11 Sc Sess Cas 2d series, 1040.

109 Confusion appears to have originated in two cases in particular: *Eisten v North British Railway Co* (1870) 8 M 980 at 983–4 per Lord President Inglis; and *Black v North British Railway Co* 1908 SC 444 at 453.

injury',[110] which does not require intent to injure. Even if this conclusion is rejected, the reality is that 'the law of Scotland has never operated within strict and exclusive classes of action and, so long as the defender is made aware of the claim he is being called upon to answer, it matters really very little whether his culpability is founded on intent or neglect'.[111] In any event, statutory damages for non-patrimonial loss, which would appear to replace the common law award, are now available to relatives, regardless of whether death is caused intentionally or negligently.[112] The sum awarded may compensate for loss of society and guidance caused by death (compensation as substitute), as well as distress and anxiety caused prior to death, and grief and sorrow caused by death (compensation as solace).[113]

Perhaps surprisingly, it is in the common law world that the greatest attitudinal change to non-pecuniary loss appears to have occurred. The conceptual starting point in all common-law countries, pursuant to the rule in *Baker v Bolton*, is the exclusion of recovery for non-pecuniary loss in wrongful-death cases. However, the legacy of this rule has differed markedly between jurisdictions. As noted above, the rule in *Baker v Bolton* continues to underpin the common law in England and Wales,[114] although damages may now be recovered under the Fatal Accidents Act 1976 (UK) for various heads of damage, including 'bereavement'.[115] Interestingly, access to bereavement damages has been further extended in the United Kingdom (including Scotland) by virtue of the Human Rights Act 1998 (UK).[116] In *Rabone v Pennine Care NHS Trust*,[117] the UK Supreme Court held that, when a public authority is liable for breach of its obligations under Art 2 of the European Convention on Human Rights (1953) (the right to life), certain family members outside the statutory class identified in s 1A of the Fatal Accidents Act 1976 (UK) are, nevertheless, entitled to damages for bereavement under s 7 of the Human Rights Act 1998 (UK). This decision has been rightly criticised on the basis that it provides plaintiffs with an 'end-run round the rule in the Fatal Accidents Act 1976' and creates a 'blurring of the line [between]

110 R Black, 'A historical survey of delictual liability in Scotland for personal injuries and death: Part 2' (1975) 8 *Comparative and International Law Journal of South Africa* 189 at 194. See also N R Whitty, 'Rights of Personality, Property Rights and the Human Body' (2005) 9 *Edinburgh L Rev* 194 at 204; K Mck Norrie, 'The Intentional Delicts' in *A History of Private Law in Scotland*, K Reid and R Zimmerman (Eds), vol 2: Obligations, Oxford University Press, 2000, pp 478, 479; H MacQueen and W D H Sellar, 'Negligence' in Reid and Zimmerman, ibid, pp 517, 530.

111 Ibid.

112 Damages (Scotland) Act 2011 ss 3–4. Statutory damages for wrongful death were first introduced by the Damages (Scotland) Act 1976.

113 Damages (Scotland) Act 2011 s 4(3).

114 *Admiralty Commissioners v SS Amerika (Owners)* [1917] AC 38; [1916–17] All ER Rep 177; (1916) 86 LJP 58; 116 LT 34. Although, as the US Supreme Court noted in *Moragne v States Marine Lines, Inc* 398 US 375 (1970) at 390, the House of Lords 'emasculated' the rule in *Rose v Ford* [1947] AC 826 at 833–4 per Lord Atkin; [1937] 3 All ER 359; 106 LJKB 576; 157 LT 174.

115 Fatal Accidents Act 1976 c30, s 1A, as amended by the Administration of Justice Act 1982, c53, s 3A.

116 The UK act implements the European Convention on Human Rights (1953), hence similar conclusions are likely to be reached in other European Countries that have ratified the convention.

117 [2012] 2 AC 72; [2012] 2 All ER 38; [2012] All ER (D) 59 (Feb); [2012] UKSC 2.

where tort stops and human rights begin'.[118] The decision creates similar difficulties for Scots law. These criticisms notwithstanding, the decision also demonstrates another context in which access to bereavement damages has expanded and may continue to expand.[119]

The rule in *Baker v Bolton* also survives at common law in Canada,[120] although all but four of Canada's provinces and territories provide statutory awards for non-pecuniary loss in cases of wrongful death.[121] Three of those jurisdictions provide damages for grief and the loss of non-pecuniary benefits,[122] and five provide damages only for the loss of non-pecuniary benefits (such as guidance, care and companionship).[123] Damages for grief and distress are also available under Arts 1053 and 1056 of the Code civil du Quebec, although that Code does not, of course, derive from Lord Campbell's Act.

In New Zealand,[124] a cause of action modelled on Lord Campbell's Act was introduced by the Deaths by Accidents Compensation Act 1880 (NZ). An amended cause of action continues in force in New Zealand.[125] However, most injuries resulting in death are now compensated in accordance with the Injury Prevention, Rehabilitation and Compensation Act 2001 (NZ), which removes personal liability from potential defendants in favour of a no-fault, nationalised system of accident compensation. Thus, the triggering mechanism built into the statutory action for wrongful death — that the deceased would have been able to maintain an action against the defendant had he or she survived — is no longer present in most cases. As a result, actions under Lord Campbell's Act are now rare in New Zealand.

The position in the United States is more complex. The US Supreme Court initially endorsed the rule in *Baker v Bolton*,[126] and 'wrongful-death' statutes, modelled on Lord Campbell's Act, were introduced in every state.[127] However, in *Moragne v States Marine Lines Inc* the Supreme Court overruled

118 A Tettenborn, 'Wrongful death, human rights, and the Fatal Accidents Act' (2012) 128 *LQR* 327 at 327–31.

119 The author is grateful to the anonymous referee for identifying this point.

120 *Canadian Pacific Railway Co v Robinson* (1888) 14 Can SCR 105; *Driver v Coca Cola* (1961) 27 DLR (2d) 20.

121 See generally, Government of Alberta, Justice and Solicitor General, *Review of Damage Amounts under Section 8 of the Fatal Accidents Act*, Discussion Paper, 2012.

122 Alberta (Fatal Accidents Act, RSA 2000, cF-8, s 8); Saskatchewan (Fatal Accidents Act, RSS 1978, cF-11, s 4.1); and New Brunswick (Fatal Accidents Act, RSNB 1973, cF-7, s 3(4)).

123 Manitoba (Fatal Accidents Act, RSM 1987, cF50, s 3.1); New Brunswick (Fatal Accidents Act, SNB 2012, c104, s 10 (1)); Newfoundland (Fatal Accidents Act, RSNL 1990, cF-6, s 6); Nova Scotia (Fatal Injuries Act, RSNS 1989, c29, s 5); Ontario (Fatal Accidents Act, RSO 1990, cF-3, s 61); and Prince Edward Island (Fatal Accidents Act, RSPEI, cF-5, s 6 (3); Damages for non-pecuniary loss are not available in British Colombia, Nanavut, Northwest Territories or Yukon Territory.

124 S Todd, *The Law of Torts in New Zealand*, 4th ed, Thomson Brookers, 2005, p 975.

125 Deaths by Accidents Compensation Act 1952 (NZ), as amended by the Deaths by Accidents Compensation Amendment Act 2005.

126 *Insurance Company v Brame* 95 US 754 (1877). The Supreme Court held that 'the authorities are so numerous and so uniform to the proposition that by the common law no civil action lies for an injury which results in death, that it is impossible to speak of it as a proposition open to question'.

127 *Moragne v States Marine Lines*, Inc 398 US 375 (1970) at 390.

its earlier decisions and firmly rejected the rule.[128] Similar judgments followed in various states.[129] The essence of the reasoning adopted in those judgments is distilled in the *Second Restatement on the Law of Torts*:

> The prevalence of the wrongful death statutes, which are to be found in all jurisdictions, and their existence for substantially more than a hundred years have given rise to some decisions holding that the principle of a right of action for wrongful death has now become a part of the common law itself. In view of the 'lack of any discernible basis' for the 1808 holding in *Baker v Bolton* and its 'harsh result' and of the scholarly criticism of the holding, it has been concluded that 'there is no present public policy against allowing recovery for wrongful death,' so that the right of action can now be regarded as arising under the common law. Most of the details of the right may be controlled by an existing statute or taken by analogy from one. When recognized, this common law right has been utilized to fill in unintended gaps in present statutes or to allow ameliorating common law principles to apply.[130]

Despite the general rejection of the rule in *Baker v Bolton*, the majority of states in the United States continue to deny damages for non-pecuniary loss in wrongful-death cases.[131] A comprehensive list of the states in this category, complete with supporting authorities, is provided elsewhere.[132] However, by way of example, the Supreme Court of Maine has stated:

> No damages can be recovered for any grief, distress of mind, loss of mere companionship or society, or injury to the affections, suffered by the beneficiaries . . . The injury for which damages can be recovered must be wholly to the beneficiaries themselves, and it is limited to the pecuniary effect of the death upon them.[133]

In contrast, superior courts in Florida,[134] Kansas,[135] Louisiana,[136] South Carolina,[137] South Dakota[138] and West Virginia[139] have interpreted the heads of damage available for wrongful death broadly, so as to compensate for the

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128 Ibid.

129 See, eg, *Gaudette v Webb* 362 Mass 60; 284 NE 2d 222 (Mass, 1972).

130 American Law Institute, *Restatement (Second) of Torts*, 1979, § 925 cmt (k), citing *Moragne v States Marine Lines, Inc* 398 US 375 (1970) at 390, and *Gaudette v Webb* 362 Mass 60; 284 N E 2d 222 (Mass, 1972).

131 *Restatement of the Law (Second) of Torts*. See also M C Dransfield, '"Sentimental" losses, including mental anguish, loss of society, and loss of marital, filial, or parental care and guidance, as elements of damages in action for wrongful death' (1979) 74 *American Law Reports* 11.

132 Dransfield, ibid.

133 *McKay v Dredging Co* 92 Me 454; 43 A 29 (1899) at 29–30, aff'd in *Graffam v Saco Grange, Patrons of Husbandry, No 53* 112 Me 508; 92 A 649 (1914). Similar views have been expressed in, eg, Indiana (*Thompson v Town of Fort Branch* 204 Ind 152; 178 NE 440 (1931) at 442).

134 *Steele v Miami Transit Co* 160 Fla 362; 34 So 2d 530 (1948).

135 *Duran v Mission Mortuary Inc* 174 Kan 565; 258 P 2d 241 (1953).

136 *Bourdier v Louisiana Western Railway* 133 La 50 at 52; 62 So 348 (1913).

137 *Administrator of the Estate of Billie Baker Turner v Charleston & Western Carolina Railway Company* 231 SC 351; 98 SE 2d 798 (1957).

138 *Simons v Kidd* 73 S D 306; 42 NW2d 307 (1950).

139 *Black v Peerless Elite Laundry Co* 113 W Va 828; 169 SE 447 (1933).

emotional impact of death.[140] Other states also permit recovery for loss of society. In *Matthews v Hicks*, for example, the Supreme Court of Appeals of Virginia recognised that:

> it is now well settled by a long line of Virginia decisions that damages may be awarded not only for the pecuniary loss sustained by the statutory beneficiaries . . . but also for loss of deceased's care, attention and society, as well as such sum as the jury may deem fair and just as solatium to the beneficiaries for their sorrow and mental anguish caused by the death.[141]

A number of conclusions may be drawn from the preceding analysis. First, whatever view is taken as to the merits of the various approaches adopted, their very existence suggests that there is no singularly correct approach (logically or morally) to the treatment of non-pecuniary loss in wrongful-death cases. A particular approach may seem axiomatic when viewed within the context of its own native legal tradition, yet repugnant or illogical when viewed from an external legal perspective. As such, historical considerations alone (such as the fact that most Australian states do not currently award damages for bereavement)[142] should not be permitted to determine the future development of the law in this area.

Second, and as indicated previously, there would appear to be a modest global trend towards the recognition of non-pecuniary loss (and in particular bereavement) in wrongful-death cases. This trend is especially pronounced in common-law jurisdictions, with the obvious exception of most Australian states and territories. In contrast, none of the countries examined appear to have moved away from a position of accepting non-pecuniary loss in wrongful-death cases to a position of rejecting it. This trend may vindicate the conclusion reached by McGregor, nearly 20 years ago:

> Perhaps the most acceptable solution in this highly controversial area would be to allow recovery for non-pecuniary loss in all actions arising out of injury and death but to keep the awards at a comparatively low figure. World opinion outside socialism clearly favours the giving of a solatium in money to the physically injured — a view to which even Socialist countries may subscribe — and, once this initial step is taken, it is surely best to afford recovery to all to whom an injury or death has brought suffering, eschewing distinctions, which appear somewhat arbitrary, between the *dommage moral* of a person physically injured and that of a person deprived through the death or even the injury of a loved one.[143]

It will be noted that McGregor sees no reason to limit non-pecuniary damages to wrongful-death cases; he also supports damages for grief or suffering caused by (the presumably catastrophic) injury to a loved one. For McGregor, the critical point is that the door to non-pecuniary damages for relatives should be opened fully or not at all. On this point Cane agrees, although his preference is to close the door entirely on the grounds, inter alia, that tariff awards are inherently objectionable and that any categorisation of claimants is

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140 See also M B Brandon Jr, 'Elements of Damages for Wrongful Death in Louisiana' (1960) 20 *La LR* 357 at 363.

141 197 Va 112 (1955).

142 See above n 12.

143 McGregor, above n 17, at [9-47].

likely to prove unfair.[144] With respect, there is no particular reason why an all-or-nothing approach must be adopted; various compelling reasons exist as to why the emotional suffering of relatives should, perhaps, be treated differently in fatal and non-fatal cases,[145] respectively, and only a small number of jurisdictions would appear to award non-pecuniary damages in cases of latter type.[146] In any event, as bereavement damages are now available in certain contexts and jurisdictions in Australia, those who would bar relatives from seeking any form of non-pecuniary compensation may be crying for the moon.[147]

Finally, and by way of a gloss on the categories identified by McGregor, the preceding analysis reveals an additional approach to non-pecuniary loss in wrongful-death cases: the acceptance of non-pecuniary loss in cases of *intentionally* caused death, but the rejection of non-pecuniary loss in cases of *negligently* caused death. While this approach does not appear to have been embraced in the wrongful death law of any common-law countries, the notion that intentionally caused emotional harm may be distinguished from unintentionally caused emotional harm has deep roots in common-law jurisprudence. Oliver Wendell Holmes famously remarked that 'even a dog distinguishes between being stumbled over and being kicked',[148] and similar reasoning underpinned Wright J's articulation of the rule in *Wilkinson v Downton* (the tort of intentional infliction of emotional distress).[149] More recently, in *Hunter v Canary Wharf*, Lord Hoffmann stated that he could see 'no reason why a tort of intention should be subject to the rule which excludes compensation for mere distress, inconvenience or discomfort in actions based on negligence . . . The policy considerations are quite different'.[150] Lord Hoffmann did not expand upon what, precisely, those policy considerations might be. However, in addition to more general considerations (such as, perhaps, the relative infrequency of intentionally caused emotional harm), it seems likely that his Lordship was referring, in particular, to the policy considerations reflected in the principles of causation, remoteness, contributory negligence, and the duty to mitigate. In *Wainwright v The Home Office*, Lord Hoffmann confirmed his view that:

> the policy considerations which limit the heads of recoverable damage in negligence do not apply equally to torts of intention. If someone actually intends to cause harm by a wrongful act and does so, there is ordinarily no reason why he should not have to pay compensation.[151]

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144 Above n 16.

145 See, eg, the various distinctions drawn by W V Horton Rogers in 'Comparative Report' in *Damages for Non-Pecuniary Loss in a Comparative Perspective*, W V Horton Rogers (Ed), Springer, 2001, pp 263–5.

146 Ibid, pp 262–3.

147 W V Horton Rogers has expressed the view, ibid, p 263, that the 'award of non-pecuniary loss damages to relatives of fatal accident victims is firmly established in [many countries] ... and it would probably be very difficult to remove them. England is the most recent recruit to this "club" and in my judgment these damages have become firmly embedded in the legal system in as short a time as twenty years.'

148 *The Common Law*, Boston, 1882, p 3.

149 [1897] 2 QB 57 at 59 per Wright J; [1895-9] All ER Rep 267; (1897) 66 LJQB 493.

150 [1997] AC 655 at 707; [1997] 2 All ER 426; [1997] 2 WLR 684.

151 [2004] 2 AC 406; [2003] 4 All ER 969; [2003] 3 WLR 1137; [2003] UKHL 53 at [44].

On the other hand, and as Lord Hoffmann himself acknowledged, the need to draw this distinction only arose because earlier cases, notably *Victorian Railway Commissioners v Coultas*,[152] prevented subsequent courts from fashioning a rule that permitted recovery for emotional distress regardless of 'whether the conduct of the defendant was intentional or negligent'.[153] It might also be argued that distinctions between intentionally and unintentionally caused harm have no place in a modern, compensatory system of tort law, and that 'what is good for the goose is good for the gander'.[154] Certainly, there could be no basis for this distinction in a *purely* compensatory system, as any loss sufficient to warrant damages in such a system would fall to be compensated regardless of the manner of fault giving rise to it. However, the reality is that compensation 'is the most important, but not the exclusive, approved purpose governing remedies afforded by private law'.[155] As Tilbury has observed, 'other objectives' (found in exemplary, restitutionary, nominal, contemptuous and vindicatory damages) are also served by damages, albeit in 'strictly exceptional' circumstances.[156] Thus, the difficulty with the argument postulated — that if damages for emotional harm are available in cases of intentionally caused harm they ought also be available, automatically, in cases of unintentional harm — is that it relies upon the exception to make the rule.[157] Put differently, the fact that emotional harm is compensated in certain exceptional circumstances does not (in and of itself) necessitate that it be compensated in *all* circumstances.

But whatever view is taken on these matters, the distinction historically drawn by the common law between intentionally and unintentionally caused harm does not equate with a distinction between criminally and civilly caused harm. The latter distinction, now enshrined in a number of Australian states by virtue of various criminal compensation schemes, does not turn upon the various policy considerations outlined above, but rather upon the jurisdiction (criminal or civil) in which damages happen to be pursued. This distinction is problematic for a variety of reasons, which form the substance of the following part of this article.

Non-pecuniary loss in cases of criminally caused death

Non-pecuniary loss, including bereavement, is compensable in many common-law jurisdictions in cases of criminally caused death. The United Kingdom has been leading the way in this regard since the introduction of its

152 Ibid, at [44]–[45].

153 Ibid.

154 Baroness Wootton of Abinger expressed a similar view in her opposition to the introduction of criminal compensation in the United Kingdom: '[T]his attempt to assess people's needs after they have suffered serious and possibly permanent injury by the question of whether it is their fault or anybody else's fault is an illogical and uncivilised approach to the subject'. United Kingdom, *Parliamentary Debates*, House of Lords, 7 May 1964, Vol 257, col 1381.

155 H Stoll, 'Consequences of Liability: Remedies' in *International Encyclopedia of Comparative Law*, A Tunc (Ed), Vol XI(2), 1986, at [8-1].

156 Tilbury, above n 30, at 699.

157 Ibid, at 706.

first ex gratia victim compensation scheme in 1967.[158] The British model became an exemplar for other common-law jurisdictions, including Australia, where many aspects of the scheme are still evident in current legislation. As Kirby observed, the UK government:

> rejected the concept of the State accepting *legal liability* for victim injuries but accepted that compensation should be paid at public expense on an *ex gratia* basis as an expression of public sympathy to the victims of violent crime. From the outset, the scheme was designed to pay compensation even where the criminal had not been found and prosecuted . . . Since the scheme was seen to be of an experimental nature, it was decided that it would be of a non-statutory structure and would be administered by a Compensation Board.[159]

Family members of homicide victims have always been entitled to compensation under the UK scheme,[160] although awards for pecuniary loss are (and have always been)[161] capped at a level lower than would be expected in a civil action.[162] Consistent with the prevailing interpretation of Lord Campbell's Act, compensation was also initially rejected for non-pecuniary loss.[163] However, the scheme has since been placed on a statutory footing,[164] and 'bereavement payments' (currently £11,000 for a single claimant, or £5500 per multiple claimant)[165] are now payable to certain family members of a person killed as a result of a 'crime of violence'.[166] Oddly, this award is £1000 higher than the equivalent award payable under s 1A(3) of the Fatal Accidents Act 1976 (UK). To avoid double recovery, an award for criminal compensation may be withheld or reduced if an applicant receives civil

158 While the 1967 scheme represents the first ex gratia compensation scheme, victims of crime were able to obtain court ordered compensation prior to its introduction. See, eg, the Forfeiture Act 1870 (UK) s 4. As the scheme developed was administrative in nature, its introduction in Scotland did not offend the historic separation of English and Scottish criminal law and procedure.

159 M D Kirby, 'Compensation for victims of criminal injuries' (1981) 7 *Commonwealth Law Bulletin* 1533 at 1538–9.

160 A Samuels, 'Compensation for Criminal Injuries in Britain' (1967) 17 *Uni of Toronto LJ* 20 at 41.

161 Ibid, at 37.

162 *Criminal Injuries Compensation Scheme 2012*, UK, at [42]–[49], at <https://www.gov.uk/government/ publications/criminal-injuries-compensation-scheme-2012> (accessed 3 November 2014).

163 Ibid.

164 The *Criminal Injuries Compensation Scheme 2012* (UK) was approved by the UK Parliament in accordance with s 11(1) of the Criminal Injuries Compensation Act 1995 (UK).

165 *Criminal Injuries Compensation Scheme 2012*, above n 162, at [61]–[62]. There are numerous reasons why ex gratia compensation at the public expense is a peculiarly appropriate response to criminal conduct: Victims have limited opportunity to insure against loss; offenders may be difficult to identify or locate, hence a civil action impossible; even if identified, 'the assailant is often "not worth powder and shot"'; victims may be too afraid to seek civil compensation against a dangerous offender, or may require compensation more speedily than the civil process can provide it; and, so the argument goes, 'the state has a duty to ensure that some kind of scheme exists to compensate the victims of misfortune'. See also Samuels, above n 160, at 20–1, 44; Kirby, above n 159, at 1537; and Cane, above n 16, p 299.

166 *Criminal Injuries Compensation Scheme 2012*, above n 162, at [4]–[5]. The definition of a crime of violence is discussed below, at nn 204–7.

compensation (by court order or settlement) in respect of the same loss.[167] The scheme is currently administered by the Criminal Injuries Compensation Authority.

In the years since victims compensation was first introduced, an additional court-based model has been introduced in England and Wales, which allows courts to make compensation orders against offenders as an outcome of the criminal process. Section 130(1) of the Powers of Criminal Courts (Sentencing Act) 2000 (UK) currently provides that a 'court by or before which a person is convicted of an offence' may make an order requiring that person 'to make payments for funeral expenses or bereavement in respect of a death resulting from any such offence'. Section 130(10) of the Act further clarifies that:

> A compensation order in respect of bereavement may be made only for the benefit of a person for whose benefit a claim for damages for bereavement could be made under section 1A of the Fatal Accidents Act; and the amount of compensation in respect of bereavement shall not exceed the amount for the time being specified in section 1A(3) of that Act.

This cross-referencing of criminal compensation orders for bereavement, on the one hand, with bereavement damages under the Fatal Accidents Act 1976 (UK), on the other, is critical to the coherency of the UK system. The salient consequence of s 130(10) is that, when awarded judicially, the categories of persons entitled to compensation for bereavement, and the amount of that compensation, are determined according to the same criteria. The upshot of the overall legislative framework in the United Kingdom is that bereavement damages (of one form or another) may now be awarded in the United Kingdom, administratively or judicially, in all instances of wrongfully caused death, regardless of whether the causal wrong is categorised as civil or criminal (or both).

Similar schemes have been introduced throughout the common-law world,[168] and all Australian states and territories now provide some form of criminal compensation.[169] In some states, compensation may also include a sum in recognition of bereavement (albeit described as 'distress' or 'trauma'). In Queensland, for example, persons closely related to a person who has died as a result of an 'act of violence' may be awarded up to $10,000 in respect of 'distress suffered, or reasonably likely to be suffered' as a result of that

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167 Ibid, at [85].

168 In Ontario, for example, a deceased victim's dependents may seek compensation for 'pain and suffering' from a quasi-judicial adjudicative agency (the CICB), where death results from 'the commission of a crime of violence constituting an offence against the Criminal Code (C) 1985, including poisoning, arson, criminal negligence and an offence under section 86 of that Act [a firearm offence] but not including an offence involving the use or operation of a motor vehicle other than assault by means of a motor vehicle' (Compensation for Victims of Crime Act RSO 1990, C 24, ss 5(a), 5(f) and 7(d) (parenthesis added). See also: Victims of Crime Act RSA 1997; Crime Victim Assistance Act RSBC 2001; and The Victims Bill of Rights RSM 2013, s 48(1).

169 In addition to New South Wales, Queensland and Victoria (discussed below) see: Victims of Crime (Financial) Assistance Act 1983 (ACT); Victims of Crime Assistance Act 2006 (NT); Victims of Crime Assistance Act 1976 (Tas); Criminal Injuries Compensation Act 2003 (WA).

death,[170] on application to a scheme manager.[171] The scheme manager may issue a notice of demand to offenders to recover all or part of any awards made, although (anecdotally) this would appear to happen rarely. The amount to be recovered may also be reduced to take account of any court-ordered compensation in respect of the same offence.[172] Section 5 of the Penalties and Sentences Act 1995 (Qld) also permits a court prosecuting an offence under the Queensland Criminal Code (Qld) to make an order for criminal compensation, regardless of whether it records a conviction. However, these provisions do not appear to allow compensation for bereavement.

In New South Wales, the Victims Rights and Support Act 2013 (NSW) implements a system of victim compensation that is operated both administratively (by a Commissioner)[173] and judicially (by a court 'that convicts a person of an offence').[174] On application to the Commissioner, and in addition to payments for approved counselling services,[175] family members of a person who 'died as a result of an act of violence' may be entitled to a 'recognition payment' (currently $7500–$15,000)[176] 'in recognition of the trauma suffered'.[177] Payments are made from a central fund,[178] which is financed in part by moneys obtained under criminal proceeds and asset-stripping legislation.[179] Offenders in New South Wales may also be required by the Commissioner to pay back some or all of the funds paid to a victim under the scheme,[180] although an equivalent amount must be deducted from any compensation awarded for the same loss in subsequent civil proceedings.[181] Of course, this would never be necessary in respect of recognition payments, as comparable awards are not available in civil proceedings.

The judicial scheme in New South Wales is far more discretionary than the administrative scheme, and permits a court to direct that compensation be paid, 'out of the property of the offender',[182] to the immediate family members of a homicide victim for any 'injury'[183] or 'loss'[184] sustained as a result of the offence. Regrettably, the Act neither defines the difference between injury and loss, nor states whether either (or both) may be non-pecuniary in nature (although such damages are not precluded by the Act).[185] However, whereas compensation for 'injury' is capped at $50,000,[186]

170 Victims of Crime Assistance Act 2009 (Qld) s 49(f).
171 Ibid, Pt 9.
172 Victims of Crime Assistance Act 2009 (Qld) s 114.
173 Victims Rights and Support Act 2013 (NSW) Pt 6.
174 Ibid, Pt 3.
175 Ibid, s 24.
176 Victims Rights and Support Regulation 2013 reg 12.
177 Victims Rights and Support Act 2013 ss 34–37.
178 Ibid, s 14.
179 Proceeds of Crime Act 1989 (NSW); Criminal Assets Recovery Act 1990 (NSW).
180 Victims Rights and Support Act 2013 (NSW) s 15.
181 Kirby, above n 159, at 1539.
182 Victims Rights and Support Act 2013 (NSW) ss 94 and 97.
183 Ibid, ss 93(b) and 94.
184 Ibid, ss 96 and 97.
185 Ibid, s 98. It would also seem incongruous to award such damages administratively with one hand, but to deny them judicially with the other.
186 Victims Rights and Support Act 2013 (NSW) ss 94–95.

compensation for 'loss' is left at large;[187] thus, it may be that the former is intended to compensate non-pecuniary damage, and that the latter is intended to compensate pecuniary damage (which may be measured more accurately according to the damage caused).

The Victorian legislation adopts yet another approach; the Victims of Crime Assistance Act 1996 (Vic) establishes a Victims of Crime Assistance Tribunal, which may award the 'related victims' of an 'act of violence' a sum of up to $50,000 for individual relatives, or no more than $100,000 for a 'pool' of relatives.[188] In addition to various pecuniary losses, this summay take account of the 'distress experienced, or reasonably likely to be experienced, by the related victim as a direct result of the death of the primary victim.'[189] As in New South Wales, awards are paid from a 'Consolidated Fund'.[190] Recipients of awards must assign their right to recover civil damages from offenders (to the amount of award received) to the state,[191] and any damages otherwise received by the recipient must be refunded to the tribunal.[192] However, the tribunal does not appear to have the power to recover funds directly from offenders in its own right.

The criminal compensation schemes implemented in some Australian jurisdictions come close to replicating the UK model.[193] However, and with respect, many of these schemes remain 'poor and distant relations' of the UK model.[194] In particular, and in contrast with the UK Model, the schemes implemented in New South Wales and Queensland, and Victoria show little regard for consistency across substantive legal areas.[195]

For one thing, the availability of criminal compensation awards for bereavement is difficult to square with the conclusion of the New South Wales Law Reform Commission that there are 'problems inherent in determining who should be entitled' to bereavement damages in cases of wrongful death.[196] Clearly, to the extent that such problems exist, they do so regardless

187 Ibid, ss 96–97.
188 Victims of Crime Assistance Act 1996 (Vic) s 13.
189 Ibid, s 13(c).
190 Ibid s 69.
191 Ibid, s 51.
192 Ibid, s 62.
193 In South Australia, for example, the Victims of Crime Act 2001 (SA) s 20(1)(c) states that spouses, domestic partners and parents of a homicide victim may be 'paid by the Crown such amount (not exceeding $10,000) as the Court thinks fit by way of compensation for the grief suffered by the claimant'. This maximum amount and the categories of eligible claimants mirror the provisions governing solatium in civil actions for wrongful death (Civil Liability Act 1936 (SA) ss 28(1)(b) and 29(1)(b)). However, the comparison is imperfect since, as noted above, solatium in South Australia is not limited to grief, but may also take account of loss of society *Rafferty v Barclay* [1942] SASR 147 at 156 per Mayo J. Moreover, awards from criminal compensation are not ordered by courts as an incident of the criminal process, but rather in the course of a separate application by eligible claimants, mediated by the Crown Solicitor.
194 Kirby, above n 159, at 1540.
195 S Deakin, A Johnson and B Markesinis, *Markesinis and Deakin's Tort Law*, 5th ed, OUP, Oxford, 2003, p 57. A notable exception in this regard is the scheme established in Western Australia by the Criminal Injuries Compensation Act 2003 (WA) s 6(2) of which cross-references the damages available under that scheme with the damages available under the Fatal Accidents Act 1959 (WA).
196 New South Wales Law Reform Commission, above n 13.

of jurisdiction, and irrespective of whether compensation is awarded administratively or judicially, or as an outcome of (or collateral to) civil or criminal proceedings. In any event, circumscribing the appropriate class of recipients has not proven to be an insurmountable task in respect of secondary hearsay victims who suffer psychiatric harm,[197] or in respect of pecuniary losses in wrongful-death cases.

Similar arguments may be made in respect of the 'direct and indirect costs that would be associated' with the introduction of bereavement damages in wrongful-death cases. While there would appear to be fewer cases of criminally caused death than negligently caused death,[198] the costs of criminal compensation are ordinarily born by the state,[199] whereas private individuals and insurance companies would bear the costs in a civil action. If it is inappropriate to require defendants and their insurance companies to pay these costs, then it is surely inappropriate to require the general public to do so.[200] In any event, the sums in question are (as outlined above) likely to be modest, and probably insufficient in their own right to justify the legal costs of bringing an action. Thus, it seems doubtful that the number of wrongful-death cases would increase significantly if bereavement damages were to be made available.

More significantly, though, introducing bereavement damages in cases of death caused by acts of violence (which are invariably crimes), while continuing to deny such damages in civil claims for wrongful death, creates a number of inconsistencies in the law. The underlying difficulty is that the spheres of civil and criminal liability are not delineated by fault criteria. It may be true that violent crimes are ordinarily intentional in nature, and that wrongful-death cases are typically raised in respect of negligent conduct; however, a wrongful-death case may also be triggered by an intentional wrong, and homicide may be committed intentionally or with gross negligence.[201] Of course, the meaning of 'intention' differs in important ways between tort and criminal law; in tort, intent may relate either to conduct or to outcomes, whereas intent in criminal law relates solely to outcome (for example, the intent to kill).[202] As Cane explains:

> In its core sense, intention involves 'aiming at' as part of a plan. If a person's conduct is aimed at producing a certain outcome, then that conduct will necessarily be deliberate. But the converse is not true. A person's planned, deliberate conduct may produce an unintended outcome.[203]

Nevertheless, most trespass actions do involve intent in its core sense, and when death is the intended outcome liability will arise both civilly and

197 See, eg, *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269; 198 ALR 100; [2003] HCA 33; BC200303072 at [47]–[52] per McHugh J.

198 Luntz et al, above n 57, p 56.

199 Some criminal compensation schemes require contributions to be made by the criminal party. See, eg, Victims Rights and Support Act 2013 (NSW) s 15(c).

200 Unless, of course, the current fault-based system is rejected in favour of an approach comparable to the NZ accident compensation scheme.

201 *Re Bateman* [1925] 19 Cr App R 8 at 13. See also Criminal Code (Cth) s 5.5.

202 The author acknowledges the significant contribution of the anonymous referee on this point.

203 P Cane, *Responsibility in Law and Morality*, Hart Publishing, 2002, p 79.

criminally. It is also possible that recklessness would be sufficient to justify criminal compensation in Australia.[204] The term 'act of violence' is not clearly defined in the Queensland, New South Wales or Victoria legislation, hence this descriptive labels adds little (other than to guide the exercise of administrative or judicial discretion).[205] However, the UK Scheme clearly anticipates compensation for bereavement and other damage caused by 'recklessness',[206] and Cane has observed that conduct 'will count as a crime of violence only if the relevant injuries were inflicted intentionally or recklessly (in the technical sense in which these words are used in the criminal law)'.[207] The best that can be said, therefore, is that, in most Australian states and territories, the same loss (bereavement), caused by the same fault (intention in its core sense, and perhaps even recklessness), may now be compensated under criminal compensation legislation but not, alternatively, at a plaintiff's own suit in a civil action for wrongful death.[208] This state of affairs is problematic, for a variety of reasons.

First, even if it is conceded that bereavement should be compensated only when death is caused intentionally, in its core sense, or recklessly, there does not appear to be any principled reason why such awards should be the preserve of administrators or courts seized of criminal jurisdiction. As noted above, the English and Welsh legislation draws no such distinction; bereavement damages may be awarded administratively and judicially, and

204 Compare *R v Criminal Injuries Compensation Board; Ex parte Clowes* [1977] 3 All ER 854; [1977] 1 WLR 1353; (1977) 65 Cr App Rep 289 and *R v Criminal Injuries Compensation Board; Ex parte Webb* [1987] QB 74; [1986] 2 All ER 478; [1986] 3 WLR 251 (CA).

205 The categories of conduct that may give rise to compensation under the Queensland scheme are obfuscated by a series of oddly circuitous and paradoxical definitions: s 25(1) of the Victims of Crime Assistance Act 2009 (Qld) defines an 'act of violence' as a 'crime or a series of related crimes'; s 25(2) defines a 'crime' as 'an act or omission constituting a prescribed offence . . . whether or not the person who did the act or made the omission has been identified, arrested, prosecuted or convicted in relation to the act or omission'; and s 25(8) defines a 'prescribed offence' as, inter alia, 'an offence against the person of someone'. It is unclear why it was considered necessary to employ three distinct terms to describe what appears to be a single category of conduct. It is also unclear (to the current author, at least) how conduct could ever be said to 'constitute' a 'prescribed offence' in the absence of a conviction to that effect. Similar criticisms may be made of s 19 of the Victims Rights and Support Act 2013 (NSW) and s 3 of the Victims of Crime Assistance Act 1996 (Vic). In this regard, the language adopted by the UK legislation seems preferable: In addition to clarifying that a crime of violence may be committed recklessly (see below n 206), para 9 of the *Criminal Injuries Compensation Scheme 2012*, above n 162, provides that a 'person may be eligible for an award under this Scheme whether or not the incident giving rise to the criminal injury to which their application relates has resulted in the conviction of an assailant in any part of the United Kingdom or elsewhere'.

206 *Criminal Injuries Compensation Scheme 2012*, above n 162, Annex B, s 2(2).

207 Cane, above n 16, pp 309–10, citing Criminal Injuries Compensation Board, *Sixteenth Report*, Cmnd 8081, 1980, at [17]. Cane, above n 203, p 80, defines recklessness as consisting 'of a mental element and a breach of a standard of conduct. The mental element has two aspects: deliberation, and knowledge or "awareness". Reckless conduct is deliberate.'

208 To the extent that criminal compensation schemes are administrative in nature, and do not technically form an incident of the criminal process, it might be argued that, strictly speaking, this state of affairs is not anomalous. However, as noted, it would appear that in New South Wales, at least, awards for bereavement may be ordered judicially. In any event, the general public are unlikely to appreciate such a subtle distinction.

when awarded judicially such damages are assessed on the same footing regardless of whether the causal wrong is characterised as civil or criminal. The same is broadly true of damages for bereavement in South Australia.[209] At the very least, therefore, consistency requires that bereavement damages should be available to civil litigants in New South Wales, Queensland and Victoria for wrongful death that is caused by intention, in its core sense, and perhaps even by recklessness, subject to the same caps and limitations as criminal compensation.

Second, the fact that criminal compensation may be awarded for a loss that is not recognised by the civil law does not sit well with the generally accepted objects of the civil and criminal law, respectively. As discussed above, compensation is often seen as the primary aim of tort law,[210] whereas the primary aims of criminal law are conventionally framed in terms of deterrence and punishment.[211] Thus, an important question is whether criminal compensation awards, and in particular the non-pecuniary elements of those awards, are properly to be classified as punitive, deterrent, vindicatory or compensatory in nature. Cane has concluded (albeit in a civil context) that 'there is a penal or punitive element underlying damages for non-pecuniary loss, especially damages for bereavement'.[212] Descheemaker observes that these objects need not be mutually exclusive, and may change over time:

> in Scots Law, the *solatium* awarded by courts to the successful claimant under the *iniuria*, in redress of his wounded feelings, was originally regarded as being entirely penal. Yet, it was effortlessly reinterpreted as being purely compensatory when the time came for legal writers to fit the *actio iniuriarum* into the modern theory of Scots delict law. Again, the South African debate shows how it is quite possible for delict scholars to interpret the same awards made by courts under that heading on a spectrum that goes from an almost exclusively penal to an almost entirely compensatory reading.[213]

On the other hand, when an award for damages is made, the common lawyer will naturally 'assume — and rightly so — that it is compensatory, unless and until we hear reason from the law to believe otherwise'.[214] Nothing in the structure of the legislation in New South Wales, Queensland or Victoria supports the conclusion that bereavement payments are intended to be

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209 See above n 193.

210 C Sappideen and P Vines (Eds), *Fleming's the Law of Torts*, 10th ed, Thomson Reuters, 2011, p 3.

211 See, eg, A Dnes, 'Criminal Law and Torts' in *Criminal Law and Economics*, N Garoupa (Ed), 3rd ed, Edward Elgar Publishing, 2009, pp 111–23. It might be argued that criminal compensation awards are typically awarded administratively, and not as an incident of the criminal process, and that these aims are therefore irrelevant. However, even if the predicate to this argument is accepted, it must surely be conceded that criminal compensation schemes form part of the broader criminal justice system. In any event, they are likely to be viewed by the public as such.

212 Above n 16, p 172.

213 Descheemaeker, above n 45, p 73, citing N Whitty, 'Overview of Rights of Personality in Scots Law' in *Rights of Personality in Scots Law: A Comparative Perspective*, N Whitty and R Zimmermann (Eds), Dundee University Press, Dundee, 2009, pp 147, 217, 236–7, and J Neethling, 'Punitive Damages in South Africa' in *Punitive Damages: Common Law and Civil Law Perspectives*, H Koziol and V Wilcox (Eds), Springer, New York, 2009, pp 123, 131–4.

214 Descheemaeker, above n 45, p 81.

punitive or deterrent in nature; indeed, the specified purposes of these Acts suggest that criminal compensation awards are intended to be vindicatory and compensatory.[215] This conclusion is supported by the fact that awards for bereavement are 'not commensurate with the degree of fault on the part of the defendant',[216] and that offenders are rarely required to contribute to payments.[217] These considerations indicate that deterrence and punishment are, at best, secondary objects of criminal compensation under these Acts.

In reality, of course, concerns as to legal coherency and the proper objects of the civil and criminal law, respectively, are unlikely to outweigh political expediency or public concerns regarding crime and disorder, and it is a safe bet that public support is high for the provision of small non-pecuniary awards to the direct and indirect victims of violent crime. Perhaps for similar reasons, bereavement payments have recently been introduced for the secondary victims of international terrorism. The Social Security Amendment (Supporting Australian Victims of Terrorism Overseas) Act 2012 (Cth) now provides 'close family members'[218] of persons killed as a direct result of an overseas terrorist attack with the right to claim up to $75,000 from the Commonwealth.[219] Payments comprise pecuniary and non-pecuniary elements, the latter of which implicitly acknowledge differing degrees of grief. Factors to be taken into account in determining the amount of the award include the nature of the relationship between the family member and the primary victim,[220] and the circumstances in which the primary victim died.[221]

It is not suggested that criminal compensation or victims of overseas terrorist schemes are in any way inappropriate or unprincipled.[222] The point, rather, is that there is no reason to suppose that public support for bereavement payments is confined to these specific circumstances. Of course, there may be no reliable way to measure public opinion on this point, which may be ambulatory in any event. That said, in a 1997 Consultation Paper, the English Law Commission concluded that it 'is clear from, for example, the responses to the Lord Chancellor's consultation Paper on the level of bereavement damages that the public *expect* a bereavement award to be made to the relatives of a deceased person'.[223] To the author's knowledge, none of the

215 Victims of Crime Assistance Act 2009 (Qld) s 3; Victims Rights and Support Act 2013 (NSW) s 17; Victims of Crime Assistance Act 1996 (Vic) s 3.

216 English Law Commission, 'Claims for Wrongful Death', 1997, Consultation Paper No 148, at [3.137].

217 Of course, this reflects the reality that offenders are unlikely to be able to afford such payments, rather than a choice on the part of the government not to punish by seeking reimbursement. Nevertheless, Cane notes that, in 2010–11, 'it seems likely that criminals provided significantly less than 1% of the compensation paid out under the' English criminal compensation scheme. See above n 16, p 302.

218 Social Security Amendment (Supporting Australian Victims of Terrorism Overseas) Act 2012 (Cth) s 1061PAA(4).

219 Ibid, ss 1061PAA(1)(b), 1061PAE(3).

220 Ibid, s 1061PAF(b)(ii).

221 Ibid, s 1061PAF(b)(iii).

222 Although it is odd that the latter scheme distinguishes between terrorism and other violent crimes perpetrated overseas. For a far more critical view of criminal compensation schemes, and bereavement damages generally, see Cane, above n 16, pp 309–13; and Deakin et al, above n 195, pp 56–7.

223 *Claims for Wrongful Death*, 1997, Consultation Paper No 148, at [3.138], citing Lord

responses to the New South Wales Law Reform Commission purported to measure general public opinion. However, it seems highly unlikely that public support for bereavement damages in cases of death caused intentionally (in its core sense) or recklessly would be restricted to claims in the criminal justice system, and perhaps support may even extend to the victims of any wrongfully caused death.

Conclusion

This article acknowledged at the outset that the problems associated with the continued rejection of civil bereavement damages may be insufficiently acute to warrant the attentions of law reformers, and that other inequities in the law may be more deserving of immediate attention. It is nevertheless difficult to escape the conclusion that the clarity and consistency of the law in all Australian states and territories (other than the Northern Territory and South Australia) would be improved significantly by the introduction of bereavement damages in civil claims for wrongful death, and that this could be achieved by lawmakers with comparative ease. With respect, the introduction of bereavement damages is unlikely to have any noticeable impact on the direct and indirect costs of litigation and — as this article has demonstrated — the current approach does in fact generate numerous tensions in the law.

At the very least, bereavement damages should be available in all civil court proceedings in New South Wales, Queensland and Victoria when the death of a loved one has been caused by intention, in its core sense, and perhaps even by recklessness (depending on which 'acts of violence' criminal compensation is available for in each respective state). However, the better solution would be to reject fault-based distinctions entirely — save those inherent to the cause of action that would have been available to the deceased — and to introduce awards for bereavement in all Australian jurisdictions, in respect of all civil and criminal wrongs, subject to the same financial caps and limits on categories of claimants. This approach would be consistent with that taken in other common-law jurisdictions, and would reflect the general global trend of rejecting arbitrary distinctions between cases of personal injury and death. It would also relieve some of the pressure created by the strained distinction, drawn by the law of negligence, between pure psychiatric injury and emotional harm.

Chancellor's Department, *Damages for Bereavement: A Review of the Level*, 1990, Consultation Paper No 2575. See also Rogers, above n 15, pp 2–3.