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**Providing Mental Health
Services and
Psychiatric Care to
Immigration Detainees:
What the Law Requires**

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Abstract

There is increasing evidence that the provision of mental health services is inadequate for immigration detainees. In *S v Secretary, Department of Immigration Multicultural and Indigenous Affairs* [2005] FCA 549, Justice Paul Finn held that the Commonwealth had breached its duty to ensure that reasonable care was taken of two Iranian detainees 'S' and 'M' in relation to the treatment of their respective mental health problems. The lack of proper psychiatric care at Baxter Detention Centre was also highlighted in the Palmer Inquiry into the detention of Cornelia Rau.

The case brought on behalf of a child refugee, Shayan Badraie, against the Department of Immigration and Multicultural and Indigenous Affairs and Australasian Correctional Services Pty Ltd and Australasian Correctional Management Pty Ltd has the potential to clarify the government's legal duty to provide reasonable care toward immigration detainees. Shayan Badraie, through his parents, is seeking compensation for the harm caused to Shayan by his detention and the traumatic events he witnessed in the Woomera and Villawood detention centres.

This paper will analyse the Commonwealth Government's legal duty to provide adequate levels of psychiatric services and psychiatric care to immigration detainees as well as the implications of the Badraie case.

Providing Mental Health Services and Psychiatric Care to Immigration Detainees: What the Law Requires

Introduction

There is growing evidence that the detention of 'unlawful non-citizens' under section 189(1) of the *Migration Act* 1958 (Cth) contributes to feelings of anxiety, hopelessness and depression¹ and that children are particularly vulnerable to the effects of prolonged detention.² It has been suggested that the detention environment is a direct contributor to psychological stress, either on its own or as a 'retraumatising influence'.³ This is borne out by suicide rates in detention centres which are estimated to be between 3 to 17 times that in the Australian community.⁴ Already, a number of lawsuits have been filed on behalf of detainees for harms sustained while in detention and it is expected that these will continue.⁵

It is well established through its own documents that the Commonwealth Government has a duty to provide health care to immigration detainees. Ian Freckelton has pointed out that the civil justice system may have a role to play in ensuring that the Government's duty of care accommodates the vulnerability of immigration detainees to psychiatric illness.⁶ Legal action may be an unfortunate last resort to ensure adequate mental health services and psychiatric care in detention. A recent decision by Justice Paul Finn in *S v Secretary, Department of Immigration Multicultural and Indigenous Affairs*⁷ certainly paves the way in this regard and this will be explored later in this paper.

1. D. Silove and Z. Steel, eds, *The Mental Health and Well-Being of On-Shore Asylum Seekers in Australia* (Sydney: University of New South Wales, Psychiatry Research and Teaching Unit, 1998); A. Sultan and K. O'Sullivan, 'Psychological Disturbances in Asylum-Seekers Held in Long Term Detention: A Participant Observer Account', *Medical Journal of Australia* 175 (2001): 593; Z. Steel, S. Momartin, C. Bateman, A. Hafshejani, D. Silove, N. Everson, K. Roy, M. Dudley, L. Newman, B. Blick and S. Mares, 'Psychiatric Status of Asylum-Seeker Families Held for a Protracted Period in a Remote Detention Centre in Australia', *Australian and New Zealand Journal of Public Health* 28(6) (2004): 527.
2. S. Mares, L. Newman and M. Dudley, 'Seeking Refuge, Losing Hope: Parents and Children in Immigration Detention', *Australasian Psychiatry* 10 (2002): 91.
3. D. Silove and Z. Steel, 'The Mental Health Implications of Detaining Asylum Seekers', *Medical Journal of Australia* 175 (2001): 596.
4. Catholic Commission for Justice, Development and Peace, *Damaging Kids: Children in Department of Immigration and Multicultural and Indigenous Affairs' Immigration Detention Centres*, Occasional Paper No 12 (Melbourne: Catholic Commission for Justice, Development and Peace, May 2002).
5. See, for example, the cases mentioned in A D Mcentee, 'The Failure of Domestic and International Mechanisms to Redress the Harmful Effects of Australian Immigration Detention' *Pacific Rim Law and Policy Journal* 12 (2003): 263 at 276.
6. I. Freckelton, 'Editorial: Madness, Migration and Misfortune: The Challenge of the Bleak Tale of Cornelia Rau', *Psychiatry, Psychology and Law* 12(1) (2005): 1 at 12.
7. (2005) 216 ALR 252.

However, there are two main hurdles that will have to be overcome in any legal claims that the government has failed in its duty of care. First, with the 'outsourcing' of the day to day management of detention centres, a legal issue arises as to whether or not this duty is delegable to third parties. There is now legal precedent suggesting that this duty is not delegable. Secondly, recent changes to tort law under Civil Liability Acts⁸ may greatly limit the scope of claims for psychiatric injury caused by detention. The case of Shayan Badraie which is currently before the Supreme Court of New South Wales has the potential to clarify the scope of such claims in future.

This paper will first outline the Commonwealth Government's duty of care and will then analyse *S's* case and give some background to the ongoing case of Shayan Badraie in order to explore whether or not the government has been fulfilling its duty of care to provide mental health services and psychiatric care to immigration detainees.

Immigration Detention Standards

Immigration detention services must comply with the Immigration Detention Standards (IDS) which were developed by the Department of Immigration and Multicultural and Indigenous Affairs in consultation with the Commonwealth Ombudsman's Office and the Human Rights and Equal Opportunity Commission.⁹ The IDS relate to the quality of care and quality of life expected in immigration detention facilities in Australia. The IDS form the basis for the contract between the department and the detention service provider.

Part One of the IDS includes the following Table:

1.3 Duty of care

Standards	Performance Measures
1.3.1 The day-to-day care needs of detainees are met.	No substantiated instance where a detainee could not have their day-to-day care needs met.
1.3.2 A secure and safe detention environment is established and maintained.	No instance of a detainee coming to harm as a result of risks not being identified, assessed, managed and ameliorated.

8. This term refers to various pieces of state and territory legislation introduced in 2002 and 2003 under various titles: *Civil Liability Act* 2002 (NSW) as amended by the *Civil Liability (Personal Responsibility) Act* 2002 (NSW); *Civil Law (Wrongs) Act* 2002 (ACT); *Civil Liability Act* 2002 (WA); *Civil Liability Act* 2002 (Tas); *Civil Liability Act* 2003 (Qld); *Wrongs Act* 1958 (Vic); *Civil Liability Act* 1936 (SA); *Personal Injuries (Liabilities and Damages) Act* 2003 (NT). All legislation enacted in 2002 and 2003 has been subject to subsequent amendment.

9. The IDS are available at http://www.immi.gov.au/detention/standards_index.htm accessed 29th November 2005 (refer to page 110).

Part Two deals specifically with health matters and includes the following:

2.2 Care needs

2.2.1 Health

[2].2.1.1 General

Standards	Performance Measures
<p>2.2.1.1.1 Detainees are able to access timely and effective primary health care, including psychological/psychiatric services (including counselling):</p> <ul style="list-style-type: none"> • in a culturally responsive framework • where a condition cannot be managed within the facility, by referral to external advice and/or treatment. 	<p>No substantiated instance of a detainee not having access to health care of this nature.</p>
<p>2.2.1.1.2 In establishing the health care service, the Services Provider:</p> <ol style="list-style-type: none"> a. ensures services are delivered by qualified, registered and appropriately trained health care professionals b. develops and implements a health care plan for each facility c. draws on the advice, knowledge and experience of a health advisory panel. 	<ol style="list-style-type: none"> a. Department is provided with evidence on a monthly basis that the health care service is available and accessible. b. No substantiated instance of health care staff not being qualified, registered and appropriately trained. c. No substantiated instance of the centre health plans not being implemented, effective or reviewed periodically. d. No substantiated instance of advice of the health advisory panel not being drawn on.

The IDS contain a statement that while the service provider is under a duty of care in relation to detainees, ‘ultimate responsibility for the detainees remains with DIMA [the then Department of Immigration and Multicultural Affairs] at all times.’¹⁰

In addition to the IDS, on 12 May 1999, the Commonwealth released a document called ‘General Detention Procedures’¹¹ which states that ‘officers are obliged to take all reasonable action to ensure detainees do not suffer any physical harm or undue emotional distress while detained.’¹²

In a submission to the Human Rights and Equal Opportunity Commission, the Commonwealth has also stated:

While retaining ultimate responsibility for all detainees, the Department exercises its duty of care commitments through the engagement of a Services Provider within the framework of relevant legislation, comprehensive contractual obligations, the Immigration Detention Standards and associated performance measures... While in detention, the ability of individuals to control their own environment is restricted... this places particular responsibilities on the Commonwealth with regard to duty of care...¹³

10. Department of Immigration, Multicultural and Indigenous Affairs, ‘Principles Underlying Care and Security’, *Immigration Detention Standards* at <http://www.immi.gov.au/illegals/det_standards.htm> accessed 29 November 2005, fourth dot point (refer to page 110).

11. Department of Immigration, Multicultural and Indigenous Affairs, ‘Migration Series Instruction MSI-234: General Detention Procedures’ issued on 12 May 1999.

12. *Ibid*, Section 8.1.

13. Department of Immigration, Multicultural and Indigenous Affairs, Submission to the Human Rights and Equal Opportunity Commission, quoted in Human Rights and Equal Opportunity Commission, *A Last Resort? Report of the National Inquiry into Children in Immigration Detention* (May 2004) at Chapter 5.3.2, p 115.

While these documents clearly indicate that the Commonwealth Government owes a duty of care to detainees, one of the legal issues that arise is whether or not this duty of care is 'delegable'. The Commonwealth contracts out the day-to-day operations of detention centres to private companies such as GSL (Australia) Pty Ltd. These companies then subcontract out health care services to other companies which may also hire private medical practitioners. This outsourcing means that service provision is fragmented between a variety of unconnected service providers. In contracting out its responsibilities, there is a legal question as to whether the Commonwealth is also contracting out its duty of care. The case discussed in the next section strongly suggests that the government's duty of care is non-delegable.

The Case of 'S'

The most significant case to date as to the Commonwealth's duty of care to immigration detainees is that of *S v Secretary, Department of Immigration, Multicultural and Indigenous Affairs*¹⁴ which was heard by Justice Paul Finn of the Federal Court of Australia.

Two Iranian men, known only as 'S' and 'M' who had both been detained in various detention centres for about five years, applied to the Federal Court for an order compelling their assessment for admission to a mental health facility in Adelaide. After S had given evidence during the hearing of the application, a doctor assessed him and made an order for his transfer under the *Mental Health Act 1993* (SA). Shortly prior to the delivery of Finn J's judgment, M was also transferred to a mental health facility. Accordingly, Finn J did not have to grant relief for the men's applications, but he stated that he would have made the orders sought and then gave detailed reasons why the applications were properly made. He also ordered that the applicants' costs be paid for by the Commonwealth Government.

Justice Finn found that the Commonwealth had breached its duty to ensure that reasonable care was taken of S and M in detention in relation to the treatment of their respective mental health problems. This was attributable to the systematic defects in the manner in which mental health services were provided at the Baxter Detention Centre in South Australia.

The Commonwealth Government has outsourced the day-to-day operation of Baxter to a company called GSL (Australia) Pty Ltd. GSL in turn contracted its obligation to provide health care services to two companies, Professional Support Services which provides psychological services including a full-time psychologist who is on duty week days from 9 am to 5 pm and a full-time counsellor and International Medical Health Services which provides general medical services. The latter contracted with a Port Augusta Medical practice to provide general medical services and a psychiatrist, Dr Andrew Frukacz, a private practitioner from Bathurst in New South Wales. Dr Frukacz agreed to visit once every six to eight weeks on Saturdays. At the time of the hearing, there were 326 detainees in Baxter, with a third being long term detainee asylum seekers, between 20 and 30 of whom were seen by Dr Frukacz.

14. (2005) 216 ALR 252.

S had committed acts of self-harm on a number of occasions prior to December 2004 including cutting his arms and chest with a razor and cutting his head by putting it into a window. After the latter incident, he was taken to the Management Unit for over a week. This Unit has 10 single rooms where individuals considered disruptive are incarcerated 24 hours a day. In April 2004, he was placed in the Management Unit for a week, and was then put in Red One for about two months. Red One is an alternative 'step-down' facility to the Management Unit for less disruptive detainees. He described this as 'terrifying'.

Towards the end of 2004, S found out that his plans to get married in Baxter had fallen through. He became very distressed and tried to cut his neck. In December, he took part in a hunger strike with 'M' and another man. The three men stayed on top of the roof of the gymnasium for nine days which caused them all to suffer from dehydration and severe sunburn.

On 30 December 2004, S was seen by a psychiatrist who was voluntarily attending Baxter to prepare reports for immigration lawyers. This was the first time S had been psychiatrically assessed during his year at Baxter. The psychiatrist wrote: 'because of the severity of his condition, he needs further psychiatric treatment, probably in an inpatient facility. He also needs a thorough medical review'.

On 12 and 13 February 2005, S was reviewed by the psychiatrist contracted to Baxter who diagnosed him with severe depression and put him on antidepressant medication. He raised the possibility of electro convulsive therapy which would have to be administered at a psychiatric facility, but was not prepared to recommend transfer at that stage.

On 29 March 2005, S was assessed by another psychiatrist for the purpose of legal proceedings who diagnosed S with severe depression with anxiety symptoms. He stated that S needed to be transferred as the current state of his illness needed review by a psychiatrist on a daily basis.

M, like S, had spent about five years in detention. He was placed in the Management Unit on one occasion where he was assaulted. Several guards were later dismissed because of this incident. He took part in the roof top hunger strike along with S and another man in December 2004. M was assessed by a general practitioner who voluntarily attended Baxter after the hunger strike and was diagnosed as being profoundly depressed and as requiring care in a psychiatric facility. This was not acted upon.

M saw the psychiatrist contracted to Baxter for the first time on 12 February 2005. The psychiatrist was of the opinion that M was 'significantly depressed and...anxious with feelings of despair largely related to his fear of deportation'. He prescribed medication, but was of the opinion that M did not need to be transferred to a psychiatric facility. However, he went on to note that the conditions of detention were contributing to M's depression and anxiety and that the medical treatment 'will only have a partial affect [sic] on his condition'.

M was seen by another psychiatrist on 29 March 2005 for the purpose of legal proceedings. This psychiatrist agreed that while M remained in detention, he was likely to remain depressed and his demoralisation and despair were likely to increase. Transfer to a psychiatric facility was recommended.

Justice Finn found that there was an inadequate level of provision of psychiatric services at Baxter and the failure to provide psychiatric care to both applicants in December 2004 after the roof top protest was in breach of the Commonwealth's duty to take reasonable care for the detainees. In relation to S, Justice Finn held that his mental health needs were not only not being met, but that he was being treated with neglect and disregard. He found that M's difficulty in accessing reasonable mental health care services was not as striking as S's, but that the condition from late December 2004 was treated with neglect. He found that the applicants 'did not have to settle for a lesser standard of mental health because they were in immigration detention'.¹⁵

In relation to the outsourcing arrangement in relation to medical services, Justice Finn remarked:

The Commonwealth entered into a complex outsourcing arrangement for the provision of mental health services which left it to contractors and subcontractors to determine the level of services to be supplied. The hallmarks of these arrangements were devolution and fragmentation of actual service provision. The service provision was so structured that there was a clear and obvious need [sic] for regular and systematic auditing of the psychological and psychiatric services provided if the Commonwealth was to inform itself appropriately as to the adequacy and effectiveness of these services for which it bore responsibility. There has to date been no such audit.¹⁶

Justice Finn's findings were echoed in that of the Palmer Report, which found that the mental health care given to the detainee Cornelia Rau while she was detained in Baxter was inadequate.¹⁷

In Justice Finn's opinion, the Commonwealth's duty of care to S and M was not delegable on the basis of the complex outsourcing arrangements. Rather, the Commonwealth itself had the responsibility to ensure the provision of medical services was adequate and effective.

The Case of Shayan Badraie

In January 2000, five year old Shayan, his father and pregnant stepmother flew out of Iran to Malaysia.¹⁸ Shayan's father, Mohammad Badraie, and his wife, Zahra Saberi, were members of a minority

15. Ibid, p 305.

16. Ibid.

17. Mick Palmer, *Inquiry into the Cornelia Rau Matter* (6 July 2005), Finding 24, p xii, available at http://www.minister.immi.gov.au/media_releases/media05/palmer-report.pdf accessed 29 November 2005.

18. The facts of this case are based on the transcript of evidence in matter 020286/03 – *Shayan Badraie by his Tutor Mohammad Badraie v The Commonwealth of Australia (by the Department of Immigration and Multicultural and Indigenous Affairs) and 2 ors* (Johnson J., The Supreme Court of New South Wales Common Law Division, 29 August 2005). My thanks to Rebecca Gilson, Principal, Maurice Blackburn Cashman Pty Ltd, Lawyers for enabling me access to the transcript.

religious group, Al-Haqq, and feared that they would be harmed by Iranian authorities if they stayed in Iran. From there, they travelled by boat to Indonesia and then by boat to Australia. In March 2000, because they arrived in Australia without visas, they were placed at the Woomera Detention Centre in South Australia. They stayed there until 3 March 2001 when they were moved to the Villawood detention centre in Sydney. On 23 August 2001, Shayan was separated from his parents and placed with foster parents in Sydney where he stayed until 16 January 2002. While with the foster parents, his legal status remained that of an immigration detainee. This meant that the house where he was staying and the school he attended were classified as places of detention and he had to be supervised at all times.

On 16 January 2002, Shayan, now aged 7, was removed from foster care and placed in the community with his mother and baby sister who had been granted bridging visas. Shayan's father remained in detention at Villawood until 9 August 2002, when he was also released on a temporary protection visa, having been recognised as a refugee.¹⁹

In his year at Woomera Detention Centre, Shayan regularly witnessed confrontations between officers and detainees. Woomera was designed as a short term temporary centre for the processing of new arrivals and lacked facilities for long term detainees. It was closed down in April 2003.

At the time Shayan and his family were detained, Woomera had at times as many as 1400 detainees. There were riots in April, June and August and mass hunger strikes in November 2000. In August 2000, Shayan witnessed officers beating detainees with batons and the use of water cannons and CS gas (commonly called tear gas). On 28 November 2000, Shayan saw a fellow detainee holding a broken piece of mirrored glass in his right hand against his chest threatening to kill himself.

The next day, Shayan was seen by a counselor who noted that, 'he is very frightened. He fears that the man will come and cut the children...He has generalised his fears to all windows and mirrors seeing them all as potential weapons. He was unable to sleep last night and is not eating. I believe that Shayan needs to be moved to a different and safe environment in order for him to be able to psychologically deal with his fears.'²⁰

Following the incident in November, Shayan started wetting the bed and suffering nightmares. In January 2001, Shayan witnessed a man climb a tree in the Main Compound and threaten to jump and he also saw one of the officers making masturbating gestures at detainees and telling his father to 'fuck off out of here'.

19. The Badraies faced detention in May 2001 after a single Federal court judge upheld the decision of the Refugee Review Tribunal that they should not be granted a visa; *Badraie v Minister for Immigration and Multicultural Affairs* [2001] FCA 616 (Unreported, Federal Court of Australia, Stone J, 25 May 2001). However, a successful appeal was held before Justices Lee, Moore and Madgwick in April 2002; *N1202/01A v Minister for Immigration and Multicultural Affairs* (2002) 68 ALR 21.

20. Transcript, 29 August 2005, p 24.

On 20 January 2001, Shayan and his family were moved to Sierra Compound, which was the security compound, apparently to move them away from an influx of new detainees, although they were not told this. Shayan and his sister who was then aged three and two teenage girls were the only children there.

On 25 January 2001, Shayan had his first meeting with a psychologist who was of the opinion that Shayan was exhibiting signs of post traumatic stress disorder and that Shayan and his family be relocated to a more appropriate centre as a matter of urgency. Over the next month, the psychologist made repeated reports to the Department indicating that Shayan and his family be moved. On 27 February 2001, he wrote, 'I am of the opinion that the failure to take any action to protect this child from further exposure is abusive on the part of the governing authorities.'²¹

That same day, Shayan witnessed a detainee smash windows and window frames in the compound.

Shayan and his family were finally taken to Villawood on 3 March 2001. He was not given any psychiatric assessment there, but his care was restricted to psychological services and general practitioner services. On 30 April 2001, it was recorded that Shayan had witnessed a detainee slash his wrists. He did not speak for the next two days and was taken to the Westmead Children's Hospital for treatment.

Throughout the course of 2001, Shayan was hospitalised on eight separate occasions for a total of 86 days. Despite medical evidence that it was in his best interests to reside with his family outside of the detention centre, he was placed with foster parents in August 2001 who were unknown to him and who had no experience in caring for a foster child.

Shayan's family was finally reunited on 9 August 2002 and they have been living in the community on temporary protection visas. Shayan continues to suffer from nightmares, has difficulty in sleeping and wets the bed. He is on antidepressant medication.

Following a complaint by his father on 29 August 2001, the Human Rights and Equal Opportunity Commission investigated Shayan's treatment at Woomera and Villawood.²² The Commission found that his detention had breached a number of Articles in the Convention on the Rights of the Child²³ and recommended an apology and compensation of around \$70,000. These recommendations were not followed by the Commonwealth.

21. Transcript, 29 August 2005, p 33.

22. Preliminary Findings 19 April 2002; Human Rights and Equal Opportunity Commission, *Report of an Inquiry Into a Complaint by Mr Mohammed Badraie on Behalf of his Son Shayan Regarding the Acts or Practices of the Commonwealth of Australia (the Department of Immigration, Multicultural and Indigenous Affairs)*, HREOC Report No. 25 (2002).

23. Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989; *entry into force* 2 September 1990; Ratified by Australia on 16 January 1991.

Shayan's story was featured on *Four Corners* on ABC TV in August 2001 and in many ways it was his story that galvanised activists working toward stopping the immigration detention of children. The Human Rights and Equal Opportunity Commission's Report, following its inquiry into children in immigration detention over the period 1 January 1999 to 31 December 2002, was tabled in Parliament on 12 May 2004.²⁴ While the government rejected the Report's major findings and recommendations,²⁵ there seems to have been a change in the approach toward detaining children.²⁶

Shayan's father is now bringing an action detained in the common law division of the Supreme Court of New South Wales on Shayan's behalf. The action is against the Commonwealth Government and Australasian Correctional Services Pty Ltd and Australasian Correctional Management Pty Ltd, the companies that operated Woomera and Villawood at the time Shayan was detained. At the time of writing, the matter is part-heard and it is being carefully watched by lawyers and advocates for immigration detainees.

One of the main arguments being put by the plaintiff is that the Commonwealth owed Shayan a duty to exercise reasonable care to prevent foreseeable injury which is a non-delegable duty. Significantly, the Commonwealth has accepted the analysis of Finn J in *S's* case concerning the Commonwealth's duty of care and has acknowledged that this is non-delegable.²⁷ The main issue in contention is whether the Commonwealth breached that duty. It is alleged that the defendants breached their duty of care by permitting Shayan to remain in immigration detention and in foster care for a prolonged period of time with no provision or adequate provision of expert psychological and psychiatric assessment and treatment and in allowing him to be exposed to numerous traumatic and aversive events.

The Commonwealth applied to amend its defence to include the claim that Shayan's injuries, which are not admitted, were caused by the actions of his parents, including causing his detention by entering Australia as unlawful non-citizens and by refusing to agree to leave Australia. Justice Johnson refused the Commonwealth's application, stating that '[s]uch factors are as irrelevant to this claim as would be the reasons why a prisoner was sentenced to imprisonment in a claim brought by the prisoner against prison authorities in negligence.'²⁸ Justice Johnson has, however, allowed the Commonwealth

24. Human Rights and Equal Opportunity Commission, *A Last Resort: The National Inquiry into Children in Immigration Detention* (May 2004), available at http://www.humanrights.gov.au/human_rights/children_detention_report/index.html accessed 29 November 2005 (refer to page 110).

25. Joint media release, Senator Amanda Vanstone and the Hon. Philip Ruddock MP, HREOC Inquiry into Children in Immigration Report Tabled 13 May 2004 available at http://www.minister.immi.gov.au/media_releases/media04/v04068.htm accessed 29 November 2005.

26. Senator Amanda Vanstone announced on 29 July 2005 that 42 children belonging to 20 families had been moved from detention into the community: Senator Amanda Vanstone, *All Families with Children Out of Detention*, Media Release, 29 July 2005 at http://www.minister.immi.gov.au/media_releases/media05/v05098.htm accessed 29 November 2005.

27. *Shayan Badraie by his Tutor Mohammad Saeed Badraie v Commonwealth of Australia and Ors* [2005] NSWSC 1195 (Unreported, Supreme Court of New South Wales Common Law Division, Johnson J, 22 November 2005) [28]: Interlocutory judgment on evidence and submissions on applications.

28. *Ibid.*, [101].

to amend its defence to claim that the parents engaged in behaviour which encouraged Shayan not to eat and promoted his injuries.²⁹ The Commonwealth wishes to call evidence from Shayan's biological mother in order to undermine the credibility of Shayan's father and stepmother as witnesses.

The case was originally set down for four weeks. It has already run for over six weeks with a current estimate of eleven weeks. The ultimate decision will have far-reaching effects for future actions brought by immigration detainees. It is clear that if those who manage detention centre fail to comply with their duty of care, they may be liable in tort.³⁰ However, there remains an onus on plaintiffs to prove their case on the balance of probabilities. Detainees who bring actions in negligence will have to prove that they are suffering from a recognised psychiatric illness that was caused by detention and which was reasonably foreseeable.³¹ There is still a great deal of uncertainty concerning psychiatric injury in negligence claims, perhaps because mental disorders are more difficult to detect than physical injuries.³² Recent changes to tort law under Civil Liability Acts³³ may also limit the scope of claims for psychiatric injury caused by detention.

Conclusion

Justice Finn's decision in *S v Secretary, Department of Immigration, Multicultural and Indigenous Affairs* sets out a framework for the Commonwealth's duty of care to provide immigration detainees access to primary health care, including mental health services. The decision in the Shayan Badraie case will undoubtedly have repercussions for the scope and type of negligence claims in the future.

On 19 September 2005, the Immigration Minister, Senator Amanda Vanstone announced that a mental health team would be 'proactively screening detainees to identify any mental health concerns' at Baxter Detention Centre.³⁴ On 6 October 2005, she announced that \$230 million would be provided over five years for a 'broad range of initiatives to improve training, provide better health and wellbeing to immigration detainees, much better records management, decision quality assurance, and a much stronger focus on clients.'³⁵ These initiatives are to be welcomed, but whether they will assist in providing the highest attainable standard of physical and mental health to immigration detainees remains to be seen.

29. *Ibid*, [104].

30. *Bebrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* (2004) 208 ALR 271 at 279-280 (Gleeson CJ), 283 (McHugh, Gummow and Hayden J. J.), 293 (Kirby J.), 313 (Hayne J.), 326 (Callinan J.).

31. *Koehler v Cerebos* (2005) 214 ALR 355.

32. *Hatton v Sutherland* [2002] 2 All ER 1 at 4 per Hale L. J.

33. This term refers to various pieces of state and territory legislation introduced in 2002 and 2003 under various titles: *Civil Liability Act* 2002 (NSW) as amended by the *Civil Liability (Personal Responsibility) Act* 2002 (NSW); *Civil Law (Wrongs) Act* 2002 (ACT); *Civil Liability Act* 2002 (WA); *Civil Liability Act* 2002 (Tas); *Civil Liability Act* 2003 (Qld); *Wrongs Act* 1958 (Vic); *Civil Liability Act* 1936 (SA); *Personal Injuries (Liabilities and Damages) Act* 2003 (NT). All legislation enacted in 2002 and 2003 has been subject to subsequent amendment.

34. Senator Amanda Vanstone, *Minister Announces Action Plan for Baxter*, Media Release, 19 September 2005 <http://www.minister.immi.gov.au/media_releases/media05/v05114.htm>, accessed 29 November 2005.

35. Senator Amanda Vanstone, *Palmer Implementation Plan and Comrie Report*, Media Release, 6 October 2005 <http://www.minister.immi.gov.au/media_releases/media05/v05119.htm> accessed 29 November 2005.