

# A Brief Understanding of Negligence

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## Sources of Power

The framers of the Australian Constitution enacted only the most basic protections like freedom of religion and the right to compensation for government appropriation of assets, but they did provide for laws to be enacted about 'aliens' more commonly known as non-citizens.

In the *Al-Kateb* case the High Court of Australia refused to restrict the Commonwealth Government's right to detain non-citizens on the basis that the indefinite mandatory detention of unlawful non-citizen under s 189 of the Migration Act was permitted under the aliens power in the Australian Constitution.

The right to detain is not unqualified though. The laws of negligence still apply to the Commonwealth that continues to have a duty of care to detainees.

How does the law of Negligence apply to detainees?

The elements of a tort or a civil wrong are:

1. The existence of a duty of care. A duty of care is a legal obligation to avoid causing a harm which is foreseeable if care is not taken.
2. A breach of the duty
3. Damage arising from the breach of the duty

The cases of *Behrooz*, *Mastipour* and *S and M* illustrate how the law of torts applies to detainees. In the case of *Behrooz* it was held that the conditions of immigration detention do not affect the legality of that detention, nonetheless a clear majority of the Court accepted, to use the words of Gleeson CJ, that:

'Harsh conditions of detention may violate the civil rights of an alien. An alien does not stand outside the protection of the civil and criminal law.

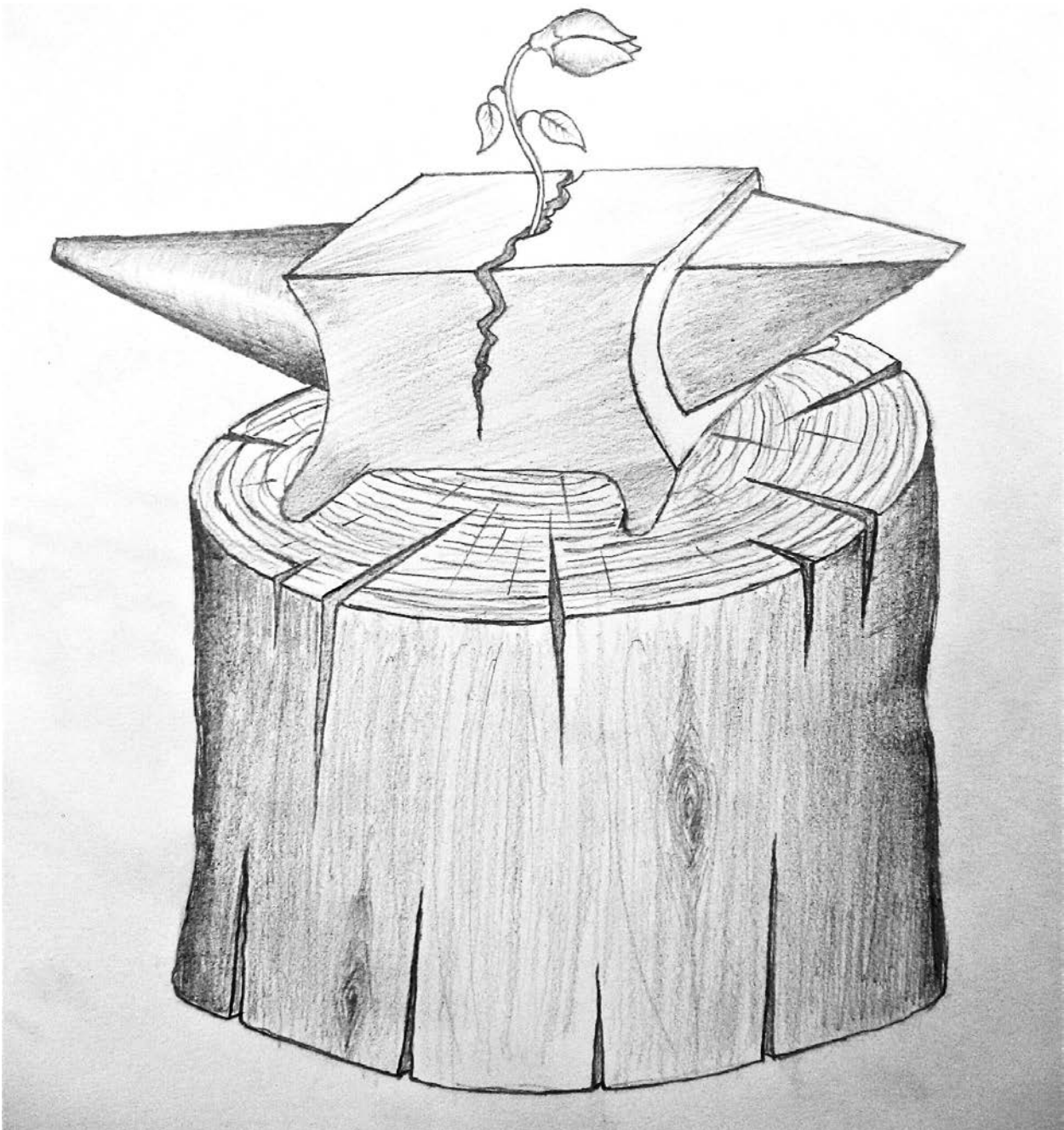
If an officer in a detention centre assaults a detainee, the officer will be liable to prosecution, or damages. If those who manage a detention centre fail to comply with their duty of care, they may be liable in tort.'

In *S v Secretary, Department of Immigration & Multicultural & Indigenous Affairs* two detainees described as S and M had been diagnosed as suffering from major depression after being detained for around five years.

S & M took action to compel their assessment for admission to a mental health facility under the Mental Health Act, 1993, (SA) ('Mental Health Act').

The court found that 'there was a duty on the Commonwealth to ensure that reasonable care was taken of 'S' and 'M' who, by reason of their detention, could not care for themselves. That duty required the Commonwealth to ensure that a level of medical care was made available to them which was reasonably designed to meet their health care needs including psychiatric care. They did not have to settle for a lesser standard of mental health care because they were in immigration detention.'

Thus, 'Given the known prevalence of mental illness amongst detainees, and the likely needs of S and M in particular at least following their participation in December 2004 roof top protest and hunger strike, the court found that the level of psychiatric service made available to S and M



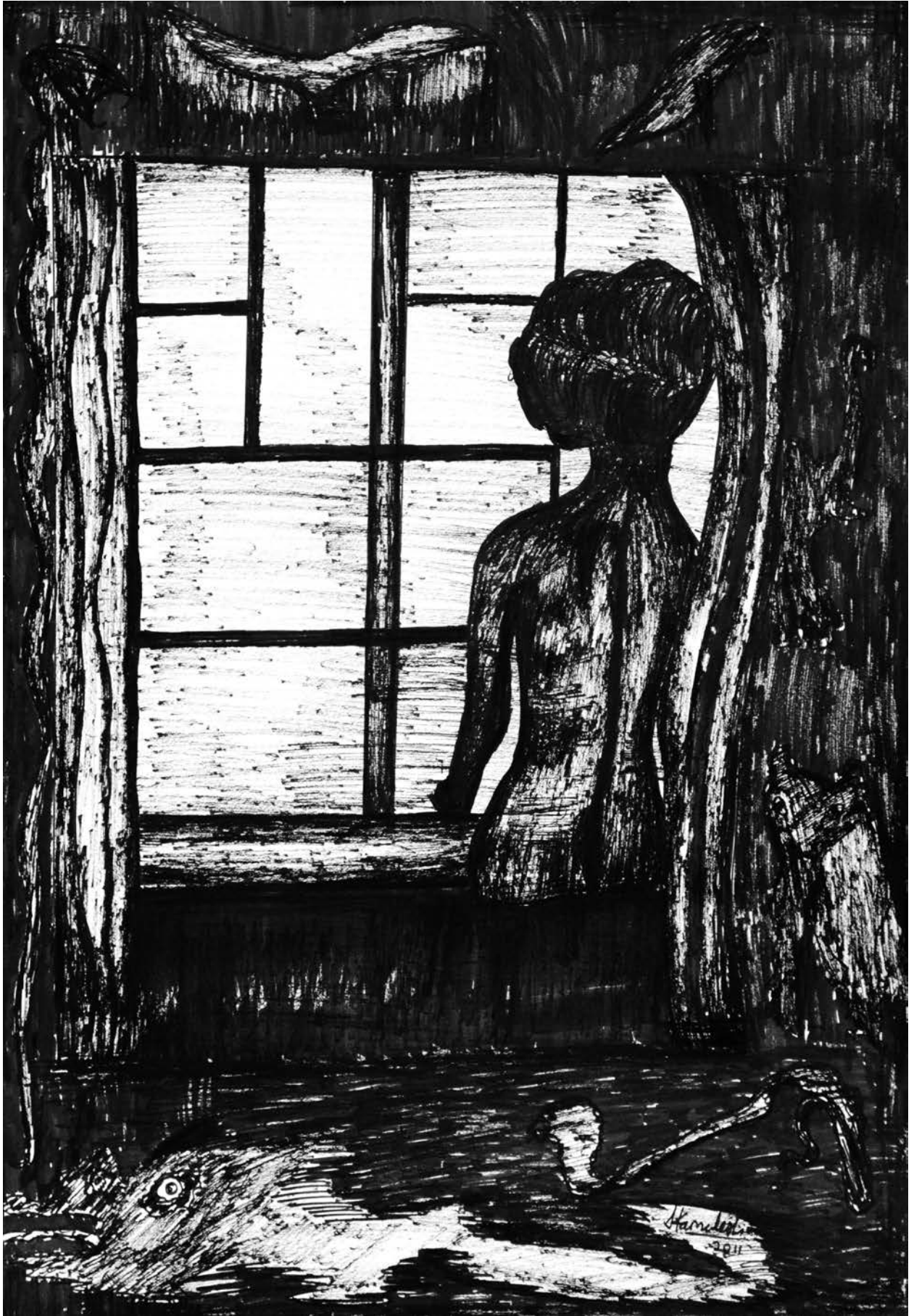
M, Patience, pencil on paper, 10x15cm

was, and remained, clearly inadequate.'

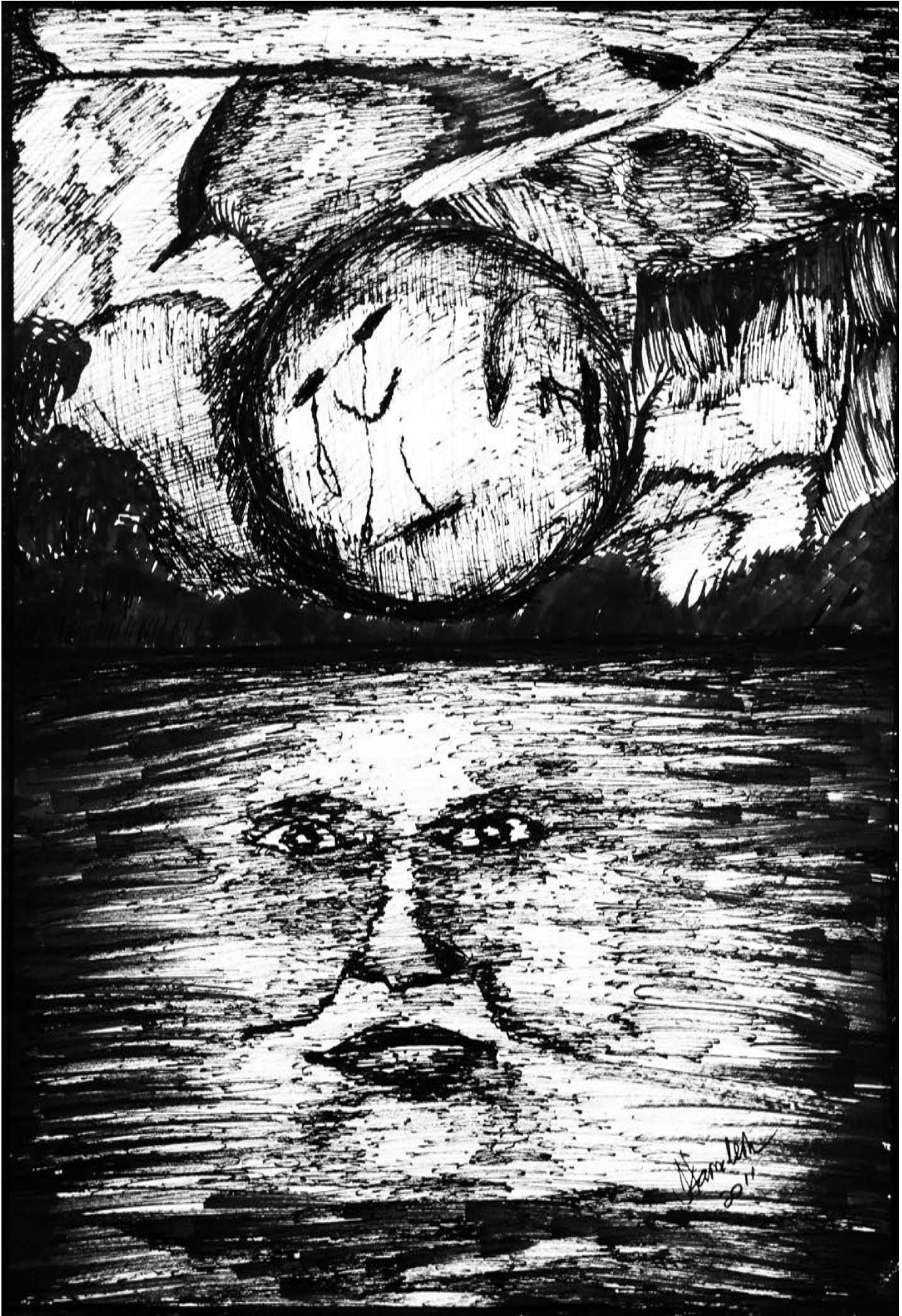
The court found further "that the Commonwealth's 'conduct contributed to the progressive deterioration of the applicants over several months.' In Mastipour the applicant alleged that "the conditions in the Management Unit [were] punitive, and caused the applicant emotional shock and psychiatric injury' and that 'the circumstances of the removal of his daughter from Australia were such as were likely to, and did, cause him further emotional shock and psychiatric injury.'

Therefore, "...by reason of his immigration detention, the applicant allege[d] that the Secretary owed to him a duty to take care to avoid exposing him to circumstances which are or were likely to cause him emotional shock and psychiatric injury, that the duty of care has been breached, and that as a consequence he has suffered severe emotional shock and psychiatric injury.'

The three cases affirm the Commonwealth's responsibility to look after detainees notwithstanding the legality of their detention.



K, Woman in a Room, pen and ink on paper, 29x41cm



K, Fantasy Drawing, pen and ink on paper, 41x29cm