NERVOUS SHOCK — THE OPENING OF THE FLOODGATES

by

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> A plaintiff in an action of negligence cannot recover damages for a 'shock' however grievous, which was no more than an immediate emotional response to a distressing experience sudden, severe and saddening. It is, however, today a known medical fact that severe emotional distress can be the starting point of a lasting disorder of mind or body, some form of psychoneurosis or a psychosomatic illness. ... nervous shock cases are not a new tort: they turn simply on the circumstances in which damages are recoverable for a particular kind of harm caused by a tort. Law, marching with medicine but in the rear and limping a little, has today come a long way since the decision in *Victorian Railway Commissioners* v. *Coultas* ... which in recent time has been regularly by-passed by Courts. An illness of the mind set off by shock is not the less an injury because it is functional, not organic, and its progress is psychogenic ...[1]

'Nervous shock' cases are those in which a defendant, who has made no physical contact with the plaintiff, has created a state of affairs which has led the plaintiff to sustain a lasting nervous disorder. The history of this area of the law has been one involving the progressive dismantling of arbitrary barriers. Just as mediaeval lawyers fastened on the primitive concept of the 'direct' injury, founding a claim in trespass, without proof of special damage, so did the nineteenth century courts insist upon physical trauma in negligence claims. There were, no doubt, a number of reasons for this, including —

1. 'The floodgates' argument, *i.e.*, that if any individual claim were to be accepted, there would be no limit to future claims.
2. A concern that if such claims were recognized, freedom of activity would be unduly impaired.
3. A concern that such claims could be easily fabricated.

Thus, the initial inclination of the Judicial Committee of the Privy Council was to reject a claim for damages for nervous shock suffered as a result of being narrowly missed by a train at a level crossing, on the basis that the harm was 'too remote':

> Not only in such a case as the present, but in every case where an accident caused by negligence had given a person a serious nervous shock, there might be a claim for damages on account of mental injury. The difficulty which now often exists in cases of alleged physical injuries of determining whether they were caused by the negligent act would be greatly increased, and a wide field opened for imaginary claims.[2]

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1 *Mount Isa Mines Limited* v. *Pusey* (1970) 125 C.L.R. 383 at pp. 394-5, *per* Windeyer J.

2 *Victorian Railways Commissioners* v. *Coultas* (1888) 13 App. Cas. 222 at p. 226; cf. *Brown* v. *Glasgow Corporation* [1922] S.C. 527 at p. 531.

Today, the trend is to determine such claims in terms of the normal application of Lord Atkin's 'neighbour' principle, using as the criterion of liability, foreseeability of injury by shock.

Fear of Personal Injury

The first arbitrary limitation erected by the Courts, in recognising a claim for damages for 'nervous shock', was that the shock must be one, 'which arises from a reasonable fear of immediate personal injury to oneself'.[3] *Dulieu* v. *White & Sons* was an illustration of the situation in which the Plaintiff was personally imperilled (by a van and horse entering a public house, in which she was situated), and that is no doubt the most obvious situation in which recovery should be allowed. The court was faced with the prior decision in *Coultas'* case, denying recovery, and no doubt it made the court more comfortable, in imposing liability, to erect an arbitrary limitation. But the limitation has long since been rejected. It was first rejected in *Hambrook* v. *Stokes Bros.*[4] where the mother of children saw a lorry descending a hill, and became frightened for the safety of her children whom she knew must be in the path of the lorry, and suffered nervous injuries which ultimately proved fatal. The trial judge, relying on the above dictum in *Dulieu* v. *White & Sons*[5] directed the jury that, for the plaintiff to recover, it had to be shown that the mother was fearful for herself. The Court of Appeal, in allowing the plaintiff's appeal, held that this was a misdirection.

Fear for the Safety of Relatives

In rejecting the first arbitrary limitation, Atkin L.J. anticipated later developments when he confessed that he found it difficult:

> to explain why the duty was confined to the case of parent or guardian and child, and did not extend to other relations of life also involving intimate associations; and why it did not eventually extend to bystanders.[6]

For many years, however, it was thought that recovery in nervous shock cases was confined to situations in which the Plaintiff had been personally imperilled or was fearful for the safety of a relative. But in *Dooley* v. *Cammell Laird & Co. Limited*,[7] the plaintiff recovered damages for nervous shock resulting from an apprehension of injury to fellow employees, not related to the plaintiff.

Subsequently, in *Chadwick* v. *British Railways Board*,[8] a serious railway accident occurred, in which ninety persons were killed. The plaintiff, who lived near the site of the accident, went to assist in rescue operations and spent some twelve hours working among the dead and injured trapped in the wreckage. The experience so distressed the plaintiff

3 *Dulieu* v. *White & Sons* [1901] 2 K.B. 669, at p. 675, *per* Kennedy J.
4 [1925] 1 K.B. at p. 141.
5 *Supra*, text at n. 3.
6 [1925] 1 K.B. at p. 159.
7 [1951] 1 Ll.L.R. 271.
8 [1967] 1 W.L.R. 912.

that he developed a psychoneurotic condition. He claimed damages in respect of this condition. Waller J. upheld his claim, notwithstanding the fact that the plaintiff was not related to any of the persons primarily physically injured.

The High Court of Australia had to consider a similar problem in *Mount Isa Mines Limited* v. *Pusey*.[9] In that case, as a result of the defendant's negligence, two employees received electrical shocks and severe burns. On hearing the noise associated with the accident, the plaintiff, a fellow employee, went to the scene and assisted one of the burnt men to an ambulance. The man he had helped died approximately nine days later. The plaintiff heard of this and later developed a mental disturbance. The plaintiff succeeded at first instance, whereupon the employer unsuccessfully appealed to the Full Court of the Supreme Court of Queensland. On further appeal to the High Court, the appeal was dismissed. So far as the point presently under consideration is concerned, Walsh J. rejected a suggestion that there was any arbitrary or doctrinaire limitation in nervous shock cases, based upon the relationship between the plaintiff and the person primarily physically injured:

> In the present case the respondent was not a close relative of the man who suffered injury. In my opinion, there is no rule of law which made it a condition of the respondent's right to recover that he should have been a close relative.[10]

Of course, a close relationship between the plaintiff and the physical victim will have relevance to the question of the foreseeability of nervous injury, and will make it easier for the plaintiff to succeed.[11]

Witnessing the Accident

In *Chester* v. *Waverley Corporation*,[12] the plaintiff's son had drowned in a water-filled trench, which had been constructed by the defendant council. The plaintiff had searched for her son and had become distressed on failing to find him. She was present when his body was found, and thereupon suffered a severe nervous shock. Her claim against the council for damages for negligence failed, and in dismissing the plaintiff's appeal, some of the members of the High Court placed emphasis on the fact that the plaintiff had not witnessed the drowning, but merely seen the result of the drowning. This led to the theory, that in order to succeed in nervous shock cases, the plaintiff must have witnessed the accident, rather than seeing its aftermath.

This view has also been discredited, and *Chester* v. *Waverley Corporation* has been explained in terms of it being a factual decision that the plaintiff's nervous injuries were not reasonably foreseeable.[13]

This, of course, postulates a high degree of robustness in the average mother.

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9 (1970) 125 C.L.R. 383.
10 Ibid, at p. 416; *cf.* at p. 404, *per* Windeyer J.
11 Ibid, at pp. 416-7, *per* Walsh J.
12 (1939) 62 C.L.R. 1.
13 See *Mount Isa Mines Limited* v. *Pusey*, supra note 9, at p. 416, *per* Walsh J.

In *Storm* v. *Jeeves*[14] the defendant was driving a truck, when it overturned and killed a child waiting for the school bus outside her home. The child's brother ran into his home and told his mother. The mother ran outside and saw her daughter under the truck. As a result, she suffered mental injury through nervous shock. In deciding in favour of the mother, Burbury C.J. specifically rejected the proposition that there was any rule of law that the plaintiff must have witnessed the accident.[15]

In *Andrews* v. *Williams*[16] the plaintiff was driving a motor car in which her mother was travelling as a passenger, when it came into collision with another vehicle. The plaintiff suffered physical injuries in the collision, and her mother was killed. The plaintiff was rendered unconscious by the collision and was advised of her mother's death several days later while she was still an in-patient in a hospital. Thereafter she suffered a reaction of anxiety and depression to which the news of her mother's death contributed.

The trial judge directed the jury that they could properly take the view that this form of mental or nervous injury and its reaction on news of her mother's death were reasonably foreseeable and that damages could be awarded in respect of this item.

The defendant appealed, contending that this was a misdirection because damages for such shock were too remote, in that the shock was due to the action of third parties in informing the plaintiff of her mother's death, and not to any negligence on the part of the defendant. The Full Court upheld the trial judge's direction.

In *Benson* v. *Lee*,[17] the plaintiff's child was struck by a motor car on a roadway and rendered unconscious. The plaintiff was then at her home, approximately 100 yards away, and did not see or hear the accident. Her oldest son ran home and told the plaintiff that the child had been in an accident. The plaintiff then ran to the scene and saw her child in an unconscious state. She went with him in the ambulance and shortly after arrival at the hospital she was informed that her child was dead. She brought proceedings against the driver for damages for nervous shock. At the conclusion of the plaintiff's case, the defendant submitted that the case should be taken away from the jury as the plaintiff did not see or hear the accident and was not within any area of potential danger and that, accordingly, no duty of care was owed by the Defendant. This submission was rejected by the trial judge, who held that in the circumstances the defendant owed a duty of care towards the plaintiff.

Susceptibility to Nervous Shock

In *Benson* v. *Lee*,[18] there was evidence that the plaintiff was, prior to

14 [1965] Tas. S.R. 252.
15 Cf. *Hambrook* v. *Stokes Bros.*, supra note 4 (although the mother in that case had seen the truck careering down the roadway); *Mount Isa Mines Limited* v. *Pusey*, *supra* note 9; *Boardman & Another* v. *Sanderson & Another* [1964] 1 W.L.R. 1317.
16 [1967] V.R. 831; cf. *Schneider* v. *Eisovich*, [1960] 2 Q.B. 430.
17 [1972] V.R. 879.
18 Ibid.

the accident, susceptible to mental illness consequent upon stress or shock. In relation to this aspect, Lush J. held that it was to be treated in the same way as a predisposition in a physical injury case.[19] In other words, the defendant takes his victim as he finds him.

Of course, as the trial judge pointed out, there may be cases in which an unusual susceptibility is such as to take the consequences suffered by the plaintiff outside the boundaries of reasonable foresight.

Foreseeability Alone, or Proximity?

It might be thought, following these decisions, that no arbitrary or policy limitations are left, so that liability in nervous shock cases turns exclusively on considerations of foreseeability. But some arbitrary limitations still exist, as appears from the decision in *Pratt & Goldsmith* v. *Pratt*.[20] In that case, the thirdnamed plaintiff was the mother of the firstnamed plaintiff. The firstnamed plaintiff, whilst pregnant, had been a passenger in a motor vehicle, which was involved in a collision, as a result of which she received serious injuries of a physical and mental nature. Her mother was not present in the vehicle, but was subsequently required to look after her daughter, and (following the birth of her child, in a disabled condition) her grandchild. The thirdnamed plaintiff claimed to have suffered personal injuries, in the form of nervous shock, induced by her observation of the pitiable state of her daughter.

The defendant took out a summons under O. 28 r. 2 of the Rules of the Supreme Court alleging that the facts set out in the Statement of Claim did not disclose any cause of action on the part of the thirdnamed plaintiff. He submitted that the duty of care owed by him as the driver of the vehicle was owed only to persons who might foreseeably suffer direct personal injury of a physical or mental kind as a result of their physical proximity to the careless conduct or to the physical circumstances arising out of such negligent conduct. Her mental shock was, he submitted, distant both in the geographical and temporal sense from the relevant careless conduct and from any physical circumstance arising from such conduct.

On behalf of the thirdnamed plaintiff it was argued that since the decision in the Wagon Mound (No. 1) case,[21] the only test as to liability was that of reasonable foreseeability, and that no longer do questions of time and space have more than incidental relevance in determining whether the harm that followed from the initial negligent act or omission was reasonably foreseeable or not.

It was held that foreseeability is not the sole criterion of liability in nervous shock cases:

> In the case of a driver of a vehicle on the highway, his duty does not, save in exceptional circumstances, extend beyond road users

19 *Cf. Pusey's* case, *supra,* note 9, where the fact that the plaintiff's schizophrenic reaction was a rare and exceptional occurrence did not preclude recovery.

20 [1975] V.R. 378.

21 [1961] A.C. 388.

> in the neighbourhood or persons who are themselves on or who have property adjacent to the roadway . . . relatives of an accident victim suffering harm by reason of nervous shock . . . have a cause of action if their shock not only is foreseeable by the tortfeasor, but also the relative is in sufficient proximity to the tortfeasor's carelessness . . .[22]

Conclusion

It is submitted that the present state of the law may be summarized by the following propositions (adapting the propositions enunciated by Burbury C.J. in *Storm* v. *Jeeves*):[23]

(i) Damages are recoverable for a recognized injury to the mind by shock without physical impact or lesion;

(ii) The fact that the shock is occasioned not by fear for the plaintiff's own safety but by peril or harm to another[24] is not of itself a ground for exclusion of recovery;

(iii) The general test of liability for shock where there is no impact on the plaintiff is foreseeability of injury by shock;[25]

(iv) There is no rule that the plaintiff must have witnessed the accident;

(v) Susceptibility to nervous shock is to be treated in the same way as a predisposition in a physical injury case, although abnormal susceptibility may be such that no injury is foreseeable.

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22 [1975] V.R. at p. 386, *per* Adam and Crockett JJ.

23 *Supra,* note 14 at pp. 254 ff.

24 The parenthetical qualification suggested by Burbury C.J. (at p. 256) '(or at least to a near relative)' has been omitted, in accordance with more recent authorities, *supra,* nn. 8-10.

25 *Cf. King* v. *Phillips* [1953] 1 Q.B. 429, at p. 441, *per* Denning L.J.; *Wagon Mound* case, *supra,* note 21, at p. 426.