

CASE COMMENTS

NERVOUS SHOCK TO PRIMARY VICTIMS

THE plaintiff in *Page v Smith*¹ was driving at about 30 mph when the defendant driving in the opposite direction suddenly turned into his path and collided into him. Both cars were damaged, but the plaintiff was not physically injured. Before the accident, the plaintiff suffered from recurring chronic fatigue syndrome. After the accident, this became permanent and rendered him incapable of ever working again as a teacher. The trial judge found the defendant liable to the plaintiff for nervous shock on foreseeability of physical injury. The Court of Appeal reversed this on the ground that the plaintiff's nervous shock was not reasonably foreseeable.

The issue before the House of Lords was whether the plaintiff, in such a case of injury resulting solely in nervous shock, must show that such type of injury was foreseeable, or whether it was sufficient for him merely to show that physical bodily injury was foreseeable.

The majority of the House of Lords (Lords Lloyd, Browne-Wilkinson and Ackner) held, in upholding the trial judge, that a primary victim of nervous shock can recover for this injury so long as physical injury is foreseeable. Primary victims refer to plaintiffs who suffer nervous shock fearing immediate physical injury to themselves, as distinct from secondary victims who suffer nervous shock fearing for the safety of others. Primary victims claiming for nervous shock can technically, therefore, be within the ambit of the defendant's duty of care even though the shock is not reasonably foreseeable. In some situations, the area of risk of physical injury that is foreseeable may extend to x yards, while the area of foreseeable risk of emotional injury may be narrower: x - y yards.² Since the bodily injury to the plaintiff here (which did not eventuate) was foreseeable, the plaintiff could recover for his nervous shock, even though this was not foreseeable: "[T]he defendant was admittedly under a duty of care not to cause the plaintiff

¹ (1995) 2 WLR 644.

² See Goodhart, "The Shock Cases and Area of Risk" (1953) 16 MLR 14, 16, note 10 referred to in the leading judgment of Lord Lloyd.

foreseeable physical injury, it was unnecessary to ask whether he was under a separate duty of care not to cause foreseeable psychiatric injury”.³ For the majority, foreseeability of physical injury to primary victims is necessary and sufficient for the recovery of nervous shock by such victims.

On the issue of remoteness of damage, it was irrelevant to the majority whether or not the plaintiff was normally constituted. Lord Lloyd held: “The defendant must take his victim as he finds him”.⁴ The “egg-shell skull” rule for physical injury includes the “egg-shell personality”. Here it was, however, unclear whether the plaintiff’s psychiatric illness was caused by the accident or by the recrudescence of his own previous peculiar psychiatric condition. The majority Law Lords, therefore, allowed his appeal, but reverted the issue of causation to the Court of Appeal.

The minority, Lord Keith and Lord Jauncey, on the other hand, held, given that the cars had collided at about 30 mph (a collision described as of only “moderate severity”), a hypothetical defendant, would have foreseen impact bodily injury, but not nervous shock to a plaintiff of normal fortitude. The recrudescence of the plaintiff’s psychiatric illness was due to his own previous extraordinary predisposition. Lord Keith said: “There is no question of the plaintiff having been terrified by his experience, as the plaintiff was in *Dulieu v White & Sons* [1901] 2 KB 669, or having suffered an ‘acute emotional trauma’”⁵ The minority Law Lords upheld the Court of Appeal and reaffirmed what was assumed to be required previously for claims by primary victims: that the test for liability for nervous shock is the foreseeability of such injury that is serious enough to cause recognisable psychiatric injury to a normally constituted person. Foreseeability of physical injury by itself is insufficient for liability.

In terms of the nature of the damage, the distinction between physical and mental injury is, undoubtedly, insufficiently scientific and somewhat artificial, as both nervous shock and physical injury result in some forms of physical disturbance to the sufferer’s body or system: in nervous shock as physical illness (like heart attack or miscarriage through the psychiatric route) or as psychiatric illness itself (through mental or emotional stress).⁶ The same is true of the distinction in negligence between physical damage and purely economic loss. Both types of damage result in some forms of common monetary loss. But the effect of these two kinds of damage on compensation is different. Nervous shock, like purely economic loss, but unlike physical damage, is not limited by physical impact. Shock is sustained through the medium of the eye and the ear – the mind – without direct

³ Per Lord Lloyd, above, at 665.

⁴ Above, at 676.

⁵ Above, at 650.

⁶ See Lord Browne-Wilkinson, above, at 660.

contact. It affects a wider range of persons. There is, therefore, the fear of opening the floodgates of litigation, particularly, in respect of secondary victims of nervous shock who are themselves not physically threatened but who fear the safety of others. Equally, but admittedly, to a lesser extent, the floodgate argument is also applicable to those primary victims who are physically endangered, but who cannot, by any measure of reasonableness, be expected to suffer in the situation of physical danger from shock. Such plaintiffs are entitled to compensation for physical injury, if this should occur, but not nervous shock: the example here of the plaintiff who was involved in a moderate speed collision with damage to his car but no injury to himself, and also the examples of even less worthy claimants who are involved in minor accidents of lesser physical risk or danger. For this reason, if in establishing the duty of care, a distinction has to be maintained between those claiming for impact bodily injury and those claiming for non-impact nervous shock, it is incongruous that the same distinction is not drawn between those claiming for bodily injury and those claiming for shock as primary victims. This inconsistency is adopted by the majority Law Lords: their Lordships equated the nervous shock claims of primary victims with the duty of care required for physical injury (on the basis of foreseeability of *physical* injury), instead of equating such claims with the duty of care that is required for nervous shock (on the foreseeability of *shock* injury). Lord Keith, in dissenting, pointed out: "As regards persons directly involved in an accident who claim on grounds of nervous shock and as regards those who claim as secondary victims...[r]easonable foreseeability being the test, there is no logical ground for distinguishing between the two classes of claimants [in this respect]".⁷

On the question of remoteness of damage, nervous shock, unlike physical injury, may be deserving of compensation only if it affects a normal plaintiff. A distinction can arguably be drawn between a person with "*thin skull*" and one with "*thin personality*". In this world, a plaintiff can justifiably claim for any negligent wound, even when others would not have suffered it, but the same person may arguably not claim for negligently inflicted mental distress, if others would not have been shocked. Generally, nervous shock can be construed as a more tenuous form of harm than physical injury when this does not affect ordinary people.⁸ In *McLoughlin v O'Brian*⁹ Lord Wright said, "the plaintiff is to be regarded as of normal disposition or phlegm: we are therefore not concerned to investigate the applicability of the 'thin skull' cases to this type of case". So for nervous shock, be it of

⁷ Above, at 649.

⁸ Though, it is conceded, that shock-induced psychiatric illness that affect people of ordinary fortitude can be as, and sometimes more, debilitating and intractable than physical injury.

⁹ [1983] 1 AC 410, 429.

the primary or the secondary victims, the “[f]oreseeability of nervous shock is to be judged in the light of what would be suffered by a person of normal fortitude”.¹⁰ The other dissenting Law Lord, Lord Jauncey, gave this example: “Suppose A while slowly reversing his car into a tight parking space inadvertently bumps the car of B which is stationary, B, who is a woman prone to hysteria, promptly develops that condition with consequential physical injury. The circumstances are such that no normal person would have been in any way mentally or physically affected by the bump. Is B to be compensated because A should have foreseen that a hysterical woman might be in the car and thereby sustain a shock from a minor bump? Common sense would loudly say No....”¹¹ Since it is well settled that the thin skull rule of remoteness is inapplicable in respect nervous shock claims by secondary victims, it is surely inconsistent for the majority to now render the rule applicable to primary victims for this very same damage.

A distinction must thus be maintained between negligently inflicted physical and mental injury on the ground of the difference in effect on compensation, in spite of the view that “recent developments [in medical science] suggest a much closer relationship between physical and mental processes than had previously been thought.”¹² Non-impact nervous shock induces more claims than physical injury caused by impact. Despite this, the majority here purported to simplify the law by introducing a single test of foreseeability of *personal injury* for the recovery of nervous shock by primary victims. The majority ignored the necessary difference between mental and physical injury and the essential relationship between nervous shock claims of primary and secondary victims. Lord Lloyd defined personal injury by reference to the Limitation Act 1980¹³ as any impairment to a person’s physical or mental condition.¹⁴ As long as a defendant could have reasonably foreseen the personal injury to the plaintiff it did not matter whether the injury in fact sustained was only physical or psychiatric or if it were both. On this basis a primary victim of nervous shock, as the plaintiff here, who did not suffer any physical injury but who was nevertheless within the range of physical injury due to the negligence of the defendant,

¹⁰ *Per* Lord Keith, above, at 649.

¹¹ Above, at 657. For the example to be strictly correct it must be assumed that physical injury was foreseeable – otherwise there would, of course, be no question of any liability in negligence in the first place: see Lord Lloyd’s criticism of this, above, at 668.

¹² *Per* Lord Browne-Wilkinson, above, at 662.

¹³ S 38(1).

¹⁴ Lord Lloyd, above, at 667 said: “In an age when medical knowledge is expanding fast, and psychiatric knowledge with it, it would not be sensible to commit the law to a distinction between physical and psychiatric injury, which may already seem somewhat artificial, and may soon be altogether outmoded. Nothing will be gained by treating them as different ‘kinds’ of personal injury, so as to require the application of different tests in law.”

would be able to recover for the shock-induced psychiatric illness if this genuinely resulted from the risk of physical injury. This approach of the majority, apart from all the above considerations, is inconsistent with the development of liability for nervous shock in the tort of negligence. The law moved away, some time ago, from the original test of the foreseeable area of physical injury ("impact theory")¹⁵ to the test of the foreseeable area of shock injury ("shock theory") for the recovery of nervous shock in order to enable the secondary victims, who are themselves not physically threatened, to recover for nervous shock arising out of fear for the safety of others. Otherwise, a timid mother who fears for her own safety is able to recover for nervous shock, but a brave and caring mother, who suffers nervous shock, not for concern of her own safety, but that of her children with her, will be denied recovery.¹⁶ Implicit in this change in the law from the impact to the shock basis is the assumption that the recovery of primary victims, who are themselves endangered, must be restricted to those situations where the physical threat is such that it would foreseeably cause a normal person to suffer shock-induced psychiatric illness whether or not the person also sustains physical injury. Being in the range of physical impact by itself is not good enough. Liability in respect of negligently inflicted mental distress has developed to a stage whereby recovery is on the basis of the common test of foreseeability of injury by shock for all victims: the primary and secondary victims. It is against this history of development that the majority here segregated the primary victims of nervous shock from the secondary victims and reverted to the impact theory for the recovery of nervous shock by such victims.

In conclusion, it is therefore evident that in establishing the duty of care and in applying the thin skull rule of remoteness of damage in the tort of negligence, a distinction must be maintained between negligently inflicted physical injury and mental distress. It is respectfully submitted that the starting principle for establishing the duty of care that is required for all nervous shock claims is the same: that of foreseeability of shock-induced psychiatric illness. For the primary victims, the test of liability is the foreseeability of shock, not foreseeability of physical injury. Foreseeability of physical injury is insufficient and too generous as a test for the recovery of such injury. The claims of secondary victims are subjected to more restrictions than the primary victims because of the greater potential in the number

¹⁵ See *Dulieu v White & Sons* [1901] 2 KB 669 where the plaintiff was able to recover for nervous shock so long as it was reasonably foreseeable that the defendant's conduct might have inflicted injury on the plaintiff by actual impact even though the plaintiff sustained no injury by impact. This interpretation of the case was considered as the only basis for the recovery of nervous shock in the tort of negligence until later development.

¹⁶ See *Hambrook v Stokes Bros* [1925] 1 KB 141 and *Bourhill v Young* [1943] AC 92.

of such claims. Foreseeability of nervous shock by itself is insufficient. A further closeness of relationship – nearness in time and place to the accident, sight or hearing of it, and a close relational tie with the physically endangered person – is required. The thin skull rule, it is also respectfully submitted, should be inapplicable to all nervous shock claimants, be they primary or secondary victims. In remoteness of damage a distinction can arguably be drawn between plaintiffs with thin skulls and those with thin personalities. The simplification sought by the majority of the House of Lords here of equating the mental distress claims of primary victims with that of physical injury claims adds complications and hides the difficulties underlying this area of the law. A recent Law Commission Consultation Paper on “Liability for Psychiatric Illness”¹⁷ sought to formulate a comprehensive and coherent statutory framework for the recovery of shock-induced psychiatric illness by both primary and secondary victims. Their task will be rendered that much more difficult by the majority decision here in extending incrementally, by way of duty and remoteness, the recovery of nervous shock by primary victims without due regard to the comparable position of secondary victims.

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¹⁷ 1995 (no 137).

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