



Tuesday 17 June 2014 – Afternoon

A2 GCE LAW

G158/01/RM Law of Torts Special Study

SPECIAL STUDY MATERIAL

Duration: 1 hour 30 minutes



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LAW OF TORTS

SPECIAL STUDY MATERIAL

SOURCE MATERIAL

SOURCE 1

Extract adapted from *McLoughlin v O'Brian* [1982] 2 All ER 298, HL.

The plaintiff's husband and three children were involved in a road accident caused by the negligence of the defendants. One of the plaintiff's children was killed and her husband and other two children were severely injured. At the time of the accident the plaintiff was at home two miles away. She was told of the accident by a motorist who had been at the scene of the accident and was taken to hospital where she saw the injured members of her family and the extent of their injuries and shock and heard that her daughter had been killed. As a result of hearing, and seeing the results of, the accident the plaintiff suffered severe and persisting nervous shock. The plaintiff claimed damages against the defendants for the nervous shock, distress and injury to her health caused by the defendants' negligence. The judge dismissed her claim on the ground that her injury was not reasonably foreseeable. On appeal, the Court of Appeal held that the plaintiff was not entitled to claim against the defendants either because as a matter of policy a duty of care was not to be imposed on a negligent defendant beyond that owed to persons in close proximity, both in time and place, to an accident, even though the injuries received by the plaintiff might be reasonably foreseeable as being a consequence of the defendants' negligence, or because the duty of care owed by a driver of a motor vehicle was limited to persons on or near the road. The plaintiff appealed to the House of Lords.

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Held – The test of liability for damages for nervous shock was reasonable foreseeability of the plaintiff being injured by nervous shock as a result of the defendant's negligence. Applying that test, the plaintiff was entitled to recover damages from the defendants because even though the plaintiff was not at or near the scene of the accident at the time or shortly afterwards the nervous shock suffered by her was a reasonably foreseeable consequence of the defendant's negligence. The appeal would accordingly be allowed.

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Per Lord Wilberforce: The application of the reasonable foreseeability test in nervous shock claims ought to be limited, in terms of proximity, so that what is foreseeable is circumscribed by the proximity of the tie or relationship between the plaintiff and the injured person, the proximity of the plaintiff to the accident both in time and place, and the proximity of communication of the accident to the plaintiff through sight or hearing of the event or its immediate aftermath.

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SOURCE 2

Extract adapted from *Alcock and others v Chief Constable of the South Yorkshire Police*, House of Lords [1992] 1 AC 310, [1991] 4 All ER 907, [1991] 3 WLR 1057, 8 BMLR 37.

Shortly before the commencement of a major football match at a football stadium the police responsible for crowd control at the match allowed an excessively large number of intending spectators into a section of the ground which was already full, with the result that 95 spectators were crushed to death and over 400 injured. Scenes from the ground were broadcast live on television from time to time during the course of the disaster and were broadcast later on television as news items. News of the disaster was also broadcast over the radio. However, in accordance with television broadcasting guidelines none of the television broadcasts depicted the suffering or dying of recognisable individuals. Sixteen persons, some of whom were at the match but not in the area where the disaster occurred, and all of whom were relatives, or in one case the fiancé, of persons who were in that area, brought actions against the chief constable of the force responsible for crowd control at the match claiming damages for nervous shock resulting in psychiatric illness alleged to have been caused by seeing or hearing news of the disaster. 5

[At trial t]he judge found in favour of ten of the plaintiffs and against six of them. The defendant appealed in respect of nine of the successful plaintiffs and the six unsuccessful plaintiffs cross-appealed. The Court of Appeal allowed the appeals and dismissed the cross-appeals, holding that none of the plaintiffs was entitled to recover damages for nervous shock. Ten of the plaintiffs appealed to the House of Lords, contending that the only test for establishing liability for shock-induced psychiatric illness was whether such illness was reasonably foreseeable. 15

Held – A person who sustained nervous shock which caused a recognisable psychiatric illness as a result of apprehending the infliction of physical injury or the risk thereof to another person could only recover damages from the person whose negligent act caused the physical injury or the risk to the primary victim if he satisfied both the test of reasonable foreseeability that he would be affected by psychiatric illness as a result of the consequences of the accident because of his close relationship of love and affection with the primary victim and the test of proximity in relationship to the tortfeasor in terms of physical and temporal connection between the plaintiff and the accident. Accordingly, the plaintiff could only recover if (i) his relationship to the primary victim was sufficiently close that it was reasonably foreseeable that he might sustain nervous shock if he apprehended that the primary victim had been or might be injured, (ii) his proximity to the accident in which the primary victim was involved or its immediate aftermath was sufficiently close both in time and space and (iii) he suffered nervous shock through seeing or hearing the accident or its immediate aftermath. Conversely, persons who suffered psychiatric illness not caused by sudden nervous shock through seeing or hearing the accident or its immediate aftermath or who suffered nervous shock caused by being informed of the accident by a third party did not satisfy the tests of reasonable foreseeability and proximity to enable them to recover and, given the television broadcasting guidelines, persons such as the plaintiffs who saw the events of a disaster on television could not be considered to have suffered nervous shock induced by sight or hearing of the event since they were not in proximity to the events and would not have suffered shock in the sense of a sudden assault on the nervous system. It followed that none of the appellants was entitled to succeed because either they were not at the match but had seen the disaster on television or heard radio broadcasts or their relationship to the victim had not been shown to be sufficiently close to enable them to recover. The appeals would therefore be dismissed. 25 30 35 40 45

SOURCE 3

Extract adapted from *Napier and Wheat's Recovering Damages for Psychiatric Injury*. Second Edition. Kay Wheat. Oxford University Press. 2002. pp 38–39.

Page v Smith

At the time of his road accident in July 1987 the plaintiff had been a sufferer from myalgic encephalomyelitis ('ME') and was recovering from an episode of the illness which had commenced in March 1987. He was hoping to return to work in September of that year. The accident happened when the defendant drove his car across the road in front of the plaintiff. Neither of the parties nor the defendant's passenger suffered any physical injury. The plaintiff did not report feeling particularly shocked by the incident and drove home afterwards.

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About three hours after the accident Mr Page experienced symptoms of a nature that indicated that his condition was resurfacing and, at the time of the trial, he was regarded as a permanent invalid. The main issue for consideration by the House of Lords was whether it was foreseeable that someone in his position would suffer psychiatric injury. Related to this was the question as to whether the plaintiff was a person of normal fortitude and whether that is relevant to the foreseeability point. In other words, although physical injury was foreseeable even though, in the event, it did not occur, it had to be decided whether foreseeability of *psychiatric* injury was a separate requirement. The majority of the House of Lords ... held that, as Mr Page was a primary victim, the two types of injury did not have to be considered separately. It was enough that he was at risk of *personal* injury. Lords Keith and Jauncey dissented on the basis that, under the circumstances, it was unforeseeable that the plaintiff would suffer injury by shock.

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The main majority judgment was that of Lord Lloyd. He said that although foreseeability of physical injury is not necessary in nervous shock cases (ie, in certain circumstances secondary victims can recover), it is sufficient. There was no need for psychiatric injury to be foreseeable as a separate form of injury: 'It could not be right that a negligent defendant should escape liability for psychiatric injury just because, though serious physical injury was foreseeable, it did not in fact transpire.' He went on to say: 'There is nothing in *Bourhill v Young* to displace the ordinary rule that where the plaintiff is within the range of foreseeable physical injury the defendant must take his victim as he finds him.'

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However, this 'ordinary rule' had, until then, applied only to cases of physical injury, because rightly or wrongly, psychiatric injury had always been treated differently requiring distinct foreseeability.

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SOURCE 4

Extract adapted from *White and others v Chief Constable of South Yorkshire Police* [1998] 1 All ER 1, HL.

Per Lord Steyn

The horrific events of 15 April 1989 at the Hillsborough Football Stadium in Sheffield resulted in the death of 96 spectators and physical injuries to more than 700. It also scarred many others for life by emotional harm. It is admitted by the Chief Constable that the events were caused by the negligence of the police in allowing the overcrowding of two spectator pens. In an ideal world all those who have suffered as a result of the negligence ought to be compensated. But we do not live in Utopia: we live in a practical world where the tort system imposes limits to the classes of claims that rank for consideration as well as to the heads of recoverable damages. This results, of course, in imperfect justice but it is by and large the best that the common law can do.

Counsel for the appellant is invoking the concept of a rescuer as an exception to the limitations recognized by the House of Lords in *Alcock* and *Page v Smith*. The restrictive rules, and the underlying policy considerations, of the decisions of the House are germane. The specific difficulty counsel faces is that it is common ground that none of the four police officers were at any time exposed to personal danger and none thought that they were so exposed. Counsel submitted that this is not a requirement. He sought comfort in the general observations in *Alcock* of Lord Oliver about the category of “participants”: see 407E. None of the other Law Lords in *Alcock* discussed this category. Moreover, the issue of rescuers entitlement to recover for psychiatric harm was not before the House on that occasion and Lord Oliver was not considering the competing arguments presently before the House. ... [O]ne English decision [cited] in support of [t]his argument [is] *Chadwick v British Railways Board* [1967] 1.Q.B. 912. Mr Chadwick had entered a wrecked railway carriage to help and work among the injured. There was clearly a risk that the carriage might collapse.

On the judge’s findings the rescuer had passed the threshold of being in personal danger but his psychiatric injury was caused by “the full horror of his experience” when he was presumably not always in personal danger. This decision has been cited with approval: see *McLoughlin v O’Brian* ... I too would accept that *Chadwick* was correctly decided. But it is not authority for the proposition that a person who never exposed himself to any personal danger and never thought that he was in personal danger can recover pure psychiatric injury as a rescuer. In order to recover compensation for pure psychiatric harm as rescuer it is not necessary to establish that his psychiatric condition was *caused* by the perception of personal danger ... But in order to contain the concept of rescuer in reasonable bounds for the purposes of the recovery of compensation for pure psychiatric harm the plaintiff must at least satisfy the threshold requirement that he objectively exposed himself to danger or reasonably believed that he was doing so. Without such limitation one would have the unedifying spectacle that, while bereaved relatives are not allowed to recover as in *Alcock*, ghoulishly curious spectators, who assisted in some peripheral way in the aftermath of a disaster, might recover. For my part the limitation of actual or apprehended dangers is what proximity in this special situation means. In my judgment it would be an unwarranted extension of the law to uphold the claims of the police officers. I would dismiss the argument under this heading.

My Lords, the law on the recovery of compensation for pure psychiatric harm is a patchwork quilt of distinctions which are difficult to justify. ... In my view the only sensible general strategy for the courts is to say thus far and no further. The only prudent course is to treat the pragmatic categories as reflected in authoritative decisions such as *Alcock* and *Page v Smith* as settled for the time being but by and large to leave any expansion or development in this corner of the law to Parliament. In reality there are no refined analytical tools which will enable the courts to draw lines by way of compromise solution in a way which is coherent and morally defensible. It must be left to Parliament to undertake the task of radical law reform.

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SOURCE 5

Extract adapted from *Understanding Law*. 3rd Edition. Adams and Brownsword. Sweet and Maxwell. 2003. pp 120–121.

Hambrook [see also: *King v Phillips* [1953]] having set out the parameters of nervous shock liability, the law was reasonably well settled through the mid-century years. However, at much the same time that [the House of Lords were dealing with cases where the scope of duty of care was creeping into pure economic loss], the House heard *McLoughlin v O'Brian* (1983), a nervous shock case but again a case inviting an expansion of the sphere of liability. The question in *McLoughlin* was whether a mother who did not witness a motor accident involving members of her family, and who did not come upon the scene of the accident, but who went straight to the hospital where the survivors were being treated, could recover for nervous shock. The House held unanimously in favour of the plaintiff. At its narrowest, *McLoughlin* extended the idea of the “immediate aftermath”; at its broadest, however, the case decided that the principle of reasonable foreseeability governed – so, if it was reasonably foreseeable that the plaintiff would suffer nervous shock, a duty of care was owed. Once again, the floodgates threatened to open and, just as the House subsequently acted to restrict liability for purely economic loss, so it acted to restrict liability for nervous shock.

In the case of nervous shock, the opportunity for cutting back on claims by secondary victims came with *Alcock v Chief Constable of the South Yorkshire Police* (1992). The claims in *Alcock* arose out of the disaster at the Hillsborough football stadium in April 1989 (on the occasion of an FA Cup semi-final between Liverpool and Nottingham Forest), where the negligence of the police in controlling access to the stadium resulted in many deaths and injuries to Liverpool supporters who were on the lower terraces at one end of the ground. Sixteen test cases went to trial in *Alcock* (with many more pending). Four of the plaintiffs witnessed the events first-hand at the stadium; the others saw the tragedy unfold on television or heard the radio transmission, or learnt about it later through conversation and the media. Fifteen of the plaintiffs were related to primary victims; the other was a fiancée. By the time that the appeals reached the House, ten cases remained – all were rejected. Setting out a revised legal framework for dealing with claims of this kind, the House emphasised that reasonable foreseeability was not sufficient and that the secondary victim had to be the right kind of person in the right place at the right time. Thus, in two of the most compelling of the appeals, a plaintiff who was in the seated upper part of the stand immediately above the terraces where the tragedy occurred and who lost two brothers, failed because (supposedly) the ties of love and affection between brothers are not normally particularly strong; and plaintiff parents who lost their son and who saw the scenes on live television, failed because scenes transmitted live on television could not normally be equated with direct sensory experience.

Understandably, the decision in *Alcock* attracted the obvious criticism that the lines of liability were drawn in an arbitrary and unduly restrictive way

SOURCE 6

Extract adapted from *Facing the Consequences, Understanding Tort Law*. 3rd Edition. Harlow, Sweet and Maxwell. 2005. pp 68–69.

Nervous shock usually figures in textbooks as a “special problem” of duty of care. It may be hard for the modern reader to understand why it should be a problem at all. The terms “trauma”, “traumatic injury”, “psychiatric illness” and “mental illness” are today well understood and accepted as recognised branches of medical practice. They exist. They can be treated. They should therefore be compensated like any other injury. The problems posed by nervous shock, a term redolent of Victorian feminine weakness and suggesting a certain scepticism about its very existence, owe much to tort law’s historical origins, which it has found difficulty in discarding. 5

The reasons why nervous shock poses problems for tort law are epitomised in the early case of *Bourhill v Young* (1942). A young woman alighting from a bus witnessed a gory traffic accident. She suffered a miscarriage and brought an action against the negligent driver claiming damages for nervous shock. It is true that some of the Law Lords did analyse the problem in terms of duty of care, reasoning that the particular claimant was insufficiently proximate because she was outside the area in which she might have suffered physical injury. This reasoning seems to suggest that psychiatric and physical injury differ in character. A different line of reasoning treats the damage as too remote, either because psychiatric injury to bystanders is not a foreseeable consequence of careless driving or perhaps because the Law Lords were not prepared to accept that fright could cause a miscarriage. In other words, there is a triangular relationship between duty of care, remoteness and causation, making nervous shock a general problem for tort law rather than merely a problem of duty. Underlying the legal analysis lie deeper practical problems. Nervous shock, the courts feel, is easily counterfeited and may produce a number of bogus claims. Once recognised, nervous injury may extend indefinitely: from those who are also physically injured; to bystanders present at an accident but not physically injured; to large numbers of people who experience traumatic events purely tangentially, like spectators round the world who witnessed the horrific events at the World Trade Centre on September 11, 2001 on television. Even if their claims are genuine, there may simply be too many. Like economic loss, the concept of psychiatric injury introduces the spectre of liability to “an indeterminate class of persons for indeterminate sums”. This is a problem of remoteness of damage rather than duty. 10 15 20 25 30

Faced with these problems, the courts preferred to move cautiously from a relatively negative base. They have set in place a number of restrictive tests, such as the rule that a claimant must be closely related to the primary victim of the accident or must have viewed the accident with “their own unaided senses” (*McLoughlin v O’Brian*, 1982). These tests allowed courts to exercise tight control over the development of liability in this area, barring the way to a flood of actions, many of them trivial. The consequence is, however, a confusing and contradictory case law. Based on no very rational principle, it is proving difficult to rationalise or dismantle. 35



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