

DEFENDANTS NEGLIGENCE CAUSING NERVOUS SHOCK OR PSYCHIATRIC INJURY TO PLAINTIFF/CLAIMANT: A CRITICAL APPRAISAL

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Abstract

In the common law jurisdictions including Malaysia, the tort of negligence is based on the existence of a duty of care owed by the defendant to the plaintiff/claimant. The law has developed over time to include many instances where duty of care exists. Psychiatric injury is an aspect of negligence concerned with mental harm which has been caused through the negligent act of another. The essential question to be asked is the degree of proximity which is required when a person has suffered psychiatric damage as a result of the defendant's negligent act. Initially the plaintiff could only succeed if he was also within the range of physical impact, i.e. only the 'primary' victim could sue. Later liability was extended to secondary victim. The appropriate test became foreseeability of the shock, but the problem is when shock is foreseeable? It is suggested the court in fact created 'sub-rules' or guidelines which indicated the kind of cases where proximity in the legal sense would exist. In *Alcock v Chief Constable of South Yorkshire* [1991] WLR 1057, the House of Lords appears to have adopted a compromise position whereby the test is one of 'foresight', but one where foresight has a coded meaning. So where the plaintiff has suffered psychiatric damage the test of proximity which is required to establish a duty of care is 'foresight' as determined in the light of the relevant guidelines, as to whether victim is the primary victim. The paper aims to give a critical appraisal of the unsatisfactory state of the law particularly in the case of secondary victim, suggesting reform in the light of many criticisms by leading authorities.

Keywords: Psychiatric Injury, Foreseeability, Primary Victim, Secondary Victim

1. INTRODUCTION

The tort of negligence is based on existence of duty of care by the defendant to the plaintiff/claimant, breach of that duty of care and damage suffered by the plaintiff/claimant by that defendant's breach of duty of care. The damage sustained must have been reasonably foreseeable and not too remote. The law has developed over time to include many instances where a duty of care exists. One of the instances, the subject matter of this paper, are claims for nervous shock or now according to modern usage psychiatric injury.

Nowadays, claims for harm or injury, which are not the result of physical injury are dealt with separately from the claims for ordinary physical damage. Physical damage caused by negligence will be limited to those within the range of the harmful event, but psychiatric harm may affect a wide range of persons beyond the direct victim of negligent conduct. Thus, this area of negligence has been the subject of uncertain development. Accordingly, the extent to which liability has been imposed has widened or restricted according to the state of medical knowledge, that is, psychiatric medicine and the development of psychiatric disorders

has developed dramatically over the past century. The concern expressed in recent years over the soldiers who were executed in First World War being a graphic example of this. Policy considerations on the part of the judges, particularly the 'floodgates' mantra, that to impose liability on a particular situation may lead to tsunami of claims and so should be avoided whatever the justice of the case; this had the effect of operating particularly harshly on secondary victims.

So looking back, actions failed in the last century for three main reasons: (i) because of the state of medical knowledge, psychiatric illness or injury was not properly recognized and so there could be no duty, if the type of damage concerned was not recognized; (ii) the fear that a person making such a claim could actually be faking symptoms; and (iii) finally, there was the floodgates' argument, that once one claim was accepted, it will lead to a multitude of claims. So in earlier century case, *Victoria Railway Commissioners v Coultas* (1888) 13 App Cas 222, nervous shock resulting from an involvement in a train crash did not give rise to liability, not least because of the floodgates' argument. So the principle to be distilled is that even from the start there were two aspects to determining whether liability should be imposed; the injury alleged must conform to judicial attitudes of what constitutes nervous shock, i.e. a recognized psychiatric disorder, and then the person claiming to have suffered nervous shock must fall into a category accepted by the courts as being entitled to claim.

It is useful to pause and clarify the nature of nervous shock, psychiatric injury and the type of recoverable damage. The answer is: **the claims must involve an actual, recognized psychiatric condition capable of resulting from the shock of the incident and recognized as having long-term effects.** The court will not impose liability for example when a couple became trapped in a lift as a result of negligence and suffered insomnia and claustrophobia after they were rescued, *Reilly and Merseyside Regional HA* [1994] 23 BM 2R26.

Psychiatry is now well advanced and in modern times conditions such as Post Traumatic Stress Disorder, Depression, and Acute Anxiety Syndrome would be recognized. However, the courts would be reluctant to allow a claim for grief and sorrow or distress or fright, fear or mental anguish, as these states are something which is expected to be put up by a person with a customary phlegm or normal fortitude, see *Hinz v Berry* [1970] All ER 1084 *Jub'il bin Mohamaed Taib Taral v Sunway Lagoon Sdn Bhd* [2001] 6 MLJ 699, *Thiruvannamali a/l Alagirisami Pillai Lwn Diner's Club (M) Sdn Bhd* [2007] 1 MLJ 240. Because, problems like grief, distress fright and fear are common problems the periodically we all suffer from.

A more pragmatic approach was taken in two cases: In *Tredget v Bexley HA* [1994] 5 Med LR 178, the parents of a child born with serious injuries following medical negligence and then dying two days later were allowed to claim for nervous shock, the court holding that they did indeed suffer from psychiatric injuries, despite the defendants' argument that their condition was no more than profound grief. And in *Vernon v Bosley* No. 1 [1997] 1 All ER 57 559, courts have been prepared to accept a claim that is partly caused by grief and partly be severe shock of the moment. The father had witnessed his children being drowned in a car negligently driven by their nanny. His claim was successful and he recovered damage for nervous shock that was held to be partly the result of pathological grief and bereavement, but partly also the consequence of the trauma of witnessing the events.

2. THE DEVELOPMENT OF LIABILITY: BRIEF HISTORICAL CONSPECTUS

Originally, claims were first allowed essentially on the ground of foreseeability of a real and immediate fear of real danger, so that the class of possible plaintiffs was at first very limited. The seminal case was *Dulieu v White Sons* [1901] 2 KB 669, where the court accepted a claim when a woman suffered nervous shock after a horse and van that had been negligently driven burst through the window of a pub where she was washing glasses. **She was allowed to recover because she had been put in fear for her own safety.**

This limitation was later widened to include a claim for nervous shock suffered as a result of witnessing traumatic events involving close family members and therefore fearing for their safety In *Hambrook v Stokes Bros* [1925] 1 KB 141, a woman was allowed to recover damages for nervous shock when she saw a runaway lorry going downhill towards where she had left her three children, and then heard that there had indeed been an accident involving a child. The court disapproved the strict test in *Dulieu v White* and opined that it would be unfair not to compensate a mother who had feared for her own safety. And in *Doolley v Cammel Laird & Co* [1951] 1 Lloyd's Rep 271, where a crane driver successfully claimed for nervous shock when he saw a load fall and thought that workmates underneath would have been injured. One restriction on

this development was to prevent a party from recovering who was not within the **area of impact** of the event. So in *King v Phillips* [1953] 1 QB 429, a mother suffered nervous shock when from 70 yards away she saw a taxi reverse into her small child's bicycle and presumed him to be injured. Her claim failed because the court's view was that she was too far away from the incident and **outside the range of foresight** of the defendant. In *Bourhill v Young* [1943] AC 92, the House of Lords introduced an alternative test to the **area of impact test**, to whether the plaintiff/claimant falls within the '**area of shock**'. In *Bourhill*, a pregnant Edinburgh fishwife claimed to have suffered nervous shock after getting off a tram, hearing the impact of a crash involving a motorcyclist and later seeing blood on the road, after which she gave birth to a stillborn child. The House of Lords held that, as a stranger to the motorcyclist, she was **outside the area of foreseeable shock**, and her claim failed.

The same principle of reasonable foresight has also allowed for recovery for nervous shock claims even where the principal damage was to property, rather than involving injury to or the safety of a person. So in *Attia v British Gas* 1987 3 AILER 465, a woman who witnessed her house burning down when she arrived home was able to successfully claim for nervous shock. She was within the area of impact. The claim was said to be within the reasonable foresight of the contractors who negligently installed her control heating, causing the fire.

Traditionally, case law clearly recognized that a rescuer could recover when he suffered nervous shock – for **danger invites rescue**. So in the seminal case of *Chadwick v BRB* [1967] 1 WLR 912, when two trains crashed in a tunnel, a man who lived nearby was asked because of his small size to crawl into the wreckage to give aid and injections to trapped passengers. He successfully claimed for the anxiety neurosis he suffered as a result. This was largely **explained that he was the primary victim, at risk to himself in the circumstances**. In *Hale v London Underground* [1992] ii BMLR 81, a fireman was able to claim successfully for Post Traumatic Stress Disorder that he suffered following the King's Cross fire in central London, though bystanders who suffered shock at the scene of disasters will not be held successful. See for example *McFarlane v EE Caledonia* [1994] 2 All ER, where a person who helped to receive casualties from an oil rig fire failed in his claim because he was classed a mere bystander rather than a rescuer at the scene.

It can be clearly seen that the tests developed in the cases cited above **involve proximity of the plaintiff in time and space to the negligent act or the closeness of the relationship with the party who is present**. The widest point of expansion of liability allowed for recovery when the plaintiff was not present at the scene but was at the **immediate aftermath**. Inevitably, 'the meaning of immediate aftermath' was open to interpretation based on policy. In the landmark case of *McLoughlin v O'Brien* [1982] 2 ALL ER 298 HL, a woman was summoned to a hospital about an hour after her children and husband were involved in a car crash. One child was dead, two were badly injured, all were in shock and they had not yet been cleaned up. The House of Lords held that since the relationship with the victims were sufficiently close, and the woman was present at the **immediate aftermath** she could claim. Lord Wilberforce identified a **three-part test for secondary victims**. This was approved later by the House of Lords in *Alcock v Chief Constable of South Yorkshire* (1992) 4 All ER 907.

3. RESTRICTIONS ON THE SCOPE OF THE DUTY

In *Alcock*, a seminal case, the House of Lords reviewed all aspects of the duty. The 'floodgates' argument, was clearly a prominent feature of their deliberations and the House identified a fairly restrictive set of circumstances in which a claim for nervous shock might succeed. It is this case that created the Primary/Secondary victim dichotomy – when deciding when to allow claims for nervous shock. In this case, ten plaintiffs alleging nervous shock arising out of the notorious Hillsborough Stadium disaster sued the police authority in charge of the incident. Nine were relatives of primary victims, one the fiancée of the primary victim. None of the plaintiffs were spouses or parents of the primary victims. The House of Lords refused all the claims and identified the factors important to consider in determining whether a party might recover.

These were: the proximity of the relationship with a party who was the victim of the incident – a successful claim would depend on the existence of close tie of love and affection with the victim, or the presence at the scene of a rescuer; the proximity in time and space to the negligent incident – there could be a claim in respect of an incident or the immediate aftermath that was witnessed on experienced directly, there could be none when the incident was merely reported; and the cause of the nervous shock – the court accepted that this must be the result of witnessing or hearing the horrifying event or the immediate aftermath. Lord Ackner

identified these restrictions as follows: Because “shock” in its nature is capable of affecting such a wide range of persons, Lord Wilberforce in *McLoughlin v O'Brian* [1983] concluded that there was a real need for the law to place some limitation upon the extent of admissible claims and in this context he considered that there were three elements inherent in any claim.

3.1 The Class of Persons Whose Claims Should Be Recognized

Lord Wilberforce, contrasted the closest of family ties - parent and child and husband and wife - with that of the ordinary bystander. As regards [the former] the justifications for admitting such claims is the presumption, as being rebuttable, that the love and affection normally associated with persons in those relationships is such that a defendant ought reasonably contemplate that they may be so closely and directly affected by his conduct as to suffer shock resulting in psychiatric illness. While as a generalization more remote relatives and friends can reasonably be expected not to suffer illness from the shock, there can well be relatives and friends whose relationship is so close and intimate that their love and affection of the victim is comparable.

3.2 The Proximity of the Plaintiff to the Accident

It is accepted that the proximity to the accident must be close both in time and space. Direct and immediate sight or hearing of the accident is not required. It is reasonably foreseeable that injury by shock can be caused to a plaintiff, not only through the sight or hearing of the event, but of its immediate aftermath.

3.3 The means by which the shock is caused.

Lord Wilberforce concluded that the shock must come through sight or hearing of the event or its immediate aftermath. The case then identifies for the future the classes of plaintiffs who will be successful and those who will not. Primary victims – present at the scene of the shocking event and either injured or at risk of injury. Secondary victims – present at the scene or its immediate aftermath and with a close tie of love and affection to the primary victim and having witnessed or heard the traumatic event with their own unaided senses. It was also considered that secondary victims watching an event on live television that contravened broadcasting standards in relation to close up shots, etc. might claim from the broadcasting authority.

4. THE PRIMARY/SECONDARY VICTIM DICHOTOMY

Primary victims traditionally, included those who were present at the scene and may suffer physical injury or when their own safety was threatened. This was the case in *Dulieu v White* [1901] 2 KB 669, where the woman could have been hurt by the horse coming threw the glass window, and did in fact suffer a miscarriage as a result of the defendant's negligence. The primary victim need not suffer any physical injury. It is sufficient that he is present at the event causing the shock and is at risk of harm. As in the Malaysian case of *Zainab binti Ismail v Marimuthu* [1955] 21 MLJ 22, where the mother saw her daughter severely injured by the defendant negligently knocking her daughter. Neither will it matter that the primary victim is more susceptible to shock: see *Brice v Brown* [1984], All ER 997. This contrasts with secondary victims who are compared with ‘a man of ordinary phlegm’, and will not be compensated if they are more likely to suffer psychiatric illness.

For example, in a recent case *Page v Smith* [1996] 3 All ER 272, Page and Smith collided in a car accident which was wholly Smith's fault. Page was physically unharmed, but subsequently suffered a recurrence of a pre-existing condition of myalgic encephalomyelitis (ME) as a result of the trauma of the incident. The House of Lords held the defendant liable for the psychiatric injury caused to the plaintiff. Lord Lloyd identified the clear distinction between primary and secondary victims. **“In claims by secondary victims the law insists on certain control mechanism, in order as a matter of policy to limit the number of potential victims. Thus the defendant will not be liable unless psychiatric injury is foreseeable in a person of normal fortitude. These control mechanisms have no place where the plaintiff is the primary victim”.**

5. SECONDARY VICTIMS

These are people who are not primary victims of the incident but who are able to show a close enough tie of love and affection to a victim of the incident and who witnessed the incident or its immediate aftermath at close hand. The probable limits of this are in *McLoughlin v O'Brian Supra*. In *Alcock*, the judges were

reluctant to allow claims because of lack of both proximity in time and space to the incidents in the football stadium, and turned down claims from people who had identified bodies in the mortuary some time after the events of the match.

It appears that the courts have engaged in some fairly fine distinctions as to what can acceptably be called the '**immediate aftermath**', in a later case *Taylor v Somerset HA* [1993] 4 Med LR 34 – the plaintiff's husband suffered a fatal heart attack while at work. She was told only that he had been taken to the hospital and when she arrived at the hospital she was told that he was dead. She was so shocked that she would not believe he was dead until she identified the body in the mortuary. She latter suffered psychiatric illness and claimed against the hospital. Even though she was at the hospital within an hour, he action failed, because, the court held that the actual purpose for her visit was to identify the body, so that it was nothing to do with the cause of his death. Rescues may of course be primary victims and at risk in the circumstances of the incident causing the nervous shock. Professional rescuers have been treated as primary victims, see *Hale v London Underground*.

But the question of who qualifies as a rescuer and will be able to recover damages has been subject to some uncertain development. And there was surprisingly no liability where a miner saw a close colleague crushed in a roof fall that was the fault of the employers, and tried unsuccessfully to resuscitate him - see *Duncan v British Coal* [1990] 1 All ER 540. It appears that the House of Lords appear to now be taking a more restrictive stance to claims by members of the emergency services for psychiatric injury suffered while dealing with the aftermath of a disaster in the course of their duties. A rescuer will only be able to claim when he is a genuine 'primary victim'.

In *White v Chief Constable of Sough Yorkshire* [1998], 1 All ER 1 HL, Police Officers who claimed to have suffered Post Traumatic Stress Disorder following their part in the rescue operation at the Hillborough Football Stadium disaster were denied a remedy. The reason seems to be that they did not actually put themselves at risk, and that public policy prevented them from recovering when relatives of the deceased in the disaster could not. As a more recent alternative the courts have been willing to accept that a rescuer can also claim as a secondary victim. Though this will only be possible where the rescuer conforms to all of the requirements for secondary victims laid out in *Alcock*. It is worthwhile noting that, the *McLoughlin v O'Brian* decision and the *Alcock* formula had been judicially received expressly or sub-silently by the Malaysian Courts in *Jub'il bin Mohamed Taib Taral v Sunway Lagoon* [2001] 6 MLJ 669, and adverted to in *Thiruvannamali a/l Alagirisami Pillay v Diner's Club (M) Sdn Bhd* [2007] 1 MLJ 240.

6. CONCLUSION

It is clear that recovery for psychiatric injury (nervous shock) for a secondary victim should also be recognized for claim. It is strongly urged to remove the requirements for secondary victims to show proximity in time and space, and that the events have been witnessed by the plaintiff's own unaided senses. The injury should be accepted even where it is not caused by a sudden traumatic event. These proposals are much fairer and it is fervently submitted the Malaysian judiciary should seriously consider them.

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