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Nervous Shock and Tortious Liability

JAMES A. RENDALL*

Writing in 1925,1 Mr. Hugh D. Parry began an article on nervous shock in the following fashion:

Theoretically, there seems to be no satisfactory ground for withholding redress for wrong inflicted upon a person merely because that wrong assumes the form of an injury to the nervous system. A man's nerves are as much a part of his "person" or "personality" as are his limbs or his reputation. They constitute, therefore, an appropriate subject for legal protection. There is, however . . . no doubt that . . . cases may occur in which a plaintiff cannot recover for nervous shock alone, although had the shock assumed perhaps a milder but more apparent form of physical injury, there would be an indisputable right to recover.

. . . this state of the law . . . we may venture to call naturally transitional rather than altogether unsatisfactory.

Fourteen years later an Australian court described the law of nervous shock as being "in a state of development".2

Judge Magruder3 has illustrated his argument that nervous shock is in an intermediate stage of development by reference to the fact that a defendant is nearly always held liable to a plaintiff for nervous shock injury to the latter arising from the former's deliberate conduct,4 although liability is more difficult to establish when the nervous shock injury arises from defendant's negligent conduct. He says that the first step in independent recognition of an interest is to secure it against conduct purposely invading it.

That this area of the law is still in a stage of development is not disputed; indeed, any other conclusion would be dismaying. For although it may be true that the present state of the law is not "altogether unsatisfactory" it is most certainly far from being altogether satisfactory. This writer, at least, could never find it satisfactory so long as plaintiff's recovery depends upon locating himself within the "ambit of physical risk"; this test was applied, in effect, as recently as 19535 by a court which included Lord Denning.

*Mr. Rendall is in the third year at Osgoode Hall Law School.

1 (1925), 41 L.Q.R. 297.
3 Magruder, Mental and Emotional Disturbances in the Law of Torts (1936), 49 Harv. L. Rev. 1033.
It is the present thesis that the development of this area has been chiefly impeded by the singularly difficult nature in nervous shock situations of two factors common to all torts cases, i.e., (1) The Proof Factor and (2) The Duty Factor.

The requirement that plaintiff prove his injury and the causal connection with the alleged default is not novel. However, the plaintiff seeking recovery for nervous shock injury faces more than usual difficulties of proof. The injury itself is likely to be imperceptible to most persons (and most jurymen), and the causal connection even more obscure. Of paramount importance is expert evidence which is not in universal favour even today. It is easy to understand the slow development of nervous shock when one considers the much more sceptical view taken of medical evidence by courts fifty years ago and the relatively undeveloped state of this area of medicine at the time. A factor which weighed heavily with courts was the possibility of faking nervous shock injury. This kind of thinking can be seen behind the judgment in one of the early cases, Victorian Railways Commissioners v. Coultas, where Sir Richard Crouch said:

The difficulty which now often exists in case 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 (i.e., if recovery were to be allowed for nervous shock injury). That modern courts are still unnerved by the prospect of "open doors" and simulated injuries is underlined in the recent Texas case of Harned v. E-Z Finance Co. where the court outlined four considerations against allowing recovery for nervous shock injury, two of the considerations being as follows:

- a 'wide door' might thereby be opened not only to fictitious claims but to litigation over trivialities and mere bad manners as well; and, finally, since mental anguish can exist only in the mind of the injured party, not only its extent but its very existence can be established only by the word of the injured party ....

Despite their fear of faked injury, courts today are accepting medical evidence as to the extent of such injuries and the causal connection with defendant's conduct. In one case the court awarded a female plaintiff damages for nervous shock injury which resulted from witnessing an assault on her husband some three years prior to the trial, the plaintiff not being present at the trial at any time. The court accepted medical evidence that she was not fit to attend the trial.

The difficulty involved in the Proof Factor is, then, gradually being overcome; the Duty Factor remains a problem. Again, this

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6 [1888] 13 A.C. 222.
7 Id. at 226.
8 (1953), 151 Tex 641; 254 S.W. (2d.) 81, 86. See also Gardner v. Cumberland Telephone Co., 207 Ky. 249; 288 S.W. 1108, 1110; cited in Harned case and Reed v. Ford, 129 Ky. 471; 112 S.W. 660; cited in Bartow v. Smith, 149 Ohio 301; 78 N.E. (2d.) 735.
factor is nothing alien to torts lawyers. To recover from defendant, it is usual that plaintiff must show the breach of duty by defendant. The problem of establishing the duty becomes more crucial when liability is sought to be based on conduct allegedly negligent. As noted earlier, the nervous shock cases do not present much difficulty when liability is sought to be attached to defendant’s deliberate conduct. Nor is it that the notion of a duty to avoid negligently causing nervous shock to other persons is universally rejected. Though many courts have been reluctant to come out flatly and say that there is a duty not to shock other persons, and a few courts have expressly rejected the idea of such a duty, the feeling has grown steadily that when one person has been clearly “careless” (if an act may be so characterized apart, entirely, from any duty) and another person has thereby suffered emotional or mental injury there should be, at least in some situations, compensation of the latter by the former. Immense difficulty has been encountered, however, in attempting to define the boundaries of the area. The problem of establishing and defining the duty will be discussed more fully at a later stage; suffice it to say here that the courts have performed the usual gyrations in leaping back and forth between the concepts of foreseeability and directness of damages with a special feature thrown in called the “area of physical risk”.

When the courts try to deal with the problem on the basis of “directness” or “remoteness” of damage they become mired in the familiar bottomless pit of “proximate”, “immediate” and numberless other causes. Their attempts to deal with it on the basis of foreseeability have been more encouraging but they commonly credit defendants with remarkably limited powers of foresight. Prof. Goodhart has written an article aptly entitled Emotional Shock and the Unimaginative Taxicab Driver, comment enough in itself probably, but to which one might add that in view of their remarkable lack of foresight it is small wonder that defendants in nervous shock actions get themselves into such difficulty.

The “area of physical risk” is a concept which appears to have been devised in order to widen defendant’s duty at a time when there was great doubt about the existence of any right to recover for nervous shock negligently inflicted. Although the courts have consistently taken the stand that liability for nervous shock is not derivative, still the early cases show that if plaintiff could prove a physical contact he could recover for all the damage sustained including emotional injury, which surely made nervous shock liability at least parasitic. Gradually this was expanded to say that if defendant could foresee that plaintiff might have been injured by physical contact, then he will be liable for all damage suffered, including

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10 See footnote 4.
emotional injury, even though there was no physical contact in fact.\textsuperscript{12} This is the “ambit of physical risk” test which produces extremely arbitrary and, it is submitted, ridiculous results in its application.

Thus, in one of the leading cases, that fortunate unfortunate, Mrs. Hambrook,\textsuperscript{13} being in the street, was therefore within the ambit of physical risk and the plaintiff could recover though in fact the runaway truck stopped some distance away from her and “in any case she would have had ample time to step aside into a shop into a position of safety”.\textsuperscript{14} On the other hand, in two of the other classics of nervous shock jurisprudence, Mrs. King,\textsuperscript{15} was at an upstairs window and Mrs. Waube\textsuperscript{16} was apparently in her house; in both cases plaintiff was denied recovery as the two mothers were outside the magic “ambit”. It is interesting to observe that in each of these three cases a child was injured in the street by a motor vehicle and in each case the action was brought to recover for resultant emotional injury to the child’s mother. It is more remarkable that the Hambrook case was the only one of the three in which recovery was given and was also the only one in which the mother did not actually see the accident. This oddity becomes the more baffling in light of Bankes L.J.’s remarks\textsuperscript{17} that the shock must result from what the mother saw or realized by her own unaided senses. The other factor distinguishing the Hambrook case is that Mrs. Hambrook was, technically, within the “ambit of physical risk”. The major motive for this article is a conviction that this is a singularly inadequate distinction on which to base compensation. Consideration will be given to the question whether it would be better to abolish recovery for nervous shock injury entirely; failing such a retrograde step, examination will be made of the tests which can be applied to determine when recovery will be allowed. In the Waube case the court said:\textsuperscript{18}

The answer to this question cannot be reached solely by logic, nor is it clear that it can be entirely disposed of by a consideration of what the defendant ought reasonably to have anticipated as a consequence of his wrong. The answer must be reached by balancing the social interests involved . . . .

The “balancing process” is not denied; indeed, it is the whole basis of tort recovery. But application of the “ambit of physical risk” test certainly does not automatically provide the balance. All it does is provide a convenient and relatively simple way of limiting defendant’s liability which could, conceivably, be extended in this area so widely as to place far too onerous a duty on defendants. I am naive

\textsuperscript{12} This was the reasoning behind Du Neu v. White and Sons, [1901] 2 K.B. 669 and Hambrook v. Stokes Bros., [1925] 1 K.B. 141.
\textsuperscript{13} Hambrook v. Stokes Bros., [1925] 1 K.B. 141.
\textsuperscript{14} Id. at 142.
\textsuperscript{16} Waube v. Warrington (1935), 216 Wis. 603; 258 N.W. 497.
\textsuperscript{17} [1925] 1 K.B. 141, 152.
\textsuperscript{18} 258 N.W. 497, 501.
enough to believe that logic can provide a solution at least better than this test.¹⁹

**THE CASE LAW:**

Though the cases date from as far back as 1861 they are not particularly numerous. The English cases are more numerous than the Canadian and provide the best picture of the development of the law in this area.

**ENGLISH CASES:**

_LYNCH v. KNIGHT²⁰_ provides one of the earliest comments on liability for mental damage.

Mental pain or anxiety the law cannot value and does not pretend to redress, when the unlawful act complained of causes that alone; though where a material damage occurs, and is connected with it, it is impossible a jury, in estimating it, should altogether overlook the feelings of the party interested.

This comment, however, was in the nature of obiter dicta; the case actually involved an action for defamation.

_VICTORIAN RAILWAYS COMMISSIONERS v. COULTAS²¹_ is the old case which actually forms the starting point for the case law on nervous shock. That was the case in which a railway’s servant negligently opened the crossing gates and invited the plaintiffs to drive across the railway tracks at a time when a train was approaching the crossing. The train did not collide with the plaintiffs’ vehicle but passed very close to it at high speed. Female plaintiff suffered a severe nervous shock from fright and subsequently was ill for a period of time.

The Privy Council reversed the result reached in the lower Australian courts which had awarded damages to the plaintiffs against the railway.

Two of the questions reserved were as follows:

1. Whether the damages awarded by the jury to the plaintiffs, or either of them, are too remote to be recovered?

2. Whether proof of “impact” is necessary in order to entitle plaintiffs to maintain the action?

²¹ 1888, 13 A.C. 222.
The Privy Council specifically refrained from answering the second question. However, their decision on the first question appears also to have answered the second.

Damages arising from mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot under such circumstances, their Lordships think, be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gate-keeper.\(^{22}\)

Then follows the passage cited above\(^{23}\) which warns of the danger of opening "a wide field for imaginary claims".

Although the court declined to say that there could be no recovery without impact the case has consistently been taken to stand for that proposition in view of the words used in answering the first question. In that connection it may be noted that the court decided the case strictly on the basis of "remoteness" of damage which was the prevailing technique of the time for limiting defendants' liability.

**Smith v. Johnson & Co.**, is an unreported decision of the English Queen's Bench Division in January, 1897; the case has been much cited in later decisions on nervous shock.\(^{24}\) There it was held that where a man was killed in plaintiff's sight by defendant's negligence, plaintiff's illness from the shock of seeing another person killed was too remote a consequence of the negligence.

**Dulieu v. White & Sons**\(^{25}\) was one of the first cases awarding compensation for nervous shock injury negligently inflicted. Plaintiff, who was pregnant at the time, was behind the bar in her husband's public house when defendants' servant negligently drove a van right into the room. Plaintiff suffered severe shock which caused her to be ill and to give premature birth to an idiot child; she was awarded compensation by the court of King's Bench though there was no actual physical impact. Phillimore J. distinguished the **Coultas** case by postulating a different duty depending on whether plaintiff was in the street or in her own home.

It is not certain that as between people travelling on highways there is any duty so carefully to conduct yourself as not to frighten others. It is a duty so carefully to conduct yourself or your vehicle as not to cause collision or some other form of direct physical damage.\(^{26}\)

Plaintiff, however, was in her own home "where she had a right, and on some occasions a duty to be".\(^{27}\) Without really defining the duty owed to a person in her own home, Phillimore J. simply concluded that there was a breach of duty to the plaintiff for which she could recover.

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\(^{22}\) Per Sir Richard Crouch at p. 225.

\(^{23}\) Supra, p. 292, see footnote 7.

\(^{24}\) See Wilkinson v. Downton (1897), 2 Q.B. 57, 61.

\(^{25}\) [1901] 2 K.B. 693.

\(^{26}\) Id. at 684.

\(^{27}\) Id. at 685.
It is interesting to note that he rejected the “remoteness” argument in these words:

the difficulty of those cases is to my mind not one as to the remoteness of the damage, but as to the uncertainty of there being any duty.

Kennedy J. agreed in rejecting the remoteness argument and he also rejected the argument, advanced in the Coultas case and many others, which would oppose giving recovery for nervous shock on the grounds of “public policy”, a judicial euphemism to express fear of unfounded claims. He said:

I should be sorry to adopt a rule which would bar all such claims on grounds of policy alone, and in order to prevent the possible success of unrighteous or groundless actions. Such a course involves the denial of redress in meritorious cases, and it necessarily implies a certain degree of distrust, which I do not share, in the capacity of legal tribunals to get at the truth in this class of claim.

Kennedy J. agreed with Phillimore J. in awarding compensation to plaintiff but he did not agree that a different duty was owed because plaintiff was in her home rather than in the street.

The legal obligations of the driver of the horses are the same, I think, towards the man indoors as towards the man out of doors; the only question here is whether there is an actionable breach of those obligations if the man in either case is made ill in body by such negligent driving as does not break his ribs but shocks his nerves.

Kennedy J. rejected out of hand the proposition that there can be no recovery for injury produced by fright simply because of the absence of accompanying impact as being “a contention both unreasonable and contrary to the weight of authority”. It is conceded that the authorities on which he relies are not all entirely appropriate nor particularly compelling of his argument; he does cite a couple of Irish cases which are on point and which are contrary to the Coultas case. Having decided that there could be recovery for nervous shock caused without impact, he then added a qualification which became known as “Kennedy J.’s limitation” and which has, in later cases, proven a major obstacle to wider development of liability in this sort of case.

It is not, however, to be taken that in my view every nervous shock occasioned by negligence and producing physical injury to the sufferer gives a cause of action. There is, I am inclined to think, at least one limitation. The shock, where it operates through the mind, must be a shock which arises from a reasonable fear of immediate personal injury to oneself. A has, I conceive, no legal duty not to shock B’s nerves by the exhibition of negligence towards C, or towards the property of B or C.

Thus was born the notion of the “ambit of physical risk” that has so plagued later courts which, instead of baldly rejecting the

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28 Id. at 685.
29 Id. at 681.
30 Id. at 672.
31 Byrne v. Great Southern and Western Railway Co. of Ireland, Unreported and Bell v. Great Northern Railway of Ireland (1890), 26 L.R. Ir. 428.
32 [1901] 2 K.B. 669, 675.
device in favour of one more in keeping with advancing philosophies on recovery for nervous shock, have preferred to apply it to exclude recovery where they think fit and to do mental gymnastics to bring plaintiff into the "ambit" in cases where they wish to give recovery.

One other aspect of Kennedy J.'s judgment merits consideration. He rejected the argument that plaintiff should be denied recovery when it is shown that she is particularly susceptible of emotional upset (as when she is pregnant) and would probably not otherwise suffer injury, at least to the same extent. To support his position he cites the doctrine of the "thin-skulled man"; about this doctrine and its application to this area of tort liability we shall have more to say presently.

**Hambrook v. Stokes Bros.**[^33] followed the Dulieu case by some twenty-three years and provided the next step in the development of liability for nervous shock injury. In this case plaintiff's wife, again pregnant, escorted her children part of the way to school and then parted from them, they disappearing around the corner of the street. Moments later a runaway lorry came around the corner and crashed into a home. Plaintiff's wife immediately became upset by fear that the truck might have injured her children in its descent and ran toward the scene. From descriptions of a girl who was injured and a subsequent visit to hospital it was confirmed that her daughter had indeed been struck. Mrs. Hambrook was subsequently ill and after an operation for removal of the dead foetus, herself died.

The appeal to the King's Bench Division was based on alleged misdirection by the trial judge who instructed the jury that if his wife's shock resulted from fear for her children's safety rather than for her own, plaintiff could not recover. This direction appears to follow the law as enunciated in the Dulieu case by Kennedy J. The appeal was allowed, Sargant L.J. dissenting, and a new trial ordered. Bankes L.J. rejected Kennedy J.'s limitation while following the Dulieu case.

In my opinion the step which the court is asked to take, under the circumstances of the present case, necessarily follows from an acceptance of the decision in Dulieu v. White & Sons, and I think the dictum of Kennedy J., laid down in quite general terms in that case, cannot be accepted as good law applicable in every case.[^34]

Then Bankes L.J. proceeded to add his own limitation by saying that there would be recovery if

the shock resulted from what the plaintiff's wife either saw or realized by her own unaided senses, and not from something which someone told her, and . . . the shock was due to a reasonable fear of immediate personal injury either to herself or to her children.[^35]

Atkin L.J. agreed that the trial judge's charge was incorrect, but it is somewhat difficult to pinpoint his reasoning on the question of

[^33]: [1925] 1 K.B. 141.
[^34]: Id. at 151.
[^35]: Id. at 152.
the duty owed. From the following passage it will be seen that he contemplated a very wide duty on owners of motor vehicles:

The duty of the owner of a motor car in a highway ... is a duty to use reasonable care to avoid injuring those using the highway. It is thus a duty owed to all wayfarers, whether they are injured or not; though damage by reason of the breach of duty is essential before any wayfarer can sue.\footnote{Id. at 156.}

He then suggested that the breach of duty to all such wayfarers was established by showing that the truck was left unattended at the top of the hill. Having thus postulated a very wide duty towards users of the highway, Atkin L.J., further on in his judgment, dealt with the case quite apart from liability of and towards users of the highway.

The question appears to be as to the extent of the duty. ... If it were necessary ... I should accept the view that the duty extended to the duty to take care to avoid threatening personal injury to a child in such circumstances as to cause damage by shock to a parent or guardian then present, and that the duty was owed to the parent or guardian; but I confess that upon this view of the case I should find 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.\footnote{Id. at 158.}

Shortly before, Atkin L.J. had said: \footnote{Id. at 157.}

Personally I see no reason for excluding the bystander in the highway who receives injury in the same way from apprehension of or actual sight of injury to a third party. There may well be cases where the sight of suffering will directly and immediately physically shock the most indurate heart; and if the suffering of another be the result of an act wrongful to the spectator, I do not see why the wrongdoer should escape.

Then he went on to discuss the \textit{Smith v. Johnson & Co.} type of case and pointed out that the reason plaintiff in that situation cannot recover is that an attack on a third person is not a wrong to the spectator. Briefly, then, it is apparent that Atkin L.J. was prepared to extend the duty to cover parents or guardians who suffer injury from witnessing their children being hurt; this would seem to coincide with Bankes L.J.'s view. However, it was not necessary for Atkin L.J. to adopt this position in view of his decision that plaintiff could show a breach of duty as a user of the highway. It is interesting to note that both judges pointed out the unreasonable position reached by holding firmly to the idea that plaintiff could only recover if her injury resulted from fear for herself. Both used illustrations involving mothers crossing the street carrying or holding to their children and rejected the thought that the "non-natural" mother who fears only for herself should be compensated while the other, who fears only for her child, should fail to receive compensation.\footnote{See p. 151 and p. 157.}
Sargant L.J., in dissent, was content with the law as enunciated by the Dulieu case including Kennedy J.’s limitation. He was not prepared to concede liability for shock which results from witnessing injury to a stranger; nor was he prepared to concede liability in in-between cases where the plaintiff and third party bear some relationship to each other. It would be too difficult to decide, he said, what degree of friendship or relationship is critical.

It is only fair to note that the Hambrook case is open to so many criticisms that it might appear rather presumptuous to rely on it.

(i) in result, the case is only a decision to order a new trial;
(ii) the majority view represents the opinions of only two judges out of three;
(iii) Atkin L.J.’s reasons for judgment are somewhat difficult to determine with certainty;
(iv) in any event, there was an admission of negligence by defendant who defended on the ground that the damage was too remote;
(v) it is questionable whether plaintiff’s wife’s injury really did result from something she saw or realized with her own unaided senses. Sargant L.J. was of the opinion that it did not; he bolstered his opinion by reference to the evidence that the woman was concerned about her daughter solely, though all three children were out of her sight and equally likely to have been injured. This he took to be evidence that she was really upset by what witnesses of the accident told her.

Despite its shortcomings the Hambrook case has been given detailed consideration here because it has been much cited and much relied upon in the thirty-six years since it was decided.

OWENS v. LIVERPOOL CORPORATION40 took the development of nervous shock liability a step further. Plaintiffs were mourners at a funeral and close relatives of the deceased. The defendants’ servant drove a tram negligently so as to collide with the hearse and upset the coffin in full view of the plaintiffs, though only one of them saw the actual impact.

The plaintiffs recovered compensation for the nervous shock injury they sustained as a result of witnessing the overturned coffin.

The court adopted the view of the majority judgment in Hambrook and extended it to say that the right to recover for mental shock is not limited to cases where the shock results from apprehension as to human safety, though the court did concede that it might be harder to prove the mental injury where a “less important” matter was alleged as the basis of the injury.

It should be noted that the court did not discuss the question of the duty owed, but simply the question of recovery where the threat was to something other than human life. It may be questioned whether the court really meant to say that defendant owed a duty to plaintiffs not to upset the coffin. It would appear that the court was pursuing much the same line of reasoning as Atkin L.J. in Hambrook, i.e. the negligent driver is in breach of duty to all users

40 [1939] 1 K.B. 394.
of the highway and the only question to be determined is one of recovery for the particular injury suffered.

It should also be noted that the plaintiffs were not precluded from recovery because of their “peculiar susceptibility to the luxury of woe at a funeral”. The court cited the “thin-skulled man” doctrine which, as we saw, was also referred to by Kennedy J. in Dulieu.

HAY (OR BOURHILL) v. YOUNG\(^{41}\) arrived on the scene in 1943 in time to stem the tide which was rapidly expanding liability for nervous shock injury. The Dulieu case had firmly settled that there could be recovery for such injury suffered without actual impact so long as plaintiff was placed in fear of his personal safety. Hambrook expanded this to say that recovery could be had if plaintiff was placed in fear for the safety of himself or of his children. Finally, just four years before Bourhill, the Owens case had said that plaintiff could recover although he had been fearful for some lesser interest than a human life. All these cases were referred to by the House of Lords in their decision of the Bourhill case. The Owens case was mentioned only briefly and generally appears to have been rejected as going too far. The Dulieu case was approved, but without Kennedy J.’s limitation.

The Hambrook case got a mixed reception. It is somewhat difficult to determine just what gloss Bourhill puts on that case and in view of the difference in fact situations involved it might be incorrect to rely on such a gloss in any event. The Bourhill case, of course, involved another pregnant woman, a fishwife this time. She suffered nervous shock and a miscarriage as a result of hearing the noise of a collision of a motorcycle with a motor car and of seeing the deceased cyclist’s blood on the road afterward. The House of Lords held that while the cyclist had driven in a reckless manner there was no breach of duty as toward the fishwife and she could not recover for her injury. This is a clear denial of the wide principle advanced by Atkin L.J. in Hambrook that the driver of a motor vehicle owes a duty to all wayfarers in the highway.

Any attempt to ascertain carefully the reasons for the decision necessarily involves consideration of the various judgments given by the five law lords. Lord Thankerton applied a foreseeability test; he said defendant’s duty is to drive so carefully as to avoid injuring any persons whom he might foresee would be injured by his neglect. He conceded that the foreseeability test includes foreseeability of injury by shock. Though his lordship expressed a disinclination to accept Kennedy J.’s limitation as a conclusive test in all cases, he did, in fact, postulate a test which appears very similar when he said:\(^{42}\)

\[\ldots\] [the] test involves that the injury must be within that which the cyclist ought to have reasonably contemplated as the area of potential danger which would arise as the result of his negligence. \[\ldots\]

\(^{41}\) [1943] A.C. 92.

\(^{42}\) Id. at 98.
There is no indication in the judgment as to whether Lord Thankerton considered his own limitation to be similar to that of Kennedy J. Probably he did; if he thought of the “area of potential danger” as being an area within which plaintiff would be exposed to physical danger, as, for example, by being struck by flying objects, then the two limitations appear very similar although they are capable of different interpretations which might give substantially different results. The difference between the two is that Kennedy J.’s limitation requires that plaintiff actually be injured as a result of reasonable apprehension of danger to himself, whereas Lord Thankerton’s test simply involves (on this reading of it) that defendant foresee the risk of physical injury to plaintiff. If that risk is foreseeable then defendant will be liable even though plaintiff’s injury results from shock not suffered because of fear for personal safety. In this respect Lord Thankerton’s test would be wider than the older one. However, there is another factor which could tend to narrow it. As we remarked earlier, the courts used the test of foreseeability for a number of years in such a manner as substantially to restrict liability. They did this by crediting defendants with very retarded powers of foresight. What defendant might foresee as the area of physical risk might thus exclude a plaintiff who was placed in reasonable apprehension of his safety, depending upon how widely the courts would be willing to construe “reasonable apprehension”. There is another possible construction of Lord Thankerton’s limitation which would make it much wider. His “area of potential danger” can be read as including danger of nervous shock apart from physical risk. Application of such a test might permit recovery for the mother on the porch or at the upstairs window. Probably his Lordship did not intend this latter construction of his test.

Lord Russell of Killowen stated that he preferred the dissenting judgment in Hambrook. As to the test for liability, he said: 43

In my opinion [defendant’s] duty only arises towards those individuals of whom it may be reasonably anticipated that they will be affected by the act which constitutes the alleged breach.

This statement of the test is remarkable for its ambiguity. The word “affected” is quite wide enough to encompass nervous shock injury, but it appears from the rest of his judgment that Lord Russell contemplated that some physical risk was necessary. He emphasized that the plaintiff was behind the bus. It is true that at one point he referred to the fact that the plaintiff could not see the cyclist and he could not anticipate that she would be physically injured by the noise of collision. This comment suggests that Lord Russell contemplated liability for nervous shock from witnessing an accident but not for shock from hearing it. The rest of his judgment, however, gives no suggestion that he had reached this degree of refinement in his thinking on nervous shock.

43 Id. at 102.
Lord MacMillan declined to decide whether Kennedy J.'s limitation was correct, but he said it had a substantial body of authority to support it in Scotland. Sargant L.J.'s dissent in *Hambrook* he called "powerful". His Lordship rejected the view that the cyclist owed a general duty to all users of the highway; he also rejected the argument that once a breach by defendant is shown liability follows for all resultant injury. This argument, as he says, is based on the *Polemis* case; his Lordship preferred to apply the foreseeability test throughout. It is not clear, however, what the cyclist in *Bourhill* would be expected by Lord MacMillan to foresee. He says Young should have foreseen that his excessive speed might involve him in a collision.

But can it be said that he ought further to have foreseen that his excessive speed, involving the possibility of collision with another vehicle, might cause injury by shock to the appellant? This remark, considered in the light of his earlier comment that an action might lie for injury by shock sustained through the medium of the eye or the ear without direct contact, provokes speculation that he may have been thinking of a test involving foreseeability of nervous shock without any limitations as to "area of danger" or "apprehension for safety". However, Lord MacMillan then followed the same pattern of discussing the fishwife's position behind the bus and her admission that her shock did not arise from fear for her own safety and resolved the issue simply by saying that defendant would be unable to foresee any injury to plaintiff. He thus leaves us without any certainty about his test of foreseeability but with the vague feeling that it would involve foresight of physical harm.

Lord Wright approved the *Hambrook* decision and disapproved Kennedy J.'s limitation in *Dulieu*. He decided the case before him simply by saying that defendant could not foresee injury to plaintiff. The interesting part of his judgment deals with the "thin skulled man" doctrine. He suggested that plaintiff's injury was a function of her own peculiar susceptibility, she being eight months pregnant. Lord Wright made the point that a person suffering the tendency to bleed on very slight contact could not complain if he mixed with a crowd and suffered fatally from being brushed against. The question of liability, said his Lordship, is anterior to the question of the measure of the consequences.

It is here, as elsewhere, a question of what the hypothetical reasonable man, viewing the position, I suppose ex post facto, would say it was proper to foresee. What danger of particular infirmity that would include must depend on all the circumstances, but generally, I think, a reasonably normal condition, if medical evidence is capable of defining it, would be the standard.

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45 [1943] A.C. 92, 105.
46 Id. at 103.
47 Id. at 110.
What Lord Wright meant by this is a puzzle. If he meant to suggest that plaintiff could never recover for injury he would not have suffered but for a trait peculiar to himself then his Lordship would be denying the doctrine of the "thin skulled man". To do so does not appear to have been his intention as he conceded that once the wrong is established the wrongdoer must take his victim as he finds him. If his Lordship meant to establish the test of foresight of a "reasonably normal" plaintiff to be applicable specially to nervous shock cases one wonders why he should find it necessary to construct a special test for those cases. It is suggested that the answer to that question lies in a failure in nervous shock cases to separate the phenomenon from the damage. This is a matter which will be discussed later at some length. Briefly, the hypothesis being raised is that in the case of physical injury from impact it is easy to distinguish the tort from the injury it causes. In nervous shock cases this is very much more difficult and the tort is usually thought of in terms of the injury it causes. This may be illustrated by reference to the well known "thin skulled man". If he is negligently knocked down we recognize immediately without more that there is a tort and that the tortfeasor will be liable for the injury he has caused. When the unusually delicate victim dies of brain damage we say that defendant must take his victim as he finds him. It is submitted here that it would be quite otherwise if, as in nervous shock, the tort were to be defined in terms of the injury. If the tort were considered as causing concussion damage to the brain and if defendant's duty were to conduct himself so carefully as not to cause concussion damage to human brains, let us consider what test would be applied in determining whether he was in breach of his duty. Supposing the foreseeability test, it is submitted that the problem would be identically the same as the one facing Lord Wright; i.e. in applying his mind to the foreseeable risk defendant would have to cast that risk with reference to his foreseeable victim. It is submitted that the foreseeable victim would reasonably be defined as a man of normal susceptibility to concussion damage of the brain and thin skulled men would then be denied any special recovery. Such, it is submitted, is the result of defining the tort in terms of the injury in which it results.

The last judgment in Bourhill was given by Lord Porter. He decided that plaintiff could not recover as she had not shown the cyclist should have foreseen that she would be placed in fear of her own safety or of the safety of anyone related to her. At one point it appeared that he also was denying the "thin skulled man" doctrine when he said:

It is not every emotional disturbance or every shock which should have been foreseen. The driver of a car or vehicle even though careless, is entitled to assume that the ordinary frequenter of the streets has sufficient fortitude to endure such incidents as may from time to time be expected to occur in them, including the noise of a collision and the sight of injury to others, and is not to be considered negligent towards one who does not possess the customary phlegm.

48 Id. at 117.
Further on in his judgment Lord Porter cited cases which spoke of "reasonable" or "unreasonable" fear and that it is worth considering whether, rather than denying the extension of the "thin-skulled man" doctrine to nervous shock cases, Lord Porter was, wittingly or unwittingly, making the rather refined distinction between unusual susceptibility to nervous upset and a susceptibility to unreasonable fears. This distinction will be raised again later.

*KING v. PHILLIPS* is another, and more recent, decision which helped to stall the development of liability for nervous shock injury. In that case a taxicab driver backed his vehicle without looking and ran into a boy on a tricycle injuring him slightly. The boy's scream attracted his mother's attention and she, looking out an upstairs window seventy or eighty yards distant, saw the tricycle under the car and was unable to see the boy. She suffered injury from nervous shock.

Singleton L.J. said:

I find it difficult to draw a distinction between damage from physical injury and damage from shock; prima facie, one would think that, if a driver should reasonably have foreseen either, and damage resulted from the one or from the other, the plaintiff would be entitled to succeed.

It is difficult to be certain from this passage whether he was thinking in terms of an "ambit of physical risk"; apparently he visualized some such boundary for he adopted the language of the trial judge who had remarked:

The mother, in my judgment, was wholly outside the area or range of reasonable anticipation.

Singleton L.J. said:

Can it be said that the driver (or any driver in the world) could reasonably or probably anticipate that injury—either physical or from shock—would be caused to the mother, who was in No. 12 Birstall Road, when he caused his taxicab to move backwards a short distance along Greenfield Road without looking to see if anyone was immediately behind? There can surely be only one answer to that question. The driver owed a duty to the boy, but he knew nothing of the mother; she was not on the highway; he could not know that she was at the window, nor was there any reason why he should anticipate that she would see his cab at all.

These passages seem to imply that for Singleton L.J. the "ambit of risk" is somehow connected with physical danger though he does not say so. His distinction between foreseeability of the boy and foreseeability of the mother is untenable on any other ground. Of course the driver knew nothing of the mother; nor did he know anything of the boy. The point is that his conduct in backing without looking entails the risk of backing into some person or object. It also entails, though somewhat more unlikely, that the parent of a person who is backed into will witness the accident and receive a

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shock. The latter possibility surely is not more unlikely than that the parent will be standing also in the path of the vehicle and, though untouched, receive shock, in which case she would recover damages. It is submitted that the plaintiff in the case Singleton L.J. was deciding could not be excluded because she was unforeseeable. If it is decided to exclude her, because she is outside the ambit of physical risk, on a ground of public policy that is a different argument, which merits consideration. If the facts were that the mother was a mile or so distant but happened to be watching her son with field glasses the case would be quite different and a valid argument might be made that she was beyond the scope of reasonable anticipation.

Denning L.J. expressed himself unable to see any reason for applying a different test to determine liability for nervous shock injury than the one applied to settle liability for injury through physical contact. He suggested that the test is simply foreseeability of injury and if injury does occur then defendant is liable unless the injury was too remote. Apparently Denning L.J. thought the injury here was too "remote". He approved the Hambroolk case which he found exactly similar except in one respect. The crucial difference in his opinion was the different manner in which the vehicles were proceeding.

It seems to me that the slow backing of the taxicab was very different from the terrifying descent of the runaway lorry.

It may be questioned whether it is any more shocking to see one's child struck by a speeding vehicle than to see him run onto slowly and remorselessly. Prof. Goodhart suggests that just the opposite would be true. It is arguable that one might reasonably fear a more serious injury to the child when the vehicle is moving more rapidly. In the King case, however, the mother could only see her son's tricycle under the car and may very well have feared her son's death.

Hodson L.J. agreed in denying recovery. Like the other judges, he relied heavily on the Bourhill case and pointed to the fact that in Hambrook the negligence was admitted. This was one of the criticisms of the Hambrook case pointed out earlier and one on which later courts have often commented.

SCHNEIDER v. EISOVITCH is the most recent English case which raises the nervous shock problem in a most peculiar and interesting manner. Plaintiff and her husband were passengers in a car which was driven by defendant in a careless manner so that an accident occurred in which plaintiff was rendered unconscious and her

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husband killed. When plaintiff recovered consciousness and was in-
formed of her husband's death she suffered shock.

Paull J. allowed the plaintiff recovery for her nervous shock
injury as well as for the injuries sustained in the collision saying:

... once a breach of duty is established the difference between seeing
and hearing is immaterial. ... The fact that the defendant by his
negligence caused the death of the plaintiff's husband does not give the
plaintiff a cause of action for the shock caused to her; but the plaintiff,
having a cause of action for the negligence of the defendant, may add
the consequences of shock caused by hearing of her husband's death
when estimating the amount recoverable on her cause of action.55

This case raises interesting questions concerning the extent of
liability for nervous shock injury, especially in light of the limitation
expressed in Hambrook that the shock must result from something
plaintiff's wife realized "by her own unaided senses". The danger
of extending liability endlessly by permitting recovery to persons far
removed from the scene who suffer shock upon having the news
conveyed to them in one way or another is often cited as support
for an argument in favour of applying one of the several proposed
limits to nervous shock recovery. The reasoning in the Schnieder
case was similar to that in Coultas applied at a different level. The
old case had said there could be no recovery without impact, but
as soon as plaintiff could show impact liability for nervous shock
injury attached parasitically. Similarly, Paull J. said that because
there had been impact constituting a breach toward plaintiff liability
for her shock attached even though she did not suffer it at the same
time or by reason of something she saw or realized by her own unaided
senses. Mr. J. A. Jolowicz, in a comment56 on this case, expresses
inability to follow this reasoning and no doubt it must be conceded
that if the reasoning was bad in Coultas at one level it would prima
facie appear bad in Schneider at another level.

CANADIAN CASES

As was mentioned earlier, the Canadian case law is fairly limited
and has tended to follow the trend of the English cases.

THE TORONTO RAILWAY CO. v. TOMS57 is fairly typical of
the early cases. It illustrates the continuing effect on Colonial courts
of the Privy Council decision in the Coultas case even after such
English lower court decisions as Dulieu and Hambrook.

In the Toms case plaintiff was thrown rather violently into the
back of a seat when one of the defendant's street cars, on which he
was a passenger, collided with a train. He suffered no observable
physical injury but later collapsed and missed weeks of work as a
result of the shock. Negligence was not denied and plaintiff was able
to recover for his nervous shock damages by showing actual impact
and thus distinguishing the Coultas case.

55 Id. at 177.
56 [1960] Cam. L.J. 156.
57 (1911), 44 S.C.R. 268; (1911), 12 C. Ry. C. 250.
NEGRO v. PIETRO'S BREAD CO.\(^{58}\) went some length in finding the “impact” upon which a claim for nervous shock injuries could be founded. Plaintiff was eating some of defendant company's bread when he discovered some broken glass in the bread in his mouth. Though he suffered no physical injury other than a slight scratch on his throat the incident produced in plaintiff, who was “of a very excitable temperament”, a “deplorable condition of nausea which was renewed whenever he attempted to eat bread”.

Middleton J.A. considered the slight scratch to be sufficient “impact” to enable him to distinguish the Coultas case. He also considered the Dulieu and Hambrook cases and ventured the opinion that in light of certain judicial statements in England,\(^{59}\) Canadian courts were not bound to follow the Coultas case which was an appeal from the Australian courts.

PURDY v. WOZNESENSKY,\(^{60}\) mentioned earlier, was the case in which the plaintiff's husband was assaulted in her presence. She suffered such severe nervous shock as to be unable to attend the trial some three years later. Recovery was allowed for the nervous shock injury. As already observed this sort of case does not present the courts with much difficulty. When defendant's conduct is deliberate rather than negligent the courts say that they will impute to him an intention to cause the injuries which actually resulted.

In AUSTIN v. MASCARIN,\(^{61}\) a case involving a collision between automobiles, the plaintiffs' child suffered fatal injuries, the child being seated by his mother in the car at the time. As a result of seeing her child injured right in front of her the female plaintiff suffered injury from nervous shock. The report is of judgment on a motion by defendant to strike from the statement of claim the paragraph dealing with the nervous injury; the motion was dismissed. The report does not indicate whether the mother also suffered physical injury in the collision. If she did, of course, the case would be similar to the Toms case. In any event, there was certainly “impact” on the vehicle. Perhaps this is sufficient to take the case outside the Coultas rule without plaintiff being herself buffeted. The case, then, can't be treated as one of great significance in the development of the law on nervous shock. It is of some importance because of the judgment of Hogg J. of the Ontario High Court which contains a good summary of the English cases to that time, and of the developing Canadian case law. Hogg J. indicated that Coultas had been largely discredited and that he preferred to follow the English line of cases such as Dulieu, Hambrook and Owens, observing that

\[^{58}\text{[1933}] \text{1 D.L.R. 490 (Ont. Ct. of A.).}\]
\[^{59}\text{See, for example, Fanton v. Denville, [1932] 2 K.B. 309, per Greer L.J. at p. 332.}\]
\[^{60}\text{[1937] 2 W.W.R. 116.}\]
\[^{61}\text{[1942] 2 D.L.R. 316.}\]
\[^{62}\text{Id. at 318.}\]
HORNE v. NEW GLASGOW was a case somewhat like Dulieu. A truck was driven by defendant corporation's servant so negligently that it crashed into the living room of the plaintiff's house demolishing the front wall and one side wall and coming to rest some 10 or 12 feet from where the plaintiff was standing. Though she was untouched plaintiff suffered nervous shock with symptoms which recur every time she saw a truck belonging to the municipal corporation. Her parents were upstairs in the house at the time and much of her concern was for their safety. It was not proven to what extent she feared for her own safety and to what extent for theirs; it would probably be impossible to make such proof. MacQuarrie J. cited most of the English and Canadian cases which have been canvassed here and found liability for the nervous shock injury, but without revealing the reasoning which led him to find liability. It appears that plaintiff was within the "ambit of physical risk" in any event and though her fear may have been for her parents rather than for herself it would probably be safe to say that a court would find that the possibility of physical harm to her was foreseeable and that recovery could thus be based even on that narrow ground.

POLLARD v. MAKARCHUK raised a very interesting problem, that of liability for nervous shock which results from the appearance of serious injury though injury is actually slight. In this case two automobiles were in collision and Mrs. Makarchuk received "superficial physical injuries" while her daughter was thrown to the road. Though the daughter also sustained only minor injury she was lying with her head under one of the cars making it appear that she had been very seriously hurt. Mrs. Makarchuk suffered severe mental shock from the sight of her daughter and belief that she was dead. Counsel for the driver of the other vehicle argued that a normal mother would not have suffered shock and that Mrs. Makarchuk must have been abnormally sensitive to nervous shock; he cited Lord Porter's remarks in Bourhill to the effect that even careless drivers are entitled to assume that frequenters of the streets have sufficient fortitude to endure such incidents. Johnson J.A. rejected that argument saying:

... while susceptibility to injury of a particular type creates no liability where liability does not otherwise exist, once negligence is established susceptibility to that injury is something that can reasonably be anticipated.

That susceptibility to unusual injury can be any more readily anticipated by someone proven to have been negligent is a proposition.

63 [1954] 1 D.L.R. 322 (N.S. Supreme Ct.).
64 (1959), 16 D.L.R. (2d.) 225.
65 [1943] A.C. at 117.
which does not appear to be supported by logic. However, it seems that what Johnson J.A. was really seeking to do was to apply the "thin-skulled man" doctrine to nervous shock cases. That he was not concerned to limit liability by reference to foreseeability, in any event, appears from the next paragraph where he said (again somewhat inaccurately, perhaps)

there would appear to be no doubt that the doctrine that a person is responsible for the direct consequences of his unlawful act applies, once the duty and its breach are found. In the present case Mrs. Makarchuk's injuries were direct consequences in the sense that they follow directly from the negligence without any other intervening or contributing cause. In such cases, it is probably unnecessary to consider what a reasonable man would be expected to anticipate because he is presumed to intend these consequences.\(^6\)

In fact, it was probably not particularly difficult to find liability in this case. Mrs. Makarchuk did suffer physical injury, however slight, from impact and the liability for nervous shock injury could therefore attach parasitically.

**AUSTRALIAN CASES**

The Australian courts have been faced with the same major problem as the Canadian courts, the problem of getting round the *Coultas* case. For the Australian courts there was the added difficulty that *Coultas* was a Privy Council appeal from Australia.

No attempt is made here to trace the development of the Australian case law. Indeed it does not appear to be any further developed than the Canadian, and the cases seem even less numerous.

*CHESTER v. WAINER CORPORATION*\(^6\)\(^8\) will be discussed because it seems to be the one outstanding Australian case\(^6\)\(^9\) and because it raises some particularly difficult questions.

In that case the defendant municipality had excavated a trench forty feet in length and ranging in depth from two and one-half to seven feet. Rain had filled the trench with water. A quantity of sand made it an attraction for children and the barricade around the trench permitted a child to pass under it. Plaintiff's child disappeared while playing. Plaintiff searched for him for some time and was present while the waters of the trench were being plumbed and when

\(^6\) As was pointed out earlier, these words which I have italicized are more frequently considered appropriate where the tortfeasor's conduct has been deliberate rather than negligent.

\(^6\) (1939), 62 C.L.R. 1.

his dead body was raised from the trench. As a result of the whole incident plaintiff suffered severe nervous shock and subsequent ill health.

The High Court of Australia held that the municipality was not liable to plaintiff. Latham C.J. said that, while there may have been a breach of duty to the child which would have entitled him to sue had he been injured instead of killed, the trench was "sufficiently" fenced that there was no breach of duty as toward plaintiff. He distinguished Owens as being a case in which the negligent driver was in breach of a duty to all users of the highway. Hambrook was distinguished on the basis of the "reasonable fear of immediate personal injury either to herself or to her children" which was present in that case. Latham C.J. went on to say:

... It cannot be said that such damage (that is, nervous shock) resulting from a mother seeing the dead body of her child should be regarded as 'within the reasonable anticipation of the defendant'...

Putting the case to the foreseeability test, his lordship apparently felt that, though nervous shock might be foreseen as the result of the apprehension of immediate danger to one's child, it could not be foreseen as the result of observing one's drowned child being taken from a trench full of water even though that scene had been preceded by several hours of anxiety and apprehension, not of an immediate, but of an uncertain danger. Latham C.J. was much concerned to know to what class a duty to avoid nervous shock would extend, and he concluded that there was no good reason to limit it at all by reference to relationship or otherwise. But he considered that such an unlimited duty was out of the question. He also asked a question which, while not really pertinent to the case before him, raised the difficult problem which was mentioned in connection with the Pollard case, i.e. appearance of injury but no injury.

Would the council have been liable to the mother as for negligence if the facts had been that she had suffered a severe nervous shock caused by fear that her child had been drowned in the trench though, in fact, the child had only wandered away for a time and had returned safe and sound? There could in such circumstances have been no action by or in relation to the child because the alleged negligence had not caused damage to the child. Would mothers and others who actually, though mistakenly, suffered shock by reason of apprehension of injury to others have a remedy against the council?

In this form the question is much more difficult than it was in the Pollard case.

Rich J. considered that the injury was not foreseeable and Starke J. thought it too remote for recovery. The remaining judge, Evatt J. delivered a lengthy dissent of which Lord Wright said in Bourhill:

70 (1939), 62 C.L.R. 1, 7.
71 Id. at 10.
72 Id. at 8.
... [It] will demand the consideration of any judge who is called on to consider these questions.\textsuperscript{73}

He rejected the argument that recovery could not be had when the nervous shock results from seeing the result of an accident rather than the accident itself.

It seems very unreasonable to make liability depend upon too nice a psychological analysis of the nature and time of the first onset of the fear and shock... the liability for the resulting illness, if it exists at all, exists as much in cases where, at the moment of the onset of the shock, the casualty feared has been completed as where it is still in progress or where it has not yet eventuated but is about to do so; or even perhaps where it has not yet eventuated and will not do so.\textsuperscript{74}

In speaking of a casualty which may never occur it is not clear whether Evatt J. would impose liability in the situation hypothesized by Latham C.J.; very likely he was simply thinking of a situation similar to \textit{Duflieu} where there was immediate danger but no actual collision. The query raised by Latham C.J. may involve making the distinction suggested earlier between unusual susceptibility to nervous upset and a tendency to unreasonable fears. Evatt J. did not make such a distinction directly, but he did reject the argument that only unusually nervous mothers would have suffered as Mrs. Chester did and that defendant would only be liable as toward “normal” people. Evatt J. was of opinion that any normal person in Mrs. Chester’s position might have suffered nervous shock; in any event, he applied the “thin skinned man” doctrine. He referred\textsuperscript{75} to Prof. Winfield’s remark that a defendant owes no duty to unreasonably nervous people with the illustration of “frightening an old lady at Charing Cross”. He traced that illustration to \textit{Hambrook} and showed that Atkin L.J. there envisaged no liability on an “otherwise careful driver” for having frightened the old lady.

Evatt J. then said there was no liability in such a case because the driver was not in breach of any duty, having driven in a reasonably careful fashion, as contrasted with the Waverly Corp. which had not acted with reasonable care in fencing its excavation.

Evatt J. would have found liability in the case before him simply by using the foreseeability test. He thought that the defendant ought to have foreseen that children would be attracted to the trench and might fall in and that parents and other people might sustain physical injury or nervous shock injury in effecting a rescue, or otherwise.\textsuperscript{76}

\textbf{AMERICAN CASES}

As with other areas of the law, the American cases on nervous shock vary widely. Reference was made earlier\textsuperscript{77} to a group of cases

\textsuperscript{73} [1943] A.C. 92, 110; relied on by Johnson J.A. in \textit{Pollard} case—see footnote 69.
\textsuperscript{74} (1939), 62 C.L.R. 1, 21.
\textsuperscript{75} Id. at 23.
\textsuperscript{76} Id. at 23.
\textsuperscript{77} Supra, footnote 8.
which adopted the very cautious approach to nervous shock, refusing
to give recovery partly from fear of the "open door" that might
result. At the other extreme, is the case in which a dairy farmer was
compensated for nervous shock injury which he suffered as a result
of fear that his customers might be injured by drinking milk from
his poisoned herd. 78

PRICE v. YELLOW PINE PAPER MILL CO. 79 was a case
somewhat similar to the Chester case. Here compensation was
awarded to a woman who suffered a miscarriage and physical illness
as a result of the nervous shock she received when her husband was
brought home from work in a bloody and battered condition, the
result of an accident on the job. It is true that plaintiff based his
claim in part on the act of defendant company's servant in taking
him home in his battered state without first warning his wife. Al-
though it is in evidence that he warned the man of his wife's state
of pregnancy it is not suggested that the action is really based on
other than negligence. It is not a case involving the sort of deliberate
conduct which occurred in Wilkinson v. Downton and that line of
cases.

BOWMAN v. WILLIAMS 80 involved another runaway truck.
This one crashed into the basement of plaintiff's house as he watched
from a dining room window. His children were playing in the base-
ment and one defence was that his nervous shock injury arose from
fear for them rather than fear for himself. The court held that
plaintiff could recover without regard to whether his fear was for
himself or the children, the breach of duty being established by the
collision of the truck with his house.

WAUBE v. WARRINGTON 81 as was noted above, 82 was a case
in which recovery was denied for nervous shock suffered by a mother
who witnessed the death of her child through collision with an auto-
mobile, the mother being outside the "ambit of physical risk".

RESAVAGE v. DAVIES 83 was a similar case. Again a mother
was denied recovery for nervous shock injury caused by witnessing
the death of her two daughters, the mother being outside the "ambit
of physical risk".

THE THEORY

At the beginning of this article it was suggested that one of the
two major obstacles to the development of nervous shock liability,
the peculiar difficulty of medical proof, has been largely overcome. At
the same time it was admitted that the other major obstacle, deline-
ation of the duty, remains a very difficult problem. There was raised

78 Rasmussen v. Benson (1938), 280 N.W. 890.
79 (1922), 240 S.W. 588.
80 (1933), 164 Md. 397; 165 Atlantic 82.
81 (1935), 258 N.W. 497.
82 Supra footnote 16.
83 (1952), 86 Atlantic (2d.) 879.
the possibility of abolishing completely recovery for nervous shock injury negligently inflicted. This retrogressive move would probably have little appeal even for the most hidebound critics of the expansion of nervous shock liability. Even the people who are most afraid of the "open door" probably do not want to close it entirely. There is a fairly general attitude, it seems, that there is no reason to preclude recovery for nervous shock injury so long as certain proof of the existence of the injury can be guaranteed and so long as the recovery can be tied to a test which will ensure that the liability does not extend too widely. Of course there is no ironclad standard of what is "too wide". It is a common feature of tort law that liability is today much wider than it was in the last century. In any event, it is impossible to predict in advance the effect of any particular test in widening liability. The predictions made by the opponents to introduction of a new test consistently overstate the danger of unrestricted liability.84

It would seem, then, unlikely that our law will ever return to a stage in which there is no recovery for nervous shock injury. If liability is to continue it must be imposed with reference to a duty on the defendant. There may be many possible forms in which the duty could be framed, many "tests" for liability. Three have been applied, historically, and those are the ones which will be examined here.

(1) Impact

The impact test was used as the first step in tempering the harshness of the position that there could be no recovery for nervous shock injury. Despite its good intent the test has been generally discredited as somewhat ludicrous.85

84 See the comments of Atkin L.J. in Hambrook case at p. 158. Dealing with the suggestion that to exceed "Kennedy J.'s limitation" might increase possible actions, he said: "I think this may be exaggerated. I find only about half a dozen cases of direct shock reported in about thirty years, and I do not expect that shocks to bystanders will outnumber them".

More significant is the observation by Prof. Fleming in his text, The Law of Torts, 2nd edition, p. 164, where he comments on the Law Reform (Miscellaneous Provisions) Act, 1944 of New South Wales and The L.R. (M.P.) Ordinance 1955 of A.C.T.; s. 4 (1) of the former Act and s. 24 (1) of the latter provide for recovery by members of the family of a person who is killed, injured or put in peril when those members suffer, as a result, nervous shock injury. Certain of the members of the family need not show that they were present at the time of the incident, the rest need only show that it took place within their sight or hearing. Prof. Fleming comments: "Drastic as this measure may seem, the absence of any serious increase in litigation should give pause to those who have been wont to predict the direst results accompanying any easing of the common law conditions of recovery".

See also Prof. Goodhart's article, Shock Cases and Area of Risk in (1953), 16 Mod. L.R. 14, particularly at p. 23 where he disputes the assumption that greatly widened liability will result from a more liberal test. "Even if the assumption be true" he says, "it is not a persuasive argument against adoption of the more liberal test". See also p. 24, conclusion (1) and p. 25, conclusion (6).

85 As Prof. Goodhart points out in his article, the "impact" test was not at all ludicrous at a time before the action on the case for negligence was clearly recognized as an independent tort—see (1953), Mod. L.R. 14 at p. 15.
(2) **Ambit of Physical Risk**

This test broadened recovery for nervous shock injury. Besides being an easier test for plaintiff to satisfy, it was considerably more pliable in judicial hands than the strictly factual "impact" test. It was submitted above that the "ambit" test, however valuable it may have been in aiding the development of the law of nervous shock, has now outlived its usefulness. Its application tends to lead to arbitrary and ridiculous results. Prof. Goodhart lists four reasons for retention of the test and denies the validity of all four. It has already been acknowledged that a compelling argument for retention of the "ambit" test could be made if the theory that normal people do not suffer lasting nervous shock from fear for the safety of persons other than themselves were proven. Even on the basis of that theory two objections to the test arise. Firstly, it is submitted, there is no reason to restrict recovery to "normal" persons, no reason why the "thin skulled man" doctrine should not be applied in this area. Secondly, the "ambit" purports to be an objective test whereas fear for one's own safety is quite subjective. There is certainly no reason to suppose that the "ambit" as delimited by the court will include all persons who were fearful of their own safety nor that it will exclude all persons who were not.

(3) **Foreseeability**

Salmond says that the question whether a person outside the area of physical impact is to recover for his nervous shock injury is a policy decision

... for which the concept of reasonable foreseeability is by itself incapable of providing a solution.

Fleming says:

... the foresight test, whatever lip service be paid to it, is incapable of providing either an adequate explanation of past decisions or a basis of reasonable prediction for the future.

Prof. Goodhart, on the other hand, endorses the foreseeability test.

This writer confesses to inability to understand the point of the statement in Salmond. Of course the question of recovery is a policy decision. The question whether a person within the ambit of physical risk will recover for nervous shock injury is equally a policy decision. That this is so does not in any way determine the merit of the foreseeability test in determining liability. If Salmond is simply saying that he does not consider the foreseeability test to be the best one, or one that will work, he is expressing an opinion on which he does not elaborate.

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86 (1953), 16 Mod. L.R. 14 at pp. 22-24.
87 Supra footnote 19.
90 (1953), 16 Mod. L.R. 14. See p. 19 where he says that the foreseeability test will give sufficient protection against extravagant claims. See also p. 25, conclusion (5).
Fleming's comment is more concrete. The foreseeability test does not explain past decisions, nor can it predict future ones so long as the courts continue to apply the test as they have done in the past. Foreseeability is a concept much more pliable again than the "ambit of physical risk". Prof. Fleming\(^9\) has himself pointed out the manner in which courts manipulated the concept, originally as a technique to limit defendants' liability.

**REASONS FOR FAILURE OF THE FORESEEABILITY TEST**

It cannot seriously be disputed that to date the foreseeability test has not worked well in nervous shock cases though it has worked fairly well to establish liability in other areas of tort including liability for injury to persons. On first impression it would not appear that nervous shock injury to a mother who witnesses, from a safe vantage point, an accident involving her child should be less foreseeable than serious brain damage to a person who is carelessly struck a slight blow on the head. Yet recovery is much more likely in the latter case than in the former. It is submitted that there are two factors which militate against the success of the foreseeability test in the area of nervous shock liability. The courts have become familiar with application of the foreseeability concept in a physical context. They have arrived at rough conclusions of what sort of physical consequences a tortfeasor should foresee, keeping in mind his knowledge of the facts around him. They are able to agree generally on what he should foresee as the result of a collision, or explosion, or fire or whatever calamity results from his lack of care, in the sense of physical occurrences — how far shattered glass may fly and that sort of thing. If someone is struck while standing within the range defendant should have foreseen for flying objects the court will say the impact was foreseeable. If the injury would nevertheless not have occurred but for a physical singularity of the plaintiff, the "thin skulled man" doctrine is available to aid him. This physical application of the foreseeability concept appeals as seeming to be somewhat scientific in approach. Also, the assumption seems to be, a knowledge of how far glass will fly after an explosion and similar physical facts is common to reasonable defendants and reasonable jurymen and reasonable judges. On the other hand, nervous shock injury does not, on the foreseeability test, depend on a "scientific" measurement of physical forces. Here defendant is asked to foresee the mental and nervous reactions of human beings placed in situations of emotional stress. The consequences might be foreseeable by medical doctors, or psychiatrists, or even psychologists, but, apparently, not by reasonable defendants, jurymen or judges.

The second factor which impedes the successful application of foreseeability in this area is closely related to the first. During the discussion of the *Bourhill* case it was suggested that a major difficulty in the nervous shock cases is a failure to separate the phenomenon

from the injury. It is suggested here that the same failure is the second factor in the apparent inadequacy of the foreseeability test in this area. One of the reasons that the test works well (and seems more scientific) in the normal case of injury is because it is applied to the phenomenon, i.e. defendant need simply foresee the risk of plaintiff being struck or otherwise interfered with; he need not foresee the particular injury. In nervous shock cases, the courts have said: “Defendant could not have foreseen nervous or mental shock to this plaintiff”. This is framing the foreseeability test in terms of the resultant injury and practically guarantees the failure of the test so long as nervous shock remains to be considered an occurrence which could only be predicted by reasonable medical or psychiatric experts. Further, this manner of stating the test precludes application of the “thin skulled man” doctrine to nervous shock cases.

**APPLICATION OF FORESEEABILITY TEST TO NERVOUS SHOCK**

If this test is to be applied to the nervous shock cases, then, we must have some way of stating the phenomenon which may result in liability. So far we have simply said: “Plaintiff suffered nervous shock”. This is an example of stating the tort in terms of the resultant damage. In ordinary cases of injury to persons we may say: “Plaintiff was cut” or “Plaintiff was bruised” etc. But whether we state it or not, we do not forget that the tort consists in infringing plaintiff’s right to physical inviolacy and the cuts or bruises are just the particular damages which take the infringement beyond the merely nominal and justify recovery.

The tort, then, is stated in terms of the infringement of plaintiff’s right. It is submitted that, similarly, the tort here should be defined as infringement of plaintiff’s right to mental or emotional inviolacy.

Difficulty is certain to be met in attempting to define this interest or its infringement. In the past the infringement has been identified by the damage caused — i.e., nervous shock injury; this manner of identification is wrong as has been emphasized. It is submitted that

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92 It is not overlooked that to postulate a “right” to emotional inviolacy is, in a sense, to beg the question of liability for nervous shock injury as it is a basic tenet of our law that there can be no right without a remedy. It is submitted, however, that this “right” is conceded already to some extent, though it may not be recognized for what it is. So long as the “impact” test was used it was arguable that the only “right” being infringed was the right to physical inviolacy, damages for the nervous shock just being tacked on as something arising out of the tort though not foreseeable—something like the injury to the “thin-skulled man”. Adoption of the “ambit of physical risk” test changes all this. Liability may now arise without infringement of plaintiff’s right to physical integrity or any of his other interests in property, etc. If the supporters of that test postulate an interest in plaintiff not to be shocked by being placed in fear of his safety or in fear of the safety of his children, if the fear arises from what he ascertains by his own unaided senses, etc, it is no wonder that recovery is uncertain. Such a right, besides being peculiarly piecemeal and fragmented, is so difficult of expression that defendant could scarcely be blamed for infringing it. It is submitted that the supporters of the “ambit” test are actually conceding a right to mental inviolacy and that all we are haggling over is the extent of that right.
it is possible to hypothesize a general interest in mental inviolacy, or "peace of mind", or call it what you will, and that infringements may be conceived though they are not readily observable as is physical interference with the person. It is conceded that mere temporary upset or pique or revulsion at bad manners or similar emotional reactions have never been the subject of compensation and it is not proposed here that they should be. While they may be, strictly, infringements of the right to mental inviolacy, they are analogous to the everyday jostlings to his person which every man must tolerate. They are part of the daily exchange of a complex society and, in any event, the damage is too minimal for the law to consider. Only when the damage is relatively serious nervous shock injury will the law consider giving compensation. This may appear to be still framing the tort in terms of the damage. Actually, it is defining the occasions in which compensation will be given by reference to the gravity of the damage. The distinction, if somewhat subtle, is of critical significance. It smooths the path for application of the foreseeability test, for, it is submitted, it will be easier for the courts to define what interference with plaintiff's "peace of mind" defendant ought to have foreseen though it was very difficult for them to determine what emotional damage he ought to have foreseen. Another result flowing from this is that the problem of the person unusually susceptible to nervous shock should be obviated. If the courts can say that defendant ought to have foreseen an infringement of plaintiff's mental inviolacy they can go on to say that he must take his victim as he finds him.

DEFINITION OF THE INTEREST

It is probable that the interest hypothesized can only be explained in terms of the human senses. A person's emotional serenity is vulnerable only through his five senses. At least two of them may be dismissed for our purposes here. Whether nervous shock injury is likely to arise through the sense of touch or the sense of taste does not really matter as an interference with either sense would, it is conceived, be dealt with as an interference with the physical integrity of the person. Possibly interference with the sense of smell would also constitute such an interference with physical inviolacy. It is unlikely that a significant number of nervous shock injuries will result through operation of this sense, in any event, but for the present purpose the senses of smell, hearing and sight will be considered together.

Basically, then, the theory being offered is that every person has an interest in mental inviolacy similar to his interest in physical inviolacy. Strictly, it might be argued that any sight, noise, or odour acting, as it does, through one of the three senses mentioned above, on plaintiff's nervous system, constitutes an infringement of his

92 Attention is drawn to the case of Negro v. Pietro's Bread, [1933] 1 D.L.R. 490. It is submitted that any interference with the sense of taste would involve such an "impact".
interest in mental inviolacy just as any touching of him constitutes, strictly, an infringement of his physical inviolacy. It is conceded that the analogy is not entirely accurate and it is not being submitted that defendant, to be on the safe side, must needs be invisible, inaudible and odourless. Regarding the interest in physical integrity, it is not every touching which will be considered a tort. A certain exchange is expected in daily life. In this area the exchange will be even greater and plaintiff will be expected to endure a great many "interferences" with his senses of sight, hearing and smell. However, the analogy is helpful in illustrating the nature of the interest involved and the manner in which the interest may be invaded. It is submitted that by looking to the interest here postulated, a court could arrive at a standard of sights, sounds and smells which must be tolerated even though, strictly, they invade the interest. Sights, sounds and smells which are more "offensive" than the permissible standard may result in liability if damage actually occurs and if defendant should have foreseen the invasion of plaintiff’s interest.

**OBJECTIONS TO THE THEORY**

There may be many objections that can be raised; four are considered here as already having been suggested in the case law.

(1) One of the factors instrumental in retarding development of liability for nervous shock injury seems to have been a fear that too many people are particularly susceptible to nervous shock. This fear probably underlies, also, the resistance to adoption of the “thin skulled man” doctrine in this area. The feeling is, apparently, that there aren’t very many thin skulled men but there are many people with extremely delicate nervous systems. This assumption is probably debatable and, in any event, it is disputed that there are such numbers of these people that any risk of unlimited liability will exist.  

(2) When a person suffers application of physical force to his person it is relatively easy to make an objective observation of the occurrence of a tort. In the area of nervous shock, the argument opposing development of liability seems to be that this is a tort quite subjective in nature. *Harned v. E-Z Finance* may be recalled as the case in which the judge said:

“...since mental anguish can exist only in the mind of the injured party, not only its extent but its very existence can be established only by the word of the injured party...”

This argument, of course, is partly nonsense and partly exaggeration. It is nonsensical to suppose that the tort will be attempted to be made out by plaintiff simply sobbing out that defendant’s conduct “disturbed” her. It is submitted that what plaintiff must do is show the conduct of which defendant should have foreseen the result to be an invasion of her interest by a sight, sound or smell more offen-

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94 See the arguments presented in footnote 84.
95 *Harned v. E-Z Finance* (1953), 151 Tex. 641; 254 S.W. (2d.) 81, 86.
sive than the community standard. Further, plaintiff must prove the resultant damage. At present our law does not consider compensating for "mental anguish" or mere "bad manners" alone, and that attitude of the law may be quite acceptable. It may be that mere mental anguish can not be measured and perhaps does not require to be compensated. The concern here is for people who, as a result of nervous shock, suffer lasting and observable damage which will often be physical in nature. Medical science doubts not that such damage occurs nor that it is observable. This sort of damage is not purely subjective at all.

A more difficult problem is involved in setting the standards of "offensiveness" of sights, sounds and smells. Such standards are capable of much subjective interpretation. No doubt there are people who are "offended" by surrealist paintings, bagpipe music and pipe smoke.

It is submitted, however, that this difficulty may also be exaggerated and that it is possible for the court to set standards of what must be tolerated in the way of sights, sounds and smells. This, it is suggested, would afford a more straightforward approach to cases like Bourhill and Chester. It is suggested that the sight presented to the mother in Chester and in the King case and the Waube case was in each instance a sight exceeding in offensiveness the reasonable standard and that in each instance it was foreseeable to the defendant.

(3) The third objection is related to the comments made by Latham C.J. in the Chester case. He raised a question concerning the situation in which a mother anticipates danger to her child when in fact the child is quite safe. This is also related to the previous objection in that fear is quite a subjective emotion. This is the point at which there arises the distinction made earlier between unusual susceptibility to nervous shock and a proclivity for unreasonable fears.

It has been submitted that the "thin-skulled man" doctrine should apply in this area so that the person singularly susceptible to nervous shock is not precluded from recovery so long as there was actually an invasion foreseeable by the defendant. On the other hand the person who suffers nervous shock injury simply as a result of his own unreasonable fear has no recovery and so the nervous old lady at Charing Cross is excluded. This does not really answer Latham C.J.'s question, of course. Apart from the sight of her drowned boy, was there in that case such an invasion of the mother's interest in mental inviolacy as to warrant compensation for the damage? There is no doubt that her fear that he might drown in the trench was reasonable. Could it be said that the poorly fenced trench constituted a sight so offensive as to exceed the standard which must be tolerated? Probably not; it must be conceded that the present theory does not answer Latham C.J.'s question altogether adequately.
Another objection that really bases itself on the risk of unlimited liability is the one which cites the danger of defendant being found liable to plaintiffs far removed from the scene, in terms both of space and of time, the shock arising as a result of plaintiff seeing the accident in a newsreel, or of reading of it in a newspaper or letter, or of being told about it. Here, again, it is submitted that the danger of widely expanded liability is greatly exaggerated. It may be that recourse must be had to Bankes L.J.’s limitation, viz. that the injury must result from something plaintiff realized from her own unaided senses. To obviate niggling problems about such things as whether plaintiff is not exercising her own unaided senses when viewing a movie or reading a letter, the same sort of limitation might be achieved by applying the old Latin tag, _novus actus interveniens._

This provides no better solution for cases such as _Schneider v. Eisovitch_ than was reached in that case by the trial judge who simply based defendant’s liability on the fact that plaintiff had been physically injured in the same accident. This should not be fatal to the theory; it will obviously not provide a simple solution to every problem involving nervous shock injury. It is offered simply as an alternative to present approaches which are somewhat uncertain and, it is submitted, stifling development of this area of the law. Making so bold as to disagree with such learned authors as Salmond and Fleming, who have said that foreseeability is inadequate to predict recovery for nervous shock injury, I submit that, if properly applied, it is capable of doing the job and of doing it more satisfactorily than it is being done at present.