The History of the Liability for Negligently Caused Psychiatric Injury (Nervous Shock)

A Study in the Interfaces of Medicine and Law

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To George,
my husband, friend and mentor
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Acknowledgements

My interest in the subject matter of this book was sparked in 1982, when, as a mature-age student I was learning Torts as part of my second year of Law studies. I remember reading with a mixture of dismay and disbelief the majority judgments in Chester v. The Council of the Municipality of Waverley (1939-40) 62 C.L.R. 1. The case, which was then the ruling precedent in Australia, concerned shock and psychiatric injury sustained by a mother who witnessed the body of her young son being lifted out of a water-filled trench. The defendants admitted negligence in leaving the trench effectively unprotected, but the court decided that they were not liable to the mother because she was not present when the child actually drowned. Within two years the law was changed, signalling ‘almost a revolution’ in the law of torts. I discussed these developments at home with my husband, George Mendelson, who suggested that we should write a paper together on ‘Nervous shock in the High Court of Australia’. Without his encouragement, guidance, and patient explanations of scientific, medical and psychiatric concepts, this book would not have been written. I also wish to acknowledge the help of Professor Martin Davies who was my LLM supervisor, and the wonderful friendship and support of Professor Louis Waller. I wish to thank Dr R. C. Renshaw, Master of the Balliol College at Oxford, for arranging my accommodation at the Graduate House; Dr John Pusey, Isabel McMann, Ronald Richenburg and other librarians at the Bodleian Library where I researched the historical parts of the book. I am grateful to Dr Elizabeth Adeney for proof-reading the manuscript, and to Lorna Frick for editorial assistance. Finally, to my two children, Hannah and David, thanks for putting up with a mother forever talking about legal matters, enthusing over old books, or, most often, glued to the computer.
Preface

This book traces the history of the relationship between the law and the state of medical knowledge in the context of liability for negligently caused psychiatric harm. It is a fascinating story related in the course of a comprehensive discussion of the relevant Australian, English, Canadian and American cases. It is not a story which reflects a great deal of credit on the law. That is because the law has not always managed to keep pace with advances in medical knowledge. The law’s inability to keep pace was partly due to the doctrine of precedent which supported principles based on out-dated medical knowledge and partly due to other reasons which included the “flood-gates” argument, an argument that has so often inhibited the coherent development of legal principle. That argument still exerts a powerful influence in the retention of the restrictive rules governing recovery by second-impact victims.

Fortunately, judges are making much more use of the extensive modern medical literature. That will have the effect of ensuring that the law keeps pace with advancing medical knowledge. It may also have the effect of enabling victims to prove more readily that their condition is due to psychiatric injury or illness, a prospect which appears all the stronger with the rapid advances now being made in this area of medical science.

It is worth recalling that one of the influential judgments on recovery of damages for nervous shock was that of Chief Baron Palles, a judge for whom Sir Owen Dixon had a high regard, in *Bell v The Great Northern and Western Rly. Co.* Palles C.B. refused to follow the Privy Council’s reasoning in the much-criticised decision in *Victorian Railway Commissioners v Coults.* His Lordship drew a distinction between organically based nervous shock and non-organic phenomena, a distinction which the Privy Council had failed to draw.

This book will be of interest to lawyers and all those who are concerned with the interface of law and medicine.

A. F. MASON
The Honourable Sir Anthony Mason AC KBE
Chancellor, University of New South Wales
National Fellow, Research School of Social Sciences,
Australian National University

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Introduction

The bystanders get most of the splashed blood.

Robertson Davies, Murther & Walking Spirits

The nature of psychiatric injury and its legal consequences, traditionally referred to in Anglo-Australian and Canadian jurisprudence as ‘nervous shock’, has held fascination for many legal and medical writers. There has been, however, a scarcity of scholarly investigations of the interface between medicine and the defendants’ liability for negligently occasioned psychiatric damage from an historical perspective. This book is a discursive exploration of conceptual developments in law and medicine over the past two centuries refracted through the prism of psychiatric injury and its legal sequelae.

The book begins with a short exposition of the history of liability for negligently occasioned harm, and examines social and medical factors which militated against admittance of psychic harm as a separate head of compensation. It then traces the evolution of liability for nervous shock, from its beginnings in Melbourne in 1886 in the case of Coultas v. The Victorian Railway Commissioners to some reported and unreported English and Australian cases decided in 1997. The cases are analysed against the background of developments that were taking place in medical science and psychiatry. There is an outline of the original medical literature describing severe, often profoundly disabling reactions to life-threatening events which involved either minimal or no actual physical contact with the sufferer’s


body, and the scientific endeavours to explain this phenomenon. The tort of negligence and the evolution of its constituent elements - including the duty of care, the notion of proximity, the requirement of remoteness of damage, the concept of legal causation, and the requirement of predisposition as they relate to psychiatric injury litigation - are analysed from the perspective of major developments in physiology, neuroanatomy, psychoanalysis, and psychiatry.

The aim of the book is to chronicle the often contradictory and sometimes ineffectual efforts by the judiciary to accommodate the ever expanding parameters of medical knowledge and understanding of psychosomatic reactions to emotional trauma within the conceptual framework of the common law system of compensation. It describes medical uncertainties and judicial fears aroused by the fact that unlike physical injury, psychiatric illness is essentially an experiential phenomenon which may be open to abuse by fraudulent claimants, and which potentially poses a danger of an indeterminate liability. These fears have led the courts to impose special - often arbitrary - limitations and qualifications upon recovery by injured plaintiffs who were not present at the site of the accident in which a close relative or a co-worker had been wrongfully killed or injured, but who suffered psychiatric illness as a result of witnessing the ‘aftermath’ of that event. The legal analysis of major English, American and Australian cases on psychiatric injury aims to illustrate how the medical understanding of the psychodynamic and neurophysiology of emotional trauma has influenced the legal principles that underlie compensation for ‘nervous shock’. In the United States, compensation for tortiously occasioned mental distress - a preferred local label for nervous shock - is governed by State law. Since there are 51 jurisdictions (including the District of Columbia), a separate volume would have been required to examine all American cases pertaining to this subject. Consequently, the book provides an analysis of those American cases which have significantly influenced the law of negligently caused pure psychiatric injury. The only Canadian cases discussed are those which contributed to the development of the nervous shock jurisprudence. Descriptions of some major historical cases include details which go beyond bare fact situations necessary for the understanding of their ratio decidendi (i.e. the substantive principle of law and the most important reasons which the judges put forward in favour of the ultimate holding). These details are included because on the one hand, they provide an emotional and social context which may help to explain the approach taken by a judge in reaching his or her conclusion, and on the other, they help to remind us that behind most
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‘nervous shock’ cases there is a story of suffering by real people, as against impersonal shibboleths.

The book discusses the question whether, in view of the uncertainties created by the common law of liability of defendants for psychiatric injury, a change in the law is needed. There are innumerable statutes which provide for compensation for nervous shock or emotional distress under anti-discrimination statutes, workers’ compensation, transport accidents, criminal injuries, sports and many other compensation schemes. Although a comparative study of the relevant statutory provisions would be very interesting, this book does not lend itself to such an analysis.

While the legal parameters of liability for negligently inflicted psychiatric injury are still in the process of development, it is important that legal practitioners and, in particular, the judiciary, understand and reflect the most advanced views on the aetiology, neurophysiology and psychology of emotional injury. It is also important for medical practitioners who undertake medico-legal work to understand how legal causes of action and the concepts which underlie them arise, develop and are refined at common law and through the statutes. Since claims for damages relating to psychiatric injury tend to be litigated in the civil jurisdiction, I shall confine my analysis to this area of the law.

A note about terminology pertaining to psychiatric injury. Throughout the book I shall be employing terms as they were used by medical practitioners and courts at the particular time and locality. This is because terms like ‘nervous shock’, ‘mental shock’, ‘neurasthenia’, ‘emotional distress’, ‘emotional disturbance’, ‘mental suffering’, ‘mental anguish’, when used in the nineteenth and early twentieth century, referred to a set of specific medical and legal concepts which such contemporary appellations as ‘psychiatric injury’ or ‘psychiatric damage’ do not convey. In the United States in 1965, the Restatement of the Law of Torts (Second) stated that the term ‘emotional distress’ referred to ‘mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea.’ This very wide definition was not adopted by courts in the United Kingdom, Australia and Canada.

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5 American Law Institute (1965), Restatement of the Law of Torts (Second), American Law Institute Publishers, St. Paul, Minnesota, s. 46, comment j. Hereinafter ‘Restatement (Second)’. 
Today, modern courts, as well as some medical practitioners, sometimes refer to ‘psychiatric injury’ and ‘psychological injury’ as if the two terms were interchangeable. In the context of personal injury litigation, however, the phrase ‘psychological injury’ is a misnomer or a term without content. In an unreported case of *R. v. Whitbread*\(^6\) Hampel J characterised psychology as ‘a branch of science which deals with mind and mental processes’\(^7\). His Honour then pointed out that ‘psychiatry’ on the other hand is defined as a medical treatment of mental illness, emotional disturbance and abnormal behaviour\(^8\), which for the purposes of the law of torts form the content of psychiatric injury or damage\(^9\). The law of nervous shock has been befuddled by an array of ambiguous concepts and terms giving rise to such questions as where to draw the legal line between the non-compensable ordinary grief and compensable nervous shock in the form of abnormal grief, or the legal meaning of transient emotions with respect to psychiatric disorder. The book will follow the definition provided by the Justices of the High Court of Australia in the case *Jaensch v. Coffey*, who characterised the nature of injury by way of nervous shock as a ‘recognised psychiatric illness’\(^10\) or a ‘psychiatric injury’.\(^11\) Legal citations will follow the Australian system of citations whereby square brackets for the year in which the case was reported indicate that the year is essential for locating the correct volume of the law report. Round brackets for the year indicate that the case can be found either by reference to the year or to the volume of

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\(^7\) Psychologists are graduates of Arts and Science Faculties, who are trained in the ‘science of nature, functioning and development of human mind and the study of the behaviour of the mind’, *R. v. Whitbread* op. cit. fn. 4, per Hampel J, ibid.

\(^8\) Ibid.

\(^9\) The clinical instruction of medical students includes the study of nosology - the theory and classification of diseases - which, together with the knowledge of such parts of medicine as anatomy, physiology, neurology, pathology, aetiology, treatment and prognosis, provides the basis for diagnosis of the patient’s complaint. Laor, N. & Agassi, J. (1990), *Episteme 15. Diagnosis: Philosophical and Medical Perspectives*, Kluwer Academic Publishers, Dordrecht.

\(^10\) According to Brennan J in *Jaensch v. Coffey* (1983) 155 C.L.R. 549, at 560: ‘The term “nervous shock’ is useful ... as a term of art to indicate the aetiology of a psychiatric illness for which damages are recoverable in an action on the case when the other elements of the cause of action are present.’ See also: Gibbs CJ at 551, 552.

\(^11\) The phrase ‘mere psychiatric injury’ has been defined by Deane J in *Jaensch v. Coffey* op. cit. fn. 8 at 593 as ‘psychoneurosis and mental illness which is not the adjunct of ordinary bodily injury to the person affected’. See also: Mullany & Handford op. cit. fn. 2.
the report because volume numbering runs consecutively throughout the particular series.
The History of the Liability for Negligently Caused Psychiatric Injury
The Concept of Nervous Shock: the Common Law, Witchcraft, and Medicine

Definition and categories of liability for nervous shock

The phrase ‘nervous shock’, like the term ‘insanity’, was originally introduced into legal usage from medicine. Neither of these terms is used in clinical practice today, and the concepts which they originally denoted have been modified and refined since the nineteenth century. They continue, however, to be utilized by lawyers who have assigned to them a specific juridical content. The law, having taken a long time to accept ‘nervous shock’ as a cause of action, has preserved this term through the means of judicial precedents, largely unaware that it no longer has any clinical meaning. The survival of the term ‘nervous shock’, and of the ideas associated with it as a legal concept, has meant that the law today is trying to fit complex contemporary psychiatric knowledge into the procrustean bed of simplistic and limited model of mental illness. The legal issues involved in the liability of the defendant for nervous shock are important, and there continues to be a certain degree of misunderstanding by medical practitioners of what is implied by lawyers when they use this term. Conversely, lawyers are often frustrated when told that nervous shock has no medical meaning and is not a diagnostic term.

Legally, the essence of the defendant’s liability for negligently inflicted nervous shock is that a specific event, which is the result of his or her tortious action, has emotionally injured the plaintiff. The law of torts recognises three major categories of cases where the claimant may obtain compensation for negligently occasioned nervous shock. The first category of liability is where the negligent conduct of the defendant caused the

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12 The term ‘tort’ is old French for ‘wrong’, and torts, including the tort of negligence, refer to ‘civil wrongs’ as against ‘criminal wrongs’.
plaintiff to suffer a physical injury, which is followed by a diagnosable mental disorder. The second category involves compensation for nervous shock to plaintiffs who, without experiencing physical impact or suffering a physical injury, were present at the site of the accident as ‘participants’ and, as a result, have suffered ‘mere’ psychiatric illness. A plaintiff within the second category may have a cause of action if he or she has been placed in peril by the wrongful act of the defendant; has witnessed the death, a serious injury, or a threat thereof to a close relative or, in some circumstances, to a co-worker. Those persons who did not witness the actual accident but who, having acted as rescuers, develop nervous shock and consequently sue for damages would also be included in this category of claimants. The third and, jurisprudentially, the most controversial category of cases involving the negligent infliction of nervous shock is that of a plaintiff who has not been present at the site of the accident in which a close relative has been killed or injured. Nevertheless, such a plaintiff may demonstrate that he or she has developed a psychiatric disorder as a result of witnessing the ‘aftermath’ of the event, in circumstances where the death or injury of the ‘primary victim’ was caused by the defendant’s tortious conduct. The appellation ‘mere’ or ‘pure nervous shock’ has been used in law to distinguish this type of damage from psychiatric illness consequent upon physical injury caused by the defendant’s wrongful conduct. It should also be noted that in the United States, actions in negligence for the second and third category of damage are often designated as actions for ‘negligent infliction of emotional distress’ with plaintiffs referred to as ‘bystander’ to distinguish them from ‘direct victims’. The American concept of ‘bystander liability’ is premised on a defendant’s breach of duty to refrain from causing emotional distress to those who witness conduct which causes harm to a third party.

How far should the law go in allowing a claim for damages against a defendant, where the wrong done was primarily a wrong done to someone other than the plaintiff, and the plaintiff (at the relevant time) was far away

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from the scene of the defendant’s wrongful act? The absence of an actual physical impact or a demonstrable physical lesion has made the courts, in England, the United States, Australia and elsewhere, wary of extending the liability of defendants to cover such alleged damage as nervous shock. It has taken nearly a hundred years - from the Coultas case in 1886 to the cases of McLoughlin v. O’Brien (1983) and Jaensch v. Coffey (1984) - to establish clear jurisprudential principles and guidelines which delineate the scope of the defendant’s liability for negligent infliction of nervous shock.

This evolution towards a legal right to be compensated for injury to the mind and nervous system in circumstances where physical injury is unintentionally inflicted to another person, can be traced through the history of the defendant’s liability for nervous shock. The evolution of this type of damage in Anglo-Australian, Canadian and American law also illustrates the interface between medicine and the law.

Liability for emotional injury in common law and the emergence of the tort of negligence

In 1348, a man went to a tavern but found it closed. He beat on the door with a hatchet, and when tavern keeper’s wife looked out of the window, he ‘struck with the hatchet but did not hit the woman.’ Through her husband, she sued the hatchet man. In the case reported as In de S. et ux. v. W. de S., the defendant was found liable for assault, and had to pay compensation for the fright he had caused her. The common law (the single national customary law administered by royal courts which in the late medieval period displaced the local and the baronial courts in England), very early in its development recognised that directly threatening, intentional and
outrageous conduct may have an immediate emotional effect on the injured person which may, in turn, provoke violent retaliation. Since the fourteenth century, the tort of assault has extended protection to a person’s right to be free of emotional disturbance brought about by intentional threats of physical violence. Likewise, had the hatchet grazed the hair of the tavern keeper’s wife and she had suffered physical or psychiatric illness as a result of such wrongful interference with her body, she could have sued the defendant for damages in an action for battery.

In medieval England, the principle of a defendant’s liability was based on strict compensation for the damage to the plaintiff’s interests. This was seen as a means whereby the plaintiff could be induced to forgo his right to take revenge for the defendant’s unlawful acts. It was only slowly that a civil theory of compensation developed, and this, originally, was on the basis that ‘the conscience of the wrongdoer must be purged by making restitution’; thus, the award of damages ‘was exacted for the benefit of the wrongdoer’s soul rather than of the victim’s pocket’. However, compensation for emotional injury suffered by the injured person was not the primary aim of the tort of trespass to the person, be it battery or assault. It was the act or threat of trespass vi et armis et contra pacem Domini Regis [with force and arms and contrary to the King’s peace] - the violent conduct founded upon the notion of the breach of the king’s peace - which constituted the wrong for which the remedy is granted. Since the law of trespass to the person attempted to deter, by way of damages, any forcible and direct conduct of the defendant causing or threatening to cause contact with another person, physical or lasting emotional injury sustained by the latter was not, and is not, a necessary element of the cause of action. At the same time, the tort of trespass to the person safeguarded not only the individual’s physical integrity, but also any direct interference with his or

21 The tort of trespass to the person is a generic name encompassing the torts of battery, false imprisonment, and assault.
22 Battery is the direct, intentional or negligent bringing about of an actual non-consensual contact with the person of another.
24 Winfield, P.H. & Goodhart, A.L. (1933), ‘Trespass and Negligence’, The Law Quarterly Review, vol. 49, 359-378 at 359. The tort of trespass to the person eventually came to be interpreted as meaning any direct and intentional invasion of the plaintiff’s rights which may lead to instant retaliation or vengeance, and hence to a breach of the peace.
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her person that was offensive to a reasonable sense of honour and dignity.\textsuperscript{25} Thus damages could be had, if as a result of an assault, the plaintiff experienced humiliation, embarrassment, anxiety, sorrow, or fright. It would have been for the immediate and direct threat to her person, as well as the transitory emotions of fright and humiliation, that the tavern-keeper’s wife obtained damages in the case of \textit{In de S. et ux. v. W. de S.}.

No compensation, however, would have been awarded to the tavern keeper’s wife if, while serving beer to the customer, she merely saw the defendant throw a hatchet at her husband and split his head in two. Even if, as a result of that frightful experience, she had suffered a miscarriage, she would not have been able to sue the culprit to recover damages for what we denote as ‘pure’ or ‘mere psychiatric injury’. The common law drew a firm line - which it steadfastly maintained for over six centuries - that distinguished direct and intentional conduct that may occasion emotional disturbance and for which damages were available, from indirect and unintentional conduct giving rise to non-compensable mere psychiatric injury. It is appropriate to note at this point that although the torts of seduction and alienation of affections, also provided remedies for emotional distress, they were based on possession of people as property interests.\textsuperscript{26} Damages obtained by the husband amounted to a forced sale of the wife’s affections.\textsuperscript{27} The common law has also awarded damages for emotional

\textsuperscript{25} Likewise, the plaintiff would have been compensated for her mental distress if the defendant had falsely imprisoned her, for example by telling her to go to an alcove, while wielding the hatchet.

\textsuperscript{26} In his \textit{An Introduction to Law Relative to Trials at Nisi Prius} (1772), Francis Buller discusses the case of \textit{Winsmore v. Greenbank} (Mic. 19 G. 2 C.B.), in which the plaintiff ‘declared that his Wife unlawfully and without his Consent departed and continued absent, and during that Time a large Estate real and personal was devised for her separate Use, and thereupon she was desirous of being reconciled and cohabiting with him, but the Defendant persuaded and inticed her to continue absent, by means of which she continued absent till her Death, whereby he lost the Comfort and Society of his Wife, and the Advantage which he ought to have from such real and personal Estate.’ An appeal from the verdict for the Plaintiff for £3,000 in damages was lost. Buller, F. (1772), \textit{An Introduction to Law Relative to Trials at Nisi Prius}, Book II, titled ‘For What Injuries Affecting a Man’s Personal Property, an Action may be Brought’, W. Strahan & M. Woodfall, London.

\textsuperscript{27} In the case of \textit{Wyman v. Wallace} (1980) 615 P. 2d 452, at 455 (Wash.), the court argued \textit{inter alia} that the cause of action for alienation of affections should be abolished because ‘... the successful plaintiff succeeds in compelling what appears to be a forced sale of the spouse’s affections’. For a discussion of this issue see: Levit, N. (1992), ‘Ethereal Torts’, \textit{Geo. Wash. L. Rev.} vol. 61, 136-93 at 140.
distress occasioned to plaintiffs who held proprietary interests in land, by way of nuisance in the form of noise, smell, fumes and emissions emanating from the defendant’s land. Thus, historically, emotional injury was recognized as sounding in damages for the purpose of intentional torts and certain proprietary torts, including nuisance. The question arises, what were the reasons for the late entry of claims for damages for negligently occasioned pure psychiatric injury into our jurisprudence? The reasons lay in the nature and development of the common law system, social and cultural prejudices, as well as the explanations of psychiatric illness provided by pre-modern medical theories.

The tort of negligence, which protects people from being directly or indirectly injured by harmful though unintentional conduct was unknown to the medieval common law. From the middle of the fourteenth century, a precursor of the concept of a legal duty of care entered the common law in the form of ‘the common custom of the realm’ which was imposed upon inn-keepers, common carriers (on land and water), smiths, surgeons, taverners, vintners, and butchers. These medieval tradesmen and professionals could be made liable for ‘special’ action on the case (sur le Cas) if, as a result of want of care, diligence and foresight, skill or honesty, the persons who had come into business relations with them suffered damage. Action for trespass on the case itself was a remedy developed in the fourteenth century to allow plaintiffs who suffered harm as a result of

28 For example, liability for emission of offensive smells was established in 1610, in the case of Aldred v. Benton (1610) 9 Co. Rep. 57, in which the plaintiff complained that his home was made uninhabitable by unhealthy odours that flowed through his hall from a pig- sty that the defendant had erected near his land.

29 The original notion of ‘custom of the realm’ relating to carriers probably derived from the law of bailment, which had its origins in the Roman law. See Forward v. Pittard (1785) 1 T.R. 27-34; reproduced in 1 The Revised Reports 1785-1790 edited by Sir Frederick Pollock, London: Sweet & Maxwell, 1891, 142-149 at 144-5. Carriers’ liability under the custom of the realm was strict in the sense that it was independent of fault. No defences were available, except for the Act of God and King’s Enemies: Coggs v. Bernard (1703) 1 Salk. 26; 91 E. R. 25; 3 Salk. 11; 91 E. R. 660; 2 Ld. Raym. 909; 92 Eng. Rep. 107. In the seventeenth century, the category of defendants originally covered by the doctrine of the custom of the realm were also sued for negligence in actions of assumpsit which dealt with the issue of the fulfilment of the terms of the undertaking. Kaczorowski, R.J. (1990), ‘The Common-Law Background of Nineteenth-Century Tort Law’, Ohio State Law Journal, vol. 51, 1127-1199.

30 Chapter 24 of the Statute of Westminster II (1285), gave the Chancery clerks the right to issue writs in consimili casu [new writs similar to the ones which have previously been entertained in the King’s courts], if they conferred and were unanimous; but the first
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intentional wrongs which were indirect, and thus outside the existing categories of intentional torts, to recover damages. Action on the case also provided remedy for careless wrongful conduct which occasioned harm without the use of force of arms and a consequent breach of the peace.\(^\text{31}\) It was in the fourteenth century that the concept of tortious wrong was re-defined. It was broadened to include not only the fault of breaching the royal peace, but also the fault of wrongfully - either by reckless conduct or failure to act - inflicting some damage upon the plaintiff’s person, land, or chattels. The gist of the cause of action on the case was damage. Although the causal link between the defendant’s wrongful conduct and the plaintiff’s damage did not have to arise through a direct contact, damage had to be demonstrable, and thus physical in nature, in order to be compensable. For example, in one of the early actions on the case tried before the Court of Common Pleas in 1473, the plaintiff alleged that he was injured when a pile of firewood carelessly built by the defendant near the highway fell upon him.\(^\text{32}\)

Conceptual beginnings of the modern tort of negligence which imposes a duty of care not only in situations where there exists a prior undertaking, but also where there is no pre-existing relationship between the parties, have been traced to seventeenth century cases involving running-down accidents. The courts of the time yet again re-formulated the notion of fault relating to collisions occasioned by negligently driven carts or carelessly manned ships which traditionally were pleaded under the writ of trespass of \textit{vi et armis}. The problem faced by victims of such collisions was that no liability would lie for forcible wrongs if the defendant could establish that the fault for the occurrence of the accident should be attributed to the horse or the unpredictable forces of nature.\(^\text{33}\) The plea of trespass by way of battery


\(^{33}\) According to Francis Buller: ‘Where by a sudden Fright a Horse runs away with his Rider, and runs against a Man, it is no Battery; and may be given in an Evidence on the General Issue: But if it were occasioned by any one whipping the Horse, such Person would certainly be liable in an Action upon the Case; and Quare, in the other Case, if the
would also fail if the defendant’s conduct was unintentional. Furthermore, then, as today, many collisions were caused not by the owners of carts, coaches and ships, but by their employees. However, vicarious liability could only be imposed by an action on the case. The first reported case to deal with the issue of whether negligently caused collisions should be pleaded under trespass or action on the case, was that of Mitchil v. Alestree (1676). The case involved an action by Mitchil against Master Alestree, and his servant Scrivener. Scrivener, while breaking in and taming wild horses in Lincoln’s Inn Fields, a popular fairground in seventeenth century London, lost control of them, with the result that Mitchil, a passer by, was kicked and injured by one of the horses. Mitchil issued a writ for action on the case, and Hale CJ eventually held that ‘It was the defendant’s fault, to bring a wild horse into such a place where mischief might probably be done, by reason of the concourse of people.’ Although negligence was not mentioned, the court reasoned that Alestree’s liability was due to his carelessness in allowing his servant to create a dangerous situation, rather than the way in which, once it had arisen, the situation was controlled. During the reign of George II (1727-1760), the courts began to accept a new general category of actions on the case for ‘injuries arising from negligence or folly.’ Many of these new actions were tried at the Court of Nisi Prius, which was a court of first instance at the Westminster Hall, comprising judge and jury. Writing in 1772, Francis Buller in his An Introduction to Law Relative to Trials at Nisi Prius stated that

Every Man ought to take reasonable Care that he does not injure his Neighbour; therefore where-ever a man receives any Hurt through the Default of another,

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34 Baker, J. op. cit. fn. 30, at 343. The modern doctrine of vicarious liability (respondeat superior) was established at the end of the seventeenth century. It made employers responsible for the acts of their employees, if they were engaged under a contract of service.

35 Mitchil v. Alestree (1676) 1 Vent. 295; 3 Keb. 650; 86 E.R. 190. For a full discussion of this case, see: Prichard, M. (1976), Scott v. Shephard (1773) and the Emergence of the Tort of Negligence, Selden Society, London; Kaczorowski op. cit. fn. 27.

36 Otherwise, until the nineteenth century, an undertaking which brought the defendant into a relationship with the plaintiff (although there need not be any consideration) was regarded as an essential element in actions for negligent performance. Baker op. cit. fn. 30, at 342-346.

37 Buller, F. op. cit. fn. 24, at 25.
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though the same were not wilful, yet if it be occasioned by Negligence or Folly, the law gives him an Action to recover Damages for the Injury so sustained.

Buller gave three examples of such actions, the case of *Mitchel v. Alestree*; the case of *Underwood v. Hewson*, where the defendant, by uncocking his gun, accidentally wounded the plaintiff, who was standing by to see him do it; and the *Anonymous* case in which the Court of King’s Bench decided that action on the case would lie if ‘... the servants of a carman run over a boy in the streets, and maimed him, by negligence.’

In the middle of the eighteenth century, the courts differentiated between trespass and action on the case primarily on the basis of directness. Buller wrote that:

... it is a settled Distinction, that where the immediate Act itself occasions Prejudice, or is an Injury to the Plaintiff’s Person, House, Land, etc, Trespass *vi et armis* will lie: But where the Act itself is not an Injury, but a Consequence from that Act is prejudicial to the Plaintiff’s Person, House, Land, etc., Trespass *vi et armis* will not lie, but the proper Remedy is an Action on the Case.

The law made a critical distinction between harm occasioned by direct and indirect wrongful conduct on the one hand, and ‘pure’ or ‘mere’ harm which is ‘once removed’ from the original harmful consequences of the defendant’s wrongful conduct, on the other. Using an example originally provided by Fortescue CJ, of what constitutes an indirect wrongful conduct for the purposes of action on the case, Buller explained that:

... if a Man lay Logs of Wood cross a Highway: though a Person may with Care ride safely by, yet if by means thereof my Horse stumble and sling me, I may bring an Action; for where-ever a Man suffers a particular Injury by a Nusance, he may maintain an Action; but then the Injury must be direct (such as before mentioned) and not consequential, as being delayed in a Journey of Importance.
Sir John Comyns in his 1822 *Digest of the Laws of England* cited the case of *Gray v. Jeffes* as an authority for the proposition that damage must be closely connected with the injurious act. In this case, the plaintiff, Gray, brought an action on the case against Jeffe, a master tailor with whom the plaintiff placed ‘his son and heir apparent as an apprentice’. The father claimed that the master ‘had so beaten his son with a spade, that he thereupon became lame by reason of which he could not have so much with his son in marriage of him as otherwise he might have, because of the same lameness is a disparagement to his said son.’ The Court of King’s Bench entered the judgment against the plaintiff on the ground that the son’s marriage ‘doth not belong properly to the father’. The legal question in this case was whether a victim who did not physically experience the impact of the defendant’s wrong could recover damages, and the answer was negative. Thus, from an early date, the rule of remoteness of damage which insisted that injury ‘should be closely connected’ with the wrongful conduct which was the foundation of the action, precluded compensation for ‘pure’ or ‘mere’ non-physical injury – be it a delay resulting in a loss of profits, or a severe emotional disturbance occasioned by the shock of harm done to one’s child. With respect to any physical damage, the plaintiff had to ‘prove that the Injury was such, as would probably follow from the Act done.’

In the second part of the eighteenth century, the majority of actions for negligence and folly involved collisions between carriages, though shipping accidents also contributed to the development of this area of law. By 1795, in cases of vehicular collisions - where the injury arose from the negligent conduct of the defendant, yet through an immediate or direct physical impact, the plaintiff was able to maintain an action on the case for negligence, and waive the trespass. At this point, the defendant’s intention became regarded as the essential feature which distinguished trespass from

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45 *Gray v. Jeffes* (29 Eliz.) 1 Leo. 50.
46 *Boyce v. Bayliffe* (1807) 1 Camp. 58 at 59; 170 E.R. 875 at 876, per Lord Ellenborough.
47 Id.
48 Buller, F. op. cit. fn. 24, at 26.
49 *Morley v. Gainsford* (1795) 2 H.Bl. 441 at 442; 25 E.R. 639 at 640. In this case which involved a collision between two carriages, the defence counsel argued that since the injury was direct and not consequential, the action ought to have been trespass. The court, however, decided that: ‘... an action on the case, not an action of trespass, is the proper remedy for an injury done to the Plaintiff’s carriage by the servant of the Defendant negligently driving his carriage against it.’
The invention of steam power in the second part of the eighteenth century gave the impetus for a rapid and unbridled industrialisation which contributed to the growing rate of tragic accidents on the highways as well as on the railways, in unsafe factories, and in the mines. The nineteenth century courts were thus practically compelled to develop specific legal tests for the cause of action in negligence. Today, the law of negligence imposes on every individual a duty of care which is owed to all persons who are within the foreseeable area of risk of harm. The legal duty of care in negligence is different from moral or religious obligation. Those who are under the legal duty of care are obliged by law to refrain from causing - by act or omission - reasonably foreseeable harm to anyone within the area of risk. For the court to impose liability upon the defendant, the plaintiff who is seeking compensation has to establish, on the balance of probabilities, each of the following five elements or requirements of the cause of action in negligence:

1. Actual injury - the plaintiff must show that the injury suffered by him or her was of the kind compensable in law.
2. Duty of care - the plaintiff has to establish a legal right to sue the particular defendant, by showing that the defendant owed him or her a duty of care. In order to do so, the plaintiffs have to show that they were so placed in relation to the defendant that it was reasonably foreseeable as a possibility that careless conduct of any kind on the part of the defendant may result in damage of some kind to the person of the plaintiff.

In modern trespass, the injurious and immediate act has to be intentional, in the sense that the defendant must have voluntarily intended the action.

The requirement of reasonable foreseeability of risk is limited by the concept of proximity which is used to define the duty relationship between the parties, and to delineate the limits beyond which the legal duty will not operate. The notion of proximity involves, inter alia, the relevant policy considerations. The modern doctrine of proximity introduced by Mr Justice Deane in the case of Jaensch v. Coffey op. cit. fn. 8, will be discussed in the context of the analysis of that case.


Minister Administering the Environment Planning and Assessment Act 1979 v. San Sebastian [1983] 2 N.S.W.L.R. 268 at 295-296, per Glass JA. A duty of care will arise out of a combination of: (a) reasonable foreseeability of a real risk that injury of the kind sustained by the plaintiff would be sustained either by the plaintiff, as an identified individual, or by a member of a class which included the plaintiff, (b) existence of the
3. Breach of a duty of care - the tort of negligence is fault-based. At the breach stage, the court will identify the acceptable standard of conduct in any given situation by reference to the touchstone of reasonableness. Failure by the defendant to act reasonably and thus occasion actionable damage is equated with fault.

4. Causation in law involves attribution of legal responsibility - the plaintiff has to establish not merely a scientific, philosophical or medical cause of the harm, but a legal connection between the particular breach of duty by the defendant and the actual injury of which the former is complaining.

5. Remoteness of damage is concerned with the ambit or scope of the defendant’s liability - unless the plaintiff can establish that his or her actionable damage was reasonably foreseeable as the outcome of the defendant’s wrongful conduct, the wrongdoer will not be held responsible for it.

The five requirements of the tort of negligence, together with defences, have been created by the courts in order to limit the defendant’s liability. Plaintiffs attempting to recover damages for ‘pure’ psychiatric injury had great difficulties in establishing the requirements of the duty of care and remoteness of damage. The requirements of causation and compensability of

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requisite element of proximity in the relationship between the parties with respect to the relevant act or omission and the injury sustained, and (c) absence of any statutory provision or other common law rule (e.g., that relating to hazards inherent in a joint illegal enterprise) which operates to preclude the implication of such a duty of care to the plaintiff in the circumstances of the case. *Jaensch v. Coffey* op. cit. fn. 8, at 586, per Deane J.

Defences to negligence include the pleas of illegality, voluntary assumption of the risk of injury, and statutory limitation of actions, as well as the partial defence of contributory negligence.
the alleged emotional injury have also involved controversial issues of
doctrine and policy.

**Allegations of indirectly caused psychiatric injury in the context of evidentiary requirements of the law of compensation**

There exists an important distinction between substantive and evidentiary aspects of the law of compensation. Whereas the jurisprudential principles which underpin the elements of the cause of action in trespass or in negligence form the substantive aspect of the law, its evidentiary aspect encompasses rules and requirements which govern the plaintiff’s burden of establishing the defendant’s liability for the alleged injury. In so far as the court determines the principles of compensability, the nature of the alleged damage is an issue of substantive law. However, once it has been determined that the injury in question is sufficient to found a cause of action in negligence, then the nature and extent of the actual injury becomes an evidentiary issue.  

Historically, the common law interpreted the question of evidence of damage literally: in proceedings for trespass to the person as well as action on the case, the court would assess the quantum of damages “upon the view of the plaintiff”. For example, in the case of *Burton v. Baynes*, in an action for an assault, battery, and mayhem, the plaintiff who had almost lost the sight of one of his eyes obtained damages of £11 14s. He believed that the award was inadequate, and

… moved the Court that they may be increased upon the view of the party; and a rule was made to shew cause; and upon view of the party, and examination of John Moor, a surgeon *ore tenus* in open Court, and hearing counsel on both sides, the damages were increased by the Court ... to 50l.

For the past two hundred years, medical examinations by expert witnesses have been generally conducted outside the courtroom. However the ability of the plaintiff to physically demonstrate his or her disabilities before the tribunal of fact is still of great importance to the outcome of the proceedings. It was therefore very difficult to recover damages for

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55 The plaintiff has to plead and establish the existence and the extent of the injury.
wrongfully occasioned psychiatric illness which did not involve apparent physical signs, for example melancholy (which today’s medicine would classify as clinical depression).

Other procedural aspects of the common law system also militated against bringing actions for compensation for ‘mere psychiatric injury.’ For under the adversarial system, the plaintiff has to persuade the tribunal that on the preponderance of probabilities there is a causal link between his or her injury and the alleged wrongful event. The comparison of probabilities does not involve the use of abstract mathematical formulae, but is based upon persuasion that in reality

… the identified negligent act or omission of the defendant was so connected with the plaintiff’s loss or injury that, as a matter of ordinary common sense and experience, it should be regarded as a cause of it.

Consequently, the notion of forensic proof in civil cases presupposes a commonality of beliefs amongst the judges, the juries, and the litigants about the reality of the plaintiff’s injury and its causes. For example, in relation to claims for compensation by plaintiffs who have allegedly suffered psychiatric injury, the parties to the litigation must ‘share a common vision of reality’, which assumes:

(1) the existence of mental illness and,
(2) the possibility that the illness was caused by biological and/or psychological factors rather than by Divine will or evil spirits.

These assumptions about the nature and causes of mental illness are very important in understanding why the courts have been reluctant to admit cases in which the allegation has centred upon indirectly caused psychiatric injury. With the exception of Hippocratic medicine, illness tended to be

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58 Under the inquisitorial system which seeks to satisfy the judicial tribunal about the truth of the allegation, the supernatural agency could be confirmed by the use of torture which was part of the forensic process.
59 Malec v. J.C. Hutton Pty. Ltd. (1990) 169 C.L.R. 638 at 642-643, per Deane, Gaudron and McHugh JJ.
regarded as caused by the gods or the evil spirits. In ancient Greece, Hippocratic physicians studied and described the nature and symptoms of psychiatric conditions. They opposed demonological explanations of mental illness, and advanced rational explanations of its causes. However, belief in the demonological origin of diseases (particularly mental disorders) was widespread. For example in Roman times, Celsus (25 BCE - CE 50), whose writings on medical subjects were generally characterised by a rational approach, advocated frightening mentally ill patients in order to cure them by scaring away spirits that possessed them. St Paul in his Epistle to the Ephesians warned Christian congregations of the powers of Satan, and when Thomas Aquinas in the 13th century codified Christian theology, he placed Satan at the top of the hierarchy of evil spirits, ‘working for the temporal and eternal suffering of mankind through the inscrutable will of God’.

In early Christian Europe, the responsibility for mental and certain physical disorders, such as epilepsy, was attributed solely to Divine punishment or evil spirits. In the sixteenth century, the famous physician, Paracelsus, provided the following classification of mental disorders in

64 ‘There were four manifestations of mental illness, epilepsy, mania (excitement), melancholia, and paranoia. Hippocratic physicians also recognised and described toxic deliria, phobias, puerperal insanity (postpartum psychosis), and hysteria, which they thought was caused by a wandering uterus that had been loosened from its moorings in the pelvic cavity.’ Alexander, F.G. & Selesnick, S.T. (1967), The History of Psychiatry, George Allen & Unwin Ltd., London, at 32.
65 Hippocratic medicine developed a theory of humours of the body (blood, yellow bile, black bile and phlegm) which when in equilibrium were a condition of health. The theory of humours was contained in a Hippocratic treatise De Natura Hominis which has been attributed to Polybos, the son-in-law of Hippocrates. Melancholia - a symptom of depression - was ascribed to an accumulation of black bile. Sarton, G. (1954), Galen of Pergamon, University of Kansas Press, Lawrence, at 52.
66 Alexander & Selesnick op. cit. fn. 62, at 42.
68 For example, in the thirteenth century, Arnald of Villanova (c. 1240-1311), wrote that ‘many illnesses originate on account of sin and are cured by the Supreme Physician after having been purified from squalor by the tears of contrition, according to what is said in the Gospel: “Go, and sin no more, lest something worse happens to you”.’ Arnald of Villanova: ‘On the Precautions that Physicians must Observe’ (De Cauteis Medicorum, attributed to Arnold of Villanova) trans. H. Sigerist. Reproduced in D.J. Rothman, S. Marcus, & S.A. Kiceluk (1995), Medicine and Western Civilization, Rutgers University Press, New Brunswick, New Jersey, at 272.
accordance with their causes: *vesani* (caused by impurities in diet), *insani* (caused by genetics), *melancholi* (caused by black bile), *lunatici* (caused by the moon), and *obsessi* (caused by evil spirits). The general view, however, was that people with mental disorders or physical symptoms that medicine was unable to explain, were possessed by devils or evil spirits.\(^6^9\)

From the forensic point of view, the significance of ascribing the cause of a disorder to evil spirits was two-fold. On the one hand, the plea of an injury occasioned by an evil spirit was unsustainable under a civil action for trespass to the person because the requirement of a demonstrable, direct wrongful contact with the victim’s body was absent. At the same time, there was an almost universally held belief that men and women were capable of causing illness and mental harm to others through magic. Any harm which could not be explained by some immediate and evident cause would be attributed to an indirect cause by way of invocation or conjuration of spirits and witchcrafts. Initially, the belief that witches had the power to manipulate the forces of the supernatural so as to inflict harm upon their victims was part of the Christian dogma, and within the jurisdiction of the Church.\(^7^0\) By the time when action on the case for indirectly caused harm became available, the common law courts began to prosecute witches independently of ecclesiastical procedures.\(^7^1\) It was not a propitious moment to raise the issue of psychiatric illness. It became even less so when, under Elizabeth I, the English Parliament in 1563 enacted the *Witchcraft Act*\(^7^2\) which created a statutory offence carrying the death penalty for all who ‘use, practise or exercise invocations and conjurations of evil and wicked spirits to or for any intent or purpose’, in particular, (i) to cause death or bodily harm; (ii) to declare where gold or silver treasure might be found; (iii) to provoke any person to ‘unlawful love’; or (iv) with the intention of

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\(^6^9\) In 1489, two Dominican monks, Jacob Spreger and Heinrich Kraemer published *Malleus Malefactorum* [The Hammer against Witches] which gave instruction for the recognition of the symptoms and signs of a witch.

\(^7^0\) It was the secular authorities that carried out the death sentences on convicted witches. Witches convicted in ecclesiastical courts were burned, those convicted in secular courts were hanged. Kors & Peters op. cit. fn. 65, at 13.

\(^7^1\) The first recorded case of sorcery at common law is *Re Crok* (1371) Y.B. Trin. 45 Edw. III, fo. 17, pl. 7; 82 Selden Soc. 162, no. 111.

\(^7^2\) Elizabeth I (5 Eliz., c. 16; S.R., IV, 116). It was partly based on an earlier statute of Henry VIII in 1542 (33 Hen. VIII, c. 8; S.R., III, 837, repealed in 1647 by Edward VI, 1 Edw. VI, c. 12), and aimed to punish sorcery, witchcraft (’the wicked offences of conjurations and invocations of evil spirits’), and buggery.
causing bodily harm. If any ‘witchcraft, enchantment, charm, or sorcery’ injured (although not mortally) any human being or did damage to goods and chattels, the witch was to be punished with a year’s imprisonment and a quarterly exposure in the pillory for the first offence, with death for the second offence. Under James I, the Witchcraft Act of 1604 added the death penalty for consulting, covenanting with, entertaining, employing, feeding or rewarding evil spirits. The law was enforced with merciless severity. Large numbers of presentments and indictments for witchcraft were brought before the courts, with the common law rules of evidence suspended. Torture was used systematically in order to extract and confirm confessions. Violations of recognized evidentiary procedures aroused protests from some lawyers and judges, but for over a century their objections were not heeded. For example, Reginald Scot, a lawyer who successfully defended two persons accused of witchcraft, published his book, The Discoverie of Witchcraft: Proving that Compacts and Contracts of Witches with Devils and all Infernal Spirits or Families, are but Erroneous Novelties and Imaginary Conceptions (1584), as material ‘very necessary to be known for the undeceiving of judges, Justices, and Jurors, before they pass Sentence upon Poor, Miserable and Ignorant People; who are frequently Arraigned, Condemned, and Executed for Witches and Wizzards.’ Scot wrote that:

If an old woman threaten or touch one being in health, who dieth shortliw after; or else is infected with the leprosie, apoplexie, or anie other strange disease: it is

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74 The Witchcraft Act of 1604 (1 Jac. I, c. 12) provided for the death penalty for any deed of black magic which harmed, though it did not kill, to be punished with death on the first offence. This Act was repealed by the Witchcraft Act (1735) 9 Geo. II, c. 5, s. 4, which itself was repealed by the Fraudulent Mediums Act 1951 (U.K.) c. 33. See: R. v. Duncan and Others [1944] 2 All E.R. 220.
75 One of the tests employed in witchcraft trials to determine whether or not the accused was a witch, was to truss the woman up and immerse her in water. If the water ‘rejected’ her, the guilt was taken to be proven, if she was ‘accepted’ by the element she would be posthumously cleared of the charges against her.
76 Scot, R. (1584), The Discoverie of Witchcraft: Proving that Compacts and Contracts of Witches with Devils and all Infernal Spirits or Families, are but Erroneous Novelties and Imaginary Conceptions, reproduced in 1930 with an introduction by Rev. Montague Summers, John Rodker, London.
(saith Bodin)\textsuperscript{77} a permanent fact, and such evidence, as condemnation of death must issue, without further proofe; if anie bodie have mistrusted hir, or said before that she was a witch.\textsuperscript{78}

Although some defendants disputed the charge of witchcraft, it generally brought a death penalty, if only because few advocates were prepared to possibly risk their own lives in order to undertake the defence of the accused. In his book, Scot, prudently, did not deny the existence of evil spirits (which would have amounted to heresy), however he argued that people knew nothing about them: they could not appear to men, ‘traffic with any person’ nor affect mankind in any way. There was no evidence that evil spirits could produce the phenomena and performances ascribed to their agency. Scot was attacked by the then Scottish King, James VI (later, James I of England), who in his 1597 treatise on witchcraft, called \textit{Dœmonologie, in Forme of a Dialogue, Divided into Three Books}, a manual for the use and guidance of the witchcraft inquisitors.\textsuperscript{79} In his critique of witch trials, Scot referred to the writings of Johann Weyer. Weyer was a physician, who in the middle of the sixteenth century wrote that many women accused of witchcraft were in fact suffering from mental illness,\textsuperscript{80} and that at least some of the symptoms manifested by the accused could be attributed to natural causes.\textsuperscript{81} Acknowledging that medicine as yet could not explain all aspects of mental illness, he wrote that witches could harm no one through the most malicious will or the ugliest exorcism. Rather, ‘their imagination is inflamed by demons in a way not understandable to us - and torture and melancholy makes them only fancy that they have caused all sorts of evil.’ However, since the then civilised world explained mental diseases solely in terms of diabolical intervention, Weyer himself was accused of being a witch, and threatened with prosecution.\textsuperscript{82}

\textsuperscript{77} Jean Bodin’s \textit{De la Démonomanie des Sociers} (Paris, 1580) was one of the most influential demonological treatises of the sixteenth century. Bodin described fifteen crimes of which every witch was supposed to be guilty, arguing that in the absence of proof, violent presumption should suffice for sentencing witches to death.

\textsuperscript{78} Scot, R. op. cit. fn. 74, Chapter III (‘Matters of Evidence against Witches’), at 13.

\textsuperscript{79} James VI of Scotland: \textit{Daemonologie, in Forme of a Dialogue, Divided into Three Books}, Edinburgh, 1597 (re-issued in London in 1603).

\textsuperscript{80} Weyer, J. (1563), \textit{De Praestigiis Daemonum} (The Deception of Demons).


\textsuperscript{82} Jean Bodin who wrote \textit{Démonomanie des Sorciers} (Paris, 1580) called for Weyer’s prosecution as a witch.
The Concept of Nervous Shock

witchcraft and sorcery to cause death and harm to others was taken for
granted, and it would have been theoretically possible for plaintiffs to sue
for compensation on action on the case for indirectly caused injury by way
of witchcraft, very few plaintiffs would have been willing to become
embroiled in any aspect of witch trials for the fear that they themselves
might be accused of witchcraft. There are no records of such civil law suits.
The belief in witchcraft was profound and universal, Trevelyan in his highly
influential history of *England under the Stuarts* described this inhumane
phenomenon thus:

Learning, headed by the pedant King, was master of the hound; science with
Bacon, and law with Coke pointed the trail; imagination and poetry blew horn
with Shakespeare and his brother playwrights; religion blessed the chase that
she had set on foot; while a discordant pack of vulgar beliefs, fears and hatreds
came yelling on their prey.

The prosecutions of witches persisted right through the Renaissance, the
Reformation, the Age of Reason, and into the eighteenth century. Though
it may appear incongruous to the modern mind, many seventeenth century
scientists, while firmly convinced of the existence of witchcraft, were also
pioneers of modern methods of scientific experimentation. Francis Bacon
(1561-1626), who in his legal capacity was at the forefront of the
persecution of witches in England, rejected the medieval inductive method
of scientific reasoning whereby knowledge could only be established by
reference to already established theories and certain accepted axioms
sanctioned by the Church. Bacon stated that although scientific research has
to be complementary to the study of the Bible, scientific propositions should
be grounded in orderly and systematic experimentation, and deductions
based on experimental data. His contemporaries, including Galileo,
Descartes, Gassendi, Boyle and Newton, developed new theories of

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83 Theoretically, surgeons and physicians as well as any other professionals covered by the
doctrine of the custom of the realm were capable of being sued on action on the case for
breach of their duty by practising witchcraft.
84 Trevelyan, G.M. (1946), *England under the Stuarts*, the revised 1946 edition, London,
The Folio Society, 1996 at 26. In the passage, Trevelyan refers to King James I (1603-
1625); Sir Francis Bacon (1561-1626), scientist and the Lord Chancellor of England
(1617-21); and Sir Edward Coke (1552-1634), eminent scholar of the common law and
the Chief Justice of the Court of Common Pleas (1606-13) and of the King’s Bench
(1613-1616).
85 In Europe, the legally sanctioned burning of witches was still taking place in the 1780s.
dynamics and optics which were based on the concepts of motion and inertia, which explained the world in terms of efficient and material causality based on changes in the properties of invisible corpuscular mechanisms. In law, once the belief in reason displaced faith and scholastic modes of deductive abstraction, the issue of causation in cases of indirect harm began to be discussed in terms of physical causes and effects. At the same time, scientifically minded physicians began to reject the idea that strange symptoms, for which an immediate and demonstrable cause could not be provided, were caused by the Divine will and evil spirits. Instead, these physicians adopted the model of medicine which correlated function and structure of the body. All signs and symptoms of health and sickness in the body were seen in terms of a close relationship between anatomy and physiology, with an emphasis on the structure and function of the central nervous system. Consequently, disease entities were categorised by reference to the signs in the form of coherent disturbances in physiological function, and symptoms which denote the pathological structural changes that underlie them.

Eighteenth century physicians also endeavoured to define the nature of their profession in the post-medieval world. The Professor of the Practice of Physic at Edinburgh, John Gregory (1725-73), published in 1772 his Lectures on the Duties and Qualifications of a Physician, in which he explained that ‘[By] the practice of medicine ... I understand, the art of preserving health, of prolonging life, and of curing diseases’. He argued that it was the ethical and professional conduct of physicians which enabled the fusion of the two divergent conceptions of the profession of medicine to be sustained, namely the concept of medicine as ‘an art the most beneficial and important to mankind, or as a trade by which a considerable body of men gain their subsistence’. Gregory stressed that the scientific learning and professional skill of every physician must be tempered by ‘the obligation to humanity, patience, attention, discretion, secrecy, and honour, which he lies under to his patients’. At the beginning of the nineteenth century...

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88 Id. at 8. Emphasis in the original.
89 Id. at 10.
90 Id. at 12.
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century, John Gregory’s pupil, Thomas Percival (1740-1804) published his seminal book on *Medical Ethics; or a Code of Institutes and Precepts, Adapted to the Professional Conduct of Physicians and Surgeons* in 1803.\(^{91}\) Percival’s *Medical Ethics* became the foundation of the American Medical Association’s first *Code of Medical Ethics* (1846-1847) which was the progenitor of all modern medical codes of ethics. In their writings Gregory and Percival emphasised the core virtues that characterised a humane and benevolent physician of the Enlightenment: a scientific approach to evaluation and application of medicinal drugs combined with compassionate care based on a nonjudgmental understanding of vulnerabilities, wishes, and needs of those who suffer from illness and disease.

**Dr Maty’s report on Count de Lordat’s ‘Palsy occasioned by a Fall, attended with uncommon symptoms’**

In the eighteenth century, the Society of Physicians in London was instrumental in encouraging a scientific approach to medicine amongst its members. It did so initially through regular meetings at which members would report interesting cases from their clinical practice followed by discussion. There was such a demand amongst members of the Society for copies of cases discussed at these meetings, that in 1757 the Society decided to publish *Medical Observations and Inquiries*.\(^ {92}\) According to the Preface to the first volume, the blueprint for this original refereed medical periodical, was that

… recommended by the great Lord Bacon; who advises us ‘to revive the Hippocratic method of composing narratives of particular cases, in which the nature of the disease, the manner of treating it, and the consequences, are to be specified,’\(^ {93}\) to attempt the cure of those diseases, which, in his opinion, have been too boldly pronounced incurable, and lastly, to extend our inquiries after the powers of particular medicines in the cure of particular diseases.\(^ {94}\)

Members of the Society were invited to send in papers to be reviewed

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92 Society of Physicians in London (1757), *Medical Observations and Inquiries*, William Johnston, London. This publication will be referred to as ‘*Medical Observations*’.

93 Bacon, F. (1605), *De augumentis scientiarum* (Advancement of Learning) L. IV. Cap. 2.

94 *Medical Observations* op. cit. fn. 90, at xi.
by a committee in accordance with the above criteria before a decision was made whether they merited publication. Thus it was that in 1767, in volume three of *Medical Observations and Inquiries*, Dr Maty, a member of the Society, published a paper, titled ‘A Palsy occasioned by a Fall, attended with uncommon symptoms.’ Though no litigation was involved, the case described by Dr Maty fascinated medical practitioners for over a hundred years, and played an important role in the medico-legal history of nervous shock.

According to Dr Maty, in April 1761, Count de Lordat, ‘a French officer of great rank and merit’, was travelling as a passenger in a carriage to join his regiment. The carriage overturned from a steep bank. The Count found himself with ‘his head pitched against the top of the coach; his neck was bent from left to right; his left shoulder, arm and especially his hand, were considerably bruised’. Though in pain, the Count was able to extricate himself from the carriage and walk to the nearest town where he resumed his journey. It was only on the sixth day that treatment, by way of blood-letting, was undertaken in relation to his injured shoulder and hand. For some six months the Count actively participated in the military campaign, but then he began to suffer from ‘a small impediment in uttering of some words, and his left arm appeared weaker’. His surgeon advised ‘the use of fomentation upon the parts affected, together with mineral waters, warm baths, and milk diet.’ The Count was able to take part in the second military campaign, but at the end of it, in December 1763, the difficulty in speaking and in moving his left arm obliged him to leave the army and return to Paris. Medical treatment proved unsuccessful, and when the Count consulted Dr Maty in October 1764, the physician observed that

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95 Modern editors of peer-reviewed journals may take heed of the final paragraph of the Preface to the first volume which explained the editorial policy of the *Medical Observations*: ‘Hypothetical disquisitions, points of controversy, numerous and needless quotations; in short, whatever has rather a tendency to shew the parts and erudition of the writer, than to advance medical knowledge, will be suppressed.’ *Medical Observations* op. cit. fn. 90, at p xii.

96 The term ‘palsy’ refers to a complete or partial muscle paralysis, often accompanied by loss of sensation and uncontrollable body movements or tremors.


98 Maty, at 258.
A more melancholy object I never beheld. The patient, naturally a handsome, middle-sized, sanguine man, of a cheerful disposition and active mind, appeared much emaciated, stooping, and dejected. He still walked alone with a cane from one room to another, but with much difficulty, and in a tottering manner; his left hand and arm were much reduced, and could hardly perform any motion; the right was somewhat benumbed, and the count could scarcely lift it to his head. 99

He was dribbling and could only utter monosyllables. His intellect, however, remained unimpaired, and he was able to read and write. According to Dr Maty, the patient’s ‘seat of disorder lay within some upper cervical vertebrae, the cause possibly being an induration or thickening of the membranes of the medulla spinalis, occasioned by some straining of them, in the fall, by the sudden bending of the neck.’ 100 The patient died in March of 1765, and Mr Sorbier, chief surgeon of the Gendarmerie, performed the post mortem examination, at which Dr Bellet, the Count’s French physician, assisted. Dr Bellet confirmed Dr Maty’s original observation that ‘the membranes of the medulla oblongata, but chiefly of the spinalis, had been hurt by the fall; ... the nervous membranes on the left were excessively stretched and irritated.’ Apparently, ‘this cause extended by degrees to the spinal marrow, which being thereby compressed, brought on paralytic symptoms, not only of the left arm, but at least in some measure also of the right.’ 101 Dr Bellet attributed the actual cause of the Count’s ‘gradual palsy’ to the ‘alterations of the medulla spinalis and oblongata’. 102

It is clear from the reports of Doctors Maty and Bellet, physicians of the Enlightenment, that they had discarded the old Aristotelian and Galenic approach to diagnosis based on the notions of imbalance of the essential humours (chymoi) (bile and phlegm, blood, and black bile or melancholy). 103 Their approach and terminology reflected the then recent theory of morbid anatomy which was developed by Giovanni Battista Morgagni (1682-1771), 104 who believed that there existed a correlation between symptoms manifested by the patient during life with the appearance of the organs of the body after death, and that post-mortem dissections could reveal disease...

99 Id. at 261.
100 Id. at 263.
101 Id. at 271.
102 Ibid.
104 Morgagni, G.B. (1760), De Sedibus et Causis Morborum [On the Sites and Causes of Death].
lesions. Palsy was regarded as a good example of such correlation.

In 1838, Sir Charles Bell, Professor of Surgery at the University of Edinburgh, in his book titled *Institutes of Surgery Arranged in the order of Lectures Delivered at the University of Edinburgh*,\(^{105}\) recalled the case of Count de Lordat. Bell, who considered palsy to be ‘a consequence of the swelling of the membranes’,\(^{106}\) discussed the case in the context of his analysis of two instances relating to ‘Injury to the Spine, attended with Affection of the Lower Extremities.’ One of them involved a carpenter who fell down some steps while hanging a curtain, and struck the lower part of his spine against the corner of a table. According to Bell, ‘The bruise was severe, but he got better of it by usual remedies, and in usual time. It was some months after he began to feel a want of power over the lower extremities’. The patient did not attribute the paralysis to his former accident, ‘the more especially as so long a time had elapsed before these symptoms appeared’\(^{107}\). Bell however, believed that the fall damaged nerves of the spinal cord. Likewise, he suggested a different explanation for Count de Lordat’s palsy from that provided by the eighteenth century physicians; namely, that the condition was due to ‘the injury to the soft envelope of the spinal marrow and the accession of inflammatory thickening.’\(^{108}\)

The eighteenth and early nineteenth century medicine strove to provide physiological and anatomical explanations for disorders or physical conditions for which a demonstrable explanation could not be found.

Yet, although the *Witchcraft Act* of 1604 was repealed in 1736, the association of unusual physical and mental disorders with evil spirits persisted for much longer among the general population. Thomas Hardy’s story, *The Withered Arm* (1888) describes the deeply held beliefs in the Wessex countryside about magical powers, passions, mental disorders and physical dysfunction. In the context of the law of causation, which was an issue of fact to be decided according to ‘common sense’, that is, by reference to the ‘experience of mankind’, when dealing with matters relating to psychiatric illness the jurors were probably more influenced by

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105 Bell, C. (1838), *Institutes of Surgery Arranged in the Order of Lectures Delivered at the University of Edinburgh*, vol. 1, Adam & Charles Black, Edinburgh, at 153-156.
106 Id. at 160. Notably, Professor Bell strongly recommended that no surgical treatment should be undertaken for palsy.
107 Id. at 153-7.
traditional beliefs than the complicated medical theories of the time.

**Brief legal and philosophical background to the rule that transient emotional suffering occasioned by negligent acts does not sound in damages**

Of great importance to the evolution of the law of nervous shock was, and is, the rule that grief, sorrow, anguish, fear, or anxiety do not sound in damages when occasioned by negligent conduct. The rule was first enunciated by Parke B in the Court of *Nisi Prius* in *Armsworth v. South-Eastern Railway Co.*, when he stated that:

> You cannot estimate the value of a person’s life to his relatives. No sum of money could compensate a child for the loss of its parent, and it would be most unjust if, whenever an accident occurs, juries were to visit the unfortunate cause of it with the utmost amount which they think ‘an equivalent for the mischief done’.

This doctrine was elaborated by Coleridge J in 1852 in *Blake v. Midland Rly. Co.* The case involved an action by the administratrix of the deceased person’s estate to recover damages for his death under the then recently passed *Fatal Accidents Act* (Eng.) 1846, known as *Lord Campbell’s Liability Act*.

This Act reversed, in part, the old common law rule that remedies for actions in tort die with the wronged person. It created a statutory cause of action for the benefit of the immediate dependants of a person wrongfully killed, where the deceased would have been able successfully to bring an action. In *Blake v. Midland Rly. Co.*, the plaintiff

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111 *Fatal Accidents Act (Lord Campbell’s Act)* (1846) 9 & 10 Vict., ch. 93, at 5319.
112 Similar statutes were enacted by the respective legislatures of the United States, however some States imposed monetary limits on these kinds of claims. For example, in 1889, the limit in Michigan was $5,000, and in New York it was $10,000. There were also differences in standards to be employed when assessing compensation. For example, Tennessee law included compensation for mental and physical suffering, loss of time, necessary expenses of the deceased and damages to the beneficiary; in Mississippi the standard for compensation was what was deemed just and fair in reference to the injury sustained by the plaintiff. Pennsylvania had no such limits. Hollingsworth Smith, H. (1889), ‘Concussion of the Spine in its Medico-Legal Aspects’, *The Journal of the American Medical Association*, vol. 13(6), 181-8 at 181.
brought an action under the *Fatal Accidents Act (Lord Campbell’s Act)* for damages for loss of dependency and pain and suffering occasioned by the death of her husband who was accidentally killed through the negligence of the defendant railway company. The question before the Court of Queen’s Bench was whether under the Act the jury should be told that in the assessment of damages they could consider the mental sufferings of the plaintiff for the loss of her husband, or whether their assessment should be limited strictly to actual pecuniary loss. The Court decided that the Act intended to restrict compensation awarded to families of persons wrongfully killed to such kind of injury ‘of which a pecuniary estimate could be made’. The award of solatium for mental suffering of the claimants for the loss of their loved ones was rejected on the grounds that:

…” if a jury were to proceed to estimate the relative degree of mental anguish of a widow and twelve children from the death of the father of a family, a serious danger might arise of damages being given to the ruin of the defendants.

The refusal to award damages for emotional harm under the *Fatal Accidents Act (Lord Campbell’s Act)* needs to be looked at in the context of the rules of evidence prevailing in the mid-nineteenth century. These rules did not allow either the plaintiff or the defendant to give evidence in court. Each party had to support its case by calling others as witnesses (in the eighteenth century, even jurors could be called as witnesses). Therefore, the only way in which plaintiffs could give any really convincing proof of their state of mind was to call as many witnesses as they could muster and pay for. This evidentiary practice made it difficult for the defendants to challenge certain fraudulent claims made by plaintiffs. Although the rules of evidence were eventually changed, the fear of bogus claims in relation to ‘purely mental’ suffering remained.

Another justification for refusal to award damages for emotional

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114 Id. at 238.
116 One of the main medieval tests of law, the Oath (known also as the ‘wager of law’), whereby one or other of the parties would be required to swear to the truth of his or her case on the holy evangels, was formally abolished only in 1833. The party swearing the Oath would bring with him or her a number of neighbours as ‘oath-helpers’ to back up the claim.
distress was the alleged difficulty with the pecuniary assessment of such injury. In 1861, in the case of *Lynch v. Knight*, Lord Wensleydale declared that 'mental pain or anxiety the law cannot value'.117 This particular justification, though oft-quoted as an authority for general denial of redress in emotional injury cases, is only part of the picture. The law had been able to - and did - put pecuniary value upon emotional anxiety caused to the plaintiff following such intentional torts as assault, battery, false imprisonment, trespass to land, and defamation, a parent’s ‘heartbalm’ action for seduction of the daughter, breach of contract of marriage, and in the actions on the case for nuisance. Moreover, Lord Wensleydale himself qualified his general statement by adding that juries tended to award so-called ‘parasitic’ damages for pain and suffering consequent upon physical damage, noting that: ‘... 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.’118 Lord Cranworth VC in *Kemp v. Sober*,119 a case involving an interest in land where the defendant had breached a negative covenant, stated that ‘a person who stipulates that her neighbour shall not keep a school stipulates that she shall be relieved from all anxiety arising from a school being kept and the feeling of anxiety is damage’.120 However in ordinary commercial transactions, the general rule for remoteness of damages in contract,121 established by Pollock CB in 1865, in *Hamlin v. Great Northern Railway Company*,122 excluded compensation for mere mental distress caused by the breach of contract (other than breach of promise of marriage). Pollock CB said that a plaintiff in an action for breach of contract ‘is entitled to recover whatever damages naturally result from the breach of contract, but not damages for the disappointment of mind

118 Id. at 863; 361-362.
119 *Kemp v. Sober* (1851) 1 Sim. (N.S.) 517; 61 E.R. 200.
120 Id. at 520; 61 E.R. 200, at 201. The plaintiff was the owner of an estate which had the benefit of a negative covenant against the carrying on of a business or calling.
121 *Hadley v. Baxendale* (1854) 9 Ex. 341; 156 E.R. 145 established the test for the remoteness of damage in contract which allowed recovery of damages for that which may reasonably have been supposed to be in the contemplation of the parties at the time they made the contract as the probable result of the contract being breached.
122 *Hamlin v. Great Northern Rly. Co.* (1856) 1 H. & N. 408; 156 E.R. 1261. In this case, Pollock CB allowed recovery of pecuniary loss and nominal damages but refused damages for distress arising from the defendant’s failure to carry the plaintiff by train to Hull in breach of contract. The plaintiff was delayed for a number of days, and missed appointments with his customers.
occasioned by the breach of the contract’. The same approach was adopted in the United States, and Canada.

Apart from doctrinal considerations which valued certain legal interests more highly than others, Justice Coleridge’s rule that negligently occasioned mental anguish cannot sound in damages was also grounded in the socio-political context of England between the years 1835 and 1880, when third-party insurance cover against liability was unavailable to the railway companies. The Courts were aware that all solatium damages were assessed ‘at large’, and as such had a potential to bring ruin upon the defendant railway company which had to bear alone the burden of the payout. Although comprehensive insurance policies became permitted after 1880, the non-compensability rule has been consistently re-affirmed. In Hinz v. Berry Lord Denning MR said that:

> In the English law no damages are awarded for grief and sorrow caused by a person’s death. No damages are to be given for the worry about the children, or for the financial strain or stress, or the difficulties of adjusting to a new life. Damages are, however, recoverable for nervous shock.

Finally, apart from the strictly legal considerations, Justice Coleridge’s rule - with its rigid distinction between mental and physical suffering - reflected the medico-philosophical thought of the first part of the nineteenth century. The rule that one could recover for bodily injury but not for mental harm was based upon the dualistic theory of the mind and body dichotomy postulated in the seventeenth century by the French mathematician and philosopher Rene Descartes. He was living at the height of the witch hunts, and in an effort to separate the realm of the natural world from that of

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123 Id. at 411; 1262. This rule was confirmed in Addis v. Gramophone Co. Ltd. [1909] A.C. 488, and was followed in Australia in Fink v. Fink (1946) 74 C.L.R. 127. Plaintiffs were able to recover for physical inconvenience and physical injuries that were the result of breach of contract.

124 Southern Express Co. v. Byers (1915) 240 U.S. 612; Restatement (Second) op. cit. fn. 3, s. 353.


The Concept of Nervous Shock

The spiritual and supernatural, Descartes identified mind with the immaterial soul. The experiences of cognition, perception and emotion were considered by Descartes as the soul’s immaterial reactions to some material movement in the blood or spirits of the bodily machine. The feelings, whether of anger, grief or joy, were not the cause but the consequence of prior material bodily actions and functions.\(^{129}\) For the purposes of metaphysical enquiry, therefore, all issues related to mind and soul could be separated from the physical body and regarded as the domain of theologians and philosophers. The body, seen as a complex mechanism with interacting solid and fluid parts, was the province of study by physiologists and doctors. At the time, Cartesian dualism allowed medicine to progress as an experimental science, allowing mechanistic, as opposed to demonological, explanations for human pathology. However, the jurisprudential consequence of the Cartesian dualism was the emergence of the notion that whereas damage to the body could be compensable because it was capable of physical examination and quantification, damage to the mind was not so quantifiable. Hence Lord Wensleydale’s assertion in *Lynch v. Knight*\(^ {130}\) that ‘mental pain or anxiety the law cannot value’.\(^ {131}\)

In fact, already in the seventeenth century such radical separation of mind and body was challenged from a philosophical point of view by Baruch Spinoza (1632-1677)\(^ {132}\) who, with great prescience, argued that mind and body are inseparable. According to Spinoza, mind and body form two aspects of the same entity - the living organism - which experiences its physiological processes psychologically as affects and thoughts. Indeed, throughout the ages, medical clinicians had observed and written about the interaction between the patient’s emotional state and his or her bodily

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130 *Lynch v. Knight* op. cit. fn. 115, at 863.

131 Lord Wensleydale’s dictum was followed in the United States in a number of cases, including *Cleveland C.C. & St. L. Rly. Co. v. Stewart* (1900) 24 Ind. App. 374; 56 N.E. 917, and *Perry v. Capital Traction Co.* (1929) 32 F. 2d 938 (D.C. Cir.).

functions. Nearly half a century after Dr Maty’s contribution to *Medical Observations and Inquires*, William Heberden, a noted English physician of the late eighteenth century, wrote this of patients who suffered chronic pain:

> In most of these patients the pain could not be traced to any certain cause: but in several they have apparently arisen from terror, grief, and anxiety, and have unquestionably been recalled and exacerbated by some disturbance of mind.  

However it was only in the second part of the nineteenth century that the medical and scientific establishment began to directly challenge the Cartesian notion of separation of body and mind. This occurred after the publication by Rudolf Virchow of his book *Cellular Pathology Based on Physiological and Pathological Histology* in 1858. In his study Virchow demonstrated that the causes of the disease process lay in the disturbance of cellular pathology, and not in ‘invisible ethereal substances’ as supposed by the medical followers of Descartes. Virchow also suggested that disease could be best explained through changes in physiology and biochemistry of the organism, whereas illness was the subjective experience of suffering. This important distinction between disease and illness is only now gaining acceptance among the medical profession. It is not too surprising, therefore, that the legal profession before 1858 should think in terms of philosophical concepts which were largely based upon the Baroque understanding of physiological functions and psychological responses of a human being.

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133 Brown op. cit. fn. 127.  
135 Virchow, R. (1858), *Die Cellular-pathologie in ihrer Begrundung auf physiologische und pathologische Gewebelehre*.  
2 Professor Erichsen and Shock Occasioned by Railway Collisions

In the nineteenth century, the railways displaced coaches as the greatest source of injury and accidental death. In the United Kingdom the era of railways began inauspiciously. At the opening of the first long-distance passenger railway on the Liverpool-Manchester line on 15 September 1830, William Huskisson, the elected member for Liverpool and a Vice-President of the Board of Trade which supervised the development and conduct of railways, was fatally injured by a passing train. According to the annual Report of the Board of Trade for 1857, out of 139,163,585 passengers who travelled by United Kingdom’s railways in that year, 236 were killed, and 738 injured ‘from causes beyond their own control’. These figures excluded all casualties where there might have been an element of contributory negligence on the part of the passenger, as well as injury and death suffered by the railway employees. A set of figures compiled by the Railway Service Gazette for 1872-3, showed that 1,387 servants of the Lancashire and Yorkshire Railway Company were injured, and 54 died in railway accidents. No statistics were collated with regard to members of the general public who died or were injured in railway collisions. In 1867, The Lancet estimated that in 1866 there were approximately 5,600 persons killed ‘outright’ on the railroads in the United States. This number rose dramatically in the subsequent years, for in 1893 there were 47,729 people

139 Under the Railway Regulation Act 3 & 4 Vict. 1840 (U.K.), c. 97, s. 3, the companies were supposed to provide data to the Railway Department of the Board of Trade relating to ‘accidents which shall have occurred ... attended with personal injury’. This data, however, was notoriously incomplete. Bartrip, P.W.J. & Burman, S.B. (1983), The Wounded Soldiers of Industry 1833-1897, Clarendon Press, Oxford, at 40-43.
injured or killed on railroads in the United States.\textsuperscript{140} While representing the frontiers of technology, the railways, with their big locomotives reaching the then incredible speed of 20-30 kph, epitomised the new and inherently dangerous force of mechanical power. Moreover, although railway companies were granted a privilege to bisect districts, cross thoroughfares, and intersect the course of footpaths, until the 1860s they were not compelled by law to make such crossings safe.\textsuperscript{141}

Writing in 1866 on clinical manifestations of ‘Injuries and Diseases of the Spine arising from Accidents, often of trivial character—from shocks to the body’ received in collisions on railways,\textsuperscript{142} John Eric Erichsen, Professor of Surgery at University College Hospital, London observed that:

\ldots in no ordinary accident can the shock be so great as in those that occur on Railways. The rapidity of movement, the momentum of the person injured, the suddenness of its arrest, the helplessness of the sufferers, and the natural perturbation of mind that must disturb the bravest, are all circumstances that of necessity increase the severity of the resulting injury to the nervous system, and justly cause these cases to be considered as somewhat exceptional from ordinary accidents.\textsuperscript{143}

Erichsen, however, also pointed out that very severe physical manifestations of response to a relatively minor accidental injury were not a particular mid-nineteenth century phenomenon.\textsuperscript{144} He quoted the statements of an eminent surgeon, Abercrombie, who in 1829 - that is before the development of passenger railways in England - wrote that even very slight injuries to the spine may be exacerbated by chronic inflammation of the spinal cord and its membranes. Consequently, according to Abercrombie:

\ldots every injury of the spine should be considered as deserving of minute attention. The more immediate effect of anxiety in such cases is inflammatory


\textsuperscript{143} Id. at 9.

\textsuperscript{144} Id. at 11.
action, which may be of an acute or chronic kind; and ... it may advance in a very insidious manner even after injuries that were of so slight a kind that they attracted at the time little or no attention.145

Erichsen used the case of Count de Lordat as an historical precedent which added weight to his theory that relatively minor physical trauma may lead to pathologic changes to the spinal cord and the brain stem. The medical symptoms of the Count’s accident closely resembled, though in a very severe form, those suffered by many patients seen by Erichsen in his clinical practice a hundred years later.146 Count de Lordat did not sue the driver of the carriage for damages, nor did many patients who presented with severely disabling symptoms that followed relatively minor accidents, for example, Mrs B, who in 1860, at the age of 32, happened to slip down four stairs.147 In the following six years,148 her symptoms included various forms of numbness of arms, legs and tongue (anaesthesia), astasia-abasia (an inability to stand straight and walk in a coordinated fashion), confusion of thought, loss of memory, bad appetite, and progressive paralysis.149 By 1866, however, Erichsen acknowledged that the class of cases involving actions for damages against railway companies for ‘secondary effects of slight primary injuries to the nervous system’ sustained as a result of collisions has become ‘a most important branch of medico-legal investigation’.150 In addition to symptoms described in the cases of Count de Lordat and Mrs B, other patients who came to see him after being slightly injured in railway accidents presented with extreme tenderness of skin, sensitivity to light, sleep disturbance, mutism, stuttering, and uncontrollable movements in limbs (choreas). Relying on the then current understanding of neurology and anatomy, Erichsen argued that these ‘secondary symptoms’

145 Abercrombie (1829), at 381.
146 One important aspect of the Count de Lordat’s case was the fact that the symptoms of his ‘nervous shock’ did not become apparent until some six months after the original accident.
147 Erichsen, J. op. cit. fn. 140, at 64-6. Erichsen also describes the case of a 23 year old man who fell from a horse, walked home, seemingly uninjured, but six weeks later developed a temporary paralysis with some residual impairment of function (at 86-89).
148 Id. at 64. She consulted Erichsen and another physician in 1861.
149 Id. at 64-6.
150 Id. at 2-3. The reason for the increase in the frequency of this type of injury was proportionate to the increase in the use of railways with their attendant risks of accidental collisions.
were due to a ‘concussion from railway shock’, the pathology of which included an inflammation of the spinal cord through ‘vibratory jarring’ of the nervous system causing a ‘molecular derangement’. He further suggested that there existed a close connection between non-impact environmental trauma and organic injury.

There were also patients who suffered similar symptoms although they did not sustain any demonstrable physical injury in train accidents in which they were involved. One of a number of such cases reported by Erichsen was that of Mr J, a 43 year old successful wine-merchant from Worcester, whose railway carriage overturned as a result of a train collision that occurred in August 1864. As a result of the collision, Mr J ‘was suddenly dashed forwards and then rebounded violently backwards.’ Nevertheless, for two hours, ‘believing himself unhurt ... he assisted his fellow passengers, many of whom were much injured.’ It was only when he returned home in the evening that he began to feel unwell, and on the following day was unable to attend to his business. Nine days later he consulted his local physician, Mr Everett, who observed that ‘he looked anxious and depressed; he complained of violent pains in the head, confusion of thought, and loud noises in the ears and head. He also complained, but slightly, of pain in the back.’ With the passing of time, his symptoms became more severe - he would often call people and things by wrong names, and addressed his wife as ‘sir’. The patient developed an ‘acute sensibility to sound in the right ear, deafness of the left. Vision of the right eye was rather dim.’ Twelve weeks after the collision, Mr J began to suffer intermittent contractions of the muscles in his right arm and hand, intense back pain, and spasms of the diaphragm. His gait became peculiar: ‘he seemed uncertain where to set his feet, and kept his head fixed (possibly because the pain in his neck increased if he moved his head)’. By the time Erichsen saw Mr J in March, 1865, his right arm and hand were numb, and the little and ring fingers contracted. He experienced fixed aching pain which was confined to the upper cervical, the middle dorsal, and the lower lumbar regions of his spine. Movement of any kind increased his pain. Mr J’s law suit against the railway company was tried at the Spring Assizes at

151 Id. at 64-77. Erichsen regarded labelling these symptoms as ‘railway spine’, absurd; id. at 10.
152 Id. at 53.
153 Id. at 53-4.
154 Id. at 54.
155 Id. at 55.
Worcester in 1865. Erichsen, who with two other medical practitioners appeared as an expert witness, testified that the plaintiff was ‘suffering from concussion of the spine, which had developed irritation or chronic inflammation of its membranes and of the cord, and that his recovery was doubtful’. Mr J was awarded £6,000 in damages. When he consulted Erichsen in May, 1866, his physical condition was unchanged, and he was unable to attend to business of any kind.

Medical controversies involving compensation for injuries occasioned by railway collisions

The general issue of compensation for personal injuries paid out by railway companies became a cause of concern in the 1860s. Writing in 1867, Edwin Morris, a surgeon, claimed that in 1865 alone, juries awarded over three hundred thousand pounds to people injured in railway accidents. He was not too far off the mark, for according to The Law Times, in 1865 the following sums were paid as compensation for personal injuries to passengers by railway companies in the United Kingdom: Caledonian, £12,849; Great Eastern, £21,996; Great Northern, £22,387 (the total included compensation for damage and loss of goods); Great Western, £40,061; Lancashire and Yorkshire, £24,708; London and North Western, £30,728 (total included compensation for damage and loss of goods); London, Brighton and South Coast, £4,504; Manchester, Sheffield, and Lincolnshire, £6,483; Midland, £25,958; North-Eastern, £14,355 (the total included compensation for damage and loss of goods); North British, £4,621; and South-Eastern, £70,726. In 1867, forty five successful legal actions brought against railway companies were reported during the first six months of the year. In twenty-nine of these actions, the railway companies were ordered to pay damages of £24,825. Most awards involved relatively small sums; however, one plaintiff was awarded a very large sum of £7,000 ‘on the assumption that he was irrevocably injured, a portion of that sum to be paid down, and a portion to be reserved until the sufferer’s condition should be finally

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156 Id. at 57-8.
decided.'\(^\text{159}\) In 1867 the Royal Commission on Railways was set up. It recommended ‘... that, on the one hand, railway companies should be absolutely responsible for all injuries arising out of the conveyance of passengers, except those due to their own negligence; and that on the other hand, the liability of the railway companies be limited within a maximum amount of compensation for each class of fares, but that any passenger should be entitled to require from the company any additional amount of insurance he may desire on paying for it according to a fixed tariff.’\(^\text{160}\) In 1870, the Select Committee of the House of Commons on Railways produced a Report which proposed that the recommendations of the Royal Commission be made the law of the land. The Committee further recommended that the jury system be abrogated and substituted with an independent specialist Court assisted by medical and engineering advice before which accident cases would be tried, or in the alternative, that the power of juries to award excessive damages be restricted.\(^\text{161}\) Neither the Commission’s nor the Committee’s recommendations were ever implemented.

With the publication of his volume on *Railway Injuries*, Erichsen, probably inadvertently, stepped on the very sensitive toes of the railway surgeons who perceived him as a threat to their financial interests. His book was immediately attacked by the Editor of the *British Medical Journal* (BMJ).\(^\text{162}\) The BMJ editorial attacked the title of the book as ‘calculated to mislead the casual reader.’ The author argued that Erichsen’s work contained

… an account only of the effects of shocks and concussions of the spinal cord and brain; whereas ‘railway injuries’ embrace a very wide field of surgical considerations, indeed almost every injury that blows and shocks can have an effect on the human body. Mr Erichsen himself in fact shows through the book that there is really no difference whatever in the symptoms and pathology of the nervous injuries of which he treats, whether produced by railway or any other

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\(^{160}\) The cost of the Railway Commission amounted to £24,740. (1867), 43 *The Law Times*, 27 July, at 205. The Commission’s recommendations were sharply criticised in *The Lancet*, 1 June 1867, under the heading ‘Compensation for Railway Injuries’, at 679-80.


The History of the Liability for Negligently Caused Psychiatric Injury

concussions. It is therefore quite superfluous to make of them a special class of railway nervous injuries.\textsuperscript{163}

The Editor was particularly critical of the fact that Erichsen singled out ‘railway injuries’ as belonging to a special category. He wrote:

We object seriously to such specialising of ‘railway injuries’. No doubt the public may readily be brought to believe that there is a specialty in the injuries produced by railway accidents, and therefore one surgeon has more special knowledge of their surgery than other surgeons have. This, it is true, may lead to the benefit of the individual, but clearly is not to the benefit of the profession at large, or of the art of medicine and surgery. The belief, on the part of the public, in the existence of such individual superiority, in the present cases, at least, would clearly be based upon a delusion, and must necessarily tend to the unfair depreciation of general surgery, and surgeons in general.

He declared that the main difference between ‘railway nervous injuries’ and other kinds of injuries turned on the legal aspect of the former: ‘A man whose spine is concussed on a railway brings an action against the company, and does or does not get heavy damages. A man who falls from an apple tree and concusses his spine, has - worse luck for him - no railway to bring an action against.’ In his reply, in a Letter to the Editor, Erichsen admitted that the effect of the words on the title page ‘Erichsen on Railway Injuries’, implied more than the book contained, and consequently was erroneous.\textsuperscript{164} He explained that he used the term ‘railway injuries’ in the same sense that surgeons employ the term ‘gun-shot injuries’: ‘not so much as denoting any specific difference in the nature of the injury, but rather as indicative of the peculiar and exceptional agency by which it has been occasioned.’ Erichsen pointed out that he considered railway injuries to be ‘peculiar in their severity’, but otherwise no different in their nature from injuries received in the ordinary accidents of life. In fact, the whole aim of his book was

… to show by cases that had been published, and by opinions that had been expressed, many years before railways came into operation, that conditions of the nervous system resulting from accident, and in every respect resembling

\textsuperscript{163} Id. at 612.
\textsuperscript{164} Erichsen, J.E. (1866), ‘Letter to the Editor’, \textit{British Medical Journal}, 15 December 1866, at 678-9. Erichsen asserted that the fault lay not with him but with the publisher and the bookbinder.
those that are now unhappily of such frequent occurrence from railway collisions, were well known to the profession.

In his response to Erichsen’s Letter, the Editor refused to acknowledge that it was possible to validly discuss pathological and surgical aspects of railway injuries in the same way as gun-shot injuries have been treated in medical literature. He wrote ‘Gun-shot wounds are, it seems to us, of special and particular character. The injuries inflicted by railroads are, as Mr Erichsen himself admits, just like all other injuries.’

In 1867, Edwin Morris, who was an enthusiastic supporter of the MBJ’s Editor, published a little book titled A Practical Treatise on Shock after Surgical Operations and Injuries with Special Reference to Shock Caused by Railway Accidents. In the Preface, the author stated that parts of the book, were written ‘with the view to assist in unravelling those intricate cases in which there is every reason to believe the symptoms are simulated, and at the same time to put medical men on their guard against such cases.’ He was particularly impressed by a controversial article written by Professor Syme in The Lancet, in which the good Professor rued the enactment of the Fatal Accidents Act (Lord Campbell’s Act) 1846 as ‘a most unjust piece of legislation’. Morris was particularly chagrined by the practice of pre-trial settlements because this meant that many cases against railway companies ‘never come before the public at all, but are privately compensated, sooner than risk a trial by jury’, arguing that as a consequence of this practice

… great imposition is practiced against railway companies, who have had but little opportunity of defending themselves against such cruel and unjust claims, with anything like a fair chance of success. And how is this? how has it arisen? With shame I confess that the surgical profession is much to blame in this

165 Id. at 678.
166 Id.
167 Id.
168 Id. at v-vi.
169 Syme, J. (1867), ‘On Compensation for Railway Injuries’, The Lancet, 5 January 1867, 2-3, at 2. The article, which described cases which in his opinion involved malingering on the part of successful claimants, gave rise to vigorous correspondence in the Letters to the Editor column of 1867.
matter; an unfair degree of prominence has been given to injuries arising from railway accidents and collisions. ...\textsuperscript{170}

Morris also quoted a letter from a certain Dr Cooper, surgeon to the Great Western Railway Company, who asserted that ‘injuries to the spine, as promulgated in courts of law, are a very different disease to that taught in the schools of anatomy and physiology, and are always cured by golden blisters.’\textsuperscript{171} Morris declared that ‘shock to, and alleged injury to the nervous system’ ‘form a class of injuries which designing and unscrupulous people do not hesitate to take shelter under for the purpose of exacting, through legal or other channels, compensation for such simulated injuries’,\textsuperscript{172} and provided the following advice for the railway companies and railway surgeons:

I must admit, that when persons are simulating nervous diseases it is a most difficult thing for the surgeon to successfully expose them. The phenomena that follow injuries of the nervous system are so varied, and so uncertain in their effects, that a cunning and unscrupulous person will comport himself in such a way as effectually to baffle the surgeon in his honest endeavour to form a correct diagnosis. These cases, and they are legion, can only be met by a visit being demanded and made on behalf of the railway company by some surgeon of experience, and afterwards an espionage kept over them until the trial takes place; so that their movements and conduct may be noted, as to enable us to say they are diametrically opposed to all known and acknowledged symptoms arising from actual injury of the part complained of. In all such cases there must be a bold and firm resistance on the part of railway directors, and not a too ready acquiescence in complying with the demands made for compensation for these nervous injuries; but it must be made known that in no such cases will money be paid, except by the direction of the jury.\textsuperscript{173}

It is important to note that the attacks on Erichsen’s book by the Editor of the \textit{BMJ}, Professor Syme and Ewin Morris were not doctrinal, for each of the participants in this controversy accepted that the injuries they were discussing, if genuine, were of physical origin. Thus the issue of aetiology and the medical nature of railway injuries did not arise. The issue on which their views diverged involved the interpretation of the medical sequelae.

\textsuperscript{170} Morris, E. op. cit. fn. 155, at 62.
\textsuperscript{171} Id. at 63.
\textsuperscript{172} Ibid.
\textsuperscript{173} Id. at 64-65.
Erichsen presumed that the severe symptoms which exacerbated the original railway injuries were due partly to physical causes such as irritation or chronic inflammation of membranes of the spinal cord and partly to the emotional trauma, particularly fear and the feeling of helplessness, which accompanied a railway collision. His opponents asserted that his theory, while pertinent to a few ‘genuine cases’ could not be used as a general rule because many patients engaged in personal injury litigation were motivated by self-interest to either exaggerate or to simulate the incapacitating symptoms in hope of obtaining greater compensation. Moreover, the Editorial in the BMJ was essentially motivated by professional self-interest - the economic threat to the rest of the profession posed by a perceived emergence of a new specialty in ‘railway injuries’. Syme and Morris attacked Erichsen because they considered him to be too sympathetic to those victims of railway collisions who claimed to have severe impairment of function without being able to demonstrate physical lesions suffered on impact.

It should be noted at this point that in the 1860s, there existed an ‘almost obsolete’ custom whereby the railway companies employed medical practitioners to arrange the amount of compensation with the injured claimants. This practice was strongly condemned by the judiciary. In the case of Acton v. Midland Railway Co. (digested in The Law Times and in The Lancet), a plaintiff accepted £31 10s in a private settlement. Soon afterwards, Mr Acton found that his condition was much worse than he was led to believe by Dr Robertson, who was his family physician, but who also acted for the railway company. Mr Acton decided to take his case to court, where the jury awarded him £1,500. The Lord Chief Justice of the Queen’s Bench was highly critical of physicians acting for both parties, and said that ‘… it is no part of the duty of a medical attendant to take part in settlements with patients.’\(^\text{174}\) The Law Times report concluded that it was ‘in vain for railway companies to attempt to settle claims through a medical officer, who has it in his power to represent to a patient that his condition is not as bad as it really is.’\(^\text{175}\)

In the case of Hand & Wife v. Midland Railway Co. reported in The

\(^{174}\) Anonymous (1867), ‘Compensation for Railway Injuries’, The Lancet, 1 June 1867, 799-80; Anonymous (1867), ‘Actions against Railway Companies’, The Law Times, vol. 43, at 118. Dr Robertson told his patient that the injury was trifling, and would be remedied in a fortnight by change of air.

\(^{175}\) Id. at 118.
Mrs Hand sustained injuries through the admitted negligence of the defendant railway company. Mr Day, a surgeon to the defendants’ company, shortly after the accident assured Mrs Hand that she would soon be well, and gave her a cheque for £211, which was to remunerate her for loss of business and medical expenses. The receipt given by Mrs Hand was witnessed by her own medical practitioner, who deposed that he did not advise the patient to settle, but merely signed his name as a witness to the receipt, though even at the time he expressed doubts as to the period of her recovery. Subsequently, she became very ill, and "was on the verge of paralysis". She sued Mr Day for fraud and misrepresentation. The jury awarded her £300 in damages, in addition to the £211 already paid. The judge commented that ‘as a general rule, it was most objectionable that medical men should engage in making compromises. If such a compromise was to be made, it was better that it should be in the hands of the professional legal advisers than in those of medical men.’

It is not known whether the Editor of the BMJ and Morris were engaged in this practice, but it is clear that a system which practically presupposed that any passenger involved in a railway collision was physically injured whether such injury was demonstrable or not, and which left only the quantum of damages to be litigated - was open to abuse. Some plaintiffs, aided and abetted by their medical and legal advisers, exploited the system, but so did, as the Chief Justice pointed out, some railway companies. Although most physicians accepted their patients’ words and symptoms in good faith whether or not the former happened to be engaged in personal injury litigation, some physicians tended to encourage their patients in the belief that they were suffering from an organic or psychosomatic illness even in the absence of any symptoms to substantiate such diagnosis. There was also a group of medical practitioners who adhered to a theory that such patients were, until proven otherwise, malingers.

Apart from raising the issue of malingering, which became a grim preoccupation of many doctors and lawyers, the 1866-7 controversy about

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176 Hand & Wife v. Midland Railway Co. (1867), Bristol County Court, reported in The Lancet, 24 August 1867, at 243.
177 Ibid.
178 Ibid.
179 Professor Syme disapproved of private settlements.
181 Malingering is a legal construct and not a medical diagnosis.
Erichsen’s book had no effect on the law of compensation. As long as the medical profession was unified in its view that even minor trauma caused by railway collisions may effect pathologic changes to the spinal cord and the brain stem, it was taken for granted that the injuries were physical in nature. The courts regarded railway companies as falling into the category of common carriers,\textsuperscript{182} responsible for any physical injury to the passengers which occurred as a direct result of their negligence. In England and in the United States, passenger carriers of all kinds were held to a standard of utmost care, and were often found liable for the slightest negligence. Despite the claims by Syme, case reports show that juries tended to hold railway companies liable if there was any possibility of avoiding the injury, however remote or improbable.\textsuperscript{183} Judges too,

… rigorously insisted that carriers [trains] do all that was humanly possible to avoid passenger injuries because of the significantly greater danger these machines presented to the safety of their passengers. The inherited moral principles and public policies underlying tort law served as insurmountable bastions against the attempts of passenger carriers to avoid the stringent liability that the common law imposed on them. Judges developed the rules of passenger carrier liability for injuries to passengers and applied these rules to dispense neutral justice, to promote public safety, and to enhance the care and diligence of passenger carriers in avoiding injuries.\textsuperscript{184}

\textsuperscript{182} Railway and Land Traffic Carriers’ Act (An Act for the Better Regulation of the Traffic on Railways and Canals, 1854 (U.K.), 17 & 18 Vict. ch. 31.

\textsuperscript{183} Kaczorowski, R. op. cit. fn. 27, at 1168.

\textsuperscript{184} Id. at 1168-9. A typical example of the judicial stance with respect to the railway carriers was the case of Austin v. The Great Western Railway Co. (1866-7) 42 The Law Times 495. The plaintiff with her infant child travelled on the defendant’s railway. By custom, infants in arms were permitted to travel free of charge. The child was injured in a collision, and the jury awarded £50 in damages against the railway company. The defendant appealed to the Court of Queen’s bench for a new trial on the ground that the ‘infant, having been carried free, was nothing more than so much luggage taken in the hand of the passenger, for which the company was not answerable, as it had not contracted for its transit.’ The Court disagreed, holding that the officials of the railway had allowed the child to pass with its mother, and thus tacitly agreed to carry both.
‘Nervous shock’ and ‘mental shock’

Erichsen who is credited with coining the phrase ‘nervous shock’ to denote severe symptoms which some patients developed following physically threatening circumstances, appears to have used it for the first time in print only in 1875,\(^ {185} \) when he published a set of 14 lectures *On the Concussion of the Spine, Nervous Shock and Other Obscure Injuries of the Nervous System*.\(^ {186} \) However, the phrase must have gained general currency some years earlier, for a London barrister, Henry Godefroi, Esq, referred to ‘nervous shock’ in a paper ‘On Compensation for Railway Accidents’ which he presented before The Juridical Society in 1870.\(^ {187} \) In the course of a proposal of a legislative scheme aimed at protecting railway companies against fraudulent claims,\(^ {188} \) Godefroi opined that railway companies should be able to further protect themselves ‘by searching inquiries into the previous character of the plaintiff; the concurrence of such facts as insolvency, bad reputation, &c., coupled with a claim for compensation for injury caused by an alleged nervous shock ...’\(^ {189} \)

Erichsen used the term ‘nervous shock’ to indicate that symptoms following railway accidents were a consequence of an organic, albeit non-demonstrable, injury. The term ‘organic’ was used in the 19\(^ {th} \) century to denote disorders based upon damage or change to bodily tissue. In the

\(^{185} \) In the original set of six lectures titled *On Railway and Other Injuries of the Nervous System*, London: Walton & Maberly, 1866, Erichsen did not use the term ‘nervous shock’.


\(^{187} \) Godefroi, H. op. cit. fn. 159.

\(^{188} \) Id. at 702. Godefroi suggested a scheme whereby in personal injury cases, payment of damages, as assessed by the jury, would be conditional upon the non-recovery of the claimant. According to this proposal, the money would be invested in trust for the plaintiff and his family, with a quarter of the whole sum awarded in one instalment. The following instalment would be paid within a year, but ‘only upon a certificate of some medical man who had been appointed to report to the Court, or the arbitrator, after a private examination of the plaintiff.’ If the medical practitioner reported that there had been exaggeration, fraud or simulation on the part of the claimant, the company would have the right to obtain leave for a new trial.

\(^{189} \) Id. at 702, emphasis in the original.
context of the law of negligence, the significance of the diagnosis of ‘nervous shock’ to indicate a form of physical injury lay in the fact that it allowed the plaintiff to jump through the first of the five hoops required by this cause of action, namely the requirement that the damage suffered be physical in nature. By that time, a number of medical practitioners began to question the organic approach. In 1870 Le Gros Clark published *Lectures on the Principles of Surgical Diagnosis*,\(^{190}\) in which he suggested that the cases of the so-called ‘railway spinal concussion’ should be regarded as instances of emotional shock rather than of a special injury to the spinal cord. Ten years later, Furneaux Jordan in his *Surgical Enquiries*\(^ {191}\) wrote that

> The principal feature of railway injuries is the combination of the psychical and corporeal elements in the causation of shock, in such a manner that the former or psychical element is always present in its most intense and violent form. The incidents of a railway accident contribute to form a combination of the most terrible circumstances which it is possible for the mind to conceive. The vastness of the destructive forces, the magnitude of the results, the imminent danger to the lives of numbers of human beings, and the hopelessness of escape from the danger, give rise to emotions which in themselves are quite sufficient to produce shock, or even death itself. ... All that the most powerful impression of the nervous system can effect, is effected in a railway accident, and this is quite irrespectively of the extent or importance of the bodily injury.

The insights of Le Gros Clark and Furneaux Jordan into the aetiology of nervous shock were confirmed when in the 1880s research on animals into the neurology and physiology of fear provided empirical evidence that an experience of extreme fear could produce consequences which approximated surgical shock.\(^ {192}\) These insights were further developed by Herbert Page who was opposed to Erichsen’s strictly organic view of nervous shock. The book on *Injuries of the Spine and Spinal Cord and Nervous Shock*\(^ {193}\) based on Page’s prize-winning doctoral dissertation, was

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\(^{193}\) Page, H. op. cit. fn. 106.
published in 1883. Page, who was a consulting physician for the London and Western Railway Company, argued that in many cases of railway accident victims such symptoms as severe and prolonged disturbance of speech, loss of memory, distressing dreams, numbness of limbs, and tendency to faint, were ‘produced by fright and fright alone’. Page noted that the term ‘general nervous shock’ or ‘shock to the nervous system’ was more applicable to ‘the whole clinical circumstances of the case than to any one symptom which may be presented by the injured person.’ He pointed out that the term ‘shock’ was used in medicine

… as synonymous with the ‘collapse’ which is concomitant of all profound and sudden injuries, whether inflicted upon the head or upon some other part of the body. And this collapse or shock we are wont to regard as the immediate expression of lessened or annihilated function of the great nerve centres which preside over the vascular system, paresis of the heart and of the peripheral parts of the circulation being the essential factor in inducing the pallor and coldness which affect the whole surface of the body, and the mental enfeeblement which is due to impaired flow of blood within the brain.

Page considered that nervous shock was a ‘functional’ disorder, which was a nineteenth century appellation denoting a bodily dysfunction without any apparent lesion, produced as a consequence of fear and alarm triggered by the shock of an accident:

In these purely psychical causes lies, ... the explanation of the very remarkable fact that after railway collisions the symptoms of general nervous shock are so common, and so often severe, in those who have received no bodily injury, or who have presented little sign of collapse at the time of the accident. The collapse from severe bodily injury is coincident with the injury itself, or with the immediate results of it, but when the shock is produced by purely mental causes the manifestations thereof may be delayed.

Page also discussed the case of Count de Lordat, but unlike Dr Maty, Professors Bell and Erichsen, he was dubious whether it was medically

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194 Id. at 117. Incidentally, Erichsen seems to have been singularly unlucky with his choice of titles. Page, at 52, objected to Erichsen’s use of the term ‘concussion of the spine’ in the title of his 1875 book (‘On the Concussion of the Spine, Nervous Shock and Other Obscure Injuries of the Nervous System’) which he regarded as ‘too vague’.

195 Id. at 143.

196 Id. at 148.
appropriate to trace the cause of the Count’s subsequent illness to a mildly traumatic episode that occurred so many months before, and was followed by two military campaigns.\textsuperscript{197} Based on their clinical observations, Furneaux Jordan and Herbert Page set out to prove, in opposition to the views of Erichsen, that such physiological injuries as inflammation of nerve tissue, meningeal irritation, and damage to the grey matter, were often absent in cases of the ‘nervous shock’. Page, just like Erichsen, was convinced that there existed a close relationship between nervous shock and surgical shock, however Page traced it to a different patho-anatomical source.\textsuperscript{198} He argued that rather than being confined to spine and brain lesions, the causes of nervous shock should be traced to morbid changes to the nerve centres. Page also noted the fundamental importance of psychological factors in determining the onset of nervous shock, however, at the time he published his book, the notion of psychopathology did not exist.\textsuperscript{199} A year later, in 1884, two American neurologists published articles suggesting that symptoms of nervous shock - in the sense in which Page used this phrase - had the characteristics of a traumatic hysteria.\textsuperscript{200} In Berlin, writing in the late 1880s, Hermann Oppenheim\textsuperscript{201} observed that ‘… in the genesis of this disease, psychic shock - fear of excitement - plays an important rôle: there are cases in which it alone is the cause of the trouble.’\textsuperscript{202} [emphasis in the original] From the legal perspective, the significance of the pathogenic effects (nervous shock) produced by intense fear, when combined with an element of surprise, was that such fear was regarded by medical authorities like Erichsen, Page and Oppenheim as an assault equivalent to physical violence.\textsuperscript{203}

\textsuperscript{197} Id. at 52.
\textsuperscript{198} Young, A. op. cit. fn. 190, at 21.
\textsuperscript{202} Id. at 733.
\textsuperscript{203} Young, A. op. cit. fn. 190, at 21.
Other important developments in the field of psychiatric illness which also had legal implications took place in the last two decades of the nineteenth century. In France, Jean-Martin Charcot, the celebrated director of the historic Salpêtrière infirmary in Paris, published over a hundred case histories based on hysterical patients which he presented in the 1870s and 1880s during clinical lessons, known as *leçons du mardi*. Charcot, who was familiar with the work of Erichsen and Page, observed that the symptoms which Erichsen called ‘railway spine’ were manifestations of hysteria which he considered to be a neurological disease, akin to epilepsy or syphilis, caused by the dysfunction of the central nervous system. Hysterical neuropathy was the result of a lesion. Though the structural and functional nature of this neurological defect were still unknown, it would eventually be discovered through the methodology of pathological anatomy. Charcot theorised that the neurological dysfunction was a result of a combination of hereditary predisposition to ‘nervous degeneration’ and such environmental factors as physical or emotional shock, for instance, an intense fright produced by a railway collision. Unlike Erichsen and Page, Charcot considered that intense and unexpected fear was an assault analogous, rather than equivalent, to physical violence.

In 1889, Pierre Janet, who worked with Charcot at Salpêtrière, developed a theory of dissociation of consciousness, based on his experience with a nineteen year old female patient whose severe hysterical symptoms were triggered by an event that happened when she was nine, and the memories of which she totally suppressed while she was in a waking state. The patient’s memory, however, was activated during hysterical paroxysms and hypnotically induced somnambulism. The theory of dissociation of consciousness exerted profound influence on Sigmund Freud, whose work will be discussed in Chapters 2 and 3.

To add to the confusion, at about the same time, another neurological diagnosis was advanced for the symptoms which some people suffered following the shock of accidents, that of ‘traumatic neurasthenia’. The term

204 Charcot, J.M. (1889), *Clinical Lectures on Diseases of the Nervous System Delivered at the Infirmary of la Salpêtrière*, New Sydenham Society, London. These lectures were held in the amphitheatre of the Salpêtrière, and were open to the public.
205 Young, A. op. cit. fn. 190, at 19-21.
206 Charcot, J. op. cit. fn. 202 at 335.
208 Young, A. op. cit. fn. 190, at 21.
‘neurasthenia’ was coined in 1868 by a New York doctor, George Miller Beard, to indicate a state of ‘physical and mental exhaustion’ which he described as a ‘functional disease of the nervous system’ particular to the upper classes of society.\footnote{209} According to Beard, it was a condition of ‘nervous exhaustion’, a disease ‘of modern civilization, and mainly of the nineteenth century, and of the United States.’\footnote{210} The disorder was characterised by symptoms which were largely subjective, they included fatigue, irritability, depression, insomnia, headache and lack of capacity for enjoyment.\footnote{211} Beard pointed out that ‘to one who does not suffer them [they] appear trifling and unreal; many of them do not appeal directly to the senses of the scientific observer: the physician can only know of their existence through the statements of the patient, or through his conduct.’\footnote{212} Neurasthenia, seen as a psycho-physiological disorder, was readily accepted by the medical profession in the United States and Europe, as well as by the lay public.\footnote{213} Neurasthenic patients were generally considered to differ from those afflicted with hysteria. The hysterics would actively display their symptoms (convulsions, paralysis, incoordination of movement, anaesthesia, etc), while the neurasthenics experienced all manner of mental and physical discomfort without displaying them. Where such experience led to physical incapacity, the dividing line between hysteria and neurasthenia became blurred.\footnote{214} Neuropsychiatrists of the late nineteenth century tended to classify neurosis according to whether it followed fright, shock, ‘general shock commotion’ or the combined effects of these experiences. There was a general belief that, in each instance, the condition would only occur in a

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210 Beard, G. (1890) op. cit. fn. 207, at 24.

211 Id. at 38. Amongst others, symptoms of nervous exhaustion included tenderness of the scalp (apparently the equivalent in the head of spinal irritation); dilated pupils, sick headache and various forms of head pains, changes in the expression of the eye, congestion of conjunctiva, disturbances of the nerves of special sense, noises in the ears, atomic voice (soft, faint, wanting in courage and clearness of tone), mental irritability, morbid fears, flushing and fidgetiness, drowsiness, desire for stimulants and narcotics.

212 Id. at 24.


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person psychologically predisposed to neurosis.\footnote{Schaller, W.F. (1918), ‘Diagnosis in Traumatic Neurosis’, \textit{Journal of the American Medical Association}, vol. 71, pp. 338-347, at 338.} Medical linkage of a person’s predisposition to neurotic illness consequent upon a traumatic event led the courts to insist that only persons of ‘normal disposition’, ‘ordinary fortitude’, or ‘ordinary phlegm’\footnote{This phrase harks back to the humoural theory of medicine, suggesting that the balance between humours is not upset by the predominance of black bile.} could recover damages for nervous shock.\footnote{Wilkinson v. Downton [1897] 2 Q.B. 57. This meant that persons with ‘predisposition to neurosis’ could be precluded from recovering damages for nervous shock.}

Thus then, as now, views were polarised between those who advanced an organic causation for post-accident complaints and those who regarded such sequelae as being of psychological origin.\footnote{Manley, T.A. (1891), ‘Traumatic Lesions of the Spine, occasioned by Railroad and Other Injuries: Their Etiology, Pathology and Treatment’, \textit{Journal of Nervous and Mental Diseases}, vol. 16(18), 351-4.} Physicians who followed Erichsen’s organic theory would make a diagnosis of ‘nervous shock’ in cases where patients’ severe and distressing symptoms followed an accident which did not involve a demonstrable grievous physical injury. Medical practitioners who believed that these symptoms constituted a functional disorder, would attribute them to ‘mental shock’. In 1881 Dr Russell Reynolds observed in \textit{The Lancet} that:

There are some members of our profession, who have become specialists in this direction, who seem to think that everything that a man tells them of his subjective symptoms are matters of fact and of great importance; and on the other hand, there are those who regard every plaintiff as either a knave or a fool, and most probably a combination of the two, but who never believe that any man is injured in a railway accident unless he has broken his neck, or has a compound fracture of his thigh.\footnote{Reynolds, R. (1881), ‘Specialism in Medicine’, \textit{The Lancet}, vol. 11, 655-58, at 657. For an analysis of the present attitudes of the medical profession towards non-organic illness see: Mendelson, G. (1988) op. cit. fn. 2; Mendelson, G. (1995), ‘Posttraumatic Stress Disorder as Psychiatric Injury in Civil Litigation’, \textit{Psychiatry, Psychology and Law}, vol. 2, 53-64.}

The notion of ‘functional disorder’ had profound consequences for the substantive law of compensation because the medical diagnosis of ‘functional disorder’ presupposed that the injury was emotional or ‘mental’ in nature rather than physical, and as such, was not necessarily...
compensable. For Erichsen, the possibility of excessive litigation by people who suffered psychogenic injury following non-impact trauma was not a major issue. However, there were many physicians, including Page, who tended to regard litigants as malingerers who presented with a condition which was not a medical disorder but a ‘compensation neurosis’, or ‘litigation neurosis’, primarily motivated by the lure of pecuniary damages. These pejorative phrases, though clearly not diagnostic terms, have been used for over a hundred years by forensic psychiatrists, physicians, and surgeons as if they actually belonged to the field of medical nosology. Page himself wrote that:

> Even in perfectly genuine cases ... compensation acts as a potent element in retarding convalescence, as evidenced in numberless instances by the speed with which recovery sets in as soon as the settlement of pecuniary claims has been accomplished.

This sentence has been repeated like a mantra by defendants in personal injury actions for over a hundred years. Even those physicians who, like Charcot, believed that the severe symptoms suffered by many victims of minor railway accidents were caused by hysteria, also asserted that hysterics were deceitful and prone to malingering. He is quoted as having said that ‘the [hysterical] patient voluntarily exaggerates real symptoms or even creates in every detail an imaginary symptomatology. Indeed, everyone is aware that the human need to tell lies, whether for no reason at all other than the practice of a sort of cult ... or in order to create an impression, to arouse pity, etc., is a common event, and this is particularly true in hysteria.’ The distrust with which many physicians approached}

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220 Confusion generated by the use of the phrases ‘nervous shock’ and ‘mental shock’ will be discussed in relation to the Privy Council’s advice in *Victorian Railways Commissioners v. Coultas* [1888] 13 A.C. 222.

221 The term ‘psychogenic’ is used to indicate that certain life events have played an important role in the genesis of the person’s psychiatric disorder.

222 Apparently, the term ‘compensation neurosis’ was coined by C.T.J. Rigler in his monograph *Über die Folgen der Verletzungen auf Eisenbahnen*, (1879), Reimer, Berlin. For the medical history of ‘nervous shock’ see Mendelson op. cit. fn. 217.


224 Page, H. op. cit. fn. 106, at 256; 261.

complaints of patients whose suffering could not be corroborated by
demonstration of a visible lesion, and the belief in the so-called
‘compensation neurosis’, had taken hold of a significant segment among the
medical profession.226 The fear of malingering has persisted, despite the fact
that already in the nineteenth century, some physicians, including Erichsen,
who compared the symptoms of patients who were pursuing a claim for
damages and those who were not involved in the litigation process, found
that there was very little difference between them. The ambiguous attitude
of the medical profession towards the cluster of syndromes called ‘nervous
shock’ exerted a negative influence over the legal debate as to whether
damages for nervous shock should be compensable and, if so, in what
circumstances.227 It is also possible that the accusations of malingering made
against patient-litigants who claimed damages for nervous shock led to the
demographical shift amongst these claimants. In the reported cases of the
late nineteenth and early twentieth centuries, the majority of plaintiffs were
women who suffered miscarriage as a sequelae to their frightful experience
brought about by the defendant’s negligent conduct. A miscarriage is the
kind of demonstrable injury that defies an allegation of exaggeration or of
simulation.

Suing for Damages, with Remarks on the Nature of this Disease and the Hysterical
Temperament’, *Journal of Nervous and Mental Diseases*, vol. 18, 13-26. The author
argues that in many cases of rape and other sexual assaults the convicted perpetrators
were really innocent victims of lies and inventions perpetrated by hysterical women. He
comments at 21-2 that he ‘cannot help suspecting that the epidemic of rapes committed,
as reported by negroes in certain parts of the South, savors [sic!] somewhat of
epidemical hysteria on the part of the victims.’

*The Journal of the American Medical Association*, vol. 13(6), 181-8. In general, see:

Knapp, P.C. (1892), ‘Traumatic Nervous Affections. An Attempt at their Classification
104, 629-43, at 641; Schaller op. cit. fn. 213.
3 Coultas v. Victorian Railway Commissioners and the Law of Injury Consequential upon Fright

The first step towards recognition that nervous shock could be compensable as a separate head of damage, even in cases where the defendant’s conduct did not result in a physical contact with the plaintiff’s person, was taken in Australia in 1886, exactly twenty years after the publication of Erichsen’s lectures. The Victorian case of Coultas v. Victorian Railway Commissioners became the forerunner of a long lineage of celebrated cases in which the legal validity of nervous shock has been argued.

The requirements of a duty of care and of remoteness of damage in the 1880s

By way of preliminary background to the discussion of legal aspects of the Coultas case, it needs to be noted that until the second decade of the twentieth century, the common law courts did not recognize a general duty of care based upon reasonable foreseeability. A plaintiff who intended to sue the defendant in negligence had to show that the defendant’s conduct came within one of the established categories which imposed the duty to take care. There were many categories of duty established both by case law and by statute. Thus, a duty could arise from the possession of property; performance of dangerous work; contractual obligations; the professional obligations of solicitors, medical practitioners, surveyors, architects, and the like; bailment, etc. The 1874 case of North Eastern Railway Company v.

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228 Coultas et uxor v. The Victorian Railway Commissioners op. cit. fn 14.
Wanless\(^{230}\) had established the requisite duty of care in respect of ‘level crossing’ accidents.\(^{231}\) Railway companies came also under a statutory duty to provide places where the public could cross the railway lines and to observe certain precautions intended to protect the public. Thus, once the gate-keeper, who was an employee of the Victorian Railway Commissioners, admitted negligence, the question of duty of care did not arise. In issue was the remoteness of damage. At the time, it was generally accepted that the test for remoteness of damage in negligence imposed liability on the defendant ‘for all the possible consequences of negligence’ which flowed directly and naturally from the breach of his or her duty of care. Joshiah W. Smith in his popular *Manual of Common Law* provided the following comprehensive, if convoluted, definition:

An action of tort may be maintained for damages, proximately, naturally, or probably, but not too remotely, resulting from the tortious act or negligence (whether alone or combined or followed by some other act or circumstances naturally or probably arising), or from special circumstances connected with the tortious act or negligence, known to the defendant.\(^{232}\)

In his definition, Smith attempted to accommodate a number of disparate approaches to the issue of remoteness of damage. For example, in two cases decided by the Court of Exchequer in 1850,\(^{233}\) Pollock CB, expressed ‘considerable doubt, whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated.’ The Chief Baron went on to state that whenever a suitable case shall arise,

I shall certainly desire to hear it argued, and to consider whether the rule of law be not this: that a person is expected to anticipate and guard against all reasonable consequences, but he is not, by the law of England, expected to


anticipate and guard against that which no reasonable man would expect to occur.\textsuperscript{234}

Two points need to be made about Pollock CB’s discussion of remoteness of damage. The first is that the references to foresight and a reasonable person’s anticipation of the consequences of his or her act are set strictly in the context of direct injury, and the second is that the proposed test was intended to limit the defendant’s liability for direct injury. Secondly, Pollock CB made it clear that he was merely proposing and not actually introducing the new doctrine into the law. In any case, before the enactment of the Acts of Judicature of 1873-6 (UK),\textsuperscript{235} the Court of Exchequer would be of persuasive rather than binding authority on the other two higher instance courts at the Westminster Hall (the Court of King’s Bench and the Court of Common Pleas). The practice of precedent as it was then understood was described by Brett MR (later to become Lord Esher) in the following way:

It was the custom for each of the courts in Westminster Hall to hold itself bound by a previous decision of itself or of a court of co-ordinate jurisdiction, but there is no statute or common law rule by which one court is bound to abide by the decision of another of equal rank. It does so simply from what may be called the comity among judges. There is no common law or statutory rule to oblige a court to bow to its own decisions; it does so again on the grounds of judicial comity.\textsuperscript{236}

Thus in 1870, in \textit{Smith v. London and South Western Rly.} which was heard before the Court of Common Pleas,\textsuperscript{237} Channell, B narrowed down the Pollock proposition, while supplying the following jurisprudential explanation for rejecting the criterion of reasonable foresight as a general test for remoteness of damage:

\begin{thebibliography}{10}
\bibitem{234} \textit{Greenland v. Chaplin}, at 248; 106. See also: \textit{Rigby v. Hewitt}, id. at 243; 104.
\bibitem{235} The \textit{Judicature Acts} 1873-5 (U.K.) created a new system of courts in England. Under the legislation, the jurisdiction of the Court of Common Pleas, the Court of Exchequer and the Court of Queen’s Bench became Divisions of the newly established High Court of Justice. In 1880, the Common Pleas and the Exchequer Divisions were merged with the Queen’s Bench Division. When the sovereign is male, the Court is known as the Court of King’s Bench.
\bibitem{236} \textit{The Vera Cruz} (No. 2) (1884) 9 P.D. 96 at 98.
\bibitem{237} \textit{Smith v. London and South Western Rly.} (1870) 40 L.J. (C.P.) 21; 6 L.R. (C.P.) 14.
\end{thebibliography}
Where there is no direct evidence of negligence, the question what a reasonable man might foresee is of importance in considering the question whether there is evidence for the jury of negligence or not. But when it has been once determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not.238

Blackburn J concurred, stating that the test of reasonable foresight is a test of culpability, not compensation:

… what the defendants might reasonably anticipate is … only material with reference to the question whether the defendants were negligent or not, and cannot alter their liability if they were guilty of negligence.

Since the wheels of law turn rather slowly, the resolution of the question which test of remoteness of damage should govern the law of negligence was not settled until the case of Re Polemis239 which came before the Court of Appeal in 1921. Meantime, although most appellate courts utilised the traditional test of directness, they were technically free to follow either the approach of Pollock CB, or to apply any of the epithets contained in the Smith definition. In the Coultas case, the Victorian Supreme Court used the directness test, whereas the Judicial Committee of the Privy Council240 employed a hybrid of ‘natural’ and ‘reasonable’ consequences.

**Coultas et uxor v. Victorian Railway Commissioners and Victorian Railways Commissioners v. James Coultas and Mary Coultas**

On the late evening of the eighth of May 1886, Mr and Mrs Coultas, together with Mrs Coultas’ brother, were driving home in a buggy from Melbourne to Hawthorn. The gates at the railway level crossing in Swan Street, East Richmond, were closed. However the gate-keeper, employed by the Victorian Railway Commissioners, opened the near gate and indicated

238 Ibid.
240 The Judicial Committee of the Privy Council was created in 1833, exclusively to hear appeals from courts in the then Colonies and Dominions of the British Empire. It consisted of the Lord Chancellor, Lord President of the Council and ex-Lords President, Lords of Appeal in Ordinary and other members of the Privy Council who had held high judicial office.
that they should proceed to cross the line.\footnote{Coultas et uxor v. The Victorian Railway Commissioners op. cit. fn. 14.} The buggy had passed over one set of rails, when the gatekeeper suddenly turned round with his lamp and shouted ‘For heaven’s sake, go back, the train is coming.’\footnote{Case Note (1888), ‘Is Negligence Causing Nervous Shock?’, The Law Journal, 21 July 1888, 390-1, at 391.} Noticing the approaching train, Mr Coultas urged the gatekeeper to ‘Open the gate quick.’ Apparently, ‘the gatekeeper tried to open the half of the gate in front, turned to the other half of the gate and opened it, Mr Coultas moved round the end of the closed half and got across the line, but not through the gate, just as the train passed.’\footnote{Id. at 391.} Frightened by the approach of the train, Mary Coultas fainted and fell into her brother’s arms. Shortly afterwards she suffered a miscarriage, and was ill for several months. Medical evidence at the subsequent court hearing indicated that she had suffered a ‘severe nervous shock from the fright, and that the illness from which she afterwards suffered was the consequence of the fright’.\footnote{Victorian Railways Commissioners v. James Coultas and Mary Coultas [1888] 13 A.C. 222 at 224. In the text, the Privy Council’s decision in Victorian Railways Commissioners v. Coultas will be referred to as the Coultas case.} Legal argument advanced on behalf of the defendants in Coultas was that the miscarriage occasioned by nervous shock which Mrs Coultas suffered was too remote to sound in damages, because:

1. There was no proof of an actual physical ‘impact’, i.e. striking or touching of the plaintiffs or their property;
2. What the plaintiff suffered was a mere ‘fright’ which is not compensable; and
3. The shock was not a natural consequence of the defendants’ conduct, since there were three persons in the buggy and only one suffered.

However, the jury found for the plaintiffs. The points of law raised by the defendants were reserved by the trial judge for determination by the Full Court of the Supreme Court of Victoria. The Full Bench decided that Mrs Coultas could recover for mental and physical injuries resulting from nervous shock caused by the defendants’ negligent conduct. Although the train did not physically touch the buggy, damage resulting from nervous shock was not too remote because it was a natural and reasonable consequence of a fright caused by the train dashing past her. The Full Court pointed out that ‘fright’ is an incident of the ‘nervous shock’, that is, it is an
element or one of the signs of such shock.245 Williams J noted that damages are not given for the fright but for the nervous shock, that is, for something which follows on from the fright. In respect of the fact that only Mrs Coultas suffered damage, Holroyd J held that ‘the principle is that it is the natural consequence if the damage “will probably” result therefrom, and not that the damage “must result”’.246 Thus, at least in respect of remoteness of damage in negligence, the Victorian Supreme Court treated Mrs Coultas’ claim for nervous shock as a claim for physical injury.

The Victorian Railway Commissioners appealed to the Privy Council, and that appeal was heard in December 1887.247 The decision of the Judicial Committee in Coultas was delivered in February 1888 by Sir Richard Couch.248 The decision stated that for damages to be recoverable for negligence the requisite injury ‘must be the natural and reasonable result of the defendants’ act; such a consequence as in the ordinary course of things would flow from the act’.249 However, in the instant case this prerequisite was not fulfilled, since, according to the Privy Council:

Damage arising from mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot ... be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gate-keeper.250

The Judicial Committee went on to state that if damages were to be recovered by Mr and Mrs Coultas, then:

Not only in such a case as the present, but in every case where an accident caused by negligence had given a person a serious nervous shock, there might be a claim for damages on account of mental injury. The difficulty which now exists in case of alleged physical injuries of determining whether they were

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245 Coultas et uxor v. The Victorian Railway Commissioners op. cit. fn. 14 at 897.
246 Id. at 896.
247 Victorian Railways Commissioners v. Coultas op. cit. fn. 242.
248 The Judicial Committee’s decisions were technically an advice to the Crown, and as such did not have a status of judgments. They would not become final and binding until incorporated into an Order in Council.
249 Victorian Railways Commissioners v. Coultas op. cit. fn. 242, at 225.
250 Id. at 225.
caused by the negligent act would be greatly increased, and a wide field opened for imaginary claims.\textsuperscript{251}

The last sentence of the above paragraph is an oblique reference to the perceived crisis in personal injury compensation relating to sums paid out in damages by railway companies in the middle of the nineteenth century. The English Parliament was sufficiently concerned to commission reports from the Royal Commission on Railways (1867), and from the Select Committee of the House of Commons on Railways (1870). The Judicial Committee was, no doubt, aware of these documents. It clearly considered that extending the liability of negligent defendants to cover the medical sequelae of non-physical impact trauma would escalate the problem. In its advice to the Queen, the Judicial Committee tackled these socio-economic concerns by imposing an apparently blanket denial of recovery for negligently caused nervous shock not accompanied by physical impact. It did so on the grounds that this kind of injury was too remote to sound in damages. Attempting to justify an essentially political decision on jurisprudential grounds, the opinion blurred the distinction between the evidentiary and substantive aspects of the law of negligence. By stating that the particular type of injury which the plaintiff had suffered - ‘a mental or nervous shock unaccompanied by any actual injury’ - was too remote to sound in damages for negligence, the Committee elevated the evidentiary issue relating to the type of injury to the status of substantive law.

The Privy Council’s decision was greeted with trenchant criticism from practising lawyers and academic writers. There were two principal objections. The first objection was based upon semantic argument that the Judicial Committee failed to distinguish between injury caused through ‘mental shock’ and injury by way of nervous shock. The second objection was to the policy based decision of the Privy Council not to impose liability for negligently caused nervous shock for the fear of opening the ‘floodgates of litigation’. In respect of the first objection Thomas Beven, in the first edition of his treatise on the \textit{Principles of the Law of Negligence},\textsuperscript{252} argued that, unlike the Justices of the Victorian Supreme Court who used the term nervous shock specifically to denote a mental injury which had physical causes and manifestations, the Privy Council mistakenly equated ‘mental shock’ (in the sense of a ‘purely emotional’ occurrence) with nervous shock

\textsuperscript{251} Id. at 226-227.
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(in the sense of an actual physical or organic injury). According to Thomas Beven, ‘where nervous shock is produced, the terror is merely another expression for a direct effect on the nervous system - a portion of physical organisation’. 253 In contrast, the term ‘mental shock’ has been taken by lawyers to refer to such painful emotional experiences as anxiety, anguish or grief which - it was then thought - were not productive of any appreciable injury to the organism. Where such ‘mental shock’ or ‘mental suffering’ was the sole harm arising from negligent conduct, it was not compensable. 254

The second ground, relating to the Judicial Committee’s refusal to develop the law of tortious liability to ‘meet modern requirements’, was canvassed in an article entitled ‘Is Negligence Causing Nervous Shock?’ which appeared in The Law Journal in July, 1888. 255 Referring to the case of Sneesby v. The Lancashire and Yorkshire Railway Co., they reminded the readers that following the Coultas decision, the law seemed to take a more lenient view of recovery for consequences of fright where beasts rather than humans are concerned. In Sneesby, Lord Cairns of the Court of Appeal, (Lord Coleridge CJ, Bramwell B and Brett J, concurring) affirmed the judgment of the Queen’s Bench that the defendant railway company was liable in negligence to the plaintiffs for the loss of six head of cattle. The plaintiff’s employees were driving the cattle across a level crossing operated by the defendants, when several railway trucks were negligently allowed to run down the tracks, separating the beasts from the drovers. As a result of this incident, the cattle ‘became infuriated’, rushed away, and were eventually found lying dead or dying on another part of the railway. Lord Cairns said that the damages were not too remote, because everything that occurred or was done after the fright-causing event ‘must have been taken to have occurred or been done continuously: the cattle rushed on in a state of fury, passed along the occupation road, charged the fence of the garden, and got on to the railway, and were ultimately killed’. 257 In this case, the cattle had only been frightened and not physically injured, yet the owners were able to recover once it was established that physical injury ensued directly.

253 Id. at 67.
254 As pointed out in Chapter 1, damages have always been available for emotional distress occasioned by intentional trespassory conduct. The common law has also awarded damages to a husband for mental suffering occasioned by alienation of the wife’s affections. Winsmore v. Greenbank Mic. 19 G. 2 C.B.
255 Case Note op. cit. fn. 240, at 391.
257 Id. at 44.
The authors of the article noted that ‘the liability for negligence was framed in the days when there were no railway trains, and the nerves of our ancestors were stouter than ours.’ They pointed out that the Judicial Committee’s decision to refuse damages on the grounds of possible difficulties in determining whether the mental injury was caused by the negligent act, and the potential for opening ‘a wide field’ for imaginary claims, was ‘truly fortified’ by Sir Richard Couch’s statement ‘that no case had been cited of this kind.’

Admitting that imaginary claims may be made to enhance the damages in cases of physical injury, they commented that ‘it is hardly a good reason for denying a cause of action, that resort to it may be abused.’ The article concluded with an expression of hope that since the decision of the Privy Council did not bind the English courts, ‘when the point comes before them they will take a little less material view of the injuries, which may fairly be said to deserve compensation if produced by the negligent act of a third person.’

The Privy Council’s decision may not have been binding upon the English courts, but it was binding on the courts in Canada. For instance, it was on the authority of the *Coultas* decision that the Alberta Court of Appeal in the case of *Miner v. C.P.R.* refused to allow damages for negligently occasioning mere nervous shock to a plaintiff who had arranged a funeral for her deceased son to be held in the township of Bawlf, and engaged the defendant to ship the corpse by rail to that location. Unfortunately, the defendant’s employees misread the destination and took the corpse off the train at Banff by mistake. As a result the body did not arrive in Bawlf in time for the funeral, causing great distress to the mother.

The opinion of the Privy Council was also very influential in the United States. The Judicial Committee did not determine that physical impact was a necessary element for liability. However, when the New York Supreme Court decided to follow the *Coultas* decision, it required proof of physical impact refusing to award damages on this basis in the case of *Lehman v. Brooklyn City Railway Co.* The pattern of the influential case of *Mitchell*

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258 Had the condition of the cattle following the accident deteriorated to such an extent that they lost market value, the owners would not have been able to recover.
259 Ibid.
260 Case Note op. cit. fn. 240, at 391.
261 *Miner v. C.P.R.* (1911) 3 Alta. L.R. 408; 18 W.L.R. 476.
v. Rochester Railway Co., was similar to that of the Coultas case. Mrs Mitchell was standing upon a pedestrian crossing on a Main Street, Monroe County, which was situated at the bottom of a steep incline. She was waiting to step into a street-car run by the defendant, when a horse car, also belonging to the defendant’s company, came down the hill. The driver of the car had driven the horses at such a speed that he was unable to stop them before they reached the car which the plaintiff was about to take. The horses’ heads ended up on either side of Mrs Mitchell, and she was almost run down by them. The fright and disturbance made the plaintiff unconscious. As a result of the shock sustained at the time, she suffered a miscarriage, and was sick for a long time.

According to expert medical evidence, the mental shock which Mrs Mitchell suffered as a result of the accident was a ‘sufficient cause’ for all her subsequent physical ailments. Initially, she was nonsuited on the ground that ‘no action would lie for a negligent act of defendant where the only injury produced as a result of that act is fright or apprehension of danger, although such fright is followed by a physical injury which is the result of it.’ The plaintiff asked for a motion for a new trial.

Having examined the apposite cases from the United States’ courts, Rumsey J granted the motion. He pointed out that from the point of view of legal causation, it was clear that Mrs Mitchell would have been allowed recovery if in the course of collision, one of the horses had struck her and as a result she had suffered a broken leg. Likewise, she would have been compensated if, while trying to avoid the collision, she had sprung aside, fell and broken her leg. Rumsey J concluded that ‘the fact that there was a mental cause for the injury, clearly traceable to the negligent act, ought not to relieve the defendant from the consequences of its wrongful act.’

Mindful of the floodgates argument, Rumsey J observed that ‘the argument ab inconvenienti is never of much force, and least of all when it is invoked to enable one to avoid a necessary legal conclusion.’ While upholding the rule that no damages can be recovered against a negligent defendant for purely mental suffering, unaccompanied by any physical injury, he recapitulated the reasoning of the Victorian Supreme Court saying ‘that where a physical injury is the natural result of the negligence, although it

264 Id. at 744-5.
265 Id. at 748.
266 Ibid.
proceeds from a mental shock caused directly by the negligent act, the defendant is liable, if the jury might find from evidence that the shock caused the injury.\textsuperscript{267} Rumsey J was very critical of the Privy Council’s opinion, particularly its mixing up of the diagnosis of mental and of nervous shock. He noted that

\begin{quote}
The case seems to have been decided upon the theory that there was no actual injury, and for the reason that mental injuries alone were not the subject of an action. No authorities are examined, and there is no particular discussion of the case. Although the court which decided the case is one of high rank, yet the case itself does not strike me as of much authority. The weight to be given to any decided case as an authority depends not alone upon the rank of the court, but upon the solidity of the reasons upon which the decision is founded, and the perspicuity and precision with which those reasons are expressed.\textsuperscript{268}
\end{quote}

The defendants appealed. The Court of Appeal of New York followed the lead of the Privy Council, upholding the appeal on the same grounds as those formulated by the Judicial Committee. Namely, that no plaintiff could recover damages for purely emotional injuries such as fright even when they were sustained as a direct result of the defendant’s negligence; and that any physical injury resulting from such emotional injuries was too remote to have been foreseen.\textsuperscript{269} The same policy reasons - the possibility of a flood of litigation, of feigned injuries and speculative claims - were also canvassed.\textsuperscript{270}

Though \textit{Mitchell v. Rochester} was merely an appellate decision of the Supreme Court of New York, it was quickly followed in other jurisdictions.\textsuperscript{271} For instance, in 1900, in the case of \textit{Ward v. West Jersey &
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Seashore Railroad, the New Jersey Supreme Court denied recovery to a plaintiff who alleged that he was ‘shocked, paralyzed, and otherwise injured’ as a result of being trapped inside a level crossing in the face of an oncoming train by a gatekeeper who negligently lowered the gate while Mr Ward was still driving across the track. According to the New Jersey Supreme Court, the plaintiff’s physical manifestations of emotional distress stemming from his fear of personal injury could not support a negligence action because ‘no personal injuries actually occurred’. Having acknowledged that emotional distress such as fright may produce physical effects, the court decided that an individual is responsible only for ‘the natural and proximate results of his negligent act’, and that ‘physical suffering is not the probable or natural consequence of fright, in the case of a person of ordinary physical and mental vigour’. Finally, just as in Coultas and Mitchell, the Ward judgment explained that to allow this type of recovery would result in a flood of cases based on ‘conjecture and speculation’, since a plaintiff could easily feign an emotional injury.

Thus the ‘inaugural’ decisions in Coultas and in Mitchell v. Rochester set a precedent for regarding liability in negligence for non-impact psychiatric injury as requiring a distinct and restrictive treatment in law. In the United States, many jurisdiction continued to adhere to the physical impact rule for nearly a hundred years. Both decisions drew an arbitrary

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Iron Co. v. Baladoni (1916) 73 So. 205; 207 (Ala. Ct. App.) which stated that ‘damages suffered where the only manifestation is fright are too subtle and speculative to be capable of measurement by any standard known to the law.’ Cleveland C.C. & St. Louis Rly. v. Stewart (1900) 24 Ind. App. 374; 56 N.E. 917 (Ind. App.).


Id. at 386; 562.

The Court in Ward referred with approval to the following statement in Spade v. Lynn & B.R. Co. op. cit. fn. 269, at 288; 89: ‘Great emotion, may, and sometimes does, produce physical effects. ... A physical injury may be directly traceable to fright, and so may be caused by it. We cannot say, therefore, that such consequences may not flow proximately from unintentional negligence.’ Nevertheless, recovery was denied for the physical consequences of fright.

Ward v. West Jersey & Seashore Railroad Co. op. cit. fn. 270, at 385; 562.

Id. at 386; 562.


California discarded the ‘physical impact’ rule in favour of the ‘zone of danger’ test in Cook v. Maier (1939) 33 Cal. App. 2d 581, 584 [92 P. 2d 434], however it was only in 1983 that the following three United States jurisdictions abandoned the ‘physical
line between physical and emotional injuries with regard to the kind of damage that was foreseeable either in respect of remoteness of damage or in respect of the duty of care. This meant that persons suffering physical injury as a result of negligent conduct could recover damages, but those who suffered mere psychiatric illness as a result of equally wrongful acts, could not.

There was also an important development in judicial practice that profoundly influenced the operation of precedents set by the Privy Council in *Coultas* and by the Appellate Divisions of the State Courts in the United States. The doctrine of precedent dates back to the beginning of the common law, and, in particular, Henry Bracton, (c 1200–1268) who in his treatise *De Legibus et Consuetudinibus Angliæ* [On the Laws and Customs of England] formulated the principle of precedents, when he stated that new cases should be adjudged by analogy with similar ones that preceded them. The modern understanding of this doctrine - that the reasons provided as the essential basis for a line of judicial decisions should be regarded as an authoritative source of law, binding on courts in later analogous cases - was established in the seventeenth century. This was the practice described in 1884 by Brett MR in *The Vera Cruz (No. 2)*. The traditional application of the common law doctrine of *stare decisis* meant that the lower courts were bound to follow decisions of the superior courts. However, in the last decade of the nineteenth century the strict rule of *stare decisis* (short for *stare decisis et non quieta movere*, variously translated as ‘stand by the thing decided and do not disturb the calm’, ‘to stand by the decisions and not to disturb settled points’), was established. The new rule meant that a holding in a particular case, rather than a line of cases, became binding upon a court in a later similar case. Then, in 1898 in the case of *London Street Tramways Co. Ltd. v. London County Council*,279 this doctrine of *stare decisis* was adopted as an absolute rule of irreversible precedent whereby the superior courts came to consider themselves bound by their own previous decisions. This widely adopted rule of judicial practice, which held sway over the common law courts for over forty years, made it even more

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difficult for actions for nervous shock occasioned by negligence to succeed before the courts in the United Kingdom and the Colonies. In the United States, although the supreme courts of each state and the United States Supreme Court have never considered themselves absolutely bound by their own previous decisions, for a time, they became more reluctant to overrule old precedents. Moreover, Chief Justice Marshall set the trend for the practice of having only one opinion for the majority of a multi-judge court. This practice of the ‘opinion of the court’ together with the rule of *stare decisis* restricted potential *rationes decidendi*, and thus the opportunity of subsequent courts to find supporting arguments that could be discerned from opinions of several judges of the majority. There was a similar problem with single opinions delivered by the Privy Council.
4 Legal Responses to the *Coultas* Decision

Although the persuasive authority of the Judicial Committee’s decisions has tended to be high, they were never technically binding as precedents upon the English, Irish, Scottish, or the United States’ courts. Thus in 1890, Chief Baron Palles of the Irish Court of Appeal refused to follow the Privy Council’s reasoning in *Coultas*, and adopted Thomas Beven’s distinction between nervous shock and mental shock when deciding the case of *Bell v. The Great Northern and Western Rly. Co.*\(^{280}\) In this case, the plaintiff suffered nervous shock as a result of being very frightened when a train, on which she was a passenger, was derailed. Subsequently, Mrs Bell became depressed and underwent a profound change of personality. Chief Baron Palles expressed disapproval of the Privy Council’s decision in *Coultas*, and decided that the precedent to be strictly followed by the Irish Court of Appeal was its own 1884 unreported decision in *Byrne v. Great Southern & Western Rly. Co.*\(^{281}\) In this case the plaintiff was a superintendent of the telegraph office at the Limerick Junction of the defendant’s railway. Apparently, he was in his office when, through the negligence of the defendant, a train entered a siding and broke down a permanent buffer which protected the wall of the telegraph office. The plaintiff heard the noise and saw the wall and part of the office fall in. Although the train did not touch him, and the wall did not collapse upon him, he was greatly frightened and sustained nervous shock which resulted in an injury to his health. The Irish Court of Appeal found for the plaintiff.

\(^{280}\) *Bell v. The Great Northern and Western Rly. Co.* (1896) 26 L.R. Ir. 428.
\(^{281}\) *Byrne v. Great Southern and Western Rly. Co.* (1884) 26 L.R.I. 428. This case apparently dealt with the issue of damages for nervous shock. The *Byrne* case was originally heard before Palles CB in 1882, and went on appeal to the Irish Court of Appeal in February of 1884. Since the case was not reported, it is difficult to ascertain the precise wording of the pleadings, arguments and the judgment in that case. If, however, the term ‘nervous shock’ was indeed used during the conduct of the lawsuit (rather than it being used anachronistically by Palles CB when he referred to this case in 1890), it would pre-date the Victorian Supreme Court judgment in *Coultas* by four years.
While acknowledging that fright, grief and mere emotional distress do not sound in damages at common law, Palles CB declared that the Privy Council in *Coultas* failed to distinguish between these apparently non-organic phenomena and the organically-based nervous shock. Palles CB noted that Sir Richard Couch’s judgment:

… assumes, as a matter of law, that nervous shock is something which affects merely the mental functions, and is not in itself a peculiar state of the body. This error pervades the entire judgement.  

In his critique of *Coultas*, Palles CB also pointed out that an injury such as nervous shock need not manifest itself contemporaneously with the negligent conduct of the defendant, but can become apparent at a later stage. Moreover, since the damage is the gist of negligence, the existence and potential compensability of nervous shock should be regarded as an evidentiary rather than a substantive issue. It is the plaintiff who has an evidentiary burden to successfully establish before the jury that he or she did in fact suffer injury as a result of nervous shock brought about by the defendant’s negligence:

I am of opinion that, as the relation between fright and injury to the nerve and brain structures of the body is a matter which depends entirely upon scientific and medical testimony, it is impossible for any Court to lay down, as a matter of law, that if negligence cause fright, and such fright, in its turn, so affects such structures as to cause injury to health, such injury cannot be ‘a consequence which, in the ordinary course of things would flow from the negligence, unless such injury accompany such negligence in point of time’.

Justice Murphy, in a concurring judgment, also held that Mrs Bell should succeed in obtaining damages for nervous shock. According to Murphy J, as long as the plaintiff can prove the presence of the injuries and trace their cause in law to the negligent conduct of the defendant, it is ‘immaterial whether [such] injuries may be called nervous shock, brain disturbance, mental shock, or bodily injury’. In any case, it was logical to suppose that the derailment of the train in which Mrs Bell was travelling inevitably had a physical impact upon her. The approach of the court in

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282 *Bell v. The Great Northern and Western Rly. Co.* op. cit. fn. 278, at 441.
283 Id. 442. This statement of Palles CB was quoted with approval by Proctor J in *Falzone v. Busch* (1965) 45 N.J. 559; 214 A. 2d 12 at 564.
284 *Bell v. The Great Northern and Western Rly. Co.* op. cit. fn. 278, at 443.
Bell’s case was supported by the best medical opinion of the time. For example, Professor Oppenheim, a widely respected expert on neurology from the University of Berlin, considered that falls on the back, blows, or general concussions sustained in railroad accidents could produce grave consequences because of

… internal haemorrhage [that] may take place in the cord and meninges [one of the three membranes enclosing the brain and spinal cord in vertebrates] without there being any external injury; even lacerations of the cord may occur in this way.285

Likewise, in the United States, the Supreme Court of Texas in the case of Gulf, Colorado & Santa Fe Railway Company v. Hayter,286 allowed recovery to a plaintiff who was a passenger on a train of the Missouri, Kansas & Texas Railway Company which was struck by a freight train of the defendant company. The coach that the plaintiff was sitting in did not leave the track, but other carriages did. Although the plaintiff did not suffer any manifest physical injury,287 the experience ‘frightened him greatly.’ As a result, he suffered from ‘a serious nervous affection known as traumatic neurasthenia’ which ‘may have been caused either by the physical shock or by the mental shock produced by fright or by both’.288 Having examined existing authorities, Gaines J, delivering the opinion of the court, was

… unable to discover any substantial difference between the case where an injury has been inflicted through physical agencies and one in which a mental emotion constitutes one of the links in the chain of causes which have led to the injurious result.289

On the issue of foreseeability of physical injury resulting as a natural and probable consequence from a mental emotion, the Gaines J emphatically stated that

286 Gulf, Colorado & Santa Fe Rly. Co. v. Hayter (1900) 93 Tex. 239; 54 S.W. 944.
287 Id. at 241; 944. According to the report, he ‘was not knocked off his seat, nor did the collision tear his hands loose from the hold he had taken, nor knock him from the seat, nor disturb his position any that he could tell’.
288 Ibid.
289 Id. at 241; 945.
… in the light of modern science, nay, in the light of common knowledge, can a court say as a matter of law that a strong mental emotion may not produce in the subject bodily or mental injury? May not epilepsy or other nervous disorder or insanity result from fright? May not a miscarriage result from a mental shock? In several of the adjudicated cases in which the question under consideration has been passed upon, there was a miscarriage caused by fright or other mental emotion.\textsuperscript{290}

In a salvo directed at the policy arguments concerning the ‘floods of litigation’ and the difficulties of distinguishing genuine from spurious claims, he observed that:

… the reported cases would indicate that the litigations arising from injuries inflicted through a mental shock are not so numerous as to cause any considerable increase of litigation. So that this objection, as it seems to us, rests upon an imaginary ground. It is true that in most cases it may be difficult to determine the extent of a mental shock and its result upon the physical system. But, in our opinion, this is not a sufficient reason for refusing a remedy for damages resulting from a wrong. The same difficulty exists in many other cases in which that objection has never been urged as a reason why a recovery should be denied.\textsuperscript{291}

Gaines J concluded by holding that

… where a physical injury results from a fright or other mental shock, caused by the wrongful act or omission of another, the injured party is entitled to recover his damages, provided the act or omission is the proximate cause of the injury, and the injury ought, in the light of all the circumstances, to have been foreseen as a natural and probable consequence thereof. In our opinion, as a general rule, these questions should be left to the determination of the jury.\textsuperscript{292}

The Western Australian Court of Appeal applied similar reasoning to Bell and Gulf judgments in a later case of Daly v. The Commissioner of Railway.\textsuperscript{293} In Daly, the plaintiff was a passenger on a train which collided with a stray horse. As a result of the collision and consequent derailment, Frances Daly was thrown off her seat against other people present in the carriage and lost consciousness. Her doctors testified that the plaintiff

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\textsuperscript{290} Id. at 242; 945.
\textsuperscript{291} Ibid.
\textsuperscript{292} Ibid.
\textsuperscript{293} Daly v. The Commissioner of Railways (1906) 8 W.A.L.R. 125.
\end{flushright}
suffered an ‘injury to the nervous system’, and that she was ‘laid up in bed for several weeks ... her memory was affected, that she lost the power in her legs, and that she had no sensation as to the position of her legs’. The Western Australian Court of Appeal found the defendant negligent and liable for the plaintiff’s injury. The Court said that although the plaintiff did not suffer any observable physical injury, in the sense of an injury to any bone or muscle, at the time of the accident there was nevertheless an actual physical injury. The Court distinguished Coultas on the facts, stating that whereas the plaintiff in Coultas suffered a mere fright caused by a risk of an impending event which never happened, Mrs Daly was involved in an actual collision in which she sustained a physical injury.

As Rumsey J pointed out in Mitchell v. Rochester, there were no substantive or evidentiary law impediments for the courts to allow recovery for the physical consequences of fright in cases where the plaintiff was injured while attempting to escape a hazard negligently created by the defendant. This was so even though the immediate injury suffered by the plaintiff was slight and the fright rather than the physical injury constituted a link in the causal chain. In 1896, the New South Wales Court of Appeal in the case of Rea v. Balmain New Ferry Company followed this reasoning when it affirmed the jury’s decision to award damages of £500 for nervous shock. The plaintiff was crossing a plank from the wharf to the defendant’s steam boat when, due to the defendant’s negligence, the plank tilted up. In trying to save herself from falling, the plaintiff sprained her ankle and also ‘received a severe fright and shock to the nervous system’. The plaintiff afterwards developed sore and swollen eyes, enlargement of the thyroid gland, palpitation of the heart, and swelling in the throat, as well as general weakness which her doctor diagnosed as an ‘exophthalmic goitre’ (Basedow’s disease or Graves’ disease). Expert medical witnesses testified that the plaintiff’s subsequent condition was produced not by the sprained ankle but by mental disturbance - the shock or fright she received as a result of the accident. The sudden terror produced shock to the nervous system which was the cause of Graves’ disease. All witnesses agreed that this

\begin{itemize}
\item \textsuperscript{294} Id. at 129.
\item \textsuperscript{295} Id. at 127.
\item \textsuperscript{296} See: Sealy v. Commissioner of Railways [1915] Q.W.N. 1.
\item \textsuperscript{297} Rea v. Balmain New Ferry Company (1896) 17 L.R. (N.S.W.) 92.
\item \textsuperscript{298} Id. at 92.
\end{itemize}
disease could be caused by emotional factors. Dr Scott Scriving stated that the condition can develop:

… without any physical injury that you can see, but you can generally hunt up a factor; the most frequent cause is some profoundly distressing mental emotion; great loss of blood has caused it; prolonged grief and nursing.

Although the other medical witnesses did not think that sprain caused the disease, when Dr. Scriving was cross-examined he said: ‘I suppose the sprain would increase the nervous shock a little’. This statement was sufficient for the jury to find that the plaintiff developed the disease as a result of the nervous shock - and partly also in consequence of the injury to her ankle. The Court of Appeal reaffirmed the findings of the jury, and having referred with approval to the *Bell* case and Professor Beven’s *Negligence in Law*, went on to conclude that whereas in the *Coultas* case ‘there was no impact’, in the instant case:

… there was impact and a physical injury resulting from the defendants’ negligence. We cannot separate that injury entirely from the illness which immediately followed it. How much of that illness was caused by the physical injury, and how much by the fright or shock and other factors in the case, we do not know. Nor could the jury know. All we know is that the physical injury must have been one of the causes which contributed to the illness which followed it, and the jury very properly found it to be so.

Likewise, in *Buchanan v. West Jersey R.R. Co.* the Supreme Court of New Jersey awarded damages to the plaintiff whose health was ‘seriously impaired by reason of the shock to her nervous system occasioned by the peril’ she faced when she was standing on a railway platform. In order to avoid being struck by a protruding timber on a passing train, she threw herself on the platform, and was injured through this fall.

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299 Id. at 94. Not unexpectedly, the witnesses for the plaintiff argued that although anaemic, Miss Rea was in good health before the accident, whereas the medical witnesses for the defence argued that ‘her nervous system before the accident was ... of an unstable character’.

300 Ibid.

301 Ibid.

302 Id. at 98.

303 *Buchanan v. West New Jersey R.R. Co.* (1890) 52 N.J.L. 265.

304 Id. at 266.
Legal Responses to the Coultas Decision

Again, possibly following the approach of Rumsey J in *Mitchell v. Rochester*, sympathetic courts tended to draw a line between cases where the plaintiff was able to establish the slightest physical impact which followed from the defendant’s negligent conduct, and *Coultas, Mitchell v. Rochester, Ward* and other strictly non-impact decisions. For example, in 1906 the New Jersey Supreme Court in the case of *Porter v. Delaware, Lackawanna & W.R.R. Co.*,\(^\text{305}\) awarded damages to the plaintiff who became ill as the result of shock at seeing a railroad bridge fall near the place where she was standing. The plaintiff testified that something fell on her neck and that dust entered her eyes. In allowing recovery for the physical consequences of her fright, the court said either the small injury to her neck or the dust in her eyes was a sufficient impact to distinguish this case from the non-physical impact ones. This line of reasoning was also relied upon by the Court of Appeal of New York in the 1931 case of *Comstock v. Wilson*.\(^\text{306}\) In this case the court, stated that “[mental] suffering or disturbance, even without consequences of physical injury, may in fact constitute actual damage.”\(^\text{307}\) It held that in the context of a car collision, the jar to the passenger was a sufficient ‘battery’\(^\text{308}\) to allow recovery for physical injury caused by the nervous shock which was consequent upon even a slight touching of the body. Under this doctrine, the court would not allow recovery for the nervous shock itself, but would award damages for emotional distress and the resultant physical injuries which flowed from the ‘battery’.\(^\text{309}\) Perhaps more ingenuous was the approach of the Supreme Court of California in *Sloane v. Southern California Rly. Co.*\(^\text{310}\) In this case the court

\(^{305}\) *Porter v. Delaware, Lackawanna & W.R.R. Co.* (1906) 73 N.J.L. 405; 63 A. 860.

\(^{306}\) *Comstock v. Wilson* (1931) 257 N.Y. 231; 177 N.E. 431.

\(^{307}\) Id. at 235.

\(^{308}\) The definition of battery was creatively interpreted in these cases to include unintentional and indirectly caused non-consensual contacts with the body of the plaintiff.

\(^{309}\) For a discussion of this issue see the opinion delivered by Meyer J in *Kennedy v. McKesson Co.* (1983) 58 N.Y. 2d 500; 448 N.E. 2d 1332; at 512-3 and 1339-40. In *Kenney v. Wong Len* (1925) 81 N.H. 427; 128 A. 343, the court awarded damages for nervous shock in a case where the plaintiff took a bite of chicken dressing and found that it contained a mouse. In 1961, the Superior Court of Pensylvania in *Zelinsky v. Chimics* (1961) 196 Pa. Super. 312; 175 A. 2d 351, 354 (Pa. Super. Ct.) awarded damages to plaintiffs who suffered no physical injuries from a car accident, but whose mental distress was associated with the ‘jarring and jostling’ caused by the collision.

allowed recovery to a woman whose preexisting condition of insomnia ‘and nervous shock and paroxysms’ became aggravated after the ‘excitement’ (perturbation) and humiliation she suffered when, in breach of contract, when she was expelled from a train. Harrison J expressly adopted the opinions of the Irish Court of Appeal in *Bell v. Great Northern Rly. Co.*, noting that:

> The interdependence of the mind and body is in many respects so close that it is impossible to distinguish their respective influence upon each other. It must be conceded that a nervous shock or paroxysm, or a disturbance of the nervous system, is distinct from mental anguish, and falls within the physiological, rather than the psychological, branch of the human organism. It is a matter of general knowledge that an attack of sudden fright or an exposure to imminent peril has produced in individuals a complete change in their nervous system, and rendered one who was physically strong and vigorous weak and timid. Such a result must be regarded as an injury to the body rather than to the mind, even though the mind be at the same time injuriously affected.  

The analysis by Harrison J of the question whether physical injury that follows upon emotional distress should be compensable, was characterised by an ambivalence towards Cartesian dualism in relation to mind and body:

> Whatever may be the influence by which the nervous system is affected, its action under that influence is entirely distinct from the mental process which is set in motion by the brain. The nerves and nerve centers of the body are a part of the physical system, and are not only susceptible of lesion from external causes, but are also liable to be weakened and destroyed from causes primarily acting upon the mind. If these nerves or the entire nervous system is thus affected, there is a physical injury thereby produced, and, if the primal cause of this injury is tortious, it is immaterial whether it is direct, as by a blow, or indirect through some action upon the mind.

By classifying the plaintiff’s condition as a physical injury ‘distinguishable from mere mental anguish’, the court did not have to consider the question of whether recovery should be allowed for psychiatric injury alone. The importance of these cases lay in their abandonment of

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311 Id. at 680; 32.
312 Id. at 681; 33. This passage was quoted with approval by Melvin J in *Lindley v. Knowlton* (1918) 179 Cal. 298 at 301; 176 P. 440 at 441.
313 For examples of cases in which carriers were found tortiously liable for insulting their passengers see: *Chamberlain v. Chandler* (1823) Case No 2575 C.C. Mass. 3 Mason
the rule that injury by way of nervous - as against mental - shock was too remote to sound in damages, as long as the injury could be considered ‘parasitic’ upon an established tort.

There was also a related line of cases which allowed the issue to go to trial where the allegation was that the defendant’s trespassory conduct to another person or chattel also had an effect of negligently injuring the plaintiff. Thus in *Renner v. Canfield*, the plaintiff’s wife suffered fright and consequently a miscarriage after she witnessed the defendant shooting her husband’s dog as it ran home. The court stated that:

> If the acts of the defendant amounted to any tort, which in any possible view of the case could be held to be the proximate cause of the injuries complained of, the gist of it must be negligence in shooting in such proximity to a human residence as might naturally and reasonably be anticipated to be liable to injure the inmates by fright or otherwise. We are by no means prepared to say that upon the evidence a verdict for plaintiff could be sustained even upon that ground. But it is enough here to say that the case was not submitted to the jury upon any such theory.

The opinion in *Renner v. Canfield* was cited by Gaines J of the Supreme Court of Texas when he decided the case of *Hill v. Kimball*. In this case, the plaintiffs - husband and wife - were in possession under a lease of a dwelling house on land owned by the defendant. The defendant, fully aware that the wife was well advanced in pregnancy, came to the plaintiff’s house, and in the immediate presence of the wife, brutally assaulted two of her servants. The conduct of the defendant frightened the wife and eventually produced a miscarriage; and otherwise seriously impaired her health. Gaines J observed that the fact that there was no exact precedent for such an action ‘was no sufficient reason why an action should not be sustained’. He then provided the following explanation for holding that the plaintiff’s case should go to trial:

> That a physical personal injury may be produced through a strong emotion of the mind there can be no doubt. The fact that it is more difficult to produce such an injury through the operation of the mind than by direct physical means affords no sufficient ground for refusing compensation in an action at law when

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314 *Renner v. Canfield* (1886) 36 Minn. 90; 30 N.W. 435.

315 *Hill v. Kimball* (1890) 76 Tex. 210; 13 S.W. 59.
The history of the liability for negligently caused psychiatric injury

the injury is intentionally or negligently inflicted. It may be more difficult to prove the connection between the alleged cause and the injury, but if it be proved, and the injury be the proximate result of the cause, we can not say that a recovery should not be had. Probably an action will not lie when there is no injury except the suffering of the fright itself; but such is not the present case. Here, according to the allegations in the petition, the defendant has produced a bodily injury by means of that emotion, and it is for that injury that the recovery is sought.316

Gaines J added that since there was no allegation that the defendant intended to injure Mrs Hill, ‘it will be a question for the jury to determine whether his conduct, so far as she was concerned, was negligent or not; that is to say, whether, under the circumstances and with the lights before him, a reasonably prudent man would have anticipated the danger to her or not.’317 These American cases recognized the validity of a cause of action for negligently inflicted mental anguish only in cases where the injury had physical manifestations, and where the negligence was an offshoot of the defendant’s intentional, trespassory conduct.318 Using the then modern medical jargon but harking back to Lord Wensleydale’s ideas in Lynch v. Knight,319 the Supreme Court of Washington provided a succinct explanation for this narrow approach: ‘An allowance of damages in the cases of traumatic neurasthenia touches the border of speculation at best’.320 Likewise, at the Federal level, the Supreme Court of the United States declared in the case of Southern Express Co. v. Byers,321 that mere mental pain and anguish are too vague for legal redress where no injury is done to person, property, health, or reputation. Consequently, recovery was also denied for physical injury which followed as a ‘mere sequel to the mental

316 Id. at 59.
317 Ibid.
318 Both the Renner v. Canfield and the Hill v. Kimball cases involved trespass to land by the respective defendants. In such cases, a person who holds a possessory interest is entitled, under the law of trespass to land, to damages for emotional distress and any physical injury that flowed from it as of right. It seems, however, that in neither case did the female plaintiffs hold a possessory interest in the land in question.
319 Lynch v. Knight & Wife op. cit. fn. 115, see Chapter 1.
320 Mickelson v. Fischer (1914) 81 Wash. 423; 142 P. 1160.
anguish’.

In England, which, like Ireland and Scotland, was not bound by the decision of the Privy Council, Lord Esher explicitly refused to accept *Coultas* as the ruling precedent in the case of *Pugh v. London Brighton & South East Coast Ry. Co.* His Lordship awarded damages to a railway signalman who, in the course of duty, noticed that the condition of one of the carriages indicated that unless it was stopped, the train approaching on the line would become derailed. He took steps to prevent the accident by leaning out of the signal-box and waving a red flag. The train was thus stopped and the derailment prevented. The plaintiff did not come into contact with the train, but the alarm caused by the anticipation of the accident which appeared imminent, and the necessity to take immediate action to prevent it, caused ‘a shock to his nervous system to such an extent that he became incapacitated from employment’.

Lord Esher MR, with whom Kay and Smith LLJ agreed, decided to award compensation on the ground that the liability of the defendant for the foreseeable injury in the instant case did not depend on negligence but on the terms of the plaintiff’s insurance contract. Although the case concerned litigation in respect of the terms of an insurance contract rather than negligence sensu stricto, the case was regarded as an important precedent in the law of nervous shock. It should be noted that the term ‘proximate cause’ was in fact developed in the nineteenth century in reference to contracts of insurance.

**Action on the case for intentional infliction of nervous shock, the tort of ‘outrage’**

The English lower instance courts had to exercise more jurisprudential ingenuity to get around the highly persuasive precedent denying recovery for nervous shock which was not consequent upon any physical impact. Indeed, following the Privy Council’s decision in *Coultas*, the Courts of Great Britain in their endeavour to distinguish this high but unacceptable authority, incidentally produced a number of judicial pronouncements which are now regarded as the fundamental principles of the law of torts.
The case of Wilkinson v. Downton,\textsuperscript{325} which came before the English Court of Appeal in 1897, was the first of these creative jurisprudential endeavours. Again in issue was nervous shock which did not follow upon physical impact. The defendant, Downton, as a practical joke, told Mrs Wilkinson, the plaintiff, that her ‘husband was smashed up in an accident and that he was lying at The Elms at Leytonstone with both legs broken’.\textsuperscript{326} The effect of this false story on the plaintiff was ‘a violent shock to her nervous system, producing vomiting and other more serious and permanent physical consequences at one time threatening her reason and entailing weeks of suffering and incapacity’.\textsuperscript{327} The defendant admitted that he intended to give the plaintiff a shock - though not of the intensity and seriousness which eventuated. The severe shock suffered by Mrs Wilkinson was not due to any immediate fear for her own safety; rather, it was due to the fear of injury which her husband was said to have suffered.

Justice Wright distinguished the Judicial Committee’s decision in Coultas on the ground that the Privy Council merely held that the illness which was the effect of shock caused by fright was too remote a consequence of a negligent act which caused the fright. Therefore the Coultas decision could not be - and was not - an authority in actions for damages for an intentional infliction of nervous shock. His Honour decided that the defendant’s act was so plainly calculated to produce some effect of the kind which was produced, namely nervous shock, that the intention to produce it ought to be imputed to Downton. Justice Wright emphasized the fact that in the case of Mrs Wilkinson the nervous shock was produced on a person proved to be in an ordinary state of health and mind. Thus, in an effort to avoid the outcome which would otherwise be imposed by the Privy Council’s decision in Coultas, a new innominate tort - a cause of action on the case for damages for an intentional infliction of nervous shock - was created.

The Wilkinson v. Downton cause of action, which aims to protect the immunity of the mind and the nervous system from indirect injury, was a clear acknowledgment by the common law that emotional harm can be at least as deleterious to a person’s wellbeing as physical harm. In order to succeed in an action on the case for damages for physical injury in respect of a statement which is intentionally made and which is intended to cause

\textsuperscript{325} Wilkinson v. Downton op. cit. fn. 215.
\textsuperscript{326} Id. at 58.
\textsuperscript{327} Ibid.
physical harm or nervous shock, the plaintiff has to establish that

1. he or she has in fact suffered the kind of harm which the defendant intended through the indirect conduct; \(^{328}\)

2. the defendant intended to inflict harm in the form of physical injury or nervous shock.

In this context, intention has been interpreted to mean either that the defendant meant to do the harm which eventuated; or that he or she knew that the injury was certain or substantially certain to follow from the actions intentionally undertaken. \(^{329}\) It is important to note, however, that although the intention to cause nervous shock is a requirement of this cause of action, the courts did not demand evidence that the defendant should consciously harbour the wrongful intention. Tortious intention may be imputed to the defendant, and the cause of action made up, if the court regards his or her statements as deserving of judicial opprobrium. To a lay person, an indirect injury by way of a psychiatric illness sustained as a result of the defendant’s reckless use of language may seem to be practically indistinguishable from an indirect injury by way of psychiatric illness occasioned by negligent conduct; yet at common law the distinction was - and still is - regarded as vital to the way in which the courts approach the liability of the defendants for negligently inflicted nervous shock.

However, unlike their American counterparts, the English courts have considered the intention to harm the plaintiff to be an essential element of the cause of action for intentional infliction of nervous shock. Therefore, in the case of *Smith v. Johnson & Co.* \(^{330}\), in which a man was killed within the sight of the plaintiff who became ill - though not from the shock of fear for himself, but from the shock of seeing another person killed - the court held that nervous shock of this kind was too remote a consequence of negligence.

The cause of action for intentional infliction of nervous shock was reaffirmed by the Court of Appeal in the case of *Janvier v. Sweeney.* \(^{331}\) In this

\(^{328}\) The equivalent cause of action for physical injury was first reported in *Bird v. Holbrook* (1828) 4 Bing. 628; 130 E.R. 911, in which Best CJ said that ‘he who sets spring guns, without notice, is guilty of an inhuman act, and … if injurious consequences ensue, he is liable to yield redress to the sufferer’.

\(^{329}\) This understanding of intention differs from intention for the purpose of trespass. The latter is limited to the commission of the act which is substantially certain to result in a direct unauthorised physical contact, whether or not such contact was in fact intended. No physical damage is necessary. Intention, in the sense of motive to inflict harm, is irrelevant.


case, during the 1914-1918 World War, the defendants, who were employed as private detectives, pretended to be military policemen. They falsely alleged that the plaintiff, Miss Janvier, was wanted by military authorities for corresponding with her fiancé whom they accused of being a German spy. The defendants thus sought to terrify Miss Janvier, a French citizen, into handing over to them certain letters which were in the possession of her employers. The shock of the accusations, together with the fear for her fiancé’s safety, had caused the plaintiff to suffer a severe psychosomatic illness. Allowing recovery, Lord Justice Bankes stated that ‘terror wrongfully induced and inducing physical mischief gives a cause of action’.

In Canada, in the case of *Edmonds v. Armstrong Funeral Home Ltd.*, the Alberta Court of Appeal reasoned that since mental suffering can be considered in assessing damages for assault, defamation, malicious prosecution and seduction, there was no good reason to exclude it in a case involving wilful misconduct. Consequently, the court held that a husband could recover damages for mental distress he suffered when an unauthorised autopsy was performed on the body of his wife. The unauthorised autopsy constituted an unlawful interference with the husband’s right to the custody and control of the remains of his deceased wife. The court noted that damages for wounded feelings in a case involving wilful misconduct are awarded in part to punish the defendant and not merely to compensate the plaintiff.

In the United States, the *Wilkinson v. Downton* cause of action became known as the tort of ‘outrage’ or ‘outrageousness’. Its beginnings can be traced to the case of *Hickey v. Welch*. In this case, the wife held a valid lease of premises from her husband. Nevertheless, the husband ‘committed a forcible trespass thereon, making it dangerous and nearly impossible for plaintiff and her children to enter the watercloset, applied vituperative and insulting language and epithets to the plaintiff, and her husband got a shotgun and a pistol, pointed the pistol at plaintiff and threatened to shoot

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332 Id. at 322.
335 *Hickey v. Welch* (1901) 91 Mo. App. 4.
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As a result, the plaintiff’s neurasthenia was aggravated, causing injury to her health. Goode J of the Supreme Court of Missouri recognized that the defendant’s conduct constituted ‘aggravated forcible trespass and an assault’ which entitled the plaintiff to compensatory damages and also punitive damages. He decided, however, that a separate action for wilful tort (distinguished from negligence) should lie in cases where the defendant intentionally causes the plaintiff to suffer mental anguish which results in some nervous illness. Goode J compared the irrationality of the historical association between mental illness and evil spirits with the falsity of the legal doctrine which attributed legal responsibility for harm occasioned to people who found themselves in traumatic situations created by wrongful conduct to mere fright, rather than to the tortfeasor. He said that:

The ancient superstition which found the proximate cause of mental and nervous diseases in diabolical possession, was scarcely more ridiculous than the theory that when an ailment of that kind follows a great fright, due to another’s tortious act, the fright and not the tort is the proximate cause of the injury.

His Honour introduced a Vichrovian gloss when he added that ‘Such diseases, like all others, have their origin in a physical lesion, not metaphysical state’.

In the case of Great Atlantic & Pacific Tea Co. v. Roch, the defendant manager of a greengrocery store was held liable for physical consequences resulting from shock sustained by the plaintiff after she opened a package which, in place of a loaf of bread that she had ordered, contained the carefully wrapped up remains of a dead rat. The declaration (pleadings) presented the conduct of the defendant as an intentional and deliberate practical joke, however the court allowed it to go to the jury solely on the theory of ‘negligent mistake’. The action probably crystallised into a discrete tort of outrage with the case of Beck v. Libraro, which involved a defendant who, from his own house, fired several shots through the lighted window of the plaintiff’s apartment. Unbeknown to him, the plaintiff had

336  Id. at 12-3.
337  Id. at 14.
338  Id. at 10.
339  Ibid.
given birth a few minutes before, and though not actually struck, suffered extreme fright, nervous shock, and hysteria resulting in serious illness. The trial judge dismissed her petition on the ground that the rule in *Mitchell v. Rochester* precluded recovery for non-impact injury. The appellate division of the Supreme Court of New York reversed the first instance judgment, and decided - along the lines of Justice Wright’s reasoning in *Wilkinson v. Downton* - that when a defendant indulges in wilful and wanton conduct, whether or not it is technically characterised as an assault, he will bear responsibility for the plaintiff’s injuries thereby sustained as a result of fright. The court distinguished *Mitchell v. Rochester* on the basis that it only applied to negligent conduct, and not to cases of wilful tort.

**Nervous shock as a compensable harm in the tort of private nuisance**

In 1899, the New South Wales Court of Appeal took yet a different legal route to circumvent the *Coultas* decision. In the case of *Pelmothe v. Phillips and Ors* the plaintiff sued in negligence and in private nuisance for damages for nervous shock suffered by his wife. The plaintiff claimed that the violent noise from blasting operations associated with the construction of sewers under the road adjoining his premises had caused injury to the health of his wife. The issue on appeal, by way of case stated, was whether the nervous shock sustained by the wife was too remote to sound in damages. Simpson GB, declared that in view of subsequent developments, the case of *Victorian Railways Commissioners v. Coultas* should be treated ‘as open to question’. He distinguished the Privy Council’s decision by holding that the negligent acts of the defendants in the case before him amounted to the tort of private nuisance. His Honour said that:

> If a man, in the performance of an act which amounts to a nuisance, does cause injury to the health of a person dwelling within a house, and such injury is the reasonable and natural consequence of his act, and such injury would be likely to be caused to ordinary persons similarly situated, then he is responsible for the injury.

O’Connor J concurred. Though this case was decided on the

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342 *Mitchell v. Rochester R. Co.* (1893) op. cit. fn. 261; (1896) op. cit. fn. 267.

343 *Pelmothe v. Phillips and Ors.* (1899) 20 L.R. (N.S.W.) 58.

344 Id. at 61.
The presumption that the injured wife was part of the plaintiff husband’s property, it now stands for the proposition that in Australia the plaintiff may recover damages in private nuisance for nervous shock which is regarded as a type of physical injury. In the United States, five years later, the Supreme Court of Texas came to an opposite conclusion in the case of *Denison, Bonham & New Orleans Railroad Company v. P.A. Barry*. The court held that the defendant’s liability for nuisance, by way of an overflow from the plaintiff’s premises, did not include damages for affecting the health of the plaintiff’s wife. She became frightened at the risk of peril stemming from the overflow, and as a result suffered a miscarriage. According to the court, such a result was not one to have been reasonably anticipated in the absence of knowledge on the defendant’s part of the wife’s condition. Conversely, in the State of Maryland, in the case of *Green v. T. A. Shoemaker & Co.*, the court said that:

> It must be conceded that the numerical weight of authority supports the general rule that there can be no recovery for nervous affections unaccompanied by contemporaneous physical injury, but the sounder view, in our opinion, is, that there are exceptions to this rule, and that where the wrongful act complained of is the proximate cause of the injury, ... and where the injury ought, in the light of all the circumstances, to have been contemplated as a natural and probable consequence thereof, the case falls within the exception and should be left to the jury.

Why did at least some of the courts willingly allow recovery in an action on the case for indirect intentional occasioning of nervous shock, and in nuisance, while they resisted similar recovery in negligence? The nature of the two causes of action, and the timing of the decisions, may provide

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345 cf. *Evans v. Finn* (1904) 4 S.R. (N.S.W.) 297, in which Darley CJ at 308 said that ‘nervous’ damage to health was not actionable in private nuisance.


347 *Green v. T. A. Shoemaker & Co.* (1909) 111 Md. 69; 73 A. 688.

348 Id. at 81; 692. In this case, a woman sued to recover for alleged injuries to her person and property, caused by the blasting of rocks by the defendants in the vicinity of her dwelling. The declaration alleged that ‘the rocks hit her house, caused plaster to fall which struck her, whereby her health was greatly damaged and her nervous system disordered’. For more recent examples of recovery for emotional distress without physical injury under the law of nuisance, see: *Armitage v. Decker* (1990) 218 Cal. App. 3d 887; 267 Cal. Rptr. 399; *Smith v. County of Los Angeles* (1989) 214 Cal. App. 3d 266; 262 Cal. Rptr. 754.
some explanation. Before the days of radio, television and electronic mail, statements - including intentional and reckless statements - tended to be directed to a relatively small number of persons. Thus fear of the opening of the floodgates in cases of emotional harm resulting from verbal communications was much less potent. Similarly, in nuisance, strict proprietary requirements of the tort restricted the number of possible claimants.

Therefore, the courts dealing with these causes of action could treat the issue of nervous shock as an evidentiary one: the judges accepted that mere nervous shock was in the category of compassable harm, providing the plaintiff could establish all the elements of the tort, including the requisite damage. When dissociated from such extraneous considerations as the fear of the opening of the floodgates, malingering, and the philosophical doctrines of Cartesian dualism the courts were quite capable of evaluating and adjudicating upon the evidence of ‘pure’ or ‘mere’ emotional harm.

This point was cogently articulated in the 1901 English case of Dulieu v. White, in which the Privy Council’s decision was again critically examined. The plaintiff, Mrs Dulieu, was standing behind the bar of her husband's public house, when a pair-horse van crashed into the premises due to the inebriated driver’s negligence. As a consequence of fright engendered by the incident, Mrs Dulieu sustained severe nervous shock which led to a premature delivery of ‘an idiot’ baby son. The question before the court was whether Mrs Dulieu’s physical injury, caused by the nervous shock, could sustain a cause of action. The Court of Appeal answered this question in the affirmative. It held that where physical damage followed reasonably and naturally from the shock, a duty to take care could arise. Kennedy and Phillimore JJ stated that damages which result from negligently inflicted nervous shock occasioned by fright, unaccompanied by any actual impact, may be recoverable in an action in negligence if physical injury to the plaintiff followed. Phillimore J said that:

There may be cases in which A owes a duty to B not to inflict a mental shock on him or her, and that in such a case, if A does inflict a mental shock upon B - as by terrifying B - and physical damage thereby ensues, B may have an action for

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349 The influence of mass communication on judicial attitudes to recovery for negligently occasioned psychiatric illness will be discussed in connexion with the case of Alcock v. Chief Constable of South Yorkshire [1992] 1 A.C. 310.

Kennedy J expressly rejected the view expressed in the *Coultas* case that pure nervous shock should be regarded as too remote to be recoverable, because it would be too dangerous to recognise liability in negligence for this kind of damage. His Honour developed arguments presented by commentators and by such judges as Palles CB, Rumsey J and Gaines J, when he said that he:

… 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 and 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 to the truth in this class of claim. My experience gives me no reason to suppose that the jury would really have more difficulty in weighing the medical evidence as to the effects of nervous shock through fright, than in weighing the like evidence as to the effects of nervous shock through a railway collision or a carriage accident, where, as often happens, no palpable injury, or very slight palpable injury, has been occasioned at the time.352

This passage, perhaps more than any other judicial observation, stands in contrast to the reasoning of those appellate judges who, like Sir Richard Couch and the members of the Judicial Committee, appear to espouse what may be called a ‘containment theory of law’. This theory was grounded in the paternalistic distrust of the analytical abilities of the lower instance courts and the juries. The appellate courts feared that the cunning plaintiffs may outwit the bumpkins on the jury and the not-so-bright judges of the first instance in cases in which the award of damages depends upon the plaintiff’s proof of the existence of his or her non-palpable injury, and where the court has to rely upon the opinion of medical experts.

The Superior Appellate Courts have been very slow in extending the protection of the law to those interests of personality which do not have, as yet, clearly demonstrable organic pathology. This attitude of the appellate judiciary is understandable in the view of the fact that medicine itself had a long history of distrust of the apparently non-organic injuries. Even

351 Id. at 682-83.
352 Id. at 681.
Kennedy J was mindful of treading warily along the path of allowing recovery for nervous shock resulting from non-physical impact when he stated that in respect of the duty of care only shock relating to the personal fear for one’s own safety was recoverable at law. According to Kennedy J, it was not ‘reasonably or naturally to be expected’ that a person could suffer a nervous shock by seeing the injury to another:

The shock, where it operates through the mind, must be a shock which arises from 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.\(^{353}\)

Kennedy J’s judgment in *Dulieu v. White*, incorporating as it does the above limitation, suffered from an internal inconsistency. For the learned judge, who had previously cited *Wilkinson v. Downton* with approval, did not explain why it is reasonable and natural for a wife to receive nervous shock when hearing of her husband’s injury, but not natural for her to do so when she has actually witnessed her husband being injured or killed.\(^{354}\) The legacy of the Privy Council’s restrictive approach towards substantive issues in nervous shock meant that recovery for this kind of harm would only be allowed if it was occasioned in a manner analogous to that of physical injury - the impact had to be direct, on a one-to-one basis. This was clearly an arbitrary substantive approach to the matter of compensation for nervous shock.

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\(^{353}\) Ibid.

5 Traumatic Neurosis, Shell-Shock, and Nervous Shock

By the end of the nineteenth century, many physicians discarded the diagnosis of ‘nervous shock’ in favour of ‘traumatic neurosis’ and ‘accident neurosis’ in relation to patients who presented with serious physical and psychiatric symptoms following accidental trauma which occasioned either no injuries or only trivial ones. Oppenheim observed that

The name *neurosis* in itself indicates that a pathologic basis to these disease conditions has not yet been found. We assume that in the functional disorders molecular alterations occur in the central nervous system. We can, it is true, refer to only few autopsies, but these were generally negative. A few observations, however, have shown that shocks which did not produce a direct lesion of the central nervous system caused a disease of the cerebral vessels, especially the capillaries, arteriosclerosis, hyaline degeneration, and endarteritis obliterans; and it is not improbable that some symptoms, as for instance, the persistent headache, attacks of vertigo, and vasomotor disorders, are due in some cases to these alterations.  

If neurology could not fully explain these conditions, what was their medical cause? In the late 1880s, intensive clinical research into psychological consequences of fright suggested that serious general functional disorders, including the then newly described ‘neurosis’, often develop even after slight injuries. By the time the Twelfth International Medical Congress was held at Wiesbaden in 1893, the attending neurologists and physicians generally accepted that disorders which follow emotional non-physical trauma were genuine medical conditions - though they were psychiatric rather than physical in nature. The theoretical basis for such classification was provided by Freud and Breuer in 1895 with the

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355 Oppenheim, H. op. cit. fn. 199, at 740. Italics in the original.
publication of *Studies in Hysteria*. In their monograph, Freud and Breuer compared symptoms of hysteria with those following psychological trauma due to fright. The authors concluded that in each instance neurotic symptoms may be produced by the antagonism of mutually incompatible emotional trends.

The work and psychoanalytic theories of Sigmund Freud led to the emergence of psychiatry as a branch of medical science and the eventual recognition that emotional distress or imbalance is a psychiatric condition and should be treated as such. The law began to reflect these developments by recognising that a person’s emotional integrity, just as much as their physical integrity, is an interest worthy of legal protection. The work of physiologists and neuroanatomists demonstrated physiological consequences of psychological experience, thus helping to legitimise pure psychiatric injury as a compensable head of damage in its own right.

Psychosomatic effects of stress were originally noted and described by a French military physician, Ambroise Paré (1510-1590). In his *Treatise*, published in England in 1634, Paré described the condition of soldiers on active duty who suffered severe psychological trauma, often resulting in death, whether or not they had sustained a physical injury. During the American Civil War doctors also reported examining combat-related psychiatric conditions suffered by the Union soldiers who had not sustained a physical injury. The condition was first described in 1865 by Professor George Burr in the *New York Medical Journal*. He described three cases of military officers who suffered such symptoms as paralysis, loss of sensation, and change of personality strongly resembling ‘derangement’

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358 Oppenheim, H. op. cit. fn. 199.


when they found themselves in close vicinity of exploding shells. Burr observed that these symptoms were ‘indicative of serious injury to the nervous system [which] may be met with, without the body receiving either wound or contusion’. In 1871 Dr Da Costa writing in the *American Journal of Medical Science*, suggested a possible psychological aetiology for this condition which he called ‘irritable heart’. 361

Then came the Great War. Hundreds of thousands of young healthy men, who volunteered for war service with great panache in all countries of the Commonwealth, were coming home broken in mind as well as in body. They presented such hysterical disorders as mutism, total loss of hearing, loss of vision, monoplegia, paraplegia, hemiplegia, involuntary movements and disorders of gait, and the like. In February 1915, Dr Charles S. Myers wrote to *The Lancet* describing cases of three ‘shell-shocked’ soldiers who suffered temporary sensory losses. 362 He used the phrase literally, attributing the soldiers’ condition to the chemical and physical effects of shells bursting close around them. But the term ‘shell-shock’ soon became a popular appellation for any mental illness suffered by those fighting in the trenches. 363 In his speech to the House of Lords on 28 April, 1920, Lord Southborough stated that at the time, in the United Kingdom alone, some 65,000 ex-servicemen were drawing disability pensions for shell-shock related neurasthenia, of whom 9,000 were still undergoing hospital treatment. 364 Some medical practitioners treated the symptoms of shell-shock with suspicion and employed brutal means to ‘cure’ it. 365 Others, like the neurologist, Sir Frederick Mott, considered shell-shock to be a strictly somatic disorder. In his first Lettsomian lecture to the Medical Society of

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London. Mott suggested that

… although there may be no discoverable lesion in a psychic trauma, yet so complex is the structure of the human central nervous system, and so subtle the chemical and physical changes underlying its functions, that because our gross methods of investigating dead material do not enable us to say that the living matter is altered, yet admitting that every effect owns a cause, a refractory phase in systems or communities of functionally correlated neurones must imply a physical or chemical change and a break in the links of the chain of neurones which subserve a particular function.

Some psychiatrists, in particular F.W.H. Myers, Havelock Ellis, Bernard Hart and Ernest Jones, explained the disorder in terms of Freudian psychoanalytical theory. Dr William H.R. Rivers, the famous anthropologist and physician from St John’s College, Cambridge, argued that the shell-shock symptoms were essentially triggered by the instinct for self-preservation. The medical practitioners treating War casualties soon noted that symptoms manifested by shell-shocked soldiers were similar to the non-impact injuries suffered by persons involved in railway and other peace-time traumatic accidents. Psychiatrists found that they were able to successfully treat with psychotherapy and hypnosis some of the acute psychosomatic symptoms of shell-shock, which was now re-named ‘war-neurosis’. It was therefore postulated that the aetiology of that particular disorder had to be psychological rather than organic. The response of the medical profession to the proposition that war neurosis should be treated by psychological methods was far from unanimous, as the following extract from Dr Eder’s article in *The Lancet* of August, 1916, illustrates:

A word as to treatment. Major F.W. Mott in his Lettsomian lectures says: ‘I do not find hypnosis or psycho-analysis necessary or even desirable; only common sense and interest in the welfare and amusement of these neurotic patients are

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necessary for their recovery.’ This contrast between common sense on the one hand and hypnosis and psycho-analysis on the other betrays, I fear, a survival of the medieval fear of witchcraft.368

Clinical observations made during the First World War led the participants of the Fifth International Psycho-Analytical Congress in Budapest in 1918 to conclude that there is no essential difference between peacetime neurotic illness and the psychoneurosis of war. Traumatic neurosis was thus to be explained as distinct neurotic reactions similar to all other types of neuroses.369 According to the psycho-analytical view, the trauma of any stressful accident, in a person with a specific emotional vulnerability, may trigger off latent predisposing mechanisms and result in a neurotic illness.370 The view that physiology and emotions were closely interrelated within the human organism was furthered by research into the neuro-physiological structure of the nervous system. During the latter part of the nineteenth century, physiologists and anatomists371 working with animals began to formulate theories concerning the physiological, pharmacological and neuronal structure of the nervous system.372 In 1898 John Newport Langley introduced the expression ‘autonomic nervous system’373 to describe that part of the nervous system which controls the internal vegetative processes of the body which, in contemporary terms, include metabolism and thermoregulation, digestion, ovulation, the

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369 Oppenheim, H. op. cit. fn. 199.
373 Langley, J.N. (1898), ‘On the Union of Cranial Autonomic (Visceral) Fibres with the Nerve Cells of the Superior Cervical Ganglion’, Journal of Physiology, vol. 23, 240-70, proposed that the term ‘autonomic nervous system’ be used to denote the sympathetic system and the allied nervous system of the cranial and sacral nerves, as well as the local nervous system of the gut.
cardiovascular system and renal functions. In 1905, following the study of the effects produced by adrenaline (epinephrine) on parts of the nervous system, Langley grouped the fibres of the autonomic nerves into ‘sympathetic’ and ‘parasympathetic’ divisions. Although the nomenclature used by Langley did not originally meet with universal acceptance, the recognition of the importance of the autonomic nervous system to health and disease led to the investigation of its functions and pathology. Thus in October of 1912 Dr Crookshank, in an address to the Medico-Legal Society of London, was able to declare that:

We have not one, but three, nervous systems. We have the cerebro-spinal nervous system, the sympathetic nervous system, and also the co-ordination of parts of these two into a third organisation - the autonomic nervous system.

The finer points of the structure and function of the autonomic nervous system have been considerably revised since 1912 and will be discussed at greater length later. However the general psycho-physiological conclusions based on the then current paradigm of the nervous system and postulated by Dr Crookshank remained valid. According to Dr Crookshank, psychical trauma - in the form of communication of bad news, or a sudden distressing and terrifying sight - may produce a defensive reaction of the autonomic nervous system. Medical science came to recognise that there ‘is always a

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374 The central nervous system has two divisions, the autonomic (involuntary, automatic) and the somatic (voluntary and sensory) nervous system. The autonomic nervous system is sub-divided into the ‘sympathetic’ system, in which neurons originate from the spinal column, and the ‘parasympathetic’ system, in which neurons originate from the base of the brain. The two systems have opposite functions within the body and use different chemicals (neurotransmitters) to transmit their electrical signals to the target effector organs such as glands and muscles.

375 Langley, J.N. (1901), ‘Observations on the Physiological Action of Extracts of the Supra-Renal Bodies’, *Journal of Physiology*, vol. 27, 237-56. Adrenaline (epinephrine) is the chief catecholamine hormone of the adrenal medulla.


physical process underlying psychical impression’.\textsuperscript{379}

**The influence of medical approaches to the mind-body relationship on the legal thought relating to the issue of proximate cause**

By the 1920s it became apparent that the complete separation between mind and body postulated by Descartes could not be scientifically sustained. Once medicine had finally left the Cartesian dichotomy behind, the law too began to cautiously recognise that the interests of personality protected by law may extend to protection of the integrity of mind. Thus in 1915, in the case of *Coyle or Brown v. John Watson Ltd.*,\textsuperscript{380} Lord Shaw of Dunfermline commented that:

> On principle, the distinction between cases of physical impact or lesion being necessary as a ground of liability for damage caused seems to have nothing in its favour - always on the footing that the causal connection between the injury and the occurrence is established. If compensation is to be recovered under statute or at common law in respect of an occurrence which has caused dislocation of a limb, on what principle can it be denied if the same occurrence has caused unhinging of the mind? The personal injury in the latter case may be infinitely graver than in the former, and to what avail - in the incidence of justice, or the principle of law - is it to say that there is a distinction between things physical and mental? ... Indeed it may be suggested that the proposition that injury so produced to the mind is unaccompanied by physical affection or


\textsuperscript{380} *Coyle or Brown v. John Watson Ltd.* [1915] A.C. 1. This case did not involve the issue of nervous shock. The widow of a miner sued for compensation under the *Workmen’s Compensation Act*, 1906 (U.K.). In issue was causation - was death consequent upon exposure to the elements rather than physical impact compensable? The deceased was exposed to severe chill through the negligence of the employer-defendant. The chill developed into a fatal pneumonia. The House of Lords decided physical impact or lesion was not a necessary element for recovery in ordinary cases of tort, and took an opportunity to reject the policy reasons which underlay the Privy Council’s decision in *Coultas*. 
change might itself be met by modern physiology or pathology with instant challenge.\footnote{Id. at 14.}

In the same year Dean Roscoe Pound, one of the great American jurists, in his article on legal interests of personality, was more circumspect when he made a distinction between ‘mental derangement’, which manifests itself objectively, and ‘purely subjective mental suffering’:

Injury to the nervous system, mental injury, and injury to sensibilities, where there is no physical impact or no injury to substance or to any relation, is a new problem of modern law. ... A nervous derangement manifested objectively is like any bodily illness. But our law does not protect against purely subjective mental suffering except as it accompanies or is incidental to some other form of injury and within certain disputed limits.\footnote{Pound, R. (1915), ‘Interests of Personality’, \textit{Harvard Law Review}, vol. 28(4), 343-65; 445-456, at 359.}

Like the judiciary, Roscoe Pound was critical of the use of the requirement of causation and remoteness of damage merely as a policy instrument to deny compensation to victims of tortious conduct on the basis that society should be protected from potentially fraudulent or unsubstantiated claims. He quoted with approval the following rhetorical statement from an influential 1912 article by Jeremiah Smith:

\begin{quote}
Do not some courts, by laying down the rule of legal cause, proceed upon the supposition that one problem before them is to determine when to exempt a tortfeasor from liability for effects which were in reality caused by his tort?\footnote{Smith, J. (1912), ‘Legal Cause in Actions of Tort’, \textit{Harvard Law Review} vol. 25, pp. 103-28; 223-52; 303-27, at 103.}
\end{quote}

Pound argued that the difficulties of evidentiary proof leading to acceptance of false testimony about mental suffering should be taken into account when the individual interests in being compensated for non-physical impact nervous shock are balanced against the social interest in preventing abuse of the legal system.\footnote{Pound, R. op. cit. fn. 380, at 360.} However, he did not see the difficulties of proof as irresolvable, and concluded by noting that:

Probably advance in our knowledge of psychology and mental pathology and progress in means of arriving at the truth in matters where expert evidence is required will determine the development of the law upon this subject. So long as the margins of imposture and the scope of pure expert conjecture remain as large as they are at present, this phase of the interest of personality must remain in some measure insufficiently secured. 385

In 1916, the Supreme Court of California in *Easton v. United Trade School Con. Co.*, 386 having examined the past authorities on the issue, declared that:

In no one of these cases, nor in any other well-adjudicated case — and certainly not by the courts of this state — is it held that where fright accompanies or follows a wrongful physical injury, it is not an element of damage. To the contrary, fright under such circumstances is but one form of mental anguish, and the mental anguish as a direct reasonable outcome of the illegal physical injuries is always an element of damage.

It thus appeared to be conceptually settled that fright accompanied by physical and psychiatric injury suffered by a plaintiff when occasioned by tortious conduct of the defendant was not too remote a kind of damage to be compensable. At the same time, some members of the judiciary began to examine the content behind the legal jargon developed around the major elements of negligence. Thus, in the 1920 case of *Weld-Blundell v. Stephens*, 387 Lord Sumner took issue with the legal nomenclature and its use and misuse in relation to the fundamental principles governing the law of causation in negligence. He asked:

What are ‘natural, probable and necessary’ consequences? Everything that happens, happens in the order of nature and is therefore ‘natural’. Nothing that happens by the free choice of a thinking man is ‘necessary’, except in the sense of predestination. To speak of ‘probable’ consequence is to throw everything upon the jury. It is tautologous to speak of ‘effective’ cause or to say that damages that are too remote from the cause are irrecoverable, for an effective cause is simply that which causes, and in law what is ineffective or too remote is not a cause at all. I still venture to think that direct cause is the best expression. Proximate cause has acquired a special connotation through its use in reference

385 Id. at 362.
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to contracts of insurance. Direct cause excludes what is indirect, conveys the essential distinction which *causa causans* and *causa sine qua non* rather cumulously indicate, and is inconstant with the possibility of the concurrence of more direct causes than one, operating at the same time and leading to a common result. ... What a defendant ought to have anticipated as a reasonable man is material when the question is whether or not he was guilty of negligence, that is of want of due care according to the circumstances. This, however, goes to culpability, not to compensation. ... Again, what ordinarily happens, or may probably be expected to happen, is material where a mere series of physical phenomena has to be investigated and the remoteness of the damage or the reverse is to be decided accordingly.388

The arguments advanced by Lord Sumner were adopted by the English Court of Appeal a year later, when it decided the case of *Re Polemis*.389 The *Re Polemis* was the very kind of case on remoteness of damage that in 1850 Pollock CB wished would come for determination before him.390 Furness, Withy & Co. Ltd. chartered from Polemis Co. a ship called S.S. Thrasyvoulos, and loaded among her cargo a quantity of cases filled with benzine and petrol. Some of the cases leaked, and there was petrol vapour in the hold of the ship. At a port of call, while some of the benzine tins were being shifted by the charterers’ employees, one of them negligently knocked a plank into the hold. The ship immediately burst into flames and was totally destroyed. Although the court inferred that the falling plank had caused the fire, the actual cause of the fire was never established. Counsel for the defence argued that the Court of Appeal should adopt a rule whereby the reasonable foreseeability of the type of damage that eventuated would become an element of remoteness of damage. This rule would have had the effect of limiting the defendant’s liability on the basis of whether the type of damage that eventuated was foreseeable or not. The Court of Appeal rejected this proposition. It held instead that where ‘physical consequences result from negligence, they may still be direct even if a reasonable man would not foresee them’. In this context, ‘physical consequences’ would include those likely to ensue in accordance with the scientific laws known to govern the world. Consequently, the criterion of ‘directness’ governing the test of remoteness of damage under *Re Polemis*, was whether a

388 Id. at 983.
390 *Rigby v. Hewitt* (1850) 5 Ex. 20; 155 E.R. 103; *Smith v. London and South Western Rly.* (1870) 40 L.J. (C.P.) 21; 6 L.R. (C.P.) 14; (1850) 5 Ex. 243; 155 E.R. 104. For a discussion of Pollock CB’s views, see Chapter 2.
reasonable person would have foreseen these physical consequences.\textsuperscript{391} In coming to this conclusion, Bankes LJ referred to the judgments of Channell B and Blackburn J in \textit{Smith v. London and South Western Rly.}...\textsuperscript{392} and Beven’s academic support for their position. His Lordship also relied on Lord Sumner’s comments in \textit{Weld-Blundell v. Stephens.}\textsuperscript{393} Scrutton, LJ in a concurring judgment criticised:

\ldots an attempt to define the point at which damage becomes too remote from, or not sufficiently directly caused by, the breach of duty, which is the original cause of action, to be recoverable. For instance, I cannot think it useful to say that the damage must be the natural and probable result. This suggests that there are results which are natural but not probable, and other results which are probable but not natural. ... To determine whether an act is negligent it is relevant to determine whether any reasonable person would foresee that the act would cause damage; if he would not, the act is not negligent. But if the act would probably cause damage, the fact that the damage it in fact causes is not of the exact kind of damage one would expect is immaterial, so long as the damage is in fact caused sufficiently directly by the negligent act, and not by operation of independent causes having no connection with the negligent act, except that they could not avoid its results. Once the act is negligent, the fact that its exact operation is not foreseen is immaterial.\textsuperscript{394}

As long as the damage was direct, it was not too remote, and therefore compensable, even where the particular type of harm was not foreseeable. Conversely, a foreseeable but indirect damage was too remote to be compensable. Since medical science associated fright sustained in traumatic circumstances with violent assault, the \textit{Re Polemis} test by implication repudiated the \textit{Coultas} doctrine that injury by way of nervous shock was too remote to sound in damages. Subsequent to the \textit{Re Polemis} decision, provided that the plaintiff could establish a duty of care owed to him or her by the defendant, the latter would not be relieved of responsibility on the ground that it was unforeseeable that the plaintiff would suffer an emotional rather than a physical injury as a result of negligent conduct. Although the


\textsuperscript{392} \textit{Smith v. London and South Western Rly.} (1870) 40 L.J. (C.P.) 21; 6 L.R. (C.P.) 14.

\textsuperscript{393} Bankes LJ also emphasised that the approach of the Court of the Common Pleas in \textit{Smith v. London and South Western Rly.} was adopted by Sir Samuel Evans P in \textit{HMS London} [1914] 83 L.J.P. 76 at 76; 30 T.L.R. 196.

\textsuperscript{394} Pound, R. op. cit. fn. 380, at 362.
plaintiff was still left with the evidentiary burden of establishing that the emotional injury caused by the defendant’s negligent conduct had demonstrable physical manifestations, the focus of the substantive law shifted to duty of care. For the next forty years, the primary concern of judges considering cases of negligently occasioned psychiatric injury tended to relate to the ambit of the defendant’s duty of care in relation to the secondary victim of nervous shock: persons who suffered serious emotional harm as a result of perceiving others being physically injured. And again, as with remoteness of damage, the concept of duty of care came to be considered primarily as a policy instrument to be used at the discretion of some judges in order to further the containment theory of law and thus prevent the opening of the floodgates of litigation.

**Hambrook v. Stokes**

The notion of duty of care has been part of the common law for a long time. Its practical effect has always meant that persons upon whom the duty is imposed are restricted in their freedom of conduct. This is because they must take care so as not to create actionable risks to the protected interests of plaintiffs who fall within the ambit of the duty. Historically, however, there was no general test which would determine the existence or otherwise of the duty of care. The absence of a general test also meant that the courts found it hard to define the extent or the outer boundaries of the duty in cases where there was no prior relationship between the plaintiff and the defendant. In 1883, in *Heaven v. Pender*, Brett MR attempted to provide such a general test based on the notion of prohibition against creating dangerous situations which pose risk of injury to others:

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395 The *Re Polemis* test of directness was replaced with the test of reasonable foreseeability of damage in 1961 in the case of *Wagon Mound Overseas Tankship (U.K.) Ltd. v. Morts & Engineering Co. Ltd. (The Wagon Mound (No. 1))* [1961] A.C. 388.

396 *Heaven v. Pender* (1883) 11 Q.B.D. 503. The case involved a claim against a dock owner who supplied and put up staging so that vessels using the dock might be painted and repaired there. The ropes by which the staging was slung were in fact unfit for use. When the plaintiff, who was a ship-painter, began to use the stage for work, a rope broke, the stage fell, causing him an injury. The majority, Cotton and Bowen LJJ, decided the case in favour of the plaintiff on the narrow ground that the dock owner who provided the staging was under an obligation to take reasonable care that it was fit for use.
Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.397

The test proposed by the Master of the Rolls did not find favour with the other judges, and did not become legally binding. It was regarded as too wide, because it failed to incorporate limits to liability in cases where the defendant’s conduct merely threatened to cause danger of injury rather than inflicting actual injury to others, and also appeared to impose a general obligation to protect others.398 However, as students of law know all too well, certain propositions contained in dissenting judgments acquire a life of their own. This was the case with Brett MR’s decision. It was discussed in academic writings, notably in Thomas Beven’s influential Principles of the Law of Negligence,399 and in 1916, Cardozo J referred to it in Macpherson v. Buick Motor Company.400 This case established the principle that a manufacturer of inherently dangerous goods which are defective, can be liable in negligence if the defect caused an injury to a third person (the ultimate purchaser who has purchased the goods from a middleman), even in the absence of a contractual relationship between the parties. Cardozo J thus extended the relational ambit of the defendants’ liability to third parties, but he limited it to the category of ‘inherently dangerous goods’, which on the facts of the case, included automobiles. An influential American academic, Professor Francis Bohlen, explained the content of the duty which prohibited causing ‘danger of injury to the person or property of the other’ regardless of contract in the context of liability for nervous shock. He noted that ‘no recovery is allowed for mere fright because fright is not of itself such an injury as must be shown to maintain an action for negligence.’401 Where, however, the result is a physical injury which is sufficient to sustain the action, then the only question will be whether or not

397 Id. at 509.
398 Brett MR’s test for duty of care would have allowed damages for nervous shock to be extended to bystanders.
399 Beven, T. op. cit. fn. 250, at 53-4.
the injury is the legal consequence of the negligence which caused the fright.\footnote{Ibid.}

These propositions loomed large in the background when the ambit of the duty of care in respect of foreseeability of risk of negligently inflicted nervous shock was analysed by the English Court of Appeal in the case of \textit{Hambrook v. Stokes Bros.}\footnote{\textit{Hambrook v. Stokes Bros} [1925] 1 K.B. 141.} The question in issue was whether tortious conduct occasioning fright, which was aroused by an anxiety for the safety of another person rather than one’s own physical integrity, could give rise to nervous shock compensable in law. More precisely, could the existing concept of a duty of care in relation to the defendant’s liability for nervous shock be extended to situations where severe psychiatric injury was caused by the parents’ fear for the safety of their children who were imperilled by the defendant’s actions?\footnote{In \textit{Hambrook v. Stokes} id. at 142, it was specifically stated that Mrs Hambrook: ‘was not herself in any personal danger, as the lorry stopped some distance short of where she was standing, and in any case, she would have had ample time to step aside into a shop into a position of safety’.

In the \textit{Hambrook} case, the plaintiff’s wife was going home after walking her children up to the bend of an inclining street, on the way to school. Suddenly she saw a lorry rushing out of control down the steep and narrow street, along which she knew her children were walking. As the lorry approached, it failed to take another bend, and ran into a wall. The lorry apparently had been left unattended at the top of the hill with the engine running. Although, from her vantage point, Mrs Hambrook could not see the children, she became immediately aware of the danger to them. She ran up the street to enquire whether anyone was injured, and was told that a little girl had been run over, but the child was not identified. Mrs Hambrook then ran to the school where she found out that it was indeed her daughter, who had been taken to hospital. The child died. Mrs Hambrook, who was pregnant at the time, became ill as a result of the nervous shock which she sustained. Three months later she suffered a miscarriage and died. The plaintiff sued under the \textit{Fatal Accidents Act}\footnote{Lord Campbell’s Act 1846 (U.K.) 9 & 10 Vict. c. 93.} for the death of his wife caused by the negligence of the defendant.

The trial judge was cognisant of the limitation in respect of damages for nervous shock resulting from fright imposed by Kennedy J in \textit{Dulieu v. White}. He directed the jury that unless the death of Mrs Hambrook was the
result of shock produced by fear of harm to herself, as contrasted with shock produced by fear of harm to her children, the plaintiff could not recover. The Court of Appeal reversed the decision, and held that the plaintiff was entitled to recover for the shock his wife had suffered which resulted from apprehension for the safety of her children.

Bankes LJ, who delivered the leading judgment, held that although Mrs Hambrook did not herself see her children, it was a reasonable and natural consequence of the defendant’s negligence that a mother, knowing the peril posed to her children by a lorry rushing out of control, would receive a shock. This was sufficient to ground the action. It was unnecessary to whether or not Mrs Hambrook was within the area of physical risk because the defendant admitted negligence on this point. The case was therefore decided on the basis that the shock produced by the mother’s fear of harm to her children could be compensable where the defendant owed an antecedent duty of care to the person who suffered the shock. According to Atkin LJ (as he then was), the defendant’s duty was to use reasonable care to avoid injuring those using the highway. Once he had breached this duty, he was responsible for the resulting damage on the basis of the Re Polemis test:

The cause of action ... appears to be created by breach of the ordinary duty to take reasonable care to avoid inflicting personal injuries, followed by damage, even though the type of damage may be unexpected - namely, shock.\textsuperscript{406}

His Lordship then added the following obiter dictum:

If it were necessary, however, I should accept the view that the [defendant’s] 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.\textsuperscript{407}

Lord Justice Atkin thus rejected the limitation upon recovery for nervous shock imposed by Kennedy J in Dulieu v. White. His Lordship commented the recovery for nervous shock should not be determined on the basis of distinctions between cases where the shock arises from the reasonable fear of immediate personal injury, and cases where the mother’s shock results from apprehension for the safety of her child, with the former but not the latter being compensable. According to Atkin LJ, such

\textsuperscript{406} Hambrook v. Stokes op. cit. fn. 401, at 158.
\textsuperscript{407} Ibid.
distinctions ‘would be discreditable to any system of jurisprudence in which they formed a part’. 408

His Lordship also said that he could see no reason for excluding from the defendant’s scope of duty of care the bystander who receives injury by way of nervous shock from an apprehension of, or the actual sight of injury to a third party. Although legal logic tends to support his Lordship’s proposition in respect of bystanders, policy reasons had, so far, prevented their inclusion within the scope of the duty.

In the course of his judgment Atkin LJ summarised the history of the law in respect of nervous shock and its relationship with medical science in the following terms:

The legal effects of injury by shock have undoubtedly developed in the last thirty or forty years. At one time the theory was held that damage at law could not be proved in respect of personal injuries, unless there was some injury which was variously called ‘bodily’ or ‘physical’, but which necessarily excluded an injury which was only ‘mental’. There can be no doubt at the present day that this theory is wrong. 409

He acknowledged that the refusal by the judiciary to extend the protection of the law to the individual’s interest in emotional integrity was at least partly due ‘to the law following a belated psychology which falsely removed mental phenomena from the world of physical phenomena’. 410

In the Hambrook case, the Court of Appeal accepted that the defendant may owe a duty of care to plaintiffs who, though themselves not directly threatened with physical harm, are within the area of physical danger and suffer a bodily injury as a result of a shocking event giving rise to fear for the safety of their close relatives.

Sargant LJ, in his dissenting judgment, argued that unless the restriction of liability for nervous shock to cases of reasonable fear for personal safety as imposed by Kennedy J were followed, the defendants might be faced with unlimited liability. According to Sargant LJ, since Mrs Hambrook’s fear was due to apprehension of danger to her children, the damage she had suffered was ‘not within ordinary or reasonable expectation’ of the defendant. According to his Lordship, apart from cases of intentional wrongdoing, the duty of the defendant in negligence should be limited to

408 Id. at 157.
409 Id. at 154.
410 Ibid.
those persons on or near the highway whose physical safety may be endangered by his or her wrongful conduct.\footnote{Id. at 162.}

Technically, the \textit{Hambrook} case turned on the issue of remoteness of damage. When the defendant negligently parked the lorry at the top of the road, he owed a duty of care to the persons who were actually using that road. Mrs Hambrook was using the road at the time of the breach of duty. The only extension to the existing law pertaining to nervous shock was the finding of the majority that, in the circumstances where a claimant’s physical integrity is at risk because of the defendant’s negligence, it is immaterial whether the fright is occasioned by fear for the claimant’s own safety or the safety of a third person.

However, implicit in the judgment of the majority, particularly in the judgment of Atkin LJ, was the proposition that the concept of duty of care in respect of nervous shock could cover situations which extended beyond physical proximity between the defendant and the plaintiff. The duty could encompass circumstances where the emotional relationship between the plaintiff and the person who was physically injured through the wrongful conduct of the defendant was a major factor in the shock causing the onset of the claimant’s psychiatric illness. In other words, the case lends itself to an interpretation that the defendant may have owed a duty of care to Mrs Hambrook independently of, or not merely because she was one of the users of the road at the time when he negligently left the out of control lorry. Rather, he owed her a duty of care because she was the mother of the child who was wrongfully killed as a result of his negligence. On this interpretation the majority decision in \textit{Hambrook v. Stokes} meant that the common law, having recognised a duty not to negligently cause physical injury to a person through shocking his or her feelings, was prepared to extend this duty as inclusive of plaintiffs who are put in fear, not for their own personal safety, but for that of other closely related persons.\footnote{Landau, N. (1939-41), ‘The Duty in Cases of Nervous Shock’, \textit{Res Judicatae}, vol. 2, 139-144.}

The concept of a duty of care which would extend beyond the risks of physical damage to pure emotional injury did not receive an enthusiastic reception by all the superior courts in England. For example, in the House of Lords decision in \textit{Bourhill v. Young},\footnote{\textit{Hay or Bourhill v. Young} [1943] A.C. 92 (known as \textit{Bourhill v. Young}).} Lord Russell of Killowen declared a clear preference for the dissenting judgment of Sargant LJ; Lord Wright
expressed a guarded approval of the decision; Lord Porter implied did so; whereas Lords Thankerton and Macmillan reserved their opinions. It was only in the second half of the twentieth century that the notions expressed by Lord Atkin were to be generally comprehended and applied.

The facts in the Hambrook case also exemplified the socio-technological changes which were taking place in the post First World War western societies. Motor vehicles began to replace trains as the primary means of locomotion, and thereby as the principal instruments of negligently inflicted injuries. From now on most personal injury litigation would involve negligently driven motor vehicles. However, as Wilkinson v. Downton demonstrated, injury by way of nervous shock was not confined to the consequences of negligent driving.

Like the Hambrook case, the decision of the South Australian Supreme Court in Brown & Anor v. The Mount Barker Soldiers’ Hospital Inc. involved the issue of remoteness of damage - the ambit of compensable risk - where there existed an antecedent duty of care owed by the defendant hospital to the plaintiff inpatient. In the Brown case, Piper J awarded damages for nervous shock, discomfort and inconvenience to Mrs Brown who was a patient in the defendant hospital and whose infant daughter suffered burns to her body as a result of the hospital’s negligence. Mrs Brown did not see the accident, but was told of the tragedy by a matron; as a result the plaintiff suffered ‘from shock and agony of mind’. The defendant argued that, on the authority of the Coultas decision, Mrs Brown could not recover damages for mental shock caused by the injuries to her child. Moreover, since she did not see the accident but only was told of it some time after it occurred, she was outside the ambit of the Hambrook case. Curiously, the court in Brown interpreted the Hambrook case as decided on the basis that Mrs Hambrook suffered shock due to the fear for her own physical safety.

Piper J decided that the defendant hospital owed Mrs Brown a duty to take care ‘to avoid, so far as reasonably practicable, all things that might prejudice her health comfort, or increase her need for exertion or care’. This duty was breached when the necessity arose of telling the mother that her child had been burnt. As to the Coultas decision on the remoteness of damage, Piper J stated that, to be compensable, direct physical

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415 Id. at 130.
416 Ibid.
consequences of negligently inflicted shock need not be serious. His Honour determined that ‘even the production of tears is a physical consequence and discomfort’ for which damages can be awarded. By finding some evidence of a direct physical impact, no matter how minimal it might be, Piper J was able to distinguish Coultas. This approach highlights the absurd legal analysis - already evident in the case of a bruised ankle in Rea v. Balmain New Ferry Company - which compassionate judges in Australia were forced to adopt.

In 1927, two years after the judgment of the English Court of Appeal in Hambrook v. Stokes, the Privy Council’s decision in Coultas was invoked in Australia in two separate cases involving intentional wrongs. In these two cases the old precedent was utilized in very different ways.

The case of Johnson v. The Commonwealth was heard in the New South Wales Supreme Court. According to the report the plaintiff, inter alia, ‘suffered a severe shock and derangement of her nervous system and physical condition with great physical discomfort and ill health’ after she had witnessed an assault upon her husband perpetrated by the defendants, who also forcibly removed him from his home and falsely imprisoned him.

The defendants demurred on the grounds that the Coultas decision, which was binding upon the Supreme Court of New South Wales, prevented recovery of damages arising from shock unaccompanied by wrongful physical impact. Moreover, according to the defence, shock to the nervous system would not constitute a valid cause of action unless the act causing it was a direct breach of a duty of care to the plaintiff. Ferguson J, who delivered the joint judgment of the Supreme Court, referred to the doubts cast upon the Coultas decision in England but acknowledged that the case was still a binding authority in Australia. The Court then proceeded to distinguish Coultas along the lines upon which Wright J distinguished it in Wilkinson v. Downton; namely, that unlike Coultas which related to negligent unintentional conduct, the case of Johnson v. The Commonwealth involved intentional wrongdoing - a ‘wilful injuria’ - on the part of the defendants. After quoting with approval Justice Phillimore’s judgment in Dulieu v. White, as well as the case of Hambrook v. Stokes, the Supreme Court of New South Wales decided that ‘the nervous shock and resulting

417 Id. at 131.
418 Rea v. Balmain New Ferry Co. op. cit. fn. 295.
419 Johnson v. The Commonwealth and Ors. (1927) 27 S.R. (N.S.W.) 133.
420 Ibid.
physical illness complained of by the plaintiff might fairly and reasonably have been anticipated as a consequence of the assault committed upon her husband in her presence'; and hence disclosed a good cause of action.\textsuperscript{421}

In the case of \textit{Davies v. Bennison},\textsuperscript{422} the defendant shot and killed his neighbour’s cat while it was sitting on the roof of her shed. Nicholls J of the Supreme Court of Tasmania held that the defendant committed trespass to the plaintiff’s airspace and to her chattel by shooting the cat. However, the Chief Justice added that although the plaintiff had suffered a shock-induced illness as a result of the intentional wrong committed by the defendant, the wrongdoer was not liable because:

… shock caused by seeing an injury occur to another human being is in law considered too remote from the original wrongful act of the defendant causing the injury to be a ground for damages, and it seems to me to be quite clear that the pet animal, however cherished, cannot be regarded as nearer and dearer than a child or another loved relative.\textsuperscript{423}

Nicholls J did not cite any of the authorities on the intentional infliction of nervous shock, even though they were directly apposite to the facts of the case. It appears that \textit{Davies v. Bennison} was the last reported case in which the \textit{Coultas} case was invoked as an authority for a blanket denial of damages for nervous shock. In 1932, the Victorian Parliament statutorily overruled this aspect of the Privy Council’s decision by providing that: ‘In any action for injury to the person the plaintiff shall not be debarred from recovering damages merely because the injury complained of arose wholly or in part from mental or nervous shock.’\textsuperscript{424} Other Australian jurisdictions followed.\textsuperscript{425}

In the United States, the decision in \textit{Hambrook v. Stokes} was referred to by Parke J of the Court of Appeals of Maryland in the case of \textit{Bowman v. Williams}.\textsuperscript{426} In this case, while his children played in the basement of his home, the plaintiff, looked out of the dining room window. He noticed a

\begin{thebibliography}{9}
\bibitem{421} Id. at 137.
\bibitem{422} \textit{Davies v. Bennison} (1927) 22 Tas. L.R. 52.
\bibitem{423} Id. at 54.
\bibitem{424} \textit{Wrongs Act} 1932 (Vic.), s. 4, reproduced in \textit{Wrongs Act 1958} (Vic.), s. 23.
\bibitem{425} \textit{Wrongs Act Amendment Act} 1936 (S.A.), s. 28(1), [now s. 6]; \textit{Law Reform (Miscellaneous Provisions) Act} 1944 (N.S.W.), s. 3(1); \textit{Law Reform (Miscellaneous Provisions) Ordinance} 1955 (A.C.T.), s. 23; \textit{Law Reform (Miscellaneous Provisions) Act} 1955 (N.T.), s. 24.
\bibitem{426} \textit{Bowman v. Williams} (1933) 164 Md. 397; 165 A. 182.
\end{thebibliography}
large truck, loaded with coal, without chains on its wheels, coming down a steep and icy hill. Within moments, the truck, gathered speed, went out of control, and crashed into the basement, beneath where the plaintiff was standing. It remained embedded in the side of the house. The plaintiff did not sustain any physical impact. Yet, the fright and alarm for the safety of his two young sons occasioned by this accident, ‘caused such a shock to his nervous system that he fell to the floor of the dining room immediately after the impact of the truck with the house and was carried into the kitchen in a weak and hysterical condition’. The case was a clear instance of trespass to the land. Parke J, however, preferred to determine the matter in negligence.\footnote{427} Having observed that

\[\ldots\] there is neither reason nor logic to hold, with some of the cases, that a distinction is to be taken, so that, if a party suffer an injury, as loss of health, of mind, or of life, through fear of safety for self, a recovery may be had for the negligent act of another; but may not recover under similar circumstances, if the fear be for safety of another.\footnote{428}

Parke J decided that with respect to the threshold question of compensability of non-impact injuries,

\[\ldots\] a plaintiff can sustain an action for damages for nervous shock or injury caused without physical impact, by fright arising directly from the defendant’s negligent act or omission, and resulting in some clearly apparent and substantial physical injury as manifested by an external condition or by symptoms clearly indicative of a resultant pathological, physiological or mental state.\footnote{429}

Implicitly adopting the \textit{Re Polemis} rule of remoteness of damage, he reached the following conclusion:

In the matter before the court, the nervous shock or fright sustained by the plaintiff was based on reasonable grounds for apprehension of an injury to the plaintiff and his children, and was one which naturally produced physical

\footnote{427} ‘The negligent, but not willful, driving of the truck from the public highway through the wall of the house in which the plaintiff lived was the breach of duty which in the user of the highway the masters owed the plaintiff.’ \textit{Bowman v. Williams} op. cit. fn. 424, at 400-1; 183. The truck was driven by employees of the defendant. In his determination of the defendants’ duty of care, Parke J relied on the analysis of duty provided by Bohlen, F. op. cit. fn. 399, at 256, 266, 270, and 280.

\footnote{428} \textit{Bowman v. Williams} op. cit. fn. 424, at 401; 183.

\footnote{429} Id. at 404; 184.
deterioration as distinguished from those shocks which primarily work on the moral nature, to the exclusion of actual physical injury. Furthermore, the cause of the fright was the negligent act or omission of the defendants in permitting the truck to get out of control or be driven so as to run into the house of the plaintiff. This was a breach of duty that the defendants owed to the plaintiff. The physical damages which the plaintiff sustained naturally, directly, and reasonably arose from this negligent act or omission, without the intervention of any other cause, and so the causal connection between the injury and the occurrence is established.430

Thus, Parke J embraced Atkin LJ’s reasoning in Hambrook v. Stokes in respect of a defendant’s liability for nervous shock unaccompanied by physical injury, though the standard he employed was analogous to that of the tort of assault: ‘reasonable grounds for apprehension of an injury to the plaintiff and his children’. This analogy was not inappropriate, given the medical view that an unexpectedly evoked intense fear produced pathogenic effects which closely resembled those of an assault by physical force.431 Parke J’s definition of compensability of damage caused by nervous shock was utilised in subsequent cases.432

Neurosis and the issue of predisposition

In respect of neurotic conditions, it was generally accepted among psychiatrists of the time that the most important factor in determining the onset of psychosomatic illness was not the severity of the traumatic event which caused the neurosis but the person’s predisposition to neurosis.433

430 Id. at 402; 184.
431 For a discussion of medical opinions on this matter, see Chapter 2.
432 For instance, in the case of Mahnke v. Moore (1951) 197 Md. 61; 77 A. 2d 923, which concerned recovery of damages ‘for shock, mental anguish and permanent and nervous and physical injuries’ by a plaintiff who as a very young child was present when her father shot her mother with a shotgun and kept the dead body in the house with himself and the child for six days. He later committed suicide in her presence by shooting himself with a shotgun, thereby causing masses of his blood to spray her face and clothing.

433 There was also a prevalent view that the second most important factor in the duration and symptomatology of neurosis was the lure of compensation. See Smith, H.W. & Solomon, H.C. (1943), ‘Traumatic Neuroses in Court’, Virginia Law Review, vol. 30, 87-175. In this very influential article the authors urged the courts to make the law of torts more stringent so as to prevent persons predisposed to neurosis possibly enriching themselves through compensation. See also Smith, H.W. (1944), ‘Relation of Emotions
Since predisposition to mental illness was considered an important medical factor in the aetiology of psychiatric disorders, it was not unreasonable that the courts should regard absence of such predisposition as essential in cases of psychiatric injury following non-physical impact trauma. In England, in 1897 Justice Wright stressed that the plaintiff who suffers injury by way of nervous shock needs to show that at the time of the event he or she was a person in ‘an ordinary state of health and mind’.434 In the United States, in the Sloane case,435 in which the plaintiff was wrongfully expelled from a train, the defendant provided evidence indicating that Mrs Sloane had previously suffered from insomnia, ‘nervous shocks and paroxysms, and that, owing to her physical condition, she was subject to a recurrence of these shocks or nervous disorder if placed under great mental excitements.’436 The court said that:

Whether the defendant or its agents knew of her susceptibility to nervous disturbance was immaterial. She had the same rights as any other person who might become a passenger on its road, and was entitled to as high a degree of care on its part. It was not necessary that this injury should have been anticipated in order to entitle her to a recovery therefor. ... If the facts under which she was excluded from the car would be an act of negligence on the part of the defendant as to any and all persons, whoever might sustain injury by such act would be entitled to recover to the full extent of his injury, irrespective of his previous physical condition or susceptibility to harm.437

Harrison J quoted with approval the following statement of the Supreme Court in Baltimore City R. R. Co. v. Kemp,438 in which the female plaintiff claimed damages for breast cancer, which her medical experts attributed to a hurt she sustained in a car accident caused by the defendant. The court held that it was for the jury to determine from the evidence whether the cancer did result from the injury, and, if so, that under the talem qualem rule (tortfeasors take their victim as they find them), the defendant was liable, even though it had no reason to anticipate such a result:

436 Id. at 680; 322.
437 Id. at 682; 324.
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It is not for the defendants to say that, because they did not or could not in fact anticipate such a result of their negligent act, they must therefore be exonerated from liability for such consequences as ensued. They must be taken to know and to contemplate all the natural and proximate consequences, not only that certainly would, but that probably might, flow from their wrongful act.439

However, since the court in Sloane classified ‘nervous shock or paroxysm’ as physical rather than mere psychiatric injury, no special rules - apart from the maxim that ‘defendants must take their victims as they find them’ - needed to be applied.

This maxim was applied to a nervous shock injury brought about by fright in the case of Dulieu v. White & Sons.440 The defendants argued, inter alia, that they should not be liable because if Mrs Dulieu had not been pregnant, her shock would not have led to physical damage. Kennedy J disagreed, and stated that

If a man is negligently run over or otherwise negligently injured in his body, it is no answer to the sufferer’s claim for damages that he would have suffered less injury or no injury at all, if he had not had an unusually thin skull or an unusually weak heart.441

On the same principle, the ‘egg-shell skull’ rule, as it is known, should apply where the tortfeasor happens to negligently injure a person with a ‘neurotic personality’, or a predisposition to psychiatric illness.442 However, this is not necessarily so. The courts’ reluctance to jettison the requirement of predisposition is intriguing if it is remembered that the principle of the ‘egg-shell skull’ rule only prevents the defendant from pleading the plaintiff’s prior susceptibility as the basis for denial of liability. The plaintiff’s predisposition to injury is taken into account in the assessment of the quantum of damages. In these cases damages are adjusted down, because the court considers the probability that the plaintiff’s predisposition, at some point in the future, would have led to similar medical, social and economic consequences as those precipitated by the

439 Ibid.
440 Dulieu v. White & Sons op. cit. fn. 348.
441 Id. at 681, per Kennedy J. This principle was re-affirmed by the House of Lords in the case of Smith v. Leech Brain & Co. Ltd. & Anor. [1962] 2 Q.B. 405 (H.L.). See also: Stephenson v. Waite Tileman Ltd. [1973] 1 N.Z.L.R. 152.
442 The matter of predisposition will be discussed at a greater length later on.
defendant’s negligence.\footnote{Unless the chance of some other event triggering the plaintiff’s condition if the defendant had not, is so small as to be speculative, the damages are reduced to allow for the contingency that the plaintiff would have been similarly affected anyway.}
6 The 1930s: *Donoghue v. Stevenson*, the American Law of Emotional Distress, and the case of an overturned coffin

**Neurophysiological explanations of psychosomatic reactions to emotional trauma**

By 1925 psychiatry had formulated a scientifically acceptable theory of neurosis, including traumatic neurosis.\(^{444}\) In a nutshell, according to the psycho-analytical view, the trauma of any stressful accident in an individual with a specific emotional vulnerability may trigger off latent predisposing psychological mechanisms and result in a neurotic illness.\(^{445}\)

Biologically, anatomists and physiologists of the inter-War period were able to develop further understanding of the autonomic nervous system which regulates such involuntary processes as breathing, heart rate and digestion. It was observed that many bodily functions are controlled by the autonomic nervous system so that the organism can quickly adapt to changing conditions without the need for conscious decisions. It was demonstrated that all internal functions of the body are regulated and coordinated by the electrical messages of the autonomic nervous system\(^{446}\) and the hormonal (chemical) messages of the neuroendocrine system.\(^{447}\)

The controlling structure of the autonomic system is a small nucleus


\(^{445}\) Mendelson (1987) op. cit. fn. 368.

\(^{446}\) Endocrines are glands or their secretions where secretion takes place directly into the bloodstream rather than by ducts.

(neurone cluster) called the hypothalamus. The size of a soyabean, the hypothalamus is located below or ventral to the thalamus and forms the floor and part of the inferior lateral walls of the third ventricle. It co-ordinates autonomic nervous system functions and ensures that its sympathetic and parasympathetic divisions work in harmony and adjust their activities to changing bodily needs. As well as regulating the autonomic functions of the body, it also controls many hormone secretions of the endocrine system through the pituitary gland, and receives information from areas of the brain, which used to be called rhinencephalon or the ‘nose brain’, but today is referred to as the limbic system. Limbic system or visceral brain is the affectual (emotional) substratum of the brain, concerned with emotional and instinctual behaviour. Research into physiological responses to adverse emotional stress further demonstrated that such stress may cause profound changes to the operation of muscles and glands of the body giving rise to physiological disorders. The hypothalamus regulates body temperature, sex drive, thirst, hunger, and plays a role in emotions of pain and pleasure.

The first systematic investigation of the autonomic changes connected with emotion was published by Walter B Cannon in 1915.\textsuperscript{448} In his subsequent studies\textsuperscript{449} Cannon described physiological mechanisms which control a phenomenon known as the ‘flight-or-fight’ response, whereby a sufficient degree of fright or threat would make the heart pound, the mouth go dry, the hairs prickle at the back of the neck, and the eyes feel as if they were popping out of their sockets.

In the 1920s Otto Loewi\textsuperscript{450} established the connection between chemicals and the body’s electrical activity by demonstrating that physiologically the living organism, when confronted with a threat to its physical integrity, or homoeostasis, responds to such a traumatic stimulus by activating the sympathetic nervous system which stimulates the


neuroendocrine system, especially the adrenal medulla.

The adrenal medulla is the central part of the two adrenal, or epinephric, glands which are situated above each kidney. The adrenal medulla secretes two hormones; the epinephrine hormone, also known as adrenaline (a powerful stimulator of the sympathetic nervous system), and noradrenaline. In situations of danger, hypothalamic chemicals alert the pituitary gland which then secretes a hormone known as ACTH (adrenocorticotropic hormone produced by the pituitary; it stimulates the adrenal glands to release glucocorticoid hormones into the bloodstream) which acts upon the adrenal glands. The adrenal glands, in anger or fear, are capable of secreting 20 times the usual amount of stress hormones, particularly cortisol, which prepare the body to deal with the stressful situation by mobilising supplies. Another adrenal chemical converts fats and proteins into sugar. In response to severe stress the adrenals produce adrenaline and noradrenaline in greater quantities: the heart beats faster, the blood pressure increases and the pupils of the eyes dilate to improve vision. The combined surge of hormones relaxes bronchial tubes for deeper breathing, increases blood sugar to supply maximum energy, slows down the digestive process to conserve muscular energy, and modifies blood components so that it clots more easily on an open wound. Thus, in a matter of seconds the body substances can be drastically altered. According to Cannon, these changes prepare the organism for fight or flight as an adaptation for survival.\(^{451}\)

By pin-pointing demonstrable psycho-physiological changes to the organism which were produced as a response to an external shock, psychiatrists and neurophysiologists were able to show that physiology and emotions are closely interrelated within the human organism. Moreover, research into physiological responses to adverse emotional stress further demonstrated that such stress may, at least in the short term, cause profound changes to the operation of muscles and glands of the body, giving rise to physiological disorders.

With the greater understanding of psycho-physiological consequences which can follow non-physical impact, medical nomenclature moved away from classification of psychosomatic syndromes based upon the aetiology of a particular accident. Emotional and physical symptoms that used to be variously described under such traditional appellations as ‘railway spine’, ‘nervous shock’, ‘shell-shock’, or ‘battle-fatigue’ were critically re-examined and abandoned. As a result, psychiatrists decided to divide mental

disorders into four generic types: organic conditions,452 functional psychoses,453 neuroses454 and personality disorders.455

But the courts, still governed by the old rule that mere mental pain and anxiety do not sound in damages, and by their apprehension of being swamped by spurious claims, persisted in their insistence that in order to be recoverable the psychological damage must have some physical manifestations. Though by now, for the purposes of the law, it did not matter whether the medical cause of these physical manifestations was physiological, neurotic or psychotic.456

Donoghue v. Stevenson

The Freudian theory of the nature and aetiology of mental disorder was controversial, but it greatly influenced the modern person’s view of mental illness and, in particular, the context and importance of inter-personal

Diagnostic and Statistical Manual of Mental Disorders, (DSM-III-R) (Third Edition Revised), American Psychiatric Association Press, Washington D.C. Those mental disorders which were secondary to brain disease were classified as ‘organic conditions’.

453 The ‘functional psychoses’ - schizophrenia and manic-depressive psychosis - were conceptualised as disorders in which the severe disturbance of mental function has had the effect of gross interference with insight, and the ability to meet some ordinary demands of life and to maintain contact with reality. Because of the absence of a demonstrable organic cause, the disturbance was considered to be one of function rather than structure.

454 Those mental disorders that did not have any demonstrable organic basis but were a result of maladaptive use of unconscious mental defence mechanisms were designated neuroses. In a neurotic condition the unconscious psychological and physiological defence mechanisms, would be utilised to avoid overwhelming anxiety which threatens to arise as a consequence of unconscious intrapsychic conflicts, or the entering into conscious awareness of unacceptable wishes or emotional drives. Neuroses are distinguished by unimpaired perception of reality by the patient and by his or her awareness of the mental disturbance. The principal manifestations of neuroses include excessive anxiety, hysterical symptoms, depression, phobias, obsessional and compulsive symptoms.

455 Personality disorders were considered to be clinical conditions essentially comparable to psychoses and neuroses. They were defined as ‘deeply ingrained maladaptive patterns of behaviour generally recognisable by the time of adolescence or earlier and continuing throughout most of adult life’. World Health Organization (1978), Mental Disorders: Glossary and Guide to their Classification, World Health Organisation Press, Geneva, at 38.

456 The occurrences of psychosis following traumatic experiences were relatively rare, but not totally unknown.
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relations. The conceptual framework of a restricted duty of care was originally based upon personal responsibility in negligence, with the court examining each case as a particular, self-contained physical event. The historical duty-situation test required either a pre-existing (be it contractual, proprietary, equitable, statutory, etc.), or a physical contact between the parties. The notion that mental illness may not necessarily be an immediate consequence of a particular physical event found reflection in the law of torts in 1932, when Lord Atkin introduced a general principle of duty of care based on a test of reasonable foreseeability in the famous case of Donoghue v. Stevenson.

In Donoghue v. Stevenson the plaintiff, May Donoghue, drank a bottle of ginger beer and ice cream which her friend had ordered at the Wellmeadow Cafe in Paisley, Scotland. Mrs Donoghue claimed the bottle of ginger beer manufactured by the defendant Stevenson, contained a decomposed snail. The bottle was made of opaque glass, therefore the snail could not be detected until the greater part of the bottle had been consumed. As a result, the plaintiff alleged, she suffered severe gastroenteritis and nervous shock.

The question before the House of Lords was whether Mrs Donoghue could obtain compensation in tort from the manufacturer of the ginger beer for her injury. In May of 1932 the majority of the House of Lords held that the manufacturer’s liability for damage to the ultimate consumer caused by his faulty products should give rise to a duty of care. The Donoghue v. Stevenson duty to take reasonable care was imposed upon the defendant because a reasonable person in his position ought to have had in contemplation the existence of a reasonably foreseeable risk of injury to others unless he, the defendant, took reasonable care. In the leading judgment, Lord Atkin extended the then existing concept of duty of care by introducing the notion of reasonable foresight of risk as a general principle governing legal relationships rather than as a narrow test to be applied in

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459 Mrs Donoghue could not sue in contract because it was her friend who bought the ginger beer for her.
460 Lords Atkin, Macmillan and Thankerton favoured the imposition of duty of care; Lords Buckmaster and Tomlin dissented.
each particular situation. His Lordship suggested that:

… in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances.\footnote{Donoghue v. Stevenson op. cit. fn. 456, at 580.}

Lord Atkin defined the common law duty of care for the purposes of the law of negligence as the duty to take reasonable care when it can be reasonably foreseen that one’s conduct is likely to injure a person who in law is one’s ‘neighbour’. Legal ‘neighbours’ were defined as

… persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.\footnote{Ibid.}

The Atkinian test for a duty of care in negligence is known as the legal ‘neighbourhood’ principle. In his analysis of the ‘general conception of relations’ Lord Atkin relied upon the dissenting judgment of Brett MR in \textit{Heaven v. Pender}.\footnote{Heaven v. Pender op. cit. fn. 394. Cardozo J in \textit{MacPherson v. Buick Motor Co.} op. cit. fn. 227, at 698-699, was the first to develop and apply the general concept of duty of care as formulated by Brett MR.} His Lordship refined Brett MR’s broad principle of duty by introducing into it the concept of proximity. The great intellectual contribution of Lord Atkin to the law of negligence lay in his definition of the notion of proximity which should not be

… confined to mere physical proximity, but be used … to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act.\footnote{Donoghue v. Stevenson op. cit. fn. 456, at 581.}

Under the Atkinian formula, events which are distant in space and chronology may yet be deemed in law to be proximate on the basis of a conceptual rather than physical framework of reasonable foreseeability of risk. By compressing the concepts of time and space, and making the notion of proximity central to the test of a duty of care, Lord Atkin extended the scope of the duty to cover
… any circumstances where the defendant’s activity posed a risk of injury to others, whether or not the law had imposed a duty in that kind of case before.\textsuperscript{465}

This statement incorporated an element of causation into the test of reasonable foreseeability, because the court would have to consider the whole chain of events or activities leading up to the accident before it determined which, if any, of these events ought to have been foreseen.\textsuperscript{466} Winfield pointed out that the causal inquiry at the stage of duty was, however, different from causation in relation to remoteness of damage. This is because at the stage of duty the question is whether a compensable wrong has been committed at all, whereas by the time causation is being determined, the plaintiff has established that the tort has been committed and the question is whether it was the defendant’s conduct that was the determinant cause of the injury.\textsuperscript{467} The distinction, though jurisprudentially critical, was subtle, and not always followed by the judges. In the long term, Lord Atkin’s notion of reasonable foreseeability of the risk of harm as an essential criterion for establishing liability in negligence shifted the focus of legal analysis from the mechanisms of tortious conduct to the outcomes of that conduct.

Mrs Donoghue suffered nervous shock and physical injury after imbibing ginger beer contaminated with a dead snail. Therefore Mrs Donoghue’s nervous shock was caused by the physical impact of a noxious agent in the form of a deliquescent snail.\textsuperscript{468} However, the question which immediately arose was whether the notions of proximity and reasonable foreseeability extended to cases of non-physical impact nervous shock, i.e. whether for the duty of care to arise the defendant ought to have foreseen the risk of any injury - be it physical or emotional - or whether the duty in respect of non-physical impact nervous shock should be limited to the foreseeability of the specific kind of emotional injury by shock. The judicial answer to this question by the House of Lords had to wait another decade.

Conceptually, following Donoghue \textit{v. Stevenson}, the law of negligently inflicted nervous shock encompassed two categories of case: cases where psychiatric injury was a sequela to negligently occasioned physical injury, and cases of ‘pure’ psychiatric injury occasioned through non-physical impact negligent conduct. In both categories of case there was a requirement

\textsuperscript{466} Winfield, P. (1948) op. cit. fn. 389, at 408.
\textsuperscript{467} Ibid. at 408.
\textsuperscript{468} Stone, J. op. cit. fn. 455, at 127.
that the psychiatric condition should have serious somatic manifestations to
the exclusion of ‘transient emotions’ such as fright, grief, anxiety, guilt and
sorrow.

With respect to the duty of care in the first category of case, while
plaintiffs did not have to establish the reasonable foreseeability of the risk
of injury they had suffered (risk of physical injury is regarded as
foreseeable), they still had to prove that they belonged to the category which
the law regards as foreseeable. The issue of whether or not these plaintiffs
could recover damages for the psychiatric condition they claimed to have
suffered as a result of their physical injury was dealt with under the
requirement for remoteness of damage. At this point, the court would ask
whether the psychiatric injury was a direct and natural consequence of the
defendant’s conduct. If the answer was in the affirmative, the plaintiff could
recover. The issue of predisposition was decided on the basis that the
tortfeasor takes his victim as he finds him.

In order to establish the requisite duty of care, plaintiffs who fell into
the second category of case, had to establish both that the risk of psychiatric
injury which they had suffered was reasonably foreseeable, and that they
belonged to a category of foreseeable plaintiffs. They could only fulfil these
two tests if they could show that they had been placed by the defendant in a
zone of danger, where they held a reasonable fear for their own life, as well
as, depending on the facts of the case, the safety of their close relatives. Mrs
Dulieu could reasonably fear for her safety behind the bar invaded by a two-
pair coach, and Mrs Hambrook, as a user of the road, was placed in
immediate danger by the out-of-control lorry, and she also feared for the life
of her two children.

The tests for remoteness of damage were the same for both categories of
case.

The law of emotional distress in the United States in the 1930s

In the United States, the preferred form of action for plaintiffs who suffered
emotional distress accompanied by physical symptoms as a result of
consuming foodstuffs from contaminated containers such as bottles and
cans was to sue the manufacturer for breach of warranty to provide products
fit for consumption. For example, in Dryden v. Continental Baking Co.,\(^{469}\)
the plaintiff ate bread containing glass. He sued the bread manufacturer for

\(^{469}\) Dryden v. Continental Baking Co. (1938) 11 Cal. 2d 33; 77 P. 2d 833.
physical injuries which he sustained as a result. These injuries included nervous shock, mental suffering and agony, and painful inflammation of the stomach and intestines. The Supreme Court of California said that even were the plaintiff’s injuries confined to nervous shock, the right to recover for subsequent disturbances of the nervous system was settled. In the 1943 case of Medeiros v. Coca-Cola Co. Ltd., the court mentioned the liability of the Coca-Cola Company in tort when it refused to grant a new trial or vary the jury’s award of $7,500 to the plaintiff who became emotionally upset and physically ill after drinking some Coca-Cola from a bottle which contained a cleaning brush. The attending physician testified that the plaintiff had a recurrence of a pre-existing ulcer, and considered that ‘if a man receives a sufficient shock to cause him to vomit it might cause a recurrence of an ulcer’. In his opinion, the plaintiff ‘received a nervous shock which started vomiting, and caused an irritation which probably lighted up an old ulcer’. In the Medeiros v. Coca-Cola Co. Ltd. case, the physician was sympathetic to the nature and consequences of psychological trauma. However, many members of the medical profession, as well as lawyers, continued to hold divergent views on the issue of the medical genuineness of mere nervous shock and its legal ramifications. These divisions were very apparent at a symposium devoted to medico-legal consequences of shock organized in May of 1933 by the Medico-Legal Society of Great Britain. The guest speaker at the symposium was Dr Earengey KC, LLD, who contended that in the light of contemporary medical knowledge the law should discard the rigid distinction between injury consequent upon physical impact and mere mental injury when compensating victims of nervous shock, because:

472 He looked inside the bottle, and saw something in it which he thought to be a bug or a spider. Thinking that he had swallowed a part of ‘that dirty bug’, he vomited and had pain in his stomach; even later on, whenever he thought of how the bottle looked he would get upset and vomit. Medeiros v. Coca-Cola Bottling Ltd. op. cit. fn. 469, at 714; 679.
473 Ibid.
… purely mental suffering may be as great as the combination of mental and physical; indeed it may not be incorrect to say in a broad sense that all suffering is nervous.475

Dr Earegey KC emphasised the importance of the distinction between evidentiary and substantive aspects of the law of negligence in relation to the recovery of damages for nervous shock when he suggested that once the plaintiff can show that his or her injury was reasonably foreseeable as a probable result of the defendant’s breach of duty, it should not matter that one kind of suffering was inflicted upon him rather than another, even where this suffering was ‘mental’ and unaccompanied by physical illness or incommodity. Nevertheless, Dr Earegey did stress that the task of compensating plaintiffs for mere emotional injury which they suffered as a result of defendants’ unintentional wrongful conduct would be made easier if medical science were able to furnish some physical evidence of the existence of such injuries.

However psychiatry was still in its infancy, and many doctors as well as lawyers tended to be contemptuous of this new branch of medicine. At the symposium a number of medical participants expressed an alarm that the extension of tortious liability might enable malingerers who faked their nervous conditions to obtain compensation. The symposium once again vividly illustrated the two impediments to rational discussion of tortious liability for nervous shock: the fear on the part of some members of the judiciary of opening the floodgates and the suspicion on the part of some medical practitioners that the patient was ‘malingering’.476

Even in cases where there was no issue of possible malingering nor any threat of setting a precedent which would swamp the courts with a multitude of fraudulent claims, some legal academics argued that the recovery of damages for non-impact nervous shock should be denied on principle. For instance, in 1936 Calvert Magruder477 wrote an article defending the conclusion reached by the Wisconsin Supreme Court in the American case of Waube v. Warrington.478 In this case, the action was brought by the

475 Id. at 28.
477 Magnuder, C. op. cit. fn 17.
478 Waube v. Warrington (1935) 216 Wis. 603; 258 N.W. 497.
plaintiff, William Waube, as a special administrator of the estate of Susie Waube who died from shock after witnessing from the window of her house an accident in which her daughter, Dolores, was negligently struck and killed by the motor car of the defendant driver. Damages were denied on the basis that Mrs Waube was outside the area of physical danger, and therefore the defendant driver could not have reasonably foreseen her as a person to whom a reasonable driver should owe a duty of care. According to the Supreme Court, to determine otherwise would have constituted an unwarranted enlargement of the duties of the users of the highway.

The position of Mrs Waube vis a vis the defendant was also regarded as being analogous to that of Mrs Palsgraf in the earlier case of *Palsgraf v. Long Island Railroad Co.*479 In *Palsgraf*, a passenger was running to catch a train operated by the defendant’s company. The defendant’s employees, trying to assist him to board it, dislodged a package from his arms. The package, containing fireworks, exploded when it fell upon the rails. The explosion, apparently, overturned heavy brass scales on another platform. They fell upon the plaintiff and injured her. This was not a case of nervous shock, but it had important jurisprudential consequences on the legal standing of second-impact victims. The New York Court of Appeals denied recovery to Mrs Palsgraf on the grounds that the injury to her was not reasonably foreseeable, and therefore the defendant did not owe her a duty of care. Drawing on Lord Esher’s 1893 definition of the threshold of liability in negligence,480 Cardozo CJ, stated that:

> Negligence is not a tort unless it results in a commission of a wrong, and a commission of a wrong imports a violation of ... the right to be protected against interference with one’s bodily security. ... One who seeks redress at law does not make out a cause of action by showing without more that there has been damage to his person. If the harm is not wilful, he must show that the act as to him had the possibilities of danger so many and so apparent as to entitle him to be protected against the doing of it though the harm was unintended. ... The victim does not sue derivatively, or by right of subrogation, to vindicate an interest invaded in the person of another ... he sues for breach of a duty owing to himself.481

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479 *Palsgraf v. Long Island Railroad Co.* op. cit. fn. 456.
Thus, under the doctrine of the unforeseeable plaintiff, the injured plaintiff cannot recover if his or her relationship to the defendant is deemed by the court to be outside of the range of the defendant’s reasonable foresight. The case of Waube v. Warrington set a precedent eventually followed in most jurisdictions of the United States, which required that in order to recover for non-impact injury, the plaintiff had to establish that he or she was in the ‘zone of danger’ created by the defendant, where the plaintiff was threatened with physical impact or feared for her or his own safety. The doctrine of ‘zone of danger’ was an advance on the ‘physical impact’ doctrine in Mitchell, because it extended the notion of foreseeability of risk to those plaintiffs who were near the physical danger and experienced ‘reasonable fear of physical impact’ even if the actual wrongful contact did not eventuate.

In fact, as Magruder pointed out in his article, even before Waube, American courts allowed recovery under the ‘zone of physical danger’ doctrine for physical injuries arising from non-physical impact shock in cases where the plaintiff’s life was directly endangered by the defendant’s negligence. In Spearman v. McCrary cited by Magruder, the court awarded damages to a mother for physical illness resulting from a shock which she experienced when the defendant’s negligence in driving his car caused a mule-drawn buggy, with her children inside, to run away just as she was alighting from it. In the case of Lindley v. Knowlton, Mrs Lindley, the plaintiff, recovered $2,000 in damages for personal injuries sustained by her because of fright occasioned by the appearance and behaviour of a 165 pound chimpanzee owned by the defendant Knowlton. The animal escaped from restraint and entered Mrs Lindley’s house. It attacked her two children, choking one of them severely. Despite being greatly frightened, the mother successfully fought the animal off. However, ‘as a consequence her nervous system was disordered; she was rendered hysterical and caused to suffer pain and mental anguish’. Furthermore, she was confined to her bed for many months ‘as a result of the permanent injuries to her physical health

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and mind and nervous system. Melvin J, giving the opinion of the court, reasoned that although

Mrs Lindley was greatly and perhaps chiefly concerned for her children, for whom she fought so valiantly and successfully, there is nothing in the testimony to indicate that she was not concerned for her own safety. All of the circumstances connected with the unexpected appearance of the animal, its attacks upon her children, and her own conflict with the chimpanzee, make it impossible that she should have been devoid of fear for herself.

In both Spearman and Lindley v. Knowlton, the respective plaintiffs’ fear for their own safety - all other elements of the cause of action being fulfilled - was regarded as an essential condition for recovery. This was also the position of Sargant LJ, the dissentient in Hambrook v. Stokes.

The restatement of the law of torts (first)

In the United States, following the adoption of federal Constitution, the administration of private law in such areas as torts, contracts, property, trusts, and family law was retained primarily by the state courts. With the relaxation of the rule of stare decisis, the development of the body of rules and principles of private law, far from being uniform throughout the nation, differed markedly from state to state. Therefore by 1930s, the appellation of ‘common law’ to American law of torts became, strictly speaking, a misnomer. It was in order to provide a systematic explanation the rules of the American common law that a private association, the American Law Institute, undertook to formulate the Restatement of Torts (1934-9). The aim of the American Law Institute was to assemble ‘a correct statement of the general law of the United States’ through summaries and definitions (‘restatements’) of the principles of the law of torts as they were expressed at the time by the State courts. Professor Magruder was an active member of the Institute. In relation to liability for mere psychiatric injury (usually in the form of psychoneurosis and mental illness which is not the adjunct of

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486 Id. at 440.
487 Id. at 441.
488 American Law Institute (1934), Restatement of the Law of Torts (First), American Law Institute Publishers, St. Paul, Minnesota, at ix. Hereinafter ‘Restatement (First)’.
489 In 1939, Professor Magruder was appointed a Judge of the United States Court of Appeals, First Circuit.
The 1930s: Donoghue v. Stevenson

ordinary bodily injury to the person affected), the Restatement took a very conservative stance, and declared that

... the interest in mental and emotional tranquillity and, therefore, in freedom from mental and emotional disturbance is not, as a thing in itself, regarded as of sufficient importance to require others to refrain from conduct intended or recognizably likely to cause such a disturbance.\(^\text{490}\)

Tortious remedies for infliction of emotional distress were limited to intentional torts. The Restatement accepted that defendants could be liable for illness or bodily harm caused by unintended emotional distress if such harm was occasioned by their intentional conduct.\(^\text{491}\) Damages for emotional distress were also regarded as recoverable, if they were “parasitic” or derivative upon a cause of action for the violation of some other recognized legal right.\(^\text{492}\) Thus mere or consequential emotional distress was compassable in actions for nuisance and for certain kinds of breach of contract, as well as breach of certain statutory duties, or fiduciary obligations.

At the same time, any independent liability for intentional infliction of mere emotional distress was rejected.\(^\text{493}\) Even though the Restatement was formulated after the decision by the House of Lords in the case of Donoghue v. Stevenson had firmly established negligence as a discrete cause of action, the Restatement, did not consider that action in negligence would lie for conduct occasioning emotional distress alone, without physical injury. It included a caveat which declared that:

The Institute expresses no opinion as to whether an actor whose conduct is negligent as involving an unreasonable risk of causing bodily harm to a child or spouse is liable for an illness or other bodily harm caused to the parent or spouse who witnesses the peril or harm of the child or spouse and thereby suffers anxiety or shock which is the legal cause of the parent’s or spouse’s illness or other bodily harm.\(^\text{494}\)

\(^{490}\) Restatement (First) op. cit. fn. 486, s. 46, comment c.

\(^{491}\) Id. at 313.


\(^{493}\) Restatement (First) op. cit. fn. 486, s. 46.

\(^{494}\) Id. s. 313.
The History of the Liability for Negligently Caused Psychiatric Injury

The caveat thus left open the issue whether the American courts would recognize a duty of care not to cause shock or mental distress which may have injurious physical consequences to bystanders, that is persons whose physical safety was not directly threatened by the defendant’s unintentional wrongful conduct. The effect of the *Restatement* for the American jurisprudence in the area of nervous shock was two-fold. First, it consolidated the law of intentional infliction of emotional distress and facilitated its coherent development. For example, in the case of *Blakeley v. Shortal’s Estate*, the Iowa Supreme Court held that a plaintiff could recover damages for mental injury caused by fright she experienced when she came across the body of a house guest who had committed suicide while in her kitchen.

Cases like *Blakeley* persuaded the Institute to include transitional provisions which stated that a defendant could be held liable for intentionally subjecting the plaintiff to intense mental distress which resulted in an illness or bodily harm. The liability, however, would not arise out of any legal right that the plaintiff had to be free from intentional interference with mental tranquillity, but because he had a right to be free from negligent interference with physical well-being. Eventually, in 1947, the following new rule was added to the *Restatement of Torts*:

One who, without the privilege to do so, intentionally causes severe emotional distress to another is liable
(a) for such emotional distress, and
(b) for bodily harm resulting from it.

In the accompanying explanation, the *Restatement* acknowledged that ‘the interest in freedom from severe emotional distress is regarded as of sufficient importance to require others to refrain from conduct intended to invade it. Such conduct is tortious.’ Eventually, an independent cause of action for intentional infliction of mental distress was recognized by the Second *Restatement* in 1965 as part of the American common law.

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495 *Blakeley v. Shortal’s Estate* (1945) 236 Iowa 787; 20 N.W. 2d, 28.
496 Ibid.
498 *Restatement (First)* op. cit. fn. 486, s. 46 (1948 Supp.).
499 Id. s. 46, comment d (1948 Supp.).
Secondly, the law regarding compensation for negligently occasioned severe emotional distress in non-physical impact cases halted at the stage of the ‘zone of danger’, and virtually did not progress until the case of *Dillon v. Legg* was heard by the California Supreme Court in 1968.

**Owens v. Liverpool Corporation: compensation for severe nervous shock occasioned by negligent mishandling of chattels**

The English courts adopted a more expansive approach towards liability for pure nervous shock. The views of legal professionals such as Dr Earengay KC, who saw the issue of compensation for nervous shock as largely an evidentiary one, seem to have influenced the joint judgment of the English Court of Appeal in the case of *Owens v. Liverpool Corporation*. In 1937 there occurred an accident which raised a question of whether witnessing an injury to an inanimate object could result in nervous shock. A negligently driven tramcar violently collided with a hearse which was riding at the head of a funeral procession on Scotland Road in Liverpool. The impact caused the coffin to be overturned with the danger of its contents being ejected on to the road. The mourners, who were relatives of the dead man, were horrified by the accident. His aged mother collapsed; she and the others suffered from severe nervous shock. Since the plaintiffs were apparently within the area of physical risk, the question of duty of care did not arise. At issue was the remoteness of damage. The Court of Appeal found that on the then operative principle of *Re Polemis* the plaintiffs could recover for all direct consequences which followed this breach of duty, however unforeseeable and unlikely. Compensation included damage by way of nervous shock.

MacKinnon LJ, who read the joint judgment, expressed disapproval of the 1888 decision of the Privy Council in *Coultas* that damages for nervous shock or mental injury were too remote and could not be recovered, and declared that:

> The principle must be that a mental or nervous shock, if in fact caused by the defendant’s negligent act, is just as real damage to the sufferer as a broken limb.

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500 Dillon v. Legg (1968) 68 Cal. 2d 728; 441 P. 2d 912; 69 Cal. Rptr. 72.
The History of the Liability for Negligently Caused Psychiatric Injury

- less obvious to the layman, but nowadays equally ascertainable by the physician.\textsuperscript{502}

The remaining, and most controversial, issue before the Court of Appeal was the nature of the shocking event itself. MacKinnon LJ stated that the issue of whether the shock was occasioned by a fear for human life, or by the imperilling of the coffin containing the corpse of a near relative, is a question of fact which must be proved by the plaintiff on the balance of probabilities. It is up to the tribunal of fact to believe or disbelieve the plaintiff’s assertion. In the present case, the judge at first instance believed it, and the Court of Appeal accepted his findings. Although there was no apprehension and no actual sight of an injury to a human being, the mourners were entitled to recover damages for mental shock in an action brought by them for negligence against the defendant tram driver. The Court of Appeal thus enlarged the parameters of recoverability of damage beyond nervous shock occasioned by fear for human safety to include fear and apprehension for the safety of inanimate objects of emotional value. According to the Court of Appeal, the right to recover damages for mental shock caused by the negligence of the defendant should not be limited to only non-physical impact cases in which apprehension for human safety is involved.

In \textit{Bourhill v. Young},\textsuperscript{503} Lords Wright and Porter disapproved of the decision in \textit{Owens v. Liverpool Corporation}. However, some fifty years later, in \textit{Attia v. British Gas PLC},\textsuperscript{504} the English Court of Appeal held that the plaintiff could recover damages for psychiatric illness occasioned by shock caused by witnessing her house burn down. The fire was started by the negligence of the defendants while they were installing central heating in her house. The court pointed out that in the instant case, the issue was one of remoteness of damage, because the defendants who were engaged by Mrs Attia to do the installation owed a duty of care to her not to start a fire in her house. Dillon LJ (Woolf and Bingham LJJ concurring), following the reasoning in \textit{Owens}, said that in the circumstances, ‘whether the plaintiff’s assumed illness caused by the shock was or was not a foreseeable consequence of the defendants’ negligence must depend on the actual

\textsuperscript{502} Id. at 400.
\textsuperscript{503} In \textit{Bourhill v. Young} op. cit. fn. 411, Lords Wright and Porter disapproved of the decision in \textit{Owens v. Liverpool Corporation}.
\textsuperscript{504} \textit{Attia v. British Gas PLC} [1988] Q.B. 304.
evidence given at the trial."\textsuperscript{505}
7 Employees, Mothers and Liability for Nervous Shock in Australia; Bystanders in the House of Lords

Developments in medicine and neuropsychiatry before and after the First World War exerted considerable influence on the judicial willingness to grant compensation for nervous shock in Great Britain. The rejection of the authority of the Coultas decision even in the 1890s by the Irish, Scottish and English courts has been illustrated above.\(^{506}\) However, as long as the Judicial Committee of the Privy Council remained at the head of the hierarchy of appeals from Canadian, New Zealand and Australian courts, its decisions took precedence over subsequent judgments of the House of Lords and of the English Court of Appeal. The peculiarities of the Colonial legal structures, with their strict doctrine of precedent, meant that in the area of negligent infliction of non-impact nervous shock the High Court of Australia\(^ {507} \) was still technically bound by the Judicial Committee’s opinion in the Coultas case, when it delivered its judgment in the case of Bunyan v. Jordan\(^ {508} \) in 1937.

In this case the plaintiff, Miss Bunyan, in October 1934, observed her employer, the defendant Jordan, who was drunk at the time, handling a loaded revolver. She overheard him saying to another employee, a Miss M., that he intended to shoot himself or someone else. Miss M. later repeated that conversation to Miss Bunyan, who became ‘agitated and nervous’. Shortly afterwards the defendant left his office, went to another building,

\(^{506}\) See Chapter 4 ante.

\(^{507}\) Appeals from the High Court to the Privy Council were abolished in 1975 by the Privy Council (Appeals from the High Court) Act 1975 (Cth.). From March 1986, when the Australia Act 1986 (Cth., U.K.) came into force, the Privy Council ceased to accept appeals from the Australian State Supreme Courts, and the High Court became the final Australian court of appeal.

\(^{508}\) Bunyan v. Jordan (1937) 57 C.L.R. 1.
and Miss Bunyan heard a shot fired in that building. Having returned to his office unharmed, Jordan proceeded to tear up one pound notes, shouting that he would not live until the morning. A doctor was called, though from the reports it is not clear whether he attended Miss Bunyan or the defendant. Miss Bunyan suffered symptoms of neurasthenia, as a result of which she was unable to work for three months. She sued her employer for nervous shock resulting in damage to her health. The High Court declared that an illness such as neurasthenia, even without accompanying physical injury, should be regarded by the courts as:

… a form of harm or damage sufficient for the purpose of any action on the case in which the damage is the gist of the action, that is, supposing that the other ingredients of the cause of action are present.\(^{509}\)

Latham CJ indicated that the plaintiff’s right of action would not be affected by the sole fact that one link in the causation between the wrongful conduct of the defendant and the plaintiff’s damage may be ‘mental in character’\(^{510}\). Such person would be able to recover damages as long as he or she could establish other elements of negligence including the ‘getting of such a fright as to suffer personal injury’\(^{511}\), and where

On medical evidence, the jury might find that the defendant’s actions threw the plaintiff into a sufficiently emotional condition to lead to neurasthenic breakdown amounting to an illness.\(^ {512}\)

The High Court also affirmed that plaintiffs may recover damages in an action on the case for intentional infliction of nervous shock,\(^ {513}\) though the essential elements of this tort were narrowly interpreted. For example, the High Court insisted that there must be not only an intention to cause emotional distress but also that the intentional words must be uttered directly to the plaintiff, or at least in his or her presence. Since Mr Jordan neither uttered the threats in Miss Bunyan’s presence, nor intended to cause distress to her as an identified person, the plaintiff had no cause of action. Under the High Court’s definition of the cause of action for the intentional

\(^{509}\) Id. at 16, per Dixon J.

\(^{510}\) Id. at 11, 14.

\(^{511}\) Ibid.

\(^{512}\) Id. at 16.

\(^{513}\) The High Court cited with approval the English cases of Wilkinson v. Downton op. cit. fn. 215, and Janvier v. Sweeney op. cit. fn. 329.
infliction of nervous shock the plaintiff who suffered nervous shock upon coming to hear a false rumour originated by the defendant that her son had hanged himself, would not have been able to recover.

The requirement of directness is anomalous in the cause of action on the case which, by definition, deals with indirect intentional conduct. Therefore it is likely that if a similar case were to come before the High Court of today, the Bench will follow the reasoning of Bray CJ in the case of Battista v. Cooper. His Honour after a careful analysis of cases dealing with intentional infliction of nervous shock but without reference to Bunyan v. Jordan, said that

… an intentional tortfeasor is liable, not only for the injury caused directly to his victim, but for the injury indirectly caused to those connected with the victim or those witnessing the injury to the victim.

Bray CJ concluded that:

Certainly the intended consequences of a tort can never be too remote. And if intended consequences as to A produce unintended consequences as to B, I think that B can recover if his connection with A is not too remote.

The cause of action for intentional infliction of nervous shock, is not dissimilar to the American tort of outrage. It is similar in so far as the defendant’s intentional conduct does not have to be produced by way of physical impact. The main differences between the tort of outrage and intentional infliction of nervous shock lay in the fact that the former does not require lasting emotional disturbance in the sense of a recognized psychiatric condition. Rather, the defendant’s conduct must cause the plaintiff severe emotional distress of a nature ‘that no reasonable man could be expected to endure’. Moreover, whereas in the United Kingdom, Canada and Australia the defendant must merely have intended the harm that has eventuated, in the United States, the defendant’s conduct must be so

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514 Bielitski v. Obadiak (1922) 65 D.L.R. 627. In this case the Canadian Court awarded the plaintiff damages for nervous shock, stating that the defendant’s statement was calculated to come to the ears of the plaintiff and to cause her not only mental anguish but physical pain.


516 Id. at 231.

517 Id. at 230.
outrageous as to be ‘utterly intolerable in a civilised community’.  

The issue of Mr Jordan’s liability for negligently inflicted nervous shock was analysed by the majority (Evatt J, dissenting) on the basis of reasonable foreseeability of the risk of nervous shock as between two strangers rather than that of an employer and an employee. The majority of the High Court appear to have regarded Miss Bunyan as an officious bystander, rather than an employee, which indeed she was. The defendant as an employer owed her a duty of care to provide safe working environment. In issue should have been the question of whether an employer’s duty of care includes guarding against a risk of emotional injury to his or her employees. However, this was not the question asked by the majority. Instead, the court focused on the question of whether the behaviour of the defendant was sufficiently ‘shocking’ to produce a serious psychiatric illness like neurasthenia. Rich J, in particular, was quite derisive about Miss Bunyan’s reaction to the drunken behaviour of her employer. The majority of the High Court held that since a reasonable man in the defendant’s position could not have reasonably foreseen that his acts would cause Miss Bunyan an emotional injury, Mr Jordan did not owe her a duty of care in respect of his, admittedly, anti-social conduct. According to Dixon J, the defendant:

… may have intended to frighten those surrounding him, but, if so, it was only for the purpose of sensationalism. The shock he intended to give or the emotions he intended to arouse could not in a normal person be more than transient. The harm which is said in fact to have been caused is not a consequence which may reasonably have been anticipated or foreseen.  

Implied in His Honour’s conclusion is the notion that a normal person in Miss Bunyan’s position would not have suffered the severe psychiatric reaction. If she did, it was her predisposition and not the defendant’s conduct which caused the condition. Perhaps it was a reflection of the social structure of the Australian society in the 1930s that the members of the majority while straining to explain the defendant employer’s conduct in the most benign light, did not bother to interpret his employee’s reaction in the context of the social realities created by the Great Depression. Only Evatt

519 Bunyan v. Jordan op. cit. fn. 506.
520 The lack of empathy with the plaintiff’s plight by the majority might have something to do with the fact that material welfare of the Justices of the High Court was safeguarded
J, in his dissenting judgment, recognized that in an era when jobs were exceedingly scarce and there were no unemployment benefits, it was perfectly reasonable for Miss Bunyan to fear that her employer’s demise would lead to the closure of the shop, loss of her employment and consequent destitution.\footnote{521}

It was acknowledged that damages may be recovered for intentional infliction of nervous shock. However, the High Court’s approach towards recovery for negligent infliction of ‘pure’ nervous shock was much more equivocal. The court took a half-step towards recognition of negligently inflicted mere nervous shock as a compensable head of damage. The recovery was dependant on foreseeability of harm ‘of some such nature’ as that which had actually occurred.\footnote{522} The judgments of the majority show that the judiciary did not take much cognisance of medical developments in the field of psychosomatic disorders. By the 1930s neurasthenia was used as a medical term denoting a wide range of psychoneurotic conditions; however, in the judgments of the High Court this psychiatric condition was still exclusively associated with fright and terror.

The High Court’s somewhat limited comprehension of the medical and psychiatric science pertaining to traumatic neurosis was again illustrated in 1939 in the case of \textit{Chester v. The Council of the Municipality of Waverley}.

In August 1937 the defendant Council excavated a seven-foot deep trench at the end of the street where the plaintiff and her family lived. Due to heavy rains, the trench filled with water. The trench was left unattended, protected only by a railing under which children could easily pass to play with white sand on the edge of the trench. On a Saturday afternoon, at about 2 pm, the plaintiff’s seven-year-old son, Max, went out to play. When he failed to return home by 3 pm, Mrs Chester went out to look for him. She was later joined by her husband and other searchers. Late in the afternoon the police were called to probe the water-filled trench. Mrs Chester was present when the body of her son was located and taken out of...
the water. Mrs Chester developed serious psychiatric illness\textsuperscript{524} and she subsequently sued the Council for damages on the basis of ‘severe nervous shock’.

On appeal to the High Court, it was held by a majority (Latham CJ, Rich and Starke JJ; Evatt J dissenting) that the plaintiff’s action should fail because the facts did not disclose a breach of any duty owed by the defendant Council to Mrs Chester. The majority adopted a substantive approach to the issue. According to Latham CJ, the defendant’s duty of care did not extend to Mrs Chester because:

… it cannot be said that such damage (that is, nervous shock) resulting from a mother seeing a dead body of her child should be regarded as ‘within the reasonable anticipation of the defendant’. … Death is not an infrequent event, and even violent and distressing deaths are not uncommon.\textsuperscript{525}

Although the Coultas case was not mentioned in the majority judgments, the floodgates argument, which was at the basis for the Privy Council’s rejection of recovery for mere nervous shock, was implicitly adopted by Latham CJ who observed that:

The duty which it is suggested the defendant owed to the plaintiff was a duty not to injure her child so as to cause her a nervous shock when she saw, not the happening of the injury, but the result of the injury, namely, the dead body of the child. It is rather difficult to state the limit of the alleged duty. If a duty of the character suggested exists at all, it is not really said that it should be confined to mothers of children who are injured. It must extend to some wider class - but to what class?\textsuperscript{526}

Latham CJ considered that since it would be impossible to restrict the numbers of possible claimants, it was better to refuse the remedy at the threshold, by withholding it from the mother. Rich J adopted a similar approach:

The train of events which flow from the injury to A almost always includes consequential suffering on the part of others. The form the suffering takes is rarely shock; more often it is worry and impecuniosity. But the law must fix a

\textsuperscript{524} Mrs Chester’s daughter told the author that her mother never mentally recovered from the shock of Max's death and died within few years of the High Court’s decision.
\textsuperscript{525} Chester v. The Council of the Municipality of Waverley op. cit. fn. 521, at 10.
\textsuperscript{526} Id. at 7.
point where its remedies stop short of complete reparation for the world at large, which might appear just to a logician who neglected all the social consequences which ought to be weighed on the other side.”  

Eventually, the courts resolved the problem of restricting the number of ultimate claimants for pure nervous shock by imposing relational requirements, such as close family kinship between the primary and secondary victims of the defendant’s negligent conduct. But in the 1930s, the High Court of Australia adopted the American ‘zone of danger’ rule based on physical propinquity which pre-dated the Atkinian Donoghue v. Stevenson general test for liability in negligence. Lord Atkin developed the test of reasonable foreseeability of risk specifically in order to extend the scope of the duty of care to persons injured through tortious conduct, irrespective of their physical and temporal proximity to the tortfeasor. The majority in the Chester case observed that the Waverley Council would have been held to owe a duty of care to the plaintiff had she been physically present at the site at the time of Max’s death. This observation clearly suggests that the High Court’s adoption of the Donoghue v. Stevenson test of duty of care was incomplete. Without the wider notion of relational proximity the test of duty of care became a judicial instrument for limiting the defendant’s liability for nervous shock caused by non-physical impact trauma for reasons other than the merits of the case.  

The majority of their Justices appear to have viewed damage occasioned by nervous shock in the same way in which railway surgeons like Edwin Morris explained this kind of injury nearly seventy years earlier.  

Mr Justice Evatt, in his dissenting judgment argued that the restrictive substantive approach to the compensation for mere nervous shock should be abandoned, and that instead the court should rely upon forensic evidence presented by the plaintiff. His Honour insisted that an account should be taken of the totality of the circumstances which had led to the death of Max, and Mrs Chester’s response. On the issue of duty of care based upon reasonable foreseeability in cases of nervous shock suffered by parents distressed by the death of their children, Evatt J said that:

527 Id. at 11.  
528 Mrs Chester was a recent migrant from Europe who sued in forma pauperis. Evatt J at 17, noted that due to her imperfect knowledge of the English language, she ‘found special difficulty in narrating the precise nature of her feelings, her fears, her hopes and her sufferings’.  
529 Chester v. The Council of the Municipality of Waverley op. cit. fn. 521, at 19.
So far as the argument rests upon the contention that no other parents would have suffered shock and illness from the ordeal undergone by Mrs Chester, I think this is a mere assertion and is contradicted by all human experience. I think that only ‘the most indurate heart’ could have gone through the experience without serious physical consequences.530

Unlike the majority judgments, Evatt J utilised the then latest advances in psychiatric and physiological understanding of emotional stress to distinguish Coultas. His Honour noted that the Committee’s decision held only that damages due to ‘mere sudden terror unaccompanied by any actual physical injury’ were too remote to be recovered, however:

It must always be a question of fact whether shock to the nerves causes ‘actual physical injury’. To-day it is known that it does. In 1888 it was widely assumed that it did not. ... It is on this basis that Coultas’ Case is to be understood, and if so understood it has no application to cases like the present where ‘shock to the nerves’ is another name for actual physical disturbance to the nervous system.531

The reasoning of Evatt J in the Chester case, which at last laid to rest the unfortunate spectre of Coultas, was widely acclaimed. It eventually led to legislative reform which created an independent statutory cause of action for nervous shock.532 At this point it is convenient to discuss what a plaintiff like Mrs Chester might have expected when she decided to sue the Waverley Council for damages consequent upon negligent infliction of nervous shock. She did not sue for, and clearly did not expect to obtain, compensation for the loss of her son’s consortium. Neither did she hope to become rich through litigation. According to information provided to the author by Mrs Chester’s late daughter, throughout the rest of her life533 her mother would compulsively collect and re-read all papers and notices which either described or referred to Max’s death. It seems that what Mrs Chester wanted was some kind of judicial acknowledgment that a serious wrong had occurred - the death of a child due to careless conduct by a public authority - and that this wrong not only cut short the life of the child but also deeply

530 Id. at 25.
531 Id. at 47.
533 Mrs Chester committed suicide on the tenth anniversary of Max’s death.
and permanently affected the lives of his family. The desire for a juristic acknowledgment for this kind of harm, though ultimately unsuccessful, was far from fatuous. Through the tragic loss of her son, Mrs Chester suffered an ‘injuria’ as Roman law defined this term.

The essence of ‘injuria’ in Roman law was an injury to one’s feelings, including the feelings of secondary victims of a wrongful conduct which results in harm or injury to a close family member. This kind of injury exists as a special kind of damage in all countries whose laws are derived from the Roman legal tradition, including Scotland. Under the Scottish law of assythment both the pecuniary loss and the suffering of the family of the person killed was compensable. The heirs of the deceased were entitled to indemnification from a person guilty of the crime. The independent statutory claim for ‘solatium’ - a descendant of the claim for assythment - allowed the surviving relatives of a wrongfully killed person to have an independent cause of action. It was founded upon a claim that the death of a close relative was indirectly a wrong to them, having infringed their interests in unimpaired family relations. Solatium thus represented a special head of damages, awarded to the spouse and family of a person who died as a result of negligence or misconduct of the wrongdoer, for mental suffering occasioned by such death: ‘a mark of acknowledgment of the grief and sorrow needlessly inflicted on the surviving relative’.

The law of assythment, and with it the doctrine of ‘solatium’, was repudiated by the English Court of Queen’s Bench in 1852.

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534 Max Chester’s death affected not only his mother but also his father and his two siblings, all of whom were present when the body was brought out of the water. Even as a grandmother, his sister would be kept awake at night by the memory of her mother’s scream at that moment.

535 At common law a truncated notion of the Roman ‘injuria’ survives in the law of defamation, where injury to one’s reputation is compensable.


537 Wrongs Act Amendment Act 1940 (S.A.), s. 23; Compensation (Fatal Injuries) Act (N.T.) 1974, s. 10(f); Civil Liability Act 1961 (Ire.), s. 49; Fatal Accidents Act 1976 (UK), s. 1A (1982 amendment).

538 Under the Scottish law, the term ‘solatium’ also denotes an award of damages for non-pecuniary loss (pain and suffering, fright, nervous shock, affront, etc.) which may be claimed by the injured plaintiff in personal injury cases, and in assault.


540 In *Blake v. Midland Rly. Co.* (1852) 21 L.J. Q.B. 233 at 237 Coleridge J said that ‘the Scottish law of assythment is wholly alien to the common law of England’. In 1982 an amendment to the Compensation (Fatal Injuries) Act 1976 (s. 1) permitted damages for ‘bereavement’ to the deceased wife or husband or, if the deceased was a minor, who was...
In Australia, since 1936 South Australia has had statutory provisions which grant the court discretion to award a specified payment of solatium for non-pecuniary loss suffered by the parents and the spouse, or putative spouse, of the deceased.\textsuperscript{541} In the Northern Territory the payment of solatium is unliquidated and applies in cases where the death was caused by a wrongful act, neglect or default which would, if death had not ensued, have entitled the victim to maintain an action and recover damages in respect of the injury. In such cases, the person who would have been liable, if the death had not ensued, will be liable to an action for damages irrespective of whether the death of that person was caused by circumstances that amount in law to a crime. The persons who have standing to sue include both infant and adult children of the deceased, where the injury contemplated by the award has resulted from death.\textsuperscript{542} In 1976 in Scotland, an independent statutory claim for solatium derived from the law of assythment, was replaced by a new statutory cause of action for ‘loss of society’.\textsuperscript{543} Under this cause of action, certain relatives of a wrongfully killed person are entitled to an award not so much for grief and sorrow but for ‘loss of society and guidance, loss of companionship, assistance, advice and similar elements whereof a survivor is deprived by the death’.\textsuperscript{544} However, the rejection of the concepts of ‘injuria’, in the sense of anguish, and ‘solatium’ by the English and Australian\textsuperscript{545} common law, meant that grieving parents who, like Mrs Chester, also suffered from a serious emotional injury as a consequence of the wrongful death of a child, were left without a legal cause of action.\textsuperscript{546}

The High Court’s denial of the existence of duty on the part of

\begin{footnotes}
\item[541] Wrongs Act 1936 (S.A.), s. 23; Wrongs Act Amendment Act 1940 (S.A.). The maximum amount awarded by way of solatium is $4,400. The award of solatium may be awarded in addition to, not in derogation of, any other rights conferred by the Wrongs Act.
\item[542] Compensation (Fatal Injuries) Act 1974 (N.T.), s. 7(1) and s. 10(f).
\item[543] Damages (Scotland) Act 1976 (U.K.), s. 1(4).
\item[544] Walker, D.M. op. cit. fn. 50, at 467.
\item[545] Public Trustee (S.A.) v. Zuanetti (1945) 70 C.L.R. 266 per Dixon J at 282-283.
\item[546] At that time in New South Wales, parents whose young child had suffered wrongful death had no statutory right of action under the Compensation to Relatives Act 1897 (N.S.W.) (Lord Campbell’s Act).
\end{footnotes}
Waverley Council towards Mrs Chester appeared arbitrary and unjust. It seemed that the judicial obsession with setting the limits of the defendants’ liability for nervous shock triumphed over the concern with the merits and equity of the case before them. In 1934, Professor Winfield\(^{547}\) queried the jurisprudential value of the requirement of duty of care as a question of law within the paradigm of the tort of negligence. Following Chester, Landau\(^ {548}\) suggested that the jury, rather than judges should be asked to decide upon the preliminary question of the existence of duty of care on the basis of whether a reasonable man should have foreseen that his acts or omissions were likely to result in the injury to the plaintiff. Changing the nature of the requirement of duty from a question of law to a question of fact might have helped to exclude the intrusion of policy considerations. The suggestion, however, was strictly theoretical, because it was most unlikely that the judges would have agreed to relinquish voluntarily their most powerful tool of judicial discretion in controlling the development of the law of negligence.

In New South Wales, the Parliament eventually stepped in to provide a remedy where the common law refused to protect the personality interest in the immunity of mind and nervous system from negligently inflicted non-physical injury. The New South Wales legislation, which will be discussed in some detail at the end of this chapter, was also propelled by the decision of the House of Lords in the case of Bourhill v. Young.\(^ {549}\)

**Hay or Bourhill v. Young**

In Bourhill v. Young, the House of Lords used the test of reasonable foresight to limit the scope of duty of care in relation to claims for negligently occasioned nervous shock. The plaintiff, Euphemia Bourhill (née Hay), a fishwife, as Lord Thankerton charmingly called her, was about eight months pregnant, when on 11 October, 1938 she alighted from the tramcar some 50 feet from the junction of the road. She walked around the front of the tram to the far side in order to retrieve her fish basket, which she had left on the driver’s platform. While the tram driver was assisting her to place the fish basket on her back, a motorcyclist, travelling in the same


\(^{549}\) *Bourhill v. Young* op. cit. fn. 411.
direction as the tram, passed on the opposite side from her. The motorcyclist, who was riding at an excessive speed, was killed when he collided at the junction with a car which was travelling in the opposite direction. The plaintiff saw nothing of the accident because she was screened by the tramcar; she merely heard the noise of the impact of the collision between a car and a motorcycle. Mrs Bourhill walked over to the site of the accident where she saw blood on the road but not the body, which had been removed. A month later the plaintiff delivered a still-born child. She sued the estate of the late motorcyclist, who was responsible for the collision, for damages for nervous shock. The trial judge held that Mrs Bourhill had proved that in consequence of being startled by the noise of the collision, she was thrown into a state of terror, and suffered a nervous shock. However, the judge concluded that the motorcyclist did not owe her a duty of care. His decision was affirmed by majority of the Second Division of the Inner House of the Court of Session (the Scottish Court of Appeal). Mrs Bourhill appealed to the House of Lords, which also held that there was no liability.

There should have been only one issue before the House of Lords, namely, whether in the circumstances of the case, on the test of reasonable foreseeability, the motorist owed Mrs Bourhill a duty of care, irrespectively of the nature of her injury. Contingent upon the finding of the existence of duty of care was the issue of remoteness of damage: whether the nature of the plaintiff’s injury, by way of pure nervous shock, was too remote to sound in damages. The House of Lords, however, telescoped the two questions into one, and asked whether the scope of reasonable foreseeability as the test for the existence of duty of care should extend to the foreseeability of risk of nervous shock at the stage of remoteness of damage.

The House of Lords accepted the principle that for the purpose of reasonable foreseeability of risk in respect of duty of care, the infliction of ‘what is called mental shock may constitute an actionable wrong’. Lord Macmillan stated that:

The crude view that the law should take cognisance only of physical injury resulting from actual impact has been discarded, and it is now recognised that an action will lie for injury by shock sustained through the medium of the eye or the ear without direct contact. The distinction between mental shock and bodily

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The trial judge held that neither the death of the child the plaintiff was carrying nor the injury to her back were due to the shock.
The History of the Liability for Negligently Caused Psychiatric Injury

injury was never a scientific one, for mental shock is presumably in all cases the result of, or at least accompanied by, some physical disturbance in the sufferer’s system, and mental shock may have consequences more serious than those resulting from physical impact.\footnote{Bourhill v. Young op. cit. fn. 411, at 103.}

This was the first recognition by the House of Lords that emotional injury not following upon physical impact should be accorded similar, but not identical, status in law to that of bodily damage. The reason for the different treatment of the two kinds of injury was provided by Lord Macmillan in the following terms:

… there are elements of greater subtlety than in the case of an ordinary physical injury and these elements may give rise to debate as to the precise scope of legal liability.\footnote{Ibid.}

His Lordship did not elaborate on what the phrase ‘elements of greater subtlety’ might comprehend.\footnote{Lord Macmillan’s reference to ‘elements of greater subtlety’ echoes the statement of the New York court in the American case of Mitchell v. Rochester R. Co. op. cit. fn. 261, which considered that mental suffering was ‘too subtle and speculative to be capable of measurement by any standard known to the law’.} Nevertheless it seems that the phrase was, almost certainly, a reference to a particular judicial concern which Professor Fleming defined as the fear

… that an unduly onerous burden would be placed on human activity, if liability were indiscriminately imposed for the failure to adjust one’s conduct to the risk of inadvertently exposing others to shock, particularly when the victim was not apprehending injury to himself but to someone else.\footnote{Fleming, J.G. (1992), The Law of Torts, 8th ed., The Law Book Co. Ltd., Sydney, at 160.}
This extraneous social concern about the imposition of a too broadly spread liability in cases of nervous shock resulted in the House of Lords taking a quintessentially substantive approach to the issue. The House of Lords held that the plaintiff was unable to show that the motor cyclist could have reasonably foreseen either the risk of either physical injury or nervous shock to Mrs Bourhill.

Lords Thankerton and Russell reasoned that since the plaintiff was outside the reasonably foreseeable zone of physical danger, the motorcyclist could not have foreseen that the mere causing of a noise would bring about an injury to her. Lord Porter focused upon the requirement of normal fortitude, and held that for the purpose of the law of negligence the ordinary frequenter of the streets must have sufficient fortitude to endure the noise of collision and the sight of injury to others. In his critique of the judgments in Bourhill v. Young, Professor Glanville Williams pointed out that the noise generated by the collision was not merely a loud noise in the abstract, rather - it must have involved the squeal of tyres on the road as brakes were applied, the crash of the two vehicles, and perhaps the cry of the injured man.

In order to deny the existence of a duty of care owed by the motorcyclist to the plaintiff, Lord Wright relied upon the doctrine of the ‘unforeseeable plaintiff’ as set out by Cardozo CJ in Palsgraf v. Long Island Railroad Co. Lord Wright said that in cases of nervous shock which do not flow from fear for one’s own bodily safety, the plaintiff must show not merely that the defendant’s conduct was negligent vis a vis someone else, but that it was negligent vis a vis her.

Once the House of Lords determined that the late motorcyclist did not owe the plaintiff a duty of care, the plaintiff’s case was lost, and the issue of remoteness of damage became irrelevant. However, concerned with placing limits upon the recovery of damages for nervous shock, the House of Lords decided, strictly obiter dictum, to re-open the question whether the test of directness of reasonable foreseeability should govern remoteness of damage in negligent infliction of nervous shock cases. The test of reasonable foreseeability as a determinant of the remoteness of damage was discussed

556 Ibid.
557 Obiter dicta (remarks in passing) are statements and observations by the judge that do not form part of the ratio decidendi of the case, and therefore create no binding precedent. They can, however, be cited as ‘persuasive’ authority.
in *Re Polemis* and rejected as too limiting of recovery. The Court of Appeal in the *Owens v. Liverpool Corporation*\(^{558}\) refused to fetter the recoverability of damages for nervous shock by introducing the test of reasonable foreseeability at the stage of remoteness of damage on the grounds that it did not apply to the rest of the law of negligence.

In *Bourhill v. Young* the House of Lords overruled this aspect of the Court of Appeal decision in the *Owens* case by saying the test of remoteness of damage in cases of nervous shock should be based upon reasonable foreseeability of nervous shock. Lord Wright commented that it was not reasonably foreseeable that an ordinary person would receive a shock of such magnitude as to cause illness from seeing a coffin with a body of a relative drop from the hearse and lose its lid. Lord Wright said that ‘the particular susceptibility there was to my mind beyond the range of normal expectancy of reasonable foresight’.\(^{559}\) It is unclear whether His Lordship considered that the relatives’ claim in the *Owens* case should have been rejected because the damage sustained was unforeseeable and therefore too remote, or whether there was no duty of care because the plaintiffs were abnormally susceptible and therefore were beyond the scope of reasonable foresight. According to Lord Wright:

> The lawyer likes to draw fixed and definite lines and is apt to ask where the thing is to stop. I should reply it should stop where in the particular case the good sense of the jury, or of the judge decides. I should myself be disposed, as at present advised, to say that it should have stopped short of judgment for the plaintiff in *Owens v. Liverpool Corp.*\(^{560}\)

At the same time, his Lordship conceded that once the duty of care is established, then it is within reasonable foresight that:

> … the ambit of persons affected by negligence or misconduct may extend beyond persons who are actually subject to physical impact. There, indeed, may be no one injured in a particular case by actual impact; but still a wrong may be committed to anyone who suffers nervous shock or is injured in an act of rescue.\(^{561}\)

Through the introduction of the test of reasonable foreseeability of

\(^{558}\) *Owens v. Liverpool Corporation* op. cit. fn. 499.

\(^{559}\) *Bourhill v. Young* op. cit. fn. 411, at 110.

\(^{560}\) Id. at 110.

\(^{561}\) Id. at 108-109.
injury by emotional shock to ascertain remoteness of damage in cases of nervous shock, another limitation upon recoverability for this type of damage was incorporated into the law of negligence. Denning LJ, in *King v. Phillips*,\(^{562}\) criticised the distinction drawn in *Bourhill v. Young* between physical injury and emotional injury and the imposition of a different test for a duty of care in regard to each kind of injury:

What is the reasoning which admits a cause of action for negligence if the injured person is actually struck, but declines if he only suffers from shock? I cannot see why the duty of a driver should differ according to the nature of the injury. I should have thought that every driver was under a plain duty which he owed to everyone in the vicinity. ... A different result is reached by viewing the driver’s duty differently. Instead of saying simply that his duty is to drive with reasonable care, you say that his duty is to avoid injury which he can reasonably foresee, or, rather, to use reasonable care to avoid it. Then you draw a distinction between physical injury and emotional injury, and impose a different duty on him in regard to each kind of injury, with the inevitable result that you are driven to say there are two different torts, one tort when he can foresee physical injury, another tort when he can foresee emotional injury. I do not think that is right. There is one wrong only, the wrong of negligence.\(^{563}\)

In the event, reasonable foreseeability of damage became the general test for remoteness of damage in negligence in 1961.\(^{564}\)

**Law Reform (Miscellaneous Provisions) Act 1944 (N.S.W.)**

Primarily as a reaction to the majority judgment in the *Chester* case, in 1942 the New South Wales Government introduced a Law Reform Bill headed ‘Injury arising from Mental or Nervous Shock’.\(^{565}\) This Bill was passed by the Legislative Assembly of the New South Wales Parliament, but was defeated in the Council. The reform of legal principles which would allow statutory compensation for injury resulting from nervous or mental shock became one of the election issues specifically mentioned in the incumbent

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\(^{562}\) *King v. Phillips* [1953] 1 Q.B. 429; 2 W.L.R. 526; 1 All E.R. 617.

\(^{563}\) Id. at 622.


\(^{565}\) *Law Reform (Torts) Bill* 1942 (N.S.W.).
Premier’s policy speech. By the time the original Bill was going to be reintroduced to the Parliament in 1944, the decision of the House of Lords in Bourhill v. Young became known. During the debates on the Bill, criticism by the House of Lords in Bourhill v. Young directed at the majority judgments in Hambrook v. Stokes was noted, and a clear preference given to the latter. Mr McKell, the Premier and Colonial Treasurer of New South Wales introduced the Law Reform (Miscellaneous Provisions) Bill, saying that it was necessary to revise ‘legal principles which have ceased to serve society’s needs and so have outlived their usefulness’.

Particular references were made to Lord Justice Atkin’s statement in Hambrook v. Stokes that once the defendant’s conduct is shown to be negligent, ‘the fact that its exact operation was not foreseen should be regarded as immaterial’. This was a paraphrase of his Lordship’s statement based on the then binding Re Polemis principle of remoteness of damage that:

If the act would or might probably cause damage, the fact that the damage it in fact causes is not the exact kind of damage one would expect, is immaterial, so long as the damage is in fact directly traceable to the negligent act, and not due to the operation of independent causes having no connection with the negligent act.

The decision of the House of Lords in the Bourhill v. Young case was regarded by the New South Wales Parliament as unacceptable because it modified the wide principle of the defendant’s liability for nervous shock as expressed by Lord Justice Atkin. The House of Lords said that the question of the defendant’s culpability depended on whether or not the plaintiff could show that his or her injury by way of nervous shock was within the range of foreseeable of a reasonably prudent driver. The legislation was amended to put an end to such a narrow interpretation of liability which was

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566 Hansard, Law Reform (Miscellaneous Provisions) Bill 1944 (N.S.W.), Legislative Assembly, at 399.
567 Hambrook v. Stokes op. cit. fn. 401.
568 Hansard op. cit. fn. 564, at 399.
569 Hambrook v. Stokes op. cit. fn. 401.
570 Hansard op. cit. fn. 564, at 400.
572 Hansard, Legislative Council at 826, per R.R. Downing, the Minister of Justice and the Vice-President of the Executive Council, speaking on the Law Reform (Miscellaneous Provisions) Bill 1944 (N.S.W.).
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described as ‘quite out of touch with the world of 1944’.573 R.R. Downing, the Minister of Justice and the Vice-President of the Executive Council, suggested that once the statutory cause of action for nervous shock became law, the courts of New South Wales would look for guidance, in part, to Lord Atkin’s judgment in Hambrook v. Stokes.574

Section 3 Law Reform (Miscellaneous Provisions) Act575 authorised the courts to have cognisance of injury resulting from nervous shock, and to award damages for this type of injury, thus abrogating the Coultas case. Section 4 provided that where a person negligently kills, injures, or puts another in peril, then he or she will be liable for the injury proved to arise from nervous or mental shock occasioned to any member of the family of the person killed, injured, or put in peril as a consequence. The statutory independent cause of action for nervous or mental shock abrogated Chester by making it unnecessary, at least for a close relative, to establish, as a foundation of the action, that there was a foreseeable risk of harm to such a plaintiff. This was because the New South Wales Parliament proceeded on the basis that an injury by way of nervous shock or mental shock to a parent, husband or wife is not an unlikely consequence where a child, wife or a husband has been killed, injured or put in peril.576 As for the remoteness of damage in cases of nervous shock suffered by close relatives of persons who have been killed, injured or put in peril by the negligence of the defendant, the statutory provision has made it ‘impossible [for the defendant] to say that such harm, if it results from death, injury or peril, was too remote a consequence to sound in damages’.577 Similar provisions were adopted in 1955 by the Northern Territory and the Australian Capital Territory.578

Other Australian States, however, were still bound by the decision in Chester. For thirty-one years the Australian common law remained virtually static in its denial of a duty of care in cases where psychiatric illness was caused by emotional shock due to physical injury to a person other than the

573 Hansard, Legislative Assembly op. cit. fn. 564, at 400, per Mr McKell, Premier and Treasurer of New South Wales, speaking on the Law Reform (Miscellaneous Provisions) Bill 1944 (N.S.W.).
574 Hansard, Legislative Council op. cit. fn. 570, at 831.
575 Law Reform (Miscellaneous Provisions) Act 1944 (N.S.W.), Pt. III.
576 See Scala v. Mammoliti (1965) 114 C.L.R. 153, per Taylor J.
577 Id. at 162, per Windley J.
plaintiff in circumstances where the claimant did not actually observe the injury being inflicted. Thus, in *Shewan v. Sellars* the husband who was injured in a motor car accident in which his wife and child were also seriously injured was denied damages for nervous breakdown resulting in loss of employment ‘caused by a anxiety [sic] neurosis resulting from worry or shock’. The judgments of Rich J and Latham CJ in the *Chester* case were quoted by the Queensland court as providing the reason for the denial of damages for nervous shock. In *Spencer v. Associated Milk Services Pty. Ltd.*, a 17-year old plaintiff was seriously injured in a car accident caused by the defendants’ negligence. Several days later he was told that both of his parents were killed in the same collision. He suffered a severe emotional disturbance and sued the defendants for, inter alia, damages for nervous shock. Lucas J of the Queensland Supreme Court decided that a reasonable person in the defendants’ position could not have foreseen that the plaintiff, on being told of his parents’ death, would develop a neurotic condition. Conversely, in *Andrews v. Williams* the Victorian Supreme Court allowed the plaintiff recovery for nervous shock which she had suffered after being informed that her mother had died in a motor car collision in which she also was seriously injured. The Full Court held that the shock was as foreseeable a consequence of the negligence as the sight of death itself would have been. The awareness of the consequences caused the shock, and the delay in the awareness was not material. However, the underlying reason for the Full Court’s holding that the jury was entitled to find that the shock was caused by the defendant’s negligence was the fact that the plaintiff, as another driver and a road user, was involved in the actual accident in respect of which the defendant owed her a duty of care. She was a primary, not a secondary victim of the defendant’s negligence. At issue, therefore, was not duty of care but remoteness of damage.

8 ‘Law, marching with medicine but at the rear and limping a little’ in the Post World War II Period

The influence of medical opinions on the courts’ analysis of the law of emotional distress and nervous shock

In the United States, a series of interrelated articles by Hubert Smith, Harry Solomon and Stanley Cobb of Harvard Medical School were published in the early 1940s. These articles surveyed approximately 300 cases involving pure nervous shock triggered by fright in the United States and Canada from a legal and medical point of view. Their scientific knowledge and power of legal analysis seemed very impressive, though they managed to re-designate the Coultas case to a Canadian court. In the tradition of Charcot and Page they believed that ‘the self-serving mechanisms involved in neurosis invariably cause some degree of unconscious exaggeration or malingering in respect of symptoms, as the neurotic desires to be believed and wants his complaints to be convincing.’ This is how they related a case of a woman who slipped on garbage left on the stairs of a railroad station:

582 In the United States, the term ‘nervous shock’ has not been entirely abandoned. It is still used, particularly in the Federal Courts: Bloom v. Consolidated Rail Corp. (1994) 41 F. 3d 911 (3d Cir.).
584 Smith & Solomon, id. at 125.
falling, she fractured her coccyx\textsuperscript{585} and was taken to a hospital. Here X-rays showed the injury. In a few days she returned home well. Here she was apparently happy until a lawyer asked her a lot of questions and suggested to her the possibility of getting damages from the railroad. She returned to the hospital in a wheel chair, said her legs were weak and painful and talked about law suits. The diagnosis this time was ‘malingering’ and a mental test showed her to be a moron (mental age about 9). She was sent home. Six months later she returned to the hospital with stiff, weak legs and anaesthesia up to the tights. The examiner could put pins into the skin and muscle without hurting her. The muscles showed atrophy from disuse. This time the diagnosis was ‘hysteria’. In her moronic mind she had made the conversion and forgotten it. Starting as a rather stupid malingerer she had become an automatic hysteric.\textsuperscript{586}

If their knowledge of historical medical reports\textsuperscript{587} had been as good as their knowledge of the legal cases, they would have realised that the case of the ‘stupid malingerer’ was not dissimilar to that of Count de Lordat related in 1767 by Dr Maty, to Sir Charles Bell’s 1838 account of the carpenter who eventually suffered lower limb paralysis after a fall from a step-ladder, or to the case of Mrs B, described by Erichsen in 1866. The authors also might have noticed the contrast between their own self-satisfied contempt for the patient, and the approach of doctors Maty, Bell, and Erichsen, who followed the principles of medical ethics set out by John Gregory. For John Gregory, the primary virtue of a humane physician was ‘sympathy’, which he defined as ‘that sensibility of heart which makes us feel for the distresses of our fellow creatures, and which as a consequence, incites us to relieve them’.\textsuperscript{588}

The importance of the articles published by Smith and his co-authors lay in the clinical explanations they provided for the medical sequelae of trivial or non-physical-impact trauma. Having noted that, historically, the legal connotation of ‘impact’ has been restricted ‘to cases where a material object or person is brought into bodily contact with another individual’, the authors expressed a preference for regarding ‘impact’

\textsuperscript{585} The last bone of the vertebral column.
\textsuperscript{586} Smith & Solomon op. cit. fn. 581, at 155-6.
\textsuperscript{587} While Smith had both legal and medical qualifications, Cobb and Solomon were physicians.
\textsuperscript{588} Gregory, J. op. cit. fn. 85, at 22.
were adopted it would be simultaneously recognized that all cases of ‘nervous shock’ involve impact, by visual, auditory or other sensory bombardment.589

Arguing that the advanced understanding of the laws of physics made the traditional definition of ‘physical impact’ meaningless, they gave examples of waves of air from an explosion which may cause ‘blast injury’ or waves of ether which may cause visual injury or burns.590 They also disparaged the ‘token distinction’ between ‘organic’ and ‘functional’ disorders, stating that

Disorder of function in an organ cannot occur without structural changes in that organ, although these may be temporary. If the law momentarily clings to a distinction between gross and microscopic injury and false distinctions between ‘organic’ and ‘functional’ disorders, it can be justified only by difficulties of proof. This justification should vanish with the introduction of proper criteria of proof and of improved mechanisms of trial for handling scientific issues.591

Yet, ironically, their conclusions were very conservative. Their approach to the issue of criteria and proof in relation to malingering was interesting, to say the least. Their proposals effectively damned plaintiffs suing for nervous shock in the form of neurosis whether the symptoms were genuine or fabricated. They urged medical practitioners to take a careful history of the patient in order to determine his or her ‘pre-traumatic personality’. If the person was revealed to have been ‘an incipient neurotic’, then the post accident neurosis was most likely real. The absence of a prior history of frequent and diffuse complains about ill-health, personal and work relationships, and the like, indicated that the person was a ‘frank malingerer’.592 Damages, by definition, would not be awarded to malingers, but the authors also pointed out that, in many cases, an emotional impact leading to neurosis was merely a trigger mechanism causing an appearance of symptoms of a pre-existing disorder in a predisposed plaintiff. Those plaintiffs were often idiosyncratic, excessively vulnerable, and prone to exaggerate their symptoms. Therefore, for reasons of social policy, they ‘should not be granted more legal protection against mere negligence of an inadvertent actor, that the person of average

589 Smith & Cobb op. cit. fn. 581, at 873.
590 Id. at 908.
591 Ibid.
592 Smith & Solomon op. cit. fn. 581, at 156-7.
Smith and his co-authors had very little faith in the ability of juries to discern between real and feigned effects of emotional distress. They advocated that the defendant should be entitled to have medical experts who, having observed the plaintiff’s demeanour and reactions during the trial, would ‘take the stand and give any opinion they may have reached as to the existence of conscious malingering’. The idea of a physician giving an opinion on the defendant’s demeanour and facts produced in evidence in court goes back to 1760, when Lord Ferrers was tried for murder before his peers, the House of Lords. A number of witnesses testified to the strange and deranged conduct of the defendant. The defence attempted to persuade the Lords, sitting as a jury, that the defendant was insane. A surgeon, called as an expert witness, was asked whether from the facts already in evidence he would say that the Lord Ferrers’ acts were symptoms of insanity. The surgeon testified that they were, and that the defendant was insane, however the Lords chose to disregard the surgeon’s opinion and convicted the peer.

Likewise, Dr Smith’s more modern proposal was spurned on the ground that the tribunal of fact is perfectly capable of assessing the demeanour of the plaintiff in court without the ‘help’ of an expert. Nevertheless, the distrust in the ability of juries to deal with issues relating to claims for pure nervous shock was reinforced, and the warning given by Dr Smith that ‘eagerness to be progressive may cause extravagant credulity and injury to scientific standards of proof,’ and that ‘… extravagant credulity, of course, means ultimate injustice’, was heeded by many of the United States’ courts.

Thus judicial reluctance to admit a duty of care in cases of pure nervous shock caused to second-impact victims and bystanders persisted. This was despite the fact that during World War II, and particularly in the post-War period, a number of scientific papers were published which examined the psychopathology of the medical sequelae which follow exposure of a person to life threatening experiences that have resulted in the deaths of many

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593 Smith & Cobb op. cit. fn. 581, at 908.
594 Smith & Solomon op. cit. fn. 581, at 158.
596 Smith op. cit. fn. 581, at 212.
As a result of these studies, the knowledge of psychiatric disorders advanced quite rapidly and a number of old theories regarding the aetiology of neurosis were either abandoned or modified. Physicians began to take note of a cluster of symptoms that tended to persist for a long time after the traumatic experience, and seemed resistant to all psychotherapeutic approaches. Observation of these intractable psychological symptoms led some physicians to revive the old Erichsenian hypothesis that sufferers of an emotional trauma might have undergone some kind of organic change after all.

At the same time, greater knowledge of neuroanatomy and psychophysiology meant that the scientific focus of the research was shifted from the spinal cord to the sympathetic nervous system. Clinical studies which followed suggested that traumatic environmental events may have not only short term effects - as demonstrated by Cannon and Loewi - but also long term neuropsychological and physiological consequences. It was postulated that traumatic events may trigger an idiosyncratic physiologic response in the victim which may lead to chronic perceptual impairment and changes in the sympathetic nervous system. Thus psychiatry began to provide scientifically demonstrable explanations for its theoretical propositions about long term psychological disorders following non-physical impact trauma. Scientific developments in psychoneurology and psychophysiology resulted in a wider recognition of psychiatry as a respected branch of medicine.

In the United Kingdom, the majority opinion among academic lawyers and the judiciary was probably best expressed by Professor Winfield. Winfield, like the American courts, preferred to limit the defendant’s liability for damage occasioned by nervous shock to particular instances of damage flowing from the commission of some particular tort. He also favoured the American doctrine which confined compensation to plaintiffs who were injured through the defendant’s negligence while within the ‘zone


of physical danger.\footnote{600}{Winfield, P. op. cit. fn. 389, at 77-78.} However, the scientific acceptance of medical science and psychiatry as relevant to legal reasoning was reflected in writings of other legal academics. Some of the judiciary were also sympathetic. Thus, in \textit{Dooley v. Cammell Laird & Co.},\footnote{601}{\textit{Dooley v. Cammell Laird & Co.} [1951] 1 Lloyd’s Rep. 271.} the defendant’s negligence led to the breaking of the rope of a crane so that its load fell into the hold of a ship in which men were working. The plaintiff who operated the crane was himself in no personal danger, but he suffered psychiatric injury from perceiving the danger to the men in the hold.\footnote{602}{By chance, none of the workers was injured.} Donovan J of the Court of Queen’s Bench held that the plaintiff was entitled to recover damages because his nervous shock was clearly foreseeable in the circumstances.

Two legal journals, \textit{The Law Quarterly Review} and \textit{The Modern Law Review}, were particularly effective in fostering the intellectual debate on the issue of ‘mere’ nervous shock. The Master of University College, Oxford, and a long-serving editor of \textit{The Law Quarterly Review}, Professor Goodhart argued forcefully in \textit{The Modern Law Review} that reasonable foresight should be the sole criterion for the existence of a duty of care in cases of second-impact victims of nervous shock. According to Goodhart:

\begin{quote}
If a person threatened is a husband, wife or child of the person receiving the shock, the foreseeability is, of course, greater than in other circumstances, but it is a gloomy view of human nature which suggests that the sight of the death or injury of someone else cannot create a shock. It must always be a question of reasonable foresight, and this cannot depend on arbitrary categories.\footnote{603}{Goodhart, A. op. cit. fn. 352, at 25. See also: Goodhart, A.L. (1953), ‘Emotional Shock and the Unimaginative Taxicab Driver’, \textit{The Law Quarterly Review}, vol. 69, 347-353.}
\end{quote}

In 1956 \textit{The Modern Law Review} published an article by John Havard,\footnote{604}{Havard, J. (1956), ‘Reasonable Foresight of Nervous Shock’, \textit{The Modern Law Review}, vol. 19, 478-497.} in which he described the then known major anatomical and physiological characteristics of the human nervous system. Havard argued that in respect of reasonable foresight, the legal distinction between ‘body safety’ and ‘mind safety’ as separate interests is insupportable by medical science because, as the author put it:
… modern medical experience has shown that in most illnesses it is not possible
to isolate the emotional and physical factors to the extent which would be
required by the courts if the distinction were to be accepted.605

In the United States, writing on recovery of damages for mental
suffering, Dean William Prosser, one of the most authoritative and
influential writers on the law of torts in the 1960s, observed that:

It is not difficult to discover in the earlier opinions a distinctly masculine
astonishment that any woman should be ever so silly as to allow herself to be
frightened or shocked into a miscarriage. But medical science has recognized
long since that not only fright and shock, but also grief, anxiety, rage and
shame, are in themselves ‘physical injuries’, in the sense that they produce well
marked changes in the body, and symptoms that are readily visible to the
professional eye. Such consequences are the normal, rather than the unusual,
result of a threat of physical harm, and of many other types of conduct.606

Prosser also pointed out that until the 1950s courts had been reluctant to
call psychiatrists as expert witnesses in order to evaluate mental suffering. It
was only in the post-Second World War period that the plaintiffs began to
call psychiatrists to testify about their knowledge of psychiatric
consequences of trauma. Opinions of psychiatrists were sought in relation to
such neurotic conditions as depression and anxiety, obsessive behaviour or
hysterical symptoms which developed in the wake of the defendant’s
wrongful conduct.607 The opinions of these academic writers were cited and
analysed by Burbury CJ in the Tasmanian case of Storm v. Geeves.608

Burbury CJ allowed damages for nervous shock suffered by the mother and
the brother of a little girl, Wilma, who was killed through the defendant’s
negligence. The mother was at home at the time when an out-of-control
truck crashed into her daughter. However, alerted by her young son to what
had happened, she immediately ran to the site of the tragedy and for nearly
an hour watched as helpers attempted to move the truck’s wheel off Wilma,

605 Id. at 480.
Paul, Minn., at 42-43.
and placed her body in an ambulance.609

In 1961, a legal development which was to have profound jurisprudential consequences for liability in negligence, including liability for ‘pure nervous shock’, occurred in the area of remoteness of damage. As long as compensability of damage in negligence depended on whether the harm that the plaintiff had suffered was ‘a direct and natural consequence’ of the defendant’s wrongful conduct,610 any loss which was ‘once removed’ from these immediate harmful consequences tended to be excluded from forensic consideration. The 1961 opinion of the Privy Council in the case of Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd. (The Wagon Mound (No. 1))611 established the principle that unless the harm suffered by the plaintiff as a result of the defendant’s negligence was foreseeable, the damage was too remote, even if it was direct. Conversely, once damage was foreseeable, the law would not consider it as too remote, even if it was not direct. The change in the substantive law of remoteness of damage meant that the plaintiff now needed to establish that the damage sustained by him or her was of such a kind as a reasonable person in the circumstances of the defendant should have foreseen. The notion that limits of liability should be defined by reference to reasonable foreseeability of damage that may flow from the defendant’s negligence, rather than in terms of direct and natural consequences, had two ramifications. First, it linked the focus of the evidentiary inquiry into the nature of harm with the issue of the ambit of the duty. Secondly, it re-opened the debate about the jurisprudential and social policy reasons that limited recovery at common law to certain kinds of wrongfully occasioned harm. This was because, unlike the test of ‘direct and natural consequences’, the doctrine of ‘reasonable foreseeability’ could easily accommodate both ‘pure’ economic loss and ‘pure’ psychiatric harm. In 1980, Mason J of the Australian High Court pointed out that when lawyers refer to a risk of injury as being ‘foreseeable’ they ‘are not making any statement as to the probability or improbability of its occurrence, save ... implicitly asserting that the risk is not one that is far-fetched or fanciful.’612

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609 Ibid. The High Court, in its subsequent approval of the case in Jaensch v. Coffey op. cit. fn. 530, did not question the possibility that a close relative other than a parent, a child or a spouse may recover damages for nervous shock, providing other elements of the tort were satisfied.

610 Re Polemis & Furness Withy & Co. Ltd. op. cit. fn. 237.

611 The Wagon Mound (No. 1) op. cit. fn. 562.

Mount Isa Mines Ltd v. Pusey

Conceptual changes to the requirement of remoteness of damage were reflected in the approach taken by the High Court of Australia in 1970 in the case of Mount Isa Mines Ltd v. Pusey. This case also marked a further step towards recognition that a psychotic disorder following a traumatic non-impact accident at work may be compensable at common law. The plaintiff, Mr Pusey, had worked as an engineer for 15 years in the defendant’s powerhouse located in the mining town of Mount Isa in Queensland. On the day of the accident two electricians were severely burned by an electric arc while they were testing a switchboard. Mr Pusey did not witness the explosion, but when he heard the noise he went to the upper floor where he organized help and assisted one of the burnt electricians by carrying him to an ambulance. Nine days later Mr Pusey heard that the man had died. For about four weeks Mr Pusey continued to work without any apparent impairment to his health; however thereafter he developed a serious mental disorder which was diagnosed as an acute schizophrenic episode. The case raised several jurisprudential issues.

Mr Pusey’s case fell within the principles governing recovery of damages for psychiatric illness suffered by persons who were traumatised by their experience of coming to the rescue of others. Nevertheless, the High Court chose to analyse Mr Pusey’s claim for compensation for negligently-caused nervous shock on different grounds. Like Coultas, but unlike the Chester case, the issue in Pusey involved remoteness of damage. The fact that the defendant employer owed the plaintiff employee a duty of care was not challenged. The defendant argued that an injury such as schizophrenia manifesting itself some four weeks after the accident - an event which the plaintiff did not witness and which, moreover, involved a stranger - was too remote to be compensable. The High Court rejected the defence argument and unanimously allowed Mr Pusey recovery for nervous shock, even though the plaintiff himself was never threatened by the explosion, was not related to the victims, and may not have known them prior to the accident. It was sufficient that he heard the explosion and was

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614 The other electrician died on the day following the accident.
closely involved with the immediate aftermath of the accident. In relation to the apparent time interval between the accident and the onset of the illness, McTiernan and Windeyer JJ adopted Evatt J’s test in the Chester case, that for the purposes of reasonable foreseeability it is sufficient for the onset of the plaintiff’s shock and subsequent illness to be “fairly contemporaneous with the casualty.” Windeyer J argued that the law should recognise medical and scientific developments of the twentieth century which have brought about a profound change in the philosophy and clinical practice of medicine:

The Cartesian distinction between mind and matter for a long time had an obdurate influence on men’s thinking. The interrelation of mind and body was little understood and often unacknowledged. But this position has given way in medicine and should, I think, give way in law.

In respect of recoverability of damages for nervous shock, Windeyer J declared that:

Law, marching with medicine but at the rear and limping a little, has today come a long way since the decision in Victorian Railways Commissioners v. Coultas, which in recent times has been regularly by-passed by courts. An illness of the mind is no less an injury because it is functional, not organic, and its progress is psychogenic.

His Honour also addressed the issue of foreseeability of nervous shock in relation to remoteness of damage, in the following terms:

Liability for nervous shock depends on foreseeability of nervous shock. That, not some other form of harm must have been a foreseeable result of the conduct complained of. The particular pathological condition which the shock produced need not have been foreseeable. It is enough that it is a recognizable psychiatric illness.

In Pusey, the plaintiff’s psychiatric illness consequent upon his emotional shock at seeing and aiding two severely burnt men was indeed rare, but it was not unknown and therefore was reasonably foreseeable. To
found liability, it was sufficient that mental disorder as a class, rather than as a particular type of injury, should be a foreseeable consequence of the defendant’s conduct. *Mount Isa Mines Ltd. v. Pusey* was a seminal case which defined the legal status of ‘nervous shock’ as a separate kind of damage in negligence.\(^{620}\) The High Court accepted unequivocally that ‘all forms of mental or psychological disorder which are capable of resulting from shock’\(^{621}\) are compensable, when other elements of the cause of action are present. Although the issue of predisposition did not arise in *Pusey*, it was addressed by the High Court, particularly by Windeyer J, who said in an obiter dictum that he was not ‘to be taken as assenting to the proposition that nervous shock caused to a man who is prone to such shock is not compensable when a similar occurrence harming a ‘normal’ man would be’ \(^{622}\).

According to *Pusey*, in order to recover damages for nervous shock occasioned by mere emotional trauma resulting from the defendant’s wrongful conduct, the plaintiff had to satisfy the following three pre-conditions:

1. the plaintiff had to show that he had seen or heard the accident happen, or had seen its immediate aftermath at the scene of the accident;
2. the plaintiff had to be a close relative of the physically injured person, or a rescuer, or a person directly involved with the accident;
3. the person who was physically injured, and the sight of whom resulted in the plaintiff’s suffering the nervous shock, had to be someone other than the negligent tortfeasor.

These three pre-conditions were held to be satisfied in the case of *Benson v. Lee*,\(^{623}\) where a mother was at home some hundred yards away from the scene of an accident in which her son was left unconscious on a roadway after being struck by a car driven by the defendant. She did not see or hear the accident, but after being told of it by her eldest son she ran to the scene, saw her son unconscious, and went with him in an ambulance to the hospital, where she was informed that he was dead. The recovery was allowed because the plaintiff’s nervous shock was occasioned by a ‘direct

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620 The reasoning of Windeyer J was followed in New Zealand in *Gartside v. Sheffield*, *Young & Ellis* [1981] 2 N.Z.L.R. 547.
621 *Mount Isa Mines v. Pusey* op. cit. fn. 611, at 414, per Walsh J.
622 Id. at 405.
The History of the Liability for Negligently Caused Psychiatric Injury

perception of some of the events which go to make up the accident as an entire event, and this includes ... the immediate aftermath.²²⁴ The Supreme Court of Victoria held that the defendant driver owed the mother a duty of care, and it was not material that she did not witness the actual accident since she was physically present at its immediate aftermath. Moreover, damages for nervous shock were awarded in this case notwithstanding evidence that the plaintiff was prone to mental illness from stress.

However, the High Court’s requirement of the plaintiff having to be present at and see the immediate aftermath of the accident prevented another Victorian plaintiff, Mrs Pratt, from establishing the proximity relationship capable of giving rise to the duty of care. In the case of Pratt & Goldsmith v. Pratt,²²⁵ the plaintiff’s pregnant daughter suffered grave injuries, including permanent brain damage, when a car driven by the daughter’s husband left the highway and collided with an electricity pole. The daughter subsequently gave birth to a girl, who also suffered disability as a result of the collision. Mrs Pratt saw her daughter in the hospital, and afterwards cared for both her daughter and grand-daughter at home.

The plaintiff claimed, inter alia, damages for nervous shock which she had suffered as a result of anxiety, nervous tension and exhaustion caused by the consequences of the collision. The nervous shock manifested itself as an abnormally low blood pressure and an aggravation of an asthmatic condition. The Supreme Court of Victoria held that, as a rule, the duty of care of the driver of a vehicle on the highway does not extend beyond road users in the neighbourhood, or persons who are themselves on, or who have property adjacent to, the roadway. Since Mrs Pratt was not actually involved in the collision, and was not in the disaster area ‘either as a matter of time or space’, there was not sufficient proximity between her injury of nervous shock and the tortfeasor’s negligence to create a duty of care. A similar conclusion was reached in Canada by the Saskatchewan Court of Appeal in the case of Abramzik v. Brenner,²²⁶ in which a mother suffered nervous shock and a serious physical illness upon being told that her two children had been killed by the defendant’s negligent driving. The court determined that the defendant owed her no duty of care because a reasonable person in the defendant’s position would not have foreseen nervous shock resulting to

²²⁴ Id. at 880, per Lush J. This passage was cited with approval in Jaensch v. Coffey op. cit. fn. 530, by Brennan and Deane JJ.
The question of foreseeability of nervous shock turned on the interpretation by the courts of what constitutes an ‘immediate aftermath’ of an accident. Thus, the case of Marshall v. Lionel Enterprises Inc., Haines J of the Ontario High Court, followed the reasoning of Windeyer J in Pusey when he stated that for the purposes of liability, foreseeability of physical damage is not necessarily the same as foreseeability of nervous shock; therefore the test of liability for nervous shock must be foreseeability of nervous shock. His Honour determined that a trial judge or jury would consider nervous shock to be reasonably foreseeable in a case where the wife came upon the body of her husband not long after an accident in which he was badly injured when the clutch on a snowmobile broke while the machine was in operation.

**Rescuers**

The High Court could well have decided the case on the basis that Mr Pusey was a rescuer. Injured rescuers belong to a category of second-impact victims who are in direct relationship with the wrongdoer, and as such, they fall into a class of foreseeable persons to whom the wrongdoer owes a duty of care. Cardozo J in Wagner v. International Rly. Co. defined a rescuer as someone who answers the call of danger and goes to give relief. His Honour explained the rule which places rescuers in a primary relationship with the defendant in the following way:

The wrong that imperils life is a wrong to the imperilled victim; it is a wrong also to the rescuer … The risk of rescue, if only it be not wanton, is born of the

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In the case of Yates v. South Kirkby Collieries Ltd. [1910] 2 Q.B. 538, the English Court of Appeal said that a miner who sustained nervous shock when he went to the aid of another miner who had been seriously injured and later died, sustained a personal injury caused by the defendant’s negligence. In Australia, the case of Chapman v. Hearse (1961) 106 C.L.R. 112 established the principle that it is reasonably foreseeable that as a result of the defendant’s negligence there may be people who having come to the injured person’s rescue, would sustain injury in doing so.

occasion. The emergency begets the man. The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had.\textsuperscript{631}

The issue of liability of defendants towards those who suffer nervous shock as a consequence of coming to extricate from danger victims of negligent conduct was analysed in depth in the 1967 case of \textit{Chadwick v. British Railways Board}.\textsuperscript{632} In that case, a railway collision occurred as a result of the defendant’s negligence. Ninety people were killed in the accident and well over two hundred were seriously injured. The plaintiff’s husband, who lived nearby, ran to help in the rescue activities. Mr Chadwick worked for twelve hours, crawling into the wreckage and administering injections to the injured. As a result of the experience he became a ‘psychoneurotic’ and had to spend six months in a psychiatric hospital.

Five years later Mr Chadwick died of causes unconnected with the accident. Waller J held that his widow was entitled to recover damages for the psychiatric illness suffered by her husband before his death. With regards to nervous shock, his Honour considered the question of whether ‘damages are recoverable for injury by shock where the shock is not caused by fear for one’s own safety or the safety of one’s children’.\textsuperscript{633} Having examined the judgments in \textit{Bourhill v. Young}, Waller J concluded that the House of Lords in this case did not suggest that this question should be answered other than affirmatively:

One only too frequently comes across the case of a man with a trivial industrial injury which subsequently produces genuine neurotic symptoms not due to fear but due to other causes. It would seem anomalous if serious mental illness accompanied by trivial injury would entitle a man to compensation but if there were no trivial injury it would not.\textsuperscript{634}

Waller J also decided that the defendant owed a duty of care to Mr Chadwick, who was neither its employee nor a passenger because he came to the aid of the endangered persons even though he had no interest in - or obligation to - them. Moreover, the fact that the risk run by the rescuer was not precisely that to which the passengers were exposed did not deprive the

\begin{footnotesize}
\begin{enumerate}[\textsuperscript{631}]  
\item Id. at 180.
\item Id. at 920.
\item Ibid.
\end{enumerate}
\end{footnotesize}
former of remedy, including compensation for psychiatric illness consequent upon shock, because both the rescue and the shock involved in the rescue were reasonably foreseeable. In rejecting the argument of the defendants that damages should be denied on the grounds of Mr Chadwick’s predisposition to nervous shock, Waller J noted that ‘the community is not formed of normal citizens, with all those who are less susceptible or more susceptible to stress to be regarded as extraordinary’. 635

Restatement of torts (second) 1965

Two years before Waller J handed down judgment in Chadwick, the American Law Institute produced the Second Restatement of Torts (1965), in which it took a more conservative approach to the defendants’ liability for nervous shock. The Restatement reiterated that the ‘zone of physical danger’ doctrine was part of the general law of the United States. 636 It permitted recovery for physical injury caused by negligently inflicted emotional distress in cases where the harm followed from the plaintiff’s ‘shock or fright at harm or peril to a member of his immediate family occurring in his presence’. 637 To be recoverable, the emotional distress had to be accompanied by physical manifestations, or sufficiently serious to be regarded as ‘amounting to physical illness, which is bodily harm’. 638 Comment c to s. 436A made the following distinction between compensable and non-compensable emotional distress:

The rule [precluding recovery for negligently caused emotional distress alone] applies to all forms of emotional disturbance, including temporary fright, nervous shock, nausea, grief, rage, and humiliation. The fact that these are accompanied by transitory, non-recurring physical phenomena, harmless in themselves, such as dizziness, vomiting, and the like, does not make the actor liable where such phenomena are in themselves inconsequential and do not amount to any substantial bodily harm. On the other hand, long continued nausea or headaches may amount to physical illness, which is bodily harm; and even long continued mental disturbance . . . may be classified by the courts as

635 Id. at 922. From a strictly jurisprudential point of view, the issue of susceptibility was probably irrelevant because of the rule that once the duty is established, the talem qualem rule springs into operation.
636 Restatement (Second) op. cit. fn. 3, s. 313(2).
637 Id. s. 436(3).
638 Id. s. 436A.
illness, notwithstanding [its] mental character. This becomes a medical or psychiatric problem, rather than one of law.

Even though he did suffer ‘bodily harm’ as defined by the Restatement, Mr Pusey would not have been able to obtain compensation at common law under the criteria delineated in the Restatement because he was outside of the zone of danger and was not a relative of the injured co-workers.

The Second Restatement of Torts (1965) also allowed recovery for outrageous conduct causing severe emotional distress. Section 46, titled ‘Outrageous Conduct Causing Severe Emotional Distress’ provided that:

One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

There are four elements which must coincide to impose liability for intentional infliction of emotional distress:

1. The conduct must be intentional or reckless;
2. The conduct must be extreme and outrageous;
3. There must be a causal connection between the defendant’s wrongful conduct and the plaintiff’s emotional distress, and
4. The emotional distress must be severe if the plaintiff is the object of the defendant’s outrageous intentional conduct. In cases where the outrageous conduct is directed at a third person, the distress of the bystander-plaintiff present at the time must result in bodily harm.639

Comment j to s. 46 emphasised that the requirement of ‘severe emotional distress’ was both an evidentiary issue and an element of the tort. Therefore, it was a prerequisite to recovery:

The rule stated in this Section applies only where the emotional distress has in fact resulted, and where it is severe. Emotional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea. It is only where it is extreme that the liability arises. Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only where the distress inflicted is so severe

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639 Id. s. 46.
that no reasonable man could be expected to endure it. The intensity and the duration of the distress are factors to be considered in determining its severity. Severe distress must be proved; but in many cases the extreme and outrageous character of the defendant’s conduct is in itself important evidence that the distress has existed.  

Furthermore, the severe emotional distress had to be ‘reasonable and justified under the circumstances’. The standard of the reasonable person (‘no reasonable man could be expected to endure it’) in relation to injury by way of emotional distress meant that the defendant would be relieved of liability where the court decided that the plaintiff had suffered ‘exaggerated and unreasonable emotional distress’, unless it was as a result of a peculiar susceptibility to such distress of which the defendant had knowledge.

Comment d to s. 46 placed further limits on recovery for intentional infliction of emotional distress by stating that ‘liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilised community’. In the Caveat to s. 46, the Institute expressed ‘no opinion as to whether there may not be other circumstances under which the actor may be subject to liability for the intentional or reckless infliction of emotional distress’. In addition, the commentary on the Caveat provided that it was ‘intended to leave fully open the possibility of further development of the law, and the recognition of other situations in which liability may be imposed’. Thus the Restatement recognized that in future situations justifying imposition of liability outside the usual limitations may arise.

The independent liability for the tort of outrage or extreme and outrageous conduct, in the form formulated in the Restatement has been adopted by most jurisdictions of the United States. However, many courts have interpreted the requirements of the tort strictly, and have made it

640 Id. s. 46, comment j.
641 Id. s. 46, comment f.
642 Ibid.
643 Id. s. 46, comment d.
644 Id. s. 46, comment c.
645 Kestin, H. op. cit. fn. 490, at 515. The process of adoption has been relatively slow, for example Maryland recognized the tort in Harris v. Jones (1977) 35 Md. App. 556; 371 A. 2d 1104; aff’d 281 Md. 560; 380 A. 2d 611 and Wyoming in Leithead v. American Colloid Co. (1986) 721 P. 2d 1059 (Wyo.).
difficult for plaintiffs to recover.\textsuperscript{646}

**Dillon v. Legg**

Three years after the publication of the *Second Restatement of Torts*, in 1968, the Supreme Court of California in the case of *Dillon v. Legg*, \textsuperscript{647} abandoned the ‘zone of danger’ rule. The case involved a claim by the plaintiff, Margery Dillon and her daughter Cheryl for negligently occasioned emotional trauma. Margery Dillon saw her daughter Erin, being fatally struck by the defendant’s car while she was lawfully crossing the road on September 27, 1964. As a result of witnessing the death of Erin, the plaintiff ‘sustained great emotional disturbance and shock and injury to her nervous system which caused her great physical and mental pain and suffering’.\textsuperscript{648} Erin’s infant sister, Cheryl, who was apparently standing at the curb, and also witnessed the collision, ‘sustained great emotional disturbance and shock and injury to her nervous system’ which caused her great physical and mental pain and suffering.\textsuperscript{649} The action in the Supreme Court proceeded on the basis that while the mother was outside the ‘zone of danger’ and did not fear for her own safety, the position of the sister may have been sufficient to meet the requirements of the ‘zone of danger’ doctrine. Tobriner J, who delivered the opinion of the court, observed that the instant case which would allow recovery for emotional trauma to the sister but deny it to the mother, because she happened to be a few yards away, illustrated the fallacy and ‘hopeless artificiality’ of the ‘zone of danger’ rule. Like Atkin LJ in *Hambrook v. Stokes Bros*,\textsuperscript{550} and Calvert

\textsuperscript{646} In *Venerias v. Johnson* (1980) 127 Ariz. 496; 622 P. 2d 55, a plaintiff who claimed that he was reduced to a ‘nervous wreck’ because of harassment by his neighbours who resented his move into their community, failed because the distress he suffered was not considered to be severe enough. In *Johnson v. Caparelli* (1993) 625 A. 2d 668 (Pa.) the court denied parents’ recovery for intentional infliction of emotional distress against a priest who sexually molested their son because they were not present at the time of the outrageous conduct. See also *L.E.O. v. Hossle* (1986) 381 N.W. 2d 641 (Iowa) and *Nancy P. v. D’Amato* (1988) 517 N.E. 2d 824 (Mass.) - in both cases parents could not recover for emotional distress against the defendant because they were not present while he engaged in outrageous conduct by sexually abusing their young children.

\textsuperscript{647} *Dillon v. Legg* op. cit. fn. 498.

\textsuperscript{648} Id. at 731; 914.

\textsuperscript{649} Ibid.

\textsuperscript{650} *Hambrook v. Stokes Bros* op. cit. fn. 401, at 158-159.
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Magruder in his 1936 article, 651 Justice Tobriner observed that

… it is incongruous and somewhat revolting to sanction recovery for the mother if she suffers shock from fear for her own safety and to deny it for shock from the witnessed death of her own daughter. To the layman such a ruling must appear incomprehensible; for the courts to rely upon self-contradictory legalistic abstractions to justify it is indefensible.' 652

Tobriner J, remarked that the concept of a duty of care, far from being an old and deep-rooted doctrine, is but a legal device developed in the latter half of the nineteenth century "to curtail the feared propensities of juries toward liberal awards". 653 He quoted the following passage from Professor Fleming’s An Introduction to the Law of Torts:

It must not be forgotten that ‘duty’ got into our law for the very purpose of combating what was then feared to be a dangerous delusion (perhaps especially prevalent among juries imbued with popular notions of fairness untempered by paramount judicial policy), viz., that the law might countenance legal redress for all foreseeable harm. 654

His Honour then argued that the ‘zone of danger’ doctrine must ‘inevitably collapse because the only reason for the requirement of presence in that zone lies in the fact that one within it will fear the danger of impact’. 655 The doctrine thus warped the concept of duty of care, and with it the very object of the law of compensation for negligently occasioned injury:

… the simple facts of plaintiff’s complaint would establish a cause of action: the complaint alleges that defendant drove his car (1) negligently, as a (2) proximate result of which plaintiff suffered (3) physical injury. Proof of these facts to a jury leads to recovery in damages; indeed, such a showing represents a classic example of the type of accident with which the law of negligence has been designed to deal. 656

Having adopted foreseeability of the injury as the basis of a negligent

651 Magruder, C. op. cit. fn. 17, at 1039.
652 Dillon v. Legg op. cit. fn. 498, at 738; 919.
653 Id. at 734; 916.
655 Id. at 733; 915.
656 Id. at 733-4; 916.
defendant’s duty, he identified the risks that could give rise to that duty as involving both negligently brought about physical impact and emotional distress. Tobriner J noted that the expansion of the concept of foreseeability to include emotional trauma was particularly compelling in the light of the then extant medical knowledge which suggested that ‘no distinction [could be] drawn between physical injury and emotional injury flowing from the physical injury’. Consequently, Tobriner J decided that in some cases, a plaintiff who was physically outside a zone of physical risk, but who had suffered bodily injury or sickness caused by the defendant’s negligent conduct, could still be regarded as being within the foreseeable zone of danger of emotional impact. In such cases, under the general principles of the law of negligence, recovery should be had if the defendant could foresee fright or shock severe enough to cause substantial injury in a person normally constituted.657

He rejected the policy argument that the possibility of fraudulent claims justified denial of recovery, at least in so far as a mother who sees her child killed is concerned, as ‘no one can seriously question that fear or grief for one’s child is as likely to cause physical injury as concern over one’s own well-being’658. Nevertheless, the court imposed three requirements for recovery of damages by those outside the zone of danger. Under the Dillon doctrine, the court must consider the following factors when determining the existence of reasonable foreseeability of risk for the purposes of a duty of care:

(1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it.
(2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence.
(3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.659

Finally, Tobriner J confirmed the general rule that the defendants in the Dillon v. Legg category of case should be liable only for foreseeable emotional injury to bystanders. Thus, in the case of Burke v. Pan American

657 Id. at 741; 919.
658 Id. at 737; 918.
659 Id. at 740-1; 920.
World Airways, Inc. District Judge Ward decided that an identical twin failed to allege a cause of action on which relief could be granted in relation to a claim that, while residing in California, she ‘experienced’ the death of her sister who died on the morning of 27 March, 1977 when two airlines collided on a runway in the Canary Islands. Ward J observed that what the plaintiff alleged was not sensory but extrasensory perception. Consequently, her injury was outside the ambit of foreseeability as defined by California law. Likewise, the contention that her injury was foreseeable because studies have documented the phenomenon of pain sharing between twins, ignored the specific guidelines established by courts to protect defendants from liability for remote and unexpected harm.

Initially, the three limiting factors in Dillon v. Legg were strictly interpreted. For example, in Parsons v. Superior Court, the court denied recovery for emotional distress to parents who were driving some distance behind the defendant’s car, in which their two children were riding. They rounded a curve in the road and came upon the wreckage of the defendant’s car containing the mangled bodies of their daughters, who were dead or dying. The Supreme Court of California decided that the contemporaneous sensory perception requirement of the Dillon rule was missing because the plaintiffs did not establish that they saw, heard, or otherwise sensorily perceived the injury-producing event. However, in the 1978 case of Dziokonski v. Babineau, Wilkins J of the Supreme Judicial Court of Massachusetts relaxed the requirement of contemporaneous sensory perception when he determined that the administratrix of the estates of Mr and Mrs Dziokonski could validly bring an action alleging that their deaths

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661 See also: Hoffner v. Hodge (1979) 407 A. 2d 940 (Pa.), in which the court dismissed a complaint by a plaintiff who alleged that she was emotionally injured as a result of being present ‘at all times’ - albeit in a different physical location - with her identical twin sister while the latter was undergoing a surgical procedure, which proved unsuccessful.
663 See also Caparco v. Lambert (1979) 402 A. 2d 1180 (Rhode Island), in which the mother did not witness the accident in which her young daughter was injured, but suffered severe emotional distress when she saw the suffering of her daughter at a later time. The court dismissed the claim, and distinguished Caparco from its earlier decision in D’Ambra v. United States (1975) 114 R.I. 643; 338 A. 2d 524 (Rhode Island) in which a mother who actually saw her child injured in a car crash was allowed to recover damages for the severe emotional distress she experienced. See also: Leong v. Takasaki (1974) 55 Haw. 398; 520 P. 2d 758 (1974); Toms v. McConnell (1973) 45 Mich. App. 647; 207 N.W. 2d 140.
were the result of physical injuries caused by emotional distress occasioned by the injuries to Norma, the child of the couple. Norma was struck by the defendant’s school bus. The mother went to the scene of the accident and witnessed her daughter lying injured on the ground. The mother, riding with the child in an ambulance, died from physical and emotional shock brought about by seeing the injuries to her daughter. The father, upon learning of the death of his wife and injury to his daughter, also died, as a result of an aggravated ulcer, coronary occlusion, and emotional shock. In relation to the claim on behalf of the mother, Justice Wilkins held that parents suffering physical harm as a result of severe mental distress over peril or harm to their minor child caused by the defendant’s negligence will have a valid action where the parent either witnesses the accident as required under the *Dillon* rule, or comes upon the scene while the child is still there. Although less definite with regards to the claim as to the estate of Mr Dziokonski, Wilkins J refused to dismiss it. A year later, in *Corso v. Merrill* the Supreme Court of New Hampshire abandoned the strict ‘zone of danger’ rule when it held that parents who, while in their home, situated some fifty feet from the scene of the accident heard the ‘terrible thud’ of the defendant’s car striking their eight-year-old daughter, had a good cause of action. The court determined that, providing the issue of foreseeability is sufficiently established, parents who either witness or contemporarily perceive through their senses a serious injury to their child, may recover damages for serious mental and emotional harm if it is accompanied by objective physical symptoms. The dissenting judge in *Corso* observed that ‘the genie is now clearly out of the bottle and I can only hope that someone will find a way to get him back in.’

The genie appeared to grow rapidly in stature when in 1980 the Supreme Court of California decided the case of *Molien v. Kaiser Foundation Hospitals*. The plaintiff’s wife, Valerie, was erroneously informed that she was suffering from infectious syphilis following a routine physical examination by the staff physician of the defendant hospital. She was instructed to inform her husband, the plaintiff, about her condition, and have him submit to a blood test to determine whether he was the source of

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667 Ibid.
his wife’s infection. The blood test established that he was free of syphilis. Because syphilis is a sexually transmitted disease, the erroneous diagnosis led the marriage partners to suspect each other of sexual infidelity. This suspicion caused such ‘tension and hostility’ that Valerie initiated dissolution of marriage proceedings. The plaintiff claimed that he suffered from extreme emotional distress, albeit with no medically significant physical manifestations and incurred significant expense for unnecessary medical treatment and counselling in an effort to save his marriage. He argued that the defendants should have foreseen that their erroneous diagnosis would have this effect. He also asserted that the defendants’ negligence constituted an interference with his rights of consortium. Counsel for the plaintiff asked the court to recognize the concept of negligent infliction of mere emotional distress as an independent tort.

Justice Mosk, writing the majority opinion, effectively agreed with the proposition, at least in relation to direct victims. The court distinguished Dillon and its limiting criteria by classifying the husband-plaintiff in the category of direct victims of the negligent act. This was because the alleged tortious conduct of the defendant was directed to the husband as well as to his wife. The court held that since the risk of harm to the plaintiff was reasonably foreseeable, the defendants owed the plaintiff a duty to exercise due care in diagnosing the physical condition of his wife.

In relation to the absence of bodily injury, Mosk J observed that the central issue in cases of emotional distress is an evidentiary one. The progress of medical science has enabled plaintiffs to present believable medical evidence in respect of the extent of their emotional distress, and the jurors as fact-finders, are in a good position to evaluate the testimony by referring to their own experience. The ‘artificial and often arbitrary’ classification scheme which distinguishes between physical and psychological injury merely clouds the issue of whether the plaintiff has suffered a serious and compensable injury. In a dissenting judgment, Clarke J pointed out that by eliminating the requirement of some physical manifestation to support the claim of severe emotional distress, the majority has implicitly reposed in the jury the responsibility for determining whether

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669 Id. at 923.
‘proof of mental distress is of a medically significant nature’ or whether the claim of mental distress is supported by ‘some guarantee of genuineness in the circumstances of the case’. According to Clarke J, ‘such standards are non-standards, opening wide the door to abuse’. 671 A subsequent court commented that the subtleties in the distinction between the right to recover as a ‘direct victim’ as against a ‘bystander’ created an ‘amorphous nether realm’.

Inevitably, some plaintiffs did see the Molien decision as a route through which they could avoid having to comply with the Dillon v Legg requirements for recovery for emotional distress set for bystanders. This was the case with the plaintiff, Maria Thing in the case of Thing v. La Chusa. 672 On December 8, 1980 her young son, John, was injured when struck by the defendant’s car. Maria Thing was nearby, but she neither saw nor heard the accident. She became aware of the injury to her son when told by a daughter that John had been struck by a car. She rushed to the scene where she saw her bloody and unconscious child, who she believed was dead, lying in the roadway. Maria sued the defendant, alleging that she ‘suffered great emotional disturbance, shock, and injury to her nervous system’ as a result of these events which were proximately caused by the defendant’s negligence. She could not establish a claim for negligent infliction of emotional distress under the Dillon doctrine, because she did not contemporaneously and sensorily perceive the accident. Maria Thing, however, claimed that she was a direct victim of the defendant’s negligence in the same way that the husband in the Molien’s case was a direct victim of the hospital’s physician who attended his wife. The Supreme Court of California rejected this argument, determining that Maria Thing was not a ‘direct victim’ but a bystander. The court re-interpreted the Molien decision in the following terms:

Molien neither established criteria for characterizing a plaintiff as a ‘direct’ victim, nor explained the justification for permitting ‘direct’ victims to recover when ‘bystander’ plaintiffs could not. The immediate effect of the decision, however, was to permit some persons who had no prior relationship with the defendant that gave rise to a duty, who did not suffer physical injury as a result of emotional distress, who did not observe the negligent conduct, and who had not been at or near the scene of the negligent act to recover for emotional distress on a pure foreseeability-of-the-injury basis. The limitations on recovery

671 Id. at 428.
672 Thing v. La Chusa (1989) 48 Cal. 3d 644; 771 P. 2d 814; 257 Cal. Rptr. 865.
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for emotional distress that had been suggested in the Dillon ‘guidelines’ were not applicable to ‘direct’ victims of a defendant’s negligence.673

The court was concerned that in a number United States jurisdictions, including that of California:

… the range of mental or emotional injury subsumed within the rubric ‘emotional distress’ and for which damages are presently recoverable includes fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation and indignity, as well as physical pain.674

Eagleson J commented that in view of the wide definition of ‘emotional distress’ the courts have to confine it to the distress that results from actually witnessing or participating in the negligently caused event, as distinct from emotion which may flow from consequences of that event:

The impact of personally observing the injury-producing event in most, although concededly not all, cases distinguishes the plaintiff’s resultant emotional distress from the emotion felt when one learns of the injury or death of a loved one from another, or observes pain and suffering but not the traumatic cause of the injury. Greater certainty and a more reasonable limit on the exposure to liability for negligent conduct is possible by limiting the right to recover for negligently caused emotional distress to plaintiffs who personally and contemporaneously perceive the injury-producing event and its traumatic consequences.675

Noting the apparent uncertainty and arbitrariness of the law in respect of bystander recovery for emotional distress, the court further refined the Dillon v Legg guidelines. It declared that ‘the societal benefits of certainty in the law, as well as traditional concepts of tort law’,676 dictated that in the absence of physical injury or impact to the plaintiff himself, damages for emotional distress should be recoverable only if the plaintiff:

(1) is closely related to the injury victim,
(2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim and,

673 Id. at 823.
674 Id. at 816.
675 Id. at 828.
676 Id. at 815.
(3) as a result suffers emotional distress beyond that which would be anticipated in a disinterested witness. 677

Applying these specific limiting factors to the foreseeability test, the court held that since Maria Thing did not witness the accident in which her son was injured, she could not recover damages from the driver for the emotional distress she suffered when she arrived at the scene of the accident.

But the genie was out and about, and in the 1990s the concept of mere emotional distress, through the magic of legal imagination, would acquire new and varied forms.

**Modification of the remoteness of damage test in contract**

The extension of defendants’ liability for the tortious infliction of nervous shock was paralleled in the law of contract. In 1952, in *Loach & Son Ltd. v. Kennedy*, 678 the English County Court awarded damages, including compensation for ‘anxiety and distress’, against an undertaker who was sued for breach of contract. The plaintiffs had given instructions to the undertaker to pick up a body from the hospital mortuary on the day scheduled for its funeral and transport it to the cemetery. To suit their own convenience, the undertakers picked up the body on Saturday and stored it in their machine shop until the funeral on Monday. *Loach & Son Ltd. v. Kennedy* was an unusual decision for its time, because under the rule established in *Hamlin v. Great Northern Railway Company*, 679 the general test for remoteness of damage in contract excluded compensation for mere mental distress caused by a breach of contract. In England, this rule was modified in 1973, when Lord Denning MR, in *Jarvis v. Swan Tours*, 680 awarded the plaintiff, Mr Jarvis, damages for his loss of enjoyment, disappointment and distress after the holiday he booked with the defendant, Swan Tours, turned out to be far less than was promised. Since then, courts have fairly readily awarded damages for mental distress in situations where such distress would have been within the contemplation of the parties as a foreseeable consequence of a breach of the contract between them. The House of Lords specified that damage in the reasonable contemplation of

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677 Ibid.
678 *Loach & Son Ltd. v. Kennedy* (1953) 103 L.J. 76.
679 *Hamlin v. Great Northern Railway Co.* op. cit. fn. 120.
the parties must be ‘a serious possibility’, ‘a real danger’, ‘liable to result’ or ‘not unlikely’ to occur.\textsuperscript{681} For example, in \textit{Heywood v. Wellers},\textsuperscript{682} the plaintiff instructed her solicitor to obtain an injunction against a certain man to protect her from molestation, but the solicitor negligently failed to do so. The court awarded damages for the severe mental distress she suffered as a consequence of being molested by the man in question on four separate occasions. Bridge LJ (as he then was) distinguished between a case where a contract is expressed to protect a promisee from disappointment of mind and a case where disappointment of mind is merely a mental reaction to a breach and resultant damage:

There is, I think, a clear distinction to be drawn between mental distress which is an incidental consequence to the client of the misconduct of litigation by his solicitor, on the one hand, and mental distress on the other hand which is the direct and inevitable consequence of the solicitor’s negligent failure to obtain the very relief which it was the sole purpose of the litigation to secure. The first does not sound in damages: the second does.\textsuperscript{683}

In the subsequent case of \textit{Watts v. Morrow},\textsuperscript{684} Bingham LJ, while confirming the proposition that a defendant in breach of contract cases is generally not liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation caused to the innocent party, described the following circumstances in which damages for mere mental distress could be awarded:

Where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead. If the law did not cater for this exceptional category of case it would be defective. A contract to survey the condition of a house for a prospective purchaser does not, however, fall within this exceptional category. In cases not falling within this exceptional category, damages are in my view recoverable for physical

\textsuperscript{681} In \textit{C. Czarnikow Ltd. v. Koufos} [1969] 1 A.C. 350, the House of Lords specified that damage in the reasonable contemplation of the parties must be ‘a serious possibility’, ‘a real danger’, ‘liable to result’ or ‘not unlikely’ to occur.

\textsuperscript{682} \textit{Heywood v. Wellers} [1976] Q.B. 446.

\textsuperscript{683} Id. at 463-4.

inconvenience and discomfort caused by the breach and mental suffering directly related to that inconvenience and discomfort.\textsuperscript{685}

His Lordship emphasised that the rule was not founded on the assumption that such reactions as distress, frustration, anxiety, displeasure, or vexation are not foreseeable, but on considerations of policy. The High Court of Australia in \textit{Baltic Shipping Company v. Dillon},\textsuperscript{686} substantially followed the reasoning in the \textit{Heywood} and \textit{Watts}' cases, noting however that personal injury in tort, as well as in contract, is defined in terms of physical or psychiatric harm. Therefore only mental distress associated with a psychiatric illness or physical injury can be recovered as damages in an action for breach of contract. In Canada, the courts tend to use the reasonable foreseeability test differently in negligence cases and in actions for breach of contract - they do not require that there be organic damage or recognisable psychiatric illness in respect of the latter.\textsuperscript{687}

\textbf{Publication of DSM-III and the diagnosis of Posttraumatic Stress Disorder}

Definition of ‘serious emotional distress’ provided in the \textit{Restatement of Torts} and the \textit{Pusey} case revealed an interesting insight into the diagnostic difficulties which psychiatrists of the late 1960s faced in relation to patients suffering the after-effects of severe psychological trauma. In his judgment Mr Justice Windeyer noted that one of the psychiatrists who gave evidence that Mr Pusey suffered from schizophrenia did not like that label. The doctor, however, was unable to find ‘a more suitable diagnostic term’\textsuperscript{688} to describe his patient’s severe psychiatric condition which resulted from emotional shock suffered through his involvement in the aftermath of the accident.

The psychiatrist witness in \textit{Pusey} would not have used the term ‘nervous shock’ to denote the persistent symptoms which sometimes follow psychologically traumatic experience, because it was discarded by clinical medicine at the end of the nineteenth century. He might have used the term

\textsuperscript{685} Id. at 1445.
\textsuperscript{687} See \textit{Heighington v. The Queen in Right of Ontario} (1987) 41 D.L.R. 4th 208; 6 A.C.W.S. 3d 302 for a further discussion of this issue.
\textsuperscript{688} Mount Isa Mines v. Pusey op. cit. fn. 611, at 403.
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‘traumatic neurosis’. However, as Oppenheim pointed out in his 1901 book on Diseases of the Nervous System, the phrase ‘traumatic neurosis’ had even then lacked specific diagnostic meaning and, with time, acquired opprobrious connotations among certain physicians and lawyers. Thus Lord Justice Lawton, speaking at a dinner held by the Medico-Legal Society in October 1978, considered claims involving traumatic neurosis to be intrinsically fraudulent, and defined the condition as:

… that oddity which arises when somebody has been injured in an accident and the lesions, if I may use the term ... have healed; everything seems to indicate that the patient is nearly as good as he was before the accident and yet he presents with all kinds of symptoms.691

The International Classification of Diseases (ICD) has retained the fashionable term of the fin de siècle, ‘neurasthenia’, as part of medical nosology under the category of ‘other neurotic disorders’. ICD is produced by the World Health Organisation and is widely used in Europe. ICD-10 provides the following diagnostic guidelines for neurasthenia:

(a) either persistent and distressing complaints of increased fatigue after mental effort, or persistent and distressing complaints of bodily weakness and exhaustion after minimal effort;

(b) at least two of the following:
   • feeling of muscular aches and pains
   • dizziness
   • tension headaches
   • sleep disturbance
   • inability to relax
   • irritability
   • dyspepsia

(c) any autonomic or depressive symptoms present are not sufficiently persistent and severe to fulfil the criteria for any of the more specific

690  Oppenheim, H. (1901) op. cit. fn. 199, at 740.
disorders in this classification [neurotic, stress-related and somatoform disorders].

In the United States, England and Australia, a diagnosis of neurasthenia has been regarded by many neurologists and psychiatrists as too vague in its symptoms and too bereft of objective signs to be useful as a tool of clinical assessment. Another nineteenth century medical construct - ‘traumatic hysteria’ - was defined in the 1979 edition of Blakiston’s Pocket Medical Dictionary as ‘any neurotic reaction in which an injury is the precipitating cause’. Again, this designation is regarded as too imprecise to be used as a strict diagnostic criterion. The term ‘trauma’ has been used in psychiatry as a word of art, with a generic meaning encompassing all insults to the person including those which do not necessarily involve a threat to life or limb. Such phrases as ‘emotional trauma’, ‘emotional distress’, or ‘emotional disturbance’, however, have not been considered diagnostic terms. As a result, the severe medical condition which is the result of an overwhelmingly stressful experience, and which the lawyers still loosely call ‘nervous shock’ - did not attain the status of a medically-recognised, distinct clinical entity until the last quarter of the twentieth century.

Physicians have been aware of the problem for a long time. Already in 1966, Jonas Robitscher suggested that posttraumatic neurosis should be regarded as a diagnostic category distinct from other neurotic conditions. He proposed that just as a physical cause can produce physical disease, fright or stress alone, without physical trauma, can produce a well-defined psychiatric illness, traumatic neurosis. The diagnosis of traumatic neurosis, as it was understood in the early 1960s, presupposed ‘a mentally

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692 World Health Organization Geneva (1992), Lexicon of Psychiatric and Mental Health Terms: The ICD-10 Classification of Mental and Behavioural Disorders, World Health Organization Press, Geneva, at 170-71. The term, ‘somatoform disorders’ has been defined as denoting a group of disorders which is characterised by physical symptoms suggesting physical disorder but without demonstrable organic findings or known physiological mechanisms to explain the symptoms, in circumstances where ‘there is positive evidence, or a strong presumption, that the symptoms are linked to psychological factors or conflicts’. American Psychiatric Association (1980), Diagnostic and Statistical Manual of Mental Disorders, (DSM-III), (3rd ed.) American Psychiatric Association Press, Washington D.C., at 241.


694 Robitscher, J. op. cit. fn. 605.

695 Id. at 102-103.
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A healthy individual who would not have developed the illness had it not been for a major trauma. Robitscher was involved in the medico-legal polemics on the nature of neurosis as compensable damage, and nosological differences, if any, among ‘posttraumatic psychoneurosis’, ‘compensation neurosis’ and ‘malingering’.

Robitscher pointed out that in the United States, decisions in workers’ compensation cases relating to nervous shock were much more liberal when compared with decisions at common law. He ascribed this to the courts’ cognisance that ‘a worker who does not have health insurance and does not have substantial savings will have to be provided for either by workmen’s compensation funds or by the community’. With widespread, and often compulsory, third party insurance, a similar conclusion could be reached about persons who are injured outside the work place. However, this was not so. Although the medical profession debated the possible aetiology and symptomatology of traumatic neurosis for a number of decades, it was only after the publication in 1968 of a comprehensive monograph on this topic by Keiser that the concept of traumatic neurosis received close scientific attention from clinicians and researchers, eventually acquiring the appellation of Posttraumatic Stress Disorder (PTSD).

In the early 1970s, protocols were developed by researchers at Washington University which enabled medical scientists to undertake large-scale epidemiological studies of disorders. The projects that followed produced explicit, rule-guided criteria for twenty-five major diagnostic categories. These were called Research Diagnostic Criteria (RDC). It was also at that time that a statistic, called ‘kappa’ for the measurement and calibration of reliability of the RDC was developed at Columbia University.

In 1974, in response to the confusion in the taxonomic and nosological classification of psychiatric conditions, the Council on Research and Development of the American Psychiatric Association appointed a Task Force on Nomenclature and Statistics. Its aim was to provide standardized

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696 Id. at 106.
697 Id. at 117.
700 Young, A. op. cit. fn. 190, Chapter III, ‘The DSM-III Revolution’ at 104.
psychiatric nosology consisting of ‘clear descriptions of diagnostic categories in order to enable clinicians and investigators to diagnose, communicate about, study and treat various mental disorders’.

The Task Force’s project was to be published in the third edition of the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders, (DSM-III). The first edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM I) appeared in 1952, and the second in 1968. The first two editions of the manual were essentially glossaries of descriptions of the then existing diagnostic categories in psychiatry. For example, DSM I identified a condition called ‘gross stress reaction’ as a transient psychoneurotic disorder originating in an experience of intolerable stress. In DSM II, this diagnosis was abandoned in favour of an even more nebulous one, defined as ‘transient situational disturbances’ with the following commentary: ‘If the patient has good adaptive capacity his symptoms usually recede as the stress diminishes. If, however, the symptoms persist after the stress is removed, the diagnosis of another mental disorder is indicated’. Psychiatrists engaged in diagnostic research found the nomenclature created by these manuals too imprecise for their purposes, which meant that the DSM I and DSM II failed to achieve acceptance among the whole of the psychiatric profession.

Professor Robert Spitzer, who was associated with both the Washington University and the Columbia University studies, was appointed the Editor-in-Chief of DSM-III. In the best eighteenth century tradition of scientific medicine, he decided that the manual would only include theories of pathogenesis [the origin and course of development of disease] which were confirmed by principles of ‘testability and verification’, and disorders which could be identified by criteria accessible to empirical observation and measurement. It was acknowledged that despite a variety of theories attempting to explain how particular psychiatric disorders came to manifest themselves, the aetiology for most mental disorders was still unknown.

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701 DSM-III op. cit. fn. 690, at 12.
702 American Psychiatric Association (1952), Diagnostic and Statistical Manual of Mental Disorders, American Psychiatric Association Press, Washington D.C.
705 Id. at 6-7.
Consequently, the new classification was to be based on ‘atheoretical and operational criteria’, so that adherents of ‘different theoretical perspectives would be able to write and talk about the same disorders, and researchers would be able to communicate directly with clinicians’. To this end, the Task Force established fourteen advisory committees, consisting of experts in the major categories of mental disorders. In order to reach a general consensus within the profession, each committee produced a series of drafts which were widely circulated, commented upon, and debated.

The debates were often vigorous because certain sections of the psychiatric profession, particularly the psychoanalysts, perceived the establishment of a new system as being adverse to their ideas and interests. In 1978 they put forward a psychoanalytical model of traumatic neurosis based on the concept of a ‘stimulus barrier’ - a complex ego function measurable in terms of a person’s psychological ability to adapt to negative stimuli and experience. Suggesting that the ‘stimulus barrier’ to psychic trauma has an innate biological component, they argued that with the personal maturation process the stimulus barrier becomes gradually reinforced through psychological components consisting of the ego’s defensive functions. These defensive functions become activated in response to a negative experience. When the defensive functions are unable to master or assimilate the negative experience, the state of anxiety ensues which, depending on the gravity of the failure to cope with the experience, may result in an acute traumatic reaction. At about the same time, clinical studies on the neuroendocrine response to stress began to indicate that patients with a neurotic disorder may have less effective mechanisms to maintain psychoendocrine homoeostasis, and that this purely biological vulnerability may underlie an increased likelihood of developing severe emotional symptoms following stressful situations.

In 1978 the Committee on Reactive Disorders submitted to the Task

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706 Young, A. op. cit. fn. 190, at 99.
707 Ibid.
The History of the Liability for Negligently Caused Psychiatric Injury

Force its report recommending that a diagnosis of ‘catastrophic stress disorder’ be included in the third edition of the manual to describe the psychiatric sequelae of natural and man-made catastrophes. When DSM-III was published in 1980, it provided, for the first time, detailed diagnostic criteria for PTSD. DSM-III classified PTSD as a type of anxiety neurosis. The diagnostic criteria of PTSD incorporated the existence of a recognisable traumatic stressor, which was ‘outside the range of usual human experience’, and would evoke significant symptoms of distress in almost everyone. The symptomatology of the disorder included: intrusive re-experiencing of the traumatic event by the patient (flashbacks); persistent avoidance of stimuli associated with reminders of that event; reduced involvement with the external world following the shock (psychic numbing); persistent symptoms of increased arousal; and previous absence of certain anxiety symptoms which would manifest themselves after the traumatic event.

DSM-III accorded formal recognition to the scientific theory, based on more than a hundred years of clinical observations, that PTSD is a specific psychiatric diagnosis with emotional pathology which may well have a biological foundation. The diagnosis was, however, open to the same objection that pertained to the diagnosis of neurasthenia, namely that it was described ‘almost exclusively in terms of psychological symptoms, most of which were based on self report’.

According to DSM-III, PTSD is the result of a traumatic event, called a ‘traumatic stressor’ or a triggering event. The pivotal function of the traumatic stressor is the feature which distinguishes the collection of syndromes known as PTSD from otherwise identical syndromes that are found in combinations of depression and anxiety disorders. The ‘traumatic event’ sufficient to trigger PTSD was defined as an exposure to environmental factors which are ‘outside the range of human experiences’ and ‘markedly distressful to almost everyone’.

The National Veterans Resource Project. This United States’ advocacy group played an important role in collecting data on the stress response syndromes among the Vietnam veterans. Young, A. op. cit. fn. 190, at 107-114.


Young, A. op. cit. fn. 190, at 288.

Retained in DSM-III-R op. cit. fn. 701.
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on data produced by research among Vietnam veterans. Using the ‘outside the range of human experiences’ definition of a traumatic event, the first epidemiological study of PTSD found that the prevalence of this disorder was in the order of one per cent.\textsuperscript{716} However, clinicians interpreted the content of traumatic event broadly, and DSM-III-R, which was published in 1987, provided a more expansive definition of the ‘traumatic trigger’.\textsuperscript{717} The term included a serious threat to one’s life or physical integrity, a serious threat to one’s children, spouse, or close relatives and friends, destruction of one’s home or community, or ‘seeing another person who is mutilated, dying, or dead or the victim of physical violence’.\textsuperscript{718} Moreover, those psychiatrists who accepted the psychodynamic model of PTSD considered any emotionally painful, though not physically threatening, disruption of family life that may impact upon a developing child to be ‘traumatic’. Using the DSM-III-R criteria, community-based studies have revealed a lifetime prevalence of PTSD of up to 14 per cent.\textsuperscript{719}

\textbf{McLoughlin v. O’Brian: the House of Lords’ extension of the doctrine of an immediate aftermath}

Some of these new medical, psychoanalytical and neurobiological developments were specifically considered by legal writers.\textsuperscript{720} The medical recognition of PTSD as a specific psychiatric diagnosis with putative biological - as well as emotional - pathology has also made some judges more receptive to jurisprudential aspects of psychological and neurophysiological sequelae to a non-physical trauma. \textit{McLoughlin v. O’Brien}\textsuperscript{721} was the first major case in which the House of Lords extended the ambit of the defendant’s liability for negligently occasioned pure psychiatric injury. In this case, the plaintiff, Mrs McLoughlin, was at home, about two miles away from the scene of the accident, at the time when a


\textsuperscript{717} DSM-III-R op. cit. fn. 701.

\textsuperscript{718} Id.


\textsuperscript{720} Hart, J.M. (1977), ‘Neurosis Following Trauma: A Dark Horse in the Field of Mental Disturbance’, \textit{Cumberland Law Rev.}, vol. 8, 495-519.

negligently driven lorry collided with a car in which one of her children, George, was driving her husband and two of his siblings. It was over an hour before Mrs McLoughlin was told of the tragedy, and another hour before she arrived at the hospital where the injured were taken. There she was told that her three-year-old daughter Gillian was dead. She then saw her daughter Kathleen, aged seven, crying, ‘with her face cut and begrimed with dirt and oil’. Mrs McLoughlin’s husband was in a very distressed state, and she could hear the screams of her seventeen-year-old son, before she was taken to see him. Suffering from serious wounds to his face and body, he appeared to recognize her before lapsing into unconsciousness. Mrs McLoughlin suffered severe depression and change of personality. She sued the driver of the lorry for damages for negligently caused nervous shock.

The Court of Appeal, though very sympathetic to her plight, denied recovery to Mrs McLoughlin on the grounds that it was settled law that the duty of care owed by a driver of a vehicle was limited to persons or owners of property at or near the scene of the accident and directly affected by his or her negligence. Stephenson LJ commented on the artificiality of legal analysis which sets very strict spatial and temporal limits upon a defendant’s liability in cases of nervous shock occasioned by negligently inflicted emotional rather than physical trauma. He came to the conclusion that:

To restrict the ambit of the duty owed by those responsible for driving carefully on a highway to those who are injured by shock when themselves on or near the highway would be to exclude from the mind of a hypothetical reasonable observer knowledge of now foreseeable medical facts or to attribute to his mind’s eye enlightened by progressive awareness of mental illness an abnormal degree of myopia.

On appeal, the House of Lords unanimously, though along different lines of reasoning, determined that the plaintiff could recover for nervous shock.

Their Lordships acknowledged that the concept of nervous shock as understood and used by lawyers was outdated and should be abandoned. Lord Wilberforce said:

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723 Id. at 1027.
Although we continue to use the hallowed expression ‘nervous shock’, English law, and common understanding, have moved some distance since the recognition was given to this symptom as a basis of liability. Whatever is unknown about the mind-body relationship (and the area of ignorance seems to expand with that of knowledge), it is now accepted by medical science that recognisable and severe physical damage to the human body and system may be caused by the impact, through the senses, of external events on the mind. There may thus be produced what is as identifiable an illness as any that may be caused by direct physical impact.\footnote{McLoughlin v. O’Brian [1983] op. cit. fn. 719, at 418.}

According to Lord Bridge of Harwich, the decision whether and in what circumstances, the emotional trauma resulting from negligently occasioned death or injury of third parties or a threat thereof was a foreseeable cause in law, as well as an actual cause in fact of the plaintiff’s psychiatric illness should be left to informed judicial opinion. His Lordship then commented that:

For too long earlier generations of judges have regarded psychiatry and psychiatrists with suspicion, if not hostility. Now I venture to hope, that attitude has quite disappeared. ... I would suppose that the legal profession well understands that an acute emotional trauma, like physical trauma, can well cause a psychiatric illness in a wide range of circumstances and in a wide range of individuals whom it would be wrong to regard as having any abnormal psychological make-up. ... It is only by giving effect to these insights in the developing law of negligence that we can do justice to an important, though no doubt small, class of plaintiffs whose genuine psychiatric illnesses are caused by negligent defendants.\footnote{Id. at 433.}

He referred to the dissenting judgment of Evatt J in the Chester case in these terms:

In a powerful dissenting judgment, which I find wholly convincing, Evatt J drew a vivid picture of the mother’s agony of mind as the search continued, culminating in the gruesome discovery in her presence of the child’s drowned body. I cannot for a moment doubt the correctness of his conclusion that the mother’s mental illness was the reasonable foreseeable consequence of the defendant’s negligence.\footnote{Id. at 439.}
Lord Wilberforce and Lord Edmund-Davies expressed concern about the scope of the cause of action and asserted that the foreseeability test should not be the sole test of the validity of a claim brought in negligence to automatically determine the existence of a duty of care. Rather, reasonable foreseeability should be accompanied by policy considerations which may either extend or limit the range of persons to whom the duty may be owed by negligent drivers. Lord Wilberforce, while acknowledging that ‘to insist upon direct sight and hearing would be impractical and unjust’, 727 nevertheless stressed the determinative importance of the two limiting factors:

i. the plaintiff’s proximity in time and space to the accident, and

ii. the claimant’s relationship of care to the primary victim.

Lord Scarman and Lord Bridge suggested that it was inappropriate to curtail a cause of action in order to satisfy judicial policy. While Lord Russell of Killowen did not deny that notions of judicial policy could be relevant in an appropriate case, he found that the facts of the case did not raise any issue of judicial policy. Lord Bridge criticised the arbitrariness of drawing policy lines by reference to such factors as proximity of time and space, the relationship of the parties and the mode of experiencing the accident, when they are utilised as additional requirements to the fundamental criterion of reasonable foreseeability. According to Lord Bridge, these factors should only be considered for any relevance they might have on the degree of foreseeability of the plaintiff’s psychiatric illness. 728 The reasoning of Lords Wilberforce and Bridge was relied upon by the High Court of Australia when it decided the case of *Jaensch v. Coffey*. 729

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727 Id. at 422.
729 *Jaensch v. Coffey* op. cit. fn. 530.
Developments in the Post World War II Period
9 Jaensch v. Coffey and the New Notion of Proximity

In 1983, just like the House of Lords in the case of McLoughlin v. O’Brian, the High Court of Australia came to examine the question whether the defendant should owe a duty of care to a plaintiff who was not present at the site of the accident in which her husband was badly hurt, but who suffered nervous shock after seeing the injured husband at the hospital. Mrs Coffey was at home in the evening of 2 June 1979, away from the scene of the accident, when her husband Allan was seriously injured in a collision which was due to the admitted negligence of Mr Jaensch, the defendant. After being notified of the accident, Mrs Coffey went to the hospital where she saw her husband with his hips dislocated and in obvious pain. She spent anxious hours while he underwent three operations. Mr Coffey remained in a critical condition for three or four weeks afterwards.\(^{730}\)

Some six days after the accident Mrs Coffey developed the initial symptoms of severe anxiety and depression. These evolved into a serious psychiatric illness which on one occasion involved an admission to a psychiatric ward at Royal Adelaide Hospital. Expert evidence was given to the effect that Mrs Coffey’s psychiatric condition caused gynaecological problems, and a hysterectomy was performed. Mrs Coffey sued the driver of the car which had collided with her husband for nervous shock.

In issue was duty of care.\(^{731}\) The defence argued that Mrs Coffey should not recover damages for nervous shock because she was not present at the site of the accident, and because she was predisposed to nervous shock through the tragic experiences which had marred her childhood. Both these arguments were rejected by the Supreme Court of South Australia which awarded damages for nervous shock to Mrs Coffey, and the High Court

\(^{730}\) Id. at 558-559, and 588.

\(^{731}\) On the issue of causation, the High Court accepted the trial judge’s finding ‘that the things which she saw and heard on the night of 2nd/3rd June 1979 and during 3rd June after she had gone to the hospital in response to a telephone call at about 8.30 a.m. caused her psychiatric illness - anxiety and depression’. Jaensch v. Coffey id. at 559.
disembled the appeal against that judgment.\textsuperscript{732}

From the medico-legal point of view, one of the most important aspects of the case was the High Court’s recognition that nervous shock is both like and unlike a physical injury. The High Court unanimously confirmed the decision in \textit{Pusey} that in cases where there was no physical impact, damage for the purposes of nervous shock includes any recognised psychiatric disorder which is capable of resulting from shock. This consideration made the medical diagnosis of the plaintiff’s psychiatric condition pivotal in determining, at the threshold stage, whether or not the claimant would have a cause of action in nervous shock. Medical diagnosis of the plaintiff’s injury has always been important at the stage of causation, remoteness of damage and for the purposes of assessment of quantum of damages. But in the non-physical impact cases, especially of the third category, medical diagnosis is decisive of whether or not the plaintiff has a cause of action at all. In order to found an action for nervous shock, the plaintiff must suffer the requisite damage. It is the medical practitioner who makes the diagnosis as to whether or not the plaintiff’s alleged injury amounts to a psychiatric illness; however, the court will decide the acceptability of the medical opinion.\textsuperscript{733}

Both Brennan and Deane JJ, in their separate judgments, attempted to clarify the type of psychiatric disorders which would be included under the rubric of nervous shock. They recognised that at the time there was no unequivocal, scientifically tested medical explanation of the likely causes of a psychiatric illness consequent upon an accident involving actual or threatened serious injury to another person. Deane J referred to psychoneurosis and mental injury that does not result from, and is not associated with, an apparent bodily harm as a ‘mere psychiatric injury’. Reviewing medical literature on the subject of nervous shock,\textsuperscript{734} his Honour noted that despite advances in the knowledge of mental illness since the

\textsuperscript{733} \textit{Swan v. Williams (Demolition) Pty. Ltd.} 9 N.S.W.L.R. 172.
majority decision in the *Chester* case, ‘much remains unexplained and uncertain even among experts’. The court determined that the plaintiff suing for mere nervous shock has to produce evidence of an element of sudden fright or surprise acting as a ‘trigger’ to neurosis following trauma occasioned by the defendant’s wrongful conduct. However, the claimant does not have to prove a correlation between psychiatric illness caused by nervous shock and the severity of the ‘shock’.

Until *Jaensch v. Coffey*, the identification of emotional illness with physical injury meant that the courts insisted upon the plaintiff having either to perceive the actual accident with his or her ‘unaided senses’. He or she had to be actually present, or close enough to the site of the accident to directly observe the immediate effect of the defendant’s wrongful conduct. By implication, a plaintiff who was away from the site of the accident, but who suffered an emotional injury upon being informed about the consequences of the defendant’s negligent conduct, could only recover damages for nervous shock by showing that the defendant had owed him or her the relevant duty of care prior to the accident.

With perfect circularity, the prior duty of care would have been owed to the plaintiff by the defendant where there was sufficient physical and temporal proximity between them to establish such a relationship. For example, where they were both road users at the relevant time and the plaintiff’s physical well-being was actually threatened by the defendant’s conduct. In such situations of pre-existing duty of care, the plaintiff could sometimes recover damages for shock resulting from the defendant’s negligence even though, technically, the shock was caused by information conveyed to the plaintiff rather than through emotionally stressful sensory perception of the actual accident. However, the law did not offer any clear guidelines on the issue and, as a consequence, decisions tended to be quite arbitrary.

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735 *Jaensch v. Coffey* op. cit. fn. 530, at 600.
736 Id. at 601.
738 In *Storm v. Geeves, Mount Isa Mines v. Pusey* and *Benson v. Lee* the respective plaintiffs arrived at the scene of the accident almost immediately and did not merely observe the tragic aftermath of the defendant’s negligence but were actively involved in caring for its victims.
739 *Hambrook v. Stokes* op. cit. fn. 401, at 142.
740 *Andrews v. Williams* op. cit. fn. 579, but cf: *Spencer v. Associated Milk Services* op. cit. fn. 578.
In *Jaensch v. Coffey*, the High Court held that the definition of an ‘aftermath’ of an accident giving rise to a claim of nervous shock should not be restricted to the claimant being present at the actual site of the accident. Rather, the definition of such an ‘aftermath’ should extend to the hospital during the period of the immediate post-accident treatment of the person physically injured by the tortfeasor. Mr Justice Deane said that:

> The facts constituting a road accident and its aftermath are not ... necessarily confined to the immediate point of impact. They may extend to wherever sound may carry and to wherever flying debris may land. The aftermath of the accident encompasses events at the scene after its occurrence, including the extraction and the treatment of the injured. In a modern society, aftermath also extends to the ambulance taking an injured person to hospital for treatment and to the hospital itself during the period of immediate post-accident treatment.

Therefore, according to the High Court, the fact that Mrs Coffey was not involved in the collision in which her husband was injured, and did not even witness it, would not debar her from compensation for nervous shock. The High Court noted that in view of today’s fast and efficient ambulance services, ‘liability cannot rationally be made to depend upon a race between the spouse and an ambulance’.

Deane J said that the progress of medical technology has enabled doctors to save many victims of serious accidents who previously had no chance of survival. His Honour gave an example of circumstances where a victim of a collision suffers an injury to the spinal cord caused by a bloodless accident. The shock sustained by the plaintiff - a close relative - present at the scene of the tragedy would be rendered insignificant by the shock of information provided to that person at the hospital.

In the process of extending the liability of the defendants to include plaintiffs who were not present at the site of the accident but only saw the physically injured person at the hospital, the High Court also established four (possibly five) prerequisites to the recovery of damages for nervous shock in such cases.

The first requirement is that the claimant should perceive the shocking event through his or her ‘own unaided senses’, and that the risk of a psychiatric illness developing as a result of this shock to the senses must be reasonably foreseeable. Secondly, it is essential that the damage take the

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741 *Jaensch v. Coffey* op. cit. fn. 530, at 607-608.
742 Id. at 578, per Brennan J.
form of a recognised psychiatric illness. According to the third prerequisite, the plaintiff had to be in close physical and temporal proximity to the site of the accident or to its ‘immediate aftermath’. The ‘immediate aftermath’ was defined by the High Court as including the hospital during the period of the immediate post-accident treatment of the person physically injured by the tortfeasor.

In complying with the fourth requirement, the claimant suing for nervous shock in non-physical impact cases has to show that he or she is a person of normal disposition. This last requirement was not stated by the High Court in categorical terms, but neither has it been explicitly rejected. Windeyer J in the Pusey case expressed his dissatisfaction with the legal rule regarding predisposition in non-physical impact cases of nervous shock. According to this rule, a claimant who has suffered shock through perception of a wrongful injury to another can have no action in negligence unless such claimant is shown to be emotionally and mentally ‘normal’. Windeyer J commented that:

The idea of a man of normal emotional fibre, as distinct from a man sensitive, susceptible and more easily disturbed emotionally and mentally, is I think imprecise and scientifically inexact.

In Jaensch v. Coffey, however, the High Court ignored Windeyer J’s observation and assumed that in order to be recoverable nervous shock must be produced on a person of ‘normal fortitude’, ‘normal disposition’, or ‘normal standard of susceptibility’. Chief Justice Gibbs said that

It may be assumed (without deciding) that injury for nervous shock is not recoverable unless an ordinary person of normal fortitude in the position of the plaintiff would have suffered some shock.

It may be trite to note here that every person has a breaking point in respect of traumatic stress, beyond which he or she will develop a specific psychiatric disorder which in law may be recognised as nervous shock.

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743 The High Court noted that Mrs Coffey, despite earlier psychological problems, was at the time of her husband’s accident ‘a person of normal fortitude’.


745 The requirement of predisposition was originally imposed by Wright J in Wilkinson v. Downton op. cit. fn. 215, who stated that nervous shock must be produced on a person ‘in ordinary state of health and mind’.

746 Jaensch v. Coffey op. cit. fn. 530, at 556.
There are psychiatric rating scales for stressful life events which give comparative values in rank order for these experiences. In *Jaensch v. Coffey* the High Court adopted the finding of the trial judge that Mrs Coffey was a person of normal fortitude. Therefore it is arguable that their Honours left open the question as to whether the proof of the plaintiff being a person of normal disposition is an absolute precondition to recovery in the third category of nervous shock cases. The better view is that the issue of normal fortitude is merely one of the factors to be taken into account when the remoteness of damage is being considered.

Apart from the prerequisites discussed above, the High Court in *Jaensch v. Coffey* also imposed a number of limitations upon recoverability of damages for non-physical impact nervous shock. Thus, the High Court reaffirmed the rule in *Blake v. Midland Rly. Co.* that such emotions as anxiety and ‘mere grief and sorrow’ do not sound in damages. Deane J, following earlier authorities, reiterated:

> It is now settled law in this country that there is a distinction, for the purposes of the law of negligence, between mere grief or sorrow which does not sound in damages and forms of psychoneurosis and mental illness (which lawyers imprecisely termed ‘nervous shock’) which may.

In respect of the duty of care, the High Court refused to extend the liability of defendants to those plaintiffs whose psychiatric illness was not caused by the shock sustained at the approximate time of the actual injury or death of a close relative, but which followed later upon bereavement or anxiety. The High Court noted that the law should be slow in recognising the claims of plaintiffs whose psychiatric illness does not stem from a sudden sensory perception of the shocking event, but from a more remote consequence of prolonged and constant association and care of a seriously injured relative subsequent to immediate post-accident treatment. Mr Justice Brennan (as he then was) gave the following examples of circumstances that may lead to psychiatric illness which is not compensable at law:

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747 DSM-III-R op. cit. fn. 701.
The spouse who has been worn down by caring for a tortiously injured husband or wife who suffers psychiatric illness as a result goes without compensation; a parent made distraught by the wayward conduct of a brain-damaged child and who suffers psychiatric illness as a result has no claim against the tortfeasor liable to the child.\(^{750}\)

Moreover, the High Court reiterated the exception to the general duty of care in negligence, that the plaintiff’s nervous shock, if sustained as a result of concern brought about by death, injury or peril of the defendant himself or herself, will not be compensable.\(^{751}\) Finally, the High Court noted that the scope of the defendant’s duty of care in nervous shock cases should exclude mere bystanders.\(^{752}\) According to \textit{Jaensch v. Coffey}, although the categories of claimants for nervous shock are not closed, it is unlikely that ‘mere bystanders’ - as against rescuers and persons with close emotional ties to the victim of the shocking event - will be successful in an action to recover damages for nervous shock unless they can satisfy the requirement of proximity.

In \textit{Jaensch v. Coffey} the High Court did not have to decide whether the plaintiff, who only heard of the accident but who had no visual perception of it or its aftermath, would be able to recover damages for nervous shock. However, in an \textit{obiter dictum} Deane J stated that it would be difficult to discern an acceptable reason why a rule based on public policy would preclude recovery for psychiatric illness sustained by a wife or a mother who is so devastated by being told on a telephone that her husband and children have all just been killed that she is unable to attend at the scene.\(^{753}\)

\textbf{The requirement of sudden single impact}

The High Court in \textit{Jaensch v. Coffey} confirmed that the injury contemplated by the expression ‘nervous shock’ for the purpose of the law of negligence is a psychiatric illness caused by shock. Technically, the injury for which recovery is allowed is not the shock itself. Rather, it is the illness resulting from it. In \textit{Mount Isa Mines Ltd. v. Pusey}, Windeyer J explained the

\(^{750}\) \textit{Jaensch v. Coffey}, at 565; see also Deane J at 606.

\(^{751}\) This exception was first formulated in \textit{Bourhill v. Young} op. cit. fn. 411; see also: \textit{Rowe v. McCartney} [1976] 2 N.S.W.L.R. 72.

\(^{752}\) Lord Atkin in \textit{Hambrock v. Stokes} op. cit. fn. 401, first discussed the possibility of bystanders being able to recover damages for nervous shock.

\(^{753}\) \textit{Jaensch v. Coffey} op. cit. fn. 530, at 608.
consequential sense of the term nervous shock in the following terms:

Sorrow does not sound in damages. A plaintiff in an action in negligence cannot recover damages for a ‘shock’, however grievous, which was no more than an immediate emotional response to a distressing experience sudden, severe and saddening. It is, however, today a known medical fact that severe emotional distress can be a starting point of a lasting disorder of mind and body, some form of psychoneurosis or a psychosomatic illness. For that, if it be the result of a tortious act, damages may be had. It is in that consequential sense that the term ‘nervous shock’ has come into law. 754

Brennan J stated that the denotation ‘nervous shock’ was useful as a term of art to indicate the aetiology of a psychiatric illness for which damages are recoverable. For legal purposes, such psychiatric illness may comprise any form of mental or psychological disorder capable of resulting from shock. Brennan J used the phrase ‘shock-induced psychiatric illness’ throughout his judgment, thus stressing the importance which the High Court assigned to the sudden traumatic impact upon the plaintiff when establishing causation between shock and the consequent mental disorder. 755

According to Brennan J:

A plaintiff may recover only if the psychiatric illness is the result of physical injury negligently inflicted on him by the defendant or if it is induced by ‘shock’. Psychiatric illness caused in other ways attracts no damages, though it is reasonably foreseeable that psychiatric illness might be a consequence of the defendant’s carelessness. 756

His Honour defined ‘shock’ as:

… the sudden sensory perception - that is, by seeing, hearing or touching - of a person, thing or event, which is so distressing that the perception of the

754 Mount Isa Mines v. Pusey op. cit. fn. 611, at 394.
755 In Nader v. Urban Transit Authority of N.S.W. [1985] 2 N.S.W.L.R. 501 the New South Wales Court of Appeal held that the plaintiff could recover for Ganser syndrome, a rare psychiatric disorder, which he claimed to suffer as a consequence of hitting his head against an electricity pole after he jumped from a slow moving bus driven by the defendant.
756 Jaensch v. Coffey op. cit. 530, at 565, per Brennan J.
phenomenon affronts or insults the plaintiff’s mind and causes a recognizable psychiatric illness.\textsuperscript{757}

He added that a psychiatric illness induced by mere knowledge of a distressing fact is not compensable.\textsuperscript{758} The test of whether the phenomenon perceived or experienced by the plaintiff is capable of amounting to a ‘shock’ in law is twofold, and consists of:

i. an objective requirement that the distressing aspects of the phenomenon in question be perceived as such by anybody, and

ii. a subjective element of ‘any special significance which the phenomenon may have for the person who perceives it.’

With respect to the subjective element, the law recognises that it is reasonably foreseeable, and therefore ought to be in the defendant’s contemplation, that conduct which creates risks to the life and limb of the plaintiff will have ‘special significance’ to people who are connected with the victim through a close family relationship or particular bonds of love and affection. At the same time, Brennan J pointed out that:

… unless a plaintiff’s extraordinary susceptibility to psychiatric illness induced by shock is known to the defendant, the existence of a duty of care owed to the plaintiff is to be determined upon the assumption that he is of a normal standard of susceptibility.\textsuperscript{759}

Brennan J’s view that the plaintiff may only recover for non-physical impact psychiatric injury if it is induced by a single shocking event which includes the immediate aftermath of the accident, was accepted by other members of the High Court. This rule presumably was devised in order to prevent liability of defendants to plaintiffs like Mrs Chiaverini in \textit{Chiaverini v. Hockey & Anor.},\textsuperscript{760} who sued for damages for nervous shock arising out her husband’s physical injuries. He sustained these injuries in two separate, relatively minor, motor vehicle accidents. According to the medical reports, Mrs Chiaverini, was suffering from a reactive depressive illness which was not triggered by a particular catastrophic event, but was ‘a direct response to her husband’s chronic disability’. Another cause of the plaintiff’s illness was attributed to her dissatisfaction with the actions of the legal

\textsuperscript{757} Id. at 565.
\textsuperscript{758} Ibid.
\textsuperscript{759} Ibid.
representatives who effected settlements for her husband’s claims for damages.\footnote{Id. at 62,256. See also the Canadian case of \textit{Beecham v. Hughes} (1988) 52 D.L.R. 4th 625; 10 A.C.W.S. 3d 149.}

There are many instances in which the sudden impact rule has precluded recovery of damages for nervous shock by plaintiffs who suffered psychiatric illness as a result of a series of shocking events occasioned by the defendant’s negligence. One of the more bizarre results of its application, is the case of \textit{Lowns & Anor. v. Woods & Ors.}\footnote{\textit{Lowns & Anor. v. Woods & Ors.} [1996] Aust Torts Reps 63,151 ¶81-376.} In this medical malpractice suit, the court found that the eleven-years-old Patrick Wood’s prolonged epileptic fit\footnote{Status epilepticus or grand mal status is a complication of epilepsy, whereby generalised convulsions occur at a frequency that does not allow consciousness to be regained in the interval between seizures.} which damaged his brain, resulting in quadriplegia, was occasioned by the negligence of the defendant medical practitioner. Patrick’s mother found the child fitting, after she returned from a walk. While attending to the child, she told her elder son to go to the ambulance station and get the ambulance, while her daughter was told to fetch a doctor. Apparently, the doctor refused to attend the child who was not his patient, and the ambulance attendants were unable to administer any useful treatment. They called for an intensive care ambulance to meet them at a nearby medical centre. Patrick’s mother was with her son at all times. At the medical centre, Patrick was given ‘immediate and appropriate treatment’, which, however, proved unsuccessful. He was then taken by an intensive care ambulance to a regional hospital, where massive doses of various medications eventually brought the \textit{grand mal} status to an end. From the hospital, the mother telephoned her former husband and the child’s father, Harry Woods, and told him what had occurred. The father, who suffered a psychiatric disorder as a consequence of being informed of Patrick’s injuries, was awarded $57,800 in damages for nervous shock, under s. 3(2) of the \textit{Law Reform (Miscellaneous Provisions) Act} 1944 (NSW) and common law. However, the action for damages for negligently occasioned psychiatric injury by Patrick’s mother failed because she was unable to establish the necessary element of suddenness in her perception of the gravity of Patrick’s condition.\footnote{\textit{Jaensch v. Coffey} op. cit. fn. 530, at 566-567, per Brennan J. For a critical analysis of this decision see: Mendelson, D. (1996), ‘Dr Lowns and the Obligation to Treat,}
There is no jurisprudential justification for the single shocking event rule in cases in which the psychiatric illness can be said to have been induced by a catastrophic event in the sense described by Brennan J in *Jaensch v. Coffey*. There is no equivalent restriction of sudden single impact in relation to cases of demonstrable physical harm. The sudden single impact rule is, in effect, yet another variant of the restrictive substantive approach towards compensation for nervous shock.

**Deane J’s notion of proximity**

Both Mrs Coffey and Mrs McLoughlin not only did not experience any physical impact, but they were both well outside the zone of danger created by the defendant’s negligent conduct. Therefore liability for their pure psychiatric injury represented a novel category of case relating to nervous shock. The Atkinian ‘neighbourhood’ test for determination of the duty of care contains an ambiguity. It is unclear whether the test was intended to be a strictly technical test of reasonable foresight, or a convenient label under which judges could exercise their discretion by considering extraneous factors while they determined the existence of a duty. The tension between the principle of reasonable foresight as a general foundation of the duty of care and the policy considerations which may negative, reduce or limit the scope of the duty were first noted in 1970 by Lord Reid in *Home Office v Dorset Yacht Club*.

Referring to Lord Atkin’s neighbourhood test, his Lordship said that ‘The time has come when we can and should say that it ought to apply unless there is some justification or valid explanation for its exclusion.’ Lord Wilberforce in the case of *Anns v Merton London Borough Council* devised a two-tier analysis of a duty of care which included an application of the test of reasonable foreseeability followed by examination of relevant policy considerations. His Lordship provided a jurisprudential foundation for the two-tier approach in *McLoughlin v*
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O’Brian, where, citing Lord Atkin’s legal ‘neighbourhood’ principle in Donoghue v Stevenson, he stressed that:

… foreseeability must be accompanied and limited by the law’s judgment as to persons who ought, according to its standards of value or justice, to have been in contemplation. Foreseeability, which involves a hypothetical person, looking with hindsight at an event which has occurred, is a formula adopted by English law not merely for defining, but also for limiting the persons to whom duty may be owed and the consequences for which an actor may be held responsible . . . When it is said to result in a duty of care being owed to a person or class, the statement that there is a ‘duty of care’ denotes a conclusion into the forming of which considerations of policy have entered. That foreseeability does not of itself, and automatically, lead to a duty of care is I think clear.

In Australia, Mason J (as he then was) in Wyong Shire Council v. Shirt noted that:

… according to Lord Atkin’s statement of principle in Donoghue v. Stevenson, as it has been refined in later decisions, prima facie a duty of care arises on the part of a defendant to a plaintiff when there exists between them a sufficient relationship of proximity, such that a reasonable man in the defendant’s position would foresee that carelessness on his part may be likely to cause damage to the plaintiff.

In Jaensch v. Coffey, Deane J interpreted Mason J’s statement as suggesting that whereas the test of reasonable foreseeability was sufficient to establish a ‘prima facie’ duty of care on the part of the defendant, there may be circumstances where it will be necessary to place qualifications or limitations on this test. Deane J proposed that the Atkinian requirement of proximity should be re-interpreted to serve as a separate and general limitation upon the traditional test of reasonable foreseeability in new and developing categories of case, including negligently occasioned pure nervous shock, pure economic loss, or negligent misstatement. The requirement of a ‘relationship of proximity’ would act as a policy control

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771 McLoughlin v. O’Brian op. cit. fn. 719.
772 Wyong Shire Council v. Shirt op. cit. fn. 610, at 44. See also Mason J’s judgment in Caltex Oil (Australia) Pty. Ltd. v The Dredge ‘Willemstad’ (1976) 136 C.L.R. 529 at 590-593, as well as Stephen J’s statement suggesting that there needs to be ‘some control mechanism based upon notions of proximity between tortious act and resultant detriment’, at 574.
mechanism to delineate the circumstances or categories of case beyond which the legal duty to take reasonable care to avoid reasonably foreseeable injury will not operate. The judicially determined existence or absence of the required relationship of proximity between parties is particularly important in the ‘landmark’ cases. In these cases an appellate court may decide that a reassessment of the content of the particular rule or rules of law is warranted in the light of current social conditions, standards and demands. The case of Jaensch v. Coffey which raised the issue of compensation for injury in the form of ‘mere psychiatric injury’ was such a ‘landmark’ case.

In developing his argument that the requirement of proximity should be seen as an overriding control mechanism for the existence of the duty of care in certain categories of case, Deane J focused upon the qualifying phrase ‘closely and directly affected’ in Lord Atkin’s definition of a person who in law is one’s ‘neighbour’. He interpreted these words as designating a separate and general limitation upon the test of reasonable foreseeability in the form of relationships which must exist between plaintiff and defendant before a relevant duty of care will arise. The distinction between reasonable foreseeability and proximity was explained by Deane J in the following way:

… reasonable foreseeability on its own indicates no more than that a duty of care will exist, if, and to the extent that, it is not precluded or modified by some applicable overriding requirement or limitation … [t]he essential function of such requirements or limitations is to confine the existence of a duty to take reasonable care to avoid reasonably foreseeable injury to the circumstances or classes of case in which it is the policy of the law to admit it. Such overriding requirements or limitations shape the frontiers of the common law of negligence.

Whereas the Atkinian principle of reasonable foreseeability transcends the concrete aspects of the notion of proximity in the sense of nearness or

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773 ‘You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question’. Donoghue v. Stevenson op. cit. fn. 456, at 580.

774 Jaensch v. Coffey op. cit. fn. 530, at 580-85.

775 Ibid.
closeness in time, space or a pre-existing relationship, and focuses on the theoretical correlation between the acts and unreasonable risks of harm, Deane J’s requirement of proximity as the ‘conceptual determinant’ and a control mechanism for a new category of case focuses on the facts involved in the relationship between the actual parties, as well as the legal nature of that relationship: who should be regarded as so closely affected by the allegedly negligent act of one person and the resulting injury sustained by the other to warrant an imposition of a legal duty of care? Why should the duty of care be imposed?

The ‘who’ and ‘why’ analysis, however, is not an open-ended one. On the contrary, the inquiry into the proximity of the relationship between the parties is circumscribed by a set of criteria identified by the High Court and specific to each category of case. Thus, the category of case relating to negligent misstatement has its own set of criteria to determine the existence of the required relationship of proximity. It includes causal proximity involving an assumption by one party of responsibility to take care to avoid injury, loss or damage to the person or property of another, and reasonable reliance by the plaintiff upon care being taken by the defendant where the defendant knows or ought to know of the plaintiff’s reliance. The negligent misstatement criteria differ from the set of requirements for the category of case involving a non-delegable duty of care. According to the High Court in *Burnie Port Authority v. General Jones Pty. Ltd.*, for a non-delegable duty of care to arise, the relationship between the parties to litigation must have two characteristic features: the central element of control exercised by the person who owes the duty, and a special relationship of dependence or vulnerability on the part of the person to whom the duty is owed.

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776 *Burnie Port Authority v. General Jones Pty. Ltd.* (1994) 179 C.L.R. 520 at 543, per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ.

777 The requirement of proximity will generally not be in dispute in ‘cases involving direct physical damage to person or property’. *Jaensch v. Coffey* op. cit. fn. 530, at 581, per Deane J.

778 The ‘why’ of the analysis includes public interest policy considerations. *Jaensch v. Coffey* op. cit. fn. 530, at 584–85.


780 *Burnie Port Authority v. General Jones Pty. Ltd.* op. cit. fn. 774, at 345, 346. The concept of non-delegable duty of care involves tests for establishing the liability of an occupier or an employer for harm occasioned by the negligence of independent contractors.
The requirement of a relationship of proximity as a prerequisite to the existence of a duty of care in cases of damage by way of ‘mere psychiatric injury’ operates to impose the following criteria:

i. the notion of nearness or closeness in the sense of physical proximity (space and time) between the person or property of the plaintiff and the person or property of the defendant;

ii. circumstantial proximity (the overriding relationship of employer and employee or of a professional man and his client), close family relationships, bonds of affection and friendship;

iii. causal proximity in the sense of the closeness or directness of the relationship between the particular tortious act and the injury sustained;\(^781\) and

iv. policy considerations which may include the balancing of such public interest issues as the ‘opening of floodgates’ and the costs to society of plethora of possible fraudulent claims as against the interests of individual plaintiffs in obtaining compensation for wrongfully inflicted psychiatric injury.

Deane J pointed out that:

A requirement based upon logical or causal proximity between the act of carelessness and the resulting injury is plainly better adapted to reflect notions of fairness and common sense in the context of the need to balance competing and legitimate social interests and claims than is a requirement based merely upon mechanical considerations of geographical or temporal proximity.\(^782\)

The new notion of proximity provided a more structured approach to the examination of (rarely articulated) factors and policy considerations which were central to the ultimate decision whether or not to impose a duty of care in certain circumstance. This is why the new notion was described as:

… the general conceptual determinant and unifying theme of the categories of case in which the common law of negligence recognises the existence of a duty to take reasonable care to avoid a reasonably foreseeable risk of injury to another.\(^783\)

Jurisprudentially, it signalled the beginning of the most important

\(^781\) Jaensch v. Coffey op. cit. fn. 530, at 584-585.
\(^782\) Id. at 607.
\(^783\) Stevens v. Brodribb Sawmilling Co. Pty. Ltd. (1986) 160 C.L.R. 16 at 53, per Deane J.
analytical re-examination of the elements of the duty of care and the standard of care in negligence. The reconceptualisation of the element of fault in fourteenth century England extended tortious liability to harms occasioned by non-violent and indirect conduct. In the seventeenth century, the concept of intention was re-examined allowing for the development of the epistemological distinction between intentional and unintentional torts. In the twentieth century, the new notion of proximity has provided the courts with an intellectual tool for extending the duty of care to those who suffer consequential loss in a controlled manner. It has provided a jurisprudential foundation for new categories of case involving a non-delegable duty of care on the part of employers and occupiers, pure economic loss suffered by subsequent home owners, and certain recipients of negligent advice.

Yet the new notion of proximity is open to criticism on the ground that it does not embody a discrete legal principle. Instead, it elevates policy considerations to the position of main determinants of the existence or otherwise of a duty of care. The open-ended power to determine on the basis of policy considerations the existence of a duty of care and thus liability, is, as Julius Stone pointed out, a self-sanctioned imprimatur for untrammelled judicial discretion. In the case of *Hill trading as R F Hill & Anor; Associates v. Van Erp*, the High Court of Australia expressed reservations about regarding the notion of proximity as ‘a unifying theme’. Dawson J, for example, suggested that the notion of proximity should merely be regarded ‘as expressing the proposition that in the law of negligence reasonable foreseeability of harm may not be enough to establish a duty of care’.

... expresses the result of a process of reasoning rather than the process itself, but it remains a useful term because it signifies that the process of reasoning must be undertaken. But to hope that proximity can describe a common element

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784 Burnie Port Authority v. General Jones Pty. Ltd. op. cit. fn. 774, at 341; Bryan v. Maloney (1995) 182 C.L.R. 609. In this case the majority of the High Court held that the same duty of care that is owed by the builder of a house to its original owner may be owed to a subsequent purchaser of the house.

785 Stone, J. op. cit. fn. 455 at 266-7.

786 *Hill v. Van Erp* (1997) 188 C.L.R. 159. The court held that a solicitor who negligently allowed the spouse of an intended beneficiary to witness the execution of a will owed a duty of care to the disappointed beneficiary in the absence of a contractual relationship.

787 Id. at 497.
underlying all those categories of case in which a duty of care is recognised is to expect more of the term than it can provide.788

Objections to the notion of proximity are equally valid when applied to the notion of reasonable foreseeability of the risk of harm. The test of reasonable foreseeability is very useful for ascertaining the normative standard against which the conduct of the defendant is measured for the purposes of determining fault and, possibly, legal causation. However, logically, the notion of reasonable foreseeability of harm cannot be regarded as a legal principle governing duty of care, because it allows the judges to determine ex post facto which kinds of risk of harm should be included or excluded. The test when used to determine duty of care was (and still is) circular because it requires the judges first to make up their mind about the desirability of imposing liability for a particular kind of harm, and then to use the test ‘to make it legal’. The Atkinian test of reasonable foreseeability was elevated to the status of a fundamental principle allowing the judges to pronounce on the existence or otherwise of a duty of care without having to spell out policy considerations which underlie the choice. This situation was unsatisfactory jurisprudentially and socially. In the better educated and more open Western societies of the second half of the twentieth century, courts came to be regarded as accountable to the society for their conduct and decisions. With no fundamental legal principle to invoke, it became increasingly difficult to defend decisions which refused to admit the existence of a duty of care in circumstances where the harm was clearly foreseeable, but where imposition of liability was regarded by the judges as being contrary to the interests of society. Hence the attempts at formally incorporating policy considerations into the process of legal reasoning. This was done at first through Lord Wilberforce’s two-stage test, and then through Deane J’s notion of proximity, and Brennan J’s ‘incremental’ approach. Each of these approaches has been flawed by failure to provide rules of legal taxonomy for the tort of negligence.

As it stands at present, the tort of negligence is an unwieldy collection of different ‘special duty situations’, each governed by different tests and principles. The old forms of action were abolished at the end of the nineteenth century, however there is no reason why the modern common law should not adapt the old tradition of developing species from a generic tort, for example the tort of trespass to the person with its species of battery.

788 Ibid.
and assault, or the action on the case with its various species including negligence. Conceptually, it would be logical for the general tort of negligence to be split into negligence *simpliciter* (*Donoghue v Stevenson*), and at least three discrete species of causes of action stemming from the generic tort of negligence. They would include the tort of pure nervous shock (in the sense of negligently occasioned mere psychiatric illness), the tort of pure economic loss and the tort of negligent communications.

Nevertheless, for the foreseeable future, in the absence of an alternative set of principles and guidelines, the liability for negligently occasioned psychiatric injury will be governed by factors of the kind to which Deane J referred in *Jaensch v. Coffey*. The courts have not, so far, used the notion of proximity to extend liability for negligently inflicted psychiatric illness to mere bystanders and to those persons whose psychiatric illness has followed upon bereavement or anxiety occasioned by the long illness and subsequent death of a wrongfully injured close relative.

In Canada, the British Columbia Court of Appeal in *Beecham v. Hughes* specifically adopted the reasoning of Deane J, stating that liability for nervous shock is based not on foreseeability alone, but foreseeability limited by proximity considerations. Applying this principle, it held that a plaintiff who developed a ‘reactive depression’ two years after an automobile accident in which his wife was severely injured could not recover because the evidence did not establish sufficient causal proximity. The approach in *Beecham* was upheld in the case of *Rhodes v. Canadian National Railway*, in which the plaintiff’s son, Conor Rhodes, was killed in a railway crash in Alberta for which the defendant was responsible. The plaintiff, Ann Rhodes, heard of the accident on the radio and decided to go to the scene. She was misdirected and then shown the wrong car. Ann had not yet seen her son’s body when she reached the conclusion that he was dead. She claimed damages for nervous shock in the form of depression with suicidal tendencies, which she suffered as a result of the accident.

The Court of Appeal refused to award damages on the grounds that such an injury was not a sufficiently close or direct result of the initial injury suffered by Mrs Rhodes’ son to give rise to liability. She failed to establish the requisite duty of care, because, in the circumstances, her illness was not a reasonably foreseeable direct consequence of the defendant’s negligent

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790 Id. at 664, per Taggart J.
conduct. The court stated that in order to establish liability, the plaintiff would have to show that he or she was associated in some way with the accident itself, or was exposed to some alarming, horrifying, shocking or frightening experience for which the defendant was responsible. Rather confusingly, the court categorised as ‘direct’, and therefore compensable, psychiatric injury caused by the ‘shock’ of the defendant’s tortious conduct. It used the term ‘indirect’ to denote a psychiatric injury resulting from a person’s subsequent reaction to the death of, or injury to, a loved one and the sorrow, anxiety and grief one experiences as a consequence, which is not compensable. Southin J stated that the impact must be direct in the sense that the claimant is ‘frightened, terrified or horrified and that fright, terror or horror causes a permanent impact on the claimant’s mind’. Wallace J said that in cases where the defendant’s negligent conduct occasions mere ‘nervous shock’, the criteria required to establish a duty of care must include the requisite proximity relationship, which in turn

... is made up of a combination of various relational elements or factors. These include, inter alia, relational proximity (the closeness of the relationship between the claimant and the victim of the defendant’s conduct); locational proximity (being at the scene and observing the shocking event); temporal proximity (the relation between the time of the event and the onset of the psychiatric illness).

His Honour observed that the term ‘causal proximity’ appeared, with perfect circularity, to describe proximity of a “causal” nature, which he presumed, if present, would resolve the issue of causation. He did not find the “concept to be of assistance in determining either foreseeability or causation”. As discussed above, in the United States, though using somewhat different terminology, the Supreme Court of California in Thing v. La Chusa also rejected the notion that ‘foreseeability’ alone should be used as the test to determine the existence of a duty of care in cases of negligently inflicted pure ‘emotional distress’. As a matter of policy, the

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792 Id. at 265, per Wallace J.
793 Id. at 272.
794 Id. at 265-6.
795 Id. at 266.
796 See discussion of the Dillon and La Chusa cases in Chapter 8.
797 Thing v. La Chusa op. cit. fn. 670.
United States courts have imposed such additional limiting requirements as close family relationship between the claimant and the victim; the presence of the claimant at the scene of the event at the time of its occurrence, and causal connection between the event and the claimant’s distress. The first two factors correspond to ‘relational’ and ‘locational’ proximity as described by Wallace J in *Rhodes v. Canadian National Rly.* op. cit. fn. 789, at 263.
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Developments in neurophysiology

The seminal decisions in *Dillon v. Legg*, *McLoughlin v. O’Brian*, and *Jaensch v. Coffey* clarified and defined the basic requirements and parameters of the liability of the defendant for negligent infliction of emotional distress and mere psychiatric injury. They were grounded in legal and medical knowledge of their time. By the end of last century it was already fashionable to claim that the ‘general stress of modern civilisation’ was a factor in causing neurasthenia and even insanity.  

However, it is only in recent years that the development of rating questionnaires which measure life events, such as the *Social Readjustment Rating Scale* has allowed researchers to plan and carry out comparative and reproducible studies in respect of chronic or repeated stress.  

The rating questionnaires assign a numerical value to the extent of psychological readjustment necessitated by the particular stressful experience within a defined environment. The published findings of the researchers who have administered questionnaires relate to the adverse effects of gradual and cumulative personal stress, as well as a series of identifiable stressful incidents within the work environment. However, these findings can also be applicable to other recurring stressful life events.

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Indeed, it has been postulated that repeated stressful life events may be implicated in the precipitation of almost all of the psychiatric disorders listed in DSM-IV. Likewise, repeated stressful life events may lead to ‘abnormal illness behaviour’, which is not considered to be a diagnosable psychiatric illness.

When, in 1980, DSM-III gave the imprimatur of American academic and clinical psychiatry to the diagnosis of PTSD as an anxiety disorder, little was known about biological concomitants of this condition. The case of Jaensch v. Coffey coincided with the relatively early stages of neurophysiological investigations of severe environmental stress upon human homoeostasis. Throughout the 1980s, medical science had been endeavouring to develop biological and pathophysiological models that could potentially explain the pathogenesis of PTSD, its perseverance, or its re-emergence. Bio-medical research into the psychological and physiological effects of emotional trauma was facilitated by the development of neuroimaging techniques such as the electroencephalogram (EEG) which measures regional electric activity of the brain, and computed tomography (CT) and magnetic resonance imaging (MRI) which are used to generate displays of brain structures and possible lesions. Three-dimensional resolution images representing biochemical and physiological processes in the living human brain can be produced either through positron-emission tomography (PET) scans, or through single photon emission computed tomography (SPECT). This is done by means of video monitoring of the brain function after administration of a radiopharmaceutical. The regional differences in the intensity of the radiotracer uptake represent differences in metabolism through variations of blood flow. Originally, these isotopic techniques were used to study children with partial epilepsy for the purpose of localising epileptogenic foci in the

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802 Id. at 139. Abnormal illness behaviour is a persistent ‘an inappropriate or maladaptive mode of experiencing, evaluating or acting in relation to one’s state of health’. The condition is characterised by the person’s ‘abnormal’ or pathological way of thinking about his or her state of health, in the sense that a phobia, an obsession, a delusion or a hallucination is a form of psychopathology. It may take the form of illness denial, for example neurotic non-compliance following myocardial infarction or refusal to accept psychological diagnosis or treatment in the presence of neurotic illness, personality disorder or drug dependency syndromes. There are also forms of abnormal illness affirming such as Munchausen’s Syndrome, factitious disorders, somatoform disorders, hypochondriacal delusions, etc. See: Pilowsky, I. (1997), *Abnormal Illness Behaviour*, John Wiley & Sons, Chichester, at 25.

803 Yehuda & McFarlane op. cit. fn. 711, at p. xi.

In the late 1980s, scientific investigations provided evidence that locus coeruleus is the neurophysiological ‘trauma center’ of the brain.\footnote{The locus coeruleus is a compact, bilateral group of cells located in the caudal pontine central grey matter, adjacent to the fourth ventricle of the mammalian brain.} A nucleus of the brainstem, the locus coeruleus contains noradrenaline (norepinephrine)-producing cells.\footnote{Noradrenaline, alternatively known as norepinephrine, is a neurotransmitter in the nerve cells of the sympathetic nervous system. Noradrenaline is the agent responsible for stimulation of the sympathetic nerves which in turn speed up the heart rate. Restak, R.M. (1984), The Brain, Bantam Books, Toronto.} In situations of environmental stress the locus coeruleus activates the neurotransmitter system,\footnote{The neurotransmitter system is a chemical net that transmits impulses from neurone to neurone. A neurone, also called nerve cell, is the basic unit of the nervous system (neurotransmitters belong to a group of some thirty messenger molecules). It consists of a cell body and threadlike projections that conduct electrical impulses. The axon, a single long fibre, transmits impulses, while the shorter extensions called dendrites receive them. Neurotransmitters are stored in the axon (the fibre that conveys outgoing impulses to other cells). These nerve cells branch out to produce an extraordinarily complex net which reaches into every part of brain and spinal cord. Fincher, J. (1984), The Brain, Torstar Books, New York.} priming the organism to detect the apprehended danger and to make appropriate defensive neurobiologic responses. The resulting neurobiologic alterations lead to arousal and the appearance of alarm behaviour.\footnote{Krystal, J.H. (1990), ‘Animal Models for Posttraumatic Stress Disorder’, in E.L. Giller Jr. (ed.), Biological Assessment and Treatment of Posttraumatic Stress Disorder, American Psychiatric Press, Inc., Washington, D.C.} These changes are usually transitory; however, in certain individuals the alarm-like state of the organism fails to return to its former homoeostasis and persists long after the original traumatic event has passed. Persons who experience prolonged states of anxiety and physiological arousal following an emotionally traumatic episode, together with concomitant emotional disturbances, are said to be suffering from PTSD. Although the natural course of PTSD has yet to be fully documented, biological studies of neuroendocrine systems on
animals tend to indicate that when an animal is subjected to uncontrollable stress it develops abnormal behaviour patterns which have been termed ‘behavioural depression’. This behavioural depression may be due to a permanent alteration and depletion in the levels of such neurotransmitters as noradrenaline (norepinephrine), dopamine\(^{809}\) and serotonin\(^{810}\) in the various brain regions.

Neurobiological studies have suggested that PTSD may also be associated with alterations in gene expression.\(^{811}\) The long-lasting neurobiologic alterations seem to occur through gene activity (altered gene expression) and microstructural remodelling when the stress-altered neurotransmitter activity produces changes in membrane potential and cell metabolism.\(^{812}\) The re-experiencing of the traumatic event in the form of intrusive thoughts, nightmares, or flashbacks may be explained by the microstructural neuronal changes in the sensory pathways of the organism. Neurobiologic alterations may be either of transient or of long-lasting nature. Some inter-cellular changes appear to be responsible for affecting the organism’s behavioural reactivity as well as its formation of short-term and long-term memory. The issue of whether particular neuronal and molecular changes are in fact permanent is of some legal importance, because in cases where it is demonstrated that a permanent neuronal and molecular change has occurred the legal distinction between ‘actual physical harm’ and ‘mere psychiatric injury’ may not apply.

The direct links between adverse environmental trauma, the changes to neurotransmitters, and such behavioural responses as unchecked aggression

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809 Dopamine is the decarboxylation product of dopa. Its excess in man is thought to contribute to severe mental illness such as schizophrenia.


811 Genes are units of inheritance that control particular characteristics or capabilities. Genes are located on the chromosomes of the cell nucleus and consist of segments of DNA molecules.

812 Metabolism refers to the chemical changes taking place within an organism, whether building up or breaking down body substances.
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and suicide (as against depression), are yet to be empirically demonstrated. Clinical studies of PTSD have provided some tentative evidence that this disorder might be associated with chronic abnormalities in sympathetic nervous system arousal, in hypothalamic-pituitary-adrenal, cortical and noradrenergic functions, as well as in the physiology of sleep and dreaming. However, unlike the law, medical science has tended to be cautious in ascribing every human behaviour to a singular cause.

Historically, neuropsychiatric research has tended to concentrate upon the neocortex which controls the intellectual aspect of human perception while the limbic system has received rather less attention. In the 1870s Pierre Paul Broca designated as ‘the great limbic lobe’ the area of the brain which includes the cingulate gyrus, retrosplenial cortex, and the parahippocampal gyrus. In 1957 Paul MacLean, building upon the work of James Papez, coined the phrase ‘limbic system’, and postulated that it is the major afferent and efferent system of communication between the limbic lobe and the brain stem, with three major branches to the amygdala, septum, and anterior hypothalamus.

The limbic system has many connections with the hypothalamus and is also concerned with biological rhythms, sexual behaviour, emotions of rage and fear, motivation, attention, and memory. It is through the limbic system that the human organism initially recognises and instinctively reacts to sensory signals. A spontaneous smile is said to be the limbic recognition of reality before this reality is fully understood by the intellect (neocortex). The limbic system thus supplies the affective tone when information is perceived or recalled. It has been further proposed that through its

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815 Murray, G. id.
connection with amygdala, the limbic system is responsible for the brain’s consciousness of the material. According to Pierre Gloor:

> Visual and auditory perceptual data are first analysed in the appropriate areas of the temporal neocortex. ... Finally, the information is conveyed to the amygdala where the affective tone is attached to it. I would like to suggest that this involvement of affect is necessary to make a perception or memory emerge into consciousness, thus enabling it to be experienced as an event ‘one is living or has lived through’.

The neuropsychiatric and biological aspects of the perceptual process are still being explored; however, deeper understanding of the causes and consequences of impairment of the limbic system and its effects upon human homoeostasis will give medical researchers a better understanding of the causation and underlying organic dysfunctions leading to mental disorders and hence lead to more specific and more effective treatment. Even so, current research into the mechanisms of perception and the aetiology of psychiatric disorders indicates that a person may suffer a psychiatric illness after having perceived the traumatic event by senses other than sight. Therefore, in certain circumstances, direct auditory perception of the tragic occurrence, or seeing ‘live’ television images of death and injury, may be as psychologically damaging as the person’s physical presence at the site of the accident.

As a result of developments in medical science, some aspects of liability which were broached by the High Court merely as dicta relating to hypothetical circumstances have crystallised into actual causes of action. This part of the book will concentrate on those cases which illustrate the ramifications of progress in medical interpretation of emotional trauma upon the legal decision-making process. The legal cases discussed below do not reflect as yet any distinct trends; rather, there exists at present a patchwork of ad hoc decisions, some of which may serve as signposts for future general theoretical reappraisal of the liability of the defendant for negligently inflicted nervous shock. The cases illustrate both the directions

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along which this kind of liability may evolve, and also its rigid limitations.

**Perception of the traumatic event by senses other than sight**

Deane J in *Jaensch v. Coffey* observed that a person may suffer psychiatric illness upon auditory rather than visual perception of the immediate results of the wrongdoer’s conduct. Subsequent to this statement, Kneipp J of the Queensland Supreme Court in the case of *Petrie v. Dowling*, awarded compensation for nervous shock to a mother who ‘collapsed with grief’ when she was informed at the hospital that her daughter was killed in a collision caused by the defendant’s negligence.

The plaintiff, Mrs Petrie, was told while at work that her young daughter had been injured in an accident. Mrs Petrie rushed to the casualty section of the hospital where, trying to make light of the situation, she said to the nursing sister:

‘She isn’t dead, is she?’

‘I’m afraid so’, came the reply.

Upon hearing these words, Mrs Petrie was overcome with shock, which led to a severe psychiatric illness. Kneipp J held that Mrs Petrie could recover damages for nervous shock even though she was not present at the site of the accident and had suffered the shock before actually seeing the body of her child. Mrs Petrie suffered nervous shock while at the hospital to which her daughter was taken, that is, she was physically present at the immediate aftermath of the accident as defined by the High Court though she did not see the immediate post-accident state of her child’s body.

In Australia, as the law stands now, it is a prerequisite to recovery for nervous shock that there be sudden, direct, sensory perception of the shocking event or its immediate aftermath. This direct perception giving rise to shock may be visual, tactile or auditory, but it always requires the plaintiff’s presence either at the site of the accident or at its immediate aftermath. However, modern technology has made communications instantaneous through the medium of satellite signals. A television viewer, a radio listener, or the user of internet, may be thousands of kilometres away from the actual events, yet he or she can have an instantaneous visual and auditory perception of them.

In relation to the liability of the defendant for the negligent infliction of nervous shock, technological advances in communications have made it

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imperative for the law to determine whether or not the requirement of physical presence should be retained or dispensed with. The answer to this question will depend on the degree of notice which the courts take of the medical understanding of psychological stress. From the medical point of view, it is as much the direct emotional involvement of the plaintiff in the accident as his or her actual physical presence at the scene and its immediate aftermath that will be material to the level of stress suffered and the ensuing psychological illness or disorder.

Alcock & Ors v. Chief Constable of South Yorkshire Police

The law’s insistence upon the requirement of spatial proximity between the stressful event and the claimant, while overlooking the bio-psychological aspect of stress, may lead to problems of legal reasoning exemplified by the case of Alcock & Ors v. Chief Constable. Although Alcock is an English case it is, sadly, only a matter of time before courts in other jurisdictions will be confronted with a similar set of facts. The case provides an example of the law’s retreat in the face of modern technological and social realities of life. The House of Lords has reinstated the substantive approach by drawing an arbitrary line on the requirement of physical presence, while restricting the evidentiary approach by imposing a novel prerequisite of loving emotional ties between the primary and the secondary victims of the defendant’s negligent conduct. The case of Alcock v. Chief Constable touches upon many aspects of liability for negligently inflicted nervous shock and will be examined as a self-contained entity.

In this case, the claim by sixteen plaintiffs arose out of the events which took place in April 1989 at Hillsborough Stadium during the FA Cup semi-final. Shortly before the start of the football match a senior police officer decided to open an outer gate at the Leppings Lane end, thus allowing a mass of spectators outside the stadium to access an area of the ground which was already full, and from which there was no exit. As a consequence, 96 people were crushed to death and 730 others were injured. The events of the crash were broadcast live on television, though the faces of injured individuals were not shown (in accordance with broadcasting ethics.

As soon as the catastrophe began to unfold the emergency services sprang into operation. The part of the ground where the disaster occurred was inaccessible because of steel pens which surrounded it, and the area of the ground where the ambulances waited to take the injured and the dead to hospitals and morgues was cordoned off. Relatives had to wait many hours before being admitted to the hospitals. Identification of the bodies took place only after temporary morgues were established. All technical arrangements were implemented for purposes of efficiency, and not in order to protect from nervous shock those persons who were searching or waiting outside in a helpless agony of uncertainty and grief to find out the fate of their loved ones.

The Chief Constable admitted liability in negligence in respect of death and physical injuries. However, he contested liability in respect of those claimants who suffered psychiatric illness though they were not directly involved in the crush though they were connected with the primary victims by the bonds of affectionate relationship. The claim proceeded to the House of Lords upon an assumption that each of the 15 plaintiffs had suffered shock leading to psychiatric illness as a result of seeing or hearing news of the disaster. In issue was duty of care.

Hidden J, in a landmark decision, allowed recovery of damages for PTSD to eight plaintiffs whose close relatives perished in the crush and who suffered shock when watching the ‘live’ television broadcast, and to one person, Mr Henderson, who was present elsewhere in the stadium and who lost two brothers in the disaster. The Court of Appeal allowed an appeal by the defendant Chief Constable against the decision of Hidden J and dismissed the cross-appeal by six unsuccessful plaintiffs. The House of Lords upheld the appellate decision.

820 The award of damages by Hidden J to one of the sixteen plaintiffs was not contested.
821 Although there was an assumption of causation for the purpose of establishing the existence of a duty of care, any of the plaintiffs who succeeded on the issue of duty would then have to prove causation in order to obtain damages.
822 Hidden J limited the recovery to those claimants who were parents, children, siblings and spouses, and thus could satisfy the proximity of relationship requirement. The claims of plaintiffs who were in a more remote family relationship, who either heard about the disaster, or saw the catastrophe on recorded television news, were rejected. The appeal to the House of Lords was made by six of the originally successful plaintiffs and one of the unsuccessful ones.
The fear of opening the floodgates whereby the defendant might become liable to an indeterminate number of claimants in cases where a catastrophe is communicated instantaneously through the electronic mass media was a major policy consideration which influenced the House of Lords’ judgment. There was also a concern about a potentially enormous number of claims for mere nervous shock which might be generated when a disaster occurs at a huge venue. The House of Lords treated the two kinds of claims as if they were identical in character. Yet each of these claims is qualitatively distinct. In respect of the indeterminate number of claimants, the objection is not that there might be a large but foreseeable number of claims for nervous shock; rather, it is a fear that the volume of claims for nervous shock caused by a television broadcast may not be capable of being determined beforehand. However, the volume of potential claims by persons who are physically injured at the venue of the disaster is usually reasonably foreseeable. Likewise, the number of close relatives and rescuers who will suffer mere nervous shock as a result of being present at the scene of the catastrophe is both reasonably foreseeable and capable of prior estimation. The House of Lords’ decision was directed primarily at the denial of compensation for the first category of claimants, but its failure to differentiate between the two classes of claims has meant that the law of compensation for negligently occasioned mere psychiatric injury has been substantially modified.

The House of Lords confirmed, with qualifications, the general principle of liability for psychiatric illness following non-impact trauma established by its earlier decision in McLoughlin v. O’Brian. According to expressed hope that the House of Lords would display a more enlightened and progressive attitude. Her hopes were not fulfilled.

824 Parker LJ in the Court of Appeal noted that the plaintiffs’ cases were representative of numerous other claimants who suffered psychiatric illness as a result of the disaster. *Jones and Others v. Wright* op. cit. fn. 817, at 92.


827 *McLoughlin v. O’Brian* [1983] op. cit. fn. 719. In *Alcock* their Lordships clearly preferred the narrow judgment of Lord Wilberforce in *McLoughlin* to the more expansive approach of Lord Bridge, who warned that liability of defendants should not be predetermined by an immutable rule of fixed categories and questioned the propriety of curtailing a cause of action to satisfy judicial policy. Lord Bridge did not deliver a judgment in *Alcock*. 
that principle, psychiatric illness resulting from negligently caused shock can be compensable without the necessity of the plaintiff establishing that he or she was actually injured or was in fear of personal injury, providing the shock:

a) resulted from death or injury to the plaintiff’s spouse or child or fear of such death or injury and
b) came about either through sight or hearing of the actual event, or its immediate aftermath.\(^{828}\)

At the same time, the House of Lords went back to its decision in *Bourhill v. Young*\(^{829}\) which held that mere psychiatric illness brought about by the infliction of physical injury, or the risk thereof, upon another person should be treated differently from the ordinary case of a direct physical harm. Thus, according to Lord Ackner:

It is now generally accepted that an analysis of the reported cases of nervous shock establishes that it is a type of claim in a category of its own. Shock is no longer a variant of physical injury but a separate kind of damage.\(^{830}\)

The House of Lords declared that whereas reasonable foreseeability remains the central test in establishing the existence of duty of care in respect of physical harm to the primary victim, in cases of mere nervous shock the test of reasonable foreseeability should be supplemented by an additional ‘requisite of proximity between the claimant and the party said to owe the duty’.\(^{831}\) Lord Ackner and Lord Jauncey of Tullichettle expressly adopted Deane J’s concept of proximity as established in *Jaensch v. Coffey*.\(^{832}\) However, their Lordships have interpreted the criteria for establishing the requisite relationship of proximity much more restrictively than the Australian High Court. Lord Oliver of Aylmerton also accepted the concept of the relationship of proximity, though not without misgivings. He

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\(^{828}\) *Alcock v. Chief Constable* op. cit. fn. 817, at 399, per Lord Ackner.

\(^{829}\) *Bourhill v. Young* op. cit. fn. 411.

\(^{830}\) *Alcock v. Chief Constable* op. cit. fn. 817, at 400.

\(^{831}\) Id. at 402.

\(^{832}\) According to Lord Ackner three requirements of proximity must be satisfied in order for a duty of care to arise: (1) the plaintiff must belong to the requisite class of persons whose claims should be recognised; (2) the plaintiff must have the requisite proximity to the accident in time and space; (3) the means by which the shock was caused must be as required (‘direct perception’). *Alcock v. Chief Constable* id. at 402.
commented that

…the concept of ‘proximity’ is an artificial one which depends more upon the court’s perception of what is the reasonable area for imposition of liability than upon any logical process of analogical deduction.\(^{833}\)

His Lordship enunciated the following requirements of the relationship of proximity which must be satisfied as a precondition to establishing liability:

i. the requisite relationship between the plaintiff and the primary victim has to be either a close family relationship or one based on documented love and affection (marital or parental or closely akin to these);

ii. the shock productive of the psychiatric injury must be unexpected and sudden;

iii. the plaintiff must have been in the more or less immediate vicinity of the accident and witnessed the aftermath shortly afterwards;

iv. the psychiatric illness suffered by the plaintiff must have arisen from witnessing the death or extreme danger to, or injury and discomfort suffered by the primary victim (the requirement of direct visual or aural perception);

v. temporal connection between the event and the plaintiff’s perception has to be close.\(^{834}\)

The requirement of close family relationship

The Australian courts have consistently refused to place any arbitrary restrictions on the categories of claimants. In *Jaensch v. Coffey*, Brennan J\(^{835}\) quoted with approval the following passage from Windeyer J’s judgment in *Pusey*:

There seems to be no sound ground of policy, and there certainly is no sound reason in logic, for putting some persons who suffer mental damage from seeing or hearing the happening of an accident in a different category from others who suffer similar damage in the same way from the same occurrence. The supposed rule that only relatives can be heard to complain is apparently a transposition of what was originally a humane and ameliorating exception to the general denial that damages could be had for nervous shock. Close relatives were put in an

\(^{833}\) Id. at 411.

\(^{834}\) Id. at 411, 416-417.

\(^{835}\) *Jaensch v. Coffey* op. cit. fn. 530, at 572.
exceptional class. ... What began as an exception in favour of relatives to a doctrine now largely abandoned has now been seen as a restriction, seemingly illogical, of the class of persons who can today have damages for mental ills caused by careless conduct.836

Within the context of the English law, Hidden J extended the defendant’s liability in respect of the class of persons who should be regarded as being within the ambit of reasonable foreseeability, and thus having a legal right to sue, to include siblings as well as parents, children and spouses. The House of Lords rejected such an extension.837 Their Lordships regarded the requisite element of proximity of relationship between the parties as an important control and restraint upon the wide test of reasonable foreseeability. Lord Ackner stated that in order to come within a recognised class, the more remote relatives and friends would have to prove that their relationship to the primary victim of the defendant’s negligence was:

… so close and intimate that their love and affection for the victim is comparable to that of the normal parent, spouse or child of the victim and should for the purpose of this cause of action be so treated.838

Mr Harrison - even though he was present at the stadium when his two brothers were crushed to death - could not recover because:

… his claim was not presented upon the basis that there were such close and intimate relationship between them, as gave rise to that very special bond of affection which would make his shock-induced psychiatric illness reasonably foreseeable by the defendant.839

837 Lord Ackner quoted, without adopting, s. 4(5) Law Reform (Miscellaneous Provisions) Act 1944 (N.S.W.) op. cit. fn. 576. Lord Oliver of Aylmerton also expressed the desirability of the United Kingdom Parliament creating a statute similar to the New South Wales provisions.
838 Alcock v. Chief Constable op. cit. fn. 817, at 403. The House of Lords devoted considerable space to the discussion of whether - and if so, in what circumstances - strangers who are not involved in the accident and who are not rescuers can recover damages for nervous shock.
839 Id. at 406. The House of Lords acknowledged that the law imposes a duty of care upon the defendant in cases of rescuers and employees who suffer nervous shock as a result of witnessing negligently caused death or injury of another.
Thus, in the UK siblings, grandparents and other relatives face the prospect of being cross-examined on the sufficiency of love and affection in their relationship with the primary victim. In order to prove the requisite closeness and intimacy, the plaintiffs may need to produce receipts of gifts, visits and personal letters written to their injured or dead sisters, brothers, grandchildren, etc. Considering that at the threshold of their cause of action the persons suing for nervous shock already have to show that they are suffering from a psychiatric disorder caused by the shocking event of the death or injury to their loved one, as well as having to satisfy the requirements of physical proximity and causation, such a restrictive interpretation of family relationship is unnecessarily invasive. It is to be hoped that courts in other jurisdictions will refrain from adopting the House of Lords’ restrictive evidentiary approach.

Mr Alcock was present at the scene of the Hillsborough Stadium disaster and lost his brother-in-law. As a brother-in-law, he failed the test of relational proximity, and was classified as being outside the class of potential sufferers from shock-induced psychiatric illness. Moreover Mr Alcock, like Mr Copoc, was held to have failed to satisfy the strict temporal element of the requirement of proximity. In the circumstances of Alcock, the immediate aftermath of the catastrophe meant identification of the bodies in one of the morgues. As explained above, relatives were not allowed to enter hospitals and morgues until many hours after the disaster. Mr Alcock was one of the first to identify the body of his brother-in-law, some eight hours after the catastrophe. The body was in a bad condition, still blue with bruising and with a blood-red chest. The House of Lords, with a singular lack of regard for medical opinion on the issue, decided that the period of an immediate aftermath should not be extended beyond an hour from the time of the accident, (an hour being, apparently, the time within which Mrs McLoughlin had arrived at the hospital in McLoughlin v.

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840 Brennan J in Jaensch v. Coffey op. cit. fn. 530, at 561, did ‘not find it desirable as a matter of policy or permissible as a technique of judicial development of the law to create new criteria of limitation upon the scope of the cause of action in negligence causing psychiatric illness’.

841 Mr Copoc, after watching the images of the disaster on the live broadcast, and knowing that his son had a ticket for the area involved, rushed to Sheffield in search of his son; he was only admitted to see his son’s body in the morgue at 6 a.m.

Accordingly, the House of Lords declared that ‘in post accident identification cases ... there was not sufficient proximity in time and space to the accident’. Moreover, Lord Jauncey of Tullichettle stressed that only a relative who ‘goes within a short time after an accident to rescue or comfort a victim’ can recover damages for nervous shock. They thereby excluded any person who rushes to the scene after being told that his or her loved one has been killed but because of the distance involved or the time delay in communication is unable to ‘beat the ambulance’.

In December 1996, Sachs J distinguished the case of Mr Alcock in the House of Lords’ decision, when he determined that a brother of a victim who died in the Hillsborough disaster could recover damages for mere nervous shock under the Alcock criteria. The plaintiff was able to prove, by oral and written testimony provided by a number of witnesses, that he had had a particularly close and affectionate relationship with his younger half-brother, Ian. He obtained the ticket for the game, and gave it to Ian on the day of the match. The seat allocation on the ticket was for the pen at the Leppings Lane end. The plaintiff’s ticket was in the north stand, an elevated position which gave him a good view of the rest of the ground. He saw the unfolding tragedy from about 90 yards away, knowing that Ian and his other brother, Joseph, were in the disaster area. After about ten minutes, he was told that Ian was dead. Thereafter, he met Joseph on the pitch and went directly to the gymnasium, which was converted into a temporary morgue, and identified the body of Ian. According to the Police witness, the plaintiff, already extremely upset, cradled the body in his arms and repeated the name ‘Ian’. He was inconsolable. Within a short time, he developed symptoms which a psychologist, Mrs Preston, described as PTSD. Sachs J agreed with the plaintiff’s counsel that the plaintiff’s case presented ‘a seamless series of events’, and as such was clearly distinguishable from the cases of Harrison and Alcock. He awarded the plaintiff compensation for negligently inflicted psychiatric injury and consequential damage to his health, on the basis that:

1. the plaintiff suffered a recognisable psychiatric illness (PTSD) which was shock-induced;

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843 In fact, two hours elapsed between the collision and Mrs McLoughlin’s arrival at the hospital.
844 *Alcock v. Chief Constable* op. cit. fn. 817, at 407, per Lord Ackner.
845 Id. at 424.
2. it was reasonably foreseeable that he, being a man of normal fortitude, might suffer psychiatric illness as a result of the defendant’s negligence;
3. that on the evidence presented and not disputed, the plaintiff’s relationship with his half-brother was sufficiently close and intimate to give him the necessary proximity of relationship;
4. because in this case the plaintiff saw or learned of the tragic events, all of them sequentially within a relatively short time, his connection with the disastrous events was sufficiently proximate in time and space.

Sachs J’s decision, though without legal precedent, was right. It does, however, highlight the capricious and arbitrary operation of the Alcock test, for had Ian’s body been placed in one of the morgues which the public could not access until many hours later, the plaintiff’s case would have failed for the lack of temporal proximity.

In Canada, in Grzywacz v. Vanderheide, McNeely J of the Ontario Court had no hesitation in awarding damages of C$9,000 to the plaintiff who suffered PTDS after she went to the hospital to identify the body of her sister which was mutilated almost beyond recognition and still covered with blood. The plaintiff went to the hospital immediately upon hearing the news that her sister was killed through the defendant’s negligence.

The restrictive approach of the House of Lords towards the class of persons who are regarded as foreseeable in respect of damage through mere nervous shock has left in a jurisprudential limbo the case of Attia v. British Gas PLC. In Attia the Court of Appeal allowed damages to the plaintiff who suffered nervous shock after she saw a fire - which was caused through the negligence of the defendant - burn down her house. In the Alcock case, Lord Oliver pointed out that the case of Owen v. Liverpool Corporation was disapproved of by the three members of the House of Lords in Bourhill v. Young. Therefore His Lordship doubted how far the Owen case could be relied upon to lend ‘support to the suggestion that such damages may be

849 Owen v. Liverpool Corporation op. cit. fn. 499. In this case, the Court of Appeal awarded damages to the relatives of the deceased who suffered shock when, during a funeral procession, a negligent tram driver collided with the hearse and upset the coffin. For a discussion of this case, see Chapter 6.
850 Bourhill v. Young op. cit. fn. 411.
recoverable by a mere spectator”. Although cited in argument, the case of *Attia* was not referred to in their Lordships’ opinions. It is therefore unclear whether the House of Lords approves of recovery for psychiatric illness caused by the shock of witnessing negligent damage being occasioned to an object, providing it is real property? Such approval, would be in sympathy with medical studies documenting great psychological trauma associated with the destruction of one’s home in a disaster.

**Physical and temporal proximity**

On the House of Lords’ interpretation of what constitutes an immediate aftermath in terms of ‘spatial and temporal propinquity’, Mrs Chester (who saw the body of her son only some four hours after the drowning took place) would still be denied recovery for nervous shock! In fact, in *Alcock*, the House of Lords followed the Court of Appeal in its rejection of two similar English cases in which damages for nervous shock were awarded. In *Hevican v. Ruane* the plaintiff was told to go to the police station because his son had been involved in a serious accident, which was due to the defendant’s negligence. Upon being informed that his son had died in the collision, the plaintiff went to the mortuary to identify his son’s body. In *Ravenscroft v. Rederiaktiebogolet Transatlantic* the plaintiff’s son was seriously injured when he was crushed by a shuttle wagon while working on the cargo deck of a vessel owned by the defendant. The son was taken to hospital but died after two hours of intensive care. The plaintiff was called into the hospital where she was told by her husband that her son had died. In *Hevican* and in *Ravenscroft* the respective plaintiffs developed severe reactive depression. The position of the House of Lords on this issue was in tandem with the approach of some United States’ jurisdictions. For example, in 1992, the Wyoming court denied recovery to the parents of a six-year-old boy whose leg was amputated by a train while he was playing

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851 *Alcock v. Chief Constable* op. cit. fn. 817, at 412.
on the tracks, because they were first notified of Alex’s injury at their workplace, and did not see him until he had been transported to the hospital.856

The reason provided by the House of Lords for its restrictive interpretation of the immediate aftermath is that in cases where there is no single, sudden, immediate and direct visual perception of the distressing event, the traumatic process is ‘elongated’ or gradual, and therefore should be regarded as being outside the definition of nervous shock. Lord Oliver stated that

… to extend liability to cover injury in such cases would be to extend the law in a direction for which there is no pressing policy need and to which there is no stopping point.857

With respect, this view is at variance with current psychiatric understanding of the development of mental disorders following the experience of trauma. It is recognised in clinical psychiatry that specific disorders such as PTSD may develop acutely, or they may occur following a delay of days, or weeks, or months.858

On the issue of whether or not watching simultaneous television transmission of the scenes from Hillsborough could be ‘equiparated with the viewer being within sight or hearing of the event or its immediate aftermath’,859 the House of Lords unanimously decided that it could not. This was because, according to Lord Keith of Kinkel, the broadcast apparently did not depict the suffering of recognisable individuals860 ‘such being excluded by the broadcasting code of ethics, a position known to the defendant’.861 His Lordship therefore concluded that the scenes of the

859 Alcock v. Chief Constable op. cit. fn. 817, at 1102.
860 The Court of Appeal did not view the television programme and therefore did ‘not know precisely what was shown’, per Nolan LJ. Jones and Others v. Wright op. cit. fn. 817, at 122. The Appellate Committee of the House of Lords was probably in the same position. Alcock v. Chief Constable op. cit. fn. 817, at 405. Lord Ackner stated that the breach by the camera-men of the broadcasting code of ethics would have amounted to novus actus interveniens. Lord Ackner’s approach is not easily reconcilable with the application of
disaster were capable of giving rise to anxiety and distress, but they did not
give rise to shock in the sense of a sudden assault upon the nervous
system.\footnote{862} Lord Oliver, echoing Latham CJ and Rich J in \textit{Chester},
declared that any extension of the notion of proximity beyond an ‘immediately
created nervous shock’ would be ‘a step along the road which must
ultimately lead to virtually limitless liability’.\footnote{863}

The House of Lords did not define the requirement of direct perception,
though perception through radio or television has been virtually excluded.
Lord Ackner and Lord Oliver accepted that in exceptional circumstances,
such as those described by Nolan LJ in the Court of Appeal, namely, where
the parents-claimants who have been invited into a television studio to
watch a live broadcast of a media event involving their children travelling in
a balloon, see the balloon suddenly burst into flames, ‘the impact of the
simultaneous television pictures would be great, if not greater, than the
actual sight of the accident’.\footnote{864} At least one English commentator has
suggested that in respect of the \textit{Alcock} requirement of direct perception, ‘the
best approach, accepting the law as it stands, would be to ignore it
altogether’.\footnote{865}

Social and economic, as well as legal, arguments govern judicial
discretion in delineating the parameters of any tort liability. The argument
for requiring the immediate physical presence of the plaintiff is primarily
based upon the old legal and medical attitudes which have been so
suspicious of any claims based upon mere psychological harm. The
requirement of the plaintiff’s physical presence reinforces the prerequisite
that damage in cases of non-physical impact psychiatric injury must be
induced by a sudden and damaging sensory perception of the shocking
event. Hence, it serves as yet another safeguard against potentially
fraudulent claims. From the medical point of view, the requirement of
physical presence dates to the time before there was much understanding of
human psychobiology and psychiatry.

It is now known that the perception of an event which is outside the
range of usual human experience - such as a serious threat to one’s physical
integrity, serious harm or threat to one’s children, spouse or other close

\footnote{862} Lord Oliver of Aylmerton expressly concurred, id. at 417.
\footnote{863} \textit{Alcock v. Chief Constable} op. cit. fn. 817, at 417.
\footnote{864} Ibid. per Lord Oliver, per Lord Ackner at 405.
\footnote{865} Nasir, K. op. cit. fn. 851, at 709.
relatives, the destruction of one’s home or community - may permanently affect the individual’s physical as well as emotional homoeostasis. Consequently, the experience may alter person’s behaviour and possibly cause a specific psychiatric disorder. Generally, but not always, visual perception of the traumatic event has the strongest emotional impact.

If the law were to take cognisance of medical theory, it would follow that as long as the damage suffered is of a compensable kind it should be of little relevance through which particular sensory pathway the claimant has perceived the shocking event. An authoritative study on bereavement found that most parents whose child has died or been killed, when interviewed, ‘gave the appearance of individuals who have suffered a physical blow [which] left them with no strength or will to fight, hence totally vulnerable’.

It is therefore arguable that today there is less need to regard the requirement of spatial or physical proximity to the scene of the accident or its immediate aftermath as the sine qua non of recovery. Rather, the requirement should be considered as one of the factors to be taken into consideration when deciding the essential question of whether the emotional impact which the ‘live’ broadcast of a disaster produces upon the claimant has an instantaneous, sudden and lasting traumatic effect. For, as Lord Bridge pointed out in *McLoughlin v. O’Brian*:

It is well to remember that we are concerned only with the question of liability of a defendant who is, ex hypothesi, guilty of fault in causing the death, injury or danger which has in turn triggered the psychiatric illness.

In Australia, provided other elements of the cause of action are present, the plaintiff will not be denied damages for negligently inflicted

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866 Smith & Copolov op. cit. fn. 707; Scrignar op. cit. fn. 368, at 40.
867 According to the ‘traumatic principle’ as postulated by Scrignar: ‘The central factor in the development of PTSD is not necessarily the type or duration of the environmental trauma, but whether the trauma poses a realistic threat to life or limb and a person is consciously aware and has full appreciation of the potential for serious injury or death to self or others’. Scrignar, id. at 13.
870 In *Wilks v. Haines* [1991] Aust. Torts Reports 68,649 ¶81-078, the Supreme Court of New South Wales refused to award damages for nervous shock to a claimant who was employed as a dormitory supervisor at a school at which two of her colleagues were
nervous shock merely because there has been an interval of some hours between the accident to the primary victim and the presence of the claimant at the hospital or at the morgue.\textsuperscript{871} For example, in the case of \textit{Budget Rent-A-Car Systems Pty. Ltd. v. van der Kemp},\textsuperscript{872} the plaintiff was in New Zealand at the time when his wife was killed through the defendant’s negligent driving in New South Wales. On arrival in Australia, having been told of his wife’s death on the telephone, Mr van der Kemp became hysterical, and suffered ‘nervous breakdown’ at the time of the funeral. He was awarded damages by the New South Wales Court of Appeal.\textsuperscript{873}

\textsuperscript{871} In these circumstances, by definition, the requirement of ‘direct perception’ of the actual accident would not be met.

\textsuperscript{872} \textit{Budget Rent-A-Car Systems Pty. Ltd. v. van der Kemp} [1984] 3 N.S.W.L.R. 303.

\textsuperscript{873} Mr van der Kemp was ‘virtually disabled’ for nine months.
232 The History of the Liability for Negligently Caused Psychiatric Injury
11 Aspects of the Law Governing Recovery of Damages for Mere Psychiatric Injury

Causation and its relationship to duty of care in respect of liability for negligent infliction of psychiatric injury

In the major cases relating to recovery of damages for mere psychiatric injury by secondary victims, such as Dillon v. Legg, McLoughlin v. O’Brien, Jaensch v. Coffey, and Alcock, causation was not a major issue. However, some recent cases in respect of this type of injury have illustrated the impact which different understandings of what constitutes causation in law and medicine may have on the outcome of the litigation. As one of the limitations of the defendant’s liability for mere nervous shock, the High Court in Jaensch v. Coffey reiterated that where the plaintiff’s psychiatric illness is sustained as a result of shock brought about by witnessing a self-inflicted death, injury or peril of the negligent person, such damage will not be compensable. This is a policy-based exception to the duty of care founded upon the desire to limit the duty of care owed to third parties.

In order to minimise the harshness of the exception, some courts have developed an interstitial approach to the High Court’s decision. In the case of Harrison v. State Government Insurance Office (Qld) & Anor,874 Vasta J interpreted the Jaensch v. Coffey exclusion of the defendant’s liability as applicable only to those nervous shock cases where the conduct of the defendant which led to his or her death or injury did not endanger the physical safety of the claimant. In the Harrison case Mrs Harrison, the plaintiff, was a passenger in a vehicle driven by her husband which left the road and collided with a guard rail. The accident was caused solely by Mr Harrison’s own negligence. Thus his severe injuries and subsequent death

were self-inflicted. His wife suffered minor physical injuries but developed psychiatric illness following the trauma of the accident and the concern for her husband. Mrs Harrison recovered damages for her physical injuries, and for nervous shock, on the grounds that the psychiatric expert witnesses could not distinguish between the shock associated with the crash in which she was involved and the trauma brought about by the plaintiff’s concern for the injuries suffered by her husband.

Yet in different jurisdictions the strict application of the exception will lead to denial of recovery. Thus, in *Klug v. Motor Accidents Insurance Board* the plaintiff was a passenger in a car driven by his de facto wife. The vehicle crashed as a result of the driver’s negligence. The de facto wife was killed and the plaintiff was injured. The plaintiff became pathologically grief-stricken and sued in respect thereof. Zeeman J of the Tasmanian Supreme Court found that the plaintiff’s psychiatric condition had its ‘origin not in the occurrence of the accident itself, but in the death of the deceased.’ As such, his claim came within the obiter statement by Deane J that no duty of care would exist in respect of a psychiatric illness sustained as a result of the death of a person where that person was responsible for his or her own death.

The issue of causation becomes even more problematic in the context of ascertaining legal responsibility for nervous shock when the defendant’s wrongful conduct is one of a number of conditions sufficient to produce that damage. It is generally understood that causation is concerned with the consequential relationship between two occurrences, one of which is claimed to have brought about the other. However, legal causation differs from philosophical and medical concepts of causation. The Aristotelian approach to causation identifies four kinds of causes — material, formal, efficient and final. John Stuart Mill (1806 –1873) explained that from a philosophical point of view, the cause of an event is the sum total of the conditions which, in combination, have served to produce an event. The philosophical and medical approaches to causation concentrate upon precursors in the physical, organic or experiential sense. For example, in medicine, a particular medical disorder is seen as the consequence of one or more conditions which have led to it. For instance, hypertension (high blood pressure) may be caused by the following medical conditions:

(i) kidney disease;

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876 Id. at 69,273.
(ii) endocrine disorders such as hyperthyroidism and acromegaly;
(iii) arterial disease, including hardening of the arteries (atherosclerosis) which reduces elasticity;
(iv) tumours of the central portion (medulla) of the adrenal gland.\textsuperscript{877}

However, there is also a condition known as primary or ‘essential hypertension’ which has no apparent specific organic cause. The medical practitioner will investigate for each one of these known causes of hypertension and, if all have been excluded, the diagnosis will be of primary or ‘essential hypertension’. Thus in medicine it is possible to diagnose a disorder and treat the symptoms without knowing its pathogenesis.

The law looks at causation from the stand-point of determining legal liability in negligence:

In law … problems of causation arise in the context of ascertaining or apportioning legal responsibility for a given occurrence … Thus, at law, a person may be responsible for damage when his or her wrongful conduct is one of a number of conditions sufficient to produce that damage.\textsuperscript{878}

The plaintiff has to establish not merely a scientific, philosophical or medical cause of the harm, but a \textit{legal connection} between the particular breach of duty by the defendant and the actual injury of which he or she is complaining.\textsuperscript{879}

For example, when a plaintiff complains about an injury by way of hypertension, alleging that it was due to the wrongdoing of the defendant employer, the lawyer will want to know not only about the medical causes of this condition, but also about other possible environmental, social and psychological context of the relationship between the parties. These non-organic factors may be relevant to the determination of whether or not the legal responsibility for the injury should be attributed to the tortious conduct of the defendant, or to some other non-tortious cause.\textsuperscript{880} This is because legal liability will be attributed to the defendant only if the plaintiff can show that it was the defendant’s wrongful conduct which, on the balance of

\textsuperscript{878} \textit{March v. E. & M.H. Stramare} (1991) 171 C.L.R. 506 at 509, per Mason CJ.
probabilities, had caused or materially contributed to the risk of the alleged injury as against all other possible causes. Therefore, although scientific and medical explanations of the causes are important, the attribution of liability is ultimately a matter of legal judgment. In the process of determining to whom or to what event the responsibility for the plaintiff’s injury should be attributed, the law distinguishes between ‘causing harm’ and ‘enabling others (or other things) to do harm’. Lord Reid in Stapley v. Gypsum Mines Ltd. pointed out that:

The question [of legal causation] must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not.

Several sufficient and independent causes of the plaintiff’s nervous shock were present in the case of X v. Pal & Ors. In that case, the plaintiff became pregnant in 1973 and consulted Dr Pal, an obstetrician. Dr Pal, the first defendant, carried out a number of tests on her but failed to screen her for syphilis. She subsequently gave birth to a child with gross hydrocephaly who died of toxoplasmosis. Neither the infant’s condition, nor its death, were related to syphilis. After childbirth, the plaintiff changed obstetricians and began to see Dr Harris, the second defendant. He also failed to screen her for syphilis. She gave birth to her second child in 1975. The infant was born dysmorphic and mentally retarded.

The plaintiff was referred to Dr Grunseit, a specialist paediatrician and the third defendant, prior to the birth of her second child. Apparently, Dr Grunseit assured the plaintiff that, despite the fact that her first baby was born deformed and died within a few weeks of birth, she could proceed with a second pregnancy. When the second baby, at the age of seven weeks did not progress well, he ordered serological tests to be carried out. These tests

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883 Id. at 681.
revealed that both the plaintiff and her child were infected with syphilis.\textsuperscript{885}

The New South Wales Court of Appeal decided, inter alia, that each of the three defendants had failed to order an early test for syphilis and therefore were liable in negligence to the mother who suffered nervous shock upon being told that she and her severely dysmorphic infant were infected with syphilis. The judgments of the Court of Appeal in \textit{X v. Pal} were characterised by the use of emotive language. Although the plaintiff’s infection apparently was asymptomatic, Clarke JA repeatedly described the plaintiff as ‘suffering from syphilis’ rather than being infected with this disease. When Mahoney JA decided that the weight of scientific evidence did not establish that the mother’s syphilis contributed to the child’s deformities and brain syndrome, his Honour did so with ‘a deep and natural regret’.\textsuperscript{886}

Brennan J, in \textit{Jaensch v. Coffey}, observed that the process of attributing causation for the defendant’s liability regarding negligent infliction of nervous shock is a two-tier one. His Honour said that:

\begin{quote}
The notion of psychiatric illness induced by shock is a compound, not a simple, idea. Its elements are, on the one hand, psychiatric illness and, on the other, shock which causes it. Liability in negligence for nervous shock depends upon the reasonable foreseeability of both elements and of the causal relationship between them.\textsuperscript{887}
\end{quote}

Since the case of \textit{Jaensch v. Coffey}, the High Court in \textit{March v. E & MH Stramare}\textsuperscript{888} has refined the concept of causation from the point of view of legal liability, and has determined that neither the criterion of reasonable foreseeability, nor the \textit{causa sine qua non} (‘but for’) should be regarded as exclusive tests of causation. Rather, the question whether the defendant’s conduct was a ‘cause’ at law of the plaintiff’s injury needs to be determined by ‘value judgment involving ordinary notions of language and common sense’.\textsuperscript{889} As Deane J said in \textit{March v. Stramare}:

\textsuperscript{885} The liability of the defendants for the syphilitic condition of the infant will not be discussed as it is irrelevant to the subject-matter of this book.

\textsuperscript{886} \textit{X v. Pal & Ors.} op. cit. fn. 882, at 30, per Mahoney JA.

\textsuperscript{887} \textit{Jaensch v. Coffey} op. cit. fn. 530, at 566-567.

\textsuperscript{888} \textit{March v. E. & M.H. Stramare} op. cit. fn. 876.

\textsuperscript{889} Id. at 522 per Deane J; Mason CJ, Toohey and Gaudron JJ agreeing; McHugh J dissenting.
For the purposes of the law of negligence, the question of causation arises in the context of the attribution of fault or responsibility: whether the identified negligent act or omission of the defendant was so connected with the plaintiff’s loss or injury that, as a matter of ordinary common sense and experience, it should be regarded as a cause of it.\textsuperscript{890} [emphasis added]

In the case of \textit{X v. Pal}, Dr Pal saw the plaintiff some two years before the childbirth in issue. He did not screen the plaintiff for syphilis at the time, and she never saw him again after a birth of her first baby who died from a condition unrelated to syphilis. Syphilis can be acquired at any time through sexual intercourse, including the last term of pregnancy.\textsuperscript{891} The timing of the mother’s infection was vital to establishing the liability of the defendants, yet no evidence was led to document the assertion that the plaintiff was already infected with syphilis in January 1973. Furthermore, to be recoverable, mere psychiatric injury must follow the perception by the plaintiff of the distressing phenomenon, as against ‘mere knowledge of a distressing fact’.\textsuperscript{892}

In the case of \textit{X v. Pal}, the plaintiff’s child was born with asymptomatic congenital syphilis. This disease either manifests itself through characteristic symptoms immediately upon birth - which was not the case with the plaintiff’s baby - or it does not manifest itself at all until the later stages of life.\textsuperscript{893} In the instant case, what did manifest itself upon the child’s birth were the gross deformities of dysmorphia. The court accepted medical evidence that the baby’s deformities were not caused by its congenital syphilis, but were the result of other unconnected causes. Thus, the Court of Appeal held that although the carelessness of all three defendant doctors contributed to the infant being born with syphilis, their conduct was not the legal cause of the infant’s perceptible physical and mental injuries. Therefore, the perception by the mother of her baby having been born with closely spaced and very small eyes, ‘bat’ ears, an unusually shaped nose and ‘webbed neck’, which undoubtedly resulted in feelings of grief and

\textsuperscript{890} Ibid.


\textsuperscript{892} \textit{Jaensch v. Coffey} op. cit. fn. 530, at 567.

\textsuperscript{893} This would have been the case with the plaintiff’s child, if she had not been treated for the infection.
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distress, could not be attributed to the wrongful conduct of the defendants. It was not disputed that as a result of her tragic experiences Mrs X suffered psychiatric illness. In issue was the question whether the disclosure that her child suffered congenital syphilis should be regarded as the legal cause of the plaintiff’s nervous shock.

The plaintiff claimed that her nervous shock was caused by being told, following the blood tests performed some seven weeks after giving birth, that both she and her severely dysmorphic infant were infected with syphilis. Thus, the plaintiff suffered shock not through a perception of a wrongfully caused distressful phenomenon, but through ‘mere knowledge’ - when the doctors told her that she and her daughter would need to undergo treatment for syphilis. Brennan J’s caveat in respect of ‘mere knowledge’ was prompted by his concern that ‘the bearers of sad tidings, able to foresee the depressing effect of what they have to impart’, should not be held liable as tortfeasors in nervous shock. In the case of X v. Pal, the bearers of the sad tidings were found liable for nervous shock.

The requirement that the onset of the plaintiff’s shock and subsequent illness, be ‘fairly contemporaneous with the casualty’

In the past three decades developments in medical technology and medical science have revolutionised the ability of medicine to sustain life of patients who had become continuously comatose due to traffic accidents. In the past, administering medical treatment to a patient who has lapsed into a deep coma was often considered futile and thus not undertaken, because the comatose patient had very little chance of survival. Today, patients who have lapsed into deep coma due to an illness or accidental injury can be treated, often effectively, in the sense that their lives are thereby prolonged. These developments in medical technology have put in issue the validity of legal reasoning behind the requirement for close temporal proximity.

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895 Blood tests also revealed that whereas the plaintiff tested positive, her husband tested negative to the VDRL test. The husband blamed the plaintiff for what had happened.
896 The Court of Appeal decided that the child was born with syphilis as a result of the defendants’ negligence, but that the disease was asymptomatic.
897 Syphilis today is a completely curable infection, and the plaintiff’s daughter was free of the disease within eighteen months of treatment.
898 Jaensch v. Coffey op. cit. fn. 530, at 567.
between the shocking event and the onset of the psychiatric illness. In *Jaensch v. Coffey* the interval between Mrs Coffey’s shock and the beginning of her psychiatric illness was approximately nine days. In the *Pusey* case there was a four-weeks delay between the shocking event witnessed by Mr Pusey and the onset of his schizophrenic episode. In both cases the High Court stated that each of the respective intervals was encompassed within the requirement of temporal proximity between the onset of the plaintiff’s shock and subsequent illness, which Evatt J defined as having to be ‘fairly contemporaneous with the casualty’. The requirement that there be both a causal and a temporal link between the wrongful event productive of shock and the subsequent psychiatric illness has led the judges - who have to grapple with the effects which technological advances of modern medicine have on human emotions - to use highly contrived arguments in order to make compensatory awards.

The case of *Spence v. Percy & Anor* can serve as an example of the not uncommon situation where a person who has suffered a severe brain injury as a result of the defendant’s conduct can be kept alive in a persistent vegetative state (PVS) or in a deep, irreversible coma for a long period of time. Many patients in a PVS can, with mechanical or biochemical assistance or both, live for a long time but they may never regain consciousness. The reported mean duration of survival of patients in PVS is 4.4 years. The law of nervous shock in regard to second-impact victims is narrowly focused upon the immediate events surrounding the negligently occasioned injury to the first-impact victim. It specifically excludes long-term consequences of the physical injury upon him or her and the psychiatric ramifications of that injury upon the plaintiff. In the case of

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899 *Chester v. Waverley Corporation* op. cit. fn. 521, at 31.
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Spence v. Percy & Anor,902 the plaintiff’s daughter, Claire, suffered serious injuries as the result of the admitted negligence of the defendants in March of 1983 in Townsville. Upon receiving the news of her daughter’s injuries and likely death, Mrs Spence, who lived in Brisbane, suffered shock and anxiety. These became more profound when, having flown to Townsville the next day, she saw Claire in a coma. Claire remained permanently comatose until her death. Nevertheless, from the time she first saw Claire in the hospital, Mrs Spence hoped - against all odds - that her daughter would recover.903 Therefore, she became very distraught and severely depressed when, on the 17th of July 1986, the news of Claire’s death came.

There was thus an interval of three years and four months between the negligent conduct causing physical injury to the daughter, which resulted in the shock to her mother, and the actual psychiatric illness which Mrs Spence suffered only upon Claire’s death. The question before the court was whether this interval can be encompassed within the High Court’s statement that the shock and the subsequent psychiatric illness must be ‘fairly contemporaneous’. The Full Supreme Court of Queensland held that, for the purposes of the defendant’s liability for negligent infliction of nervous shock, the long duration of survival by the first-impact victim of the defendant’s wrongful conduct is irrelevant. The only relevant question is whether the psychiatric illness suffered by the plaintiff had occurred soon after the shock, and whether the shock itself occurred by way ‘of sudden sensory perception’ of the distressing event or of its immediate aftermath. This was not the case with respect to Mrs Spence’s injury.

There are at least two ways in which the court may look at the issue of the long interval between the negligent conduct causing serious physical injury to the loved person which results in the shock to the plaintiff, and the actual psychiatric illness which the plaintiff suffers upon the death of the first impact victim. One way to approach this issue is the way in which the Full Court of the Supreme Court of Queensland did in the Spence case, when it determined that the psychiatric illness must manifest itself as a result of ‘sudden sensory perception’ of the original physical injury to the loved person, either at the scene of the accident or soon afterwards at the

902 Spence v. Percy op. cit. fn. 898.
hospital. Had Mrs Spence suffered psychiatric injury upon first seeing Claire comatose in the hospital, she would have been able to recover damages for her psychiatric injury. However, the plaintiff admitted that she suffered psychiatric illness not as a result of that particular impact but as a result of a series of distressing events over the intervening years which culminated in her daughter’s death.\footnote{Prior to Claire’s accident, Mrs Spence’s other daughter’s son suffered death which led to his mother’s nervous breakdown some months after Claire’s accident. Subsequently, the relationship between Mrs Spence and her bereaved daughter deteriorated, because she blamed her mother for insufficient emotional support.} Mrs Spence’s experiences had placed her within ambit of the Jaensch v. Coffey rule that psychiatric illness is not compensable when it results from the plaintiff being ‘worn out’ by constant anxiety and sorrow born out of the knowledge of the victim’s condition and prognosis.

Another way to approach the issue relating to the psychiatric illness ensuing upon hearing that the original victim has died after being kept alive for a number of years through artificial life supports is to equate medical causation with legal causation. This is what the trial Judge did in the Spence case.\footnote{Spence v. Percy op. cit. fn. 898.} Justice Derrington said that if the plaintiff can show ‘directness of causation’, then the temporal requirement of receiving the shock through sight or hearing of the original event or of its immediate aftermath should be regarded as ‘totally irrelevant’. His Honour suggested that no matter how long the interval between the original shocking event and the consequent psychiatric illness, the plaintiff, who like Mrs Spence can establish that ‘she suffered a psychiatric illness directly caused by shock at the death of her daughter as the inevitable aftermath of her injury’ should be able to recover.\footnote{Id. at 68,041.} Such an interpretation of the temporal link between the shocking event and the plaintiff’s injury is incompatible with the High Court’s definition of the temporal requirement of the cause of action. Claire’s biological life, possibly at the insistence of her mother, was prolonged a number of times through emergency operations. With the help of mechanical and biochemical life support systems she might have lived on in the comatose state, not merely for three but for five, ten years or more.

For similar reasons, Justice Nader of the Northern Territory Supreme Court in the case of Anderson v. Smith & Anor\footnote{Anderson v. Smith & Anor. (1990) 101 F.L.R. 34.} found that he was unable to award damages for nervous shock to the plaintiff who suffered depressive
illness upon the death of her infant daughter some fifteen months after the original accident which was due to the defendant’s negligence. Mrs Anderson, the plaintiff, was told by the police that her daughter, Amy, having been found lying in the pool face down was taken to the hospital where efforts were being made to revive her. The child was revived, but remained in a deep coma until her death. The plaintiff looked after Amy, feeding her through a tube and applying suction, first at the hospital and then at home. Justice Nader found that Mrs Anderson’s psychiatric illness was not caused by the shock of being told of the drowning injury and then seeing her daughter injured and comatose; rather, the illness was a result of ‘prolonged contact with a complex set of stressful events culminating in the death of Amy’.

It was acknowledged that Mrs Anderson directly perceived the phenomenon of Amy’s injury within immediate aftermath of the accident, and that this perception must have been ‘indescribably distressing to the plaintiff’. However, again, modern technology had enabled the child to survive for long enough for the law to say that the psychiatric illness to the mother should not be attributed to the sudden shock of seeing her child injured.

It is in the realm of speculation whether the mother would have suffered a lasting psychiatric condition had Amy died within a day or two of drowning, however it is equally speculative to argue that even if the child did eventually recover Mrs Anderson would not have suffered a lasting emotional injury. Experience shows that when faced with grave injuries to their children, parents tend to focus exclusively upon their offspring and to summon up all their emotional resources until there is some kind of resolution of the crisis, whereupon they may recognise that they themselves are suffering an illness and are in need of professional help. Should close relatives of those victims who are kept alive only through the use of extraordinary measures go without compensation merely because they have suffered a psychiatric illness not at the beginning but at the end of the tragedy?

It is time the law jettisoned the temporal requirement that the onset of

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908 The Court found that the defendant - the child’s grandmother - who was supervising the child at the time of the accident, was in breach of her duty of care to Amy when she failed to securely close the door leading to an unfenced swimming pool.

909 Anderson v. Smith op. cit. fn. 905, at 50.

910 Ibid.
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the psychiatric illness be fairly contemporaneous with the shocking event involving comatose and PVS patients. This requirement was introduced long before life-sustaining measures became widespread. The limiting criterion goes to causation, and as such is a substantive law issue. Since nervous shock has been recognised as a compensable injury, why should the precise timing of the onset of the psychiatric illness matter in the process of attribution of liability? Even if the requirement were to be abandoned, the plaintiff might still find it difficult - but not impossible - to provide evidence of causation between the wrongful act of the defendant and the ensuing emotional injury in circumstances where there is an interval of several years between the two events.

It would be most unusual for close relatives of first impact victims who previously had no chance of surviving the injury but whom modern medical technology enables to stay alive, to commence litigation in their own right before the death of the loved one occurs. Were the requirement of temporal proximity to the actual tortious event to be discarded, the question would arise as to whether the time for the purpose of the provisions of the relevant Limitation of Actions legislation should begin to run from the date of the tortious event but for which the plaintiff’s injury would not have transpired, or from the date of the victim’s death at which point the plaintiff’s damage manifested itself as a psychiatric illness. In the case of the cause of action in negligence for damages for mere psychiatric illness where the psychiatric illness manifests itself only after the death of the first-impact victim which happens some years after the accident, there will be a disparity between the two dates. The procedural problems created by the capacity of medical technology to sustain life for many years are partly addressed in the extension provisions of the relevant Limitation of Actions Acts. For, although statutory provisions in respect of limitation of actions differ considerably, most jurisdictions grant the court discretion to extend the period of limitation, having regard to the circumstances of a particular case.91

Two balancing public interest questions concern the rights of the defendant. Is it fair and reasonable that the threat of litigation for damages for mere nervous shock by a second impact victim may hang over the

defendant for an indefinite period? Likewise, is it fair and reasonable for the court to attribute the secondary victim’s present psychiatric condition to a specific traumatic event that happened many years ago when it is well known that every person’s life experience involves multiplicity of psychologically traumatic events? Presumably it was because of these concerns that the High Court insisted upon the requirement that the onset of psychiatric illness be fairly contemporaneous with the plaintiff’s perception of the shocking event.

The issue of causation in the case of a plaintiff whose close relative survives for a long time through ‘heroic’ medical intervention arises only when such claimant suffers nervous shock not at the initial contact with the person injured by the defendant but only at the death of such person. This touches upon another restrictive requirement of substantive law unique to emotional distress and nervous shock cases, namely, predisposition.

**The requirement of the plaintiff having no prior predisposition to nervous shock re-visited**

Traditionally, predisposition has been treated as a substantive issue affecting the ambit of reasonable foreseeability of the real risk of injury. This legal approach was based upon the medical opinion of the late nineteenth century that traumatic neurosis could only develop in predisposed individuals. However, already after the First World War some doctors began to voice their disagreement with this hypothesis. Later, even individual judges, such as Windeyer J and others, questioned a presumption which postulated that the world is composed mostly of individuals who are not pre-disposed to emotional or mental disturbance.

In *Jaensch v. Coffey* the High Court adopted the conventional medical view on the aetiology of psychoneurosis when it assumed that in order to recover damages for nervous shock in non-physical impact cases, the plaintiff would need to show that he or she was a person of normal disposition at the time of the accident.

Since 1984, however, there has been a review of the medical status of predisposition in relation to psychoneurosis. It is now recognised that predisposition, while an important factor, is not the only element in the aetiology of the PTSD. Experiments conducted in the United Kingdom with

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912 Contribution to discussion of Dr Julius Grinker in: Schaller op. cit. fn. 687, at 345.
913 See: *Chadwick v. British Railways Board* op. cit. fn. 630, at 922, per Waller J.
the participation of the Royal Air Force Aircrew demonstrated that among the group of men who had been specially selected and trained, and who were generally regarded as psychologically very stable, 40% of survivors who had ejected from military aircraft experienced prolonged emotional symptoms.914 Undoubtedly, the victim’s personality, as well as his or her cultural background, plays an important role in determining the psychological meaning which such a person may attach to the shocking event, and thus influence the long-term emotional response to it.915 Scientific data suggest that PTSD following a traumatic event may be caused as much by a sudden alteration in neurobiologic activity of the brain mechanisms916 as by the psychologically predisposing factors.917

Recent research on rhesus monkeys has also demonstrated that genetic predisposition to traumatisation, although a factor, does not necessarily lead to an enduring behavioural disturbance when the animal is exposed to stress. Whether an exposure to sudden stress will result in such a disturbance will depend on the particular interaction of neurobiologic, genetic and environmental factors in the monkey’s life.918 PTSD in animals is characterised by a cluster of symptoms which include markedly diminished interest in significant activities, diminished food consumption and weight loss.919

In humans, these symptoms also tend to include restricted affective range, interpersonal detachment, and a sense of foreshortened future. Both animal and human studies have demonstrated that stress induces alterations in central and peripheral noradrenergic function, with particularly profound

916 The primary neuronal center for the ascending dorsal noradrenergic system in the brain is the locus coeruleus.
917 Neurophysiological studies on monkeys have shown that threatening situations and stimuli associated with alarm (conditioned fear stimuli) elicit an activation of the locus coeruleus. The locus coeruleus primes the organism to detect danger and to make appropriate defensive responses. Krystal op. cit. fn. 806.
918 Id. Studies on animals exposed to severe or repeated inescapable adverse stimuli have shown that recurring stress results in traumatic behavioural disturbance in only a proportion of such animals. This kind of behavioural disturbance has been explained as a state of learned helplessness - known as ‘the inescapable stress response’.
919 Murburg, McFall & Veith op. cit. fn. 815. It should be pointed out that these symptoms may also occur as a consequence of a single traumatic event of short duration.
changes occurring in central and peripheral catecholamines. The inescapable stress syndrome had been observed to reduce levels of brain norepinephrine which is thought to be necessary for the learning of avoidance behaviours.

The common law as yet has not taken cognisance of the reassignment of predisposition in the new bio-medical model of neurotic illness. A legal double standard still pertains in respect of recovery of damages for nervous shock. Those claimants who have been ‘predisposed’ to neurosis or psychosis, and who are psychologically injured as a result of wrongfully inflicted physical injury, may recover for psychiatric illness and emotional distress. However, those claimants who have been similarly ‘predisposed’, and who suffer similar psychiatric injury as a result of tortiously inflicted mere emotional trauma, may be barred from recovery for nervous shock on the basis that they fail the requirement of normal disposition.

The South Australian case of Eaton v. Pitman can serve as an illustration. The case involved a plaintiff who developed a spontaneous stress fracture in the bones of her spine through abnormal susceptibility to such fractures (congenital spondylolisthesis) when she came to the assistance of a person injured by the defendant. Counsel for the defence relied on the statements in respect of predisposition in Jaensch v. Coffey, in arguing that the plaintiff should not recover damages for physical injury because of her abnormal susceptibility to the kind of damage she had sustained. King CJ rejected counsel’s argument, and stated that criteria which govern foreseeability of risk in cases of physical injury are different from the requirement of normal disposition which governs the criterion of reasonable foreseeability in nervous shock cases. At this point one may properly ask why the modern legal system should discriminate against people who have suffered psychiatric illness as a result of tortious conduct.

920 ‘Catecholamines’ is the collective term used to refer to three chemicals which transfer electrical activity between neurones; these neurotransmitters are dopamine, noradrenaline (norepinephrine) and adrenaline (epinephrine). These three substances share a common structure, known as the catechol nucleus, and have an amine side chain. As well as their function as synaptic neurotransmitters in the central nervous system, noradrenaline is also a peripheral transmitter at sympathetic neuroeffector junctions, and adrenaline is synthesised and released by the central (medullary) portion of the adrenal glands. Goldfarb, J. and Wilk, S. (1976), ‘Neuroanatomy, Neurophysiology, and Neurochemistry’, in S. D. Glick & J. Goldfarb, Behavioural Pharmacology, The C.V. Mosby Co., St. Louis, 14-57.

921 Nader v. Urban Transit Authority of N.S.W. op. cit. 753.

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because they happened to be born with a predisposing gene, as distinct from persons who suffer physical injury as a result of genetic predisposition. A duty of care is owed, for instance, to blind persons whether their disability is congenital or due to injury or illness because their presence is deemed to be reasonably foreseeable.  

The requirement of normal disposition is not, however, a universal one. For example, as pointed out above, in the 1960s the Workmen’s Compensation tribunals in some states of the USA began to award compensation to workers who had suffered psychiatric disorders following a traumatic event at work in cases where there was no physical injury or impact; this included cases where the claimant’s predisposition to neurosis was medically established. One of the reasons for dispensing with the requirement that the claimant under the Workmen’s Compensation Act be of normal fortitude in non-physical impact cases was the principle that an employer hires the employee with all his pre-existing problems, and if the employee is injured or becomes ill at work the employer should not escape responsibility by alleging predisposition. At the same time it is clear that in awarding compensation in such cases the tribunals, and the courts which upheld the awards, took into account new psychiatric understanding of mental disorders and illness.  

Since 1984 the High Court has progressively extended the defendant’s duty of care in the area of physical injury to include persons who may be careless, or inattentive, and whose faculties may be ‘impaired either naturally or by reason of the effect of alcohol’ [emphasis added]. The statutory cause of action for nervous shock does not refer to predisposition, and there is no valid reason why the law should not extend its protection to persons who may be particularly vulnerable to morbidity following emotional trauma. It is time for the law to abandon the old fashioned equation of a person with so-called predisposition to psychiatric

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926 *March v. E. & M.H. Stramare Pty. Ltd.* op. cit. fn. 876, at 520, per Deane J.
927 Section 4 of the *Law Reform (Miscellaneous Provisions) Act* 1944 (N.S.W.) and equivalent provisions in Northern Territory and the Australian Capital Territory op. cit. fn. 576.
injury with an abnormal, and thus ‘unforeseeable’, plaintiff. The prior vulnerability of persons who do not display the ‘customary phlegm’ can be taken into account when the quantum of damages is calculated.

The criterion of ‘normal fortitude’, when taken together with the High Court’s insistence that the psychiatric illness must be ‘shock-induced’ within a relatively short time after the injurious event, leads to internal inconsistency. A person of normal fortitude, faced with a relative who has been severely injured, would presumably be expected to fight his or her own emotions until the death of the victim. If they did so, they would find themselves in the same position as Mrs Anderson and Mrs Spence - unable to recover. Ironically, through the requirement of the temporal link between the onset of psychiatric illness and the wrongful shocking event, the law tends to provide compensation to those plaintiffs who, perhaps due to prior psychological vulnerability, suffer psychiatric injury as an immediate sequela of the shocking event.

Yet the suffering of those with normal disposition is no less real than the suffering of those who are predisposed to psychiatric illness; it is brought about just as suddenly, though the agony is prolonged by the rise and fall of, generally false, hopes. Moreover, modern psychiatry recognises that psychiatric injury is a complex process, rarely occurring as a result of an isolated shock. The very real suffering inflicted upon relatives who have to live with the sight and knowledge that someone they love may remain comatose for a long time, should be acknowledged by our legal system either by way of expanding the liability of the defendant for negligent infliction of nervous shock or by way of specific legislation providing for a statutory compensation in such cases.

**Psychiatric illness occasioned by a series of traumatic events due to the defendant’s initial negligence: the emergence of a new tort of vexation and harassment?**

The requirement that psychiatric injury must be caused by a single traumatic event has another limiting effect. In Australia, the case of *Council of the City of Campbelltown v. Mackay*\(^{928}\) stands for the proposition that psychiatric illness induced by a series of traumatic events brought about by the defendant’s initial negligence is not regarded in law as an instance of nervous shock. The rule, however, does not mean that the injury is not

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\(^{928}\) *Campbelltown City Council v. Mackay* (1989) 15 N.S.W.L.R. 501.
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Compensable. Medically, physiological effects of chronic stress involve a reduction in the level of testosterone and a modification of the endocrine effects of acute stress. Like the response to acute stress, the body’s response to chronic stress is associated with alterations in the immune and the neuroendocrine system. These changes suggest that there is a biological link between chronic stress and depression. The courts appear to have taken cognisance of these factors, for there has been a search for new tortious remedies capable of providing compensation to such claimants.

In the Mackay case, the plaintiffs observed the presence of hairline cracks which were due to faulty underpinning of the house within the first eight months of moving into a newly completed ‘dream home’. Before the remedial work on the house was completed, heavy rains caused such extensive damage to the house that it became uninhabitable and the Council issued an order for demolition of the premises. Six months after moving out of the house Mrs Mackay became pregnant but delivered a stillborn child before term.

Dr Milton, Mrs Mackay’s treating psychiatrist, indicated that the two factors of the collapse of the house and the stillbirth had combined to produce her severe psychiatric condition, and that without either one of them the patient’s depressive state might not have ensued. Two years after having to move out of their home, the plaintiffs’ marriage had irretrievably broken down and they were separated. From at least this point onwards, Mr Mackay also begun to suffer psychiatric illness. In relation to Mr Mackay, the psychiatrist reported that the plaintiff’s ‘depression and marital breakdown were a direct result of stress associated with the collapse of the house’.

The plaintiffs brought an action in negligence against the Council, two engineers and a firm of contractors. The trial Judge awarded compensation to the plaintiffs for damage to their home and consequential losses, including nervous shock. The New South Wales Court of Appeal held that since the psychiatric illness which they both suffered was not caused by the sudden perception of the damage to their home, the trial Judge had erroneously classified the plaintiffs’ injuries as nervous shock. Nevertheless, the quantum of damages for nervous shock awarded by the

930 Smith & Copolov op. cit. fn. 707. The neuroendocrine alterations involve levels of serotonin, dopamine and noradrenaline in the brain.
931 Id. at 510.
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trial Judge was supportable on the basis of vexation, worry, distress and inconvenience.\textsuperscript{932} This was so because, as Justice Kirby pointed out:

... the price paid for the failure of the law to develop is the persistence of a legal entitlement to recovery which nowadays bears little relationship to contemporary psychological understanding. Such artificialities bring law into disrepute. They force claimants to try to squeeze their claims into outmoded formulae. They subject expert witnesses to the pressure to distort opinions on what they may feel to be legitimate claims, out of deference to outmoded formulations of the legal basis of entitlement to recovery.\textsuperscript{933}

It is an ironic reflection of the traditional priorities of the common law that a new tort of vexation leading to psychiatric injury should apply to property owners who suffer psychiatric illness as a consequence of a sequential tortious damage to their property, but not to close relatives of wrongfully injured victims who do not die within short period of that injury.\textsuperscript{934} But then, interest in land is still at the apex of interests protected by the common law. Injuries arising from negligent interference with land have always been compensable. For example, in Canada, Holland J of the Ontario High Court of Justice in \textit{Heighington et al. v. The Queen in Right of Ontario},\textsuperscript{935} determined that having negligently failed to prevent in 1973 the development for housing of land contaminated by nuclear waste,\textsuperscript{936} the Government of Ontario was liable to those owners of houses who suffered recognizable psychiatric illness when contamination was discovered in 1980.

**Intentional conduct consisting of a succession of stressful and damaging episodes**


\textsuperscript{933} \textit{Campbelltown City Council v. Mackay} op. cit. fn. 929, at 503.

\textsuperscript{934} In his judgment in \textit{Anderson v. Smith} op. cit. fn. 905, Nader J argued in favour of such an extension.


\textsuperscript{936} The contamination occurred in 1945, and was known to provincial government officials. The houses were built in 1973 and sold by the province under a plan to assist low-income buyers.
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v. Shoreline Sav. Assn., the court held that in the case of breach of partnership obligations through a series of intentional acts of concealment and deceit by another partner, whereby the first partner was placed in financial hardship, compensatory damages for emotional distress may be awarded in the absence of proof of any objective symptoms.

In the United Kingdom, the Court of Appeal abandoned the requirement of a single shocking event, when it held in the case of Khorasandjian v. Bush that repeated harassment which results in physical or psychiatric harm may be actionable under the tort of Wilkinson v Downton. In this case, the defendant, a 21 year old man, met the plaintiff, a 16 year old girl, at a snooker club in 1990. They became friends. However, in late 1991, their friendship broke down and the plaintiff told the defendant she did not wish to see him again. Unable to accept this, the defendant began to harass the plaintiff, threatening her with violence, following her around while shouting abuse. He pestered the plaintiff with telephone calls to her parents’ home and to her grandmother’s to such an extent that the telephone number had to be changed. Eventually, in March 1992, he was arrested, charged and given a 12 month conditional discharge. He made further threats to the plaintiff and in May 1992 was sent to prison for threatening to kill her. He was also fined for offences under the Telecommunications Act 1984 (UK) in respect of his telephone calls. The plaintiff was granted an interim injunction restraining the defendant from molesting, harassing, or otherwise interfering with her, and from entering, or coming within 200 yards of, her parents’ home or any other address at which she might reside. The injunction was upheld by the Court of Appeal. In the Khorasandjian case, the plaintiff did not seek damages. However, the Court of Appeal observed that had the requisite injury in the form of a recognised psychiatric condition been pleaded and established, the plaintiff would have been able to recover damages

‘Mere grief and sorrow’

The difference between non-compensable psychological reactions of anxiety, grief and sorrow and compensable psychiatric illness has been described by Lord Bridge in McLoughlin v. O’Brian in the following terms:

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The common law gives no damages for the emotional distress which any normal person experiences when someone he loves is killed or injured. Anxiety and depression are normal human emotions. Yet an anxiety neurosis or a reactive depression may be recognisable psychiatric illnesses, with or without psychosomatic symptoms. So, the first hurdle which a plaintiff claiming damages of the kind in question must surmount is to establish that he is suffering, not merely grief, distress or any other normal emotion, but a positive psychiatric illness.  

Brennan J adopted this distinction, and used the expression ‘any recognisable psychiatric illness’ to define injuries for which recovery will be allowed in nervous shock claims. Should this distinction be retained as a substantive element of the law of nervous shock? The definition of compensable damage in terms of ‘any recognisable psychiatric illness’ necessarily implies that the judges need to have regard to expert psychiatric evidence as to whether the injury complained of amounts to a psychiatric illness. This may lead to very curious results, as exemplified in the following cases.

In the case of De Franceschi v. Storrier three of the plaintiff’s four children, while waiting for the school bus, were driven into and seriously injured by an out-of-control car. It was some five years before it became clear that one of the children would survive into adulthood. Chief Justice Miles decided that although compensable psychological consequences of the nervous shock had continued for many years, as the children had all recovered to an extent that they were out of danger, the nervous shock would at some stage have been displaced by the plaintiff’s natural concern and anxiety for her children, which was not compensable. Miles CJ described these distinctions as ‘a highly artificial exercise’.

Modern medicine has recognised that bereavement may be a cause of psychiatric illness. It is a matter of clinical judgment by the attending psychiatrist to decide whether the bereaved person is experiencing ‘normal’ grief or whether he or she suffers from a diagnosable psychiatric disorder. Age and sex may influence the risk of morbidity following loss of a spouse.

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940 Jaensch v. Coffey op. cit. fn. 530, at 559. This expression was first used by Lord Denning MR in Hinz v. Berry op. cit. fn. 125, at 42.
941 The Spence and the Anderson cases also illustrate the arbitrary effect of this distinction.
943 Id. at 67,657.
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The outcome is generally considered to be worse for men than women.\textsuperscript{944} The psychological state which the lawyers traditionally call ‘mere grief and sorrow’ is referred to in medicine as an ‘uncomplicated bereavement’, that is, grief which is not associated with the full depressive syndrome.\textsuperscript{945} Conversely, ‘abnormal grief’, that is, grief combined with depressive and anxiety symptoms, is regarded as a recognised mental disorder. Though grief is generally considered to be a purely emotional phenomenon, persons undergoing bereavement have been shown to have abnormal physiological functions which may be associated with severe depression.\textsuperscript{946}

By stating that mere grief and sorrow does not sound in damages, the High Court left open the option of awarding damages for an abnormal grief reaction. Since the characterisation of the injury is an evidentiary issue, this ‘opening’ has been utilized by the courts to award compensation to those plaintiffs whose grief upon the death or injury of their loved ones resulted in a recognised mental disorder. As the law stands at present, the award of damages depends entirely upon the medical diagnosis of whether the claimant’s grief is ‘normal’ or ‘abnormal’, therefore the judge who disregards such medical opinion is technically in error. Two contrasting decisions illustrate this point.

In the case of Petrie v. Dowling,\textsuperscript{947} Mrs Petrie’s response to the news of the death of her daughter was medically diagnosed as an abnormal grief reaction, manifesting such psychopathological features as ‘depersonalisation’ and ‘derealisation’. In Mrs Petrie’s case, Kneipp J accepted the opinions of medical expert witnesses as to the psychiatric condition of the plaintiff, and decided that the shock of her daughter’s death caused Mrs Petrie to suffer not just a normal reaction to grief, but a psychiatric illness which was compensable. In the case of Swan v. Williams (Demolitions) Pty. Ltd.,\textsuperscript{948} the plaintiff company claimed damages from the defendant for the loss of Mr Swan’s services resulting from nervous shock caused to him by his wife’s death. Mr Swan’s wife was killed when a 630 kg sandstone block fell upon her car as a result of the negligence of the

\textsuperscript{944} Mendelson, G. (1988) op. cit. fn. 2, at 58.
\textsuperscript{945} DSM-III-R op. cit. fn. 701.
\textsuperscript{946} These include suppression of the immune system, impaired lymphocyte function, and elevated urinary catecholamine output. Catecholamine hormones of the adrenal medulla include epinephrine (adrenaline) and norepinephrine. Raphael, B. (1984), The Anatomy of Bereavement. A Handbook for Caring Professions, Hutchinson, London.
\textsuperscript{947} Petrie v. Dowling op. cit. fn. 816.
\textsuperscript{948} Swan v. Williams (Demolition) Pty. Ltd. op. cit. fn. 731.
defendant. Mr Swan was examined by two psychiatrists, neither of whom was called to give evidence. In their reports, however, they both agreed that the plaintiff did not suffer a psychiatric illness. Dr John Woodforde stated that the patient suffered ‘an unresolved and atypical bereavement reaction following upon the sudden death of his wife’, but that ‘There was no evidence of any anxiety or severe depression ... hallucinations or any psychotic phenomena’. Dr Robbie originally reported that although Mr Swan presented ‘an abnormal mourning reaction’, he did not suffer from a psychiatric illness. In his second report Dr Robbie was even more emphatic, stating that Mr Swan had ‘absolutely no psychiatric condition’.

The opinions of the expert medical witnesses concerning the absence of any psychiatric illness or disorder were accepted by the trial Judge, Lusher J, who declined to award damages for nervous shock. On appeal Samuels JA, in his dissenting judgment, agreed with the trial Judge and stated that since the medical witnesses had refused to categorise the plaintiff’s condition as a ‘psychiatric illness’ there could be no basis for the finding that Mr Swan suffered any medical disorder capable of amounting to mental or nervous shock as the law understands that term. However, the majority on the Court of Appeal disregarded the uncontested psychiatric diagnosis of no psychiatric illness. They held that Mr Swan underwent an ‘unresolved and atypical bereavement reaction’ amounting to more than an ordinary grief as a result of his wife’s death. According to the majority decision, what had happened to Mr Swan was an injury resulting from nervous shock within the meaning of words in the Law Reform (Miscellaneous Provisions) Act, 1944. This suggests that for the purposes of statutory compensation for nervous shock under the New South Wales legislation the condition of the claimant may not amount to a ‘psychiatric illness’.

Thus, the New South Wales Court of Appeal distinguished between the meaning of the phrase “nervous shock” for the purposes of common law and the statute. However under the common law, as it stands at present, the High Court Bench in Jaensch v. Coffey has accepted that expert medical evidence is essential to the determination whether or not the claimant had developed injuries.

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949 Id. at 196.
950 Ibid.
951 Id. at 198.
952 Ibid.
953 Id. per Priestley JA, with whom McHugh JA agreed.
954 Mr Swan was thus entitled to damages of $10,000 for nervous shock.
a compensable injury. As long as the distinction between compensable and non-compensable emotional injuries remains, it would appear prudent for judges to refrain from imposing their own opinion in disregard of the expert medical evidence as to the presence or absence of psychiatric illness.

The whole concept of compensation for the sudden loss of a loved person, including the old rule that so called ‘mental emotions’ of grief and sorrow are not compensable, may need to be re-examined. The rule is based on an old Cartesian distinction between body and mind which was discarded by medical science a very long time ago. Clinical studies have revealed that grief adversely affects neuroendocrine homoeostasis by altering the immune and endocrine systems of the body. There is evidence that during the initial two years following bereavement bereft individuals tend to suffer from an increased rate of cancer, cardiovascular disease, Cushing’s disease, ulcerative colitis and thyrotoxicosis. A full analysis of both the medical and jurisprudential issues involved needs to be undertaken, including a consideration of possible legislative action along the lines of the solatium provisions which already exist in certain jurisdictions. In connection with the latter, it should be noted that in Anderson v. Smith & Anor, the court, having refused to allow the plaintiff damages for nervous shock, awarded her compensation in the form of solatium under the Compensation (Fatal Injuries) Act. However, in Spence v. Percy, the plaintiff was left without a legal remedy.

**Damages for ‘pure’ fear of a future illness or disorder**

The recognition of ‘pure’ fear as a head of damages in some United States jurisdictions provides an example of the evolution of the law of negligence in the area of emotional distress. From determining that ‘phobia’ of a future adverse medical sequela flowing from a negligently inflicted physical injury is not too remote a kind of damage, some courts have extended the

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956 See Chapter 2 ante.
958 Ibid.
959 Anderson v. Smith op. cit. fn. 905.
960 Spence v. Percy op. cit. fn. 898.
definition of damage to include ‘pure’ fear of possible illness or disorder that may occur in time to come. The 1958 case of Ferrara v. Galluchio appears to have introduced the term ‘cancerophobia’ into the medico-legal dictionary. In this case, the Court of Appeals of New York affirmed the jury’s award of $15,000, for ‘severe cancerophobia’. Medical witnesses testified that the plaintiff had ‘a phobic apprehension that she would ultimately develop cancer in the site of the radiation burn’ which she sustained while undergoing medical treatment. The plaintiff’s fear in this case was not a phobia, it was realistic and well founded. For, it is a known fact that cancer can develop in burn scars, including post-radiation scars. Cancer which develops in a burn scar is called Margolin’s ulcer. Phobia, on the other hand, is a recognized psychiatric condition which manifests itself in a disproportionate, obsessive and irrational fear of an external situation, condition or object. The issue in Ferrara was remoteness of damage in the case of a primary victim who suffered a physical injury. The case could be explained on the basis that while the issue of the development of a cancer was speculative, the anxiety generated by the radiation burn was part of pain and suffering for which damages can be had. Moreover, in the Ferrara case, the court was attempting to overcome a difficult problem faced by many plaintiffs who sue defendants for physical injuries they have already sustained, but who are uncertain whether they may not suffer further adverse consequences stemming from the initial injury. Under the ‘once for all’ rule of compensation, having recovered damages for the wrongful injury, the plaintiff will not be allowed to bring another action based on the same facts, even if it transpires that the injury for which damages were awarded develops into a much more serious condition than it appeared to be at the time of trial. Hence, claims for fear of future diseases and disorders.

The case of Battalla v. State of New York, was a classic variant of the ‘zone of danger’ category of cases where fear for one’s life resulted in psychiatric and physical injury. It involved a claim against the State for damages for ‘severe emotional and neurological disturbances with residual physical manifestations’ sustained by a nine-year-old girl. On a descent from Bellayre Mountain Ski Center in a State park, she was placed alone in one of the chairs by a State employee who negligently failed to lock the chair’s safety bar. It was sheer good luck that run was smooth, and she was

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not propelled out of the open chair to her death.

The *Ferrara* and *Battalla* cases are distinguishable from later cases of ‘pure’ fear, that is, fear which stems from being told of environmental circumstances created by the defendant’s wrongful conduct. The 1993 Californian case of *Potter et al. v. Firestone Tire and Rubber Co.*,\(^{964}\) arose out of the illegal practice of the defendant to dispose of its toxic wastes at a landfill. Toxic chemicals, including benzene and vinyl chloride, which are known to be human carcinogens, leached into groundwater and contaminated the plaintiffs’ domestic water wells.\(^{965}\) The Supreme Court of California, without referring to the *Ferrara v. Galluchio* case, distinguished fear of cancer from cancerophobia, by stating that

… cancerophobia, as a ‘phobic reaction,’ is a mental illness that is the recurrent experience of dread of a cancer in the absence of objective danger. In contrast, the fear of cancer is a claimed anxiety caused by the fear of developing cancer and is not a mental illness.\(^{966}\)

The court determined that recovery of damages for fear of cancer as a form of emotional distress in a negligence action ‘should be allowed only if the plaintiff pleads and proves that the fear stems from a knowledge, corroborated by reliable medical and scientific opinion, that it is more likely than not that the feared cancer will develop in the future due to the toxic exposure’.\(^{967}\) The *Potter* decision is unsatisfactory on a number of levels. To begin with, the decision effectively re-writes the rule that the cause of action in negligence does not accrue until there is an actual injury. Then, there is the issue of the role of the judge. The function of the court of law is to determine the matter before it by ascertainment of the facts, by application of legal tests to these facts, and by exercise, where appropriate, of judicial discretion. By predating the recovery solely upon the plaintiff’s proving the medical probability of the feared cancer, the court abdicates its judicial function. Moreover, despite a remarkable number of advances in the understanding of the disease, the pathogenesis of cancer is still far from

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\(^{965}\) It is unclear why the case proceeded in negligence rather than in nuisance. The plaintiffs sued Firestone in negligence, negligent and intentional infliction of emotional distress, and strict liability for ultrahazardous activity.

\(^{966}\) Id. at 980; 805.

\(^{967}\) Id. at 974; 800. The court added that ‘an exception to this general rule is warranted if the toxic exposure that has resulted in the fear of cancer is caused by conduct amounting to “oppression, fraud, or malice”’. 
being scientifically unravelled.\textsuperscript{968} It is known that not only hereditary and acquired genetic mutations, but also environmental factors play a fundamental role in the development of cancer.\textsuperscript{969} It is not known, however, how these, as well as other biological and psychological factors, interact in any one individual. Consequently, medical predictions relating to a particular plaintiff’s risk of developing cancer are based on intuition, rather than science. At this point it should be noted that the very concept of ‘risk’ in medicine differs from the way lawyers use this term. Lawyers, as the \textit{Potter} test illustrates, conceptualise the existence of a particular risk and its outcome in terms of the balance of probabilities, which means that the plaintiff has to show odds of at least 51 to 49 that something has taken place or will do so.\textsuperscript{970} Medicine approaches the concept of risk in terms of the high-risk and the low-risk groups that comprise the total population.\textsuperscript{971} Yet, when applying the \textit{Potter} test, the court invites physicians to play the role of crystal-gazing clairvoyants foretelling the onset of a condition in the absence of verifiable medical predictors.

Other American jurisdictions have rejected the Californian approach, and continue to adhere to the traditional common law rule that a threat of future harm which is not yet realised cannot constitute sufficient damage to found a cause of action in negligence.\textsuperscript{972} These jurisdictions also rely on the principle that the statute of limitations does not begin to run until there is a manifestation of a physical injury or a psychiatric disorder. Thus, in \textit{Ayers}...
v. Township of Jackson, the Court of Appeal of New Jersey overturned the part of the jury’s decision which provided compensation for emotional distress to the residents of a municipality who sued the town for damages sustained when their well water was contaminated by toxic pollutants. The court determined that emotional distress caused by the knowledge that the residents had consumed contaminated water for up to six years was not a compensable damage. Likewise, in Burns v. Jaquays Mining Corporation, the Supreme Court of Arizona rejected the plaintiffs’ claim for damages for mental anguish which they suffered as a result of their exposure to asbestos, because there was ‘no competent’ evidence of any physical impairment or harm caused by the exposure. The court said that subclinical injury resulting from exposure to asbestos is insufficient to constitute the actual loss or damage to a plaintiff’s interest required to sustain a cause of action under generally applicable principles of tort law.

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Medical and Legal
Developments in the Late
1990s: Not Quite a Full Circle

Medical understanding of PTSD and its use in the context of the legal process

In 1992, the *ICD-10 Classification of Mental and Behavioural Disorders* included for the first time the diagnosis of PTSD under the rubric of Neurotic, Stress-related and Somatoform Disorders. The disorder was described as

… a delayed and/or protracted response to a stressful event or situation (either short- or long-lasting) of an exceptionally threatening or catastrophic nature, which is likely to cause pervasive distress in almost anyone. The response to emotionally traumatic stress in the form of PTSD may be caused by a natural or man-made disaster, combat, serious accident, witnessing the violent death of others, being a victim of torture, terrorism, rape, or other crime.

Two years later the fourth edition of the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders*, (DSM-IV) was published. In the new edition an attempt was made to eliminate the distinction between ‘organic’ and ‘functional’ mental disorders, thus closing the chapter of medical epistemology based on the Cartesian mind-body dichotomy. DSM-IV recognized that all mental disorders have both functional and organic aspects. Some courts in the

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976 Id. at 147.
United States, England, Australia, and Canada have followed this new approach by abandoning the requirement for evidence of somatic manifestations of PTSD, arguing that the accompanying symptoms of the disorder constitute sufficient objective, physical injuries. For example in *Bloom v. Consolidated Rail Corp.* the court accepted that such symptoms as weight loss, loss of sleep, nightmares, and vomiting which led to the diagnosis of PTSD, established sufficient manifestations of physical injury as required by the Federal Employers’ Liability Act. In *Collins v. Union County Jail*, the plaintiff sued the board and directors of the Union County Jail for negligently causing him permanent psychological harm in the form of PTSD after he was raped by a correction officer employed by the jail. His psychologist testified that the plaintiff suffered from frequent nightmares, flashbacks, difficulty in sleeping, sudden outbursts of crying, screaming in his sleep, a severe loss of self-esteem, and an inability to trust others. The Supreme Court of New Jersey decided that the plaintiff’s PTSD, which was a result of a violent physical assault, came within the definition of a ‘permanent loss of a bodily function’, even in the absence of any residual physical symptoms.

Ever since its inclusion in DSM-III, the status of PTSD as a medical disorder has been controversial. Some critics regard it merely as a ‘politically or socially motivated conceptualisation of human suffering’. Developments in medical science since the publication of DSM-III have gone some way towards objective validation of PTSD as a disorder with discrete biological abnormalities. For example, the use of nuclear neuroimaging techniques in the study of PTSD has suggested that such symptoms of the disorder as persistent re-experiencing of the traumatic event and persistent arousal symptoms appear to have a neuroanatomical as well as psychological basis. Nevertheless, the optimism of the early 1990s

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978 Bloom v. Consolidated Rail Corp. (1994) 41 F. 3d 911 (3d Cir.).  
979 In Gottshall v. Conrail (1993) 988 F. 2d 355 (3d Cir.), the court determined that sleepwalking, nervousness and irritability showed sufficient physical manifestation resulting from emotional distress.  
981 In an earlier civil action against Robinson, the correction officer who raped him, the jury awarded Collins $100,000 for compensatory damages, $150,000 for punitive damages, and $3,220 for medical expenses.  
982 The plaintiff was suing under N.J.S.A. 59:9-2(d) of the Tort Claims Act.  
983 Yehuda & McFarlane op. cit. fn. 711, at xi.  
that studies of physiological reactions to traumatic stimuli would soon become more specific and reliable, has given way to caution. The availability of a psychophysiological based diagnostic test to help in making a diagnosis of PTSD is still a long way off. Moreover, intensive research into PTSD is yet to produce a coherent and consistent model of biological abnormalities that may characterise this disorder. The inability of biological science to provide objective criteria for a particular disorder should not, however, of itself, be a barrier to compensation. For the law compensates victims of torts not on the basis of a medical name they can point to, but on the principle that the wrongful act of a particular defendant has seriously harmed them. As long as the plaintiff can prove on the balance of probabilities that the emotional shock has created substantial, lasting damage to his or her psychological equilibrium, which cannot be managed without medical intervention, the actual medical name given to the disorder should be regarded as irrelevant. In this sense, the insistence of the English, Australian and Canadian judges that to be compensable, the injury must be a ‘recognized’ psychiatric condition is a limitation on the general principle of compensation.

Controversial or not, PTSD remains a recognized psychiatric disorder which has gained a much wider currency since the DSM-IV abandoned the previous definition for a traumatic stressor. In the previous editions, the requisite traumatic event was restricted to those ‘outside the range of human experience’ and ‘markedly distressful to almost anyone who experienced it’. The DSM-IV has retained, in part, the DSM-III-R description of diagnostic features characteristic of PTSD, but has extended them considerably. It states that:

… the essential feature of Posttraumatic Stress Disorder is the development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of the event that involves actual or threatened death or serious injury, or other threat to one’s physical integrity; or witnessing an event that involves death, injury, or a threat to personal integrity.


of another person; or learning about unexpected or violent death, serious harm, or threat of death or injury experienced by a family member or other close associate.986

To meet the diagnostic criteria for PTSD, the person’s response to the event must have involved intense fear, helplessness or horror.987 However the diagnostic criteria do not set a time limit on the interval between the traumatic event and the onset of symptoms that are sufficient to cause ‘clinically significant distress or impairment in social, occupational, or other important areas of functioning’.988 The time interval between the traumatic event and the onset of PTSD may be many years. Moreover, according to DSM-IV, the inability of a trauma victim to recall important aspects of the shocking event can be apparently symptomatic of PTSD. The following five diagnostic criteria for PTSD specify that for adults:

I The traumatic event [must be] persistently re-experienced in one (or more) of the following ways:
1. recurrent and intrusive distressing recollections of the event, including images, thoughts, or perceptions;
2. recurrent distressing dreams of the event;
3. acting and feeling as if the traumatic event were recurring (includes a sense of reliving the experience, illusions, hallucinations, and dissociative flashback episodes, including those that occur on awakening or when intoxicated);
4. intense psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event;
5. physiological reactivity on exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event.

II Persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness (not present before the trauma), as indicated by three (or more) of the following:
1. efforts to avoid thoughts, feelings, or conversations associated with the trauma;
2. efforts to avoid activities, places, people that arouse recollections of the trauma;
3. inability to recall an important aspect of the trauma;
4. markedly diminished interest or participation in significant activities;

986 DSM-IV op. cit. fn. 717, at 424.
987 Ibid.
988 Young, A. op. cit. fn. 190, at 289.
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(5) feelings of detachment or estrangement from others;
(6) restricted range of affect (e.g., unable to have loving feelings);
(7) sense of foreshortened future (e.g., does not expect to have a career, marriage, children, or a normal life span).

III Persistent symptoms of increased arousal (not present before the trauma), as indicated by two (or more) of the following:
(1) difficulty falling or staying asleep;
(2) irritability or outbursts of anger;
(3) difficulty in concentration;
(4) hypervigilance;
(5) exaggerated startle response.

IV Duration of the disturbance (symptoms in Criteria B, C, and D) is more that one month.

V The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.989

The above criteria, expressed in plain language and based largely on self-reporting, have been embraced by the legal profession because they give an impression that the diagnosis of PTSD is a mere process of ticking off relevant boxes. However, already DSM-III in its Introduction warned that the use of the criteria for non-clinical purposes, such as determination of legal responsibility, or justification for third-party payment, ‘must be critically examined in each instance within the appropriate institutional context’.990 The Introduction to DSM-IV makes it clear that:

… when DSM-IV categories, criteria, and textual descriptions are employed for forensic purposes, there are significant risks that diagnostic information will be misused or misunderstood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and information contained in a clinical diagnosis.991

The classification of mental disorders provided in ICD-10 and DSM-IV,

990 DSM-III op. cit. fn. 701, at 12.
991 DSM-IV op. cit. fn. 717, at xxiii.
particularly in relation to PTSD, has to be used with care and awareness that medical techniques for obtaining a diagnosis differ radically from the legal approach to establishing whether or not an individual plaintiff has a valid cause of action. The common law has as its object the furtherance of the legal rights of an individual in society. To this end it strives to protect the certainty and predictability of the legal rules and principles which fashion and define these rights. This involves application of legal tests and standards, with preference for objective criteria. Cases which fall outside the relevant principle, formula or doctrine are regarded as not justiciable. When a lawyer provides advice to an individual client regarding a grievance, he or she is not looking for features that are unique to the case. Rather, the object is to delineate those characteristics of the case that will bring it within some recognised principle of the law and thus establish a legal foundation, in the form of a legal right, for which a remedy may be granted. Thus in the case of negligence, the elements of duty of care, breach, causation, and foreseeability of damage must be present if the plaintiff is to recover damages.

Medicine is different. In medicine, as noted above, a valid diagnosis of a disorder can be made even if one or more of the criteria do not conform with the conventional nosology. Doubt and uncertainty are admitted as elements of medical art and science. As the User’s Guide for Structured Clinical Interview for DSM-IV Axis I Disorders992 emphatically points out,

Ultimately, the clinician must make a clinical judgment as to whether a diagnostic criterion is met. If the clinician is convinced that a particular symptom is present, he or she should not allow the patient’s denial of the symptom to go unchallenged. ... Yet, if the clinician doubts that the symptom is present even after having the patient describe it, the item should be rated as not present.993

Medicine, especially psychiatry, regards as important not only the objective evidence of signs and symptoms of a disorder, but also the way in which the patient experiences them. For example, in relation to PTSD, the criteria which identify the traumatic stressor as the direct personal experience of the traumatic event, or witnessing of such an event, are

993 Id. at 7.
capable of providing an objective standard as to whether or not the traumatic stressor was or was not ‘extreme’ in the circumstances. It would be much more difficult to establish such an objective standard in relation to patients for whom the traumatic stressor takes the form of ‘learning about an unexpected or violent death, serious harm, or threat of death or injury experienced by a family member or other close associate’. But the psychiatrists who devised the criteria for the aetiology of PTSD, on the basis of their clinical observations and medical research, were not concerned that these criteria may present difficulty to lawyers.

Furthermore, scientific research into PTSD so far has not overcome the problem of subjectivity in self-reporting of the experience of helplessness, fear and horror, which are regarded as the central aspects of the acute response to the traumatic event, and possible precursors of the onset of PTSD. At this stage, scientists advise that prudence must be exercised in interpreting biological research as providing objective validation of PTSD. In particular, it has been pointed out that almost all studies of biological abnormalities in PTSD have been correlative, and ‘correlation does not necessarily imply causation’. Thus the issue of objective validation - which so preoccupied nineteenth century physicians dealing with railway injuries - still remains to be resolved. It is one thing to make a clinical judgment about a diagnosis, with a view to therapy, based upon self-reporting of the patient’s subjective experience; it is an altogether different matter for the court to use these criteria as grounds for deciding the issue of causation and the consequent liability of the defendant.

The apparent ease with which one can follow the criteria for the diagnosis of PTSD, combined with the relative absence of identified bio-pathological structural correlates, has led to the overuse, and sometimes misuse, of this diagnosis in the forensic context. The 1997 English case of Vernon v. Bosley can serve as an illustration of how the diagnosis of

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994 DSM-IV op. cit. fn. 717, at 424.
996 Yehuda & McFarlane op. cit. fn. 711, at xi.
998 A Victorian County Court Judge cited PTSD as an extenuating circumstance when sentencing a former police sergeant who forced a man to make a false confession after beating and kicking him, and who assaulted other crime suspects. Queen v. Hahnel (1991), The Age, 30 May, at 5.
999 Vernon v. Bosley (No. 2) [1997] 1 All E.R. 614 at 617.
PTSD can be manipulated to suit the process of litigation. In March 1996, the plaintiff, Mr Vernon, was awarded by a trial judge, Sedley J, £1,332,231.59 by way of damages and interest for PTSD and pathological grief. Mr Vernon claimed to have sustained the injury when, in August 1982, a car driven by the defendant, Miss Bosley, went off the road and crashed into a river in South Wales. In the car were two of the plaintiff’s young daughters, and Miss Bosley who was employed by the Vernon family as a nanny. Mr Vernon did not see the accident, but was called to the scene shortly after. He witnessed the unsuccessful attempt to salvage the car and its passengers.

On appeal, the defendant, without challenging the finding of negligence against her, submitted, inter alia, that Mr Vernon did not suffer PTSD, but a grief reaction albeit an extreme one, for which damages are not recoverable. She also submitted that the plaintiff’s subsequent problems of depression and consequent disability were reactions to life’s events unconnected to the accident. The majority of the Court of Appeal disagreed with Miss Bosley’s submission on this issue, but halved the award on different grounds.

A draft judgment by the Court of Appeal was prepared, but not handed down, when in April 1996 copies of two 1995 judgments in the Family Court proceedings between Mr and Mrs Vernon came to light. In September, 1993, Mr Vernon’s wife applied to the Family Court to oust the plaintiff from the matrimonial home. Mr Vernon furnished reports from Mr Mackay, a clinical psychologist, and Dr Lloyd a consultant psychiatrist, to the effect that due to Mr Vernon’s PTSD, if he were ousted from the matrimonial home, he might commit suicide. These reports were disclosed by the plaintiff as evidence to support his case in the personal injury litigation against Miss Bosley, which started before Sedley J in 1994. Both Mr Mackay and Dr Lloyd gave evidence. After his wife had divorced him in 1993, the plaintiff applied to the Family Court for a residence order in respect of his surviving children. In the course of these custody proceedings, Vernon’s matrimonial solicitors, Messrs. Thring and Long,

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1001 Id. Evans and Thorpe LJJ; Stuart-Smith LJ, dissenting on this point.
1002 The copy of the judgment by McNaught J, read on 6 January 1995, together with a copy of the judgment of the Court of Appeal (Russell LJ and Wall J) delivered on 4 July 1995, dismissing the plaintiff’s appeal from McNaught J’s decision.
1003 Vernon’s application for residence order was refused by McNaught J, and his appeal from the judgment dismissed.
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writing to Mr Mackay and Dr Lloyd with a view to obtaining medico-legal reports, said:

… we need to show that his mental health has improved dramatically since the date of your report in May 1993 and moreover that it has improved again since the conclusion of his big personal injury case.\textsuperscript{1004}

Consequently, Mr Mackay, who saw the plaintiff on 11 October 1994 in order to re-assess his mental state, stated that the plaintiff had fully recovered from chronic depression from which he was still suffering in September 1993, adding that he had:

… no doubt, whatsoever, that Mr Vernon would prove not merely an adequate parent but in fact a ‘rock’ upon whom the children could confidently depend during the remainder of their childhood, and indeed throughout adulthood, for support, guidance and encouragement.\textsuperscript{1005}

Dr Lloyd in his report to the Family Court stated:

Following the death of his children he suffered from severe prolonged post-traumatic stress disorder the consequences of which were to cause a state of chronic depression which has improved quite dramatically in the last year. ... In my opinion Mr Vernon is currently in good mental health and is not showing symptoms of depressive illness, although I feel he needs continuing pharmacological treatment and outpatient supervision to minimise the risk of relapse especially during this particularly stressful time.\textsuperscript{1006}

Mr Vernon, his medical, and his legal advisers were aware of the dramatic improvement in his health before submissions were made to Sedley J, yet neither the judge, nor the defendant’s counsel were informed of this fact.\textsuperscript{1007} In his report for the personal injury case, and in the oral evidence before Sedley J, Mr Mackay said that Mr Vernon remained profoundly depressed, and that in view of the intractable nature of his

\textsuperscript{1004} Vernon v. Bosley (No. 2) op. cit. fn. 998, at 620; 648.
\textsuperscript{1005} Id. at 649.
\textsuperscript{1006} Ibid.
\textsuperscript{1007} McNaught J, the judge in the Family Court proceedings, was very concerned that the picture of Vernon’s health presented to him was so significantly different from that which had been presented to Sedley J. However, he was informed by the plaintiff’s personal injury solicitors, Osbourne Clarke, that it was not appropriate for him to communicate with Sedley J, and if he did, the tort proceedings might be aborted.
depression throughout the last seven years, he considered an improvement in the plaintiff’s condition, which was noted in September 1993, as merely a temporary amelioration. Dr Lloyd also testified that the plaintiff had developed many features of a chronic depressive illness following the 1982 accident. He confirmed that in his opinion Mr Vernon’s prognosis was poor, and he would probably need long term medication. In autumn 1996, following their respective consultations with Mr Vernon for the purpose of writing further reports for the Court of Appeal, both Mr Mackay and Dr Lloyd reported a deterioration in the plaintiff’s condition. It was at this point that the judges of the Court of Appeal were notified of the existence of the Family Court judgments. Having ordered the discovery of all documents relating to the Family Court proceedings, the Court of Appeal examined the reports of Mr Mackay and Dr Lloyd, and was not impressed. Cases like Vernon do little to enhance the status of PTSD as a reliable diagnosis.

**Issues of nomenclature**

In *Jaensch v. Coffey* as well as in *Alcock*, the judges defined the term ‘nervous shock’ as denoting a recognised psychiatric injury. This was done in order to distinguish the United States approach where compensable damage by way of ‘emotional distress’ encompasses grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, and worry. In Anglo-Australian jurisdictions these emotions are regarded as ‘transient’ and no recovery can be had for them alone under the law of negligence. So what happens when a primary victim of another’s negligence suffers very unusual physical rather than psychiatric symptoms for which at present there is no biological or psychiatric explanation?

This was the case with Mr Page. On 24 July 1987, Mr Page, the plaintiff, was driving an estate Volvo when the defendant driver carelessly collided with it. Mr Page suffered no physical injury, not even bruises from the seat belt. His car ‘lost a bit of its bumper and its wing was bent’, but he drove it home. Due to the age and, presumably, decrepit condition of the Volvo, repairs were inadvisable, and it was written off. Mr Page was 46 years old at the time, and had been afflicted for the previous 20 years with a

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1008 *Restatement (Second)* op. cit. fn. 3, s. 46, comment j.
1010 Passengers in the defendant’s car did not suffer any injury either.
1011 Id. at 529, 530.
condition variously known as Chronic Fatigue Syndrome, Post Viral Fatigue Syndrome, or Myalgic Encephalomyelitis. The term ‘Chronic Fatigue Syndrome (CFS)’ was coined in 1987 in Denver, Colorado at a conference of infectious disease physicians. In 1988, the United States Centers for Disease Control (CDC) published a set of diagnostic criteria for this condition. The publication of the diagnostic criteria was merely intended to counteract the presumption of a ‘postinfective’ aetiology of the syndrome.\textsuperscript{1012} The publication of the criteria, however, had the effect of contributing ‘to the notion that CFS was an established diagnostic entity’.\textsuperscript{1013}

Medical expert witnesses have described this illness as ‘an ill-defined condition with a range of symptoms including malaise, fatigue, headache and exhaustion’,\textsuperscript{1014} ‘a disease of the whole person [which] cannot be defined as either psychological or organic’, and the aetiology of which is yet to be established.\textsuperscript{1015}

Prior to the accident, Mr Page, a school teacher, was so profoundly ill with sinusitis, debility, exhaustion, poor concentration and muscle aches that he was on prolonged sick leave from work. On 26 May 1987, Mr Page saw Dr Siklos who was ‘sure that he had Post Viral Fatigue Syndrome’.\textsuperscript{1016} On the 17th of July - seven days before the accident - the plaintiff saw his general practitioner, Dr Deane, who noted that the patient was ‘slightly better’ but still issued him with a certificate recommending that he not resume work for an extra four weeks. The plaintiff sued for damages for nervous shock, alleging that after the car accident his CFS, which before had manifested itself on sporadic occasions in a mild form, became a chronic and permanent state. Dr Wessely, a consultant psychiatrist, who saw the plaintiff in 1992, wrote:

What is ... more established is that he did suffer ‘nervous shock’ - I note he thought during the accident that he might be about to kill the female passenger

\textsuperscript{1013} \textit{Page v. Smith} op. cit. fn. 1007, 530.
\textsuperscript{1014} Id. at 531.
\textsuperscript{1015} Id. at 527.
\textsuperscript{1016} Id. at 526.
involved - and that these nervous shocks would have a significant deleterious effect on the psychological state which ... is already affected in CFS.\footnote{1017}

It is difficult to discern whether Dr Wessely was using the term ‘nervous shock’ in its old clinical sense, or whether he was proffering a legal conclusion on the issue of fact and law, thus encroaching upon the function of the court.\footnote{1018} At the trial in 1992, Otton J agreed with Dr Wessely’s analysis, and found that CFS is a scientifically recognised illness.\footnote{1019} All the appellate courts involved with this case also accepted this finding. Having determined that the recrudescence of this condition was likely to prevent the plaintiff from ever working again, he awarded Mr Page £162,153 as damages for personal injuries. The defendant appealed on the grounds that the plaintiff had failed to prove causation and reasonable foreseeability of damage, and the Court of Appeal allowed the appeal on the issue of foreseeability. The plaintiff then appealed to the House of Lords, where the majority stated that in relation to primary victims of the defendant’s negligence, the latter had to take his victim as he found him. Accordingly, a negligent driver was liable for damages for nervous shock suffered by a primary victim of the accident if personal injury of some kind to that person was reasonably foreseeable as a result of the accident.

In the case of primary victims of an accident, the test in all cases is the same, namely whether the defendant could have reasonably foreseen that his or her conduct would expose the plaintiff to the risk of personal injury, whether physical or psychiatric. In the case of an affirmative answer, the duty of care will be established, even though physical injury did not in fact occur. The plaintiff is not required to prove that injury by nervous shock, as against physical harm, was reasonably foreseeable by the defendant. The House of Lords determined that, since it is established by medical science that psychiatric illness can be suffered as a consequence of an accident even where it is not demonstrably attributable directly to physical injury to the

\footnote{1017} Id. at 528. 
\footnote{1018} In her report, Dr Reveley, another consultant psychiatrist, seems to have read Dr Wessely’s statements as relating to legal causation, for she wrote that: ‘Dr Wessely concludes that the plaintiff suffered “nervous shock” and that the accident would adversely affect a depressive illness of whatever aetiology. I agree ... to some extent ... for this is surely common sense.’ Id. at 529. 
plaintiff, the argument that the defendant could not have foreseen that the plaintiff had an ‘eggshell personality’ must be regarded as irrelevant. The appeal was allowed, and the case remitted back to the Court of Appeal for determination on the issue of causation. The Court of Appeal held that, on the balance of probabilities, the balance of medical opinion indicated that the defendant’s negligence could have materially contributed to the relapse suffered by the plaintiff, converting the CFS from a mild and sporadic state to one of chronic intensity and permanence.

On its facts, *Page v Smith* is not a particularly remarkable case - the plaintiff who has suffered from an ‘ill-defined’ condition for 20 years was involved in a minor car accident, following which he continued to suffer from the same condition. The case is remarkable in so far as it was argued on the basis that the plaintiff had suffered nervous shock, that is a psychiatric injury, which, strictly speaking, he had not. The fact that CFS was accepted as compensable damage following a non-physical-impact shock is very much in the tradition of the railway injury cases, in which the courts recognised that human reactions to an unexpected and uninvited physical impact, no matter how small, can manifest themselves in somatic and psychological patterns for which medical science is yet to find an explanation. In the nineteenth century this was the case with nervous shock as then understood, hysteria, neurasthenia, and neurosis. Today, it is the case with PTSD and CFS. Indeed, the symptoms of CFS have an uncanny resemblance to neurasthenia as described by the *fin de siècle* physicians. From a jurisprudential point of view, the important aspect of *Page v Smith* is its discussion of the substantive law of nervous shock which will be examined below.

**Participants, rescuers and bystanders**

In 1994, the English Court of Appeal re-visited the issue of duty of care owed by an employer towards employees who suffer psychiatric injury in the course of rescuing victims of the employer’s negligence. The legal status of rescuers has been governed by policy considerations which dictate that, if injured, they should recover. Conceptually, the analysis of their legal status
left much to be desired. The case of *McFarlane v. E. E. Caledonia Ltd.*,\(^{1023}\) concerned the plaintiff who, though not physically injured, suffered PTSD after witnessing the North Sea Piper Alpha oil rig disaster in July 1988, in which 164 men died, and many others suffered serious injuries. He was employed as a painter on the Piper Alpha rig during the day, and at night was housed in quarters on board the MV Tharos. On the night in question this vessel was lying partially anchored about 550 metres south-west of the Piper Alpha platform rig when the first explosion occurred at 10 p.m. The MV Tharos went to assist with rescue operations and, before the plaintiff was evacuated by helicopter at approximately 11.45 p.m., the vessel had been within 100 meters of the platform for about an hour, and less than this distance for the rest of the time. However, neither the MV Tharos nor anyone on board was in physical danger at any stage. Nevertheless, the plaintiff, together with other non-essential personnel, was urged to take shelter in or behind the helicopter hangar. He did not do so. The plaintiff was not involved in the rescue operation, except when he helped to move blankets for the expected casualties, and possibly assisted two ‘walking injured as they arrived on the Tharos’ in a dazed state.\(^{1024}\)

The plaintiff’s arguments in favour of being granted recovery were based on three grounds. Firstly, he argued that he could be regarded as a participant in the event, because he was reasonably in fear for his life and safety, and it was the fear that caused the shock that led to his injury. Secondly, even if he was not reasonably in fear for his safety, he was a rescuer, and suffered shock, and consequent PTSD, as a result of the impact of the horrifying events. Thirdly, even if he was only a bystander or witness of the events, they were so horrendous that the defendant could have reasonably foreseen that they would cause psychiatric injury in such a person as he.\(^{1025}\) The trial judge accepted the plaintiff’s first argument, and awarded damages. The defendants appealed. The Court of Appeal allowed the appeal, stating that the trial judge did not apply an objective test of reasonable foreseeability, namely, whether a reasonable person in the defendant’s position


\(^{1024}\) Id. at 13.

\(^{1025}\) Id. at 3.
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... should have foreseen that a person of ordinary fortitude in the position of the plaintiff would reasonably be in such fear of his life and safety as to suffer psychiatric shock.\textsuperscript{1026}

Stuart-Smith LJ defined three situations in which plaintiffs may be regarded as participants when they sustain psychiatric injury caused by fear of physical injury to themselves:

(a) \textbf{Persons who are in the actual area of danger created by the event, even though they escape physical injury by chance or good fortune.} Some of the people who actually were on the Piper Alpha rig at the time of the fire, while they escaped physical injury, might well have been in reasonable fear for their life or safety.

(b) \textbf{Persons who may not actually be in danger, but because of the sudden and unexpected nature of the event, may reasonably think that they are.} This happened to the plaintiff in \textit{Dulieu v. White},\textsuperscript{1027} who was put in fear of her safety when a drunken coachman unable to control his coach burst into the pub stopping just short of the bar behind which she was serving. Stuart-Smith LJ contrasted the case of \textit{Dulieu v. White} with that of \textit{Bourhill v. Young},\textsuperscript{1028} in which the House of Lords held that the defendant could not have reasonably foreseen that the plaintiff might be injured by his failure to exercise reasonable care, because the plaintiff was too far from the scene of the crash (she was screened by a tram).

According to Stuart-Smith LJ, those who, like Mrs Mitchell in \textit{Mitchell v. Rochester R. Co.},\textsuperscript{1029} may be able to fling themselves out of the path of an out of control vehicle and so escape physical injury, nevertheless belong to the first category of participants. However, those who ‘in the agony of the moment’ reasonably believe that they are in danger, belong to the second category.\textsuperscript{1030}

(c) \textbf{Persons who are not originally within the area of danger, but come to it later.} This category of participants can be divided into two groups:

(i) Persons who come as volunteers in the sense of officious bystanders or onlookers. The common law denies compensation for any emotional distress or psychiatric injury suffered by persons in this category.

\textsuperscript{1026} Id. at 9.
\textsuperscript{1027} \textit{Dulieu v. White} & Sons op. cit. fn. 348.
\textsuperscript{1028} \textit{Bourhill v. Young} op. cit. fn. 411.
\textsuperscript{1029} \textit{Mitchell v. Rochester R. Co.} op. cit. fn. 261.
\textsuperscript{1030} \textit{McFarlane v. E.E. Caledonia Ltd.} op. cit. fn. 1022, at 10.
on the ground that a tortfeasor cannot be expected to foresee that a person will freely and voluntarily enter an area of danger. The defence of voluntary assumption of risk of being injured through the defendant’s negligence without legal recourse (*volenti non fit injuria*) may also operate in such cases to preclude recovery.\(^{1031}\)

(ii) Persons who come as rescuers and suffer an injury can recover on the principle that a ‘tortfeasor who has put A in peril by his negligence must reasonably foresee that B may come to rescue him, even if it involves risking his own safety’.\(^{1032}\)

Stuart-Smith LJ, added that a ‘rescuer is entitled to put his or her own safety at risk, but not that of others, unless they too consent to be part of the rescue effort’.\(^{1033}\) For example, if the captain had taken the MV Tharos into a position of danger, whereby those on board were injured or reasonably feared injury, he would have been negligent and in breach of his duty to ensure the safety of his vessel and those on it. In these circumstances, the captain’s own negligent action would have been deemed to constitute a *novus actus interveniens*\(^{1034}\) for which he and his employers, rather than the defendant owners of the rig, would be held liable.

But the defendants would have been found liable for damage to the MV Tharos and for personal injury to those on board in a case where its captain decided to take a risk which at the time seemed justified, and not negligent, though in hindsight it proved to have been an error of judgment which resulted in bringing the rescue vessel into actual danger. The liability would remain with the defendants because:

\[
\text{… a reasonable man in the position of the defendant should have foreseen that if his negligence caused such a catastrophic emergency, those in charge of rescue...}
\]

\(^{1031}\) The defence of voluntary assumption of risk operates as a complete defence if the defendant can show that the plaintiff had the actual knowledge of the facts constituting the danger, appreciated the nature or extent of the danger inherent in the situation, and freely and willingly exposed himself or herself to the danger.

\(^{1032}\) *McFarlane v. E.E. Caledonia Ltd.*, op. cit. fn. 1022, at 10.

\(^{1033}\) Ibid.

\(^{1034}\) The phrase, *novus actus interveniens* [a new act intervening], refers to an independent act or event which breaks the chain of causation between a defendant’s negligence and a plaintiff’s injury. If the defendant can establish a break in the chain of causation, he or she will be absolved of liability for the plaintiff’s injury.
vessels may not be able to judge to a nicety exactly how near it is safe to bring their vessels.\textsuperscript{1035}

Stuart-Smith LJ’s reasoning in McFarlane v. E. E. Caledonia Ltd. was relied upon and further refined by Rose LJ in two appeals which were heard together as Frost & Ors. v. Chief Constable of the South Yorkshire Police; Duncan v. British Coal Corp.\textsuperscript{1036} The first appeal concerned yet another legal action following the Hillsborough disaster. The plaintiffs were police officers who sued the Chief Constable for damages for PTSD. They alleged that he, as their employer, breached a duty of care owed to them as employees or as rescuers. Three of the plaintiffs had been on duty at the stadium at the time of the disaster. One of the officers had attempted to help free spectators from the pens, and later, together with two other plaintiffs, had attended a makeshift morgue set up at the ground. Two other officers had been drafted in shortly afterwards to help with the aftermath of the disaster. The court accepted evidence that all five officers had witnessed chaotic and gruesome scenes at the stadium. The sixth officer had not been on duty at the ground but had acted as liaison officer between the hospital staff and the casualty bureau. She had also dealt with relatives and later went to the temporary morgue at the ground.

In respect of the duty of care, the Court of Appeal reiterated that, as a general principle, there is no justification for regarding physical and psychiatric injuries negligently caused to an employee as different kinds of injury with different requirements governing the test of foreseeability of injury. Consequently, an employer who negligently creates an area of risk, thereby causing physical injury to one employee, is equally liable to a fellow employee of normal fortitude working on the same task who sustains psychiatric injury, either because of fear for his or her own safety, or through witnessing what happened to the co-worker. The Court of Appeal decided that the Chief Constable owed a duty of care to the five police officers who were present at the stadium, i.e. within the area of risk created by his negligence.\textsuperscript{1037} The requisite duty of care was held to exist because:

\textsuperscript{1035} McFarlane v. E.E. Caledonia Ltd. op. cit. fn. 1022, at 10-11.
\textsuperscript{1036} Frost & Ors. v. Chief Constable of the South Yorkshire Police; Duncan v. British Coal Corp. [1997] 1 All E.R. 540.
\textsuperscript{1037} The Chief Constable was vicariously liable for the admitted negligence of his police officers.
… although a police officer could not complain against his employer, the Chief Constable, if he was injured in the course of his duties when deployed to prevent a riot or summoned to the scene of an accident, he did have a right of action if his injury was caused by the antecedent negligence of the Chief Constable.\footnote{Ibid.}

With regard to the duty of care owed to rescuers, the court reiterated the rule that those who come to the succour of the primary victims of a tortious act are considered to be in an analogous relationship with the wrongdoer to the victims. Rose LJ pointed out that, although rescuers who suffer psychiatric illness as a result of their endeavours are injured indirectly, and therefore fall into the category of secondary victims,\footnote{An example of a rescuer who would also be a primary victim occurred in the case of \textit{Ward v. T.E. Hopkins & Son Ltd. Baker v. T.E. Hopkins & Son Ltd.} [1959] 3 All E.R. 225; 1 W.L.R. 966, where, like the very victims he had come to rescue, the plaintiff was overcome by toxic fumes.} they are ‘in a primary relationship with the tortfeasor if and in so far as the categorisation of primary and secondary victims is relevant to rescuers’.\footnote{\textit{Frost & Ors. v. Chief Constable of the South Yorkshire Police} op. cit. fn. 1035, at 546, per Rose LJ.} Because of their primary relationship with the tortfeasor, rescuers are not subject to the limitations otherwise imposed on claims by secondary victims, and it makes no difference whether or not they happen to be professional rescuers.\footnote{\textit{Ogow v. Taylor} [1987] 3 All E.R. 961; [1988] A.C. 431. In this case, the House of Lords rejected the American ‘fireman’s rule’ enunciated by the Supreme Court of New Jersey in \textit{Krauth v. Geller} (1960) 157 A 2d 129 which precluded firemen from claiming damages in negligence for injuries they sustain while engaged in extinguishing fires ([1987] 3 All E.R. 961 at 966; [1988] A.C. 431 at 448-449, per Lord Bridge of Harwich).}

The only difference between professional and non-professional rescuers is that the former are more hardened and therefore it may be more difficult to foresee psychiatric injury to them, but this does not change the scope of the duty owed.\footnote{\textit{Frost & Ors. v. Chief Constable of the South Yorkshire Police} op. cit. fn. 1035, at 546, per Rose LJ.}

Rose LJ also broached the issue of temporal proximity between the actual danger and the arrival of the rescuer. Referring to the two policemen who were summoned to the stadium after the crash had occurred, he noted...
that ‘the fact that the peril has passed’ should not prevent recovery by a rescuer. Thus all five officers also came within the category of rescuers, and, hence, within the ambit of the Chief Constable’s duty of care. However, the legal position of the sixth officer stationed on duty at the local hospital was different. Since she was neither physically present in the area of risk at the relevant time, nor a rescuer, the Chief Constable was deemed not to owe her a duty of care.

The second appeal involved the consequences of a colliery accident. The plaintiff developed a psychiatric illness after one of the men for whom he was responsible as a pit deputy at a colliery was crushed to death at the coal face. The plaintiff was about 275 metres away at the time, and arrived at the scene of the accident within four minutes. By then the victim of the crush was apparently already dead and the plaintiff’s attempts to revive him were unsuccessful. The plaintiff brought a claim against his employer who operated the colliery. The employer admitted that the death of the victim had been caused by negligence, but denied being in breach of the duty of care owed to the plaintiff. The Court of Appeal upheld the defendant’s claim on the ground that the plaintiff was not a rescuer because he was not ‘geographically proximate’ when the incident occurred, and by the time he arrived at the scene there was no danger to him or to the deceased. He was outside the area of risk of physical or psychiatric injury when the deceased was injured and he was not exposed to any unnecessary risk of injury when he attended the scene. Furthermore, his actions in rendering first aid were within the normal scope of his employment and were not attended by any unusually distressing features. Thus it seems that in order to be regarded as a rescuer, the person has to be sufficiently close in time and space to the scene of the accident to risk injury in coming to the rescue of the primary victim. A person will come within the category of rescuers, if she or he comes on to the scene of the disaster after the peril has passed, but while there are still primary victims in need of succour. Finally, psychiatric injuries which follow rescue attempts that occur in particularly distressing or horrendous circumstances may also be compensable.

In Canada, the Ontario Court of Appeal discussed the issue of a negligent defendant’s liability for psychiatric injury suffered by a rescuer in

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In this case a motorcyclist, Charles C. Haliburton, failed to stop at a stop sign and drove into an intersection, colliding heavily with the right front side of the car in which the plaintiff, Mrs Dolores Bechard, was a passenger. The motorcyclist was injured and thrown into the middle of the road. Mrs Bechard was physically injured in the collision, but she eventually got out of the car. When she saw a car approaching, she attempted unsuccessfully to warn the defendant driver, Ben Z. Damsgard, to stop by screaming and waving her arms. She saw the defendant’s car fatally strike the motorcyclist, and his body roll out from beneath the Damsgard vehicle. Mrs Bechard suffered amnesia following the accident. The trial judge found that the defendant had been negligent, and that the two collisions had caused a severe psychiatric illness to Mrs Bechard, which her medical witnesses called ‘post-traumatic stress reaction’ or ‘post-traumatic neurosis’. On appeal, the defendant claimed that Mrs Bechard was a mere bystander, unrelated to Haliburton, and that therefore her psychiatric injury was not to be regarded as ‘foreseeable’ on policy grounds. The Court of Appeal disagreed, and determined that Damsgard should have realised that an accident had occurred and should have foreseen that victims of it, including the plaintiff and the injured motorcyclist, might be in the vicinity. The court held that Dolores Bechard was performing a role similar to that of a rescuer, and was similarly entitled to recover damages for nervous shock. One may add that Mrs Bechard was also a ‘participant’ (in the second category) as defined by Stuart-Smith LJ in McFarlane v. E.E. Caledonia.

It is perhaps fitting to end this history of the evolution of liability for negligently occasioned psychiatric injury with a case which represents both recent developments in the jurisprudence of this cause of action and the influence upon the judiciary of medical understanding of PTSD. The case of McLean v. The Commonwealth of Australia also illustrates both positive and negative aspects of these developments. It concerns the plaintiff, Mr McLean, who in 1995 was awarded by Sperling J A$1,723,403 in damages for PTSD resulting, in turn, in excessive cigarette smoking, gambling, alcoholism, brain damage and laryngeal cancer diagnosed in 1995. The plaintiff claimed that his PTSD was caused by his reaction to the collision

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between the aircraft carrier, H.M.A.S. Melbourne, and the destroyer, H.M.A.S. Voyager, on the night of 10th February 1964.

Mr McLean had been an enlisted serviceman on the Melbourne which, travelling at close to top speed, was carrying out night flying exercises off the coast of New South Wales, east of Jervis Bay. The Voyager, which was executing a slow turn in front of the Melbourne’s bow, was instructed to remain starboard where it might be able to pick up fliers who crashed into the sea. However, due to negligence of the captain, the Voyager turned to port instead of starboard, and thus was brought directly across the path of the oncoming carrier. The destroyer was cut in half, and its forward section sank within minutes, with the loss of 82 lives, including the captain. No one on board the Melbourne was physically injured. The plaintiff, who was below deck at the time of the collision, and thus had no visual apprehension of the injury, gave evidence that

… he felt and heard the impact of the collision. Apparently, ‘he heard the sound of tearing metal, escaping steam and men’s screams. He did not know whether the Melbourne was afloat or not. There was a stampede to get out. A closed door barred the way. Someone said there was super-heated steam. He made his way to the boat-deck. There, he saw survivors from the Voyager being brought over the side. He had a feeling of disbelief that it was happening.’

Leo Garrett, a close friend of Mr McLean, was serving on board the Voyager, and the plaintiff became extremely upset when he found out that Garrett had perished. The plaintiff did not suffer any physical injury, and continued to serve on the Melbourne until 1966. In 1968, he was discharged

Litigation in courts by the naval personnel injured on board the Voyager commenced only in 1983, when in the case of Groves v. The Commonwealth (1982) 150 C.L.R. 113, the High Court of Australia disapproved of obiter dicta made by Windeyer J, in Parker v. The Commonwealth (1965) 112 C.L.R. 295 at 301-302. Windeyer J said that for reasons of public policy, a member of the armed forces could not recover damages for the negligence of another member of the armed forces in the course of duty. Mr McLean was the first person who had been on board the Melbourne to sue for personal injury.

The defendant denied such causation and asserted that the further damage was due to voluntary actions of the plaintiff, and as such was either not foreseeable, or too remote. The trial judge withdrew from the jury part of the defendant’s case on the validity of the diagnosis of the stress disorder, and factual issues relevant to the plaintiff’s claim in respect of the further damage, including the issue of remoteness. The judge also refused the defendant leave to amend to raise contributory negligence. The jury returned a verdict for the plaintiff.

from the Navy as unfit for service due to ‘an anxiety state’. According to the Navy, McLean’s condition was the result of a serious motor car accident in which he was involved in 1967. Afterwards he obtained qualifications as carpenter and joiner. Mr McLean initiated action in negligence against the Commonwealth in 1993, following a conversation with another former serviceman about successful compensation suits by some of the Voyager survivors. In 1994, while being examined by a Dr Briggs, in relation to his pension review, Mr McLean was told by the physician that his condition could be related to the Voyager collision. Mr McLean said that although he knew he had a problem since the collision, he did not know it was related to the collision. In a trial held before Sperling J, the jury found that the plaintiff’s injury was not caused by the 1964 disaster. After a successful appeal to the New South Wales Court of Appeal, the McLean case was sent back for re-trial before Studdert J, on the question of whether it had been proven on the balance of probabilities that the plaintiff suffered PTSD, and if so, whether it was caused by the shock of the Voyager collision.

The case appears to have been run on the basis that the plaintiff fell into the first category of ‘participants’ delineated by Stuart-Smith LJ in McFarlane. He was on board the Melbourne and thereby in the actual area of danger created by the collision, even though, by good luck, there were no physical injuries sustained on his ship. However, it would also have been possible to argue that the Melbourne was never really in any physical danger, and that the personnel aboard this ship were in the position of bystanders. Having decided the issue of duty of care in favour of the plaintiff, Studdert J set out to determine whether Mr McLean suffered from chronic PTSD. In view of disagreements between medical witnesses as to whether the plaintiff’s symptoms satisfied the requirements for a person suffering from this disorder, the learned judge examined each of the DSM-IV criteria for PTSD, and determined that they did.

Santow JA in the Court of Appeal reproduced the part of Sperling J’s charge to the jury which contained the quotation from the Introduction to DSM-IV. It emphasised that

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1049 It was pointed out at the trial, that before the publication of DSM-III in 1980, the term PTSD did not exist, and therefore, even if Mr McLean suffered from this disorder, it would not have been documented.
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… the specific diagnostic criteria in DSM-IV are meant to serve as guidelines to be informed by clinical judgment and are not meant to be used in a cookbook fashion.\(^{1050}\)

Nevertheless, Studdert J proceeded to do just that. His Honour went through each of the diagnostic criteria for PTSD, and decided that most of them were applicable in Mr McLean’s case. On the issue of causation, the defendant argued that it was the motor car accident rather than the Voyager collision that was responsible for the plaintiff’s symptoms. Studdert J however, determined that for the purposes of PTSD, the traumatic trigger was the naval disaster, though the car accident caused a ‘flare-up in the plaintiff’s condition, a happening which is characteristic of PTSD’.\(^{1051}\) With respect to the plaintiff’s evidence that he suffered flashbacks but did not, until 1994, connect them with the traumatic experience he suffered on the night of 10th February 1964, the judge accepted evidence of Professor McFarlane, called on behalf of the plaintiff, who testified that

… a person with PTSD has a tendency to misattribute the cause of his or her symptoms (often to the most proximate event), a tendency which is typical of the disorder, as well as unreliable for defining a cause for the person’s symptoms. ... It is quite possible for a person to have a profound recurring memory, such as flashback, and yet not be aware of the event to which it is linked because the memory is not linked with a verbal narrative; a development of the narrative is required for the understanding of the flashbacks.\(^{1052}\)

Professor McFarlane further opined that

… if the plaintiff was experiencing flashbacks when he visited the naval doctors, he may nevertheless have had difficulty in linking persisting symptoms of anxiety and nervousness to the naval collision; and if the plaintiff did make the link he may have declined to express it out of shame or guilt.\(^{1053}\)

\(^{1050}\) DSM-IV op. cit. fn. 717, at xxiii.
\(^{1051}\) McLean v. The Commonwealth of Australia, (28 August 1996) op. cit. fn. 1043, at 64.
\(^{1052}\) Id. at 20.
\(^{1053}\) Ibid.
Finally, according to the witness,

... if it is accepted, as the plaintiff claimed, that the flashbacks were experienced only at night and the anxiety symptoms were experienced during the day, the plaintiff would not in any event necessarily have linked the anxiety symptoms and the flashbacks.\textsuperscript{1054}

The above explanations might have been in accord with the statement in DSM-IV that the inability of a trauma victim to recall important aspects of his or her trauma is symptomatic of PTSD, had it not been for the fact that the plaintiff deposed that he had experienced flashbacks. The DSM-IV describes flashbacks for the purpose of diagnosing PTSD as ‘rare instances’ in which

... the person experiences dissociative states that last from a few seconds to several hours, or even days, during which components of the [traumatic] event are relived and the person behaves as though experiencing the event at that moment.\textsuperscript{1055}

One would have expected that the nature of the flashbacks experienced by Mr McLean would identify the specific traumatic incident to which these flashbacks referred. To say that the person has experienced flashbacks but cannot identify their cause is self-contradictory. Moreover, although a patient’s self-reports of flashbacks and memories are of great interest in the context of clinical psychiatric practice, whether they meet the objective criteria required by law for attribution of responsibility for the plaintiff’s injury to a particular defendant, is another matter. In relation to the existence of an alleged injury and its medical consequences, judges have to furnish reasons for rejecting the opinion expressed in a single medical report and testimony, or, in cases of conflicting views, for preferring one opinion over another.\textsuperscript{1056} However, this should not be done by usurping the role of a medical expert for which they are not trained. Studdert J’s earnest reliance on self-serving assertions of the plaintiff in determining the existence of PTSD (and its medical sequelae) as a compensable injury attributable to the 1964 Voyager disaster, was out of step not only with the

\textsuperscript{1054} Id. at 21.

\textsuperscript{1055} DSM-IV op. cit. fn. 717, at 424.

\textsuperscript{1056} \textit{Bruneau v. Bruneau} (1996, Supreme Court of British Columbia, 20 November, Maczko J, unreported).
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English approach but also with that of the United States. Furthermore, because of the prominence accorded to Mr McLean’s anxiety about the fate of his friend, Leo Garrett, the case appears to have extended defendants’ liability for psychiatric injury to secondary victims who are friends rather than close relatives of the primary victim.

Summary of the law of nervous shock

The 1992 Alcock decision left the law relating to negligently inflicted nervous shock in England restrictive and uncertain. Since then, the courts have clarified its substantive and evidentiary requirements. Today, the law of nervous shock distinguishes between primary and secondary victims, which approximates the distinction between ‘direct’ victims and bystanders in American jurisprudence. The most elegant definition of primary and secondary victims has been provided by Rose LJ in Frost who explained that whereas a primary victim is a person who

... suffers injury by reason of being directly involved in an accident caused by the defendant’s negligence; a secondary victim suffers injury by reason of observing or apprehending harm done to another person involved in an accident caused by the defendant’s negligence, but he is not personally threatened.

In Page v. Smith, Lord Lloyd, having observed that since the decision in McLoughlin v O’Brian, the House of Lords has not taken the law of nervous shock forward, set out the following five propositions which outline legal consequences that flow from the distinction between primary and secondary victims:

1057 York v. Wayne County Sheriff’s Department (1996) 219 Mich. App. 370 at 373. In this case, the claim involved an award of worker’s compensation benefits for psychiatric disability in the form of PTSD triggered by work as a Wayne County’s sheriff’s deputy at the scene of an airliner crash at Detroit Metropolitan Airport in 1987. It was found that the ‘plaintiff’s claim of work-related disability was nothing more than “long-after-the-fact rationalisation” by the disabled claimant indicting work experiences for an illness that is actually unrelated to the claimant’s employment’. The court noted that ‘the claimant’s honest perceptions are not necessarily reliable’.

1058 See Thing v. La Chusa op. cit. fn. 670.


1060 Id. at 546.
In cases involving nervous shock, it is essential to distinguish between the primary victim and secondary victims. In claims by secondary victims the law insists, as a matter of policy, on certain control mechanisms to limit the number of potential claimants. 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. In claims by secondary victims, it may be legitimate to use hindsight in order to be able to apply the test of reasonable foreseeability at all. Hindsight, however, has no part to play where the plaintiff is the primary victim. Subject to the above qualifications, the approach in all cases should be the same, namely, whether the defendant can reasonably foresee that his conduct will expose the plaintiff to the risk of personal injury, whether physical or psychiatric. If the answer is yes, then the duty of care is established, even though physical injury does not, in fact, occur. There is no justification for regarding physical and psychiatric injury as different ‘kinds of damage’. A defendant who is under a duty of care to the plaintiff, whether as primary or secondary victim, is not liable for damages for nervous shock unless the shock results in some recognised psychiatric illness. It is no answer that the plaintiff was predisposed to psychiatric illness. Nor is it relevant that the illness takes a rare form or is of unusual severity. The defendant must take his victim as he finds him.  

In *Frost*, Rose LJ stated that in order to recover damages for nervous shock, primary victims have to establish that a reasonable person in the defendant’s position would have foreseen the risk of personal injury to them. Secondary victims, however, must also show:

(i) That they fall within the category of persons whose claim should be recognised,
(ii) the requisite spatial, temporal and causal proximity,
(iii) that the psychiatric injury complained of was shock induced, and
(iv) that it was foreseeable that a person of normal fortitude would suffer an injury by nervous shock.

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1061 *Page v. Smith* op. cit. fn. 1007, at 197.
1062 *Frost & Ors. v. Chief Constable of the South Yorkshire Police* op. cit. fn. 1035, at 547.
The above definitions and guidelines are comprehensive enough to encompass the main features of the law in Australia and Canada. In the United States, the law relating to emotional distress suffered by bystanders has developed similar, though somewhat less conceptually explicit, rules.

To sum up, there is no longer a distinction between negligently occasioned physical and psychiatric injury - both may attract the duty of care. However, the shock must result in some recognised psychiatric illness. However, once the duty of care is established, neither the plaintiff’s predisposition to psychiatric illness, nor the unusual form and severity of the illness will defeat his or her claim. Persons who claim damages for psychiatric injury in negligence can generally be divided into:

1. Primary victims who have experienced maximum exposure to the catastrophic event created by the defendant’s negligence. As a result, they may sustain either a psychiatric injury which follows from a physical injury, or a ‘pure psychiatric injury’ which stems from their involuntary participation in the wrongfully occasioned accident. The plaintiffs will be regarded as participants when they sustain psychiatric injury caused by fear of physical injury to themselves because they are in the actual area of danger created by the event. They will also be regarded as participants, if because of the sudden and unexpected nature of the event, they reasonably think that they are in danger, although in fact they are not. Primary victims of the defendant’s negligence, whether they suffer psychiatric or physical injury, are regarded as being in a direct relationship with the wrongdoer. This means that the existence of a duty of care in their case is governed by the test of reasonable foreseeability alone. At the same time, primary victims do not have to establish that the psychiatric injury they have suffered was foreseeable in a person of normal fortitude.

2. Secondary victims are divided into three categories:
   (i) Rescuers of the primary victims. As a matter of policy, rescuers are regarded by law as being in a direct relationship with the defendant, and therefore the issue of duty of care in their cases is governed by reasonable foreseeability alone.
   (ii) Secondary victims who are related to the primary victim through close family ties or a relationship of love and affection. They are in an indirect relationship with the wrongdoer in the sense that, although not present at the scene of the accident, they suffer psychiatric injury upon perception ‘with their own unaided senses’ of the primary victim. The shocking perception
must occur during the immediate aftermath of the accident, though the definition of what are the temporal and physical parameters of the ‘immediate aftermath’ differs from jurisdiction to jurisdiction.

(iii) Those who suffer injury by reason of observing or apprehending harm done to another person involved in an accident caused by the defendant’s negligence, but are not personally threatened. This category includes close relatives, as well as employees in cases where their employer has negligently created an area of risk whereby one employee is physically injured, and the plaintiff, working in close proximity, sustains psychiatric injury either because of fear for his or her own safety, or through witnessing what happened to the co-worker.

In order to recover damages for nervous shock, secondary victims have to establish that:

(a) The defendant owed them a duty of care based on reasonable foreseeability and proximity which includes policy considerations;

(b) their injury was shock-induced, and

(c) it was foreseeable that a person of normal fortitude would suffer nervous shock in the circumstances.

Conclusion

Since the 1860s, the law of compensation has turned nearly a full circle. At that time, a clinical diagnosis of nervous shock designated what was generally regarded to be an organic neurological injury. The courts treated claims for ‘nervous shock’ by primary victims as they would any other compensable injury. Then came medical reconceptualisation of the symptomatology and aetiology of nervous shock in terms of hysteria, neurosis, and other psychiatric conditions. The courts followed, by distinguishing between two kinds of personal harm for the purposes of negligence: physical injury and ‘mental’ or emotional injury. Recovery was allowed for the first type, but not for the second, unless the latter followed upon the first. Eventually, psychiatric injury (emotional distress in the United States), became recognised as a foreseeable, and therefore compensable, type of damage in its own right. This happened when medical science began to provide neurophysiological and pharmacological explanations for affective disorders, thus eliminating the distinction between organic and functional disorders. Thus, at least in relation to
primary victims, both medicine and the law have turned the full circle.

The enigma of the pathogenesis of PTSD and a number of other affective disorders still remains to be solved. In future, the science of neurophysiology and pharmacology relating to these disorders may advance to the point where techniques of nuclear neuroimaging, together with emotional and behavioural data obtained through psychiatric examination, will enable plaintiffs to provide objectively verifiable proof for their psychiatric conditions. Perhaps the hopes of eighteenth and nineteenth century physicians such as Maty, Bell, Erichsen and Page will be fulfilled, and it will become possible to better visualise and quantify the physiological and biochemical activity of regions of the brain. This would have the incidental effect of enabling the courts to determine whether plaintiffs complaining of clinical depression or PTSD following emotional trauma brought about by the defendant’s negligence do in fact suffer from abnormal alterations of brain function.

When the existence of psychiatric illness can be correlated with abnormality of physiological and biochemical brain function, the fears of opening the floodgates of claims by second-impact victims, as well as the issue of possible fraud and dishonesty on the part of such claimants, should lose some of their potency. Though it seems that, despite a few notable exceptions, the fear of opening of floodgates is so ingrained in the collective judicial psyche that it will remain a powerful, if extraneous, influence upon legal developments in this area of common law. For example, it remains to be seen whether the law of nervous shock will jettison the rule that, in order to be compensable, psychiatric illness must be shown to arise out of a single traumatic episode. This rule is out of step with medical science and technology, and is particularly unjust when applied to those relatives whose negligently injured loved ones are sustained in a deep irreversible coma or in a persistent vegetative state for a long time after the


1064 Among these exceptions are the judgments of Palles CB in Bell v. The Great Northern and Western Rly. Co. op. cit. fn. 278; Atkin LJ in Hambrook v. Stokes op. cit. fn. 401; the joint judgment in Owens v. Liverpool Corporation op. cit. fn. 499, Tobriner J in Dillon v. Legg op. cit. fn. 498, the House of Lords judgments in McLoughlin v. O’Brien op. cit. fn. 719, and of the High Court of Australia in Jaensch v. Coffey op. cit. fn. 530.
original tortious event has effectively put an end to their sapient life.\textsuperscript{1065} The same rule of causation also prevents first-impact victims from recovering damages for nervous shock in cases where the aetiology of the psychiatric illness cannot be attributed to a singular event but to a sequence of tortious events which add up to an overwhelming trauma.\textsuperscript{1066} Recognition of the contemporary understanding of psychiatric illness may lead to modification of this rule. As long as the plaintiff can show that he or she has suffered compensable damage in the form of a diagnosed psychiatric illness as a result of the defendant’s negligence, then, to paraphrase Lord Justice Atkin in \textit{Hambbrook v. Stokes}, the exact operation of the negligent conduct - the exact means or mode through which the illness was occasioned - should be regarded as immaterial.

Perhaps we should also re-examine the traditional assumption that the primary objective of compensation for nervous shock is to restore the plaintiff to the position in which he or she had been before the wrongful event. Rather, we should accept that an award of damages for nervous shock will not fill the empty space of a permanently comatose child, a brain-damaged parent or spouse, nor will it restore to the plaintiff the negligently killed relative. Hence, we should regard the award of damages in tort to plaintiffs who suffer negligently occasioned mere psychiatric illness as an affirmation of a public interest principle. Namely, that a civilised and humane society recognises and legally protects the private individual’s interest in physical and psychological integrity, and that wrongful conduct which results in mental injury with consequent serious emotional and physiological dislocation\textsuperscript{1067} is not to be regarded as legally acceptable.

The reluctance of the judiciary to loosen the substantive restrictions upon recovery for nervous shock and let the evidence “speak for itself” can sometimes be explained by the court’s limited understanding of the jurisprudence in this area of the law, or by the inability of the lower instance judges to alter the paradigm of negligence. In Australia, legislation allowing recovery for nervous shock has come about as a response to the community’s dissatisfaction with the common law. The original statutory provisions in respect of nervous shock\textsuperscript{1068} were introduced into the New South Wales Parliament with the main aim of overruling the High Court’s

\footnotesize {\begin{quote}
\textsuperscript{1065} \textit{Spence v. Percy} op. cit. fn. 898.
\textsuperscript{1066} \textit{Campbelltown City Council v. Mackay} op. cit. fn. 929.
\textsuperscript{1067} Raphael, B. (1984) op. cit. fn. 945.
\textsuperscript{1068} \textit{Law Reform (Torts) Bill} 1942 op. cit. fn. 563.
\end{quote}}
decision in the Chester case which, in its harshness, offended the sensibilities and sensitivities of society. The liability for nervous shock in the original legislation was then extended to overcome the strict interpretation of the reasonable foreseeability test by the House of Lords in Bourhill v. Young. Unlike Lord Atkin in Hambrook v. Stokes, the majority in Chester and the Law Lords in Bourhill v. Young appeared unaware of the medical and scientific views on the subject of emotional injury - the very issue upon which they adjudicated. Yet, half a century later, in the Alcock case, ‘in the entire House of Lords judgment ... there [was] not a single explicit reference to the medical determinants of psychiatric illness’. It is therefore to be commended that in all the major English appellate decisions since Alcock, when deciding cases concerning psychiatric injury, judges have referred to medical literature, and in particular to DSM-IV, which, when used correctly, has been an important educative tool. Likewise, the 1995 English Law Commission’s Consultation Paper on Liability for Psychiatric Illness, with its succinct exposition of major medical aspects of such psychiatric conditions as PTSD, has been very influential within the legal profession. An awareness of new developments in the understanding of mental disorders has also informed judgments in the Australian, Canadian and United States’ courts.

Ultimately, the fact that psychological trauma is yet to find verifiable biological validation should not detract from the legitimacy of a claim which can document the suffering of a person who has been a victim of another’s negligence. From the perspective of the grand scheme of the law, the proposed reforms are relatively minor; yet the availability of an appropriate remedy to those who suffer psychiatric illness as a consequence of tortious conduct by others will affirm the quintessential goals of our legal system, namely, to reflect the best philosophical, scientific and social aspirations of the society it serves with fairness, impartiality and compassion.

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