

Foreseeability of Nervous Shock to a 'Primary Victim' who Suffers no Physical Injury

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Introduction

The decision of the British House of Lords in *Page v Smith* has raised a number of interesting issues in the area of foreseeability of (what might be termed 'secondary') harm to a primary victim and the 'boundaries' of liability of a tortfeasor who causes it.¹ The facts of the particular case seem to be straightforward except in one regard, the absence of physical injury. The plaintiff, Ronald Page, was driving with his family when he became involved in a car accident with the defendant, Simon Smith. Both Page and his family escaped unhurt. However, the plaintiff suffered from what was described as a 'chronic fatigue syndrome' (CFS) which became permanent after the accident. The plaintiff therefore claimed against the defendant for the recrudescence of his condition and his resulting inability to work again. The lower court found in his favour and awarded him damages. The Court of Appeal reversed the earlier ruling and decided that the defendant was not liable for the consequent injury to the plaintiff.² It was left to the House of Lords to consider the tenuous link between the negligent act of Smith and the belated consequence of 'harm' to Page. In the event, the House affirmed the lower court's decision.

The fact that the defendant's act did not directly result in a physical harm but only a change of a psychological state (at a later stage) amounting, at most, to an indirect injury prompts the question whether the House of Lord's ruling on the basis of the ordinary duty-of-care-breach-of-duty-causation approach was appropriate. It seems that the highest court did not view the

¹ [1995] 2 WLR 644.

² [1994] 4 All ER 522.

case as presenting any new issue that had not been dealt with previously. Its treatment left no doubt that it chose to characterise *Page v Smith* as being similar to earlier cases except in detail only. While prior case law considered the scope of, and limits to, culpability of a defendant for actions or omissions that might foreseeably have consequences beyond the first or direct victim,³ *Page v Smith* posed the question of the extent of liability in a completely different way: that of foreseeability of 'non-physical' harm to a primary victim who did not suffer any physical injury.

The Permissibility of Recovery in Principle

The water-tight classification of injury into either physical or mental, on the one hand, and the reluctance to accept a claim for recovery for mental shock in so far as it was not an after-effect or simultaneous result of physical injury, on the other, had proved so enduring in English law that, until very recently, plaintiffs seemed to have no recourse at all. Case authorities provided no consistent rules as to whether negligently caused nervous shock, but neither preceded nor accompanied by damage to property or physical injury, should be compensatable in principle.⁴

The first step towards removing the distinction so long maintained between physical and nervous injury as regards legal remedy to a victim and the question of foreseeability of both was taken in *Kirk v Phillips*.⁵ In that case, Denning LJ not only brushed away the distinction that used to be entrenched in English law but formulated a rule of foreseeability:

The true principle, as I see it, is this: Every driver can and should foresee that, if he drives negligently, he may injure somebody in the vicinity in some way or other; and he must be responsible for all the injuries which he does in fact cause by his negligence to anyone in the vicinity, whether they are wounds, or shocks, unless they are too remote in law to be recovered. If he does by his negligence in

³ The major relevant cases are *Bourhill v Young* [1943] AC 92, *McLoughlin v O'Brian* [1983] AC 410, and *Alcock v Chief Constable of South Yorkshire Police* [1992] AC 310.

⁴ For the evolution of case law in this area, see Nicholas J Mullany and Peter R Handford, *Tort liability for psychiatric damage; the law of 'nervous shock'*, (1993) The Law Book Company, Sweet & Maxwell.

⁵ [1953] 1 QB 429.

fact cause injury by shock, then he should be liable for it unless he is exempted on the ground of remoteness.⁶

The juxtaposition of 'wounds' to 'shocks' clearly broke down any separation between the two that prevailed in legal analysis before then. Although such a characterisation makes an answer to the (second) question of foreseeability redundant, Lord Denning put it clearly that the issue of recovery for nervous shock was determinable by applying the ordinary rules.

In *Koufos v C Czarnikow Ltd*,⁷ Lord Reid took the elastic view that a defendant 'will be liable for any type of damage which is reasonably foreseeable as liable to happen even in the most unusual case, unless the risk is so small that a reasonable man would in the whole circumstances feel justified in neglecting it'.⁸ Although this pronouncement was *obiter* and came by way of comparing the latitude of foreseeability of liability under contract law with that under tort law, it underscored and endorsed Lord Denning's earlier formulation of the problem. The only difference appeared to be a preference for terms of art, referring to 'the risk' as being 'small' as opposed to 'remote'. Lord Upjohn also took the same position using only a slight variation of the term of art: 'The test in tort, as now developed in the authorities, is that the tortfeasor is liable for any damage which he can reasonably foresee may happen as a result of the breach however unlikely it may be, unless it can be brushed aside as far fetched'.⁹

It may be objected that Lord Upjohn's reference to 'any damage' does not necessarily include both the physical and psychological types as the distinction has always been maintained in tort law, despite medical evidence to the contrary. Yet, the case for a unitary approach seems to have been fully stated, albeit not explicitly.

Once the rigid separation of the types of injury was removed as regards the characterisation of legal issues relating to them, it did not take long for similar treatments to be brought in for legal remedies too. However,

⁶ *Ibid*, p 440.

⁷ [1969] 1 AC 350.

⁸ *Ibid*, pp 385-6.

⁹ *Ibid*, p 422.

differences in the incidence of mental illness soon required special attention in the courts. The next step the courts had to take thus involved the determination of liability where mental illness was delayed, despite the existence of physical injury, or was antecedent as well as incidental to it.

This task faced the courts in the Australian case (originating in New South Wales), *Hoffmueller v Commonwealth*.¹⁰ The case concerned a motor car accident which resulted immediately in very slight physical injury to the appellant (and his children travelling with him) with a nervous illness following at a later stage. The respondent, the Commonwealth of Australia, accepted liability for causing the accident. The issue before the District Court was whether the injured could recover for the delayed mental illness. The court formulated the main question as being one of causation: whether the disorder was a consequence of the accident or something which would develop in any case. The reasoning was that, if the accident was a mere condition (a triggering incident) for the emergence of the symptoms, then recovery would be denied (as it eventually was). The judge gave a lot of weight to the medical evidence which indicated that the injured was suffering from anxiety (and that he had an obsessional personality) which was developing into a condition such that the symptoms that emerged after the accident would surface anyway. The District Court judge hence awarded compensation only for the physical injury.

On appeal to the Supreme Court of New South Wales, the relationship between the accident and the subsequent symptoms was examined and it was ruled that there was no cause and effect relationship and that the defendant was not responsible for the symptoms. Mahoney JA reasoned that the plaintiff's 'anxiety feelings proceed from the personality; they precede and are not generated by such an accident as the present'.¹¹ He added that the defendant would only have been responsible had he acted knowing of the possibility that symptoms would be precipitated, or carelessly disregarding that they might be. He considered the existence of duty to be irrelevant so long as the act 'is not the physical cause of them or the reason for them but merely the occasion of them'.¹² It is difficult to think how the act would not

¹⁰ [1981] 54 FLR 48.

¹¹ *Ibid*, pp 61-2.

¹² *Ibid*, p 63.

in any sense be a factor in the incidence of the mental illness, however pre-existing it may have been in some form. Indeed, there seems to have been a shift away from determining whether the defendant was liable for negligently causing the incidence of the illness to that of whether he caused the illness *per se*. It is submitted that the preference to deal with causation of the illness rather than its incidence forced the court to beg the very issue with which it started to deal. As a consequence, it confirmed what was factually determinable and, by adopting the wrong conclusion, it left the legal issue still open.

Having abandoned this issue, Mahoney JA went on to address the applicability of the 'thin skull' rule to the case. He argued that which the law requires a defendant should foresee, the possibility of a plaintiff's skull being thin, extending such a duty to include persons 'having paranoid persecution conditions or an obsessional personality such that [the defendant's] acts may become the occasion for the onset of the symptoms of their conditions' would end up 'casting the limit of damages too widely'.¹³ This appears to affirm Lord Wright's reasoning in *Bourhill v Young* that culpability of a negligent defendant should be dependent on the 'normal standard of susceptibility' of the plaintiff in the specific situation.¹⁴

The same issues were considered in an English case, *Brice v Brown*, a little later but with quite an opposite decision.¹⁵ The case concerned a plaintiff who had a hysterical personality disorder from childhood but the disorder manifested itself only occasionally. The plaintiff sustained a minor injury while a taxi she was travelling in with her daughter collided with an oncoming bus. Her behaviour became erratic and she was eventually hospitalised. She subsequently claimed against the taxi and bus company for the severity of the mental illness and resulting disablement. The defendants contended that the precise nature and extent of the mental shock should have been foreseeable but was not. The High Court held that 'the kind and type of injury which she has in fact sustained is the same as that which could reasonably have been foreseen. The fact that the tortfeasor could not foresee the precise name the

¹³ *Ibid*, p 64.

¹⁴ [1942] 2 All ER 396. Lord Wright argued thus (at 460): 'The test of the plaintiff's extraordinary susceptibility, if unknown to the defendant, would in effect make the defendant an insurer'.

¹⁵ [1984] 1 All ER 997.

psychiatrists were to put on the condition or the precise mental or psychological process that led to that result is immaterial, because a completely normal person would not have suffered the consequences that the plaintiff in fact suffered'. The conclusion was that the plaintiff could claim.

It is submitted that the High Court's decision left the critical questions unanswered. While the Australian decision erred on the side of neglecting the question of foreseeability of the incidence of the underlying illness, the English High Court never even considered its relevance to the determination of liability. Under the circumstances, the opposite ways the decision went do not reveal any rational basis.

Again, the same issue was at the centre of the dispute in the Australian High Court case, *Jaensch v Coffey*, on appeal from the Supreme Court of South Australia.¹⁶ Although that case concerned a secondary victim's claim, it is relevant here, especially, because of the judgement of Deane J as will be seen below. The facts briefly were that the wife of a motor cyclist who suffered serious injury in a collision with a vehicle negligently driven by Jaensch sought to claim for nervous shock that allegedly occurred after she saw her husband in hospital and was told by the staff that his condition was 'pretty bad' and deteriorating.

Brennan J argued that it is not 'the precise events leading to the administration of the shock' but shock and 'some recognised' psychiatric illness induced by it which should be reasonably foreseeable.¹⁷ According to him, liability for psychiatric illness cannot be established independently of the shock that induced it: 'Liability in negligence for nervous shock depends upon the reasonable foreseeability of both elements and of the causal relationship between them'.¹⁸ Above all, and in what matters to our topic of discussion, he considered delay in the occurrence or distance as adding to the problem of proof (of causation and foreseeability) rather than as important in themselves.¹⁹

Deane J, on the other hand, noted that addressing the issue of proximity

¹⁶ [1983-84] 155 CLR 549.

¹⁷ *Ibid*, p 563.

¹⁸ *Ibid*, pp 566-7.

¹⁹ *Ibid*, p 570.

has not appeared to be necessary in cases involving direct physical damage to person or property so long as the sustained damage was reasonably foreseeable. He added, 'the fact that, as a practical matter, any separate requirement of proximity is commonly disregarded in cases where no issue is raised about it does not establish that it has been discarded as a matter of principle. All that the fact establishes is that, in such cases, the requirement of proximity is not a subject of dispute'.²⁰ It is submitted that, as we shall see below, the majority of their Lordships in *Page v Smith* did precisely what Deane J warned against.

Regarding foreseeability of psychiatric injury, Deane J stated two limitations, the first of which is relevant to our line of enquiry. He stated that, unless the risk of psychiatric injury ('unassociated with conventional physical injury') in the particular form was reasonably foreseeable, proof of foreseeability of physical harm alone would not be sufficient to grant a claim for such psychiatric injury.²¹

In the end, the Australian High Court held that the events which caused the plaintiff shock were part of the aftermath of the accident resulting from the defendant's negligence and affirmed the lower courts' decision. The argument about her abnormal susceptibility to injury was also rejected, just as in the lower courts, for lack of factual evidence to support it.

The uncertainty in all these cases seems to have been cleared considerably since *Attia v British Gas*.²² The modern rule seems to be that a 'primary victim' who has not suffered any injury to his physical being might succeed in claiming for nervous shock if such shock results from damage to his property. The only serious hurdle that a claimant may have to overcome in such situations is tendering proof of foreseeability of shock. In *Attia v British Gas*, where this issue was central to the appeal, Dillon LJ formulated the problem as follows:

Was the damage, in the way of psychiatric illness from shock, though of a different kind from the damage to the house itself and contents most obviously foreseeable, nonetheless foreseeable? Would the reasonable man, endowed with appropriately

20 *Ibid*, pp 581-2.

21 *Ibid*, p 604.

22 [1988] 1 QB 304.

progressive awareness of mental illness, have regarded the danger of psychiatric illness from shock as so fantastic or far-fetched that he would have paid no attention to it or would he have thought that it was something that the plaintiff might suffer from seeing her house and its contents in flames?²³

In the event, he concluded that, while it was foreseeable that the plaintiff would see and hear her house burning, the question whether her 'assumed illness caused by the shock was or was not a foreseeable consequence of the defendant's negligence must depend on the actual evidence given at the trial'.²⁴ Consequently, he held that the issue was, in principle, not incapable of determination, only that it could not be done by the Court of Appeal itself since the facts were not ascertained at the trial court.

Woolf LJ approached the matter in a different way. He argued that 'the plaintiff could well have sustained physical injuries as well as the psychiatric injuries of which she complains when she would have been entitled to damages and in my view there can be no reason of policy for distinguishing between the two types of injury'.²⁵ According to him, it did not matter that the plaintiff was not physically injured in so far as it was conceivable that she might have been. He seemed to postulate that both types of injury are inseparable or, even, identical so that if the one occurred, the other would be inevitable, or vice versa. The argument would nevertheless not stand because the real facts, as found, have been substituted by hypothetical ones. Although Lord Woolf took the view that the identity of the two types of injury should be maintained (and therefore appeared to back the finding of medical science), he furnished no proof for his assumption that once one was found the other should be deemed to have been there and recovery should be allowed as a matter of course. Yet, his assumption more or less pre-empted the ruling of the majority in *Page v Smith*.

Bingham LJ, by contrast, sought to address the issues in terms of first principles, that is firstly, establishing a duty of care if the plaintiff is 'so closely and directly affected by the defendant's act that he ought reasonably to have him or her in contemplation as being so affected when he directs his

²³ *Ibid.*, p 313.

²⁴ *Ibid.*

²⁵ *Ibid.*, p 317.

mind to the acts of omissions which are called in question'. If such a duty exists, the next step would be to consider whether the plaintiff's psychiatric damage is 'too remote to be recoverable because not reasonably foreseeable as a consequence of the defendant's careless conduct'.²⁶ The suggested identical treatment of issues of duty of care and that of liability for breach of that duty does not appear to appreciate the inherent differences in the issues. It is submitted that, by reducing the problem of determination of foreseeability of psychiatric injury to 'the ordinary test of remoteness in tort', Lord Bingham merely avoided solving it.

By contrast, in *Nicholls v Rushton*,²⁷ it was ruled that the plaintiff could not recover because the nervous reaction suffered by him after the motor car collision fell short of an identifiable psychological illness. The Court of Appeal held that if there was no physical injury, nor a psychological injury, there could be no question of awarding damages for mental suffering, fear, anxiety and the like.

Should Foreseeability be taken for granted where Primary Victims Claim?

An important factor that emerges from the perusal of previous case authorities in this area of the law is that the issue raised in *Page v Smith* was the first of its kind to appear before the House of Lords. In other words, negligent injury of the type claimed under the specific circumstances of that case has not been contested before the House. We will see to what extent the House's decision went towards clarifying the problem raised in the lower courts.

The defendant had contended in the lower court that, since the impact of the accident was minimal, the onset of the syndrome could not possibly have been caused by it and therefore would not have been foreseeable. It may be recalled from our earlier discussion that this line of argument was consistent with the decision in *Hoffmueller v Commonwealth*. The plaintiff's submission, on the other hand, was that, as long as the accident was caused by a defendant's careless driving and that it could foreseeably result in some

²⁶ *Ibid*, p 319.

²⁷ *The Times* (19 June 1992).

form of personal injury (physical or psychological), it would be necessary to prove that the particular form of injury was foreseeable. The court rejected the defendant's submission on the basis of the 'egg-shell' rule. Otton J argued, 'Once it is established that CFS exists, and that a relapse or recrudescence can be triggered by the trauma of an accident, and that nervous shock was suffered by the plaintiff who was actually involved in the accident, it becomes a foreseeable consequence'.²⁸

In its reversal of the lower court's decision, the Court of Appeal relied heavily on the test of phlegm/fortitude (that an ordinary plaintiff is supposed to have) not to limit, but to reject the liability of the defendant. It reasoned that the claimed 'injury was not foreseeable in a person of ordinary fortitude'.²⁹ Farquharson LJ thus concluded that 'while the nature of the accident was such that at the moment of the defendant's negligent driving some physical injury to the plaintiff was foreseeable, the circumstances taken as a whole do not establish the defendant could reasonably have foreseen that the plaintiff would suffer any mental injury'.³⁰ Hoffman LJ added that the plaintiff's experience of the accident as a participant does not exempt him from proving the foreseeability of the alleged mental trauma.³¹ Accordingly, he did not view it to be 'reasonably foreseeable that this accident would cause Mr Page compensatable damage by mental trauma'.³²

The strength of the Court of Appeal's (majority) decision was that they did not seek to resolve the issue of foreseeability of harm merely by reference to the plaintiff's status as bystander or direct participant. They went on to argue that, whatever the status of the plaintiff was, his claim could only be legally tenable if the harm he suffered had been reasonably foreseeable by the defendant. In other words, by advancing the argument that nervous shock befalling a participant must be proved to be reasonably foreseeable just as much as for a non-participant, they reduced the requirements on direct or indirect victims, to the same legal rationale.

28 Quoted in [1994] All ER 522, at 533.

29 *Ibid.*

30 *Ibid.*, p 548.

31 *Ibid.*, p 550.

32 *Ibid.*, p 553.

The House of Lords decision, on the other hand, would appear to point towards continuing divergence in the treatment of the two types of victims although they deny that a different approach directed at the types of injuries of a primary victim was unnecessary. In affirming the trial judge's decision, the majority held that, as long as the defendant was under a duty of care towards the plaintiff not to cause him harm, the type of harm he actually caused the plaintiff was immaterial; the only thing that required to be established was that the defendant's negligent act would foreseeably harm the plaintiff. They concluded that the risk of injury by nervous shock was foreseeable and allowed the appeal. The grounds of such a decision have, however, not been the same for all their Lordships.

Lord Brown-Wilkinson in particular stressed (along with Lord Lloyd)³³ that determination of issues relating to mental illness cannot be undertaken differently from those relating to physical illness (taking on board growing evidence supplied by medical science as to the identical nature of the two). As far as the case before the court was concerned, his Lordship did not think that the non-occurrence of 'tangible physical injury' was relevant to the question whether the plaintiff could recover 'damages for the recrudescence of his illness'. Instead he saw the main question to be 'whether a driver of a car should reasonably foresee that a person involved in an accident may suffer psychiatric injury of some kind, whether or not accompanied by physical injury'.³⁴ According to him, such a driver 'should reasonably foresee that, if he drives carelessly, he will be liable to cause injury, either physical or psychiatric or both, to other users of the highway who become involved in an accident'. He did not find it difficult to establish that the defendant owed the plaintiff a duty to prevent foreseeable injury to him, 'including psychiatric damage' and that 'the defendant must take the plaintiff as he found him', regardless of the fact that 'the defendant could not foresee the exact type of psychiatric damages in fact suffered by the plaintiff'.³⁵

Lord Lloyd, on his part, saw *Page v Smith* to be different from earlier cases that appeared before the House in that the plaintiff in those cases was a 'secondary' victim of the defendant's negligence, being in the position of a

³³ [1995] 2 WLR 645, at 667.

³⁴ *Ibid.*, pp 660-661.

³⁵ *Ibid.*, pp 661-662.

spectator or a bystander. In this case, however, the plaintiff was a primary victim. He framed the issue to be whether 'the foreseeability of physical injury is enough to enable the plaintiff to recover damages for nervous shock'.³⁶ Citing the important fact that the plaintiff did not suffer 'external injury', as he called it,³⁷ he asked whether that would necessitate a different legal solution, or a 'different test', and force the court 'to concern itself with different 'kinds' of injury'?³⁸ He considered the incidence of the type of illness, that it was or was not accompanied by physical injury, to be totally inconsequential.³⁹ He contended:

Foreseeability of psychiatric injury remains a crucial ingredient when the plaintiff is the secondary victim, for the very reason that the secondary victim is almost always outside the area of physical impact, and therefore outside the range of foreseeable physical injury. But where the plaintiff is the primary victim of the defendant's negligence, the nervous shock cases, by which I mean the cases following on from *Bourhill v Young*, are not in point. Since the defendant was admittedly under a duty of care not to cause the plaintiff foreseeable physical injury, it was unnecessary to ask whether he was under a separate duty of care not to cause foreseeable psychiatric injury... It could not be right that a negligent defendant should escape liability for psychiatric injury just because, though serious physical injury was foreseeable, it did not in fact transpire. Such a result in the case of a primary victim is neither necessary, logical nor just.⁴⁰

Regarding the need to limit liability of the defendant, Lord Lloyd pointed out that the law has introduced control mechanisms for secondary victims, including requiring a degree of proximity, but that such was not necessary in the present case involving a primary victim. 'Since liability depends on foreseeability of physical injury, there could be no question of the defendant finding himself liable to all the world. Proximity of relationship cannot arise, and proximity in time and space goes without saying.' Nor did he view the question of the plaintiff being of 'ordinary phlegm' as appropriate,

36 *Ibid*, 663.

37 *Ibid*.

38 *Ibid*, p 666.

39 *Ibid*.

40 *Ibid*, pp 666-7

since, according to him, 'the number of potential claimants is limited by the nature of the case, there is no need to impose any further limit by reference to a person of ordinary phlegm.'⁴¹ He concluded:

...it was enough to ask whether the defendant should have reasonably foreseen that the plaintiff might suffer physical injury as a result of the defendant's negligence, so as to bring him within the range of the defendant's duty of care. It was unnecessary to ask, as a separate question, whether the defendant should reasonably have foreseen injury by shock; and it is irrelevant that the plaintiff did not, in fact, suffer any external physical injury.⁴²

We will now look at the dissenting options. Lord Keith characterised the primary question to be whether proof of reasonable foreseeability should be required in all cases of injury by nervous shock or that proof as regards 'personal injury of some kind' could be sufficient.⁴³ He then proceeded to lay down the conditions for establishing liability to be 'proof both that it was reasonably foreseeable that injury would result from the act or omission called in question and that a relationship of proximity existed between plaintiff and defendant'.⁴⁴

Applying these conditions to the case before him, he argued, 'The defendant can be liable only if the hypothetical reasonable man in his position should have foreseen that the plaintiff, regarded as a person of normal fortitude, might suffer nervous shock leading to an identifiable illness.' By making reference to the fact that nobody was injured during the accident, that the accident itself was described as of 'moderate severity' and expressing uncertainty as to whether the recrudescence of the plaintiff's condition was attributable to the accident, he ruled that a reasonable man in the position of the defendant would not have foreseen that an accident of the nature that he actually brought about might inflict on a person of normal susceptibility such mental trauma as to result in illness.⁴⁵ He therefore sought to dismiss the

41 *Ibid*, p 668.

42 *Ibid*, p 669.

43 *Ibid*, p 647.

44 *Ibid*, pp 647-8.

45 *Ibid*, p 650.

appeal.

Lord Jauncey's dissent was based on a similar characterisation of the issue followed by a contention that the moderate severity of the damage to the car and non-existence of an 'acute emotional trauma' made the case different from those in which nervous shock had already been established. He referred to the frequent tendency to leave out consideration of foreseeability in 'self-evident' circumstances such as road accidents but noted, similarly to Deane J, 'that is not to say that the need for it is dispensed with. It is by no means impossible that a plaintiff could be directly involved in an accident caused by a negligent act where the circumstances required specific proof that injury was foreseeable.'⁴⁶ He underlined that, 'while it is not uncommon for a severe physical injury to give rise to some degree of psychiatric illness it is not the law that such illness is presumed to be a foreseeable consequence of every physical injury.'⁴⁷ He therefore concluded that in a case involving only damage to vehicles, the occurrence of psychiatric illness to an occupant(s) could not normally be expected.⁴⁸

The Unresolved Issues

It is submitted that the majority decision in the House of Lords still needs to be clarified in many respects. First of all, where the foreseeability of after-effects of a defendant's action/omission is in doubt, as in *Page v Smith*, an imposition of a legal duty of care and hence liability, in the manner that the House of Lords has sanctioned by affirming the appeal, will have the opposite consequence of all previous attempts to narrow down the liability of potential tortfeasors. This is from the point of view of fairness and the court's need to shut the door on interminable litigation, as well as to limit claims on consequences of consequences.

Secondly, the court could have embraced the apparent distinction, parallel to its own classification of victims as 'primary' or 'secondary' in a

46 *Ibid*, p 61.

47 *Ibid*, p 652.

48 *Ibid*, pp 659-660.

number of preceding 'nervous shock' cases,⁴⁹ between what might reasonable be termed as 'primary' and 'secondary' negligence.⁵⁰ This could have provided a useful tool of analysis without the need to create a firm category ('heading') of negligence, something which English courts dread to do. However, the ruling of the House of Lords skirted around the problem of pinpointing the outer limits ('boundaries') of negligence by a wrong-doer who arguably cannot foresee the impact of his act or omission because that impact will be too remote to contemplate, even by the standards of the elastic redefinition adopted in the *Wagon Mound (1)*.⁵¹ Instead of taking up the opportunity to explore and examine the indirect consequences of a wrong-doer's action/omission in order to determine where the chain must be broken, the House preferred to rely on a facile distinction of facts in this most recent case. It merely chose to treat *Page v Smith* as an ordinary case of a wrong-doer being responsible in negligence for directly occurring effects. Yet, whilst the indirect consequences of a defendant's negligent act which will lead to liability and those which will not should be differentiated from juridical and policy angles, the House simply assumed that, where a primary victim is concerned, introducing any 'control mechanisms' would not be necessary.⁵²

The House of Lords made a comparison between cases where the victims are bystanders ('secondary') or direct ones ('primary'), as in *Page v Smith*, but stopped short of extending its comparison beyond the stage of identifying the victims. It did not go further and consider whether the use of control mechanisms to minimise the number of claimants could not be applicable to both categories of victims, rather than as Lord Lloyd attempted to justify, to secondary victims alone.⁵³ Other than the assumption, in the case of primary victims, that 'proximity in time and space goes without saying',⁵⁴

49 See note 3 above

50 This might include 'secondary' damage occurring separately and therefore in discontinuity with any physical injury but as a reaction to it. Such has been the characterisation in all cases which considered negligence to secondary victims.

51 *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)* [1961] AC 388.

52 See Lord Lloyd's argument in [1995] WLR 645, at 668.

53 *Ibid.*

54 *Ibid.*

the question of why they cannot be brought within the 'control mechanisms' where their claims could not be sustainable on grounds of foreseeability remains unexplored. Indeed, Lord Keith brushed aside this crucial issue in this way: 'Where the plaintiff is personally involved in a terrifying accident proof of proximity presents no problem...Proximity clearly existed in the present case.'⁵⁵ It is not impossible that other less terrifying accidents would occur and the issue of proximity not be as 'clear' as in the example given by Lord Keith.

Thirdly, taking note of advances in medical knowledge and the fact that the distinction between physical and psychiatric injury 'may already seem somewhat artificial, and may soon be altogether outmoded',⁵⁶ the majority of their Lordships have argued against the law treating the two differently. It is submitted that they could have taken this to the logical conclusion and made the law much clearer by recognising that psychiatric harm is a physical injury *per se*, in other words by relying on advances in medical science.⁵⁷ If they had done so, the ordinary rules of negligence that they sought to rely on could have fitted the particular case neatly—the consequence being that wherever psychiatric illness flows from some accident for which a defendant is liable, 'nervous shock' would be ruled in as a matter of course. Since *Page v Smith* could not possibly be decided on the basis of existing authorities (which make it clear that nervous shock accompanying physical injury is the typical basis for recovery), the issue whether the alleged deterioration of the medical condition of Page should not be viewed as *a form of* physical injury appears to have been critical.

Until that position is adopted, it will remain ironical that the majority's ruling in *Page v Smith* (where physical injury was absent but mental shock

55 *Ibid*, pp 647-8.

56 Per Lord Lloyd; *Ibid*, at 667.

57 There is nothing new in this suggestion of course. Nicholas J Mullany and Peter R Handford have already expressed this view while at the same time venting their dismay (at p 42) against decisions in a number of nervous shock cases: '... in many respects the common law has either clung to outdated and historical notions or merely tinkered with principles that are fundamentally unsound.' By contrast, see Tony Weir's rejection of this proposition because he wrongly equates assimilating psychiatric illnesses to physical injury (as medical science has established their basic identity) to treating them alike when culpability is considered. See Tony Weir, Tort liability for psychiatric damage; the law of 'nervous shock' by Mullany N J, Handford PR, (1993) 52 *The Cambridge Law Journal* 520, at 521.

occurred) was identical to those in earlier cases where mental illness followed from physical injury. Indeed, it would be hard to explain how a bystander who witnessed the accident and got a mental shock would be turned away from claiming recovery while the current victim got what he sought without satisfying the legal test of foreseeability for the specific tort.

A more difficult scenario could have been had Page not been affected in any way but his wife had received the news of the disaster and suffered shock. Could she have been able to claim successfully against Smith on the basis of the ruling in *McLoughlin*, since that case seems to match her situation? It would appear to be very doubtful. As Mullany and Handford suggest (at p 91), 'secondary parties have no rights separate from that of the victim—they can be compensated only through the victim, and only in so far as it is appropriate so to compensate them.' If the first victim cannot claim on the basis of foreseeability and proximity, it would appear too far fetched for his wife, a secondary victim, to have any chance of success.

This hypothetical example may illustrate the point that, instead of *Products Ltd v British Steel Corporation*⁵⁸ considering the defendant's argument on their merits, the House of Lords seemed to have been tempted into using precedent authority, spare though it may have been, and declined to find differently when all indications were that there was a new issue. The consequences of the decision in *Page v Smith* is that so long as a primary victim is proximate to what appears to be a tortious act or omission, the chance of succeeding against the tortfeasor or any 'heading' of liability will not be under question. Yet, a blanket ruling that proof will not be required of a primary victim, even in the absence of physical injury, will thwart the thrust of previous decisions.

In the end, the elementary but crucial issues of whether both the plaintiff and the kind of damage were foreseeable must continue to be relevant to all cases, regardless of whether the claimant is primary or secondary. In so far as the main issue under litigation would be likely to be indirect rather than direct consequences (claims under the latter no longer having to be fought out each time they occur since they now form elementary principles of tort law),⁵⁹

58 [1985] 3 All ER 52.

59 For a brief review of the liberalisation of the rules of recovery in negligently inflicted nervous shock cases, see, David W Robertson, Liability in negligence for nervous shock, (July 1994) 57 *The Modern Law Review* 649.

the time will not be far off when the House of Lords might find it necessary to rethink its decision in *Page v Smith* and resolve the issue of foreseeability in 'secondary negligence'.

Conclusion

Previous decisions in *McLoughlin* and *Alcock* addressed the ambit of indirect consequences to secondary victims in general and demonstrated the court's reluctance to deny remedy to all claimants although it was ready at the same time to break the chain of causation where it saw fit. The award in *McLoughlin* on the one hand, and the refusal in *Alcock* on the other, indicate the delicate balancing of varying factors the House of Lords took into account while trying not to spread the net of liability too wide, particularly where the consequence to the tortfeasor might appear catastrophic. Judicial extension of the limits of liability in certain instances and discriminatory application of the rule to restrain claims in others have not, however, provided clear leads as to what are the appropriate criteria that help identify the scope of liability in 'secondary' negligence.

It is therefore understandable that, lacking previous direct authority regarding the fresh question of foreseeability of nervous shock to a primary victim that arose in *Page v Smith*, the Court of Appeal manifested an instinctive reaction while the House of Lords sought to use the convenient device of not seeing anything new in the case before them. The ruling of the House of Lords has only lent prominence to the issue and the need to address it. Could one reject the defendant's argument of unforeseeability and remain consistent with prior case law which underscores the need to limit liability where foreseeability and remoteness stand in the way of any claims, be it by a primary or secondary victim? Was it necessary that Page's condition ought to have been foreseeable to Smith for the former to succeed (per the Court of Appeal) or that it did not matter at all (per the House of Lords)?

The obvious shortcut would have been establishing new frontiers or solutions to the problem so that the scope of 'secondary' negligence could be clarified in the same process. It might be recalled that *Bourhill v Young* was decided on the basis of existence of duty, which was easier to consider, rather than on the foreseeability of the harm which was caused to the fish wife. The House of Lords' reluctance to budge from the typical duty-of-care-breach-of-duty-causation approach has not helped overcome that kind of difficulty.

It does not seem that the Court of Appeal's decision was an unnecessary complication (per Lord Lloyd). It is the author's contention that requiring foreseeability of nervous shock as such, in place of foreseeability of harm in general to a primary victim, was not asking a separate question. Indeed, as Mullany and Handford argue (at p 68) 'foreseeability is required not only of the plaintiff but also of the kind of damage suffered or, if more than one type of damage is inflicted, of each kind of damage'.

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