



ADVANCED GCE

LAW

Law of Torts Special Study

G148/RM

PRE-RELEASE MATERIAL FOR JUNE 2010 EXAMINATION

**Friday 25 June 2010
Morning**

Duration: 1 hour 30 minutes

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G148 LAW OF TORTS
SPECIAL STUDY MATERIAL

SOURCE MATERIALS

SOURCE 1

Extract from the judgment of Atkin LJ in *Donoghue v Stevenson* [1932] All ER 1

The rule that you are to love your neighbour becomes in law: You must not injure your neighbour, and the lawyers' question: 'Who is my neighbour?' receives a restricted reply. 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.

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SOURCE 2

Adapted from the judgment of Porter LJ in *Bourhill v Young* [1943] AC 92

Is the result of Lord Atkin's view that a duty of care is owed to those who are foreseeably likely to be injured by an act that all persons in or near the street down which the negligent driver is progressing are potential victims of his negligence? I cannot think so. The duty is not to the world at large. It must be tested by asking with reference to each complainant was a duty owed to him or her. If no one of them was in such a position that direct physical injury could reasonably be anticipated to them or their relations or friends, normally I think no duty would be owed; and if, in addition, no shock was reasonably anticipated to them as a result of the defendant's negligence, the defendant might, indeed, be guilty of actionable negligence to others but not of negligence towards them.

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SOURCE 3

Adapted from the judgment of Wilberforce LJ in *McLoughlin v O'Brian* [1982] 2 All ER 298

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. That foreseeability does not of itself, and automatically, lead to a duty of care is, I think, clear. A general rule is that recoverable damages must be confined to those within sight and sound of an event caused by negligence or, at least, to those in close, or very close, proximity to such a situation.

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The policy arguments against a wider extension can be stated under four heads. First, it may be said that such extension may lead to a proliferation of claims, and possibly fraudulent claims. Second, it may be claimed that an extension of liability would be unfair to defendants, as imposing damages out of proportion to the negligent conduct complained of. Third, to extend liability beyond the most direct and plain cases would greatly increase evidentiary difficulties and tend to lengthen litigation. Fourth, it may be said that an extension of the scope of liability ought only to be made by the legislature, after careful research.

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SOURCE 4**From the judgment of Wilberforce LJ in *McLoughlin v O'Brian* [1982] 2 All ER 298**

There remains, in my opinion, just because 'shock' in its nature is capable of affecting so wide a range of people, a real need for the law to place some limit on the extent of admissible claims. It is necessary to consider the three elements inherent in any claim: the class of persons whose claims should be recognised; the proximity of such persons to the accident; and the means by which the shock is caused.

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SOURCE 5**Adapted from *Law of Tort* John Cooke (2001) Longman p. 49**

Judicial and public scepticism about the genuineness of psychiatric illnesses and the controversy in the medical profession about their diagnosis have held back this area of law and led to it being treated as a separate area with its own rules.

English law does not give damages for the shock itself which is the primary response to a traumatic event. Compensation is awarded for the secondary more long lasting effects of trauma. The illness must be shock induced. Psychiatric illness which is brought about by a cumulative effect on the nervous system, such as watching a relative die slowly after negligent medical treatment, is not generally compensatable.

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A further difficulty is the 'floodgates' problem. Ordinary physical damage caused by negligent conduct will by its nature be limited to those within the range of impact. Nervous shock is not so limited, as persons not within the range of impact may be affected. The courts have been conscious of this problem and imposed restrictions on those who can recover.

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SOURCE 6**Adapted from the judgment of Scarman LJ in *McLoughlin v O'Brian* [1982] 2 All ER 298**

The distinguishing feature of the common law is this judicial development and formulation of principle. Policy considerations will have to be weighed; but the objective of the judges is the formulation of principle.

In relation to nervous shock at each landmark stage common law principle, when considered in the context of developing medical science, has beckoned the judges on. And now common law principle requires the judges to follow the logic of the 'reasonably foreseeable test' so as, in circumstances where it is appropriate, to apply it untrammelled by spatial, physical or temporal limits. Space, time, distance, the nature of the injuries sustained and the relationship of the plaintiff to the immediate victim of the accident are factors to be weighed, but not legal limitations, when the test of reasonable foreseeability is to be applied.

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But I am by no means sure that the result is socially desirable. Why then should not the courts draw the line? Simply, because the policy issue where to draw the line is not justiciable. The problem is one of social, economic and financial policy. The considerations relevant to a decision are not such as to be capable of being handled within the limits of the forensic process.

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SOURCE 7

Extract from *The Modern Law of Tort* Stanton (1994) Sweet and Maxwell pp. 203-204

The twentieth century has witnessed a steady liberalisation in the judicial attitude towards allowing recovery of damages for nervous shock. In this the courts have followed developments in social attitudes. Psychiatric illness is now more readily recognised as a medical affliction; the variety of possible causes for it are more widely appreciated and, as a result, accident victims are more likely to seek compensation for this form of loss.

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The history of the subject provides an excellent illustration of the evolution of negligence theory during the twentieth century. Nonetheless, problems remained. The expansionary tendencies of the neighbour test posed particular problems in relation to shock, in as much as a far wider range of views was possible as to when this form of loss was foreseeable than was the case in relation to damage caused by physical impact. Finally, the spectre of novel and indeterminate forms of liability was raised by the wide range of persons who might be foreseen as possible victims of shock.

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SOURCE 8

Extract from *Textbook on Torts* Jones (5th edition) (1996) Blackstone Press p.127

Historically, the courts have been extremely cautious about admitting claims for psychiatric harm which were not the result of physical injury to the plaintiff. This was partly due to judicial scepticism about the authenticity of psychiatric harm, based to some extent upon doubts about the validity of psychiatry as a medical discipline. The initial fear of a flood of fraudulent claims was gradually replaced with the fear of a multiplicity of genuine claims if the neighbour principle was applied in an unqualified manner to this type of harm. This is reflected in the case law. The first response was to deny any action for psychiatric harm which was not the product of some form of physical impact with the plaintiff. Then in *Dulieu v White* [1901] the plaintiff succeeded for harm sustained as a result of being put in fear for her own safety by the defendant's negligence. In *Hambrook v Stokes* [1925] a mother suffered psychiatric injury when she saw a runaway lorry going down a hill and round a bend, where she had just left her three children who were walking to school. She did not see a collision but feared that the lorry may have injured her children, and was subsequently told that there had been an accident with one of the children involved fitting the description of her daughter. A majority of the Court of Appeal held that the defendant driver was liable for the injury if it was induced by what the mother had seen with her own eyes rather than what she had been told.

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Once having admitted the possibility of claims for psychiatric harm by such 'ricochet victims' the courts faced the problem of determining how wide the scope of liability should be drawn. Scepticism about the nature of psychiatric damage and concerns about a possible flood of claims led to more or less strict limits as to who could recover and in what circumstances.

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SOURCE 9

Extract adapted from the judgment of Lord Ackner in *Alcock v Chief Constable of South Yorkshire Police* [1992] WLR 1057

Because 'shock' in its nature is capable of affecting such a wide range of persons, Lord Wilberforce in *McLoughlin v O'Brian* concluded that there was a real need for the law to place some limitation upon the extent of admissible claims and he considered that there were three elements inherent in any claim (1) the class of persons whose claims should be recognised; (2) the proximity of such persons to the accident – in time and space; (3) the means by which the shock has been caused.

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(1) The class of persons whose claims should be recognised

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

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(2) The proximity of the plaintiff to the accident

Proximity to the accident must be close both in time and space. Direct and immediate sight or hearing of the accident is not required. It is reasonably foreseeable that injury by shock can be caused to a plaintiff, not only through the sight or hearing of the event, but of an immediate aftermath it is clear from *McLoughlin v O'Brian* that there may be liability where subsequent identification can be regarded as part of the 'immediate aftermath'. Mr Alcock identified his brother-in-law in the mortuary eight hours after the accident. Even if his identification could be described as part of the 'aftermath', it could not be described as part of the immediate aftermath.

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(3) The means by which the shock is caused

Lord Wilberforce concluded that the shock must come through sight or hearing of the event or its immediate aftermath. It was clearly foreseeable by the defendant the scenes at Hillsborough would be broadcast live and that amongst those who would be watching would be parents and spouses and other relatives and friends of those in the pens behind the Leppings Lane end. However, he would also know of the code of ethics which the television authorities could be expected to follow, namely that they would not show pictures of suffering by recognisable individuals. Had they done so this would have been a '*novus actus*' breaking the chain of causation between the defendant's alleged breach of duty and the psychiatric illness in the circumstances of this case the simultaneous television broadcasts of what occurred cannot be equated with the 'sight or hearing of the events or its immediate aftermath'. I agree, however, with Nolan LJ that simultaneous broadcasts of a disaster cannot in all cases be ruled out as providing the equivalent of actual sight or hearing of the event or its immediate aftermath.

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SOURCE 10

Adapted from *Street on Torts* Margaret Brazier and John Murphy (1999) Butterworths pp. 202 & 208-9

Arguments that members of the emergency services should not, as a matter of policy, receive compensation for undertaking the very duty which they are engaged to perform have received scant consideration from the English courts. The rescue cases in England are marked by an emphatic desire by the judiciary to 'reward' desirable conduct and encourage in this sphere 'Good Samaritanism'.

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In the context of liability to members of the 'professional rescue' services, such as the police, firefighters and ambulance workers, controversy has raged about awarding such rescuers damages for psychiatric injury triggered by the trauma of their work. It is entirely clear that the courts will award compensation to the ordinary citizen who puts himself in danger trying to help the victims of some horrific disaster, as in *Chadwick v British Transport Commission* (1967).

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In *White v Chief Constable of South Yorkshire Police* (1999) the plaintiffs were police officers who claimed damages for psychiatric illness resulting from their professional involvement in events at Hillsborough. The Court of Appeal originally had held in *Frost* that a duty of care was owed to the officers actually present at the ground. First, it was said they were primary victims, participants in the event directly involved in the consequences of their 'employer's' failure to provide safe crowd control. Second, even if there was doubt as to their status as primary victims, they could recover as secondary victims. The House of Lords in *White* reversed the findings of the appeal court openly acknowledging the argument that it would be perceived as unacceptable to compensate police officers present at the ground in the course of their job and yet deny any remedy to brothers and sisters who saw their relatives die horrifically. First, their Lordships ruled that the plaintiffs were not primary victims. Where the psychiatric harm results, not from anything directly done to the employee-plaintiff, but from his traumatic experience of what is done to others, he is a secondary victim, just like any other victim not endangered himself but witnessing injury to others. He can thus only recover if he meets conditions set by the control mechanisms in *Alcock*. Second, their Lordships ruled that the plaintiff could not recover within some general broad category of rescuers. Rescuers must meet the same conditions as other witnesses of injury to third parties. They can recover only if their illness results from foreseeable physical injury to themselves or they meet the other conditions limiting recovery by secondary victims.

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SOURCE 11

Adapted from *Traffic Accidents and Nervous Shock* Barbara Harvey and Andy Robinson *New Law Journal* July 21 1995 pp. 1100-1101

Page v Smith demonstrates that the law on nervous shock is neither settled nor satisfactory.

The case of *Page* involved what seems to have been a fairly minor road accident, in which one driver negligently turned out of a junction causing another driver to run into him. The plaintiff suffered from myalgic encephalomyelitis (ME). The plaintiff claimed that he had been recovering from the illness and had hoped to return to work as a teacher in the near future. The sudden trauma of the accident, he said, had caused a severe and permanent return of the condition, meaning that he could not work again.

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The Court of Appeal were unanimous in the view that the harm suffered was not foreseeable as a consequence of such an accident. The issue before the House of Lords was the question, what precisely had to be foreseeable – personal injury of any kind, or, in particular, injury by nervous shock? And what effect should the plaintiff's particular susceptibility due to his suffering from ME have on his claim?

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Lord Lloyd approved of Otton J's approach at first instance that where the plaintiff is a primary victim what must be foreseeable is personal injury of some type, and he questioned whether the absence of physical injury to the plaintiff could make any difference to the question of liability.

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Lord Lloyd's view was that a distinction should not be drawn between physical and psychiatric injury and that developments in medical science which "suggest a much closer relationship between physical and mental processes than had previously been thought" are likely to lead to undesirable complications in certain cases.

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Lord Lloyd concluded his judgment by giving five propositions regarding nervous shock.

- 1 In cases involving nervous shock it is essential to distinguish between the primary victim and secondary victims.
- 2 In claims by secondary victims the law insists on certain control mechanisms, in order as a matter of policy to limit the number of potential claimants. These control mechanisms will have no place where the plaintiff is a primary victim.
- 3 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 a primary victim.
- 4 Subject to the above qualifications, the approach in all cases should be the same, 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 there is no justification for regarding physical and psychiatric injury as 'different kinds of damage'.
- 5 A defendant who is under a duty of care to the plaintiff, whether as primary or secondary victim, is not liable for damage for nervous shock unless the shock results in some recognised psychiatric illness.

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Lord Lloyd states that these principles do not involve any radical departure from previous decisions. They certainly have the appearance of a useful checklist while the checklist undoubtedly provides a clear result in the case of a straightforward collision such as in *Page*, its application to the facts of more complex situations such as the Hillsborough disaster is bound to be more complex.

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