NERVOUS SHOCK AND PSYCHIATRIC INJURY

By Nidhi Singh, NUALS, Kochi

Editor's Note: Earlier in Tort law compensation was awarded for suffering from some physical injury only. It was considered that mental stress and injury are ‘less worthy’ of being classified as wrongs under tort law and hence was not recognized. The courts refused to treat psychiatric damage same as physical damage but had no difficulty compensating for psychiatric damage caused as a direct consequence of physical injury. However, over the years there has been a development in this law and precedents are being set with relief for causing mental injury and shock as well. The paper identifies the various criteria that are taken into account while determining the extent of the psychiatric trauma caused and what compensation must be awarded for the same by observing what situations will give rise to primary victims and what to secondary victims and lays down the guidelines to curb the ‘floodgate’ of claims. Various control mechanisms to tackle the floodgate effect established by various case laws have been enumerated. The Law Commission in its report laid down the best way to tackle the floodgate of claims is to look at the close ties of love and affection between the primary victim and the secondary victim rather than going by the ‘aftermath test’.

1. Introduction to Nervous Shock

"In the case of mental shock... 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“ Bourhill v Young [i][1943], per Lord Macmillan.

Tort law protects the interests of the individual and adjudicates private wrongs. It is a judicial proceeding, developed through case law in which the rules of evidence apply. Fault or negligence is an important issue in tort law and tort law is fault oriented. Tort law deals with civil wrongs for which the law provides compensation. It protects equity between individuals by providing compensation for damages, so that the status quo that existed prior to the harm can be reestablished between the parties. Tort law aims at making good the loss suffered by the plaintiff, i.e. it seeks to make the plaintiff whole[ii]. Tort law compensates the plaintiff for all damages including pain and suffering. The types of damages are Actual, Compensatory and Punitive. It does not seek punishment of the wrongdoer EXCEPT when damage is made with malice or wantonness. Punitive damages are awarded when the mental damages are due to intentional or wanton behavior. The legal standard used is a preponderance of the evidence.

The English legal system has often regarded negligence and compensation of psychiatric harm as a controversial issue within the realm of tort law. The laws behind psychiatric harm or “nervous shock”, as the courts have commonly referred to it, has been seen by many judges, lawyers and academicians as leading to inconsistent results, having complex criteria and standards, and adopting illogical approaches leading to injustice. Nervous shock can be seen as a mental injury or medically recognized psychiatric illness. In recent years the courts have begun to move away from this terminology and have begun to talk about ‘psychiatric illnesses rather than nervous shock[iii]. Psychiatric illness or injuries which can be triggered by the perception of traumatic events include “conditions such as depression, schizophrenia, post-traumatic stress disorder[iv] and anxiety neurosis”. The development of law within the
compensation of psychiatric injury has been largely influenced by policy considerations and attempts to restrict the number of potential claimants. This paper will discuss how the courts, through the use of case law, have created standard tests and specific criteria which are used to place limits on claims dealing with psychiatric harm. It is becoming more apparent that our current laws need to be reformed in order to reflect the constantly evolving nature of new cases and society as a whole.

In many respects the history of liability for psychiatric illness has been characterized by ignorance, suspicion and fear (a view that could equally be applied to the history of mental illness itself). There has been ignorance of the causes of psychiatric illness, judicial suspension of the medical discipline devoted to treating psychiatric illness, and fear that opening up liability would produce a flood of claims (either fraudulent or genuine). Deeply pragmatic the common law and its judges may be, but in the context of liability for psychiatric illness this, on occasion, seems to translate into the simple, indeed simplistic, notion that if it cannot be seen it cannot be shown to have caused any harm. This in turn has produced what might be termed the "pull yourself together" school of legal analysis (sometimes aided, it must be said, by a similar attitude within the medical profession) which regards psychiatric damage as less important, less significant and indeed less worthy of compensation than physical injury, which after all can be objectively seen and measured. Although we have moved on, to some extent, from these attitudes, they nonetheless lurk beneath the surface of the "policy factors" which are wheeled out to justify restricting recovery.

The courts have refused to treat psychiatric damage on the same basis as physical damage, though with remarkable, but scarcely commented upon, inconsistency see no difficulty in compensating psychiatric damage produced as a direct consequence of physical injury to the plaintiff (even to the extent of compensating for the plaintiff's suicide in the course of a depressive illness produced by his physical injuries as seen in Pigney v Pointer's Transport Services Ltd). Indeed, the House of Lords has now reached the position that if some physical injury to the plaintiff was foreseeable in the circumstances, however trivial, but did not in fact occur, the plaintiff can recover for psychiatric illness without even asking the question whether the psychiatric illness was foreseeable: Page v Smith. The presence or even the foreseeability of physical injury somehow legitimates the plaintiff's claim for psychiatric injury. The primacy of physical injury in the realm of compensation is apparent even when the courts are engaged in permitting recovery for psychiatric illness. Lord Macmillan's "elements of greater subtlety" apply only to psychiatric illness which is not produced by means of physical injury to the plaintiff.

In order for a claimant to receive damages from nervous shock due to the negligence of the defendant, they must prove all the elements of the tort of negligence:

1) a duty of care exists;

2) there is a breach in that duty;

3) the causal link between the breach and shock;

4) shock was not too remote a consequence.
Out of fear for false claims and unrestricted liability of defendants, the courts have created a number of “control mechanisms” which can limit liability[viii]. These were first seen in McLoughlin v O’Brian[ix] and brought about a three part test in order to restrict compensation in relation to negligently inflicted psychiatric harm. The controls have outlined distinctions between physical harm and psychiatric harm and there are four basic reasons for this as suggested by Lord Steyn in White v Chief Constable of South Yorkshire Police:

(1) evidential problems: the difficulties in drawing the line between psychiatric illnesses and mere grief or anxiety;

(2) the view that allowing claimants suffering psychiatric injury to sue may act as unconscious disincentive to them recovering from their illnesses;

(3) 'floodgates' concerns about a significant increase in the scope of tort liability if recovery for psychiatric injury was not limited;

(4) the potential unfairness to the defendant of imposing damages out of all proportion to the negligent conduct.

Whether or not these reasons hold to be true is yet to be seen and The Law Commission Report (1998) addresses these arguments by claiming that most of them do not stand up to close scrutiny. Some of these suggestions came forward in the report which proposed a number of reforms dealing with psychiatric harm, in an attempt to improve those aspects of the law which are deemed less desirable today and to ensure the law is efficient and just in its application. The report suggested that many of Lord Steyn’s reasons apply equally well to claims for physical injury in addition to the psychiatric injury it is intended to limit. Furthermore, the report states that “fraudulent or exaggerated claims are just as likely in relation to physical harm” and there is no way of proving the kind of pain the claimant is in - the courts just trust the claimants words and hold them to be true[x].

This paper will discuss the Law Commission’s recommendations and whether these would make the law more or less coherent, and ways in which the courts have attempted to do this. The Law Commission recognized that the law in relation to recovery for negligently caused psychiatric injury has “taken a wrong turn”. Too much appears to turn upon the primary/secondary victim distinction, and the restrictive approach to actions of secondary victims has led to unjust results. We will now turn to the related case law dealing with primary and secondary distinctions and show how the courts have limited claims in these cases.

2. Primary and Secondary Victims

Before discussing if the proposed reforms of the Law Commission are of any value, it is important to take a look at how the case law dealing with psychiatric harm has evolved and the limits that judges have placed on the broadness of the term ‘nervous shock’. One of the first instances dealing with psychiatric harm was in Dulieu v White & Sons. Kennedy J. introduced a test upon which liability could be based and this was referred to as the “Kennedy test” in which the danger presented should have been foreseeable and “there must be a shock which arises from a reasonable fear of personal injury to oneself”.
This test carved out the distinction between primary and secondary victims, and bystanders who happen to witness an accident were not regarded as primary participants and therefore were to be treated separately under the law. This criterion is still common today when dealing with primary victims. Where being directly involved in the accident to a point where one's own personal safety is at risk and the negligence of another party has caused injury; this is seen as the base requirement of this test and the negligent party will be held liable[xi].

This test was further expanded to apply in the case of Page v Smith where Lord Lloyd held that where there was reasonably foreseeable then “physical and psychiatric harms are not of different types, so that if the former is foreseeable, the claimant can recover in respect of both physical and psychiatric harms, even where the latter is not in itself foreseeable”. Lord Lloyd’s judgment created a restrictive definition of primary victims, where the sole requirement of the party was to be within the zone of physical danger and removing the requirement of psychiatric harm to be foreseeable; which was used as the basis of denying the claimants in Delieu v White[xii].

The case of Hambrook v Stokes Bros[xiii] nearly two decades later furthered the narrow requirements of Dulieu and expanded them to cover family members and friends of victims. In this case a woman had suffered psychiatric harm after watched a lorry swerve out of control down a hill where her children were known to be. Although she was a non-participant in the event she had experienced direct shock as a direct result of fear for her children and was able to recover her claim. Despite the creation of secondary victims, the test for primary victims remained the same, involving foreseeability of injury and being in the zone of danger, whereas now secondary victims had a greater hurdle to overcome as complex applications of legal rules increased the problems within such cases. More recently, we have seen judges respond to the “floodgates” problem by limiting the scope of liability within psychiatric harm cases by restricting the concept of foreseeability and making proximity one of the crucial aspects when determining whether a duty of care is owed.

Lords Bridge and Scarman preferred a test based upon foreseeability alone, "Untrammeled by spatial, physical or temporal limits," which would be largely arbitrary in their application. The factors included in Lord Wilberforce’s "aftermath test" would have a bearing on the degree to which psychiatric illness was foreseeable, but they would not necessarily preclude a claim. Lord Bridge could see no logic in denying an action to a mother who read a newspaper report of a fire at a hotel where her children were staying, and who subsequently learnt of their deaths, simply because "an important link in the chain of causation of her psychiatric illness was supplied by her imagination of the agonies of mind and body in which her family died, rather than direct perception of the event."

As the number of claims increased and the case law evolved we saw the secondary victim distinctions becoming more apparent. A secondary victim was a person who was not at risk of physical injury but suffers psychiatric injury as a result of witnessing someone being harmed. This was the issue at hand in Bourhill v Young, where there was an attempt to expand the established zone of danger from previous cases, and prove that a duty of care is still owed to a claimant who is outside this zone of danger, but is still within the reasonable area of shock.

In the second category of cases the plaintiff was simply a passive and unwilling witness of injury caused to others. In this category, where the psychiatric injury was attributable simply to witnessing the misfortune
of another person in an event by which the plaintiff was not personally threatened or in which he was not directly involved as an actor, there were four issues that had to be considered:

(i) The nature of the relationship between the plaintiff and the primary victim;

(ii) The proximity of the plaintiff to the accident or its immediate aftermath;

(iii) The means by which the plaintiff perceived the events or received the information;

(iv) The manner in which the psychiatric illness was caused.

In order to recover from such cases, a number of policy considerations had to be taken into account, where “the notion of ordinary phlegm or fortitude, is invoked as a means of assessing the validity of a claimants emotional reaction in the face of trauma.” The claimant was unsuccessful in her claim and the Lords held that ordinary people should be expected to withstand any associated trauma when witnessing an injury of a stranger. They noted that she was outside the area of foreseeable physical danger and therefore cannot claim psychiatric illness on those grounds. From this case the courts began to evolve their approach towards the secondary victim limiting future floodgates of claims.

3. Creation of control mechanisms and Alcock criteria

As psychiatric harm evolved the courts began to take different approaches, like that seen in McLoughlin v O’Brian. In McLoughlin the plaintiff’s husband and her three children were involved in a road accident caused by the defendant’s negligence. The plaintiff was informed about the accident two hours after the event, and she was taken to the hospital where she was told about the death of one of her children and saw the injuries to her family in distressing circumstances. The House of Lords was unanimous in holding that the plaintiff’s claim for psychiatric illness should succeed, but there was a difference of opinion as to the appropriate test of liability. Lords Wilberforce and Edmund-Davies considered that foreseeability of psychiatric injury was not the sole requirement. There must be some additional limits based on:

(i) the class of person who could sue; the closer the emotional tie the greater the claim for consideration;

(ii) physical proximity to the accident, which must be close both in time and space, though this could include persons who did not witness the accident but came upon the “aftermath” of events - persons who would normally come to the scene, such as a parent or spouse, would be within the scope of the duty;

(iii) the means by which the psychiatric illness was caused - it must come through the plaintiff’s own sight or hearing of the event or its immediate aftermath; communication by a third party was not sufficient.

At the time this judgment was viewed as a borderline case which applied a logical progression towards assisting the claimant, and felt because psychiatric illness was capable of affecting such a large number of potential claims there was “a real need for the law to place some limitation on the extent of admissible claims.” Lord Wilberforce's now famous judgment laid out the groundwork for his threefold test of
proximity which was later referred to as the “Alcock control mechanisms”. The three factors or “control mechanisms” made up of comprised “the class of persons whose claims should be recognized; the proximity of such persons to the accident; and the means by which the shock was caused”.

He contended that there needed to be a close tie of love and affection towards the person suffering injury; that the accident had to be close in terms of time and space and the claimant either have witnessed or been in the immediate aftermath of the accident; and that the shock must have been caused by direct perception (sight or hearing) of the incident or its aftermath and not have been a communication from a third party. Through the creation of this test the courts were able to limit the amount of potential claims as now they had a concrete guideline to apply for future cases.

Almost a decade later this test was thoroughly applied in the aftermath of the Hillsborough Stadium disaster[xvi] and the other cases which ensued such as Alcock v Chief Constable of South Yorkshire[xvii] . Actions were brought against the police arising out of the Hillsborough stadium disaster in April 1989, when 95 people were killed and over 400 injured by getting crushed in debris when too many people were allowed to crowd into a confined area of the football stadium. The events were shown in a live television broadcast. The actions were brought by 16 people, some of whom were at the stadium but not in the area where the disaster occurred, and some of whom identified bodies at the mortuary[xviii].

All the plaintiffs were relatives, or in one case a fiancée, of people who were in the disaster area, but none were either a spouse or parent of those who died or sustained physical injuries. The police admitted liability for negligence in respect of those who were killed and injured in the disaster, but denied that they owed a duty of care to the plaintiffs. The House of Lords, applying Lord Wilberforce’s "aftermath test," dismissed the plaintiffs’ actions.

When applying the criteria from the McLoughlin case the courts took a narrower approach than what had been done in the past. This was due to the expected number of claims from such a large public tragedy, the shift in the concept of proximity of perception (could a claim fail if event was witnessed on TV) and ties of love and affection (witnessing somebody you love or close to you being harmed). Because of these factors the Lords had to re-establish how they approached the immediate aftermath definition and this was reflected in the Alcock control mechanisms[xix]. The Alcock case dealt with a few important points when relating to the limits placed by the courts. The claimants based their entire argument on the duty of care aspect within nervous shock whether or not it was reasonably foreseeable; which was later rejected on similar grounds found in McLoughlin, stating that foreseeability on its own did not mean the claimant was owed a duty of care.

These controls are still used in courts today to limit claims by applying these strict rules. Under the criteria of close tie of love and affection many of the Hillsborough claims failed when it was applied. A claimant from the Alcock case, Brian Harrison, had witnessed his two brother’s die in the disaster was unable to claim after suffering from post-traumatic stress disorder[xx].

The courts held that there was insufficient evidence leading to show a close tie of love and affection which reasonable foreseeability would have been tied with. Similarly, the proximity aspect of the test was applied with a situation where a closer tie of love was found between a mother and father who had witnessed the death of their child and the disaster on television[xxi]. The courts found that although they
did meet the requirement of close ties of love and affection and foreseeability that they would suffer psychiatric harm, their claim would fail on the grounds that their illness was caused by being in the immediate aftermath, which was not the case here. They had viewed the disaster on television but due to broadcasting standards, horrific and disturbing images were not to be shown in order to prevent such trauma and therefore their illness could not have stemmed from this.

4. Fundamental Questions

In any review of the law on liability for psychiatric illness there are two fundamental questions that should be addressed. First, why treat the victims of psychiatric illness differently from those who suffer physical injury? There may well be good reasons for regarding these forms of injury differently for the purpose of compensation, but they must be clearly articulated and must stand up to public scrutiny. A major criticism of the present state of the law is that in an attempt to place limits on recovery for negligently inflicted psychiatric illness the courts have established criteria which are arbitrary in their application and, in some respects, do not correspond with medical understanding of how such damage can occur. Indeed, some of the present rules are so arbitrary as to be utterly indefensible, even on grounds of policy, and are such as to bring the law into disrepute with the general public.

The second, and equally significant, question is whether psychiatric illness is a form of harm worth protecting through the tort system. In other words, do we want to compensate plaintiffs who suffer this type of loss, and if so why? The answer seems almost self-evident i.e., yes. The tort system already recognizes the importance of compensating for psychiatric illness since the courts do permit recovery: (a) where the plaintiff has sustained some physical injury, no matter how trivial, and (b) where the plaintiff has not sustained physical injury but satisfies the criteria re-stated by the House of Lords in Alcock. Moreover, psychiatric illness can be very serious for the person suffering from it; indeed, it can be just as debilitating, in some instances more so, than physical injury. Understanding and awareness of the problems caused by psychiatric illness, although by no means perfect, has moved a long way since "shell-shocked" soldiers could be executed as deserters in the First World War, or described in pseudo-medical terms as "lacking moral fiber." The significance of psychiatric injury and the appropriateness of claims for psychiatric illness were recognized over fifty years ago in Bourhill v Young [1943] AC 92 when Lord Macmillan acknowledged that "a mental shock may have consequences more serious than those resulting from physical impact."[xxiii]

Given that psychiatric illness is a serious form of damage which is compensable through the tort system in some circumstances, the question is should the law distinguish between different plaintiffs who have suffered this form of damage as a result of the defendant's negligence? The burden of proof, that it is just, fair or reasonable to exclude certain plaintiffs from the ambit of recovery, should rest very firmly with those who would deny them compensation. The grounds for distinguishing between plaintiffs must rest in policy rather than principle, but before addressing the policy factors that have been invoked bear in mind that in all cases it is assumed that both negligence by the defendant and causation of the damage (in the sense that as a question of fact the psychiatric illness suffered by the plaintiff can be causally attributed to the defendant's negligence) have been established.

It is trite that proof of both negligent conduct and causation is an essential element of a cause of action for negligence.[xxiv] The policy factors invoked to exclude liability are being applied to plaintiffs who have
been injured by the defendant's fault. A further preliminary point (raised here simply to discount its relevance) is that there is no force in the argument that one should compare the position of those who sustain psychiatric illness as a result of a tort with those many people who suffer psychiatric illness as a result of non-tortious events who will have no means of compensation for their loss, other than that provided through the social security system, the National Health Service, private insurance or charitable provision. To suggest, for example, that one should not extend liability for psychiatric illness through the tort system because it simply exacerbates the anomalies and inequities that the tort system creates between tortuously injured individuals and non-tortuously[xxv] injured individuals, is to shift the focus of the debate away from the question of psychiatric illness itself, to the value of the tort system in general as a means of compensating the victims of personal injury, disease or even congenital disability. That is a much larger question which the Pearson Commission addressed in the 1970s and may well have to be revisited in the future. The point is that objections to the tort system as a whole should not deflect one from addressing the more limited question of recovery for psychiatric illness within the current tort system[xxvi].

5. Law Commission Report

This report was originally set out to resolve problems within negligently inflicted psychiatric harm and not to codify all the laws relating to it. It recommended that the law should be able to evolve naturally through judicial decision making while applying precedent and creating a binding rule of law in the absence of a statute. Case law has reached a point where the secondary victim still faces greater difficulty in recovering claims and the report suggested that this should continue to be restricted further confirmed that reasonable foreseeability should not be a grounds for a claim[xxvii].

The Law Commission submitted that the Alcock control mechanisms be modified and its impact reduced. Specifically, that secondary victim need not show proximity in terms of time, space and perception. The reasons for this are exemplified when the report asks, “How many hours after the accident the mother of an injured child manages to reach the hospital should not be the decisive factor in deciding whether the defendant may be liable for the mother’s consequential psychiatric illness”[xxviii]

A better way to deal with the floodgates argument and limit claims was through a strict application of the close tie of love and affection requirement. This is dealt with in detail within the report as a fixed list of relationships is submitted, to include parents, children, spouses, cohabitants and siblings. Having to prove this aspect with this new list would rid the intrusive evidence gathering which was used in the past to prove close ties. Another important reform the report submitted was to abolish the requirement of sudden shock and to include psychiatric injury which has slowly occurred over a number of years and to change the present law so that liability could arise where defendant's actions in imperiling themselves caused the claimant's psychiatric injury.

Lastly, it deals with the floodgates argument and tries to anticipate that if these reforms are put in place then it will lead to a flood of claims. In order to prevent this, the courts would have to refer back to policy considerations to cut down claims from major events like Hillsborough and the new claims which would arise from separate events.
Historically, the term "nervous shock" has been used by lawyers to describe a medically recognised psychiatric illness, although in Attia v British Gas [1987] 3 All ER 455, 462 Bingham LJ described it as a "misleading and inaccurate expression."


Page v Smith [1996] 1 AC 55


McLouglin v O'Brian [1982] 2 All ER 298


See also http://www.lawteacher.net/tort-law/essays/the-law-of-torts.php

Dulieu v White & Sons [1901] 2 KB 669

Hambrook v Stokes Bros [1925] 1 KB 141

See also http://www.vanuatu.usp.ac.fj/Courses/LA203_Torts_1/LA203Psyche_injur.html

See also http://www.ejcl.org/133/art133-6.pdf

Davie M (1992) 'Negligently Inflicted Psychiatric Illness: The Hillsborough Case in the House of Lords' 43 Northern Ireland Legal Quarterly

Alcock v Chief constable of South Yorkshire [1992] 1 AC 310


[xxii] See also http://www.bitsoflaw.org/tort/negligence/revision-note/degree/psychiatric-damage-liability

[xxiii] See also Lord Wilberforce in McLoughlin v O'Brian [1983] 1 AC 410; N.J. Mullany and P.R. Handford, Tort Liability for Psychiatric Damage, 1993, p. 309: "... an injured mind is far more difficult to nurse back to health than an injured body and is arguably more debilitating and disruptive of a greater number of aspects of human existence."

[xxiv] The Law Commission raised the question of liability for psychiatric illness in general, but in practice it would appear that the most difficult problems have arisen in the context of claims for negligence. The courts do not appear to have engaged in lengthy debate about the recovery of damages for psychiatric illness arising from other torts such as the intentional torts or, say, defamation.

[xxv] See also, http://www.e-lawresources.co.uk/Negligently-inflicted-psychiatric-harm.php

