

Nervous Shock: Time and Space

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ABSTRACT

Liability for psychiatric injury, also known as nervous shock, may pose several challenges when considered as an aspect of personal injury. Within the context of Bahamian tort law, it is an emerging area, which so far has been dealt with only briefly. Several questions arise when assessing nervous shock, such as determining whether a defendant is liable and whether the plaintiff should be awarded damages. In The Bahamas the approach has been similar to that in other jurisdictions such as England and other Commonwealth states. In these jurisdictions the issue has been whether the cause of the psychiatric injury was reasonably foreseeable, especially where the claimant did not suffer any physical injury or was not directly involved in the accident. This article reflects on The Bahamas' approach to nervous shock, the correlation of "time and space," where the claimant is said to have witnessed the injury: it will present a discussion of the current understanding of nervous shock and whether it constitutes an appropriate claim.

INTRODUCTION

The concept of nervous shock in negligence, recognises the elements of time and space, and considers whether the victim should be entitled to damages based on psychiatric injury suffered consequential upon the shock sustained, not from direct contact, but through the medium of the eye or the ear. At first sight, this aspect of personal injury, which affects the mind, may appear incomprehensible but Bahamian case law affirms that "damages for nervous shock caused by negligence can be made without immediate personal injury to oneself" (*Wilchombe vs Princess Margaret Hospital*, p. 25).

Consider the case of *Wilchombe vs Princess Margaret Hospital*: Infant Dominique

Wilchombe* was born on Tuesday August 6, 1996, at the New Beginning Birthing Centre, Nassau, The Bahamas. She was transferred to the Special Care Baby Unit of the Princess Margaret Hospital for observation because her umbilical cord was around her neck at birth. She later developed a fatal *Acinetobacter* spp. infection (McDonald et al., 1998).

The *Acinetobacter* spp. bacteria are found primarily in water and soil and cause human disease. It is especially prevalent in intensive care units of hospitals (Centers for Disease Control and Infection, 2010). After being infected with *Acinetobacter* spp., infant Dominique died four days later on August 10, 1996. Her parents sued the hospital to recover damages for psychiatric injury

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*Note that the Plaintiff's surname was misspelled consistently in the Carilaw database and other published sources. The correct spelling is Wilchcombe. –Ed.

because of her death. The relevant question was whether the hospital could be held liable for psychiatric injury suffered by the parents who witnessed her death. The analysis of this case is based on a traumatic event culminating in a claim for nervous shock and/or psychiatric damage.

PRINCIPLES ADVANCED

Nervous shock is an area of law in which the courts have expanded their approach for damages in respect of negligently inflicted psychiatric injury. In medical terms, psychiatric injury may be considered as an aspect of personal injury (Kodilinye, 2009, p. 122). The courts have ruled that a plaintiff, in some instances, may recover damages for nervous shock brought on by an injury not to himself or herself, but rather to a near relative. The challenges in these cases occur because the claimant is not the primary victim and the injury sustained is in the mind. This is considered problematic for the law because it is believed that it presents a greater risk of inaccurate diagnosis and the line between ‘mental and physical’ is not fully, scientifically understood (Rogers, 2006, p. 225). The mind is an unseen element and mental injury is, in contrast to physical injury, often difficult to determine; therefore, trying to reconcile even the fear of such injury, could be considered subjective. In addition, there is the principal issue of proximity, denoting ‘time and space’, which may appear to lead to an illogical conclusion. It raises the question of foreseeability of injury and remoteness of damage in negligence. It considers the question of whether the accident caused or materially contributed to the plaintiff’s deteriorating condition. The difficulty the courts face is in determining the circumstances in which there should be compensation for psychiatric injury and which could be regarded as reasonably foreseeable where the claimant had no direct

involvement in the accident.

DISCUSSION

At the outset, it is important to note that when one considers the term “nervous shock” legally, it is taken to mean mental injury or psychiatric illness and not simply grief and sorrow (*Wilchombe vs Princess Margaret Hospital*). The criterion which if used identifies nervous shock, resulting in liability, cannot in and of itself relate to psychiatric illness carte blanche. This was clarified in the case of *Eastern Airlines Inc. vs Floyd*. In this case there was a near crash landing of an Eastern Airlines flight between Miami, Florida and The Bahamas. The United States Supreme Court held only by virtue of the Warsaw Convention, that compensation was not allowed for purely mental injuries (*Eastern Airlines Inc. vs Floyd*, pp. 534-553). The critical issue for the Supreme Court in determining the liability of Eastern Airlines was that in 1929, under the Warsaw Convention, personal injury did not encompass psychiatric injuries.

The House of Lords, authorities considered highly persuasive in The Bahamas, noted in *Page vs Smith* that nervous shock means a reaction to an “immediate and horrifying impact, resulting in some recognizable psychiatric illness” (p. 736). Lord Keith of Kinkel observed that there must be some serious mental disturbance outside the range of normal human experience (p. 739). His Lordship noted that such mental disturbance goes beyond ordinary emotions of anxiety, grief or fear. The recognition of a serious mental disorder not associated with direct personal injury, represents the increasing recognition by the courts that although at common law damages cannot be awarded for grief and sorrow, damages for psychiatric illness may be made where there is injury by shock without direct contact (*Alleyne vs Attorney General*, p. 10). It may be a

difficult concept to assimilate that a person may be awarded damages caused by shock applicable through the eye or ear without direct contact. However, once it is understood that psychiatric harm is comparable to physical harm, one cannot then disregard that liability may be possible for the wrongdoer. Sustaining an injury from a blow inflicted by a stone to the head is no less significant than an immediate and horrifying impact to the mind. Once the time of the accident is concurrent with the resulting shock, psychiatric harm is significant to a claim in negligence.

The immediacy of the tort was seen in *Alcock vs Chief Constable of South Yorkshire Police* (p. 907), a leading English law tort case. In this case, fans died in a massive crush during a semifinal football game, at the Hillsborough Stadium in Sheffield, England. Lord Oliver observed that cases classified as nervous shock should be divided broadly into two categories. The first category are those in which the plaintiff was involved as a participant in the incident giving rise to the action—the primary victims—and those where the plaintiff was a witness to the injury caused to others—the secondary victims.

In order to differentiate between primary victims and secondary victims, it is important to note that as with any other injury in tort, the claimant in cases of nervous shock must establish a duty of care. The concept of a duty of care presumes that individuals have a legal obligation to others for risks of harm that may be reasonably foreseeable. This foreseeability of harm was developed in the case of *Donoghue vs Stevenson* (p. 562), where Lord Atkin enunciated the neighbourhood principle:

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 (p. 580).

The neighbourhood principle and the concept of duty of care encompass both the primary victim and the secondary victim. The primary victim is directly affected by the accident and can reasonably be seen as being within the contemplation of the wrongdoer. If we reflect on the Hillsborough disaster it can be reasonably deduced that those victims who died or were injured during the stampede should have been in the contemplation of the officers, calculating that if an excessively large number of people were allowed into the stadium, in relation to the capacity to comfortably house them, then in the event of a disaster, the likelihood of harm was almost a certainty.

On the other hand, in the case of *Alleyne vs Attorney General*, the Barbadian High Court was not prepared to rule on nervous shock where the claimant's deceased baby was accidentally incinerated. According to Reifer J, there was no causal link between the plaintiff's psychiatric illness and the defendant's negligence as the evidence failed the threshold test of breach of duty. The claimant was unable to establish reasonable foreseeability, which did not fall within the "control mechanism" of the persons responsible. In *Wilchombe vs Princess Margaret Hospital*, Small J referred to Lord Wilberforce in *McLoughlin vs O'Brian*, when he noted that because nervous shock is capable of affecting a wide range of people, the law needs to put some limitation on admissible claims: "(1) the class of persons whose claims should be

recognised, (2) the proximity of such persons to the accident and (3) the means by which the shock is caused” (*Wilchombe vs Princess Margaret Hospital*, p. 29). The control mechanism therefore anticipates reasonable foresight, once negligence has been established. A duty of care could be presumed where it is reasonable to expect that a hospital maintain a clean environment, free from deadly bacteria. It is medically known that the *Acineobacter* spp. bacterium is easily spread to vulnerable patients and special attention should be paid to infection control procedures. These clinical factors relate to the third arm of Lord Wilberforce’s control mechanism in classifying nervous shock.

The court in *Bourhill vs Young* (p. 92) held no duty of care was owed to Mrs. Bourhill, the plaintiff, even though she was in the vicinity of a fatal motorcycle crash and witnessed the accident caused by the negligence of the defendant in which the defendant was killed. She claimed she heard the accident and saw the aftermath of it and this caused her baby stillborn. It was held that the defendant was not liable because it was not reasonably foreseeable that she would suffer nervous shock. She was not in danger herself nor was she closely connected with the deceased by way of a relationship. She was not of the class of persons whose claims should be recognised.

However, in *McLoughlin vs O’Brian*, the majority of the members of the House of Lords found the defendant liable, after the plaintiff viewed the badly battered and bloodied bodies of her family following their involvement in a road traffic accident. There must therefore be a close tie of love and affection between the plaintiffs, a secondary victim, as was noted in *Alcock vs Chief Constable of South Yorkshire Police*. Where the claimant is the primary victim it matters not whether the injury was physical or

psychiatric, the test remains the same. In the case of *Page vs Smith* it was held that the defendant was liable for damages for nervous shock suffered by a primary victim of the accident if personal injury to that person was reasonably foreseeable. The victim is not required to prove that nervous shock was reasonably foreseeable, where it is foreseeable that the victim may suffer physical injury from the act or omission of the defendant. This was likewise noted by Lord Bridge in *McLoughlin vs O’Brian* (p. 312) where the interrelation between physical and psychiatric injury was observed. The suffering sustained by a patient from psychiatric disorders is no less painful or disabling than that inflicted by physical injury.

There is no doubt that the claimant mother in the Barbadian case of *Alleyne vs Attorney General*, suffered mental distress because of the accidental incineration of her deceased infant. The court did not determine that her psychiatric illness at the time of the trial gave rise to nervous shock, which would have enabled the court to find the defendant hospital liable. Reifer J reiterated that even though nervous shock is reasonably foreseeable, the law does not award damage if the psychiatric injury was not induced by shock. This would involve a horrifying event which violently agitates the mind. This judgment by Reifer J begs the question of what is to be classified as a horrifying event. It affirms the challenges of the court when considering an injury involving not only the mind but also the relationship of the parties. In the *Alleyne* case, the psychiatric illness occurred over a period of time, not in the immediate aftermath and the case therefore failed the threshold test of breach of duty. It appears that the court in *Alleyne vs Attorney General* did not consider the time period of three months as being in the immediate aftermath, and so the case did not fit the

control mechanism significant to time and space.

In the Bahamian case of *Wilchombe vs Princess Margaret Hospital*, Small J adopted Lord Wilberforce's control mechanism of time and space as applicable to proximity of the relationship between the claimant parents and the defendants. The Wilchombes, parents of Dominique, had anticipated her recovery and eventual discharge, not her death within three days of birth. Relationship, time, space, and reasonable foreseeability were prima facie evidence of the hospital's liability. It was fair and just that the parents be compensated for the injury suffered.

CONCLUSION

It may be deduced from the ruling by Small J in the Bahamian case of *Wilchombe vs Princess Margaret Hospital* that the Bahamas' approach in determining liability

in nervous shock is the same as that of other common-law jurisdictions. Courts in these jurisdictions realize the challenges faced when assessing injury of the claimant, a secondary victim. Psychiatric illness, unlike physical illness, creates difficulties, because the injury is sustained through the medium of the eye or ear and weighs heavily on mental determination. In determining liability for nervous shock, the Bahamian court was mindful of the judgment of Lord Keith in *Page vs Smith* in ruling out emotional distress, in contrast to a serious mental disturbance. Like any other personal injury matter, foreseeability remains a relevant principle in nervous shock, where the control mechanism of time and space must be applied. Small J's ruling in *Wilchombe vs Princess Margaret Hospital*, has set a noteworthy precedent for future claims for nervous shock.

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