Negligence: nervous shock

1. Duty of care
- That someone is legally responsible to someone else for the harm that the first person has caused

2. Breach of DOC

3. Damages

4. Causation

5. Remoteness

Donoghue v Stevenson 1932 HL → **Manufacturer DOC/negligence**

Appellant drank a bottle of ginger beer manufactured by the defendant. The bottle had bought the drink from a retailer and given it to her. The bottle contained the decomposed remains of a snail. The appellant suffered shock and severe gastro-enteritis as a result.

Does a manufacturer owe a duty of care to consumers to make sure that products are free from defects likely to cause injury to health?

Mrs Donoghue argued that the manufacturer owed a DOC to her as a consumer, the manufacturer neglected this duty and therefore should be liable for damage caused.
Difficulty: no contract between Donoghue and Stevenson

- Stevenson had a contract with the pub to supply the ginger beer, the pub had a contract with Donoghue's friend (who paid for the drinks).
- Donoghue has no contract with her friend (absence of consideration); nor could the friend sue Stevenson (as contract was with the pub)

Held: for Donoghue

- 'Love thy neighbour'/Neighbourhood principle: a person must take reasonable care to avoid acts or omissions which it is reasonably foreseeable would injure a neighbour
    - Neighbour: people so closely and directly affected by an act that you should have reasonably had them in contemplating for being affected when acts/omissions are called into question
- Manufacturer sells products in a form that he intends the consumer to drink them in, there was no opportunity/reasonable possibility of **intermediate examination**, so the preparation of the ginger beer could cause injury to the consumer
    - Where there is opportunity for intermediate exception; no DOC can be established
    - Therefore DOC to consumer to take reasonable care

Dissenting Lord Buckmaster: no DOC shold exist, opens the floodgates to manufacturers being liable for too much.

Donoghue v Stevenson established the law of negligence and the generalised fault principle.

Manufacturers owe a DOC to the users of their products when users are not able to undertake a reasonable inspection.

Palsgraf v Long Island Railway Co 1928 NY → **DOC/negligence, applies D v S logic**

Two men ran to catch a train. One man was carrying a package wrapped up in brown paper and tied with string. He seemed unsteady as he jumped aboard the train, and so two guards helped him by trying to push/pull him aboard. During this, the package became dislodged and fell to the ground, where it exploded (contained fireworks). A woman was standing on the platform and was injured by the exploded fireworks. The woman attempted to sue the guards for negligence.

Did the guards owe a duty of care to the plaintiff for her injuries sustained by the fireworks?

Cardozo CJ: establishing DOC

- Nothing in the situation indicated that the package could harm the plaintiff
    - Applying Donoghue v Stevenson principles: the guard owed a DOC if it was reasonably foreseeable that the fireworks would explode
- Negligence is not actionable unless it involves the invasion of a legally protected interest
    - Salmond: "negligence is the absence of care… proof of negligence in the air will not do"
    - The guards were not aware of the risk posed by the package, and could not be held liable for the absence of care for a risk they did not know existed
- Plaintiff must also prove that the action is personal/particular wrong or violation of right rather than a general wrong or general duty owed to the public
- In order to gain redress: the damage must be particular to a person from wilful harm
    - If it is not wilful, the act should have so many or obvious possibilities of danger that would entitle a person to protection

Held: for the guards, no DOC could be established

Palsgraft can be seen as an example of applying the principles of Donoghue v Stevenson.

A person does not owe a DOC if the harm is not wilful, or the injury resulted from an apparent danger inherent in the actions of the person. The guards had no risk or knowledge of the risk posed by the packages, and could not be held liable.

Wilson & Horton Ltd v Attorney-General 1997 CA → **DOC/negligence, contributory negligence**

Wilson & Horton (publishers) stored newsprint for BCNZ. They over-stacked this newsprint in a building owned by Harris. A fire started in the building. It was not caused by WH, but exacerbated by the over-stacked newsprint. The fire destroyed the newsprint and the building

Did Wilson & Horton owe a DOC to BCNZ and Harris to minimise the damage caused by the fire, when the fire started due to no actions or negligence of Wilson & Horton?

1. Duty of care

There is a well-established DOC that the occupier of a building will take reasonable care not to cause a fire

There is also a DOC of WH to not exacerbate a fire through not taking reasonable care in storing the paper

- It was reasonably foreseeable that a fire could occur in a paper warehouse, and excessive paper storage would exacerbate the fire
- Hand formula: there was a respectable possibility of a fire occurring, and the resulting injury of this would be significant. Therefore WH shouldered the burden of taking adequate precautions to avoid this. (B < PL)

WH had a DOC to take reasonable care to avoid the fire and to take reasonable care to minimise the effect of the fire.

2. Breach of duty of care

It was reasonably foreseeable that a fire would break out, and therefore WH should have taken reasonable care in storing the paper.

- Weight ratio of 1000kg per square metre should not have been exceeded; **but it was;** therefore, if it was exceeded then it was reasonably foreseeable that damage would be caused.

DOC had been breached as WH did not take reasonable care in storing the paper.

3. Damages

Damages have to be a causally connected (causation) and not too remote (remoteness). A breach of a DOC does not make a person automatically liable.

- The damage to the building and newsprint occurred due to the overstacking.
- Therefore, fulfils the causation and remoteness requirements.

Apportionment

The fire occurred outside of WH's control, WH sought apportionment.

- i.e. the fire was caused partly by the tortious events (over-stacking), but also by non-tortious events (actual outbreak).

Contributory negligence: apportion or discount the amount of damages a person might have received against the percentage of contributory negligence (what contribution did a person make to the negligence?).

The defendant had a duty to mitigate the fire. The defendant breached this duty, and the breach resulted in damages to the building and newsprint. Given that the fire occurred partially due to non-tortious events, the amount of damages was apportioned against the percentage of contributory negligence.

Bourhill v Young 1943 HL → **DOC/nervous shock, limiting proximity/foreseeability**

John Young was speeding on a motorbike, lost control and was killed by an oncoming car. Bourhill was on a nearby tramcar facing the opposite direction. She was 8 months pregnant, and suffered shock as a result of hearing the noise of the crash. The baby was stillborn 1 month later, attributed to the shock suffered.

Did Young owe Bourhill a DOC?

1. Duty of care

Lord Russell:

- Young was speeding, but it doesn't follow that he owed a DOC.
- Proximity: she was not physically involved in collision, and had no fear of immediate bodily injury.
    - Not reasonably foreseeable that someone as far away as she (in the tramcar) would be physically affected by shock by his speeding.

Lord Wright:

- Torts can allow for physical shock as a form of damage.
- Proximity: but to claim, must be **within the range of foreseeable danger**
    - Bourhill was not
- Foreseeability: whether a duty exists depends on a "**normal standard of susceptibility"**
    - It has to be reasonable to foresee that nervous shock may occur
    - Bourhill was 8 months pregnant, and therefore more susceptible
        - *Criticism: pregnancy is a normal human condition, absurd to try make it seem abnormal?*
    - **For policy reasons, we have to draw the line** in terms of liability, otherwise effectively makes the defendant an insurer and allows for too much liability.
        - Assumes that people can "put up with stuff"
        - Expect that people experience and react to traumatic events in different ways?

Young did not owe a duty of care to Bourhill, as it was not reasonably foreseeable that she would be physically impacted by shock as a result of his negligence, due to her proximity not meeting the threshold of being within the range of foreseeable danger and her extraordinary susceptibility due to pregnancy.

Bourhill v Young sets out the tests for limiting liability for nervous shock in relation to proximity and foreseeability.

McLoughlin v O'Brian 1983 HL → **Nervous shock/proximity, tests for nervous shock, secondary victims**

Mrs McLouglin saw her husband and child in hospital 2 hours after they were involved in a car accident. She suffered nervous shock as a result.

Can Mrs McLouglin sue O'Brian for nervous shock given that she didn't see the accident happen (i.e. doesn't meet proximity requirement).

Bourhill v Young: established that claims for nervous shock are valid.

- No claims for grief
- Can claim for nervous shock even without direct impact or fear of immediate personal injuries
- Can recover for damages caused to near relative (but doesn't extend past spouse/child)
- Must be within sight or earshot of the accident
- Rescuer exception: shock caused not from fear to oneself or for near relative, but can still claim
    - McLouglin was the mother and wife of the victims, but didn't see the accident happen (only at hospital afterwards)

Policy: should not allow McLoughlin to recover: slippery slope process

- Could lead to the opening of the floodgates, with possible fraudulent claims
- Unfair to impose this liability on defendants: *foreseeability*
- Increases evidentiary difficulties and lengthens the litigation process
- It is very significant to extend this scope of litigation, and should be a matter for Parliament: *seems a cop-out*

Wilberforce: held for McLoughlin

- Though she was not present at the accident, she came across them in the aftermath when they were still "covered with oil and mud, and distraught with pain"
    - I.e. essentially witnessing just what she would have at the crash scene
    - To say that she wasn't fulfilling this requirement and deny her claim would be drawing an arbitrary line, Wilberforce more logically expanding the law to cover McLoughlin (though notes that this case lies on the margins of what should receive cover)
- The boundaries of negligence should be fixed:
    - Proximity test (Lord Atkin's neighbour principle, only persons who are closely and directly affected)
    - Foreseeability: only those who were reasonably thought of to be in contemplation (reasonable person test, must be of normal susceptibility)

Tests for policy

- Class of person or relationship: (child/parent & husband/wife vs. ordinary bystander)
    - The closer the tie, the greater the claim for consideration
    - McLoughlin was the mother and wife = fulfilled this
- Proximity to accident:
    - "Close in time and space", directly there or in the immediate aftermath

    - McLoughlin saw them covered still in oil and mud, essentially saw what she would have at the crash site, sufficient proximity
        - *Criticism: this seems an unusual argument, if the child was cleaned up, surely this was just as frightening?*
- Means by which the shock is caused

McLoughlin could sue for damages in relation to her nervous shock claim. Extension of the law to include instances where the plaintiff is not at the site, but experiences the 'immediate aftermath'.

Where Bourhill v Young made it unlikely to recover damages for nervous shock, McLoughlin adopted a more generous approach and extended the law. Wilberforce adopted a process of analogy by extending the law through creating exceptions, issue with this ("pulling the rubber band") is where it will snap or stop. McLoughlin also introduces the tests for nervous shock as being the relationship, proximity, and means by which the shock is caused.

Alcock v Chief Constable 1992 HL → **Nervous shock/secondary victims, *McLoughlin* test**

The Hillsborough tragedy occurred in 1989, where 95 people died and 400 were injured in a human crush during a football game. It was thought that this was due to fault on the part of unruly fans, rather than the police who opened the wrong gates allowing too many people into one pen and not exercising sufficient crowd control. Here, the relatives of those who died at Hillsborough were attempting to get compensation for the nervous shock of watching their relatives die.

Were the relatives of those who died at Hillsborough able to sue for nervous shock?
Held: for defendants, applied the test of elements of secondary victims in *McLoughlin*

1. Class of people

- Only the closest of family ties (*McLoughlin*)
  - Must be love and affection in those relationships, as it would be reasonably foreseeable that they would be closely or directly affected by the conduct of that person, and therefore reasonably foreseeable they might suffer nervous shock as a result.
    - I.e. could be friends or wider relatives than the strict parent/child/spouse in *McLoughlin*: but need to prove that it was an intimate and close relationship (love and affection)
  - Brian Harrison: was at grounds, satisfied proximity and means of hearing requirements.
    - His two brothers died; but Lord Ackner questioned the "quality of brotherly love" as saying that it is known to differ widely, giving Cain and Abel as an example
    - Not enough proof to establish that theirs was a close and intimate relationship
  - Alcock: brother-in-law
    - Was able to gather proof that this relationship fulfilled the necessary requirements of love and affection

2. Proximity to accident

- Direct sight/sound not needed, can be in the immediate aftermath (*McLoughlin*)
  - *McLoughlin*: extended as the mother saw her family in oil, blood and mud i.e. just as how they would have looked at the scene of the crash
  - Alcock: saw the brother-in-law 8 hours in the mortuary
    - *Rubber band in McLoughlin snaps*

3. Means by which the shock is caused

- Must come through direct sight/hearing of an event or in the immediate aftermath (*McLoughlin*)
- Simultaneous TV broadcasts were not equivalent to this due to the code of ethics for broadcasters which would blur out people suffering so viewers couldn't actually identify loved ones
  - This broke the chain of causation (Novus Actus)

    - *Criticism: this likely wouldn't actually make a difference – a viewer would know exactly where their relatives were due to the nature of football pitches being divided into fan parts. Would fall apart under analysis - more an argument about policy, allowing this would open up too much liability*
- Some exceptions to this, e.g. hot air balloon televised example

Lord Oliver: Logic vs. Policy

- Reasoning seems unfair, seems stupid to limit because of this "logic" re foreseeability and proximity requirements
    - The real reason is one of "policy" i.e. line drawing: essentially we have to restrict who can claim damages
        - E.g. if it was self-inflicted injury (probably brought this up as the attitude of the time suggested it was the fans themselves who were at fault)
        - TV transmission: concern this would open it up to infinite liability
- Why policy? Other solution would be to deny recovery to everyone; so have to accept that we have to draw arbitrary lines

The Chief Constable Young was not liable for the nervous shock of Alcock and the other defendants, as they did not satisfy the McLoughlin tests for secondary victims. Specifically, they failed on the proximity of relationships (having to prove love and affection), and that they did not meet the threshold for proximity (not *immediate* aftermath).

Alcock tightens the test from *McLoughlin.* Alcock is a case about line-drawing. Nervous shock cases were described as a "slippery slope" in terms of opening up liability, and in Alcock the rubber band finally snaps and the line has to be drawn.

Page v Smith 1996 HL → **Nervous shock/primary victim, ordinary phlegm**

The plaintiff was in a low-speed car accident caused by the defendant. It was low-risk, and there was no physical injury suffered but it did aggravate the plaintiff's chronic fatigue syndrome.

Can the defendant claim for nervous shock as a primary victim, or are they barred by the control mechanisms in *McLoughlin* and *Alcock* considering that these were established for secondary victims?

Secondary victim tests should not apply

Lord Lloyd:

- Should not distinguish between physical injuries and mental injuries for primary victims
    - We do for secondary victims in terms of considering foreseeability: this is because secondary victims are outside the area of physical impact, and therefore outside the range for foreseeable physical injury
    - But primary victims are in the area of physical injury, and defininitely covered by a DOC by the defendant not to cause a foreseeable physical injury; therefore unnecessary to establish a separate DOC for foreseeable psychiatric injury
    - Cites modern science as showing no hard and fast line to distinguish physical from psychiatric harm
    - Criticism of opening liability up to far, with the potential for fraudulent claims:
        - This is important for secondary victims (thus why we have the policy control mechanisms)
        - But these do not apply to primary: just foreseeability, and you **take the victim as you find them,** no need to go into the eggshell skull/personality arguments

Tests for primary victims:

1. Must be a recognisable psychiatric illness
2. Must be some foreseeability for **physical** injury

Held for the plaintiff as satisfied these tests.

Lord Jauncey (dissenting)

- The tests of normal fortitude of secondary victims should apply to primary victims
    - Odd example of car slowly reversing and bumps into a nearby car, causing a woman to suffer hysteria (*Weird example – women suffering from hysteria, seems to write this off as a legitimate thing due to gender?)*
- The injury must be foreseeable, and therefore we assume that the victim is of reasonable fortitude: **unless the defendant has special knowledge of their condition**

- Here, it was not foreseeable that a reasonably robust person would have suffered psychiatric illness as a result of what happened; have to consider events as they actually occurred

The plaintiff was able to sue for nervous shock, as the threshold for establishing a negligence claim is lower for primary victims than for secondary victims. Primary victims only need to show that there was foreseeability for physical injury and that they suffered a recognisable psychiatric illness as a result. Here, it was foreseeable that they might have been injured by the defendant's negligent driving (though, fortunately they avoided injury) and they suffered chronic fatigue syndrome (recognisable illness).

Page v Smith distinguished the tests for primary victims from secondary victims. The control mechanisms for secondary victims are in place for policy reasons (line-drawing to limit liability); but this is neither relevant or necessary for primary victims. Lord Lloyd made it easier to recover for this plaintiff, but harder for secondary victims to recover. This lead on to issues in Frost/White (as a deserving group of plaintiffs for compensation, but do not satisfy McLoughlin v O'Brian control mechanisms).