

[COURT OF APPEAL]

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ATTIA v. BRITISH GAS PLC.

[1984 A. No. 1703]

1987 June 5; 26

Dillon, Woolf and Bingham L.JJ.

B

Negligence—Foreseeability of risk—Nervous shock—Plaintiff's home set on fire by negligence of central heating installers—Plaintiff suffering psychiatric illness due to witnessing fire—No physical injury to plaintiff or other persons—Damage to property only—Whether plaintiff entitled to damages for nervous shock

The plaintiff engaged the defendants to instal central heating in her home. In the course of the installation the defendants' employees negligently caused a fire which extensively damaged the home and its contents. The defendants admitted liability and settled the plaintiff's claim for damage to the home and its contents. The plaintiff subsequently brought an action against the defendants claiming damages for nervous shock alleging that she had suffered a psychiatric illness as a result of witnessing the fire. The parties agreed that the question whether the plaintiff could recover damages should be determined as a preliminary issue on assumed facts to save costs. The judge held that damages for nervous shock could only be recovered if consequent upon physical injury, that therefore it was not reasonably foreseeable that the plaintiff might suffer psychiatric illness as a result of the defendants' negligence in starting the fire and he dismissed the plaintiff's claim.

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On appeal by the plaintiff:—

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Held, allowing the appeal, that a plaintiff who suffered psychiatric illness caused by witnessing damage to her property rather than personal injury to another person could recover damages for nervous shock if she could prove causation and reasonable foreseeability; that those were issues of fact which should be determined on full and proven facts rather than assumed facts; and that, in the circumstances, the matter should proceed to trial (post, pp. 312B–E, 313D–G, 320A–C, F—321A, C–E).

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McLoughlin v. O'Brian [1983] 1 A.C. 410, H.L.(E.) considered.

Decision of Sir Douglas Frank Q.C., sitting as a deputy judge of the Queen's Bench Division, reversed.

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The following cases are referred to in the judgments:

Hay (or Bourhill) v. Young [1943] A.C. 92; [1942] 2 All E.R. 396, H.L.(Sc.)

Czarnikow (C.) Ltd. v. Koufos [1969] 1 A.C. 350; [1967] 3 W.L.R. 1491; [1967] 3 All E.R. 686, H.L.(E.)

Donoghue v. Stevenson [1932] A.C. 562, H.L.(Sc.)

Dorset Yacht Co. Ltd. v. Home Office [1970] A.C. 1004; [1970] 2 W.L.R. 1140; [1970] 2 All E.R. 294, H.L.(E.)

H

Jaensch v. Coffey (1984) 58 A.L.J.R. 426

King v. Phillips [1953] 1 Q.B. 429; [1953] 2 W.L.R. 526; [1953] 1 All E.R. 617, C.A.

I Q.B. *Attia v. British Gas Plc. (C.A)*

A *McLoughlin v. O'Brian* [1983] 1 A.C. 410; [1982] 2 W.L.R. 982; [1982] 2 All E.R. 298, H.L.(E.)
Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd. (The Wagon Mound) [1961] A.C. 388; [1961] 2 W.L.R. 126; [1961] 1 All E.R. 404, P.C.
Owens v. Liverpool Corporation [1939] 1 K.B. 394; [1938] 4 All E.R. 727, C.A.

B No additional cases were cited in argument.

APPEAL from Sir Douglas Frank Q.C. sitting as a deputy judge of the Queen's Bench Division.

C By a writ dated 18 May 1984 the plaintiff, Madiha Attia, claimed against the defendants, British Gas Plc., damages for nervous shock suffered as a result of witnessing a fire in her home which was caused by the defendants' negligence while installing central heating there. The parties agreed that the matter should proceed by way of preliminary issue raising the question:

D "Can the plaintiff recover damages for nervous shock caused by witnessing her home and possessions damaged and/or destroyed by a fire caused by the defendants' negligence while installing central heating in the plaintiff's home?"

On 19 December 1986 the judge gave judgment in the defendants' favour by answering the question in the negative.

E By a notice of appeal dated 11 February 1987 the plaintiff appealed on the grounds that (1) the judge had misdirected himself in posing the question "was it readily foreseeable by the defendants that the ordinary householder exposed to the experience undergone by the plaintiff might break down under the shock of the event and suffer psychiatric illness as opposed to grief and sorrow at losing one's home?" The question ought to have been was it reasonably foreseeable and not readily foreseeable; (2) the judge was wrong to hold, if he did so hold, that damages for nervous shock could only be recovered if consequent upon physical injury. Nervous shock was itself a form of injury and whether damages were recoverable therefore depended upon the question of whether the defendants ought reasonably to foresee that psychiatric illness to the plaintiff might arise from their acts or omissions; and (3) the judge ought to have held that the defendants ought reasonably to have foreseen that the plaintiff, exposed to the consequences of the fire caused by their admitted fault, might be so affected through her senses that she might suffer psychiatric damage.

G The facts are stated in the judgment of Dillon L.J.

H *David Tucker* for the plaintiff. The principle question in this appeal is—would the reasonable man reasonably foresee that the carelessness of the defendants in causing the fire which destroyed the plaintiff's home might injure the plaintiff in the sense of causing her injury through nervous shock, i.e., the psychiatric illness which it is accepted on the assumed facts has been caused by witnessing the fire. The courts today recognise that such nervous shock is injury as much as physical injury:

McLoughlin v. O'Brian [1983] 1 A.C. 410, 418B–C, per Lord Wilberforce and *Jaensch v. Coffey* (1984) 58 A.L.J.R. 426, 434B, per Brennan J. A

As Denning L.J. observed in *King v. Phillips* [1953] 1 K.B. 429, 441 after commenting on the different ways of approaching the problem, either on duty of care or remoteness “Howsoever that may be, whether the exemption for shock be based on want of duty or on remoteness, there can be no doubt since *Bourhill v. Young* [1943] A.C. 92 that the test of liability for shock is foreseeability of injury by shock.” B

The plaintiff was plainly a person likely to be affected by the defendants’ careless acts in burning her house—she was the occupier, the woman in charge, the housewife whose home would usually be her most valuable and prized asset inside which would be often irreplaceable possessions such as mementos of family life and the defendants therefore ought reasonably to have foreseen that (1) she might witness the fire and (2) that the effects of witnessing the fire upon her senses might produce shock resulting in psychiatric illness. C

In the circumstances therefore the court has to assess whether a duty of care existed in the light of the principles expounded originally in *Donoghue v. Stevenson* [1932] A.C. 562. The judge has to decide whether it was reasonably foreseeable by the reasonable man that, on the facts of this case, the plaintiff’s psychiatric illness was a sufficiently foreseeable consequence of the defendant’s carelessness. The judge ought to have so found. As a question of pure foreseeability it is obvious that a housewife might suffer severe shock at witnessing her home destroyed, and that such shock might result in psychiatric illness. D

McLoughlin v. O'Brian [1983] 1 A.C. 410 is the most recent consideration by the House of Lords on the problem of recovery for nervous shock. As in earlier cases on the problem there is a marked lack of unanimity. Lord Wilberforce and Lord Edmund-Davies appearing anxious to place limitations as a matter of policy against extending the categories of persons who might recover damages under this head, Lord Bridge of Harwich and Lord Scarman expressing an opposing view. Lord Russell of Killowen indicated that he would not shrink from regarding policy in an appropriate case as something which may feature in a judicial decision, but on the facts of the case in front of him did not see that the policy question arose. E

Apart from *Owens v. Liverpool Corporation* [1939] 1 K.B. 394, it is accepted that recovery has been made where the sufferer of nervous shock was either suffering fear or apprehension for his or her own safety or was witnessing physical injury or death to another. There is no reason in principle, if the test is foreseeability of nervous shock, why recovery should be so limited to the fear or apprehension of the plaintiff’s own safety or witnessing physical injury or death to another. As Brennan J. observed in *Jaensch v. Coffey*, 58 A.L.J.R. 426, 438B the limitations suggested by Lord Wilberforce as matters of policy can be appropriately taken into account by the general principles of causation and reasonable foreseeability “There are no other elements which might preclude a duty of care arising where the kind of damage caused by a defendant’s conduct is shock-induced psychiatric illness and that kind of damage is reasonably foreseeable.” That is the correct approach. Lord Bridge and H

A Lord Scarman in *McLoughlin v. O'Brian* [1983] 1 A.C. 410 were firmly against policy limiting recovery for damages for nervous shock. In reality each of these cases has to be decided on its own facts using the general principles of causation and reasonable foreseeability derived from *Donoghue v. Stevenson* [1932] A.C. 562 which provide the means for the court to draw the line as to recoverability based on what the reasonable man would anticipate as to the harm which might be caused by the

B defendants' careless acts.

If, as Lord Wilberforce and Lord Edmund-Davies considered in *McLoughlin*, policy needs to be taken into account in these type of cases then if reasonable foreseeability is established, policy considerations to prevent recovery must be clear and cogent. The only real argument advanced by the defendants in this case is the floodgates argument, which was not even considered by Lord Wilberforce and Lord Edmund-Davies in *McLoughlin* to be a valid argument.

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Janet Turner for the defendants. The question for the judge was whether the plaintiff could recover damages for nervous shock caused by witnessing her home and her possessions damaged and/or destroyed by fire caused by the defendants' negligence while installing central heating in the plaintiff's home. Two issues required determination: (i) did the

D defendants owe the plaintiff a duty of care? (ii) if yes, was there any reason to delimit the scope of that duty so that liability was not imposed upon the defendants in this case?

The existence of a duty of care in the modern law of negligence depends upon questions of proximity and foreseeability: see Lord Atkin in *Donoghue v. Stevenson* [1932] A.C. 562, 580 and Lord Reid in *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004, 1027. It is necessary to ascertain whether a relationship is sufficiently proximate for reasonable foreseeability that the person would be affected by the acts and then ask whether it is reasonably foreseeable that a person will suffer damage as a result of the acts in question. In the present case the plaintiff witnessed the fire resulting from the defendants' carelessness, therefore was her relationship sufficiently proximate for the defendants reasonably to have foreseen her as a person likely to be affected by their acts? The answer is probably "yes." Was it reasonably foreseeable by the defendants assuming the plaintiff to be a person of normal susceptibility that she would suffer nervous shock as a result of witnessing the fire caused by the defendants' careless acts? The answer is "no." Accordingly the defendants owed no duty of care to the plaintiff to act in such a way as not to cause her to suffer nervous shock.

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The judge ought to have held that as a matter of law a duty of care not to cause harm in the form of nervous shock only arises where it is reasonably foreseeable by the defendants that there is a risk of injury in the form of mental illness being caused by their acts and it is reasonably foreseeable that the nervous shock will be sustained as a result of the death, injury or peril of some person other than the defendants. Accordingly, no duty arose in this action where nervous shock was sustained as a result of the plaintiff witnessing the damage to and/or destruction of property as opposed to the death, injury or peril of a third person.

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The correct test to apply was—was it reasonably foreseeable by the defendants that there was a risk of the plaintiff, being an ordinary householder of reasonable fortitude, suffering injury in the form of mental illness as a result of their careless acts and that the mental illness would be sustained as a result of the death, injury or peril of some person other than the defendants, whose carelessness is alleged to have caused the injury. Alternatively, the correct test to apply was—was it reasonably foreseeable by the defendant that there was a risk of the plaintiff, being an ordinary householder of reasonable fortitude, suffering injury in the form of mental illness by witnessing her home and her possessions being destroyed or damaged by fire as a result of the defendants' careless acts. The state of the present law can be summarised thus: (i) the basic test of liability for nervous shock is foreseeability of nervous shock: see Denning L.J. in *King v. Phillips* [1953] 1 Q.B. 429, 441. There is no agreement as to whether that is the sole test. Foreseeability of damage to property or damage in the form of physical injury is not enough; (ii) nervous shock in the form of psychiatric illness is required to found the cause of action; grief, sorrow, temporary depression and similar are not enough; (iii) the plaintiff is assumed to be a person of normal susceptibility: see Lord Wright in *Bourhill v. Young* [1943] A.C. 92, 110; and (iv) as summarised in *Jaensch v. Coffey*, 58 A.L.J.R. 426, 450 a duty of care not to cause harm in the form of nervous shock will arise, and only arise, where it is reasonably foreseeable that the nervous shock will be sustained as a result of death, injury or peril of someone other than the defendant.

Lord Wilberforce's discussion in *McLoughlin v. O'Brian* [1983] 1 A.C. 410, 422 is based upon the fact that the nervous shock is triggered by the sight or hearing of an accident or incident in which physical harm is inflicted or feared to have been inflicted upon a person close to the plaintiff. See also Lord Scarman at p. 431B–C where he refers to a powerful case for legislation similar to that in New South Wales. That legislation falls within these same limitations. See also Lord Bridge at p. 432A–B where he states "given the fact of the plaintiff's psychiatric illness caused by the defendant's negligence in killing or physically injuring another" and at p. 441D where he refers to being concerned only with "the question of liability of a defendant who is, ex hypothesi, guilty of fault in causing death, injury or danger which has in turn triggered the psychiatric illness." Recovery of damages for nervous shock caused by the sight of damage to or destruction of property as opposed to persons is beyond Lord Wilberforce's margin of logical progression and is plainly outside the scope of the present law. Unlike the case of *McLoughlin*, to permit recovery here must be to extend the scope of the law and to do so substantially.

The defendants have been unable to discover any single decided case within this jurisdiction where any such claim has been made, let alone permitted. The position is similar in respect of the Commonwealth jurisdictions. The reason for this absence of authority is that it has been recognised by lawyers that it is not reasonably foreseeable that if property is damaged a person witnessing such an incident would suffer nervous breakdown or similar psychiatric illness. The development of

A the law to permit the recovery of damages for nervous shock sustained as a result of witnessing death or injury to a close relative or other person rests upon the recognition that one human being seeing the suffering of another human being may be traumatically affected and may suffer from mental illness as a result, just as he may do so if put in fear for his own personal safety.

B Despite the refusal of their Lordships in *McLoughlin v. O'Brian* [1983] 1 A.C. 410 to lay down a dividing line for recovery and non-recovery in such cases, nevertheless several of their Lordships were concerned to place some limitation upon the extent of admissible claims: see in particular the remarks of Lord Wilberforce at p. 422B–c that cases involving less close relationships than the closest of family ties must be very carefully scrutinised. Those remarks reveal a recognition that in
 C cases other than the closest family ties it may not be reasonably foreseeable that a person of normal fortitude would suffer anything so dramatic as a mental illness upon witnessing injury to or the death of, or the aftermath of the injury to or death of, another person. In addition the remarks of those of their Lordships not willing to lay down dividing lines are made in the context of preceding case law where injury or death of persons, or the aftermath, has without exception precipitated
 D the nervous shock. Also, the dividing line which there was reluctance to lay down would have been as to proximity, this being the real issue in the case. If it may not be reasonably foreseeable that a person unrelated to the injured or dead party would suffer mental illness as a result of witnessing the injury or its aftermath, how can it be said that it is reasonably foreseeable that the sight of damage to or destruction of an
 E inanimate item of property would cause a plaintiff of normal susceptibility to suffer mental illness as a result. This case is remote from the nervous shock understandably precipitated in a parent by the sight of his or her child being killed or severely injured, a case in which the “pursuit of justice” referred to by Lord Scarman would invite recovery.

F Reasonable foreseeability alone is not the test of liability, for example, recovery for pure economic loss has been circumscribed in the law of tort although such loss is often foreseeable. It is clear that there may be good reasons, whether you label them policy reasons or use some other label, for delimiting the scope of a duty of care owed by a party and thereby consequential liability. The class of persons hitherto able to sue for nervous shock has been limited. That class would be dramatically multiplied if liability were permitted in these circumstances,
 G because of the high incidence in our society of damage to or destruction of property.

Tucker replied.

Cur. adv. vult.

H 26 June. The following judgments were handed down.

DILLON L.J. This is an appeal by the plaintiff in the action against a decision of Sir Douglas Frank Q.C., sitting as a deputy judge of the High Court in the Queen’s Bench Division, which was given on 19

December 1986 by way of determination of a preliminary issue in the action. A

As to the facts, in the summer of 1981 the plaintiff, Mrs. Attia, lived (as I apprehend she still does) at 11, Leaver Gardens, Greenford, Middlesex, and the defendants, British Gas Plc., were engaged to instal central heating there. When she was returning home at about 4 p.m. on 1 July 1981 she saw smoke coming from the loft of the house. She telephoned the fire brigade, but by the time the firemen arrived, the whole house was on fire and it took the firemen over four hours to get the fire under control. Obviously the house and its contents were extensively damaged. B

The defendants admit that the fire was caused by their negligence, i.e., by the carelessness of their employees who were working at the house, and we were told that the plaintiff's claims for damage to the house itself and its contents have been settled. In this action the plaintiff's only claim is for a different type of damage, namely, damages for nervous shock; by this is meant that, though she did not suffer any physical injury, the plaintiff, as the result of seeing her home and its contents ablaze, has suffered a psychiatric or mental illness, the effects of which are set out in some detail in her statement of claim. C D

The defendants dispute this claim of the plaintiffs, but in order to save costs, especially as the plaintiff has legal aid, the parties agreed, and the master ordered, that the following question should be set down for determination as a preliminary issue, viz:

“Can the plaintiff recover damages for nervous shock caused by witnessing her home and possessions damaged and/or destroyed by a fire caused by the defendants' negligence while installing central heating in the plaintiff's home?” E

For the purpose of this preliminary issue, the facts alleged in the statement of claim are to be assumed to be true; in particular it is to be assumed that the plaintiff has suffered a psychiatric illness which was caused by the shock of seeing her home and its contents ablaze. Causation does not therefore have to be considered on the preliminary issue, though it will have to be considered at the trial if the preliminary issue is not answered in the negative, as the defendants would wish. The defendants say on the preliminary issue that the plaintiff cannot succeed in this action for either of two reasons, viz: (1) that it was not reasonably foreseeable that the plaintiff might suffer any psychiatric illness as a result of the defendants' negligence in starting the fire; or (2) that, even if it was reasonably foreseeable that the plaintiff might suffer psychiatric illness, damages for “nervous shock” can, as a matter of law and public policy, only be recovered if the shock was caused by the death or injury of a person, or by fear of the death or injury of a person, normally a person closely related to the plaintiff, and cannot be recovered if it was merely caused by injury to property. F G H

The preliminary issue was raised to test these two contentions of the defendants. The deputy judge decided in favour of the defendants on

A contention (1) and therefore dismissed the action. The plaintiff now appeals.

The law as to “nervous shock” has recently been considered very carefully and helpfully by the House of Lords in *McLoughlin v. O’Brian* [1983] 1 A.C. 410 and by the High Court of Australia in *Jaensch v. Coffey* (1984) 58 A.L.J.R. 426. In *McLoughlin v. O’Brian* Lord Bridge of Harwich said, at p. 431:

B “The common law gives no damages for the emotional distress which any normal person experiences when someone he loves is killed or injured. Anxiety and depression are normal human emotions. Yet an anxiety neurosis or a reactive depression may be recognisable psychiatric illnesses, with or without psychosomatic symptoms. So, the first hurdle which a plaintiff claiming damages of
C the kind in question must surmount is to establish that he is suffering, not merely grief, distress or any other normal emotion, but a positive psychiatric illness.”

The plaintiff accepts this statement of the law, and accordingly it is claimed that what she has suffered, as described in the statement of
D claim, amounts to a positive psychiatric illness. Where exactly the line is to be drawn between possibly extravagant grief, distress or other normal emotion and a positive psychiatric illness, may perhaps be difficult to discern in what may, for all I know, be a matter of degree; but that is a matter for the trial and does not arise on the preliminary issue.

In the next place it is to be assumed that the plaintiff is of a normal disposition or toughness, possessing, as it has been put in the cases, “the
E customary phlegm.” Whatever the position may be at the trial, on this preliminary issue we are not concerned with the possibility of it being shown that she has suffered psychiatric illness because, though the defendants did not know and she herself may not have known, she was particularly or “abnormally” susceptible to some form of psychiatric illness.

A third point which emerges from the cases cited is that damage for
F “nervous shock,” i.e., for psychiatric illness occasioned by shock, is regarded as a separate head of damage, distinct, for example, from damage for personal injury. The law has developed step by step and is still developing. In those circumstances I would be particularly reluctant to lay down any general rule as to the conditions in which such damages can or cannot be recovered as a matter of public policy. For that reason
G the procedure of a preliminary issue on assumed facts, somewhat briefly stated, has disadvantages where what is under consideration is how the law should develop in a matter of some general importance.

That said, however, as appears from the speeches in *McLoughlin v. O’Brian* [1983] 1 A.C. 410 and the judgments in the Australian case, *Jaensch v. Coffey*, 58 A.L.J.R. 426, a great deal of the difficulty which
H has been felt over the development of the law as to damages for “nervous shock” has arisen in relation to what, in the terminology of the tort of negligence, is described as the question of proximity. How far is it right that the law should allow a claim for damages against a wrongdoer, where the wrong done by the wrongdoer was primarily a

wrong done to someone other than the claimant, and the claimant is a person of whom, at the relevant time, the wrongdoer had no knowledge and who may then have been far away from the scene of the wrongdoer's act? This difficulty is particularly concerned with whether the wrongdoer owed any duty of care to the claimant. But that difficulty does not arise in the present case because in the present case there is no problem of proximity. The defendants knew about the plaintiff and unquestionably owed a duty of care to her not to start a fire in her house. If her claims for damage to the house and contents had not been settled, she would have brought the one action against the defendants in which she would have pleaded the negligence of the defendants in starting the fire and would have gone on to assert that, by reason thereof, she had suffered and was suffering damage and loss, which would be put under two headings, viz. (1) damage to the house and contents; and (2) damage for nervous shock. The issues at the trial, assuming the facts pleaded, including the psychiatric illness, were proved, would have been (a) causation and (b) foreseeability of the damage as a question of remoteness. I can see no good reason why, in such a context, the law should have refused to allow her damages for "nervous shock" if she could get over the hurdles of causation and foreseeability as an aspect of remoteness. It cannot make any difference that in the event her claim for damage to the house and contents has been settled; the duty was nonetheless there.

I am not therefore prepared to hold that the fact that the shock which caused the plaintiff's assumed psychiatric illness was caused by damage to property must preclude her from recovering damages for "nervous shock" even if it was reasonably foreseeable that she might suffer psychiatric illness as a consequence of the defendants' negligence in causing the fire in her house.

Are the defendants right, then, in asserting a priori that it was not reasonably foreseeable that the plaintiff might suffer any psychiatric illness as a result of their negligence in starting the fire? It is not necessary that any particular psychiatric illness should have been foreseen.

Whether it was reasonably foreseeable to the reasonable man—whether a reasonable onlooker, or, in the context of the present case, a reasonable gas fitter employed by the defendants to work in the plaintiff's house—is to be decided, not on the evidence of psychiatrists as to the degree of probability that the particular cause would produce the particular effect in a person of normal disposition or customary phlegm, but by the judge, relying on his own opinion of the operation of cause and effect in psychiatric medicine, treating himself as the reasonable man, and forming his own view from the primary facts as to whether the chain of cause and effect was reasonably foreseeable: see *per* Lord Bridge in *McLoughlin v. O'Brian* [1983] 1 A.C. 410, 432C–D. The good sense of the judge is, it would seem, to be enlightened by progressive awareness of mental illness: *per* Lord Bridge at p. 443D. One consequence of this approach is, however, that the view of the courts as to what is reasonably foreseeable is, in this field, likely to lag behind informed medical opinion. Another consequence is that a view

A which finds favour with the courts at one time may well be considered unacceptable and out of date a few years later—when progressive awareness has progressed further.

B The question which the deputy judge asked himself in the present case was whether it was readily foreseeable by the defendants that the ordinary householder exposed to the experience undergone by the plaintiff might break down under the shock of the event and suffer psychiatric illness as opposed to grief and sorrow at losing one's home. If "reasonably" is substituted for "readily"—as the judge probably intended—I would for my part endorse that as a correct direction. It is not however a test of probability, as opposed to possibility.

C 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 itself foreseeable? Would the reasonable man, endowed with appropriately 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?

D That, if the house caught fire from the defendants' workmen's fault, the plaintiff would see and hear it burning was foreseeable. But how much she saw and heard, and how extensive was the damage to or destruction of the house and contents by the fire we are left to guess at on this preliminary issue. We are asked to say, in effect, that psychiatric illness caused by the shock can never, as a matter of fact rather than law, be a foreseeable consequence when a woman sees her home and its contents burning down. I am not prepared to make any such general a priori ruling on such scanty material. Whether the plaintiff's assumed illness caused by the shock was or was not a foreseeable consequence of the defendants' negligence must depend on the actual evidence given at the trial.

E Accordingly I would allow this appeal, set aside the order of the deputy judge and leave this action to proceed to trial.

F It follows that the attempt to decide this action on a preliminary issue has, in my judgment, failed. But in view of the expense and delays of litigation at the present time and of the difficult position of a defendant who is not legally aided when sued by a legally aided plaintiff, I would not for my part criticise the parties' advisers at all for making the attempt.

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 H WOLF L.J. There have now been a series of decisions by courts of the highest authority both in this country and in the Commonwealth dealing with the problems created by actions for damages where the plaintiff is seeking to recover compensation for psychiatric illness due to what has been colloquially called "nervous shock." On this appeal counsel on both sides relied on two of these decisions, namely, a decision of the House of Lords in *McLoughlin v. O'Brian* [1983] 1 A.C. 410 and the decision of the High Court of Australia in *Jaensch v. Coffey* (1984) 58 A.L.J.R. 426. However, the circumstances giving rise to the

preliminary issue with which this appeal is concerned differ from the A
circumstances of those two decisions in two significant respects.

The first difference is that in those two decisions the plaintiff was B
contending that she suffered her injuries because she had learnt that
members of her family had been involved in a serious accident as a
result of which they had either been killed or seriously injured while in
this case no one had suffered any personal injury. The plaintiff alleges
that her injury was caused in consequence of her seeing her home, of C
which she was proud, on fire, a fire which continued to burn for over
four hours before the fire was brought under control by the fire brigade.

The second difference is that in both of the earlier decisions the D
plaintiffs had not witnessed the accident which caused the injuries to
their respective families and the judgments therefore focused on the
question as to whether the plaintiffs were owed a duty of care by the
defendants, it being contended by both defendants that it could not be
foreseen that their acts could injure the plaintiffs. However, in this case
undoubtedly the defendants owed a duty of care to the plaintiff in
respect of the damage which was caused to her home and indeed she
has been compensated for this damage. Furthermore, if the plaintiff,
who entered the house to telephone the fire brigade had been physically
injured, as could have happened, then in relation to that physical injury
the defendants would have owed her a duty of care and she would be
entitled to be compensated by them for that injury. The problem raised
by the preliminary issue is therefore as to whether the damage actually
alleged to have been suffered by the plaintiff is too remote and is not as
to whether there was a breach of a duty of care. The distinction between
the two situations was discussed in eloquent terms by Denning L.J. in
King v. Phillips [1953] 1 Q.B. 429, 439–440: E

“What is the reasoning which admits a cause of action for negligence
if the injured person is actually struck, but declines it if he only
suffers from shock? I cannot see why the duty of a driver should
differ according to the nature of the injury. I should have thought
that every driver was under a plain duty which he owed to everyone
in the vicinity. He ought to drive with reasonable care. If he drives
negligently with the result that a bystander is injured, then his
breach of duty is the same, no matter whether the injury is a wound
or is emotional shock. Only the damage is different. The bystander
may be so close as to be put in fear for himself, or he may be just a
little way off and be shocked by fear for the safety of others. In
either case he has been injured by the driver’s negligence. If you
view the duty of care in this way, and yet refuse to allow a
bystander to recover from shock, it is not because there was no
duty owed to him, nor because it was not caused by the negligence
of the driver, but simply because it was too remote to be admitted
as a head of damage. F
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“A different result is reached by viewing the driver’s duty
differently. Instead of saying simply that his duty is to drive with
reasonable care, you say that his duty is to avoid injury which he
can reasonably foresee, or, rather, to use reasonable care to avoid
it. Then you draw a distinction between physical injury and H

A emotional injury, and impose a different duty on him in regard to
 each kind of injury, with the inevitable result that you are driven to
 say there are two different torts—one tort when he can foresee
 physical injury, and another tort when he can foresee emotional
 injury. I do not think that that is right. There is one wrong only,
 the wrong of negligence. I know that damage to person and damage
 B to property are for historical reasons regarded as different torts; but
 that does not apply to physical injury and emotional injury. Lord
 Wright clearly treated impact and shock as one cause of action
 when he said in *Bourhill v. Young* [1943] A.C. 92: ‘The man who
 negligently allows a horse to bolt, or a car to run at large down a
 steep street, or a savage beast to escape is committing a breach of
 duty towards every person who comes within the reach of foreseeable
 C danger, whether by impact or shock.’

“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
 D negligence in fact cause injury by shock, then he should be liable
 for it unless he is exempted on the ground of remoteness.”

The position must be the same if, instead of causing a traffic
 accident, what is being considered is causing a fire at someone’s home.
 Later in the same judgment Denning L.J. went on to say, at p. 441,
 whether the issue was one of duty of care or remoteness of damage
 E since in *Bourhill v. Young* [1943] A.C. 92 the test of liability for shock is
 foreseeability of injury by shock. This dicta was expressly endorsed by
 Viscount Simonds when giving the judgment of the House of Lords in
Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd.
(The Wagon Mound) [1961] A.C. 388, 426.

However, notwithstanding the fact that the test both in the case of
 F breach of duty and remoteness is foreseeability, it is helpful to identify
 the true nature of the problem in considering the two reasons relied
 upon by the defendants for saying that it is possible on this preliminary
 issue to decide that the plaintiff cannot succeed in her action. Those
 reasons being (1) that the defendants could not reasonably foresee that
 as a result of their being responsible for starting the fire, the plaintiff
 G would suffer psychiatric injury, and, (2) that in any event as a matter of
 policy the law does not allow damages for psychiatric injury to be
 recovered in the absence of personal injury either to the plaintiff or a
 member of her family.

In *Jaensch v. Coffey*, 58 A.L.J.R. 426 Brennan J. in a judgment in
 which he helpfully analysed virtually all the authorities on recovering
 damages for “nervous shock,” with regard to the test of foreseeability
 H referred to the present rule in negligence as being that stated by Lord
 Reid in *C. Czarnikow Ltd. v. Koufos* [1969] 1 A.C. 350. In that case
 Lord Reid was considering foreseeability in the context of remoteness of
 damage. He said, at p. 385:

“The 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.” A

In the same case a similar approach was adopted by Lord Upjohn, who said, at p. 422:

“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.” B

In deciding the preliminary issue in favour of the defendants Sir Douglas Frank, before whom the issue was argued, as it was before this court, on the basis that it raised a question of duty of care, said: C

“It is widely recognised that the burning of one’s home can be a frightening experience and give rise to a sense of grief and sorrow at the loss of all that is embodied in the word ‘home’ and of one’s possessions. It can result in great inconvenience and sometimes hardship. Nevertheless the loss of possessions from various causes happens to a large proportion of the population. A burglary can not only result in the loss of valued and irreplaceable possessions but to some people it is a traumatic and frightening experience. Nevertheless, in my judgment the ordinary householder endures such incidents and the shock of them without suffering mental illness. I think that the same applies to nervous shock caused by a fire, albeit in one’s own house, unless the fire caused injury which in turn triggered off the nervous shock. That is where I would draw the line. In my judgment, therefore, it was not reasonably foreseeable that the plaintiff would suffer mental illness as a result of the defendants’ negligence and this action fails.” D E

Especially if the question of foreseeability is approached in the manner indicated by Lord Reid, as I consider it should be, the judge was not entitled to come to this conclusion. I can conceive of circumstances where it would be readily foreseeable that intense distress would be caused to an “ordinary householder” who saw her home being destroyed by fire particularly if the process was as protracted as it appears to have been on the basis of the facts set out in the statement of claim which for the purpose of the determination of the issue have to be assumed to be true. Such distress could well be of the order of the “acute emotional trauma” which “like a physical trauma can well cause a psychiatric illness in a wide range of circumstances and in a wide range of individuals” as indicated by Lord Bridge in *McLoughlin v. O’Brian* [1983] 1 A.C. 410, 433D. F G

It appears from the passage which I have quoted that the judge came to his decision in favour of the defendants not only on the basis of foreseeability but also as a matter of policy in accordance with the second ground relied upon by the defendants. With regard to this part of Sir Douglas Frank’s judgment, differing views were taken by the members of the House of Lords in *McLoughlin v. O’Brian* [1983] 1 H

A A.C. 410 and by the members of the High Court of Australia in *Jaensch v. Coffey*, 58 A.L.J.R. 426 as to whether, if the injury was foreseeable, liability could be excluded as a matter of policy. Fortunately, for the purposes of this appeal I do not consider that it is necessary to resolve this divergence of opinion. Even assuming that the test is not confined to being one of foreseeability, I cannot conceive that, if the injury which the plaintiff alleges that she suffered was a foreseeable consequence of the defendants' negligence, there could be any overriding policy reason for preventing her recovering damages. As I have already pointed out, she 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.

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C In agreement therefore with the judgments of Dillon and Bingham L.JJ., which I have had the advantage of seeing in draft, I would allow this appeal. I would also not determine finally the preliminary issue in favour of the plaintiff on the facts before this court. Like Dillon and Bingham L.JJ., I consider that it is preferable that an issue of this sort should only be determined after the court has had an opportunity of exploring all the relevant facts as to liability. The statement of claim which contains the only facts before this court only indicates in outline the circumstances in which the plaintiff sustained her injuries. While the facts which are before this court do not disclose a situation where as a matter of law the plaintiff cannot succeed, whether she is entitled to succeed should only be finally determined after a trial.

D
E BINGHAM L.J. The plaintiff's claim pleaded in this action is a simple one. She alleges that the defendants were installing central heating in her house and that a fire occurred as a result of the defendants' negligent work. This the defendants admit. The plaintiff further pleads that she returned home to see smoke coming from the loft of the house and then witnessed the burning of the house for over four hours until the fire was brought under control. This experience, she alleges, caused her "nervous shock in the form of a serious psychological reaction evidenced by an anxiety state and depression."

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G Her claim is accordingly one for what have in the authorities and the literature been called damages for nervous shock. Judges have in recent years become increasingly restive at the use of this misleading and inaccurate expression, and I shall use the general expression "psychiatric damage," intending to comprehend within it all relevant forms of mental illness, neurosis and personality change. But the train of events (all of which must be causally related) with which this action, like its predecessors, is concerned remains unchanged: careless conduct on the part of the defendant causing actual or apprehended injury to the plaintiff or a person other than the defendant; the suffering of acute mental or emotional trauma by the plaintiff on witnessing or apprehending that injury or witnessing its aftermath; psychiatric damage suffered by the plaintiff.

H There is, however, one respect in which this case differs from all the decided cases; or almost all: *Owens v. Liverpool Corporation* [1939] 1

K.B. 394 would appear to be an exception. Although the plaintiff suffered injury in that her home and presumably her possessions were burned and damaged, it is not said that she was at any time in fear for her own personal safety or that of anyone else, nor is it said that physical injury (as opposed to the psychiatric damage of which she complains) was suffered by anyone. It was no doubt this singular feature of the case which led the parties to agree to the trial of a preliminary issue:

“Can the plaintiff recover damages for nervous shock caused by witnessing her home and possessions damaged and/or destroyed by a fire caused by the defendants’ negligence while installing central heating in the plaintiff’s home?”

The parties are not to be criticised for adopting a procedure which they conscientiously believed would save costs and time. But it would, I think, have been better if the action had proceeded to trial, at any rate on liability, perhaps leaving the assessing of damages, if any, to a later date. For I think that there are, within the issue set down for trial, two distinct questions. One is a question of far-reaching legal principle: is a claim for damages for psychiatric damage suffered by one who has witnessed the destruction of her property, in the absence of any actual or apprehended physical injury, one that must necessarily fail as a matter of law? In the light of such illustrious precedents as *Donoghue v. Stevenson* [1932] A.C. 562 and *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004, questions such as this cannot be regarded as unsuitable for determination on, in effect, demurrer. But there is in this case a special feature to which I shall return, namely, a pre-existing relationship between the defendants as contractors and the plaintiff as occupant of a house in which they were working. I would be happier deciding even this legal question against a background of full and proven, rather than outline and assumed, facts. The second question is much more limited. It is whether on the facts pleaded it was reasonably foreseeable by the defendants that careless performance of their work might cause psychiatric damage to the plaintiff. This is a question of fact which, for reasons I shall give, cannot in my view be fairly decided at this stage.

The question of principle

As Lord Russell of Killowen pointed out in *Bourhill v. Young* [1943] A.C. 92, 101, what the defendant ought to have contemplated as a reasonable man is relevant both to testing the existence of a duty as the foundation of alleged negligence and to the question of remoteness of damage. The leading cases on psychiatric damage have very largely concentrated on examining what was reasonably foreseeable by the defendant in order to determine whether the careless defendant owed a duty of care to the particular plaintiff at all. This is understandable and perhaps inevitable. A defendant, however careless, cannot owe a duty of care towards the whole world. It is accordingly necessary to apply the tests of proximity and foreseeability derived from Lord Atkin’s classic statement in *Donoghue v. Stevenson* [1932] A.C. 562 in order to define the class to whom the defendant owes a duty and decide whether the

A plaintiff falls within it. This is a particularly necessary exercise in the psychiatric damage cases, where the defendant will ordinarily have no awareness of the plaintiff as an individual before the act of carelessness occurs. Unless, therefore, it can be shown that the plaintiff is a person who 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 mind to the acts or omissions which are called in question, the plaintiff cannot surmount the first hurdle which confronts any plaintiff in negligence, that of establishing a duty of care.

B In this case the problem is somewhat different. Since the defendants were working in the house where the plaintiff lived, it must have been obvious to them that she would be so closely and directly affected by their performance of their work that they ought reasonably to have her in contemplation as being so affected when they carried out the work. It is not, I think, contested that the defendants owed her a duty to take reasonable care to carry out the work so as to avoid damaging her home and property. But it is said that the defendants owed her no duty to take reasonable care to carry out the work so as to avoid causing her psychiatric damage. This analytical approach cannot, I think, be said to be wrong, but it seems to me to be preferable, where a duty of care undeniably exists, to treat the question as one of remoteness and ask 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. The test of reasonable foreseeability is, as I understand, the same in both contexts, and the result should be the same on either approach. So the question in any case such as this, applying the ordinary test of remoteness in tort, is whether the defendant should reasonably have contemplated psychiatric damage to the plaintiff as a real, even if unlikely, result of careless conduct on his part.

E *McLoughlin v. O'Brian* [1983] 1 A.C. 410 is the most recent House of Lords authority on psychiatric damage and the ratio of that decision is of course binding upon us. All members of the House were agreed that for the plaintiff in that case to succeed it was necessary for her to show that the psychiatric damage which she in fact suffered was a reasonably foreseeable result of the defendant's careless driving. A minority of the House (Lord Scarman and Lord Bridge of Harwich) held that, if causation was established, that was all that the plaintiff need show and that it was not for the courts on policy grounds to limit a right to recover for reasonably foreseeable psychiatric damage caused by the defendant. Lord Wilberforce and Lord Edmund-Davies, although agreeing in the result, rejected the contention that reasonable foreseeability was the sole test of liability for the consequence of wrongdoing. It was, they held, proper for the courts to limit on grounds of policy the class of those, within the larger class of those to whom psychiatric damage was reasonably foreseeable, to whom a duty of care should be held to be owed. Lord Russell of Killowen accepted policy as something which might in an appropriate case feature in a judicial decision, but saw no policy requirement to restrict the plaintiff's right to recover on the facts of that case. The majority ratio of this decision is, therefore, if I have correctly understood their Lordships' speeches, that

reasonable foreseeability of psychiatric damage to the plaintiff is a necessary condition of a successful claim, but that even where reasonable foreseeability of such damage is shown a right to recover may be denied on grounds of policy. A

Whether the psychiatric damage suffered by this plaintiff as a result of the carelessness of the defendants was reasonably foreseeable is not something which can be decided as a question of law. In considering the present question of principle reasonable foreseeability must for the present be assumed in the plaintiff's favour. So the question is whether, assuming everything else in the plaintiff's favour, this court should hold this claim to be bad in law because the mental or emotional trauma which precipitated the plaintiff's psychiatric damage was caused by her witnessing the destruction of her home and property rather than apprehending or witnessing personal injury or the consequences of personal injury. B
C

It is submitted, I think rightly, that this claim breaks new ground. No analogous claim has ever, to my knowledge, been upheld or even advanced. If, therefore, it were proper to erect a doctrinal boundary stone at the point which the onward march of recorded decisions has so far reached, we should answer the question of principle in the negative and dismiss the plaintiff's action, as the deputy judge did. But I should for my part erect the boundary stone with a strong presentiment that it would not be long before a case would arise so compelling on its facts as to cause the stone to be moved to a new and more distant resting place. The suggested boundary line is not, moreover, one that commends itself to me as either fair or convenient. Examples which arose in argument illustrate the point. Suppose, for example, that a scholar's life's work of research or composition were destroyed before his eyes as a result of a defendant's careless conduct, causing the scholar to suffer reasonably foreseeable psychiatric damage. Or suppose that a householder returned home to find that his most cherished possessions had been destroyed through the carelessness of an intruder in starting a fire or leaving a tap running, causing reasonably foreseeable psychiatric damage to the owner. I do not think a legal principle which forbade recovery in these circumstances could be supported. The only policy argument relied on as justifying or requiring such a restriction was the need to prevent a proliferation of claims, the familiar floodgates argument. This is not an argument to be automatically discounted. But nor is it, I think, an argument which can claim a very impressive record of success. All depends on one's judgment of the likely result of a particular extension of the law. I do not myself think that refusal by this court to lay down the legal principle for which the defendants contend, or (put positively) our acceptance that a claim such as the plaintiff's may in principle succeed, will lead to a flood of claims or actions, let alone a flood of successful claims or actions. Insistence that psychiatric damage must be reasonably foreseeable, coupled with clear recognition that a plaintiff must prove psychiatric damage as I have defined it, and not merely grief, sorrow or emotional distress, will in my view enable the good sense of the judge to ensure, adopting Lord Wright's language in *Bourhill v. Young* [1943] A.C. 92, 110, that the thing stops at the D
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A appropriate point. His good sense provides a better, because more flexible, mechanism of control than a necessarily arbitrary rule of law.

I would therefore answer this broad question of principle in favour of the plaintiff.

The question of fact

B We were asked to determine, assuming the truth of the facts pleaded, whether psychiatric damage to the plaintiff was reasonably foreseeable by the defendants. This might fairly have been done in *McLoughlin v. O'Brian* [1983] 1 A.C. 410, where the plaintiff was the mother, or in *Jaensch v. Coffey*, 58 A.L.J.R. 426, where the plaintiff was the wife, of the alleged tortfeasor's immediate victim, although in each of those cases there was a full trial. But one must be very cautious in determining questions of fact on assumed facts, and the risk of doing so unfairly to one side or the other is increased where, as here, the parties were by no means strangers to each other before the careless act occurred. In deciding what the defendants should reasonably have foreseen I would wish to have a much fuller picture than pleadings can give of the plaintiff's personality and circumstances as manifested to and known by the defendants. I therefore decline to answer this question because I do not think it is fairly answerable on existing materials at this stage.

D I am accordingly of opinion that this appeal should be allowed. The case should be remitted to a judge for trial of all live issues related to reasonable foreseeability, causation and damage on the footing that, if the plaintiff succeeds on all these issues, her claim may in principle be upheld. Whether the parties wish to defer the assessment of damages (if any) is a question for them.

Appeal allowed.

Leave to appeal refused.

F 28 January 1988. The Appeal Committee of the House of Lords (Lord Bridge of Harwich, Lord Griffiths and Lord Ackner) dismissed a petition by the defendants for leave to appeal.

Solicitors: Fremont & Co.; Solicitor, British Gas Plc. (North Thames Region).

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