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[HOUSE OF LORDS]

McLOUGHLIN . . . . . APPELLANT

AND

O'BRIAN AND OTHERS . . . . . RESPONDENTS

B

1982 Feb. 15, 16, 17; May 6

Lord Wilberforce, Lord Edmund-Davies, Lord Russell of Killowen, Lord Scarman and Lord Bridge of Harwich

Negligence—Duty of care to whom?—Shock—Plaintiff's husband and children injured in road accident caused by defendants' negligence—Plaintiff subsequently told of accident and taken to see family in hospital—Whether nervous shock reasonably foreseeable—Whether duty of care owed to persons not present at scene of accident—Policy considerations

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The plaintiff's husband and three children were involved in a road accident at about 4 p.m. on October 19, 1973, when their car was in collision with a lorry driven by the first defendant and owned by the second defendants that had itself just collided with an articulated lorry driven by the third defendant and owned by the fourth defendants. The plaintiff, who was at home two miles away at the time, was told of the accident at about 6 p.m. by a neighbour, who took her to hospital to see her family. There she learned that her youngest daughter had been killed and saw her husband and the other children and witnessed the nature and extent of their injuries. She alleged that the impact of what she heard and saw caused her severe shock resulting in psychiatric illness. In 1976, she began an action against the defendants for damages for personal injuries pleaded as shock and injury to health resulting in depression and change of personality affecting her abilities as a wife and mother. The defendants admitted liability for the death of her daughter and the injuries suffered by her family but denied that the shock and injury to her was due to their negligence. At the trial, Boreham J. assumed, for the purpose of enabling him to decide the issue of legal liability, that the plaintiff had suffered the condition of which she complained, that that condition had been caused or contributed to by shock, as distinct from grief or sorrow, and that the plaintiff was a person of reasonable fortitude. He gave judgment for the defendants, holding that they had owed no duty of care to the plaintiff because the possibility of her suffering injury by nervous shock, in the circumstances, had not been reasonably foreseeable. The Court of Appeal dismissed an appeal by the plaintiff, holding that, although it was reasonably foreseeable that injury by shock would be caused to a wife and mother in the position of the plaintiff, it was settled law that the duty of care that was owed by the driver of a vehicle was limited to persons or owners of property at or near the scene of an accident and directly affected by his negligence, that considerations of policy limited the duty of care in that way and did not require it to be extended and that, accordingly, since the plaintiff had been two miles from the accident and had not learned of it or seen its consequences until two hours later, she was not entitled to recover damages for nervous shock.

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On appeal by the plaintiff: —

Held, allowing the appeal, that the nervous shock assumed to have been suffered by the plaintiff had been the reasonably foreseeable result of the injuries to her family caused by the defendants' negligence; that policy considerations should not inhibit a decision in her favour; and that, accordingly, she was entitled to recover damages (post, pp. 418G, 419D, 422D–H, 424F–G, 428G–H, 429B–F, F–G, 433D–F, 439E–F, 443A–D).

Victorian Railways Commissioners v. *Coultas* (1888) 13 App.Cas. 222, P.C.; *Dulieu* v. *White & Sons* [1901] 2 K.B. 669, D.C.; *Hambrook* v. *Stokes Brothers* [1925] 1 K.B. 141, C.A.; *Bourhill* v. *Young* [1943] A.C. 92, H.L.(Sc.); *Chadwick* v. *British Railways Board* [1967] 1 W.L.R. 912; *Marshall* v. *Lionel Enterprises Inc.* [1972] 2 O.R. 177 and *Benson* v. *Lee* [1972] V.R. 879 considered.

Per Lord Scarman. The policy issue here is not justiciable. There is a powerful case for legislation (post, p. 431C).

Decision of the Court of Appeal [1981] Q.B. 599; [1981] 2 W.L.R. 1014; [1981] 1 All E.R. 809 reversed.

The following cases are referred to in their Lordships' opinions:

Abramzik v. *Brenner* (1967) 65 D.L.R. (2d) 651.

Anns v. *Merton London Borough Council* [1978] A.C. 728; [1977] 2 W.L.R. 1024; [1977] 2 All E.R. 492, H.L.(E.).

Bell v. *Great Northern Railway Co. of Ireland* (1890) 26 L.R.Ir. 428.

Benson v. *Lee* [1972] V.R. 879.

Boardman v. *Sanderson* [1964] 1 W.L.R. 1317, C.A.

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

Chadwick v. *British Railways Board* [1967] 1 W.L.R. 912; [1967] 2 All E.R. 945.

Chester v. *Waverley Corporation* (1939) 62 C.L.R. 1.

Dillon v. *Legg* (1968) 29 A.L.R. 3d 1316.

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.).

Dulieu v. *White & Sons* [1901] 2 K.B. 669, D.C.

Fender v. *St. John-Mildmay* [1938] A.C. 1, H.L.(E.).

Hambrook v. *Stokes Brothers* [1925] 1 K.B. 141, C.A.

Haynes v. *Harwood* [1935] 1 K.B. 146, C.A.

Hedley Byrne & Co. Ltd. v. *Heller & Partners Ltd.* [1964] A.C. 465; [1963] 3 W.L.R. 101; [1963] 2 All E.R. 575, H.L.(E.).

Herrington v. *British Railways Board* [1972] A.C. 877; [1972] 2 W.L.R. 537; [1972] 1 All E.R. 749, H.L.(E.).

Hinz v. *Berry* [1970] 2 Q.B. 40; [1970] 2 W.L.R. 684; [1970] 1 All E.R. 1074, C.A.

Jansen v. *Driefontein Consolidated Mines Ltd.* [1902] A.C. 484, H.L.(E.).

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

Lambert v. *Lewis* [1982] A.C. 225; [1980] 2 W.L.R. 299; [1980] 1 All E.R. 978, C.A.

Launchbury v. *Morgans* [1973] A.C. 127; [1972] 2 W.L.R. 1217; [1972] 2 All E.R. 606, H.L.(E.).

McKew v. *Holland & Hannen & Cubitts (Scotland) Ltd.* [1969] 3 All E.R. 1621, H.L.(Sc.).

Marshall v. *Lionel Enterprises Inc.* [1972] 2 O.R. 177; 25 D.L.R. (3d) 141.

Nova Mink Ltd. v. *Trans-Canada Airlines* [1951] 2 D.L.R. 241.
Overseas Tankship (U.K.) Ltd. v. *Morts Dock and Engineering Co. Ltd. (The Wagon Mound)* [1961] A.C. 388; [1961] 2 W.L.R. 126; [1961] 1 All E.R. 404, P.C.
Practice Statement (Judicial Precedent) [1966] 1 W.L.R. 1234; [1966] 3 All E.R. 77, H.L.(E.).
Rondel v. *Worsley* [1969] 1 A.C. 191; [1967] 3 W.L.R. 1666; [1967] 3 All E.R. 993, H.L.(E.).
Victorian Railways Commissioners v. *Coultas* (1888) 13 App.Cas. 222, P.C.
Wagner v. *International Railway Co.* (1921) 232 N.Y. 176.

The following additional cases were cited in argument:

Best v. *Samuel Fox & Co. Ltd.* [1952] A.C. 716; [1952] 2 All E.R. 394, H.L.(E.).
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.).
Dooley v. *Cammell Laird & Co. Ltd.* [1951] 1 Lloyd's Rep. 271.
Hughes v. *Lord Advocate* [1963] A.C. 837; [1963] 2 W.L.R. 779; [1963] 1 All E.R. 705, H.L.(Sc.).
Overseas Tankship (U.K.) Ltd. v. *Miller Steamship Co. Pty.* [1967] 1 A.C. 617; [1966] 3 W.L.R. 498; [1966] 2 All E.R. 709, P.C.
Robertson v. *Turnbull*, 1982 S.L.T. 96, H.L.(Sc.).
Schneider v. *Eisovitch* [1960] 2 Q.B. 430; [1960] 2 W.L.R. 169; [1960] 1 All E.R. 169.

APPEAL from the Court of Appeal.

This was an appeal by the plaintiff, Mrs. Rosina McLoughlin, by leave of the Court of Appeal (Stephenson, Cumming-Bruce and Griffiths L.JJ.) from their decision on December 16, 1980, dismissing, on different grounds, the plaintiff's appeal from a judgment of Boreham J. given on December 11, 1978. By his judgment, Boreham J. dismissed the plaintiff's claim against the defendants, Thomas Alan O'Brian, A. E. Docker & Sons Ltd., Raymond Sygrove and Ernest Doe & Sons Ltd., for damages for personal injuries, suffering, shock and consequent loss and damage arising out of a motor accident on October 19, 1973, caused by the negligent driving of the first and third defendants.

The facts are set out in the opinion of Lord Wilberforce.

Michael Ogden Q.C. and *Jonathan Haworth* for the plaintiff. The agreed test for liability for shock is the foreseeability of shock: see *Overseas Tankship (U.K.) Ltd.* v. *Morts Dock and Engineering Co. Ltd. (The Wagon Mound)* [1961] A.C. 388, 426. Could a reasonable hypothetical observer, or would a reasonable judge, have foreseen the possibility of shock? If the foreseeability issue is decided in favour of the plaintiff's favour, then she establishes a prima facie duty of care and will fail on considerations of public policy only if those considerations are of a compelling nature. It is unnecessary to consider whether the majority of the Court of Appeal in *Hambrook* v. *Stokes Brothers* [1925] 1 K.B. 141 were right in 1925, for two reasons: (i) so far as foreseeability is concerned, a reasonable observer knows far more today than he used to

about injury caused by shock; what might not have been foreseen then may be foreseeable today; (ii) as to public policy, the plaintiff invites the House to adopt the approach in *Rondel* v. *Worsley* [1969] 1 A.C. 191 and consider what the position ought to be today. The question (under *The Wagon Mound* [1961] A.C. 388) is not whether shock was a likely eventuality but whether it was a possible one. A psychiatrist might say: "of course that would be likely to result," whereas an ordinary man might not be able to say that, but one just has to take the view of the man on the Clapham omnibus. *C. Czarnikow Ltd.* v. *Koufos* [1969] 1 A.C. 350 shows that one does not have to say that shock is probable; a possibility is quite sufficient, provided that it is not far-fetched. *Czarnikow* and *The Wagon Mound* [1961] A.C. 388 are the only two cases on foreseeability as such. [Reference was made to *Dulieu* v. *White & Sons* [1901] 2 K.B. 669; *Chester* v. *Waverley Corporation* (1939) 62 C.L.R. 1; *Bourhill* v. *Young* [1943] A.C. 92; *Best* v. *Samuel Fox & Co. Ltd.* [1952] A.C. 716 and *King* v. *Phillips* [1953] 1 Q.B. 429.] The judges in these cases seem to be groping for the right test. There really seem to be two questions in all of them: was it reasonably foreseeable? If yes, is the plaintiff to fail for policy reasons? [Reference was made to *The Wagon Mound* [1961] A.C. 388, 426, and *Boardman* v. *Sanderson* [1964] 1 W.L.R. 1317.] On what principle does *Chadwick* v. *British Railways Board* [1967] 1 W.L.R. 912 fit into the scheme of things? The law has been feeling its way towards its position. Then one gets to *The Wagon Mound*: foreseeability of shock is the test. One can say that the cases before that are wrong, or that modern courts take a different view. After that, it may be that the test of foreseeability remains the same but lawyers' knowledge of psychiatric medicine develops. [Reference was made to *Abramzik* v. *Brenner* (1967) 65 D.L.R. (2) 651; *Dillon* v. *Legg* (1968) 29 A.L.R. 3d 1316; *Marshall* v. *Lionel Enterprises Inc.* [1972] 2 O.R. 177 and *Benson* v. *Lee* [1972] V.R. 879.]

As to the "policy" cases (the plaintiff is happy to call it "policy" rather than "public policy"), see *Rondel* v. *Worsley* [1969] 1 A.C. 191, *per* Lord Reid and *Dorset Yacht Co. Ltd.* v. *Home Office* [1970] A.C. 1004. *Anns* v. *Merton London Borough Council* [1978] A.C. 728 shows that, if there is a prima facie right to damages, they ought to follow unless there is some good reason to the contrary. *Hinz* v. *Berry* [1970] 2 Q.B. 40 reinforces how rare these cases are.

The Court of Appeal has held that this shock was within the reasonable contemplation of the defendants. It is for the defendants to show that there is some good policy reason for denying the plaintiff damages. It is a material consideration that such a case is very rare indeed: see Report of the Royal Commission on Civil Liability and Compensation for Personal Injury (1978), vol. I (Cmnd. 7054), para. 958 for statistics regarding motor accidents. There will be no opening of floodgates.

The plaintiff is inviting the House not to make new law but to keep up with advances in psychiatric medicine and the ordinary citizen's advances in knowledge.

Michael Turner Q.C. and *John Leighton Williams* for the defendants.

The defendants commend the judgment of Griffiths L.J. to the House with a qualification as to foreseeability. Running through all the cases is a difficulty in confining the bounds of foreseeability in the real and practical world and as a philosopher might see it in the sense that, once the event has happened, it is easy to envisage the chain of circumstances that brought it about. This does not mean that the test of foreseeability is necessarily satisfied if the question is asked at or about the moment when the tort is committed. One authority does say that one has to look at it ex post facto, but the difficulty is that by hindsight it is possible to work back and say that damage can readily be foreseen.

The defendants seek to derive the following propositions from the cases. A duty of care has been found to exist where the conduct and relationship have been as follows. (1) The tortfeasor had acted carelessly towards a party, thereby causing him direct physical harm. This is the starting point. (2) The first departure from that is where, although no direct contact was made between the tortfeasor and the injured party, the plaintiff was nevertheless put in reasonable fear for his own safety: *Dulieu* v. *White & Sons* [1901] 2 K.B. 669. (3) Although no direct contact was made between the tortfeasor and the person claiming, and that person was not himself put in fear for his own safety, he was put in fear for the safety of others. That enabled him to recover (the action taking place in his sight or close to him): *Hambrook* v. *Stokes Brothers* [1925] 1 K.B. 141; *Boardman* v. *Sanderson* [1964] 1 W.L.R. 1317 and *Dooley* v. *Cammell Laird & Co. Ltd.* [1951] 1 Lloyd's Rep. 271. The latter case was a logical extension of the *Hambrook* v. *Stokes Brothers* situation. It took it one stage further: where those who might have been injured were not relatives but people the plaintiff knew.

Out of the above propositions springs (4). The common features of these three areas are (i) fear of impending danger; (ii) perception of the immediate consequences while the accident is unfolding.

(5) Although the plaintiff may not have been present at the accident, he was drawn to it as a rescuer and was thus present in its immediate aftermath endeavouring to save those who were injured from the wreckage. It is inherent in the rescue cases that the rescuer is not in the first instance a person to whom the tortfeasor owed a duty at the time of the commission of the tort, in the sense that he could not see that the rescuer would be the person who came within the ambit of his tort. The ratio of the rescuer's right to recovery is that the tortfeasor has to foresee that anyone who is injured or put at risk by his tort may be drawn to the place where the damage occurs (*Chadwick* v. *British Railways Board* [1967] 1 W.L.R. 912) or was threatened (*Haynes* v. *Harwood* [1935] 1 K.B. 146).

(6) Where recovery has been denied is where the claimant has been out of the danger area and has only become aware of the accident after it has happened: *Bourhill* v. *Young* [1943] A.C. 92 and (with a query) *King* v. *Phillips* [1953] 1 Q.B. 429. The query is as to whether that case was rightly decided; it is very difficult to understand why the court in *fact* found for the defendant.

It is plain from all the speeches in *Bourhill* v. *Young* that the House

A was concerned with ambit or range or the physical proximity of the plaintiff to the area of the accident. The question now before the House is whether there is a duty to a person who is removed both in space and in time from the commission of the tort not to cause him damage by nervous shock. Nervous shock does present unusual difficulties in determining where the limits of liability should be set. In the "usual" type of case where a person claims damages for personal injury, there is B direct physical contact between the plaintiff and whatever object causes the damage. The consequence to the present plaintiff was not reasonably foreseeable (this is a question of fact, not law: inference from other facts). The question as regards foreseeability is whether anyone would have described it as a *real* risk: not any risk that may be foreseen but one that can be foreseen as a *real* risk, a real possibility (see *Overseas* C *Tankship (U.K.) Ltd.* v. *Miller Steamship Co. Pty.* [1967] 1 A.C. 617). [Reference was made to *Dorset Yacht Co. Ltd.* v. *Home Office* [1970] A.C. 1004.] The common theme running through all the speeches in *Bourhill* v. *Young* is that the duty is restricted in time and space to those at or near the road. Boreham J. and the members of the Court of Appeal all came to the conclusion that, ultimately, good sense dictated that the plaintiff's claim could not succeed. Stephenson L.J. perhaps D found the greatest difficulty in rationalising the reason.

A number of difficulties arise: (i) what perception is required in order to satisfy the test whether the defendants owed the plaintiff this duty? By perception one is not merely concerned with seeing and hearing, but also with the means by which the shock is communicated (as by television). The cases show that the concept of physical proximity has E always been required: see *Hambrook* v. *Stokes Brothers* [1925] 1 K.B. 141, 160. The distinction between the rescue cases and the present is that when one goes to the hospital most of the danger and uncertainty have passed. It would appear that the law of Scotland has set its face against extension where extension might have been justified by applying the test of reasonable foreseeability: *Robertson* v. *Turnbull*, 1982 S.L.T. 96. Similar considerations apply in the instant case.

F To summarise the defendants' submissions, 1. It was not reasonably foreseeable, as a real possibility, that a plaintiff in the position of this mother would have suffered personal injury by shock, as distinct from feelings of grief or concern. 2. If it were held that such injury was foreseeable, the questions still remain, first, whether the defendants were under any duty to her and, secondly, whether they were not under any duty to her because, if G they were under any such duty, that would be extending the class of persons to whom such a duty is owed and the circumstances in which their injury is caused beyond what the present authorities have permitted. 3. (the policy point). In allowing this appeal, the House would be going further than the existing authorities allow, the effect of which would be substantially to widen the classes of person entitled to sue. The policy argument against that is that, save in the instant case, there appears to have been no need for such H extension of the duty. Further difficulties arise: what perception or communication of the event will suffice, and will it matter whether a disaster is learned about contemporaneously or days or weeks later, or that the plaintiff may be miles from the scene, or on the other side of the world?

Who, in enlarged circumstances, will be entitled to sue? Only close relatives? Where does one draw the line? Will a common law marriage do? If an unrestricted meaning is to be applied to "foreseeability," is there not a real danger that one will get back into a *Polemis* [*In re Polemis and Furness, Withy & Co. Ltd.* [1921] 3 K.B. 560] type of situation, in the sense that, once the event has happened, retrospectively one may say that it was foreseeable? Or does one introduce "real," or "likely," or "very probable"?

Ogden Q.C. in reply. If the House is going to impose a policy limitation, the question of moral duty is not irrelevant: a mother (like a rescuer) may have a moral duty to come to the scene. One should not restrict this simply to a sight or sound test, nor just to people who actually go to the scene. The "aftermath" should not be drawn too narrowly. The plaintiff was in the aftermath here.

As to psychiatric evidence, the test is what the *ordinary man* would have foreseen. The fact that a psychiatrist would say that on this particular occasion the ordinary man should *not* have foreseen it does not matter. As to negligence, if the ordinary man will foresee that damage will result, it does not matter that it is of an unusual nature (*Hughes* v. *Lord Advocate* [1963] A.C. 837), and the precise mechanism of its occurrence does not matter.

As to policy, the House should apply the test of Lord Reid in *Rondel* v. *Worsley* [1969] 1 A.C. 191: any limitation on the grounds of public policy must be clearly justifiable: see also *Anns* v. *Merton London Borough Council* [1978] A.C. 728 and *Dorset Yacht Co. Ltd.* v. *Home Office* [1970] A.C. 1004. As to the "crushing burden" that this would place on tortfeasors, this is not the type of case where one person is landed with immense claims. There is insurance. There are not likely to be very large damages: cf. *Hinz* v. *Berry* [1970] 2 Q.B. 40. The extension of passenger insurance has not had a dramatic effect on premiums. The House should only legislate when a very clear case is made out. It is for the defendants to establish that there is a proper policy escape route: that the existing law will otherwise lead to a real mischief. This is very small beer in relation to other burdens on insurers. (The plaintiff does not confine her submissions to road accidents.)

Their Lordships took time for consideration.

May 6. LORD WILBERFORCE. My Lords, this appeal arises from a very serious and tragic road accident which occurred on October 19, 1973, near Withersfield, Suffolk. The appellant's husband, Thomas McLoughlin, and three of her children, George, aged 17, Kathleen, aged 7, and Gillian, nearly 3, were in a Ford motor car: George was driving. A fourth child, Michael, then aged 11, was a passenger in a following motor car driven by Mr. Pilgrim: this car did not become involved in the accident. The Ford car was in collision with a lorry driven by the first respondent and owned by the second respondent. That lorry had been in collision with another lorry driven by the third respondent and owned by the fourth respondent. It is admitted that the accident to the Ford car was caused by the respondents' negligence. It is necessary to state what followed in full detail.

A As a result of the accident, the appellant's husband suffered bruising and shock; George suffered injuries to his head and face, cerebral concussion, fractures of both scapullae and bruising and abrasions; Kathleen suffered concussion, fracture of the right clavicle, bruising, abrasions and shock; Gillian was so seriously injured that she died almost immediately.

At the time, the appellant was at her home about two miles away; an hour or so afterwards the accident was reported to her by Mr. Pilgrim, B who told her that he thought George was dying, and that he did not know the whereabouts of her husband or the condition of her daughter. He then drove her to Addenbrooke's Hospital, Cambridge. There she saw Michael, who told her that Gillian was dead. She was taken down a corridor and through a window she saw Kathleen, crying, with her face cut and begrimed with dirt and oil. She could hear George shouting and screaming. She C was taken to her husband who was sitting with his head in his hands. His shirt was hanging off him and he was covered in mud and oil. He saw the appellant and started sobbing. The appellant was then taken to see George. The whole of his left face and left side was covered. He appeared to recognise the appellant and then lapsed into unconsciousness. Finally, the appellant was taken to Kathleen who by now had been cleaned up. The child was too upset to speak and simply clung to her mother. There D can be no doubt that these circumstances, witnessed by the appellant, were distressing in the extreme and were capable of producing an effect going well beyond that of grief and sorrow.

The appellant subsequently brought proceedings against the respondents. At the trial, the judge assumed, for the purpose of enabling him to decide the issue of legal liability, that the appellant subsequently suffered the E condition of which she complained. This was described as severe shock, organic depression and a change of personality. Numerous symptoms of a physiological character are said to have been manifested. The details were not investigated at the trial, the court being asked to assume that the appellant's condition had been caused or contributed to by shock, as distinct from grief or sorrow, and that the appellant was a person of reasonable fortitude.

F On these facts, or assumed facts, the trial judge (Boreham J.) gave judgment for the respondents holding, in a most careful judgment reviewing the authorities, that the respondents owed no duty of care to the appellant because the possibility of her suffering injury by nervous shock, in the circumstances, was not reasonably foreseeable.

On appeal by the appellant, the judgment of Boreham J. was upheld, G but not on the same ground. Stephenson L.J. took the view that the possibility of injury to the appellant by nervous shock *was* reasonably foreseeable and that the respondents owed the appellant a duty of care. However, he held that considerations of policy prevented the appellant from recovering. Griffiths L.J. held that injury by nervous shock to the appellant was " readily foreseeable " but that the respondents owed no duty of care H to the appellant. The duty was limited to those on the road nearby. Cumming-Bruce L.J. agreed with both judgments. The appellant now appeals to this House. The critical question to be decided is whether a person in the position of the appellant, i.e. one who was not present at the scene of

grievous injuries to her family but who comes upon those injuries at an interval of time and space, can recover damages for nervous shock.

Although we continue to use the hallowed expression " nervous shock," English law, and common understanding, have moved some distance since recognition was given to this symptom as a basis for liability. Whatever is unknown about the mind-body relationship (and the area of ignorance seems to expand with that of knowledge), it is now accepted by medical science that recognisable and severe physical damage to the human body and system may be caused by the impact, through the senses, of external events on the mind. There may thus be produced what is as identifiable an illness as any that may be caused by direct physical impact. It is safe to say that this, in general terms, is understood by the ordinary man or woman who is hypothesised by the courts in situations where claims for negligence are made. Although in the only case which has reached this House (*Bourhill* v. *Young* [1943] A.C. 92) a claim for damages in respect of " nervous shock " was rejected on its facts, the House gave clear recognition to the legitimacy, in principle, of claims of that character. As the result of that and other cases, assuming that they are accepted as correct, the following position has been reached:

1. While damages cannot, at common law, be awarded for grief and sorrow, a claim for damages for " nervous shock " caused by negligence can be made without the necessity of showing direct impact or fear of immediate personal injuries for oneself. The reservation made by Kennedy J. in *Dulieu* v. *White & Sons* [1901] 2 K.B. 669, though taken up by Sargant L.J. in *Hambrook* v. *Stokes Brothers* [1925] 1 K.B. 141, has not gained acceptance, and although the respondents, in the courts below, reserved their right to revive it, they did not do so in argument. I think that it is now too late to do so. The arguments on this issue were fully and admirably stated by the Supreme Court of California in *Dillon* v. *Legg* (1968) 29 A.L.R. 3d 1316.

2. A plaintiff may recover damages for " nervous shock " brought on by injury caused not to him- or herself but to a near relative, or by the fear of such injury. So far (subject to 5 below), the cases do not extend beyond the spouse or children of the plaintiff (*Hambrook* v. *Stokes Brothers* [1925] 1 K.B. 141, *Boardman* v. *Sanderson* [1964] 1 W.L.R. 1317, *Hinz* v. *Berry* [1970] 2 Q.B. 40—including foster children—(where liability was assumed) and see *King* v. *Phillips* [1953] 1 Q.B. 429).

3. Subject to the next paragraph, there is no English case in which a plaintiff has been able to recover nervous shock damages where the injury to the near relative occurred out of sight and earshot of the plaintiff. In *Hambrook* v. *Stokes Brothers* an express distinction was made between shock caused by what the mother saw with her own eyes and what she might have been told by bystanders, liability being excluded in the latter case.

4. An exception from, or I would prefer to call it an extension of, the latter case, has been made where the plaintiff does not see or hear the incident but comes upon its immediate aftermath. In *Boardman* v. *Sanderson* the father was within earshot of the accident to his child and likely to come upon the scene: he did so and suffered damage from what he then saw. In *Marshall* v. *Lionel Enterprises Inc.* [1972] 2 O.R. 177, the wife came immediately upon the badly injured body of her husband. And in

A *Benson* v. *Lee* [1972] V.R. 879, a situation existed with some similarity to the present case. The mother was in her home 100 yards away, and, on communication by a third party, ran out to the scene of the accident and there suffered shock. Your Lordships have to decide whether or not to validate these extensions.

5. A remedy on account of nervous shock has been given to a man who came upon a serious accident involving numerous people immediately
B thereafter and acted as a rescuer of those involved (*Chadwick* v. *British Railways Board* [1967] 1 W.L.R. 912). " Shock " was caused neither by fear for himself nor by fear or horror on account of a near relative. The principle of " rescuer " cases was not challenged by the respondents and ought, in my opinion, to be accepted. But we have to consider whether, and how far, it can be applied to such cases as the present.

C Throughout these developments, as can be seen, the courts have proceeded in the traditional manner of the common law from case to case, upon a basis of logical necessity. If a mother, with or without accompanying children, could recover on account of fear for herself, how can she be denied recovery on account of fear for her accompanying children? If a father could recover had he seen his child run over by a backing car, how can he be denied recovery if he is in the immediate vicinity and runs to
D the child's assistance? If a wife and mother could recover if she had witnessed a serious accident to her husband and children, does she fail because she was a short distance away and immediately rushes to the scene (cf. *Benson* v. *Lee*)? I think that unless the law is to draw an arbitrary line at the point of direct sight and sound, these arguments require acceptance of the extension mentioned above under 4 in the interests of justice.

E If one continues to follow the process of logical progression, it is hard to see why the present plaintiff also should not succeed. She was not present at the accident, but she came very soon after upon its aftermath. If, from a distance of some 100 yards (cf. *Benson* v. *Lee*), she had found her family by the roadside, she would have come within principle 4 above. Can it make any difference that she comes upon them in an ambulance, or, as here, in a nearby hospital, when, as the evidence shows, they were
F in the same condition, covered with oil and mud, and distraught with pain? If Mr. Chadwick can recover when, acting in accordance with normal and irresistible human instinct, and indeed moral compulsion, he goes to the scene of an accident, may not a mother recover if, acting under the same motives, she goes to where her family can be found?

I could agree that a line can be drawn above her case with less hardship
G than would have been apparent in *Boardman* v. *Sanderson* [1964] 1 W.L.R. 1317 and *Hinz* v. *Berry* [1970] 2 Q.B. 40, but so to draw it would not appeal to most people's sense of justice. To allow her claim may be, I think it is, upon the margin of what the process of logical progression would allow. But where the facts are strong and exceptional, and, as I think, fairly analogous, her case ought, prima facie, to be assimilated to those which have passed the test.

H To argue from one factual situation to another and to decide by analogy is a natural tendency of the human and the legal mind. But the lawyer still has to inquire whether, in so doing, he has crossed some critical line behind which he ought to stop. That is said to be the present case.

The reasoning by which the Lords Justices decided not to grant relief to the plaintiff is instructive. Both Stephenson L.J. and Griffiths L.J. accepted that the "shock" to the plaintiff was foreseeable; but from this, at least in presentation, they diverge. Stephenson L.J. considered that the defendants owed a duty of care to the plaintiff, but that for reasons of policy the law should stop short of giving her damages: it should limit relief to those on or near the highway at or near the time of the accident caused by the defendants' negligence. He was influenced by the fact that the courts of this country, and of other common law jurisdictions, had stopped at this point: it was indicated by the barrier of commercial sense and practical convenience. Griffiths L.J. took the view that although the injury to the plaintiff was foreseeable, there was no duty of care. The duty of care of drivers of motor vehicles was, according to decided cases, limited to persons and owners of property on the road or near to it who might be directly affected. The line should be drawn at this point. It was not even in the interest of those suffering from shock as a class to extend the scope of the defendants' liability: to do so would quite likely delay their recovery by immersing them in the anxiety of litigation.

I am impressed by both of these arguments, which I have only briefly summarised. Though differing in expression, in the end, in my opinion, the two presentations rest upon a common principle, namely that, at the margin, the boundaries of a man's responsibility for acts of negligence have to be fixed as a matter of policy. Whatever is the correct jurisprudential analysis, it does not make any essential difference whether one says, with Stephenson L.J., that there is a duty but, as a matter of policy, the consequences of breach of it ought to be limited at a certain point, or whether, with Griffiths L.J., one says that the fact that consequences may be foreseeable does not automatically impose a duty of care, does not do so in fact where policy indicates the contrary. This is an approach which one can see very clearly from the way in which Lord Atkin stated the neighbour principle in *Donoghue* v. *Stevenson* [1932] A.C. 562, 580: "persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected. . . ." This is saying that foreseeability must be accompanied and limited by the law's judgment as to persons who ought, according to its standards of value or justice, to have been in contemplation. Foreseeability, which involves a hypothetical person, looking with hindsight at an event which has occurred, is a formula adopted by English law, not merely for defining, but also for limiting, the persons to whom duty may be owed, and the consequences for which an actor may be held responsible. It is not merely an issue of fact to be left to be found as such. When it is said to result in a duty of care being owed to a person or a class, the statement that there is a "duty of care" denotes a conclusion into the forming of which considerations of policy have entered. That foreseeability does not of itself, and automatically, lead to a duty of care is, I think, clear. I gave some examples in *Anns* v. *Merton London Borough Council* [1978] A.C. 728, 752, *Anns* itself being one. I may add what Lord Reid said in *McKew* v. *Holland & Hannen & Cubitts (Scotland) Ltd.* [1969] 3 All E.R. 1621, 1623:

A "A defender is not liable for a consequence of a kind which is not foreseeable. But it does not follow that he is liable for every consequence which a reasonable man could foresee."

We must then consider the policy arguments. In doing so we must bear in mind that cases of "nervous shock," and the possibility of claiming damages for it, are not necessarily confined to those arising out of accidents B on public roads. To state, therefore, a rule that recoverable damages must be confined to persons on or near the highway is to state not a principle in itself, but only an example of a more general rule that recoverable damages must be confined to those within sight and sound of an event caused by negligence or, at least, to those in close, or very close, proximity to such a situation.

The policy arguments against a wider extension can be stated under C four heads.

First, it may be said that such extension may lead to a proliferation of claims, and possibly fraudulent claims, to the establishment of an industry of lawyers and psychiatrists who will formulate a claim for nervous shock damages, including what in America is called the customary miscarriage, for all, or many, road accidents and industrial accidents.

D Secondly, it may be claimed that an extension of liability would be unfair to defendants, as imposing damages out of proportion to the negligent conduct complained of. In so far as such defendants are insured, a large additional burden will be placed on insurers, and ultimately upon the class of persons insured—road users or employers.

Thirdly, to extend liability beyond the most direct and plain cases would E greatly increase evidentiary difficulties and tend to lengthen litigation.

Fourthly, it may be said—and the Court of Appeal agreed with this—that an extension of the scope of liability ought only to be made by the legislature, after careful research. This is the course which has been taken in New South Wales and the Australian Capital Territory.

The whole argument has been well summed up by Dean Prosser (*Prosser, Torts*, 4th ed. (1971), p. 256):

F "The reluctance of the courts to enter this field even where the mental injury is clearly foreseeable, and the frequent mention of the difficulties of proof, the facility of fraud, and the problem of finding a place to stop and draw the line, suggest that here it is the nature of the interest invaded and the type of damage which is the real obstacle."

G Since he wrote, the type of damage has, in this country at least, become more familiar and less deterrent to recovery. And some of the arguments are susceptible of answer. Fraudulent claims can be contained by the courts, who, also, can cope with evidentiary difficulties. The scarcity of cases which have occurred in the past, and the modest sums recovered, give some indication that fears of a flood of litigation may be exaggerated—experience in other fields suggests that such fears usually are. If some H increase does occur, that may only reveal the existence of a genuine social need: that legislation has been found necessary in Australia may indicate the same thing.

But, these discounts accepted, there remains, in my opinion, just because

" shock " in its nature is capable of affecting so wide a range of people, a real need for the law to place some limitation upon the extent of admissible claims. It is necessary to consider three elements inherent in any claim: the class of persons whose claims should be recognised; the proximity of such persons to the accident; and the means by which the shock is caused. As regards the class of persons, the possible range is between the closest of family ties—of parent and child, or husband and wife—and the ordinary bystander. Existing law recognises the claims of the first: it denies that of the second, either on the basis that such persons must be assumed to be possessed of fortitude sufficient to enable them to endure the calamities of modern life, or that defendants cannot be expected to compensate the world at large. In my opinion, these positions are justifiable, and since the present case falls within the first class, it is strictly unnecessary to say more. I think, however, that it should follow that other cases involving less close relationships must be very carefully scrutinised. I cannot say that they should never be admitted. The closer the tie (not merely in relationship, but in care) the greater the claim for consideration. The claim, in any case, has to be judged in the light of the other factors, such as proximity to the scene in time and place, and the nature of the accident.

As regards proximity to the accident, it is obvious that this must be close in both time and space. It is, after all, the fact and consequence of the defendant's negligence that must be proved to have caused the " nervous shock." Experience has shown that to insist on direct and immediate sight or hearing would be impractical and unjust and that under what may be called the " aftermath " doctrine one who, from close proximity, comes very soon upon the scene should not be excluded. In my opinion, the result in *Benson* v. *Lee* [1972] V.R. 879 was correct and indeed inescapable. It was based, soundly, upon

> " direct perception of some of the events which go to make up the accident as an entire event, and this includes . . . the immediate aftermath . . ." (p. 880.)

The High Court's majority decision in *Chester* v. *Waverley Corporation* (1939) 62 C.L.R. 1, where a child's body was found floating in a trench after a prolonged search, may perhaps be placed on the other side of a recognisable line (Evatt J. in a powerful dissent placed it on the same side), but, in addition, I find the conclusion of Lush J. to reflect developments in the law.

Finally, and by way of reinforcement of " aftermath " cases, I would accept, by analogy with " rescue " situations, that a person of whom it could be said that one could expect nothing else than that he or she would come immediately to the scene—normally a parent or a spouse—could be regarded as being within the scope of foresight and duty. Where there is not immediate presence, account must be taken of the possibility of alterations in the circumstances, for which the defendant should not be responsible.

Subject only to these qualifications, I think that a strict test of proximity by sight or hearing should be applied by the courts.

Lastly, as regards communication, there is no case in which the law

A has compensated shock brought about by communication by a third party. In *Hambrook* v. *Stokes Brothers* [1925] 1 K.B. 141, indeed, it was said that liability would not arise in such a case and this is surely right. It was so decided in *Abramzik* v. *Brenner* (1967) 65 D.L.R. (2d) 651. The shock must come through sight or hearing of the event or of its immediate aftermath. Whether some equivalent of sight or hearing, e.g. through simultaneous television, would suffice may have to be considered.

B My Lords, I believe that these indications, imperfectly sketched, and certainly to be applied with common sense to individual situations in their entirety, represent either the existing law, or the existing law with only such circumstantial extension as the common law process may legitimately make. They do not introduce a new principle. Nor do I see any reason why the law should retreat behind the lines already drawn. I find on this C appeal that the appellant's case falls within the boundaries of the law so drawn. I would allow her appeal.

LORD EDMUND-DAVIES. My Lords, I am for allowing this appeal. The facts giving rise to it have been related in detail by my noble and learned friend, Lord Wilberforce, and both he and my noble and learned friend, Lord Bridge of Harwich, have spaciously reviewed the case law relating to D the recovery of damages for personal injury resulting from nervous shock. My own observations can, in the circumstances, be substantially briefer than I had originally planned.

It is common ground in the appeal that, the appellant's claim being based on shock, " there can be no doubt since *Bourhill* v. *Young* [1943] A.C. 92 that the test of liability . . . is foreseeability of injury by shock " E (*per* Denning L.J., *King* v. *Phillips* [1953] 1 Q.B. 429, 441). But this was not always the law, and great confusion arose in the cases from applying to claims based on shock restrictions hedging negligence actions based on the infliction of *physical* injuries. In the same year as that in which *King* v. *Phillips* was decided, Professor A. L. Goodhart perceptively asked in " The Shock Cases and Area of Risk " (1953) 16 M.L.R. 14, 22 why it was considered that the area of possible physical injury should be relevant to F a case based on the unlawful infliction of shock, and continued:

> " A woman standing at the window of a second-floor room is just as likely to receive a shock when witnessing an accident as she would be if she were standing on the pavement. To say that the careless driver of a motor car could not reasonably foresee such a self-evident fact is to hide the truth behind a fiction which must disappear as soon G as we examine it. The driver obviously cannot foresee that the woman at the window will receive a physical injury, but it does not follow from this that he cannot foresee that she will receive a shock. As her cause of action is based on shock it is only foresight of shock which is relevant."

Indeed, in *King* v. *Phillips* itself Denning L.J. expressly held that the fact H that the plaintiff was in an upstairs room 80 yards away from the scene of the accident was immaterial.

It is true that, as Goodhart observed (p. 22), in most cases the foresight concerning emotional injury and that concerning physical injury are

identical, the shock following the physical injury, and the result was that, in the early development of this branch of the law, the courts tended to assume that this must be so in all cases. But in fact, as Goodhart laconically put it (p. 16, n. 10): ". . . the area of risk of physical injury may extend to only X yards, while the area of risk of emotional injury may extend to Y yards." That error still persists is indicated by the holding of Stephenson L.J. in the instant case [1981] Q.B. 599, 614 that the ambit of duty of care owed by a motorist is restricted to persons "on or near the highway at or near the time of the accident," and by Griffiths L.J. at p. 623, to those "on the road or near to it who may be directly affected by the bad driving. It is not owed to those who are nowhere near the scene." The most striking feature in the present case is that such limits on the duty of care were imposed notwithstanding the unanimous conclusion of the Court of Appeal that it was reasonably foreseeable (and even "readily" so in the judgment of Griffiths L.J.) that injury by shock could be caused to a person in the position of the appellant.

Similar restrictions were unsuccessfully sought to be imposed in *Haynes* v. *Harwood* [1935] 1 K.B. 146, the plaintiff having been inside a police station when he first saw the bolting horses and therefore out of sight and seemingly out of danger. And they were again rejected in *Chadwick* v. *British Railways Board* [1967] 1 W.L.R. 912, where the plaintiff was in his home 200 yards away when the Lewisham railway accident occurred. Griffiths L.J. expressed himself [1981] Q.B. 599, 622–623 as ". . . quite unable to include in the category of rescuers to whom a duty [of care] is owed a relative visiting victims in hospital . . ." I do not share the difficulty, and in my respectful judgment none exists. I am here content to repeat once more the noble words of Cardozo J. in *Wagner* v. *International Railway Co.* (1921) 232 N.Y. 176, 180:

> "Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognises them as normal. It places their effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperilled victim; it is a wrong also to his rescuer."

Was not the action of the appellant in visiting her family in hospital immediately she heard of the accident basically indistinguishable from that of a "rescuer," being intent upon comforting the injured? And was not her action "natural and probable" in the circumstances? I regard the questions as capable only of affirmative answers, and, indeed, Stephenson L.J. [1981] Q.B. 599, 611D–F, so answered them.

I turn to consider the sole basis upon which the Court of Appeal dismissed the claim, that of public policy. They did so on the grounds of what, for short, may be called the "floodgates" argument. Griffiths L.J. presented it in the following way, at pp. 617, 623:

> "If the [appellant's] argument is right it will certainly have far reaching consequences, for it will not only apply to road traffic accidents. Whenever anybody is injured it is foreseeable that the

A relatives will be told and will visit them in hospital, and it is further foreseeable that in cases of grave injury and death some of those relatives are likely to have a severe reaction causing illness. Of course, the closer the relationship the more readily it is foreseeable that they may be so affected, but if we just confine our consideration to parents and children and husbands and wives, it is clear that the potential liability of the tortfeasor is vastly increased if he has to B compensate the relatives as well as the immediate victims of his carelessness."

"Every system of law must set some bounds to the consequences for which a wrongdoer must make reparation. If the burden is too great it cannot and will not be met, the law will fall into disrepute, and it will be a disservice to those victims who might reasonably C have expected compensation. In any state of society it is ultimately a question of policy to decide the limits of liability."

Stephenson L.J. expressed the same view, at p. 614, by citing his own observation when giving the judgment of the Court of Appeal in *Lambert* v. *Lewis* [1982] A.C. 225, 267 that, "There comes a point where the logical extension of the boundaries of duty and damage is halted by D the barrier of commercial sense and practical convenience."

My Lords, the experiences of a long life in the law have made me very familiar with this "floodgates" argument. I do not, of course, suggest that it can invariably be dismissed as lacking cogency; on the contrary, it has to be weighed carefully, but I have often seen it disproved by later events. It was urged when abolition of the doctrine E of common employment was being canvassed, and it raised its head again when the abolition of contributory negligence as a total bar to a claim in negligence was being urged. And, even before my time, on the basis of conjecture later shown to be ill-founded it provided a fatal stumbling-block to the plaintiff's claim in the "shock" case of *Victorian Railways Commissioners* v. *Coultas* (1888) 13 App.Cas. 222, where Sir Richard Couch sounded the "floodgates" alarm in stirring words which are F quoted in the speech of my noble and learned friend, Lord Bridge of Harwich.

My Lords, for such reasons as those developed in the speech of my noble and learned friend, Lord Wilberforce, and which it would serve no purpose for me to repeat in less felicitous words of my own, I remain unconvinced that the number and area of claims in "shock" cases would G be substantially increased or enlarged were the respondents here held liable. It is a question which Kennedy J. answered in *Dulieu* v. *White & Sons* [1901] 2 K.B. 669, 681 in the following terms, which commend themselves strongly to me:

"I should be sorry to adopt a rule which would bar all such claims on grounds of policy alone, and in order to prevent the possible H success of unrighteous or groundless actions. Such a course involves the denial of redress in meritorious cases, and it necessarily implies a certain amount of distrust, which I do not share, in the capacity of legal tribunals to get at the truth in this class of claim."

My Lords, in the present case two totally different points arising from the speeches of two of your Lordships call for further attention. Both relate to the Court of Appeal's invoking public policy. Unless I have completely misunderstood my noble and learned friend, Lord Bridge of Harwich, he doubts that any regard should have been had to such a consideration and seemingly considers that the Court of Appeal went wrong in paying any attention to it. The sole test of liability, I read him as saying, is the reasonable foreseeability of injury to the plaintiff through nervous shock resulting from the defendants' conceded default. And, such foreseeability having been established to their unanimous satisfaction, it followed that in law no other course was open to the Court of Appeal than to allow this appeal. I have respectfully to say that I cannot accept this approach. It is true that no decision was cited to your Lordships in which the contrary has been held, but that is not to say that reasonable foreseeability is the *only* test of the validity of a claim brought in negligence. If it is surmounted, the defendant would probably be hard put to escape liability.

Lord Wright found it difficult to conceive that any new head of public policy could be discovered (*Fender* v. *St. John-Mildmay* [1938] A.C. 1, 41), and, were Lord Halsbury L.C. sound in denying that any court could invent a new head of policy (*Jansen* v. *Driefontein Consolidated Mines Ltd.* [1902] A.C. 484, 491), I should have been in the happy position of accepting the standpoint adopted by my noble and learned friend, Lord Bridge of Harwich. But, as I shall later indicate, the more recent view which has found favour in your Lordships' House is that public policy is not immutable. Accordingly, whilst I would have strongly preferred indicating with clarity where the limit of liability should be drawn in such cases as the present, in my judgment the possibility of a wholly new type of policy being raised renders the attainment of such finality unfortunately unattainable.

As I think, all we can say is that any invocation of public policy calls for the closest scrutiny, and the defendant might well fail to discharge the burden of making it good, as, indeed, happened in *Rondel* v. *Worsley* [1969] 1 A.C. 191. But that is not to say that success for the defendant would be unthinkable, for, in the words of MacDonald J. in *Nova Mink Ltd.* v. *Trans-Canada Airlines* [1951] 2 D.L.R. 241, 256:

> " there is always a large element of judicial policy and social expediency involved in the determination of the duty-problem, however it may be obscured by the use of traditional formulae."

I accordingly hold, as Griffiths L.J. [1981] Q.B. 599, 618, did, that " The test of foreseeability is not a universal touchstone to determine the extent of liability for the consequences of wrongdoing." Authority for that proposition is both ample in quantity and exalted in status. My noble and learned friend, Lord Wilberforce, has already quoted in this context the observation of Lord Reid in *McKew* v. *Holland & Hannen & Cubitts (Scotland) Ltd.* [1969] 3 All E.R. 1621, 1623 and referred to his own treatment of the topic in *Anns* v. *Merton London Borough Council* [1978] A.C. 728, 752, where further citations are furnished. To add yet another,

A let me conclude by recalling that in *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.* [1964] A.C. 465, 536 Lord Pearce observed:

> "How wide the sphere of the duty of care in negligence is to be laid depends ultimately upon the courts' assessment of the demands of society for protection from the carelessness of others."

B I finally turn to consider the following passage in the speech of my noble and learned friend, Lord Scarman (post, p. 430B–C):

> "Policy considerations will have to be weighed: but the objective of the judges is the formulation of principle. And, if principle inexorably requires a decision which entails a degree of policy risk, the court's function is to adjudicate according to principle, leaving policy curtailment to the judgment of Parliament. . . . If principle
C leads to results which are thought to be socially unacceptable, Parliament can legislate to draw a line or map out a new path."

And at a later stage my noble and learned friend adds (post, p. 431C):

> "Why then should not the courts draw the line, as the Court of Appeal manfully tried to do in this case? Simply, because the
D policy issue as to where to draw the line is not justiciable."

My understanding of these words is that my noble and learned friend shares (though for a different reason) the conclusion of my noble and learned friend, Lord Bridge of Harwich, that, in adverting to public policy, the Court of Appeal here embarked upon a sleeveless errand, for public policy has no relevance to liability at law. In my judgment, the
E proposition that "the policy issue . . . is not justiciable" is as novel as it is startling. So novel is it in relation to this appeal that it was never mentioned during the hearing before your Lordships. And it is startling because in my respectful judgment it runs counter to well-established and wholly acceptable law.

I restrict myself to recent decisions of your Lordships' House. In
F *Rondel* v. *Worsley* [1969] 1 A.C. 191, their Lordships unanimously held that public policy required that a barrister should be immune from an action for negligence in respect of his conduct and management of a case in court and the work preliminary thereto, Lord Reid saying, at p. 228:

> "Is it in the public interest that barristers and advocates should be protected against such actions? Like so many questions which raise the
G public interest, a decision one way will cause hardships to individuals while a decision the other way will involve disadvantage to the public interest. . . . So the issue appears to me to be whether the abolition of the rule would probably be attended by such disadvantage to the public interest as to make its retention clearly justifiable."

H In *Dorset Yacht Co. Ltd.* v. *Home Office* [1970] A.C. 1004 your Lordships' House was called upon to decide whether the English law of civil wrongs should be extended to impose legal liability for loss caused by conduct of a kind of which had not hitherto been recognised by the

courts as entailing liability. In expressing the view that it did, Lord Diplock said, at p. 1058:

> ". . . I agree with [Lord Denning M.R.] that what we are concerned with in this appeal 'is . . . at bottom a matter of public policy which we, as judges, must resolve.'"

And in *Herrington* v. *British Railways Board* [1972] A.C. 877, dealing with an occupier's duty to trespassing children, Lord Reid said, at p. 897:

> "Legal principles cannot solve the problem. How far occupiers are to be required by law to take steps to safeguard such children must be a matter of public policy."

My Lords, in accordance with such a line of authorities, I hold that public policy issues *are* "justiciable." Their invocation calls for close scrutiny, and the conclusion may be that its nature and existence have not been established with the clarity and cogency required before recognition can be granted to any legal doctrine, and before any litigant can properly be deprived of what would otherwise be his manifest legal rights. Or the conclusion may be that adoption of the public policy relied upon would involve the introduction of new legal principles so fundamental that they are best left to the legislature: see, for example, *Launchbury* v. *Morgans* [1973] A.C. 127, and especially *per* Lord Pearson, at p. 142G. And "public policy is not immutable" *per* Lord Reid in *Rondel* v. *Worsley* [1969] 1 A.C. 191, 227. Indeed, Winfield, "Public Policy in the English Common Law" (1928) 42 Harvard L.R. 76, described it as "*necessarily* variable," (p. 93) and wisely added, at pp. 95, 96, 97:

> "This variability . . . is a stone in the edifice of the doctrine, and not a missile to be flung at it. Public policy would be almost useless without it. The march of civilization and the difficulty of ascertaining public policy at any given time make it essential . . . How is public policy evidenced? If it is so variable, if it depends on the welfare of the community at any given time, how are the courts to ascertain it? Some judges have thought this difficulty so great, that they have urged that it would be solved much better by the legislature and have considered it to be the main reason why the courts should leave public policy alone . . . This admonition is a wise one and judges are not likely to forget it. But the better view seems to be that the difficulty of discovering what public policy is at any given moment certainly does not absolve the bench from the duty of doing so. The judges are bound to take notice of it and of the changes which it undergoes, and it is immaterial that the question may be one of ethics rather than of law."

In the present case the Court of Appeal did just that, and in my judgment they were right in doing so. But they concluded that public policy required them to dismiss what they clearly regarded as an otherwise irrefragable claim. In so concluding, I respectfully hold that they were wrong, and I would accordingly allow the appeal.

A LORD RUSSELL OF KILLOWEN. My Lords, I make two comments at the outset. First: we are not concerned with any problem that might have been posed had the accident been not wholly attributable to the negligence of the respondents, but partly attributable to negligent driving by the injured son of the plaintiff. Secondly: the plaintiff is to be regarded as of normal disposition or phlegm: we are therefore not B concerned to investigate the applicability of the "thin skull" cases to this type of case.

The facts in this case, and the physical illness suffered by the plaintiff as a result of mental trauma caused to her by what she learned, heard and saw at the hospital, have been set out in the speech of my noble and learned friend, Lord Wilberforce, and I do not repeat them.

All members of the Court of Appeal concluded that that which hap- C pened to the plaintiff was reasonably foreseeable by the defendants as a consequence of their negligence on the road. (In some cases, and at all levels, a reasonable *bystander* seems to be introduced as a relevant mind: I do not understand why: reasonable foreseeability must surely be something to be attributed to the person guilty of negligence.)

But if the effect on this wife and mother of the results of the negligence D is considered to have been reasonably foreseeable, I do not see the justification for not finding the defendants liable in damages therefor. I would not shrink from regarding in an appropriate case policy as something which may feature in a judicial decision. But in this case what policy should inhibit a decision in favour of liability to the plaintiff? Negligent driving on the highway is only one form of negligence which may cause wounding or death and thus induce a relevant mental trauma in a person such as the E plaintiff. There seems to be no policy requirement that the damage to the plaintiff should be on or adjacent to the highway. In the last analysis any policy consideration seems to be rooted in a fear of floodgates opening —the tacit question "What next?" I am not impressed by that fear— certainly not sufficiently to deprive this plaintiff of just compensation for the reasonably foreseeable damage done to her. I do not consider that such F deprivation is justified by trying to answer in advance the question posed "What next?" by a consideration of relationships of plaintiff to the sufferers or deceased, or other circumstances: to attempt in advance solutions, or even guidelines, in hypothetical cases may well, it seems to me, in this field, do more harm than good.

I also would allow this appeal.

G LORD SCARMAN. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Bridge of Harwich. It cannot be strengthened or improved by any words of mine. I accept his approach to the law and the conclusion he reaches. But I also share the anxieties of the Court of Appeal. I differ, however, from the Court of Appeal in that I am persuaded that in this branch of the law it is not for H the courts but for the legislature to set limits, if any be needed, to the law's development.

The appeal raises directly a question as to the balance in our law between the functions of judge and legislature. The common law, which in a constitutional context includes judicially developed equity, covers

everything which is not covered by statute. It knows no gaps: there can be no "casus omissus." The function of the court is to decide the case before it, even though the decision may require the extension or adaptation of a principle or in some cases the creation of new law to meet the justice of the case. But, whatever the court decides to do, it starts from a baseline of existing principle and seeks a solution consistent with or analogous to a principle or principles already recognised.

The distinguishing feature of the common law is this judicial development and formation of principle. Policy considerations will have to be weighed: but the objective of the judges is the formulation of principle. And, if principle inexorably requires a decision which entails a degree of policy risk, the court's function is to adjudicate according to principle, leaving policy curtailment to the judgment of Parliament. Here lies the true role of the two law-making institutions in our constitution. By concentrating on principle the judges can keep the common law alive, flexible and consistent, and can keep the legal system clear of policy problems which neither they, nor the forensic process which it is their duty to operate, are equipped to resolve. If principle leads to results which are thought to be socially unacceptable, Parliament can legislate to draw a line or map out a new path.

The real risk to the common law is not its movement to cover new situations and new knowledge but lest it should stand still, halted by a conservative judicial approach. If that should happen, and since the 1966 practice direction of the House [*Practice Statement: Judicial Precedent* [1966] 1 W.L.R. 1234] it has become less likely, there would be a danger of the law becoming irrelevant to the consideration, and inept in its treatment, of modern social problems. Justice would be defeated. The common law has, however, avoided this catastrophe by the flexibility given it by generations of judges. Flexibility carries with it, of course, certain risks, notably a degree of uncertainty in the law and the "floodgates" risk which so impressed the Court of Appeal in the present case.

The importance to be attached to certainty and the size of the "floodgates" risk vary from one branch of the law to another. What is required of the law in its approach to a commercial transaction will be very different from the approach appropriate to problems of tortious liability for personal injuries. In some branches of the law, notably that now under consideration, the search for certainty can obstruct the law's pursuit of justice, and can become the enemy of the good.

The present case is a good illustration. Certainty could have been achieved by leaving the law as it was left by *Victorian Railways Commissioners* v. *Coultas*, 13 App.Cas. 222, or again, by holding the line drawn in 1901 by *Dulieu* v. *White & Sons* [1901] 2 K.B. 669, or today by confining the law to what was regarded by Lord Denning M.R. in *Hinz* v. *Berry* [1970] 2 Q.B. 40, 42, as "settled law," namely that "... damages can be given for nervous shock caused by the sight of an accident, at any rate to a close relative."

But at each landmark stage common law principle, when considered in the context of developing medical science, has beckoned the judges on. And now, as has been made clear by Evatt J., dissenting, in *Chester* v. *Waverley Corporation*, 62 C.L.R. 1 in the High Court of Australia, by

A Tobriner J. giving the majority judgment in the Californian case of *Dillon* v. *Legg*, 29 A.L.R. 3d 1316, and by my noble and learned friend in this case, common law principle requires the judges to follow the logic of the "reasonably foreseeable test" so as, in circumstances where it is appropriate, to apply it untrammelled by spatial, physical, or temporal limits. Space, time, distance, the nature of the injuries sustained, and the relationship of the plaintiff to the immediate victim of the accident, are factors B to be weighed, but not legal limitations, when the test of reasonable foreseeability is to be applied.

But I am by no means sure that the result is socially desirable. The "floodgates" argument may be exaggerated. Time alone will tell: but I foresee social and financial problems if damages for "nervous shock" should be made available to persons other than parents and children who C without seeing or hearing the accident, or being present in the immediate aftermath, suffer nervous shock in consequence of it. There is, I think, a powerful case for legislation such as has been enacted in New South Wales and the Australian Capital Territories.

Why then should not the courts draw the line, as the Court of Appeal manfully tried to do in this case? Simply, because the policy issue as to where to draw the line is not justiciable. The problem is one of social, D economic, and financial policy. The considerations relevant to a decision are not such as to be capable of being handled within the limits of the forensic process.

My Lords, I would allow the appeal for the reasons developed by my noble and learned friend, Lord Bridge of Harwich, while putting on record my view that there is here a case for legislation.

E

LORD BRIDGE OF HARWICH. My Lords, I gratefully adopt the account given by my noble and learned friend, Lord Wilberforce, of the facts giving rise to this appeal.

This is only the second case ever to reach your Lordships' House concerning the liability of a tortfeasor who has negligently killed or physically injured A to pay damages to B for a psychiatric illness resulting from F A's death or injury. The previous case was *Bourhill* v. *Young* [1943] A.C. 92. The impression with which I am left, after being taken in argument through all the relevant English authorities, a number of Commonwealth authorities, and one important decision of the Supreme Court of California, is that this whole area of English law stands in urgent need of review.

G The basic difficulty of the subject arises from the fact that the crucial answers to the questions which it raises lie in the difficult field of psychiatric medicine. 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 H which a plaintiff claiming damages of 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. That is here not in issue. A plaintiff must then establish the necessary chain of causation in fact

between his psychiatric illness and the death or injury of one or more third parties negligently caused by the defendant. Here again, this is not in dispute in the instant case. But when causation in fact is in issue, it must no doubt be determined by the judge on the basis of the evidence of psychiatrists. Then, here comes the all-important question. Given the fact of the plaintiff's psychiatric illness caused by the defendant's negligence in killing or physically injuring another, was the chain of causation from the one event to the other, considered ex post facto in the light of all that has happened, "reasonably foreseeable" by the "reasonable man"? A moment's thought will show that the answer to that question depends on what knowledge is to be attributed to the hypothetical reasonable man of the operation of cause and effect in psychiatric medicine. There are at least two theoretically possible approaches. The first is that the judge should receive the evidence of psychiatrists as to the degree of probability that the particular cause would produce the particular effect, and apply to that the appropriate legal test of reasonable foreseeability as the criterion of the defendant's duty of care. The second is that the judge, relying on his own opinion of the operation of cause and effect in psychiatric medicine, as fairly representative of that of the educated layman, should treat himself as the reasonable man and form his own view from the primary facts as to whether the proven chain of cause and effect was reasonably foreseeable. In principle, I think there is much to be said for the first approach. Foreseeability, in any given set of circumstances, is ultimately a question of fact. If a claim in negligence depends on whether some defect in a complicated piece of machinery was foreseeably a cause of injury, I apprehend that the judge will decide that question on the basis of the expert evidence of engineers. But the authorities give no support to this approach in relation to the foreseeability of psychiatric illness. The judges, in all the decisions we have been referred to, have assumed that it lay within their own competence to determine whether the plaintiff's "nervous shock" (as lawyers quaintly persist in calling it) was in any given circumstances a sufficiently foreseeable consequence of the defendant's act or omission relied on as negligent to bring the plaintiff within the scope of those to whom the defendant owed a duty of care. To depart from this practice and treat the question of foreseeable causation in this field, and hence the scope of the defendant's duty, as a question of fact to be determined in the light of the expert evidence adduced in each case would, no doubt, be too large an innovation in the law to be regarded as properly within the competence, even since the liberating 1966 practice direction [*Practice Statement: Judicial Precedent* [1966] 1 W.L.R. 1234], of your Lordships' House. Moreover, psychiatric medicine is far from being an exact science. The opinions of its practitioners may differ widely. Clearly it is desirable in this, as in any other, field that the law should achieve such a measure of certainty as is consistent with the demands of justice. It would seem that the consensus of informed judicial opinion is probably the best yardstick available to determine whether, in any given circumstances, the emotional trauma resulting from the death or injury of third parties, or indeed the threat of such death or injury, ex hypothesi attributable to the defendant's negligence, was a foreseeable cause in law, as well as the actual cause in fact, of the plaintiff's psychiatric or psychosomatic illness. But the word I

would emphasise in the foregoing sentence is "informed." For too long earlier generations of judges have regarded psychiatry and psychiatrists with suspicion, if not hostility. Now, I venture to hope, that attitude has quite disappeared. No judge who has spent any length of time trying personal injury claims in recent years would doubt that physical injuries can give rise not only to organic but also to psychiatric disorders. The sufferings of the patient from the latter are no less real and frequently no less painful and disabling than from the former. Likewise, I would suppose that the legal profession well understands that an acute emotional trauma, like a physical trauma, can well cause a psychiatric illness in a wide range of circumstances and in a wide range of individuals whom it would be wrong to regard as having any abnormal psychological make-up. It is in comparatively recent times that these insights have come to be generally accepted by the judiciary. It is only by giving effect to these insights in the developing law of negligence that we can do justice to an important, though no doubt small, class of plaintiffs whose genuine psychiatric illnesses are caused by negligent defendants.

My Lords, in the instant case I cannot help thinking that the learned trial judge's conclusion that the appellant's illness was not the foreseeable consequence of the respondents' negligence was one to which, understandably, he felt himself driven by the authorities. Free of authority, and applying the ordinary criterion of reasonable foreseeability to the facts, with an eye "enlightened by progressive awareness of mental illness" (the language of Stephenson L.J. [1981] Q.B. 599, 612), any judge must, I would think, share the view of all three members of the Court of Appeal, with which I understand all your Lordships agree, that, in the words of Griffiths L.J., at p. 617, it was

> "readily foreseeable that a significant number of mothers exposed to such an experience might break down under the shock of the event and suffer illness."

The question, then, for your Lordships' decision is whether the law, as a matter of policy, draws a line which exempts from liability a defendant whose negligent act or omission was actually and foreseeably the cause of the plaintiff's psychiatric illness and, if so, where that line is to be drawn. In thus formulating the question, I do not, of course, use the word "negligent" as prejudging the question whether the defendant owes the plaintiff a duty, but I do use the word "foreseeably" as connoting the normally accepted criterion of such a duty.

Before attempting to answer the question, it is instructive to consider the historical development of the subject as illustrated by the authorities, and to note, in particular, three features of that development. First, it will be seen that successive attempts have been made to draw a line beyond which liability should not extend, each of which has in due course had to be abandoned. Secondly, the ostensible justification for drawing the line has been related to the current criterion of a defendant's duty of care, which, however expressed in earlier judgments, we should now describe as that of reasonable foreseeability. But, thirdly, in so far as policy considerations can be seen to have influenced any of the decisions, they appear to

have sprung from the fear that to cross the chosen line would be to open the floodgates to claims without limit and largely without merit.

Perhaps the most vivid illustration of all three features is in the very first case in the series, the decision of the Privy Council in *Victorian Railways Commissioners* v. *Coultas*, 13 App.Cas. 222. The plaintiff, a pregnant lady, was a passenger in a buggy which was negligently allowed by the defendants' gatekeeper to cross the railway line when a train was approaching. The buggy crossed just in time, ahead of the train, but only narrowly escaped collision. The plaintiff was so alarmed that she suffered what was described as "a severe nervous shock." She fainted, and subsequently miscarried. She succeeded in her claim for damages in the courts below. Delivering the judgment of the Privy Council, allowing the appeal, Sir Richard Couch said, at pp. 225–226:

> "According to the evidence of the female plaintiff her fright was caused by seeing the train approaching, and thinking they were going to be killed. Damages arising from mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot under such circumstances, their Lordships think, be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gate-keeper. If it were held that they can, it appears to their Lordships that it would be extending the liability for negligence much beyond what that liability has hitherto been held to be. Not only in such a case as the present, but in every case where an accident caused by negligence had given a person a serious nervous shock, there might be a claim for damages on account of mental injury. The difficulty which now often exists in case of alleged physical injuries of determining whether they were caused by the negligent act would be greatly increased, and a wide field opened for imaginary claims."

Two Irish courts declined to follow this decision: *Bell* v. *Great Northern Railway Co. of Ireland* (1890) 26 L.R.Ir. 428, following *Byrne* v. *Great Southern and Western Railway Company of Ireland* (unreported). The next English case followed the Irish courts' lead. This was *Dulieu* v. *White & Sons* [1901] 2 K.B. 669. The case was argued on a preliminary point of law. The plaintiff, again a pregnant lady, pleaded that she had suffered nervous shock when the defendants' horse-drawn van was negligently driven into the public house where she was behind the bar. Kennedy J. gave the leading judgment of the Divisional Court in the plaintiff's favour. It is worth quoting the passage which is central to his decision, if only to show how far we have travelled in the last 80 years in the judicial approach to the kind of medical question presently under consideration. He said, at p. 677:

> "For my own part, I should not like to assume it to be scientifically true that a nervous shock which causes serious bodily illness is not actually accompanied by physical injury, although it may be impossible, or at least difficult, to detect the injury at the time in the living subject. I should not be surprised if the surgeon or the physiologist told us that nervous shock is or may be in itself an injurious affection

A of the physical organism. Let it be assumed, however, that the physical injury follows the shock, but that the jury are satisfied upon proper and sufficient medical evidence that it follows the shock as its direct and natural effect, is there any legal reason for saying that the damage is less proximate in the legal sense than damage which arises contemporaneously? "

B But earlier in his judgment Kennedy J. had drawn a new line of limitation when he said, at p. 675:

> "The shock, where it operates through the mind, must be a shock which arises from a reasonable fear of immediate personal injury to oneself."

He supported this by reference to an earlier unreported case (*Smith* v. C *Johnson and Co.*), where the unsuccessful plaintiff suffered from the shock of seeing another person killed, and said of such a case, at p. 675:

> "I should myself . . . have been inclined to go a step further, and to hold . . . that, as the defendant neither intended to affect the plaintiff injuriously nor did anything which could reasonably or naturally be expected to affect him injuriously, there was no evidence of any breach D of legal duty towards the plaintiff . . ."

The next landmark is *Hambrook* v. *Stokes Brothers* [1925] 1 K.B. 141. This was the case which turned on whether "nervous shock" caused to a mother by fear for her children, who had just disappeared round a corner going up a hill when a runaway lorry appeared round the corner going downhill, and when, as it turned out, one of her children was injured, gave E a cause of action against the driver whose negligence allowed the lorry to run down the hill. The court by a majority held that it did. The leading judgment of Bankes L.J. sought to demonstrate the absurdity of maintaining the boundary of a defendant's liability for "nervous shock" on the line drawn by Kennedy J., saying, at p. 151:

> "Assume two mothers crossing this street at the same time when this F lorry comes thundering down, each holding a small child by the hand. One mother is courageous and devoted to her child. She is terrified, but thinks only of the damage to the child, and not at all about herself. The other woman is timid and lacking in the motherly instinct. She also is terrified, but thinks only of the damage to herself and not at all about her child. The health of both mothers is seriously affected by the mental shock occasioned by the fright. Can any real G distinction be drawn between the two cases? Will the law recognise a cause of action in the case of the less deserving mother, and none in the case of the more deserving one? Does the law say that the defendant ought reasonably to have anticipated the non-natural feeling of the timid mother, and not the natural feeling of the courageous mother? I think not."

H Sargant L.J., at p. 162 in his dissenting judgment, nevertheless sought to uphold the distinction essentially on the basis that "nervous shock" caused to a plaintiff by fear of injury to himself occasioned by a "near miss" is indistinguishable, so far as the defendant's duty is concerned, from injury

by direct impact, whereas "nervous shock" caused by the fear or sight of injury to another is beyond the defendant's anticipation and hence beyond the range of his duty.

When one comes to the decision of your Lordships' House in *Bourhill* v. *Young* [1943] A.C. 92 it is important to bear in mind, as the speeches delivered show, that the difference of judicial opinion in *Hambrook* v. *Stokes Brothers* [1925] 1 K.B. 141 remained unresolved, and indeed that their Lordships did not purport to resolve it. Furthermore, on the facts of that case the result was surely a foregone conclusion. The pursuer was alighting from a tram when she heard, but did not see, the impact of a collision between a motor-cyclist (on whose negligence in driving too fast her claim was based) and a car. The motor-cyclist, a stranger to the pursuer, was killed. There is nothing in the report to indicate that she ever saw the body, but after the body had been removed she saw the blood left on the road. In these circumstances I cannot suppose that any judge today would dissent from the view that "nervous shock" to the pursuer was not reasonably foreseeable. Nor would anyone, I think, quarrel with the following passage from the speech of Lord Porter, at p. 117, as expressing a view of the law as acceptable in 1982 as it was in 1942:

> "The question whether emotional disturbance or shock, which a defender ought reasonably to have anticipated as likely to follow from his reckless driving, can ever form the basis of a claim is not in issue. It is not every emotional disturbance or every shock which should have been foreseen. The driver of a car or vehicle, even though careless, is entitled to assume that the ordinary frequenter of the streets has sufficient fortitude to endure such incidents as may from time to time be expected to occur in them, including the noise of a collision and the sight of injury to others, and is not to be considered negligent towards one who does not possess the customary phlegm."

On the difference of opinion in *Hambrook* v. *Stokes Brothers* [1925] 1 K.B. 141, Lord Russell of Killowen at p. 103 in terms expressed a preference for the dissenting view of Sargant L.J. Lord Thankerton and Lord Macmillan, although not saying so in terms, appear by necessary implication to support the same view by confining a driver's duty of care to those in the area of potential physical danger which may arise from the manner of his driving. Lord Porter's speech is neutral. Lord Wright expressed provisional agreement with the majority decision in *Hambrook* v. *Stokes Brothers*. His speech also contained the following and, as I think, far-sighted passage [1943] A.C. 92, 110:

> "What is now being considered is the question of liability, and this, I think, in a question whether there is duty owing to members of the public who come within the ambit of the act, must generally depend on a normal standard of susceptibility. This, it may be said, is somewhat vague. That is true, but definition involves limitation which it is desirable to avoid further than is necessary in a principle of law like negligence which is widely ranging and is still in the stage of development. It is here, as elsewhere, a question of what the hypothetical reasonable man, viewing the position, I suppose ex post

A facto, would say it was proper to foresee. What danger of particular infirmity that would include must depend on all the circumstances, but generally, I think, a reasonably normal condition, if medical evidence is capable of defining it, would be the standard. The test of the plaintiff's extraordinary susceptibility, if unknown to the defendant, would in effect make him an insurer. The lawyer likes to draw fixed and definite lines and is apt to ask where the thing is B to stop. I should reply it should stop where in the particular case the good sense of the jury or of the judge decides . . . I cannot, however, forbear referring to a most important case in the High Court of Australia, *Chester* v. *Waverley Corporation* (1939) 62 C.L.R. 1, where the court by a majority held that no duty was made out. The dissenting judgment of Evatt J. will demand the consideration of any C judge who is called on to consider these questions."

I shall return later to the judgment of Evatt J. to which Lord Wright there refers.

I need not consider in detail the subsequent English Court of Appeal decisions in *King* v. *Phillips* [1953] 1 Q.B. 429, *Boardman* v. *Sanderson* [1964] 1 W.L.R. 1317 and *Hinz* v. *Berry* [1970] 2 Q.B. 40. In *King* v. D *Phillips* Denning L.J., as he then was, said, at p. 441: " 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." This observation was cited with approval in *Overseas Tankship (U.K.) Ltd.* v. *Morts Dock and Engineering Co. Ltd. (The Wagon Mound)* [1961] A.C. 388, 426. I would add, however, that *King* v. *Phillips,* a case in which the plaintiff E failed, would, as I think, clearly be decided differently today. By 1970 it was clear that no one could any longer contend for the limitation of liability for " nervous shock " to those who were themselves put in danger by the defendant's negligence, so much so that in *Hinz* v. *Berry* [1970] 2 Q.B. 40 a mother who witnessed from one side of the road a terrible accident to her family picnicking on the other side of the road recovered damages for her resulting psychiatric illness without dispute on the issue of F liability, and the case reached the Court of Appeal on the issue of quantum of damages only. Lord Denning M.R. said, at p. 42:

> " The law at one time said that there could not be damages for nervous shock: but for these last 25 years, it has been settled that damages can be given for nervous shock caused by the sight of an accident, at any rate to a close relative."

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The only other important English decision is *Chadwick* v. *British Railways Board* [1967] 1 W.L.R. 912. The plaintiff's husband lived 200 yards from the scene of the terrible Lewisham railway accident in 1957 in which 90 people were killed. On hearing of the accident in the evening he went at once to the scene and assisted in the rescue work through the night until early the next morning. As a result of his experiences of the H night he developed an acute anxiety neurosis for which he required hospital treatment as an in-patient for over six months. After his death from unrelated causes his wife, as administratrix of his estate, recovered damages for his psychiatric illness. This was a decision of Waller J. It

was not challenged on appeal and no one, I believe, has ever doubted that it was rightly decided.

I should mention two Commonwealth decisions of first instance. In *Benson* v. *Lee* [1972] V.R. 879 Lush J., in the Supreme Court of Victoria, held that a mother who did not witness, but was told of, an accident to her son 100 yards from her home, went to the scene and accompanied the child in an ambulance to hospital where he died was entitled to damages for "nervous shock" notwithstanding evidence that she was prone to mental illness from stress. In *Marshall* v. *Lionel Enterprises Inc.* (1971) 25 D.L.R. (3d) 141, Haines J., in the Ontario High Court, held that a wife who found her husband seriously injured shortly after an accident caused by defective machinery was not, as a matter of law, disentitled to damages for the "nervous shock" which she claimed to have suffered as a result. On the other hand in *Abramzik* v. *Brenner*, 65 D.L.R.(2d) 651 the Saskatchewan Court of Appeal held that a mother who suffered "nervous shock" on being informed by her husband that two of her children had been killed in a road accident was not entitled to recover.

Chester v. *Waverley Corporation*, 62 C.L.R. 1, referred to by Lord Wright in the passage quoted above, was a decision of the High Court of Australia. The plaintiff's seven-year-old son, having been out to play, failed to return home when expected. A search was mounted which continued for some hours. Eventually, in the presence of the plaintiff, his mother, the child's dead body was recovered from a flooded trench which the defendant authority had left inadequately fenced. The plaintiff claimed damages for "nervous shock." The majority of the court (Latham C.J., Rich and Starke JJ.) rejected the claim. The decision was based squarely on the ground that, the plaintiff's injury not being a foreseeable consequence of the defendant's omission to fence the trench, they owed her no duty. But the judgment of Latham C.J. contains an interesting example of the "floodgates" argument. He said, at pp. 7–8:

> "But in this case the plaintiff must establish a duty owed by the defendant to herself and a breach of that duty. The duty which it is suggested the defendant owed to the plaintiff was a duty not to injure her child so as to cause her a nervous shock when she saw, not the happening of the injury, but the result of the injury, namely, the dead body of the child. It is rather difficult to state the limit of the alleged duty. If a duty of the character suggested exists at all, it is not really said that it should be confined to mothers of children who are injured. It must extend to some wider class—but to what class? There appears to be no reason why it should not extend to other relatives or to all other persons, whether they are relatives or not. If this is the true principle of law, then a person who is guilty of negligence with the result that A is injured will be liable in damages to B, C, D and any other persons who receive a nervous shock (as distinguished from passing fright or distress) at any time upon perceiving the results of the negligence, whether in disfigurement of person, physical injury, or death."

A In a powerful dissenting judgment, which I find wholly convincing, Evatt J. drew a vivid picture of the mother's agony of mind as the search continued, culminating in the gruesome discovery in her presence of the child's drowned body. I cannot for a moment doubt the correctness of his conclusion that the mother's mental illness was the reasonably foreseeable consequence of the defendant's negligence. This was a case from New South Wales and I cannot help wondering whether it was not the B manifest injustice of the result which led, a few years later, to the intervention of the New South Wales legislature, to enable the parent, husband or wife of a person "killed, injured or put in peril" by another's negligence to recover damages for "mental or nervous shock" irrespective of any spatial or temporal relationship to the accident in which the death, injury or peril occurred [New South Wales Law Reform (Miscellaneous Provisions) C Act 1944, section 4 (1)].

My Lords, looking back I think it is possible to discern that there only ever were two clear lines of limitation of a defendant's liability for "nervous shock" for which any rational justification could be advanced in the light both of the state of the law of negligence and the state of medical science as judicially understood at the time when those limitations were propounded. In 1888 it was, no doubt, perfectly sensible to say: "Damages D arising from mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot . . . be considered a consequence which, in the ordinary course of things, would flow from . . . negligence" (*Victorian Railway Commissioners* v. *Coultas*, 13 App.Cas. 222, 225). Here the test, whether of duty or of remoteness, can be recognised as a relatively distant ancestor of the modern criterion of reasonable E foreseeability. Again, in 1901 it was, I would suppose, equally sensible to limit a defendant's liability for "nervous shock" which could "reasonably or actually be expected" to be such as was suffered by a plaintiff who was himself physically endangered by the defendant's negligence (*Dulieu* v. *White & Sons* [1901] 2 K.B. 669, 675). But once that line of limitation has been crossed, as it was by the majority in *Hambrook* v. *Stokes Brothers* [1925] 1 K.B. 141, there can be no logical reason whatever F for limiting the defendant's duty to persons in physical proximity to the place where the accident, caused by the defendant's negligence, occurred. Much of the confusion in the authorities since *Bourhill* v. *Young* [1943] A.C. 92, including, if I may say so, the judgments of the courts below in the instant case, has arisen, as it seems to me, from the deference still accorded, notwithstanding the acceptance of the *Hambrook* principle, to G dicta of their Lordships in *Bourhill* v. *Young* which only make sense if understood as based on the limited principle of liability propounded by Kennedy J. in *Dulieu* v. *White & Sons* [1901] 2 K.B. 669, and adopted in the dissenting judgment of Sargant L.J. in *Hambrook* v. *Stokes Brothers*.

My Lords, before returning to the policy question, it is, I think, highly instructive to consider the decision of the Supreme Court of California H in *Dillon* v. *Legg*, 29 A.L.R. 3d 1316. Before this decision the law of California, and evidently of other states of the Union, had adhered to the English position before *Hambrook* v. *Stokes Brothers*, that damages for nervous shock could only be recovered if resulting from the plaintiff's

apprehension of danger to himself and, indeed, this view had been affirmed by the Californian Supreme Court only five years earlier. The majority in *Dillon* v. *Legg* adopted a contrary view in refusing a motion to dismiss a mother's claim for damages for emotional trauma caused by seeing her infant daughter killed by a car as she crossed the road.

In delivering the majority judgment of the court, Tobriner J. said, at pp. 1326–1327:

> "Since the chief element in determining whether defendant owes a duty or an obligation to plaintiff is the foreseeability of the risk, that factor will be of prime concern in every case. Because it is inherently intertwined with foreseeability such duty or obligation must necessarily be adjudicated only upon a case-by-case basis. We cannot now predetermine defendant's obligation in every situation by a fixed category; no immutable rule can establish the extent of that obligation for every circumstance of the future. We can, however, define guidelines which will aid in the resolution of such an issue as the instant one. We note, first, that we deal here with a case in which plaintiff suffered a shock which resulted in physical injury and we confine our ruling to that case. In determining, in such a case, whether defendant should reasonably foresee the injury to plaintiff, or, in other terminology, whether defendant owes plaintiff a duty of due care, the courts will take into account such factors as the following: (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship. The evaluation of these factors will indicate the *degree* of the defendant's foreseeability: obviously defendant is more likely to foresee that a mother who observes an accident affecting her child will suffer harm than to foretell that a stranger witness will do so. Similarly, the degree of foreseeability of the third person's injury is far greater in the case of his contemporaneous observance of the accident than that in which he subsequently learns of it. The defendant is more likely to foresee that shock to the nearby, witnessing mother will cause physical harm than to anticipate that someone distant from the accident will suffer more than a temporary emotional reaction. All these elements, of course, shade into each other; the fixing of obligation, intimately tied into the facts, depends upon each case. In light of these factors the court will determine whether the accident and harm was *reasonably* foreseeable. Such reasonable foreseeability does not turn on whether the particular plaintiff as an individual would have in actuality foreseen the exact accident and loss; it contemplates that courts, on a case-to-case basis, analysing all the circumstances, will decide what the ordinary man under such circumstances should reasonably have foreseen. The courts thus mark out the areas of liability, excluding the remote and unexpected. In the instant case,

the presence of all the above factors indicates that plaintiff has alleged a sufficient prima facie case. Surely the negligent driver who causes the death of a young child may reasonably expect that the mother will not be far distant and will upon witnessing the accident suffer emotional trauma. As Dean Prosser has stated: 'when a child is endangered, it is not beyond contemplation that its mother will be somewhere in the vicinity, and will suffer serious shock.' (*Prosser, Torts*, p. 353. See also 2 *Harper & James, The Law of Torts*, p. 1039.) We are not now called upon to decide whether, in the absence or reduced weight of some of the above factors, we would conclude that the accident and injury were not reasonably foreseeable and that therefore defendant owed no duty of due care to plaintiff. In future cases the court will draw lines of demarcation upon facts more subtle than the compelling one alleged in the complaint before us."

The leading minority judgment [Burke J., at p. 1333] castigated the majority for embarking on a first excursion into the "fantastic realm of infinite liability," a colourful variant of the familiar "floodgates" argument.

In approaching the question whether the law should, as a matter of policy, define the criterion of liability in negligence for causing psychiatric illness by reference to some test other than that of reasonable foreseeability it is well to remember that we are concerned only with the question of liability of a defendant who is, ex hypothesi, guilty of fault in causing the death, injury or danger which has in turn triggered the psychiatric illness. A policy which is to be relied on to narrow the scope of the negligent tortfeasor's duty must be justified by cogent and readily intelligible considerations, and must be capable of defining the appropriate limits of liability by reference to factors which are not purely arbitrary. A number of policy considerations which have been suggested as satisfying these requirements appear to me, with respect, to be wholly insufficient. I can see no grounds whatever for suggesting that to make the defendant liable for reasonably foreseeable psychiatric illness caused by his negligence would be to impose a crushing burden on him out of proportion to his moral responsibility. However liberally the criterion of reasonable foreseeability is interpreted, both the number of successful claims in this field and the quantum of damages they will attract are likely to be moderate. I cannot accept as relevant the well-known phenomenon that litigation may delay recovery from a psychiatric illness. If this were a valid policy consideration, it would lead to the conclusion that psychiatric illness should be excluded altogether from the heads of damage which the law will recognise. It cannot justify limiting the cases in which damages will be awarded for psychiatric illness by reference to the circumstances of its causation. To attempt to draw a line at the furthest point which any of the decided cases happen to have reached, and to say that it is for the legislature, not the courts, to extend the limits of liability any further, would be, to my mind, an unwarranted abdication of the court's function of developing and adapting principles of the common law to changing conditions, in a particular corner of the common law which exemplifies, par excellence, the important and indeed necessary part which that function has to play. In the end I believe

that the policy question depends on weighing against each other two conflicting considerations. On the one hand, if the criterion of liability is to be reasonable foreseeability simpliciter, this must, precisely because questions of causation in psychiatric medicine give rise to difficulty and uncertainty, introduce an element of uncertainty into the law and open the way to a number of arguable claims which a more precisely fixed criterion of liability would exclude. I accept that the element of uncertainty is an important factor. I believe that the "floodgates" argument, however, is, as it always has been, greatly exaggerated. On the other hand, it seems to me inescapable that any attempt to define the limit of liability by requiring, in addition to reasonable foreseeability, that the plaintiff claiming damages for psychiatric illness should have witnessed the relevant accident, should have been present at or near the place where it happened, should have come upon its aftermath and thus have had some direct perception of it, as opposed to merely learning of it after the event, should be related in some particular degree to the accident victim—to draw a line by reference to any of these criteria must impose a largely arbitrary limit of liability. I accept, of course, the importance of the factors indicated in the guidelines suggested by Tobriner J. in *Dillon* v. *Legg*, 29 A.L.R. 3d 1316 as bearing upon the *degree* of foreseeability of the plaintiff's psychiatric illness. But let me give two examples to illustrate what injustice would be wrought by any such hard and fast lines of policy as have been suggested. First, consider the plaintiff who learned after the event of the relevant accident. Take the case of a mother who knows that her husband and children are staying in a certain hotel. She reads in her morning newspaper that it has been the scene of a disastrous fire. She sees in the paper a photograph of unidentifiable victims trapped on the top floor waving for help from the windows. She learns shortly afterwards that all her family have perished. She suffers an acute psychiatric illness. That her illness in these circumstances was a reasonably foreseeable consequence of the events resulting from the fire is undeniable. Yet, is the law to deny her damages as against a defendant whose negligence was responsible for the fire simply on the ground that an important link in the chain of causation of her psychiatric illness was supplied by her imagination of the agonies of mind and body in which her family died, rather than by direct perception of the event? Secondly, consider the plaintiff who is unrelated to the victims of the relevant accident. If rigidly applied, an exclusion of liability to him would have defeated the plaintiff's claim in *Chadwick* v. *British Railways Board* [1967] 1 W.L.R. 912. The Court of Appeal treated that case as in a special category because Mr. Chadwick was a rescuer. Now, the special duty owed to a rescuer who voluntarily places himself in physical danger to save others is well understood, and is illustrated by *Haynes* v. *Harwood* [1935] 1 K.B. 146, the case of the constable injured in stopping a runaway horse in a crowded street. But in relation to the psychiatric consequences of witnessing such terrible carnage as must have resulted from the Lewisham train disaster, I would find it difficult to distinguish in principle the position of a rescuer, like Mr. Chadwick, from a mere spectator as, for example, an uninjured or

A only slightly injured passenger in the train, who took no part in the rescue operations but was present at the scene after the accident for some time, perforce observing the rescue operations while he waited for transport to take him home.

My Lords, I have no doubt that this is an area of the law of negligence where we should resist the temptation to try yet once more to freeze the law in a rigid posture which would deny justice to some who, in the B application of the classic principles of negligence derived from *Donoghue* v. *Stevenson* [1932] A.C. 562, ought to succeed, in the interests of certainty, where the very subject matter is uncertain and continuously developing, or in the interests of saving defendants and their insurers from the burden of having sometimes to resist doubtful claims. I find myself in complete agreement with Tobriner J. in *Dillon* v. *Legg*, 29 A.L.R. C 3d 1316, 1326 that the defendant's duty must depend on reasonable foreseeability and

> "must necessarily be adjudicated only upon a case-by-case basis. We cannot now predetermine defendant's obligation in every situation by a fixed category; no immutable rule can establish the extent of that obligation for every circumstance of the future."

D To put the matter in another way, if asked where the thing is to stop, I should answer, in an adaptation of the language of Lord Wright (in *Bourhill* v. *Young* [1943] A.C. 92, 110) and Stephenson L.J. [1981] Q.B. 599, 612, "where in the particular case the good sense of the judge, enlightened by progressive awareness of mental illness, decides."

I regret that my noble and learned friend, Lord Edmund-Davies, who E criticises my conclusion that in this area of the law there are no policy considerations sufficient to justify limiting the liability of negligent tortfeasors by reference to some narrower criterion than that of reasonable foreseeability, stops short of indicating his view as to where the limit of liability should be drawn or as to the nature of the policy considerations (other than the "floodgates" argument, which I understand he F rejects) which he would invoke to justify such a limit.

My Lords, I would accordingly allow the appeal.

Appeal allowed with costs.
Plaintiff's costs to be taxed in accordance with Schedule 2 to Legal Aid Act 1974.

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M. G.

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