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**EVALUATING THE ‘SPACE’ AND ‘TIME’ PROXIMITY CRITERIA IN
TORT LAW**- Nupur Barman¹**ABSTRACT**

Earlier in Tort law compensation was awarded for suffering from some physical injury only. It was considered that mental stress and injury are ‘less worthy’ of being classified as wrongs under tort law and hence was not recognized. The courts refused to treat psychiatric damage same as physical damage but had no difficulty compensating for psychiatric damage caused as a direct consequence of physical injury. However, over the years there has been a development in this law and precedents are being set with relief for causing mental injury and shock as well. Various control mechanisms to tackle the floodgate effect established by various case laws have been enumerated. This paper aims to evaluate the second criteria of the control mechanisms set up by *Alcock* and identify the effects that it has on secondary victims using case laws from various jurisdictions.

At the outset, this paper will attempt to answer the following two questions:

Research Question 1: Does the “sudden shock” requirement have a negative impact on secondary victims with respect to accessing relief?

Research Question 2: Should the parameters for defining the zone of impact be ever fixed?

INTRODUCTION

A psychiatric harm is a medically recognized condition of a perpetuating nature that disturbs the normal working of the mind. It might or might not be accompanied by overt physical symptoms.² Under the English law of tort, the same is defined as follows: nervous shock or injury inflicted upon a person by intentional or negligent actions or omissions of another. It is most often applied to psychiatric disorders triggered by witnessing an accident, for example an injury caused to one’s parents or spouse.

Although the term “nervous shock” has been described as “inaccurate” and “misleading” (Lord

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² *Haynes v Harwood* [1935] 1 KB 146.

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Keith and Lord Oliver, respectively, both in *Alcock v. Chief constable of South Yorkshire*³, it continues to be applied as a useful abbreviation for a complex concept. The rationale behind the law of nervous shock is that the body is controlled by its nervous system (an essential part of the body) and if by reason of an acute shock to the nervous system the activities of the body are impaired and as a consequence is prevented from functioning normally, there is a clear “bodily injury”. This was also held by the Madras High Court in *Halligua v. Mohansundarum*⁴.

It is important to note that the cause of nervous shock itself is not enough to make it an actionable tort, some injury or illness must take place as a result of emotional disturbance, fear, or sorrow. The common law regarding recovery of compensation for pure psychiatric illness also described by the expression nervous shock was reviewed by the House of Lords in *White v. Chief Constable of South Yorkshire*⁵, where all relevant earlier authorities were considered. The court noticed that this law "is a patchwork quilt of distinctions which are difficult to justify." Even after judicial attempts to clarify the principles governing liability for psychiatric harm and to package claims neatly according to a scheme of primary and secondary victims, loose ends remain.

The law of nervous shock has been evolved over the decades by the courts, wherein they moved from entertaining claims only limited to sudden shock to taking a wider and more flexible approach in dealing with the claims of an individual taking into account several eventualities. Claims for psychiatric injury were historically regarded with scepticism, and today courts demonstrate considerable caution when asked to extend the parameters of such actions. The reasons for this caution include concern about the difficulties inherent in identifying damage of a mental rather than a physical nature, fear that the number of people who might foreseeably suffer mental injury as a result of an incident could far exceed those suffering physical injury, and fear that the large number of potential claims could place a disproportionate burden on defendants.⁶ Too much appears to turn upon the primary/secondary victim distinction, and the restrictive approach to actions of secondary victims has led to unjust results.

In India, it was held in the judgment regarding nervous shock in which damages were paid was *Bangalore Development Authority v Syndicate Bank*⁷ clearly states that “the amount of

³Alcock v. Chief constable of South Yorkshire [1992J 1 A.C. 310 (H.L.).

⁴Halligua v. Mohansundarum (1951) 2 MLJ 471.

⁵ White v. Chief Constable of South Yorkshire (1999) 1Alter 1(HL).

⁶ Margaret Fordham, PSYCHIATRIC INJURY, SECONDARY VICTIMS AND THE 'SUDDEN SHOCK' REQUIREMENT, Singapore Journal of Legal Studies [2014] 41-58.

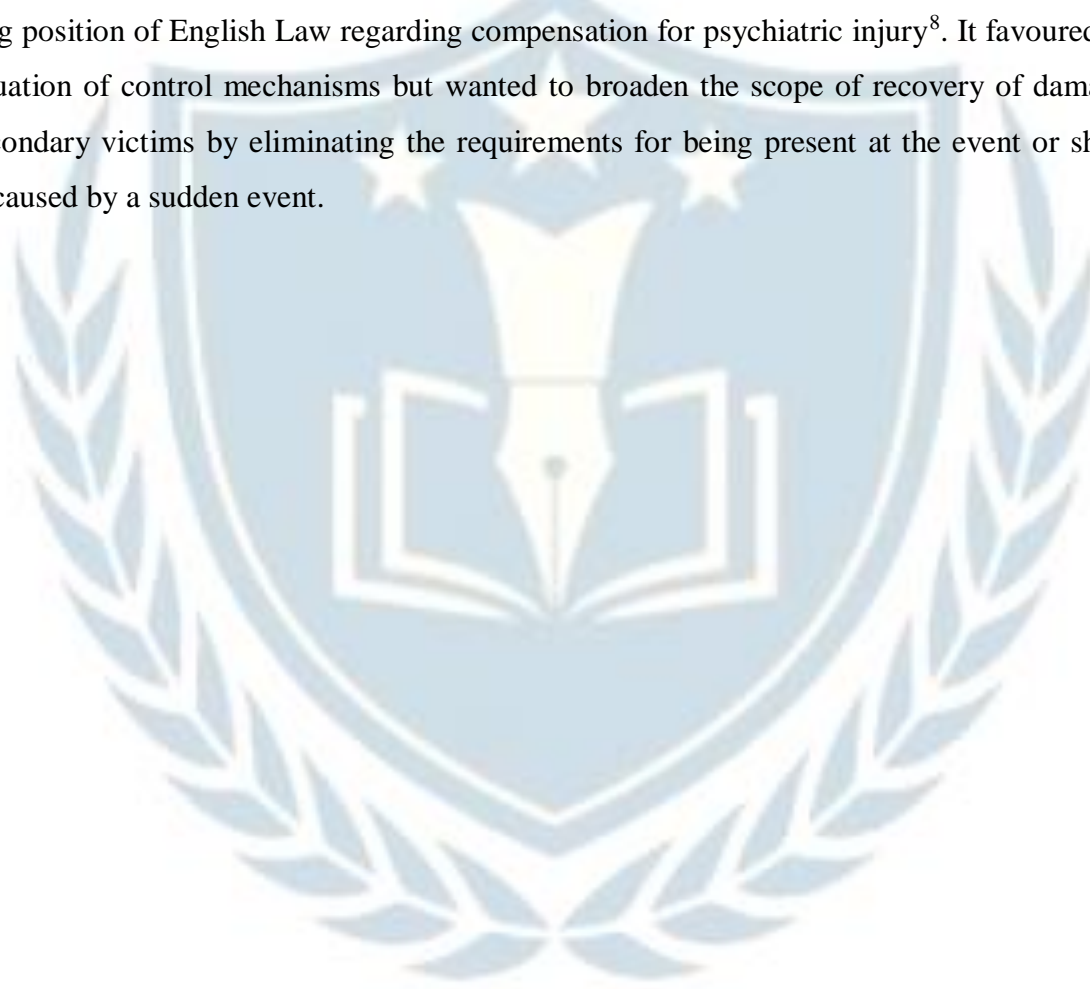
⁷ Bangalore Development Authority v Syndicate Bank AIR 2007 SC 2198.

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compensation will depend on the fact of each situation, nature of harassment, the period of harassment, & nature of arbitrary or capricious or negligent action of the authority which led to such harassment."

There is just one act regulating the rules which govern a person suffering from mental illness and authority taking care of her is governed by the Mental Health Act, 1987 which is the only legislation in India in this area of tort. The rest of the aspects are dealt in the manner as explained henceforth.

In 1998, The Law Commission on Liability of Psychiatric Illness recommended reforms to the existing position of English Law regarding compensation for psychiatric injury⁸. It favoured the continuation of control mechanisms but wanted to broaden the scope of recovery of damages for secondary victims by eliminating the requirements for being present at the event or shock being caused by a sudden event.



⁸ Law Com. "Liability of Psychiatric Illness" No. 249.

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PRIMARY AND SECONDARY VICTIMS

In *Alcock v Chief Constable of South Yorkshire Police*⁹, which arose out of the Hillsborough disaster (where ninety-five spectators were killed and over 400 injured as a result of overcrowding due to negligent policing. The sixteen plaintiffs, who were either relatives or friends of victims, claimed damages for 'psychiatric illness', mainly in the form of post-traumatic stress disorder), as a control mechanism for limiting the class of individuals who could recover damages, the court divided claimants into two categories:

Primary victims - those directly involved in sufficiently shocking (usually life threatening) situations. 'Primary victims' are more likely to succeed in a claim for nervous shock than 'secondary victims', since they are directly involved in the accident and was exposed to the risk of injury, unlike secondary victims who suffer nervous shock fearing the safety of other and thus, can be within the ambit of defendant's duty of care even when the shock is not considered reasonably foreseeable. The position of primary victim is governed by the decision in *Page v. Smith*¹⁰ wherein a claimant may recover for psychiatric harm even though the threatened physical harm does not materialize.

Secondary victims - those not directly threatened, often close family members of those injured or killed. In this case the claimant may not be directly involved in the original accident, and be at no personal risk of physical injury, but nonetheless witness injury to others and suffer psychiatric harm in consequence. These victims usually have to overcome a battery of policy-driven restrictions before gaining damages.

Current Criteria for Determination of Secondary Victims- Control Mechanisms

When the law developed to recognise the possibility of claims by secondary victims, sudden shock on witnessing the damage-causing event was incorporated as a key element of the claim. The need to link the relevant psychiatric injury to a sudden shock was implicitly affirmed in the seminal secondary victim case of *McLoughlin v. O'Brian*¹¹, in which the House of Lords allowed a claim for psychiatric harm brought by a woman who saw her family (including the dead body one of her children) in hospital after an accident caused by the defendant's negligent driving. In this, the plaintiff was not present in close proximity of the accident but sustained

⁹Supra note 2.

¹⁰Infra note 12.

¹¹McLoughlin v. O'Brian [1983] 1 A.C. 410 (H.L.).

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nervous shock when she was told about the accident. In holding the defendants liable the House of Lords extended the law to cover a situation where the plaintiff had not seen or heard the accident itself but had come upon its immediate aftermath. Lord Wilberforce identified three factors that would need to be identified in every case:

- the class of persons whose claims should be recognized;
- the proximity of such persons to accident; and
- the means by which psychiatric illness was caused.

These three control mechanisms suggested by Lord Wilberforce were subsequently reformulated and applied by a unanimous house of Lords.

In the subsequent landmark case of *Alcock v. Chief of Yorkshire Police*¹², which involved a number of secondary victim claims from the events of the Hillsborough Football Stadium disaster, the House of Lords confirmed the application of the McLoughlin proximities, while confining their ambit through a number of more specific requirements, now widely referred to as Alcock's "control mechanisms".

A series of decisions have set limits, often referred to as 'control mechanisms', on who may claim as a secondary victim of psychiatric harm, which limit the potential liability for psychiatric harm¹³.

A plaintiff falling in the category of secondary victim can be allowed damages if the following conditions known as 'control mechanism' are satisfied. To succeed in a claim for psychological harm as a secondary victim however, it ultimately has to be shown that on the basis of:

1. The relationship between the primary and secondary victim, which requires to be one involving close ties of love and affection.
2. The proximity of the secondary victim to the primary victim's accident, which requires to be one sufficiently proximate in both time and space.
3. The manner in which the primary victim's accident has been communicated to or perceived by the secondary victim, that the pursuer "could not be expected to exhibit the normal fortitude to be expected of others not in such a relationship", therefore rendering any psychological harm thereto a reasonably foreseeable consequence of the defender's negligence (Robertson).

¹²*Supra* note 2.

¹³ Page v. Smith, [1996]AC155.

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IMPLICATION OF THE SUDDEN SHOCK REQUIREMENTS

Lord Oliver observed that there had been no successful claim in which¹⁴:

“[T]he shock sustained by the [claimant] was not either contemporaneous with the event or separated from it by a relatively short interval of time. The necessary element of proximity... is furnished, at least in part, by both physical and temporal propinquity and also by the sudden and direct visual impression... of actually witnessing the event or its immediate aftermath.”

The application of these “control mechanisms” has resulted in a very strict and limited interpretation of cases and has been an impediment for many in receiving justice. Continued insistence on sudden impact is doubly regrettable in that courts adopted Lord Ackner's narrow definition of shock in *Alcock*, as 'the sudden appreciation by sight or sound of a horrifying event, which violently agitate mind'.

The effect of the decision in *White's* case is to finally replace the test of foreseeability of psychiatric injury to a person of normal fortitude which started from *Hay or (Bourhill) v. Young*¹⁵, by the test of foreseeability of personal injury in case of primary victims and by the control mechanisms mentioned above in case of secondary victims. In the case of *Taylor V A Novo*¹⁶, a mother suffered injury because of the negligence of a co-worker when a stack of boards fell on her. Although she made a good recovery, she unexpectedly died. Her daughter did not witness her mother's accident, but suffered post-traumatic stress disorder at the time of her mother's death. *Judge Dyson* held the sustaining of injuries and the woman's subsequent were distinct events in themselves.

Accordingly, a plaintiff who becomes mentally ill from watching the deteriorating health of a close relative (caused, for example, by the hazardous fumes the latter was negligently exposed to at work), would therefore be left without a remedy notwithstanding contemporaneous perception of the injury.¹⁷

For example, in the case of *Taylorson v. Shieldness Produce Ltd.*¹⁸, the Court of Appeal refused a claim by parents who has to witness the death of their son over two days. Another

¹⁴*Supra* note 2.

¹⁵ *Hay or (Bourhill) v. Young* (1942) 2 All ER 396 : (1943) AC 92 : 167 LT 261(HL).

¹⁶ *Taylor v. A Novo* (2013) EWCA Civ 194.

¹⁷ *Kralj v McGrath* [1986] 1 All ER 54.

¹⁸ *Taylorson v. Shieldness Produce Ltd.* [1994] EWCA Civ 13.

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case is that of *Galli-Atkinson v. Seghal*¹⁹, in which the Court took a rather flexible approach of interpretation in granting relief to a mother who went looking for her daughter and later saw her body in the mortuary, which is tangential to the judgement in *Taylor v. A Novo (UK) Ltd.*²⁰, where the Court disallowed a claim by a woman who suffered psychiatric injury on watching her mother collapse and die 3 weeks after an accident—on the grounds that the relationship between the parties was not sufficiently proximate as the plaintiff was not present at the scene of her mother's accident or its immediate aftermath. This demonstrates the need to reinforce the link between spatial and temporal link between damage-causing event and the shock.

Another example of taking a rigid approach is case of *S v First-tier Tribunal (Social Entitlement Chamber)*²¹ in which the First-Tier Tribunal dismissed the appeal of psychiatric harm of the husband of a woman who was assaulted by her neighbour at a gunpoint. The Court of Appeal, then, upheld the decision and held that- 'If the "occasion" in question is extended to later consequences, the application of the term "immediate aftermath" becomes strained and artificial, and the scope of the Scheme as it applies to secondary victims becomes much broader and more uncertain than is suggested by the plain words "witnessed and was present on the occasion".'

However, in *Walters v. North Glamorgan NHS Trust*²², the Court of Appeal allowed a mother's claim for a pathological grief reaction with respect to a 36-hour period during which she watched her son die as a result of the hospital's negligence.

In *Frost v South Yorkshire Police*²³, Henry L.J., purporting not to be at odds with Lord Ackner, said of the experience undergone by police officers at Hillsborough that "the length of the exposure and the circumstances of the exposure was the trauma that caused the psychiatric illnesses, rather than any sudden and immediate 'shock'". "What matters", he added, "is not the label on the trigger for psychiatric damage, but the fact and foreseeability of psychiatric damage, by whatever process".

One can see, then, how a strict application of that requirement is essential for its continued existence and how the lawmaker's choice is limited to applying it stringently, or not at all. In real terms, its extension to include 'immediate aftermath' cases as defined, but to exclude all others, is less the product of any spurious justification on grounds of causation, than of an attempt to mitigate the blanket rejection of what can be significantly more meritorious claims.

¹⁹Galli-Atkinson v. Seghal [2003] EWCA Civ 697.

²⁰Taylor v. A Novo (UK) Ltd. [2013] EWCA Civ 194.

²¹ S v First-tier Tribunal (Social Entitlement Chamber [2013] EWCA Civ 1040.

²² Walters v. North Glamorgan NHS Trust [2002] EWCA 1792

²³ Frost v South Yorkshire Police [1997] 3 W.L.R. 1194, at pp. 1208-1209.

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The extension can also be looked at as reintroducing, by the back door, a degree of flexibility into the law. Far from being the only cause of psychiatric disorder, a single, sudden event is not even the most common²⁴.

The approach of Australian Courts have been much more flexible in comparison to English Courts. This principle was expressed by Brennan J. in *Jaensch v. Coffey*²⁵ in the following way: “A plaintiff may recover only if the psychiatric illness is the result of physical injury negligently inflicted on him by the defendant or if it is induced by 'shock.' Psychiatric illness caused in other ways attracts no damages, though it is reasonably foreseeable that psychiatric illness might be a consequence of the defendant's carelessness.”

The mother's claim in *Pratt & Goldsmith v. Pratt*²⁶, after tending to her daughter who was involved in a road accident due to defendant's negligence, failed not because the mother had not perceived the distressing phenomenon (indeed, she rendered constant attention to her daughter and granddaughter, at least in what might be described as the immediate aftermath of the accident) but because the psychological impact which manifested itself in symptoms of a psychiatric illness occurred at a time very far removed from the time of the accident.

It was, however, recognised that this parameter would be an impediment in recovering damages by some very well-deserved plaintiffs.

In the ground-breaking decision of *Tame v. New South Wales*²⁷; *Annetts v. Australian Stations Pty Limited*²⁸, collectively referred to as Tame/Annetts, the High Court of Australia reconsidered the law with respect to psychiatric harm. In the former case, Annetts went missing and died on a cattle station of dehydration in the Kimberley and his parents brought an action against the employers due to suffering nervous shock as a result. In *Tame*, Mrs. Tame became obsessed about a clerical error by a police officer in measuring alcohol levels in blood and, ultimately, suffered psychotic depression. It was unanimously held by a full Bench in Australian High Court that to treat those who directly perceive some distressing phenomenon or its aftermath as the only persons who may recover for negligently caused psychiatric harm is productive of anomalous and illogical consequences, even though such factual considerations may be relevant.

²⁴S. Wessely, the Report, para 5.29(2), n 56.

²⁵*Jaensch v. Coffey* (1984) 54 A.L.R. 417, 429.

²⁶ *Pratt & Goldsmith v. Pratt* [1975] V.R. 378.

²⁷ *Tame v. New South Wales* (2002) 211 C.L.R.

²⁸ *Annetts v. Australian Stations Pty Limited* 317 (H.C.A.).

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EVOLUTION OF THE SPATIAL CRITERIA: WHO CAN SUE ?

'Zone of danger' refers to the Zone of danger is defined as the area within which one is in actual physical peril from the negligent conduct of another person. In many cases, compensation was denied on the ground of the claimant not being inside the zone of danger. This criteria was first undone in the USA in the 1968 case of *Dillon v Legg*²⁹. In this case a small girl was mortally injured by a car, the sister of victim was also hit by driver but mother was unharmed. Both mother and sister sued the driver, sister was in zone of danger, mother wasn't. Many most of the states have opted out of the rule of zone of danger—which excludes secondary victims completely, and have moved one to control mechanisms. However, it is to note that control mechanisms are not without imperfections in this area too.

Invidious distinctions are inevitable when the 'immediate' aftermath is treated in isolation, as a crude notion of temporal proximity. A claimant can succeed because they experienced shock only two hours after the crash, whereas a spectator at Hillsborough who identified a victim at the mortuary eight hours after the disaster would almost certainly have failed on that ground alone. A mother affected in precisely the same way as the abovementioned claimant, but too far away or too overcome to reach the hospital quickly would likewise fail.³⁰

At first, it was thought that a claimant could only succeed in a claim if they were within the range of physical impact as in *Dulieu v White*³¹. In other words, only the 'primary' victim could sue; being the person who would foreseeably suffer physical damage. This judgement created a restrictive definition of victims where only those who are in physical proximity to the zone of danger are allowed to recover damages. However, this was later extended to include people who saw or heard the accident, as established in *Hambrook v Stokes*.³² In this case a woman had suffered psychiatric harm after watched a lorry swerve out of control down a hill where her children were known to be. Although she was a non-participant in the event she had experienced direct shock as a direct result of fear for her children and was able to recover her claim. Despite the creation of secondary victims, the test for primary victims remained the same, involving foreseeability of injury and being in the zone of danger, whereas now secondary victims had a greater hurdle to overcome as complex applications of legal rules increased the problems within such cases. More recently, we have seen judges respond to the "floodgates" problem by limiting the scope of liability within psychiatric harm cases by

²⁹*Dillon v. Legg* (1968) 29 ALR 3d 1316.

³⁰F. A. Trindade, 'The Principles Governing the Recovery of Damages for Negligently Caused Nervous Shock' (1986) 45 CLJ 476, 490-3.

³¹*Dulieu v. White* [1901] 2 K.B. 669 (K.B.D.).

³²*Hambrook v. Stokes* [1925] 1 K.B. 141 (C.A.).

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restricting the concept of foreseeability and making proximity one of the crucial aspects when determining whether a duty of care is owed.

As the number of claims increased and the case law evolved we saw the secondary victim distinctions becoming more apparent. A secondary victim was a person who was not at risk of physical injury but suffers psychiatric injury as a result of witnessing someone being harmed. This was the issue at hand in *Bourhill v Young*³³, where there was an attempt to expand the established zone of danger from previous cases, and prove that a duty of care is still owed to a claimant who is outside this zone of danger, but is still within the reasonable area of shock.

Furthermore, in the case of *Mclaughlin v O'Brian*³⁴ the law moved in the direction of a test of 'reasonable foreseeability', which included immediate aftermath of the accident, but not necessarily present at the scene. Lord Wilberforce stated that there were three elements to a claim. The first element was the relationship of the person who could sue. The closer the emotional tie the greater the claim for consideration. The second element to be satisfied was the claimant had to be proximate to the accident, which must be close both in time and space, though this could include persons who did not witness the accident but came upon the aftermath of events. Shock resulting from being told by a third party would not be sufficient.

In *Alcock*, Their Lordship held that, to succeed as secondary victim, a plaintiff had to show a high degree of proximity to the accident in time and space. Thus, the plaintiff must normally witness the accident as actually occurs, or must come upon its immediate aftermath within a very small space.

Lord Oliver has observed that the expressions of "reasonable foreseeability" and "proximity" and the idea "just and reasonable" are 'merely facets of the same thing, as in some cases the degree of foreseeability is such that it is from that alone that the requisite proximity can be deduced, while in others the absence of that essential relationship can most rationally be attributed simply to the court's view that it would not be fair, just and reasonable to hold the defendant accountable'.

The concept of this physical proximity is an artificial one and usually depends on the court's perception of what is the reasonable area for the imposition of liability.

Thus, it can be said that the zone of impact is rather vague and fraught with difficulties in causal terms and capable of producing over-extensive liabilities. Thus, it cannot be limited if the courts want to provide relief to majority of the secondary victims who, despite not

³³Supra note 11.

³⁴Supra note 7.

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witnessing the accident, suffer from psychiatric harm on say, listening about the news of accidents involving their loved ones. The evaluation needs to be on a case to case basis, in reference to the facts of the situation under question and instead of 'physical proximity' the consideration should be on the basis of 'causal proximity', viz, the directness of the relationship between the particular act or cause of action and the injury sustained.

CONCLUSION

As exemplified above with the help of case laws, the answer to the first question is affirmative and that to the second question is negative.

What is most indefensible about the current rules, and most calculated to bring the law into disrepute, is that by treating contingent features—such as sudden shock, spatial proximity, time and means of perception—as determinants, they encourage invidious distinctions which defy medical understanding of how psychiatric conditions arise.

Social attitudes have undergone massive changes since the first nervous shock case was decided at the beginning of the 20th century. In contemporary society, we recognise the many genuine manifestations of mental illness and—at least in theory—no longer treat with suspicion and insensitivity those who suffer from psychiatric conditions. In consequence, all jurisdictions nowadays accept the validity of need for, actions in tort to recover damages for negligently-inflicted psychiatric injury. However, the immediate aftermath requirement is unsatisfactory. Based on the shakiest of legal and medical foundations, it places an artificial barrier in the path of secondary who seek damages for psychiatric injury. Even if one accepts the need for where such actions are concerned, the use of such an arbitrary and inflexible is not an acceptable way to regulate the number of potential claims. It may be seen as a superfluous criterion, adding not value to a more open-ended determination of duty as a fun reasonable foreseeability, "sufficient proximity" and that w "fair, just and reasonable". However, it is also true that the removal of the shock requirement is viewed with relative equanimity, as not constituting a floodgates problem in its central and most threatening form-- a proliferation of claims arising out of a single event.

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