39/74

SUPREME COURT OF VICTORIA — FULL COURT

PRATT and GOLDSMITH v PRATT

Adam, Starke and Crockett JJ

14-16 August, 17 September 1974 — [1975] VicRp 37; [1975] VR 378

CIVIL PROCEEDINGS – MOTOR VEHICLE COLLISION – MOTOR VEHICLE COLLIDED WITH A POLE – DRIVER'S WIFE A PASSENGER RECEIVED BOTH PHYSICAL AND MENTAL INJURIES – WIFE PREGNANT GAVE BIRTH TO CHILD – PASSENGER'S MOTHER REQUIRED TO LOOK AFTER HER DAUGHTER – LOST INCOME AND TRAVELLING EXPENSES INCURRED BY MOTHER AS A RESULT – WHETHER MOTHER ENTITLED TO BE COMPENSATED FOR THE LOSS.

HELD:

1. While reasonable foreseeability is essential to any liability for negligence, such foreseeability by itself does not in all situations impose a duty of care. In the case of the driver of a vehicle on the highway, his duty does not, save in exceptional circumstances, extend beyond road users in the neighbourhood or persons who are themselves on or who have property adjacent to the roadway. Policy and reasons of humanity have extended by way of exceptional cases the primary duty to take care to those injured in the course of rescue attempts or the like.

2. Likewise, these considerations have dictated that relatives of an accident victim suffering harm by reason of nervous shock should have a cause of action if their shock not only is foreseeable by the tortfeasor, but also the relative is in sufficient proximity to the tortfeasor's carelessness.

3. But beyond this the law has not yet gone nor is it for the Court to attempt to take it. It still remains true that a negligent motorist who caused great facial disfigurement to a pedestrian could not be made liable to every person who throughout the pedestrian's life experienced shock or nausea on seeing his disfigurement, although such shock or nausea might have been reasonably foreseeable.

4. Accordingly, the mother had no cause of action in respect of the primary claim nor in respect of the claim made for the economic loss in the form of travelling expenses and lost income caused by the attention voluntarily given the daughter.

ADAM and CROCKETT JJ: On 28 March 1969, one Pratt (hereafter called the son-in-law) was the driver on a highway of a car that came into collision with a pole. Pratt's wife (hereafter called the daughter) was a passenger in the car at the time. She was then pregnant. As a result of the collision she received grave injuries both of a physical and mental nature, severely incapacitating her. She subsequently gave birth to a daughter (hereafter called the infant). The infant is said to suffer disability caused by the injuries received by her mother. For these injuries the daughter and the infant, who are the first and second named plaintiffs respectively, commenced proceedings against the son-in-law to recover damages. The action is framed in negligence.

There is also a third plaintiff joined in the action. She is the first plaintiff's mother (hereafter called the mother). She, too, claims damages in negligence against her son-in-law. Her claim is pleaded in this way: as the mother and only relative of the first plaintiff to whom the first plaintiff could turn, she had a moral and maternal duty to care for her daughter in her severely incapacitated state. The provision of such care and the rendering of services for her, especially after the birth of the infant, were essential when the daughter was not in hospital. That care and those services were provided gratuitously by her without any agreement being made for any future payment or recompense. Prior to the need to assist her daughter arising, the mother conducted a hairdressing business of which she was the proprietress.

The facts so far recited emerge clearly enough from the pleadings. What is perhaps not so clear from the pleadings is the nature of the personal injury alleged to have been suffered by the mother and of the loss occasioned to her, for which she claims damages. The claim in respect of such matters is embodied in par. 13 of the statement of claim as twice amended with leave. It

reads:

> "13. IN consequence of the rendering of the services referred to in par. 11 hereof the third named plaintiff's health has deteriorated and she has suffered and will in the future suffer loss and damage. "PARTICULARS OF ILL HEALTH "Nervous shock resulting in development of anxiety, nervous tension, nervous exhaustion, low blood pressure and aggravation of asthmatic condition.
>
> "PARTICULARS OF LOSS AND DAMAGE
>
> (a) $252 for travelling expenses; and
>
> (b) $3,000 for loss of earnings.
>
> "The third named plaintiff is continuing to incur travelling expenses and loss of income."
>
> The services referred to in par. 11 were "services to and for the first and second named plaintiffs... necessary by reason of the effects of such injuries upon them."

Thus on the face of the pleading it is not clear whether:

> (a) The ill health alleged to have been suffered by the mother arose from the physical and mental strain placed upon her by the work load created by rendering constant and demanding services to her injured daughter and granddaughter, or was the result of a nervous shock suffered by witnessing the physical and mental wreck to which the daughter had been reduced by her own injuries.
>
> (b) The item of special damage consisting of "travelling expenses" was incurred by the mother in order to travel to and from her daughter in order to render assistance, or was connected with the mother's own injuries, e.g. cost of trips made to obtain medical attention for herself.
>
> (c) The "loss of earnings" sprang from a neglect of the mother's business due to time devoted to her daughter's welfare, or arose from an inability to work caused by the mother's own ill health, or both.

Paragraph 12A of the statement of claim alleges that "the loss and damage suffered by the mother in consequence of the defendant negligently injuring his wife should have been reasonably foreseen by him".

The defendant by his defence has asserted that the facts set out in the statement of claim disclose no cause of action in law upon which the mother can found her claim. A similar defence was pleaded in answer to the infant's claim. That, however, was abandoned following the decision of this Court in *Watt v Rama* [1972] VicRp 40; [1972] VR 353. The infant's claim however, has not yet been heard. But the claim of the daughter was, with the consent of the parties, litigated independently of the claim of the other plaintiffs. In this matter negligence was admitted. The only issue contested was that of damages. The hearing occupied several days and the action was then compromised.

In the meantime the defendant, despite the unsatisfactory form of the pleading to which we have referred, had sought and obtained an order that the point of law raised by his defence be set down and be disposed of before trial of the action pursuant to O25, r2. The point of law was duly set down and came on before Gillard J who, at the request of the plaintiff, reserved the point for consideration by the Full Court. Accordingly, it now falls for disposal by this Court.

As it appeared that the form of the pleading to which reference has already been made robbed the pleaded facts of the degree of certainty essential for adoption of the procedure prescribed by O25, r2 and that a fuller understanding of those facts might be of critical significance on the point of law to be resolved, counsel concurred in making an informal supplementary statement of facts explanatory of the pleadings. Such a course, it seems, is permissible in this type of proceeding: *Noall v Middleton* [1961] VicRp 43; [1961] VR 285.

The supplementary statement was to the effect that:

> (a) The mother's personal injuries consisted entirely of nervous shock and the consequences thereof induced by observation of the pitiable state to which the daughter had been reduced by her injuries.

(b) The "travelling expenses" related solely to costs of travel associated with the rendering of assistance to the daughter.

(c) Some "loss of earnings" was referable to assistance given to the daughter and the balance was due to the mother's own ill health having incapacitated her from remunerative employment.

However, certain other crucial facts not pleaded were not subject of any agreement. These included answers to the questions:

(a) When and where first after the accident did the mother tend her daughter?

(b) When first after

(i) the accident, and

(ii) first tending the daughter did the mother sustain a psychological impact which manifested itself in the symptoms of nervous shock?

We have entertained considerable doubt whether, because of the imprecision of the pleaded facts that have been alleged as constituting the alleged cause of action, at least so far as the mother's primary cause of action based upon nervous shock is concerned, we should entertain the present reference. On balance, however, having regard to the course the matter took during argument, and while not to be taken as establishing any precedent, we have concluded that the appropriate course is for us to determine as best we can the question now before this Court. The argument proceeded on the basis that, although the seriousness of the daughter's injuries was immediately known and their irreparable nature appreciated soon afterwards, it was only after the passage of some weeks, if not months, that a medically recognizable condition of some mental origin affected the mother, and, perhaps more importantly, that it was only after a similarly substantial period that there first occurred the events that were causally connected with the mother's subsequent neurasthenic condition.

It is on this footing that we have proceeded to determine the point of law. It will be seen that the mother makes two separate claims in respect of which quite different considerations may apply in determining whether she has a recognizable cause of action. The primary claim is for personal injury referred to as "mental shock" and the injurious effects thereof with consequential financial loss. The secondary, and smaller claim is for economic loss incurred as a result of caring for her crippled daughter. This consists of a small sum for travelling expenses, and some undefined (but relatively small) loss of earnings.

The defendant's submission was that the duty of care owed by him as the driver of a vehicle on the highway was only to persons who might foreseeably suffer direct personal injury of a physical or mental kind as a result of their physical proximity to the careless conduct or to the physical circumstances arising out of such negligent conduct. The third named plaintiff has plainly suffered no such direct injury. Her "mental shock" was clearly very distant both in the geographical and the temporal sense from the relevant careless conduct (the collision with the pole) and from any physical circumstances arising from that conduct (injury to the daughter). The mother was not at the scene of the accident and her mental shock did not originate until long after the mother had first seen her daughter's pitiable condition.

As every lawyer knows, Lord Atkin said in *Donoghue v Stevenson* [1932] UKHL 100; [1932] AC 562; [1932] All ER 1 at p11; [1932] SC (HL) 31; [1932] SLT 317; (1932) 37 Com Cas 350; (1932) 48 TLR 494; (1932) 147 LT 281; [1932] Sol Jo 396; (1932) 101 LJPC 119; (1933) 4 DLR 337; 533 CA 47; [1932] SC 31; [1932] WN 139. "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour." Neighbours, he defined as being "persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

This test of reasonable foresight had for long been limited to the question of culpability as distinct from compensation (*Weld-Blundell v Stephens* [1920] AC 956 at p984; [1920] All ER 32; 21 P 72; LR 6 CP 14). Thus if a duty of care was owed and broken, damage was not considered

so remote as to be irrecoverable, if directly caused by the breach, whether reasonably foreseeable or not. (In *Re Polemis and Furness, Withy and Co Ltd* [1921] 3 KB 560; [1921] All ER 40.) This proposition was revealed as heresy in *The Wagon Mound (No.1)* [1961] UKPC 1; [1961] AC 388; [1961] 1 All ER 404; [1961] 2 WLR 126. Even before such revelation occurred courts of great authority had for obvious policy reasons been qualifying in particular situations the application of reasonable foresight as a general criterion for determining the existence of a duty of care.

Thus in *Bourhill v Young* [1942] UKHL 5; [1943] AC 92; [1942] 2 All ER 396; [1942] SC (HL) 78; [1943] SLT 105, the House of Lords expressed the view that the driver of a vehicle should not be treated as reasonably foreseeing that a person who suffered injury as a result of his carelessness would do so, unless the injured person was "within the area of potential danger" created by such carelessness. Lord Russell said (at AC p102 and at All ER pp401-402):

> "The duty of the driver of a motor vehicle in a highway has often been stated in general terms which, if literally interpreted, would include persons to whom the driver would obviously owe no duty at all, as for instance, persons using the highway but who having passed the vehicle are well on their way in the opposite direction. I think the true view was correctly expressed by Lord Jamieson in the present case when he said: 'No doubt the duty of a driver is to use proper care not to cause injury to persons on the highway or in premises adjoining the highway, but it appears to me that his duty is limited to persons so placed that they may reasonably be expected to be injured by the omission to take such care.'"

Then in *Best v Samuel Fox and Co Ltd* (1951) 2 KB 639; [1952] AC 716; [1952] 2 All ER 394 Lord Goddard emphasized the "proximity" limit to the scope of such duty in these terms at (1 AC pp730-1 and at All ER p398):

> "Negligence, if it is to give rise to legal liability, must result from a breach of duty owed to a person who thereby suffers damage. But what duty was owed here by the employers of the husband to the wife? If she has an action in this case so must the wife of any man run over in the street by a careless driver. The duty there which gives rise to the husband's cause of action arises out of what may for convenience be called proximity; the driver owes a duty not to injure other persons who are using the road on which he is driving. He owes no duty to persons not present except to those whose property may be on or adjoining the road which it is his duty to avoid injuring. It may often happen that an injury to one person may affect another; a servant whose master is killed or permanently injured may lose his employment, it may be of long-standing, and the misfortune may come when he is of an age when it would be very difficult for him to obtain other work, but no one would suggest that he thereby acquires a right of action against the wrongdoer. Damages for personal injury can seldom be a perfect compensation, but where injury has been caused to a husband or father it has never been the case that his wife or children whose state of living or education may have radically to be curtailed have on that account a right of action other than that which, in the case of death, the *Fatal Accidents Act 1846*, has given."

With this opinion both Lord Oaksey and Lord Reid agreed. These views were given application by Diplock J (as he then was) in *Kirkham v Boughey* [1958] 2 QB 338; [1957] 3 All ER 153. In that case a husband, acting reasonably, determined to stay in England because his wife had been seriously injured by a negligent motorist, was in hospital in England and unable to look after their children. But for her injuries the husband would have resumed his employment in Africa. His decision, which arose from anxiety about his wife and the need to care for the children, resulted in his sustaining a substantial wage loss as his wages in England were much less than those to be earned in Africa. His claim for that loss was rejected. His Lordship said (at QB pp341-2 and at All ER p155):

> "Mr Harington has argued that the circle which encloses those to whom the driver owes a duty to take care is not a mere geographical circle, but extends to the family circle of those who find themselves within the geographical circle, and he does not shrink from the proposition that if a daughter or a sister gives up lucrative employment to nurse an injured father or brother she would have a cause of action against the driver provided only that the court was satisfied that in the circumstances it was reasonable for her so to do. This extensive proposition, not limited to any special relationship which may in law exist between husband and wife, is unsupported by authority and in direct conflict with the *dicta* and, possibly, the *ratio decidendi* in *Best v Samuel Fox and Co Ltd* (1951) 2 KB 639; [1952] AC 716; [1952] 2 All ER 394. However commendable may be the sacrifice made by the relative of the injured person, she has, in my opinion, no remedy in law against the driver of the vehicle which caused the injuries, because the driver owes no duty to her."

The historical development of the law with the consequent preservation of anomalous causes of action and obvious policy reasons, have combined to provide well defined exceptions to the general rule limiting the recovery of damage to those whose loss was suffered by reason of their physical proximity in time or place to the careless act of the tortfeasor. Examples are:

(a) The provisions of Lord Campbell's Act which, as has already been seen, were noted by Lord Goddard.

(b) The right of a husband to claim damages for loss of his wife's *consortium* suffered by him as a result of the injuries inflicted on her by a tortfeasor.

(c) The right of a master in an action *per quod servitium amisit* to recover economic loss sustained as a result of wrongful harm done to his servant. The servant may be such in fact or presumed to be such, e.g. a child.

(d) The right of a parent with a legal duty to provide care and attention for his child to recover the cost of medical attention provided pursuant to that duty when its need was occasioned by injury to the child inflicted by the wrongful act of the defendant: *Lloyd v Lewis* [1963] VicRp 43; [1963] VR 277.

The learned editor of the 15th ed. of *Salmond on Torts*, after discussing *Bourhill v Young*, *supra*, was moved to state (p275) that "the fundamental fact (is) that the question cannot be answered solely by logic and that an issue of policy is involved for which the concept of reasonable foreseeability is by itself incapable of providing a solution". With this comment Windeyer J in *Mount Isa Mines Ltd v Pusey* [1970] HCA 60; (1970) 125 CLR 383 at p396; [1971] ALR 253 at p260 agreed. Moreover, both the comment and that agreement, it is to be noted, post-dated *The Wagon Mound (No. 1) supra*, an observation that brings us to the submissions made on behalf of the third-named plaintiff.

If the mother's primary claim presently before us had arisen for consideration before 1961 it was conceded by the plaintiff that the authorities would have made success for the defendant inevitable. But it was said that the decision in *The Wagon Mound (No. 1)*, *supra*, changed the law of negligence by introducing the test of foreseeability as a general and the sole test for determining both culpability and compensation. The affirmation of "foreseeability" as a single test both for the existence of liability in negligence and for the extent of recoverable damage has had the effect, so it is said, of removing the gloss or limitation that previously restricted the duty owed by the driver of a vehicle on a highway to those in proximity to his careless act.

Additional support for this proposition was sought to be gained from an examination of the cases dealing specifically with nervous shock. Illness arising from infliction of a mental disorder has, of course, long been recognized as a compensable form of injurious harm. But where that harm was suffered by some third person the development of the law to allow a remedy to be extended to the sufferer has been slow and cautious. At first there was no remedy (*Victorian Railways Commissioners v Coultas* (1888) 13 AC 222; 37 WR 129; 52 JP 500; 58 LT 390; 57 LJPC 69; 4 TLR 286; 8 Rul Cas 405). Then an action was allowed if the shock suffered was the result of the sight of the accident provided that the plaintiff was a close relation of the victim (*Hambrook v Stokes Bros* [1925] 1 KB 141; [1924] All ER 110; 132 LT 707). Next, it was sufficient if the relations saw, not the accident itself, but its aftermath (*Owens v Liverpool Corporation* [1939] 1 KB 394; [1938] 4 All ER 727; 55 TLR 246; *Benson v Lee* [1972] VicRp 103; [1972] VR 879).

Just how amorphous is this branch of the law was illustrated by the decision in *Chester v Waverley Corporation* [1939] HCA 25; (1939) 62 CLR 1; [1939] ALR 294. A mother suffering mental shock at the sight of the removal of her dead child from a water-filled trench was denied an action against the corporation whose negligence caused the child's death. But, distinguishing that case on its facts, the High Court had no difficulty in *Mount Isa Mines Ltd v Pusey*, *supra*, in holding that an action lay in respect of nervous shock suffered by a man who not only did not witness the accident but was only a workmate of the victim whom he saw hideously burnt when going to his aid shortly after the occurrence of the accident. Relevant to the test of duty was, of course, foreseeability. But merely to answer in the affirmative the question "was it foreseeable by a negligent employer that the plaintiff would probably seek to assist an injured workmate and suffer some kind of mental disorder at the sight of the victim's ghastly injuries?" was not, be it noted, the simple solution adopted to solve the issue that that case presented.

The Court was concerned to determine whether, despite foreseeability, the duty embraced non-relatives: see, e.g. per Windeyer J at CLR p403 and at ALR pp264-265. Such an enquiry would have been superfluous if the third named plaintiff's contention in the present case was valid. And, so too would have the significant remark of McTiernan J (at CLR p391 and at ALR p257) that the onset of the shock sustained by the plaintiff, Pusey, was "fairly contemporaneous with the casualty". The quoted words were taken from the judgment of Evatt J in *Chester v Waverley Corporation*, *supra*, at CLR p31 and at ALR p305 when the learned judge, though expressing by his dissent his opinion that the plaintiff was on the facts entitled to recover damages, stated that contemporaneity was necessary for liability. Moreover, it is to be noticed in *Pusey's Case* that, although the manifestation of the plaintiff's psychological disturbance did not appear until four weeks later (he appearing to be normal in the meantime), the onset of the plaintiff's condition was held to be directly due to his "seeing and assisting" the injured workmate at the scene of the accident.

In our view, it is still the law that, while reasonable foreseeability is essential to any liability for negligence, such foreseeability by itself does not in all situations impose a duty of care. In the case of the driver of a vehicle on the highway, his duty does not, save in exceptional circumstances, extend beyond road users in the neighbourhood or persons who are themselves on or who have property adjacent to the roadway. Policy and reasons of humanity have extended by way of exceptional cases the primary duty to take care to those injured in the course of rescue attempts or the like: *Chapman v Hearse* [1961] HCA 46; (1961) 106 CLR 112; [1962] ALR 379; *Chadwick v British Railways Board* [1967] 1 WLR 912; [1967] 2 All ER 945; *The Law of Torts* 4th ed. (1971) Fleming p157. Likewise, these considerations have dictated that relatives of an accident victim suffering harm by reason of nervous shock should have a cause of action if their shock not only is foreseeable by the tortfeasor, but also the relative is in sufficient proximity to the tortfeasor's carelessness. (Cf. per Lush J *Benson v Lee*, *supra*, at p880.) But beyond this the law has not yet gone nor do we think it is for us to attempt to take it.

In our opinion, it still remains true as Rich J said in *Chester v Waverley Corporation*, *supra*, at CLR p11 and at ALR p297 that "a negligent motorist who caused great facial disfigurement to a pedestrian could not be made liable to every person who throughout the pedestrian's life experienced shock or nausea on seeing his disfigurement", although such shock or nausea might have been reasonably foreseeable. See also, *The Negligent Infliction of Nervous Shock in Road and Industrial Accidents* (1974) 48 ALJ 196.

We do not think there is anything in the opinion at which we have arrived that is inconsistent with what appears in *Dorset Yacht Co Ltd v Home Office* [1970] UKHL 2; [1970] AC 1004; [1970] 2 All ER 294; [1970] 2 WLR 1140; [1970] 1 Lloyds Rep 453; 114 Sol Jo 375 upon which counsel for the plaintiff placed considerable reliance. Of course, in that case the question whether the harm suffered was foreseeable was much debated. But that is not to say that any harm resulting from the depredations of escapees that is foreseeable gives rise to actionable negligence although the escape is due to carelessness. Each of the law lords who formed the majority made it clear that it was injury that was proximate in time and/or place to the careless act that alone, if foreseeable, was capable of giving rise to a duty to take care. After all, the facts of that case were that the boys who escaped did so from an island and in so doing damaged yachts used in an attempt to make good the escape, these vessels being in an anchorage adjacent to the island.

Lord Reid spoke of the need for responsible authorities to "weigh on the one hand the public interest of protecting neighbours and their property from the depredations of escaping trainees..." (AC p1031 and at All ER p301). And we need scarcely add that Lord Reid used the term "neighbour" in the popular, not the Atkinian sense. Lord Morris referred to "The possibilities of damage being done to one of the nearby yachts" (AC p1034 and at All ER p303). Lord Pearson left no doubt as to his view. He said, "It seems clear that there was sufficient proximity: there was geographical proximity and it was foreseeable that the damage was likely to occur unless some care was taken to prevent it" (AC pp1054-5 and at All ER p321). Finally, Lord Diplock at AC p1070 and at All ER p334, observed:

> "What distinguishes a Borstal trainee who has escaped from one who has been duly released from custody is his liability to recapture, and the distinctive added risk which is a reasonably foreseeable consequence of a failure to exercise due care in preventing him from escaping is the likelihood that in order to elude pursuit immediately upon the discovery of his absence the escaping trainee may

> steal or appropriate and damage property which is situated in the vicinity of the place of detention from which he has escaped."

An illuminating discussion of this case, particularly in relation to the question of "policy", may be found in an article, *The Duty of Care In Negligence* (1971) 34 Mod LR 394 esp. at pp406-9.

We would add that an analysis of the authorities very recently led Gillard J to the same conclusion as that to which we have come: *Watt v Rama* [1972] VicRp 40; [1972] VR 353 at pp364 et seq. Similarly, Burbury CJ in *Storm v Geeves* [1965] Tas SR 252 at p264, after an elaborate review of the authorities dealing with nervous shock, formulated what he considered to be the essential question in these terms:

> "Whether in the facts of the particular case it should have reasonably been foreseen that there would be a series or conjunction of events or concomitant circumstances which would bring to the vicinity of the accident at or about the time it occurred a person placed in such circumstances in relation to the accident or its victims as to be likely to suffer injury by shock from witnessing the accident or its immediate consequences."

Both Windeyer and Walsh JJ referred in *Mount Isa Mines Ltd v Pusey*, *supra*, to the Tasmanian case without disapproval. Finally, we may add a significant observation of Barwick CJ in *Mutual Life and Citizens' Assurance Co Ltd v Evatt* [1968] HCA 74; (1968) 122 CLR 556 at p566; [1969] ALR 3; (1968) 42 ALJR 316 to the effect that:

> "I think it is quite clear that the relationship of proximity, adequate for compensation of injury caused by physical acts or omissions, would be inappropriate in the case of utterance by way of information or advice which causes loss or damage."

In our opinion, therefore, the third named plaintiff has no cause of action in respect of that part of her claim that we have chosen to describe as the primary claim. It remains then to deal with the claim made for the economic loss in the form of travelling expenses and lost income caused by the attention voluntarily given the daughter.

This claim of the mother, being limited to economic loss sought to be recovered by a "third person" from the tortfeasor is, we think, *a fortiori*, unsustainable. There appears to be no authority establishing that pecuniary loss which is voluntarily incurred and is unassociated with personal injury to a person other than the immediate victim of a road user's tortious act, is recoverable by that other person from the road user. Indeed, it appears clear that such pecuniary loss suffered by a third person is, apart from the exceptional cases to which we have already referred, irrecoverable unless the loss has arisen as an expense which the third party was under a legal duty to discharge. See *Attorney-General for New South Wales v Perpetual Trustee Co (Ltd)* [1952] HCA 2; (1951) 85 CLR 237 at p291; [1952] ALR 125 at p157; *Commissioner for Railways (NSW) v Scott* [1959] HCA 29; (1958) 102 CLR 392 at pp408 and 462; [1959] ALR 896 at pp904 and 940. In so far as this is based on policy considerations see *Weller and Co v Foot and Mouth Disease Institute* [1966] 1 QB 569 at pp584-585; [1965] 3 All ER 560; [1965] 2 Lloyds Rep 414; [1965] 3 WLR 1082; 109 Sol Jo 702; *SCM (UK) Ltd v Whittall* [1971] 1 QB 337; [1970] 3 All ER 245 at p250; [1970] 3 WLR 694 . There is in *Gow v Motor Vehicle Insurance Trust* [1967] WAR 55 a suggestion that where a third party incurs a debt pursuant to some moral obligation to the injured victim the tortfeasor is liable to compensate that third person provided that it was reasonably foreseeable that such debt would be incurred. However, we are not persuaded that this is the law.

The only authority that would appear to provide any support for the mother's claim is *Behrens v Bertram Mills Circus Ltd* [1957] 2 QB 1; [1957] 1 All ER 583; [1957] 2 WLR 404. In that case the defendant's duty to an injured wife was owed as the keeper of a dangerous animal. The circumstances of the case in relation to the successful claim by the husband for damages for loss of income whilst staying with his injured wife were of the most exceptional character and the result reached in that case cannot, we think, be treated as laying down any general principle of application to the present case. Compare the observations of Diplock J in *Kirkham v Boughey*, *supra*, at 344-5.

The question to which we have had to address our attention is not, of course, to be confused with the quite different question when the injured victim in an accident can have included in his

recoverable damages a sum incurred, or representing a loss suffered, by a third party due to the plaintiff's injuries. There has been, particularly in recent years, a proliferation of reported cases dealing with this question. We are not required to refer to them and therefore refrain from doing so. They may be found collected in the modern texts. Perhaps the most up-to-date treatment in Australia will be found in Mr Luntz's *Assessment Of Damages For Personal Injury And Death* published this year. The most recent cases are two decisions of the Court of Appeal: *Cunningham v Harrison* [1973] 1 QB 942; [1973] 3 WLR 97; [1973] 3 All ER 463; and *Donnelly v Joyce* [1974] 1 QB 454; [1973] 3 WLR 514; [1973] 3 All ER 475, in which the judgments were delivered on successive days by different divisions of the Court of Appeal.

In the latter of those two cases the Court determined that a plaintiff was entitled to have included in his damages a sum the equivalent of the wages lost by his mother by reason of her having nursed him when recuperating from his injuries. It was said the loss suffered by the son was not the payment for nursing services but compensation for the need for those nursing services. The Court (at WLR p519; All ER at p480 and at QB p462) added that,

> "The question of legal liability to reimburse the provider may be very relevant to the question of the legal right of the provider to recover from the plaintiff. That may depend on the nature of the liability imposed by the general law or the particular agreement. But it is not a matter which affects the right of the plaintiff against the wrongdoer. The corollary of this proposition is that, unless at any rate some very special circumstances exist, such perhaps as the anomalous and anachronistic rules regarding loss of consortium or loss of services, inapplicable and irrelevant here, the provider has no direct cause of action against the wrongdoer."

The proposition contained in this last sentence is, of course, completely opposed to the contention of counsel for the mother in the present case. But we feel constrained to observe that, in rejecting that contention as we do, we are not to be taken as doing so because the denial of a right of action to a provider is to be seen as a "corollary" of the provider's loss being recoverable by him to whom service was provided. We would wish to reserve for future consideration, when the point arises, whether the injured plaintiff can, in the absence of a legal obligation to reimburse a third party for moneys expended or lost in connection with the provision of some service to the plaintiff made necessary by his injuries, recover such moneys as part of his damages—either special or general. Similarly, we would want further to consider, if and when it should become necessary to do so, whether in awarding damages a court may direct that that part of such damages as represents the value of services voluntarily provided is to be held by the plaintiff in trust for the donor of the services, as was stated in *Cunningham v Harrison*, *supra*; as to which cf. *Blundell v Musgrave* [1956] HCA 66; (1956) 96 CLR 73 at p94; [1956] ALR 1183 at pp1195-1196.

It is sufficient for the purposes of the present case for us to say no more than that for the reasons we have given the point of law should be answered as follows: the facts set out in the statement of claim do not disclose any cause of action in law upon which a claim by the third named plaintiff can be founded.

STARKE J: The first named plaintiff issued a writ claiming damages for personal injuries for the alleged negligence of the defendant in driving a motor vehicle. At the time she was pregnant. Between the time of the accident and the time the writ was issued the first named plaintiff gave birth to a child and this infant was joined as a plaintiff. Subsequently the third named plaintiff was joined and the statement of claim was twice amended. On 20 June 1972, the defendant took out a summons under O25, r2 alleging that the facts set out in the statement of claim did not disclose any cause of action in law upon which a claim by the third named plaintiff could be founded. I do not find it necessary to trace the vicissitudes of this summons. Suffice it to say that on 21 February 1974, Gillard J referred the point of law raised in the summons to the Full Court pursuant to s44 of the *Supreme Court Act* 1958, and the matter finally came before this Court.

The third named plaintiff is the mother of the first named plaintiff and the mother-in-law of the defendant. It appears from the pleadings that the first named plaintiff suffered, *inter alia*, very severe and permanent brain damage. As a result the third named plaintiff felt obliged to and has cared for and provided services for the first named plaintiff and the second named plaintiff and will be obliged to continue to provide such care and services. It further appears from the pleadings that owing to the severity of the first named plaintiff's injuries such persons as were employed to look after her could not be induced to stay. The defendant was unable to provide

proper care for his wife because he, by his employment, provided the sole source of income for the household. It further appears that there were no relatives who could provide such care and supervision. In these circumstances it was alleged that the defendant should have reasonably foreseen that if by his negligence he caused injuries to the first named plaintiff the third named plaintiff would be compelled by a moral and maternal obligation to act in the way she did, and that the third named plaintiff's health might suffer and she might incur financial loss. Finally it was alleged that as a consequence of rendering the services the third named plaintiff's health did suffer and that she sustained financial loss.

Her claim falls under two heads: firstly, damages for nervous shock resulting in the development of anxiety, nervous tension, nervous exhaustion, low blood pressure and aggravation of an asthmatic condition; secondly, damages for loss of earnings from a hairdressing business of which she was proprietoress and for travelling expenses. The case was argued on the basis that the third named plaintiff was not in the immediate area either in a geographic or temporal sense when the accident in which the first named plaintiff was injured occurred.

The determination of the second issue, that is whether the third named plaintiff was entitled to recover damages for financial loss, may in my judgment be readily determined. In *Donnelly v Joyce* [1974] 1 QB 454; [1973] 3 WLR 514; [1973] 3 All ER 475 it was held that since the loss to the plaintiff caused by the defendant's wrongdoing included the existence of the need for the nursing services provided by his mother he was entitled to recover her loss of wages as the proper and reasonable cost of supplying that need. At QB p462 and WLR pp519-520 and All ER p480, Megaw LJ delivering the judgment of the Court of Appeal said:

> "The corollary of this proposition is that, unless at any rate some very special circumstances exist such perhaps as the anomalous or anachronistic rules regarding loss of consortium or loss of services, inapplicable and irrelevant here, the provider has no direct cause of action against the wrongdoer."

In a judgment delivered the day before that judgment in *Cunningham v Harrison* [1973] 1 QB 942 at p952; [1973] 3 WLR 97 at p103; [1973] 3 All ER 463 at p469, Lord Denning MR, said, although *obiter*:

> "It seems to me that when a husband is grievously injured — and is entitled to damages — then it is only right and just that, if his wife renders services to him, instead of a nurse, he should recover compensation for the value of the services that his wife has rendered. It should not be necessary to draw up a legal agreement for them. On recovering such an amount, the husband should hold it on trust for her and pay it over to her. She cannot herself sue the wrongdoer."

It seems to me that the decision in *Donnelly v Joyce*, *supra*, as fortified by Lord Denning's *obiter* observations is directly in point on the issue of financial loss. A decision of the Court of Appeal is of course not binding on this Court, but it is very highly persuasive. In *Waghorn v Waghorn* [1942] HCA 1; (1942) 65 CLR 289 at p292; [1942] ALR 39 at p40, Rich J said:

> "In accordance with the opinion expressed in this case the Supreme Courts of the then colonies of Australia, yielded to the decisions of the English Court of Appeal in order to secure this uniformity of decision."

And lower down on the same page he said,

> "... but, as heretofore, we shall pay the highest respect to the decisions of the English Appeal Court...".

At CLR p297 and at ALR p42 Dixon J said:

> "The question how far this court should defer to the decisions of the Court of Appeal is one to which an unqualified answer can hardly be given. But I think that if this Court is convinced that a particular view of the law has been taken in England from which there is unlikely to be any departure, wisdom is on the side of the Court's applying that view to Australian conditions, notwithstanding that the Court has already decided the question in the opposite sense."

Lower down he went on,

> "But where a general proposition is involved the Court should be careful to avoid introducing into

> Australian law a principle inconsistent with that which has been accepted in England. The common law is administered in many jurisdictions, and unless each of them guards against needless divergences of decision its uniform development is imperilled."

If these are the principles the High Court adopts towards the decisions of the Court of Appeal they must apply with even greater force to this Court. I cannot find, nor can I remember, nor have I been referred to any decision of the Court of Appeal that this Court has not followed except where the High Court or the House of Lords has expressed a contrary opinion. In my judgment a decision of the Court of Appeal should be departed from in this Court only in exceptional circumstances. In the circumstances of this case I find no reason whatsoever for departing from the decision of the Court of Appeal in *Donnelly v Joyce*, *supra*. Further, if I may say so with respect, I agree with the reasons of Megaw LJ in that case. Accordingly in so far as the statement of claim relating to the third named plaintiff is based on financial loss I am of opinion that it discloses no cause of action.

It might perhaps be argued that in so far as the third named plaintiff's claim is based on nervous shock arising away from the immediate area of catastrophe it necessarily follows that if she cannot recover damages for financial loss then she cannot recover damages for nervous shock. However, I do not rest my judgment on this basis, nor do I find it necessary to examine it further. In my view it is far too late, at any rate in this Court, to suggest that nervous shock suffered by a person not actually involved in the accident and not in the disaster area either as a matter of space or time can be the basis for a claim for damages arising from the original negligent act or omission. Cf. *Hambrook v Stokes Bros* [1925] 1 KB 141; [1924] All ER 110; 132 LT 707; *Hay (or Bourhill) v Young* [1942] UKHL 5; [1943] AC 92; [1942] 2 All ER 396; [1942] SC (HL) 78; [1943] SLT 105; *Chapman v Hearse* [1961] HCA 46; (1961) 106 CLR 112; [1972] ALR 379; *Mount Isa Mines Ltd v Pusey* [1970] HCA 60; (1970) 125 CLR 383; [1971] ALR 253 and other cases.

In all these cases bar perhaps *Chapman v Hearse* the question in issue was whether the plaintiff, be he a relative or not, was within the area of potential danger. In *Chapman v Hearse*, which was a *Wrongs Act* claim, the deceased doctor arrived in a car on the scene of an accident. Later as he was attending the third party who had been injured in that accident he was struck and killed by a car driven by the defendant. Neither the interval of time between the first accident and the doctor's arrival nor the interval of time between the doctor's arrival and the second accident appear from the evidence.

However both periods of time must have been relatively short. Nevertheless if driving at any speed the doctor may have been miles away when the first accident occurred. Thus it seems to me a consideration of time as well as space is involved when considering the principle of proximity. It was suggested by Mr Meagher for the plaintiff, whose elaborate argument I found most helpful, that the line of cases establishing proximity as a basis for liability had been overthrown by *The Wagon Mound (No. 1)* [1961] UKPC 1; [1961] AC 388; [1961] 1 All ER 404; [1961] 2 WLR 126. He argued that the test and the only test was that of reasonable foreseeability, and that no longer questions of time and space have more than an incidental relevance in determining whether the harm that flowed from the initial negligent act or omission was reasonably foreseeable or not. But on examination both in *Hay (or Bourhill) v Young*, *supra*, which was decided before *The Wagon Mound (No. 1)* and in *Mount Isa Mines Ltd v Pusey*, *supra*, which was decided after it, the principle of reasonable foreseeability was discussed. Whether one regards the principle of proximity referred to above as a rule engrafted on the doctrine of reasonable foreseeability for reasons of policy or whether one regards it as a mere application of that doctrine seems to me not to be to the point. The principle of proximity in my judgment to be found in the cases I have referred to and in other cases is far too firmly entrenched to allow this Court at this time to depart from it.

Accordingly in my judgment in so far as the statement of claim relating to the third named plaintiff is based on nervous shock it also discloses no cause of action. In the result in my opinion the point of law raised by the defendant in the summons referred to this Court is a good one. Ruling accordingly.

Solicitors for the third named plaintiff: W. Carew, Hardham and Co.
Solicitors for the defendant: Read and Read.