Ann Kelly, Plaintiff, v. **Fergus Hennessy**, Defendant
[S.C. No. 159 of 1993]

Supreme Court 28th November, 1995

Negligence - Nervous shock - Plaintiff's family involved in serious car crash - Plaintiff becoming ill on hearing of accident - Condition aggravated on visiting family in hospital - Plaintiff developing post-traumatic stress disorder and depression - Whether trial judge justified in finding post-traumatic stress disorder and depression to be psychiatric illnesses - Whether plaintiff's condition attributable to shock of accident or strain of caring for family - Whether plaintiff entitled to recover damages - Whether plaintiff failed to mitigate loss by not taking in trained help.

Negligence - Nervous shock - Conditions to be satisfied by plaintiff seeking to recover damages for negligent infliction of nervous shock - Whether foreseeability of nervous shock limited by proximity of relationship, space and time.

The plaintiff's family were involved in a serious car-crash caused by the negligence of the defendant in April, 1987. The plaintiff's husband and one of her daughters suffered permanent brain damage. They recovered damages from the defendant, which included a provision for the cost of long-term care. However, the plaintiff refused to take in trained help, as she believed it would prevent her from recovering from a condition she herself had developed as a result of the crash.

The plaintiff had not been present at the crash, but had learnt of it by a telephone call. She sought damages for nervous shock from the driver of the car. The High Court found as a matter of fact that:-

(a) on hearing of the accident, the plaintiff immediately went into shock and commenced vomiting;
(b) on the way to the hospital in which her family were being treated, she became ill;
(c) her condition was gravely aggravated on seeing the state of her family;
(d) the plaintiff suffered from post-traumatic stress disorder until 1992 at the earliest and continued to suffer from depression;
(e) her refusal to take in trained help did not constitute a failure to mitigate her loss;
(f) she was unlikely to make a full recovery.

The High Court awarded damages of £35,000 for nervous shock to date, and £40,000 for the future.

On appeal, the defendant accepted that the plaintiff was suffering from post-traumatic stress disorder, but contended that it was not a psychiatric illness of the kind which gave rise to damages for nervous shock. It was also contended that the post-traumatic stress disorder and depression had been caused by the strain of caring for her family rather than shock attributable to the accident; that in refusing to take in trained

help, the plaintiff had failed to mitigate her loss; and that the defendant did not owe a duty of care to the plaintiff. The defendant also appealed against quantum.

Held by the Supreme Court (Hamilton C.J., Egan and Denham JJ.), in reducing the level of damages, 1, (*per* Hamilton C.J. and Egan J.), that in order to recover damages for nervous shock a plaintiff must establish:-

(a) that he or she actually suffered a recognisable psychiatric illness;
(b) that such illness was shock-induced;
(c) that the nervous shock was caused by the defendant's act or omission;
(d) that the nervous shock sustained was by reason of actual or apprehended physical injury to the plaintiff or a person other than the plaintiff;
(e) that the defendant owed him or her a duty of care not to cause him or her a reasonably foreseeable injury in the form of nervous shock as opposed to personal injury in general.

McLoughlin v. O'Brian [1983] 1 A.C. 410 and *Jaensch v. Coffey* (1984) 115 C.L.R. 549 approved.

2. (*per* Hamilton C.J. and Egan J.) That the law permitted the recovery of damages for nervous shock and psychiatric illness induced thereby where a plaintiff came on the immediate aftermath of an accident - either at the scene or in hospital - involving a person with whom the plaintiff had a close relationship; and that in the instant case, the relationship between the plaintiff and those injured could not be closer.

Jaensch v. Coffey (1984) 115 C.L.R. 549 and *dicta* of Lord Wilberforce in *McLoughlin v. O'Brian* [1983] 1 A.C. 410 approved.

(*Per* Denham J.) That where a person with a close proximate relationship to an injured person, while not a participant in an accident, heard of it very soon afterwards and visited the injured person as soon as practicable and was exposed to the serious injuries of the primary victim, that person became a secondary victim to the accident.

McLoughlin v. O'Brian [1983] 1 A.C. 410, *Jaensch v. Coffey* (1984) 115 C.L.R. 549, *Mullally v. Bus Éireann* [1992] I.L.R.M. 722 and *Donoghue v. Stevenson* [1932] A.C. 562 considered.

Semble: (*per* Denham J.): That in the instant case it was not necessary to decide whether the test in relation to nervous shock was reasonable foreseeability *simpliciter* or whether the application of the test should be limited in terms of proximity of relationship, spatial proximity and temporal proximity.

3. That there had been credible evidence to support the trial judge's finding that the plaintiff's post-traumatic stress disorder and depression were caused by nervous shock in the immediate aftermath of the accident rather than by the strain of caring for her family; his finding that the post-traumatic stress disorder was a psychiatric illness; and his finding that the plaintiff had not failed to mitigate her loss; and that accordingly the Court could not interfere with those findings.

Hay v. O'Grady [1992] 1 I.R. 210 applied.

4. (Denham J. dissenting) That in relation to future damages, the trial judge, in finding that the plaintiff would never fully recover, had anticipated that she would make a partial recovery; and that in the circumstances, the figure of £40,000 was excessive and should be reduced to £20,000.

(*Per* Denham J.) That the trial judge had clearly taken into account that the plaintiff might make a partial recovery, and that in the circumstances, the figure of £40,000 was not excessive.

Cases mentioned in this report:-

Alcock v. Chief Constable of South Yorkshire Police [1992] 1 A.C. 310; [1991] 3 W.L.R. 1057; [1991] 4 All E.R. 907.

Bell v. Great Northern Railway Company of Ireland (1895) 26 L.R. Ir. 428.

Byrne v. Great Southern and Western Railway Company of Ireland (1884) cited at 26 L.R. Ir. 428.

Donoghue v. Stevenson [1932] A.C. 562.

Hay v. O'Grady [1992] 1 I.R. 210; [1992] I.L.R.M. 689.

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

Jaensch v. Coffey (1984) 115 C.L.R. 549; 54 A.L.R. 417.

McLoughlin v. O'Brian [1983] 1 A.C. 410; [1982] 2 W.L.R. 982; [1982] 2 All E.R. 298.

Mullally v. Bus Éireann [1992] I.L.R.M. 722.

Appeal from the High Court.

The facts are summarised in the headnote and fully set out in the judgment of Denham J., *infra.*

A plenary summons was issued on the 16th February, 1990. The action was tried by the High Court (Lavan J.) on the 25th and 26th February, 1993. Judgment was delivered on the 30th March, 1993. Notice of appeal was filed on the 21st May, 1993.

The appeal was heard by the Supreme Court (Hamilton C.J., Egan and Denham JJ.) on the 20th March, 1995.

Kevin Haugh S.C. (with him *Frank Duggan*) for the defendant referred to *Mullally v. Bus Éireann* and *Alcock v. Chief Constable of South Yorkshire Police*. The English courts have sought to draw a line between those who witness an incident live and those who learn of it indirectly, i.e. on television. The distinction is justified on public policy grounds, and likewise public policy grounds should prevent the plaintiff from recovering in this case. It was not the events of the night of the accident which caused the plaintiff's post-traumatic stress disorder, but the strain of

caring for her family over the following years and months. Further, post-traumatic stress disorder is not a psychiatric illness of the type giving rise to damages for nervous shock. In any event, the plaintiff has failed to mitigate her loss by taking in trained help or seeking psychiatric help. There was no credible evidence on which the trial judge could base his finding that she would never fully recover.

Paul O'Higgins S.C. (with him *Patrick Hunt*) for the plaintiff: The plaintiff has fulfilled the criteria laid down in *McLoughlin v. O'Brian* and *Jaensch v. Coffey*. It is not for the courts to exclude liability on the grounds of public policy - that is a matter for the Oireachtas. See also *Alcock v. Chief Constable of South Yorkshire Police*.

Kevin Haugh S.C. in reply.

Cur. adv. vult.

Hamilton C.J. 28th November, 1995

The facts relevant to the appeal and findings of fact in relation thereto made by the learned High Court Judge are set forth in detail in the judgment about to be delivered by Denham J. and it is not necessary for me to set them forth in the course of this judgment.

As appears therefrom, the plaintiff had claimed against the defendant damages for nervous shock and for emotional and psychological distress which she alleged was caused by the negligence and breach of duty of the defendant in the driving of a motor vehicle on the 14th April, 1987, which was involved in a collision as a result of which the plaintiff's husband and two daughters suffered severe personal injuries.

The plaintiff was not involved in the collision but shortly after 9.30 p.m. on that evening was informed by her niece of the fact of the collision and that her husband and two daughters were seriously injured therein.

The learned trial judge found that

(1) the plaintiff immediately went into shock, became upset and commenced vomiting;

(2) while being brought to Jervis Street Hospital, to which hospital her husband and two daughters had been brought by neighbours, she became ill during the course of the journey;

(3) while in hospital she saw each member of the family, each of whom was in an appalling condition;
(4) the plaintiff has from that time led what the learned trial judge described as a traumatised existence;
(5) the plaintiff had suffered immediate nervous shock resulting in vomiting on receiving the telephone call concerning the accident and that this condition was gravely aggravated by the scenes she immediately thereafter witnessed in Jervis Street Hospital;
(6) the post-traumatic stress disorder continued up to 1992 at the earliest and she continues to suffer a serious depression;
(7) he was not satisfied, having regard to all the evidence, that the plaintiff will ever fully recover from what he perceived to be a clear psychiatric illness, and
(8) the defendant had not established on the balance of probability that, because the plaintiff has refused to acknowledge her pain grief and depression, she should be found guilty of a failure to mitigate her damages.

On the basis of such findings the learned trial judge held that the plaintiff was entitled to recover as against the defendant damages for nervous shock and assessed damages in the sum of £35,000 for the past and £40,000 for the future.

The defendant has appealed against the judgment and order of the learned trial judge on the grounds that the learned trial judge had erred in law and in fact in holding that:-

(1) the defendant owed a duty to the plaintiff;
(2) the injury (if any) suffered by the plaintiff was caused by the accident;
(3) the plaintiff suffered nervous shock and post-traumatic stress disorder;
(4) the plaintiff had a depressive illness at the date of the hearing;
(5) failing to hold that the injury (if any) suffered by the plaintiff was too remote;
(6) the plaintiff was entitled to compensation for the future having regard to the evidence that the plaintiff would recover if she obtained the appropriate treatment and failing to hold that the plaintiff had failed to mitigate her loss;
(7) the award of £35,000 was excessive and against the weight of the evidence.

In the course of his judgment in *McLoughlin v. O'Brian* [1983] 1 A.C. 410, Lord Wilberforce stated at p. 418 of the report:-

"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 cases seem to establish that in order to succeed in an action for damages for nervous shock a plaintiff must establish the following:-

1. The plaintiff must establish that he or she actually suffered "nervous shock". This term has been used to describe "any recognisable psychiatric illness" and a plaintiff must prove that he or she suffered a recognisable psychiatric illness if he or she is to recover damages for "nervous shock".

In this case it was found by the learned trial judge that the plaintiff did suffer the psychiatric illness of post-traumatic stress disorder and such finding was accepted by counsel on behalf of the defendant. Consequently, the plaintiff had discharged her onus in that regard.

2. A plaintiff must establish that his or her recognisable psychiatric illness was "shock-induced".

This principle was enunciated in the Australian case of *Jaensch v. Coffey* (1984) 155 C.L.R. 549, by Brennan J. as follows:-

"A plaintiff may recover only if the psychiatric illness is the result of physical injury 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."

Brennan J. gave two examples where there would be no recovery:-

"The spouse who has been worn down by caring for a tortiously injured husband or wife and who suffers psychiatric illness as a result goes without compensation: a parent made distraught by the wayward conduct of a brain damaged child and who suffers psychiatric illness as a result has no claim against the tortfeasor liable to the child."

Counsel on behalf of the defendant herein, while conceding that the plaintiff suffered from a post-traumatic stress disorder, submitted that this condition was not caused by the shock of hearing of the collision and learning of and seeing the condition of the injured members of her family but by the self-induced strain of caring for her husband and daughter and consequently was not sufficiently proximate to the negligence of the defendant.

This submission will be dealt with by me at a later stage.

3. A plaintiff must prove that the nervous shock was caused by a defendant's act or omission.

There is no doubt having regard to the findings of the learned trial judge but that the plaintiff herein has established that the nervous shock suffered by her was due to the defendant's negligence. She has clearly established that the circumstances of the accident and the appalling injuries suffered therein by her husband and two daughters caused or materially contributed to the nervous shock.

4. The nervous shock sustained by a plaintiff must be by reason of actual or apprehended physical injury to the plaintiff or a person other than the plaintiff.

This view was clearly expressed by Deane J. in *Jaensch v. Coffey* (1984) 115 C.L.R. 549 as being the present state of the law when he said that a duty of care (and hence liability for nervous shock) will not exist unless "the reasonably foreseeable psychiatric injury was sustained as a result of the death, injury or peril of someone other than the person whose carelessness caused the injury".

The plaintiff has established that the nervous shock sustained by her was by reason of the appalling injuries sustained by her husband and two daughters which were caused by the negligence of the defendant and which she saw on the occasion of her visit to Jervis Street Hospital and subsequently.

5. If a plaintiff wishes to recover damages for negligently inflicted nervous shock he must show that the defendant owed him or her a duty of care not to cause him a reasonably foreseeable injury in the form of nervous shock.

It is not enough to show that there was a reasonably foreseeable risk of personal injury generally. Deane J. stated in *Jaensch v. Coffey* (1984) 155 C.L.R. 549 that:-

> "a duty of care will not arise unless risk of injury in that particular form (i.e. psychiatric injury unassociated with conventional physical injury) was reasonably foreseeable."

Though the issue of foreseeability was not an issue argued in the course of this appeal, it is relevant in the context of determining the nature of the duty owed by the defendant to the plaintiff.

The plaintiff in this case has established a chain of causation from the defendant's negligence in causing serious personal injuries, with appalling consequences, to her husband and at least one of her daughters to her nervous shock and shock-induced psychiatric illness.

Was the fact that such nervous shock would be suffered by the plaintiff reasonably foreseeable by the defendant?

It was stated by Brennan J. (now Chief Justice of Australia) in the case of *Jaensch v. Coffey* (1984) 155 C.L.R. 549 already referred to, that:-

> "It is not necessary that the precise events leading to the administration of the shock should be foreseeable. It is sufficient that shock and a psychiatric illness induced by it are reasonably foreseeable"

and

> "It is not necessary for a plaintiff to prove that a reasonable man in the defendant's position could foresee that any particular psychiatric illness might be caused by his conduct: it suffices that he could have foreseen that his conduct might cause some recognised psychiatric illness by shock."

In the course of his judgment in *McLoughlin v. O'Brian* [1983] 1 A.C. 410 Lord Bridge of Harwich stated:-

> "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."

The question of who came within the scope of those to whom a defendant owed a duty of care has arisen in many cases and is the subject of continuing debate.

However, the question relevant to this appeal is whether the plaintiff came within the scope of the defendant's duty of care and the fact that she does so is not in issue.

As stated by Lord Atkin in *Donoghue v. Stevenson* [1932] A.C. 562 at p. 580:-

> "At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of "*culpa*," is no doubt based upon a general public sentiment of moral wrongdoing for which the

offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - 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."

There is no doubt but that nervous shock and a psychiatric illness induced by it are reasonably foreseeable consequences of the defendant's negligence in this case.

Nor is there any doubt but that the plaintiff came within the defendant's duty of care.

The acts of negligence on the part of the defendant which occasioned the injuries to her husband and two daughters occurred out of sight and earshot of the plaintiff.

However, the law permits of the recovery of damages for nervous shock and psychiatric illness induced thereby where a plaintiff comes on the immediate aftermath of the accident.

The relationship between the plaintiff and the person injured must be close.

As stated by Gibbs C.J. in *Jaensch v. Coffey* (1984) 155 C.L.R. 549:-

> "where the relationship between the person killed or physically injured and the person who suffers shock is close and intimate . . . it is readily defensible on grounds of policy to allow recovery".

Lord Wilberforce in the course of his judgment in *McLoughlin v. O'Brian* [1983] 1 A.C. 410 stated at p. 422:-

> "The closer the tie (nor merely in relationship but in care) the greater the claim for consideration."

Even though in *McLoughlin's* case and in *Jaensch v. Coffey* the plaintiffs were able to recover damages for nervous shock which they suffered as a result of injuries to members of their respective families which were not inflicted in their sight or hearing, nevertheless both the House of Lords and the High Court of Australia emphasised that the

plaintiffs were present at, and personally perceived the aftermath of the accident.

Both the House of Lords and the High Court of Australia held that it was sufficient that the psychiatric illness which the plaintiffs suffered were as a result of what the plaintiffs saw or heard in the aftermath of the accident at the scene or even at the hospital where the injured relatives were taken as a result of the accidents.

As Brennan J. stated:-

> "liability cannot rationally depend on a race between a spouse and an ambulance."

The plaintiff's ties with her husband and daughters could not be closer and the effect of the learned trial judge's judgment in this case is that the nervous shock and psychiatric illness suffered by the plaintiff was caused to her by what she learned in the 'phone call from her niece in the immediate aftermath of the accident and what she heard and saw at the hospital immediately thereafter.

If the learned trial judge's finding in this regard is correct, then the plaintiff is entitled to recover damages and this appeal must be dismissed.

Counsel on behalf of the appellant, however, submitted that, while the plaintiff did suffer nervous shock and a post-traumatic stress disorder and depression, such post-traumatic stress disorder and depression were not caused in the aftermath of the accident but by the events subsequent thereto, the grief and worry caused by serious injuries to her husband and daughters, the constant visits to the hospital and the strain imposed on her by the necessity to care for her husband and daughter after their discharge from hospital.

He submitted that an illness caused in such circumstances did not come within the proximity rule and that public policy required that the plaintiff's claim for damages be excluded.

There is no public policy that the plaintiff's claim, if substantiated, should be excluded.

As stated by Lord Russell of Killowen in *McLoughlin v. O'Brian* [1983] 1 A.C. 410 at p. 429 of the report:-

> "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 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 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."

In the course of the trial herein the learned trial judge heard the evidence of the plaintiff and other witnesses, in particular, Dr. Michael Corry, consultant psychiatrist, on behalf of the plaintiff, and Dr. John A. Ryan, consultant psychiatrist on behalf of the defendant.

The assessment of such evidence is a matter for the learned trial judge and he stated that:-

"I accept, therefore, that the plaintiff's personality and her lifestyle has been changed utterly by virtue of the events the subject matter of this case. I accept Dr. Corry's evidence"

and went on to state as follows:-

"I am, therefore, satisfied that the plaintiff suffered immediate nervous shock resulting in vomiting on receiving the telephone call concerning the family's accident. This condition was, in my view, gravely aggravated by the scenes she immediately thereafter witnessed in Jervis Street Hospital.

I am satisfied that the post-traumatic stress disorder which Dr. Corry has given evidence of continued up to 1992, at the earliest. I accept that the plaintiff continues to suffer a serious depression. I doubt, having regard to all the evidence, that I could be satisfied that she will ever fully recover from what I perceive to be a clear psychiatric illness. On the evidence adduced by the defendant, I do not accept that he has established on the balance of probability that because this plaintiff has refused to acknowledge her pain, grief and depression I ought to hold her guilty of failure to mitigate her damages."

With regard to these findings the only issue before this Court is whether or not there was credible testimony before the learned trial judge to justify such findings and inferences.

As stated by McCarthy J. in *Hay v. O'Grady* [1992] 1 I.R. 210 at 217:-

"The role of the this Court, in my view, may be stated as follows:-

1. An appellate court does not enjoy the opportunity of seeing and hearing the witnesses as does the trial judge who hears the substance of the evidence but, also, observes the manner in which it is given and the demeanour of those giving it. The arid pages of a transcript seldom reflect the atmosphere of a trial.
2. If the findings of fact made by the trial judge are supported by credible evidence, this Court is bound by those findings, however voluminous and, apparently, weighty the testimony against them. The truth is not the monopoly of any majority.
3. Inferences of fact are drawn in most trials; it is said that an appellate court is in as good a position as the trial judge to draw inferences of fact. (See the judgment of Holmes L.J. in *"Gairloch," The S.S., Aberdeen Glenline Steamship Co. v. Macken* [1899] 2 I.R. 1, cited by O'Higgins C.J. in *The People (Director of Public Prosecutions) v. Madden* [1977] I.R. 336 at p. 339). I do not accept that this is always necessarily so. It may be that the demeanour of a witness in giving evidence will, itself, lead to an appropriate inference which an appellate court would not draw. In my judgment, an appellate court should be slow to substitute its own inference of fact where such depends upon oral evidence or recollection of fact and a different inference has been drawn by the trial judge. In the drawing of inferences from circumstantial evidence, an appellate tribunal is in as good a position as the trial judge."

It is clear from a consideration of the evidence in this case there was credible testimony to support the findings of the learned trial judge that the plaintiff suffered nervous shock in the immediate aftermath of the accident which was due to the negligence of the defendant; that as result thereof she suffered a post-traumatic stress disorder and depression; that these conditions were induced by such nervous shock. Consequently, it is not open to this Court to interfere with such findings.

I would disallow the appeal on these grounds.

In addition the defendant has appealed against the finding by the learned trial judge that the plaintiff, by not having treatment for her depressive condition which would prove beneficial and aid her recovery, had not failed to mitigate her damages.

There is a duty on all plaintiffs to take all reasonable steps to mitigate the damages or loss which they claim against another party.

The duty is to take all reasonable steps having regard to the nature of their injuries or illness and the circumstances of the case and the onus is on the defendant to establish such failure on the balance of probabilities.

The plaintiff in this case has provided an explanation for her failure so to do, which the learned trial judge accepted.

There was evidence before the learned trial judge which entitled him to accept the explanation and this ground of appeal also fails.

The defendant has also appealed to this Court on the grounds that the damages awarded by the learned trial judge were excessive.

The learned trial judge had awarded the sum of £35,000 by way of damages to the date of hearing and £40,000 in respect of the future.

Having regard to the evidence with regard to her condition between the date of the accident and the date of the hearing as found by the learned trial judge, I cannot find that the damages awarded in respect of that period by the learned trial judge were excessive or so excessive as to justify this Court in interfering therewith and would dismiss the appeal in respect of this award.

With regard to damages for the future, the plaintiff was at the date of the hearing, fifty-two years of age and the learned trial judge found that she continued to suffer from a serious depression and that having regard to all of the evidence, he doubted whether he could be satisfied that she will ever fully recover from what he perceived to be a clear psychiatric illness.

The onus was on the plaintiff to establish on the balance of probabilities that she would not recover from this illness and if she had discharged this onus I would have no hesitation in accepting that the amount awarded by the learned trial judge was fair and reasonable.

The learned trial judge, however, does not appear to have been so satisfied and refers to a full recovery. He appears to anticipate at least a partial recovery.

In these circumstances, I consider the award of £40,000 to be excessive and would substitute an award of £20,000 under this heading for damages.

Egan J.
I agree.

Denham J.
This is an appeal by the defendant against a judgment of the High Court delivered on the 30th March, 1993. The learned High Court Judge

found that the plaintiff was entitled to recover damages against the defendant for "nervous shock".

On the 14th April, 1987, the defendant, while driving his car in County Dublin, collided with a motor car wherein Thomas Kelly and his two daughters were travelling and as a result Thomas Kelly and his daughters suffered severe personal injuries, loss and damage for which they have recovered damages against the defendant, which sum for damages includes the cost of future care. The plaintiff was not within sight or sound of the accident; however, she claims that arising therefrom she suffered injury which was caused by the negligence of the defendant.

On that evening the plaintiff's husband and two daughters had left home to travel to Dublin Airport to meet a niece of the plaintiff off a plane. After 9.30 p.m. the niece telephoned the plaintiff and told her that her husband and two daughters had been seriously injured in a road traffic accident. The learned trial judge found that on receipt of that telephone call:-

> "The plaintiff immediately went into shock, became upset and commenced vomiting. She was taken to Jervis Street Hospital by her neighbours to see her family . . . When at Jervis Street Hospital she saw her family, each of whom [was] in an appalling condition and one of whom she has described as looking like mince meat."

The plaintiff's family remained in hospital for some time: her husband and daughter Adrienne until July, 1987, her daughter Shirley Anne until April, 1988. The time during which they were in hospital was traumatic for the plaintiff.

The plaintiff's husband has been left brain damaged, and is now at home where she cares for him. Her daughter Shirley Anne is also permanently brain damaged and at home and continues to pose major management problems for the plaintiff. Adrienne has made a full recovery from her injuries. While the plaintiff's husband and Shirley Anne have received damages for their injuries from the defendant which includes the cost of their care (which will be permanent) the plaintiff will not take in trained help. She believes she should not hand their care to another person. She feels that she cannot let go, and that if she did "let go" she would never recover.

The learned trial judge found the plaintiff to be a genuine witness and a caring human being whose personality and lifestyle have been utterly and disastrously changed. There was conflicting medical evidence and the court preferred that of Dr. Corry concluding:-

"I am, therefore, satisfied that the plaintiff suffered immediate nervous shock resulting in vomiting on receiving the telephone call concerning her family's accident. This condition was, in my viw, gravely aggravated by the scenes she immediately thereafter witnessed in Jervis Street Hospital.

I am satisfied that the post-traumatic stress disorder which Doctor Corry has given evidence of continued up to 1992, at the earliest. I accept that the plaintiff continues to suffer a serious depression. I doubt, having regard to all of the evidence, that I could be satisfied that she will ever fully recover from what I perceive to be a clear psychiatric illness. On the evidence adduced by the defendant, I do not accept that he has established on the balance of probability that, because this plaintiff has refused to acknowledge her pain, grief and depression, I ought to hold her guilty of a failure to mitigate her damages. I accept the plaintiff's explanation . . . I, . . ., find that this plaintiff is entitled to recover as against the defendant for nervous shock.

For pain and suffering to date, I would award a figure of £35,000. For pain and suffering in the future, I would award a figure of £40,000."

Submissions

While a wide-ranging notice of appeal was filed, the issues argued before the Court were more restricted. Mr. Haugh on behalf of the defendant, accepted that there was credible evidence that the plaintiff did suffer the psychiatric illness of post-traumatic stress disorder but submitted that her illness was not related sufficiently to the accident but rather to the events in the weeks and months thereafter. He argued that in these circumstances, where the cause was not the immediate traumatisation but that rather it occurred over the months after the accident, the plaintiff was outside the contemplation of the defendant. He distinguished *Mullally v. Bus Éireann* [1992] I.L.R.M. 722, and submitted that public policy requires that the plaintiff be excluded.

On the matter of *quantum* he argued that there was a clear failure to mitigate loss by the plaintiff. He submitted that during the year after the accident it was reasonable that the plaintiff's family would be her main concern, but that after Shirley Anne was discharged home from hospital there was time for her to consider her own needs and that at that stage there was a clear failure by her to mitigate loss. She did not seek appropriate treatment for herself, which was a failure to mitigate her loss: it was

not a foreseeable consequence that the defendant must pay for longer care because the plaintiff refuses genuinely but unreasonably to get treatment. He submitted that the award of £35,000 for six years' suffering would be unreasonable and not legally appropriate because of the evidence, that she could have been cured earlier if she had taken the care urged on her.

Addressing the issue of the plaintiff's depression he submitted that Dr. Corry had an inappropriate definition of psychiatric illness. Mr. Haugh drew attention to the evidence of the plaintiff's problems with the care of her husband, her lack of social interest, her lack of recreation, and submitted that she was not after 1992 suffering a psychiatric illness. He argued that it was perverse of the learned trial judge to find the plaintiff was suffering a psychiatric illness at the time of trial because Dr. Corry gave an inappropriate definition of "psychiatric illness": a life event was not a psychiatric illness. He submitted that the learned trial judge erred in fact in holding (by reason of an inappropriate definition of psychiatric illness) that she was entitled to damages for nervous shock where the post-traumatic stress disorder had gone and that at that stage she was suffering from anxiety and depression. He submitted further that if the plaintiff is entitled to general damages from the date of the hearing, £40,000 is grossly excessive, because if she took remedial care (according to the evidence) she would recover. He pointed out that her genuineness was not in issue but that it must be objectively reasonable.

Mr. O'Higgins for the plaintiff, submitted that to approach the case on the floodgates principle was to overstate this case. The post-traumatic stress disorder of the plaintiff was not in issue. He referred to the situation at the hospital, describing it as devastating, and Dr. Corry's evidence as to the plaintiff's exposure to the trauma surrounding the accident and her reactions at that time. Mr. O'Higgins said that while this case was not conformable to *Mullally v. Bus Éireann* [1992] I.L.R.M. 722, it was not to be distinguished on principle. In this case it was conceded that the plaintiff had had post-traumatic stress disorder. He argued that the disorder occurred proximate to the accident. Mr. O'Higgins submitted that there was no break in the trauma from when the plaintiff learnt of the accident; that the learned trial judge found post-traumatic stress disorder, which it is conceded by the defendant he could so find; that all the evidence relates back to the accident. He argued that for someone in the close nexus of the plaintiff to the injured husband and daughter, she is very nearly in the position of a rescuer. He said that the courts should not concern themselves about public policy; that is for the legislature. On the quantum of damags he said they ought to reflect only a small part of the

disaster for the plaintiff, i.e., her post-traumatic stress disorder and the depression. In that context the award of damages was modest.

Nervous shock

"Nervous shock" is a legal term used to connote a mental as opposed to physical injury to a person. It has been accepted in Irish law that such an injury can be the subject of damages. The term was used over a hundred years ago and accepted: see *Byrne v. Great Southern and Western Railway Company of Ireland* (1884) cited at 26 L.R. Ir. 428 and *Bell v. Great Northern Railway Company of Ireland* (1896) 26 L.R. Ir. 428.

"Nervous shock" is a mental injury, being a recognisable and distinct psychiatric illness: *Hinz v. Berry* [1970] 2 Q.B. 40. It is a term to be contrasted to mental distress, fear, grief or sadness.

In this case neither the law on mental illness nor the fact of the post-traumatic stress disorder are in issue. It was conceded by counsel for the defendant that the plaintiff did suffer post-traumatic stress disorder.

Victim

The plaintiff was not a primary victim; that is to say she was not a participant in the accident. Her case is that she is a secondary victim; that is to say one who did not participate in the accident, but was injured as a consequence of the event.

Foreseeability

There was no issue before the Court in the appeal on foreseeability. The matters for decision rest elsewhere.

Proximity

This case turns on the issue of proximity. There are several aspects of proximity. These may include: (a) proximity of relationship between persons; (b) proximity in a spatial context; and (c) proximity in a temporal sense.

(a) *Proximity of relationships*

The proximity of relationship between the primary victim and the secondary victim is a critical factor. In this case there is a close relationship between the persons injured in the accident and the plaintiff. This concept was not an issue before the Court.

(b) *Spatial proximity*

It is evident that the plaintiff was not at the scene of the accident. However, she was told of the event on the telephone shortly thereafter, and she went immediately to the hospital. She viewed her loved ones who were in a very serious condition. She perceived the aftermath of the road traffic accident in the hospital. These facts are not in contention.

(c) *Temporal proximity i.e., proximity in time*

It is on the issue of proximity in time that this case turns. The defendant's case is that the post-traumatic stress disorder arose later in time than the accident, that it arose as a result of the events in the weeks and months after the accident.

The learned trial judge stated:-

> "I am, therefore, satisfied that the plaintiff suffered immediate nervous shock resulting in vomiting on receiving the telephone call concerning her family's accident. This condition was, in my view, gravely aggravated by the scenes she immediately thereafter witnessed in Jervis Street hospital.
>
> I am satisfied that the post-traumatic stress disorder which Doctor Corry has given evidence of continued up to 1992, at the earliest . . . I . . . find that this plaintiff is entitled to recover as against the defendant for nervous shock."

It was conceded by counsel for the defendant that the plaintiff suffered from a post-traumatic stress disorder some time after the accident. It was appropriate for Mr. Haugh to so concede, in view of the facts found by the learned trial judge on the evidence and the jurisdprudence of this Court: see *Hay v. O'Grady* [1992] 1 I.R. 210 at page 217. This case falls to be determined on the very precise issue as to the temporal proximity of the post-traumatic stress disorder, i.e. when did the post-traumatic stress disorder occur: did it arise after the accident or some weeks or months later? This is a question of fact. Several matters are relevant to this issue.

First, to take the commense approach. The illness in question arises as a result of a shock, of exposure to a trauma far outside the usual range of

experience. There is no doubt that the accident exposed the plaintiff to such a trauma.

Secondly, the learned trial judge has found a continuum of nervous stress, post-traumatic stress disorder, and depression from the accident. That continuum is based on credible evidence before the court.

Thirdly, the finding of the learned trial judge is as to an immediate "nervous shock" and then he refers to post-traumatic stress disorder. The shock is the trigger for the following events. There is evidence from Dr. Corry that the psychiatric illness developed in the initial few days when the patients were in hospital. Dr. Corry was asked:-

> "Question: Can I just ask you to expand on that. When you talk about the traumatic stress issue and subsequent depression in the first place, to what do you relate these?
>
> Answer: Very much to her exposure to the trauma that surrounded the accident, the sudden news being told in the hospital. I mean, it was an event way outside her normal range of experience and basically the fact that she was having intrusive thoughts relating to the incident. She could not get the incident out of her mind. She had nightmares about the hospital, nightmares of Shirley Anne being on the ventilator. I mean, all the criteria of what we would call a post-traumatic stress."
>
> (See transcript, 25th February, 1993 at question 148).

Also the plaintiff's evidence, accepted by the learned trial judge, as to her sleep pattern in the immediate days after the accident:-

> "I was not sleeping at all. Well, broken sleep for a few minutes, every time I would wake up. Even without waking up when I would be asleep I would hear those bleeps going all the time from the life support machine and also I was hearing the telephone ringing. . . .
>
> . . .I actually heard it [the telephone] ringing but when I got down it was not ringing. I actually rang the hospital and said 'Did you ring, I heard the phone' and they said in Intensive Care 'No, nobody rang'."
>
> (See transcript, 25th February, 1993, question 53 *et seq.*)

There was the above and other evidence upon which the High Court could (and did) conclude that the post-traumatic stress disorder occurred at a time proximate to the accident. These are facts found on credible evidence. It is clear from the text and context of the judgment that the learned trial judge used the term "immediate nervous shock" to indicate

the immediate reaction to the accident, the shock, which, together with the aftermath, triggered the on-set of the post-traumatic stress disorder.

Law

The law on the issue is to be found in common law. It is useful to consider cases in other jurisdictions. In *McLoughlin v. O'Brian* [1983] 1 A.C. 410, the plaintiff's husband and three children were involved in a road accident. One of the plaintiff's children was killed and her husband and other children seriously injured. When the accident occurred the plaintiff was two miles away, at home. She was told of the accident by a motorist who had seen it and brought to hospital where she saw her seriously injured husband and two children, and heard her daughter had been killed. As a result of seeing and hearing the results of the accident, the plaintiff suffered nervous shock: a psychiatric illness. The House of Lords allowed her appeal holding that the nervous shock had been the reasonably forseeable result of the injuries to her family caused by the defendant's negligence.

Lord Bridge of Harwich stated at p. 433 of the report:-

> "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 forseeably 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."

After analysing the authorities he stated at p. 441 of the report:-

> "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 . . . 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 . . .

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 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."

Lord Wilberforce took a more restricted view and held that the application of the reasonable foreseeability test for nervous shock cases should be limited in terms of proximity. The proximity has three elements: the proximity of the tie or relationship between the plaintiff and the injured person; the proximity of the plaintiff to the accident in time and space; and the proximity of the communication of the accident to the plaintiff, either through sight or hearing of the event or its immediate aftermath.

In Australia, in *Jaensch v. Coffey* (1984) 155 C.L.R. 549, a wife, who was not at the scene of the road traffic accident was brought to hospital where she saw her husband who was "pretty bad". Next morning he was in intensive care, she was told he had taken a change for the worse, and she was required to come to hospital as quickly as possible. Her husband survived but she suffered nervous shock as a result of what she had seen and been told. The driver of the car was held to owe a duty of care to her and that he had been in breach of that duty. Gibbs C.J. stated:-

"In the present case there was a very close relationship, both legal and actual, between the respondent and her husband. She was notified of the accident, and went to the hospital, as soon as practicable on the evening when it occurred. She personally perceived the aftermath of the accident, although not at the scene but at the hospital . . . She was, in my opinion, a 'neighbour' of the appellant within Lord Atkin's principle; it was foreseeable that a person in her position would suffer

nervous shock, and there is no reason of policy why her claim should not succeed."

A number of other members of the High Court of Australia held views similar to those of Bridge L.J. in *McLoughlin v. O'Brian* [1983] 1 A.C. 410.

In this jurisdiction, in *Mullally v. Bus Éireann* [1992] I.L.R.M. 722, it was found as a fact that the plaintiff, the wife and mother of primary victims, who was not at the scene of a serious bus accident but viewed its aftermath in hospitals, suffered the psychiatric illness of post-traumatic stress disorder which was triggered by the news of the accident and her experiences in its aftermath, the illness manifesting itself two days after the accident, was entitled to damages.

I have considered the above cases, and the "neighbour" principle in *Donoghue v. Stevenson* [1932] A.C. 562. It is not necessary in this case to choose between either the general or the more restricted approach in common law. I have used the cases to isolate factors which are relevant in law and applied these factors to the facts of this case.

The relationship of the plaintiff to the victims who were participants in the accident could not be closer, the victims were her daughter and husband who with her formed a close loving family. The plaintiff was drawn into the trauma by a telephone call. She went to the hospital as soon as practicable. She saw the seriously injured victims in the immediate aftermath of the accident when they were in so serious a state of injury as to be disturbing to the normal person. She was told of the serious nature of the injuries of her husband, but especially the serious injuries of her daughter Shirley Anne.

I am satisfied that a person with a close proximate relationship to an injured person, such as the plaintiff, who, while not a participant in an accident, hears of it very soon after and who visits the injured person as soon as practicable, and who is exposed to serious injuries of the primary victims in such a way as to cause a psychiatric illness, then she becomes a secondary victim to the accident. In reaching these determinations it is necessary to review the accident and immediate aftermath in an *ex post facto* way to test the situation.

In this case, the learned trial judge used the legal term "nervous shock" which is recognised legal terminology for a medically recognised psychiatric illness resulting from shock. On the facts as found by the learned trial judge, on the evidence before the Court, in view of the concession (quite rightly in my view) by counsel that the plaintiff did have post-traumatic stress disorder, in view of her proximity in relation-

ship, space and time, and in view of the principles in *Hay v. O'Grady* [1992] 1 I.R. 210 it is not open to this Court to interfere with the decision of the learned trial judge as to liability.

Mr. Haugh also submitted that Dr. Corry's definition of psychiatric illness was inappropriate. I have considered his evidence carefully. *Inter alia* he was asked:-

> "Can I ask you this, is post-traumatic stress disorder a psychiatric condition in itself?"

To which he answered:-

> "Well, I suppose any condition that brings about symptomatology where somebody is anxious all the time, and depressed, having nightmares, intrusive thoughts relating to the incident, I think you call that a psychiatric condition, depression, anxiety, tension, irritability, difficulty sleeping. I mean, I do not know what else is a psychiatric condition if that is not."

(See transcript, 25th February, 1993, question 150).

Later he was examined by Mr. Haugh who having set out the plaintiff's happy family life prior to the accident asked:-

> "After the accident all that is changed. She now has responsibility she never had previously. She now has a routine that is not enjoyable, she has to mind her husband and daughters. She has no one to go out with in the evening and none of the concerts or theatre or cinema. She has to cook and care for and bath her husband. All of these things, I am suggesting these things would make anybody angry, would make anybody tense, would make anybody irritable. Would you accept that?"

Dr. Corry answered:-

> "Yes, I would."

Mr. Haugh then stated:-

> "And you can have all of these things, I suggest, in the proportion in which she has them without being psychiatrically ill?"

To which Dr. Corry responded:-

> "Well, this is probably a very philosophical question, to what is mental illness. To my own sense of mental illness, mental illness is a manifestation of the kinds of experience people have in life. People do get sick when they lose their jobs, people do get depressed when somebody dies belonging to them, serious life events are to me the causation of what we call mental illness."

When the above is read in the context of the entire body of evidence of Dr. Corry it is not such as to negate the medical evidence and it is clear

that the learned trial judge had evidence upon which to hold that the plaintiff suffered from a psychiatric illness, namely, post-traumatic stress disorder. Indeed this illness is not in dispute. It is clear from the evidence that Dr. Corry grounded the plaintiff's illness in the events surrounding the accident. Thus, there was evidence upon which the learned trial judge could hold the post-traumatic stress disorder was caused by the events immediately surrounding the accident.

Depression

The same considerations apply to the evidence of Dr. Corry as to the plaintiff's psychiatric illness of depression. There was oral evidence which was credible upon which the learned trial judge could make his findings of fact.

Quantum

On the issue of quantum of damages there was no real contest as to the sum for the post-traumatic stress disorder, which is not excessive. The matters in contest are the damages for the depression from approximately 1992 and for the future.

The learned trial judge had credible evidence upon which to reach his conclusion that the plaintiff did not fail to mitigate her damages. Her actions were consistent with her illness.

The learned trial judge held, on credible evidence:-

> "I accept that the plaintiff continues to suffer a serious depression. I doubt, having regard to all of the evidence, that I could be satisfied that she will ever fully recover from what I perceive to be a clear psychiatric illness."

The fact that the plaintiff may never fully recover implies that she may partially recover. A psychiatric illness from which there is partial recovery remains a serious problem, and this fact was clearly taken into consideration by the learned trial judge when he determined the quantum.

In these circumstances the sum is not excessive or so excessive as to warrant interference by this Court.

I would dismiss the appeal on all grounds.

Solicitors for the plaintiff: *Fitzmaurice Ludlow.*

Solicitors for the defendant: *Corrigan & Corrigan.*

James Devlin, Barrister