LCA 444/87

LCA 452/87

CA 80/88

Abu Sirchan Araf Makabel Munhar Alsoucha and Another
v.
Estate of the late David Dehan and Others

LCA 444/87

Estate of the late David Dehan and Others
v.
Abu Sirchan Araf Makabel Munhar Alsoucha and Another

LA 452/87

Hitam Zeidan Jizmawi
v.
Aiyash Jamal and Another

CA 80/88

The Supreme Court Sitting as a Court of Civil Appeals

Before Shamgar, p., Barak, J., and D. Levin, J.

Editor's Synopsis

These combined appeals raise a common issue, whether a person who suffered mental injury in consequence of the death or severe bodily injury negligently caused to a close relative can recover damages in tort under the Civil Wrongs Ordinance [New Version], which establishes a cause of action based on common law negligence, and under the Road Accident Compensation Law, 1975, which imposes absolute liability for injuries suffered "in a road accident". After surveying the English, Australian and American judgments relating to compensation for mental injuries suffered because of severe injury to a loved one, the Supreme Court ruled that such damages were recoverable under both the Civil

Wrongs Ordinance and the Compensation Law, pursuant to certain guidelines laid down by the Court.

1. Generally, the conceptual duty of care not to cause mental injury to third persons in consequence of bodily injury caused to the primary victim should be limited to those third persons who are related to the primary victim in the first degree, such as parents and children or spouses. Exceptional circumstances which might also be worthy of legal protection may be left to later cases.

2. It is not necessary that the secondary victim suffer the mental injury by virtue of his having directly perceived the original injury or its immediate aftermath. There should be no such special requirement, whether as part of or superimposed upon the general foreseeability test.

3. Similarly, the significance of the injured person's proximity or remoteness from the scene of the original accident should also be examined in the context of its influence on the foreseeability of the harm.

4. Nor should recovery be limited to such mental injury as is induced by shock. Injury that is the result of continuous exposure to the primary harm, for example by lengthy treatment and care of the primary victim, may also be compensable.

5. Only severe and substantial mental reactions are compensable. Lesser mental effects such as distress, pain and anger, that are daily occurrences and, in the nature of things, temporary and ephemeral, are not recoverable.

6. The same standards for recovery should apply under the Civil Wrongs Ordinance and under the Compensation Law.

Israel Supreme Court Cases Cited:

[1] CA 294/54 *Zvii v. Shamir,* 12 P.D. 421.

[2] CA 4/57 *Nadir v. Kahanowitz,* 11 P.D. 1464.

[3] CA 813/81 *Zion Insurance Co. v. Estate of the late David Buskila,* 38(4) P.D. 785.

[4] Cr.A. 6/55 *Dahoud v. The Attorney General, 9* P.D. 1009.

[5] *Cr.A.402/75 Algavish v. The State of lsrael,* 30(2) P.D. 561.

[6] CA 145/80 *Waknin v. The Bet Shemesh Local Council,* 37(1) P.D. 113.

[7] Cr.A. 186/80 *Yaari v. The State of lsrael,* 35(1) P.D. 769.

[8] CA 243/83 *Jerusalem Municipality v. Gordon,* 39(1) P.D. 113.

[9] CA 358/83 *Shulman v. Zion Insurance Co. Ltd.,* 42(2) P.D. 844.

District Court Cases Cited:

[10] C.C. (Jerusalem) 583/66 *Kardi v. Feltzgein,* 61 P.M. 161.

[11] Motion (Beersheva) 109/78 *Peretz* v. *Carmi,* 1978(1) P.M. 506.

[12] C.C. (Haifa) 910/69 *Estate of the late Yehudit Haleb v. Carmel Beach Ltd.,* 72 P.M. 161.

[13] C.C. (Tel Aviv) 582/72 Shakui v. Salmon, 1979(2) P.M. 77.

[14] C.C. (Jerusalem) 907-09/81 *Estate of the late Salhav v. Shalhav,* 1984(2) P.M. 441.

Australian Cases Cited:

[15]*Jaensch v. Coffey* (1983-84) 155 C.L.R. 549.

[16] *Pratt Goldsmith v. Pratt* [1975] V.R. 378.

[17]*Mount lsa Mines Ltd. v. Pusey* [1970] C.L.R. 383.

American Cases Cited:

[18] *Dillon v. Legg* 441 P.2d 912 (1968).

[19] *Champion v. Gray* 478 so.2d 17 (1985).

[20]*Brown v. Cadillac Motor Car Div.* 468 so.2d 17 (1985).

[21] *Paugh v. Hanks* 451 N.E.2d 759 (1983).

English Cases Cited:

[22] *Victorian Railway Commissioners v. Coultas* (1888)

13 App. Cas.

222 (P.C.).

[23] *Dulieu v. White & Sons* [1901] 2 K.B. 669.

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

[25] *Bourhill v. Young* [1942] 2 All E.R. 396 (H.L.).

[26] *Boardman v. Sanderson [1964] 1* W.L.R. 1317

(CA).

[27] *King v. Phillips* [1953] 1 Q.B. 429 (CA).

[28] *McCloughlin* v. *O'Brian* [1982] 2 All E.R. 298

(H.L.).

[29] *Anns* v. *Merton London Borough* [1978] A.C. 728.

[30] *Attia v. British Gas Plc.* [1987] All E.R. 455 (CA).

[31] *Chadwick v. British Transport Commission* [1967] 2

All E.R. 945 (Q.B.).

[32]*Dorset Yacht Co. v. Home Office* [1970] A.C. 1004.

JUDGMENT

SHAMGAR, P.:

1. Before us are two reciprocal requests for leave to appeal against a judgment of the Jerusalem District Court in an action for damages under the Road Accident Victims Compensation Law, 1975 (hereinafter the Compensation Law). We decided to consider them as though such leave had been granted and the appeals had been brought pursuant to such leave.

An appeal against a judgment of the Nazareth District Court will be considered at the same time.

The two judgments appealed against raise the same question, namely, the liability - within the meaning of the Civil Wrongs Ordinance [New Version] (hereinafter - the Civil Wrongs Ordinance) and the Compensation Law - for mental injury caused to relatives of a person injured in a road accident. That is why we decided to consider the appeals together.

2**. LCA 444/87 and 452/87**

The relevant facts were surveyed in the partial judgment of the Jerusalem Magistrate Court, which considered the action brought by the applicants in LCA 452/87 (who are the respondents in LCA 444/87).

These are the principal facts:

On 8.1.82, the boy David Dehan was injured by a car driven by the first respondent in LCA 452/87 (the first applicant in LCA 444/87). David was born on 11.9.76 and on the day of the accident he was not yet six years old. He was taken to the Hadassah Hospital, Ein Karem, and died 24 days later. David's parents were not with him at the time of the accident and when they heard about it they went to the hospital where, according to the trial court, "they saw him in serious condition and in terrible agony and sat with him all the time until he died."

After David died, his parents and his estate brought an action under the Compensation Law in the Jerusalem Magistrate Court in which they sought, inter alia, compensation for mental injuries caused to the parents, who are the second and third respondents in LCA 444/87. The injuries were defined as follows:

> "9. As a result of the accident, the serious injury to the deceased, the stay at his side in the hospital and the sight of his dying and final decease, the plaintiffs' mental and physical health declined.
>
> 10. The plaintiffs no longer function as in the past. They suffer from stress, depression, fears and nervousness. They are frequently absent from work and require physical and psychiatric help."

3. The argument of the applicants in LCA 444/87, as set forth in their statement of defence submitted to the Magistrate Court, was that the compensation claimed by the parents was not actionable under the Compensation Law.

In its partial judgment the Magistrate Court held as follows: first, the parents have a cause of action for compensation in tort against the driver for the mental injury "caused in consequence of the trauma which the parents suffered as a result of the injury caused to their son, which includes both pain and suffering". Second, the parents also have a cause of action under the Compensation Law as "victims" who suffered "bodily damage" in a "road accident".

4. The driver and his insurers (the applicants in LCA 444/87 and the respondents in LCA 452/87) appealed against the above two findings in the partial judgment.

The District Court concluded that the injury does not come within the scope of the Compensation Law, because the condition that the bodily damage be caused by a "road accident" was not satisfied. The District Court was of the opinion that:

> "The respondents' son was injured in the road accident, not the respondents themselves. The respondents were injured at a later time and by something else - by their son's suffering. If there is any connection between their injury and the road accident, it is remote. Moreover, as defined in the Law, an 'injured person' is a person who is injured in a road accident. The preposition 'in' points to a direct

> injury in the accident, at the time of the accident, at its place and by its force."

As to the cause of action based on the Civil Wrongs Ordinance, the District Court found that the parents had an action for negligence against the defaulting driver. The District Court found that he had a duty of care toward a relative of the direct victim, since he should have foreseen such relative's mental injury, whether the relative was present at the scene of the accident and witnessed it or whether the consequences of the accident were brought to his knowledge at a later stage.

According to the District Court:

> "It is not the proximity in time and space to the accident that determines but the emotional suffering, and what is the difference between suffering which began at the time of the accident and suffering caused when the relative first sees the victim? ... Once incidental mental injury is brought within the bounds of foreseeability, we say thereby that the negligent person owes a duty of care not only to the immediate victim but also to his relatives who are injured by his suffering. And if that is so, then what is the difference between relatives who were present at the accident and those who were not?"

The driver and his insurers (in LCA 444/87) appealed against the finding of liability in tort; and the parents and the deceased's estate appealed (in LCA 452/87)

against that part of the judgment in which the court found that there was no cause of action under the Compensation Law.

5. **CA 80/88**

The facts in this case were summarized by the parties who formulated an agreed version of the preliminary question now before the court:

" 1. The first defendant's lorry hit the plaintiff's mother while she was returning from the grocery store in her village and injured her critically.

2. The mother was hospitalized in the Hillel Yaffe Hospital in Hadera on 18.6.82 and died there of her injuries on 26.6.82.

3. The event described above is within the scope of the Compensation Law.

4. The plaintiff was not present at the scene of the accident, but was informed about her mother's injury a short time later at her home nearby.

5. The plaintiff visited her mother in the hospital during her stay there and afterwards saw her corpse when her mother's body was brought home for burial.

6. On the assumption that, as a result of hearing of her mother's injury and seeing her corpse, the plaintiff suffered mental illness - is this illness bodily damage that is compensable under the Compensation Law".

In the District Court, the plaintiff claimed compensation for the mental illness she suffered, and for all her injuries resulting therefrom.

6. The Nazareth District Court's conclusion was that the daughter had no cause of action for compensation in tort in the circumstances of the case before us. The reason for this was the absence of any legal causal connection between her illness and the accident. In the words of the District Court:

"The injury which has a legal causal connection with the accident (as opposed to a factual causal connection), and the injury which is directly foreseeable from the accident, is the injury caused in consequence of the accident and not that which is caused because of or in consequence of the someone else's injury in the accident... Once we allow an action for injury which is not directly connected with the accident itself, and the connection with it is only secondary - we are no longer concerned with injury whose cause is legally connected with the accident".

With regard to the cause of action under the Compensation Law, the Nazareth Court was inclined to accept the conclusion of the Jerusalem District Court in the above additional judgment that is before us on appeal - that the plaintiff does not come within the definition of the term "injured person" in a "road accident". The Nazareth Court added:

> "The Law is intended to provide relief to victims of road accidents by imposing an absolute duty of compensation. Prima facie, it would appear that the legislature's intention was to compensate the injuries of those actually involved in the accident".

The deceased's daughter - the plaintiff - appeals against the District Court's judgment in both of its aspects (CA 80/88).

7. **The Legal Question**

Within the framework of cases before us we are asked to reply to each of the following questions:

First, is there liability under the Civil Wrongs Ordinance for mental injury caused to a family member, whose dear one was injured, killed or threatened with such harm, by the defendant's negligent act or omission, when such mental injury is caused by the said harm or as a result thereof.

Second, is a person who suffers such mental injury an "injured person" in a "road accident" within the meaning of the Compensation Law.

The "family members" or "relatives" of whom we speak here are the parents in one case and the daughter in the other; the mental injury we consider is "stress, depression, fears and nervousness" in the one case and "mental illness" in the other. In both matters, we deal with mental injury that caused the plaintiffs both pecuniary injury and non-pecuniary injury.

8. **The Israeli Precedents**

The courts in Israel have considered the question before us on a few occasions, while examining the English law on the subject and its adoption in our system.

(A) In CA 294/54 [1] the parents of a minor who drowned in a cesspool sued for damages in tort. Among other claims, they sought compensation for the mental shock suffered by the mother when she heard of her son's death and for her mental depression ever since the event. This condition, she claimed, prevented her from pursuing her profession (dressmaking).

The Supreme Court, at page 443, in a judgment delivered by Justice Agranat (as his title was then), refused to compensate this injury, for two reasons: "First, because the English courts have not gone so far, in a single one of their judgments, as to hold that hearing, from a third person, after the fact, of a tragic accident that occurred to a blood relative, and that was caused by the defendant's negligence, could serve as grounds for

compensation." The second reason concerns the kind of damage caused. The court reaffirmed what it had held in CA 4/57 [2], at page 1467, that "emotional disturbances, such as emotional trauma and cognitive shock caused to a person as a result of the negligence of another, do not entitle him to damages unless they result in a visible injury or illness". In the circumstances of the case, it was held, as a finding of fact, that the mental suffering caused to the mother as a result of the tragedy that occurred to her son did not express itself in any illness at all.

It may be said, therefore, that the court's opinion in this matter was that, on the one hand, no duty of care existed toward the mother - and it could therefore not have been breached - because of her distance from the scene of the accident; and, on the other hand, that the mother's injury is not compensable as it is solely emotional, unaccompanied by any visible external manifestation.

(B) C.C. (Jerusalem) 583/66 [10] considered the claim of a husband whose wife and youngest son were killed in an accident. The plaintiff claimed, inter alia, that because of his broken heart and the deep sadness which he suffered since the tragedy he forgot to feed his horse, which died as a result. He sued for compensation in the amount of the horse. The court, in a judgment delivered by Judge M. Ben Porat (as her title was then), considered the question whether the wrongdoer owed a duty of care to the husband and held that the husband did not belong to the circle of persons toward whom the wrongdoer owes a duty not to be negligent:

> "When a mother sees *with her own eyes* how her son is run down,
>
> she being close to the scene of the accident, she has a cause of action

> for compensation against the wrongdoer, if she suffers emotional shock as a result thereof. In such circumstances she is within the scope of persons to whom the wrongdoer owes a duty of care Hambrook v. Stock Bros. (1925) 1 K.B. 141, 152, because a reasonable driver should foresee the possibility that a mother would be injured by such a sight. However, the situation is different when the parent, or the husband, of the victim was not present at the scene and did not experience the event directly, but heard about it from another person. In such a case he does not come within the range of foreseeability on the part of a reasonable driver, and the latter, therefore, does not owe him a duty of care".

A similar conclusion was reached in Motion (Beersheva) 109/78 [11]. In that case a son, who suffered a nervous breakdown as a result of his mother's death in a road accident, claimed varying damages (including pain and suffering, costs of treatment and loss of future earnings). The plaintiff was not at the scene of the accident and heard about it afterward from a third party. The court, at page 510, was of the opinion that in establishing a duty of care -

> "the plaintiff's geographic relation, time relation or visual relation to the event are relevant considerations in deciding whether the breakdown was a reasonably foreseeable result of the defendant's conduct...

> In this continuum, it is not necessary that the plaintiff be present at the place where the accident actually occurred; but it is still necessary that the plaintiff should have been an eye-witness to the tragedy or to its immediate aftermath."

The son's action was dismissed for failure to establish any one of the above relations.

(C) A certain relaxation of the limitation that the relative be physically present at the scene of the event for the wrongdoer to be liable for damages toward him was established in the case that was considered in C.C. (Haifa) 910/69 [12]. In that case the plaintiff and her two children were at the seashore. Her children went swimming while the plaintiff remained on the shore. Both children drowned and **the** plaintiff saw them being brought out of the water and the attempts to revive them. In her presence they were taken to a hospital, where she was informed of their death. The plaintiff claimed that she became mentally ill as a result of the emotional shock she suffered and supported her claim with a medical certificate.

In this case, too, the question confronting the court was whether, in the circumstances, the defendants had breached "a duty which they owed the mother under the Civil Wrongs Ordinance to ensure that she be protected against emotional shock". The court thought, in an opinion written by Judge Schall, that the test to be applied is the foreseeability test, which is accepted as the test for fixing the limits of the duty of care in negligence. The court's conclusion was that the mother had a cause of action in negligence for the emotional shock caused her. It said, at page 166:

> "The precedents which I have reviewed show that today emotional shock caused by fear or terror can furnish a cause of action against the person who negligently caused a situation which caused the shock, not only when there is a threat of bodily injury to the person himself but also when his children are threatened... The cause of action will be complete even if the mother was not present at the scene of the accident and did not see the tragedy with her own eyes. It is sufficient that it was foreseeable that she would be in the **vicinity of the accident,** and learn there of the tragedy that befell her child, or that she be in fear that a tragedy had happened to him... If the defendants owed the children a duty to care for their safety while swimming in the sea, then they also owed a duty to the mother, who was on the beach **near the place** where the children were brought after they were drawn out of the water, to protect her against the emotional shock that the sight of her drowned children was likely to cause" (Emphasis added - M.S.).

(D) Based on the principles laid down in the above judgments, relatives who were **involved** in, or **witness** to, an accident to someone dear to them, caused by the defendant's negligence, and who suffered therefrom emotional injury in the form of shock, nervous breakdown or mental illness, were entitled to compensation for their injuries. In C.C. (Tel Aviv) 582/72 [13] the plaintiff was present at the accident to her son which resulted in his death. A medical expert found that she suffered 10% permanent mental disability. The District Court, at page 80, awarded the mother

compensation for pain and suffering "both for the suffering itself and because it was likely that her disability makes it more difficult for her to work than otherwise..." Other pecuniary damage was not proved.

The same principles have been applied in matters adjudicated under the Compensation Law. In C.C. (Jerusalem) 907-09/81 [14], at page 458, the court considered the claim of a woman whose husband and two children were killed in a road accident in which she, too, was involved. She claimed compensation for "the shock and grief caused her when she witnessed with her own eyes the tragic results of the accident and the loss of her dear ones in this accident." No defined mental injury was proved. Relying on the principle concerning the plaintiff s **presence** at the scene of the accident, the court awarded her damages in the amount of 5% of the maximum sum payable under Regulation 2(b) of the Road Accident Victims Compensation Regulations (Calculation of Compensation for Non-Pecuniary Injury), 5776-1976 (cf. CA 4/75 [2], referred to above, which required proof of a "visible injury or illness").

(E) This court affirmed the District Courts' position concerning compensation to a relative for his emotional injuries. CA 813/81 [3] considered, among other matters, a widow's claim for compensation for emotional suffering due to the death of her husband in a road accident. The widow was herself involved in the accident and sat beside her husband who drove the car.

Deputy President, Justice M. Ben Porat, said the following in this context:

> "The argument that the widow should not be compensated for her emotional suffering as a result of her husband's death must be dismissed, in my opinion. She was in the car at the time of the accident, and her loss of consciousness was the result of this event and not unconnected with it. This is sufficient under the Israeli precedents, in my opinion, to recognize her cause of action for compensation for the suffering resulting from her husband's death: C.C. (Haifa) 910/69; C.C. (Tel Aviv) 582/72. There is similarly no reason not to interpret the term "bodily injury" in section 1 of the Compensation Law to include emotional shock caused to the injured person by the actual injury (and perhaps even by the possible injury) to a relative, and no one has argued otherwise in the proceedings before us. It should be noted that the English judgments in recent years reflect a departure from the demand for immediate presence as an eye witness (McLoughlin v. O'Brian (1982)). In any event, it is the fact that the widow received a shock from the very event which was common to her and to her husband. It would, therefore, be artificial to separate her suffering in consequence of the shock caused by the event itself, from her suffering caused by the death of her husband when the event occurred".

(F) To sum up, the Israeli courts have allowed a first-degree relative's claim and have awarded him damages on account of emotional injury caused him when he was **witness** to a negligent act or omission, committed by the defendant against his dear one,

that caused such person actual injury or death. The rule is the same when the relative was at least in the vicinity of the scene of the event.

So far as a cause of action under the Civil Wrongs Ordinance is concerned, it has been held that in such circumstances the defendant owes the plaintiff relative a **duty of care** not to cause him to suffer any mental shock, since a reasonable person, in such circumstances, should have foreseen that the plaintiff, who witnessed with his very own eyes the tragic occurrence to his dear one, will be injured emotionally as a result thereof. Foreseeablity of the injury has been the key to the establishment of the duty of care owed to the relative, as an independent duty separate from the duty of care which the wrongdoer owed to the direct victim who was injured bodily as a result of the breach of the duty of care in the same event.

Concerning the cause of action under the Compensation Law, the relative who was present was recognized, by virtue of the same principles, as an "injured person" in a "road accident", who is entitled to compensation under the Law and the Road Accident Victims Compensation (Calculation of Compensation for Non-Pecuniary Damage) Regulations.

9. The English Precedents

The Israeli courts have referred to English law in connection with the question before us. It would not be superfluous, therefore, to examine, by way of comparison, the developments in English law.

(A) The issue of mental injury, in its various forms, has been examined in English law with the greatest of caution. This restraint has its source in two central considerations.

First, there was the fear that the treatment of injuries in man's mental system with the concepts and the same legal framework as are used with respect to bodily injuries could flood the courts with baseless claims based either on deliberate deception or false illusions. Doubt was also expressed in this context concerning the reliability of medical opinions, with regard to both the very existence of mental injury and the causal connection between the injury and the defendant's negligence. The English courts tended to regard mental injury as incidental to bodily injury, hence their reluctance to recognize mental injury, standing by itself pure and simple, as compensable. They required that the mental injury be accompanied by external physiological consequences (such as a miscarriage or a heart attack) or that there be a severe mental injury (such as hysteria or neurotic fright).

Second, there was the fear that if liability for mental injuries per se were recognized, this would impose too heavy a burden on the conduct of the person who is required to refrain from causing such injury to a fellow-man (see J.G. Fleming, The Law of Torts (Sydney, 7th ed., 1987) 145; H. Street, The Law of Torts (London, 8th ed., by M. Brazier, 1988) 177).

This is the basis of the judgment handed down by the Privy Council in 1888 *(Victorian Railways Commissioners v. Coultas* (1888) [22]). In that case a woman claimed compensation for the nervous shock caused her by the negligence of the person

in charge of a railway gate who allowed the carriage in which she was travelling to cross the railway tracks just a moment before the train passed. As a result of the shock which she suffered she miscarried. The Privy Council allowed the defendant's appeal against the judgment of damages in the lower courts. It stated in the judgment, at page 225:

> "According to the evidence of the female plaintiff her fright was caused by seeing the train approaching, and thinking they were going to be killed. Damages arising from mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot under such circumstances, their Lordships think, be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gate-keeper."

(B) In the judgment in the case of *Dulieu v. White & Sons* (1901) [23] the above approach was abandoned for the first time, and the court recognized liability for the injury to a pregnant woman who miscarried as a result of nervous shock occasioned when a cart to which a horse was harnessed was driven negligently into the inn in which she was at the time. It was stated in the judgment that in order for the shock to be compensable, it had to flow from fear, that was reasonable in the circumstances, of physical injury to the person himself.

In the judgment in the case of *Hambrook v. Stokes Bros.* (1925) [24] the Court of Appeals recognized the right of a mother to compensation for the nervous shock she

suffered because she saw a lorry roll down a hill toward the place where her children were at the time. It transpired, in the end, that one of the children was injured. The mother died a few months later. An action was brought against the driver of the lorry who had negligently parked it in such a way that it began rolling down the slope of the hill by itself. It should be stressed that the mother herself was not exposed to threat of bodily harm from the lorry and that only her children were endangered. It was held that there was no logic and reason to distinguish between a mother's fear of threat of injury to her children and her fear of injury to herself. In the words of Bankes I, at page 151:

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

Later on the judge enumerates the factors which the injured mother's husband must prove in order to succeed in an action for compensation (id., at p. 152):

> "... that the death of his wife resulted from the shock occasioned by the running away of the lorry, that the shock resulted from what the plaintiffs wife either saw or realised by her own unaided senses, and not from something which someone told her, and that the shock was due to a reasonable fear of immediate personal injury either to herself or to her children."

In sum, the conditions are:

(1) Shock caused by the threat to the woman or to her children.

(2) Direct perception of the event, that is seeing or hearing the injury, as opposed to being informed about it by someone else.

(3) Reasonable fear of injury to herself or to her children.

(C) The first case, on the issue before us, that reached the House of Lords concerned a woman who, when getting off a tram, was witness to an accident in which a bicycle rider, who rode negligently, collided with a car. The bicycle rider was killed. The plaintiff heard the sound of the crash of the collision and saw the blood on the street after the body was removed from the scene. The plaintiff, who was pregnant, miscarried as a result of the shock. The reference is to *Bourhill v. Young* (1942) [25].

The House of Lords dismissed the woman's appeal on the ground that the bicycle rider owed no duty of care toward a person who it could not be foreseen would be injured bodily or mentally as a result of his negligent conduct. It was held that a reasonable person could not foresee, in the circumstances of the case, that a passer-by with ordinary phlegm and fortitude would suffer emotional shock as a result of the noises and the sights which the plaintiff experienced. This judgment laid down the basis for the rule that the question of compensation for emotional shock must be resolved in each case according to the foreseeability test. Compensation would be awarded only when a reasonable person in the wrongdoer's position would have foreseen that the plaintiff would suffer nervous shock as a result of his negligent act.

In the words of Lord Porter, at page 409:

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

Later judgments adopted the test laid down by the House of Lords in the *Bourhill* case. Thus, for example, a father was given compensation for emotional shock caused him when the defendant drove his car backwards onto his son's leg. The father did not see the accident, but heard his son's screams from nearby. *Boardman* v. *Sanderson (1964)* [26]. On the other hand, in another case a mother's claim was denied where, upon hearing screams, she looked out of the window and saw her son under the wheels of a taxi *(King v. Philips* (1953) [27]. It was held, at page 442:

> "The taxicab driver cannot reasonably be expected to have forseen that his backing would terrify a mother 70 yards away..."

The judgment in *King* [27] was severely criticized, mainly because, in the light of the rule laid down in *Hambrook* [24], there was no ground to distinguish between the two cases (see, for example: H. Teff, "Liability for Negligently Inflicted Nervous Shock" 99 L.Q.R. (1983) 100, 101; fleming, supra, at 149 n. 79).

(D) To sum up, until the leading judgment by the House of Lords in *McLoughlin v. O'Brian* (1982) [28], which will be referred to below, the rule which guided the English courts in the matter of compensation for nervous shock was as follows:

(1) The right to compensation exists only for a relative who is very close to the victim of the accident;

(2) The right is limited to a relative who was present at the scene of the accident, or was in very close proximity to it.

In the words of Street, supra, at 179:

> "The limits on liability established by analysis of the case-law up to 1982 appeared to be that the plaintiff should be present at the scene of the accident, or very near to it, so that with his unaided senses he realised what had happened, and that generally he must be very closely related to the person suffering physical injury. Indeed in the vast majority of cases the plaintiff has been the parent of a young child".

10. (A) A leading judgment on our subject is that of the House of Lords in *McLoughlin* [28].

The plaintiff, Mrs. McLoughlin, was at home when her husband and three children went for a drive in the family car. A lorry collided with their car two miles away from the house. It was determined that the accident occurred as a result of the lorry driver's negligence. Mrs'. McCIoughlin's daughter was killed and her husband and two other children were injured in varying degrees. Mrs. McLoughlin was informed about the accident an hour later and immediately went to the hospital to which the injured were taken. There she saw her injured family in the state in which they were brought from the scene of the accident and grasped the extent of the disaster that had befallen her. As a result of her tragic experience, the plaintiff suffered "severe trauma, organic depression and a change of personality, accompanied by physiological manifestations" (i.e., mental injury with physical-external expression): id., at p. 301.

The lower court thought that the defendants did not care Mrs. McLoughlin a duty of care since her injuries from shock were not foreseeable in the circumstances. The Court of Appeal held that the injury caused to her was foreseeable, but refused to recognize a duty of care in the circumstances, since Mrs. McLoughlin was not present at the scene of the accident and there was no basis in the existing precedents for finding liability in these circumstances. In other words, considerations of judicial policy caused the appellate court not to recognize liability in tort, despite the finding concerning foreseeability.

(B) The House of Lords reversed the decision and Mrs. McLoughlin's appeal was allowed. The rule which was established there was that a relative, who suffered mental shock as a result of seeing an accident or its immediate aftermath, could recover compensation from the negligent wrongdoer, if the shock which was caused to him was reasonably foreseeable in the circumstances of the case. This judgment, which is considered till today to be the leading judgment on the subject, examined the existing English case-law and laid out the central rules in the matter before us.

Lord Wilberforce was of the opinion that Mrs. McLoughlin's case could be examined in the light of the precedents which had been established in England until that time and could be seen to be an additional link in the chain, that is, a direct and natural continuation in the development of the law. In his opinion, one could claim compensation for nervous shock caused by negligence, under English common law, and the plaintiff need not prove that he suffered bodily injury or fear of such bodily injury, it being sufficient that there was such injury, or the fear thereof, to a person

close to him (his spouse or child). Until then, as indicated, the courts had recognized liability for injury caused when the plaintiff saw or heard, that is, when he was present at the scene of the accident in which his close relative was injured, or even if he did not see or hear it, but he arrived at the scene immediately thereafter and discovered its immediate aftermath.

Lord Wilberforce was of the opinion, therefore, at page 302, that:

> "If one continues to follow the process of logical progression, it is hard to see why the present plaintiff also should not succeed. She was not present at the accident, but she came very soon after on its aftermath. If, from a distance of some 100 yards... she had found her family by the roadside, she would have come within principle 4 above. Can it make any difference that she comes on them in an ambulance, or, as here, in a nearby hospital, when, as the evidence shows, they were in the same condition, covered with oil and mud, and distraught with pain?".

Further on in his judgment Lord WilbeKorce reiterated the principle (which he had laid down in his judgment in *Anns v. Merton London Borough* (1978) [29]) that foreseeability of the damage is not sufficient per se to establish a duty of care and liability for compensation in tort, but that one should set out the boundary-lines of liability on the basis of considerations of legal policy, and one should consider whether it is proper to impose responsibility toward every person whose injury is a likely probability in the circumstances. In other words, foreseeability of damage is an essential

condition but not a sufficient one; particularly when the damage is of the nature of mental shock or disturbance, which could, in the natural course of events, occur to very many "secondary injured parties". There is, therefore, a real need to limit the scope of recoverable damages.

Lord Wilberforce reviewed the considerations by which he thought one should be guided in establishing the limits of liability (such as, for example the fear that the courts would be inundated with claims, ("the floodgates argument"), the fear of dissimilation and fraud, increasing the onus of insurance on road-users, etc.), and listed three factors which should be considered when examining liability for nervous shock. According to him, there are three policy constraints which it is essential to apply alongside, and in addition to, the foreseeability test. They are: the class of persons whose claims will be recognized; their proximity to the scene of the accident in time and place; and the means by which the shock was caused.

As to the first element, the choice is between the closest of family relationships (parent-child) and opening the court portals to a casual passersby who happened by chance to be at the scene of the accident and suffered nervous shock in consequence thereof. The House of Lords did not need to decide this matter on its merits, since Mrs. McLoughlin's relationship with those who were physically injured in the accident was of the first kind. The view was expressed, on page 304, that:

> "the closer the tie (not merely in relationship but in care) the greater the claim for consideration. The claim, in any case, has to be judged in

> the light of the other factors, such as proximity to the scene in time and place, and the nature of the accident".

Concerning proximity to the scene of the accident it was held that such proximity most certainly must exist, since it should not be forgotten that the plaintiff must prove that it was the defendant's negligence that caused the nervous shock and not later developments. It was further noted that experience shows that insistence upon physical presence at the scene of the accident is not realistic and is even unjust. Therefore, the claim of one who arrived immediately after the traumatic event and observed its immediate aftermath would not be dismissed. This is the "aftermath" doctrine, by means of which the courts overcame the demand for physical presence before the judgment in the *McLoughlin* case. In summing up this point, he said, at page 305:

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

As for the question of the means by which the shock was caused, there had not been any occasion which recognized the claim of a person who had suffered a shock as a result of receiving information from a third party, so that (page 305) -

> "the shock must come through sight or hearing of the event or of its immediate aftermath. Whether some equivalent of sight or hearing, e.g. through simultaneous television, would suffice may have to be considered".

It should be noted that Mrs. McLoughlin heard about the accident from a third party, who informed her about the tragedy to her home. But the duty of care which was recognized toward her concerned only what she saw with her own eyes, that is, the aftermath of the accident which she observed in the hospital and not the information she received before that second hand.

(C) A second judge, Lord Bridge, also discussed the question of the appropriate legal policy and said the following in this context, at page 319:

> "On the one hand, if the criterion of liability is to be reasonable foreseeability simpliciter, this must, precisely because questions of causation in psychiatric medicine give rise to difficulty and uncertainty, introduce an element of uncertainty into the law and open the way to a number of arguable claims, which a more precisely fixed criterion of liability would exclude. I accept that the element of uncertainty is an important factor. I believe that the 'floodgates' argument, however, is, as it always has been, greatly exaggerated. On the other hand, it seems to me inescapable that any attempt to define the limit of liability by requiring, in addition to reasonable

> foreseeability, that the plaintiff claiming damages for psychiatric illness should have witnessed the relevant accident, should have been present at or near the place where it happened, should have come on its aftermath and thus have some direct perception of it, as opposed to merely learning of it after the event, should be related in some particular degree to the accident victim - to draw a line by reference to any of these criteria must impose a largely arbitrary limit of liability. I accept, of course, the importance of the factors indicated in the guidelines suggested by Tobriner J in Dillon v. Legg as bearing on the degree of foreseeability of the plaintiff's psychiatric illness".

(D) The legal literature regards the positions of Lord Wilberforce and Lord Bridge as representing the majority opinion in the *McLoughlin* case [28]. Lord Scarman commented that there is no room for considerations of policy in this context and that the legislature should express its opinion on the subject. Lord Edmund-Davies examined the matter before him in light of the situation of the "rescuer", toward whom it has long been recognized there is a duty to take care not to cause him nervous shock (see: P. Handernon, "Shock and Policy: McLoughlin v. O'Brian" 15 U.W. Aust. L. Rev. (1983) 398, 401). Nevertheless, it is customary to distinguish between the approaches of the above two judges on the question of the application of legal policy considerations in establishing liability for negligence in tort. While Lord Wilberforce is though to have added to the pure test of foreseeability additional external conditions, Lord Bridge's stand is that such conditions are merely considerations for establishing the degree of foreseeability in the circumstances of the case. It would seem that the first approach is stricter and more dogmatic, while the second appears more flexible, since it does not

obviate the possibility of recognizing liability in a future case in which foreseeability will be established despite the failure to fulfil all three conditions with respect to proximity and immediacy. An example can be found in the words of Lord Bridge himself, who was prepared to leave for further consideration the possible claim of a woman who read in a newspaper (accompanied by pictures) that the hotel in which her family was staying was burnt down and only later was informed that her entire family had perished, with the consequence that she lost her reason. In such circumstances, Lord Bridge said, the mental illness was most certainly foreseeable, and therefore, would compensation be refused only because of the lack of presence at the scene of the catastrophe and because the mosaic of tragic events was completed with the aid of imagination (see pages 319-320 of the judgment[28])?

On the question of the decisive weight of considerations of policy in fixing the boundaries for liability for nervous shock, the majority opinion sides with Lord Wilberforce's system, with which Lord Edmund-Davies and Lord Russell concurred (see also in this connection *Attia v. British Gas Plc.* (1987) [30], at 463-464).

Among the writers, there are those who prefer Lord Wilberforce's approach, which produces, it is argued, a higher degree of certainty and predictability. Thus, for example, R.A. Buckley, The Modem Law of Negligence (London, 1988) 23:

> "Nevertheless it is submitted that it is likely to remain true that the application of the forseeability test is subject to some degree of qualification in this area. Accordingly Lord Wilberforce's overt recognition of this in McLoughlin v. O'Brian is to be welcomed. It is

> both more convincing and, insofar as the special factors can be specifically identified, likely in this unusual area to produce a higher degree of certainty and predictability than insistence that assertion of the foreseeability test leaves nothing further to be said".

On the other hand, there are those who prefer to rely on the foreseeability test exclusively. For example, Teff, supra, at page 102:

> "The key consideration is whether or not the plaintiff ought to have been in the contemplation of the defendant as someone who might suffer psychiatric illness, given the particular circumstances".

11. Another judgment, which interpreted the *McLoughlin* [28] rule and discussed it sseveral aspects was handed down recently by the Court of Appeals in *Attia* [30]. There, a woman sued the gas company that installed a heating system in her home negligently, which caused the house to bum down. The claim was both for damage to property and psychiatric damage resulting from nervous shock. The Court of Appeal considered the question of liability for psychiatric illness whose origin was damage to property, as distinct from death or bodily damage to another. The plaintiff s right to compensation was recognized (see id., page 458, opposite the letter D). The facts in this case are different from the issue before us: whereas in the cases discussed hitherto the courts considered the legal possibility of recognizing a duty of care toward someone who was injured mentally in addition to the duty which was owed to the direct victims of the accident and which was breached; *Attia* recognized a duty of care not to act negligently toward the plaintiff as regards her property; and the question was whether the plaintiffs

mental injury was not too remote and whether it was included within the scope of the duty that was breached.

On the question of the dispute between Lord Wilberforce and Lord Bridge - that is, considerations of policy as against the foreseeability test simpliciter - Lord Justice Woolf said, at page 461:

> "...differing views were taken by the members of the House of Lords in McLouglin v. O'Brian and by the members of the High Court of Australia in Jaensch v. Coffey on the question whether, if the injury was foreseeable, liability could be excluded as a matter of policy. Fortunately, for the purposes of this appeal I do not consider that it is necessary to resolve this divergence of opinion. Even assuming that the test is not confined to being one of foreseeability, I cannot conceive that, if the injury which the plaintiff alleges that she suffered was a foreseeable consequence of the defendant's negligence, there could be any overriding policy reason for preventing her recovering damages. As I have already pointed out, she could well have sustained physical injuries as well as the psychiatric injuries of which she complains when she would have been entitled to damages and in my view there can be no reason of policy for distinguishing between the two types of injury".

12. Lord Justice Woolf refers above to the judgment of the Australian Court of Appeals in *Jaensch* v. *Coffey* (1983-1984) [15].

In that case the plaintiff was a woman whose husband was hurt in a road accident caused by the defendant's negligence. The plaintiff, who was at home at the time, did not come to the scene of the accident but was brought to the hospital immediately thereafter, where she saw her husband being taken in and out of the operating room

several times. Late at night she left the hospital and went home. During the course of the night she received several telephone calls in which she was informed that her husband's condition had deteriorated. She arrived at the hospital the following morning and during the course of the day it was not certain whether her husband would survive or not. In the end, the husband recovered and left the hospital after several weeks, whereas the plaintiff was soon found to be suffering from mental illness characterized by depression and a high degree of fear. It was found that the matters which she had seen and heard in the hospital on the night of the accident and the following day had caused the mental illness. The Court of Appeals, relying, inter alia, on the English decisional law in *McLoughlin* [28], awarded the plaintiff damages, applying the following rules:

(a) One who claims for damages because of nervous shock, must prove, by expert medical testimony, that he suffers from "a recognized psychiatric illness".

(b) The illness must be "shock induced", that is, it must be caused by a sudden shock, and not be the result of a continuous process of exposure to, and involvement in, the suffering of another, for example, by caring for him.

In the words of Judge Brennan, at page 565:

> "A plaintiff may recover only if the psychiatric illness is the result physical injury negligently inflicted on him by the defendant or if it is induced by 'shock'. Psychiatric illness caused in other ways attracts no damages, though it is reasonably foreseeable that psychiatric illness

> might be a consequence of the defendant's carelessness. The 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".

(c) The psychiatric illness must flow from a negligent act of the defendant, who caused bodily injury to or endangered another. An act or omission of personal risk, that causes mental illness to another, cannot raise a right to damages.

The court was unanimous insofar as the rules enumerated above are concerned. A majority of the judges of the Australian Court of Appeals supported the additional rules which will be enumerated later.

(d) As stated above, there was general agreement that the plaintiff would not be entitled to damages for nervous shock caused by negligence unless

> "some recognisable psychiatric illness induced by shock was reasonably forseeable" (ibid, at 566).

The minority were of the opinion that the foreseeability test is the only test that should be applied in establishing liability, whereas the majority (as the majority position in the *McLoughlin* case [28]) were of the opinion that the foreseeability test alone is insufficient, and that several external limitations should be added, whose origin is in

considerations of legal policy. According to the majority approach, then, the foreseeability of injury as a probable result of the defendant's negligence is an essential condition, but not a sufficient one.

(e) According to the majority opinion, another element which must be proved in order to establish the duty of care is that there be a relationship between the plaintiff and the person who was killed or injured or exposed to danger as a result of the defendant's negligence. The relationship must be "close and intimate" (ibid [15], at 555).

(f) So, too, it is necessary that the plaintiff be present and perceive with his senses the accident or its immediate aftermath (Judge Deane, as Lord Bridge in the *McLoughlin* case [28], left the question of damages for mental injury reasonably and foreseeably resulting from information given to the plaintiff second hand for further consideration).

(g) The plaintiff must prove proximity in time and place between the accident and its immediate aftermath, on the one hand, and the mental injury caused him, on the other hand.

13. It is not superfluous to note that in some of the Australian states there is express legislation awarding compensation to a relative (a parent or a spouse) of one who is killed or injured or exposed to danger, who suffers mental shock. The compensation is not conditional on establishing an independent duty of care toward the relative or complying with the test of foreseeability. Similarly, proximity to the event in time or

place is not required. As to other relatives of the direct victim, who are neither parents nor spouses, they are entitled to compensation if the accident occurred within the range of their sight or hearing (for fuller details, see Fleming, supra, at 150-15 l; and Jaensch [15], at 601-602).

14. **Interim Summary**

It would be useful to make an interim summary of the guiding principles that have taken shape in English common law over the years with respect to compensation for mental injury resulting from negligence.

(A) A plaintiff seeking to recover compensation for mental injury must prove that he suffered "nervous shock". This has been interpreted to mean "any recognisable psychiatric illness", as distinct from sorrow, grief or any other mental distress, which are not compensable. The reference is, therefore, to a sick mental reaction, which has to be proved by means of suitable medical evidence:

> "The plaintiffs right of action depends on proof of 'nervous shock'. It is clear from the cases that, for legal purposes, this term implies mental distress which results in an acknowledged medical condition, whether physical, such as a heart attack or miscarriage, or psychopathological, as with various neuroses, hysteria, schizophrenia or morbid depression. Emotional distress without objective symptoms will not suffice. Thus mere temporary sensations of fright, tension or

anger, and feelings of grief, anguish or sorrow without more cannot ground an action" (Teff, supra, at 105).

I shall enlarge upon the medical aspects of the subject (including the distinction between "primary" and "secondary" reactions to a traumatic event) at a later stage (see also Jaensch [15], at 600-60).

(B) An additional requirement concerns the process of causation, or the manner in which the mental illness was caused, which is that it has to be shock induced. As explained above, the mental illness must be the immediate consequence of a sudden and severe emotional experience and not the product of the cumulative influence of the accident and its aftermath on the plaintiff.

In *Pratt & Goldsmith v. Pratt* (1975) 116], the court of the State of Victoria, in Australia, dismissed the action of a mother who suffered mental illness, whose symptoms appeared weeks (if not months, as stated in the judgment) after the accident. It appears that the reason for dismissing the action was based more on the absence of a causal connection and the remoteness of the injury rather than on the .existence of a duty of care, since according to the facts of the case, the plaintiff witnessed the immediate aftermath of the accident but she failed to prove that her illness was "shock induced".

Based on scientific criteria, this condition for imposing liability appears not to be connected to the foreseeability test, that is to the requirement that the mental illness which the plaintiff suffered was probably foreseeable as a result of the defendant's

negligent act: one can find in the medical literature support for the opposite thesis concerning mental illness as a result of continuous pressure and strain resulting from exposure to and involvement in the aftermath of the physical injury caused to another. This condition is, therefore, external to the manner in which the duty of care is established and its source is in considerations of legal policy and the inclination to limit the circle of persons entitled to compensation for mental illness caused by negligence (see Fleming, supra, at 149 n. 85).

In the *Jaensch* case [15], it was stated in this connection, at p. 601:

> "There is also strong expert support for the proposition that there is a real - and foreseeable - risk that psychiatric illness may result from mental stress during the period consequent upon bereavement, particularly conjugal bereavement, or during a period of constant association and care of a badly injured spouse or other close relative independently of any shock sustained at the time of the actual death or injury. While it must now be accepted that any realistic assessment of the reasonably foreseeable consequences of an accident involving actual or threatened serious bodily injury must, in an appropriate case, include the possibility of injury in the form of nervous shock being sustained by a wide range of persons not physically injured in the accident, the outer limits of reasonable foreseeability of mere psychiatric injury cannot be identified in the abstract or in advance".

(C) The nervous shock to the plaintiff must result from a negligent act that caused physical injury or threatened such injury to someone other than the defendant himself. Thus, for example, a pregnant woman, who had a miscarriage as a result of nervous shock she suffered when she saw a window-cleaner who, in the course of working outside a window, lost his hold and fell to the ground, would not be entitled to compensation even though her injury could have been reasonably foreseen in the circumstances (for discussion of this subject, which does not directly apply in our case, see F.A. Trindade, "The Principles Governing the Recovery of Damages for Negligently Caused Nervous Shock" 45 Camb. L.J. (1986) 476, 481-482, 484; F.A. Trindade, "Negligently Caused Nervous Shock - An Antipodean Perspective" 5 Oxford J. Legal Stud. (1985) 305, 307).

(D) The plaintiff must show that the defendant owes him a duty of care not to cause him harm of the nature of mental illness which is foreseeable in the circumstances of the case. In other words, there must be foreseeability of mental illness caused by shock, but it is not necessary that the specific mental illness suffered by the plaintiff be foreseen or every stage of its development. It is sufficient to prove the causal chain with reference to foreseeability on the part of a reasonable person, in the circumstances.

We have seen that considerations of legal policy have been superimposed on the pure foreseeability test, in order to limit the scope of liability and to deny recovery to some persons for various reasons (including the fear of imposing too heavy a burden on the defendants, of flooding the courts with actions, some of which are vexatious, and the like), despite the fact that their injury was foreseeable. Only thus, for example, can we explain the third principle enumerated above concerning the absence of compensation

for mental injuries resulting from negligence that caused an accident to oneself. Furthermore, it would appear that limiting the compensable damage to mental illness (as opposed to lesser mental harm) derives from the same source. This is the reason also for the demand that the mental illness be caused by shock:

> "...An examination of all the decided cases on nervous shock in Britain and Australia is more likely to lead to the conclusion that reasonable foreseeability by the defendant of some recognised psychiatric illness induced by shock cannot be the sole test for determining whether a duty of care is owed. If it were the sole test, it would be difficult to exclude, from those owed a duty of care, the close relative or friend who has no contact with the accident or its immediate aftermath but who suffers reasonably foreseeable nervous shock by reason of constant social contact, as loyal nurse or companion, with the injured victim" (Trindade, Camb. L.J., supra, at 484).

15. As mentioned above, it is customary to enumerate three conditions which the plaintiff must fulfil in order to establish an action for compensation for mental injury, in addition to the requirement of foreseeability of the injury in the circumstances of the case. The common characteristic of these three conditions, which will be enumerated below, is that they relate to proof of proximity between the accident and its immediate aftermath, such as the death, injury or threat of injury to the direct victim, and the person who was injured mentally as a result thereof.

The first condition is that there be a close relationship between the plaintiff and the direct victim of the accident. A family relationship of the first order (spouse, parents, children) is sufficient, of course. But a relationship of intimacy and care - a "tie of care" - not based on a family relationship, can also justify imposing liability. One who is injured mentally but is not within the category of "relative" will be deemed to be a casual passerby, toward whom there is no duty of care. However, liability was recognized in the past for the injury caused to a person who rushed to rescue persons injured in a terrible train accident and was hurt mentally as a result of the traumatic scenes he witnessed. (Allowance of compensation to a rescuer also stems from the consideration, based on the public interest, that such behavior should be encouraged; see *Chadwick v. British Transport Commission* (1967) [31]). It has been held in Australia that close work relations are also sufficient for this purpose: *Mount Isa Mines Ltd. v. Pusey* (1970) [17]. (For a fuller discussion of this subject, see Trindade, Cam. L.J., supra, at 486-489).

According to the known medical information, the most important factor explaining the phenomenon of mental illness caused by injury to another is the extent and intensity of the relationship between the direct victim of the negligent event, who was killed or suffered actual or threatened injury, and the person who became mentally ill:

> "Much of the artificiality surrounding the analysis of foreseeability in the cases could be avoided if the courts paid more attention to what medical science can tell us about the causes of nervous shock. Thus, in the absence of fear for himself, the crucial determinant of whether the plaintiff is so affected as to suffer from a 'recognisable

> psychiatric illness' is almost invariably the nature of his relationship with the victim. Since it is normally only when the relationship between plaintiff and victim is in fact exceptionally close that medical experience indicates a degree of reaction that would be compensable, fear of the floodgates seems misconceived" (Teff, supra, at 104).

And see also the *Jaensch* case [15], at 600.

The second condition is that there must be proximity of place and time, between the accident and its aftermath, on the one hand, and the shock which caused the mental illness from which the plaintiff suffers, on the other hand. The origin of this condition is in the requirement that the plaintiff be present at the accident and see or hear the injury done to his relative. This condition has not been preserved in its original form but has been softened by the decisions over the years, so that what is required today is that the plaintiff be close to the accident or to its immediate aftermath. For example, though he is not present at the scene of the accident itself when it occurred, he learns of the tragedy from his own senses, at the first opportunity, for example in the ambulance or in the hospital to which the injured person was taken.

> "Laibility cannot rationally be made to depend upon a race between a spouse and an ambulance; it must depend upon what the spouse perceives, its effect upon her, and whether her perceptions and their effect are the reasonably foreseeable result of the defendant's careless conduct" (ibid, at 578).

This condition is linked to the third condition, in addition to the condition of foreseeability itself, that the plaintiff must actually feel the effect of the accident and its aftermath with his own senses. This means that it is not sufficient that he receive the information second hand, even if it be imparted to him close to the event in time and in place. "What is required is that the plaintiff must actually experience the accident or its immediate aftermath himself.

The source of these last two conditions concerning the direct contact and the degree of proximity in time and place between the plaintiff and the traumatic event is in the belief that the closer the plaintiff is to the tragic occurrence, the more likely it is that the mental injury he incurred was foreseeable as a probable consequence of the defendant's negligence. The theory is that the further one is distanced and removed from the scene of the accident the less likely it is that one would suffer mental injury as a result of someone else's death or bodily injury. The power of the severe event is softened and blunted so that it cannot any longer be said that the defendant should have foreseen that the plaintiff would suffer shock which would cause him mental illness (since, it must be remembered, the requirement is that the mental illness be shock induced); and although exposure to the later consequences of the accident (such as, through caring for the direct victim) can cause mental injuries, and even mental disease, this would be the product of a continuous process of confrontation with the results of the tragedy. As explained above, the requirement is that the mental illness result from sudden nervous shock. The assumption is that an event that is later than the tragedy itself and its results cannot cause so severe a shock as to develop into mental illness:

"When the scene of an accident is left behind, and the perception of some later phenomenon induces a psychiatric illness in a plaintiff, the factual difficulties in the way of establishing negligence occasioning nervous shock are greatly increased though the principles are unchanged. The occurrence or existence of the later phenomenon, its sudden perception by the plaintiff and the inducing of the plaintiff s psychiatric illness must be proved to be the results, and the reasonably foreseeable results, of the defendant's conduct. But the separation in time and distance of the later phenomenon from the immediate consequences of the defendant's conduct may make it difficult to prove the elements of causation and reasonable foreseeability as they apply in cases of nervous shock. The cry of distress which summons a rescuer, spouse or parent to the scene of an accident may lose some of its urgency as time passes after the initial injury; later visits by a spouse or parent to the injured person in hospital may not be so distressing as to induce psychiatric illness in a spouse or parent of a normal standard of susceptibility - especially if the injured person's condition and treatment proceed without dramatic fluctuations. It may not be reasonably foreseeable that the perception of the injured spouse or child in hospital might induce a psychiatric illness" (ibid, at 570).

The imposition of these two last conditions in addition to the requirement of foreseeability has been heavily criticized. The criticism stems from Lord Bridge's speech in the *McLoughlin* case [28], where he left open for further consideration the possibility of awarding compensation for mental illness suffered by someone who heard

about the tragedy to his dear one from a third party. In the *Jaensch* case [15], too, Deane J left the said question for further consideration (id., at p. 608).

The legal literature published after the above two judgments brings many examples of instances in which insistence upon the two conditions mentioned above would lead to illogical and even unjust results. For example, the existing law would not recognize the claim for compensation of a woman who, while watching her husband participate in a car race on television, sees that car catch fire with him inside and develops mental illness in consequence of the shock. Should the answer be different if the race were televised directly from a place near where she happened to be, so that the requirement of proximity of time and place would appear to be satisfied? Another example is that of a bedridden husband who cannot visit his wife who is injured in an accident, but he receives photographs and details from a third party which cause him to lose his mind. A third example brought is that of a blind and deaf grandfather waiting for his granddaughter on the opposite side of the street and because of his blindness and deafness he is unable to hear or see that she has fallen into a pit, negligently dug there, while crossing the street. (For further details, see Trindade, Camb. L.J., supra, at 490-493).

These examples are presented to make the criticism of the above two conditions concerning "proximity" to the traumatic event more concrete. The theory behind the criticism is that application of these conditions could be arbitrary in certain circumstances, in which it can be said, despite their absence, that the mental injury was foreseeable and that considerations of justice and the public interest render it mete to impose liability in the circumstances.

16. **American Precedents**

(A) In the United States, too, there was consistent opposition in the judgments in the various states to the recognition of liability for purely emotional damage. The reasons have already been mentioned above, and will be repeated here briefly:

> "There are at least three principal concerns, however, that continue to foster judicial caution and doctrinal limitations on recovery for emotional distress: (1) the problem of permitting legal redress for harm that is often temporary and relatively trivial; (2) the danger that claims of mental harm will be falsified or imagined; and (3) the perceived unfairness of imposing heavy and disproportionate financial burdens upon a defendant, whose conduct was only negligent, for consequences which appear remote from the 'wrongful' and (W.L. Prosser and W.P. Keeton, On The Law of Torts (St. Paul, 5th ed., by W.P. Keeton, 1984) 360-36 l).

The American courts entrenched their reservations about providing legal protection not to be harmed or distressed emotionally by means of the following two "threshold rules", which the plaintiff had to satisfy before his right to be compensated for the harm caused to him would be considered.

The first rule was that a claim may be brought for mental injuries only when they accompany, secondarily, bodily injuries negligently caused. When the bodily injury is

not immediate, but occurs later, as a result of the mental injury (as in the case of a miscarriage following upon severe emotional upset), most of the courts established the condition that there be physical impact between the defendant and the injured person. The demand for physical impact also was satisfied by mild bodily injuries, such as a light push, dust in the eye or smoke inhalation. But in recent years the tendency in the judgments in the states is to recognise a cause of action in negligence for causing serious emotional distress, without distinguishing whether the plaintiff fell ill or was harmed because of it (ibid, at 364-365).

The second rule was that where the mental injury is not the result of the plaintiff s fear for his own safety, but its source is in seeing bodily harm to, or the threat to the life or health of another, then a condition for the recognition of liability was that the plaintiff himself must be in the zone of physical danger created as a result of the defendant's conduct ("the zone of danger rule"). This rule was abandoned in a 1968 judgment of the Supreme Court of California, *Dillon v. Legg* (1968) [18]. Incidentally, this judgment served as one of the comer-stones upon which the *McLoughlin* ruling [28] was based.

(B) The above *Dillon* case [18] recognized the right of a mother to compensation for mental injuries caused her as a result of witnessing a road accident in which her daughter was killed. It was expressly established that the mother witnessed the accident from a place in which she herself was absolutely safe physically. In other words, a duty of care not to cause the plaintiff mental injury will arise when a reasonable defendant would have foreseen that his negligent acts will cause mental injury to the plaintiff, or to persons of a like nature, as a probable consequence, in the circumstances of the case

(see *Dillon* [18], at 919). It was further held there that three measures of proximity should be taken into account in establishing the probable foreseeability: "physical proximity", "temporal proximity", "relational proximity" (see Prosser and Keeton, supra, at 366).

It was said there [18], at pages 920-921:

> "We note, first, that we deal with a case in which plaintiff suffered a shock which resulted in physical injury and we confine our ruling to that case. In determining, in such a case, whether defendant should reasonably foresee the injury to plaintiff, or, in other terminology, whether defendant owes plaintiff a duty of due care, the courts will take into account such factors as the following: (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.
>
> The evaluation of these factors will indicate the degree of the defendant's foreseeability: Obviously defendant is more likely to foresee that a mother who observes an accident affecting her child

> will suffer harm than to foretell that a stranger witness will do so. Similarly, the degree of foreseeablity of the third person's injury is far greater in the case of his contemporaneous observance of the accident than that in which he subsequently learns of it. The defendant is more likely to foresee that shock to the nearby, witnessing mother will cause physical harm than to anticipate that someone distant from the accident will suffer more than a temporary emotional reaction. All these elements, of course, shade into each other; the fixing of obligation, intimately tied into the facts, depends upon each case".

(C) The judgment in the *Dillon* case [18] was adopted in a substantial number of states in the United States of America, while only a few continued to abide by the earlier requirement that the plaintiff must have been within the zone of physical danger.

In some of the states which adopted the *Dillon* ruling the law further developed such that it abandoned the pure foreseeability test and applied the three criteria concerning proximity as principles of the substantive law limiting responsibility, rather than as tools for examining the existence of a duty of care, as had been expressly emphasized in the *Dillon* case (see further: P.A. Bell, "The Bell Tolls: Toward Full Tort Recovery for Psychic Injury" 36 U. Flo. L. Rev. (1984) 333, 338-340). Thus, the judgments of the Supreme Court of Florida in *Champion* v. Gray (1985) [19]; *Brown v. Cadillac Motor Car Div.* (1985) [20], represent the tendency to narrow the *Dillon* holding. In the *Champion* case [19] a mother witnessed her

daughter's death in a road accident, fainted and died on the spot. It was held that although impact was not required - that is, there was no need for physical harm prior to the occurrence of mental injury, the mental injury must be accompanied by concrete physical results. Mental injury, alone, is not sufficient. In the *Dillon* case, too, the ruling was based on the assumption of mental injury that is expressed physically. The court thought that the plaintiff must establish the three additional criteria, in addition to the usual tests for foreseeability of injury, as set forth in detail below. Thus, the *Dillon* ruling, which had emphasized that these are criteria of foreseseeability, not additional conditions, was in fact narrowed thereby:

> "Foreseeability is the guidepost of any tort claim. Because we are dealing with an unusual and nontraditional cause of action in allowing damages caused by psychic injury following an injury to another, however, public policy comes into play and some outward limitations need to be placed on the pure foreseeability rule. We have already referred to the requirement of a significant discernible physical injury. In addition the psychically injured party should be directly involved in the event causing the original injury. If such a person sees it, hears it, or arrives upon the scene while the injured party is still there, that person is likely involved... Another factor in the foreseeability requirement is that the secondarily injured party must have an especially close emotional attachment to the directly injured person. A child, a parent, or a spouse would qualify; others may or may not, depending upon their relationship and the circumstances thereof' *(Champion* [19], at 20).

On the other hand, the judgment of the Ohio Supreme Court in *Paugh v. Hanks* (1983) [21], is representative of the opposing thesis. In that case road accidents occurred on three separate occasions near the plaintiff s house, which was opposite a road junction that connected an interstate highway with a state highway. All three accidents also caused property damage as the cars involved hit the plaintiff's courtyards. The plaintiff sued all three drivers, and claimed, in addition to her property damage, that she suffered "depression, including neurotic fear with depressive characteristics". The court held that it was not necessary that the mental injury be accompanied by physical manifestation. Instead, it held that it had to be "serious", page 765:

> "In delineating the standards to guide Ohio courts in reviewing cases seeking damages for the negligent infliction of serious emotional distress, we wish to underscore the element of 'seriousness' as a necessary component required for a plaintiff-bystander in order to sufficiently state a claim for relief. We view the standard of 'serious' emotional distress as being a more reliable safeguard than an 'ensuing physical injury' requirement in screening out legitimate claims. By the term 'serious', we of course go beyond trifling mental disturbance, mere upset or hurt feelings. We believe that serious emotional distress describes emotional injury which is both severe and debilitating. Thus, serious emotional distress may be found where a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances of the case".

As to the three criteria established in the *Dillon* case [18] (physical proximity, temporal proximity and relational proximity) it was emphasized, on page 766, that these were guiding principles for establishing the existence of a duty of care and not prior conditions which the plaintiff had to prove in addition to the foreseeability of the injury:

> "Concomitant with this test of foreseeability, we add several factors which should be considered in order to determine the reasonable foreseeability of a negligently inflicted emotionl injury to a plaintiff-bystander. These factors are by no means exclusive, and the mere failure of a plaintiff to satisfy all of them should not preclude an aggrieved party from recovery. Thus, the term 'factors' should be underscored to alleviate any misconception that such factors are requirements. The purpose of these factors is to assist and guide the determination of whether the serious emotional injury was reasonably foreseeable to the defendant at the time the accident (which precipitated the cause of action) took place".

The legal literature published in the United States following upon the *Dillon* case and later judgments also set forth the two theories discussed above. Thus, for example, Bell's article, mentioned above, sets forth the thesis that tort damages can be recovered for any mental injury (the full recovery rule). The underlying principle is that every person is entitled to psychic well being, and this right should benefit from the protection of the law. The author supports his approach with various economic considerations, and, in his opinion, acceptance of his approach would reduce the overall cost of road accidents, on the one hand, while general principles of fairness and justice would be

advanced, on the other hand. This approach was criticized in an article by R.N. Pearson, "Liability for Negligently Inflicted Psychic Harm: a Response to Professor Bell" 36 U. flo. L. Rev. (1983) 413.

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17. Until now we have discussed the legal thinking on our subject, as it has been developed in England, Australia and the United States of America. We return now to our own law. We shall first refer to the legal situation from the perspective of the law of negligence in tort, and then we will examine the application of the Compensation Law.

18. (A) Let us now examine the legal criteria pertaining to the establishment of liability in tort for **mental** injuries caused to Reuben as a result of the death of, or injury or threat of injury to, Simon (Reuben's relative), by means of Levi's negligent act or omission.

(B) The key to the solution of the question of liability lies in establishing the existence or absence of a **duty of care,** owed by Levi, the tortfeasor (whose negligence caused physical injury, or the risk of physical injury, to Simon, who is the immediate and direct victim of his act), and to Reuben, who was injured mentally as a result of the injury to Simon. We have seen that it has been held in England and the United States that, in **certain circumstances, a** defendant owes a duty of care in tort toward someone who is injured mentally, not to inflict such an injury on him, where the mental injury was the probable, foreseeable consequence of the defendant's conduct.

(C) There are three building blocks in the process of establishing liability for the tort of negligence (Cr.A. 6/55 [4], at p. 1012; Cr.A. 402/75 [5], at p. 570):

(a) the existence of a duty of care on the part of the tortfeasor toward the injured person;

(b) a breach of the said duty;

(c) causing injury as a result of the breach of the duty.

With regard to the question of the duty of care, the first building block, we examine two aspects - one in principle, the other specific - that apply directly to the facts of the case (CA 145/80 [6], at p. 122). The aspect of principle deals with what is known as "the conceptual duty of care"; the specific aspect concerns the concrete duty of care. In the words of P.H. Winfield & J.A. Jolowitz, **On Torts** (London, 11th ed. by W.V.H. Rogens (1979) 67:

> "The concept of the duty of care performs two distinct functions. If the plaintiff is to succeed it must be established first that the circumstances in which his damage was caused were capable of giving rise to a duty of care, and, secondly, that the defendant actually owed him a duty on the particular facts of the case."

The first aspect, as stated, concerns the conceptual duty of care. In the words of my honorable colleague, Barak J, in Cr.A. 186/80 [7], at p. 776:

"The first aspect considers the conceptual question (the 'conceptual duty of care') whether the general categories to which the tortfeasor, the victim, the act and the injury belong can create a duty of care. According to Shamgar J, in CA 343/74, at p. 156:

'Reference to the existence or absence of a duty between one person and another is not anchored, fundamentally, in any particularized decision concerning the nature of the specific relations which should exist between the two individuals. Its existence is a matter of law, built on the general distinction and classification of types of injuries and types of wrongdoers and of victims, and its limits are influenced first and foremost by legal policy'".

The existence of the conceptual duty of care is established on the basis of the foreseeability test, that is, according to the answer to the question whether a reasonable person should have foreseen the occurrence of the injury. My honorable colleague, Barak J, said in CA145/80 [6] *supra,* at p. 123:

"Normative foreseeability - where technical foreseeability exists in first - serves to limit the scope of liability. In principle, where injury can be foreseen technically, there exists a conceptual duty of care, unless considerations of legal policy negate the duty (see Lord Reid in *Home Office v. Dorset Yacht Co. Ltd.* (1970)). Such considerations of legal policy serve to strike a balance between the various interests

> struggling for priority. The court takes into consideration the need to ensure freedom of action on the one hand and the need to protect property and life on the other hand. It takes into account the nature of the injury and the manner in which it occurred. It takes into account the influence its decision will have on people's conduct in the future. It weighs the financial burden which will be imposed on a certain class of tortfeasors or victims in the wake of its decision. These and other considerations are balanced in the court's judicial consciousness, as it weighs them on the scales of justice, and based on them, the court fixes the scope and limits of the conceptual duty of care, which constitutes **the** consideration in the parallelogram of forces".

In this connection recall the words of Lord Diplock in *Dorset Yacht Co. v. Home Office* (1970) [32], at 1059:

> "And the choice is exercised by making a policy decision as to whether or not a duty of care ought to exist..."

Similar in spirit are Lord Wilberforce's words in the *McLoughlin* case [28], *supra,* at 303:

> "It is not merely an issue of fact to be left to be found as such. When it is said to result in a duty of care being owed to a person or a class, the statement that there is a 'duty of care' denotes a conclusion into the forming of which considerations of policy have entered".

(D) Does a conceptual duty of care exist in the relations between the tortfeasor and the injured person's relative in our case, as described above?

Before we deal with this question in detail I must state that I accept the view that we do not refer merely to one, solitary duty of care, which carries others along with it, in numbers equal to the number of secondary victims. If that were the case, then we could deal with the problem before us solely on the basis of considering the degree of remoteness of the injury (see J.C. Smith, *Liability in Negligence* (London, 1984) 121-125).

The duty of care owed to the person injured bodily (the main victim) and the duty of care owed to additional secondary victims arise and exist in parallel. We are concerned with an independent and separate duty of care between the tortfeasor and the person who is injured mentally. Incidentally, we call the one duty "primary", not because of the significance of its consequences in comparison with those of the "secondary" duty, since the consequences of a breach of the latter duty can be much more serious than those of a breach of the former duty (see the *Jaensch* case [15]. *infra),* but because a breach of the primary duty of care is a condition of fact for the other breaches, even when the consequences of the primary injury pass on before those of the secondary injury:

> "Though the plaintiffs shock in these cases is typically consequent on the defendant's having injured or imperilled someone else, his cause of action is not dependent on, or 'secondary' to, the primary victim's.

> The defendant's liability arises from a breach of a duty of care owed to the plaintiff directly, not derivatively, even if it is generally at once also a breach of duty to the other. Thus it is no defense that the primary victim could not himself recover, be it because he suffered no injury or because he was contributorily negligent or because he lost his claim for some other reason" (Fleming, supra, at 150).

In the *Jaensch* case [15], *supra*, the husband recovered from his injuries, but his wife - the plaintiff - developed a mental illness. The fact that the direct victim recovered was irrelevant to the question of liability towards the wife for the mental illness caused her.

19. As stated, the considerations of legal policy serve to strike a balance between the various interests. Causing bodily damage by negligence is an event which occurs in the world of reality. This event, in the nature of things, is not confined to causing such damage alone, but has secondary consequences and incidental results, including its being the source of mental injuries of varied kinds and strength, caused to another. Thus, for example, causing bodily damage to one person can induce a variety of mental injuries to an indefinable number of victims, from the injured person's close relatives through the circle of his friends and, finally, to innumerable casual passers-by who witnessed the event itself by chance, or read about it in a newspaper or saw its immediate consequences in a television broadcast.

Establishing the limits of tort liability in a matter such as that before us, on the basis solely of the possibility of the physical foreseeability of any kind of mental injury,

would mean that the tortfeasor, who negligently injured someone physically, would find himself obligated to compensate a great number of people, whose feelings and mental stability were in some way affected by his negligent act. This result, naturally, would not be reasonable, both because of the heavy burden it would impose on the tortfeasor in particular and on human conduct in general, and because of the burden it would impose on the judicial system, by seeking to harness it to the cause of spreading the law's protection over the interest not to be injured mentally. The application of the foreseeability test exclusively would lead to a multiplication of claims, including, in all probability, claims on account of trivial damage, and baseless and false claims. The judicial system which, because of its limitations, copes with great difficulty with the flood of litigation even today, would be faced with double and perhaps even triple, the number of cases connected with each accident: a reasonable legal policy cannot lend its hand to this.

20. A filtering device is therefore required, within the framework of establishing the conceptual duty of care, which will select from amongst all the foreseeable mental injuries only those which deserve to be included within the bounds of liability. One can try to enumerate the various considerations on the basis of which the existence of liability for compensation for mental injuries should be assessed. Of course, this is not an exhaustive list and it is subject to the test of judicial practice and the development of the law from case to case.

(A) The Identity of the Plaintiff - The case under consideration before us does not require us to decide this question directly, since both appeals concern first-degree

relatives (parents; daughter), who claim to have suffered mental injury as a result of the bodily injury inflicted on their dear ones.

It is logical to establish, **at this stage, a** condition that the action may be brought by first-degree relatives (parents, children, spouses) only. We have seen that according to known medical data, the process of causing mental damage and its severity are to a considerable extent the result of the degree of relationship which existed, **in fact,** before the accident, between the primary victim of the accident and the person who became mentally ill as a result thereof. That is, the degree of actual intimacy and relationship is a very important factor. In other words, there is a degree of relationship that speaks for itself in which the mental effect of the injury is foreseeable, but other different degrees of relationship could produce the same results. It is, therefore, proper to leave the question whether to add to the list of first-degree relatives, in exceptional cases, an additional victim whose right not to be injured mentally would be deemed worthy of the law's protection, for future consideration by the courts .

(B) Direct Perception of the Tortious Act - The foreign precedents require that the plaintiff be an **eye- and ear-witness** to the traumatic event or that he discern its immediate aftermath by means of his own senses (whether as an element of the foreseeability test or as a limiting condition extraneous to the foreseeability test). On the other hand, we have seen that the demand for a direct perception of the tortious act, as a material bar to imposing liability, has been strongly criticized. This criticism argues that the possibility of recognizing mental injury caused by information received second-hand from a third party should not be barred.

It is obvious, on the face of it, that the nearer the plaintiff was to the tortious act and the more he perceived its traumatic impact himself, the more the mental injury he suffered was foreseeable as a probable consequence in the circumstances. When there is distance from the events as they occur and the information about them is received second hand, one may reasonably conclude that the strength of the difficult events has become blunted and softened, and in such circumstances, the foreseeability of real mental injury decreases. This is so generally, but not always. I do not think that we should establish a preliminary condition that the right to compensation should be denied, at the very threshold, to a relative who was not present at the scene of the accident and who does not, therefore, comply with the condition that he perceive it directly, though his injury was foreseeable in the circumstances. We have seen that there are many examples of situations in which it can be imagined that insistence on the demand for direct perception of the injurious event would lead to unjust results. It is therefore proper, in my opinion, to adhere to the foreseeabiity test in this connection, that is, to examine in each case whether the plaintiffs injury - even if caused by second-hand information - was foreseeable in the overall circumstances of the case as a probable consequence of the defendant's negligent conduct. The manner in which the information was received should be considered in this framework. I would not deny compensation, where appropriate, for the injury caused, for example, by listening to a verbal report, as described above. Incidentally, seeing the catastrophic occurrence while fortuitously watching television appears to me, logically, equivalent to direct observation of the event at its scene.

(C) degree of Spatial and Temporal Proximity to the Injurious Event - Another condition established in the foreign precedents for recognizing liability for mental injury is that the plaintiff be a witness to the accident or to its immediate aftermath. In this context, the arena of events also includes the ambulance or the hospital to which the person who was bodily injured was taken, but not beyond this.

A distinction was drawn between two possible scenarios in connection with this question: **the first,** when the mental injury was created by shock, which was caused to the plaintiff whose initial encounter with the injurious event was by observing its later consequences, far from the scene of the events (for example, a parent who was abroad when he was informed of an accident to his child and arrives at the hospital a few days later; or when the accident victim's body is not identified on the spot, but in the hospital, some time after the accident, as, for example, in the case of a mass catastrophe). **The second,** when the mental injury is the product of a continuous process of exposure to the consequences of the injurious event. Here, the mental injury is not created by way of a one-time experience, but it is the result of constant and continuous contact with the developments after the injurious event occurred, in a manner that leads finally to the creation of mental injury (for example, mental injury caused to a relative - a parent or a spouse - who cares regularly for someone physically injured by the injurious event).

It would not be superfluous to quote, in this context, the following words Of Deane J in the *Jaensch* case [15], at 606-607:

> "...it would seem reasonably clear that the requisite duty relationship will not, on the present state of the law, exist in a case where mere

psychiatric injury results from subsequent contact, away from the scene of the accident and its aftermath, with a person suffering from the effects of the accident. An example of psychiatric injury suffered as a result of such post-accident contact is that which may result from the contact involved in the nursing or care of a close relative during a period subsequent to immediate post-accident treatment: see, e.g. *Pratt*. There are at least two possible rationales of the distinction, for the purposes of the requisite duty relationship, between cases where psychiatric injury was sustained as a result of direct observation at the scene of the accident and its aftermath and cases where the psychiatric injury was sustained from subsequent contact, away from the scene of the accident and its aftermath, with a person suffering from the effects of the accident. One such rationale lies in considerations of *physical* proximity, in the sense of space and time between the accident and its immediate aftermath on the one hand and the injury on the other. The other lies in considerations of *causal* proximity in that in the one class of case the psychiatric injury results from the impact of matters which themselves form part of the accident and its aftermath, such as the actual occurrence of death or injury in the course of it, whereas, in the other class of case, the psychiatric injury has resulted from contact with more remote consequences such as the subsequent effect of the accident upon an injured person. The choice between one or other or a combination of these two distinct rationales may obviously be of importance in the more precise identification of any

> essential criteria of the existence of the requisite duty relationship. On balance, I have come to the conclusion that the second, which justifies the line of demarcation by reference to considerations of causal proximity, is to be preferred as being the less arbitrary and the better attuned both to legal principle and considerations of public policy" (Emphasis added - M.S.).

Both situations described above concern mental injury that occurs after the injurious event and removed from it, but in the one instance the injury is the product of the initial encounter between the plaintiff and the results of the injurious event, while in the second case the injury is the product of a series or succession of encounters that culminate in creating mental injury.

As to the first set of circumstances described, there is, in my opinion, no justification to decide arbitrarily in advance what would be sufficient proximity in space and in time as a condition for imposing liability. In general, the further one is removed in space and in time from the scene of the harmful event, the less foreseeable is the mental injury likely to be (see *laensch* [15] at 601, quoted in paragraph 13(B) above). Direct and contemporaneous observation of an accident in which a beloved person is injured is not the same as a visit some time later to the hospital in which he is confined. The first situation involves a sudden shock resulting from a sudden and dramatic event, whereas the second entails an experience which could indeed be harsh and depressing but does not contain the surprise and is not as drastic as presence at the injurious event itself. However, as already stated, generalizations are not in place and each case should be examined on its own merits, whether the wrongdoer, as a reasonable person, should

have foreseen the likelihood that injury would occur, in the circumstances, as a result of the negligent event. Furthermore, it should also be remembered that in addition to determining the duty of care, the injury incurred must be causally related - both factually and . legally - to the harmful event. In examining the question of causality, especially when the injuries occurred far away, in time and space, from the negligent act, attention must of course be given to the influence of later events on the establishment of liability.

As far as the second set of circumstances described above is concerned, that is, the occurrence of mental injury as the result of a continuous process of exposure to the results of the harmful event, such injury is not compensable according to the foreign precedents. The reason for this is not linked to considerations of foreseeability, since it is often foreseeable that continuous and constant contact with someone who was physically injured by a harmful event (for example, by taking care of him) would ultimately lead to the development of mental injury, even of a severe nature. The requirement that the mental injury be shock induced is based on considerations of legal policy and on the sense that it would impose too severe a burden on the tortfeasor to be responsible for such damages.

It should be remembered that we are concerned here with the establishment of an independent and separate duty of care that the tortfeasor owes to the one who was injured mentally, to avoid causing him injury, that is, that the tortfeasor should not cause such injury **by his acts.**

In contrast to the criteria adopted by other countries, I do not see the need to advance the distinction between injury caused on the spot, as an immediate result of shock from the main injury, and damage caused at a later stage. The proper distinction should be according to **the extent of the damage.** As held, for example, by the court in the *Paugh* case [21], *supra*, what should govern is the severity of the damage as a result of which the victim is deprived of his ability to cope with the mental pressure. Such severe injury may stem from the shock of immediate observation, while even more severe damage might result from the continuous observation of a dying child's suffering. The requirement that the injury be shock induced appears to me to a large extent artificial. It would be more in keeping with the demands of logic and justice that the governing test should be causal proximity and clear proof of real and definite mental injury, not proximity of time and place.

(D) What is Mental Injury - We have seen above that the rule in England and the United States is that the plaintiff must suffer **severe mental injury** before he will be entitled to a remedy. This requirement is phrased in different ways: a substantial recognized mental illness, mental injury with physiological manifestations, severe mental injury, and the like. The idea at the basis of this condition is that legal protection should be given only to mental injury that clearly and obviously amounts to illness, since slight mental harms are an everyday matter in the reality of our lives and a person must overcome them by his own means. These injuries, such as distress, pain and anger are, in the nature of things, temporary and ephemeral and should not be compensable even if they do not disappear. In general, they furnish no justification to impose liability on the wrongdoer, on the one hand, and one should also not burden the legal system on their account, on the other hand. It should be

emphasized and reemphasized that in the absence of any clear criterion, there is a substantial reason to fear the false creation of injuries that never occurred. The absence of acknowledged medical classification would also make it extremely difficult to estimate the extent of the injury, and might even prevent it completely.

In CA 243/83 [8] my honorable colleague, Barak I, held, at p. 142, that "... non-property injury, too, is injury for purposes of the tort of negligence, and it is compensable, if a reasonable person had the duty (both conceptual and concrete) to foresee its occurrence because of the negligence". He said further that "... according to all considerations of legal policy there exists a (normative) duty to foresee non-property injury to a person who is within **the primary circle of risk,** that is, the person against whom the injurious act was aimed... We can leave for further consideration whether **additional victims,** who suffer non-property injury, come within the scope of those who must be taken into account as likely to be injured" (Emphasis added - M.S.). In our case the direct victim of the negligent act is the person who was killed, injured or imperilled. The duty owed to him not to cause him any bodily injury was infringed. The victim's relatives who were injured mentally as a result of the injury to him come within the "circle of secondary risk" and, therefore, we must examine the question whether all purely non-property damage caused to a relative is sufficient to create liability toward him. Clearly, this is a question of the duty to foresee from a normative aspect, since some mental injury will generally be an automatic consequence of the negligent event.

Without laying down any hard and fast rule, it appears to me that there are weighty reasons to limit compensable damage to **substantial** mental reactions (as distinguished from negative human reactions that the person who experiences them can cope with and

overcome them by his own means) as, for example, mental illness plain and simple (a psychosis) and other clear and severe, and even continuing, mental ailments (neuroses), though they do not amount to mental illness per se. This question will undoubtedly recur to be considered by the courts from case to case, taking into account the circumstances of each case and the evidence of medical experts that will be adduced. But it is clear that cases that do not come within the definition of recognized psychoses can serve as a basis for an action only in clear and serious instances.

21. **The Law in Israel - The Road Accident Victims Compensation Law**

The two appeals before us involve events which were road accidents within the meaning of the Compensation Law and therefore an additional question to be answered is whether the applicants in LCA 452/87 and the appellant in CA 80/88 are entitled to compensation for the injury they suffered as "injured persons" to whom "bodily injury" was caused in a "road accident".

Section 1 of the Compensation Law defines an "inured person" as "a person to whom bodily injury has been caused in a road accident". 'Bodily injury" is defined to include mental or cognitive defect". Hence, the injury in both cases before us is "bodily injury". The question is whether this injury was caused in a "road accident". "A road accident" is defined as "an event in which bodily injury is caused to a person **as a result of the use of a motor vehicle"** (Emphasis added - M.S.). The combination of these definitions creates the condition that an "injured person" must be a person to whom bodily injury has been caused in an event in which a person was caused bodily injury **as a result of** the use of a motor vehicle.

The Jerusalem District Court held, in the combined cases LCA 452/87 and LCA 444/87, that:

> "the word 'in' points to direct injury in an accident, at the time and place of its occurrence and by virtue of its force. It does not say 'because of an accident', nor does it say 'in consequence of an accident'. It says 'in an accident', which indicates that the reference is to a direct injury".

The District Court relied also on the opinion of Professor I. Englard, **Compensation for Victims of Road Accidents** (Yahalom, 5739) 30 n. 78, and on Professor D. Kretzmer "Road Accident Victims Compensation Law, 5735-1975" **Lectures Given During Discussion Session for Judges 5736** (The Hebrew University and The Courts Administration, S. Shitreet ed., 5737) 113, 116-117, according to whom a shock which occurs at a distance from the scene of an accident is not a "road accident" within the meaning of the law. This was the opinion also of the Nazareth District Court in CA 80/8, which also supported its opinion by considerations of legal policy, as follows:

> "The law is designed to provide a remedy for victims of road accidents, by imposing an absolute duty of compensation. On its face, the legislator's intent was to provide for the injuries of persons actually involved in the accident, and since this is one of the possible

> interpretations of the law's terms, - and the more common one at that, in every day parlance - I think it should be adopted rather than interpret the law in a way that expands the scope of liability".

22. (A) From the point of view of legal policy, it is of course desirable that there be a unified approach in tort actions and actions under the Compensation Law that relate to the same accident. There is no sense or logic in a situation in which the main victim sues under the Compensation Law while the relative who is mentally injured sues under the Civil Wrongs Ordinance, particularly since in the case of a road accident both claims will be based on the same insurance policy. Of course, on the other hand, it can be argued that in fixing absolute liability the legislature intended to provide compensation only to one "actually involved" in an accident, and that the law should not be interpreted so as to expand the bounds of liability. The answer to this argument is that the legislature's main aim was that, in light of the extent and frequency of road accidents, it should no longer be required to litigate the question of guilt, and from this aspect, therefore, it is not necessary to interpret the law so as to confine its application to the main victim alone.

(B) The central question is, of course, whether the Compensation Law, as it stands, can encompass liability such as that under consideration here.

The answer to this question is in the affirmative. My honorable colleague, Barak J, discussed the question of interpreting the term "road accident", inter alia, in CA 358/83 [9]. As said there, an event in which a person is injured bodily is a road accident under that law if the injury was caused "in consequence of' the use of a motor vehicle, that is:

where there is a causal connection between the use of a motor vehicle and the injury, then there is a road accident. The expression "in consequence of', in the Compensation Law, includes not merely the causal-factual test but also a causal-legal connection, which selects from amongst the sine-qua-non causes those causes which, because of their nature, provide a basis for imposing liability **(id.,** 862-863). To quote Judge Orr in another case, as referred to in the same judgment, at p. 864:

> "Much has been written about the nature of the required causal connection or, in other words, the nature of the use to which a vehicle must be put so that the injury which is caused will be regarded as having been caused 'in consequence of the use of a vehicle' within the meaning of the Law. The District Courts have deliberated hard to solve the problem of finding the redeeming formula... Most of the disputes concerning the meaning of the required legal causal connection derive from the fact that the Law does not define the nature of this connection clearly, but leaves the matter to the courts. It has been left to the courts, therefore, to resolve this matter on the basis of the appropriate legal policy, all the while it is difficult to anticipate the great variety of instances which will require such resolution, and occasionally the court is forced to decide on the basis of facts which it can be assumed that the legislature did not foresee, and perhaps could not have foreseen (C.C. (Nazareth) 230/86, at p. 233)".

Barak J. summarized the question of the legal-causal connection applied in the Compensation Law as follows:

> "...the foreseeability tests looks at the conduct, as it could have been seen in advance, while the Compensation Law looks upon the conduct, as it appears after the fact. In these circumstances, generally, it is not mete to have recourse to the causal test of foreseeability, where the basis of the liability is absolute liability...
>
> These considerations for rejecting the foreseeability test as an appropriate causal-legal test point, in my opinion, to the risk test as the proper causal-legal test. This test holds that the required causal-legal connection exists 'if the injurious result is within the scope of the risk that the tortfeasor's conduct created, even if the injurious result was caused by the intervention of a foreign cause' (CA 576/81, at p. 7). According to the risk test 'the question is what risk did the legislature seek to prevent, and once the 'scope of risk' has been established, every harmful consequence which falls within this zone satisfies the required legal-causal connection' (CA 145/80, at p. 146). 'The question this test asks is whether a particular process of causing injury is within the zone of risks for which the Law provides a remedy' (Gilad, in the above article, at p. 30). When we apply this test in the setting of the Compensation Law, it was said that the use of a vehicle is a substantial cause of bodily injury if the injury is within the scope of the risk (both primary and secondary) which the

use of the vehicle creates and for which the legislature sought to provide compensation. In my opinion, this is the principal test that arises from the interpretation of the Compensation Law:

'This test fulfills the legislature's aim. It has appropriate flexibility and it is suitable to the nature of the liability... which is liability without fault...' (CA 804/80, at p. 439)".

This is also the answer to the question before us: the legal-causal connection also embraces mental injury to a first-degree relative of the person directly injured in the accident itself. The injury to the relative is a risk which should be taken into account. It is within the scope of the risk created by the tortfeasor's conduct. Professor Englard expressed the same opinion in his book referred to above (2nd ed. 1990), at page 59:

"In our opinion, the preferred approach in this matter is that which expands liability under the Law up to the limits of liability for the tort of negligence. Formally, the risk test adopted in the *Shulman* case tends toward expanding the right to a remedy. According to this test, the exact process of causing damage is not important; the kind of general risk is the important factor. It would appear that a mental shock at the site of the accident is not different in essence from one that occurs a bit more removed. Both come within the zone of risk which accompanies the use of a motor vehicle. From a substantive point of view, as well, narrowing recovery appears unjustified. It would require splitting the actions when grounds exist for liability in

> tort: the primary victims would claim under the Compensation Law while the indirect victims would claim under the Civil Wrongs Ordinance. The simultaneous administration of two compensation systems would complicate orderly litigation unnecessarily. This stands out particularly in light of the fact that one insurance policy covers both cases. For all these reasons, one should coordinate between the rule applicable to mental shock under the Compensation Law and that applicable in the tort of negligence".

I am, therefore, of the opinion that mental injury to a relative comes within the scope of the Compensation Law. The tests will be the same as those set forth in great detail above, in our discussion of liability in tort.

It should be added in this context that, based on the principle of unification of causes of action, anyone who has a cause of action because of a "road accident" within the meaning of the Compensation Law, may not sue for compensation for bodily damage under the Civil Wrongs Ordinance (section 18(a) of the Compensation Law). But the provisions of the Civil Wrongs Ordinance will apply in all cases in which the injury does not occur in a "road accident", as defined in the Compensation Law (for example, damage because of a child drowning in a swimming pool or similar tragedies).

23. In the light of what has been said above, the cases before us should be returned to the courts of first instance to allow amendment of the statements of claim and for reexamination in accordance with the guidelines set forth at the end of paragraph 22 of this judgment.

24. To sum up, the appeal in LCA 444/87 is dismissed.

LCA 452/87 and CA 80/88 should be returned to the District Court or to the Magistrate Court, whichever is appropriate, for further proceedings in accordance with the guidelines detailed above.

The applicants in LCA 444/87 and the respondents in CA 80/88 will pay costs in the amount of NIS 5000 to each of the opposing sides.

Justices A. Barak and D. Levin concur.

Decided as stated in the president's Opinion.

Judgment given on 30.7.90.