In any case whether or not the State Acts are valid exercises of State legislative powers is of little practical importance so long as the Commonwealth Act remains in force.[71] It is submitted that all gaps in Commonwealth legislation revealed by the High Court have been remedied by statute and unless the Commonwealth Act can be challenged these gaps will be forever closed.

F. C. O'BRIEN

MOUNT ISA MINES LIMITED v. PUSEY[1]

Negligence—Nervous shock—Liability for damage—Foreseeability

The High Court had no difficulty in unanimously rubber-stamping the decision of the Queensland Supreme Court. The judgments, however, demonstrate the unsatisfactory nature of the law of negligence.

Two electricians employed by the appellant company negligently used a multimeter and were as a result horribly burned by an intense electric arc. The respondent, also employed by the company, was on the floor below as an assistant charge engineer. On hearing the noise on the floor above, he hastened there and assisted to an ambulance one of the electricians whom he found naked and 'just burnt up'. The man died nine days later. The respondent continued work without any apparent ill-effects for about four weeks, when he developed symptoms of mental disturbance diagnosed by psychiatrists as a type of schizophrenia. He was awarded ten thousand dollars damages for personal injuries caused by the appellant's negligence. This decision was affirmed on appeal by the Full Court of the Supreme Court of Queensland.[2] The High Court of Australia likewise affirmed the decision unanimously.

The appellant company claimed on appeal that it owed no duty of care since neither the precise kind of injury the respondent suffered nor, indeed, any psychological disturbance was reasonably foreseeable. Furthermore, it was submitted that the respondent's mental illness was not 'caused' by the appellant's negligence, but was essentially due to the respondent's abnormally sensitive nature.

Various judges described the respondent's precise illness in such circumstances as 'rare', 'rare and exceptional', and an experienced psychiatrist was quoted as saying that he had had only one case like it in eighteen years' practice. Despite a small rearguard action by the Chief Justice, who described the actual nervous shock suffered as 'rare but not unexpected', and therefore, presumably, foreseeable (but by a psychiatrist rather than the reasonable employer), the majority opinion of the High Court was clearly that the precise kind of nervous injury suffered was not foreseeable.

However, all five judges held that some class of psychosomatic, nervous shock was foreseeable, and that the respondent's illness belonged to that class. They then applied the well-established rule that there is liability if the precise form of injury falls into a class of injury that was foreseeable.[3]

[71] Professor Lane would argue otherwise, *op. cit.* 144; see *supra* n. 68.

[1] (1971) 45 A.L.J.R. 88. High Court of Australia; Barwick C.J., McTiernan, Menzies, Windeyer and Walsh JJ.

[2] [1970] Qd R. 1.

[3] *Chapman v. Hearse* (1961) 106 C.L.R. 112, 115. *Overseas Tankship (U.K.) Ltd v. Miller Steamship Co. Pty Ltd* [1967] 1 A.C. 617, 636 (*Wagon Mound (No. 2)*).

The appellant claimed in addition that the respondent received at the time of the incident a transient shock, but by brooding on it brought on himself his schizophrenic condition. This argument can be further explained in two ways. According to the first explanation, the respondent's own subsequent mental activity constituted a *novus actus interveniens* and so the negligence of the appellant did not cause the damage. This was rejected by all judges. According to the second, the respondent was unusually and abnormally susceptible, and such susceptibility in the case of 'nervous shock' could be regarded as either negating the existence of the duty of care or, at any rate, limiting the liability. McTiernan and Windeyer JJ. rejected this argument by finding the respondent 'normal' and not unusually susceptible. Barwick C.J., Menzies and Walsh JJ. used the foreseeability test to establish the existence of a duty of care, and found the appellant liable under the 'egg-shell skull' rule for any extra damage due to the respondent's possible sensitivity.

More generally, the High Court used foreseeability as the one criterion of liability both for establishing the duty of care and for testing remoteness. Barwick C.J. based his decision on this one test: '[a]ccepting for the purposes of this case that liability is all one question depending solely on foreseeability . . .',[4] and both Walsh and Menzies JJ. explicitly decided this case on the one criterion of foreseeability. Since liability depends on foreseeability of a general class of injury, it is obviously important that one be able to distinguish various classes of injury. For this case, Walsh J. relied on *Bourhill v. Young*[5] and the *Wagon Mound (No. 1)*[6] to reach the conclusion that 'all forms of mental or psychological disorder which are capable of resulting from shock are to be regarded as being, for the purposes of the foreseeability test of liability, damage of the same *kind*'.[7] Windeyer J. suggested the qualities necessary to make the nervous shock compensible: it must be lasting, and a 'recognisable psychiatric illness'.[8] This latter is very vague—'recognisable' seems to mean 'medically classifiable' or, maybe, 'medically labelled'.

In *In re Polemis*[9] the negligent person was held liable for all the damage directly caused by his negligence. Thus, while foreseeability was the test to determine duty of care, direct causation was the only test in determining the extent of the liability. This doctrine was specifically rejected in *Wagon Mound (No. 1)*.[10]

> They [Their Lordships] have been concerned primarily to displace the proposition that unforeseeability is irrelevant if damage is "direct". In doing so they have inevitably insisted that the essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen.

[4] (1971) 45 A.L.J.R. 88, 90.

[5] *Bourhill v. Young* [1943] A.C. 92.

[6] *Overseas Tankship (U.K.) Ltd v. Morts Dock and Engineering Co. Ltd* [1961] A.C. 388.

[7] (1971) 45 A.L.J.R. 88, 100.

[8] *Ibid.* 92.

[9] *In re an Arbitration between Polemis and Another and Furness, Withy & Co. Ltd* [1921] 3 K.B. 560.

[10] [1961] A.C. 388, 426.

Thus, after *Wagon Mound (No. 1)*[11] there were two criteria of liability: direct causation and foreseeability.[12]

Now, in the area of nervous shock, at any rate, the High Court seems to be moving back to the *In re Polemis* situation (if, indeed, it even left it). The High Court asserted with vigour that the only test for liability was foreseeability, but so stretched foreseeability as to include virtually any direct consequence.[13]

Windeyer J. outlined the development of the law of negligence in the 'nervous shock' cases. At first, recovery was limited to relatives only, and this was gradually extended to rescuers.[14] He could see no reason either in logic or in policy for not extending a defendant's liability to include any person suffering 'nervous shock' which was reasonably foreseeable.

Moreover, he was concerned with the basic proposition in this area that the test of liability for shock is foreseeability of injury by shock. This had been interpreted to mean 'foreseeability of injury by shock to an emotionally normal person'. Windeyer J. quite rightly found the concept of 'the man of normal emotional fibre' quite unsatisfactorily vague. He then went on to say that a plaintiff could not recover for nervous shock if he was prone to suffer shock. This is too inexact a statement of the position. As Windeyer J. himself pointed out, the decision in *Dooley v. Cammell Laird and Co. Ltd*[15] does not bear this out. A more precise statement of the position would be: a plaintiff can recover for nervous shock if the hypothetical man of normal emotional fibre would have suffered some kind of nervous shock. The 'egg-shell skull' rule, which is still a lively doctrine,[16] would apply to render the tortfeasor liable for the extra damage caused by this plaintiff's peculiar sensibility.

Windeyer J. realized that in this field of law, development has proceeded pragmatically rather than through being based on any logical principle. While insisting on the *Qualcast (Wolverhampton) Ltd v. Haynes*[17] doctrine that facts can never be precedent, he was very aware that in the absence of any real principle, facts will have a power of suggestion normally, one would hope, kept for principle. Lord Wright's statement of a wide judicial discretion in this area: 'it [liability] should stop where in the particular case the good sense of the jury or of the judge decides',[18] virtually gives subjective judicial opinion the status of a legal principle. The whole of the

[11] [1961] A.C. 388.

[12] But note *Hughes v. Lord Advocate* [1963] A.C. 837, 845 *per* Lord Reid: '[b]ut a defender is liable, although the damage may be a good deal greater in extent than was foreseeable. He can only escape liability if the damage can be regarded as differing in kind from what was foreseeable'.

[13] See the letter of Professor P. Brett in 45 *Australian Law Journal* 220, where in reference to this case he writes: 'foreseeability has come to have a very special and unusual meaning (closely approaching "unforeseeability")'.

[14] *Dulieu v. White & Sons* [1901] 2 K.B. 669 (fear of physical contact); *King v. Phillips* [1953] 1 Q.B. 429; *Boardman v. Sanderson* [1964] 1 W.L.R. 1317 (son injured in vicinity); *Chadwick v. British Railways Board* [1967] 1 W.L.R. 912 (duty owed to unknown rescuer).

[15] [1952] 1 Lloyd's Rep. 271.

[16] See *Smith v. Leech Brain & Co. Ltd* [1962] 2 Q.B. 405, 414 *per* Lord Parker C.J.

[17] [1959] A.C. 743, 755 *per* Lord Keith of Avonholm '[i]n the sphere of negligence where circumstances are so infinite in their variety it is rarely, if ever, that one case can be a binding authority for another'.

[18] *Bourhill v. Young* [1943] A.C. 92, 110.

judgment of Windeyer J. implies the need for a greater classification or codification of compensible damages in this area.

While Walsh J. could state that any injury resulting from shock for the purposes of tort liability was in the one class of injury, Payne J. in *Tremain v. Pike*[19] perceived a generic difference between injury from rats' bites and injury from rats by some kind of infection.

> The kind of damage suffered here was a disease contracted by contact with rats' urine. This, in my view, was entirely different in kind from the effect of a rat bite, or food poisoning by the consumption of food or drink contaminated by rats. I do not accept that all illness or infection arising from an infestation of rats should be regarded as of the same kind.[20]

Fridman and Williams[21] have argued the need for more definite, more visible criteria in this area.

> the courts must identify, explain, and justify the criteria or considerations that they are going to utilise or rely upon to arrive at decisions in any given case. It is not enough to speak of "foreseeability": it will not suffice to differentiate on the basis of types or kinds of injury.[22]

The High Court in this case further buttressed their position. Windeyer J. was obviously unhappy with the present situation, and the actual decision, while clearly satisfactory, was based on what can, I think, be fairly called little more than arbitrary judicial value judgments.

JOHN WILLIS

BABATSIKOS v. CAR OWNERS' MUTUAL INSURANCE CO. LTD[1]

Insurance—Motor vehicle policy—Misrepresentation—Instruments Act 1958, section 25—Materiality—Admissibility of expert evidence.

In his proposal for a comprehensive motor vehicle insurance policy the complainant misrepresented the length of time for which he had held a driver's licence. He was asked: '[w]ill any person holding a learner's permit or a provisional licence ever drive the vehicle?' These terms are appropriate to the relevant New South Wales legislation and the complainant therefore correctly answered in the negative. In fact the complainant held a probationary licence issued pursuant to section 22B of the Motor Car Act 1958. The proposal concluded: 'I do hereby declare and warrant that the answers given above are in every respect true and correct, and I have not withheld any information likely to affect the acceptance of this proposal, and I agree that this proposal shall be the basis of the contract between the company and myself. . . .' The complainant's signature followed.

The defendant refused to indemnify the complainant in respect of a claim made under the policy, arguing that it was entitled to avoid the policy by reason of the complainant's material misrepresentations and/or non-disclosures

[19] [1969] 1 W.L.R. 1556.
[20] *Ibid.* 1561.
[21] Fridman and Williams, 'The Atomic Theory of Negligence' (1971) 45 *Australian Law Journal* 117.
[22] *Ibid.* 124.
[1] [1970] V.R. 297; [1970] 2 Lloyd's Rep. 314. Supreme Court of Victoria; Pape J.