WHO'S AFRAID OF IMAGINARY CLAIMS? COMMON MISUNDERSTANDINGS OF THE ORIGIN OF THE ACTION FOR PURE PSYCHIATRIC INJURY IN NEGLIGENCE 1888–1943

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1. Introduction

In *Victorian Railways Commissioners v Coultas*,[4] Sir Richard Couch famously stated that Mary Coultas' injury, which was characterised as nervous shock resulting from fright occasioned by her near collision with a train, could not found a cause of action in negligence primarily because:

> "The difficulty which now often exists in cases of alleged physical injuries of determining whether they were caused by the negligent act would be greatly increased, *and a wide field opened for imaginary claims*."[5]

The view seemingly embedded in this sentence, that the Court was sceptical about the existence of psychiatric injury, has been seized upon in nearly all historical accounts of the action for pure psychiatric injury in negligence to explain early judicial reluctance to award damages to claimants. Scepticism about the reality of mental injury is also frequently identified as one of the factors unique to the development of the law governing these claims that has resulted in a doctrinal mess rendering the action a universally recognised embarrassment to the common law.[6] The myriad flaws in the current law are well-known and we do not intend to rehearse

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[4] (1888) 13 App. Cas. 222.
[5] *Coultas* (1888) 13 App. Cas. 222 at 226 (emphasis added).
[6] Stated most forcefully by Kirby J. and Gummow J. in *Tame v New South Wales* [2002] HCA 35 at 190: "Unprincipled distinctions and artificial mechanisms of this type bring the law into disrepute". See also Jane Stapleton, "In Restraint of Tort" in P.B.H. Birks (ed), *The Frontiers of Liability*, vol 2 (Oxford: Oxford University Press, 1994), at p.95: "the silliest rules now exist and … criticism is almost universal". The Law Commission's 1998 report concluded reform was needed, yet despite repeated calls, none has been forthcoming (Law Commission, *Liability for Psychiatric Illness* (1998), Law Com. No.249). As Mullany and Handford put it, "the common law has either clung to outdated and historical notions or merely tinkered with principles that are fundamentally unsound": Nicholas J. Mullany and Peter R. Handford, *Tort Liability for Psychiatric Damage: The Law of "Nervous Shock"* (London: Sweet & Maxwell, 1993), at p.42.

them here. The primary focus of this article is on the historical development of the action from 1888 to 1943.

The "imaginary claims" point from *Coultas* is referenced in most judgments and academic articles which discuss the history of the action and also in the few textbooks that provide background for students to the modern action.[7] In these works there is also a general consensus about the line of cases which founded and developed the action. The Law Reform Commission's report on pure psychiatric injury published in 1998[8] is representative of most academic and judicial accounts that work through the same line of cases leading up to the 1983 decision of the House of Lords in *McLoughlin v O'Brian*,[9] which is the first articulation of the current position.[10] The line of cases is generally set out as follows: recovery for nervous shock occasioned without physical impact was denied in *Coultas*; allowed where the claimant was shocked by fear for their personal safety in *Dulieu v White*;[11] further extended in *Hambrook v Stokes Bros* to nervous shock sustained from fright for the safety of another if the claimant perceived the shocking event with their own eyes or ears;[12] applied generously in *Owens v Liverpool Corporation*;[13] and then restricted in *Bourhill v Young* to refuse recovery in cases where the claimant was unforeseeable or unduly emotionally fragile.[14] Although other cases in the intervening years are variously mentioned, these key cases covering the period 1888–1943 are generally seen to form a spine of doctrinal development which we refer to as the "early cases" in this article.

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[7] Judgments discussed throughout. For examples of academic references see Prue Vines, "Proximity as Principle or Category: Nervous Shock in Australia and England" (1993) 16 U.N.S.W.L.J. 458 at 461; Danuta Mendelson, "English Medical Experts and the Claims for Shock Occasioned by Railway Collisions in the 1860s: Issues of Law, Ethics, and Medicine" (2002) 25 *International Journal of Law and Psychiatry* 303 at 328; Danuta Mendelson, "The History of Damages for Psychiatric Injury" (1997) 4 *Psychiatry, Psychology and Law* 169 at 171, col 2; Jyoti Ahuja, "Liability for Psychological and Psychiatric Harm: The Road to Recovery" (2014) 23 Med. L.R. 27 at 30; Christian Witting, *Street on Torts*, 15th edn (Oxford: Oxford University Press, 2018), at pp.64–65; M. Lunney, D. Nolan, and K. Oliphant, *Tort Law: Text and Materials*, 6th edn (Oxford: Oxford University Press, 2017), at p.340.

[8] Law Commission, *Liability for Psychiatric Illness* (1998).

[9] [1983] 1 A.C. 410.

[10] The fundamentals of the current law are laid down in *McLoughlin v O'Brian*, however the leading case is now *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 A.C. 310, in which the current restrictions on secondary victim claims were elucidated (the concept of "secondary victim" as we understand it now is not used in *McLoughlin*, rather the focus is on whether to limit the duty via reasonable foreseeability).

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

[12] *Hambrook v Stokes Bros* [1925] 1 K.B. 141.

[13] *Owens v Liverpool Corporation* [1939] 1 K.B. 394.

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

A persistent theme in the literature that addresses the early cases is that judges were worried about fraudulent claims. It is said that this was explicit in *Coultas* but remained implicit even after the action was allowed in *Dulieu*. For some scholars, the hangover of concerns about potential fraud continues to exert some force in the law today.[15] For example, Prue Vines *et al*, writing on Australian law, refer to the "fear of fakery" as "one of the major hurdles in the way of acceptance of the action for psychiatric harm caused by negligence", and go so far as to say that in the early cases, "nervous shock or psychiatric or emotional harm [were] regarded as irrational (and therefore unreal) and therefore something for which compensation should not lie".[16] Consequently, they argue that the "special rules" developed in *Dulieu*, *Hambrook*, *Bourhill*, and *King v Phillips*[17] were "designed to alleviate the concern of the law that psychiatric harm was unreal, and could be fraudulent".[18] John Fleming has taken a similar view, suggesting that in this area:

> "Administrative considerations … have loomed large in the past, and are still far from spent, in opposition to claims for nervous shock or mental disturbance. These are based in large measure on prevalent fears that alleged injury to the nervous system is more easily simulated than external wounds inflicted by actual impact, and that judges, let alone juries, are ill equipped to pass judgement upon vexing questions of causal relation between the defendant's negligence and the alleged psychosomatic trauma of the plaintiff, especially in face of conflicting medical evidence and such endemic distrust of psychiatry as has survived from the days when these problems were first encountered in legal practice."[19]

Judicial voices, too, have rehearsed this historical narrative, most notably Lord Wilberforce in *McLoughlin*, where he noted (with disapprobation) that concerns about proof and "facility of fraud" had been among the reasons the courts had previously been reluctant to expand liability.[20]

This consensus about historical judicial scepticism is shared and supported in the influential historical studies of pure psychiatric injury written by Teff, Mendelsohn, and Mullany and

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[15] For example, Donal Nolan has commented that much policy resistance has some basis in this fear of feigned claims: Donal Nolan, "Reforming Liability for Psychiatric Injury in Scotland: A Recipe for Uncertainty?" (2005) 68 M.L.R. 983 at 994.
[16] Prue Vines, Mehera San Roque and Emily Rumble, "Is 'Nervous Shock' Still a Feminist Issue? The Duty of Care and Psychiatric Injury in Australia?" (2010) 18 Tort L.R. 9 at 20.
[17] [1953] 1 Q.B. 429.
[18] Vines, San Roque and Rumble, "Is 'Nervous Shock' Still a Feminist Issue?" (2010) 18 Tort L.R. 9 at 21.
[19] John G. Fleming, *An Introduction to the Law of Torts*, 2nd edn (Oxford: Clarendon Press, 1985), at p.47. A more recent example is Ahuja, "Liability for Psychological and Psychiatric Harm" (2014) 23 Med. L.R. 27 at 30, in which the author cites *Lynch v Knight* (1861) 9 H.L. Cas. 577 and *Coultas* and suggests that these cases form the basis of a "longstanding atmosphere of scepticism about such claims".
[20] *McLoughlin v O'Brian* [1983] 1 A.C. 410 at 421.

Handford discussed in detail below. Teff in particular, explains the restrictive nature of the law up until *McLoughlin* as operating against a background of a longstanding fear of "spurious or exaggerated claims" which was "prevalent among judges sceptical about psychiatric evidence".[21] A different emphasis on the fear of imaginary claims is offered by commentators like Donal Nolan and Rachael Mulheron who merely report that narrative as a now overturned historical artefact, but do not endorse it as an explanation of the current law,[22] and note that it has been, at least latterly, judicially resisted. Nolan writes, "It is now commonplace to dismiss concerns about fraudulent claims for psychiatric injury on the grounds that they do not really exist, and that in any case the courts are able to detect them", although he does not explicitly reject them himself.[23]

Our key point here, is that even those who do not consider that such considerations animated the courts still feel it necessary to repeat them and then reject them. Critically, to our minds, is the ongoing *reiteration* of these policy considerations and their impact. This, we argue, evidences both the broad acceptance that they were at one point relevant (hence the need felt to reject them) and, more importantly, demonstrates the extent to which this informs both judicial responses and wider scholarship. In other words, the notion that "fear of imaginary claims" was determinative in the early cases is so woven into our shared understanding of the law in this area that it is impossible to place the past behind us entirely. Judges feel a need to explain that such fears are *not* now motivating them, and the Law Commission felt compelled to devote a section of its consultation paper to explaining why such concerns should be confined to the dustbin of history.[24]

In contrast, we argue that this historical account, which has ossified into the accepted origin story of the law on psychiatric injury, is ill-founded and unreasonably critical of judges in the

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[21] Harvey Teff, *Causing Psychiatric and Emotional Harm: Reshaping the Boundaries of Legal Liability* (Oxford: Hart Publishing, 2009), at p.56. We tentatively suggest that this historical narrative could also have been exacerbated by cross-pollination between the English and American scholarship, as early academic writing on the American courts' reactions to psychiatric injury regularly referenced judicial concerns about fictitious claims, such as the dicta of Martin J. of the New York Court of Appeals in *Mitchell v Rochester Rly Co* 45 N.E. 354 at 354–355 (1896): "If the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection, and where the damages must rest on mere conjecture or speculation." However, we have not turned substantial attention to this thesis, and hence do not take a firm position on its feasibility here.

[22] Rachael Mulheron, *Principles of Tort Law*, 1st edn (Cambridge: Cambridge University Press, 2016), at pp.224–225.

[23] Donal Nolan, "Psychiatric Injury at the Crossroads" [2004] J.P.I.L. 1 at 20.

[24] Law Commission, *Liability for Psychiatric Illness* (1995), Law Com. CP 137, at paras 4.7–4.9. See also Nolan, "Reforming Liability for Psychiatric Injury in Scotland" (2005) 68 M.L.R. 983 at 994.

early cases. We demonstrate that fear of imaginary claims was not, in fact, a hallmark of these early decisions (post-*Coultas*), and did not ground the reasoning in these cases.[25] In so doing we seek to correct misunderstandings about the nature of Victorian ideas about psychiatric illness and their impact on judicial reasoning. A second purpose of this article is to resurrect discussion of three important cases that were fundamental to the development of the action in England but which have been overlooked: *Byrne v Great Southern and Western Railway Co*,[26] *Bell v Great Northern Railway Co of Ireland*,[27] and *Wilkinson v Downton*[28] explicitly articulate judicial recognition of this type of injury as real damage that should be open to compensation. These cases should, but almost never do, appear when its early development is being discussed.

It is not the aim of this article to unravel all the many threads that have created a Gordian knot frustrating attempts to reform the law in this area; still less do we pretend that a reconceptualisation of the history will provide an Alexandrian solution to the mess we now find ourselves in. Nevertheless, by unpicking some of the historical factors that have brought us to where we are today, we hope to contribute to finding a clearer way forward.

2. The Early Cases: Concept of Injury

Before turning to the question of how attitudes to mental illness have, or have not, affected the development of negligence claims for pure psychiatric injury we first need to consider another little-acknowledged distinction in the history of the action. This will help to explain the persistence of the judicial scepticism argument. The injury being considered in the early cases is fundamentally different to the modern cases, so much so, that it is alarming that the early cases have contributed to the law governing the modern tort. The fundamental difference is twofold.

First, in all of the early cases excluding *Owens*, the plaintiff (each of them a pregnant woman) complains that the negligence of the defendant caused her to suffer physical symptoms including miscarriage or premature delivery. Thus, the early cases significantly differ from all

[25] It is perhaps fair to say that there are some early decisions in the United States jurisprudence where this fear was expressed and did have an impact (see note 18 above), but we are focused solely on the English, Irish and Scottish case law in this paper.
[26] Unreported 1884 Court of Appeal (Ireland).
[27] (1890) 26 L.R. Ir. 428, following *Byrne*.
[28] [1897] 2 Q.B. 57.

the modern cases in that the descriptions of the early claimants' sufferings are explicitly *physical*. It is highly surprising, then, that these cases—where there are clear articulations of physical suffering: pain, haemorrhage and even death in the case of Mrs Hambrook—are routinely discussed in the context of "pure" psychiatric injury or mental suffering. These cases cannot be classed as ones in which the damage is "pure psychiatric injury", a term which, although deeply problematic, does map onto the symptoms described in modern cases which most often fall broadly within the category of post-traumatic stress disorder. In all of the early cases, as we explain further below, it is clear that "nervous shock", as understood at the time, was a *physical* condition.

The mis-categorisation of damage in the early cases has its roots in *Coultas* where the Privy Council described Mary Coultas' damage as "arising from mere sudden terror *unaccompanied by any actual physical injury* but occasioning nervous or mental shock".[29] Here the Privy Council was describing something unknown to medicine at that time. Even absent their offensive assumption that a miscarriage was not "actual physical injury", the diagnosis of "nervous shock" (even without miscarriage) could not in the medical thinking of the time be divorced from actual physical injury. Thomas Beven pointed this out in the first edition of *Negligence in Law* where he stated that there was a fundamental error in the reasoning of the Privy Council when it equated nervous shock (physical) with mental shock (a less serious, transient, non-physical condition).[30] The point was also discussed by Alfred Stirling in 1928 in an article drawing out the difference between nervous shock and mental shock, in which Stirling ultimately (and as it turned out wrongly) concluded that for this reason *Coultas* would "be unlikely to be followed" in Australia.[31]

Danuta Mendelson's work on the history of pure psychiatric injury and Railway Spine is instructive on this point.[32] Railway Spine, a condition that people began to suffer in train accidents in the 1800s, is often seen as a precursor to the early nervous shock cases.[33] Mendelson's work considering Railway Spine cases and contemporary debates about the

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[29] *Coultas* (1888) 13 App. Cas. 222 at 225 (emphasis added).
[30] T. Beven, *Principles of the Law of Negligence* (London: Stevens & Haynes, 1889), at pp.68–69.
[31] Alfred Stirling, "Liability for Nervous Shock" (1928) 2 *Australian Law Journal* 46 at 46–50.
[32] Danuta Mendelson, "The Defendants' Liability for Negligently Caused Nervous Shock in Australia—Quo Vadis?" (1992) 18 Monash U.L.R. 16; "The History of Damages for Psychiatric Injury" (1997) 4 *Psychiatry, Psychology and Law* 169; *The Interfaces of Medicine and Law: The History of the Liability for Negligently Caused Psychiatric Injury (Nervous Shock)* (Dartmouth: Dartmouth Publishing Co, 1998).
[33] See variously Teff, *Causing Psychiatric and Emotional Harm* (2009), especially at pp.41–43; Nicola Fox and Frank Tallis, "Adjustment Disorder" (1998) 148 New L.J. 164 at 164.

aetiology of "nervous shock" in the late 1800s effectively demonstrates that "nervous shock" was considered to be a genuine and *physically-based* affliction. Those suffering from it were considered to have sustained strange tremors, paralyses, blindness, miscarriages and disturbances to their systems resulting from a disruption of the normal operation of the spine and/or nervous system. In railway accidents claimants involved in, and jostled about by, the collision or derailment of a train often had no immediate or more than trivial physical lesion but manifested these serious symptoms days or weeks later. There were debates at the time over how many of the claims were genuine, but the key point here is that, for those who were believed to be genuinely afflicted, "nervous shock" was explicitly understood as a *physical*, not a psychological, condition. Thus, in *Coultas* the Privy Council's judgment was actually framed around an injury that bore no relationship to the damage claimed by the plaintiff. Further, the notion that the cases that followed presenting similar facts should be framed as cases involving no physical injury—and thus distinct from "normal" negligence cases—is wrongly embedded in most modern discussion.

Accordingly, it should not be thought that "normal" negligence cases were based in physical damage (often with consequent psychological or emotional damage in the form of pain and suffering),[34] and the early cases in *pure* psychological injury. In fact, both types of damage were present in both types of case. As damage was understood at the time, both medically and by ordinary people, the only difference between the two types of case was that the manner in which the injuries were sustained was different. In "normal" cases, the plaintiff suffered impact to their body. In the early cases involving psychiatric injury of some kind, the plaintiff suffered a non-impact blow (a shock) to their nervous system, consequentially and *as a direct result of that*, the plaintiffs then suffered a cluster of psychological and physical symptoms.

Some modern commentators have understood this difference to be one merely of the *order* of events leading to the physical damage. Such commentators have regarded the initial non-impact blow in these early cases as belonging to the category of fright or emotional disturbance. They argue, in the same vein as we do, that the ultimate "package" of damage was the same in "normal" cases and in the early cases: both physical injury and psychological injury were present. The difference for these commentators is that the order in which each injury is sustained is reversed: "normal" cases involve immediate physical injury which then causes

[34] Modern critics of the law have often pointed out that psychological injury is routinely compensated where it is the sequalae of even the slightest physical injury caused by negligence.

some psychological harm; the early cases involve immediate psychological injury which causes physical harm. For example, Christian Witting in *Street on Torts* suggests that

> "the focus [in the early cases] is upon the *initial* injury caused. Unless the law recognises a duty of care with respect to the causation of the initial psychiatric illness, there can be no compensation for any consequential physical losses (which might be quite severe, such as was evident in the many miscarriages that accompanied early cases in this area)."[35]

According to Witting, the issue was one of duty, and the question was whether the law was prepared to regard harm of this kind as damage, such that the *consequential* physical damage would be recoverable. This would be a fairly plausible justification of the denial of recovery in the early cases, but only if the initial injury is seen as psychological. But this is not how such injuries were understood at the time. Given the Privy Council stated Mrs Coultas' shock was "unaccompanied" by physical injury, instead of saying that Mrs Coultas' shock "preceded" her physical injury, we think it is clear that that the judges were not framing her injuries in this sequential way.

This leads to the second difference which may be an important, if fine, distinction to appreciate when unravelling the threads of pure psychiatric injury today. Judges in the early cases which came after *Coultas* understood nervous shock as physical and were shaping the law in response to and around a type of injury—non-impact occasioned physical damage—fundamentally different to the type of injury presented in the modern cases. In the modern cases plaintiffs allege a shock, but the resulting injury is characterised and shaped around the legal requirement of a "recognised psychiatric condition" without the shared understanding—present in the early cases—of a *physical nexus* forming a fundamental part of the damage. By contrast, psychiatric injury in the modern cases is understood as a *mental* condition, which does not rest on or derive from any underlying physical change in the body. Hence, while the modern cases are shaped around a mental nexus, the early decisions were shaped around a physical nexus, and the path from *Coultas* to *McLoughlin*,[36] *Alcock*,[37] and *Page v Smith*[38] is rather more complex than it has been understood to be, if the path actually connects at all.

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[35] Witting, *Street on Torts* (2018), at p.64 (fn.60) (emphasis in original).
[36] *McLoughlin v O'Brian* [1983] 1 A.C. 410.
[37] *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 A.C. 310.
[38] [1995] 2 W.L.R. 644.

3. Existing Legal Histories: Judicial Scepticism

Despite the thousands of pages that have been written about pure psychiatric injury claims there are only a few texts that attempt a rigorous legal history of the action. The most widely cited of these is Danuta Mendelson's work *The Interfaces of Law and Medicine*.[39] In her first chapter Mendelson advances the argument that in the medieval and early modern period when the common law was formed, the concept of mental illness did not exist and that such afflictions were thought to be the work of divine or demonic intervention. This, she argues, explains why mental injury was not included in very early legal concepts of damage. Turning to the nineteenth and twentieth centuries, Mendelson is at pains to draw out the relationship (and disjunctions) between medical and psychiatric understandings of nervous shock, and the characterisation of mental injury by judges in the leading cases. As discussed above she effectively makes the point that in the relevant period nervous shock was not thought to be a "purely psychiatric" injury as we would understand that term now, and that the injuries in "nervous shock" cases would have been understood by most clinicians at the time as resulting from physical damage to the spine or nervous system. Her book illuminates in great detail developments in psychiatric theory around the time of each key case and in some instances she is able to draw a parallel, if not a causal link, with developments in the law.

The other significant monograph dealing with the history of the action is Harvey Teff's *Causing Psychiatric and Emotional Harm*. Teff sets out the history of social antipathy to the mentally ill, grounded in an evolving blend of religious belief, post-Cartesian confusion, and stoicism. Teff states:

> "The early case law, from the 1880s onwards, reflected prevalent attitudes extolling the virtues of self-reliance, laced with mistrust of the fledgling discipline of psychiatry. … In one form or another, social stigma has continued to influence the law's approach to liability for psychiatric harm."[40]

His argument is supported by extensive evidence of cultural mistrust of the mentally ill. While we would never dispute the wealth of social and medical history about the reality of this prejudice, neither Mendelson nor Teff demonstrates a link between those cultural attitudes and

[39] Mendelson, *The Interfaces of Medicine and Law* (1998).
[40] Teff, *Causing Psychiatric and Emotional Harm* (2009), at p.13.

judicial decision-making. Teff seems to assume that the depth of cultural antipathy is such as to produce an osmosed doctrinal influence:

> "[I]t would be surprising if [attitudes about the exaggeration of mental conditions] had not influenced the law … shaped by judges whose own professional environment has traditionally favoured a robust, individualistic outlook."[41]

This hypothesis is not substantiated apart from noting that Lord Steyn identified "greater diagnostic uncertainty" as one reason psychological injury has to be treated differently in *White v Chief Constable of South Yorkshire*.[42] Teff also tries to point to actual evidence of judicial hostility or "pull yourself together" reasoning in the cases.[43] He does tip his cap to what he portrays as lone wolf instances of judges being open to mental harm being the same as physical harm but asserts the majority run in the other direction. To support his theory about judicial distrust of psychological harm he employs the key quotes that are singled out by other commentators—they are always the same and there are not many of them. These include Lord Bridge's comment in *McLoughlin v O'Brian* that "[f]or too long earlier generations of judges have regarded psychiatry and psychiatrists with suspicion, if not hostility",[44] as well as the oft-referenced comment in *Coultas* that there is "a wide field opened for imaginary claims".[45] He also rests his view on Lord Wensleydale's dictum in *Lynch v Knight* (which does not go to scepticism) that "mental pain or anxiety the law cannot value".[46]

One of the points being made by these two historians is important: the law developed at best out of step with medicine, and at worst in defiant ignorance of it. This point is similar to the fierce castigation of the modern law post-*McLoughlin* for its requirement that injury must be caused by the "sudden shock" of witnessing the horrifying event.[47] This critique rests on the concern that the current law entirely fails to align with scientific evidence about how mental

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[41] Teff, *Causing Psychiatric and Emotional Harm* (2008), at p.15.
[42] *White v Chief Constable of South Yorkshire* [1999] 2 A.C. 455 at 493.
[43] Teff, *Causing Psychiatric and Emotional Harm* (2008), at p.16.
[44] [1983] 1 A.C. 410.
[45] (1888) 13 App. Cas. 222 at 226.
[46] *Lynch v Knight* (1861) 9 H.L. Cas. 577 at 598.
[47] See especially *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 A.C. 310 at 398 (Lord Keith), 401 (Lord Ackner), 416 (Lord Oliver). The Law Commission criticised and recommended the abolition of this requirement in its 1998 Report: *Liability for Psychiatric Injury*, at paras 5.28–5.33. But the requirement continues to cause the dismissal of psychiatric injury claims, as in, for example, *Liverpool Women's Hospital NHS Foundation Trust v Ronayne* [2015] EWCA Civ 588. See for forceful criticism Andrew S. Burrows and John H. Burrows, "A Shocking Requirement in the Law of Negligence Liability for Psychiatric Illness" (2016) 24 Med. L.R. 278.

injury can be sustained.[48] While dissonance between medicine and law is a very important issue, and a fundamental thread in the knotted problem of pure psychiatric injury claims, the concomitant claim—that judges did not believe in psychiatric injury—has diverted attention from the way in which the law actually developed. The significance of the "wide field opened for imaginary claims" quote from *Coultas* has been exaggerated in the English context, where it was neither binding precedent, nor representative of contemporaneous judicial attitudes.

4. What do the early cases actually say about imaginary harm?

In 1982 in *McLoughlin v O'Brien*, Lord Bridge expressed the view that:

> "For too long earlier generations of judges have regarded psychiatry and psychiatrists with suspicion, if not hostility. Now, I venture to hope, that attitude has quite disappeared. No judge who has spent any length of time trying personal injury claims in recent years would doubt that physical injuries can give rise not only to organic but also to psychiatric disorders… *It is in comparatively recent times that these insights have come to be generally accepted by the judiciary*."[49]

This statement, in tandem with the "imaginary claims" quote from *Coultas* has been taken as evidence by many of the judicial scepticism about psychiatric illness caused by shock and its influence on the development of the law of negligence. However, a close reading of the judgments in the early cases does not support Lord Bridge's final sentence. In fact, it positively undermines it. All the judges in the early cases demonstrate a scientifically informed view of nervous shock congruent with the widely held medical view at the time as set out above—i.e. that fear or a shock could cause almost simultaneous disruption of the nervous system resulting in illness and physical damage. Many of the judges explicitly point out that although it is not so easy to see this damage with the naked eye, or for the layperson to perceive it, it is just as real as physical damage occasioned by impact.

This understanding of psychiatric injury amongst the judiciary is evident in the first case to come before the English Courts after *Coultas*, namely *Dulieu*.[50] In that case the pregnant Mrs Dulieu was keeping bar at her husband's establishment, the Bonner Arms in Bethnal Green, East London. The defendant's employee negligently drove a horse and carriage through the

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[48] Mullany and Handford, in their comprehensive account of the progress of the action in multiple jurisdictions, give a detailed account of post-traumatic stress disorder and its neurological explanation at the time of their writing: *Tort Liability for Psychiatric Damage* (1993), Chapters 1 and 2. .
[49] *McLoughlin v O'Brian* [1983] 1 A.C. 410 at 433 (emphasis added).
[50] *Dulieu v White & Sons* [1901] 2 K.B. 669.

wall of the pub, occasioning no physical impact but causing Mrs Dulieu to suffer a great fright. In consequence of her shock she became very unwell. Kennedy J. delivered a judgment which, far from expressing scepticism about nervous shock, instead serves as a strident piece of advocacy for its recognition as a legally cognisable injury. He was critical of the *Coultas* decision, both because the statement of claim in that case clearly demonstrated "there was evidence of actual physical illness, not only of a mental pain", but also because of the inaccurate use of the terms "mental" and "nervous shock" by the Privy Council.[51] Kennedy J. discussed nervous shock from the outset as a real injury describing the damage to Mrs Dulieu as "such a nervous shock as to make her *ill in body* and *suffer bodily pain*".[52] He expressed (*obiter*) the view that there was probably an actual and contemporaneous physical injury at the time of the shock.[53] In response to the "imaginary claims" concerns from *Coultas*, Kennedy J. drew on the extensive experience of the judges and juries sorting genuine from spurious claims in railway cases where, "as often happens, no palpable injury, or very slight palpable injury, has been occasioned at the time".[54] He said he:

> "should be sorry to adopt a rule which would bar all such claims on grounds of policy alone, and in order to prevent the possible success of unrighteous or groundless actions. Such a course involves the denial of redress in meritorious cases, and it necessarily implies a certain degree of distrust, which I do not share, in the capacity of legal tribunals to get at the truth in this class of claim."[55]

In the same case, Phillimore J. embraced the injury complained of as both real and legally cognisable, and while not dwelling on the issue, stated explicitly that there was no problem with an element of the chain of causation being mental.[56]

Twenty-three years later in *Hambrook v Stokes Bros*[57] the focus of judicial reasoning was again not on the real or imaginary nature of the alleged injury, but on Kennedy J.'s statement that the plaintiff's shock had to be occasioned by "fear for oneself", rather than fear for another. In this case, Mrs Hambrook had suffered a shock, miscarriage and subsequent serious illness resulting ultimately in her death. Her shock was occasioned by seeing a runaway lorry owned by the defendants, which put her in fear for the safety of her children (although she could not

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[51] *Dulieu v White & Sons* [1901] 2 K.B. 669 at 678.
[52] *Dulieu v White & Sons* [1901] 2 K.B. 669 at 671 (emphasis added).
[53] *Dulieu v White & Sons* [1901] 2 K.B. 669 at 677.
[54] *Dulieu v White & Sons* [1901] 2 K.B. 669 at 681.
[55] *Dulieu v White & Sons* [1901] 2 K.B. 669 at 681.
[56] *Dulieu v White & Sons* [1901] 2 K.B. 669 at 685.
[57] [1925] 1 K.B. 141.

see them) whom she knew had been walking in its path. Each of the judges in this case expressly accepted that shock could lead to death and was actionable. Atkin L.J. stated that Mrs Hambrook had "immediately evinced signs of great mental disturbance … caused … by fear".[58] He went on to discuss the legal effects of injury by shock and stated that *Coultas* had been wrong to exclude damage which was only "mental", stating it was based on "a belated psychology which falsely removed mental phenomena from the world of physical phenomena".[59] Sargant L.J. agreed:

> "[I]t is no doubt more difficult to prove that physical injury results from nervous shock than from direct impact. But when once this difficulty of proof is overcome, I cannot see why a negligence which so nearly causes direct impact as to cause physical injury by nervous shock is a more remote or less natural cause of damage than a negligence causing actual physical impact. Or, to put it more precisely, as a matter of duty which is owed to the plaintiff … the duty of the defendant so to control his vehicle as to avoid causing physical injury to those on or near the highway … can hardly be limited to actual physical impact on the plaintiff … but must logically include such an immediate threat of impact on the plaintiff as to produce physical injury to him, or her, through the nervous system. There seems to me to be no magic in actual personal contact. A threatened contact producing physical results should be an equivalent."[60]

Alfred Stirling, reflecting on the developments up to *Hambrook* in 1928, concurred with the view that even as early as 1925, psychiatric injury was considered discernible via "objective symptoms … and reasonable tests".[61]

Similar views were expressed in *Owens v Liverpool Corporation*[62] in 1939. In that case, where family members sustained shock after seeing a carriage collide with the funeral hearse of their near-relative, MacKinnon L.J. stated:

> "The principle must be that mental or nervous shock, if in fact caused by the defendant's negligent act, is just as really damage to the sufferer as a broken limb—less obvious to the layman, but nowadays equally ascertainable by the physician."[63]

McKinnon L.J. actually warned against being driven by a fear of imaginary claims, stating:

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[58] *Hambrook v Stokes Bros* [1925] 1 K.B. 141 at 153.
[59] *Hambrook v Stokes Bros* [1925] 1 K.B. 141 at 154.
[60] *Hambrook v Stokes Bros* [1925] 1 K.B. 141 at 161–162.
[61] Stirling, "Liability for Nervous Shock" (1928), at 49.
[62] [1939] 1 K.B. 394.
[63] *Owens v Liverpool Corporation* [1939] 1 K.B. 394 at 400 (MacKinnon L.J. was speaking for the Court: MacKinnon L.J., Goddard L.J., and du Parcq L.J.).

> "[F]ear that unfounded claims may be put forward, and may result in erroneous conclusions of fact, ought not to influence us to impose legal limitations as to the nature of the facts that it is permissible to prove."[64]

He cited Kennedy J.'s comments in *Dulieu* to this effect with approval.[65]

Finally, even in *Bourhill v Young* where recovery was denied, there was no judicial scepticism about the nature of the claimant's injury. The position of the many judgments in this case is best summed up by Lord Macmillan's opening: "it is established that the appellant suffered in her health and in her ability to do her work by reason of the shock which she sustained".[66] He addressed the nature of the injury claimed and affirmed that shock without direct contact was now well established as actionable in negligence and that it was well known that mental shock accompanied "physical disturbance in the sufferer's system".[67]

The strongest claim for the influence of scepticism in the early cases is when—as in *Coultas*—it is linked to a fear of opening the floodgates to a deluge of claims.[68] However, it is important to keep clear that the floodgates concern is simultaneously about a rash of fake claims, and a cascade of legitimate mental injuries following a major disaster. Teff deals with the likelihood of a rush of claims in one of his later chapters, demonstrating how unlikely it would be to overwhelm the imperative for just law and, indeed, this forms part of the reform agenda of his book.[69] It is certainly true that that the second type of floodgate fear—a potentially huge and indeterminate class of claimants—is to be found in many judgments and has had a significant impact on the development of the law in this area. However, the fear of *imaginary* claims did not have a significant effect on the development of the law. Far from being a feature of these early cases, what we see is an almost entirely consistent view that mental illness was as real an injury as physical illness. In the early cases they are almost invariably classed together under the heading of damage, and the distinction we see made between them in later case law is not in evidence. A careful reading of the early cases post-*Coultas* demonstrates that the concerns about imaginary claims in that judgment were widely rejected by the English courts. The

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[64] *Owens v Liverpool Corporation* [1939] 1 K.B. 394 at 400.
[65] *Owens v Liverpool Corporation* [1939] 1 K.B. 394 at 400.
[66] *Bourhill v Young* [1943] A.C. 92 at 103.
[67] *Bourhill v Young* [1943] A.C. 92 at 103.
[68] For example, Lord Edmund-Davies notes in *McLoughlin v O'Brian* that such fear "provided a fatal stumbling block" to the plaintiff's claim in *Coultas.* Such fear, he noted, rested on a "conjecture later shown to be ill-founded", and was a fear he, like Lord Wilberforce, did not share. See *McLoughlin v O'Brian* [1983] 1 A.C. 410 at 425.
[69] Teff, *Causing Psychiatric and Emotional Harm* (2009), especially at pp.149–166.

judgment's effect on modern judicial and academic discussion of the history of the action has been disproportionate. Its powerful shadow derives from the appeal of the "imaginary claims" quote to a significant cultural enthusiasm for identifying and redressing prejudice. It has thus diverted attention from the cases that, in reality, determined the early course of the law on pure psychiatric injury. It is to these which we now turn.

5. The Forgotten Cases: *Bell, Byrne,* and *Wilkinson*

When one returns to the foundational decisions in *Dulieu*, *Hambrook, Owens*, and *Bourhill*, it becomes apparent that there were three other cases which had a substantial impact on the courts in this early stage of the law's development, yet they have received little attention in modern writing. By contrast, as we have shown, *Coultas* continues to be regularly referenced, despite the fact that the Privy Council's approach in that case was roundly criticised and rejected in each of the early cases. Far from affording *Coultas* any weight or respect, the courts in all the early cases cited with approval the decisions of the Irish courts in *Byrne v Great Southern and Western Railway Co*[70] (1884) and *Bell v Great Northern Railway Company of Ireland*[71] (1890). The English decision in *Wilkinson v Downton*[72] (1897) was also highly influential, despite now being regarded as belonging to a different strand of precedent (due to the intentional nature of the act). Despite this, modern commentary almost entirely fails to draw out the significance of these decisions. *Bell* and *Byrne* are referenced merely in a few footnotes by Mullany and Handford.[73] Mendelson does offer some discussion of *Bell*, but it is rather cursory.[74] Teff mentions both cases in passing during his discussion of *Dulieu* but offers no analysis of their importance.[75] The only reference to the importance of Palles C.B.'s decisions in these cases is made by former Australian Chief Justice, Anthony Mason, in his preface to Danuta Mendelson's book.[76]

When the English courts were called upon to consider a claim for psychiatric injury at the turn of the twentieth century in *Dulieu,* Kennedy J. pointed to a substantial body of authority for

[70] Unreported 1884 Court of Appeal (Ireland).
[71] (1890) 26 L.R. Ir. 428.
[72] [1897] 2 Q.B. 57.
[73] Mullany and Handford, *Tort Liability for Psychiatric Damage* (1993), at pp.2, 10, 106, 149, 264, 285.
[74] Mendelson, *The Interfaces of Medicine and Law* (1998), at ch 4.
[75] Teff, *Causing Psychiatric and Emotional Harm* (2009), at pp.44–45.
[76] Mendelson, *The Interfaces of Medicine and Law* (1998), Preface.

accepting nervous shock as a legally cognisable injury in support of his decision not to follow the Privy Council's decision in *Coultas*.[77] Noting that nervous shock had properly been treated as a physical injury in *Pugh v London, Brighton and South Coast Railway Co*,[78] the most significant, and ultimately influential, of the prior cases for Kennedy J. were *Byrne* and *Wilkinson*, in both of which the mental injuries suffered by the plaintiffs were acknowledged and compensated by the courts.[79] We turn now to demonstrate the significance of these cases in relation to the English courts' consideration of nervous shock as a legally cognisable injury.[80]

The importance of *Byrne* to the development of English law is encapsulated in Kennedy J.'s statement that, "I prefer [over *Coultas*], as I have already indicated, the two decisions of the Irish Courts".[81] Indeed, the unreported decision in *Byrne* was significantly more important to the development of English Law than *Coultas*. However, the little that we know of *Byrne* is what is presented in the decision of Palles C.B. in *Bell*. In the latter case, an elderly woman received a shock from the jolting of a train carriage and suffered subsequent "nervous shock" symptoms including insomnia, night terrors and debilitating weakness. The decision in *Byrne* determined the outcome of *Bell*. *Byrne* came before Palles C.B. in December 1882 and was heard in the Irish Court of Appeal in 1884. In that case the plaintiff, a Superintendent of the Telegraph Office at Limerick Junction, received a great shock and fright when the defendants' train negligently broke through a siding buffer and crashed into the wall of the plaintiff's office.

> "On cross-examination [the plaintiff] said, 'A hair of my head was not touched; I swear I received no physical injury; I got a great fright and shock; I do not mean a physical shake; it was the crash and falling in of the office, and shouts of the clerks saying they were killed; I saw part of the office falling in; I believed it was all falling in.'"[82]

We know no more of the injuries suffered by Mr Byrne but the decision is described as one which "goes much further" than the facts in *Bell*, and in which there is no suggestion of any impact at all.[83] As a man, Mr Byrne was also not able to present incontrovertible symptoms of

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[77] *Dulieu v White & Sons* [1901] 2 K.B. 669 at 673–679.
[78] [1896] 2 Q.B. 248.
[79] The other cases he relied on were *Jones v Boyce* [1816] 171 E.R. 540, *Harris v Mobbs* (1878) 3 Ex. D. 268, and *Wilkins v Day* (1883) 12 Q.B.D. 110. These had been cited in *Wilkinson v Downton* [1897] 2 Q.B. 57 at 61.
[80] There is a related, and substantial, legal history to be written around these cases and the wrangling of the courts during this period with the concept of remoteness. Regrettably, it is not possible to also effectively engage with that issue in an article of this length and so we confine ourselves to our central point which is judicial recognition of the type of injury.
[81] *Dulieu v White & Sons* [1901] 2 K.B. 669 at 682.
[82] Quoted in *Bell v Great Northern Railway Company of Ireland* (1890) 26 L.R. Ir. 428 at 442 (Palles C.B.).
[83] *Bell v Great Northern Railway Company of Ireland* (1890) 26 L.R. Ir. 428 at 442 (Palles C.B.).

some physical sequalae such as a miscarriage.[84] Of all the early cases it seems that *Byrne* presents the most definitive account of a "pure" injury with no accompanying immediate physical consequence. And yet, in contrast with the Privy Council, the Irish judges before whom the case came had no difficulty in recognising and compensating his injury. There is no suggestion that in *Byrne* or *Bell* the court was concerned about "imaginary" or "faked" symptoms. Rather (in reasoning replete with double negatives) the judges declined to establish as a point of law that if negligence causes fright, and that fright causes injury such injury "cannot be a consequence which, in the course of things would flow from" the negligence unless such injury "accompany such negligence in point of time".[85] In simpler terms, they recognised the often-delayed symptoms of nervous shock as not too remote. Determining the "reality" of the symptoms was not directly raised in the judgments in *Bell*, but Palles C.B. did note the unwarranted singularity of the Privy Council's assumption, *against* the factual finding of the jury in *Coultas*, "that the fright was … unaccompanied by any physical injury".[86]

On the basis of *Byrne*, and its binding authority over the Irish court, Palles C.B. and each of the other judges in *Bell* declined to follow *Coultas* on the question of whether the injury to the plaintiff was too remote. However, each of the judges also made a point of stating they preferred the reasoning in *Byrne* in any event, rejecting the view taken in *Coultas* that "nervous shock is something which affects merely the mental functions, and is not itself a peculiar physical state of the body".[87] Palles C.B. called this an "error that pervades the entire judgment" and made explicit that he regarded the Privy Council as wrong to regard nervous shock and mental shock as one and the same.[88] He referred to Thomas Beven's *Principles of the Law of Negligence* (1889) in which Beven distinguishes mental shock (which is not recoverable) and nervous shock (which is)—the latter has *physical* implications.[89] In Beven's view *Coultas* was clearly a case of nervous, not mental, shock. Both Palles C.B. and Murphy J. were adamant in *Bell* that the nature of the injury was not material, Murphy J. explicitly stating that "[i]t appears

[84] Mendelson muses that the preponderance of miscarriage plaintiffs in the early cases might be attributed to the demonstrable physicality of miscarriage even if the other symptoms could be "made up": Mendelson, *The Interfaces of Medicine and Law* (1998), at p.56.
[85] *Bell v Great Northern Railway Company of Ireland* (1890) 26 L.R. Ir. 428 at 442 (Palles C.B.).
[86] *Bell v Great Northern Railway Company of Ireland* (1890) 26 L.R. Ir. 428 at 441.
[87] *Bell v Great Northern Railway Company of Ireland* (1890) 26 L.R. Ir. 428 at 441.
[88] *Bell v Great Northern Railway Company of Ireland* (1890) 26 L.R. Ir. 428 at 441.
[89] Beven, *Principles of the Law of Negligence* (1889), at p.67.

to me immaterial whether the injuries may be called nervous shock, brain disturbance, mental shock, or bodily injury".[90]

What they mean is that it does not matter *how* the injury occurred (via physical impact or the impact of a nervous shock), because both would eventually manifest physically, and hence all fall within the sphere of injury to the body, which the law is content to compensate. Palles C.B.'s reference to Beven was to make the point that the injuries seen in *Coultas* and *Bell* (as well as *Byrne*) fell into this class and were not mere mental (trivial) shocks with no physical implications. As Murphy J. put it, one of the only questions to be considered was: "Was the health or capacity of the plaintiff for the discharge of her duties and enjoyment of life affected by what occurred to her whilst in the carriage?"[91] In *Dulieu*, it is precisely this approach to nervous shock that both Kennedy J. and Phillimore J. accept, and it is the reason why both reject *Coultas* and instead are influenced heavily by the reasoning in the Irish cases. Phillimore J. explicitly states that an action can lie "though the medium through which [the damage] has been inflicted is the mind".[92] It is hence *Bell* and *Byrne* which ground the direction taken in the first of the four foundational early cases in this area. And it is this perspective that informs their view that nervous shock, or psychiatric injury, in the sense that they understood it, is as much an injury as any bodily impact, and not, consequently, something that might be imagined or faked.

The other case upon which Kennedy J. and Phillimore J. place some reliance in *Dulieu* is *Wilkinson v Downton*.[93] Both recognised the argument of counsel that *Wilkinson* differed from the instant case because of the direct intent of the defendant in that case to cause mental distress to the plaintiff,[94] and accordingly rely more heavily on the Irish authority. However, the significance of *Wilkinson* is still important. It is a case that has, by and large, following the passage of the Protection from Harassment Act 1997 been relegated to the silo of "historical oddities" in tort. However, despite the intentional element of the case being different, it (and the prior authorities it assembles) clearly influenced the thinking of Kennedy J. and Phillimore

[90] *Bell v Great Northern Railway Company of Ireland* (1890) 26 L.R. Ir. 428 at 443.
[91] *Bell v Great Northern Railway Company of Ireland* (1890) 26 L.R. Ir. 428 at 443.
[92] *Dulieu v White & Sons* [1901] 2 K.B. 669 at 683.
[93] [1897] 2 Q.B. 57.
[94] *Dulieu v White & Sons* [1901] 2 K.B. 669 at 674 (Kennedy J.), 683–684 (Phillimore J.).

J. around the notion that mental disruption or, as Phillimore J. characterised it, an infringement of the "legal right to his personal safety",[95] was a harm recoverable in tort.

A key question in *Wilkinson* was whether a physical injury caused not by physical impact, but by a fright, was too remote a consequence for the defendant to be liable. Wright J. was clear that it was not too remote, and in taking this view, he explicitly rejected *Coultas*.[96] Instead, he favoured the approach in both *Pugh* and *Bell*, that such illness was a direct and natural consequence of the conduct causing the fright and hence actionable. He also rejected concerns raised in *Allsop v Allsop*,[97] a slander case, that illness due to slander should not be considered special damage because to do so "might lead to an infinity of trumpery or groundless actions".[98] Such a concern was not applicable to illness deriving from a shock, in Wright J.'s view, and indeed he went so far as to suggest that "if death ensued from a shock caused by [a] false statement, I cannot doubt that at this day the case might be one of criminal homicide".[99] Wright J. clearly considered physical illness resulting from shock as both a real form of harm and so took the view that an action would lie even though the physical impact only resulted as a consequence of a fright.

It was this aspect of *Wilkinson* on which both Kennedy J. and Phillimore J. drew in in *Dulieu*, to refuse to follow *Coultas*. Both agreed that nervous shocks in some fashion operate through the body to produce physical illness. Far from being the singular oddity it is now seen as, at this time *Wilkinson* was a highly significant case which helped to firmly establish in English law recognition of mental harm in tort. It is one of the foundational decisions in which the courts recognise that injury can derive from mental, rather than physical impacts.

Twenty years post-*Dulieu*, in *Hambrook*,[100] the key question was the ambit of potential liability for psychiatric injury, specifically whether Kennedy J.'s limitation that nervous shock was only actionable if occasioned by a fear of injury to oneself was good law. In *Hambrook* this issue was crucial. Unlike *Dulieu*, in which the plaintiff had suffered injury due to a clear fear for her

[95] *Dulieu v White & Sons* [1901] 2 K.B. 669 at 683.
[96] *Wilkinson v Downton* [1897] 2 Q.B. 57 at 59–60.
[97] (1860) H. & N. 534.
[98] *Wilkinson v Downton* [1897] 2 Q.B. 57 at 60.
[99] *Wilkinson v Downton* [1897] 2 Q.B. 57 at 61.
[100] *Hambrook v Stokes Bros* [1925] 1 K.B. 141.

own safety, in *Hambrook* the injury to Mrs Hambrook resulted from her fear for the safety of her children.

At first instance, the court had followed Kennedy J's dictum in *Dulieu* and found for the defendants on the grounds that nervous shock produced by fear for others alone was not actionable. Counsel for the defendants argued that the distinction made by Kennedy J. was insupportable, and in support cited two cases of deliberately induced fear—*Wilkinson v Downton* and *Janvier v Sweeney*[101]—on the grounds that "if there is a duty not to shock by fear of the one kind, there must equally be a duty not to shock by fear of the other".[102] Here, again, they were picking up the thread that links these cases: that it is wrong (and actionable) to induce illness in another via a shock or fright. While the motive differed (negligence as opposed to malice), the key link raised in this case, as in *Dulieu*, was the mechanism for causing the illness. This is why, in our view, *Wilkinson* forms an important part of the precedent on negligent infliction of mental harm, even though it is usually classified with the cases involving intention. That distinction did not prevent it from being considered highly influential in these early negligence decisions, as *Hambrook* also demonstrates.

For Phillimore J. in *Dulieu* and Atkin L.J. in *Hambrook* the core issue was whether the risk of injury, whether precipitated by shock or physical means, was one which the defendant ought to have foreseen. From this position, Atkin L.J. firmly rejected Kennedy J.'s attempt to constrain that duty only to fear for one's own safety, and not that of another. The duty owed was "not a duty to refrain from inflicting *a particular kind* of injury upon those who are in the highway" but rather "a duty to use reasonable care to avoid injuring those who use the highway".[103] Whether injury derived from fear for oneself, or for another, only the fact that there was a risk of causing injury of some kind was relevant. To hold otherwise, he opined, would be inconsistent with *Pugh* and, importantly, *Wilkinson*, which again he saw as a relevant case with which consistency needed to be maintained. According to Atkin L.J., once a breach was established:

> "one had no longer to consider whether the consequences could reasonably be anticipated by the wrongdoer. The question is whether the consequences causing damage are the direct result of the wrongful act or omission."[104]

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[101] [1919] 2 K.B. 316.
[102] *Hambrook v Stokes Bros* [1925] 1 K.B. 141 at 145.
[103] *Hambrook v Stokes Bros* [1925] 1 K.B. 141 at 156 (emphasis added).
[104] *Hambrook v Stokes Bros* [1925] 1 K.B. 141 at 156.

That is, the question became one of remoteness as understood at the time: whether the harm actually suffered was a natural and direct result of the breach (following *Re Polemis*[105]).

Even Sargant L.J., who dissented in *Hambrook*, had no doubt about the reality of injuries that arose as a result of shock. There was, he said, "no magic in actual personal contact" as a means to cause real harm, and he considered a threatened harm as equally able to cause genuine injury.[106] He dissented, however, on the majority's view of Kennedy J.'s restriction, which he felt was a valid and necessary limit on liability because such harms could not "properly be held to have been within [a defendant's] ordinary and reasonable expectation".[107] He alone rejected the relevance of *Wilkinson* but only by reason of its being a case of intentionally, rather than negligently, induced harm; he did not specifically engage with its relevance to the nature of how that harm was caused.[108]

Hambrook was followed some fourteen years later by the unusual case of *Owens v Liverpool Corporation*.[109] Again, *Bell* rather than *Coultas* was regarded as the most important and relevant precedent. The case involved a negligently driven tramcar overturning a hearse and tipping the coffin into the street. While the coffin mercifully remained closed, several family members who witnessed the event suffered severe nervous shock. The question before the court was whether the lower court judge had been right that the law required apprehension of injury to some human being, or sight of such injury, for a plaintiff to recover for nervous shock due to negligence, effectively a restriction that followed the expanded approach taken in *Hambrook*. In reviewing the relevant history, MacKinnon L.J., reading for the court, damningly referred to the view in *Coultas* on nervous shock as having been "uniformly discredited and disapproved ever since", citing as the "first, and perhaps the loudest voice in the chorus of disapproval" that of Palles C.B. in *Bell*.[110] No mention was made of *Wilkinson*, but its legacy on the question of whether psychiatric injury should be recoverable was effectively maintained via the reliance on *Dulieu* and *Hambrook* on this point. As in the other post-*Coultas* decisions, MacKinnon L.J. emphasised that an injury due to shock "is just as really damage to the sufferer as a broken limb—less obvious to the layman, but nowadays equally ascertainable by the physician".

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[105] *Re Polemis & Furness, Withy & Co Ltd* [1921] 3 K.B. 560.
[106] *Hambrook v Stokes Bros* [1925] 1 K.B. 141 at 162.
[107] *Hambrook v Stokes Bros* [1925] 1 K.B. 141 at 162.
[108] *Hambrook v Stokes Bros* [1925] 1 K.B. 141 at 164.
[109] [1939] 1 K.B. 394.
[110] *Owens v Liverpool Corporation* [1939] 1 K.B. 394 at 398–399.

Citing Kennedy J. with approval, he stated that "fear that unfounded claims may be put forward and may result in erroneous conclusions of fact, ought not to influence us to impose legal limitations as to the nature of the facts that it is permissible to prove".[111] *Owens* represents the peak of this period of expansion in recognising liability for psychiatric illness, with the 1943 decision in *Bourhill v Young*[112] marking the limit of what the court regarded as compensable.

In *Bourhill*, a pregnant woman heard a negligently driven motorcycle crash into a car. She neither saw the accident itself, nor was afraid for her own safety, but she suffered a severe shock to her nervous system, which she alleged resulted in the stillbirth of her baby and the loss of her ability to work for some time. The House of Lords approached the situation as a question of the exact ambit of the motor cyclist's duty of care to other road users. Lord Thankerton noted that it was well settled that there was no question that "injury" included an injury induced by shock in the absence of physical impact.[113] The question was one of proximity (or remoteness) and whether the injury to Mrs Bourhill was within the range "within that which the cyclist ought to have reasonably contemplated as the area of potential danger which would arise as the result of his negligence".[114] In Lord Thankerton's view, it was not. He drew on the remoteness approach in *Re Polemis* as well as the exploration of duty in *Hambrook* and *Owens* to come to this conclusion. He was critical of the finding in *Owens*, in which he had "difficulty" in seeing any relationship between the parties and appeared to feel similarly in *Bourhill*.[115]

Significantly, Lord Wright stated that the crucial question was whether the act was "negligent vis-à-vis the plaintiff".[116] On this point, though he did not mention *Wilkinson*, he harked back to the point made in relation to it in *Dulieu* by Phillimore J. that the applicant "has a cause of action because of a wrong to herself".[117] Lord Wright's point was that that the plaintiff could not "build on a wrong to someone else".[118] The link to *Wilkinson* is clear in that liability arises when there is an infringement of the right of the plaintiff herself. Phillimore J. had explicitly accepted this point raised by (another) Lord Wright in *Wilkinson*, stating, "I cordially accept the decision of my brother Wright in *Wilkinson v Downton* that everyone has

[111] *Owens v Liverpool Corporation* [1939] 1 K.B. 394 at 400.
[112] [1943] A.C. 92.
[113] *Bourhill v Young* [1943] A.C. 92 at 98.
[114] *Bourhill v Young* [1943] A.C. 92 at 99.
[115] *Bourhill v Young* [1943] A.C. 92 at 100.
[116] *Bourhill v Young* [1943] A.C. 92 at 108.
[117] *Bourhill v Young* [1943] A.C. 92 at 108.
[118] *Bourhill v Young* [1943] A.C. 92 at 108.

the legal right to his personal safety", and this extended to injuries caused by nervous shock (based, as he had just stated, on the decision in *Bell*).[119]

Here, we can see the long impact of *Wilkinson* on the understanding of the issue, that fundamentally persons have a right to freedom from harm induced by shock (whether negligently or intentionally), and that this right informed the ambit of the duty owed to persons by those who might injure them. But that duty did not, therefore, extend to persons harmed only when the right of *another* person was infringed; this could not be built upon by a person in the position of the plaintiff in *Bourhill*, and hence this marked the boundary of that duty. This perspective explains the reticence of the court in *Bourhill* in relation to the decision in *Owens*.

Taken together, the early cases—*Dulieu*, *Hambrook*, *Owens* and *Bourhill*—form the foundation of the current law on psychiatric injury induced by negligence. Close analysis of the judgments clearly demonstrates that *Bell*, *Byrne* and *Wilkinson*, not *Coultas*, were the precedents on which they placed weight. Far from having any influence, the Privy Council's decision in *Coultas* was roundly rejected and indeed scorned for its outmoded views on nervous shock. It is in these three cases that the courts found support for their view that such injuries were real, as well as providing the grounding for their understanding of the questions of duty, its ambit, and the fundamental right to personal safety. In this perhaps *Wilkinson* formed the strongest foundation, offering a broadly based perspective that, regardless of the means of injury, all such cases were to be understood as infringements on that fundamental right. While it is true some distinctions were made on the basis of intentionality, more weight was placed on the principle that unified the approaches in *Wilkinson* and *Dulieu* that persons had a right not to have harm inflicted on their person via nervous shock or other means. Thus, we can see that the modern law on psychiatric injury finds its roots not in *Coultas*, but in a case that has long been regarded as belonging to a separate strand of precedent, namely *Wilkinson*.

6. Conclusion

We have shown that it is simply not true that judges only came to recognise psychiatric injury as a real thing in the mid-to-late twentieth century. Quite to the contrary, the judgments in the

[119] *Dulieu v White & Sons* [1901] 2 K.B. 669 at 683.

early cases are explicit and dogmatic about the reality of this type of injury and its analogy to a "broken leg". Informed by experience with railway cases, and cognisant of medical developments, judges in the early cases have been unfairly maligned. Indeed, we might go so far as to say they evinced a *greater* openness to seeing psychiatric injuries as both real and actionable than has been seen in more recent judgments. Far from lagging behind in the acceptance of injury caused via shock, they were pressing for the law to keep pace with modern understandings that regarded such injuries as very real.

It is true that these early judges were working with an understanding of such injuries as at least partially physical, and that *purely* mental injuries with no physical implications could not be recognised. As discussed above this rested on a contemporary distinction between a transient "mental" shock, which was not thought to be serious or to manifest physically, and the more serious "nervous" shocks. The disconnect between the injury actually considered in the early cases and the injury considered in psychiatric injury cases today is a fundamental insight revealed by this historical analysis. Moreover, the historical origins of a distinction between mental distress and nervous shock, and our unpicking of the consequent case law, may be of assistance to the courts in this country and in other common law jurisdictions currently vexed by the seemingly arbitrary and inconsistent lines drawn between mental distress and recognised psychiatric injury.[120]

It is difficult, given what we have shown here, to understand the attribution of "prejudice" to the development of the law in pure psychiatric injury. It is clear that the modern law is beset with unreasonable, medically ill-informed, and unjust restrictions on recovery. However, it is more likely that these have been constructed around a fear of legitimate, rather than imaginary, claims. Far from being sceptical about psychiatric injury, judges who must see this kind of thing all the time in their courts, have been frightened by the devastating reality of this kind of damage, and the potential for it to lead to an overwhelming influx of claims.

In existing legal histories, the foundations of the current law have been misunderstood and the notion of the sceptical judge has been wrongly maintained. We should regard the origins of the current law as lying in an acceptance of nervous shock as real, and no longer consider *Coultas*, the one case in which this scepticism does manifest, as in any way influential. *Coultas*

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[120] Most recently: *Moore v Scenic Tours Pty Ltd* [2020] H.C.A 17 at [68]–[75] (per Edelman J). See also see also *Baltic Shipping Co v Dillon* (1993) 176 C.L.R. 344 and *Wainwright v Home Office* [2003] U.K.H.L. 53 at [10]–[11], and [36]–[47] (per Lord Hoffman).

should be reframed as the outlier case, which went against those before it such as *Bell* and *Wilkinson* and was resoundingly rejected in the decisions that followed. The claim in *Coultas* that the field was open for imaginary claims was rejected then, and we should continue to reject it as in any way having shaped the early law in this area. It is much more accurate to regard the origins of this area of law as a *critical reaction* to this claim in that case by judges keen to reject it at every turn.

In doing so, then, we should see instead that the origins of the law on psychiatric injury lie in three key cases in which the courts even as early as the late nineteenth century were open to seeing injury caused by nervous shock as real and requiring legal protection. Further, these cases of *Bell*, *Byrne*, and *Wilkinson* form a triad which collectively recognised the rights of individuals to be protected against infringements on their personal safely, where threats to that safety via nervous shocks were emphasised to be just as much injury attracting liability as any caused by bodily impacts. Though now classed as separate strands of precedent, these cases collectively form the foundation in this area of law. Their differences should not overshadow this, and further *Wilkinson* is much more appropriately regarded as a key case in the area of psychiatric injury than the unusual outlier which it is generally now considered to be.

These findings have implications for our understanding of the law as it stands today. For too long, *Alcock* has been understood as the logical end point of a century of scepticism about mental injuries, merely another in a long line of poorly grounded judicial scepticism and a result of a judiciary out of touch with modern understandings of mental illness. The better view is that the judiciary were originally open-minded, and resistant to seeing such injuries as open to fakery. They were committed to resisting any approach that would prevent legitimate claims, and they trusted in their ability to identify these and reject those that were ill-founded. Their concern was, as it remained in later cases, how to determine the appropriate boundaries of liability based on what a reasonable defendant might foresee balanced against the need to protect persons' right to individual safety. These judges were far more open to finding liability than their later compatriots, as Lord Atkin's prescient musing in *Hambrook* on whether a bystander to a terrible event might be included in the scope of a defendant's duty demonstrates.[121] Unlike the majority in *Alcock*, he saw "no reason" to exclude the bystander who was harmed by the sight of injury to a third party,[122] and hence he took a far more expansive

[121] *Hambrook v Stokes Bros* [1925] 1 K.B. 141 at 157–159.
[122] *Hambrook v Stokes Bros* [1925] 1 K.B. 141 at 157.

position that would be taken some seventy years later when those so harmed by the impact of the Hillsborough disaster brought their claims to the House of Lords.