REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

[HIGH COURT OF AUSTRALIA.]

BUNYAN . . . . . APPELLANT;
PLAINTIFF,

AND

JORDAN . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, 1936, *Dec.* 2.

MELBOURNE, 1937, *Mar.* 1.

Latham C.J., Rich, Dixon, Evatt and McTiernan JJ.

Action — Tort — Contract — Assault — Intentional injury — Negligence — Duty of employer to employee—Threat by employer to "shoot someone"—Shot fired—Shock and illness suffered by employee.

The plaintiff, who was employed by the defendant, observed him handling a loaded revolver and later overheard him in his office inform one of her fellow employees that he was going to shoot himself or someone. The defendant was under the influence of intoxicating liquor. Shortly afterwards his statement was repeated to the plaintiff by the employee to whom it was made and the plaintiff became nervous. The defendant left his office and the plaintiff heard a shot fired, but shortly afterwards the defendant returned unharmed. Later on the same day the defendant tore up pound notes in the plaintiff's presence and said that he would not be there in the morning to mend them and that a death would be heard of. The plaintiff made a case supported by medical evidence that the defendant's conduct shocked her and caused her to

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become ill. She sued the defendant for damages for negligence, breach of contract, and assault, and for wilfully causing her harm.

Held by *Latham* C.J., *Rich*, *Dixon* and *McTiernan* JJ. (*Evatt* J. dissenting), that the facts were not sufficient to constitute any of the causes of action. The injury of which the plaintiff complained was not such as might reasonably have been expected by the defendant to result from his conduct.

Decision of the Supreme Court of New South Wales (Full Court): *Bunyan* v. *Jordan*, (1936) 36 S.R. (N.S.W.) 350; 53 W.N. (N.S.W.) 130, affirmed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court of New South Wales in which the plaintiff, Lucy Bunyan, claimed from the defendant, Arthur E. Jordan, the sum of £1,000 as damages for injuries alleged to have been sustained by her as a result of his conduct. In the declaration it was alleged that in the presence, sight and hearing of the plaintiff, the defendant produced and aimed a revolver, and said "I am going to shoot someone"; and that this caused her such a mental shock that she became ill, and suffered consequential damage. These facts were, in separate counts, alleged to constitute alternatively causes of action in (*a*) negligence; (*b*) breach of an implied promise that the shop in which the plaintiff was employed by the defendant would be and would continue to be a fit and proper place for her to work in and would not be rendered a dangerous or unfit place for such purpose by any wilful act of the defendant's; and (*c*) assault. In the fourth count the plaintiff alleged a malicious production of a revolver in her presence, sight and hearing and the speaking of the words mentioned above, and the putting of the plaintiff into fear of immediate personal injury with the result mentioned in the other counts. The defendant pleaded that he was not guilty; that he did not promise as alleged, and a denial of breaches. The plaintiff, who at the date of the incident referred to hereunder was about twenty-two years of age, was employed at a general store kept by the defendant and had been so employed by him for upwards of two years. Evidence given by the plaintiff was to the effect that on 19th October 1934 the defendant was under the influence of intoxicating liquor. It was the late shopping night, and, after having had tea, the plaintiff returned to the store and went into the office, where she saw the defendant sitting at a

table, and another female employee. There was a revolver lying on the table in front of the defendant, who extracted the cartridges from the revolver in the presence of the plaintiff. Also on the table in front of the defendant was a bottle which was marked "Poison." The plaintiff walked out of the office and overheard the defendant say to the other employee that he was going to shoot himself or shoot someone. The plaintiff said that she "felt all nervous and all worked up about it." The defendant went out to an adjoining building and the other employee came into the shop and repeated to the plaintiff that the defendant had said that he was going to shoot himself or shoot someone. A report of a firearm was then heard. The plaintiff said that this report made her "feel very nervous and sick in the stomach, then shaky all over." She was "too frightened to go out to where the shot" had been fired. She saw the defendant unharmed about five or ten minutes later. The plaintiff remained at work until the shop closed and took the takings to the defendant, who, according to her evidence, tore up the pound notes and said that he would not be there in the morning to mend them and to have them banked, and that "we would hear of a death before morning." A doctor came and gave the plaintiff some powders and then everybody went home. On the following day, Saturday, the plaintiff was still feeling shaky and nervous and became worse on Sunday and Monday when a doctor was called in. He attended her for six months. The doctor said that the facts which he observed as to her nervous condition were symptoms of neurasthenia and that her condition could have been brought about by a shock. A police sergeant who was called by the plaintiff deposed to a conversation which he had had with the defendant between 9 o'clock and 10 o'clock a.m. on some unspecified day in October or November 1934. He said that the defendant told him that he, the defendant, had fired a shot in the office shortly before he "rang-up" the police and that he had fired it at himself having some armour under his vest, and that he did it "with the idea of putting the wind up the boys"—his sons. The plaintiff was quite definite that the shot which she heard fired was fired at night and not in the morning, in a building adjoining the office, and that her

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sister and brother-in-law—who were not called as witnesses—were in the shop for some time after the shooting took place. The trial judge gave general leave to amend the pleadings and dealt with the case on the assumption that any necessary amendments had been made. In pursuance of that leave the plaintiff produced to the trial judge an amendment in which it was alleged that the defendant maliciously, wrongfully and wilfully produced in her presence, sight and hearing a loaded revolver and wilfully and wrongfully said: "I am going to shoot someone" and thereupon wilfully and wrongfully discharged the revolver within her hearing whereby she sustained great shock and agony of mind and was for a long time sick and unwell and unable to attend to her business and suffered great pain of body and mind. The trial judge held that there was no evidence that the plaintiff apprehended any personal injury to herself, and also that there was no such relationship between the plaintiff and the defendant as to create in the defendant a legal duty not to terrify the plaintiff by wrongful action causing mental shock followed by physical consequences. His Honour directed a verdict for the defendant and the Full Court of the Supreme Court held that this direction was correct: *Bunyan* v. *Jordan* (1).

The plaintiff appealed, *in forma pauperis*, to the High Court.

Dwyer (*Evatt* K.C. with him), for the appellant. A cause of action arises where there is a deliberate, wilful intent to cause shock, and in pursuance of that intention certain things are done and words spoken, and where in fact shock and consequent physical injury follow as a result (*Wilkinson* v. *Downton* (2); *Dulieu* v. *White & Sons* (3)). This is not a case of mere negligence; here the respondent deliberately intended to cause shock. That shock was the cause of the appellant's serious illness. The facts should have been left to the jury. A person is responsible for the consequences which flow from acts done or words spoken by him with the intention that they should cause some degree of harm. The respondent's display of the revolver and poison bottle amounted to carelessness or negligence for which he is liable in damages in respect of injuries caused

(1) (1936) 36 S.R. (N.S.W.) 350; 53 W.N. (N.S.W.) 130.

(2) (1897) 2 Q.B. 57.

(3) (1901) 2 K.B. 669.

thereby to the appellant. In *Victorian Railways Commissioners* v. *Coultas* (1) there was no question of intention; here it is a case of wilful wrong. The court should not draw a distinction between injury arising from fear of personal injury, and an injury threatened to or sustained by another person. Whatever may have been his attitude or intention as regards the appellant, the respondent certainly intended to cause harm to other persons. Her knowledge of that intention and the subsequent act of the respondent caused mental shock and other injuries to the appellant (*Dulieu* v. *White & Sons* (2)).

Stuckey (with him *Lang*), for the respondent. Where an action is based upon negligence it must be shown that the defendant has not observed a duty owed by him to the plaintiff. If an action is based upon a wilful wrong by the defendant to the plaintiff, the wilful wrong must be proved by an express statement of intention or the facts must be such that such an intention should be imputed as a matter of law. A person injured as the result of a wrongful act towards a third party can recover damages only when a wrongful intention can be imputed as a matter of law. This is the true meaning of *Wilkinson* v. *Downton* (3) and *Janvier* v. *Sweeney* (4). The wrongful intention must be directed to the plaintiff (*Johnson* v. *The Commonwealth* (5); *Lynch* v. *Knight* (6)). Here there is no evidence of any intention, express or implied, on the part of the respondent to injure the appellant, nor are there any facts from which such an intention should be imputed to the respondent (*Scott* v. *Shepherd* (7)). Even if the appellant experienced fear, it was fear not for her own safety but for the safety of the respondent's sons, who were not in any way related to her (*Lynch* v. *Knight* (8); *Wilkinson* v. *Downton* (9); *Hambrook* v. *Stokes Bros.* (10)). On the evidence there was no question to be left to the jury. The circumstances surrounding the firing of the revolver were such that

(1) (1888) 13 App. Cas. 222.
(2) (1901) 2 K.B., at pp. 682, 683.
(3) (1897) 2 Q.B. 57.
(4) (1919) 2 K.B. 316.
(5) (1927) 27 S.R. (N.S.W.) 133, at p. 137.
(6) (1861) 9 H.L.C. 577; 11 E.R. 854.
(7) (1773) 3 Wils. K.B. 403; 95 E.R. 1124.
(8) (1861) 9 H.L.C., at p. 600; 11 E.R., at p. 863.
(9) (1897) 2 Q.B. 57.
(10) (1925) 1 K.B. 141.

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no one would anticipate that a person hearing that shot would suffer a shock leading to illness (*Janvier* v. *Sweeney* (1)). A mere momentary fright does not give a cause of action. The test to be applied, the quality of the act and the duty imposed upon him is: What would any reasonable man anticipate as the consequences before he fired the shot? The respondent was not under any legal duty to the appellant to take care that she did not suffer harm (*Donoghue* v. *Stevenson* (2)), nor, if he were, is there any evidence of a breach of such a duty. Even if the appellant suffered harm by any act or words of the respondent, that fact simpliciter does not give her a cause of action against the respondent (*Grant* v. *Australian Knitting Mills Ltd.* (3); *Farr* v. *Butters Bros. & Co.* (4)). There is no evidence of a wrongful intention on the part of the respondent to the appellant or any other person, nor can such an intention be imputed (*Sorrell* v. *Smith* (5); *Salmond* on *Torts*, 8th ed. (1934), pp. 29, 30). There is no cause of action for damage suffered through some heedless act (*Lochgelly Iron and Coal Co.* v. *M'Mullan* (6); *Salmond* on *Torts*, 8th ed. (1934), p. 35). *Coultas' Case* (7) is still good law notwithstanding the opinion expressed in *Coyle or Brown* v. *John Watson Ltd.* (8), and its distinguishment in *Stevenson* v. *Basham* (9) was by a single judge only. Here there is direct evidence that the plaintiff's illness did not arise, if at all, until some days after the alleged shock. The cause of action set forth in the amendment said to have been made to the declaration is not supported by the evidence. A verdict cannot be entered for the plaintiff.

Dwyer, in reply. The cause of action is not based upon a particular duty but upon a breach of the ordinary duty to take reasonable care to avoid causing other persons to suffer harm (*Hambrook* v. *Stokes Bros.* (10)), especially as regards a young female employee. The decision in *Coultas' Case* (11) should not now be followed.

Cur. adv. vult.

(1) (1919) 2 K.B., at pp. 321, 322, 326.
(2) (1932) A.C. 563.
(3) (1936) A.C. 85, at p. 103; 54 C.L.R. 49, at pp. 63, 64.
(4) (1932) 2 K.B. 606, at p. 613.
(5) (1925) A.C. 700, at p. 738.
(6) (1934) A.C. 1, at p. 25.
(7) (1888) 13 App. Cas., at p. 225.
(8) (1915) A.C., at p. 13.
(9) (1922) N.Z.L.R. 225.
(10) (1925) 1 K.B., at p. 158.
(11) (1888) 13 App. Cas. 222.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal *in forma pauperis* from a judgment of the Full Court of the Supreme Court of New South Wales dismissing an appeal from a judgment of Mr. Justice *Maxwell* based upon a verdict entered by direction for the defendant respondent.

The plaintiff was employed at a general store kept by the defendant and had been working for him for about two or two and a half years. On 19th October 1934 the defendant had been drinking and was under the influence of liquor. It was the late shopping night, and, after having had tea, the plaintiff returned to the store and went in to the office where she saw the defendant and another employee, Miss McGuiness. There was a revolver lying on the table and the defendant extracted the cartridges from it in the presence of the plaintiff. There was a bottle on the table which was marked "Poison." The plaintiff walked out of the office and overheard the defendant say to Miss McGuiness that he was going to shoot someone. She gave evidence that she felt all nervous and all worked up about it. The defendant went out to an adjoining building and Miss McGuiness came into the shop and repeated to the plaintiff that the defendant had said that he was going to shoot someone. A report of a firearm was then heard. The plaintiff remained at work until the shop closed and took the takings to the defendant, who, according to her evidence, tore up the pound notes and said that he would not be there in the morning to mend them and to have them banked, and that "we would hear of a death before morning." A doctor came and gave the defendant some powders and then everybody went home. On the following day, Saturday, the plaintiff was still feeling shaky and nervous and became worse on Sunday and Monday when Dr. Donellan was called in. He attended her for six months. The doctor said that the facts which he observed as to her nervous condition were symptoms of neurasthenia and that her condition could have been brought about by a shock.

A police sergeant who was called by the plaintiff deposed to a conversation which he had with the defendant between 9 a.m. and 10 a.m. on some unspecified day in October or November 1934. He gave evidence that the defendant said to him that he had fired a shot in the office shortly before he rang up the police and that he

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had fired it at himself having some armour under his vest and that he did it " with the idea of putting the wind up the boys " (that is, his sons).

The evidence of the plaintiff was quite definite that the shot which she heard fired was fired at night and not in the morning, and that her sister and brother-in-law (who were not called as witnesses) were in the shop for some time after the shooting took place. Her evidence also was that the shot was fired in an adjoining building to which the defendant went when she saw him go out of the office.

The declaration of the plaintiff contained four counts. In the first count the plaintiff alleged that the plaintiff was lawfully in a room upon certain premises of the defendant and thereupon the defendant so recklessly, negligently and wrongfully conducted himself in and about the care, control and management, production and aiming of a revolver in the presence, sight and hearing of the plaintiff and in and about the speaking of the words " I am going to shoot someone " that the plaintiff then present was put in fear of immediate personal injury whereby she suffered shock and agony of mind and was thereby sick and unwell. There was no evidence that the plaintiff was put into immediate or any fear of personal injury.

In the second count the plaintiff alleged that the premises were dangerous and unfit by the wilful act of the defendant in producing and aiming a revolver in the presence and in the sight of the plaintiff whereby the plaintiff suffered fear of immediate personal injury and thereby became sick &c. This count is not supported by any evidence.

The third count alleged assault and battery. There was no evidence of personal violence either exercised in relation to the plaintiff or threatened against her, and thus there was no evidence of assault or of battery.

In the fourth count the plaintiff alleged a malicious production of a revolver in her presence, sight and hearing and the speaking of the words mentioned and the putting of the plaintiff into fear of immediate personal injury with the result mentioned in the other

counts. There was no evidence of fear of immediate or any personal injury to support this count.

The learned judge, however, gave general leave to amend the pleadings and dealt with the case upon the assumption that any necessary amendments had been made. He held that there was no evidence that the plaintiff apprehended any personal injury to herself. He then considered whether there was a legal duty not to terrify the plaintiff by wrongful action causing mental shock followed by physical consequences. The learned judge held that there was no such relationship between the plaintiff and the defendant as to create such a duty in her case and directed a verdict for the defendant. It was held by the Full Court that the judge acted rightly in directing such a verdict.

Although no formal amendment of the pleadings was made in pursuance of the leave to amend, the plaintiff produced the following amendment to the trial judge : " And the plaintiff sues the defendant for that the defendant maliciously wrongfully and wilfully produced in the presence sight and hearing of the plaintiff a loaded revolver and wilfully and wrongfully spoke the words following ' I am going to shoot someone ' and thereupon wilfully and wrongfully discharged the said revolver within the hearing of the plaintiff whereby the plaintiff sustained great shock and agony of mind and was for a long time sick and unwell and unable to attend to her business and suffered great pain of body and mind and was otherwise greatly damnified."

It is most desirable that the issues in a case should be clearly defined before any judgment is given in any action, but this court is not in a position to direct the plaintiff at this stage to make a formal amendment. On the arguments addressed to this court, however, it appears that the plaintiff in fact relies upon the cause or causes of action alleged in the draft amendment to which I have referred. No other cause of action has been suggested, and it is said that this draft amendment discloses three possible causes of action.

In the first place it is said that the evidence shows that the defendant deliberately uttered words, namely, " I am going to shoot someone " and discharged a revolver and that thereby the

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plaintiff sustained a shock which produced illness. This suggested cause of action is independent of any intention to injure the plaintiff and of any negligence and of any special relationship between the parties which could be the foundation of any legal duty. It would involve the principle that the mere fact that a man is injured by another's act gives him a cause of action. No such principle is known to the law. If authority is required for this negative proposition it may be found in *Grant* v. *Australian Knitting Mills Ltd.* (1); *Farr* v. *Butters Bros. & Co.* (2).

In the second place it is argued that the evidence shows that the defendant deliberately spoke the words mentioned and fired a revolver with the intention of frightening his sons : that in fact he frightened the plaintiff, and that his wrongful act in attempting to frighten his sons caused the personal injury of which the plaintiff complains. If a person deliberately does an act of a kind calculated to cause physical injury for which there is no lawful justification or excuse and in fact causes physical injury to that other person, he is liable in damages (*Wilkinson* v. *Downton* (3)). The wilful act in that case consisted in informing the plaintiff by way of " a practical joke " that her husband had been badly injured in an accident. The result was a violent shock to the nervous system of the plaintiff producing a severe illness. The act done by the defendant was likely to cause injury and it was found that there was an intention to alarm the plaintiff. The learned judge said : " It is difficult to imagine that such a statement, made suddenly and with apparent seriousness, could fail to produce grave effects under the circumstances upon any but an exceptionally indifferent person, and therefore an intention to produce such an effect must be imputed, and it is no answer in law to say that more harm was done than was anticipated, for that is commonly the case with all wrongs " (4). In *Janvier* v. *Sweeney* (5) also there was an intention to injure and it was obvious that the act done was likely to cause harm. In that case it was held that threats addressed to a person which were calculated to cause injury, which were uttered with the knowledge that they were likely to cause such injury, and which actually caused

(1) (1936) A.C., at p. 103.
(2) (1932) 2 K.B, at p. 613.
(3) (1897) 2 Q.B. 57.
(4) (1897) 2 Q.B., at p. 59.
(5) (1919) 2 K.B. 316.

such injury, were actionable. The result of the threats made to the woman plaintiff in that case was that she was extremely frightened so that she suffered very severe nervous shock and had a long period of serious illness. The fact that one link in the causation was mental in character was held not to affect the plaintiff's right of action. The threats found by the jury to have been uttered were directed against the woman plaintiff and also against the man to whom she was betrothed.

For the purposes of this appeal I accept the law as stated in the two cases cited without inquiring whether the principles which they lay down are too broadly stated. The question of deliberate intent to cause injury as in itself constituting the tortious element in an otherwise lawful act is a question which raises some difficult and interesting problems. See, for example, the discussion of *Hollywood Silver Fox Farm Ltd.* v. *Emmett* (1) by Sir *William Holdsworth* in a note in the *Law Quarterly Review*, vol. 53 (1937), p. 1, and the authorities there mentioned. This appeal can, however, be determined without examining that question.

In *Wilkinson* v. *Downton* (2) and in *Janvier* v. *Sweeney* (3) the person suffering the injury was the person to whom the words were uttered, and the words spoken were of such a character and were spoken in such circumstances that it was naturally to be expected that they might cause a very severe nervous shock with serious results to the health of the person to whom the words were said. In the present case the words were not uttered to the plaintiff and they were not even uttered in her presence. According to her own evidence she overheard them being uttered to someone else after she had left the room in which the defendant was at the time. There is no direct evidence that the defendant actually fired a revolver upon the night in question and no evidence that other persons in the shop were alarmed by the report which the plaintiff heard. If, however, it be assumed that the plaintiff did then fire off a revolver, the firing was not done in the plaintiff's presence but in an adjoining building, though the plaintiff heard the report. The only evidence that the defendant on any occasion intended by

(1) (1936) 2 K.B. 468. (2) (1897) 2 Q.B. 57.
(3) (1919) 2 K.B. 316.

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firing a revolver to frighten his sons is to be found in the evidence of the police officer, and according to that evidence the firing of the revolver which was intended to frighten the sons was done in the morning and was not a firing of the shot which the plaintiff heard.

It is put, however, that it was open to the jury to believe that the police officer had made a mistake in fixing the time of his visit to the defendant during the course of which the defendant said that he had fired the shot just before the arrival of the officer at an hour in the morning. It is said that the jury were entitled to believe that the shot intended to frighten the sons was the shot which the plaintiff heard. I can discover no evidence connecting the firing of the shot which the plaintiff heard with an intention to frighten anybody, but I proceed to examine the position upon the assumption that it was open to the jury to find that there was such a connection. On this view of the facts the evidence shows that the defendant, having an intention in his mind to frighten his sons, did an act which in fact frightened the plaintiff and caused injury to her. There is no evidence of any intention to cause injury to the plaintiff, but the absence of this particular intention is not material if the act was unlawful. If A, intending to hit B unlawfully, in fact hits C, there is no doubt as to A's liability to C. Upon the authorities cited the question arises whether it can be said that the acts of the defendant in this case were likely to cause injury to other persons than his sons. The words about shooting someone were addressed to Miss McGuiness and not to any other person, and there is no evidence which can make the defendant responsible for the fact that the plaintiff overheard what the defendant said, or for the fact that Miss McGuiness afterwards repeated those words to the plaintiff. None of the cases has gone so far as to suggest that a man owes a duty to persons who merely happen to overhear statements that are not addressed to them. There is the additional fact of the revolver shot, but there is no reason to suppose or anticipate that the firing of a revolver shot, even following upon a threat of shooting somebody, will cause serious illness to a person who hears it fired. The acts of the defendant, taken all together, cannot be said to be calculated or likely to cause harm to any person—even to his sons, if they were normal persons.

In the third place it is urged that the defendant is liable as for negligence. It is said that he owes a duty to the plaintiff to take care to avoid doing acts in relation to her which might damage her personal safety unless there was some lawful justification or excuse for doing those acts. In *Hambrook* v. *Stokes Bros.* (1) it was held by a majority in the Court of Appeal that, where the negligence of the defendant in the management of a motor lorry caused a mother to become so alarmed for the safety of her children that she suffered a nervous shock which brought about her death, the defendant was liable in an action under the *Fatal Accidents Act.* In this case the Court of Appeal rejected the statement of *Kennedy* J. in *Dulieu* v. *White & Sons* (2) that a nervous shock occasioned by negligence and producing physical injury gave rise to a cause of action only where the shock was caused by a reasonable fear of immediate personal injury to oneself. The Court of Appeal accepted the principle that a nervous shock caused by negligence and producing physical injury does give rise to a cause of action even though the injury did not arise from fear of personal injury to the person suffering the shock but from fear by that person of personal injury to her child. There is, however, no negligence apart from the existence of a duty to take care. In *Hambrook* v. *Stokes Bros.* (1) the duty to take care was clear. It was obvious negligence to leave an unattended motor lorry, with the engine running, on a public road, at the top of a steep hill, without taking proper precautions to prevent it from moving. In the present case it is difficult to define the duty upon the breach of which the plaintiff must rely in order to succeed in an action for negligence. It cannot be said that there is a simple absolute legal duty to avoid frightening people, or even to avoid causing injury to them by frightening them (See *Wilkinson* v. *Downton* (3) and *Janvier* v. *Sweeney* (4)). Where there is any duty to take care, the duty is to take reasonable care in all the circumstances of the case, and, in defining the extent of the duty, it is necessary to consider what results may reasonably be expected to follow from the act in question in a particular case. It has been held, in a much-discussed case, that, when the breach of duty is established,

(1) (1925) 1 K.B. 141.
(2) (1901) 2 K.B., at p. 675.
(3) (1897) 2 Q.B. 57.
(4) (1919) 2 K.B. 316.

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the defendant is liable for the results which in fact flowed from it even though they might not have been expected (*In re Polemis and Furness, Withy & Co. Ltd.* (1)). But the question whether a particular injury could reasonably have been expected is very relevant in the decision of the question whether an act is or is not negligent (*In re Polemis and Furness, Withy & Co. Ltd.* (1)).

In this case the application of this principle reduces itself to finding the answer to the question whether it can fairly be said that the defendant might reasonably have expected that after the plaintiff had seen him with the revolver she might overhear what she subsequently did overhear and, hearing the revolver shot soon afterwards, might get such a fright as to suffer personal injury. In the case of a person known to the defendant to be highly nervous it might be said that such a result could be expected. There is, however, no evidence that, if the plaintiff was peculiarly susceptible to nervous shock, the defendant was aware that that was the case. In the case of ordinary persons, if a man said to them that he was going to shoot somebody and they then heard a shot or even saw the speaker shoot himself or someone else, they would be disturbed or upset in varying degrees, but they would not suffer from illness producing a nervous breakdown. Such a consequence is not within the scope of reasonable anticipation. Accordingly I am of opinion that there was no evidence upon which any jury could properly hold that the defendant was guilty of negligence in this case.

I have considered the evidence in this case in relation to every cause of action suggested on behalf of the plaintiff, and, being of opinion that the evidence would not entitle the jury to find for the plaintiff upon any of these alleged causes of action, I think that the judgment of the Supreme Court was right and should be affirmed.

The appellant was permitted to appeal *in forma pauperis*. There should be no order as to costs.

RICH J. It may be unfortunate in the present case that the learned trial judge took the course of nonsuiting the appellant. For I can scarcely believe that the common sense of juries has fallen to such a degree that a verdict in favour of the plaintiff would have been returned. Upon the facts of the case it is not surprising that her pleader found it difficult to declare upon a known cause of

(1) (1921) 3 K.B. 560.

action. Her counsel at the trial, however, may be congratulated on his success in manœuvring into a position in which he was at liberty to disregard the pleadings and rely on any cause of action which ingenuity might then or thereafter discover in the evidence which he was able to lead. That evidence included medical testimony that the appellant presented objective symptoms in her reflexes and otherwise of a neurasthenic condition or nervous breakdown. Her condition was accounted for by the medical witness by the supposition that she received a nervous shock. It would be unkind, perhaps, to assume that both her claim and her condition were more readily attributable to the loss of her employment. But, whatever may have produced her nervous breakdown, I am unable to take the view that a reasonable person might antecedently expect that it would ensue from the emotions however creditable to the human heart which would be excited by the spectacle of an alcoholic storekeeper, pretending however realistically, that he was taking his own life. In fact there appears to have been but little realism. But perhaps a female clerk could not be expected to discover the incongruities of the respondent's behaviour, and to discredit the theatrical threats of a man who produced first poison and then a revolver and after the fullest advertisement of his suicidal purposes retreated with the revolver to the public thoroughfare. I do not desire to say anything which will affect somewhat uncertain principles upon which liability for inflicting damage through shock may depend. This case is not worthy of a serious discussion of such legal difficulties. But I agree in the view expressed by my brother *Dixon* that in any case this action must fail because the conduct of the respondent was not such that the illness of which the appellant complains is a consequence that might reasonably be expected to flow from the emotions or feelings thereby excited.

In my opinion the appeal should be dismissed.

DIXON J. As the appellant was not tied to the causes of action disclosed by her declaration and as she was nonsuited, she is in a position to have her appeal decided upon the question whether on the evidence it was open to the jury to find facts constituting any cause of action whatever against the defendant. Upon the evidence as it stands the jury might find, I think, that, under the influence

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Dixon J.

of drink, the defendant produced a bottle labelled " Poison " and a revolver, threatened to commit suicide, and afterwards fired a shot, all with the intention of promoting among those about him feelings of interest, surprise, pity and horror. With the same view, on his reappearance unharmed, he proceeded to tear up pound notes, saying that he would not be there in the morning. The plaintiff was one of those about the defendant at the time he exposed the poison and the revolver to view and when he threatened suicide. When he fired the shot he was outside, but the distance was not great and she could plainly hear the shot.

The jury would not be at liberty to find that he had a specific intention of frightening the plaintiff, but they might conclude that he intended to arouse the feelings I have described in all those who were at hand, including the plaintiff. On the medical evidence, the jury might find that the defendant's actions threw the plaintiff into a sufficiently emotional condition to lead to a neurasthenic breakdown amounting to an illness.

I have no doubt that such an illness without more is a form of harm or damage sufficient for the purpose of any action on the case in which damage is the gist of the action, that is, supposing that the other ingredients of the cause of action are present. But I do think that upon facts like those I have stated it is impossible to formulate any cause of action in which the reasonable likelihood of harm of some such nature resulting from the act done does not form an essential element. In stating the effect of the decisions of the courts in America upon this subject, Dean *Roscoe Pound* said:— " In another type of this case the nervous or mental shock which caused the physical injury was inflicted intentionally. Here the difficulties are less than in the first type and the better judicial view allows recovery. But there are courts that will not go so far and there are limits. If the defendant intended to bring about the physical harm which followed, there would seem no occasion of requiring more. If, however, the defendant did not intend the physical harm, but only a mild fright or mild nervous shock which would work no further harm in a person of ordinary nerves and normal sensibilities, the accepted rule seems to be that there should be no recovery " (*Harvard Law Review*, vol. 28, p. 361).

This view accords with the statement made by *Pollock* C.B. in *Allsop* v. *Allsop* (1): "The law deals with damage which might reasonably result, not with that which may depend on the idiosyncrasy of the party. Suppose the allegation was that the plaintiff, being a person liable to the gout, was thrown into a violent fit of anger, and was seized with a fit of the gout."

On the facts of the present case I am of opinion that this element is not established. It is, of course, quite clear that the defendant did not intend to bring upon the plaintiff a nervous breakdown or any physical harm. He may have intended to frighten those surrounding him, but, if so, it was only for the purpose of sensationalism. The shock he intended to give or the emotions he intended to arouse could not in a normal person be more than transient. The harm which is said in fact to have ensued is not a consequence which might reasonably have been anticipated or foreseen.

Upon this ground I am of opinion that the appeal should be dismissed.

EVATT J. The conclusion which I have reached is that the plaintiff adduced evidence which would have supported a finding by the jury (*a*) that, by threatening to kill himself, the defendant wilfully attempted to cause alarm to a number of persons in close proximity to him (including the plaintiff); and (*b*) in pursuance of such attempt, actually fired a revolver shot in the hearing of the plaintiff. There was also evidence (*c*) that, in the case of the plaintiff, the defendant did cause the plaintiff to be alarmed and terrified, and (*d*) that, as a direct result thereof, the plaintiff suffered injury to her health.

Where a person, whether for malicious motives or those of self-display, wilfully alarms or terrifies another by the unlawful act of threatening to commit suicide, and that condition of alarm or terror causes physical illness, an action lies; and it is no answer to such an action for the defendant to set up either (*a*) that he was threatening to kill or injure himself, and no other person, or (*b*) that the plaintiff did not apprehend physical danger to himself, or (*c*)

(1) (1860) 5 H. & N. 534, at p. 536; 157 E.R. 1292, at p. 1293.

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that many persons, or a majority of persons, or even that especially formidable person " the ordinary, normal human being " would not be alarmed or terrified, or have suffered illness as a result of the defendant's action.

I think that the propositions on which I base this judgment are established explicitly or impliedly in *Wilkinson* v. *Downton* (1), and *Janvier* v. *Sweeney* (2).

Although he did not dissent from the judgment of the Full Court, I think (except for the treatment of certain evidence which I need not elaborate) the opinion I have expressed approximates very closely to that of *Davidson* J. (3) in the Supreme Court.

For the above reasons I think the above appeal should be allowed and a new trial ordered.

McTIERNAN J. I agree that the appeal should be dismissed.

The evidence upon which the plaintiff relies to establish a ground of civil liability is fully set out in the judgment of the Chief Justice. I agree that the findings of fact at which a jury could reasonably arrive upon that evidence would not support any cause of action. In particular there is no evidence upon which the jury could in the circumstances find that the defendant wilfully did any act calculated to inflict damage on the plaintiff. The defendant is not liable in damages because, after the happening of the events proved, the plaintiff suffered the illness described in the evidence. Nor is it proved that the defendant did any act in breach of a legal duty which he owed to the plaintiff. The defendant's conduct, including the discharge of the firearm, was not such as he ought reasonably to have foreseen would cause a person in the situation of the plaintiff to have suffered damage and there is no evidence that he knew that the plaintiff was so delicately constituted that she would be injured by his peculiar conduct.

Appeal dismissed. No order as to costs.

Solicitors for the appellant, *Abram Landa & Co.*
Solicitors for the respondent, *Greenwell & York.*

J. B.

(1) (1897) 2 Q.B. 57.
(2) (1919) 2 K.B. 316.
(3) (1936) 36 S.R. (N.S.W.), at pp. 356-361.