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1 INTRODUCTION

The tort of negligence has developed only recently and has, by its very nature, the potential to touch on many areas of human activity which have previously been covered, if at all, by other parts of the law. In other words, the courts are still struggling to work out what negligence is all about and when a case goes to the House of Lords, we genuinely have no idea what their Lordships are going to say. A decision either way could easily be justified on principle and the key factor is often a policy consideration. The actual decision reached is simply the most convenient one for the state of the law and for the good of society. The problem is that it is vulnerable to argument and appeal.

The conventional analysis of the tort of negligence suggests that three elements must be satisfied as a condition of liability: there must be a duty of care owed by the defendant to the claimant, breach of that duty, and resulting damage. It will be seen that in claims for psychiatric injury the courts have been reluctant to apply the foreseeability principle of negligence alone. The courts have developed a set of rules that place specific restrictions on those who can recover for psychiatric injury and which limit the circumstances in which a duty of care will be imposed.

The superiority of physical injury in this field is apparent. In many respects, as will be seen, the history of liability for psychiatric illness has been characterised by ignorance, suspicion and fear (a view that could equally be applied to the history of mental illness itself). This in turn has produced the view that psychiatric damage is less important, less significant and indeed less *worthy* of compensation than physical injury, which after all can be objectively seen and measured. Although these attitudes have changed to a certain extent, they can still be found beneath the surface of the “policy factors” used to justify restricting recovery.

It is a topical and controversial area of law and that is also the reason why I chose to write about it. After a year spent at an English university, it became clear to me that I wanted to concentrate on the approach taken in English law. Nevertheless, it has been interesting comparing it to Norwegian law.

In the following, starting with a general introduction to the law of tort, and the tort of negligence, I will in turn look at how the question of liability for psychiatric injury has developed, then attempt an explanation of the law as it stands today with a short comparison to Norwegian law. Before concluding, I will consider some proposals for reform.

The thesis is concerned with the common law relating to liability for negligently inflicted psychiatric illness. I will, therefore, not consider statutory provisions or any other area of tort where there are, or are likely to be, special restrictions which would not be imposed in a physical injury claim.

2 NATURE AND FUNCTIONS OF THE LAW OF TORT

Tort law has two main objectives: compensation and deterrence. What is a tort? A tort is a civil wrong, i.e. it is committed against an individual (including legal entities) rather than the state. The general idea is that a person has certain interests which are protected by law.

“The law of torts is concerned with those situations where the conduct of one party causes or threatens harm to the interests of other parties.”¹ In a tortious claim, the argument is that the defendant did something wrong and thereby caused harm to the claimant. The defendant should be held responsible for the consequences of his wrongdoing and make an adjustment by providing compensation for the harm suffered by the claimant. This is different from the other parts of the law of obligations. With a contractual claim, compensation should be paid because the defendant promised not to cause the particular harm to the claimant. With a restitutionary claim, the claimant argues that the defendant has been unjustly enriched at his expense.

Various interests are protected by the law of torts. Historically, the most important were the protection of the person from deliberately inflicted physical harm and restriction on freedom of movement, and the protection of interests in tangible property. Because of its significance, further torts offering protection of personal and proprietary interests have emerged, such as nuisance and the rule in *Rylands v Fletcher*.² Other examples include protection of interests in intellectual (intangible) property, often overlapping with another area, namely interests in economic relations. Where a person’s reputation is damaged by untrue speech or writing, then they may have an action in the tort of defamation. Some of these tort causes of action are regulated by statute; others are based on the common law.

The protection only of *intentional* invasion of personal and proprietary interests would be clearly inadequate and the courts have developed the tort of negligence rapidly since the landmark judgement of *Donoghue v Stevenson* [1932] AC 562. The duty to be careful not to

¹ Brazier (1993) at 3

² (1868) LR 3 HL 330

harm your fellow citizens is an important aspect of the law. If not restricted, the tort of negligence could absorb most of the common law. As a result, the story of the development of negligence is the desperate struggle that the courts have had to keep it under control. Of course you should be liable to compensate a fellow citizen who has been hurt by your carelessness. On the other hand, if that principle were to be carried out to its logical extreme, there is no telling what the consequences will be. And then again, maybe the fear is groundless.

3 NEGLIGENCE

Negligence as a tort is a breach of a legal duty to take care which results in damage to the claimant. Thus, to succeed in a negligence action the claimant must prove three things: (1) a legal duty on the part of the defendant towards the claimant to exercise care in such conduct of the defendant as falls within the scope of the duty; (2) breach of that duty, i.e. a failure to come up to the standard required by law; and (3) consequential damage to the claimant which can be attributed to the defendant's conduct and is not too remote. This structure is the way in which most of the cases are approached by the English courts. Nevertheless, because the concept of foreseeability plays a part in all three elements they overlap and their separation is artificial in some cases.

The defendant may raise certain defences to the action. The most important defences are that the claimant consented to run the risk of the injury (*volenti non fit injuria*) or that the claimant was contributorily negligent.

3.1 A duty of care

An action in negligence must fail where a duty is not established. The first attempt to formulate a general principle was made by Brett MR in *Heaven v Pender* (1883) 11 QBD 503 but by far the most important generalisation is that of Lord Atkin, in his famous dictum in *Donoghue v Stevenson* at 580 called the "neighbour principle":

"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

The facts of the case were as follows: a manufacturer of ginger beer sold to a retailer ginger beer in an opaque bottle. The retailer resold it to a woman who then gave it to her friend. It was alleged that the bottle also contained the decomposed remains of a snail which had found its way into the bottle at the factory. The woman who had drunk from the bottle alleged that she became seriously ill in consequence and sued the manufacturer for negligence. Because she was given the bottle by a friend she could not bring a claim founded upon breach of a warranty in a contract of sale. This was prevented by the doctrine of privity of contract. A majority of the House of Lords held that the manufacturer owed her a duty to take care that the bottle did not contain noxious matters and that he would be liable in tort if that duty was broken.

Lord Macmillian had said in *Donoghue v Stevenson*, “the categories of negligence are never closed”.³ In accordance with changing social needs and standards the law developed and new duty-situations were readily recognised by the courts. In these subsequent cases the defendant failed his “neighbour”. He could have foreseen, and should have taken steps to prevent, the injury suffered by the claimant. For a period of time the categories of negligence looked infinitely expandable. The boundaries extended until it became clear that foreseeability of harm alone is not enough to create a duty of care. There was a need for introducing some element of predictability into the development of duty-situations. The leading case is now *Caparo Industries plc v Dickman* [1990] 1 All ER 568, HL. As Lord Bridge put it: “In addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of “proximity” or “neighbourhood” and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other.” The three criteria, (1) reasonable foreseeability of damage; (2) proximity between the person owing the duty and to whom it is owed and; (3) that it is fair, just and reasonable to impose a duty of care, are considered all at once and must be satisfied before a court should be willing to impose a duty of care.

A claimant should not fail his claim simply because the duty-situation he is relying on has never previously been recognised. However, he will have to persuade the court that extension

³ At 619

of liability to this new situation accords with analyses of policy and justice in analogous cases. It becomes more difficult to create new categories or categories significantly different or wider in scope than its predecessors. It may be that where a duty-situation is not entirely novel, but analogous to a category or case where earlier authorities have refused to recognise a duty, there can be no expansion. The courts are reluctant to impose a duty where none existed before, as they see this as the constitutional role of Parliament. So even though the categories of negligence have not been closed, their growth has been restricted. Principles in tort need to be reasonably predictable. Tort defines those obligations imposed on us. Justice demands that we have some means of knowing what those obligations are.

3.2 Breach of duty

A defendant will not be liable to pay damages to a claimant just because he owes him a duty of care. This statement remains true even if the claimant has actually suffered a serious loss as a direct result of the defendant's actions. It must be proved that the defendant was in breach of his duty. There is no requirement to guarantee safety. Right at the heart of the tort of negligence is the concept of fault. There is also a long-standing policy only to allow negligence to operate in certain well-defined situations where the right kind of damage has been caused. A defendant will indeed be liable to compensate the right kind of damage but only if he was at fault, i.e. that his conduct has fallen below the standard required in all the circumstances. It is up to the claimant to prove, on the balance of probabilities, that the defendant was negligent. This is likely to be the hardest task that a claimant faces in a negligent action.

A defendant will have been at fault if he did not act in a way that a "reasonable man" might well have done. The standard is objective but does not always reflect average behaviour. In reality no individual is perfect and even the most careful person will probably on a few occasions fail to foresee a risk when he has no excuse for doing so. Therefore, the legal standard is not that of the defendant himself but that of a "hypothetical" man.⁴ The judge has to decide what "reasonable" means, and it is inevitable that different judges may take alternative views on the same question with respect to such an elastic term. Furthermore, as the standard of reasonable care is a flexible concept the court is enabled to impose standards

⁴ *King v Phillips* [1953] 1 All ER 617, CA per Lord Denning

ranging from very low to very high. In *Nettleship v Weston* [1971] 3 All ER 581 the Court of Appeal held that the learner driver must exercise the skill and of a reasonably competent, experienced driver, certainly a very high standard. Such high standards may be justified for high-risk activity and there is little doubt that the court will be influenced by the presence of compulsory insurance when fixing the level of care. Unlike a number of European systems, the English law does not recognise different “degrees” of negligence; the defendant has come up to a single required standard or he has not.

What is reasonable conduct varies with the circumstances, and liability depends on what the reasonable man would have foreseen. This may in turn depend upon what particular knowledge and experience, if any, he is qualified with.⁵ Whilst the defendant is not negligent if the consequences of his conduct were unforeseeable, it does not necessarily follow that he will be liable for all foreseeable consequences. Care must be taken in respect of a risk that is reasonably foreseeable, so that in practice the court will find him negligent if he exposes the claimant to an unreasonable risk of harm. In the balance a number of factors must be weighed for the court to make a judgment as to what a reasonable man would have done in the circumstances. Case law has shown that factors which are taken into account include the magnitude of the risk, the court will take into account not only the risk of any damage to the claimant but also the extent of the damage that is risked;⁶ the seriousness and foreseeability of the harm; the burden of taking precautions;⁷ utility of the act of the defendant and; the common practice (but not obvious folly).

There are certain types of defendant to whom additional special rules apply in determining the standard of care required of them. These are defendants acting in an emergency, engaged in sport, claiming to have special or professional skills and children. For example a doctor who conforms to practices accepted as proper by some responsible members of his profession is not liable merely because other members would take a different view.⁸ To constitute evidence of proper, non-negligent, practice expert opinion must be shown to be reasonable and responsible: “...the court has to be satisfied that the exponents of the body of opinion relied

⁵ *Roe v Minister of Health* [1954]2 QB 66

⁶ *Paris v Stepney Borough Council* [1951] AC 367, HL; the greater risk to the claimant meant that greater precautions than normal had to be taken.

⁷ *Latimer v AEC Ltd* [1953] 2 All ER 449; it is not necessary to take precautions that is out of proportion with the risk involved.

⁸ *Bolam v Friern Barnet Hospital* [1957] 1 WLR 582

on can demonstrate that such opinion has a logical basis.”⁹ For children the standard of care is that which can reasonably be expected of an ordinary child of the defendant’s age.

3.3 Causation and remoteness of damage

The third element in the claimant’s case in negligence is damage. The claimant must prove that their damage was caused by the defendant’s breach of duty, sometimes called causation in fact, and that the damage was not too remote, called causation in law. To put the matter another way, there must be a sufficiently close causal link between the breach of duty and the damage suffered for it to be fair enough to make the defendant compensate the claimant’s injury. You cannot be liable for simply being at fault; only if harm flows from it. Unlike crime, tort does not punish wrongful acts per se.

3.3.1 Factual causation

It must first be established that the breach was a cause of the damage, not necessarily the sole or principal cause, although it must materially have contributed to the damage. Where there is some evidence that the defendant’s conduct may have contributed to the claimant’s injury the burden remains with the claimant to establish on the balance of probabilities that it did so. The starting point for assessing the factual cause is the “but for” test. This basic test is whether the damage would not have occurred but for the breach of duty. Its function is not to allocate legal responsibility but merely to eliminate those factors which could not have had any causal effect.

There are, however, areas where the “but for” test will not solve the problem. These are in relation to the degree of probability of damage occurring, negligent omission, multiple causes of harm (which may be either successive or concurrent) and economic loss.

Where the claimant has proved a breach of duty by the defendant and can further prove that that breach of duty materially increased the risk of the injury suffered by the claimant the defendant will be liable. Accordingly, in *McGhee v National Coal Board* [1973] 1 WLR 295, HL, it was found that failure to provide adequate washing facilities substantially increased the

⁹ *Bolitho v City and Hackney HA* [1997] 3 WLR 1151, HL per Lord Browne-Wilkinson

danger to the claimant of his developing dermatitis. He recovered damages from his employers, even though medical knowledge at the time was unable to establish that his suffering resulted from the absence of washing alone.

In *McGhee* there was only one cause whereas in *Wilsher v Essex AHA* [1988] 1 All ER 871, HL there were a number of possible causes. Their Lordships could not accept the argument that the principle of *McGhee* that the breach of duty had materially contributed to the injury, could extend to the facts of *Wilsher*. It was not sufficient to prove that the breach was most likely *a* cause; it had to be most likely *the* cause. The claimants had not established that it was more probable than not that the defendants' breach of duty rather than any of the other possible causes caused the plaintiff to succumb to the injury.

3.3.2 Remote damage

The question of remoteness of damage arises where causation in fact is established, but the court holds that as a matter of law the damage is too remote. Defendants are not liable for all the consequences which "but for" their conduct would not have occurred. In order to contain the defendant's liability within reasonable bounds a cut-off point must be imposed beyond which the damage is said to be too remote or, in other words, is regarded as not having been caused in law by the defendant's breach of duty. This area of law is affected by policy considerations, as the court will not wish to impose too heavy a burden on the defendant or their insurers.

Remote damage is damage which was not reasonably foreseeable, and we have already noted that no duty of care is owed in respect of damage which was not reasonably foreseeable. Consequently, there is no liability for it in negligence. A number of principles have emerged on remoteness of damage. If the kind of damage suffered is reasonably foreseeable,¹⁰ it does not matter that the damage came about in an unforeseeable way,¹¹ or that it is more extensive than could have been foreseen. The extent of damage principle is also illustrated by the "egg-

¹⁰ *Overseas Tankship Ltd v Morts Docks & Engineering Co Ltd, The Wagon Mound (No. 1)* [1961] 1 All ER 404, PC

¹¹ *Hughes v Lord Advocate* [1963] 1 All ER 705, HL. This case can be contrasted with subsequent cases but on the balance of authority *Hughes* is to be preferred.

shell skull rule”. This states that the defendant must take the claimant as they find them, as regards their physical or psychological characteristics.¹²

In practice, a defendant will often claim that particular damage is “too remote” as a last resort. This can make it seem like a defence, which decidedly it is not. For these and other reasons, “remote damage” is one of the most elusive the concepts in the law of tort.

3.3.3 Intervening causes

An event which occurs after the breach of duty, and which contributes to the claimant’s damage, may break the chain of causation, so as to render the defendant not liable for any damage beyond this point. Where this occurs the event is known as a *novus actus interveniens* – a new intervening act. It is usually dealt with as part of the issue of remoteness because even though the damage would not have occurred “but for” the defendant’s breach, some other factual cause, intervening after the breach, may be regarded as the sole cause of some, or all, of the claimant’s damage.

There are three classes of *novus actus interveniens* to be considered, namely; where a natural event occurs independently of the breach, where the event is an act or omission of a third party or where the event consists of the act or omission of the claimant himself.

The law in this area is far from clear. The key policy factor is the court’s determination of where the loss should lie.

3.4 Defences

The best way to resist any legal action is to establish that there is a necessary element missing from the basic cause of action. If a defendant can persuade a court that no duty of care was owed to the claimant, there is simply no liability in negligence. However, if the plaintiff can establish that there was indeed a breach of a duty of care which was indeed the cause of his injury, the basic liability in negligence has been established. At this point, the defendant’s

¹² *Smith v Leech Brain & Co Ltd* [1961] 3 All ER 1159

only hope is to argue that one or more defences apply. Some defences operate to remove the defendant's liability; some merely limit the amount of damages to be paid.

There are three defences to a negligence action:

3.4.1 Contributory negligence

This defence will apply where the damage which the claimant has suffered was caused partly by their own fault and partly by the fault of the defendant. The claimant's fault has contributed to their damage and the damages awarded are reduced in proportion to their fault.

At common law, contributory negligence operated as a complete defence. In 1945 a general power to apportion damages was given to the courts by the Law Reform (Contributory Negligence) Act 1945. Section 1(1) provides:

“Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such an extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.”

The claimant is expected to show an objective standard of reasonable care and the court will take into account factors similar to those which would render the defendant negligent. He is therefore guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable man, he might hurt himself.¹³ Although the test is basically an objective one, subjective factors are introduced when looking at child defendants and persons under a disability.

3.4.2 Volenti non fit injuria

The defence of *volenti non fit injuria*, sometimes called voluntary assumption of risk, reflects the common sense notion that “[o]ne who has invited or assented to an act being done against

¹³ *Jones v Livox Quarries* [1952] 2 QB 608, CA per Lord Denning

him cannot, when he suffers from it, complain of it as a wrong”.¹⁴ The claimant voluntarily agrees to undertake the legal risk of harm at his own expense.

There are certain requirements before the defence will apply. In order for *volenti* to operate, the claimant must have knowledge of the existence of the risk and its nature and extent. The test is subjective. Moreover, it must be shown that the claimant acted voluntarily in the sense that they had a genuine freedom of choice. The issue of voluntariness also arises in the rescue cases. A rescuer, who acts to save a person in danger and is injured, cannot be said to exercise the free choice which is necessary for *volenti*. An assumption of risk may be either express or implied. It is now rare for the defence to be successful in a negligence action in the absence of an express prior agreement. In limited circumstances the courts may be prepared to imply the agreement to run the risk.¹⁵ The reluctance of the courts to imply an agreement can be seen in the cases where the claimant has accepted a lift with the defendant who is incapable of driving.¹⁶ The defence of contributory negligence¹⁶ is more practical. If *volenti* does apply, however, it is a complete defence to an action and the claimant will recover no damages at all.

3.4.3 Ex turpi causa

A person who is involved in a criminal act at the time he is injured may be denied an action by the maxim “ex turpi causa non oritur actio” which means that an action cannot be founded on a bad cause. This principle is based purely upon public policy and may also apply where the claimant’s conduct is immoral.¹⁷ The definition of public policy criteria is unclear. In practice the defence can only be understood by reference to the facts of decided cases. It has been suggested that perhaps the key question is whether the award of compensation to the claimant would undermine the purposes of the law of torts.¹⁸

¹⁴ *Smith v Charles Baker & Sons* [1891] AC 325, HL at 360 per Lord Herschell

¹⁵ e.g. *ICI v Shatwell* [1964] 2 All ER 999, HL

¹⁶ e.g. *Nettlehip v Weston*

¹⁷ *Kirkham v Chief Constable of the Greater Manchester Police* [1990] 3 All ER 246, CA

¹⁸ Brazier (1993) at 106

4 DUTY OF CARE: THE SPECIFIC PROBLEM OF LIABILITY FOR PSYCHIATRIC INJURY

4.1 Introduction

In *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 at 536 Lord Pearce said that: “How wide the sphere of the duty of care in negligence is to be laid depends ultimately on the courts’ assessment of the demands of society for protection from the carelessness of others.”

Legal responsibility for psychiatric damage is an aspect of negligence liability. There are some specific situations in which the courts have to apply the general duty of care principles already discussed that need to be considered in more detail. Duty of care problems generally arise either because of the nature of the parties involved (as in cases against public bodies) or because a form of loss has been suffered which differs from the standard case of negligently inflicted personal injury (such as cases of psychiatric harm and those where the complaint is the conception of an unwanted child). In the following, my aim is to illustrate the unique difficulties in relation to liability for psychiatric harm.

Traditionally, the expression “nervous shock” was used to describe this condition, a label which adds to the confusion surrounding this area of the law by being completely misleading. However, the Court of Appeal in *Attia v British Gas* [1987] 3 All ER 455 at 462 has indicated that the expression “psychiatric injury” is preferable.

4.2 Policy considerations

Psychiatric injury is dealt with separately from ordinary physical damage for a number of reasons. Physical damage caused by negligence will be limited to those within the range of the harmful event, but psychiatric harm may affect a wide range of persons beyond the direct victim of the negligent conduct. Therefore, the courts have adopted a cautious and restrictive approach to the imposition of liability. The implications of the special conditions to be

satisfied in cases of psychiatric injury are further considered below, but firstly, it is necessary to look at the reasons behind the imposition of special conditions of any kind.

A major criticism of the present state of the law is that in an attempt to place limits on recovery for negligently inflicted psychiatric illness the courts' have established criteria which are arbitrary in their application and, in some respects, do not correspond with medical understanding of how such damage can occur.¹⁹ The devastating impact that psychiatric illness can have on people's lives is beyond dispute. It would be absurd to insist that such harm is somehow fundamentally less serious than physical injury. In the words of Lord Lloyd of Berwick in *Page v Smith* [1995] 2 All ER 736: "There is no justification for regarding physical and psychiatric injury as different "kinds" of damage". And yet, people with a psychiatric injury will have to work harder to persuade a court to award them damages than someone else who has simply broken their arm. It has also been suggested that the prospect of damages may be an unconscious disincentive to rehabilitation.

Initially there was judicial scepticism about the existence of "nervous shock" as a medical condition and a fear of fraudulent and exaggerated claims. Advances in psychiatry in the twentieth century means this is no longer a major problem and are rarely referred to by the courts. The policy objection that there may be differences of medical opinion should be rejected on the ground that the courts are no less capable of weighing competing psychiatric opinions than competing expert opinions in many other areas, and moreover there is evidence that psychiatrists are as consistent in their diagnoses as other physicians. As for the assessing of damages, it should not be more difficult to see to than in other personal injuries claims. There was also the fear that if such actions were allowed to succeed the "floodgates" would open to allow a rush of claims; furthermore, the assumption that psychiatric illness is less serious than physical injury and, finally, the fact that the claimant is commonly a *secondary victim*, i.e. the claimant suffers psychiatric harm as a result of what happens, or what they fear has happened, to a third party.

In the case of *White v Chief Constable of South Yorkshire Police* [1999] 1 All ER 1, Lord Steyn presents some of the difficulties with claims for psychiatric harm and the policies at work in this area. He notes that the courts have regarded the policy reasons against admitting

¹⁹ See for example Lords Bridge and Scarman in *McLoughlin v O'Brian* [1982] 2 All ER 298; [1983] 1 AC 410

such claims as compelling and that public perception undoubtedly has played a substantial role in the development in this branch of the law. He goes on to say that: “nowadays we must accept the medical reality that psychiatric harm may be more serious than physical harm”.²⁰ The Law Commission²¹ also clearly accepts that psychiatric illness is as deserving of the law's protection as physical injury.

The most common reason advanced is the floodgates argument, which is based on the fear of an unacceptably large number of claims arising from one incident of negligence. There are a number of responses to this argument. First, if the claims are genuine then it indicates that there are considerable numbers of victims of negligence who currently go uncompensated. Secondly, given that there is simply no concrete evidence as to how many claims there would be, or how expensive it would be to meet them, the floodgates argument is simply unconfirmed. Presumably, it is motorists, employers, consumers and tax-payers who will bear the cost through insurance premiums or the cost of self-insurance. Thirdly, the floodgates argument sometimes concentrates on disaster cases such as Hillsborough, where there are a large number of potential victims from one incident. The vast majority of claims, however, are likely to arise from much smaller incidents where the risk of imposing crushing liability on a defendant is much less obvious. Moreover, the number of potential claims is not likely an issue when considering physical injury, which leads us back to the historical scepticism towards psychiatric illnesses. Finally, it is a strange principle that declares that the greater the extent of the damage caused by the defendant the greater the need to protect the defendant from legal responsibility. One of the standard criticisms of negligence is that the defendant's liability will be “disproportionate”. Once liability is established, the principle of compensating the claimant's actual loss takes over; the fact that the defendant was only “a little bit” negligent is neither here nor there.

The “floodgates” argument has been criticised by a number of judges²² and the fact that the claimant is commonly a secondary victim is, the Law Commission state, really the floodgates argument in disguise. It is, nevertheless, the argument which in the end persuaded the Commission to the view that the proximity tests should remain for psychiatric injury, and that foreseeability alone is not enough.

²⁰ at 32 h

²¹ Law Com 249 (1998)

²² See for example *McLoughlin v O'Brian*, Lord Edmund-Davies (at 425) and Lord Bridge (at 442)

4.3 Historical development

The development of the law on recovery of compensation for psychiatric injury has been a gradual increase in the willingness of the courts to overcome the aforementioned historical suspicion of psychiatry and to recognise and take seriously the merits of such claims.

In the 19th Century, the courts were fairly dismissive of psychiatric injury. The initial response was to deny all claims for psychiatric injury which were not the product of direct physical injury to the claimant (*Victorian Railway Commissioners v Coultas* (1888) 12 App Cas 222, PC), but in *Dulieu v White & Sons* [1901] 2 KB 669, DC, the claimant was permitted to recover for psychiatric illness having been put in fear for her own physical safety when the defendant crashed through a wall into the bar where she was serving. The recovery of damages was limited to “shock which arises from a reasonable fear of immediate personal injury to oneself”. A bystander who witnesses a particularly horrific event without fear of personal harm is not owed a duty of care (See *McFarlane v EE Caledonia Ltd* [1994] 1 All ER 1).

Having once opened the door to such claims the question then became how wide the ambit of liability should be drawn. In *Hambrook v Stokes Bros* [1925] 1 KB 141 the Court of Appeal extended liability to circumstances where shock is the product of what the claimant had perceived with her own unaided senses, rather than what she was subsequently told about the event. The limitation in *Dulieu v White* was rejected on the ground that to allow this would deny a remedy to a mother who feared for the safety of her children in circumstances where a claimant who thought only of her own safety would recover. The effect of this decision was to limit claims to claimants who were in close physical proximity to the accident although it was not essential that they had seen the accident itself (*Boardman v Sanderson* [1964] 1 WLR 1317, CA). The “sight and sound” requirement was later extended in *McLoughlin v O’Brian* to include the “aftermath” of the accident.

The nature of the relationship between the accident victim and the person who suffered the psychiatric illness was also important. It became apparent that those with close family ties, such as parents or spouse of a victim, would more readily be accepted as a person likely to be

affected, and accordingly within the range of a duty of care owed by the defendant. A bystander who was a total stranger to the accident victim would be treated as an unforeseeable claimant (*Bourhill v Young* [1943] AC 92²³). The relationship between a rescuer and his victims, however, gave rise to a duty to the rescuer on the grounds that rescue invites danger (*Chadwick v British Railways Board* [1967] 2 All ER 945). The principle is clear: it must be established that the defendant owed a duty to a foreseeable claimant, even if its application in particular cases can be called into question. See for example *King v Phillips*, where the defendant was a taxi driver who negligently ran over a boy's tricycle. It was held that he could not reasonably have contemplated psychiatric injury to the mother 70 yards away. It has been suggested that had the case been litigated today, a court would not have difficulty in viewing the mother's presence as foreseeable²⁴. In *King v Phillips*, Denning LJ said that the test of liability for psychiatric injury was foreseeability of injury by psychiatric injury.

When applying this test of foreseeability, it has to be shown that the claimant is a person of reasonable fortitude and not particularly vulnerable to some form of psychiatric reaction. But the "egg-shell skull principle" applies to cases of psychiatric injury as it does to any other type of injury i.e. that once *some* psychiatric harm is foreseeable to a person of reasonable fortitude, then the particularly vulnerable claimant can recover (*Jaensch v Coffey* (1984) 54 ALR 417). Moreover, he is entitled to damages for the full extent of his injuries; even if they are more severe than an ordinary individual would have experienced (*Brice v Brown* [1984] 1 All ER 997).

²³ Known as the pregnant "fishwife" case.

²⁴ *Alcock v CC of South Yorkshire Police* [1991] 4 All ER 907, per Lord Oliver

5 PRESENT LAW

In recent years, the popular interest in this area of the law has grown due to the widespread media coverage that has been given to high-profile cases. The current state of the law owes much to litigation arising out of the Hillsborough disaster in Sheffield on 15 April 1989 when the police allowed a crowd of supporters into an area of the already overcrowded football ground. The match was stopped after six minutes as the weight of numbers of people had created such pressure that spectators were being trapped against the high fences separating the pens from the pitch. Ninety-five spectators were crushed to death and hundreds more were injured. Those on the other side of the football field could actually see this happening, and thousands more were at home watching an edited version on television. Claims for psychiatric illness were brought by relatives of those killed or injured in the disaster²⁵ and by police officers who attended at the scene.²⁶ In deciding that no duty of care was owed to any of these claimants, the House of Lords developed and applied a set of rules that are hard to justify in terms of logic and morality. The area has been subject of the abovementioned report by the Law Commission, whose recommendations are considered below.

In this part the present law on liability for negligently inflicted psychiatric injury is discussed. First, we look at the requirement for a recognised psychiatric illness. We then consider which claimants may recover, and look particularly at the distinction which case law has drawn between so-called primary and secondary victims.

5.1 A recognised psychiatric illness

²⁵ *Alcock v CC of South Yorkshire Police* [1991] 4 All ER 907, HL

²⁶ *Frost v Chief Constable of South Yorkshire Police* [1997] 1 All ER 550, appealed to the House of Lords under the name of *White v Chief Constable of South Yorkshire Police* [1999] 1 All ER 1

In the words of Lord Bridge: “[T]he first hurdle which a plaintiff claiming damages of the kind in question must surmount is to establish that he is suffering, not merely grief, distress or any other normal emotion, but a positive psychiatric illness.”²⁷

In order to succeed, a claimant must prove that they have suffered from a genuine illness or injury, not merely grief, distress, anxiety, or shock in the ordinary sense of that word. Damages have been awarded in the past for clinical depression,²⁸ personality changes,²⁹ pathological grief disorder,³⁰ chronic fatigue syndrome (ME)³¹ and post-traumatic stress disorder (PTSD),³² an illness in which a shocking event causes symptoms including difficulty sleeping, tension, horrifying flashbacks and severe depression. The courts are prepared to allow any “recognisable psychiatric illness”.³³ Expert medical evidence will generally be required and, consequently, this is a matter that is primarily medical rather than legal. Where the shock has caused physical harm (e.g. a heart attack or miscarriage), there is no need to show a recognised psychiatric illness.

5.2 Types of claimant

Once the claimant has established that he is suffering from an actionable psychiatric condition, he must then establish that he is owed a duty of care by the defendant. This depends on their relationship to the event. The number of categories of claimant has varied at different stages of the law’s development, but since the most recent House of Lords case, *White v Chief Constable of South Yorkshire Police* [1999] 1 All ER 1, there are now three. First, there are those who are physically as well as psychiatrically injured as a result of the event caused by the defendant. Secondly, there are those who were put in danger of physical harm, but actually suffer only psychiatric injury; these are called primary victims. Finally, the type of claimant who are not put in danger of physical injury to themselves, but suffer psychiatric harm as a result of witnessing such injury to others, are labelled secondary victims.

²⁷ *McLoughlin v O’Brian* at 431

²⁸ *Hinz v Berry* [1970] 2 QB 40

²⁹ *Brice v Brown*

³⁰ *Vernon v Bosley (No1)* [1997] 1 All ER 577

³¹ *Page v Smith*

³² *White v Chief Constable of South Yorkshire Police*

³³ *Hinz v Berry* at 42, per Lord Denning MR.

Claimants who are physically injured due to the negligence of another can recover damages not just for the physical injuries but also for any psychiatric injury. The ordinary rules of negligence apply to such cases.

5.2.1 Primary and secondary victims

There are different sets of rules for different categories of claimant. In cases of psychiatric injury it is therefore necessary to distinguish between primary and secondary victims.

5.2.1.1 Distinction

A “primary” victim is either one who suffers both physical and psychiatric injury, or one who is in danger of physical harm but suffers only psychiatric. If personal injury of some kind is foreseeable, it is not necessary to show that injury by shock was foreseeable. A “secondary” victim is not in danger of physical harm to themselves but suffer psychiatric harm as a result of witnessing such injury to others. There are very restrictive requirements for a defendant to owe a secondary victim a duty of care.

The distinction has been much criticised,³⁴ both as being artificial³⁵ and as bringing more litigation, not less. In its recent report on psychiatric illness, the Law Commission described it as “more of a hindrance than a help”.³⁶ A primary/secondary division was first proposed by Lord Oliver in *Alcock*. In *Page v Smith*, Lord Lloyd said that it was essential to draw the distinction since the fear of psychiatric injury suits justifies the control mechanisms imposed on secondary victim claims. Instead, it is increasing the prospects of litigation and number of appeals as victims make every effort to be regarded as “primary” in order to benefit from the more advantageous rules. In addition, approval of the derogatory label “secondary” victims “too readily confers an inferior legal status on such claimants which, in turn, makes it easier to see them as less deserving.”³⁷ An area of the law which was in desperate need of an end to complicated rules and problematic distinctions was made even more obscure.

³⁴ See e.g. Mullany, (1999) 115 LQR 30

³⁵ Teff, (1998) 57 CLJ 91 at 113

³⁶ para. 5.51

³⁷ *Ibid.*, at 111

5.2.1.2 Primary victims

A primary victim is a person directly involved in the accident within area of risk of physical injury. A claimant must, in order to succeed, prove injury and foreseeable harm (physical or psychiatric). The issue of foreseeability is considered prospectively, i.e. the only thing that has to be reasonably foreseeable in primary victim cases is physical damage. There are no policy control mechanisms to limit the number of claimants.

The position of “primary” victims is governed by the decision in *Page v Smith* [1995] 2 All ER 736, [1996] AC 155. The claimant suffered from myalgic encephalomyelitis (ME), also known as chronic fatigue syndrome. In the eyes of the law, this is regarded as a psychiatric injury. The claimant was physically uninjured in a collision between his car and a car driven by the defendant but his condition became chronic and permanent as a result of the accident. The House of Lords held that he could recover³⁸ even though this injury was not reasonably foreseeable, because some physical injury had been foreseeable. The case confirmed what had been established in the early case of *Dulieu*; that such a claimant may recover for psychiatric harm, even though the threatened physical harm does not materialise. The idea is that if a person negligently exposes another to a risk of injury they will be liable for any psychological damage that this may cause. It would be purely fortuitous to deprive the claimant of compensation should he, by good luck, escape reasonably foreseeable physical harm. There is no “separate duty of care not to cause foreseeable psychiatric injury”.³⁹ The “ordinary fortitude”⁴⁰ rule does not apply. Provided some physical damage is foreseeable, the full extent of the claimant’s damage (subject to causation) is recoverable.⁴¹ *Page v Smith* has been the subject of some sharp criticism, especially in the dissenting judgment of Lord Goff of Chieveley in *White*.⁴² Nevertheless, it remains good law until the House of Lords chooses to reconsider it.⁴³

³⁸ Note that the damages were reduced by about 60% of the loss to reflect the fact that the claimant was vulnerable to the recurrence of the condition from other causes.

³⁹ *Page v Smith* at 187

⁴⁰ *Bourhill v Young*

⁴¹ I.e. the “egg-shell skull” rule. Lord Goff (dissenting) in *White* (at 11), however, observed that this rule was “a principle of compensation, not of liability”. It was similarly criticised by the dissenting judges in *Page v Smith*.

⁴² At 14-18

⁴³ Lord Steyn said in *White* (at 39) “thus far and no further” and chose to “leave any expansion or development” to Parliament.

Although a claimant can claim for psychiatric injury caused by fears for their own safety where no physical harm actually occurred, there must be some basis for the fears. The decision of the Court of Appeal in *McFarlane v EE Caledonia* [1994] 2 All ER 1 makes it clear that the fear must be reasonable, given the nature of the risk and the claimant's situation. The case arose out of the Piper Alpha oil rig disaster in July 1988, where many people died as a result of the rig exploding. The claimant had been in a support boat about 50 yards away. His claim was rejected on the grounds that it was obvious that the boat had never been in any danger and, consequently, his fear for his safety was unreasonable. For reasons which are considered below, merely witnessing the disaster was not sufficient for this claimant to recover as a secondary victim.

When a claimant reasonably fears for his safety it is normally due to the fact that he is in actual danger. Yet it is possible to imagine situations where he has reasonable grounds for thinking he is in danger, but in reality no such danger exists. The position of such claimants is unclear because the two leading judgments in *White* differ slightly in this area. Lord Steyn says the claimant “must at least satisfy the threshold requirement that he objectively exposed himself to danger or *reasonably believed* that he was doing so”⁴⁴ (my italics). According to Lord Hoffman, however, the claimant has to be “within the range of foreseeable physical injury”⁴⁵ to qualify as a primary victim, but it is unclear whether his Lordship meant there must be actual danger. In this respect it can be noted that the Law Commission suggested that for secondary victims to recover, the immediate victim had to be in actual danger.

5.2.1.3 Secondary victims

A secondary victim will typically suffer psychiatric illness because of witnessing an accident, though they are not themselves in any danger.⁴⁶ The claimant must establish that psychiatric illness was reasonably foreseeable. This means that, in order to recover, a secondary victim must show that a person of ordinary fortitude or “customary phlegm”⁴⁷ might reasonably have suffered a recognisable psychiatric illness under the same circumstances. The issue is considered with hindsight. It follows that people who are unusually susceptible to such harm

⁴⁴ At 38 f

⁴⁵ At 47 c, f and g

⁴⁶ For the position where the person injured or put in danger is the defendant himself, see below.

⁴⁷ *Bourhill v Young* at 117, per Lord Porter

is not owed a duty of care to avoid causing psychiatric harm. That being said, once it is shown that duty exists, and has been breached, the rule is that the defendant takes the claimant as he finds him. He will be liable for all of the psychiatric illness that results, even though the precise nature and the seriousness of the claimant's particular illness may not have been foreseen.

While early cases dealing with those who are now called secondary victims established that the claimant must show that his psychiatric illness was reasonably foreseeable, it became clear that certain factors, such as the claimant's closeness in time and space to the scene of the accident⁴⁸ and the claimant's relationship to the immediate ("primary") victim⁴⁹ were particularly important to the finding of liability. At first it was unclear whether these factors were a part of the test of foreseeability, or whether they were additional requirements in order to establish a duty of care.

White confirms that all secondary victims are to be subject to the rules developed in two key cases, namely *McLoughlin v O'Brian* and *Alcock v CC of South Yorkshire Police* [1991] 4 All ER 907. The rules provide that such a claimant only can recover in very limited circumstances.

In *McLoughlin v O'Brian* the claimant's husband and children were involved in a serious car accident, caused by the defendant's negligence. One of her daughters was killed and her husband and two other children badly injured. Mrs McLoughlin had been at home some two miles away at the time of the accident. She first heard of the accident from a neighbour an hour later and arrived at the hospital about two hours after the crash. She saw her family cut and bruised, they were still covered in dirt and oil, and she heard her son screaming in fear and pain. As a result she suffered clinical depression and personality changes.

The House of Lords unanimously held that the claimant was owed a duty of care by the defendants. This clearly involved some extension of the existing law as Mrs McLoughlin was not at the scene of the accident. The reasoning of their Lordships, however, varied. Lord

⁴⁸ *Ibid.*; the claimant who was not related to the deceased and 50 feet from the accident scene and out of visual range failed to recover; in *King v Phillips*, a mother who heard her child scream from some 70 yards distance when a taxi backed into him also failed to recover.

⁴⁹ For example mothers (*Hambrook v Stokes Bros*; *Hinz v Berry*; *McLoughlin v O'Brian*), and a spouse (*McLoughlin v O'Brian*).

Bridge suggested that the only criterion was reasonable foresight and the claimant could recover because her psychiatric injury was reasonably foreseeable. On the other hand, Lords Wilberforce and Edmund-Davies suggested that while psychiatric injury did have to be reasonably foreseeable, it was not the sole test for creating a duty of care towards secondary victims and it was open to the court to decide the issue on grounds of policy. The need to restrict the scope of liability for psychiatric illness required additional tests and there were three elements in a claim which were necessary to consider: “the class of persons whose claims should be recognised; the proximity of such persons to the accident; and the means by which the shock is caused.”⁵⁰ Close relationship with the victim, such as close family ties, would satisfy the first element of the test, whereas mere bystanders at an accident would be owed no duty. One reason is that the latter must be assumed be strong enough to withstand the tragedies of modern life, another that the defendant cannot be expected to compensate the world at large. Less close relationships than that of parent and child, or husband and wife, would have to be analysed on a case to case basis. Secondly, proximity in terms of time and space meant that the claimant had to be within sight or sound of the accident or, as Mrs McLoughlin did, come upon its immediate aftermath. Thirdly, shock resulting from being told by a third party of the accident would not be compensated; it must come through the claimant's own sight or hearing of the event or its immediate aftermath. The question of whether simultaneous television would suffice was left open. Lord Scarman and Lord Bridge, adopting a broader approach, thought that these three factors were to be weighed in applying the reasonable foreseeability test, but were not limitations on it. Policy was rejected as inappropriate for the court and any “floodgates” problem dismissed. Thus, the case left the issue unresolved, as it was arguable that the test for liability for psychiatric injury depended on foreseeability alone, until it was decisively dealt with in the decision of the House of Lords in *Alcock v Chief Constable of South Yorkshire Police*. It was Lord Wilberforce’s approach which was favoured and explained in detail.

1. The *Alcock* criteria

Alcock was a test case⁵¹ brought by a number of relatives and friends of spectators involved in the Hillsborough disaster. The 1989 FA Cup semi-final between Liverpool and Nottingham

⁵⁰ Lord Wilberforce

⁵¹ Sixteen claimants claimed damages, and ten were successful at first instance. The

Forest at Hillsborough football stadium was completely sold out and the match was being shown on live television. The South Yorkshire Police were responsible for policing the ground, and it was admitted that the death and injuries of the fans at the stadium occurred as a result of a negligent decision by the police, allowing too many people into the ground, but it was denied that they owed a duty of care to the claimants. It was assumed for the purposes of the trial that each of the claimants had proved the infliction of psychiatric illness. The specific claimants were chosen because they represented a range of relationships to the immediate victims from parents to brother, sister, brother-in-law, fiancée and grandfather. They had either been present at the match and witnessed the disaster at first hand, watched events on television either as the disaster unfolded on live broadcasts or subsequently on recorded bulletins, gone to the stadium to look for someone they knew, been told the news by a third party (including radio broadcasts), or had to identify someone in the temporary mortuary at the ground. Their claim was based on the argument that the only test for establishing liability for shock-induced psychiatric illness was whether such illness was reasonably foreseeable, as suggested by Lord Bridge in *McLoughlin v O'Brian*. This argument was rejected and the claimants' actions were dismissed. The House of Lords applied Lord Wilberforce's "aftermath test". It was said⁵² that while it was clear that deaths and injuries usually produced consequences beyond those to the immediate victim, it was generally the policy of the common law not to compensate third parties. Although some exceptions could be made, they should be subject to much stricter requirements than those which applied to primary victims.

Accordingly, in *Alcock*, following the approach of Lord Wilberforce in *McLoughlin v O'Brian*, "secondary victims" of psychiatric illness had to satisfy further "control mechanisms", designed to limit the scope of liability, not only reasonable foreseeability of their injuries. The House of Lords stated there were three additional tests which had to be considered.⁵³ These are known as the *Alcock* criteria and include: the nature of the relationship between the primary victim and the claimant; the proximity of the claimant in time and space to the scene of the accident; and the means by which the claimant perceived the events or received the information.⁵⁴ Each is considered in turn below.

Court of Appeal allowed the defendant's appeal in respect of nine of these claimants and denied the cross-appeals by the six unsuccessful claimants. Ten of the fifteen claimants appealed to the House of Lords.

⁵² Lord Oliver at 924 et seq.

⁵³ Psychiatric illness and causal link assumed.

⁵⁴ Note that some elements of the second and third criteria are sometimes called "proximity of perception".

(a) The nature of the relationship between the claimant and the primary victim

The class of persons who would sue was not limited by reference to a particular relationship, such as husband and wife or parent and child. The crucial factor was the existence of a relationship between the primary victim and the claimant which involved close ties of love and affection, a tie that would have to be proved by the claimant. There was a rebuttable presumption that such ties would exist between spouses and in the parent-child relationship, though they could be present in other family relationships or those of close friendship, and may be stronger in the case of engaged couples than in that of persons who have been married to each other for many years.⁵⁵

Lords Ackner, Keith and Oliver were not prepared to rule out even a bystander where the accident was particularly horrific and a reasonably strong-nerved person would have been affected. The example given was where a petrol tanker crashed into a school playground, caught fire and caused serious injuries to children. It is not clear, however, how a bystander could be regarded as being foreseeably affected in these hypothetical circumstances when their Lordships concluded that *relatives* of the primary victims who were present in the Hillsborough stadium, and watched the catastrophic events unfold, were not within the reasonable contemplation of the defendant in *Alcock*. Just how horrific must a catastrophe be and how are litigants to know when their particular events satisfy the test? It is apparent that giving a reasoned answer to the degree of horror required is impossible. Subsequent to the decision in *Alcock*, the Court of Appeal tested this point in *McFarlane v EE Caledonia Ltd* [1994] 2 All ER 1 and held that witnessing at close range the Piper Alpha oil rig disaster was not sufficiently horrific for a bystander to succeed (see below). The reasoning in *McFarlane* has probably excluded the possibility of such claims in the future.

The closeness of the tie of love and affection is a matter that clearly goes to the likelihood of the claimant suffering psychiatric illness. It should therefore probably form part of the question of causation; there is no good reason for making it a factor relevant to the existence of a duty of care. Following *Alcock*, it is suggested that a close relationship of love and affection could be presumed to exist in the case of spouses, parent and children. The presumption could be rebutted by evidence in an appropriate case, such as where the parties

⁵⁵ Per Lord Keith at 914 d et seq.

were estranged. Siblings and other relatives would not normally be regarded as having the closeness required unless it could be proved by the claimant that such a relationship did in fact exist. A claimant who had lost his brother in the disaster did not satisfy the “close tie of love and affection” test in the absence of evidence that his relationship with his brother had been particularly close. Lord Ackner pointed out: “The quality of brotherly love is well known to differ widely”.⁵⁶ It is clear from Lord Keith’s speech, however, that the category of the “presumptive relationship” is not closed.

(b) The proximity of the claimant to the accident or its immediate aftermath

In the past, the courts required the claimant to witness events personally, which meant that the claimant had to be physically present at the scene of the accident. Just as the requirement for a close tie of love and affection excluded mere bystanders from recovery for psychiatric illness, the requirement that the claimant be present at the scene excluded those who satisfied the tie of love and affection but did not witness the events.

Sight or sound of the accident will continue to satisfy the proximity test but their Lordships did not define immediate aftermath: in this case identifying a body in the mortuary eight hours after the incident was not within the immediate aftermath.

In *McLoughlin v O'Brian* the requirement that the claimant must be close to the accident in both time and space was extended to the “immediate aftermath”. Similarly, in the Australian case of *Jaensch v Coffey* (1984) 54 ALR 417,⁵⁷ Deane J said that the “aftermath” extended to the hospital to which the injured person was taken, and continued for so long as the victim remained in the state produced by the accident, up to and including immediate post-accident treatment. It was said that *McLoughlin v O'Brian* was a case on the boundaries of what was acceptable as the aftermath,⁵⁸ and their Lordships in *Alcock* refused to extend the meaning of “immediate aftermath” to include the identification of a victim's body at a mortuary some eight hours after death. In the words of Lord Ackner: “Even if this identification could be described as part of the “aftermath”, it could not in my judgment be described as part of the *immediate* aftermath.”⁵⁹ Their Lordships did not define “immediate aftermath” any more precisely. Lord Jauncey emphasised that in *McLoughlin v O'Brian* the victims were waiting to

⁵⁶ At 921 h

⁵⁷ At 462-463

⁵⁸ Per Lord Wilberforce in *McLoughlin*; affirmed by Lord Ackner in *Alcock*

⁵⁹ At 921 a

be attended to, and were in very much the same condition as they would have been had the claimant found them at the scene of the accident. It is arguable that this emphasis makes too much hang on an entirely arbitrary circumstance. Moreover, the distinction between the “aftermath” and the “immediate aftermath” is clearly artificial. Lord Jauncey's refusal even to attempt to define it only accentuates this fact.⁶⁰

(c) The means by which the claimant perceived the events or received the information

Alcock confirmed that a claimant must either see or hear the event or its immediate aftermath. Psychiatric illness induced by communication of events by a third party was insufficient. It will be recalled that Lord Wilberforce in *McLoughlin* had left the question open regarding live television. If the claimants had only seen pre-recorded television pictures of the disaster, they clearly would not have satisfied the requirement of proximity. In the circumstances of the *Alcock* case, the live television broadcast was found not to equate with the “sight or hearing of the event or its immediate aftermath” because the television authorities had followed the broadcasting code of ethics. Pictures of suffering by recognisable individuals had not been shown. On the other hand, the showing of such pictures could constitute a *novus actus interveniens* and break the chain of causation between the original breach of duty and the psychiatric illness. Then the broadcasters, rather than the police, might have been regarded as the legal cause of the claimants’ psychiatric illness. Lord Ackner and Lord Oliver agreed that here may be cases, however, where viewing simultaneous television may be treated as equivalent to sight and sound of the accident. An example is given of a televised hot-air balloon event with children in the balloon, which suddenly burst into flames.⁶¹

By contrast, in *Hevican v Ruane* [1991] 3 All ER 65, liability was established in a case where a father of a boy killed in a car accident was told of his death at a police station and then identified the body at a mortuary, i.e. he was not present at the scene of the accident or the aftermath. In *Ravenscroft v Rederiaktiebolaget Transatlantic*,⁶² the judge at first instance held that a mother who had been called to the hospital and on arrival was informed by her husband that her son was dead, was entitled to succeed for a reactive depression, not having even seen her son’s body. The correctness of the decisions was doubted in *Alcock*, since in both cases

⁶⁰ At 936 j: “To essay any comprehensive definition would be a fruitless exercise.”

⁶¹ At 921 g (Nolan LJ)

⁶² [1992] 2 All ER 470

the effective cause of the psychiatric illness was regarded as the fact of a son's death and the news of it, rather than a reaction to a traumatic event.⁶³ *Ravenscroft* was subsequently reversed on appeal, on the ground that the claimant's illness had not come about through sight or hearing of the relevant event or its immediate aftermath, applying *Alcock*. This seems to imply that it is unlikely that the ruling in *Hevicane*'s case would have gone the same way if it had come after *Alcock*. Note, however, that in *Atkinson v Seghal* [2003] LTL 21.3.03 the aftermath was held to extend to a mother who came upon the accident scene, and saw her daughter in the mortuary.

Creation of this distinction between claimants reflects the historical development of the law and serves as an arbitrary means of cutting down the numbers of potential claimants for policy reasons. It cannot be logically sustained.⁶⁴ If a parent has suffered psychiatric illness as a result of hearing about the death of his or her child there is no basis *in principle* for refusing compensation when a parent who witnessed the event could recover. The latter claimant is not less "worthy" the law's protection than the former claimant. Furthermore, many of the *Alcock* claimants suffered a reaction from a series of events, of which the television pictures formed only part. The insistence that there should be "direct, immediate perception" of the event also ruled out these claims.

2. Additional restrictions for recovery

In *Alcock*, Lord Jauncey remarked: "The means by which the shock is caused constitutes a third control, although in these appeals I find it difficult to separate this from proximity."⁶⁵ Therefore, their Lordships chose to consider a number of additional points under this third heading of the *Alcock* criteria.

(a) The shock requirement

The previously used term "nervous shock" led to the view was that the claimant's psychiatric illness must be caused by a single event, which in everyday language can be regarded as

⁶³ At 915 b, 917 h

⁶⁴ Per Lord Oliver at 926 d: "And, in the end, it has to be accepted that the concept of "proximity" is an artificial one which depends more upon the court's perception of what is the reasonable area for the imposition of liability than upon any logical process of analogical deduction."

⁶⁵ At 933 j

“shocking”. Even though a traumatic, “shocking” event is a more likely trigger a psychiatric illness,⁶⁶ this in itself does not justify excluding psychiatric illness caused by less “shocking” events.

Nevertheless, it was reaffirmed in *Alcock* that the psychiatric illness must result from the sudden psychological impact of witnessing a single event or its immediate aftermath. Lord Ackner defined “shock” to involve the “sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind.”⁶⁷ He continues: “It has yet to include psychiatric illness caused by the accumulation over a period of time of more gradual assaults on the nervous system.” Therefore, where subsequent reflection on an event or prolonged exposure to distressing circumstance is the cause, the “sudden shock” requirement has not been satisfied. Accordingly, it seems that one who suffers psychiatric damage from caring for a loved one who is seriously injured, physically or mentally, by an accident will have no claims against the person whose negligence caused the initial injury. This does not exclude situations where, following the initial impact, constant contact with a badly injured or incapacitated relative causes continuation or aggravation of the shock victim’s condition.⁶⁸ The justification for making sudden shock the defining factor is hard to see. Moreover, the range of claimants likely to be able to sue in this kind of action is unlikely to be particularly extensive.⁶⁹

In *Sion v Hampstead HA* [1994] 5 Med LR 170, the claimant had developed a stress-related psychiatric illness as a result of watching his son slowly die in intensive care as a result of negligent medical treatment. He could not recover damages as the father’s illness had not been caused by sudden shock. Causation will often be difficult to prove but in *Vernon v Bosley (No. 1)* [1997] 1 All ER 577,⁷⁰ it was made clear that so long as a sudden shock is at least partly responsible for the claimant’s psychiatric injury, the fact that the grief also played a part in causing it will not prevent a claim.

In the recent case of *Walters v North Glamorgan NHS Trust* [2002] EWCA Civ 1792, where a 10-month-old baby died after receiving negligent treatment for which the defendants were responsible, Thomas J held that for the purposes of the control mechanism the necessary

⁶⁶ As the Law Commission Consultation Paper points out in its review of the medical literature

⁶⁷ At 918 b

⁶⁸ See *S v Distillers Co Ltd* [1969] 3 All ER and *Whitmore v EEC Ltd*, *The Times*, 4 May 1984

⁶⁹ Markesinis and Deakin (2003) at 101

⁷⁰ The claimant had witnessed his children drowning in a car that was negligently driven by their nanny.

“horrible event” could be made up of a series of events. The appeal was dismissed and he was correct to conclude that when the mother suffered psychiatric illness from the unavoidable progression from the moment her son suffered a fit, “the fit causing the brain damage which shortly thereafter made termination of this child’s life inevitable and the dreadful climax when the child died in her arms” was a single “horrible event”. The claimant’s appreciation of the event was also “sudden” because each part of the event had an immediate impact.

An interesting point in this decision is Clarke LJ’s bold statement that if it had been necessary, he would have been willing to make an incremental extension to the category of victims entitled to claim. He drew attention to the word “yet” in Lord Ackner’s statement (cited above). With judges willing to contemplate such “incremental steps” maybe there can be a gradual judicial implementation of the Law Commission’s proposal to remove the requirements of “direct perception of the accident or its immediate aftermath” and a “sudden shock”.⁷¹ The assessment⁷² by the Government of the effects of the recommendations is still not complete.

(b) Liability for communicating distressing news

Their Lordships confirmed in *Alcock* that a defendant who causes harm or endangerment to an “immediate victim” will not be liable to a claimant who is merely informed about this by a third party. It has been suggested by the Law Commission that also this restrictive rule, like many others, should be abolished.⁷³

The rule does not, however, mean that there can never be liability where a claimant suffers psychiatric illness as the result of hearing distressing news. The person who *communicates* the news may be liable if the news is broken in a negligently insensitive manner. In *AB v Tameside & Glossop HA* [1997] 8 Med LR 91, the defendant health authority discovered one of their health workers to be HIV-positive and wrote to inform patients whom he had treated that there was a small risk they might have been exposed to infection. The claimants alleged that they suffered psychiatric illness as a result of the communication of bad news by letter

⁷¹ *Op.cit.* paras. 5.28-5.33 and 6.10-6.18

⁷² Announced in November 1999

⁷³ See below

rather than face-to-face. The Court of Appeal held that the defendants had not been negligent in deciding to break the news in the way that they did. No comment was made on the fact that counsel in the case had conceded that a duty of care was owed. Mullany⁷⁴ has argued that the concession seems justified: “[t]he duty to communicate carefully should not depend on the presence of a pre-existing professional or other relationship” but where there was such a relationship, as there was in *AB*, “the case for the existence of a duty to communicate carefully is particularly strong” and mental illness was foreseeable.⁷⁵

Another type of case is where the bad news is false. In *Allin v City and Hackney Health Authority* [1996] 7 Med LR 167, the claimant recovered damages for PTSD as a result of being told after a difficult birth that her baby had died; six hours later, she learnt that the baby had in fact survived. The defendant had conceded that they owed a duty of care, as in *AB*. Mullany argues that liability should depend on foreseeability of psychiatric harm, not whether the bad news was true or false.

(c) Claims against the primary victim

One further point was considered, obiter, in *Alcock*, but was left undecided. This was whether the law would allow a claim in a situation where, as a result of their own negligence, a primary victim causes psychiatric damage to a third party. In the recent judgment of the High Court in *Greatorex v Greatorex* [2000] 4 All ER 769 the issue was raised. The claimant was a fireman who was called to the scene of a car accident where his son had been seriously injured as a result of his own negligent driving. The father unsuccessfully claimed for PTSD (knowing that any award would be covered by the Motor Insurers’ Bureau as his son was uninsured). Cazelet J acknowledged that there was no binding authority on the question of duty, but taking on the view that Lord Oliver favoured in *Alcock*, and guided by *inter alia* German law, he ruled that a defendant who endangered or injured himself owed no duty to those suffering psychiatric injury as a result. To hold otherwise would impose a significant limitation on an individual’s freedom of action and would potentially encourage undesirable litigation arising from deliberate self-harm or between family members.

⁷⁴ Mullany, (1998) 114 LQR 380 at 381

⁷⁵ *Ibid.*, at 383

5.2.2 Particular categories of claimant

Following the reasoning of the majority in *White*, it appears that although the element physical danger, or reasonable fear of it, is a precondition of qualifying as a primary victim, it is not necessary to show that fear of physical harm is the cause of the primary victim's psychiatric illness. The decision is important because, prior to it, it had been unclear whether claimants such as rescuers, employees and other "participants" in the circumstances of an accident who, despite the fact that they were not put in any physical danger, could be categorised as primary victims. Although controversial, *White* establishes that claimants who has suffered psychiatric injury and are not either physically injured or in danger of being physically injured are to be regarded as secondary victims. In other words, they had to satisfy the *Alcock* criteria in order to succeed. The criteria had not been met, not least because none of the officers at the scene had a close relationship of love and affection with the dead and injured. The House of Lords demonstrates that the majority in that case were not in favour of the expansionist views of the Law Commission.

Although nowadays it can be said that courts has accepted that there is no qualitative difference between physical and psychiatric harm it is not the same as to say that no distinction was made or ought to be made between principles governing the recovery of damages in tort for physical injury and psychiatric harm. To allow the claims of the police officers would substantially expand the existing categories in which compensation could be recovered for pure psychiatric harm. Moreover, the House of Lords openly acknowledged the argument that it would be unacceptable to the public to compensate police officers for psychiatric illness suffered while doing their jobs when compensation had been denied to the bereaved relatives by the decision in *Alcock*.⁷⁶

Four types of claimant will be considered in the following; first bystanders, then the implications of *White* for rescuers, employees and so-called "unwitting agents" of traumatic events.

5.2.2.1 Bystanders

⁷⁶ Lord Hoffman at 48 g

A “bystander” is a person who witnesses the death, injury or imperilment of the immediate victim but has no close tie of love and affection with him. Whether such a claimant may in any circumstances recover damages for psychiatric injury is not certain. English courts have time after time refused to allow claims by mere bystanders, although from a psychological point of view it is entirely foreseeable that such people may experience psychiatric harm.

In *Bourhill v Young* Lord Porter said that a driver of a car is entitled to assume that ordinary frequenter of streets has sufficient fortitude to endure incidents as may be expected to occur. Lord Wilberforce, in *McLoughlin v O’Brian*, thought similarly that bystanders must be assumed to tolerate modern life tragedies, hence such claims should be denied, alternatively on the basis that defendants cannot be expected to compensate the world at large. As discussed above, the question was left open in *Alcock* with the possibility of successful claims where the witnessed event was particularly horrific and would be likely to traumatise a person of ordinary fortitude.

Reactions to such events are entirely subjective, however, and there would be great practical problems in deciding which accidents were sufficiently horrific. The Piper Alpha oil rig disaster witnessed by the claimant in *McFarlane v EE Caledonia Ltd*⁷⁷ was deemed by the Court of Appeal not to be horrific enough, especially where the claimant was not a person of ordinary fortitude. One possible implication of this decision is that no event can ever be horrific enough for a mere bystander to recover for psychiatric illness. This unless, of course, he could be said to be foreseeably at risk of physical danger, then he could possibly recover for psychiatric illness in the absence of any physical damage following *Page v Smith*.

5.2.2.2 Rescuers

The case of *White* involved police officers on duty claimed for psychiatric injury arising out of the Hillsborough disaster. They were not active in the immediate area of the deaths (claims for which were admitted) but elsewhere in and around the ground.

The traditional view was that rescuers were a special category of claimant who should be awarded damages on grounds of public policy; the theory being that such behaviour should be

⁷⁷ See above

encouraged and supported. Danger invites rescue and is thus foreseeable. Nothing should deter rescuers from acting in an emergency. Following the majority of *White*, in determining liability for psychiatric damage there are no special rules for rescuers engaged in rescuing others endangered by the defendant's negligence. In order to contain the concept of rescue in reasonable bounds the claimant must at least satisfy the threshold requirement that he objectively exposed himself to danger or reasonably believed that he was doing so. Unless that was the case, they remain "secondary victims" subject to the control mechanisms in *Alcock*.

Lord Griffiths, disagreeing with the majority on this point, would have allowed rescuers to recover if psychiatric illness was reasonably foreseeable, even though physical injury was not. In Lord Goff's dissenting speech, he would have classified rescuers as primary victims.⁷⁸ As a result of their position, the majority had to distinguish the case of *Chadwick v British Transport Commission* [1967] 2 All ER 945 where a rescuer assisting the victims of the Lewisham railway accident who suffered psychiatric illness succeeded in his claim for damages even though he was not injured by fear for his safety, but by the horror of what he had experienced. The case was distinguished on its facts, the basis on which was less than satisfactory. By entering the wrecked train carriages, Mr Chadwick had been objectively exposed to physical danger and he had therefore been within the range of foreseeable personal injury. This made him a "primary victim".

It has been suggested that a more preferable way to distinguish is between amateur rescuers (like Mr Chadwick) and professionals (like the police) who are trained and required to run such risks of psychiatric trauma.⁷⁹ The House of Lords could easily have limited itself to consider whether professional rescuers should be treated in the same way as those who volunteer their help and maintained the special treatment of voluntary rescuers.

5.2.2.3 Employees

Should employees be in a special category by virtue of employment relationship? It is well established that employers owe a duty of care towards employees, which obliges them to take

⁷⁸ Referring to Lord Oliver's speech in *Alcock*

⁷⁹ Hepple, Howarth & Matthews (2000) at 147

reasonable care to ensure that employees are safe at work. In *White*, the police officers' claims as employees were held to be limited by the bystander principle of *Alcock*.⁸⁰ Like rescuers, an employee is in no special position just because the incident was due to the negligence of the employer. The House of Lords stated that the employers' duty to employees was governed by the ordinary rules of the law of negligence.⁸¹ Accordingly, when a type of injury was subject to special restrictions on when a duty of care would exist, these rules applied in an employer-employee relationship, just as they would normally. Unless the employees were exposed to the risk of physical harm they remain "secondary victims" and therefore subject to the control mechanisms in *Alcock*.⁸² In addition, police officers who were traumatised by something in their work had the benefit of statutory schemes which permitted them to retire on pension. In that sense, they were better off than the bereaved relatives in *Alcock*.

Note, however, the suggestion in *Leach v Chief Constable of Gloucestershire* [1999] 1 WLR 1421, that rescuers who are employees may be successful in claims for psychiatric injury if the employer fails to provide counselling after the traumatic event.

It was acknowledged by their Lordships in *White* that the claimant *Walker v Northumberland CC* [1995] 1 All ER 737 was a primary victim because it was the strain of work lead to his nervous breakdown.⁸³

5.2.2.4 Unwitting agents

The decision in *White* leaves unresolved the law relating to "unwitting agents of misfortune", i.e. claimants who, because of the defendant's negligence, are placed in a position where they themselves cause the death, injury or imperilment of the immediate victim.

In *Dooley v Cammell Laird & Co Ltd* [1951] 1 Lloyd's Rep 271, a case decided before *Alcock* and *White*, an employee was allowed to recover for the fear that his workmates might have been injured when the crane he was operating, through no fault of his, dropped a load into the hold of a ship where men were working. Until *White*, it was thought that this, and similar,

⁸⁰ I.e. they should have sufficient fortitude

⁸¹ Lord Hoffman at 43 j

⁸² *McFarlane v EE Caledonia Ltd* and *Robertson v Forth Road Bridge Joint Board* [1995] IRLR 251

⁸³ See below

decisions might have established the right of an employee to recover for psychiatric illness caused by witnessing or fearing injury to fellow workers as a result of their employer's negligence. Lord Hoffman⁸⁴ argues that there is no such right, and that the cases were decided on their facts, before the control mechanisms of *Alcock* had been invented.

It remains unclear, however, whether cases like *Dooley* are still good authority for the proposition that special treatment should be given to "unwitting agents". Lord Hoffman concedes that "there may be grounds for treating such a rare category of case as exceptional and exempt from the *Alcock* control mechanisms."⁸⁵ The point is *obiter* since, as Lord Hoffman points out, the facts of *White* do not raise the issue.

By contrast, *Dooley* et al were distinguished in *Hunter v British Coal Corporation* [1998] 2 All ER 97; the case seems to suggest that unwitting agents may have a claim if they can satisfy the requirements of proximity in time and space.

Subsequent to *White*, their Lordships unanimously declined to exclude the possibility of such claims when they were invited to do so in a striking-out application in *W v Essex County Council* [2000] 2 All ER 237. In this case the approved foster carers had made it clear to the authority that they would not be willing to foster a known or suspected sexual abuser. Nevertheless, the council sent a known sexual abuser, a 15-year-old boy, to live with the claimants as a foster child; he then abused the claimants' children. The parents claimed psychiatric injury which they alleged had been caused not only by the discovery of the abuse, but also by feelings of guilt that having brought the foster child into their home, they were indirectly responsible for the abuse of their children. It was held that although the claimants would have difficulty succeeding, it was not clear and obvious that the claim would fail, and the parents had, at least, an arguable case. Lord Slynn observed: "[...] the categorisation of those claiming to be included as primary or secondary victims is not as I read the cases finally closed. It is a concept still to be developed in different factual situations."⁸⁶ The case can be read as a suggestion that the rigid distinction between primary and secondary victims is becoming less popular.⁸⁷ It should be noted that since the enactment of the Human Rights Act

⁸⁴ *White* at 45

⁸⁵ *Ibid.*, at 46 a

⁸⁶ At 243

⁸⁷ Hepple, Howarth & Matthews (2000) at 148

1998, the courts have shown a reluctance to grant “blanket immunity” and to exclude a duty of care on grounds of policy.

5.2.3 Other situations

5.2.3.1 The liability of an employer for work-related stress

A new and exciting area of development concerns claims brought against employers by employees who claim to have suffered psychiatric injuries caused by stress at work. The term “stress” is a lay description for the harm that is suffered. Employees cannot sue for “occupational stress”, only for psychiatric illness induced by it. The common law has been slow to recognise and compensate such claims. For an employee to succeed, the requisite elements of the tort of negligence – breach of duty, injury, causation and foreseeability – must be present. Obviously here there is no requirement that the injury must be a reaction to a sudden event. As the law has developed in this area, the scope of liability and the responsibilities of employers have not always been clear.

The first case in which an employer was found liable for his employee’s work-related stress was in *Walker v Northumberland CC* [1995] 1 All ER 737. A social worker suffered a nervous breakdown as a result of the demanding nature of his work and his heavy workload. On his return to work, the employer was given medical advice about the measures that ought to be taken to limit the demanding nature of the job in order to protect Mr Walker from the risk of further illness. These measures were not taken and he suffered a second breakdown. He established that the second breakdown resulted from a breach of the employer’s duty of care, so that he recovered damages for the consequences of this illness, but he failed to establish a case in respect of the first breakdown.

In *Garrett v London Borough of Camden* [2001] EWCA Civ 395 Simon Brown LJ declared: “Many alas suffer breakdowns and depressive illnesses from stress of work [...] Unless, however, there was a *real risk of breakdown* which the claimant’s employers ought reasonably to have foreseen and which they *ought properly to have averted*, there can be no liability” (my italics). In this case he found no breach of duty on the facts.

A recent decision of the Court of Appeal, however, has gone some way to providing guidance in relation to stress-related claims. The case of *Sutherland v Hatton* [2002] EWCA Civ 76 dealt with four appeals made by employers held liable in respect of employees' psychiatric injuries. It was held that there were no special control mechanisms applying to claims for psychiatric (or physical) illness or injury arising from the stress of doing the work that the employee was required to do. The ordinary principles of employer's liability applied.

The court allowed three of the four appeals (*Hatton*, *Barber* and *Bishop*) on the basis that it had not been "reasonably foreseeable" that these employees would suffer such injuries as a result of occupational stress. The court took also the opportunity to reaffirm and clarify the law in this area and specify practical propositions to be taken into account by employers dealing with stress-related problems.

The threshold question of when a psychiatric injury can be said to be reasonably foreseeable was given the most detailed guidance by the court. Foreseeability depends upon what the employer knew or ought reasonably to have known about the individual employee. Hence, the test is not whether the injury was foreseeable to a person of "ordinary fortitude". The court was of the opinion that the nature of the injury makes it harder to foresee than physical injury, but it might be easier to foresee in a known individual than in the population at large. It was stated that an employer will be entitled to assume that an employee can cope with the normal pressures of a job unless the employer knows of something specific about the job or the individual employee that should make him consider the issue of psychiatric injury. The same test is applicable whatever the employment; there are no intrinsically high stress occupations. An employer is not obliged to make intrusive enquiries and is generally entitled to take what he is told by his employee at face value. If an employee returns to work after illness and does not tell his employer otherwise, this can usually be taken as implying that they believe themselves fit to return to pre-illness duties. An employee who recognises that he or she is suffering from potentially harmful levels of stress must take some responsibility for dealing with the situation. Where an employee does not draw his or her employer's attention to the fact that he or she is suffering from occupational stress, the employer is unlikely to be liable if the employee goes on to suffer a psychiatric injury.

To trigger a duty to take steps, indications must be "plain enough" for any reasonable employer to realise that something should be done. He would only be in breach of duty if he

had failed to take the steps which were reasonable in the circumstances. Hale LJ said of the case of *Barber*, a teacher and one of the four claimants in *Sutherland*: “This was a classic case where it is essential to consider at what point the school’s duty to take some action was triggered [...]” The House of Lords is now considering his case.

The court stated that an employer who offers a confidential advice service, including counselling or treatment services, is unlikely to be found in breach of duty unless he has been placing unreasonable demands on an individual where the risk of psychiatric injury was clear. An employer is not, however, obliged to demote or dismiss an otherwise willing employee in order to remove him or her from a stressful situation. Where the illness is attributable to more than one cause, the defendant can raise the question of apportionment.

The principles were subsequently applied in *Pratley v Surrey County Council* [2002] EWCH 1608 (QB). The case demonstrates clearly that the approach of the Court of Appeal to cases of liability for stress at work has not softened since *Sutherland v Hatton*. The steep “foreseeability” hurdle effectively protects the employer from liability in the quite typical case where the employee will not admit to experiencing stress for fear of appearing unable to cope. Nevertheless, *Young v Post Office* [2002] EWCA Civ 661 May LJ emphasizes that “[a]n employee who is known to be vulnerable is not necessarily to be regarded as responsible or a recurrent psychiatric illness if he fails to tell his employer that his job is becoming too much for him.” I.e. where there is foreseeability – for example, because of a previous breakdown – contributory negligence should not apply.

5.2.3.2 Damage to property

The Court of Appeal in *Attia v British Gas* [1987] 3 All ER 455 held that a claimant could be entitled to damages for a psychiatric illness which she suffered as a result of witnessing her home destroyed by a fire, without personal injury to anyone, caused by the negligence of the workmen whom she had employed to install central heating in her home. On a preliminary issue, the court held that psychiatric illness caused by property damage could be reasonably foreseeable and was not prepared to accept that as a matter of policy all such claims should be ruled out. She was entitled to claim if she could prove causation and reasonable foreseeability of this kind of injury. It should be borne in mind that this case was decided before *Alcock* and

White. *Attia* was cited in argument in *Alcock* but their Lordships did not refer to it in their speeches.

The criteria for liability are not clear. Was the claimant a “primary” victim? If so this elevates property rights to a higher level of protection than personal relationships, and simply emphasizes the point that the rigid distinction between “primary” and “secondary” victims is unsatisfactory. If she was a “secondary” victim, she clearly did not satisfy the “relationship” requirement of *Alcock*. In *Attia*, at least two of the judges appear to have treated the issue as a matter of remoteness of damage rather than duty of care, since the defendants undoubtedly owed the claimant a duty of care not to inflict physical damage to her house (and indeed her claim for property damage had already been settled).

Owens v Liverpool Corporation [1939] 1 KB 394 may also be regarded as a case involving property damage. The defendant had negligently driven into a hearse, causing damage to the hearse and overturning the coffin so that it appeared that the coffin might fall out. Relatives of the deceased man saw the damage from the funeral procession and suffered psychiatric injury as a result. The Court of Appeal held that the right to recover damages for psychiatric illness was not restricted to cases in which fear for the safety of human beings was involved. The possibility of recovery for distress at the death of a favourite pet cat or dog was also considered. It is doubtful how far the case, which was disapproved by three members of the House of Lords in *Bourhill v Young*,⁸⁸ may still be relied upon.⁸⁹

⁸⁸ Lords Thankerton, Wright and Porter

⁸⁹ *Alcock* at 927 c, per Lord Oliver

6 A COMPARISON WITH NORWEGIAN LAW

As in English law, finding liability for negligently inflicted psychiatric injury causes problems. There are four Høyesterett⁹⁰ decisions concerning “pure” psychiatric harm, only one of which is fairly recent. This is now considered the leading case. The three previous judgments did all involve mothers suffering shock as a result of their sons being killed in car accidents. Central in the recent development of the English law is, as shown above, the claims following the Hillsborough disaster. Conversely, in Norway, there has not been any horrific event of considerable size which has brought about such extensive and ground-breaking litigation. As an example, when the Aleksander Kielland platform disaster happened in 1980, most of the ensuing claims were settled.⁹¹ It is clear, however, that psychiatric injuries are to be equated with physical.⁹²

The earlier discussed policy considerations can be seen applied also by Norwegian legal opinion. The nature of the injury gives rise to the problem of limitation of liability and a fear of fraudulent claims. An often used argument for the limitation of liability is that the prospect of compensation has a disincentive effect on the claimants’ healing. Lødrup has put forward that a better solution than limiting claims would be to quickly settle the issues.⁹³

It is worth noting that although the term “shock”, which has been abandoned in English law, is still in use. Nonetheless, there is no indication that this means a narrower definition of psychiatric injury. Moreover, there is no express requirement of a “recognised psychiatric illness” as such, but it is clear that the same principle is applied in Norwegian courts.

The different types of claimant are, similarly to what we have seen in the case in England, divided into three categories. Where the claimant suffers both physical and psychiatric harm the main rule is also here recovery in full, even though the physical injury is inconsiderable. The defendant must “take his victim as he finds him”. This was recently confirmed in the

⁹⁰ The Supreme Court of Norway

⁹¹ An exception is discussed below.

⁹² Rt. 1985 p. 1011

⁹³ JV 1972 p. 121 at p. 133

decision in *Rossnes*, Rt. 1997 p. 1. Although this is the general rule, it is somewhat modified in cases where the claimant's characteristics lead to an unduly severe and protracted psychiatric illness. In Rt. 1940 p. 82 a minor injury from being hit by a car caused a disproportionately serious psychiatric illness and the claimant's compensation was reduced. This is in contrast with *Page v Smith*, where the claim was for the activation of the claimant's ME, which had been in remission when the accident, described as one of modest severity, had reactivated it.

The category where the claimant suffers only psychiatric harm is again divided into two groups, which in essence correspond to those of primary and secondary victims. Shock is often triggered by fear and such claims are normally allowed according to Norwegian law. In Rt. 1867 p. 324, *Abortdommen*,⁹⁴ a pregnant woman suffered shock and miscarried as a result. It seems established that psychiatric injury resulting from reasonable fear for his or her safety should be compensated.⁹⁵

In other circumstances the psychiatric injury is caused by merely witnessing a horrific event or being told distressing news; typically that loved ones are dead or seriously injured. Until Høyesterett's decision in Rt. 1985 p. 1011, *Hauketoddommen*, there were very strict limitations on such claims;⁹⁶ as a general rule, a secondary victim was not entitled to compensation. In *Hauketo*, a man was badly injured in the head by a passing train at a train station; his wife suffered psychiatric injury from witnessing the accident. The judge observed that it was "highly foreseeable that she would suffer shock". The need for a reasonable limitation of the defendants' liability was not an impediment on the wife's claim in this case and she could recover in full. It seems to follow from this that whether a psychiatric illness is recoverable must be determined individually, and depends on the general rules of limitation of liability, namely adequate causation. In Norway, foreseeability has become in practice and theory the dominant factor in determining whether there is adequate causation. This does not differ so much from the remoteness test in English law.⁹⁷

⁹⁴ cf. *Dulieu*

⁹⁵ RG 1950 p. 223 (Ålesund) and RG 1995 p. 1 (Eidsivating)

⁹⁶ Rt. 1938 p. 626, *Sjokkdom I*, Rt. 1960 p. 357, *Bersageldommen*, and Rt. 1966 p. 163, *Soladommen*

⁹⁷ Note also a comment in Hepple (2000) at 148: "The *Attia* case shows that the question of liability for psychiatric injury can be treated as an issue of remoteness of damage rather than at the level of duty (as in, for example *Alcock*)."

Where there is no risk of physical harm, or fear thereof, the Norwegian courts thus accentuate certain issues when determining liability for psychiatric injury suffered by a third party. The following main factors cannot, however, be regarded as set requirements similar to the *Alcock* criteria, which need to be satisfied in order to succeed with a claim. Much weight is put on the means and manner by which by the claimant perceived the events. In Rt. 1938 p. 626, *Sjokkdom I*, a 4-year-old was brought home to his mother seriously injured, he later died, whereas in Rt. 1966 p. 163, *Soladommen*, the mother was merely informed of her son's death in a car accident, and in a sensitive way. Although the reasoning in these two cases no longer is good law, it is thought that the outcome must be upheld.⁹⁸ Furthermore, the defendant's degree of negligence is an important aspect for the court to consider, and will affect to which extent the injury will be compensated, contrary to approach taken in English law.

It is unclear whether claimants who do not have a close relationship with the immediate victim are entitled to claim. Based on foreseeability, it is arguable that they should be allowed to do so in the circumstances. Hagstrøm⁹⁹ refers to English case law regarding employees, rescuers and damage to property in his article from 1987. The position has, as shown above, much changed since then. Norwegian law must await further decisions to ascertain its view on the matter. In RG 1990 p. 187 (Gulating), a case arising from the Aleksander Kielland disaster, the unsuccessful claimant witnessed the accident from an oil rig nearby. As in *McFarlane*, the claimant was never in any danger. It follows that psychiatric injury to a mere bystander is not foreseeable.

The analysis¹⁰⁰ of this area of law concentrates on shock-induced psychiatric illness. It is unclear whether, as a consequence, "shock" is regarded as a condition for compensation. Claims for harassment at work (by colleagues), leading to psychiatric illness, can and has been compensated, see Rt. 1993 p. 616, *obiter*, and Rt. 1997 p. 786. In Rt. 1994 p. 924, the successful claimant suffered psychiatric harm subsequent to a charge of sexual crime and the time spent in custody. Following *Alcock*, accumulation of "gradual assaults" on the nervous system does not satisfy the requirement for sudden impact.¹⁰¹

⁹⁸ Hagstrøm (1987) at p. 630

⁹⁹ *Ibid.*

¹⁰⁰ Lødrup (1972) and (1999), Nygaard (2000); see also Hagstrøm (1987)

¹⁰¹ See above

Based on reasonable foreseeability, Norway has opted for an attitude towards the liability for communicating distressing news similar to that of England.¹⁰² Hence, experiencing the (immediate) aftermath is in principle recoverable,¹⁰³ whereas hearing and reading about an accident, including watching it on television, is, as a general rule, not.

As in England, opinions differ widely as to how the law ought to be. Nevertheless, there seems to be some consensus for a careful expansion, particularly concerning psychiatric injury which is viewed as normal and readily foreseeable.¹⁰⁴ The dissenting judge in *Soladommen* said in his speech that a temporary impairment due to shock would be within contemplation. The argument is especially strong in respect of close relatives.

In general, there are more similarities than there are differences between English and Norwegian law regarding liability for psychiatric injury. Although English law favours an approach where strict criteria are limiting the range of claims, the Norwegian courts appear to take largely the same factors into consideration, but as a part of a general assessment in each individual case. The most important difference is, in my view, the disagreeing position as regards compensation for claimants who are abnormally susceptible to psychiatric illness. This is clearly a question of policy. Whereas one chooses to limit claims on the basis of non-foreseeability, or “remoteness”, the other is prepared to let the psychologically vulnerable claimants recover in full as long as it can be shown that a person of normal fortitude would foreseeably suffer *some* psychiatric injury. The fact that the degree of that injury, the extent of the illness suffered, is greater than would be expected is irrelevant.

¹⁰² See for example *Hambrook v Stokes*

¹⁰³ Lødstrup (1999) at p. 348

¹⁰⁴ Lødstrup (1999) p. 347 et seq., Nygaard (2000) p. 360, Hagstrøm (1987)

7 PROPOSALS FOR REFORM

It is widely recognised that the existing law suffers from major defects and is in need of reform. The courts have developed the rules of liability on an almost ad hoc basis. As a result they are complex, there are some unjustifiable distinctions and they ignore modern developments in the understanding of mental illness.

In March 1998, the Law Commission published a report which recommended some important changes to the law. In para. 1.2 of the report it is stated that “[t]he aim of the proposals that we outline in this Report is to remove what we believe to be unnecessary constraints on claims for negligently inflicted psychiatric illness thereby alleviating the arbitrariness of the current law, but without giving rise to fears of uncontrolled liability.”

It was recognised that the cost of the recommendations which was made in the report is likely to be borne by a large section of the public through higher insurance premiums and, although the Law Commission proposes some liberalisation of the current law, it did not go as far as suggesting that the normal principles of negligence liability should apply to all cases of psychiatric harm.

In summary, the report concluded that the current rules on compensation for secondary victims are too restrictive. It was agreed that the requirement for a close tie between primary and secondary victim was justified and should remain, but there would be a statutory “fixed list” of relationships in which close ties of love and affection would be deemed to exist. This is in line with the view that it is not necessary in the interests of justice or even good policy to demand of a person allegedly suffering from psychiatric illness to verify their love for the dear deceased. The Commission believed this alone would be sufficient; they recommended that the requirements of proximity (both in time and space, and in method of perception) should be abolished. They also suggested that the requirement for psychiatric injury to be caused by “sudden shock” should be abandoned.

The majority of the House of Lords in *White* were not in favour of these views. The control devices in *Alcock* still apply, unless primary victim status is established.

All the same, there seems to be some movement away from certain restrictions of the *Alcock* test. In *Robinson v St Helens MBC* [2002] EWCA Civ 1099 the reaction to misdiagnosis of dyslexia was held to be in principle a personal injury “although it fell short of psychiatric injury in the recognised form”. In *Walters v North Glamorgan NHS Trust* [2002] EWCA Civ 1792 the cumulative response of a mother to the illness and death of her child over several days as a result of medical negligence founded liability even in the absence of a single sudden shock.¹⁰⁵ *Atkinson v Seghal* [2003] LTL 21.3.03¹⁰⁶ in relation to “aftermath” is also worth mentioning.

¹⁰⁵ See above

¹⁰⁶ See above

8 CONCLUSION

The issue of liability for psychiatric illness provokes a range of strongly-held opinions. At one end of the scale are those who argue that the same principles that apply to liability for physical injury should be applied to liability for psychiatric illness, and that there is no legitimate reason to impose special restrictions in respect of claims for the latter¹⁰⁷. In the words of Mullany:¹⁰⁸ “In the push for tort reform it must always be remembered that liability will not lie in the absence of proven fault. This fact is often forgotten in the cry to contain or cut back liability.” At the other extreme are those who argue that liability for psychiatric illness should be abandoned altogether. They say that the arbitrary rules which are required to control potential liability are so artificial that they bring the law into disrepute¹⁰⁹.

Weir¹¹⁰ may have a point saying: “This is surely an area in which it is best to adopt rules that are clear, even if artificial, since the claimants will inevitably (unless lying) be in a disturbed state which is sure to be worsened by prolonged uncertainty about the outcome of their claim.”

By distinguishing between the “primary victim” who suffers physical injury and the “secondary victim” who suffers psychiatric illness one is simply re-stating the way of thinking that physical injury is somehow superior to, or morally more entitled to compensation than, psychiatric illness. It is arguable that the fear of opening the “floodgates” is based on the same belief. If one accepts the idea that psychiatric illness is just as substantial and disabling as physical injury and is just as much a subject for compensation under the tort system then the distinction primary/secondary dissolves.

A “primary” victim, whether it is a person who fears for her own safety (*Dulieu*), a rescuer (*Chadwick*) or an involuntary participant in the events (*Dooley*) has suffered psychiatric illness as a consequence of what he or she has experienced, just as the relatives in *Alcock*

¹⁰⁷ See e.g. Mullany (1993)

¹⁰⁸ (2002) 118 LQR 373

¹⁰⁹ See e.g. Stapleton; extracted in Lunney and Oliphant (2003) at 333

¹¹⁰ (2002)

suffered psychiatric illness as a result of what they had experienced. The mechanism by which the psychiatric illness was caused is essentially the same in the case of both “primary” and “secondary” victims. What possible reason can there be for distinguishing between them? In other common law jurisdictions such as Australia and Canada the distinction primary/secondary is not seen.

The requirements of “direct perception of the accident or its immediate aftermath” and “sudden shock” before a so-called secondary victim can recover damages have attracted serious academic criticism.¹¹¹ They serve only to put an arbitrary limit on the number of claims that can be successfully made. In addition, it has no support from the perspective of psychiatry. It would perhaps be better for that limit to be based on the severity of the harm suffered by the claimant or the culpability of the defendant’s conduct, or some similar factor related to justice.

One of the problems with arbitrary limits is that they are often difficult to interpret and apply. A judge who is uncertain about how to interpret or apply a rule will usually be guided by the reasons for that rule, but such guidance is unavailable when the rule is acknowledged to be arbitrary. Did the claimant “perceive a horrifying event” or was he “told about a horrifying event”, whether with “sudden impact” or “gradual dawning”?

Liability for psychiatric illness arises in England exclusively as a matter of common law, but, as has been noted, there are growing calls for legislative reform. Such reforms have already been introduced in other Commonwealth jurisdictions. Time will show whether a reform of any nature will be made to English law. As of yet, the assessment of the Law Commissions recommendations, which was thought to be finished by early 2000, is still not complete. An alternative is to hope that the courts are willing to consider a gradual judicial implementation of the Commissions proposals.

¹¹¹ See e.g. Teff (1996) 4 Tort L Rev 44

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