Rosamund Smith Mooting Competition 2022, Semi-Final 2
Moot problem

IN THE COURT OF APPEAL, CIVIL DIVISION

NHS Frimley Health Foundation Trust (Appellant) v Lola Giordano (Respondent)

1. In the early morning of 17 September 2019, Amelia Clark, a 31 year old pregnant woman, started experiencing strong contractions and her waters broke. She was 37 weeks gestation and had an uncomplicated pregnancy. Amelia contacted her local NHS Trust, the Appellant in this case, who advised her to make her way to the maternity unit. However, Amelia's partner, George Gleave, was on a night shift at the time she went into labour and could not be contacted until he finished his shift at 9am.
2. Being unable to drive to hospital herself, Amelia knocked on her neighbour's door and asked for her assistance. Amelia had known her neighbour, Lola Giordano, for many years, having grown up in the area since she was child. Lola had two adult children of her own and was a teacher, so Amelia thought that Lola would be a good backup birth partner. Amelia's mother died when she was 17 years old and Lola had taken on a role as Amelia's mother figure in the intervening years. Amelia sometimes even stayed with Lola when her and George had relationship problems.
3. Lola and Amelia drove to Frimley Park Hospital and arrived shortly after 1am, where Amelia was admitted to the labour ward. Amelia was placed under constant monitoring because her waters had broken. Amelia was experiencing severe pain and discomfort almost immediately following admission to the ward. Lola remained with Amelia throughout the morning as her labour progressed, witnessing Amelia's severe discomfort. Around 5am Amelia requested an epidural for pain relief, but the epidural fell out and had to be re-inserted. After 3 failed attempts at insertion, the epidural was abandoned. This was very distressing for Amelia who was screaming in pain and Lola was becoming concerned for Amelia's welfare.
4. Around 8.30am on the morning of 17 September 2019, the fetal heart rate monitor picked up a drop in the baby's heart rate, signifying that the baby

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was now in distress. An emergency call was triggered and doctors and nurses came rushing in the room. The obstetric registrar examined Amelia and declared that the baby needed to be delivered in an emergency as the heart rate was not recovering. At this point, the registrar prepared Amelia for an instrumental delivery, using ventouse to deliver the baby. It took 3 attempts to do so and at 9.04am a baby girl was delivered.

5. The baby girl was born lifeless and blue and was immediately taken for resuscitation in one corner of the room. Amelia was screaming and trying to get to her baby but could not do so as she was suffering a severe postpartum haemorrhage and began to lose consciousness. Due to negligence in the performance of the instrumental delivery, Amelia had to be rushed to theatre for emergency life-saving treatment. At this point, Lola started to panic and did not know whether to stay with the baby or to be with Amelia. She was also responsible for calling George, Amelia's partner, to let him know what had happened and to tell him to make his way to the hospital.
6. The baby girl was successfully resuscitated and survived but with brain damage impacting her for the rest of her life. Amelia did recover from her haemorrhage but was in hospital for 2 weeks and subsequently suffered postnatal depression following her discharge from hospital. Lola experienced frequent flashbacks of the labour and the moment that the baby girl was taken for resuscitation. Lola suffered panic attacks and found it very distressing every time she saw the baby girl out walking with Amelia. Lola was subsequently diagnosed with Post Traumatic Stress Disorder.
7. A clinical negligence claim was brought against NHS Frimley Health Foundation Trust. The Trust accepted liability for the injury caused to the baby and Amelia during the birth but did not accept liability for Lola's injuries.
8. At first instance, Russell J held that the Trust were liable for Lola's psychiatric injury on the grounds that Lola was a secondary victim under the *Alcock* criteria (*Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310). She was proximate in time and space to the childbirth, witnessed the birth with her own sight, and, had a close tie of love and affection with Amelia as her neighbour.
9. The Trust appealed on the following grounds:

(1) Russell J erred in law because he failed to consider whether there was a sudden shocking event which violently agitated the mind (*Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310) in this case. The Trust submitted that childbirth does not automatically constitute a sudden, shocking event and a period of eight hours cannot be categorised as a sudden shocking event. On the facts, there was no relevant element that met the requirements of a shocking event which violently agitated the mind.

(2) Lola was not a secondary victim. While the Trust accepted that she was proximate in time and space and did perceive the event with her own sight and senses, they submit that Lola did not have a close tie of love and affection such that she could recover for psychiatric injury.

Moot problem set by:
Jaime Lindsey
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6 June 2022

Neutral Citation Number: [2015] EWCA Civ 588

Case No: B2/2013/2430

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM LIVERPOOL COUNTY COURT
HIS HONOUR JUDGE GORE QC
1IR21287

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 17th June 2015

Before:

LORD JUSTICE SULLIVAN
LORD JUSTICE TOMLINSON
and
LORD JUSTICE BEATSON

- -

Between:

Liverpool Women's Hospital NHS Foundation Trust	**Appellant/ Defendant**
- and -	
Mr Edward Ronayne	**Respondent /Claimant**

(Transcript of the Handed Down Judgment of
WordWave International Limited
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Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Charles Cory-Wright QC (instructed by **Hill Dickinson LLP**) for the **Appellant**
Amanda Yip QC and Simon Fox (instructed by **Maxwell Hodge Solicitors**) for the **Respondent**

Hearing dates: 22 April 2015

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Judgment
As Approved by the Court

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Lord Justice Tomlinson:

Introduction

1. In July 2008 the Respondent Edward Ronayne, Claimant at trial, was 53 years old. He was an ambulance driver. Although working on the non-emergency side, he was used to seeing people on life support in the course of his work.

2. On 8 July 2008 the Claimant's wife, Julie Ronayne, was admitted to the Liverpool Women's Hospital, administered by the Appellant NHS Foundation Trust, Defendant at trial, where she underwent a hysterectomy.

3. A few days after discharge Mrs Ronayne became unwell with a high temperature, thirst and shallow breathing. In the early morning of 18 July she was admitted to the Royal Liverpool University Hospital by way of its Accident and Emergency department. During the course of a period of about 24 hours the Claimant observed a rapid deterioration in the condition of his wife, manifested most vividly in two distinct episodes:-

    (a) At about 5.00pm on 18 July, shortly before she underwent emergency exploratory surgery, he observed her connected to various machines, including drips, monitors etcetera;

    (b) Sometime on the following day he observed her in her post-operative condition. She was unconscious, connected to a ventilator and was being administered four types of antibiotic intravenously. Her arms, legs and face were very swollen. Pressure pads were in place to keep the blood in her legs flowing. Three years later Mr Ronayne described his wife's then appearance to a consultant psychologist, Dr Eileen Bradbury, who gave evidence at trial, as resembling the "Michelin Man."

4. It is common ground that Mrs Ronayne's condition on 18 and 19 July was a consequence of the negligence of the Appellant Trust in the performance of the hysterectomy. A suture was misplaced in her colon, in consequence of which she developed septicaemia and peritonitis. Although Mrs Ronayne remained in intensive care for a further nine weeks, developed a MRSA infection and had to deal with other extremely unpleasant complications, happily she has, so far as I am aware, made a complete recovery. This case is not concerned with her grievous suffering.

5. The Claimant alleged at trial that he suffered psychiatric injury in the shape of post traumatic stress disorder, "PTSD", consequent upon the shock of seeing his wife's sudden deterioration on 18 July, and in particular her appearance on the two distinct occasions I have described. At trial therefore he claimed damages as a secondary victim of the Appellant's admitted negligence.

6. His claim succeeded in the Liverpool County Court, although not on the basis asserted, before His Honour Judge Allan Gore QC, a judge of immense experience in this field. The judge rejected his case that he suffered from PTSD, but nonetheless found that he suffered from a frank psychiatric illness which the judge thought it unnecessary to specify by reference to the established taxonomy. He was awarded

damages of £9,165.88 inclusive of interest. The Appellant appeals. It will be immediately apparent that, leaving on one side costs, which are not insignificant, this case has an importance to health authorities which goes far beyond the award here made.

7. The Appellant does not accept the judge's somewhat enigmatic conclusion that the Claimant suffered a frank psychiatric disorder, to which the judge, expressing an aversion to the attribution of what he called labels, would have attached the description adjustment disorder had that been thought relevant. Mr Charles Cory-Wright QC, for the Appellant, did however accept that the court may feel that the judge had just sufficient evidence to find that the Claimant had suffered adjustment disorder, as opposed to anger and stress falling short of psychiatric illness, which was the opinion of Dr Lesley Faith, the consultant psychiatrist called by the Appellant. This is an important point for, as pointed out by Lord Steyn in *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455 at 491H, in this field "only recognisable psychiatric illness ranks for consideration" by which he meant, in context, compensation. Nonetheless, the position adopted by Mr Cory-Wright was realistic.

8. The appeal has therefore concentrated upon two interrelated points:-

   (a) Whether the events concerned were of a nature capable of founding a secondary victim case, i.e. were they in the necessary sense "horrifying"; and

   (b) Whether the sudden appreciation of that event or those events, i.e. shock, caused the Claimant's psychiatric illness.

   Bound up in those questions is the distinct issue, what was here the event or events said to be of a sufficiently horrifying character?

9. Although it is inappropriate to revisit the judge's conclusion that the Claimant suffered from an adjustment disorder, I should indicate that for my part I think that the judge was, with great respect, wrong to be dismissive of the utility of diagnosis or label. Whilst I understand his point that he was concerned only to ascertain whether the Claimant had sustained a frank psychiatric illness, close attention to diagnostic criteria is in my view likely in this field to be of assistance in resolving what are often complex questions of causation. At the very least, attribution of a label introduces what might be characterised either as a discipline or as a cross-check, according to taste. I am not sure that the judge would have come to the conclusion he did on causation had he paid closer attention to the diagnostic criteria for adjustment disorder, and to the significance of the fact that he had found the elements of PTSD not to be made out.

The law

10. It is common ground that on the points in dispute on this appeal the judge directed himself correctly in law, founding on *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 and *White*, above, by identifying the four requirements for recovery established by those authorities, *viz*:-

(a) The Claimant must have a close tie of love and affection with the person killed, injured or imperilled;

(b) The Claimant must have been close to the incident in time and space;

(c) The Claimant must have directly perceived the incident rather than, for example, hearing about it from a third person; and

(d) The Claimant's illness must have been induced by a sudden shocking event.

To this list the judge added a fifth requirement to which I have already adverted, that the Claimant must have suffered frank psychiatric illness or injury as opposed to what Lord Oliver described in *Alcock* at page 410E as

> "grief, sorrow, deprivation and the necessity for caring for loved ones who have suffered injury or misfortune [which] must, I think, be considered as ordinary and inevitable incidents of life which, regardless of individual susceptibilities, must be sustained without compensation."

11. It is unnecessary on this appeal to revisit the "control mechanisms" which regulate recovery in this field, which can be said to be both arbitrary and pragmatic but which are well-understood, binding on us, and which were considered only recently by this court in *Taylor v Novo* [2014] QB 150. The question is whether the judge correctly applied the principles and in particular the fourth criterion as broken down into the two issues identified at paragraph 8 above.

12. In *Alcock*, Lord Ackner said, at page 401F:-

> ""Shock" in the context of this cause of action, involves the sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind. It has yet to include psychiatric illness caused by the accumulation over a period of time of more gradual assaults on the nervous system."

13. In *Shorter v Surrey & Sussex HC NHS Trust* [2015] EWHC 614 QB Swift J, who also has enormous experience in this field, was concerned with a claimant who saw her sister in undeniably distressing circumstances in hospital. It was suggested that the claimant's professional background – she was a radiographer – gave her an unusual degree of insight into her sister's medical condition and that, as a result, she would have been more sensitive to events at the hospital and therefore more likely to find them "horrifying". Swift J said this, at paragraph 214:-

> "… it seems to me that it is necessary to be cautious in finding that the Claimant's professional expertise made the sight of Mrs Sharma more "horrifying" than it would have been to a person without that knowledge. I consider that the "event" must be one which would be recognised as "horrifying" by a person of ordinary susceptibility; in other words, by objective standards. After all, certain people would find it *more*

> frightening to have no medical knowledge and not to know what was going on; they may feel helpless and isolated. Others may have armed themselves in advance with medical information from the internet which leads them to feel far greater fear than is in fact justified. It would be unfortunate if secondary victims' claims were to become embroiled in debates about an individual claimant's level of medical knowledge and its effects upon whether an "event" should be classified as "horrifying"."

I respectfully agree with those observations, and in particular with the judge's view that the question whether an event is for these purposes to be recognised as in the relevant sense "horrifying" must be judged by objective standards and by reference to persons of ordinary susceptibility.

14. I have also found helpful in orientating myself in this jurisprudential field the observations of another judge, His Honour Judge Hawkesworth QC. In *Ward v The Leeds Teaching Hospital NHS Trust* [2004] EWHC 2106 (QB) he was dealing with a claim by a mother who had witnessed her 22 year old daughter motionless in the recovery unit after failing to emerge from anaesthesia following a routine operation to remove a wisdom tooth. Four events said to be shocking were relied upon:-

(a) Seeing Catherine motionless in the recovery unit and touching her hand;

(b) Seeing her in the intensive care unit with a variety of tubes present;

(c) Seeing her in the chapel of rest bleeding from her ears with her neck and chest area bruised as if she had been battered;

(d) Being informed that the brain would be kept for examination.

The judge had to decide whether Mrs Ward had suffered PTSD. At paragraph 21 he said this of the evidence of the Defendants' consultant psychiatrist:-

> "Dr Reveley's opinion as to PTSD is founded upon a wide experience of reporting upon incidents which without question met the relevant criteria for PTSD – Kings Cross, Hillsborough and other such major disasters. Her insistence that a necessary criterion must be a clearly shocking event of a particularly horrific nature seemed to me to accord with the diagnostic criteria produced in evidence. An event outside the range of human experience, sadly, does not it seems to me encompass the death of a loved one in hospital unless also accompanied by circumstances which were wholly exceptional in some way so as to shock or horrify. Mrs Ward's own descriptions of these incidents did not strike me as shocking at the time in that sense, although undoubtedly they were distressing. To describe an event as shocking in common parlance is to use an epithet so devalued that it can embrace a very wide range of circumstances. But the sense in which it is used in the

> diagnostic criteria for PTSD must carry more than that colloquial meaning."

That was said in the context of a determination whether PTSD had been suffered, as opposed to a severe and prolonged bereavement reaction, but the same principles apply, *mutatis mutandis*, to an assessment whether an event should properly be characterised as shocking in the sense intended by Lord Ackner in *Alcock*.

15. In seeking to allocate to this case its appropriate place on the spectrum between circumstances which attract compensation and those which do not, I have also found it helpful to consider the facts in the decided cases. In addition to the cases to which I have already made reference we were also referred by Counsel to *McLoughlin v O'Brian* [1983] AC 410; *Taylor v Somerset Health Authority* [1993] PIQR P262; *Taylorson v Shieldness Produce Limited* [1994] PIQR P329; *Sion v Hampstead HA* [1994] 5 Med LR 170 – 193-200; *North Glamorgan NHS Trust v Walters* [2003] PIQR P16; *Galli-Atkinson v Seghal* [2003] Lloyds Rep Med 285; *Wild v Southend University Hospital NHS Trust* [2014] EWHC 4053 (QB); and *Brock v Northampton General Hospital NHS Trust* [2014] 4244 (QB).

16. I do not propose to rehearse here the facts in all those cases. *McLoughlin v O'Brian* was however the first "nervous shock" case to reach the House of Lords since the rejection of the claim in *Bourhill v Young* [1943] A.C. 92. The facts as recounted by Lord Wilberforce at pages 416-7 can perhaps be regarded as a paradigm of those in which the pragmatic control mechanisms permit recovery:-

> "This appeal arises from a very serious and tragic road accident which occurred on 19th October 1973 near Withersfield, Suffolk. The appellant's husband, Thomas McLoughlin, and three of her children, George, aged 17, Kathleen, aged 7 and Gillian, nearly 3, were in a Ford motor car: George was driving. A fourth child, Michael, then aged 11, was a passenger in a following motor car driven by Mr. Pilgrim: this car did not become involved in the accident. The Ford car was in collision with a lorry driven by the first respondent and owned by the second respondent. That lorry had been in collision with another lorry driven by the third respondent and owned by the fourth respondent. It is admitted that the accident to the Ford car was caused by the respondents' negligence. It is necessary to state what followed in full detail.
>
> As a result of the accident, the appellant's husband suffered bruising and shock; George suffered injuries to his head and face, cerebral concussion, fractures of both scapulae and bruising and abrasions; Kathleen suffered concussion, fracture of the right clavicle, bruising, abrasions and shock; Gillian was so seriously injured that she died almost immediately.
>
> At the time, the appellant was at her home about two miles away; an hour or so afterwards the accident was reported to her by Mr. Pilgrim, who told her that he thought George was dying, and that he did not know the whereabouts of her husband or the

> condition of her daughter. He then drove her to Addenbrooke's hospital, Cambridge. There she saw Michael, who told her that Gillian was dead. She was taken down a corridor and through a window she saw Kathleen, crying, with her face cut and begrimed with dirt and oil. She could hear George shouting and screaming. She was taken to her husband who was sitting with his head in his hands. His shirt was hanging off him and he was covered in mud and oil. He saw the appellant and started sobbing. The appellant was then taken to see George. The whole of his left face and left side was covered. He appeared to recognise the appellant and then lapsed into unconsciousness. Finally, the appellant was taken to Kathleen who by now had been cleaned up. The child was too upset to speak and simply clung to her mother. There can be no doubt that these circumstances, witnessed by the appellant, were distressing in the extreme and were capable of producing an effect going well beyond that of grief and sorrow."

Of this case Mr Cory-Wright rightly observed that whilst it was an "aftermath" case, it could properly be said that Mrs McLoughlin came upon the accident, albeit transposed into the setting of the hospital.

17. I consider it telling that there is, so far as the experienced Counsel who appeared before us were aware, only one reported case in which a claimant has succeeded at trial in a claim of this type in consequence of observing in a hospital setting the consequences of clinical negligence. That is in my view unsurprising. In hospital one must expect to see patients connected to machines and drips, and as Mr Cory-Wright put it, expect to see things that one may not like to see. A visitor to a hospital is necessarily to a certain degree conditioned as to what to expect, and in the ordinary way it is also likely that due warning will be given by medical staff of an impending encounter likely to prove more than ordinarily distressing.

18. The exceptional case is *Walters*, which had the unusual feature of a mother witnessing at first hand her infant child undergoing a fit in consequence of negligence, and the circumstance that thereafter she was unprepared for the sequelae because she had been reassured by further incorrect medical advice. I gratefully adopt, with only one or two adaptations, Swift J's account of the facts of this case, as set out in her judgment in *Shorter*.

19. The case concerned the negligent treatment of the respondent's young baby. When he was aged ten months, he became unwell and was admitted to hospital. He was mistakenly diagnosed as suffering from hepatitis A. In fact, he was suffering from acute hepatitis which led to liver failure. The NHS Trust responsible for the relevant hospital (the appellant) admitted that he had not been properly diagnosed or treated and that, if he had been, he would have been given a liver transplant and would probably have lived.

20. In the event, the baby was kept in the hospital whilst various tests were carried out, but was allowed home at weekends. One weekend, his condition deteriorated and his parents took him back to hospital. The respondent mother stayed with him there, sleeping in the same room. Two days or so after his readmission, the respondent

awoke to hear the baby making choking noises in his cot. She saw a blood-like substance and his body was still. A nurse told the respondent that he was having a fit. He was transferred to the ICU and, shortly afterwards, the respondent was told by a doctor that it was very unlikely that the baby would have serious damage as a result of the fit. She understood that he might at worst be slightly brain damaged; she did not consider it was life threatening. This information was, in fact, wholly wrong. The baby had suffered a major epileptic seizure leading to a coma and irreparable brain damage. A few hours later, after a CAT scan, the respondent was told that there was no damage to her baby's brain, but that he should be transferred to King's College Hospital, London for a liver transplant. He was taken there by ambulance later that day and underwent on arrival a further CAT scan which showed diffuse brain injury consistent with a profound hypoxic ischaemic insult. The respondent and her husband followed the ambulance by car.

21. Approximately two and a half hours after his admission to King's College Hospital, the respondent and the baby's father arrived at the hospital in the evening. There, she was told by doctors that the baby had suffered severe brain damage as a result of the fit and was on a life support machine. She was told that, if he had a liver transplant, the chances of success were only 50-50 and he would be severely handicapped. The respondent described herself as "numb, panic stricken and terrified" at what she was told. On the following day, she was told that the brain damage was so severe that her son would have no quality of life if he survived. The parents were asked whether or not they felt that it was in their son's interest to continue with life support. They made the decision that life support should be terminated, this was done shortly afterwards and the baby died in the respondent's arms.

22. The psychiatrists who gave expert evidence agreed that the respondent had suffered a recognised psychiatric illness, namely pathological grief reaction. They also agreed that, absent the events that were witnessed, experienced and participated in by the respondent over the period of her son's illness, her pathological grief reaction would not have occurred.

23. The trial judge, Thomas J as he then was, directed himself that:

> "… the essence of what the claimant must show is that the psychiatric illness was brought about through the sudden appreciation by sight or sound of a horrifying event that affected her mind. Although the psychiatrists are agreed that she suffered "shock" and I am satisfied that her mind was violently agitated, the question is whether what happened was a sudden appreciation by sight or sound of a horrifying event rather than an accumulation over a period of time of more gradual assaults on the nervous system and that it was that sudden appreciation that caused the pathological grief reaction."

He identified "the essence of the [respondent's] case" as being that the 36 hour period beginning with the moment at which she was wakened by her son's fit until the moment at which the life support machine was switched off could be looked on as a "horrifying event" which she suddenly appreciated, in contradistinction to the accumulation over a period of time of more gradual assaults on the nervous system.

He held that an event could cover "in ordinary parlance something that occurs over several days".

24. Giving the leading judgment in the Court of Appeal, Ward LJ approved the trial judge's decision. At paragraph 34 he dealt with the meaning of the word "event":

> " In my judgment the law as presently formulated does permit a realistic view being taken from case to case of what constitutes the necessary "event". Our task is not to construe the word as if it had appeared in legislation but to gather the sense of the word in order to inform the principle to be drawn from the various authorities. As a word, it has a wide meaning as shown by its definition in the Concise Oxford Dictionary as: "An item in a sports programme, or the programme as a whole". It is a useful metaphor or at least a convenient description for the "fact and consequence of the defendant's negligence", per Lord Wilberforce, or the series of events which make up the entire event beginning with the negligent infliction of damage through to the conclusion of the immediate aftermath whenever that may be. It is a matter of judgment from case to case depending on the facts and circumstances of each case. In my judgment on the facts of this case there was an inexorable progression from the moment when the fit occurred as a result of the failure of the hospital properly to diagnose and then to treat the baby, 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. It is a seamless tale with an obvious beginning and an equally obvious end. It was played out over a period of 36 hours, which for her both at the time and as subsequently recollected was undoubtedly one drawn-out experience."

At paragraph 36, when considering whether the event was "horrifying", Ward LJ said:

> "For my part the facts only have to be stated for the test to be satisfied. This mother awakens to find her baby rigid after a convulsion. Blood is coming from his mouth. He is choking. Is that not as much an assault upon her senses as if her child had been involved in a road accident, suffered grievous head injuries as yet undetected and was found bleeding in the car seat? Her fear and anxiety was undoubtedly calmed not only afterwards when given an incorrect medical opinion that it was very unlikely and would be very unlucky if Elliot had suffered serious damage. Every mother would seize upon the good news for her comfort to reduce the impact of the horror. Consequently, all the more likely it is that she should have felt numb, panic stricken and terrified by the sudden turn in events when she arrived at King's College Hospital. That left her stunned. As the consultant observed she "responded as if half in a dream…in a state of emotional shock". Her hopes were lifted then they were dashed and finally destroyed when shortly

> thereafter she was advised to terminate treatment on the life support machine. That she should have felt that "this was a complete shock" seems to me to be inevitable. That her immediate reaction should have been one of anger is understandable. Anger is part of the grieving process. But the agreed medical evidence made it plain that the combination of events "witnessed and experienced" caused her pathological grief reaction and was different from a normal grief reaction. They must have been chilling moments, truly shocking events, as the experts agreed in answer to the seventh question put to them, and thus amply justifying the conclusion that this was a horrifying event."

25. Ward LJ then went on to deal with the element of "sudden appreciation of the horrifying event" which is an aspect of proximity necessary to establish liability. As he observed at paragraph 38:

> "Without the sudden and direct visual impression on the claimant's mind of actually witnessing the event or its immediate aftermath, there is no liability".

He considered that the judge had been fully justified in coming to the conclusion that the respondent's appreciation had been "sudden". Being awoken by her baby's convulsion and seeing his state had been "a sudden assault on her mind". In the same way, the bad news given to her at King's College Hospital the following morning could, he found, be characterised as "sudden and unexpected assaults on her mind". He summarised the effects thus:

> "The first…event in the series is her being woken by her child's convulsion. What she saw was unexpected. That amounted to a sudden assault on her mind. The next event is arriving at the hospital, hopes high. She is given news she did not expect and did not want. The reaction was to leave her stunned. That was a sudden and unexpected assault on her mind. The next day she is told she should switch off the life support machine. Perhaps she feared it might be so but does one doubt the consultant's evidence that she and her partner "found it particularly devastating because they thought they had been reassured prior to Elliot's transfer that his condition was treatable"? Each of these three events had their impact there and then. This is not a case of gradual dawning of realisation that her child's life had been put in danger by the defendant's negligence. A consequence of that negligence was that the child was seized with convulsion. She was there witnessing the effect of that damage to her child. The necessary proximity in space and time is satisfied. The assault on her nervous system had begun and she reeled under successive blows as each was delivered. It comes as no surprise to me that when her new baby was ill she should suffer the flashbacks of 36 horrendous hours which wreaked havoc upon her mind"

The Court of Appeal dismissed the appeal against the judge's decision.

The facts

26. With that introduction I turn to the facts in the present case. The judge did not set out the facts in the traditional manner but referred to the most relevant episodes in the course of expressing his conclusions, particularly at paragraphs 10, 19 and 21 of his judgment. I think it helpful to set out the facts in a little more detail, since it assists in an evaluation of the critical period which the judge regarded as constituting the relevant "event". The judge regarded the Claimant as an honest and reliable witness and so I can take the relevant facts from his own witness statement prepared for use at the trial.

27. Mrs Ronayne was discharged from the Liverpool Women's Hospital on 10 July. The surgery had apparently gone well. Mr Ronayne collected her and took her home. His account of what transpired thereafter is as follows:-

> "4. Julie was sore immediately after the operation, which we expected, and aside from her temperature being slightly raised, she seemed generally fine. She was taking Paracetamol for the temperature.
>
> 5. I suppose things started to go wrong when Julie's temperature continued to stay high for a few days, and rather than her postoperative discomfort improving, it seemed to be getting worse. I suggested she go back to hospital but Julie was reluctant because she hates hospitals. She said just leave it until Monday.
>
> 6. Over that weekend, Julie spent most of her time lying down. I was on 12-hour shifts at the time, but I was calling home periodically to speak to her to see how she was. She was telling me that she was okay, although I think she was probably downplaying things.
>
> 7. On Thursday night, 17th July 2008, I arrived home from work. I asked the kids how their mum was? They said she was not too good and so she had gone upstairs to bed. Her temperature was still high.
>
> 8. I went upstairs to see Julie and told her I wanted to call the hospital because she had had a week of high temperature, and she needs to get it sorted. Julie still wouldn't have it, saying she would just take more Paracetamol.
>
> 9. I went back downstairs to have my dinner. When I went up, I got into my son Phil's bed because Julie was struggling to get any sleep. I then heard Julie calling me. I got up and found her in the bathroom. She was white, her breathing was shallow and her temperature was still high. I told her I wanted to take her to hospital. Julie suggested I ring the Liverpool Women's

Hospital first, which I did, and spoke to a nurse. The nurse asked me to put Julie on. She managed to convince Julie that she should go to the Royal Liverpool University Hospital Accident & Emergency Department.

10. We went to A&E on 18th July. The doctors said they would need to carry out tests, including bloods, urine tests and an x-ray. We were there all night. The doctors told us there was a shadow over Julie's lower lung and her bloods were abnormal. They wanted to do further tests. As I had been up over 24 hours, I went home to get some sleep. I was concerned at that point, but thought Julie would ultimately be ok, now that she was at hospital.

11. I received a phone call from the hospital late afternoon on Friday, 18th July 2008. I was told Julie was going in for an operation. They just told me they had found abnormalities in her blood and suggested I come down to speak to the doctor to find out more.

12. My son and I went straight to the hospital and went to the Assessment Unit where Julie was. When we spoke to the doctor, she again said Julie's bloods had shown abnormalities. Julie had undergone a CT scan, and they found a mass in her abdomen. They said they did not know what it was. I was very very worried, although God knows what I was thinking at that stage.

13. They then took us to see Julie. I was in complete shock at seeing her due to the extent of deterioration. She was hooked up to machines, including drips, monitors, etc. I had taken her into hospital just 12 hours or so before with a high temperature and feeling unwell. I could not believe the difference. My son was very upset, as was I, but I had to hold back my emotions for his sake, to try to be strong for him. I was trying to reassure him that his mum would be okay, whilst wondering in my own mind if she would be.

14. In the job I do, I have seen very sick people. However, when it is your own wife, it really hits home. When I walked in and saw Julie in the bed after I had left her just hours earlier, it was like being punched. To see your own flesh and blood with all of those tubes hanging out was extremely difficult.

15. We were told the doctors did not know what was causing the problem, but Julie would have to go to theatre. We were told to say our goodbyes before she went. I was very, very concerned. I recall thinking what the hell is going on? I knew that her condition – whatever it was – was deadly serious if they were taking her straight to theatre. I kept telling my son

and was a sudden and shocking trigger to the mental illness that I have found."

Discussion and Conclusions

33. I do not for a moment doubt the profound distress which the Claimant must have suffered in consequence of the appalling sequence of events which unfolded after the initial realisation that his wife was not recovering as expected from the surgery which she underwent on 8 July. Anyone would have the most profound sympathy for a loving husband and father who has in consequence suffered psychiatric illness. Nonetheless, the circumstances with which the Claimant was confronted in my judgment fall far short of those which have been recognised by the law as founding secondary victim liability.

34. There is some confusion in the judge's paragraphs 10, 19 and 21 as to the precise dates involved, but it is I think clear that the judge treated as the relevant event here the period beginning with "the sight of the sudden shocking state and condition of his wife" when he first saw her at about 1700 on 18 July prior to surgery connected to drips, monitors etc through to the first moment when he saw her in her post-operative swollen condition, connected to life support systems.

35. In my judgment the judge was wrong to regard the events of this period of probably about 36 hours as, for present purposes, one event. It was not, like *Walters*, "a seamless tale with an obvious beginning and an equally obvious end." In Walters the obvious beginning was the mother awakening to see her baby rigid and choking after a convulsion, with blood pouring out of his mouth. The obvious end was the tragic death of the baby in the mother's arms. The working out of the tragedy, with the raising of hopes, the journey up the motorway to London following in the wake of the ambulance, and the dashing of hopes and then their final destruction was almost Sophoclean in its seamlessness.

36. The present case is in my judgment not comparable, just as Swift J found the facts in *Shorter* not comparable. As there, so here, there was in my judgment a series of events over a period of time. There was no "inexorable progression" and the Claimant's perception of what he saw on the two critical occasions was in each case conditioned or informed by the information which he had received in advance and by way of preparation.

37. In the first place, I do not regard the sight of his wife at about 1700 on 18 July as the obvious beginning of a distinct event. It is nothing like the "assault upon the senses" to which Mrs Walters awoke which Ward LJ equiparated with the mother seeing her child bleeding in a seat after a road traffic accident, and compare also the facts in *McLoughlin v O'Brian*. The Claimant knew from his time at the hospital earlier in the morning that abnormalities had been found, a shadow on his wife's lower lung and abnormalities in the blood. Before he saw her later in the day he knew that, as a result of a CT scan, a mass had been found in her abdomen which the doctors could not identify. He knew before seeing her that she was to go into theatre for immediate surgery, and he knew that that meant that her condition, whatever it was, was, in his own words, "deadly serious." In these circumstances I regard it as artificial to regard

the sight of his wife in her pre-operative condition as constituting the beginning of an event distinct from what had gone before.

38. Equally I regard it as wholly artificial to describe the sight of his wife in her post-operative condition as the end of a distinct event. It was all part of a continuum. Thankfully it was very different in nature from the death which occurred in *Walters*. The Claimant knew that the next 24 hours were critical, and that the story was far from over. As it turned out, the story had many weeks and months to run.

39. Furthermore this sequence of events was far from seamless. The Claimant went home whilst his wife underwent surgery. At 11.30 that evening the Claimant was told that things had gone well and that there was no point in his returning to hospital as his wife was unconscious. He was told to visit the next day. Before next seeing his wife it was explained to him that the mass on the CT scan had been discovered to be "bad peritonitis" and it was further explained to him that she was being treated with a cocktail of antibiotics, but that the next 24 hours were critical. In other words, it was explained to him that her life was in danger. It was explained to him that a suture had been found in her colon which had permitted bacteria to leak into the abdominal wall and had poisoned her blood. The Claimant deduced, if it was not explained, that a mistake had been made in carrying out the hysterectomy. He was overwhelmed by anger.

40. It follows that this was not in my judgment a case in which there was a sudden appreciation of an event. As Swift J found in *Shorter*, there was a series of events which gave rise to an accumulation during that period of gradual assaults on the Claimant's mind. Ward LJ in *Walters* contrasted what there occurred with a "gradual dawning of realisation that her child's life had been put in danger by the defendant's negligence," which would not have amounted to a sudden and unexpected assault on her mind. That in my judgment is an apt description of what here occurred – a gradual realisation by the Claimant that his wife's life was in danger in consequence of a mistake made in carrying out the initial operation. At each stage in this sequence of events the Claimant was conditioned for what he was about to perceive. Before first seeing his wife connected to drips, monitors etc he knew, of course, that she was in hospital, and that that was because she was not recovering as expected from her operation and was running a high temperature. He knew that abnormalities had been found and that she was to undergo immediate exploratory surgery. There was in these circumstances nothing sudden or unexpected about being ushered in to see her and finding her connected to medical equipment as she was. Similarly the next day. One important purpose of the doctor wishing to have a word with Mr Ronayne before he visited his wife for the first time after the operation was no doubt to prepare him for the condition in which he would find her. There is no evidence that the doctor warned of her swollen appearance, and I will assume that he did not, but he did warn that she was gravely ill. The really bad news, that her life was in real danger, was imparted orally. Further, it was the explanation of the mistake which had led to this state of affairs which induced in the Claimant extreme anger before the second of the incidents said to be part of the shocking event, the sight of his swollen wife on life support. Having been told of the severity of his wife's condition and that she was being administered a cocktail of antibiotics, it cannot in my judgment be said that what thereafter occurred had the necessary element of suddenness.

41. Furthermore what the Claimant saw on these two occasions was not in my judgment horrifying by objective standards. Both on the first occasion and on the second the appearance of the Claimant's wife was as would ordinarily be expected of a person in hospital in the circumstances in which she found herself. What is required in order to found liability is something which is exceptional in nature. On the first occasion she was connected to monitors and drips. The reaction of most people of ordinary robustness to that sight, given the circumstances in which she had been taken into the A. and E. Department, and the knowledge that abnormalities had been found, including a shadow over the lung, necessitating immediate exploratory surgery, would surely be one of relief that the matter was in the hands of the medical professionals, with perhaps a grateful nod to the ready availability of modern medical equipment. The same is more or less true of her swollen appearance on the second occasion. There is I think a danger of the "Michelin Man" epithet acquiring a significance greater than it deserves. The Claimant was conditioned to see someone from whom a litre of abscess had been drained and whose life was in grave danger. The pressure pads, routine medical equipment, no doubt contributed to the swollen appearance. I can readily accept that the appearance of Mrs Ronayne on this occasion must have been both alarming and distressing to the Claimant, but it was not in context exceptional and it was not I think horrifying in the sense in which that word has been used in the authorities. Certainly however it did not lead to a sudden violent agitation of the mind, because the Claimant was prepared to witness a person in a desperate condition and was moreover already extremely angry.

42. In my judgment therefore the claim fails at the first hurdle. This renders it unnecessary to decide whether the judge was justified in finding that it was the appearance of his wife on these two distinct occasions, as opposed to his wife's ill-health, which caused the adjustment disorder.

43. I feel it right to record however that I am very doubtful about the judge's conclusion in this regard. It was Dr Bradbury's evidence that the Claimant had suffered PTSD, and she did not address the question whether what the judge called this "visceral two day, subjective perception or experience" either could or did cause the diagnostically different condition adjustment disorder. The judge initiated a long discussion with Dr Faith during her cross examination with the question:-

> "How can you say, with respect Dr Faith, that it is his wife's health that is the cause of an adjustment disorder as opposed to the viscerality of his subjective perception of it in the two days that it was most acute?"

To which the answer was:-

> "The characteristics of his response. He was distressed and angry and upset with people he considered were then talking about trivial matters, all kinds of things that, that would normally happen during a, a critical period in somebody's life when they have had a threatened loss and are dealing with stress. If it were the result of a visceral attack it would be that specific psychopathology, I can't think of another word, the, the intrusive recollection of that, which would cause clinically significant impairment, and it has not."

The judge pressed Dr Faith, and in a later answer she said:-

> "The description given by Mr Ronayne was what I would expect from somebody who had been through what he described. That is the core of it. There is nothing abnormal about it. If it were a direct result of distressing imagery then that distressing imagery would have to be a significant part in the clinical disturbance thereafter, but what he described was being angry that he nearly lost his wife and that she was suffering."

The judge then noted that the absence of nightmares and flashbacks might be indicative that the condition from which the Claimant suffered was not PTSD, to which Dr Faith responded:-

> "No, but, but if it, if it was, if this entire, several years of mental ill health has been caused by two days of particular events, whether it was PTSD or not, forgetting the labels as you say, it would be there, it would be the core of the picture. I, I can't get on with my work because it's there in front of me all the time; when I look at my wife all I can see is her looking like the Michelin Man. These, that's what I would have expected to see or hear, I beg your pardon."

44. The judge seems to have thought that the circumstance that the Claimant had on occasion, if not with Dr Faith, been tearful in giving his account of these events, and the loss of control of his stammer, pointed towards the conclusion that it was the enormity of the event over the two days that the Claimant described, rather than his wife's ill health in general, which caused the adjustment disorder. With respect, I do not understand how those two factors assist in reaching that conclusion, and the judge does not explain why that is so. Furthermore Dr Faith pointed out that many people become tearful when talking about the deaths of their parents maybe 20 years ago. This is simply because it recalls something very unpleasant and very unhappy, and is not representative of a psychiatric disorder.

45. With respect to the judge, I think he gave insufficient weight to the circumstance that Mr Ronayne was already extremely angry before he saw his wife on the second occasion, which might properly be regarded as the more distressing of the two. In fairness to the judge, I am not sure that that was a point noticed or argued at trial. Furthermore, having found none of the persistent recurrent flashbacks and/or nightmares that characterise PTSD, the judge should in my judgment have been far less ready to attribute causative potency to the two visual images, rather than to the whole set of circumstances which overcame Mrs Ronayne and the consequential effect upon her husband. It was Dr Faith's uncontradicted evidence that if the Claimant's psychiatric condition were the result of a sudden visceral attack of the type posited by the judge, then one would expect it to manifest itself in intrusive recollection. Lack of intrusive recollection therefore told against the visual images being the trigger of or for the condition.

46. On the other hand, it was not the evidence of Dr Faith that adjustment disorder could not be caused by sudden exposure to a horrifying image, rather that the presentation

of Mr Ronayne and his affect overall was not indicative of a condition which had been so caused and was far more consistent with a condition caused by the entirety of the circumstances in which his wife became unwell.

47. Had the point been live before us, it may be that the judge's conclusion could be justified on the basis that the Claimant's experiences on 18 and 19 July played a part in the cause and development of the adjustment disorder, as Dr Faith unsurprisingly accepted to be the case. Had it been necessary to consider the case on this basis however, I would for my part have wanted to give further consideration to the question whether, in a case of adjustment disorder as opposed to PTSD, it is logically defensible to isolate one or two events from a larger continuum in an attempt to attract that liability which attaches to the perception of a tortiously caused horrifying event. As it is, the point does not arise and I need express no concluded view on the question whether causation was in this case made out as the judge thought.

48. I would allow the appeal.

Lord Justice Beatson:

49. I agree.

Lord Justice Sullivan:

50. I also agree.

[HOUSE OF LORDS]

ALCOCK AND OTHERS . . . . . APPELLANTS

AND

CHIEF CONSTABLE OF SOUTH YORKSHIRE POLICE . . . . . RESPONDENT

1990 June 19, 20, 21, 22, 25; July 31
1991 April 11, 12, 16, 17, 18; May 3
Oct. 7, 8, 9, 10, 14; Nov. 28

Hidden J.
Parker, Stocker and Nolan L.JJ.
Lord Keith of Kinkel, Lord Ackner, Lord Oliver of Aylmerton, Lord Jauncey of Tullichettle and Lord Lowry

Negligence—Foreseeability of consequential injury—Nervous shock—Disaster at football stadium caused by defendant's negligence—Relatives of victims at disaster or watching live television broadcasts or hearing radio reports—Whether nervous shock to victims' relatives reasonably foreseeable—Whether relationship sufficiently proximate

The defendant was responsible for the policing of a football match at which, as a result of overcrowding in part of the stadium, 95 people died and many more sustained crushing injuries. As the disaster became apparent live pictures of the events at the stadium were broadcast on television. The plaintiffs were all related to, or friends of, spectators involved in the disaster. Some witnessed events from other parts of the stadium. One plaintiff, who was just outside the stadium, saw the events on television and went in to search for his missing son. Other plaintiffs were at home and watched the events on live television broadcasts or heard of them from friends or through radio reports but only later saw recorded television pictures. All the plaintiffs, alleging that the impact of what they had seen and heard had caused them severe shock resulting in psychiatric illness, claimed damages in negligence against the defendant. On the issue of liability the judge held that the category of plaintiffs entitled to claim damages for nervous shock included a sibling as well as a parent or spouse of a victim, and that those plaintiffs present in or immediately outside the stadium at the time of the disaster or who watched it live on television were sufficiently close in time and place for it to be reasonably foreseeable that what they had seen would cause them to suffer psychiatric illness. Accordingly, nine of the plaintiffs, who were either parents, spouses or siblings of the victims and who were eye-witnesses of the disaster or who saw it live on television, were held to be entitled to claim damages for nervous shock. The remaining six plaintiffs were excluded as claimants because they were in a more remote relationship or because they had heard about the disaster by some means other than live televison broadcasts. The Court of Appeal allowed the defendant's appeal and dismissed the unsuccessful plaintiffs' cross-appeal.

case turned out to be uninjured. All the plaintiffs claimed damages for nervous shock resulting in psychiatric illness which they alleged was caused by the experiences inflicted on them by the disaster.

The actions came on for trial before Hidden J. on 19 June 1990, and he gave judgment on 31 July 1990, ante, pp. 314E et seq. That judgment was concerned with the question whether the defendant owed a duty of care in relation to nervous shock to any, and if so to which, of the plaintiffs. The defendant admitted that if he owed such a duty to any plaintiff, and if that plaintiff could show causation, then the defendant was in breach of duty and liable in damages to that plaintiff. For purposes of his judgment Hidden J. assumed in the case of each plaintiff that causation was established, leaving that matter to be dealt with, if necessary, in further proceedings. In the result, he found in favour of ten out of the sixteen plaintiffs before him and against six of them. The defendant appealed to the Court of Appeal in the cases of nine out of the ten successful plaintiffs, and the six unsuccessful plaintiffs also appealed to that court. On 3 May 1991 the Court of Appeal (Parker, Stocker and Nolan L.JJ.) gave judgment allowing the defendant's appeals in the cases of the nine formerly successful plaintiffs and rejecting the appeals of the six unsuccessful ones. Ten only of these fifteen plaintiffs now appeal to your Lordships' House, with leave granted in the Court of Appeal.

The circumstances affecting each of the 10 plaintiffs were thus summarised in the judgment of Parker L.J., ante, pp. 352–354:

> "one, Brian Harrison, was at the ground. He was in the West Stand. He knew both of his brothers would be in the pens behind the goal. He saw the horrifying scene as it developed and realised that people in the two pens had been either killed or injured. When, six minutes after the start, the match was abandoned he tried to find his brothers. He failed to do so. He stopped up all night waiting for news. At 6 a.m. he learnt that his family were setting off for Sheffield. At 11 a.m. he was informed by telephone that both his brothers were dead. . . .
>
> "Mr. and Mrs. Copoc lost their son. They saw the scenes on live television. Mrs. Copoc was up all night. She was informed by police officers at 6 a.m. that her son was dead. Mr. Copoc went to Sheffield at 4 a.m. with his nephew. He was informed at 6.10 a.m. of his son's death and later identified the body. . . .
>
> "Brenda Hennessey lost her brother. She watched television from about 3.30 p.m. and, although she then realised there had been deaths and injuries in the pens, she was not worried because she believed her brother to be in a stand seat. However, at about 5 p.m. she learnt from her brother's wife that he had a ticket in the Leppings Lane terrace. At 6 p.m. she learnt from members of the family who had gone to Sheffield that her brother was dead.
>
> "Denise Hough lost her brother. She was 11 years older than her brother and had fostered him for several years although he no longer lived with her. She knew he had a ticket at the Leppings Lane end and would be behind the goal. She was told by a friend that there was trouble at the game. She watched television. At

4.40 a.m. she was informed by her mother that her brother was dead. Two days later, on 17 April, she went with her mother to Sheffield and confirmed an earlier identification of the body. His face was bruised and swollen.

"Stephen Jones lost his brother. He knew that his brother was at the match. He watched television and saw bodies and believed them to be dead. He did not know his brother was dead until 2.45 a.m. when, having gone to the temporary mortuary at Hillsborough, he found his parents there in tears. . . .

"Robert Alcock lost his brother-in-law. He was in the West Stand, with his nephew, the brother-in-law's son. He witnessed the scenes from the West Stand and was sickened by what he saw but was not then concerned for his brother-in-law whom he believed to be in the stand because, on the way to the match, he had swapped a terrace ticket which he held for a stand ticket. Tragically, however, the brother-in-law had, unknown to the plaintiff, returned to the terrace. After the match the plaintiff left the ground for a rendezvous with the brother-in-law who did not arrive. He and his nephew became worried and searched without success. At about midnight they went to the mortuary where the plaintiff identified the body which was blue with bruising and the chest of which was red. The sight appalled him. . . .

"Catherine Jones lost a brother. She knew he was at the match and would normally be behind the goal. At 3.30 p.m. whilst shopping she heard that there was trouble at the match and at 4.30 p.m. that there were deaths. At 5.15 p.m. she went home and heard on the radio that the death toll was mounting. At 7 p.m. a friend telephoned from Sheffield to say that people at the hospital were describing someone who might be her brother. At 9 p.m. her parents set off for Sheffield. At 10 p.m. she watched recorded television in the hope of seeing her brother alive. She thought, mistakenly, she saw him collapsed on the pitch. At 5 a.m. her father returned from Sheffield and told her that her brother was dead.

"Joseph Kehoe lost a 14-year-old grandson, the son of his daughter and her divorced husband. Unknown to the grandfather the boy had gone to the match with his father. In the afternoon the plaintiff heard on the radio that there had been deaths at Hillsborough. He later saw scenes of the disaster on recorded television. He later still learnt that his grandson was at the match. He became worried. At 3 a.m. he was telephoned by another daughter to say that both the boy and his father were dead. . . .

"Alexandra Penk lost her fiancé, Carl Rimmer. They had known each other for four years and recently became engaged. They planned to marry in late 1989 or at the latest early in 1990. She knew he was at the match and would be on the Leppings Lane terraces. She saw television in her sister's house and knew instinctively that her fiancé was in trouble. She continued to watch in the hope of seeing him but did not do so. She was told at about 11 p.m. that he was dead."

The question of liability in negligence for what is commonly, if inaccurately, described as "nervous shock" has only twice been considered by this House, in *Bourhill v. Young* [1943] A.C. 92 and in *McLoughlin v. O'Brian* [1983] 1 A.C. 410. In the latter case the plaintiff, after learning of a motor accident involving her husband and three of her children about two hours after it had happened, went to the hospital where they had been taken. There she was told that one of the children had been killed, and saw her husband and the other two in a distressed condition and bearing on their persons the immediate effects of the accident. She claimed to have suffered psychiatric illness as a result of her experience, and at the trial of her action of damages against those responsible for the accident this was assumed to be the fact. This House, reversing the Court of Appeal, held that she was entitled to recover damages. The leading speech was delivered by Lord Wilberforce. Having set out, at pp. 418 and 419, the position so far reached in the decided cases on nervous shock, he expressed the opinion that foreseeability did not of itself and automatically give rise to a duty of care owned to a person or class of persons and that considerations of policy entered into the conclusion that such a duty existed. He then considered the arguments on policy which had led the Court of Appeal to reject the plaintiff's claim, and concluded, at p. 421, that they were not of great force. He continued, at pp. 421–423:

> "But, these discounts accepted, there remains, in my opinion, just because 'shock' in its nature is capable of affecting so wide a range of people, a real need for the law to place some limitation upon the extent of admissible claims. It is necessary to consider three elements inherent in any claim: 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. As regards the class of persons, the possible range is between the closest of family ties—of parent and child, or husband and wife—and the ordinary bystander. Existing law recognises the claims of the first: it denies that of the second, either on the basis that such persons must be assumed to be possessed of fortitude sufficient to enable them to endure the calamities of modern life, or that defendants cannot be expected to compensate the world at large. In my opinion, these positions are justifiable, and since the present case falls within the first class, it is strictly unnecessary to say more. I think, however, that it should follow that other cases involving less close relationships must be very carefully scrutinised. I cannot say that they should never be admitted. The closer the tie (not merely in relationship, but in care) the greater the claim for consideration. The claim, in any case, has to be judged in the light of the other factors, such as proximity to the scene in time and place, and the nature of the accident.
>
> "As regards proximity to the accident, it is obvious that this must be close in both time and space. It is, after all, the fact and consequence of the defendant's negligence that must be proved to have caused the 'nervous shock.' Experience has shown that to insist on direct and immediate sight or hearing would be impractical

and unjust and that under what may be called the 'aftermath' doctrine one who, from close proximity, comes very soon upon the scene should not be excluded. . . .

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

"Subject only to these qualifications, I think that a strict test of proximity by sight or hearing should be applied by the courts.

"Lastly, as regards communication, there is no case in which the law has compensated shock brought about by communication by a third party. In *Hambrook v. Stokes Brothers* [1925] 1 K.B. 141, indeed, it was said that liability would not arise in such a case and this is surely right. It was so decided in *Abramzik v. Brenner* (1967) 65 D.L.R. (2d) 651. The shock must come through sight or hearing of the event or of its immediate aftermath. Whether some equivalent of sight or hearing, e.g. through simultaneous television, would suffice may have to be considered."

Lord Bridge of Harwich, with whom Lord Scarman agreed, at p. 431D–E, appears to have rested his finding of liability simply on the test of reasonable foreseeability of psychiatric illness affecting the plaintiff as a result of the consequences of the road accident, at pp. 439–443. Lord Edmund-Davies and Lord Russell of Killowen both considered the policy arguments which had led the Court of Appeal to dismiss the plaintiff's claim to be unsound: pp. 428, 429. Neither speech contained anything inconsistent with that of Lord Wilberforce.

It was argued for the plaintiffs in the present case that reasonable foreseeability of the risk of injury to them in the particular form of psychiatric illness was all that was required to bring home liability to the defendant. In the ordinary case of direct physical injury suffered in an accident at work or elsewhere, reasonable foreseeability of the risk is indeed the only test that need be applied to determine liability. But injury by psychiatric illness is more subtle, as Lord Macmillan observed in *Bourhill v. Young* [1943] A.C. 92, 103. In the present type of case it is a secondary sort of injury brought about by the infliction of physical injury, or the risk of physical injury, upon another person. That can affect those closely connected with that person in various ways. One way is by subjecting a close relative to the stress and strain of caring for the injured person over a prolonged period, but psychiatric illness due to such stress and strain has not so far been treated as founding a claim in damages. So I am of the opinion that in addition to reasonable foreseeability liability for injury in the particular form of psychiatric illness must depend in addition upon a requisite relationship of proximity between the claimant and the party said to owe the duty. Lord Atkin in

Donoghue v. Stevenson [1932] A.C. 562, 580 described those to whom a duty of care is owed as being:

> "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 concept of a person being closely and directly affected has been conveniently labelled "proximity," and this concept has been applied in certain categories of cases, particularly those concerned with pure economic loss, to limit and control the consequences as regards liability which would follow if reasonable foreseeability were the sole criterion.

As regards the class of persons to whom a duty may be owed to take reasonable care to avoid inflicting psychiatric illness through nervous shock sustained by reason of physical injury or peril to another, I think it sufficient that reasonable foreseeability should be the guide. I would not seek to limit the class by reference to particular relationships such as husband and wife or parent and child. The kinds of relationshp which may involve close ties of love and affection are numerous, and it is the existence of such ties which leads to mental disturbance when the loved one suffers a catastrophe. They may be present in 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. It is common knowledge that such ties exist, and reasonably foreseeable that those bound by them may in certain circumstances be at real risk of pyschiatric illness if the loved one is injured or put in peril. The closeness of the tie would, however, require to be proved by a plaintiff, though no doubt being capable of being presumed in appropriate cases. The case of a bystander unconnected with the victims of an accident is difficult. Psychiatric injury to him would not ordinarily, in my view, be within the range of reasonable foreseeability, but could not perhaps be entirely excluded from it if the circumstances of a catastrophe occurring very close to him were particularly horrific.

In the case of those within the sphere of reasonable foreseeability the proximity factors mentioned by Lord Wilberforce in *McLoughlin v. O'Brian* [1983] 1 A.C. 410, 422, must, however, be taken into account in judging whether a duty of care exists. The first of these is proximity of the plaintiff to the accident in time and space. For this purpose the accident is to be taken to include its immediate aftermath, which in *McLoughlin's* case was held to cover the scene at the hospital which was experienced by the plaintiff some two hours after the accident. In *Jaensch v. Coffey* (1984) 155 C.L.R. 549, the plaintiff saw her injured husband at the hospital to which he had been taken in severe pain before and between his undergoing a series of emergency operations, and the next day stayed with him in the intensive care unit and thought he was going to die. She was held entitled to recover damages for the psychiatric illness she suffered as a result. Deane J. said, at p. 608:

> "the aftermath of the accident extended to the hospital to which the injured person was taken and persisted for so long as he remained in the state produced by the accident up to and including immediate

post-accident treatment. . . . Her psychiatric injuries were the result of the impact upon her of the facts of the accident itself and its aftermath while she was present at the aftermath of the accident at the hospital."

As regards the means by which the shock is suffered, Lord Wilberforce said in *McLoughlin v. O'Brian* [1983] 1 A.C. 410, 423 that it must come through sight or hearing of the event on or of its immediate aftermath. He also said that it was surely right that the law should not compensate shock brought about by communication by a third party. On that basis it is open to serious doubt whether *Hevican v. Ruane* [1991] 3 All E.R. 65 and *Ravenscroft v. Rederiaktiebølaget Transatlantic* [1991] 3 All E.R. 73 were correctly decided, since in both of these cases the effective cause of the psychiatric illness would appear to have been the fact of a son's death and the news of it.

Of the present plaintiffs two, Brian Harrison and Robert Alcock, were present at the Hillsborough ground, both of them in the West Stand, from which they witnessed the scenes in pens 3 and 4. Brian Harrison lost two brothers, while Robert Alcock lost a brother-in-law and identified the body at the mortuary at midnight. In neither of these cases was there any evidence of particularly close ties of love or affection with the brothers or brother-in-law. In my opinion the mere fact of the particular relationship was insufficient to place the plaintiff within the class of persons to whom a duty of care could be owed by the defendant as being foreseeably at risk of psychiatric illness by reason of injury or peril to the individuals concerned. The same is true of other plaintiffs who were not present at the ground and who lost brothers, or in one case a grandson. I would, however, place in the category to members of which risk of psychiatric illness was reasonably foreseeable Mr. and Mrs. Copoc, whose son was killed, and Alexandra Penk, who lost her fiancé. In each of these cases the closest ties of love and affection fall to be presumed from the fact of the particular relationship, and there is no suggestion of anything which might tend to rebut that presumption. These three all watched scenes from Hillsborough on television, but none of these depicted suffering of recognisable individuals, such being excluded by the broadcasting code of ethics, a position known to the defendant. In my opinion the viewing of these scenes cannot be equiparated with the viewer being within "sight or hearing of the event or of its immediate aftermath," to use the words of Lord Wilberforce [1983] 1 A.C. 410, 423B, nor can the scenes reasonably be regarded as giving rise to shock, in the sense of a sudden assault on the nervous system. They were capable of giving rise to anxiety for the safety of relatives known or believed to be present in the area affected by the crush, and undoubtedly did so, but that is very different from seeing the fate of the relative or his condition shortly after the event. The viewing of the television scenes did not create the necessary degree of proximity.

My Lords, for these reasons I would dismiss each of these appeals.

LORD ACKNER. My Lords, if sympathy alone were to be the determining factor in these claims, then they would never have been

contested. It has been stressed throughout the judgments in the courts below and I would emphasise it yet again in your Lordships' House that the human tragedy which occurred on the afternoon of 15 April 1989 at the Hillsborough Stadium when 95 people were killed and more than 400 others received injuries from being crushed necessitating hospital treatment, remains an utterly appalling one.

It is, however, trite law that the defendant, the Chief Constable of South Yorkshire, is not an insurer against psychiatric illness occasioned by the shock sustained by the relatives or friends of those who died or were injured, or were believed to have died or to have been injured. This is, of course, fully recognised by the appellants, the plaintiffs in these actions, whose claims for damages to compensate them for their psychiatric illnesses are based upon the allegation that it was the defendant's negligence, that is to say his breach of his duty of care owed to them as well as to those who died or were injured in controlling the crowds at the stadium, which caused them to suffer their illnesses. The defendant, for the purposes of these actions, has admitted that he owed a duty of care *only* to those who died or were injured and that he was in breach of only that duty. He has further accepted that each of the plaintiffs has suffered some psychiatric illness. Moreover for the purpose of deciding whether the defendant is liable to pay damages to the plaintiffs in respect of their illnesses, the trial judge, Hidden J., made the assumption that the illnesses were caused by the shocks sustained by the plaintiffs by reason of their awareness of the events at Hillsborough. The defendant has throughout contested liability on the ground that, in all the circumstances, he was not in breach of any duty of care owed to the the plaintiffs.

Since the decision of your Lordships' House in *McLoughlin v. O'Brian* [1983] 1 A.C. 410, if not earlier, it is established law that (1) a claim for damages for psychiatric illness resulting from shock caused by negligence can be made without the necessity of the plaintiff establishing that he was himself injured or was in fear of personal injury; (2) a claim for damages for such illness can be made when the shock results: (a) from death or injury to the plaintiff's spouse or child or the fear of such death or injury and (b) the shock has come about through the sight or hearing of the event, or its immediate aftermath.

To succeed in the present appeals the plaintiffs seek to extend the boundaries of this cause of action by: (1) removing any restrictions on the categories of persons who may sue; (2) extending the means by which the shock is caused, so that it includes viewing the simultaneous broadcast on television of the incident which caused the shock; (3) modifying the present requirement that the aftermath must be "immediate."

A recital of the cases over the last century show that the extent of the liability for shock-induced psychiatric illness has been greatly expanded. This has largely been due to a better understanding of mental illness and its relation to shock. The extension of the scope of this cause of action sought in these appeals is not on any such ground but, so it is contended, by the application of established legal principles.

Mr. Hytner for the plaintiffs relies substantially upon the speech of Lord Bridge of Harwich in *McLoughlin v. O'Brian* [1983] 1 A.C. 410, 431, and on the judgment of Brennan J. in the Australian High Court decision *Jaensch v. Coffey*, 155 C.L.R. 549, 558, for the proposition that the test for establishing liability is the unfettered application of the test of reasonable foreseeability—viz. whether the hypothetical reasonable man in the position of the defendant, viewing the position ex post facto, would say that the shock-induced psychiatric illness was reasonably foreseeable. Mr. Woodward for the defendant relies upon the opinion expressed by Lord Wilberforce supported by Lord Edmund-Davies in *McLoughlin v. O'Brian*]1983] 1 A.C. 410, 420F, that foreseeability does not of itself, and automatically, lead to a duty of care:

> "foreseeability must be accompanied and limited by the law's judgment as to persons who ought, according to its standards of value or justice, to have been in contemplation."

He also relies on similar views expressed by Gibbs C.J. and Deane J. in *Jaensch v. Coffey*, 155 C.L.R. 549, 552, 578.

The nature of the cause of action

In *Bourhill v. Young* [1943] A.C. 92, 103, Lord Macmillan said:

> "in the case of mental shock there are elements of greater subtlety than in the case of an ordinary physical injury and these elements may give rise to debate as to the precise scope of the legal liability."

It is now generally accepted that an analysis of the reported cases of nervous shock establishes that it is a type of claim in a category of its own. Shock is no longer a variant of physical injury but a separate kind of damage. Whatever may be the pattern of the future development of the law in relation to this cause of action, the following propositions illustrate that the application simpliciter of the reasonable foreseeability test is, today, far from being operative.

(1) Even though the risk of psychiatric illness is reasonably foreseeable, the law gives no damages if the psychiatric injury was not induced by shock. Psychiatric illnesses caused in other ways, such as by the experience of having to cope with the deprivation consequent upon the death of a loved one, attracts no damages. Brennan J. in *Jaensch v. Coffey*, 155 C.L.R. 549, 569, gave as examples, the spouse who has been worn down by caring for a tortiously injured husband or wife and who suffers psychiatric illness as a result, but who, nevertheless, goes without compensation; a parent made distraught by the wayward conduct of a brain-damaged child and who suffers psychiatric illness as a result also has no claim against the tortfeasor liable to the child.

(2) Even where the nervous shock and the subsequent psychiatric illness caused by it could both have been reasonably foreseen, it has been generally accepted that damages for merely being informed of, or reading, or hearing about the accident are not recoverable. In *Bourhill v. Young* [1943] A.C. 92, 103, Lord Macmillan only recognised the action lying where the injury by shock was sustained "through the medium of the eye or the ear without direct contact." Certainly

Brennan J. in his judgment in *Jaensch v. Coffey*, 155 C.L.R. 549, 567, recognised:

> "A psychiatric illness induced by mere knowledge of a distressing fact is not compensable; perception by the plaintiff of the distressing phenomenon is essential."

That seems also to have been the view of Bankes L.J. in *Hambrook v. Stokes Brothers* [1925] 1 K.B. 141, 152. I agree with my noble and learned friend, Lord Keith of Kinkel, that the validity of each of the recent decisions at first instance of *Hevican v. Ruane* [1991] 3 All E.R. 65 and *Ravenscroft v. Rederiaktiebølaget Transatlantic* [1991] 3 All E.R. 73 is open to serious doubt.

(3) Mere mental suffering, although reasonably foreseeable, if unaccompanied by physical injury, is not a basis for a claim for damages. To fill this gap in the law a very limited category of relatives are given a statutory right by the Administration of Justice Act 1982, section 3 inserting a new section 1A into the Fatal Accidents Act 1976, to bring an action claiming damages for bereavement.

(4) As yet there is no authority establishing that there is liability on the part of the injured person, his or her estate, for mere psychiatric injury which was sustained by another by reason of shock, as a result of a self-inflicted death, injury or peril of the negligent person, in circumstances where the risk of such psychiatric injury was reasonably foreseeable. On the basis that there must be a limit at some reasonable point to the extent of the duty of care owed to third parties which rests upon everyone in all his actions, Lord Robertson, the Lord Ordinary, in his judgment in the *Bourhill* case, 1941 S.C. 395, 399, did not view with favour the suggestion that a negligent window-cleaner who loses his grip and falls from a height, impaling himself on spiked railings, would be liable for the shock-induced psychiatric illness occasioned to a pregnant woman looking out of the window of a house situated on the opposite side of the street.

(5) "Shock," in the context of this cause of action, involves the sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind. It has yet to include psychiatric illness caused by the accumulation over a period of time of more gradual assaults on the nervous system.

I do not find it surprising that in this particular area of the tort of negligence, the reasonable foreseeability test is not given a free rein. As Lord Reid said in *McKew v. Holland & Hannen & Cubitts (Scotland) Ltd.* [1969] 3 All E.R. 1621, 1623:

> "A defender is not liable for a consequence of a kind which is not foreseeable. But it does not follow that he is liable for every consequence which a reasonable man could foresee."

Deane J. pertinently observed in *Jaensch v. Coffey*, 155 C.L.R. 549, 583:

> "Reasonable foreseeability on its own indicates no more than that such a duty of care will exist if, and to the extent that, it is not precluded or modified by some applicable overriding requirement or

limitation. It is to do little more than to state a truism to say that the essential function of such requirements or limitations is to confine the existence of a duty to take reasonable care to avoid reasonably foreseeable injury to the circumstances or classes of case in which it is the policy of the law to admit it. Such overriding requirements or limitations shape the frontiers of the common law of negligence."

Although it is a vital step towards the establishment of liability, the satisfaction of the test of reasonable foreseeability does not, in my judgment, ipso facto satisfy Lord Atkin's well known neighbourhood principle enuniciated in *Donoghue v. Stevenson* [1932] A.C. 562, 580. For him to have been reasonably in contemplation by a defendant he must be:

> "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 requirement contained in the words "so closely and directly affected . . . that" constitutes a control upon the test of reasonable foreseeability of injury. Lord Atkin was at pains to stress, at pp. 580–582, that the formulation of a duty of care, merely in the general terms of reasonable foreseeability, would be too wide unless it were "limited by the notion of proximity" which was embodied in the restriction of the duty of care to one's "neighbour."

The three elements

Because "shock" in its nature is capable of affecting such a wide range of persons, Lord Wilberforce in *McLoughlin v. O'Brian* [1983] 1 A.C. 410, 422, concluded that there was a real need for the law to place some limitation upon the extent of admissible claims and in this context he considered that there were three elements inherent in any claim. It is common ground that such elements do exist and are required to be considered in connection with all these claims. The fundamental difference in approach is that on behalf of the plaintiffs it is contended that the consideration of these three elements is merely part of the process of deciding whether, as a matter of fact, the reasonable foreseeability test has been satisfied. On behalf of the defendant it is contended that these elements operate as a control or limitation on the mere application of the reasonable foreseeability test. They introduce the requirement of "proximity" as conditioning the duty of care.

The three elements are (1) the class of persons whose claims should be recognised; (2) the proximity of such persons to the accident—in time and space; (3) the means by which the shock has been caused.

I will deal with those three elements seriatim.

(1) *The class of persons whose claim should be recognised*

When dealing with the possible range of the class of persons who might sue, Lord Wilberforce in *McLoughlin v. O'Brian* [1983] 1 A.C.

410 contrasted the closest of family ties—parent and child and husband and wife—with that of the ordinary bystander. He said that while existing law recognises the claims of the first, it denied that of the second, either on the basis that such persons must be assumed to be possessed with fortitude sufficient to enable them to endure the calamities of modern life, or that defendants cannot be expected to compensate the world at large. He considered that these positions were justified, that other cases involving less close relationships must be very carefully considered, adding, at p. 422:

> "The closer the tie (not merely in relationship, but in care) the greater the claim for consideration. The claim, in any case, has to be judged in the light of the other factors, such as proximity to the scene in time and place, and the nature of the accident."

I respectfully share the difficulty expressed by Atkin L.J. in *Hambrook v. Stokes Brothers* [1925] 1 K.B. 141, 158–159—how do you explain why the duty is confined to the case of parent or guardian and child and does not extend to other relations of life also involving intimate associations; and why does it not eventually extend to bystanders? As regards the latter category, while it may be very difficult to envisage a case of a stranger, who is not actively and foreseeably involved in a disaster or its aftermath, other than in the role of rescuer, suffering shock-induced psychiatric injury by the mere observation of apprehended or actual injury of a third person in circumstances that could be considered reasonably foreseeable, I see no reason in principle why he should not, if in the circumstances, a reasonably strong-nerved person would have been so shocked. In the course of argument your Lordships were given, by way of an example, that of a petrol tanker careering out of control into a school in session and bursting into flames. I would not be prepared to rule out a potential claim by a passer-by so shocked by the scene as to suffer psychiatric illness.

As regards claims by those in the close family relationships referred to by Lord Wilberforce, the justification for admitting such claims is the presumption, which I would accept as being rebuttable, that the love and affection normally associated with persons in those relationships is such that a defendant ought reasonably to contemplate that they may be so closely and directly affected by his conduct as to suffer shock resulting in psychiatric illness. While as a generalisation more remote relatives and, a fortiori, friends, can reasonably be expected not to suffer illness from the shock, there can well be relatives and friends whose relationship is so close and intimate that their love and affection for the victim is comparable to that of the normal parent, spouse or child of the victim and should for the purpose of this cause of action be so treated. This was the opinion of Stocker L.J. in the instant appeal, ante, p. 376E–G, and also that of Nolan L.J. who thus expressed himself, ante, pp. 384–385:

> "For my part, I would accept at once that no general definition is possible. But I see no difficulty in principle in requiring a defendant to contemplate that the person physically injured or threatened by

his negligence may have relatives or friends whose love for him is like that of a normal parent or spouse, and who in consequence may similarly be closely and directly affected by nervous shock . . . The identification of the particular individuals who come within that category, like that of the parents and spouses themselves, could only be carried out ex post facto, and would depend upon evidence of the 'relationship' in the broad sense which gave rise to the love and affection."

It is interesting to observe that when, nearly 50 years ago, the New South Wales legislature decided to extend liability for injury arising wholly or in part from "mental or nervous shock" sustained by a parent or husband or wife of the person killed, injured or put in peril, or any other member of the family of such person, it recognised that it was appropriate to extend significantly the definition of such categories of claimants. Section 4(5) of the Law Reform (Miscellaneous Provisions) Act 1944 provides:

"'Member of the family' means the husband, wife, parent, child, brother, sister, half-brother or half-sister of the person in relation to whom the expression is used. 'Parent' includes father, mother, grandfather, grandmother, stepfather, stepmother and any person standing in loco parentis to another. 'Child' includes son, daughter, grandson, granddaughter, stepson, stepdaughter and any person to whom another stands in loco parentis."

Whether the degree of love and affection in any given relationship, be it that of relative or friend, is such that the defendant, in the light of the plaintiff's proximity to the scene of the accident in time and space and its nature, should reasonably have foreseen the shock-induced psychiatric illness, has to be decided on a case by case basis. As Deane J. observed in *Jaensch v. Coffey*, 155 C.L.R. 549, 601:

"While it must now be accepted that any realistic assessment of the reasonably foreseeable consequences of an accident involving actual or threatened serious bodily injury must, in an appropriate case, include the possibility of injury in the form of nervous shock being sustained by a wide range of persons not physically injured in the accident, the outer limits of reasonable foreseeability of mere psychiatric injury cannot be identified in the abstract or in advance. Much may depend upon the nature of the negligent act or omission, on the gravity or apparent gravity of any actual or apprehended injury and on any expert evidence about the nature and explanation of the particular psychiatric injury which the plaintiff has sustained."

(2) The proximity of the plaintiff to the accident

It is accepted that the proximity to the accident must be close both in time and space. Direct and immediate sight or hearing of the accident is not required. It is reasonably foreseeable that injury by shock can be caused to a plaintiff, not only through the sight or hearing of the event, but of its immediate aftermath.

Only two of the plaintiffs before us were at the ground. However, it is clear from *McLoughlin v. O'Brian* [1983] 1 A.C. 410 that there may

A be liability where subsequent identification can be regarded as part of the "immediate aftermath" of the accident. Mr. Alcock identified his brother-in-law in a bad condition in the mortuary at about midnight, that is some eight hours after the accident. This was the earliest of the identification cases. 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. *McLoughlin's* case was described by Lord B Wilberforce as being upon the margin of what the process of logical progression from case to case would allow. Mrs. McLoughlin had arrived at the hospital within an hour or so after the accident. Accordingly in the post-accident identification cases before your Lordships there was not sufficient proximity in time and space to the accident.

C *(3) The means by which the shock is caused*

Lord Wilberforce concluded that the shock must come through sight or hearing of the event or its immediate aftermath but specifically left for later consideration whether some equivalent of sight or hearing, e.g. through simultaneous television, would suffice: see p. 423. Of course it is common ground that it was clearly foreseeable by the defendant that D the scenes at Hillsborough would be broadcast live and that amongst those who would be watching would be parents and spouses and other relatives and friends of those in the pens behind the goal at the Leppings Lane end. However he would also know of the code of ethics which the television authorities televising this event could be expected to follow, namely that they would not show pictures of suffering by recognisable individuals. Had they done so, Mr. Hytner accepted that E this would have been a "novus actus" breaking the chain of causation between the defendant's alleged breach of duty and the psychiatric illness. As the defendant was reasonably entitled to expect to be the case, there were no such pictures. Although the television pictures certainly gave rise to feelings of the deepest anxiety and distress, in the circumstances of this case the simultaneous television broadcasts of what F occurred cannot be equated with the "sight or hearing of the event or its immediate aftermath." Accordingly shocks sustained by reason of these broadcasts cannot found a claim. I agree, however, with Nolan L.J. that simultaneous broadcasts of a disaster cannot in all cases be ruled out as providing the equivalent of the actual sight or hearing of the event or its immediate aftermath. Nolan L.J. gave, ante, pp. 386G–387A, an example of a situation where it was reasonable to anticipate that the G television cameras, whilst filming and transmitting pictures of a special event of children travelling in a balloon, in which there was media interest, particularly amongst the parents, showed the balloon suddenly bursting into flames. Many other such situations could be imagined where the impact of the simultaneous television pictures would be as great, if not greater, than the actual sight of the accident.

H *Conclusion*

Only one of the plaintiffs, who succeeded before Hidden J., namely Brian Harrison, was at the ground. His relatives who died were his two

whom the victim is connected whether by ties of affection, of blood relationship, of duty or simply of business. In many cases those persons may suffer not only injured feelings or inconvenience but adverse financial consequences as, for instance, by the need to care for the victim or the interruption or non-performance of his contractual obligations to third parties. Nevertheless, except in those cases which were based upon some ancient and now outmoded concepts of the quasi-proprietorial rights of husbands over their wives, parents over their children or employers over their menial servants, the common law has, in general, declined to entertain claims for such consequential injuries from third parties save possibly where loss has arisen from the necessary performance of a legal duty imposed on such party by the injury to the victim. Even the apparent exceptions to this, the old actions for loss of a husband's right to consortium and for loss of servitium of a child or menial servant, were abolished by the Administration of Justice Act 1982.

So, for instance, in *Kirkham v. Boughey* [1958] 2 Q.B. 338, a husband, whose wife had been severely injured in a road accident as a result of the defendant's negligence, failed to recover damages for a reduction in his earnings due to his having, because of his anxiety for his wife, declined to resume more remunerative employment abroad; although in that case Diplock J. was prepared to allow his claim for the expenses incurred in providing medical care for his wife on the ground that the plaintiff was under a legal duty to provide it. So too in *Best v. Samuel Fox & Co. Ltd.* [1952] A.C. 716, 734, Lord Morton of Henryton observed:

> "it has never been the law of England that an invitor, who has negligently but unintentionally injured an invitee, is liable to compensate other persons who have suffered, in one way or another, as a result of the injury to the invitee. If the injured man was engaged in a business, and the injury is a serious one, the business may have to close down and the employees be dismissed; a daughter of the injured man may have to give up work which she enjoys and stay at home to nurse a father who has been transformed into an irritable invalid as a result of the injury. Such examples could be easily multiplied. Yet the invitor is under no liability to compensate such persons, for he owes them no duty and may not even know of their existence."

A fortiori the law will not compensate such a person for the mental anguish and even illness which may flow from having lost a wife, parent or child or from being compelled to look after an invalid, although there is a statutory exception to this where the victim dies as a result of the accident and the plaintiff is his widow or minor unmarried child. In such circumstances section 1A of the Fatal Accidents Act 1976 (substituted by section 3 of the Administration of Justice Act 1982) gives a limited right of compensation for bereavement.

Beyond this, however, the law in general provides no remedy, however severe the consequences of the distress or grief may be to the health or well-being of the third party and however close his relationship

to the victim. I doubt whether the reason for this can be found by an appeal to logic, for there is, on the face of it, no readily discernible logical reason why he who carelessly inflicts an injury upon another should not be held responsible for its inevitable consequences not only to him who may conveniently be termed "the primary victim" but to others who suffer as a result. It cannot, I think, be accounted for by saying that such consequences cannot reasonably be foreseen. It is readily foreseeable that very real and easily ascertainable injury is likely to result to those dependent upon the primary victim or those upon whom, as a result of negligently inflicted injury, the primary victim himself becomes dependent. If one goes back to what may be regarded as the genesis of the modern law of tortious negligence—that is to say, the judgment of Sir Baliol Brett M.R. in *Heaven v. Pender* (1883) 11 Q.B.D. 503, 509—there is nothing in it which necessarily limits the liability of the tortfeasor to compensating only the primary victim of the event. What was there postulated was a simple test of attributed foresight of that which the ordinary person, given the hypothetical situation of his pausing to think about the consequences before acting, would see to be a likely consequence of his conduct. That simple test, described by Lord Atkin in his classical exposition in *Donoghue v. Stevenson* [1932] A.C. 562, 580 as "demonstrably too wide"—as indeed it clearly was—was, however, refined by him into the more restricted "neighbour" test which introduced, in addition to the element of reasonable foreseeability, the essential but illusive concept of "proximity" or "directness." Citation of a principle so familiar may justly be described as trite but it is, I think, of critical importance in the context of the instant appeals.

The failure of the law in general to compensate for injuries sustained by persons unconnected with the event precipitated by a defendant's negligence must necessarily import the lack of any legal duty owed by the defendant to such persons. That cannot, I think, be attributable to some arbitrary but unenunciated rule of "policy" which draws a line as the outer boundary of the area of duty. Nor can it rationally be made to rest upon such injury being without the area of reasonable foreseeability. It must, as it seems to me, be attributable simply to the fact that such persons are not, in contemplation of law, in a relationship of sufficient proximity to or directness with the tortfeasor as to give rise to a duty of care, though no doubt "policy," if that is the right word, or perhaps more properly, the impracticability or unreasonableness of entertaining claims to the ultimate limits of the consequences of human activity, necessarily plays a part in the court's perception of what is sufficiently proximate.

What is more difficult to account for is why, when the law in general declines to extend the area of compensation to those whose injury arises only from the circumstances of their relationship to the primary victim, an exception has arisen in those cases in which the event of injury to the primary victim has been actually witnessed by the plaintiff and the injury claimed is established as stemming from that fact. That such an exception exists is now too well established to be called in question. What is less clear, however, is the ambit of the duty in such cases or, to

put it another way, what is the essential characteristic of such cases that marks them off from those cases of injury to uninvolved persons in which the law denies any remedy for injury of precisely the same sort.

Although it is convenient to describe the plaintiff in such a case as a "secondary" victim, that description must not be permitted to obscure the absolute essentiality of establishing a duty owed by the defendant directly to him—a duty which depends not only upon the reasonable foreseeability of damage of the type which has in fact occurred to the particular plaintiff but also upon the proximity or directness of the relationship between the plaintiff and the defendant. The difficulty lies in identifying the features which, as between two persons who may suffer effectively identical psychiatric symptoms as a result of the impression left upon them by an accident, establish in the case of one who was present at or near the scene of the accident a duty in the defendant which does not exist in the case of one who was not. The answer cannot, I think, lie in the greater foreseeability of the sort of damage which the plaintiff has suffered. The traumatic effect on, for instance, a mother on the death of her child is as readily foreseeable in a case where the circumstances are described to her by an eye witness at the inquest as it is in a case where she learns of it at a hospital immediately after the event. Nor can it be the mere suddenness or unexpectedness of the event, for the news brought by a policeman hours after the event may be as sudden and unexpected to the recipient as the occurrence of the event is to the spectator present at the scene. The answer has, as it seems to me, to be found in the existence of a combination of circumstances from which the necessary degree of "proximity" between the plaintiff and the defendant can be deduced. 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.

The common features of all the reported cases of this type decided in this country prior to the decision of Hidden J. in the instant case and in which the plaintiff succeeded in establishing liability are, first, that in each case there was a marital or parental relationship between the plaintiff and the primary victim; secondly, that the injury for which damages were claimed arose from the sudden and unexpected shock to the plaintiff's nervous system; thirdly, that the plaintiff in each case was either personally present at the scene of the accident or was in the more or less immediate vicinity and witnessed the aftermath shortly afterwards; and, fourthly, that the injury suffered arose from witnessing the death of, extreme danger to, or injury and discomfort suffered by the primary victim. Lastly, in each case there was not only an element of physical proximity to the event but a close temporal connection between the event and the plaintiff's perception of it combined with a close relationship of affection between the plaintiff and the primary victim. It must, I think, be from these elements that the essential requirement of proximity is to be deduced, to which has to be added the reasonable foreseeability on the part of the defendant that in that combination of circumstances there was a real risk of injury of the type sustained by the

particular plaintiff as a result of his or her concern for the primary victim. There may, indeed, be no primary "victim" in fact. It is, for instance, readily conceivable that a parent may suffer injury, whether physical or psychiatric, as a result of witnessing a negligent act which places his or her child in extreme jeopardy but from which, in the event, the child escapes unharmed. I doubt very much, for instance, whether *King v. Phillips* [1953] 1 Q.B. 429, where a mother's claim for damages for shock caused by witnessing a near accident to her child was rejected, would be decided in the same way today in the light of later authorities. It would, for instance, have made no difference to the result in *Hambrook v. Stokes Brothers* [1925] 1 K.B. 141, if the plaintiff's child had not, as she did in fact, suffered any injury at all. In that case, the Court of Appeal, by a majority, held that a plaintiff who, while using the highway, had seen a runaway lorry which threatened, and indeed subsequently caused, injury to her child, was entitled to recover so long as the shock from which she claimed to be suffering was due to her own visual perception and not to what she had been subsequently told by third persons. The primary difficulty here was that of establishing the foreseeability of the injury which the plaintiff suffered rather than the proximity of her relationship to the defendant, who owed her the same duty as he owed to any other users of the highway. It is interesting to note, however, that Atkin L.J. (at p. 158) clearly contemplated the possibility of a successful action at the suit of a mere bystander given sufficiently horrifying circumstances. In *Owens v. Liverpool Corporation* [1939] 1 K.B. 394, mourners at a funeral, apparently relatives of the deceased, recovered damages for shock allegedly occasioned by negligence of the defendant's tram driver in damaging the hearse and upsetting the coffin. Although this lends support to the suggestion that such damages may be recoverable by a mere spectator, it is doubtful how far the case, which was disapproved by three members of this House in *Bourhill v. Young* [1943] A.C. 92, 100, 110 and 116, can be relied upon.

In *Bourhill v. Young* the pursuer was neither related to or known to the deceased cyclist, who was the victim of his own negligence, nor did she witness the accident, although she heard the crash from some 50 feet away and some time later saw blood on the road. She had no apprehension of injury to herself but simply sustained a nervous shock as a result of the noise of the collision. That injury sustained through nervous shock was capable of grounding a claim for damages was never in doubt, but the pursuer's claim failed because injury of that type to her was not within the area of the deceased's reasonable contemplation. The physical proximity of the pursuer to the point of collision was outside the area in which the deceased could reasonably have contemplated any injury to her and that answered both the question of whether there was reasonable foresight and whether there was any relationship with the deceased inferring a duty of care. The case is thus a good illustration of the coalescence of the two elements of reasonable foreseeability and proximity, but otherwise it affords little assistance in establishing any criterion for the degree of proximity which would establish the duty of care, save that it implies necessity for a closer

matter of the policy of the law, a relationship outside the categories of those in which liability has been established by past decisions can be considered sufficiently proximate to give rise to the duty, quite regardless of the question of foreseeability. Or it may be asked whether injury of the type with which these appeals are concerned can ever be considered to be reasonably foreseeable where the relationship between the plaintiff and the primary victim is more remote than that of an established category. Or, again, it may be asked whether, even given proximity and foreseeability, nevertheless the law must draw an arbitrary line at the boundary of the established category or some other wider or narrower category of relationships beyond which no duty will be deemed to exist. Lord Wilberforce, at p. 422, appears to have favoured the last of these three approaches, but found it, in the event, unnecessary to determine the boundary since the case then before the House concerned a claim within a category which had already been clearly established. He did not altogether close the door to an enlargement of the area of the possible duty but observed:

> "other cases involving less close relationships must be very carefully scrutinised. I cannot say that they should never be admitted. The closer the tie (not merely in relationship, but in care) the greater the claim for consideration. The claim, in any case, has to be judged in the light of the other factors, such as proximity to the scene in time and place, and the nature of the accident."

In so far as this constituted an invitation to courts seized of similar problems in the future to draw lines determined by their perception of what public policy requires, it was an invitation accepted by Parker L.J. in the Court of Appeal in the instant case, ante, pp. 359H–360G. It was his view that liability should, as a matter of policy, determine at the relationship of parent or spouse and should be restricted to persons present at or at the immediate aftermath of the incident from which injury arose. The approach of Lord Edmund-Davies and Lord Russell of Killowen, as I read their speeches, was similar to that of Lord Wilberforce. On the other hand, Lord Bridge of Harwich, with whom Lord Scarman agreed, rejected an appeal to policy considerations as a justification for fixing arbitrary lines of demarcation of the duty in negligence. Lord Bridge propounded simply a criterion of the reasonable foreseeability by the defendant of the damage to the plaintiff which had occurred without necessarily invoking physical presence at or propinquity to the accident or its aftermath or any particular relationship to the primary victim as limiting factors, although, of course, clearly these elements would be important in the determination of what, on the facts of any given case, would be reasonably foreseeable. He expressed himself as in complete agreement with Tobriner J. in *Dillon v. Legg* (1968) 29 A.L.R. 3d 1316, 1326, that the existence of the duty must depend on reasonable foreseeability and

> "must necessarily be adjudicated only upon a case-by-case basis. We cannot now predetermine defendant's obligation in every situation by a fixed category; no immutable rule can establish the extent of that obligation for every circumstance of the future."

A Counsel for the plaintiffs and for the defendant respectively have invited your Lordships to accept or reject one or other of these two approaches on the footing that they represent mutually exclusive alternatives and to say on the one hand that the only criterion for the establishment of liability is the reasonable foreseeability of damage in accordance with the views expressed by Lord Bridge (which, it is urged, existed in the case of each of the plaintiffs) or, on the other hand, that B liability must, as a matter of public policy, be decreed to stop at the case of a spouse or parent and in any event must be restricted to injury to a person who was physically present at the event or at its aftermath and witnessed one or the other.

My Lords, for my part, I have not felt able to accept either of these two extreme positions nor do I believe that the views expressed in C *McLoughlin v. O'Brian* [1983] 1 A.C. 410, are as irreconcilable as has been suggested. If I may say so with respect, the views expressed by Lord Bridge are open to the criticism that, on their face, they entirely ignore the critical element of proximity to which reference has been made, taking us back to the "demonstrably too wide" proposition of Brett M.R. in *Heaven v. Pender*, 11 Q.B.D. 503. But the critical part played by this element is very clearly expressed by Lord Bridge himself D in his speech in *Caparo Industries Plc. v. Dickman* [1990] 2 A.C. 605, 618, 621, 623, and I do not believe for one moment that, in expressing his view with regard to foreseeability in *McLoughlin v. O'Brian* [1983] 1 A.C. 410, he was overlooking that element which is, after all, implicit in any discussion of tortious negligence based upon Lord Atkin's classical statement of principle, or was doing more than meeting the argument E which had been advanced that, even given foreseeability, an immutable line either had been or ought to be drawn by the law at the furthest point reached by previously decided cases. Equally, I do not read Lord Wilberforce (whose remarks in this context were, in any event, obiter since the question of fixing lines of demarcation by reference to public policy did not in fact arise) as excluding altogether a pragmatic approach to claims of this nature. In any event, there is in many cases, as for F instance cases of direct physical injury in a highway accident, an almost necessary coalescence of the twin elements of foreseeability and proximity, the one flowing from the other. But where such convergence is not self evident, the question of proximity requires separate consideration. In deciding it the court has reference to no defined criteria and the decision necessarily reflects to some extent the court's G concept of what policy—or perhaps common sense—requires.

My Lords, speaking for myself, I see no logic and no virtue in seeking to lay down as a matter of "policy" categories of relationship within which claims may succeed and without which they are doomed to failure in limine. So rigid an approach would, I think, work great injustice and cannot be rationally justified. Obviously a claim for damages for psychiatric injury by a remote relative of the primary victim H will factually require most cautious scrutiny and faces considerable evidentiary difficulties. Equally obviously, the foreseeability of such injury to such a person will be more difficult to establish than similar injury to a spouse or parent of the primary victim. But these are factual

difficulties and I can see no logic and no policy reason for excluding claims by more remote relatives. Suppose, for instance, that the primary victim has lived with the plaintiff for 40 years, both being under the belief that they are lawfully married. Does she suffer less shock or grief because it is subsequently discovered that their marriage was invalid? The source of the shock and distress in all these cases is the affectionate relationship which existed between the plaintiff and the victim and the traumatic effect of the negligence is equally foreseeable, given that relationship, however the relationship arises. Equally, I would not exclude the possibility envisaged by my noble and learned friend, Lord Ackner, of a successful claim, given circumstances of such horror as would be likely to traumatise even the most phlegmatic spectator, by a mere bystander. That is not, of course, to say that the closeness of the relationship between plaintiff and primary victim is irrelevant, for the likelihood or unlikelihood of a person in that relationship suffering shock of the degree claimed from the event must be a most material factor to be taken into account in determining whether that consequence was reasonably foreseeable. In general, for instance, it might be supposed that the likelihood of trauma of such a degree as to cause psychiatric illness would be less in the case of a friend or a brother-in-law than in that of a parent or fiancé.

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But in every case the underlying and essential postulate is a relationship of proximity between plaintiff and defendant and it is this, as it seems to me, which must be the determining factor in the instant appeals. No case prior to the hearing before Hidden J. from which these appeals arise has countenanced an award of damages for injuries suffered where there was not at the time of the event a degree of physical propinquity between the plaintiff and the event caused by the defendant's breach of duty to the primary victim nor where the shock sustained by the plaintiff was not either contemporaneous with the event or separated from it by a relatively short interval of time. The necessary element of proximity between plaintiff and defendant is furnished, at least in part, by both physical and temporal propinquity and also by the sudden and direct visual impression on the plaintiff's mind of actually witnessing the event or its immediate aftermath. To use Lord Wilberforce's words in *McLoughlin's* case [1983] 1 A.C. 410, 422–423:

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> "As regards proximity to the accident, it is obvious that this must be close in both time and space. . . . The shock must come through sight or hearing of the event or of its immediate aftermath."

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Grief, sorrow, deprivation and the necessity for caring for loved ones who have suffered injury or misfortune must, I think, be considered as ordinary and inevitable incidents of life which, regardless of individual susceptibilities, must be sustained without compensation. It would be inaccurate and hurtful to suggest that grief is made any the less real or deprivation more tolerable by a more gradual realisation, but to extend liability to cover injury in such cases would be to extend the law in a direction for which there is no pressing policy need and in which there is no logical stopping point. In my opinion, the necessary proximity cannot be said to exist where the elements of immediacy, closeness of

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A time and space, and direct visual or aural perception are absent. I would agree with the view expressed by Nolan L.J. that there may well be circumstances where the element of visual perception may be provided by witnessing the actual injury to the primary victim on simultaneous television, but that is not the case in any of the instant appeals and I agree with my noble and learned friend, Lord Keith of Kinkel, that, for the reasons which he gives, the televised images seen B by the various plaintiffs cannot be equiparated with "sight or hearing of the event." Nor did they provide the degree of immediacy required to sustain a claim for damages for nervous shock. That they were sufficient to give rise to worry and concern cannot be in doubt, but in each case other than those of Brian Harrison and Robert Alcock, who were present at the ground, the plaintiff learned of the death of the victim at C secondhand and many hours later. As I read the evidence, the shock in each case arose not from the original impact of the transmitted image which did not, as has been pointed out, depict the suffering of recognisable individuals. These images provided no doubt the matrix for imagined consequences giving rise to grave concern and worry, followed by a dawning consciousness over an extended period that the imagined consequence had occurred, finally confirmed by news of the D death and, in some cases, subsequent visual identification of the victim. The trauma is created in part by such confirmation and in part by the linking in the mind of the plaintiff of that confirmation to the previously absorbed image. To extend the notion of proximity in cases of immediately created nervous shock to this more elongated and, to some extent, retrospective process may seem a logical analogical development. E But, as I shall endeavour to show, the law in this area is not wholly logical and whilst having every sympathy with the plaintiffs, whose suffering is not in doubt and is not to be underrated, I cannot for my part see any pressing reason of policy for taking this further step along a road which must ultimately lead to virtually limitless liability. Whilst, therefore, I cannot, for the reasons which I have sought to explain, accept Mr. Woodward's submission that it is for your Lordships to lay F down, on grounds of public policy, an arbitrary requirement of the existence of a particular blood or marital relationship as a pre-condition of liability, I equally believe that further pragmatic extensions of the accepted concepts of what constitutes proximity must be approached with the greatest caution. *McLoughlin v. O'Brian* [1983] 1 A.C. 410 was a case which itself represented an extension not, as I think, wholly G free from difficulty and any further widening of the area of potential liability to cater for the expanded and expanding range of the media of communication ought, in my view, to be undertaken rather by Parliament, with full opportunity for public debate and representation, than by the process of judicial extrapolation.

In the case of both Brian Harrison and Robert Alcock, although both were present at the ground and saw scenes which were obviously H distressing and such as to cause grave worry and concern, their perception of the actual consequences of the disaster to those to whom they were related was again gradual. In my judgment, the necessary proximity was lacking in their cases too, but I also agree with my noble

and learned friend, Lord Keith of Kinkel, that there is also lacking the necessary element of reasonable foreseeability. Accordingly, I too would dismiss the appeals and it follows from what I have said that I agree that the correctness of the decisions in *Hevican v. Ruane* [1991] 3 All E.R. 65 and *Ravenscroft v. Rederiaktiebølaget Transatlantic* [1991] 3 All E.R. 73 must be seriously doubted.

I would only add that I cannot, for my part, regard the present state of the law as either entirely satisfactory or as logically defensible. If there exists a sufficient degree of proximity to sustain a claim for damages for nervous shock, why it may be justifiably be asked, does not that proximity also support that perhaps more easily foreseeable loss which the plaintiff may suffer as a direct result of the death or injury from which the shock arises. That it does not is, I think, clear from *Hinz v. Berry* [1970] 2 Q.B. 40 (see particularly the judgment of Lord Pearson, at p. 44). But the reason why it does not has, I think, to be found not in logic but in policy. Whilst not dissenting from the case-by-case approach advocated by Lord Bridge in *McLoughlin's* case, the ultimate boundaries within which claims for damages in such cases can be entertained must I think depend in the end upon considerations of policy. For example, in his illuminating judgment in *Jaensch v. Coffey*, 155 C.L.R. 549, Deane J. expressed the view that no claim could be entertained as a matter of law in a case where the primary victim is the negligent defendant himself and the shock to the plaintiff arises from witnessing the victim's self-inflicted injury. The question does not, fortunately, fall to be determined in the instant case, but I suspect that an English court would be likely to take a similar view. But if that be so, the limitation must be based upon policy rather than upon logic for the suffering and shock of a wife or mother at witnessing the death of her husband or son is just as immediate, just as great and just as foreseeable whether the accident be due to the victim's own or to another's negligence and if the claim is based, as it must be, on the combination of proximity and foreseeability, there is certainly no logical reason why a remedy should be denied in such a case. Indeed, Mr. Hytner, for the plaintiffs, has boldly claimed that it should not be. Take, for instance, the case of a mother who suffers shock and psychiatric injury through witnessing the death of her son when he negligently walks in front of an oncoming motor car. If liability is to be denied in such a case such denial can only be because the policy of the law forbids such a claim, for it is difficult to visualise a greater proximity or a greater degree of forseeability. Moreover, I can visualise great difficulty arising, if this be the law, where the accident, though not solely caused by the primary victim has been materially contributed to by his negligence. If, for instance, the primary victim is himself 75 per cent. responsible for the accident, it would be a curious and wholly unfair situation if the plaintiff were enabled to recover damages for his or her traumatic injury from the person responsible only in a minor degree whilst he in turn remained unable to recover any contribution from the person primarily responsible since the latter's negligence vis-à-vis the plaintiff would not even have been tortious.

Policy considerations such as this could, I cannot help feeling, be much better accommodated if the rights of persons injured in this way were to be enshrined in and limited by legislation as they have been in the Australian statute law to which my noble and learned friend, Lord Ackner, has referred.

LORD JAUNCEY OF TULLICHETTLE. My Lords, for some 90 years it has been recognised that nervous shock sustained independently of physical injury and resulting in psychiatric illness can give rise to a claim for damages in an action founded on negligence. The law has developed incrementally. In *Dulieu v. White & Sons* [1901] 2 K.B. 669, a plaintiff who suffered nervous shock as a result of fears for her own safety caused by the defendant's negligence was held to have a cause of action. However Kennedy J. said, at p. 675, that if nervous shock occasioned by negligence was to give a cause of action it must arise "from a reasonable fear of immediate personal injury to oneself." In *Hambrook v. Stokes Brothers* [1925] 1 K.B. 141, Kennedy J.'s foregoing limitation was disapproved by the majority of the Court of Appeal who held that a mother who had sustained nervous shock as a result of fear for the safety of her three children due to the movement of an unmanned lorry had a cause of action against the owner of the lorry. Until 1983 however there had in England been no case in which a plaintiff had been able to recover damages for nervous shock when the event giving rise to the shock had occurred out of sight and out of earshot. I use the word "event" as including the accident and its immediate aftermath. In *McLoughlin v. O'Brian* [1983] 1 A.C. 410, a wife and a mother suffered nervous shock after seeing her husband and children in a hospital to which they had been taken after a road accident. The wife was not present at the locus but reached the hospital before her husband and son and daughter had been cleaned up and when they were all very distressed. This was the first case in the United Kingdom in which a plaintiff who neither saw nor heard the accident nor saw its aftermath at the *locus* successfully claimed damages for nervous shock. These appeals seek to extend further the circumstances in which damages for nervous shock may be recovered.

I start with the proposition that the existence of a duty of care on the part of the defendant does not depend on foreseeability alone. Reasonable foreseeability is subject to controls. In support of this proposition I rely on the speech of Lord Wilberforce in *McLoughlin v. O'Brian* [1983] 1 A.C. 410, 420F–421A and on the carefully reasoned judgment of Deane J. in the High Court of Australia in *Jaensch v. Coffey*, 155 C.L.R. 549, 578–586. In a case of negligence causing physical injury to an employee or to a road user reasonable foreseeability may well be the only criterion by which liability comes to be judged. However in the case of negligence causing shock different considerations apply because of the wide range of people who may be affected. For this reason Lord Wilberforce said in *McLoughlin v. O'Brian* [1983] 1 A.C. 410, 421–422:

> "there remains . . . a real need for the law to place some limitation upon the extent of admissible claims. It is necessary to consider

three elements inherent in any claim: the class of persons who claim should be recognised; the proximity of such persons to the accident; and the means by which the shock is caused."

The class of persons with recognisable claims will be determined by the law's approach as to who ought according to its standards of value and justice to have been in the defendant's contemplation: again *McLoughlin v. O'Brian, per* Lord Wilberforce, at p. 420F. The requisite element of proximity in the relation of the parties also constitutes an important control on the test of reasonable foreseeability: *Jaensch v. Coffey*, 155 C.L.R. 549, 578–586, *per* Deane J. 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.

The present position in relation to recognisable claims is that parents and spouses have been held entitled to recover for shock caused by fear for the safety of their children or the other spouse. No remoter relative has successfully claimed in the United Kingdom. However a rescuer and a crane driver have recovered damages for nervous shock sustained as a result of fear for the safety of others in circumstances to which I must now advert.

In *Dooley v. Cammell Laird & Co. Ltd.* [1951] 1 Lloyd's Rep. 271, Donovan J. awarded damages to a crane driver who suffered nervous shock when a rope connecting a sling to the crane hooks snapped causing the load to fall into the hold of a ship in which men were working. The nervous shock resulted from the plaintiff's fear that the falling load would injure or kill some of his fellow workmen. Donovan J. drew the inference that the men in the hold were friends of the plaintiff and later stated, at p. 277:

> "Furthermore, if the driver of the crane concerned fears that the load may have fallen upon some of his fellow workmen, and that fear is not baseless or extravagant, then it is, I think, a consequence reasonably to have been foreseen that he may himself suffer a nervous shock."

Although Donovan J. treated the matter simply as one of reasonable foreseeability, I consider that the case was a very special one. Unlike the three cases to which I have referred in which the plaintiff was merely an observer of the accident or its immediate aftermath, Dooley was operating the crane and was therefore intimately involved in, albeit in no way responsible for, the accident. In these circumstances the defendants could readily have foreseen that he would be horrified and shocked by the failure of the rope and the consequent accident which he had no power to prevent. I do not consider that this case is of assistance where, as here, the plaintiffs were not personally involved in the disaster. In *Chadwick v. British Railways Board* [1967] 1 W.L.R. 912, the plaintiff recovered damages for nervous shock sustained as a result of his prolonged rescue efforts at the scene of a serious railway accident which had occurred near his home. The shock was caused neither by fear for his own safety nor for that of close relations. The

position of the rescuer was recognised by Cardozo J. in *Wagner v. International Railway Co.*, 232 N.Y. 176, 180:

> "Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognises them as normal. It places their effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperilled victim; it is a wrong also to his rescuer."

Lord Wilberforce in *McLoughlin v. O'Brian* [1983] 1 A.C. 410, 419B considered that the principle of rescuers ought to be accepted. This is a particular instance where the law not only considers that the individual responsible for an accident should foresee that persons will come to the rescue and may be shocked by what they see but also considers it appropriate that he should owe to them a duty of care. I do not however consider that either of these cases justify the further development of the law sought by the plaintiffs.

Of the six plaintiffs who were successful before Hidden J. only one, who lost two brothers, was present at the ground. The others saw the disaster on television, two of them losing a son and the remaining three losing brothers. Of the four plaintiffs who were unsuccessful before the judge, one who lost his brother-in-law was at the ground, one who lost her fiance saw the disaster on television, another who lost her brother heard initial news while shopping and more details on the wireless during the evening and a third who lost a grandson heard of the disaster on the wireless and later saw a recorded television programme. Thus all but two of the plaintiffs were claiming in respect of shock resulting from the deaths of persons outside the categories of relations so far recognised by the law for the purposes of this type of action. It was argued on their behalf that the law has never excluded strangers to the victim from claiming for nervous shock resulting from the accident. In support of this proposition the plaintiffs relied on *Dooley v. Cammell Laird & Co. Ltd.* and *Chadwick v. British Railways Board* as well as upon the following passage from the judgment of Atkin L.J. in *Hambrook v. Stokes Brothers* [1925] 1 K.B. 141, 157:

> "Personally I see no reason for excluding the bystander in the highway who receives injury in the same way from apprehension of or the actual sight of injury to a third party."

However the suggested inclusion of the bystander has not met with approval in this House. In *Bourhill v. Young* [1943] A.C. 92, 117, Lord Porter said:

> "It is not every emotional disturbance or every shock which should have been foreseen. The driver of a car or vehicle, even though careless, is entitled to assume that the ordinary frequenter of the streets has sufficient fortitude to endure such incidents as may from time to time be expected to occur in them, including the noise of a collision and the sight of injury to others, and is not to be considered negligent towards one who does not possess the customary phlegm."

In *McLoughlin v. O'Brian* [1983] 1 A.C. 410 Lord Wilberforce said, at p. 422, that existing law denied the claims of the ordinary bystander:

> "either on the basis that such persons must be assumed to be possessed of fortitude sufficient to enable them to endure the calamities of modern life, or that defendants cannot be expected to compensate the world at large."

While it is not necessary in these appeals to determine where stands the ordinary bystander I am satisified that he cannot be prayed in aid by the plaintiffs.

Should claims for damages for nervous shock in circumstances such as the present be restricted to parents and spouses or should they be extended to other relatives and close friends and, if so, where, if at all, should the line be drawn? In *McLoughlin v. O'Brian* Lord Wilberforce in the context of the class of persons whose claim should be recognised said:

> "As regards the class of persons, the possible range is between the closest of family ties—of parent and child, or husband and wife—and the ordinary bystander. Existing law recognises the claims of the first: it denies that of the second . . . In my opinion, these positions are justifiable, and since the present case falls within the first class, it is strictly unnecessary to say more. I think, however, that it should follow that other cases involving less close relationships must be very carefully scrutinised. I cannot say that they should never be admitted. The closer the tie (not merely in relationship, but in care) the greater the claim for consideration. The claim, in any case, has to be judged in the light of the other factors, such as proximity to the scene in time and place, and the nature of the accident."

I would respectfully agree with Lord Wilberforce that cases involving less close relatives should be very carefully scrutinised. That, however, is not to say they must necessarily be excluded. The underlying logic of allowing claims of parents and spouses is that it can readily be foreseen by the tortfeasor that if they saw or were involved in the immediate aftermath of a serious accident or disaster they would, because of their close relationship of love and affection with the victim be likely to suffer nervous shock. There may, however, be others whose ties of relationship are as strong. I do not consider that it would be profitable to try and define who such others might be or to draw any dividing line between one degree of relationship and another. To draw such a line would necessarily be arbitrary and lacking in logic. In my view the proper approach is to examine each case on its own facts in order to see whether the claimant has established so close a relationship of love and affection to the victim as might reasonably be expected in the case of spouses or parents and children. If the claimant has so established and all other requirements of the claim are satisfied he or she will succeed since the shock to him or her will be within the reasonable contemplation of the tortfeasor. If such relationship is not established the claim will fail.

I turn to the question of proximity which arises in the context of those plaintiffs who saw the disaster on television either contemporaneously or in later recorded transmissions and of those who identified their loved ones in the temporary mortuary some nine or more hours after the disaster had taken place. I refer once again to a passage in the speech of Lord Wilberforce in *McLoughlin v. O'Brian*, at p. 422:

> "As regards proximity to the accident, it is obvious that this must be close in both time and space. It is, after all, the fact and consequence of the defendant's negligence that must be proved to have caused the 'nervous shock.' Experience has shown that to insist on direct and immediate sight or hearing would be impractical and unjust and that under what may be called the 'aftermath' doctrine one who, from close proximity, comes very soon upon the scene should not be excluded. In my opinion, the result in *Benson v. Lee* [1972] V.R. 879 was correct and indeed inescapable. It was based, soundly, upon 'direct perception of some of the events which go to make up the accident as an entire event, and this includes . . . the immediate aftermath . . .' (p. 880)"

Lord Wilberforce expressed the view, at p. 422H, that a "strict test of proximity by sight or hearing should be applied by all courts." Later, he said, at p. 423:

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

My Lords, although Lord Wilberforce in *McLoughlin v. O'Brian* did not close the door to shock coming from the sight of simultaneous television I do not consider that a claimant who watches a normal television programme which displays events as they happen satisfies the test of proximity. In the first place a defendant could normally anticipate that in accordance with current television broadcasting guidelines shocking pictures of persons suffering and dying would not be transmitted. In the second place, a television programme such as that transmitted from Hillsborough involves cameras at different viewpoints showing scenes all of which no one individual would see, edited pictures and a commentary superimposed. I do not consider that such a programme is equivalent to actual sight or hearing at the accident or its aftermath. I say nothing about the special circumstances envisaged by Nolan L.J. in his judgment in this case, ante, pp. 386G–387A. If a claimant watching a simultaneous television broadcast does not satisfy the requirements of proximity it follows that a claimant who listens to the wireless or sees a subsequent television recording falls even further short of the requirement.

What constitutes the immediate aftermath of an accident must necessarily depend upon the surrounding circumstances. To essay any comprehensive definition would be a fruitless exercise. In *McLoughlin v. O'Brian* the immediate aftermath extended to a time somewhat over an hour after the accident and to the hospital in which the victims were

Neutral Citation Number: [2021] EWHC 1576 (QB)

Case No: F90BS630

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BRISTOL DISTRICT REGISTRY

Civil Justice Centre
Bristol BS1 6GR

Date: Wednesday 16 June 2021

Before :

PHILIP MOTT QC
Sitting as a Deputy High Court Judge

- -

Between :

JAMIE KING	**Claimant**
- and -	
ROYAL UNITED HOSPITALS BATH NHS FOUNDATION TRUST	**Defendant**

- -
- -

Ben Collins QC and Kara Loraine (instructed by **Augustines Injury Law**) for the **Claimant**
Jeremy Hyam QC and Gemma Witherington (instructed by **Bevan Brittan**) for the **Defendant**

Hearing dates: 24 - 27 May 2021

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Approved Judgment

Philip Mott QC :

Introduction

1. The Claimant is an actor. He is married to another actor, Tamara Podemski. They have a son, Oliver, who was born on 8 July 2014 in the Royal United Hospital, Bath ("RUH"). Their second son, Benjamin, was born there by emergency caesarean section on 5 May 2016. Tragically he died on 10 May 2016. On 4 July 2017 the Defendant admitted liability for his death "*in not providing care that would have led to the option of Benjamin being delivered before 5 May 2016*". It was accepted that "*had Benjamin been delivered before 5 May 2016, he would have avoided injury and survived*". As a result the full details of Benjamin's death have not been explored in evidence in this trial, but it is clear that his viability was severely compromised by meconium aspiration.

2. Claims on behalf of the estate, for bereavement, and for psychiatric injury to Tamara have all been dealt with. I was not provided with any details, but understand that Tamara's claim was made as a primary victim, since Benjamin was in law still a part of her when the negligence occurred.

3. By this action, the Claimant seeks damages for psychiatric injury, with consequential loss and damage. It is accepted that he does so as a secondary victim. As a result, it is common ground that in order to succeed he needs to satisfy the control mechanisms derived from *Alcock v South Yorkshire Police* [1992] 1 AC 310. These have been described as "*both arbitrary and pragmatic*" by the Court of Appeal in *Liverpool Women's NHS Foundation Trust v Ronayne* [2015] EWCA Civ 588, but they are binding and must be applied here.

4. Four control mechanisms are laid down, but it is common ground that all are satisfied save for the last. The four requirements, as summarised in *Ronayne*, are:

   i) The Claimant must have a close tie of love and affection with the person killed, injured or imperilled;

   ii) The Claimant must have been close to the incident in time and space;

   iii) The Claimant must have directly perceived the incident rather than, for example, hearing about it from a third person; and

   iv) The Claimant's illness must have been induced by a sudden shocking event.

5. Even if these control mechanisms are satisfied, recovery is limited to loss arising from frank psychiatric injury, as opposed to what Lord Oliver described in *Alcock* at page 410E as

   > "grief, sorrow, deprivation and the necessity for caring for loved ones who have suffered injury or misfortune [which] must, I think, be considered as ordinary and inevitable incidents of life which, regardless of individual susceptibilities, must be sustained without compensation."

6. The fourth control mechanism, which is the only matter in dispute on liability, was defined or described in *Alcock* as follows:

oxygen. That was the extent of Dr Edmonds' knowledge prior to the Claimant's first visit to NICU. She told me, and I accept, that at that time she had no knowledge of CFM readings or more up-to-date blood gas analysis. That explanation would make no sense if she had just heard Dr Jones say that Benjamin was so ill that he might die. Dr Edmonds struck me as a careful and sensitive communicator, and I note from her CV that she is the joint author of a paper entitled "How to Break Bad News", published in 2007. I do not accept that she would have avoided dealing with the substantial risk of death if she had been aware of the deterioration in the blood gases at the time of her discussion with the Claimant. The fact that she clearly did not do so strongly suggests that the discussion took place before the Claimant first spoke to Dr Jones.

vi) A discussion before the Claimant's first visit to NICU is also consistent with his recollection that Dr Jones was in NICU when he first visited. Dr Jones was not called there until about 08:00, yet Benjamin had been moved to NICU by 07:30 and Tamara had left the CDS at 07:51. A discussion starting around this time would fill the gap between this and the Claimant's first visit to NICU.

29. What was said in that discussion? Whilst the detailed description of the various machines and their functions, as set out in Dr Edmonds' witness statement at paragraph 8, does not appear in her retrospective note, I accept that she did give this explanation. The Claimant was asked about it in his evidence, and said that he had no complaint about what he was told, or the way he was told it, only that it came after the shock of going to NICU and seeing Benjamin. As he put it "*there may have been perhaps an explanation as to what I had just seen*". The absence of full details in the notes is not surprising in my judgment. I accept that he was fully prepared for all the interventions and machinery he would see, and that this came before his visit to NICU.

30. What did he see on that first visit to NICU? I accept the descriptions in Dr Edmonds' and Dr Jones' statements. Benjamin was like a sleeping new-born baby except for the many tubes and wires. The Claimant did not suggest in his evidence that Benjamin was showing any signs of distress. Indeed, the fact that Benjamin was apparently so peaceful may explain the Claimant's question to Dr Jones asking for confirmation that he was alive. In addition, I find that there was no panic. Even the Claimant changed this in his evidence to "a sense of urgency", with a complaint that it was "difficult to see past the throng". In a neonatal intensive care unit, the presence of a high number of staff and intense concentration on the babies under their care, which the Claimant may have interpreted as a sense of urgency, is hardly surprising and would to some parents be comforting.

31. It follows that I reject Mr Collins' suggestion that the Claimant may inadvertently observed the NICU team attempting to intubate Benjamin again around 08:00. Dr Edmonds told me, elaborating on what was in Dr Jones' statement, that the decision to admit a parent to NICU is made by the nurse in charge of the unit, in consultation with the nurse caring for the baby. It would be unheard of for anyone to bring in a parent without checking first. I am satisfied that the Claimant would not have been allowed into NICU at this time, or before Benjamin had been settled. His first visit was some time after 08:05, when the Pancuronium muscle relaxant was given and Benjamin had been re-intubated. It was also after he had received a full explanation of what he was likely to see.

32. Later in the day there were further explanations, as more information became available. Dr Jones and Dr Cochrane provided an update after the Claimant had visited NICU, probably around 09:00. Later discussions and visits involved both the Claimant and Tamara, when she had recovered from her anaesthetic.

33. It must have been an exhausting and harrowing morning for the Claimant. I do not find it at all surprising that his recollection of the various discussions, and his visits to see Benjamin, has become a little confused.

Does this satisfy the legal test?

34. I return to the legal test to be applied to these factual findings. For the Claimant to recover as a secondary victim, he must have suffered a "*sudden and unexpected shock*" which amounted to "*a horrifying event, which violently agitates the mind*".

35. The most recent Court of Appeal authority is *Ronayne*. Tomlinson LJ (with whom Sullivan and Beatson LJJ agreed) at [13] expressly agreed with the observations of Mrs Justice Swift in *Shorter v Surrey and Sussex Healthcare NHS Trust* [2015] EWHC 614 (QB) that "*the "event" must be one which would be recognised as "horrifying" by a person of ordinary susceptibility*". He also at [14] cited with apparent approval the comment of His Honour Judge Hawkesworth QC in *Ward v The Leeds Teaching Hospital NHS Trust* [2004] EWHC 2106 (QB) that:

> "*An event outside the range of human experience, sadly, does not it seems to me encompass the death of a loved one in hospital unless also accompanied by circumstances which were wholly exceptional in some way so as to shock or horrify*."

Tomlinson LJ added, at [17]:

> "*A visitor to a hospital is necessarily to a certain degree conditioned as to what to expect, and in the ordinary way it is also likely that due warning will be given by medical staff of an impending encounter likely to prove more than ordinarily distressing*."

36. *Ronayne* was a case in which the condition of the Claimant's wife deteriorated sharply after a routine hysterectomy because of a suture misplaced in her colon, leading to septicaemia and peritonitis. When the Claimant first saw her, on the evening after her re-admission to hospital as an emergency case, she was connected to various machines, including drips, monitors, etc. Tomlinson LJ said of this sight, at [41]:

> "*The reaction of most people of ordinary robustness to that sight, given the circumstances in which she had been taken into the A&E Department, and the knowledge that abnormalities had been found, including a shadow over the lung, necessitating immediate exploratory surgery, would surely be one of relief that the matter was in the hands of the medical professionals, with perhaps a grateful nod to the ready availability of modern medical equipment*."

37. I was referred to a large number of other cases, which it is accepted are simply illustrations of the application of the control test to other facts. Of these, I will refer only to four relatively recent decisions of High Court judges with substantial experience in this field, *Wells & Smith v University Hospital Southampton NHS Foundation Trust* [2015] EWHC 2376 (QB), *Owers v Medway NHS Foundation Trust* [2015] EWHC 2363 (QB), *RE & Ors v Calderdale & Huddersfield NHS Foundation Trust* [2017] EWHC 824 (QB), and *YAH v Medway NHS Foundation Trust* [2018] EWHC 2964 (QB). I have considered the other decisions cited, but generally find them to be of lesser assistance.

38. What is clear from the authorities is that "shock" in the *Alcock* sense requires something more than what might be described as "shocking" or "horrifying" in ordinary speech. It may be for that reason that the word "exceptional" has crept in, not as an addition to the test, but as an explanation that the shocking event must be outside ordinary human experience in the context in which it occurs.

39. In ordinary language, what happened to the Claimant was "horrifying". He had been waiting for the birth of his second child, what should have been a joyous event, and instead he was told that Benjamin was seriously unwell and might die. That would be a nightmare for any parent. But from time to time such things happen, with or without clinical negligence, and hospital staff have to prepare the parents and allow them to see their damaged child. Fortunately it is a rare occurrence. Dr Jones told me that at RUH they have about 5,000 babies born each year, and only 0.5 to 1 in 1,000 is encephalopathic.

40. The sight of Benjamin in NICU on his first visit must have brought home to the Claimant vividly the seriousness of his condition as explained previously by Dr Edmonds. I have no doubt that the Claimant is a person especially affected by visual triggers, and with a capacity to imagine and empathise with suffering which is invaluable to him as an actor. The agreed psychiatric evidence is that this sight did cause him PTSD. But in my judgment it was not an objectively shocking and horrifying event in the *Alcock* sense.

41. I have considered whether the additional words of Dr Jones take the case over the threshold. Certainly they added significantly to the level of risk to which the Claimant was alerted. Had Dr Jones realised that Dr Edmonds was not aware of the latest blood gas readings, and therefore did not fully realise the risk to life, he may have been more cautious about expressing himself as he did. But the Claimant had the right to know the truth, and Dr Jones tempered his warning with the information that other babies in Benjamin's condition had made a good recovery. In my judgment this does not take the case over the threshold. Even taking what the Claimant saw and what he was told together, this was not an objectively shocking and horrifying event in the *Alcock* sense.

42. As a result the claim must fail on liability. In case I am wrong on that, I go on to consider quantum.

The Actionable Injury

43. The psychiatric evidence is summarised in the joint statement dated 29 June 2020 from the Claimant's clinical psychologist, Ms Angelica MacArthur-Kline, and the Defendant's psychiatrist, Dr Martin Baggaley. They agree on a diagnosis of a

combination of PTSD and Pathological Grief (either a prolonged grief disorder in ICD 11 or a persistent complex bereavement disorder in DSM 5). They agree that the PTSD was caused by the Claimant witnessing his son critically ill in NICU on his first visit there, and the belief that he was going to die. They also agree that the Pathological Grief was caused by the circumstances of Benjamin's death and the knowledge that the death was avoidable.

44. The experts further agree that these conditions (plural, so apparently taken together) were of moderate severity in relation to the Judicial College Guidelines. Clinically they were "*severe for 12 months after Benjamin's death but have gradually improved with time and treatment and would now* [June 2020] *be mild/on the borderline of clinical significance*". In relation to the Claimant's ability to work, the joint statement records the following agreement:

> "*… he was too unwell to work as an actor by virtue of his psychiatric injury for 12 months. He was then fit to audition and find work as an actor. He experienced some difficulties with particular roles which triggered reminders of his son (for example exposure to blood in a vampire film/playing the role of a negligent surgeon) whilst his symptoms were moderate. However with time and treatment we agree he is now fit for almost all roles although he might struggle with roles in which the plot involved the death of children.*"

45. It is agreed by the parties that the PTSD may give rise to a secondary victim claim, but not the Pathological Grief. However, the two experts did not give evidence, and their joint statement does not divide up the consequences of each part of the diagnosis. Mr Collins' submission is that the court therefore cannot distinguish between them, and should treat all the psychiatric consequences as arising, at least in part, from the PTSD.

46. Mr Hyam relies on the underlying reports of the Claimant's own expert, Ms MacArthur-Kline. Her first report, dated 27 April 2018, concludes that the remaining unresolved psychological presentation as at that date is consistent with a diagnosis of Persistent Complex Bereavement Disorder [A127]. In more detail, she states that "*the duration of his most intrusive and full post traumatic distress lasted for approximately 12 months*" [A140, §11]. His PTSD started to recover after the second inquest [the adjourned hearing in February 2017] and improved again after he started auditioning and working again [she says this was in February 2017, but the first audition of which clear evidence was given at the trial, and in which the Claimant was successful in obtaining a part, was on 2 June 2017]. However "*his continuing psychological reactions, which no longer qualify for full PTSD, remain uncomfortable*" [A141, §14]. A reassessment report dated 20 November 2019 concludes that the Claimant's psychological symptoms no longer conform to a persistent complex bereavement disorder, and that "*he continues to suffer from mild anxious and depressive adjustment issues in the face of an as yet unresolved litigation process*" [A165, §9].

47. My task is not made easy by this limited evidence. In legal theory the Claimant is entitled to be put in the position he would have been in if the actionable damage had not been caused. That involves a comparison between his actual history and the hypothetical position he would have been in if he had not suffered PTSD but Benjamin

NHS Maternity Statistics, 2019-20

Hospital Episode Statistics and Maternity Services Data Set

Excel tables

Publication date: 29 October 2019
Link to publication:

http://digital.nhs.uk/pubs/maternity1920

Introduction
This is a joint report between Hospital Episode Statistics (HES) and the Maternity Services Data Set (MSDS). This spreadsheet provides the data tables to support the summary report and to provide addtional analysis. The annual publication covers the financial year ending March 2019 as well as earlier time periods.

The tables should be referenced alongside the Annual Summary Report.

Further Information
More about HES:
http://digital.nhs.uk/hes
More about MSDS:
http://content.digital.nhs.uk/maternityandchildren
HES Data Dictionary:
https://digital.nhs.uk/data-and-information/data-tools-and-services/data-services/hospital-episode-statistics/hospital-episode-statistics-data-dictionary

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Published by NHS Digital part of the Government Statistical Service
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or email: psi@nationalarchives.gsi.gov.uk

Summary Report 1: Summary of deliveries, 2009-10 to 2019-20 (HES)

	Number of Deliveries										
	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20
Total	652,377	668,195	668,936	671,255	646,904	636,643	648,107	636,401	626,203	603,766	591,759

Source: HES, NHS Digital

NHS Digital, NHS Maternity Statistics, 2019-20
For more information on data quality please see the data quality note accompanying this publication.

Responsible statistician:
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Return to Contents

Summary Report 4: Proportion of deliveries with anaesthetic or analgesic use before or during delivery by age group, 2019-20 (HES)

	Proportion of Deliveries with Anaesthetic or Analgesic Use	
Age Group	**2009-10**	**2019-20**
Total deliveries	**65**	**60**
Under 20 years	63	56
20-29 years	64	58
30-39 years	67	61
40 years and over	69	65

Source: HES, NHS Digital
2019-20 - includes 'other' but excludes n/a values.

NHS Digital, NHS Maternity Statistics, 2019-20
For more information on data quality please see the data quality note accompanying this publication.

Responsible statistician:

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Return to Contents

Summary Report 5: Proportion of deliveries by method of delivery and age of mother, 2019-20 (HES)

	Percentage of Deliveries by Age Group				
Method of delivery	**Total deliveries**	**Under 20 years**	**20-29 years**	**30-39 years**	**40 years and over**
Spontaneous	57	69	62	54	45
Instrumental	12	13	13	12	9
Caesarean	31	18	26	34	47

Source: HES, NHS Digital

Where the method of delivery was unknown, those deliveries have been excluded from this analysis.

NHS Digital, NHS Maternity Statistics, 2019-20

For more information on data quality please see the data quality note accompanying this publication.

Responsible statistician:

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Return to Contents

Summary Report 6: Percentage of top 5 most prevalent delivery complications, 2019-20 (HES)

	Most prevalent delivery complication	
Complication (ICD-10 code)	**Complication description**	**Percentage**
O70	Perineal laceration during delivery	41
O68	Labour and delivery complicated by fetal stress [distress]	26
O36	Maternal care for other known or suspected fetal problems	23
O72	Postpartum haemorrhage	22
O99	Other maternal diseases classifiable elsewhere but complicating pregnancy, childbirth and the puerperium	21

Source: HES, NHS Digital

NHS Digital, NHS Maternity Statistics, 2019-20
For more information on data quality please see the data quality note accompanying this publication.

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Return to Contents

Court of Appeal

Taylor and another *v* A Novo (UK) Ltd

[2013] EWCA Civ 194

2013 Feb 13;
March 18

Lord Dyson MR, Moore-Bick, Kitchin LJJ

Negligence — Foreseeability of consequential injury — Nervous shock — Claimant's mother suffering injuries caused by defendant's negligence — Mother unexpectedly collapsing and dying while recovering at home three weeks later — Claimant suffering psychiatric illness after witnessing death — Whether relationship with claimant sufficiently proximate for defendant to be liable for consequential illness

The claimant's mother sustained injuries to her head and foot in an accident caused by the defendant's negligence. Some three weeks later, while recovering at home from her injuries, she unexpectedly collapsed and died. The claimant, having witnessed her mother's collapse and death, suffered psychiatric illness in the form of post-traumatic stress disorder, for which she claimed damages against the defendant. The judge found that the relevant "event" which had caused the damage was the mother's sudden death, that there was no gap between the death and the injury suffered by the mother three weeks earlier and that the claimant's injury was a reasonably foreseeable consequence of the defendant's negligence. He gave judgment for the claimant. The defendant appealed on the ground that the relationship between the parties was not sufficiently proximate since the claimant had not been present at the scene of her mother's accident or its immediate aftermath.

On the appeal—

Held, allowing the appeal, that, in order to establish that she was a secondary victim of the defendant's negligence, a claimant had to establish both a relationship of proximity with the defendant sufficient to found a duty of care, and also physical proximity in time and space to the event caused by the negligence, the latter being a necessary but not sufficient condition of the former and also one of the strict control mechanisms which, for policy reasons, the law had introduced in order to limit the number of persons who could claim damages for psychiatric injury as secondary victims; that those policy reasons militated against substantial extension of the scope of such liability, which should only be done by Parliament; that the defendant's negligence had caused a single accident or event, with two consequences which had occurred three weeks apart; that to make the defendant liable to the claimant for that second consequence would require a considerable extension of the scope of liability for secondary victims, which the courts were astute not to do; that, therefore, the judge had been wrong to hold that the death of the claimant's mother, rather than her accident, was the relevant event for the purpose of determining the proximity question; and that, accordingly, although the claimant would have been able to recover damages as a secondary victim had she suffered shock and psychiatric illness as a result of seeing her mother's accident, she could not do so where that shock and illness had resulted from her seeing her mother's death three weeks later (post, paras 24, 26–32, 36, 37, 38).

Dictum of Auld J in *Taylor v Somerset Health Authority* [1993] PIQR P262, P267 approved.

Alcock v Chief Constable of South Yorkshire Police [1992] 1 AC 310, HL(E) and *Frost v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, HL(E) applied.

North Glamorgan NHS Trust v Walters [2003] PIQR P232, CA and *Galli-Atkinson v Seghal* [2003] Lloyd's Rep Med 285, CA distinguished.

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A accident, but the collapse and death that resulted from it. If the latter is the relevant event, proximity is established, since Ms Taylor was present and witnessed the collapse and death of her mother.

The law on secondary victims

4 The classification of primary and secondary victims appears to have
B derived originally from the speech of Lord Oliver of Aylmerton in *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310. The plaintiffs in that case alleged that the impact of what they saw and heard at the Hillsborough stadium disaster had caused them nervous shock resulting in psychiatric illness. At p 407D–E, Lord Oliver said:

> "Broadly [the cases] divide into two categories, that is to say, those
C cases in which the injured plaintiff was involved, either mediately or immediately, as a participant, and those in which the plaintiff was no more than the passive and unwilling witness of injury caused to others."

5 He proceeded to refer to these two categories of plaintiff respectively as "primary" and "secondary" victims. In the case of secondary victims, the starting point is whether psychiatric injury caused to the claimant was a
D reasonably foreseeable consequence of the defendant's negligence; and in addition to the requirement of reasonable foreseeability of psychiatric illness, there must be a relationship of proximity between the claimant and the alleged tortfeasor.

6 He explained, at p 410D, that the reasonable foreseeability test had been described by Lord Atkin in *Donoghue v Stevenson* [1932] AC 562, 580 as "demonstrably too wide" and was refined by him into the more restricted
E "neighbour" test which introduced the "essential but illusive [sic]" concept of proximity. Lord Oliver then said [1992] 1 AC 310, 410–412:

> "The failure of the law in general to compensate for injuries sustained by persons unconnected with the event precipitated by a defendant's negligence must necessarily import the lack of any legal duty owed by the defendant to such persons. That cannot, I think, be attributable to some
F arbitrary but unenunciated rule of 'policy' which draws a line as the outer boundary of the area of duty. Nor can it rationally be made to rest upon such injury being without the area of reasonable foreseeability. It must, as it seems to me, be attributable simply to the fact that such persons are not, in contemplation of law, in a relationship of sufficient proximity to or directness with the tortfeasor as to give rise to a duty of care, though no
G doubt 'policy,' if that is the right word, or perhaps more properly, the impracticability or unreasonableness of entertaining claims to the ultimate limits of the consequences of human activity, necessarily plays a part in the court's perception of what is sufficiently proximate.
>
> "What is more difficult to account for is why, when the law in general declines to extend the area of compensation to those whose injury arises only from the circumstances of their relationship to the primary victim,
H an exception has arisen in those cases in which the event of injury to the primary victim has been actually witnessed by the plaintiff and the injury claimed is established as stemming from that fact. That such an exception exists is now too well established to be called in question. What is less clear, however, is the ambit of the duty in such cases or, to put it another

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way, what is the essential characteristic of such cases that marks them off from those cases of injury to uninvolved persons in which the law denies any remedy for injury of precisely the same sort. Although it is convenient to describe the plaintiff in such a case as a 'secondary' victim, that description must not be permitted to obscure the absolute essentiality of establishing a duty owed by the defendant directly to him—a duty which depends not only upon the reasonable foreseeability of damage of the type which has in fact occurred to the particular plaintiff but also upon the proximity or directness of the relationship between the plaintiff and the defendant. The difficulty lies in identifying the features which, as between two persons who may suffer effectively identical psychiatric symptoms as a result of the impression left upon them by an accident, establish in the case of one who was present at or near the scene of the accident a duty in the defendant which does not exist in the case of one who was not. The answer cannot, I think, lie in the greater foreseeability of the sort of damage which the plaintiff has suffered. The traumatic effect on, for instance, a mother on the death of her child is as readily foreseeable in a case where the circumstances are described to her by an eye witness at the inquest as it is in a case where she learns of it at a hospital immediately after the event. Nor can it be the mere suddenness or unexpectedness of the event, for the news brought by a policeman hours after the event may be as sudden and unexpected to the recipient as the occurrence of the event is to the spectator present at the scene. The answer has, as it seems to me, to be found in the existence of a combination of circumstances from which the necessary degree of 'proximity' between the plaintiff and the defendant can be deduced. 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. The common features of all the reported cases of this type decided in this country prior to the decision of Hidden J in the instant case and in which the plaintiff succeeded in establishing liability are, first, that in each case there was a marital or parental relationship between the plaintiff and the primary victim; secondly, that the injury for which damages were claimed arose from the sudden and unexpected shock to the plaintiff's nervous system; thirdly, that the plaintiff in each case was either personally present at the scene of the accident or was in the more or less immediate vicinity and witnessed the aftermath shortly afterwards; and, fourthly, that the injury suffered arose from witnessing the death of, extreme danger to, or injury and discomfort suffered by the primary victim. Lastly, in each case there was not only an element of physical proximity to the event but a close temporal connection between the event and the plaintiff's perception of it combined with a close relationship of affection between the plaintiff and the primary victim. It must, I think, be from these elements that the essential requirement of proximity is to be deduced, to which has to be added the reasonable foreseeability on the part of the defendant that in that combination of circumstances there was a real risk of injury of the type sustained by the particular plaintiff as a result of his or her concern for the primary victim."

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A 7 The five common features identified by Lord Oliver have since been referred to as the "control mechanisms" for limiting the class of persons who can recover damages for psychiatric illness as secondary victims: see per Lord Lloyd of Berwick in *Page v Smith* [1996] AC 155, 197E–H. There follows a detailed consideration by Lord Oliver in the *Alcock* case [1992] 1 AC 310 of some of the cases culminating in his conclusion, at p 415G, that there is no "logic and no virtue in seeking to lay down as a matter of 'policy' categories of relationship within which claims may succeed and without which they are doomed to failure in limine". At pp 416–417, he summarised the position in these words:

B

> "But in every case the underlying and essential postulate is a relationship of proximity between plaintiff and defendant and it is this, as it seems to me, which must be the determining factor in the instant appeals. No case prior to the hearing before Hidden J from which these appeals arise has countenanced an award of damages for injuries suffered where there was not at the time of the event a degree of physical propinquity between the plaintiff and the event caused by the defendant's breach of duty to the primary victim nor where the shock sustained by the plaintiff was not either contemporaneous with the event or separated from it by a relatively short interval of time. The necessary element of proximity between plaintiff and defendant is furnished, at least in part, by both physical and temporal propinquity and also by the sudden and direct visual impression on the plaintiff's mind of actually witnessing the event or its immediate aftermath. To use Lord Wilberforce's words in *McLoughlin's* case [1983] 1 AC 410, 422–423: 'As regards proximity to the accident, it is obvious that this must be close in both time and space . . . The shock must come through sight or hearing of the event or of its immediate aftermath.' Grief, sorrow, deprivation and the necessity for caring for loved ones who have suffered injury or misfortune must, I think, be considered as ordinary and inevitable incidents of life which, regardless of individual susceptibilities, must be sustained without compensation. It would be inaccurate and hurtful to suggest that grief is made any the less real or deprivation more tolerable by a more gradual realisation, but to extend liability to cover injury in such cases would be to extend the law in a direction for which there is no pressing policy need and in which there is no logical stopping point. In my opinion, the necessary proximity cannot be said to exist where the elements of immediacy, closeness of time and space, and direct visual or aural perception are absent."

C D E F G

8 *Frost v Chief Constable of South Yorkshire Police* [1999] 2 AC 455 was another case arising from the Hillsborough disaster. The plaintiffs were police officers who brought claims for psychiatric injury suffered as a result of tending victims of the tragedy. It was held by the House of Lords that the general rules restricting the recovery of damages for pure psychiatric harm applied to the plaintiffs' claims as employees. Lord Steyn made some important observations about the law governing recovery for pure psychiatric harm. At pp 493A–494G, he explained why, on policy grounds, the courts had adopted a restrictive approach to this area of the law. He identified four features of claims for psychiatric harm which in combination may account for the different treatment. One factor was that the abolition

H

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or a relaxation of the special rules governing the recovery of damages for psychiatric harm would "greatly increase the class of persons who can recover damages in tort": p 494C. Another factor was that the imposition of liability for pure psychiatric harm in a wide range of situations

> "may result in a burden of liability on defendants which may be disproportionate to tortious conduct involving perhaps momentary lapses of concentration, e g in a motor car accident": p 494E.

Lord Steyn's overall conclusion was set out at p 500:

> "*Thus far and no further*
>
> "My Lords, the law on the recovery of compensation for pure psychiatric harm is a patchwork quilt of distinctions which are difficult to justify. There are two theoretical solutions. The first is to wipe out recovery in tort for pure psychiatric injury. The case for such a course has been argued by Professor Stapleton. But that would be contrary to precedent and, in any event, highly controversial. Only Parliament could take such a step. The second solution is to abolish all the special limiting rules applicable to psychiatric harm. That appears to be the course advocated by *Mullany & Handford, Tort Liability for Psychiatric Damage*. They would allow claims for pure psychiatric damage by mere bystanders: see (1997) 113 LQR 410, 415. Precedent rules out this course and, in any event, there are cogent policy considerations against such a bold innovation. In my view the only sensible general strategy for the courts is to say thus far and no further. The only prudent course is to treat the pragmatic categories as reflected in authoritative decisions such as the *Alcock* case [1992] 1 AC 310 and *Page v Smith* [1996] AC 155 as settled for the time being but by and large to leave any expansion or development in this corner of the law to Parliament. In reality there are no refined analytical tools which will enable the courts to draw lines by way of compromise solution in a way which is coherent and morally defensible. It must be left to Parliament to undertake the task of radical law reform."

9 At p 501C, Lord Hoffmann embarked on a comprehensive review of the case law relating to recovery for psychiatric injury. He noted at p 502D–E that in the *Alcock* case the House of Lords decided that liability for psychiatric injury should be restricted by "control mechanisms", which he said were "more or less arbitrary conditions which a plaintiff had to satisfy and which were intended to keep liability within what was regarded as acceptable bounds". He noted that the control mechanisms had been criticised as drawing distinctions which the ordinary man would find hard to understand. Having referred to various proposals for reform, he said none of them was open to the House. He added, at p 504:

> "It is too late to go back on the control mechanisms as stated in the *Alcock* case [1992] 1 AC 310. Until there is legislative change, the courts must live with them and any judicial developments must take them into account."

10 Finally, at p 511A–B, he said:

> "It seems to me that in this area of the law, the search for principle was called off in [the *Alcock* case]. No one can pretend that the existing law,

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A which your Lordships have to accept, is founded upon principle. I agree with Jane Stapleton's remark that 'once the law has taken a wrong turning or otherwise fallen into an unsatisfactory internal state in relation to a particular cause of action, incrementalism cannot provide the answer:' see *The Frontiers of Liability*, vol 2, p 87."

Lord Browne-Wilkinson agreed that the appeals should be allowed for the
B reasons given by Lord Steyn and Lord Hoffmann. Lord Griffiths agreed that the appeals should be allowed, but made no general comments and Lord Goff of Chieveley dissented.

11 It might be thought that, for the purposes of determining the issues that arise in the present case, it is unnecessary to consider any more of the case law. But in the light of the submissions of Mr Bartley Jones QC, I need
C to refer to several other authorities. The first is *Taylor v Somerset Health Authority* [1993] PIQR P262. The plaintiff's husband suffered a heart attack whilst at work and died shortly after being taken to the defendant's hospital. The plaintiff went to the hospital within an hour and was told of his death by a doctor about 20 minutes after her arrival. She was shocked and distressed. She then went to the mortuary and identified her husband's body. The defendants had been treating him for many months and
D negligently failed to diagnose or treat his serious heart disease. It was admitted that she had suffered nervous shock (i e psychiatric illness) as a result of what she had heard and seen at the hospital. Auld J held that the death was the final consequence of negligence by the defendants many months earlier. The "immediate aftermath" extension had been introduced as an exception to the general principle established in accident cases that a
E plaintiff could only recover damages for psychiatric injury where the accident and the primary injury or death caused by it occurred within his sight or hearing. He continued, at p P267:

> "There are two notions implicit in this exception cautiously introduced and cautiously continued by the House of Lords. They are of: (i) an external, traumatic, event caused by the defendant's breach of duty which
F immediately causes some person injury or death; and (ii) a perception by the plaintiff of the event as it happens, normally by his presence at the scene, or exposure to the scene and/or to the primary victim so shortly afterwards that the shock of the event as well as of its consequence is brought home to him. There was no such event here other than the final consequence of Mr Taylor's progressively deteriorating heart condition which the health authority, by its negligence many months before, had failed to arrest. In my
G judgment, his death at work and the subsequent transference of his body to the hospital where Mrs Taylor was informed of what had happened and where she saw the body do not constitute such an event."

12 The next authority is *Sion v Hampstead Health Authority* [1994] 5 Med LR 170. This was a strikeout case. A father claimed damages against the defendant health authority in respect of psychiatric illness allegedly
H caused to him by the negligence of hospital staff in caring for his son. The son was injured in a motorcycle accident. He was taken to hospital and his father stayed with him for 14 days watching him deteriorate, fall into a coma and die. The claim was that the son's death was caused by the negligent failure to diagnose internal bleeding. The judge struck the claim out as

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disclosing no cause of action. The plaintiff's appeal was dismissed by the Court of Appeal. Staughton LJ held that there was no trace in the plaintiff's medical report that the plaintiff had suffered a shock. On an application of the *Alcock* case [1992] 1 AC 310, the claim was therefore bound to fail. Waite LJ agreed that the appeal should be dismissed for the reasons stated in the judgments of Staughton and Peter Gibson LJJ. Peter Gibson LJ agreed that the claim was bound to fail because there was no evidence of nervous shock. But he also dealt with the defendant's submission that the claim could not succeed because the injuries and/or death of the plaintiff's son did not qualify as a relevant event for the purposes of a valid secondary victim claim. The defendant relied on the decision of Auld J in the *Taylor* case. Peter Gibson LJ said that he was not persuaded by this argument. He acknowledged that in most of the decided cases there had been a sudden and violent incident resulting from a breach of duty. But, he said at p 176, "it is the sudden awareness, violently agitating the mind, of what is occurring or has occurred that is the crucial ingredient of shock". He then said:

> "I see no reason in logic why a breach of duty causing an incident involving no violence or suddenness, such as where the wrong medicine is negligently given to a hospital patient, could not lead to a claim for damages for nervous shock, for example where the negligence has fatal results and a visiting close relative, wholly unprepared for what has occurred, finds the body and thereby sustains a sudden and unexpected shock to the nervous system."

13 But since he agreed with Staughton LJ that there was no evidence of nervous shock, what Peter Gibson LJ said in relation to the *Taylor* case [1993] PIQR P262 was not necessary for his decision (i e was obiter dicta).

14 The next authority is *W v Essex County Council* [2001] 2 AC 592, which is another strikeout case. Parents signed an agreement with the council to become foster parents. Following assurances from the council that they would not place a sexual abuser with them and following a false representation by the council's social worker that G was not a known sexual abuser, they agreed to foster him. The parents later discovered that G had sexually abused their children. They alleged that as a result of the abuse of their children, they had suffered psychiatric illnesses. They commenced proceedings claiming damages in negligence. The judge struck the claim out and the Court of Appeal upheld the decision. The House of Lords allowed the parents' appeal. Lord Slynn of Hadley gave the only substantive speech. He reviewed the leading authorities relating to secondary victims. At p 600B, he noted that in *McLoughlin v O'Brian* [1983] AC 410, 430C–E Lord Scarman recognised the need for flexibility in dealing with new situations not clearly covered by existing decisions and that in this still developing area the courts must proceed incrementally. At p 601A, he said:

> "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."

He said, at p 601:

> "Whilst I accept that there has to be some temporal and spatial limitation on the persons who can claim to be secondary victims, very

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Novo's challenge to the decision of Judge Halbert

20 Mr Cory-Wright QC submits that the judge misunderstood the test for proximity. He erred in seeking to characterise the issue as being what was the proximate "event", instead of looking at the proximity of the relationship between the parties. In most cases the relationship of proximity will be satisfied by proving physical and/or temporal proximity to a relevant event and its aftermath, whether it is a car crash, a crowd being crushed in a stadium or a hospital accident. That is because in most cases there is only one relevant event. But it is incorrect to elevate proximity to a relevant event so as to be the test. It distracts attention from the fact that what is required is proximity between the secondary victim and the tortfeasor. Once it is appreciated that the correct question is whether the parties were in a sufficiently proximate relationship, it becomes clear that the answer must be no. That is because Ms Taylor was not present at the scene of her mother's accident at work or any scene that might sensibly be thought to be part of its immediate aftermath. In short, on any sensible application of Lord Atkin's neighbour principle, Ms Taylor was not Novo's neighbour.

Summary of the submissions of Mr Bartley Jones

21 Mr Bartley Jones accepts that the collapse and death of Mrs Taylor were not part of the "immediate aftermath" of the first event. He submits, however, that the judge reached the right conclusion for the right reasons. In short, the death of Mrs Taylor was the relevant event in the present case and her daughter was physically proximate in time and space to that event. He relies on the short passage in the speech of Lord Wilberforce in *McLoughlin v O'Brian* [1983] 1 AC 410, 422D cited by Lord Oliver in the *Alcock* case [1992] 1 AC 310. I should set it out again, although a slightly extended version of it:

> "As regards proximity to the accident, it is obvious that this must be close in both time and space. It is, after all, the fact and consequence of the defendant's negligence that must be proved to have caused the 'nervous shock'. Experience has shown that to insist on direct and immediate sight or hearing would be impractical and unjust and that under what may be called the 'aftermath' doctrine one who from close proximity, comes very soon upon the scene should not be excluded."

22 I should interpolate that this was said in the context of a single event case. The plaintiff's daughter had been killed and other members of her family injured in a road accident. The plaintiff heard about the death and saw the injuries and as a result suffered psychiatric illness. But Mr Bartley Jones submits that the reasoning of Lord Wilberforce should also be applied to a second event case and the control mechanisms should be applied in the same way in both cases. Novo's negligence caused the second event and caused Ms Taylor's nervous shock and the control mechanisms do not exclude proximity in this case.

23 In his skeleton argument he argued that certain clinical negligence cases "mandated [the judge's] conclusion at least at Court of Appeal level". The cases to which he referred were *Sion v Hampstead Health Authority* [1994] 5 Med LR 170 and *North Glamorgan NHS Trust v Walters* [2003] PIQR P232. He argued, for example, that if Novo's submissions were

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correct, the plaintiff could not have succeeded in the *Walters* case. During the course of oral argument, however, Mr Bartley Jones moderated his position somewhat, but continued to rely on these authorities. He also relied on what Lord Slynn said in *W v Essex County Council* [2001] 2 AC 592 and the decisions in the *Walters* case and the *Galli-Atkinson* case [2003] Lloyd's Rep Med 285 as evidence of a trend towards a more liberal approach in this area of the law.

Conclusion

24 The broad distinction between primary and secondary victims propounded by Lord Oliver in the *Alcock* case [1992] 1 AC 310 (see para 7 above) has been criticised as unhelpful: see, for example, the Law Commission Paper *Liability for Psychiatric Illness* (March 1998) (Law Com No 249), paras 5.45–5.53. In particular, it is said that the authorities provide little guidance as to where the line between primary and secondary victims should be drawn. But the distinction is well established in our law and the relevant principles were stated by the House of Lords in the *Alcock* case and the *Frost* case [1999] 2 AC 455. For the reasons stated in the *Frost* case, however, the courts should not seek to make any substantial development of these principles. That should be left to Parliament, although the case law shows that some modest development by the courts may be possible.

25 This case does not raise questions of the kind which typically arise in secondary victim cases such as whether the claimant (i) had a close tie of love and affection with the primary victim; or (ii) was close in time and space to the incident for which the defendant was negligently responsible; or (iii) directly perceived the incident rather than, for example, hearing about it from a third person. The issue raised in this case is whether the death of Mrs Taylor was a relevant incident for the purposes of Ms Taylor's claim as a secondary victim. If it was, then her claim would succeed because, on this hypothesis, it would not founder on the rock of any of the control mechanisms.

26 I accept the submission of Mr Cory-Wright that, in order to succeed, Ms Taylor must show that there was a relationship of proximity between Novo and herself. The word "proximity" has been used in two distinct senses in the cases. The first is a legal term of great importance in the law of negligence generally. It is used as shorthand for Lord Atkin's famous neighbour principle. Used in this sense, it is a legal concept which is distinct from and narrower than reasonable foreseeability. It describes the relationship between parties which is necessary in order to found a duty of care owed by one to the other. In his speech in the *Alcock* case Lord Oliver refers to proximity in this sense more than once in the passages which I have cited above. Lord Atkin's neighbour principle itself is concerned with the relationship between parties. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure

> "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": *Donoghue v Stevenson* [1932] AC 562, 580.

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A Lord Bridge of Harwich made the same point in *Caparo Industries plc v Dickman* [1990] 2 AC 605, 617–618:

> "What emerges is that, 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
B 'proximity' or 'neighbourhood' . . ."

27 But in secondary victim cases, the word "proximity" is also used in a different sense to mean physical proximity in time and space to an event. Used in this sense, it serves the purpose of being one of the control mechanisms which, as a matter of policy, the law has introduced in order to limit the number of persons who can claim damages for psychiatric injury as
C secondary victims or to put it in legal terms, to denote whether there is a relationship of proximity between the parties. In a secondary victim case, physical proximity to the event is a necessary, but not sufficient, condition of legal proximity.

28 I accept the submission of Mr Cory-Wright that the correct question is whether Ms Taylor and Novo were in a relationship of proximity in the legal sense. The difficulty in answering this question is that, as Lord Oliver
D said, the concept of proximity depends more on the court's perception of what is the reasonable area for the imposition of liability than any process of logic. In the context of claims by secondary victims, the control mechanisms are the judicial response to how this area should be defined. This has involved the drawing of boundaries which have been criticised as arbitrary and unfair. But this is what the courts have done in an area where they have
E had to fix the ambit of liability without any guiding principle except Lord Atkin's famous, but elusive, test.

29 In the present case Novo's negligence had two consequences which were separated by three weeks in time. The judge described them as two distinct events. The use of the word "event" has the tendency to distract. In reality there was a single accident or event (the falling of the stack of racking boards) which had two consequences. The first was the injuries to
F Mrs Taylor's head and arm; and the second (three weeks later) was her death. There was clearly a relationship of legal proximity between Novo and Mrs Taylor. Moreover, if Ms Taylor had been in physical proximity to her mother at the time of the accident and had suffered shock and psychiatric illness as a result of seeing the accident and the injuries sustained by her mother, she would have qualified as a secondary victim on established
G principles. But, in my view, to allow Ms Taylor to recover as a secondary victim on the facts of the present case would be to go too far. I have reached this conclusion for two inter-related reasons.

30 First, it seems to me that, if the judge is right, Ms Taylor would have been able to recover damages for psychiatric illness even if her mother's death had occurred months, and possibly years, after the accident (subject, of course, to proving causation). This suggests that the concept of proximity
H to a secondary victim cannot reasonably be stretched this far. Let us now consider the situation that would have arisen if Mrs Taylor died at the time of the accident and Ms Taylor did not witness the death, but she suffered shock when she came on the scene shortly after the "immediate aftermath". In that event Ms Taylor would not have been able to recover damages for

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psychiatric illness because she (possibly only just) would have failed to satisfy the physical proximity control mechanism. The idea that Ms Taylor could recover in the first situation but not in the others would strike the ordinary reasonable person as unreasonable and indeed incomprehensible. In this area of the law, the perception of the ordinary reasonable person matters. That is because where the boundaries of proximity are drawn in this difficult area should, so far as possible, reflect what the ordinary reasonable person would regard as acceptable. This is the idea that Lord Hoffmann was expressing in the *Frost* case [1999] 2 AC 455 in the context of distinguishing between different categories of secondary victims in that case. Accordingly, unless compelled to do so by previous authority, I would refuse to hold that it is reasonable to impose liability on Novo for Ms Taylor's psychiatric illness. I do not consider that there is any authority which compels such a conclusion. I explain below why I do not accept the submission of Mr Bartley Jones that any of the authorities on which he relies supports the decision reached by the judge in the present case.

31 The second reason is closely connected with the first. In the *Frost* case the House of Lords recognised that this area of the law is to some extent arbitrary and unsatisfactory. That is why Lord Steyn said "thus far and no further" in the *Frost* case and Lord Hoffmann and Lord Browne-Wilkinson agreed with him. It is true that the issue in the *Frost* case was very different from that with which we are concerned in the present case. But that does not detract from the force of the general point that their Lordships were making. In my view, the effect of the judge's approach is potentially to extend the scope of liability to secondary victims considerably further than has been done hitherto. The courts have been astute for the policy reasons articulated by Lord Steyn to confine the right of action of secondary victims by means of strict control mechanisms. In my view, these same policy reasons militate against any further substantial extension. That should only be done by Parliament.

32 It follows that, in my view, the judge was wrong to hold that the death of Mrs Taylor was the relevant "event" for the purposes of deciding the proximity question. A paradigm example of the kind of case in which a claimant can recover damages as a secondary victim is one involving an accident which (i) more or less immediately causes injury or death to a primary victim and (ii) is witnessed by the claimant. In such a case, the relevant event is the accident. It is not a later consequence of the accident. Auld J put the point well in *Taylor v Somerset Health Authority* [1993] PIQR P262: see para 11 above. Ms Taylor would have been able to recover damages as a secondary victim if she had suffered shock and psychiatric illness as a result of seeing her mother's accident. She cannot recover damages for the shock and illness that she suffered as a result of seeing her mother's death three weeks after the accident.

33 I turn to the authorities relied on by Mr Bartley Jones. It follows from what I have said that in my view the reasoning of Auld J in the *Taylor* case was correct. As I have explained at para 13 above, the observations of Peter Gibson LJ in *Sion v Hampstead Health Authority* [1994] 5 Med LR 170 were obiter dicta and they are therefore not binding on this court.

34 *W v Essex County Council* [2001] 2 AC 592 is a strikeout case. All that the House of Lords decided was that the claim should not have been struck out because it raised an arguable case. For that reason alone, it is of

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THE LAW COMMISSION

LIABILITY FOR PSYCHIATRIC ILLNESS

CONTENTS

(c) The defendant causes the death, injury or imperilment of a person other than the plaintiff, and the plaintiff can establish sufficient proximity in terms of:

(i) his or her tie of love and affection with the immediate victim;

(ii) his or her closeness in time and space to the incident or its aftermath; and

(iii) the means by which he or she learns of the incident[48]

2.19 While early cases dealing with plaintiffs who suffered psychiatric illness pursuant to another person's death, injury or imperilment established that the plaintiff must show that his or her psychiatric illness was reasonably foreseeable,[49] it became clear that certain factors, such as the plaintiff's closeness in time and space to the scene of the accident[50] and the plaintiff's relationship to the immediate victim[51] were particularly important to the finding of liability. It was not initially clear, however, whether these were factors relevant to the test of foreseeability, or whether they were additional hurdles over and above foreseeability that the plaintiff must surmount in order to establish a duty of care. In *McLoughlin v O'Brian*[52] Lord Wilberforce (with whom Lord Edmund-Davies agreed) thought that reasonable foreseeability was not the sole test. The risk of opening the door to a limitless number of claims required that the law should impose additional proximity tests in terms of the class of persons whose claims may be recognised, the proximity of such persons to the accident, and the means by which the shock was caused.[53] Lord Scarman and Lord Bridge thought that these three factors were to be weighed in applying the reasonable foreseeability test, but were not limitations on it.[54]

2.20 This issue was decisively dealt with in the decision of the House of Lords in *Alcock v Chief Constable of South Yorkshire Police*.[55] This was a test case brought by a number of relatives and friends of spectators involved in the Hillsborough disaster. It was admitted that the death and injuries of the fans at the stadium occurred as a result of the negligence of the police and it was assumed for the purposes of the trial that each of the plaintiffs had proved the infliction of psychiatric illness.[56]

[48] For the position where the person injured or imperilled is the defendant him or herself, see para 2.66 below.

[49] See para 2.5 above.

[50] *Bourhill v Young* [1943] AC 92 (plaintiff some 45 to 50 feet from the accident scene and out of visual range failed to recover); *King v Phillips* [1953] 1 QB 429 (a mother who heard her child scream from some 70 to 80 yards distance when a taxi backed into him failed to recover).

[51] Successful plaintiffs prior to *Alcock* included mothers (*Hambrook v Stokes Bros* [1925] 1 KB 141; *Hinz v Berry* [1970] 2 QB 40; *McLoughlin v O'Brian* [1983] 1 AC 410; *Brice v Brown* [1984] 1 All ER 997), a father (*Boardman v Sanderson* [1964] 1 WLR 1317) and a spouse (*McLoughlin v O'Brian* [1983] 1 AC 410).

[52] [1983] 1 AC 410.

[53] *Ibid*, 421-422.

[54] *Ibid*, 431 and 441-443 respectively. Lord Russell's opinion on this point is not clear: *ibid*, 429.

[55] [1992] 1 AC 310.

[56] [1992] 1 AC 310, 318 (Hidden J); 351 (Parker LJ); 406 (Lord Oliver).

Sixteen plaintiffs claimed damages, and ten were successful at first instance. The Court of Appeal allowed the defendant's appeal in respect of nine of these plaintiffs and denied the cross-appeals by the six unsuccessful plaintiffs. Ten of the fifteen plaintiffs appealed to the House of Lords. The relationship of these plaintiffs to the immediate victims ranged from parents to brother, sister, brother-in-law, fiancée and grandfather. Two of the plaintiffs were present at the match, whilst the others had watched events on television either as the disaster unfolded on live broadcasts or subsequently on recorded bulletins. None of the plaintiffs were successful before the House of Lords.

2.21 The House of Lords unanimously adopted Lord Wilberforce's view that liability for psychiatric illness was limited on policy grounds by the concept of proximity. This involved, in the words of Lord Oliver, "not only an element of physical proximity to the event but a close temporal connection between the event and the plaintiff's perception of it combined with a close relationship of affection between the plaintiff and the primary victim".[57] Therefore, even where the psychiatric illness is a reasonably foreseeable consequence of the defendant's conduct, if all three additional proximity requirements are not met, the claim will fail. These three proximity requirements are considered in turn below, after we have examined (in paragraphs 2.22 to 2.24) a preliminary point concerning the relationship between the defendant and the immediate victim.

2.22 It has been suggested that in order to succeed under this category (c) the plaintiff must first establish that the defendant was in breach of a duty of care to the immediate victim.[58] The principal reason for this appears to be that success by a plaintiff in a claim for psychiatric illness where the defendant's conduct with regard to the immediate victim was not negligent would result in disparate legal standards of conduct being required from the defendant in the same circumstance.[59]

2.23 We do not consider that this is the position under the present law and think that such reasoning stems from the confusion created by the use of the terminology 'primary' and 'secondary' victims. It was Lord Oliver in *Alcock v Chief Constable of South Yorkshire Police* who first explicitly referred to the distinction between a primary and secondary victim in claims for psychiatric illness, and although he thought that it was useful terminology, he recognised the possibility of confusion

[57] *Ibid*, 411.

[58] B J Rodger, "Nervous Shock and Breach of Duty of Care Owed to Secondary Victims" 1997 SLT 22. In *Dillon v Legg*, a decision of the Californian Supreme Court allowing recovery for psychiatric illness suffered by the mother of a girl killed in a car accident in front of her, Tobriner J stated: "In the absence of the primary liability of the tortfeasor for the death of the child, we see no ground for an independent and a secondary liability for claims for injuries by third parties. The basis for such claims must be the adjudicated liability and fault of the defendant; that liability and fault must be the foundation for the tortfeasor's duty of care to third parties who, as a consequence of such negligence, sustain emotional trauma": 29 ALR 3d 1316, 1320-1321 (1968). But see P G Heffey, "The Negligent Infliction of Nervous Shock in Road and Industrial Accidents" (1974) 48 ALJ 240, 251-254 and Lord Wright in *Bourhill v Young*: "If, however, the appellant has a cause of action it is because of a wrong to herself. She cannot build on a wrong to someone else": [1943] AC 92, 108.

[59] *Ibid*, 23.

when he said: "Although it is convenient to describe the plaintiff ... as a 'secondary' victim, that description must not be permitted to obscure the absolute essentiality of establishing a duty owed by the defendant directly to him."[60] The plaintiff must therefore show that an independent duty of care is owed by the defendant to him or her, and there is no suggestion that such claim is parasitic on any claim that the immediate victim might have in respect of his or her personal injuries.[61] Indeed it is clear that the plaintiff may be successful where he or she fears that another has been injured even though they are in fact unharmed.[62] This point was clearly recognised by Lord Oliver when he said: "There may, indeed, be no primary 'victim' in fact. It is, for instance, readily conceivable that a parent may suffer injury, whether physical or psychiatric, as a result of witnessing a negligent act which places his or her child in extreme jeopardy but from which, in the event, the child escapes unharmed."[63] Indeed, one of the plaintiffs in *Alcock* suffered illness consequent upon his fear for the safety of his nephew, who in fact escaped unharmed from the tragedy. Although ultimately unsuccessful,[64] there was no suggestion that this plaintiff should fail because his relative was not injured.

2.24 We consider that this approach is justifiable, even where it results in the plaintiff being able to recover damages for psychiatric illness suffered pursuant to the injury of a loved one caused by the defendant in circumstances where the defendant would not be liable in negligence to the physically injured person.[65] For example, the plaintiff may suffer psychiatric illness as a result of injuries inflicted by the defendant on a person who has agreed an exclusion clause exempting the defendant from liability for the injuries.[66] This does not *necessarily* mean, however, that the defendant should be able to ignore the claims of any others who might foreseeably be injured by his or her acts, including those with a close tie of love and affection to the injured person. Likewise, the defendant may be able to rely on the defence of *ex turpi causa* to defeat an injured person's claim for damages, whereas there may be no similar public policy justification to deny the claim of a loved one who suffers psychiatric illness as a result.

[60] *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, 411.

[61] The position may therefore be contrasted with that of the dependant claiming under the Fatal Accidents Act 1976 whose success depends on whether the deceased would have been able to maintain an action at the moment of death had death not taken place: Fatal Accidents Act 1976, s1(1).

[62] For example, in *Dooley v Cammell Laird* [1951] 1 Lloyd's Rep 271 and in *Galt v British Railways Board* (1983) 133 NLJ 870 the plaintiff recovered damages for psychiatric illness suffered after he mistakenly feared that his work colleagues had been injured.

[63] *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, 412.

[64] The Court of Appeal held that he had failed to satisfy the proximity of relationship test: *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, 361, *per* Parker LJ; 380, *per* Stocker LJ; 385, *per* Nolan LJ. He did not appeal to the House of Lords.

[65] Although see para 6.37 below in relation to policy issues that may negate both duties of care.

[66] Such an exclusion clause could only be valid in relation to non-business liability: Unfair Contract Terms Act 1977, ss 1(3), 2(1).

(i) a close tie of love and affection

2.25 The plaintiff must establish a close tie of love and affection to the immediate victim.[67] Such a tie may be present in family relationships or those of close friendship.[68] In *Alcock*, all their Lordships were agreed that the closeness of the tie must be proved in each case by the plaintiff, although it may be rebuttably presumed in the case of a spouse, parent or child[69] and possibly fiancé(e).[70] More distant relatives and friends are required to show that their relationship is so close and intimate that their love and affection for the victim is comparable to that of the normal spouse, parent or child,[71] but it is the closeness of the care as opposed to the nature of the relationship which is important.[72]

2.26 In *Alcock* one plaintiff had been present at the ground and had witnessed the accident in which his two brothers were killed. His claim failed because he produced no evidence of a close tie of love and affection with his brothers and no presumption of such a tie was to be made in the case of siblings.[73] However, in a subsequent action, *McCarthy v Chief Constable of South Yorkshire Police*,[74] a plaintiff whose half-brother had died at Hillsborough successfully recovered damages for the psychiatric illness which he suffered. He adduced evidence from relatives and friends that his family was very close, and the two half-brothers particularly so.[75]

2.27 There was general agreement amongst their Lordships in *Alcock* that the issue of proximity by relationship should be decided on a case by case basis. Lord Oliver stated that creating a list of categories within which claims may succeed and without which they are doomed to failure would work great injustice and could not be rationally justified. Lord Jauncey thought that any such dividing line would be arbitrary and lacking in logic.[76]

[67] *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, 397, *per* Lord Keith.

[68] *Ibid*, 397, *per* Lord Keith.

[69] *Ibid*, 398, *per* Lord Keith; 403, *per* Lord Ackner; 422, *per* Lord Jauncey.

[70] *Ibid*, 398, *per* Lord Keith.

[71] *Ibid*, 403, *per* Lord Ackner; 422, *per* Lord Jauncey.

[72] *McLoughlin v O'Brian* [1983] 1 AC 410, 422, *per* Lord Wilberforce.

[73] Lord Oliver thought that the claim also failed on the degree of perception. Although present at the ground, the perception was a gradual as opposed to a sudden process: [1992] 1 AC 310, 417. See further paras 2.61 to 2.65 below.

[74] Unreported, 11th December 1996.

[75] In Scotland, where the rules relating to liability for negligently inflicted psychiatric illness are similar to those in England, the courts have adopted a strict interpretation of the requirement for a close tie of love and affection. In *Robertson v Forth Road Bridge Joint Board* 1996 SLT 263, Lord President Hope, supporting the trial judge, held that the plaintiffs, one of whom had spent the greater part of his working life with the deceased and had socialised with him on a weekly basis, failed to show that they had the necessary close tie of love and affection required by *Alcock*. See M J M Bogie, "A Shocking Future?: Liability for Negligently Inflicted Psychiatric Illness in Scotland" [1997] Jur Rev 39, 46.

[76] [1992] 1 AC 310, 415-416, *per* Lord Oliver; 422, *per* Lord Jauncey.

(ii) physical and temporal proximity

2.28 The plaintiff must be close to the accident both in terms of time and space.[77] The accident includes not only the scene of the event which causes the death, injury or imperilment, but also its "immediate aftermath". This extension was firmly established in *McLoughlin v O'Brian*.[78] The plaintiff was two miles away at her home when a car carrying her husband and three of her children was involved in a crash caused by the defendant's negligence. One of the children died almost immediately and the other two were seriously injured. An hour or so later she was told of the accident and went directly to the hospital where she saw her husband and two children still covered in dirt and oil, suffering obvious pain and distress. She was held to have established sufficient proximity to the events which made up the accident. Lord Wilberforce said it would be impractical and unjust to insist on direct and immediate sight or hearing and to exclude a plaintiff who comes very soon upon the scene.[79]

2.29 An attempt by the plaintiffs in *Alcock v Chief Constable of South Yorkshire Police*[80] to extend the concept beyond the immediate aftermath failed. Several plaintiffs who had not been present at the ground when the tragedy occurred went there subsequently in order to identify the bodies of relatives. The earliest such plaintiff arrived at the scene between eight and nine hours after the accident, as opposed to the hour or so after the accident that Mrs McLoughlin had arrived at the hospital. Lord Ackner thought that, while the identification process might correctly be described as part of the aftermath, it was not part of the *immediate* aftermath.[81] Lord Jauncey agreed, but also went further. He thought that the purpose for which the plaintiff comes upon the immediate aftermath was also relevant in testing proximity. The plaintiffs in *Alcock* went to the scene for the purpose of identifying the bodies. This, he said, was a very different situation from that in which the plaintiff goes within a short time of the accident to provide comfort and care.[82]

(iii) the means of perception

2.30 In *McLoughlin*, Lord Wilberforce noted that there was no case in which the law had compensated shock brought about by communication by a third party, and

[77] *McLoughlin v O'Brian* [1983] 1 AC 410, 422, *per* Lord Wilberforce.

[78] [1983] 1 AC 410.

[79] *Ibid*, 422. See also the Australian case, *Jaensh v Coffey* (1984) 155 CLR 549, where the plaintiff saw her injured husband at the hospital to which he had been taken in severe pain before and between his undergoing a series of emergency operations. The aftermath was held to include the hospital to which the injured victim was taken and persisted for so long as he remained in the state produced by the accident up to and including immediate post accident treatment.

[80] [1992] 1 AC 310.

[81] *Ibid*, 405.

[82] *Ibid*, 424. This reasoning has been criticised. In "Compensation for Psychiatric Injury: The Limits of Liability" (1995) 2 Psychiatry, Psychology and Law 37, 43-44 P R Handford points out that "there is all the difference in the world between a relative who arrives to identify a body knowing that the person concerned is already dead, and one who is viewing rows of bodies, as in the Hillsborough case, hoping against hope that the person they seek will not be one of them".

one had been imperilled, the potential number of plaintiffs would become limited only by the concept of reasonable foreseeability, and we fear that the policy against opening the floodgates of litigation would be undermined. We consider, therefore, that at this stage legislation should draw the line at where the loved one has in fact been killed, injured or imperilled by the defendant.

4. THE METHOD OF LEGISLATING ON OUR CENTRAL RECOMMENDATION

6.19 There are two alternative methods by which recommendation (11) could be given legislative effect. The first method would be a legislative provision which stated that a claim for psychiatric illness could succeed at common law even where the plaintiff was neither close to the accident or aftermath nor had direct perception of it. We were initially attracted by the simplicity of this approach, but we eventually rejected it for two reasons. First, we were uncertain whether, having removed these two bars, it would be clear that there remained at common law a right to recover damages for psychiatric illness suffered pursuant to another's injury. That is, we would have legislatively repealed the ratio in *Alcock v Chief Constable of South Yorkshire Police*,[44] without affirming that any part of it should remain intact. Secondly, we were concerned that even if it were clear that a right to recover damages for psychiatric illness based on the plaintiff's relationship with the immediate victim remained, the courts would be in a position to impose new restrictions on liability, in place of the two bars that had been removed. We wish to remove, or minimise so far as possible, the scope for this.

6.20 The second method, which we have adopted, is to impose a new statutory duty of care in relation to psychiatric illness - with its elements positively spelt out in the statute - that is not restricted by reference to the plaintiff's closeness to the accident and direct perception of it. This positive approach removes any doubt that the plaintiff does have a right of recovery based on reasonable foreseeability and his or her relationship with the immediate victim, and prevents any further bars to recovery from being imposed other than those provided for in our legislation.

6.21 We should emphasise the novelty of the method of legislative reform which we have adopted. Rather than laying down all the requirements of liability, we have provided for one, albeit central, component of liability: the existence of a duty of care. We intend that all other aspects of the tort of negligence, for example the rules relating to the standard of care, causation, remoteness and contributory negligence, are to apply in the normal way. Although one might draw comparisons with the Occupiers' Liability Acts 1957 and 1984, which have been described as simply "applied negligence",[45] our proposals are not directly analogous. We do not propose to set up a new statutory tort relating to liability for psychiatric illness, but rather to lay down one segment of a finding of liability under the tort of negligence, the duty of care, but otherwise to leave the common law rules in play.

6.22 In spelling out the new duty of care, we have borne in mind recommendations (7) and (8) above. It would plainly be unacceptable to remove those bars from the

[44] [1992] 1 AC 310.

[45] M A Jones, *Textbook on Torts* (5th ed 1996) p 230.

common law and yet to re-erect them as ingredients of our proposed new statutory duty of care. Recommendation (7) - the removal of the shock requirement - is easy to accommodate, by our simply not recommending that shock should be an element of our proposed new duty of care. But in order to accommodate recommendation (8) - relating to the removal of the bar to recovery where the defendant is the immediate victim - we think that it is easier and clearer to set out a duty of care for where the defendant is the immediate victim that is separate from the duty of care imposed in the usual situation where the defendant is not the immediate victim. This is because the policy concerns are not identical and, where the defendant is the immediate victim, one cannot draw on any policies that negate the defendant owing a duty of care to the immediate victim (because the defendant cannot owe a duty of care to him or herself).

6.23 Accordingly, we recommend that:

(12) to implement recommendation (11):-

(a) our proposed legislation should adopt the method of imposing a statutory duty of care to avoid psychiatric illness (with its elements positively spelt out in the statute) for the purposes of the tort of negligence; (Draft Bill, clause 1 and 2)

(b) our proposed legislation should actually set out two new duties of care, one for the usual situation where the defendant is not the immediate victim, and the second for the rarer situation where the defendant is the immediate victim. (Draft Bill, clause 1 and 2)

5. THE ELEMENTS OF THE NEW STATUTORY DUTY OF CARE WHERE THE DEFENDANT IS NOT THE IMMEDIATE VICTIM

(1) Those to whom the New Duty of Care is Owed: a Close Tie of Love and Affection

6.24 After *Alcock*, a close tie of love and affection is rebuttably presumed in the case of a parent, child or spouse (and possibly fiancé(e)) of the immediate victim. In other cases, such as more distant relatives or friends, the plaintiff is required to prove that such a close tie of love and affection existed.[46] We consider that the class of relationships in which the tie may be presumed is currently drawn too narrowly and that in certain instances the plaintiff should be deemed (without being put to proof) to have had such a tie. In coming to this conclusion we have attempted to steer a path through various conflicting factors. We want to create a greater degree of certainty in relation to liability for psychiatric illness than is present in the current law.[47] We dislike a regime which requires a plaintiff, who *a fortiori* is suffering from a psychiatric illness as a result of the death, injury or imperilment of a relative or friend, to prove that a close tie of love and affection existed or which allows for the possibility of distressing cross-examination on the

[46] See para 2.25 above.

[47] For criticism of uncertainty in the law on liability for psychiatric illness see D Robertson, "Liability in Negligence for Nervous Shock" (1994) 57 MLR 649.

issue.[48] We are, however, aware that it would not be possible to draw up a list that would include all categories of relationship where such a tie might exist without including many who in fact were not close. We therefore propose that a narrow list should be drawn of those who may be deemed to have had a close tie of love and affection with the immediate victim (hereinafter referred to as the fixed list) but would allow a plaintiff outside the list to prove that his or her relationship with the immediate victim was equally close. This proposal was not one of the various options specifically suggested in the Consultation Paper.[49] However, we asked consultees for any other suggestions as to the formulation of the list and some put this idea forward as a preferable alternative. We are persuaded that it represents the best approach.

6.25 This seems the most appropriate point to clarify that there will be a close correlation between the requirement for a close tie of love and affection and the test of reasonable foreseeability.[50] That is, if the plaintiff satisfies the requirement for a close tie of love and affection (and is assumed to be a person of reasonable fortitude), then he or she will always, or almost always,[51] fall within the class of those whom it is reasonably foreseeable might suffer psychiatric illness as a result of the death, injury or imperilment of the immediate victim.

6.26 We therefore recommend that:

(13) the legislation should lay down a fixed list of relationships where a close tie of love and affection shall be deemed to exist, while allowing a plaintiff outside the list to prove that a close tie of love and affection existed between him or herself and the immediate victim; (Draft Bill, clause 3(1)-(5))

6.27 We further recommend, and set out the details of our reasoning in the following paragraphs, that:

[48] On consultation two QCs referred to the distress that would be caused to plaintiffs by cross-examination on their love for the immediate victim. See also, M A Jones, "Liability for Psychiatric Illness - More Principle, Less Subtlety?" [1995] 4 Web JCLI: "Is it really necessary in the interests of justice or even good policy, to conduct detailed enquiry into the personal emotional lives of plaintiffs, in effect questioning their love for the primary victim at a time when, if the allegations are accurate, they are extremely vulnerable emotionally?"

[49] We asked consultees whether there should be: (a) a fixed list of qualifying relationships of close love and affection; or (b) a list of relationships in which there is a rebuttable presumption of a close tie of love and affection, while also allowing a plaintiff not on that list to prove a close tie of love and affection; or (c) a list of relationships in which there is a rebuttable presumption of a close tie of love and affection, while not allowing a plaintiff outside that list to prove a close tie of love and affection; or (d) no list at all, so that the plaintiff has to prove on the facts of each case a close tie of love and affection; or (e) an approach different to any of (a) to (d): Consultation Paper No 137, para 5.17.

[50] See paras 5.7 to 5.10 above. Of course, we do not seek to deny that it is reasonably foreseeable that plaintiffs other than those having a close tie of love and affection to the immediate victim (eg rescuers or bystanders) might suffer a psychiatric illness consequent on the immediate victim's death, injury or imperilment.

[51] A conceivable example of where this might not be so is where a mother who abandoned her son at birth and had no subsequent contact with him, suffers psychiatric illness on reading, many years later, of her son's death in a road accident. The court might consider that her illness was not a reasonably foreseeable consequence of the defendant's conduct.

(14) **the fixed list of relationships where a close tie of love and affection is deemed to exist should consist of the following relationships:**

(a) spouse;

(b) parent;

(c) child;

(d) brother or sister;

(e) cohabitant, defined as being a person who, although not married to the immediate victim, had lived with him or her as man and wife (or, if of the same gender, in the equivalent relationship) for a period of at least two years. (Draft Bill, clause 3(2), 3(4) and 3(5))

(a) the fixed list

(i) parents, children and spouses

6.28 We propose that parents, children and the spouse of the immediate victim (in favour of whom there is currently a rebuttable presumption) should be included on the fixed list. Parents would include those who had adopted the immediate victim; and children would include adopted children of the immediate victim.[52] We considered whether stepparents and stepchildren should be included on the fixed list, since many clearly have a tie of love and affection as close as any parent and child. However, the relationship between a stepparent and a stepchild can clearly vary enormously, and so as not to include on the fixed list many who were in fact not close, we would need to put some restriction on this class. We also considered including plaintiffs who had treated the immediate victim as their child;[53] and plaintiffs who had treated the immediate victim as their parent.[54] However, to the extent that this test would be satisfied by a plaintiff producing factual evidence of his or her tie of love and affection with the immediate victim, this would amount to proving that a close tie of love and affection existed, and there would be no advantage to his or her inclusion on the fixed list. On the other hand, there might quite often be no close tie of love and affection if this test were satisfied merely by, for example, evidence that the plaintiff made financial provision for the immediate victim. It seemed to us that any sensible restriction on this class should involve the plaintiff in producing evidence that a close tie in fact existed, so that no benefit would be gained by its inclusion on the fixed list. However, we would confidently expect that many stepparents and stepchildren will readily be able to produce factual evidence that a close tie of love and affection

[52] Section 39(6) of the Adoption Act 1976.

[53] In *Hinz v Berry* [1970] 2 QB 40 the plaintiff's feelings for her foster children were assumed without question to be the same as those for her natural children.

[54] These categories are included as "dependants" in s 1(3)(d) and (f) of the Fatal Accidents Act 1976. The Act does not, however, make provision for a residual category of dependant equivalent to our proposed category of those who can establish a close tie of love and affection to the immediate victim.

existed between them, and therefore successfully claim despite being outside the fixed list.

(ii) brothers and sisters

6.29 We consider that there is a strong case for including siblings on the fixed list.[55] We recognise that the relationship between brothers and sisters varies from family to family, and that creating an irrebuttable presumption in favour of siblings might allow recovery where the plaintiff could not otherwise produce sufficient evidence of a close tie. However, we consider that this risk is outweighed by the benefits gained from removing the distressing obligation to prove sibling love in each case. The very fact that the plaintiff is suffering from a psychiatric illness as a result of his or her brother or sister's injury must in itself go some way to suggest that there was a tie between them. On consultation our provisional view that any list (whether fixed or rebuttable) should include brothers and sisters[56] was accepted by 93 per cent of consultees who responded to this question. We also considered whether provision should be made to include half-brothers and half-sisters on the fixed list. However, as with stepparents and stepchildren, we would have needed to put some limit on this class, so as not to include many who were in fact not close. Such a restriction could be by reference to a requirement that the half-siblings were brought up in the same household. But again, we think that the most sensible restriction would be proof of a close tie of love and affection. There would therefore be no advantage in including half-siblings on the fixed list.

(iii) cohabitants

6.30 In compiling the fixed list we have been looking for those people with whom the immediate victim had the closest of relationships. In the light of the number of couples that live together outside marriage we believe that recognition should be given to committed heterosexual and same sex relationships. Where the parties have chosen to enter into such a committed relationship and remain in it, the close tie may be reasonably deemed to exist. In contrast, we wish to exclude transitory relationships where it would not be appropriate to presume that the closest ties of love and affection had yet been forged.

6.31 We therefore propose that an irrebuttable presumption is drawn in favour of those couples who have cohabited for a period of at least two years. We acknowledge that this two year cut off point may be thought to be arbitrary. But this was the period of cohabitation chosen for claims under the Fatal Accidents Act 1976 and

[55] Hidden J, the judge at first instance in *Alcock v Chief Constable of South Yorkshire Police*, held that the relationship between brothers and sisters could be presumed to be sufficiently proximate to impose liability: [1992] 1 AC 310, 337-339. However his decision was overturned by the Court of Appeal and the House of Lords. Lord Ackner said [1992] 1 AC 310, 406: "The quality of brotherly love is well known to differ widely." See also H Teff, "Liability for Psychiatric Illness after Hillsborough" [1992] OLJS 440, 445-446. In *Turbyfield v Great Western Railway* (1937) 54 TLR 221 an eight year old girl was awarded damages for the shock of being an unwilling witness to an accident caused by the defendant that fatally injured her twin sister.

[56] Consultation Paper No 137, para 5.19.

seems to have worked satisfactorily in that context.[57] Moreover, a person who has cohabited with the immediate victim for a lesser period of time will have the possibility of proving that their tie of love and affection was equally as close, and factors other than time, such as the production of a child of the relationship, might be relevant. In the Consultation Paper we provisionally suggested that any list (fixed or rebuttable) should include stable heterosexual and homosexual relationships defined using a two year test.[58] Ninety-four per cent of consultees who responded to this question agreed with the inclusion of stable heterosexual relationships and 87 per cent with the inclusion of stable homosexual relationships.

(b) outside the fixed list

6.32 There are many other persons who may have had a particularly close relationship with the immediate victim, such as a grandparent, grandchild, uncle, aunt or friend. In *Alcock,* for example, Lord Keith thought that the closeness of the tie could be presumed between fiancée(e)s.[59] We consider, however, that the further one moves away from the nuclear family, the more difficult it becomes to generalise about the degree of commitment involved in a relationship. We therefore propose that the fixed list should not be extended beyond that set out above, but that any plaintiff not included in that list may prove that his or her tie of love and affection was as close as those on it.

6.33 It has been suggested that what is required is not a tie based on love and affection, but rather a "tie of care".[60] This would include, for example, a teacher-pupil or patient-nurse relationship. However, we consider that such an approach is too broad. We are not suggesting that plaintiffs who are not relatives of the immediate victim should be excluded, but we consider that it should be sufficient to say that anyone not on the list must prove that he or she had a close tie of love and affection with the immediate victim.[61]

(c) the timing of the close tie of love and affection test

6.34 Little attention has been paid to the question of *when* the plaintiff need show that he or she has a close tie of love and affection with the immediate victim. Presumably this is because the requirements of closeness to the accident, direct perception of it and shock have always linked the plaintiff to the point in time of the accident to the immediate victim. However, we have recommended that these requirements should be removed. We therefore need to specify in the proposed legislation the time at which the close tie of love and affection test must be

[57] The wording is used in the definition of a "dependant", although the category is limited to heterosexual relationships: s 1(3)(b) of the Fatal Accidents Act 1976.

[58] Consultation Paper No 137, para 5.19.

[59] [1992] 1 AC 310, 398.

[60] F A Trindade, "The Principles Governing the Recovery of Damages for Negligently Caused Nervous Shock" [1986] CLJ 476, 488.

[61] We consider that it would not be helpful to attempt to define the elements that make up a close tie of love and affection since the circumstances of the plaintiff's relationship with the immediate victim may be infinitely variable. Rather, as at common law, the courts should continue to give the words their plain meaning, resolving borderline factual issues if and when they arise on a case by case basis.

satisfied. At first sight, the most obvious time is that of the defendant's act or omission which causes the death, injury or imperilment of the immediate victim. It is at this point that the defendant should have regard to those whom he or she can reasonably foresee might suffer as a result of his or her actions. However, we consider that this may not be wide enough. It might also be reasonably foreseeable that a person who later forms a close tie of love and affection with the immediate victim will suffer psychiatric illness, maybe, for example, as a result of long-term caring for the immediate victim who was initially a stranger. Since the requirement for a close tie of love and affection is purely a controlling tool, essentially adopted in addition to the reasonable foreseeability test in order to limit any possible "flood" of claims, we see no reason not to apply the test as generously as possible. We therefore consider that, as an alternative to there being a close tie of love and affection at the time of the defendant's act or omission, the requirement may be satisfied where the plaintiff has a close tie of love and affection at the onset of his or her psychiatric illness.

6.35 We therefore recommend that:

(15) the legislation should provide that the requirement for a close tie of love and affection between the plaintiff and the immediate victim may be satisfied either at the time of the defendant's act or omission or at the onset of the plaintiff's psychiatric illness. (Draft Bill, clause 1(3)(b))

(2) Additional Policy Restrictions

6.36 The close tie of love and affection test can be regarded as a policy restriction on reasonable foreseeability designed to avoid the possibility of a flood of claims in respect of psychiatric illness suffered as a result of another's death, injury or imperilment. But is there a need for further policy restrictions? A plaintiff who suffers physical harm need often, in practice, only show that some physical injury was a reasonably foreseeable consequence of the defendant's conduct in order to establish that he or she was owed a duty of care. The additional two tests of proximity and whether it is just and reasonable to impose a duty of care, although relevant,[62] will rarely be in issue.[63] However, the courts do retain a certain flexibility to find that the defendant owes no duty of care in the circumstances of the particular case before them, for reasons that have nothing to do with the type of injury that the plaintiff has suffered. For example, special considerations apply where the plaintiff's injury or loss results from the defendant's omission rather than commission[64] or where the defendant is a public body.[65] In addition, the particular circumstances of the case may militate against finding a duty of care. For example, in a claim brought against the police on behalf of the estate of a murder victim, the House of Lords held that as a matter of public policy the police

[62] See *Marc Rich & Co AG v Bishop Rock Marine Co Ltd* [1996] AC 211 where, in a case relating to physical damage, the House of Lords said that all three elements of the tripartite test of negligence were necessary whatever the nature of the harm sustained by the plaintiff.

[63] *Winfield and Jolowicz on Tort* (14th ed 1994) p 84 and M A Jones, *Textbook on Torts* (5th ed 1996) p 34.

[64] See *Winfield & Jolowicz on Tort* (14th ed 1994) pp 102-109.

[65] See *Winfield & Jolowicz on Tort* (14th ed 1994) pp 109-113.

are immune from actions for negligence in respect of their activities in the investigation and suppression of crime.[66] We were concerned in defining our new duty of care in relation to psychiatric illness that the courts should retain this flexibility to deny a duty of care on policy grounds, while at the same time ensuring that liability should not be denied by the courts for what, in our view, would be unacceptable reasons based on the fact that the plaintiff has suffered a psychiatric illness as opposed to any physical injury.

6.37 Laying down in legislation all the circumstances in which it might not be just and reasonable to impose a duty of care where the plaintiff suffers psychiatric illness as a result of the death, injury or imperilment of a third person proved not to be practicable, not least because one cannot foresee the varied and miscellaneous situations in which liability might arise. Nor would it seem acceptable to go to the other extreme of providing the courts with a wide open discretion not to impose a duty of care on any policy grounds, since this would permit arguments about, for example, floodgates or the risk of fraudulent claims, to creep back into the courts' reasoning. This might result in the whole purpose of our proposed legislation being defeated. The only policy considerations that we want the courts to consider (if a close tie of love and affection exists) are those that would be relevant even in deciding whether the defendant owed a duty of care not to cause physical injury: that is, the only policy considerations are those that would be relevant in deciding whether the defendant owed a duty of care not to cause physical injury to the immediate victim. Where, for example, the defendant was a mere passer-by who failed to warn the immediate victim of some impending danger, the defendant would not normally owe a duty of care to the immediate victim because there is no general duty to act for the benefit of another. On the same reasoning (that there is no general duty to act for the benefit of another) the defendant should not normally owe a duty of care to a loved one who suffered psychiatric illness consequent on the immediate victim's injury.

6.38 On the other hand, there may be situations where no duty of care as regards physical injury is owed to the immediate victim and yet there would be no policy inconsistency in holding that a duty of care is owed to a loved one of the immediate victim. For example, the defendant may owe no duty of care to the immediate victim because the immediate victim's injury was sustained while they were pursuing a criminal activity, and the defendant can raise a successful plea of *ex turpi causa*. However, imposing a duty of care in respect of psychiatric illness suffered by the loved one of the immediate victim might not be inconsistent with the public policy reasoning which denies the duty of care to the immediate victim; and, as we have explained, there is no necessary reason why the claim for psychiatric illness (which rests on an independent duty of care owed to the plaintiff) should fail merely because no duty of care was owed to the immediate victim.[67]

6.39 Accordingly, we consider that the appropriate way to deal with policy restrictions on our new duty of care (over and above the close tie of love and affection) is as follows: the courts should be given scope to decide not to impose our proposed

[66] *Hill v Chief Constable of West Yorkshire Police* [1989] AC 53.

[67] See paras 2.23 to 2.24 above.

new duty of care where satisfied that it would not be just and reasonable to impose the duty because of any factor by virtue of which the defendant owed no duty of care to the immediate victim.

6.40 Another example of what could be satisfactorily dealt with by the approach suggested in the last paragraph, is the need not to restrict unduly a person's self-determination. We have already discussed this where the defendant is the immediate victim.[68] But this policy can also be relevant where the defendant injures a third person and the plaintiff suffers psychiatric illness as a result. A person's freedom to take part in some dangerous activity which he or she recognises might result in another person causing him or her physical injury, or even a person's intent that another person should deliberately injure him or her, is not restricted by the duty of care not to cause physical injury. This is because the defendant can rely on the immediate victim's consent as a defence to his or her claim for damages.[69] However, were the defendant to face potential liability for psychiatric illness suffered by the loved one of the immediate victim, his or her willingness to carry out the activity would be restricted. As in cases where the defendant is the immediate victim, these issues are best dealt with by the courts on a case by case basis. The courts could deal with these issues by being given scope to decide not to impose the duty of care where satisfied that it would not be just and reasonable to do so because of any factor by virtue of which the defendant owed no duty of care to the immediate victim; or, more specifically - given that volenti is commonly regarded as not going to the existence of the duty of care[70] - because the immediate victim voluntarily accepted the risk of his or her death, injury or imperilment.

6.41 We therefore recommend that:

(16) where the plaintiff suffers psychiatric illness as a result of the defendant causing the death, injury or imperilment of another (the immediate victim), our proposed new duty of care should not be imposed if the court is satisfied that its imposition would not be just and reasonable either because of any factor by virtue of which the defendant owed no duty of care to the immediate victim, or because the immediate victim voluntarily accepted the risk that the defendant's act or omission might cause his or her death, injury or imperilment. (Draft Bill, clause 1(4)(a) and (b))

[68] See paras 5.34 to 5.43 above.

[69] Although in certain situations the criminal law may act as a deterrent: *R v Brown* [1994] 1 AC 212.

[70] Some writers argue that where the immediate victim voluntarily accepted the risk of injury this exempts the defendant from the duty of care which he or she would otherwise have owed: see A E Jaffey, "Volenti Non Fit Injuria" [1985] CLJ 87, 105 and *Salmond & Heuston on the Law of Torts* (21st ed 1996) p 472. But other writers treat a person's consent as reducing the normal standard of care or as being a defence to a breach of duty: for a discussion of these issues see *Clerk and Lindsell on Torts* (17th ed 1995) pp 88-90 and M A Jones, *Textbook on Torts* (5th ed 1996) pp 465-467 .