

## THE DEVELOPMENT OF THE LAW ON PSYCHIATRIC INJURY IN THE ENGLISH LEGAL SYSTEM

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**ABSTRACT:** This article is concerned with the development of the law on compensation for psychiatric injuries in the English legal system. The rules regarding compensation in such cases have been created solely by the courts over the last century, and this study focuses mainly on decisions from the House of Lords. Despite several decades of legal activity in this field, the law is still not settled. Judges are faced with complex questions involving ethics, business interests, public policy considerations and advancing medical science. This mix of conflicting criteria has led to a situation where it is virtually impossible to predict if a claim for damages fulfils even the basic requirements of the law. Aware of this situation, the courts have often called for Parliament to end the uncertainty, but these calls have gone unanswered. The aim of this article is to point out the inconsistencies and drawbacks of the current situation, analyse how the process of law making under the Common Law System has led to the current situation, and argue for intervention by Parliament to resolve the unsettled issues.

### I INTRODUCTION

This article deals with the law concerning compensation for psychiatric illness in England, commonly also known as nervous shock. The rules governing the awarding of damages in this area have been developed solely by the courts over the last century, but this development is still ongoing. Particularly in the last 15 years, triggered mainly by cases in the wake of the disaster at Hillsborough Stadium in Sheffield, which left 96 spectators dead, there has been a renewed controversy concerning who is entitled to recover for psychiatric harm and who is not. The views of various courts differed significantly on this issue and the growing influence of public policy considerations has become increasingly apparent. Some judges, even in the House of Lords, called for Parliament to end the uncertainty and enact a Statute. However, this did not occur and rather than following a stringent set of rules, even some principles that were believed to be settled have recently been called into question by the House of Lords itself.

Thus, the aim of this article is to show the genesis of a body of rules dealing with psychiatric injuries, the struggle of the courts in identifying general principles when confronted not only with questions of law but also with questions of public policy and advancing medical science, and the problems that can arise when using the common law

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technique of deciding such issues on a case-by-case basis. It is argued that the common law is frequently ill-equipped when it must operate in an area characterised by several conflicting interests, especially when those interests are of a predominantly non-legal or political nature. Taken together with the rule of precedent, in which courts are reluctant to overrule past decisions, the outcome can become a confusing mix that fails to settle pressing legal questions. This is especially true when courts themselves delve into political considerations in efforts to appease public opinion - heeding the wishes of the proverbial “man on the underground.”

## **II IN THE BEGINNING THERE WAS A FISHWIFE- THE FIRST CASE TO REACH THE HOUSE OF LORDS**

The first time the House of Lords dealt with the issue of damages for psychiatric illness was in the case *Bourhill v Young* [1943] AC 92. In that case, a pregnant fishwife from Edinburgh witnessed, rather indirectly, a deadly accident involving the driver of a motorbike. The accident was caused by the driver himself due to excessive speed. At the time of the crash, the fishwife was standing at a tram station some 40 feet away and, her view being blocked by a tram wagon, heard the crash occur and only later actually saw what happened to the driver. The sight of this deadly incident caused psychiatric problems for her and she later filed suit against the decedent’s estate for psychiatric injury.

The House of Lords denied her claim. The Lords reasoned, applying the neighbourhood-principle, which had been developed only ten years earlier in the case of *Donoghue v Stevenson* [1932] AC 562, that the foreseeability of such an injury was also the basic requirement for a claim of psychiatric illness. In the *Bourhill* case<sup>2</sup> it was decided that the plaintiff was too far away from the direct zone of danger. Since she had only heard and not actually seen the deadly accident, the defendant could not reasonably have foreseen that a person in the position of the plaintiff would be affected. Thus, he did not owe her a duty of care- she was not his “neighbour”. In sum, it was said that a duty of care only exists when it is foreseeable that a person of customary phlegm in the light of all that occurs would suffer some psychiatric injury. The requirement that one be of “customary phlegm” does not apply when the defendant has special knowledge to the contrary.<sup>3</sup>

In the following cases the courts also took into consideration how close the plaintiff was to the direct scene of the incident and, if there was a primary victim, how close the relationship between the plaintiff and this person was. Generally these questions were asked in the general context of foreseeability and thus were not explicitly separate requirements for a successful claim.<sup>4</sup>

However, compensation for psychiatric illness was also held to be recoverable where the plaintiff had no special relationship with the direct victims or thought to be in any clear and present danger himself. Thus, in *Chadwick v British Railways Board* [1967] 1

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<sup>2</sup> *Bourhill v Young* [1943] AC 92.

<sup>3</sup> *Ibid* page 109 per Lord Macmillan.

<sup>4</sup> *King v Phillips* [1952] 1 QB 429, 441 per Denning LJ.

WLR 912, the plaintiff, who voluntarily helped rescue the victims of a severe train crash, was held to be entitled to compensation for psychiatric illness he had suffered due to the horrific scenes at the place of the disaster. Notably, the Judge did not mention if the plaintiff had feared for his own life. He apparently thought this to be irrelevant.

### **III ON THE SECOND DAY THE LORDS CREATE A MULTI-PART TEST- POLICY CONSIDERATIONS AT WORK TO LIMIT THE SCOPE OF PLAINTIFFS**

After a period of relative calm around the issue of psychiatric illness the courts thought there was a need to clarify the requirements for a successful claim or, to be more precise, to impose additional requirements. The reason for this was the fear of a flood of cases where damages for psychiatric injury might be sought.

So, in the case of *McLaughlin v O'Brian* [1983] 1 AC 410, the House of Lords placed emphasis on the relationship between the plaintiff and the primary victim. The facts of this case are summarised nicely in the Speech of Lord Wilberforce:<sup>5</sup>

The family of the plaintiff was involved in a serious car accident. At this time she was at her home about two miles away. Approximately two hours later she learned about the crash and was rushed to the hospital. There she saw her youngest son who told her that her youngest daughter was dead. She then was taken down a corridor and through a window she saw her oldest daughter, crying, with her face cut and covered in oil and mud. She also could hear her oldest son screaming. She was taken to her husband who was sitting with his head in his hands. His shirt was hanging off him and he also was covered in oil and mud. When he saw his wife he started sobbing. She then was taken to her oldest son whose whole left face and side was covered and who shortly after he had seen her lapsed into unconsciousness.

Lord Wilberforce<sup>6</sup> concluded that there was no doubt that these circumstances were distressing in the extreme and were capable of producing an effect going well beyond grief and sorrow.

It was held that for a successful claim a close tie of love and affection between plaintiff and the primary victim needed to exist, such as that found between a parent and child or husband and wife. In all other cases it was said that very careful consideration by the courts will be needed in order to decide if such close ties existed or not<sup>7</sup>. Additionally the Lords clearly stated that a certain physical and temporal proximity was of great importance. As Lord Wilberforce said,<sup>8</sup> quoting with approval a passage from Lush J. in *Benson v Lee* [1972] VR 879: "[...] direct perception of some of the events which go to make up the accident as an entire event" is needed and that: "[...] this includes [...] the immediate aftermath."

In this particular case the House of Lords held that the requirements of an immediate

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<sup>5</sup> *McLoughlin v O'Brian* [1983] 1 AC 410, 416-417.

<sup>6</sup> *Ibid* page 417.

<sup>7</sup> *Ibid* page 422.

<sup>8</sup> *Ibid*.

aftermath were satisfied because although the plaintiff arrived at the hospital 2 hours after the initial accident, the direct victims still were:<sup>9</sup> “[...] *in the same condition, [...] covered with oil and mud and distraught with pain*”. Thus when a plaintiff finds his or her relatives essentially in the same state as at the scene of the accident, a certain elapse of time is not relevant. But the Lords did not go as far as to give strict guidelines as to which means of perception could constitute sufficient proximity.

Just as notably, Lord Wilberforce cautioned against a wider extension of claims for psychiatric injuries:<sup>10</sup>

First, it may be said that such extensions may lead to a proliferation of claims, and possibly fraudulent claims, to the establishment of an industry of lawyers and psychiatrists who will formulate a claim for nervous shock damages, including what in America is called the customary miscarriage, for all, or many, road accidents and industrial accidents.

Secondly, it may be claimed that an extension of liability would be unfair to defendants, as imposing damages out of proportion to the negligent conduct complained of. In so far as such defendants are insured, a large additional burden will be placed on insurers, and ultimately upon the class of persons insured - road users or employers.

Thirdly, to extend liability beyond the most direct and plain cases would greatly increase evidentiary difficulties and tend to lengthen litigation.

Fourthly, it may be said— and the Court of Appeal agreed with this — that an extension of the scope of liability ought only to be made by the legislature, after careful research. This is the course that has been taken in New South Wales and the Australian Capital Territory.

#### **IV ON THE THIRD DAY THE LORDS DIVIDED THE RELATIONSHIPS AND THE MEANS OF PERCEPTION— THE FLOODGATE ARGUMENT AND FURTHER RESTRICTIONS ON THE CLASS OF POSSIBLE PLAINTIFFS**

On the next occasion that the House of Lords addressed the issue of damages for psychiatric illness, the “floodgates” argument simply could not be avoided. In 1989, due to the undisputed negligence of police officers, 96 spectators at a football match at Hillsborough Stadium in Sheffield were crushed to death. Their relatives sought compensation for their distress.

Before having to deal with the issue of psychiatric illness, the courts were successful in denying claims of relatives on behalf of the deceased for their pain and suffering by, rather cynically, pointing to medical evidence that the victims finally were crushed to death so quickly that they had no time to feel too much pain and fear.<sup>11</sup>

In that case, *Alcock and Others v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, sixteen relatives of victims of the Hillsborough disaster claimed damages for psychiatric illness. Their case was a test for approximately 150 similar claims of other

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<sup>9</sup> Ibid page 419.

<sup>10</sup> Ibid page 421.

<sup>11</sup> *Hicks v Chief Constable of South Yorkshire Police* [1992] 2 All ER 65.

relatives. The plaintiffs represented the whole range of close family-relationships to the victims: parents, brothers and sisters, grandparents, fiancées and brothers-in-law. Fourteen of the plaintiffs had seen the events on TV, one of them in a coach next to the Stadium. The other two were present at the Stadium and saw the events “live and in colour”.

At first instance, 10 plaintiffs were successful. Hidden J. held that they satisfied all requirements for compensation for psychiatric injury. Specifically, they were within the range of persons to whom the defendant owed a duty of care and it was reasonably foreseeable that a breach of duty as occurred at Hillsborough-Stadium would cause psychiatric harm to them. Notably, Hidden J. also held that brothers and sisters were within the range of closest relationships and he could “see no basis in logic or in law, why those relationships should be excluded”.<sup>12</sup> He further held that watching the events live on TV was sufficient enough.<sup>13</sup>

It is in my view the visual image which is all-important. It is what is fed to the eyes which makes the instant effect upon the emotions, and the lasting effect upon the memory [...]. I am satisfied that the observation through simultaneous television of the scenes of what was happening during the disaster at Hillsborough is sufficient to satisfy the test of proximity of time and space required in such actions as these.

The Court of Appeal and ultimately the House of Lords saw things differently and denied the claims of all the relatives. Both Courts ruled that a general assumption of a close relationship only exists between parents and children and husband and wife. In all other cases the plaintiffs must provide specific evidence that their particular relationship to the victim deserves equal consideration. In this instance the House of Lords decided that none of the plaintiffs had produced such evidence.<sup>14</sup> Additionally, the Lords held that reception via TV will generally not be sufficient to construe enough proximity in time and space.<sup>15</sup> Rather, the psychiatric injury has to be induced by shock.<sup>16</sup> This means that a sudden event must cause the psychiatric injury and not a development over a longer period, even if the result of this development is as distressing as the sudden reception of a single event. Lord Ackner said that “the sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind” is needed.<sup>17</sup> And Lord Keith of Kinkel required that the scenes must be “...a sudden assault on the nervous system”.<sup>18</sup>

In the final analysis, the Lords clearly sought to restrict the possible number of plaintiffs by imposing new requirements and by narrowly interpreting the reasoning of Lord Wilberforce in the case *McLoughlin v O'Brian*<sup>19</sup> concerning the close ties of love and

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<sup>12</sup> *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, 337 per Hidden J.

<sup>13</sup> *Ibid* page 343.

<sup>14</sup> *Ibid* page 398 per Lord Keith of Kinkel.

<sup>15</sup> *Ibid* 398 per Lord Keith of Kinkel; page 416-417 per Lord Oliver of Aylmerton; page 423 per Lord Jauncey of Tullichettle.

<sup>16</sup> M Brazier and J Murphy (eds) *Street on Torts* (10th ed, Butterworths, London, 1999) p 207.

<sup>17</sup> *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, 401.

<sup>18</sup> *Ibid* page 398.

<sup>19</sup> *McLoughlin v O'Brian* [1983] 1 AC 410.

affection and the means of reception. By concluding that there is no general assumption of sufficiently close ties among siblings, even when they directly witness the death or injury of their brother or sister, it became clear that policy grounds played their part in the outcome of the case. How such plaintiffs may satisfy the additional requirements in order to establish a sufficiently close relationship is not clear either. The only case where a sibling - a brother as it were - succeeded with his claim is unreported.<sup>20</sup>

But although narrowing the range of plaintiffs, the growing unease of the House of Lords about considering policy reasons was also expressed, as can be seen in the speech of Lord Oliver of Aylmerton:<sup>21</sup>

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<sup>22</sup> to which my noble and learned friend, Lord Ackner,<sup>23</sup> has referred.

**V ON THE FOURTH DAY THE LORDS DIVIDE THE  
PRIMARY FROM THE SECONDARY VICTIMS—ONE  
TYPE OF INJURY, TWO CLASSES OF VICTIMS  
AND DIFFERENT REQUIREMENTS**

In the *Alcock* case [1992] 1 AC 310, Lord Oliver fashioned a new term to differentiate between the causes of the injuries:

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 circumstances of their relationship to the primary victim, an exception has arisen to 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 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 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 eyewitness at the inquest as it is in a

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<sup>20</sup> *McCarthy v Chief Constable of South Yorkshire Police*, 11 December 1996, quoted from Law Commission Report (249) 1998, page 19.

<sup>21</sup> *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, 419.

<sup>22</sup> The Australian Statute includes a final listing of those relatives who might be entitled for compensation, including, eg, siblings and grandparents.

<sup>23</sup> *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, 404.

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.

He did so in order to make it more vivid why those who claim damages for psychiatric illness have to satisfy different requirements from those whose initial injuries had caused the nervous shock of the physically unhurt plaintiffs. Furthermore it illustrates why he thought a combination of personal and timely proximity to be of the utmost importance, acknowledging<sup>24</sup> that the concept of proximity is an artificial barrier that serves to limit the liability of the defendants.

The next occasion that the House of Lords dealt with a case of psychiatric injury was in *Page v Smith* [1996] AC 155. This case was quite different from those before it. The plaintiff was the direct victim of a rather moderate car accident and did not suffer any physical injuries, but only psychiatric harm. In this case, which was decided in favour of the plaintiff with a majority of 3-2, the House adopted the terms of primary and secondary victims as introduced by Lord Oliver in the *Alcock* case,<sup>25</sup> but used them to establish different requirements for the defendants' liability for psychiatric injury in relation to these two classes of victims. One can also say that with this decision physical or psychological injury became now simply the two sides of the same coin "injury", at least as far as primary victims are concerned. Thus where primary victims, i.e. those victims who are in the direct zone of physical harm, suffer any form of injury that is not totally outside any foreseeability, they can claim damages for these injuries.

Lord Lloyd of Berwick in his leading speech sums it up as follows:<sup>26</sup>

In conclusion, the following propositions can be supported.

1. In cases involving nervous shock, it is essential to distinguish between the primary victim and secondary victims.
2. In claims by secondary victims the law insists on certain control mechanisms, in order as a matter of policy to limit the number of potential claimants. Thus, the defendant will not be liable unless psychiatric injury is foreseeable in a person of normal fortitude. These control mechanisms have no place where the plaintiff is the primary victim.
3. In claims by secondary victims, it may be legitimate to use hindsight in order to be able to apply the test of reasonable foreseeability at all. Hindsight, however, has no part to play where the plaintiff is the primary victim.
4. Subject to the above qualifications, the approach in all cases should be the same, namely, whether the defendant can reasonably foresee that his conduct will expose the plaintiff to the risk of personal injury, whether physical or psychiatric. If the answer is yes, then the duty of care is established, even though physical injury does not, in fact, occur. There is no justification for regarding physical and psychiatric injury as different "kinds of damage."

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<sup>24</sup> Ibid pp 410-411.

<sup>25</sup> Ibid.

<sup>26</sup> *Page v Smith* [1996] AC 155, 197.

5. A defendant who is under a duty of care to the plaintiff, whether as primary or secondary victim, is not liable for damages for nervous shock unless the shock results in some recognised psychiatric illness. It is no answer that the plaintiff was predisposed to psychiatric illness. Nor is it relevant that the illness takes a rare form or is of unusual severity. The defendant must take his victim as he finds him.

From this characterisation of victims, problems arose in the following cases, mainly due to inconsistent arguments proffered by Lord Oliver and Lord Lloyd. According to Lord Lloyd, once it is established that there was a foreseeable risk of physical injury, the victim is a “primary victim”. At that point it is irrelevant what type of injury the victim suffers. Furthermore it is also irrelevant if the victim is of ordinary phlegm or not. On the other hand, Lord Oliver counted those as primary victims who, for example, feared for their own safety or acted as rescuers. He did not require there to be an actual danger of physical injury. Thus, Lord Oliver’s definition of “primary victim” is to some extent broader than that of Lord Lloyd. This has led to different views among Judges concerning which plaintiffs are primary victims and which are merely secondary victims.

#### **VI ON THE FIFTH DAY THE LORDS HIT THE EMERGENCY BREAK – PUBLIC POLICY AND VOX POPULI**

The second major case following the disaster at Hillsborough Football Stadium was *White v Chief Constable of South Yorkshire Police, sub nom Frost* [1999] 2 AC 455.

In this case several police officers that had been on the ground when the tragedy happened sought compensation for the psychiatric injuries they had suffered. The Court of Appeal held that unlike the relatives of the deceased in the *Alcock* case<sup>27</sup> the officers were entitled to compensation because they were primary victims. On appeal, the House of Lords in a 3-2 decision overturned the Court of Appeal and denied the police officers’ claims.

Lord Steyn, speaking for the majority,<sup>28</sup> explicitly mentions the floodgate argument, and thus the need to uphold a restrictive approach to protect potential defendants from a disproportionate burden of liability.<sup>29</sup> His Lordship also referred to the ordinary man on the underground who would hardly understand why relatives were denied compensation whereas policemen could claim damages for what they experienced while doing their duty. He also rejected the argument that liability could arise from the employment relationship of the officers. Rather, he concluded that the duty of an employer not to cause any physical harm to his employees does not also imply a duty not to cause any psychological illness. Additionally if police officers could recover for damages of this kind, the same had to be true for doctors and hospital workers, to name a few. This would create much too wide a group of potential claimants. One has to take into account that traumatised police officers, in contrast to ordinary citizens, already have the

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<sup>27</sup> *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310.

<sup>28</sup> *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, 494.

<sup>29</sup> M Brazier and J Murphy (eds) *Street on Torts* (10th ed, Butterworths, London, 1999) p 209.

advantage of statutory schemes and thus better treatment than those of the relatives of the victims of Hillsborough.

Similarly, Lord Steyn also rejected the rescue argument. Although he agreed that the *Chadwick* case was correctly decided,<sup>30</sup> he insisted on the element of actual danger of physical injury and concluded that here there was no such danger to the plaintiffs. This is especially noteworthy, as Waller J in *Chadwick*<sup>31</sup> based his decision solely on the horrific scenes that the plaintiff had witnessed. In *Chadwick*, there was no discussion of any actual danger to the plaintiff, nor was there any evidence that the plaintiff even believed they were in danger. Lord Steyn concluded by stating in direct terms<sup>32</sup> that the courts should not open any new categories of possible plaintiffs:<sup>33</sup>

My Lords, the law on the recovery of compensation for pure psychiatric harm is a patchwork quilt of distinctions that are difficult to justify. There are two theoretical solutions. The first is to wipe out recovery in tort for pure psychiatric injury. [...] 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. [...] 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 A.C. 310 and *Page v Smith* [1996] A.C. 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.

Lord Hoffman was similarly unprepared to accept that liability existed for the defendant. Notably, he expressed his unease with the law as it had stood since the *Alcock case*,<sup>34</sup> but also pointed out that the courts had to live with it until a legislative change.<sup>35</sup> He then went on to conclude that the plaintiffs in the instant case were not primary victims. Agreeing with the reasoning of Lord Hope in *Robertson v Forth Road Bridge Joint Board* 1996 SLT 263,<sup>36</sup> he found that no automatic duty not to cause psychological injury arises from an employment relationship. With respect to the police officers, he pointed out that it would be unfair or unsatisfactory to acknowledge such a special duty when compared to, for example, St. John's workers.<sup>37</sup> Merely classifying a group as rescuers does not automatically lead to a status of primary victim. His Lordship reasoned that absent some special classification all plaintiffs needed to show that they were in actual physical danger. Looking back, the plaintiff in the *Chadwick case*<sup>38</sup> had been in just that position, although Waller J did not mention it or make it an explicit reason for his decision.

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<sup>30</sup> *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, 499.

<sup>31</sup> *Chadwick v British Railways Board* [1967] 1 WLR 912.

<sup>32</sup> *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, 500: "This far and no further."

<sup>33</sup> *Ibid.*

<sup>34</sup> *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310.

<sup>35</sup> *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, 504.

<sup>36</sup> There at p. 269 per Lord President (Hope).

<sup>37</sup> *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, 506.

<sup>38</sup> *Chadwick v British Railways Board* [1967] 1 WLR 912.

Lord Hoffman concluded that the law should not permit compensation for persons such as police officers who were on the football pitch in the line of duty. This would cause problems in defining who should be classified as a rescuer and, more importantly, ordinary people would not be able to understand why such favourable treatment should be given to such people.<sup>39</sup> His Lordship states:<sup>40</sup>

There is no authority which decides that a rescuer is in any special position in relation to liability for psychiatric injury.

There does not seem to me to be any logical reason why the normal treatment of rescuers on the issues of foreseeability and causation should lead to the conclusion that [...] they should be given special treatment as primary victims when they were not within the range of foreseeable physical injury and their psychiatric injury was caused by witnessing or participating in the aftermath of accidents which caused death or injury to others.

Should then your Lordships take the incremental step of extending liability for psychiatric injury to "rescuers" (a class which would now require definition) who give assistance at or after some disaster without coming within the range of foreseeable physical injury? [...] In my opinion there are two reasons why your Lordships should not do so. The less important reason is the definitional problem to which I have alluded [...].

But the more important reason for not extending the law is that in my opinion the result would be quite unacceptable. [...] I do not mean that the burden of claims would be too great for the insurance market or the public funds, the two main sources for the payment of damages in tort. [...] But I think that such an extension would be unacceptable to the ordinary person because [...] it would offend against his notions of distributive justice. He would think it unfair between one class of claimants and another, at best not treating like cases alike and, at worst, favouring the less deserving against the more deserving. He would think it wrong that policemen, even as part of a general class of persons who rendered assistance, should have the right to compensation for psychiatric injury out of public funds while the bereaved relatives are sent away with nothing.

## **VII ON THE SIXTH DAY THE LORDS DOUBTED THE DECISIONS OF THEIR OWN HOUSE – NEW CONTROVERSY REGARDING PROXIMITY IN TIME AND SPACE AND THE CATEGORISATIONS OF THE VICTIMS AS PRIMARY AND SECONDARY**

In the most recent case considering this issue to reach the House of Lords, *W and Others v Essex County Council and Another* [2001] 2 AC 592, a very remarkable change is shown in the way the Lords deal with cases of psychiatric injury. The previous cases, starting with *McLoughlin v O'Brian*,<sup>41</sup> demonstrate a clear intent to limit the scope of possible plaintiffs. In this most recent decision, the Lords unanimously loosened the requirements of proximity in time and space and widened the classification of primary victims.

The facts of this case, summarised in the judgment, are as follows:<sup>42</sup>

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<sup>39</sup> *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310.

<sup>40</sup> *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, 509-511.

<sup>41</sup> *McLoughlin v O'Brian* [1983] 1 AC 410.

<sup>42</sup> *W and Others v Essex County Council and Another* [2001] 2 AC 592, 596.

The parents, who in October 1992 had been approved as specialist adolescent foster carers by the council expressly told the Council and the social worker that they were not willing to accept any child who was known to be or suspected of being a sexual abuser. Despite that stipulation the council, through the social worker, placed with the parents a 15-year-old boy, G, who had admitted and had been cautioned by the police for an indecent assault on his own sister and who was being investigated for an alleged rape. These facts were not communicated to the parents, although they were recorded on the council's files and were known to the social worker. Serious acts of sexual abuse against the children are alleged to have been committed between 7 April and 7 May 1993 after the boy had arrived at the parents' home.

It is important to note that the parents themselves were never in danger of being abused, nor did they learn about the various crimes and the suffering of their children until 4 weeks after the attacks had started. Nevertheless their Lordships held that there may have been sufficient proximity in time and space and the parents could be considered primary victims. The leading speech of Lord Slynn of Headley, to which all the other Lords agreed, sums this up as follows:<sup>43</sup>

On a strike out application it is not necessary to decide whether the parents' claim must or should succeed if the facts they allege are proved. On the contrary, it would be wrong to express any view on that matter. The question is whether if the facts are proved they must fail.

On the other hand, it seems to me impossible to say that the psychiatric injury they claim is outside the range of psychiatric injury which the law recognises. Prima facie pleaded it is more than "acute grief.

Nor do I find it possible to say that a person of reasonable fortitude would be bound to take in his or her stride being told of the sexual abuse of his or her young children when that person had, even innocently, brought together the abuser and the abused. [...]

This, however, is only the beginning. Is it clear beyond reasonable doubt that the parents cannot satisfy the necessary criteria as "primary" or "secondary" victims? As to being primary victims it is beyond doubt that they were not physically injured [...]. But 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. Lord Geoff of Chieveley (dissenting) in the Frost case [1999] 2 AC 455, 472g said that Lord Oliver "did not attempt any definition of this category [i.e. of primary victims] but simply referred to a number of examples".

I do not consider that any of the cases to which your Lordships have been referred conclusively shows that [...] they are prevented from being primary victims. Indeed, in the *Alcock* case [1992] 1 AC 310, 408 Lord Oliver said:

"The fact that the defendant's negligent conduct has foreseeably put the plaintiff in the position of being an unwilling participant in the event establishes of itself a sufficiently proximate relationship between them and the principal question is whether, in the circumstances, injury of that type to that plaintiff was or was not reasonably foreseeable." [...]

Whilst I accept that there has to be some temporal and spatial limitation on the persons who can claim to be secondary victims, [...] it seems to me that the concept of "the immediate aftermath" of the incident has to be assessed in the particular factual situation. I am not persuaded that in a situation like the present the parents must come across the abuser or the abused "immediately" after the sexual incident has terminated.

If this were, on the authorities, a clear cut case, I would not hesitate to strike it out. However [...]

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<sup>43</sup> Ibid page 600-602.

I have come to the conclusion that the parents' claim cannot be said to be so certainly or clearly bad that they should be barred from pursuing it to trial.

It should be remembered that the appeal of the parents was against the striking out of their claim. Striking out means that a court does not allow a claim to proceed because it is clear beyond any reasonable doubt that an action can not possibly succeed, or, that the action on the face of it is absolutely unsustainable. In other words, when the pleading discloses an unreasonable cause of action. In making such a finding, the judge:<sup>44</sup>

...[M]ust proceed on the assumption that the facts contained in the statement of claim are true and, assuming those facts to be true, consider whether a claim is made out. An order to strike out a statement of claim will not be granted unless on the facts as pleaded the action is obvious unsustainable. In considering an application to strike out a pleading it is not the court's function to try the issues but rather decide if there are issues to be tried. Where the law is not settled but in a state of development [...] it is normally inappropriate to decide novel questions on hypothetical facts. This means that it is inappropriate to strike out.<sup>45</sup>

Nonetheless the clear doubts that the Lords expressed as to the way the requirements for a successful claim had been interpreted until now shows that the law governing psychiatric illness is everything but finally settled.

### **VIII ON THE SEVENTH DAY THE LORDS REST— TIME TO REFLECT BACK AND ASSESS THE DEVELOPMENTS IN THE LAW**

The common law approach toward areas of law not governed by statute is marked by a case-by-case approach. With this technique the courts attempt to formulate certain principles that tend only to apply to other cases where the facts are similar to the original case. Unlike Parliament, the courts do not undertake to create general principles of law or a fixed body of rules that cover the widest possible range of disputes in that area. Rather, the idea is to leave the development of the law to later decisions until, after series of subsequent decisions, the law eventually becomes settled.

This approach has characterized the development of the English legal system as we know it today; however, as can be seen in the area of psychiatric injury, this approach also has significant drawbacks. The common law approach is especially problematic when judges are confronted with questions of ethics, public policy, public opinion and scientific issues.

Medical science, for example, advances steadily and many older theories concerning the interaction of body and psyche have proven to be inaccurate. In the scientific community old theories are easily changed and updated to reflect new findings.

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<sup>44</sup> *Vladi Private Islands Ltd. v Haase* (1990), 96 NSR (2d), 323 at 325 per MacDonald, JA.

<sup>45</sup> *Barrett v Enfield London Borough Council* [2001] 2 AC 550, 557 Per Lord Browne-Wilkinson.

However, once a court has based its decision on a scientific theory, it is much harder to change the legal principles that arise from such a decision. Courts in general are reluctant to overrule their past decisions for the doctrine of precedent is an anchor in the common law system. Thus, a legal principle formulated on outdated medical evidence may still influence courts in later decisions. As a consequence, judges may avoid directly overruling a past decision but rather reinterpret a speech of a former judge, squeeze new ideas into an old judgment or try to extract a new principle out of the old reasoning. In the field of psychiatric injury this can be seen in the *Chadwick* case,<sup>46</sup> for example, where there was no requirement of actual physical danger to the plaintiff, but the House of Lords in the *White* case<sup>47</sup> nevertheless introduced this requirement referring to this older case. Generally, such preservation of old judgments results in newer decisions being more of a patchwork trying to incorporate both old and new legal concepts and ideas. The ideal of satisfactorily settling a problem of law for all time may not ever be achieved.

Undoubtedly, courts in every legal system are confronted with constantly advancing science; but, where there is no rule of precedent, courts enjoy more flexibility in adapting their decisions to constantly changing situations. The extraction of generally applicable principles from a case is also difficult when judges are confronted with matters of public policy.<sup>48</sup> How should a court determine what the relevant public policy is and what not?<sup>49</sup> Judges are politically independent and yet in public policy cases they are called upon to make an inherently political judgment. In rare situations where there has been extended public debate on an issue and there is a clear majority view, it might be possible for judges to determine public policy. But where there is no such open debate and only certain pressure groups or a few scholars have voiced their views, it is rather impossible for a judge to come to an objective conclusion. Especially if one bears in mind that in the common law system substantial criticism of court decisions by academic commentators and practitioners is not really custom.

With respect to cases involving psychiatric injury the courts were obviously persuaded by public policy concerns regarding an avalanche of claims or, as one put it, “dreadful hordes of claimants”.<sup>50</sup> In turn, this would have economic consequences that might cost the insurance industry, among others, large sums of money. However, in the opinion of this author, it is not the task for the judiciary to protect certain sectors of the economy. This is the domain of Parliament and should be achieved through the political process. If Parliament believes that such protection is necessary, it is free to make laws accordingly. If no such laws are passed, one can assume that the problem is not that urgent. Furthermore, in attempting to resolve matters of public policy, the courts make it too easy for elected representatives to avoid doing what ought to be their job - creating the legal basis of society, for which they “are accountable to the people. It is somehow strange that in a political system that so fiercely defends the absolute sovereignty of Parliament, unelected judges must often carry the burden of defining

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<sup>46</sup> *Chadwick v British Railways Board* [1967] 1 WLR, 912.

<sup>47</sup> *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455.

<sup>48</sup> *Clerk & Lindsell on Torts* (18th ed, Sweet & Maxwell, London, 2000) 7-69.

<sup>49</sup> J Murphy (ed) *Street on Torts* (11th ed, Lexis Nexis UK, London, 2003) 226-228.

<sup>50</sup> Kay Wheat “Proximity And Nervous Shock” (2003) 32(4) CLWR 313-337 at page 337.

public policy. Where psychiatric injury is concerned, the courts have persistently called for Parliament to act. However, because Parliament remained silent on the issue, the courts continued to carry on protecting the insurance industry. Perhaps a decision in favour of the relatives of the victims of Hillsborough would have served as a wake-up call for politicians to act at last.

Closely connected to public policy is the problem of public opinion - with “the man on the underground” and what he thinks is fair and just. It is probably even harder for a judge to accurately gauge public opinion. Is public opinion what is voiced in tabloid newspapers, or on television, or what friends and family believe? In any case, should it really be of concern for a court of law what the layman on the street thinks, especially when that person may not know all of the facts of the case? Quite often law and justice are not congruent. That is because a legal system must consider the whole of society and its highly complex interactions. It cannot cater to individual justice in every single case. Of course one cannot demand that a judge be entirely free from emotions and personal opinions. However, basing a decision primarily on public opinion, especially in a legal system where one decision can influence an entire area of law, may complicate matters for future cases. Public opinion is inherently ambulatory and constantly shifting. Things may be different in cases of constitutional law, but in private law certainty and stability are paramount. This goal can hardly be reached by looking at public opinion. It is probably preferable to make an unpopular decision and leave the issue to Parliament to change the law if necessary.<sup>51</sup>

The structure of common law decisions may also lead to confusion. They are delivered at length in direct speech, without clear separation between ratio and obiter dictum. A judge reviewing a previous decision may use a particular passage to develop new principles, although the passage may never have been intended as part of the ratio. In the field of psychiatric injury this can be seen at the *Page* case.<sup>52</sup> In that case, Lord Lloyd referred to the distinction between primary and secondary victims as previously expressed by Lord Oliver in the *Alcock* case.<sup>53</sup> Lord Oliver drew this distinction to make clear that a secondary victim is much more remote to the actual zone of danger and thus must show that the tortfeasor owed a special duty of care to him. Lord Oliver never indicated that he saw the need to create two classes of victims with different requirements for a successful claim. Nevertheless, Lord Lloyd used this sentence to do exactly that. Subsequent courts addressing this issue found it very hard to determine who belongs to which class of victims.<sup>54,55</sup> Their judgments were often divided on this point as, for example, in the *Frost* case.<sup>56</sup> In that case the House of Lords finally saw the

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<sup>51</sup> See *McLoughlin v O'Brian* [1983] 1 AC 410, 430 per Lord Scarman.

<sup>52</sup> *Page v Smith* [1996] AC 155, 197.

<sup>53</sup> *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310.

<sup>54</sup> See, eg, *Salter v UB Frozen and Chilled Foods Ltd.* (OH, 2003 SLT 1011. In this recent Scottish case the plaintiff was seen as primary victim although he was not in danger of physical harm or feared to be in such danger, but thought he had caused the death of a colleague.

<sup>55</sup> For a short discussion of this case see: David Locke “Nervous Reaction To Compensation” *Law Society Gazette* Vol 101 Nr 12, page 39.

<sup>56</sup> *White v Chief Constable of South Yorkshire Police, sub nom Frost* [1999] 2 AC 455, 499.

need to overrule the decision of the lower court in an effort to establish clarity.

So where does this leave us in the analysis of how the legal problems of psychiatric injury have been treated so far in England? The basic fiction of the common law remains that the law is somewhere out there and that it need only be declared by judges when a case must be decided. This is a rather convenient idea for Parliament. If the law truly exists in some form and judges need only declare it when a question of law arises, Parliament is relieved of any urgency to act and pass a statute addressing the issue. There can be no doubt that English judges take their responsibility seriously, are highly trained and generally neutral and independent. But even the most noble and learned judge is first and foremost a lawyer and not a scientist. Likewise, judges are in no position to gauge public opinion or create public policy. The task of creating new law, especially in highly complex fields, is a task that judges are frequently ill-equipped to perform. Seldom is this more apparent than with the law of psychiatric injury.

Cases involving psychiatric injury demonstrate the difficulty of using the common law approach of forming general principles on a case-by-case basis. The law in this area as it stands today is not so much based on logic,<sup>57</sup> as even some judges of the House of Lords have confirmed<sup>58</sup>, but rather on a fear of a flood of claims against the insurance industry. To define such a goal is something that should be done by Parliament. Some judges have made it clear that they are not impressed by the floodgate-argument, and that they have seen too often that the alarm bell has been rung.<sup>59</sup> But the majority of judges still seem content to play the role of the last line of defence.

Additionally, inconsistent interpretation of older decisions has created confusion as can be seen in the distinction between primary and secondary victims. In this respect, the *White* case<sup>60</sup> shows how the personal views of judges can influence the outcome of a case. In that case, the Judges of the Queens Bench apparently had enough sympathy for the police officers, in contrast to the relatives of the victims, to classify them as primary victims. The House of Lords then had enough fear of the wrath of the „man on the underground“ to overturn this decision. The latest case in Scotland<sup>61</sup> highlights that even more unrest might be on its way with respect to this issue.

The confusion in this area can also be seen in the way that courts have approached the issue of proximity in time and space.<sup>62</sup> Depending on the case, watching something on TV can be enough<sup>63</sup> or too remote.<sup>64</sup> Experiencing the direct aftermath might be enough<sup>65</sup> but what exactly qualifies as a direct aftermath? Learning about a chain of

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<sup>57</sup> M Brazier and J Murphy (eds) *Street on Torts* (10th ed, Butterwoths, London, 1999) page 210.

<sup>58</sup> *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 410, 511 per Lord Hoffmann.

<sup>59</sup> *McLoughlin v O'Brian* [1983] 1 AC 410, 425 per Lord Edmund-Davies.

<sup>60</sup> *White v Chief Constable of South Yorkshire Police, sub nom Frost* [1999] 2 AC 455.

<sup>61</sup> *Salter v UB Frozen and Chilled Foods Ltd.(OH)* 2003 SLT 1011.

<sup>62</sup> J Murphy (ed) *Street on Torts* (11th ed, Lexis Nexis UK, London, 2003) page 223.

<sup>63</sup> *McLoughlin v O'Brian* [1983] 1 AC 410.

<sup>64</sup> *Alcock v Chief Constable of South Yorkshire Police* [ 1992] 1 AC 310.

<sup>65</sup> *McLoughlin v O'Brian* [1983] 1 AC 410.

events after four weeks can be enough or not.<sup>66</sup> It simply is not possible to detect a common theme. This confusion is only made worse by the closely connected requirement that the psychiatric illness must be induced by shock. In this area the courts have also reached very different decisions in those cases where a relative stays with the victim in hospital. Depending on the case, watching someone slowly die may or may not be enough.<sup>67</sup> The same holds true for personal proximity. How close must the ties of love and affection be and how does one prove ones love and affection for the victim? In such instances, a fixed catalogue of possible plaintiffs is probably desirable. This might not serve the ends of justice in every case, but at least there would be an element of predictability.

Finally, one must consider the classes of victims.<sup>68</sup> Again, the courts are totally divided regarding who belongs to what class. Must one be in the direct zone of danger<sup>69</sup> or is it sufficient to only fear that one is in danger?<sup>70</sup> And, if fear is enough, does this fear have to be reasonable? Is someone who fears to have caused the death of someone else a primary victim<sup>71</sup> or no victim at all?<sup>72</sup> And what degree of danger must there be: a possibility of getting bruised, breaking a limb, getting squashed or dying? Does it matter if you have a tendency to react hysterically<sup>73</sup> All these questions remain unanswered.<sup>74</sup>

## IX CONCLUSION

The common law method of case-by-case decisions until enough general principles have been elaborated which finally delineate the law, has not achieved what is needed in terms of clarity and predictability.<sup>75</sup> Although more than 60 years have passed since the House of Lords first dealt with cases of psychiatric injury, every time a new case comes before the court it is nearly impossible to predict the outcome.<sup>76</sup> Even the frequently used floodgate argument - which at least provided some predictability in terms of whether a claim would succeed - seems no longer to hold sway. One certainly gets this impression when looking at the latest case to be heard by the House of Lords<sup>77</sup> where the application to strike out the case was not granted. Unfortunately, the final outcome of this case in the lower court is not reported.

The enactment of a Parliamentary statute seems to be the only way to end ongoing uncertainty in the area. But, although such a statute has been demanded by several

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<sup>66</sup> *W and Others v Essex County Council and Another* [2001] 2 AC 592.

<sup>67</sup> *Sion v Hampstead Health Authority* [1994] 5 Med LR 170 (CA);

*Taylorson v Shieldness Produce Ltd* [1994] PIQR P329 (CA).

<sup>68</sup> K Mackenzie “‘Oh what a tangled web we weave’: Liability in negligence for nervous shock” in S Baulac, S Pitel & J Schulz (eds) *The Joy of Torts* (Butterwoths, London, 2003) page 138.

<sup>69</sup> *Page v Smith* [1996] AC 155.

<sup>70</sup> *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310.

<sup>71</sup> *Salter v UB Frozen and Chilled Foods Ltd.(OH)* 2003 SLT 1011.

<sup>72</sup> *Ravenscroft v Rederiaktiebelaget Transatlantic* [1991] 3 All ER 73, revsd. [1992] 2 All ER 470n, CA.

<sup>73</sup> *Page v Smith* [1996] AC 155.

<sup>74</sup> W VH Rogers (ed) *Winfield and Jolowicz on Torts* (15th ed, London, 1998) page 162.

<sup>75</sup> K Mackenzie “‘Oh what a tangled web we weave’: Liability in negligence for nervous shock” in S Baulac, S Pitel & J Schulz (eds) *The Joy of Torts* (Butterwoths, London, 2003) pp 141-143.

<sup>76</sup> Joe Thomson *Delictual Liability* (2nd ed, Butterwoths, Edinburgh, 1999) page 75-76.

<sup>77</sup> *W and Others v Essex County Council and Another* [2001] 2 AC 592.

members of the House of Lords and the Law Commission, Parliament as yet does not seem to feel the need for action. This means that in the coming years the courts still will be left to deal with the ongoing uncertainty in this area. How the “man on the underground” will receive all this can only be the subject of speculation.

Ultimately, when courts are confronted with too many conflicting positions and they also attempt to incorporate such criteria as public policy and public opinion, their ability to satisfactorily create law is highly limited. In a complex field such as that of psychiatric injury, only Parliament with all its resources should make the decision about the existence of a right or claim and its general conditions and requirements. In the meantime, courts with their knowledge of the legal system, can surely point to the general direction a statute should take. But courts should not attempt to create new law themselves on a case-by-case basis if it is evident that the issues are highly complex.<sup>78</sup> If they attempt otherwise, the result can be a confusing mix representing the different ideas of the various judges. In the view of this author, the laws governing psychiatric injuries are a good example of what can go wrong if the courts attempt to master a task that is just too huge. If Parliament remains inactive, it is probably better for the courts to make a costly or unpopular decision. Only then will the “man on the underground” be able to openly voice his opinion and demand action from the elected representatives whose task it ought to be anyway.

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<sup>78</sup> See *White v Chief Constable of South Yorkshire Police, sub nom Frost* [1999] 2 AC 455, 500 per Lord Steyn.