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Discussion Paper on Damages for Psychiatric Injury

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[1] Amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (S.I. 1999/1820).

Contents

Part 1 Introduction

Remit

1.1 In July 2001 we received the following reference[1] from the Deputy First Minister and Minister for Justice, Mr Jim Wallace, QC, MSP;

> "To examine the law of Scotland relating to psychiatric injury caused by another person and to make recommendations as to possible changes in the law."

This discussion paper is issued as part of our work on this reference.

Advisory Group

1.2 In preparing this discussion paper we have been greatly assisted by an Advisory Group whose members are listed below.[2]

Scope of the discussion paper

1.3 This discussion paper deals with delictual claims for psychiatric injury. It concentrates on "pure" psychiatric injury, that is where the act or omission of the wrongdoer gives rise to psychiatric injury without any physical or other injury.[3] We are not concerned with cases where compensation is regulated by statute, such as the Criminal Injuries Compensation Scheme 2001 (made under the Criminal Injuries Compensation Act 1995),[4] the Carriage by Air Act 1961 and the Carriage by Air (Supplementary Provisions) Act 1962, the Consumer Protection Act 1987 and the Nuclear Installations Act 1965 in so far as these provisions regulate damages payable for psychiatric injury.[5] Nor does the discussion paper deal with damages for psychiatric injury arising from breach of contract (except in the area of employment[6]). Another exclusion is the claims under the Damages (Scotland) Act 1976 for non-patrimonial loss including grief and distress arising from the death of a relative.[7]

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[1] Under the Law Commissions Act 1965, s 3(1)(e).

[2] Dr Pamela Abernethy, Solicitor, Edinburgh; Dr Douglas Brodie, University of Edinburgh; Dr Chris Freeman, Consultant Psychiatrist, Edinburgh; Mr Ian Mackay QC; Miss Ishbel McLaren, Solicitor, Edinburgh; Mr Peter Milligan, Advocate; and Professor Barry Rodger, University of Strathclyde.

[3] See paras 2.2-2.9 below. We do not deal with psychiatric injuries to animals, as for example where Ms Gill James, the owner of a showjumper, was awarded £1,000 for the loss of value of her horse which became nervous after a traffic incident, Daily Telegraph, 6 July 2002.

[4] The 2001 Scheme mirrors the common law of damages for psychiatric injuries. It is likely that if the common law were to be changed equivalent changes would be made to the Scheme.

[5] It is often not clear whether the provisions exclude claims for psychiatric injury by those involved in the accident or whether claims by those whose psychiatric injury arises from the death or personal injury of the immediate victim are within the scope of the provisions. For example, s 45(1) of the Consumer Protection Act 1987 defines personal injury to include impairment of a person's mental condition, but it is thought secondary victims are not covered. It has recently been decided by the House of Lords that a pure psychiatric illness is not "bodily injury" for the purposes of a claim under the Carriage by Air Act 1961, *King v Bristow Helicopters Ltd* 2002 SLT 378.

[6] See paras 3.23-3.24 below.

[7] We have looked at which relatives should have title to sue for non-patrimonial loss and published our Report on *Title to Sue for Non-Patrimonial Loss* (Scot Law Com No 187) in August 2002.

The present law and its defects

1.4 We give here a brief outline of the existing law in the area covered by this discussion paper. It is examined in greater detail in Parts 2-5.

(1) The pursuer must suffer from a psychiatric illness. Damages are not awarded for mere grief or distress.[8]

(2) The pursuer's psychiatric injury must be induced by "shock" - a sudden assault on the senses[9] - rather than a more drawn-out process.[10] But there is no shock requirement in employment cases.[11]

(3) Pursuers are to be divided into primary victims and secondary victims, but there is a doubt as to the correct criteria for distinguishing between them. One view is that primary victims are those immediately involved in the incident as participants (such as those who feared for their own safety, rescuers and involuntary participants) in contrast with secondary victims who merely witness the death or injury of a third party.[12] But primary victims have also been-more narrowly-defined as being those who were both directly involved in the incident and well within the range of foreseeable physical injury.[13] A claim may also be made by persons in respect of psychiatric injury arising out of damage to or interference with their own property as a result of another's negligence.[14]

(4) Generally the pursuer's psychiatric illness must be a reasonably foreseeable consequence of the wrongdoer's act or omission, but a primary victim may claim for an unforeseeable psychiatric illness as long as some sort of personal injury (physical or psychiatric) was reasonably foreseeable.[15]

(5) A secondary victim has to satisfy three further criteria in addition to the reasonably foreseeability test in (4) above. These are that the secondary victim must:

(a) have a close tie of love or affection with the dead or injured person;

(b) be sufficiently close in time and space to the incident or its immediate aftermath;

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[8] *Simpson v Imperial Chemical Industries Ltd* 1983 SLT 601; *Rorrison v West Lothian Council* 2000 SCLR 245; *McLoughlin v O'Brian* [1983] 1 AC 410. But immediate family members are entitled to claim for non-patrimonial loss (including grief and distress) under the Damages (Scotland) Act 1976 where a person dies as the result of another's careless acts or omissions.

[9] *Wood v Miller* 1958 SLT (Notes) 49; *Alcock v Chief Constable South Yorkshire Police* [1992] 1 AC 310; *Hegarty v E E Caledonia Ltd* [1997] 2 Lloyd's Rep 259.

[10] *Sion v Hampstead Health Authority* [1994] 5 Med LR 170 (CA).

[11] *Cross v Highlands and Islands Enterprise* 2001 SLT 1060, Lord Ordinary (Macfadyen) at 1075-1076.

[12] *Alcock v Chief Constable South Yorkshire Police* [1992] 1 AC 310, Lord Oliver at 407.

[13] *Page v Smith* [1996] AC 155, Lord Lloyd at 184.

[14] *Clarke v Scottish Power plc* 1994 SLT 924; *Attia v British Gas plc* [1988] QB 304.

[15] *Page v Smith* [1996] AC 155.

(c) have perceived the incident or its immediate aftermath directly through his or her unaided senses.[16]

(6) A secondary victim may not be entitled to claim if the dead or injured person was wholly or substantially liable for the incident.[17]

1.5 It is widely recognised that the existing law suffers from major defects and is in need of reform.[18] The courts have developed the rules of liability over the past 100 or so years on an almost ad hoc basis. As a result they are complex, productive of unjustifiable distinctions and ignore modern developments in the understanding of mental illness. Examples are the requirement for a sudden shock which prevents a claim for damages by those whose psychiatric illness is due to a more long drawn-out process; and a need for those whose psychiatric illness arises from the wrongfully inflicted death or physical injury of a close relative to have been present at the incident or its immediate aftermath and have observed it with their own unaided senses. The categorisation of persons into primary and secondary victims, especially rescuers, involuntary participants and employees presents difficulties.

1.6 In March 1998 the Law Commission published its Report on *Liability for Psychiatric Illness*[19] which was preceded by a consultation paper with the same title in 1995.[20] We have derived great assistance from these documents and the arguments set out in them. In general we agree with the Law Commission's recommendations in its Report. There are however, some areas such as liability for unforeseeable psychiatric injury where we provisionally take a different view. The Law Commission's Report contains a substantial section on the medical background and responses from the medical consultees to their consultation paper.[21] We refer readers to that section for an overview of the medical aspects of psychiatric illnesses. Our Advisory Group contains a psychiatrist[22] so that we may be informed of current medical knowledge on which any proposals for legal reform have to be based.

Plan of discussion paper

1.7 Part 2 looks at two general issues; the kind of psychiatric injury for which the law will provide compensation and whether a compensatable psychiatric injury has to arise from a shock. Part 3 considers pursuers (often called primary victims) who have suffered a psychiatric injury otherwise than by their witnessing the death or injury of a third party. Part 4 examines those persons (often called secondary victims) whose psychiatric injury results from witnessing the death or injury of a third party. It also looks at the legal position

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[16] *Alcock v Chief Constable South Yorkshire Police* [1992] 1 AC 310.
[17] *Greatorex v Greatorex* [2000] 4 All ER 769.
[18] *Alcock v Chief Constable South Yorkshire Police* [1992] 1 AC 310, Lord Oliver at 418 "… I cannot, for my part, regard the present state of the law as either entirely satisfactory or as logically defensible"; J Stapleton, "In Restriction of Tort" in P Birks (ed), *The Frontiers of Liability*, vol 2 at 95 thought that liability for nervous shock is where the silliest rules now exist; H Teff, "Liability for Negligently Inflicted Psychiatric Harm: Justifications and Boundaries", (1998) 57 CLJ 91 at 94 "Unquestionably the prevailing liability rules are a source of embarrassment. … At times it almost seems as if they have been crafted with an eye to untenable distinctions."; *Frost v Chief Constable South Yorkshire Police*, [1999] 2 AC 455 (sometimes cited as *White v Chief Constable South Yorkshire Police*), Lord Steyn at 500 "… the law on the recovery of compensation for pure psychiatric harm is a patchwork quilt of distinctions which are difficult to justify... It must be left to Parliament to undertake the task of radical law reform."
[19] Law Com No 249.
[20] Consultation Paper No 137.
[21] Section B.
[22] See fn 2 above.

of rescuers. Part 5 concerns the links between primary and secondary victims, in particular whether a secondary victim's claim against the wrongdoer is dependent on that of the primary victim and whether a primary victim who was wholly or partly responsible for the incident owes a duty of care to the secondary victim. Part 6 lists our provisional proposals for reform on which we invite comment. Appendix A contains a summary of the law on liability for psychiatric injury in a number of other jurisdictions. Appendix B is a bibliography of books and articles.

Legislative competence

1.8 The proposals put forward in this discussion paper generally lie within the legislative competence of the Scottish Parliament. None of our proposals would result in amendment to any of the enactments set out in Schedule 4 of the Scotland Act 1998 that are protected from modification by the Scottish Parliament.[23] Delict is not a reserved matter. However, consumer protection, product safety and liability and employment and industrial relations[24] are reserved and in so far as our proposals affect those areas any implementing legislation would have to be enacted by the UK Parliament.

1.9 In our view our proposals would not give rise to any breach of the European Convention on Human Rights or Community law.

[23] Scotland Act 1998, s 29(2)(c) and Sch 4.
[24] Sections C7, C8 and H1 respectively, Scotland Act 1998, Sch 5 and s 29(2)(b).

Part 2 Nature of injury and need for shock

Introduction

2.1 In this Part we consider two criteria that currently must be satisfied before any entitlement to damages for a psychiatric injury can arise. The first is that the pursuer must have suffered a psychiatric injury or illness rather than mere mental distress (ie the normal emotional reactions of grief, distress or fright at an accident). The other criterion is that the psychiatric injury must have been induced by a shock. We should stress that we are not dealing here with claims for non-patrimonial loss under the Damages (Scotland) Act 1976 by members of a deceased's immediate family.

Psychiatric injury or mental distress

2.2 A successful claim for pure psychiatric injury requires pursuers to establish that they suffered something beyond the normal emotional response of grief, distress or fear (ie mental distress) to an incident. What is required has been described in various ways. In *Simpson v Imperial Chemical Industries*[1] the Inner House allowed the defender's reclaiming motion against the Outer House award of damages to employees who had suffered shocks as a result of an explosion at its Grangemouth plant. Lord Robertson said that:[2]

> "It is not enough for a person to say that he received a shock or a fright from an explosion which caused normal emotional reaction with no lasting effect, and to claim on account of this "shock" alone. He can only claim damages if he proves that he suffered some physical, mental or nervous injury."

Lord Grieve quoted Lord Bridge's dictum in *McLoughlin v O'Brian*.[3] "The common law gives no damages for the emotional distress which any normal person experiences when someone he loves is killed or injured…So, the first hurdle which a plaintiff claiming damages of the kind in question must surmount is to establish that he is suffering, not merely grief, distress or any other normal emotion, but a positive psychiatric illness." Lord Grieve went on to say that:[4]

> "While it is well established that damages can be recovered on the ground of nervous shock, as well as the ground of actual physical injury, there must be some evidence that the "nervous shock" complained of is a condition which can reasonably be described as an illness."

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[1] 1983 SLT 601.
[2] *Ibid* at 605. See also *Harvey v Cairns* 1989 SLT 107, Lord Ordinary (Murray) at 109; *Page v Smith* [1996] AC 155, Lord Keith at 167, Lord Jauncey at 171 and Lord Lloyd at 189 and 197.
[3] [1983] 1 AC 410, at 431. In a later case, *Hicks v Chief Constable South Yorkshire Police* [1992] 2 All ER 65 at 69, Lord Bridge said "…fear by itself, of whatever degree, is a normal humane motion for which no damages can be awarded".
[4] 1983 SLT 601 at 609.

2.3 In *Rorrison v West Lothian Council*[5] the Lord Ordinary (Reed) dismissed the pursuer's claim saying that she "can recover only if she has sustained psychiatric injury in the form of a recognised psychiatric illness". Later on, in dealing with foreseeability he said:[6]

> "Many, if not all, employees are liable to suffer these emotions [frustration and embarrassment], and others mentioned in the present case such as stress, anxiety, loss of confidence and low mood. To suffer such emotions from time to time, not least because of problems at work, is a normal part of human existence. It is only if they are liable to be suffered to such a pathological degree as to constitute a psychiatric disorder that a duty of care to protect against them can arise; …".

2.4 Should there continue to be a threshold level of suffering that has to be attained before damages can be awarded? There has been a call for severe mental suffering short of mental illness to be compensatable.[7] Awards of solatium are made in actions based on delict for worry, disturbance and distress caused to the pursuer. However, in all the reported Scottish cases solatium has been awarded in addition to other damages, such as damages for physical injury, loss of property, or loss of earnings.[8] It seems to be incompetent to award damages for worry, disturbance or distress alone.[9] Where these have given rise to a psychiatric injury an award may be made, but it is made for that injury not the causative stressors.

2.5 The arguments in favour of retaining the present distinction between mental distress and psychiatric injury are that:

> (1) The requirement for a psychiatric injury serves to limit the number of cases, so that wrongdoers are not faced with paying compensation out of all proportion to their culpability and the courts are not inundated with claims. While a distinction can be made between a psychiatric injury and mental distress, it would be difficult, if not impossible, to draw a line between compensatable mental distress and non-compensatable mental distress.
>
> (2) People should not expect to be compensated for mental distress which is a normal human reaction to the vicissitudes of life.

The arguments against retention are that:

> (1) No threshold requirement exists for physical injuries, yet the courts are not inundated with claims for minor injuries. The same practical restrictions would apply to claims in relation to minor or transient mental distress.

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[5] 2000 SCLR 245 at 250.
[6] *Ibid* at 254.
[7] See for example N J Mullany, "Personal Perception of Trauma and Sudden Shock - South Africa Simplifies Matters" (2000) 116 LQR 29.
[8] See for example *Martin v Bell-Ingram* 1986 SC 208 (negligent home survey, solatium and diminution of value of property awarded); *Fleming v Strathclyde Regional Council* 1992 SLT 161 (solatium and damage to home from flooding with sewage); *Curran v Docherty* 1995 SLT 716 (bungled domestic conveyancing, solatium and cost of rectification awarded); *McLelland v Greater Glasgow Health Board* 2001 SLT 446 (solatium, loss of earnings and care costs for severely disabled child).
[9] Apart from those claimed in respect of death under the Damages (Scotland) Act 1976.

(2) The distinction between mental distress and psychiatric injury is essentially one for medical evidence so that the decision as to what is compensatable depends on psychiatric opinion and practice rather than the law.

2.6 In its Report on *Liability for Psychiatric Illness*[10] the Law Commission recommended that compensation should continue to be available only for a "recognisable psychiatric illness" - the term used by the courts in England and Wales to denote something more than mere mental distress. We favour this approach. The law ought to differentiate between initial transient mental distress arising out of an incident which nearly all people will suffer and the more long-lasting and debilitating psychiatric injury which develops in a minority of cases. Physical and mental injuries cannot be fully equated with each other. Most people go through their daily lives without being physically injured by the actions of others. But people do not live on the same emotional plane all the time. They inevitably experience mental highs and lows in the course of interacting with their surroundings and other people. Removing the existing requirement of a psychiatric illness so making all mental distress compensatable would enlarge liability to an unacceptable extent.

2.7 The other jurisdictions that we have studied exclude claims for distress and require the pursuer to establish the existence of a psychiatric illness, disorder or injury. In the Australian case of *Mount Isa Mines Ltd v Pusey*[11] Windeyer J said "A plaintiff in an action of negligence cannot recover damages for a 'shock' however grievous, which was no more than an immediate emotional response to a distressing experience sudden, severe and saddening.". Wallace JA in the Canadian case of *Rhodes v Canadian National Railway*[12] made a similar point saying "grief, sorrow or reactive depression are not compensable". Germany requires an injury to health.[13] This is taken to mean that the psychiatric injury must exceed the level of pain, grief and despair normally encountered in such a situation.[14] One of the five conditions for damages laid down by the Irish Supreme Court in *Kelly v Hennessy*[15] was that plaintiffs must establish that they suffered a recognisable psychiatric illness. New Zealand also adopts this approach,[16] as does South Africa.[17]

2.8 Assuming there is to be a threshold requirement, how should it be expressed? If the threshold continues to rest on the common law, no definition is required and what is compensatable can be left to the courts. But if there is to be legislation some definition may be necessary.[18] We agree with the Law Commission[19] that any definition should not be based on the Diagnostic and Statistical Manual of Mental Disorders[20] or the International Classification of Mental and Behavioural Disorders.[21] These classifications are not drawn up for legal purposes and are meant to serve as guidelines to be informed by clinical judgment.

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[10] Para 5.6.
[11] (1970) 125 CLR 383 at 394.
[12] (1991) 75 DLR (4th) 248 at 264.
[13] § 823 I BGB.
[14] C von Bar, *The Common European Law of Torts* vol 2, 66.
[15] [1995] 3IR 253.
[16] *The Queen v Moffat* [2000] NZCA 252.
[17] *Barnard v Santam Bpk* 1999 (1) SA 202, mother's claim for "mourning" dismissed but her claim based on her psychiatric disorder was allowed. See also N J Mullany, "Personal Perception of Trauma and Sudden Shock - South Africa Simplifies Matters"(2000) 116 LQR 29.
[18] It would depend to some extent on the content of the legislation.
[19] Report on *Liability for Psychiatric Illness*, para 5.2.
[20] American Psychiatric Association, 4th edn (1994), commonly referred to as "DSM - IV".
[21] World Health Organisation (1992), commonly referred to as "ICD-10".

Moreover, a claim could not be made for a new mental disorder until a revised edition of the documents had been issued.[22] The phrase "recognised psychiatric injury" would suffer from the same defect. We prefer the term "significantly disabling psychiatric injury" to "recognisable psychiatric illness". First, not all recognisable psychiatric illnesses or disorders affect the sufferer's quality of life to an extent that should attract compensation. Second, the injury and the extent to which it was disabling would be a question of fact in each case, in which the court would rely on evidence by psychiatrists or other experts and the pursuer. We consider that it would be easier for a psychiatrist or other expert to express a view as to whether the pursuer was suffering from a significantly disabling psychiatric injury than whether he or she had a recognisable psychiatric illness. We understand that experts often disagree about the diagnosis (eg post-traumatic stress disorder or adjustment disorder) in an individual case, but agree about the degree of disability the psychiatric injury is causing the pursuer. Finally, the term "injury" helps to distinguish those symptoms that are part of a pre-existing psychiatric disorder and those that were produced by the incident.

2.9 We seek views on the following proposal and question:

1. (1) It should continue to be the position that no compensation may be claimed for mere mental distress.

(2) Should the compensatable category be defined as a significantly disabling psychiatric injury or in some other way?

The shock requirement

2.10 Traditionally this aspect of the law of delict has been known as liability for nervous shock. Originally, this nomenclature simply reflected contemporary medical and judicial understanding of how mental injury was incurred. In turn, "shock" has been defined as the "sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind".[23] Reparation, at least in the case of secondary victims whose psychiatric injuries are due to witnessing the death or injury of others, is still possible only where the injuries have been induced by shock.[24] Thus in *Wood v Miller*,[25] for example, it was held that a woman who was rendered unconscious by an accident which seriously injured her husband could not claim damages for her psychiatric injury as it arose from her slow realisation of the extent of his injuries after she recovered consciousness. Similarly, in *Sion v Hampstead Health Authority*[26] a father who watched his son slowly die in hospital allegedly as a result of mistreatment of his accident injuries failed in his claim for damages as his psychiatric illness had not been caused by shock. The deterioration in the son's health had been a continuing process.[27] But damages may be awarded if there is a sudden realisation of danger within a continuing process. Thus in *Walters v North Glamorgan NHS Trust*[28] a mother was awarded damages where she had been present from the time her baby son had a major epileptic seizure (due to acute hepatitis that the hospital had failed to diagnose) to when he died

[22] See comment of the Lord Ordinary (Carloway) in *Fraser v State Hospitals Board for Scotland* 2001 SCLR 357 at 377-378.
[23] *Alcock v Chief Constable South Yorkshire Police* [1992] 1 AC 310, Lord Ackner at 401.
[24] *Ibid*, Lord Keith at 398, Lord Oliver at 411.
[25] 1958 SLT (Notes) 49.
[26] [1994] 5 Med LR 170 (CA).
[27] See also *Taylorson v Shieldness Produce Ltd* [1994] PIQR P329.
[28] [2002] EWHC 321.

36 hours later. She was wrongly told the seizure was not serious when in fact it had caused major irreparable brain damage. Thomas J held that the mother had suffered a sudden appreciation of her son's injuries. Moreover, in recent employment cases where the pursuer was a primary victim whose psychiatric injury arose out of stressful conditions at work, the need for a single "shock" has not been applied.[29]

2.11 In its Report[30] the Law Commission recommended that the shock requirement should be abandoned and listed the following arguments for and against abandoning it.

For abandoning the shock requirement

(1) The shock requirement produces harsh decisions, and if its sole purpose is to limit the number of potential claims, it is a very crude method of doing so.

(2) The shock requirement renders some forms of psychiatric illness, such as post-traumatic stress disorder, more readily compensatable than other psychiatric illnesses, such as depression. The suffering involved in each can be equally severe and equally causally connected with the wrongdoer's negligence.

(3) The full extent of the physical injuries of the immediate victim may become apparent to the pursuer only over a period of time.

(4) The first part of the shock requirement that the pursuer had a sudden appreciation by sight or sound of a horrifying event retains the second of the *Alcock* criteria - that the pursuer must have been present at the accident or its immediate aftermath.[31]

(5) The requirement excludes those whom society may feel most worthy of legal support, such as the person worn down by the long-term caring of an injured relative.

Against abandoning the shock requirement

(1) Abandoning the shock requirement would increase the potential number of claims, thereby opening the floodgates of litigation.

(2) The shock test facilitates proof of causation. Without such a test, the court would be required to decide whether the pursuer's illness, possibly occurring many months or even years after the allegedly negligent act or omission, was in fact caused by that act or omission or some other intervening event.

(3) The requirement maintains a level of immediacy with the primary event, thereby protecting the wrongdoer from the possibility of claims arising much later.

(4) Several other jurisdictions have a shock requirement.

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[29] *Cross v Highland and Islands Enterprise* 2001 SLT 1060, Lord Ordinary (Macfadyen) at 1075-76 (express denial of requirement). In *Fraser v State Hospitals Board for Scotland* 2001 SCLR 357 a claim by an employee arising out of a series of disciplinary measures was dismissed not because of the absence of shock, but because his psychiatric injury was not foreseeable.

[30] Report on *Liability for Psychiatric Illness*, paras 5.28-5.33.

[31] See paras 4.22-4.27 below where we propose that it should be abolished.

(5) Damages are not available for every misfortune that may occur as the result of a person's negligence. Psychiatric illness brought on by the long-term caring of an injured relative could be regarded as one of the unfortunate vicissitudes of life for which the law should not provide compensation.

2.12 Our study of other jurisdictions shows that views differ on the shock requirement. In Australia proof that the psychiatric injury arose as a result of a sudden shock is required.[32] Thus in *Anderson v Smith*[33] a mother's claim for damages for psychiatric injury arising from her seeing her daughter slowly die in hospital was dismissed as there was no sudden shock. Nor is a long drawn-out death regarded as part of the aftermath of the accident.[34] Canada[35] and Ireland[36] adopt a similar approach. In Germany injuries which do not amount to a shock to the system go uncompensated.[37] Singapore does not require a shock, the question being whether it was reasonably foreseeable that the psychiatric injury would result from the negligent act or omission.[38] The South African Supreme Court of Appeal said in *Barnard v Santam Bpk*[39] that if Mrs Barnard's psychiatric injury had been sustained in the absence of any shock to her senses she would not have failed for that reason.

2.13 We agree with the Law Commission's recommendation to abandon the shock requirement.[40] We think that it is based on an outdated conception of how mental illness occurs and draws an unjustifiable distinction between sufferers whose psychiatric injury arises from a single event and those whose injuries arise from a series of events or a process. In many cases there is no "shock" or emotional reaction at the time of the incident, although it is clear from the nature and content of the later-developing psychiatric injury that it can be related back to the incident. Chronic stressors are risk factors for psychiatric disorders and may be even stronger predictors than acute stressors.[41] If it can be shown that the wrongdoer's act or omission caused the pursuer's psychiatric injury, it should be immaterial how the process occurred. We note the response of the Mental Health Law Group of the Royal College of Psychiatrists to the Law Commission's discussion paper to the effect that the shock requirement causes serious problems for psychiatrists. They said that the term "shock" was vague, had no psychiatric meaning and was emotively misleading.[42] It has also been argued that the shock requirement is particularly inappropriate for medical negligence cases where the patient's family suffer psychiatric injury in seeing the patient injured or

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[32] *Jaensch v Coffey* (1984) 54 ALR 417; *Chiaverini v Hockey* (1993) Aust Torts Rep 81-223; *Gifford v Strang Patrick Stevedoring Pty Ltd* [2001] NSWCA 175.
[33] (1990) 101 FLR 34.
[34] *Spence v Percy* (1991) Aust Torts Rep 81-116.
[35] *Beecham v Hughes* (1988) 52 DLR (4th) 625; *Rhodes v Canadian National Railway* (1991) 75 DLR (4th) 248.
[36] *Kelly v Hennessy* [1995] 3 IR 253.
[37] NJW 1971, 1883; see Appendix A, para 4.3.
[38] *Pang Koi Fa v Lim Djoe Phing* [1993] 3 SLR 317, mother watched child die slowly in hospital after botched operation and lack of proper aftercare.
[39] 1999 (1) SA 202. See NJ Mullany, "Personal Perception of Trauma and Sudden Shock – South Africa Simplifies Matters" (2000) 116 LQR 29 at 34.
[40] Report on *Liability for Psychiatric Illness*, para 5.33.
[41] Swindle, Cronkite and Moose, "Life Stressors, Social Resources, coping and the 4-Year course of Unipolar Depression" (1989) 98 J of Abnormal Psychology 468; McGonagle and Kessler, "Chronic Stress, Acute Stress and Depressive Symptoms" (1990) 18 Amer J of Community Psychology 681.
[42] Report on *Liability for Psychiatric Illness*, para 5.29(2). See also C Tennant, "Liability for Psychiatric Injury: an Evidence-based Appraisal" (2002) 76 ALJ 73.

dying. There is seldom a single shocking incident, but rather a gradual realisation that the operation or other procedure has gone wrong.[43]

2.14 We therefore propose that:

2. It should be competent to claim damages for a psychiatric injury even though it was not induced by shock.

[43] F S Shuaib, "Claims for 'nervous shock' by secondary victims in medical negligence cases" (1999) 15 Professional Negligence 18.

Part 3 Primary Victims

Introduction

3.1 In this Part we consider the current law as it relates to a pursuer who has suffered a significantly disabling psychiatric injury as a consequence of the defender's negligence and whose injury was not merely the result of witnessing the death or personal injury of a third party. Such a pursuer is often described as a primary victim. At the outset, we shall consider the general principles of delictual liability which are relevant in such cases.

Duty of care, breach of duty and remoteness of injury

3.2 It is trite law that before there can be liability in delict the defender's conduct must amount to a breach of a pre-existing duty of care which the defender owed to the pursuer.[1] It is generally accepted that a duty of care to prevent physical harm to the pursuer will arise if the defender can reasonably foresee that his careless acts or omissions will harm the pursuer.[2] Reasonable foreseeability of harm is therefore the touchstone for the imposition of a duty of care: and in the context of delictual liability for physical injury, it is usually sufficient to establish the duty.[3] In other words, where a pursuer is at risk of physical harm as a consequence of the defender's carelessness, the defender owes him a duty of care provided such harm to the pursuer was reasonably foreseeable.

3.3 Even if the defender owes the pursuer a duty of care, there is no liability unless the particular harm sustained by the pursuer was foreseeable by the defender as a probable consequence of his acts or omissions. Put another way, there is no breach of the duty of care if the defender could not foresee that his conduct could in the circumstances have had as its probable consequence the kind of harm sustained by the defender.[4] This is sometimes characterised as the doctrine of remoteness of injury. Accordingly, a pursuer cannot recover compensation for injuries which are too remote in the sense that they were not reasonably foreseeable as arising from the defender's conduct. For our purposes, the important point to notice is that liability is denied not by the court's refusal to impose a duty of care but by its finding that the duty was not broken in the particular circumstances of the case. Confusion can arise because the concept of reasonable foreseeability plays a key role in both situations *viz* the initial imposition of a duty of care and whether it has been broken in the circumstances. While the result of both processes might appear the same in that there is a denial of liability, the former operates at a more fundamental level than the latter. The refusal to impose a duty of care means that the pursuer's case fails *in limine*; indeed, it can be considered a question of law which can be determined as an issue of relevancy. Remoteness

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[1] See, for example, *Gibson v Orr* 1999 SC 420.
[2] *Donoghue v Stevenson* 1932 SC (HL) 31; *Marc Rich & Co AG v Bishop Rock Marine Co Ltd, The Nicholas H* [1996] AC 211, Lord Steyn at 235. Where physical harm to the pursuer is reasonably foreseeable, there will usually be a sufficient degree of proximity between the pursuer and defender so that it is fair, just and reasonable to impose a duty of care upon the defender: *Caparo Industries plc v Dickman* [1990] 2 AC 605.
[3] *Ibid*.
[4] *Malcolm v Dickson* 1951 SC 542.

of injury on the other hand is primarily a question of fact and degree and should not be dismissed without a proof.

3.4 An example may be helpful. In the leading case of *Muir v Glasgow Corporation*[5] there was no doubt that Mrs Alexander as occupier of the teashop owned by her employer, Glasgow Corporation, owed the pursuers, children on a Sunday school picnic, a duty of care as her invitees to prevent them suffering physical harm while on the premises. Nevertheless, her conduct in allowing two Free Church of Scotland elders to carry a tea urn through a corridor into the tearoom did not amount to a breach of that duty because she could not foresee that the children would be scalded as a probable consequence of giving such permission. In the circumstances, the children's injuries were held to be too remote. This is quite different from the possible contention that Mrs Alexander did not owe a duty to take reasonable care to prevent the children suffering physical harm because it was not reasonably foreseeable that they might be scalded while on the premises. The recognition of a general duty to take reasonable care towards persons within the area of foreseeable potential physical injury has not opened the floodgates to unmeritorious cases because there is no breach of duty and consequently no liability if the pursuer's injury is too remote, ie if the harm sustained by the pursuer was not of a kind that could reasonably have been foreseen as a probable consequence of the defender's conduct.

3.5 In personal injury cases there is an important qualification to the remoteness of injury principle. While it is necessary to foresee the kind of injury that the pursuer has suffered, it is not necessary to foresee the extent of the injury or the precise way in which it was sustained.[6] Further, the pursuer must take his victim as he finds him; this means that if as a consequence of a foreseeable physical injury the defender suffers unforeseeable harm, the pursuer is liable for the unforeseeable as well as the foreseeable consequences.[7] Nor does it matter that the unforeseeable consequences constitute a different kind of harm from that which could have been reasonably anticipated.[8] This is known as the "thin skull" or "egg shell skull" rule. For example, A owes a duty of care to B to prevent B suffering physical injury. As a result of A's negligence, B's leg is broken. Assuming that B's broken leg was a foreseeable consequence of A's conduct, A is in breach of the duty of care and is liable in delict to B. But because A must take his victim as he finds him, should B die from the leg injury because he has haemophilia, A is liable for B's death even if it was not foreseeable. It will be noticed that A is in breach of the duty of care because B has sustained an injury of a kind that was foreseeable: B's broken leg is not too remote. A only has to take his victim as he finds him *after* a breach of his duty has been established. In other words, the normal remoteness test is satisfied in relation to some harm - the broken leg - sustained by B. It would appear that the "thin skull" rule does not operate to *establish* liability, ie to render the defender's conduct a breach of his duty of care; this only occurs when some of the harm sustained by the pursuer is a foreseeable consequence of the defender's conduct.[9] Instead, the "thin skull" rule operates to determine the *extent* of the defender's liability after a breach of duty has been established in accordance with the normal remoteness rules.

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[5] 1943 SC (HL) 3.
[6] *Hughes v Lord Advocate* 1963 SC(HL)31; *Galbraith's Curator ad Litem v Stewart (No 2)* 1998 SLT 1305.
[7] *McKillen v Barclay Curle & Co Ltd* 1967 SLT 41.
[8] *Ibid*.
[9] *Malcolm v Dickson* 1951 SC 542.

3.6 So far we have been considering duty, breach of duty and remoteness in the context of delictual liability for physical injury. It is important to bear these fundamental principles in mind when considering liability in delict for psychiatric injury. As we shall see, liability in delict for psychiatric injury has often been denied on the basis that the defender did not owe the pursuer a duty of care: but on occasions, a more principled approach would have been to hold that there was a duty of care but in the circumstances there was no breach of duty because the mental illness suffered by the pursuer was not reasonably foreseeable as a probable consequence of the defender's conduct.

Psychiatric injury and delictual liability

(a) The law before *Page v Smith*[10]

3.7 As a general rule, a duty of care to prevent physical injury arises when the defender can reasonably foresee that the pursuer may be injured by the defender's careless acts or omissions. This can be characterised as a general duty on the defender to take reasonable care towards persons who are within the area of risk of foreseeable physical harm arising from the defender's conduct. However, the courts have refused to develop an analogous general duty of care to prevent psychiatric injury whenever the defender can reasonably foresee that the pursuer may sustain such injury as a consequence of the defender's careless acts and omissions. Instead, they have proceeded in a piecemeal fashion and the law has not developed in a coherent way. Time and again the logical application of a principled approach to the subject is jettisoned to encompass the circumstances of a particular case where it is felt that reparation should be awarded; in turn, the new development is distinguished - if not discarded - when its application to the facts of a later case would appear to extend the scope of potential liability beyond what the courts feel is socially and economically desirable.[11] It is therefore exceedingly difficult to give a simple and accurate account of the law.

3.8 Initially, the Scottish courts refused to recognise mental illness as a reparable interest at all.[12] By the early years of the twentieth century, however, Scots law, like English law, began to allow claims in delict for psychiatric injury.[13] It would appear that a duty of care to prevent mental illness was only owed to those who were within the zone of physical danger arising from the defender's negligent conduct, ie where B owed a duty of care to A to take reasonable care to prevent A suffering physical harm.[14] In other words, reasonable foreseeability of physical harm to the pursuer was a necessary condition for the existence of a duty of care to prevent mental illness; but it was not sufficient. In addition, psychiatric injury to the pursuer had to be reasonably foreseeable before a duty of care arose. Moreover, there would be no breach of that duty unless psychiatric injury to the pursuer was foreseeable as a probable consequence of the defender's conduct in the particular circumstances of the case.[15] In other words there was no liability if the psychiatric injury was

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[10] [1996] AC 155.

[11] The classic example is *McLoughlin v O'Brian* [1983] 1 AC 410, where damages were awarded in respect of a psychiatric illness caused to a mother from witnessing the aftermath of an accident in which her family was injured. The House of Lords later narrowed the potential scope of *McLoughlin* in *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310. See paras 4.5 and 4.22-4.27 below.

[12] See, for example, *Pridie v Dick* (1857) 19D 287.

[13] *Cooper v Caledonian Railway Co* (1902) 4F 880; *Wallace v Kennedy* (1908) 16 SLT 485. *Brown v Glasgow Corpn* 1922 SC 527.

[14] *Ibid*. See also *Currie v Wardrop* 1927 SC 538.

[15] *Wallace v Kennedy* (1908) 16 SLT 485; *Ross v Glasgow Corpn* 1919 SC 174.

too remote. The mental illness had to arise from the pursuer's fear for his own safety.[16] Foreseeability would often break down at this point since in determining these questions the reasonable person in the position of the defender was entitled to assume that the pursuer was a person of ordinary fortitude and customary phlegm.[17]

3.9 Accordingly, if the pursuer was within the area of risk of potential physical harm, a duty of care arose to prevent the pursuer suffering mental illness if it was reasonably foreseeable that this might occur, assuming the pursuer to be of ordinary fortitude. Thus in the leading case of *Bourhill v Young*,[18] Mrs Bourhill's action failed *in limine* because she was not within the zone of physical danger, ie it was not reasonably foreseeable that she would be physically injured by the defender's careless driving and accordingly no duty of care to prevent physical harm arose. Since there was no duty to prevent physical harm the *conditio sine qua non* of a duty of care to prevent psychiatric injury was not satisfied. But even if Mrs Bourhill had been within the area of potential physical harm, her action might still have failed if it could not be established that it was reasonably foreseeable that a person of ordinary fortitude in Mrs Bourhill's position would have suffered mental illness from hearing and seeing the road accident.

3.10 We have been considering the situation where the pursuer did *not* suffer physical harm but only psychiatric injury. Where the pursuer was within the zone of potential physical danger and sustained physical and mental injuries, damages could be available for both types of injury. There is no difficulty where both kinds of injury are reasonably foreseeable: in that case there will have been breach of a duty to prevent physical harm and a breach of a duty to prevent psychiatric injury. But what if psychiatric injury was not reasonably foreseeable? Provided physical injury was reasonably foreseeable and was in fact sustained by the pursuer, there has been a breach of a duty of care to prevent physical harm. Whether damages can also be obtained for psychiatric injury now becomes a matter of remoteness of injury, not the existence of an independent duty of care to prevent the pursuer sustaining psychiatric harm.

3.11 It is generally accepted by personal injury practitioners that where the pursuer has in fact been physically injured, any psychiatric injury also suffered by the pursuer will not be regarded as too remote, even if it was not reasonably foreseeable. In an analogy with the "thin skull" rule, the defender has to take the victim as he finds him and is liable even although the mental illness arose because the victim had a "thin skull personality": it therefore does not matter that a mental illness would not have been sustained by a person of ordinary fortitude and for that reason was unforeseeable. Indeed, it would appear that where a pursuer has been physically injured in breach of a duty of care to prevent physical harm, a mental illness can constitute a head of loss even though it is not a direct result of the pursuer's physical injury. In *Schneider v Eisovitch*[19] for example, a woman who was injured in a car crash recovered damages for a mental illness she sustained when she heard that her husband had been killed in the same accident. In the course of his judgment Paul J observed:[20] "The fact that the defendant by his negligence caused the death of the plaintiff's husband does not give the plaintiff a cause of action for the shock caused to her; but the

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[16] *Ibid.* See also *Bourhill v Young* 1942 SC (HL) 78, Lord Porter at 98.
[17] *Ibid.*
[18] 1942 SC (HL) 78.
[19] [1960] 2 QB 430. The decision has been followed in Australia: see *Andrews v Williams* [1967] VR 831; *Tranaktsidis v Oulianoff* (1980) 24 SASR 500.
[20] [1960] 2 QB 430 at 442.

plaintiff, having a cause of action for the negligence of the defendant [the physical injuries suffered by her], may add the consequence of shock caused by hearing of her husband's death when estimating the amount recoverable on her cause of action". Put simply, when a pursuer has been physically injured in breach of a duty to prevent foreseeable harm, damages will be recovered for any psychiatric injury also sustained whether or not the mental illness was reasonably foreseeable.

3.12 We have seen that in determining the existence of a duty of care to prevent psychiatric injury and whether or not the duty of care has been breached, the pursuer is assumed to be a person of ordinary fortitude unless the defender knows or ought to have known that he had an unusual susceptibility to psychiatric injury. However, it is difficult to understand what is meant by persons of ordinary fortitude. A traumatic event may cause the pursuer psychiatric injury yet leave others unaffected. If those who were unaffected were always regarded as persons of ordinary fortitude, those who suffered mental illness would never obtain reparation since either no duty of care would arise or there would be no breach of duty. Yet, it cannot be simply a matter of statistics. For instance, a duty of care can arise to protect particularly vulnerable persons from physical harm[21] when such a duty would not arise - or would not be breached[22] - in respect of ordinary persons. Over 30 per cent of the population will suffer some form of mental disorder at some stage in their lives[23] and it is known that this can be triggered by traumatic events like being involved in a car or rail crash. On the other hand, the requirement enables the court to make a qualitative assessment of the defender's conduct and can exonerate him from liability on the basis that it was not sufficiently serious as to cause psychiatric injury in a person of ordinary fortitude while leaving open the possibility of liability if the defender knew (or ought to have known) of the pursuer's peculiar susceptibilities to mental illness.[24]

3.13 To summarise. Before the decision of the House of Lords in *Page v Smith*[25], there were two ways in which a pursuer could recover for psychiatric injury. The first was a breach of a duty of care to prevent psychiatric injury. This duty of care only arose when the pursuer was within the area of risk of potential physical injury, and psychiatric injury to a person of ordinary fortitude was reasonably foreseeable. It was irrelevant that the pursuer had not sustained a physical injury. The second was as a consequence of a breach of a duty to prevent physical injury. Since the pursuer was physically injured, he could recover for any psychiatric injury, whether or not it was reasonably foreseeable, on analogy with the "thin skull" rule. In these circumstances, psychiatric injury was not too remote a head of loss.

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[21] *Haley v London Electricity Board* [1965] AC 778 (duty of care to protect blind - as opposed to full sighted - pedestrians from falling into a trench).

[22] *Paris v Stepney BC* [1951] AC 367 (breach of duty of care in respect of a man blinded in one eye, when there would be no breach of duty if his sight had not been impaired).

[23] J K Myers, M M Weissman, G L Tischler et al, "Prevalence of Psychiatric Disorders in Three Communities" (1984) 41 Archives of General Psychiatry 959; R C Kessler, K A McGonagle, S Zhao et al, "Lifetime and 12 Month Prevalence Rates of DSM IIIR Psychiatric Disorders in the United States" (1994) 51 Archives of General Psychiatry 8. However, only about 1% of the population will suffer a new disorder or a new episode in any given year.

[24] In *McLoughlin v Jones* [2002] 2 WLR 1279 Brooke LJ considered (at 1294) that "damages can only be recovered if it is foreseeable that psychiatric illness would have been suffered by the claimant, given all those features of his personal life and disposition of which the defendants were aware".

[25] [1996] AC 155.

(b) ***Page v Smith***

3.14 These principles have now been overtaken by the decision of the House of Lords in *Page v Smith.*[26] Here the plaintiff was involved in a car accident. He escaped physical injury but suffered a recurrence of a psychiatric illness. It was accepted that the recurrence of the illness was unforeseeable. Applying the principles described above, the court should have held that the defendant was not liable. Although the plaintiff was within the area of potential physical danger, a duty of care to prevent him suffering psychiatric illness could not arise since it was not reasonably foreseeable that a person of ordinary fortitude would sustain such illness. Moreover, since the plaintiff had not been physically injured there had been no breach of the pre-existing duty of care not to cause him physical harm: as there was no breach of duty, remoteness issues did not arise. In particular, resort could not be made to the "thin skull" rule which is only relevant after a breach of a duty to prevent physical injury has occurred.

3.15 Nevertheless, the House of Lords by a majority found for the plaintiff. In Lord Lloyd's opinion, when the plaintiff was in the area of risk of potential physical harm there was no distinction between physical and mental injury.[27] The question was whether the defender could reasonably foresee that his conduct would expose the pursuer to *personal* injury, be it physical or psychological. If the answer was in the affirmative, a duty of care arose not to harm the pursuer. Liability for psychiatric injury would then be incurred if the duty was breached even although the pursuer was not physically injured and the mental illness suffered by the pursuer was not reasonably foreseeable in the circumstances. Lord Lloyd justified this conclusion on the basis that the defender must take his victim as he finds him: an "egg shell" personality being equated with an "egg shell" skull. In the case of primary victims, the plaintiff did not have to be of ordinary fortitude.

3.16 The decision has proved controversial.[28] It is axiomatic that even although a defender has been careless, there is no liability in delict unless he has broken a duty of care owed to the pursuer. The duty is only *breached* if the defender's conduct causes the kind of harm to the pursuer which he should have taken reasonable care to avoid: but he is only obliged to avoid the kind of harm he can reasonably foresee as being suffered by the pursuer as a probable consequence of his careless acts or omissions. As the plaintiff in *Page* was not physically injured there was no breach of a duty to prevent him suffering physical harm: and as in the particular circumstances of the case no kind of psychiatric illness to the plaintiff was reasonably foreseeable as a probable consequence of the defendant's careless driving, there was no breach of a duty to prevent him suffering psychiatric harm. Since no duty was broken from either a physical or mental injury perspective, remoteness issues did not arise and "thin skulls" and "egg shell" personalities were, on this analysis, irrelevant.

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[26] [1996] AC 155.
[27] *Ibid* at 197. See also Lord Browne-Wilkinson at 180-181.
[28] See, for example, T K Feng, "Nervous Shock to Primary Victims" (1995) SJLS 649; C A Hopkins, "A New Twist to Nervous Shock" (1995) 54 CLJ 491; N J Mullany, "Psychiatric damage in the House of Lords - Fourth time unlucky: Page v Smith" (1995) 3 Journal of Law and Medicine 112; A Sprince, "Page v Smith - being 'primary' colours House of Lords' judgment" (1995) 11 PN 124; P R Handford, "A New Chapter in the Foresight Saga: Psychiatric Damage in the House of Lords" (1996) 4 Tort L Rev 5; F McManus, "Nervous Shock - Back to Square One?" (1996) Jur Rev 159; F A Trindade, "Nervous Shock and Negligent Conduct" (1996) 112 LQR 22. F A Trindade and P Cane, *The Law of Torts in Australia* (3rd edn, 1999) 362. But see B McDonald and J Swanton, "Foreseeability in relation to negligent infliction of nervous shock" (1995) 69 ALJ 945.

3.17 Nevertheless, after *Page v Smith* it is generally accepted that if the pursuer is within the area of risk of reasonably foreseeable physical harm the defender is under a duty of care to prevent the defender suffering psychiatric as well as physical injury. It appears to be irrelevant that the psychiatric injury is not reasonably foreseeable as a probable consequence of the defender's conduct. However this result is achieved by departing from well established principles of delictual liability. In particular, the criteria for the imposition of a duty of care are intertwined with issues of remoteness of injury which should only arise after a pre-existing duty has been broken. In practice, of course, where physical injury is reasonably foreseeable it will usually follow that psychiatric injury will also be reasonably foreseeable: consequently, there will be a duty of care not to cause the defender psychiatric injury. Even if psychiatric injury is not reasonably foreseeable, the pursuer will be able to obtain damages for that injury as a consequence of the "thin skull" principle provided he was *in fact* physically injured. Indeed, it was to avoid the apparent absurdity that Mr Page would have recovered on this basis if he had sustained a minor physical injury but would obtain nothing in the absence of such an injury, that the majority of the House departed from established principle in order to find the defendant liable.

3.18 In the course of their speeches in *Page*, both Lord Browne-Wilkinson and Lord Lloyd[29] maintain that a distinction should no longer be made between physical and psychiatric injury. Instead, there is a duty to prevent the plaintiff suffering personal injury which includes mental as well as physical harm. Yet the distinction remains inherent in *Page*. For according to Lord Lloyd, for example, it is only when the pursuer is within the zone of potential physical danger that the general duty not to cause him personal, including psychiatric, injury arises. *Page* can therefore be seen as restrictive in the sense that the general duty of care to prevent personal injury does not arise unless the pursuer is within the area of risk of potential physical harm. It is not enough that there is a reasonably foreseeable risk of psychiatric injury to a pursuer who is not in physical danger.

(c) The definition of primary victims after *Page v Smith*

3.19 *Page v Smith* was concerned with a plaintiff who was within the area of foreseeable physical danger. Such persons are known as primary victims. The idea is that a primary victim has been directly involved in the circumstances which caused the injury. This is contrasted with the position of a secondary victim who suffers psychiatric injury as a result of being "no more than the passive and unwilling witness of injury caused to others".[30] Under the current law a duty of care not to cause reasonably foreseeable psychiatric harm to a secondary victim does not arise unless (a) there was a close tie of love and affection between the secondary victim and the person injured, (b) the secondary victim was present at the accident or its immediate aftermath, and (c) the secondary victim's psychiatric injury must have been caused by direct perception of the accident or its immediate aftermath. These are known as the "*Alcock* criteria".[31] In this section we are only concerned with primary victims.

3.20 In *Frost v Chief Constable of South Yorkshire*[32] a majority of the House of Lords indicated that the sole criterion for a primary victim was whether the person was within the range of

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[29] [1996] AC 155 at 197.
[30] *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310, Lord Oliver at 407.
[31] See paras 4.2-4.8 below.
[32] [1999] 2 AC 455. See in particular the speech of Lord Steyn at 491.

foreseeable physical injury. Following *Page v Smith*, such persons would be able to recover damages for psychiatric injury whether or not it was reasonably foreseeable and whether or not they had suffered any physical harm.[33] Unless he was within the area of foreseeable physical injury, however, the pursuer would automatically be treated as a secondary victim and the *Alcock* criteria would have to be satisfied before a duty of care would arise to prevent the pursuer suffering psychiatric injury.

3.21 The rule that a primary victim must be within the range of foreseeable physical injury arguably gives rise to hard cases and has been criticised.[34] Some recent decisions illustrate this. In *Hunter v British Coal Corporation*[35] the plaintiff had hit a high pressure hydrant while driving a truck down a mine. A workmate tried to stop it leaking while the plaintiff went to get equipment. Some minutes later the hydrant exploded killing his workmate. The plaintiff heard but did not see the incident and was prevented from returning to the scene. His claim as a primary victim failed as he had been in no physical danger after he left his workmate. A claim as a primary victim was successful in *Young v Charles Church (Southern) Ltd*[36] where the plaintiff was standing only a few feet away from his workmate who was fatally electrocuted when a pole the workmate was holding touched an overhead power line. Proof before answer was allowed in *Campbell v North Lanarkshire Council.*[37] Here the pursuer and his fellow workers were mending electrical equipment in a switchroom. He left the room and when he was some 30-40 yards away there was an explosion. He immediately ran back to help his terribly injured workmates. There was still flashing in the room and he thought parts of it were live. It was decided that the pursuer's status as a primary victim could not be determined without evidence of whether he had been exposed to danger or reasonably feared for his own safety.

3.22 More importantly, perhaps, it has become clear that, in spite of the view taken by the majority in *Frost,* there are situations where persons are treated as primary victims who were not within the range of foreseeable physical injury.

3.23 First, the courts have recognised that an employer can be liable in delict for psychiatric injury suffered by an employee as a consequence of the employer's failure to take reasonable care for the employee's health and safety at work. The psychiatric injury is often caused as a result of stress during a period of employment.[38] Nonetheless, the courts have proceeded cautiously. Two techniques are apparent. First, although an employer is under a general duty to prevent an employee suffering personal injury, some judges took the view that a particular duty of care not to cause the employee psychiatric injury had to be established, ie it had to be reasonably foreseeable in the particular circumstances of the case that the defender would suffer a recognisable psychiatric illness as a consequence of the defender's conduct. So, for example, a duty of care did not arise in *Rorrison v West Lothian Council*[39] because, while it was reasonably foreseeable that the pursuer might experience

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[33] It is presumed in the cases that as the pursuer is within the area of potential physical danger, he is afraid for his own safety as opposed to the safety of others.
[34] See, for example, F A Trindade, "Nervous Shock and Negligent Conduct" (1996) 112 LQR 22.
[35] [1999] QB 140.
[36] [1997] 39 BMLR 146.
[37] 2000 SCLR 373.
[38] As such, it is already an exception to the general rule that reparation is only available for psychiatric injury caused by shock. See para 1.4 above.
[39] 2000 SCLR 245.

anger, stress and loss of confidence from the way that she was treated, it was not reasonably foreseeable that she would suffer a psychiatric injury.

3.24 However, the predominant view now accepted by the courts is that the employer's duty to prevent personal injury is sufficiently wide to include psychiatric injury; thus the issue of the existence of a duty of care not to cause the employee psychiatric injury does not arise. Instead, the controlling device is whether there has been a breach of the duty, ie whether the employee's psychiatric injury was reasonably foreseeable by the employer as a probable consequence of his conduct.[40] Thus in *Walker v Northumberland County Council*,[41] for example, there was no breach of duty when an employee suffered a breakdown as a result of working excessive hours: but there was a breach when, having returned to work, he suffered a second breakdown because his hours had not been reduced and he had not received any additional support. Only after the first breakdown did it become reasonably foreseeable to the employer[42] that Walker might suffer a psychiatric injury if his hours were not reduced when he came back to work.[43] This approach has been confirmed by the Court of Appeal in *Hatton v Sutherland*.[44] There Hale LJ maintained that there was a single test *viz* whether a harmful reaction to the pressure of the workplace was reasonably foreseeable in the individual employee concerned. Important factors include the nature and extent of the work being done by the employee, whether the employer has put the employee under unreasonable pressure and whether other workers doing the same job have suffered injury to their health. But in an important passage,[45] Hale LJ stated that unless he knew of some particular problem or vulnerability, an employer is usually entitled to assume that his employee is up to the normal pressures of the job. Put another way, in determining whether or not his psychiatric injury is too remote, an employee is assumed to be a person of ordinary fortitude unless the employer knew of any susceptibility to mental illness. The important point to notice about these decisions is that that the employer can be liable in delict for psychiatric injury even where the employee is not within the area of risk of physical harm, ie the employee is not a primary victim as defined in *Page* and *Frost*.[46]

3.25 A second situation where damages have been awarded to an employee who was not in physical danger is that which arose in *Dooley v Cammell Laird*.[47] Dooley believed he had been responsible for the death or injury of his colleagues who were working out of his sight in the hold of a ship when, as a result of his employer's negligence, the load his crane was lifting fell into the hold. Although no one was injured, he recovered damages for psychiatric

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[40] *Fraser v State Hospitals Board for Scotland* 2001 SLT 1051, Lord Ordinary (Carloway) at 1054-1055; *Cross v Highland and Island Enterprise* 2001 SLT 1060, Lord Ordinary (Macfadyen) at 1075; *Green v Argyll & Bute Council* 2002 GWD - 295 Lord Ordinary (Bonomy).

[41] [1995] 1 All ER 737; see also *Young v Post Office* [2002] EWCA Civ 661.

[42] Or ought to have been reasonably foreseeable to the employer.

[43] Similarly, there was held to be no breach of duty in *Fraser v State Hospitals Board for Scotland* 2001 SLT 1051, *Cross v Highland and Island Enterprise* 2001 SLT 1060 and *Green v Argyll & Bute Council* 2002 GWD 9-295 because in each case the employer could not reasonably foresee that the employee would suffer a psychiatric injury as a probable consequence of their conditions of employment.

[44] [2002] 2 All ER 1. See also A Bowen, "Earmuffs and Non-slip Flooring for the Soul: Negligence and Occupational Stress" 2002 SLT(News) 81 and N J Mullany, "Containing Claims for Workplace Mental Illness" (2002) 118 LQR 373.

[45] *Ibid* at 15.

[46] In *Frost*, Lord Hoffmann distinguished *Walker* on the basis that Walker had suffered a mental breakdown as a consequence of the strain of doing work which his employer had *required* him to do: see [1999] 2 AC 455 at 506. But surely the distinction is that the plaintiffs in *Frost* suffered psychiatric illnesses as a result of witnessing harm suffered by third parties, albeit that they were acting in the course of their employment and their employer's negligence had caused the third parties' injuries.

[47] [1951] 1 Lloyds Rep 271.

injury on the ground that it was a reasonably foreseeable consequence of the employer's negligence: he was an involuntary participant in the incident.

3.26 Third, in *McLoughlin v Jones*[48] the plaintiff suffered a nervous breakdown after having been wrongfully imprisoned. He argued that his conviction had been the consequence of his solicitor's negligence in preparing his defence. The Court of Appeal held that in these circumstances the plaintiff should be treated as a primary victim even although he had not been in physical danger while in prison.[49] It was enough that psychiatric injury was reasonably foreseeable as a result of the defendant's negligence.

3.27 Fourth, claims for psychiatric injury arising out of the receipt of distressing news have been allowed. In *Allin v City and Hackney Health Authority*[50] a mother was awarded damages for Post Traumatic Stress Syndrome caused by her being told (falsely) that her new-born baby had died. Claims may also arise where distressing but true information is imparted in an insensitive manner. For example, in *AB v Tameside and Glossop Health Authority*[51] the authority on learning that one of its health workers was HIV positive had posted letters to former patients warning them that there was a very slight risk of infection. The Court of Appeal allowed the authority's appeal on the ground that the information had been given in a reasonable way. The existence of a duty of care was not in issue as this had been conceded by the authority.

3.28 Finally, in spite of *Frost*, the House of Lords has itself accepted that the concept of a primary victim can in exceptional circumstances be extended beyond persons who are within the area of potential physical harm. In *W v Essex County Council*[52] the plaintiffs had agreed to become foster parents on the express understanding that any child they would be asked to foster would have no history of having sexually abused other children. In spite of their assurance, the social work department sent them a 15 year old boy whom they knew had sexually abused children. The boy proceeded to abuse the plaintiffs' four children. When this was discovered the plaintiffs felt guilt and remorse at having indirectly injured their children. Their marriage broke down and they became mentally ill. In these circumstances the House of Lords held that the defendants owed the parents a duty of care to prevent them suffering psychiatric injury from their failure to honour their undertaking. In the course of his speech, contrary to the opinions of the majority expressed in *Frost*, Lord Slynn maintained[53] that it was not always necessary for the plaintiff to be in the area of potential physical harm before he could be classified as a primary victim: like negligence, the category of primary victims appears not to be closed. *W* is clearly a special case. It could be argued that the parents were secondary victims and would have succeeded if the *Alcock* criteria were satisfied. But on the basis that their illness was caused by their sense of responsibility for what their children had suffered rather than witnessing the consequences of the children's abuse, the analogous case may be *Dooley*: like him, they were involuntary participants in the incident. Once again a duty of care not to cause psychiatric injury was

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[48] [2002] 2 WLR 1279.
[49] However, Hale LJ considered (at 1296) that, "Loss of liberty is just as much an interference in bodily integrity as is loss of limb": she was therefore prepared to consider the case as analogous with *Page*.
[50] [1996] 7 Med LR 167, see also *Farrell v Avon Health Authority* [2001] Lloyd's Rep Med 458 where a father was falsely informed of the death of his child and was given the wrong corpse to hold when he came to the hospital.
[51] [1997] 8 Med LR 91; Court of Appeal, 13 Nov 1996. See also N J Mullany, "Careless Communication of Traumatic Information'' (1998) 114 LQR 380.
[52] [2000] 2 All ER 237.
[53] *Ibid* at 243.

imposed simply on the basis of reasonable foresight of the risk of psychiatric injury to the pursuer.

(d) *Page v Smith* - the case for reform

3.29 *Page v Smith*[54] has given rise to two major problems. First, where a person is within the area of potential physical harm, he will be able to recover for psychiatric injury even although the mental illness was not reasonably foreseeable and he has not been physically harmed. This result involves a departure from conventional delictual theory by which the "thin skull" rule would only operate after there has been a breach of a duty of care to prevent physical harm which only occurs if the pursuer has been physically injured.[55] For this reason, the case has not been followed in Australia.[56] In our view it is not clear that mental illness should be treated as the same kind of harm as a physical injury so that foreseeability of physical injury should suffice to found a duty of care to prevent *unforeseeable* mental illness. Ironically, however, the distinction between psychiatric and physical injury remains crucial as a person is only a primary victim for the purposes of *Page v Smith* if he is within the range of foreseeable *physical* injury. On the other hand, *Page* has not led to a large increase in claims. This is because in most cases the victim will have suffered physical injuries so that compensation for psychiatric injury can legitimately be recovered under the "thin skull" rule. Moreover, where a person is within the area of potential physical harm, psychiatric injury caused by fear for his own personal safety will usually be reasonably foreseeable and a duty of care to prevent mental illness can arise for that reason. In other words, it is only in the exceptional case like *Page* itself, where a minor accident causes mental - but no physical - injury to a person who is unusually susceptible to psychiatric illness that the decision will be relevant in practice.

3.30 The Law Commission recommended that the rule in *Page v Smith* - that reasonable foresight of psychiatric illness is not required provided physical injury to the victim was reasonably foreseeable - should not be overturned.[57] However, the Commission reported before the decision of the House of Lords in *Frost v Chief of South Yorkshire*.[58] This later decision raises the second difficulty with *Page*. In *Frost*, *Page* was read as authority for the contention that the sole criterion for a primary victim was whether or not physical injury was reasonably foreseeable. However, we have seen that reasonable foreseeability of physical harm has not been regarded as the exclusive criterion for the imposition of a duty of care to prevent psychiatric injury.[59]

3.31 There appear to be two reasons why the House of Lords in *Frost* felt it necessary to make a distinction between primary and secondary victims and to define primary victims in such a restrictive way. First, when the pursuer is classified as a primary victim because he is within the zone of foreseeable personal danger, following *Page v Smith,* he enjoys the advantage of being able to recover damages for psychiatric injury even though the mental illness was not reasonably foreseeable and he was not physically injured. If this aspect of the decision in *Page* was overturned, then the significance of the pursuer being classified as a

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[54] [1996] AC 155.
[55] Para 3.15 above.
[56] *Morgan v Tame* [2000] NSWCA 121.
[57] Report on *Liability for Psychiatric Illness*, para 5.16.
[58] [1999] 2 AC 455.
[59] Paras 3.22-3.28 above.

primary victim for this reason would diminish. It would therefore not be so important to restrict "primary" victims to persons who were within the area of potential physical harm.

3.32 Secondly, by restricting primary victims to persons who were within the zone of foreseeable personal danger, the courts were able to identify those situations where the *Alcock* criteria were relevant. Undoubtedly a major reason why the courts did not develop a general duty of care to prevent reasonably foreseeable psychiatric injury was to inhibit persons recovering damages for psychiatric injury as a consequence of witnessing or being informed of the death or injury of a third party.[60] However, it is not necessary to have a definition of a primary victim for this purpose; it is enough to identify those who should be treated as "secondary victims". As Lord Hoffmann opined in *Frost*, the starting point is to discover the cause of the plaintiff's psychiatric illness.[61] If the illness was caused by the death of or personal injury suffered by a third party (or apprehended to have been suffered or as likely to be suffered by a third party), then the *Alcock* criteria have to be satisfied. Conversely, when the pursuer's psychiatric injury is not a consequence of physical harm suffered by a third party the *Alcock* criteria are irrelevant. If this approach is accepted, the way is open to suggest rational criteria for the imposition of a duty of care not to cause psychiatric injury to those who do not have to satisfy the *Alcock* criteria.

The criteria for liability for psychiatric injury

3.33 Once the position of secondary victims is excluded, it appears to us that a duty of care to prevent psychiatric injury should arise whenever it is reasonably foreseeable that the pursuer might sustain psychiatric injury from the acts or omissions of the defender. The adoption of this simple principle can be seen in several jurisdictions.[62] In many cases the pursuer will in fact also be within the zone of potential physical harm but that would no longer be a condition for the imposition of a duty to prevent psychiatric harm. It would thus encompass the cases discussed above where the psychiatric injury did not result from a personal injury accident, for example stressful employment, communication of bad news etc. In applying the test of reasonable foreseeability of psychiatric injury, it is consonant with the general principles of negligence that the defender can assume that the pursuer is a person of normal fortitude, unless the defender has knowledge of the pursuer's unusual susceptibility to psychiatric injury.[63] A duty to prevent psychiatric injury will not arise merely because the pursuer is within the area of potential physical harm.

3.34 Moreover, liability will not be established unless there is a breach of the duty by the defender. This will only happen when psychiatric injury can reasonably be foreseen as a probable consequence of the defender's conduct: for this purpose, once again the defender can assume that the pursuer is a person of normal fortitude unless he has actual knowledge of the pursuer's unusual susceptibility to mental illness. This will prevent the defender being held liable where the injury is incommensurate to his fault. Only if, in breach of a duty of care to prevent physical harm, the pursuer is physically injured but also suffers a

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[60] See in particular *Frost v Chief Constable of South Yorkshire* [1999] 2 AC 455.
[61] [1999] 2 AC 455 at 504. See also *Campbell v North Lanarkshire Council* 2000 SCLR 373, Lord Ordinary (Reed) at 381-382.
[62] See, for example, *Bechard v Haliburton Estate* (1991) 84 DLR (4th) 668, Griffiths JA at 674 (Canada); *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 (1) SA 769.
[63] This is the approach taken in respect of reasonable foreseeability of physical harm: *Haley v London Electricity Board* [1965] AC 778. This was also the view of the Law Commission in its Report on *Liability for Psychiatric Illness*, para 5.27.

mental illness will the defender be liable for unforeseeable psychiatric injury as a consequence of the "thin skull" rule.

Psychiatric injury and damage to property

3.35 In *Attia v British Gas Plc*,[64] the Court of Appeal considered the question of liability for a plaintiff's psychiatric illness where the defendant was under a duty of care to the plaintiff not to damage the plaintiff's property. When the property was destroyed and the duty breached as a consequence, the Court held that the defendant could be liable to the plaintiff if she suffered a mental illness as a result of losing her property, always provided it was reasonably foreseeable that a person in the plaintiff's position would suffer psychiatric injury in the circumstances. It should be noted that there must be a pre-existing duty not to damage the pursuer's property; the duty must be breached ie the property must be damaged; and the pursuer's mental illness must be reasonably foreseeable on the assumption that the pursuer is of ordinary fortitude, as the "thin skull" doctrine has no place outwith physical injury cases. In *Attia* the defendant set the plaintiff's house on fire when installing central heating. They clearly broke their duty of care not to damage the plaintiff's property: consequently, the plaintiff could recover damages for psychiatric injury she suffered when the house was burnt down so long as such illness was foreseeable and therefore not too remote. It should be emphasised that the issue here is one of remoteness of injury arising from breach of a pre-existing duty of care not to harm the pursuer's property - as in the cases discussed above in relation to a breach of a pre-existing duty not to cause the pursuer physical injury.

Conclusions

3.36 In the light of the foregoing discussion we seek views on the following proposals relating to the criteria for delictual liability in respect of psychiatric injury sustained by a primary victim. It should be emphasised again that at this stage we are not concerned with persons who have sustained psychiatric injury as a consequence of witnessing the death or injury of others.

3. (1) A duty of care not to cause psychiatric injury should arise when it is reasonably foreseeable that the pursuer will sustain psychiatric injury as a consequence of the defender's conduct.

(2) The pursuer should not have to be within the area of potential physical harm before a duty of care to prevent psychiatric injury can arise.

(3) A duty of care to prevent psychiatric injury should not be breached if in the circumstances of the case some kind of psychiatric injury to the pursuer was not reasonably foreseeable as a probable consequence of the defender's conduct.

(4) Where there has been a breach of a duty of care not to cause the pursuer physical harm, ie the pursuer has in fact sustained physical injury, the pursuer should continue to be able to recover damages for unforeseeable psychiatric injury: otherwise damages should be recovered

[64] [1988] QB 304.

only if some kind of psychiatric injury was foreseeable as a probable consequence of the defender's conduct.

(5) Where the defender owes the pursuer a duty of care not to damage the pursuer's property, the pursuer should be able to recover damages for psychiatric injury arising from damage to the property provided that psychiatric injury to the pursuer was reasonably foreseeable as a probable consequence of the defender's negligence.

(6) In determining whether psychiatric injury is reasonably foreseeable for these purposes the pursuer should be regarded as a person of reasonable fortitude unless the defender has knowledge of the pursuer's unusual susceptibility to psychiatric injury.

Part 4 Secondary Victims

Introduction

4.1 The present law on damages for psychiatric injury distinguishes between primary victims and secondary victims. The main legal significance of the distinction is that in order that secondary victims can recover damages for a psychiatric injury they have to satisfy the additional criteria referred to as "the *Alcock* criteria" that are summarised in paragraph 4.5 below. Also, as the law currently stands, a primary victim does not have to establish that the psychiatric injury was foreseeable provided some personal injury (physical or psychiatric) was foreseeable,[1] and the "normal fortitude" rule applies only to secondary victims. A wrongdoer has to take primary victims as they are and so will be liable to compensate those with an "egg-shell" personality.[2] In Part 3 we asked for views as to whether these further differences should continue to be part of the law.[3] In this Part we look at the *Alcock* criteria and at the special position of rescuers.

Classification into primary and secondary victims

4.2 The categorisation of those suffering from psychiatric injuries into primary and secondary victims stems from Lord Oliver's speech in *Alcock v Chief Constable of South Yorkshire Police*. The two categories are "those cases in which the injured plaintiff was involved, either mediately or immediately, as a participant" (a primary victim) and "those in which the plaintiff was no more than the passive and unwilling witness of injury caused to others" (a secondary victim).[4] Three examples of primary victims were given: those who feared for their own safety, rescuers and involuntary participants.[5] However in the later case of *Page v Smith* Lord Lloyd referred to primary victims as being those who were "directly involved in the accident and well within the range of foreseeable physical injury", and secondary victims as those who were "in the position of a spectator or bystander".[6]

4.3 The discrepancy between these two definitions has given rise to much discussion. However, the House of Lords in *Frost v Chief Constable of South Yorkshire Police*[7] adopted Lord Lloyd's approach. Lord Griffiths said, "In my view [the Alcock criteria] should apply to all those not directly imperilled or who reasonably believe themselves to be imperilled…".[8] Lord Steyn regarded Lord Lloyd as having intended to narrow the range of primary victims. He remarked that "Lord Lloyd said that a plaintiff who had been within the range of foreseeable injury was a primary victim. Mr Page fulfilled this requirement and could in principle recover compensation for psychiatric loss. In my view it follows that all other victims, who suffer pure psychiatric harm, are secondary victims and must satisfy the

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[1] *Page v Smith* [1996] 1 AC 155.
[2] *Ibid*; *Hunter v British Coal Corporation* [1999] QB 140, Brooke LJ at 154.
[3] Proposals 3(1)-(4).
[4] [1992] 1 AC 310 at 407.
[5] Involuntary participants were considered in Part 3, paras 3.25 and 3.28 above. Rescuers are discussed further at paras 4.28-4.34 below.
[6] [1996] AC 155 at 184.
[7] [1999] 2 AC 455.
[8] *Ibid* at 464.

control mechanisms laid down in the *Alcock* case.".[9] Lord Hoffmann, dealing with the argument for the police officer pursuers that they were primary victims as they had been akin to rescuers, said that there was no reason why "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.".[10] Lord Browne-Wilkinson agreed with Lord Steyn and Lord Hoffmann, but Lord Goff dissented on the basis that Lord Lloyd's remarks in *Page v Smith* could not have been intended to alter Lord Oliver's definition of primary victims in the earlier case of *Alcock*.[11]

4.4 Lord Hoffmann in *Frost v Chief Constable South Yorkshire Police* suggested that the distinction between primary and secondary victims should depend on the cause of their psychiatric injury.[12] In line with that suggestion, we proceed on the basis that a secondary victim is an individual who suffers a psychiatric injury as a consequence of the death or injury of another person ("the injured person") that has been caused by the defender's negligence.

Should secondary victims be compensated?

4.5 Under the present law a secondary victim may claim damages for a psychiatric injury if it arose out of an incident for which the defender was responsible and the secondary victim satisfies the three criteria set out by Lord Oliver in *Alcock v Chief Constable of South Yorkshire Police*.[13] These criteria may be summarised as follows:

(a) there must be a close tie of love and affection between the secondary victim and the injured person;

(b) the secondary victim must have been present at the accident or at its immediate aftermath; and

(c) the secondary victim's psychiatric injury must have been caused by direct perception (ie through his or her own unaided senses) of the accident or its immediate aftermath.

4.6 The first question is whether secondary victims should be compensated at all. It could be argued that people who were not themselves in any actual or apprehended physical danger during the incident or its immediate aftermath should not be compensated simply because they observe the death or injury of others. For many people this would seem a heartless approach. We think that it is plainly foreseeable that even persons of normal fortitude may suffer more than grief and distress if they see their spouse, child or parent killed or severely injured in a gruesome incident. If there were legislation preventing claims by secondary victims, the courts would be tempted to extend the categories of primary victims.

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[9] *Ibid* at 496-497.
[10] *Ibid* at 509.
[11] *Ibid* at 479-480.
[12] *Ibid* at 504, see also para 3.33 above.
[13] [1992] 1 AC 310 at 411.

4.7 A less drastic method of restricting a wrongdoer's liability would be to have a statutory limit on the amount of damages a secondary victim could be awarded for psychiatric injury. There could be a maximum placed on the global sum awardable to all the secondary victim claimants or each award could be capped. A refinement would allow a higher limit for members of the injured person's immediate family. Bereavement damages which can be claimed in England and Wales by a spouse of the deceased or parents of a deceased minor child from a wrongdoer whose negligence caused the death are fixed at £10,000.[14] A statutory maximum would be preferable to a fixed sum as the latter would be over-generous if the psychiatric injury was minor. The main disadvantage of a maximum is that it could fail to provide adequate compensation for those who had a severe and disabling injury. There is also the difficulty of deciding what is the appropriate maximum sum.

4.8 Our provisional view is that claims by secondary victims should be neither abolished nor capped. The Law Commission did not recommend any such restrictions and none of the jurisdictions that we have studied adopt this approach. In order to elicit views we propose that:

4. (1) A person should continue to be entitled (subject to satisfying other requirements) to claim damages for a psychiatric injury suffered as a result of another individual's personal injury or death.

(2) There should be no statutory limit set to the amount of such damages.

Are the *Alcock* criteria necessary?

4.9 We first examine the case for retaining any of the three present *Alcock* criteria. Later we argue that the second and third criteria (requiring presence at, and direct perception of, the incident or its immediate aftermath) should no longer be necessary. The arguments about retention of the *Alcock* criteria therefore relate only to the first one, requiring the pursuer to have a close tie of love and affection with the dead or injured person. The purpose of these criteria is to limit the number of potential claimants for psychiatric injury so that a wrongdoer who causes a horrific and well-publicised accident is not faced with compensating the whole world. It would be possible to allow claims by persons on the simple ground that their psychiatric injury was a reasonably foreseeable consequence of the defender's conduct. In its Report on *Liability for Psychiatric Illness*, the Commission rejected this on the grounds that it would risk opening the floodgates, so leading to an unacceptable increase in the number of claims.[15]

4.10 The fear of a large increase in the number of cases may be unfounded. People are unlikely to suffer psychiatric injury as a consequence of the death or injury of persons to whom they are not emotionally close. Courts would be aware of the potential for a vast increase in the number of claims and would continue to take a conservative approach on

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[14] Fatal Accidents Act 1976, s 1A added by the Administration of Justice Act 1982, s 3(1); Damages for Bereavement (Variation of Sum)(England and Wales) Order 2002, SI 2002/644. The Law Commission in its Report on *Claims for Wrongful Death* (Law Com No 263, 1999) recommended widening the class of eligible relatives, increasing the amount of the award and capping the wrongdoer's liability in the case of multiple claims. The amount was increased from £7,500 to £10,000 with effect from April 2002 by the above Order.

[15] Paras 6.5-6.9.

foreseeability. It was held in *Bourhill v Young*[16] that mere bystanders or spectators should have sufficient fortitude to withstand the shock of seeing people injured or killed. However, *Alcock* contains dicta to the effect that an unrelated bystander ought to be entitled to claim damages if the accident was particularly horrific.[17] These dicta were not followed in *McFarlane v EE Caledonia Ltd*[18] where a claim by a man who watched the Piper Alpha disaster from a nearby recovery ship was dismissed. The floodgates argument may also be criticised at a more fundamental level. If people suffer psychiatric injuries as a reasonably foreseeable consequence of the negligence of others then arguably they deserve compensation irrespective of the numbers of claimants.

4.11 Removal of the need to establish a close tie of love and affection would assist in those cases where a person who was not in any danger sees a workmate killed in an accident or the horrific immediate aftermath.[19] Dropping all the *Alcock* criteria which apply only to secondary victims would also make it possible to cease to differentiate between primary and secondary victims with all the difficulties that the distinction creates. The other differences are that the normal fortitude rule applies to a secondary but not to a primary victim, and that while a secondary victim's psychiatric injury must be foreseeable a psychiatric injury suffered by a primary victim need not be foreseeable provided some kind of personal injury was foreseeable.[20] In Part 3 we have argued that both these differences are unjustified and have suggested that as far as primary victims are concerned that all compensatible psychiatric injury should have to be foreseeable and all victims should be assumed to be of normal fortitude.[21]

4.12 Under the present law a close tie of love and affection is required. A close tie is also needed in Australia while Germany allows claims only by close relatives. In Canada the existence of a proximity relationship determines whether the psychiatric injury was reasonably foreseeable. The proximity relationship is made up of a number of factors, such as closeness of relationship, being at the scene and seeing the shocking event, and the time between the event and the onset of the illness. No one factor is decisive, although the relationship between the claimant and the immediate victim is generally regarded as a predominant factor.[22] In the USA the general view is that the closeness of relationship, being at the scene and seeing the shocking event, which were guideline factors have now become requirements, each of which has to be satisfied for a claim to be successful. In France, however, there is no restriction on the relationship between the secondary victim and the injured person. South Africa takes the approach that the closer the relationship the more likely it is that the secondary victim's injury was reasonably foreseeable.

4.13 Our provisional view is that there is force in the floodgates argument and that we should proceed cautiously in this area. It would be better to wait and see what effect removing the need for the second and third *Alcock* criteria has on the level of claims before considering abolition of the close tie of love and affection requirement. We are also of the

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[16] 1942 SC(HL) 78.
[17] [1992] 1 AC 310, Lord Keith at 397, Lord Ackner at 403 and Lord Oliver at 416.
[18] [1994] 2 All ER 1.
[19] *Mount Isa Mines v Pusey* (1970) 125 CLR 383; *Robertson v Forth Road Bridge Joint Board* 1995 SC 364; *Campbell v North Lanarkshire Council* 2000 SCLR 373.
[20] See para 4.1 above.
[21] Proposals 3 (4) and (6).
[22] *Rhodes v Canadian National Railway* (1991) 75 DLR (4th) 248, Wallace JA at 265. See Appendix A for further details of the other jurisdictions.

opinion that foreseeability by itself is too vague a concept for distinguishing those cases where damages ought to be awarded and those where they should not. We therefore propose that:

5. It should continue to be a requirement for a claim for psychiatric injury suffered as a result of another person's death or personal injury that the pursuer had a close tie of love and affection with that person.

Determining close ties of love and affection

4.14 At present there has to be a close tie of love and affection between the pursuer/secondary victim and the injured person. A close tie is currently presumed to exist in relation to a parent, a child, a spouse and possibly a fiancé(e).[23] Other pursuers (relatives or close friends) have to show that such a tie exists.[24] Being a close colleague and socialising after work for many years was regarded as insufficient in *Robertson v Forth Road Bridge Joint Board*.[25]

4.15 In Australia claims at common law are restricted to members of the deceased's immediate family including siblings[26] and a girlfriend.[27] The Law Reform (Miscellaneous Provisions) Act 1944 of New South Wales permits recovery for nervous shock by any "member of the family" provided they saw or heard the accident.[28] Similar legislation exists in the Australian Capital Territory[29] and the Northern Territory.[30] Member of the family is defined widely to mean husband, wife, parent, child, brother or sister (whole blood and half blood) with "parent" being a father, mother, grandfather, grandmother, stepfather, stepmother and any person standing *in loco parentis*: child has a similar extended meaning.[31] In Canada relationship is only one of the factors that is taken into account in deciding whether the claimant's injury was reasonably foreseeable. Successful claims by parents, children and spouses are common, while claims by a cohabitant[32], sister or niece[33] have not been ruled out. France imposes no restriction on the relationship between the claimant and the immediate victim so that even those with no links by blood or marriage may claim.[34] South Africa takes the approach that the closer the relationship the more likely it is that the secondary victim's psychiatric injury was reasonably foreseeable.[35] Germany allows claims by close relatives only, but includes fiancé(e)s.[36] The USA adopts a restrictive approach,

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[23] *Alcock v Chief Constable South Yorkshire Police* [1992] 1 AC 310, Lord Keith at 397; see also *Currie v Wardrop* 1927 SC 538.
[24] *McCarthy v Chief Constable South Yorkshire Police* (unreported) 11 Dec 1996, half-brother.
[25] 1995 SC 364, Lord President (Hope) at 368 and 370.
[26] *Quayle v State of New South Wales* (1995) Aust Torts Rep 81-367 (brother); *Storm v Geeves* [1965] Tas SR 252 (brother and sister, sister's claim dismissed as had not a recognisable psychiatric illness, but court regarded her as within category of potential claimants).
[27] *Kohn v State Government Insurance Commission* (1976) 15 SASR 255.
[28] S 4(1)(b). A parent or spouse need not have seen or heard the accident, s 4(1)(a).
[29] Law Reform (Miscellaneous Provisions) Act 1955, s 24.
[30] Law Reform (Miscellaneous Provisions) Act 1956, s 25.
[31] S 4(5).
[32] *Beecham v Hughes* (1988) 52 DLR (4th) 625, claim dismissed but not due to lack of relationship.
[33] *Cameron v Marcaccini* (1978) 87 DLR (3d) 442.
[34] See Appendix A, para 3.2.
[35] *Barnard v Santam Bpk* 1999 (1) SA 202.
[36] BGH, NJW 1969, 2286. See Appendix A, para 4.4.

generally limiting claims to nuclear family members, ie parents, children, spouses and siblings.[37] Claims by more distant relatives have been generally rejected.[38]

4.16 The law could be left as it is or reformed in some way. There are a number of options for reform. The first question is whether there should be any list of relatives who are presumed or deemed to have a close tie of love and affection with the injured person. In the absence of any list, the courts would have a complete discretion so that any person's claim would succeed if a sufficiently close tie was established by evidence. This would enable the courts to do justice in each case and follow future changes in the concept of a family. However, it gives the courts no guidance in an area where there are likely to be differing views as to what constitutes a close tie. The concept of a close tie of love and affection is vague. Without some boundaries it leads to an open-ended class of secondary victims (with concomitant extended liability by wrongdoers) and encourages claims by those on the periphery of the injured person's family and social circle. The evidence that would be required could be distasteful to air in public and the claimants with psychiatric injuries might be subjected to stressful questioning as to the details of their relationship. Averments of a close tie would also be difficult to refute. We think that giving courts complete discretion would promote uncertainty and litigation and encourage speculative claims.

4.17 We see advantages in having a statutory list of those who are presumed or deemed to have a close tie of love and affection. These are the converse of the disadvantages of a discretionary system mentioned in the previous paragraph. A list would promote certainty and avoid distressing or distasteful litigation. Claims by distant relatives or friends who were unduly sensitive would either never be brought or could be dismissed at a preliminary stage without the need for expensive and time-consuming proof. The experience with claims for non-patrimonial loss under the Damages (Scotland) Act 1976 is instructive. Schedule 1 contains a list of members of the deceased's immediate family who are entitled to claim for grief, sorrow and loss of society. In theory, no damages for non-patrimonial loss will be awarded unless the immediate family member establishes such loss. In practice, damages are awarded without requiring extensive detailed evidence (which could be distressing and distasteful) of the relative's grief, sorrow and loss of society and claims are rarely defended on the basis that the pursuer in fact suffered no grief or other non-patrimonial loss.

4.18 The Law Commission recommended a list of relatives (spouse, cohabitant, parent, child and sibling) who were to be deemed to have a close tie.[39] Provisionally, we too favour a deemed list. In order to be awarded damages a secondary victim has to establish to the satisfaction of the court that he or she is suffering from a significantly disabling psychiatric injury as a result of the immediate victim's death or injury. It would be very unlikely that a listed relative would suffer such an injury if estranged from the immediate victim. Furthermore, it would be very difficult for the wrongdoer to disprove the existence of a

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[37] See, for example, *Dillon v Legg* (1968) 29 ALR 3d 1316 (Calif); *Landreth v Reed* (1978) 570 SW 2d 486 (Texas); *Garrett v City of New Berlin* (1985) 362 NW 2d 137 (Wisc).

[38] See, for example, *Trapp v Schuyler Construction* (1983) 197 Calif Rptr 411 (close first cousin) in which the court said that a "close relationship" did not include friends, housemates and those in meaningful relationships; *Thing v La Chusa* (1989) 48 Cal 3d 644, recovery should be limited to those who live in the same household or parents, grandparents, siblings and children of the immediate victim. *Trombetta v Conking et al* (1993) 605 NYS 2d 678 (aunt), further details in Appendix A, para 8.4.

[39] Report on *Liability for Psychiatric Illness*, para 6.27.

close tie where the secondary victim had suffered a psychiatric injury, and any challenge could be stressful to the secondary victim.

4.19 If there is to be a statutory list who should be included in it? We think that the choice lies between the "nuclear family" or the more numerous immediate family members who have title to sue for non-patrimonial loss under the Damages (Scotland) Act 1976. It is difficult to see where to draw the line if the list is to be expanded beyond the 1976 Act relatives. The nuclear family would be spouse, domestic partner (ie an opposite-sex or same-sex cohabitant), parents, children and siblings. This is the list recommended by the Law Commission, but if it were to be adopted for Scotland we think that a child accepted by the injured person as a member of the family should also be included. We have just published a report[40] suggesting a new list of immediate family members for the 1976 Act. Our recommended new list comprises: spouse, opposite-sex or same-sex cohabitant, parent (including a person who had accepted the child as a child of the family), child (including a person accepted by the deceased as a child of the family), brother, sister,[41] grandchild and grandparent.

4.20 Finally, should the list be exclusive or should others be entitled to claim if they can establish that in their case a close tie of love and affection did exist. This prevents the arbitrariness of a closed list, but introduces some of the disadvantages of a discretionary system mentioned in paragraph 4.15 above. The arguments for some element of discretion have more weight if the basic list is confined to members of the injured person's nuclear family.

4.21 In order to elicit views we ask the following questions:

6. (1) Should there be a statutory list of individuals deemed to have a close tie of love and affection with the immediate victim, or should the existing common law be retained whereby certain close relatives are presumed to have a close tie while others may establish a close tie?

(2) If there is to be a statutory list, should it comprise:

(a) spouse, opposite-sex or same-sex cohabitant, parent (including a person who had accepted the immediate victim as a child of the family), child (including a child who had been accepted by the immediate victim as a child of the family) and sibling; or

(b) those entitled to sue for non-patrimonial loss under the Damages (Scotland) Act 1976 which we have recommended should be; spouse, opposite-sex or same-sex cohabitant, parent (including a person who had accepted the immediate victim as a child of the family), child (including a person who had been accepted by the immediate victim as a child of the family), brother, sister, grandchild or grandparent; or

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[40] Report on *Title to Sue for Non-Patrimonial Loss* (Scot Law Com No 187, August 2002).

[41] Brother and sister includes any person who was brought up in the same household and as a child of the same family as the deceased.

(c) any other relatives and if so which?

(3) Should individuals not on the statutory list be entitled to lead evidence to establish that they had a close tie of love and affection with the immediate victim?

Abolition of the second and third *Alcock* criteria

4.22 We turn now to consider whether the second and third *Alcock* criteria (present at incident or immediate aftermath and perception with own unaided senses) should continue to be required. These criteria lead, for example, to the harsh result that a mother who is told of her son's fatal accident by telephone but is too distraught to go to the hospital will fail in her claim for psychiatric injury. However, if she had been less immediately affected and went at once and saw him die she would succeed. The following cases are further illustrations of the injustice produced by the criteria. In *Ravenscroft v Rederiaktiebølaget Transatlantic*[42] a young man was crushed by machinery while working. He died in hospital two hours later. His mother went there 20 minutes after his death. *Tranmore v T E Scudder Ltd*[43] also involved a fatal accident at work. The father was told hours afterwards and saw his son's body the next day. In *Taylorson v Shieldness Produce Ltd*[44] the father had a brief glimpse of his fatally injured son as he was transferred from the ambulance and was with him in intensive care after treatment. *Taylor v Somerset Health Authority*[45] concerned a woman who went to hospital within 20 minutes of being told that her husband had suffered a heart attack. When she arrived she was told he was dead and saw the body. All these claims for psychiatric injury failed as the courts held that the claimants had not been at the scene of the incident or its immediate aftermath.

4.23 In many of the other jurisdictions that we have studied there is either no requirement for direct perception of the accident or its immediate aftermath or the courts are in the process of abandoning this requirement. Germany permits claims where the death or injury of the immediate victim is communicated to the pursuer in some way, for example, by a telephone call.[46] The South Africa Supreme Court of Appeal has recently taken the same line in *Barnard v Santam Bpk*.[47] In Australia there has been strong criticism of the requirement by Deane J in *Jaensch v Coffey*[48] and Kirby P in *Coates v Government Insurance Officer of New South Wales*[49]: awards have since been made where the pursuer was not present at the accident and did not see the aftermath or the body.[50] Ireland adopts a flexible approach on the nature of the aftermath: the issue is whether in the circumstances the pursuer's psychiatric injury was reasonably foreseeable.[51] Canada, however, retains the direct perception of the accident or its immediate aftermath rule,[52] as do most states in the USA.[53]

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[42] [1992] 2 All ER 470 (note).
[43] Court of Appeal, 28 April 1998 (unreported).
[44] [1994] PIQR P329.
[45] [1993] 4 Med LR 34.
[46] Appendix A, para 4.4.
[47] 1999 (1) SA 202.
[48] (1984) 54 ALR 417.
[49] (1995) 36 NSWLR 1.
[50] *Quayle v State of New South Wales* (1995) Aust Torts Reps 81-367; *Reeve v Brisbane City Council* [1995] 2 Qd R 661.
[51] *Mullally v Bus Éireann* [1992] ILRM 722.
[52] *Devji v District of Burnaby* (2000) 180 DLR (4th) 205.
[53] See Appendix A, para 8.2.

4.24 As far as post traumatic stress disorder is concerned the duration, severity of threat to life, extent of injury and loss of life and property affect the likelihood of developing this disorder.[54] The nature and type of the traumatic experience also has a major impact on its long term course.[55] However, people who are not present at an incident in which their relatives are killed or injured (or its immediate aftermath) often suffer other types of psychiatric injury, such as depression, which can be just as debilitating.

4.25 Furthermore, the aftermath of an incident is not a precise term. It is therefore difficult to decide whether or not a pursuer with an undoubted psychiatric injury fulfils this requirement. The aftermath rule leads to harsh and unjustified distinctions based on the length of time between the accident and the secondary victim seeing the dead or injured person. A claim for damages under paragraphs (a) and (b) of section 1(4) of the Damages (Scotland) Act 1976 (distress contemplating deceased's suffering before death and grief at death) in respect of the death of an immediate family member is not subject to the *Alcock* criteria. It is anomalous that distress and grief are not subject to the *Alcock* criteria while a more disabling psychiatric injury is.

4.26 On the other hand, removing the need for these two criteria might increase the number of claims to a substantial extent. A large-scale incident like Hillsborough, Piper Alpha or the World Trade Centre could give rise to an enormous number of large value claims which are presently barred, with consequential effects on the solvency of insurance companies and the general level of insurance premiums. Another argument against abolition is that it might create difficulties for the courts. It is hard enough to resolve conflicting evidence as to whether a person suffered psychiatric injury through seeing an accident; it could be even harder where the injury was averred to have been caused by being told about it.

4.27 Nevertheless, provisionally we agree with the Law Commission's recommendation[56] that the second and third *Alcock* criteria should be abolished. We accordingly propose that:

7. A claim for damages for psychiatric injury suffered as a result of the death or injury of another individual should be competent regardless of:

(a) the pursuer's closeness in time or space to the accident or its aftermath, or

(b) the means by which the pursuer learnt of the death or injury.

Rescuers

4.28 We turn now to discuss rescuers, a type of pursuer that is difficult to fit into the normal categories of primary and secondary victims. In *Chadwick v British Railways Board*[57] Mr Chadwick's estate successfully claimed damages for psychiatric injuries suffered by him. He lived near the scene of a horrific railway accident and had spent several hours in and

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[54] A C McFarlane and G Girolamo "The Nature of Traumatic Stressors and the Epidemiology of Post Traumatic Reactions" in Van der Kolk, McFarlane and Weisaeth (eds), *Traumatic Stress: the Effects of Overwhelming Experience on Mind, Body and Society* (1996, New York).
[55] Breslau, Davis, Anderskip et al, "Traumatic Events and Post Traumatic Stress Disorder in an Urban Population of Young Adults" (1991) 48 Archives of General Psychiatry 216.
[56] Report on *Liability for Psychiatric Illness*, para 6.16.
[57] [1967] 1 WLR 912.

under the wreckage helping to rescue and comfort the victims. The position of rescuers was considered in *Frost v Chief Constable of South Yorkshire Police*[58] where several police officers sued for psychiatric injury suffered as a result of their involvement in the Hillsborough disaster. The House of Lords allowed the chief constable's appeal but were divided on the position of rescuers. None of the police officers had been in any physical danger or reasonably apprehended physical danger and were therefore not primary victims as defined in *Page v Smith*.[59] Lord Steyn said that a rescuer "must at least satisfy the threshold requirement that he objectively exposed himself to danger or reasonably believed that he was doing so". He accepted that Mr Chadwick had passed that threshold and that the *Chadwick* case had correctly decided that it is not necessary for a rescuer to establish that his psychiatric condition was caused by the perception of personal danger to himself.[60] Lord Hoffmann said that rescuers had no special status, except that they were not regarded as *volenti* and that it was foreseeable that attempts would be made to rescue victims. They were not to be regarded as primary victims unless they were within the range of foreseeable physical injury, but if they were then, on the basis of *Page v Smith,* they could recover even if they suffered only a psychiatric injury.[61] Lord Browne-Wilkinson simply concurred with these two speeches. Lord Griffiths dissented on this point as he thought that it was reasonably foreseeable that a person who helped with the immediate aftermath of a horrific incident would suffer psychiatric injury and that it was artificial to impose a requirement of (apprehended) physical danger.[62] Lord Goff, who also dissented, said that involvement with the aftermath of an accident should be sufficient to bring a rescuer within the category of a primary victim. In his view requiring a rescuer to have been within the range of foreseeable physical injury before liability for psychiatric injury as a primary victim arose was contrary to authority and would have undesirable consequences in practice.[63]

4.29 We think that rescuers should be entitled to claim for psychiatric injury arising out of their involvement in an accident where people are killed or injured. It is foreseeable that if a serious accident occurs, ordinary people (not just professional rescuers) will go to the assistance of the victims. It is also foreseeable that rescuers may suffer physical and/or psychiatric injuries as a result of their involvement. The losses arising from such psychiatric injuries should not be borne by the rescuers themselves.

4.30 The current law is that rescuers are not in any privileged position but are treated as primary victims if they were, like any other person, in actual or reasonably apprehended physical danger. In *Frost* the House of Lords added the physical danger requirement in order to prevent police officers at Hillsborough claiming damages for psychiatric injuries after the earlier case of *Alcock* had denied the right of relatives of the victims to claim. The new rule has the advantage of not requiring rescuers to be separately defined, but it seems unrealistic. The psychiatric injuries will often arise from the horror of what the rescuers experience rather than any concern for their own personal safety. It is also liable to lead to harsh anomalies. For example, a rescuer who had been in some physical danger could recover for psychiatric injury, while others who were not in any danger could not recover, however crippling their psychiatric injuries.

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[58] [1999] 2 AC 455.
[59] [1996] 1 AC 155.
[60] [1999] 2 AC 455 at 499.
[61] *Ibid* at 509.
[62] *Ibid* at 464-465.
[63] *Ibid* at 486.

4.31 The Law Commission did not make any recommendation on rescuers as it agreed with the law as it stood in 1998, ie before the decision of the House of Lords in *Frost*. Echoing the then law the Commission said "It should not be a condition for a rescuer's entitlement to recover damages for psychiatric illness that he or she is in physical danger."[64] There is a dearth of reported cases in other jurisdictions dealing with rescuers. The position in Ireland is the same as it was in England and Wales before *Frost*.[65] In the Canadian case of *Fenn v City of Peterborough*[66] Holland J commented that physical injuries to rescuers were reasonably foreseeable and hence compensatable and "that the principle is the same whether the injury be physical or mental".

4.32 We think that rescuers are best regarded as a special class of secondary victims who need not satisfy the normal requirement of having close ties of love and affection with the dead or injured. Some definition of rescuer will be necessary as not everyone who assists in the aftermath of an accident should be regarded as a rescuer. In his dissenting opinion in *Frost* Lord Griffiths suggested that those who offered immediate help at the scene of the accident should qualify while those who simply assisted and treated the victims once they were safe should not.[67] We are attracted by this formula. What counts as immediate help and how substantial it has to be can be left to the courts on a case by case basis.[68]

4.33 Should there be a different test for "professional rescuers", such as members of the police and fire services? The current approach is that they are not debarred from claiming damages for personal injury arising in the course of their duty,[69] but that in deciding whether any psychiatric injury was foreseeable account would be taken of their training and experience in dealing with incidents.[70] Those in charge of the services may also be liable if officers with psychiatric injuries continued to be assigned to stressful duties after this had been brought to their attention. Provisionally, we do not favour any change in the law here. The generous ill-health and retirement pensions that are available to members of the rescue services are not always sufficient compensation for a debilitating psychiatric injury.

4.34 We propose that:

> **8. (1) A claim for damages should be competent by a person who assists at the site of an accident in the immediate aftermath and suffers psychiatric injury as a result of being closely involved with dead or injured victims whether or not that person:**
>
> **(a) was in any actual or apprehended physical danger, or**
>
> **(b) had a close tie of love and affection with any of the victims.**

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[64] Report on *Liability for Psychiatric Illness*, para 7.3.
[65] G Kelly, "Haunted by Hillsborough" (2001) 95 Law Soc (of Ireland) Gazette, No 7, 18, quoted in Appendix A, para 5.6.
[66] (1977) 73 DLR (3d) 177 at 209.
[67] [1999] 2 AC 455, at 465.
[68] In *Rapley v P & O European Ferries (Dover) Ltd* (unreported) 21 Feb 1991 the plaintiff helped relatives and helped with the recovery of bodies a day or so after the Herald of Free Enterprise sank. His claim was dismissed as he had not helped those involved in the accident. See also *Duncan v British Coal Corporation* [1997] 1 All ER 540 where a pit deputy failed in his claim for damages. He was not present at the accident but had come to the scene and attempted to resuscitate a colleague who died. The situation was not particularly distressing.
[69] *Ogwo v Taylor* [1988] AC 431.
[70] *Frost v Chief Constable South Yorkshire Police* [1999] 2 AC 455, Lord Goff at 471.

(2) There should not be a different rule for members of the rescue services who assist at an accident as part of their duties of employment.

Claims where immediate victim has only a psychiatric injury

4.35 So far we have been considering the situation where the secondary victim claims damages arising out of the death or physical injury of the immediate victim. We now turn to look at the situation where the immediate victim's injuries are purely psychiatric. That person would be a primary victim and as such have to satisfy the criteria for liability as proposed in Part 3.[71] For example in *Page v Smith*[72] Mr Page was not physically injured in the car accident, but suffered a recurrence of a severe psychiatric problem. Could Mrs Page claim damages if she had psychiatric injuries as a result of seeing her husband suffering? At present such a claim is unlikely because of the second and third *Alcock* criteria set out in paragraph 4.5 above. These require the secondary victim to be present at the accident or its immediate aftermath and his or her psychiatric injury to arise out of direct perception of the accident or its immediate aftermath. They will generally prevent a claim because any substantial psychiatric injury to the immediate victim is likely to become apparent only some time after the accident. However, earlier in this Part[73] we have proposed that these two criteria should be abolished, so that claims of the type under discussion could become more common.

4.36 It could be argued that a secondary victim's psychiatric injuries are just as debilitating and worthy of compensation whether the immediate victim is physically or psychiatrically injured. On the other hand, allowing claims where the immediate victim's injuries are purely psychiatric could be regarded as an unwelcome extension of the wrongdoer's liability. In France, damages are awarded for "dommage moral" caused by seeing an "être cher" injured. Such damages, called "dommage moral par ricochet", have been criticised as potentially giving rise to an endless series of claims. B claims for psychiatric injury on seeing A's psychiatric injury as the result of an accident; C claims as a result of seeing B's psychiatric injury and so on.[74] We agree that an endless series of claims has to be avoided, but it is possible to do so by confining claims to those by a secondary victim arising out of the sufferings of the immediate victim of the accident, ie B in the example above.

4.37 At this stage we express no view but ask the following question:

9. Should a secondary victim be entitled to claim damages for a psychiatric injury arising out of injuries to another person caused by a wrongdoer's negligence where that person's injuries are purely psychiatric?

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[71] Proposal 3, para 3.33.
[72] [1996] AC 155 discussed in Part 3 above.
[73] Paras 4.22-4.27.
[74] See Appendix A, para 3.3.

Part 5 Other liability issues

Introduction

5.1 In this Part we consider what duty of care is owed to the secondary victim by the wrongdoer and the primary or immediate victim. It is clear that the wrongdoer owes a duty of care to the secondary victim which is separate from that owed to the immediate victim. In *Bourhill v Young*[1] Lord Wright stated that if "the appellant has a cause of action it is because of a wrong to herself. She cannot build on a wrong to someone else". In that sense the claims are independent. However there are two main areas where the current law is unclear. First, is the secondary victim's claim against the wrongdoer dependent on that of the primary victim in the sense that if the wrongdoer has a defence to the primary victim's claim, that is also a defence to any claim by the secondary victim? The partial defence of contributory negligence reduces the immediate victim's claim, but does it also reduce the secondary victim's claim by the same proportion? Second, where the immediate victim has been wholly or partially responsible for the accident, does that person owe a duty of care to the secondary victim?

Dependency of secondary victim's claim

5.2 Professor Rodger has argued that the success of a secondary victim's claim for pure psychiatric injury is reliant on the existence of a breach of a duty of care owed to the immediate victim and that defences such as *volenti non fit injuria* and contributory negligence available against the immediate victim should also be available to defeat or limit the claims of a secondary victim.[2] The first argument for this approach is that it avoids the unreasonable outcome of the immediate victim's claim being defeated while that of the secondary victim succeeds. In other words, the same conduct could result in the wrongdoer being treated as negligent against the secondary victim but not as regards the immediate victim. Examples of defences to the immediate victim's claim are that the immediate victim was *volens*, that the immediate victim was wholly responsible for the accident or that the immediate victim escaped from an apparently horrific accident without any injuries. Arguably, the wrongdoer should not have to compensate the secondary victim in such cases. Where, for example, the immediate victim was *volens* it could be said that he or she had essentially broken the chain of causation between the wrongdoer's careless acts or omissions and the resulting injuries to the secondary victim. Thus the wrongdoer did not legally cause the injuries, ie the wrongdoer's breach of duty is not regarded as the *causa causans*. It seems anomalous therefore to require the wrongdoer to compensate the secondary victim for injuries arising out of those acts or omissions which technically did not cause the psychiatric injury to the secondary victim.

[1] 1942 SC(HL) 78 at 91 .
[2] B Rodger, "Nervous Shock and Breach of Duty of Care Owed to Secondary Victims" 1997 SLT (News) 22.

5.3 Another argument for Professor Rodger's approach is that it avoids inconsistencies which can occur where the immediate victim was contributorily negligent. In *Alcock v Chief Constable South Yorkshire Police*[3] Lord Oliver considered this point and said:[4]

> "…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."

However, this "curious and wholly unfair situation" would be avoided if, as we discuss in paragraphs 5.11 to 5.20 below, the immediate victim were liable for the balance of the secondary victim's claim.

5.4 To allow a secondary victim an independent claim for psychiatric injury against the wrongdoer would be inconsistent with other legislation dealing with similar claims. Where a primary victim has died, members of his immediate family may claim for non-patrimonial loss (grief, distress and loss of society) arising out of the death under section 1(4) of the Damages (Scotland) Act 1976. Section 1(2) of that Act provides that:

> "No liability shall arise…if the liability to the deceased or his executor in respect of the act or omission has been excluded or discharged (whether by antecedent agreement or otherwise) by the deceased before his death, or is excluded by virtue of any enactment."

Furthermore, the immediate family member's claim is reduced by any contributory negligence on the part of the deceased.[5] Suppose the immediate victim had been *volens*. This prevents any claim for non-patrimonial loss under the 1976 Act, but a member of the deceased's immediate family who suffered a psychiatric injury from the death would be entitled to claim as a secondary victim unless the defence also applied to that claim.

5.5 An entirely independent claim for secondary victims is also inconsistent with relatives' claims under the Administration of Justice Act 1982. A relative of the injured person may claim for reasonable remuneration for providing necessary services to the injured person, such as housekeeping or personal care.[6] A relative may also claim for the loss of services that the injured person used to provide to the relative.[7] These claims are not independent, but are additional heads of the injured person's claim against the wrongdoer. Consequently, any defences available to the wrongdoer affect these claims and any contributory negligence by the injured person will result in a proportionate reduction of all the heads of claim.

5.6 The counter argument is essentially as follows. If the *Alcock* criteria are satisfied and it is reasonably foreseeable that the secondary victim will suffer psychiatric injury as a result of the wrongdoer's conduct, the wrongdoer owes a duty of care to the secondary victim

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[3] [1992] 1 AC 310.
[4] *Ibid* at 418.
[5] Law Reform Contributory Negligence Act 1945, s 1(4) as read with Damages (Scotland) Act 1976, s 7.
[6] S 8.
[7] S 9.

which is not only separate but entirely independent of the duty owed to the immediate victim. Consequently, even if the immediate victim was *volens* there should still be a breach of the duty owed by the wrongdoer to the secondary victim (unless, of course, the secondary victim was also *volens*). Similarly, if the immediate victim was contributorily negligent, this should not affect an action brought by the secondary victim. The wrongdoer has committed a delictual wrong against the secondary victim and the conduct of the primary victim should be irrelevant.

5.7 In its Report on *Liability for Psychiatric Injury*,[8] the Law Commission rejected Professor Rodger's approach for two main reasons. First, that the approach was not in line with existing authority, in particular those cases where the secondary victim was successful even though the immediate victim was in fact unharmed.[9] Moreover, in *Alcock v Chief Constable South Yorkshire Police*[10] Lord Oliver 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".

The Commission also considered that it was justifiable that the secondary victim should be entitled to claim damages for psychiatric injury even though the immediate victim had agreed an exclusion clause exempting the wrongdoer from liability or had been injured in the course of a criminal enterprise. The wrongdoer should not be able to ignore the claims of secondary victims who it was reasonably foreseeable were likely to sustain psychiatric injury as a result of the acts or omissions of the wrongdoer.

5.8 Other jurisdictions seem divided on the line to be taken on these difficult issues. In *Dillon v Legg*,[11] the Californian Supreme Court allowed recovery for psychiatric injury suffered by the mother and older sister of a child killed by a car. They had both witnessed the accident. The older sister was also injured but the mother was not within the zone of danger. The driver claimed that the pursuers had been contributorily negligent which at that time was a complete defence. Tobriner J stated:

> "If any such defence is sustained and the defendant found not liable for the death of the child because of the contributory negligence of the mother, sister or child, we do not believe that the mother or sister should recover for the emotional trauma that they have allegedly suffered. In the absence of the primary liability of the tortfeasor for the death of the child, we see no ground for an independent and secondary liability for claims for injuries by third parties."

In Germany the Bundesgerichtshof has held[12] that where the primary victim has been contributorily negligent the secondary victim's damages should be reduced accordingly. However, in the Australian case of *Jaensch v Coffey*[13] Brennan J stated that it is "now settled

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[8] Paras 2.22ff.
[9] *Dooley v Cammell Laird* [1951] 1 Lloyd's Rep 271 and *Galt v British Railways Board* (1983) 133 NLJ 870 where the plaintiffs recovered damages for psychiatric injury suffered after they mistakenly thought that their work colleagues had been injured by actions on their part. We have taken the view that the pursuer in this kind of case is a primary not a secondary victim; see paras 3.25-3.28.
[10] [1992] 1 AC 310 at 412.
[11] (1968) 29 ALR 3d 1316 at 1320-1321.
[12] BGH 11 May 1971.
[13] (1984) 54 ALR 417.

law that the duty owed to one is not to be regarded as secondary to or derived from the duty owed to the other", and in *White v Butcher*[14] parents who suffered psychiatric injury as a result of a serious accident to their daughter recovered damages unaffected by her contributory negligence. Several Australian jurisdictions have legislated for "nervous shock".[15] In *Scala v Mammolitti*[16] the High Court of Australia held that section 4 of the New South Wales Law Reform (Miscellaneous Provisions) Act 1944[17] created a new statutory duty of care to the secondary victim and that liability to the immediate victim was immaterial. Mullany and Handford assert[18] that under the various Australian statutes it is clear that secondary victims have an independent claim and it therefore follows that such a claim is unaffected by contributory negligence on the part of the immediate victim.

5.9 While we appreciate the force of the argument that a secondary victim should have a right of action which is entirely independent from that of the immediate victim, nevertheless we find the anomalies unattractive. Although we accept that the wrongdoer owes a duty of care to the secondary victim which is separate from that which is owed to the immediate victim, at this stage it is our provisional view that in a secondary victim's claim the wrongdoer should be able to use any defences which are pleadable against the immediate victim. As we shall discuss in the next section,[19] where the immediate victim has been contributorily negligent (or *volens*) the secondary victim could be allowed to sue the immediate victim and thereby obtain full reparation.

5.10 The Law Commission considered that a secondary victim should have a right of action where the immediate victim has suffered no harm at all.[20] It is our preliminary view that the immediate victim must suffer a physical or psychiatric injury before the secondary victim can succeed. Indeed, we have defined a secondary victim as a person who suffers psychiatric injury as a consequence of the death or injury of another person.[21] If the immediate victim has escaped any kind of harm we think that there should be no liability towards the secondary victim since it is not reasonably foreseeable in these circumstances that a person of ordinary fortitude in the position of the secondary victim would suffer psychiatric injury. Short term emotional distress and worry may well be suffered until the true position emerges, but such distress is not compensatable.[22]

Liability of immediate victims to their relatives

5.11 Another issue is whether an immediate victim owes a duty of care not to cause psychiatric injury to any secondary victim. This issue can arise either in tripartite cases where the immediate victim is *volens* or contributory negligent or in cases where the immediate victim is solely responsible for his or her own injury, as for example where the immediate victim commits or attempts suicide or participates in dangerous sport.

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[14] New South Wales Supreme Court, 13 Oct 1982 (unreported).
[15] Law Reform (Miscellaneous Provisions) Act 1944 (New South Wales), s 4; Law Reform (Miscellaneous Provisions) Act 1955 (Australian Capital Territory), s 24; Law Reform (Miscellaneous Provisions) Act 1956 (Northern Territory), s 25.
[16] (1965) 114 CLR 153.
[17] Section 4(1) quoted in Appendix A, para 1.10.
[18] N J Mullany and P R Handford, *Tort Liability for Psychiatric Damage* 255.
[19] See paras 5.11-5.20.
[20] Report on *Liability for Psychiatric Illness,* para 2.23.
[21] Para 4.4 above.
[22] See Part 2 above.

5.12 In *Greatorex* v *Greatorex*[23] an English court had to consider for the first time whether a secondary victim could be successful in an action where the immediate victim was solely responsible for his injuries. In that case a young man was involved in a car accident caused by his own careless driving (he had been drinking). His father, a fire officer, was called to the scene where he witnessed his son's injuries and as a consequence suffered from severe post-traumatic stress disorder. He sued his son for psychiatric injury. The father met the requirements necessary for a successful "secondary victim" claim. He was suffering from a recognised psychiatric illness and fulfilled the *Alcock* criteria. He had a close tie of love and affection with the victim, was present at the immediate aftermath of the accident and his psychiatric injury was caused by direct perception of his son's injuries. Nevertheless, his claim was unsuccessful on policy grounds. Cazalet J considered that to allow this claim would be to "create a significant further limitation upon an individual's freedom of action".[24] This would indeed be the case if individuals are to be held liable for self-inflicted injuries arising out of suicide attempts or participation in dangerous activities. He was also of the opinion that it would be "potentially productive of acute family strife".[25] Given that a successful claim requires a secondary victim to have a close tie of love and affection with the immediate victim, it is almost inevitable that the secondary victim will be a member of the primary victim's family.

5.13 In its Report on *Liability for Psychiatric Illness*, the Law Commission recommended that the court should have a discretion to disallow a claim for psychiatric injury arising out of the immediate victim's death or injury where it was satisfied that imposition of liability would not be just and reasonable because the immediate victim chose to cause his or her own death or injury.[26] The Commission argued that there is a tension between an individual's right of self-determination and the imposition of a duty of care not to behave in a way as to cause psychiatric injury to others in exercising that right. It could become impossible for people to indulge in any dangerous activities; for a claim for psychiatric injury could not be avoided by going to carry out the activity in some remote spot if, as we propose,[27] it should no longer be necessary for the secondary victim to have seen the accident or its immediate aftermath.

5.14 As the Commission acknowledged, its formula has the disadvantage of the pursuer being able to claim if the conduct of the injured close relative was negligent, but not if it was deliberate. Cazalet J was also aware of this in *Greatorex* v *Greatorex*, drawing attention to a potential "paradoxical situation" in which it will be in the defendant's interest to argue that the incident which caused the secondary victim's psychiatric injury was deliberate, while the secondary victim will be seeking to persuade the court that it was inadvertent.[28]

5.15 Other jurisdictions have confronted this problem with differing results. At first, the courts in Australia refused to accept claims by secondary victims where the immediate victim was responsible for his or her own death or injury.[29] However, in *Shipard v Motor*

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[23] [2000] 4 All ER 769.
[24] [2000] 4 All ER 769 at 783.
[25] *Ibid* at 784.
[26] Para 6.53. It may be impossible to determine what the deceased's intention actually was. For example, a person could slip and fall over a cliff or may have jumped. The close relatives would have to prove that the deceased fell accidentally in order to claim successfully.
[27] Proposal 7, para 4.27.
[28] [2000] 4 All ER 769 at 786.
[29] *Jaensch v Coffey* [1984] 54 ALR 417 (High Court). Deane J saying at 460 "…on the present state of the law…a duty of care will not exist unless the reasonably foreseeable psychiatric injury was sustained as a result of the

Accidents Commission[30] the South Australian Full Court refused to strike out a claim where the immediate victim was at fault, holding that the secondary victim was entitled to have the claim determined in the light of all the relevant facts. Another similar case is *FAI General Insurance Co Ltd v Lucre*[31] where the New South Wales Court of Appeal held that the principled development of the common law could not sustain the exclusion of claims simply because the immediate victim had been at fault and that the immediate victim owed a duty of care to secondary victims. In Germany the Bundesgerichtshof has maintained that:[32]

> "[A] person is under no legal duty, whatever the moral position may be, to look after his own life and limb simply in order to save his dependants from the likely physical effects on them if he is killed or maimed: to impose such a legal duty…would be to restrict a person's self-determination in a manner inconsistent with our legal system.".

However an exception was deemed acceptable in "peculiar cases", such as where a person commits suicide in a "deliberately shocking manner". Courts in the USA recognise that people who inflict harm on themselves may in appropriate circumstances be liable for the emotional distress thereby caused to secondary victims.[33]

5.16 There are difficulties with the present situation in the United Kingdom. Family members may currently sue one another in respect of physical injuries.[34] It might seem inappropriate to create a distinction in this context between physical and psychiatric injury. If the father in *Greatorex* had been physically injured by the son in the accident, he would have been able to sue. It may also seem anomalous that a family member can claim for any damage done to property in the course of a relative's accident yet cannot claim for psychiatric injury. For example, if a man seriously injures himself by inadvertently walking into his mother's glass door, she could sue her son for the cost of the door, but following *Greatorex* she would be unable to claim compensation for her psychiatric injury caused by witnessing her son's injuries.

5.17 It would be simpler to have no bar, absolute or discretionary. The argument against family strife can be overstated. Close relatives are already able sue each other in contract or delict but rarely do so. It is usually only where the claim will be met by some third party (such as an insurance company) that it is made. Indeed, it is more likely that close relatives will sue one another if both parties' financial situations would be improved through such an action, but actions are unlikely to be numerous because of the requirement that the pursuer must have suffered a significantly disabling psychiatric injury. Furthermore, a secondary victim would not succeed unless the psychiatric illness was a probable consequence of the wrongdoer's conduct to a person of ordinary fortitude in the position of the pursuer.

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death, injury or peril of someone other than the person whose carelessness is alleged to have caused the injury"; *Harrison v State Government Insurance Office* (1985) Aust Torts Rep 80-723 (Queensland); *Klug v Motor Accidents Insurance Board* (1991) Aust Torts Rep 81-134 (Tasmania).

[30] (1997) 70 SASR 240.

[31] [2000] NSWCA 346; see also P R Handford, "Psychiatric Damage where the Defendant is the Immediate Victim" (2001) 117 LQR 397.

[32] NJW 1971, 1883 at 1886. Translated in BS Markesinis, *A Comparative Introduction to the German Law of Torts* 112.

[33] Appendix A, para 8.5.

[34] *Young v Rankin* 1934 SC 499. Also the Law Reform (Husband and Wife) Act 1962, s 2(1) allows a right of action between spouses.

5.18 We therefore seek views on whether individuals should have a duty of care not to cause psychiatric injury to their close relatives. If a wrongdoer owes a general duty of care to the relatives of an immediate victim (people who will inevitably be strangers) should it not follow *a fortiori* that a "wrongdoer" who is also the immediate victim should owe a duty of care to their own relatives (people who are obviously not strangers)?

5.19 On the issue of the secondary victim suing the primary victim for the remaining proportion of damages where the immediate victim has been contributorily negligent, we see no reason why this should be disallowed. The wrongdoer and the immediate victim could be held jointly liable for the psychiatric injury incurred by the secondary victim.

5.20 We therefore seek views on the following proposals:

10. (1) While the secondary victim is owed an independent duty of care by the wrongdoer, nevertheless any defences available to the wrongdoer against the immediate victim should extend to the secondary victim.

(2) There should be no bar against secondary victims suing immediate victims where the immediate victim has been wholly responsible for his or her own injuries, ie individuals owe a duty of care to their close relatives not to cause them psychiatric injury.

(3) The wrongdoer and immediate victim should be held jointly liable to the secondary victim where the immediate victim has been contributorily negligent.

Part 6 List of Proposals

1. (1) It should continue to be the position that no compensation may be claimed for mere mental distress.

(2) Should the compensatable category be defined as a significantly disabling psychiatric injury or in some other way?

(Para 2.9)

2. It should be competent to claim damages for a psychiatric injury even though it was not induced by shock.

(Para 2.14)

3. (1) A duty of care not to cause psychiatric injury should arise when it is reasonably foreseeable that the pursuer will sustain psychiatric injury as a consequence of the defender's conduct.

(2) The pursuer should not have to be within the area of potential physical harm before a duty of care to prevent psychiatric injury can arise.

(3) A duty of care to prevent psychiatric injury should not be breached if in the circumstances of the case some kind of psychiatric injury to the pursuer was not reasonably foreseeable as a probable consequence of the defender's conduct.

(4) Where there has been a breach of a duty of care not to cause the pursuer physical harm, ie the pursuer has in fact sustained physical injury, the pursuer should continue to be able to recover damages for unforeseeable psychiatric injury: otherwise damages should be recovered only if some kind of psychiatric injury was foreseeable as a probable consequence of the defender's conduct.

(5) Where the defender owes the pursuer a duty of care not to damage the pursuer's property, the pursuer should be able to recover damages for psychiatric injury arising from damage to the property provided that psychiatric injury to the pursuer was reasonably foreseeable as a probable consequence of the defender's negligence.

(6) In determining whether psychiatric injury is reasonably foreseeable for these purposes the pursuer should be regarded as a person of reasonable fortitude unless the defender has knowledge of the pursuer's unusual susceptibility to psychiatric injury.

(Para 3.36)

4. (1) A person should continue to be entitled (subject to satisfying other requirements) to claim damages for a psychiatric injury suffered as a result of another individual's personal injury or death.

(2) There should be no statutory limit set to the amount of such damages.

(Para 4.8)

5. It should continue to be a requirement for a claim for psychiatric injury suffered as a result of another person's death or personal injury that the pursuer had a close tie of love and affection with that person.

(Para 4.13)

6. (1) Should there be a statutory list of individuals deemed to have a close tie of love and affection with the immediate victim, or should the existing common law be retained whereby certain close relatives are presumed to have a close tie while others may establish a close tie?

(2) If there is to be a statutory list, should it comprise:

(a) spouse, opposite-sex or same-sex cohabitant, parent (including a person who had accepted the immediate victim as a child of the family), child (including a child who had been accepted by the immediate victim as a child of the family) and sibling; or

(b) those entitled to sue for non-patrimonial loss under the Damages (Scotland) Act 1976 which we have recommended should be; spouse, opposite-sex or same-sex cohabitant, parent (including a person who had accepted the immediate victim as a child of the family), child (including a person who had been accepted by the immediate victim as a child of the family), brother, sister, grandchild or grandparent; or

(c) any other relatives and if so which?

(3) Should individuals not on the statutory list be entitled to lead evidence to establish that they had a close tie of love and affection with the immediate victim?

(Para 4.21)

7. A claim for damages for psychiatric injury suffered as a result of the death or injury of another individual should be competent regardless of:

(a) the pursuer's closeness in time or space to the accident or its aftermath, or

(b) the means by which the pursuer learnt of the death or injury.

(Para 4.27)

8. (1) A claim for damages should be competent by a person who assists at the site of an accident in the immediate aftermath and suffers psychiatric injury as a result of being closely involved with dead or injured victims whether or not that person:

(a) was in any actual or apprehended physical danger, or

(b) had a close tie of love and affection with any of the victims.

(2) There should not be a different rule for members of the rescue services who assist at an accident as part of their duties of employment.

(Para 4.34)

9. Should a secondary victim be entitled to claim damages for a psychiatric injury rising out of injuries to another person caused by a wrongdoer's negligence where that person's injuries are purely psychiatric?

(Para 4.37)

10. (1) While the secondary victim is owed an independent duty of care by the wrongdoer, nevertheless any defences available to the wrongdoer against the immediate victim should extend to the secondary victim.

(2) There should be no bar against secondary victims suing immediate victims where the immediate victim has been wholly responsible for his or her own injuries, ie individuals owe a duty of care to their close relatives not to cause them psychiatric injury.

(3) The wrongdoer and immediate victim should be held jointly liable to the secondary victim where the immediate victim has been contributorily negligent.

(Para 5.20)

Appendix A

Other Jurisdictions

1. Australia

1.1 While Australian courts draw heavily on United Kingdom case law when dealing with psychiatric injury, it is acknowledged that:

> "In Australia the Courts have indicated a willingness to take a more relaxed approach to questions of proximity. However, proof of a psychiatric disorder or illness as a result of a sudden shock has been required."[1]

Indeed, distress is not deemed sufficient as a basis for a psychiatric injury claim. In *Mount Isa Mines Ltd v Pusey*,[2] Windeyer J said "A plaintiff in an action of negligence cannot recover damages for a "shock", however grievous, which was no more than an immediate emotional response to a distressing experience sudden, severe and saddening.".

1.2 Australian courts appear to follow the *Alcock* criteria for secondary victims. In considering the first criterion - the need for a tie of love and affection - Mullany and Handford state that traditionally Australian courts have focused only on immediate family ties, restricting recovery to those within the special relationships of spouse, child and parent.[3] For example, in *Swan v Williams (Demolition) Pty Ltd*[4] the plaintiff confined his claim to psychiatric damage suffered on the death of his wife. He did not bring an action in respect of his in-laws who were involved in the same accident. However, siblings may also be entitled to claim,[5] while a girlfriend's claim was dismissed but not on the ground of her lack of relationship.[6]

1.3 Whether it is necessary for a secondary victim to have been present at, and have directly perceived, the accident or its immediate aftermath (the second and third *Alcock* criteria) remains an open question. In *Jaensch v Coffey*[7] Mrs Coffey was not present at the scene of the accident. She developed severe anxiety and depression partly as a result of seeing her husband badly injured in hospital later that day and partly from being told of the seriousness of his condition by the hospital staff.[8] She was successful. Deane J expressed the view that it was difficult to discover an acceptable reason for disallowing claims based solely on being informed of the accident or its aftermath. Kirby P in *Coates v Government Insurance*

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[1] *van Soest v Residual Health Management Unit* [2000] 1 NZLR 179 at 192.
[2] (1970) 125 CLR 383 at 394.
[3] N J Mullany and P R Handford, *Tort Liability for Psychiatric Damage* 106.
[4] (1987) 9 NSWLR 172.
[5] *Storm v Geeves* [1965] Tas SR 252 (brother and sister, sister's claim dismissed as had not a recognisable psychiatric illness, but court regarded her as within category of potential claimants); *Quayle v State of New South Wales* (1995) Aust Torts Rep 81-367 (brother).
[6] *Kohn v State Government Insurance Commission* (1976) 15 SASR 255.
[7] (1984) 54 ALR 417.
[8] *Pham v Lawson* (1997) 68 SASR 124 was similar in that the successful claimant was told of the accident, but she also passed by the scene on her way to the hospital where she saw her dead and injured family.

Office of New South Wales[9] was more forceful. He took the view that learning of an accident by telephone, or by a later oral message could, in today's world, be just as foreseeable and just as directly related to the wrong, as witnessing it in person. He maintained that the direct perception requirement was "hopelessly out of contact with the modern world of telecommunications".[10] The results of recent "pure information" cases are mixed. In *Annetts v Australian Stations Pty Ltd*[11] the father was told that his son was missing from the cattle station where he had been working and months later identified his body from a photograph. His claim for psychiatric injury failed. However, the claimants in *Reeve v Brisbane City Council*[12] and *Quayle v State of New South Wales*[13] were both successful even though they were only informed of the death of their relatives, having seen neither the accident nor their bodies.

1.4 A claimant must have suffered a "shock": a sudden sensory perception.[14] Thus no damages will be awarded for a psychiatric injury arising from watching a loved one suffer over a long period of time. In *Anderson v Smith*[15] a mother saw her daughter slowly die in hospital. Her claim was dismissed as there was no sudden shock.

1.5 The case of *Morgan v Tame*[16] illustrates the attitude of the courts to the thin skull rule. Here the plaintiff was involved in a car accident. Due to a mistake, tests suggested that she had an illegal amount of alcohol in her blood when the accident occurred. Although the mistake was later admitted, the plaintiff developed a psychotic depressive illness and argued that liability should arise on the basis of her "eggshell psyche". The court took the view that *Page v Smith* was not consistent with Australian law and accordingly damages were not recoverable as her illness was too remote. No duty of care was owed unless a person of normal fortitude would suffer psychiatric injury as a result of the negligent act or omission of the defendant, unless the defendant had knowledge of any particular susceptibility of the plaintiff. The "thin skull" rule applied only after it was foreseeable that a person of normal fortitude would suffer some psychiatric injury.

1.6 Trindade and Cane[17] also criticise *Page v Smith*, saying:

> "[*Page v Smith*] is inconsistent with basic principles of foreseeability in the law of negligence and with the approach to hypersensitivity...If accepted in Australia, the decision would require courts to distinguish between primary victims of nervous shock who were subjected to a risk of foreseeable bodily injury and those who were not."

They move on to discuss the English case of *Schneider v Eisovitch*,[18] where a husband and wife were injured in a car accident. The wife learned of the death of her husband at a later date as she had been unconscious until then. The court held that the wife could recover, not only

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[9] (1995) 36 NSWLR 1.
[10] *Ibid* at 11.
[11] [2000] WASC 104.
[12] [1995] 2 Qd R 661.
[13] (1995) Aust Torts Rep 81-367.
[14] *Jaensch v Coffey* (1984) 54 ALR 417; *Campbelltown City Council v Mackay* (1989) 15 NSWLR 501; *Chiaverini v Hockey* (1993) Aust Torts Rep 81-223; *Gifford v Strang Patrick Stevedoring Pty Ltd* [2001] NSWCA 175.
[15] (1990) 101 FLR 34. See also *Spence v Percy* (1991) Aust Torts Rep 81-116, prolonged coma of relative in hospital which caused psychiatric injury was held not to be part of the aftermath of the accident.
[16] [2000] NSWCA 121.
[17] F Trindade and P Cane, *The Law of Torts in Australia* 362.
[18] [1960] 2 QB 430.

for nervous shock resulting from her injuries, but also for shock resulting from being told of the accident. The defendant owed her a duty not to cause her physical injuries and she could add the nervous shock caused by the bad news on to the consequences of that breach of duty (even though that was not a consequence of the bodily injury). The case has been applied in at least two Australian decisions.[19] The authors consider that these decisions are "open to objection on technical grounds because it is clear (subject to acceptance of the rule in *Page v Smith*) that in order to be liable for nervous shock the defendant must owe the plaintiff a duty not to cause *nervous shock* rather than a duty not to cause physical damage".[20]

1.7 The Australian courts have moved away from barring claims where the defendant is the immediate victim. In *FAI General Insurance & Anor v Lucre*[21] the claimant was involved in a head-on collision due solely to the negligence of the deceased other driver and suffered post-traumatic stress disorder as he blamed himself for the death of the other driver. The deceased's insurers accepted that the psychiatric injury was reasonably foreseeable but argued that the duty of care was negated because the injury was sustained as a result of the death of the negligent deceased. The court declined to follow Deane J's dictum in *Jaensch v Coffey* excluding the plaintiff from suing the immediate victim if the latter was responsible for the accident),[22] and stated that the principled development of the common law could not sustain drawing the line represented by that doctrine. Because the claimant felt himself to be somewhat responsible for the accident, he could be classified as an "involuntary participant". The court distinguished him from a "mere bystander" by the immediacy of his involvement in the crash. It was felt that these circumstances and the ensuing inquiries into the accident were so clearly capable of generating a sense of unresolved anxiety and guilt that it was reasonable to impose a duty of care upon the other (deceased) driver.

1.8 Australian law protects employees from foreseeable psychiatric injuries. In *State of NSW v Seedsman*,[23] for example, the plaintiff was employed by the police services. He was exposed to crimes committed against children and as a result suffered PTSD. It was held that the police services had failed to provide him with a safe system of work. In *Mount Isa Mines v Pusey*,[24] the plaintiff was involved in the aftermath of an accident in which two of his colleagues were injured. He assisted one of the men who was extremely badly burned and who died some days later. As a result the plaintiff developed a serious mental disturbance, diagnosed as a form of schizophrenia; he was held to be entitled to damages.[25]

1.9 Several Australian jurisdictions have enacted legislation. New South Wales made statutory provision for "injury arising from mental or nervous shock" in the Law Reform

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[19] *Andrews v Williams* [1967] VR 831; *Tsanaktsidis v Oulianoff* (1980) 24 SASR 500.
[20] F Trindade and P Cane, *The Law of Torts in Australia* 365.
[21] [2000] NSWCA 346. Also see *Shipard v Motor Accidents Commission* (1997) 70 SASR 240 where the South Australian Full Court refused to strike out a claim where the immediate victim was at fault, holding that the secondary victim was entitled to have the claim determined in the light of all the relevant facts.
[22] (1984) 54 ALR 417. Deane J said at 460 "…on the present state of the law…a duty of care will not exist unless the reasonably foreseeable psychiatric injury was sustained as a result of the death, injury or peril of someone other than the person whose carelessness is alleged to have caused the injury"; *Harrison v State Government Insurance Office* (1985) Aust Torts Rep 80-723 (Queensland); *Klug v Motor Accidents Insurance Board* (1991) Aust Torts Rep 81-134 (Tasmania).
[23] [2000] NSWCA 119.
[24] (1970) 125 CLR 383.
[25] Lord Goff in *Frost v Chief Constable South Yorkshire Police* [1999] 2 AC 455 at 485 stated: "In the course of the judgments of some members of the High Court, the plaintiff was treated as a rescuer; but I understand the prevailing view of the High Court in that case [*Mount Isa Mines v Pusey*]…to have been that the defendants' liability arose from breach of their duty as employers of the plaintiff…".

(Miscellaneous Provisions) Act 1944 (the "1944 Act"). The Australian Capital Territory[26] and the Northern Territory[27] have passed similar legislation.

1.10 The 1944 Act provides:

> "4(1) The liability of any person in respect of injury caused after the commencement of this Act by an act, neglect or default by which any other person is killed, injured or put in peril, shall extend to include liability for injury arising wholly or in part from mental or nervous shock sustained by –
>
> (a) a parent or the husband or wife of the person so killed, injured or put in peril; or
>
> (b) any other member of the family of the person so killed, injured or put in peril where such person was killed, injured or put in peril within the sight or hearing of such member of the family."

Section 4(5) of the Act defines "member of the family" to mean the husband, wife, parent, child, brother, sister, half-brother, half-sister of the person and goes on to define "parent" to include father, mother, grandfather, grandmother, stepfather, stepmother and any person standing *in loco parentis* to another. "Child" is defined in a similarly extended fashion.

1.11 Notably, only parents and spouses may claim without having been spatially or temporally proximate to the accident. Other family members, including children, must see or hear the accident. This rule was challenged in *Gifford v Strang Patrick Stevedoring Pty Ltd*.[28] Here the wife and children of a man crushed to death by a forklift vehicle sued for damages. None of the plaintiffs witnessed the accident or its aftermath as they were advised not to view the body. The wife relied on section 4(1)(a) of the 1944 Act and the trial judge held that the children's claims failed as section 4 displaces the common law. However, the Supreme Court of New South Wales held that section 4 does not have the effect of excluding any liability at common law that might otherwise exist. Indeed, Hodgson JA stated that section 4 "does not expressly say that there should be no liability in respect of mental or nervous shock sustained by persons other than the immediate victim, unless the conditions laid down by that section are satisfied."[29] He also felt that while the statutory provision builds liability onto the breach of duty to the "primary victim", at common law the liability is based on a breach directly to the secondary victim. Therefore the children were entitled to bring their claim at common law. Nevertheless, the court dismissed the claim. Hodgson JA said:[30]

> "It is not possible to compensate everyone who is injured, and the law must draw lines. It should be kept in mind that the civil standard of proof on the balance of probabilities necessarily means that damages may sometimes be awarded for injuries which did not occur or have been exaggerated, and/or against persons whose actions did not cause them. It is difficult enough for courts to resolve conflicting evidence in relation to claimed physical injuries, and harder still to do so in relation to claimed mental injuries to persons actually perceiving a horrific event. It is or would be much harder again to resolve conflicting evidence in relation to mental injuries claimed to arise from merely hearing about horrific events. Floodgates

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[26] Law Reform (Miscellaneous Provisions) Act 1955, s 24.
[27] Law Reform (Miscellaneous Provisions) Act 1956, s 25.
[28] [2001] NSWCA 175.
[29] *Ibid* at para 35 of his opinion.
[30] *Ibid* at para 45 of his opinion.

arguments are often criticised, but there are limits to the compensation that the community can afford to pay, particularly in relation to claimed injuries the existence and causation of which are so difficult to determine with assurance. In my opinion, it is reasonable to maintain the line that has been drawn in the cases."

1.12 There have been instances where the common law has been utilised in New South Wales to allow "family members" (not including parents or spouses) to recover damages. For example, in *Quayle v State of New South Wales*[31] Hoskings DCJ upheld "nervous shock" claims by three brothers of an aboriginal man who had hanged himself in a police cell, regardless of the fact they had not seen the incident or the aftermath.

1.13 On the issue of dependency of the secondary victim's claim,[32] the High Court of Australia held that section 4 of the 1944 Act created a new statutory duty of care to the secondary victim and that liability to the immediate victim was immaterial.[33] Mullany and Handford assert[34] that under the various Australian statutes it is clear that secondary victims have an independent claim and it therefore follows that such a claim is unaffected by contributory negligence on the part of the immediate victim. This reinforces the previous position. For example, in *White v Butcher*[35] parents recovered damages for psychiatric injury sustained as a result of a serious accident involving their daughter. Their damages were unaffected by her contributory negligence. Also, in *Jaensch*[36] Brennan J stated that it is "now settled law that the duty owed to one is not to be regarded as secondary to or derived from the duty owed to the other".

2. Canada

2.1 It is clear that in order to recover damages for psychiatric injury in Canada, a plaintiff must have incurred a recognisable psychiatric illness.[37] Wallace JA in *Rhodes v Canadian National Railway* said, "grief, sorrow and reactive depression are not compensable".[38] In the later case of *Mason v Westside Cemeteries Ltd*[39] Mollay J held that a plaintiff could recover for moderate emotional damage, but this decision was challenged by Macpherson JA in *Vanek v The Great Atlantic and Pacific Company of Canada Limited*.[40] Canadian courts also require a "sudden shock".[41]

2.2 It has been suggested that causing "nervous shock" is a separate tort.[42] However, this approach was subsequently criticised.[43] It is now acknowledged that the law relating to nervous shock is subject to the general rules of negligence. In *Bechard v Haliburton Estate* Griffiths JA has maintained that "under Canadian and English law, reasonable foresight of nervous shock to the plaintiff is the touchstone of liability.".[44] In the later case of *Nespolon v*

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[31] (1995) Aust Torts Rep 81-367.
[32] See Part 5 above.
[33] *Scala v Mammolitti* (1965) 114 CLR 153.
[34] N J Mullany and P R Handford, *Tort Liability for Psychiatric Damage* 255.
[35] New South Wales Supreme Court, 13 Oct 1982, (unreported).
[36] (1984) 54 ALR 417.
[37] *Duwyn v Kaprielian* (1978) 22 OR (2d) 736, Morden JA at 754-55; *McDermott v Ramadanovic Estate* (1988) 27 BCLR (2d) 45, Southin J at 52; *Rhodes v Canadian National Railway* (1991) 75 DLR (4th) 248.
[38] (1991) 75 DLR (4th) 248 at 264.
[39] (1996) 29 CCLT (2d) 125.
[40] [1999] 48 OR (3d) 228.
[41] *Beecham v Hughes* (1988) 52 DLR (4th) 625; *Rhodes v Canadian National Railway* (1991) 75 DLR (4th) 248.
[42] *Abramzik v Bremner* (1968) 65 DLR (2d) 651.
[43] See, for example, *Marshall v Lionel Enterprises Inc* (1972) 25 DLR (3d) 141, Haines J at 149.
[44] *Bechard v Haliburton Estate* (1991) 84 DLR (4th) 668 at 674.

Alford Abella JA considered that reasonable foreseeability of nervous shock *potentially limited by policy considerations* is the proper test for imposing a duty of care.[45]

2.3 Whether a secondary victim's psychiatric injury was reasonably foreseeable and hence compensatable by the wrongdoer depends on the existence of a proximity relationship. This relationship is made up of a number of factors; the relationship between the secondary and the immediate victim, being present at the shocking event or shortly thereafter, and direct perception of it. The relationship is regarded as a predominant factor. Damages have been awarded for psychiatric injury arising out of the death or injury of a wife and children,[46] a husband,[47] and not ruled out in the case of a de facto wife[48] or a sister or niece.[49] Bystanders who develop psychiatric injuries through witnessing "horrifying or gruesome accidents" might be able to claim as it is reasonably foreseeable that they would be upset.[50] A mother's claim was dismissed on the basis that she had heard of the accident (in another province) on the radio and was given details of her son's death when she got to the scene several days later. Similarly a family who viewed the body in the hospital mortuary several hours after they had been told that the person had died in a car accident were unsuccessful.[51]

2.4 Canadian courts are reluctant to exclude rescuers from the class of persons who may sue for psychiatric injury. In *Fenn v City of Peterborough*[52] Hollard J clearly acknowledged the existence of the rescuer principle. In *Bechard v Haliburton Estate*[53] the plaintiff also recovered on the basis that she was in fact a rescuer.

2.5 In *Duwyn v Kaprielian*[54] Mrs Duwyn saw her young son screaming in her car as she left a shop. The car had been involved in an accident but the child was in fact unharmed. She suffered a psychiatric illness influenced by memories of her young brother being burned many years previously. On behalf of a unanimous court, Morden JA held:

> "I appreciate that…a defendant does not have to foresee the precise way in which the damage is caused as a condition of liability. However, these factors do not, in my view, allow for a situation where it seems likely that, but for Mrs Duwyn's particular hypersensitivity…she would not have reacted in the extreme way that she did, whether she was at the scene of the accident or had come upon it just after.

When considering the Canadian decisions where the plaintiff's susceptibility was in fact taken into account,[55] Mullany and Handford maintain that approaching psychiatric injury cases "from the question of plaintiff sensitivity is contrary to general principles of negligence."[56]

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[45] (1998) 40 OR (3d) 355 at 364-366.
[46] *Fenn v City of Peterborough* (1977) 73 DLR (3d) 177.
[47] *Marshall v Lionel Enterprises Inc* (1972) 25 DLR (3d) 141.
[48] *Beecham v Hughes* (1988) 52 DLR (4th) 625.
[49] *Cameron v Marcaccini* (1978) 87 DLR (3d) 442.
[50] *Bechard v Haliburton Estate* (1991) 84 DLR (4th) 668, Griffiths JA at 681.
[51] *Devji v District of Burnaby* (2000) 180 DLR (4th) 205.
[52] (1977) 73 DLR (3d) 177.
[53] (1991) 84 DLR (4th) 668.
[54] (1978) 94 DLR (3d) 424.
[55] *Brown v Hubar* (1974) 45 DLR (3d) 664; *McMullin v FW Woolworth Co Ltd* (1974) 9 NBR (2d) 214.
[56] N J Mullany and P R Handford, *Tort Liability for Psychiatric Damage* 231 fn 35.

3. France

3.1 In French law, there are no statutory provisions dealing specifically with the issue of damages for psychiatric injury. The cornerstone of the French law of delict is article 1382 of the Civil Code, which provides that:

> "Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer."

"Dommage" is not qualified in article 1382. Consequently, damages for "dommage moral" are not excluded by the Civil Code.

3.2 The French Supreme Court (Cour de Cassation) granted damages for "préjudice moral" for the first time in 1833.[57] Since then the courts have had no difficulty in awarding damages for "dommage moral". This is particularly clear in the case of the pain caused by the loss of an "être cher" ("a loved one").[58] There seems to be no restriction on the relationship between the person who died and the person to whom "dommage moral" is caused. No family link is required. Damages have even been awarded for the loss of a dog[59] or a horse.[60] These cases have been the subject of fierce academic criticism.[61]

3.3 The death of the victim is not a necessary condition. The courts have made it clear that the case of an injury to the victim is also covered. Damages can be awarded not only for the pain caused by the loss of an "être cher", but also for the pain caused by witnessing such a person suffer.[62] This is called "dommage moral par ricochet". Some authors[63] have criticised such an approach, arguing that it may lead to an endless list of cases being brought. For example, as they put it, Jacques is severely injured in a car crash, which causes great pain to Paul (characterised as a "dommage par ricochet"). Pierre then suffers a further "dommage par ricochet" because he is deeply affected by seeing Paul in such pain, and so on.

4. Germany

4.1 Mullany and Handford maintain:

> "…recovery for such harm [emotional suffering] is rather more limited in German law than in most other civil law countries. The German *Bürgerliches Gesetzbuch*, which was enacted nearly a hundred years later than the French Code and had a rather different genesis, does not have a general principle of liability similar to the French art 1382 and does not recognise any general protected interest in freedom from emotional injury."[64]

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[57] 15 June 1833, S. 1833.1.458.
[58] See Civ 13 February 1923, D 1923.1.52.
[59] *Mirza*, Tgi, Caen, 30 October 1962, D 63.92.
[60] *Lunus*, Civ 1, 16 January 1962, B. I, No 33.
[61] See P Malaurie & L Aynès, *Droit civil: les obligations* para 247.
[62] See for example Civ 2, 23 May 1977, B. II, No 139.
[63] See P Malaurie & L Aynès, *Droit civil: les obligations* para 247.
[64] N J Mullany and P R Handford, *Tort Liability for Psychiatric Damage* 57 - 58.

4.2 In Germany, victims of psychiatric injury must meet the criteria of § 823 I BGB, which demand evidence of an injury to health. As, according to von Bar, most claimants cannot meet this demand,[65] German law is consequently restrictive.

4.3 Regarding the concept of "psychiatric illness", in 1971 the Bundesgerichtshof stated:

> "…liability for harm psychically occasioned…must be limited to cases where the man in the street, and not only a medical practitioner, would describe it as injury to…health…Injuries which are medically ascertainable but do not amount to a "shock" to the system will go uncompensated…No claim can be made in the normal case of deeply felt grief…".[66]

If the victim does manage to overcome this hurdle, he must subsequently pass the test of the adequate cause (*Adäquanztest*) and, in the case of "secondary victims", prove that the "indirect violation" could be foreseen.[67] Markesinis claims that this reliance on *Adäquanztest* "shows the tendency of German law (and modern civil law in general) to use normative concepts of causation in cases where Common lawyers would more evidently have recourse to the notion of duty of care.".[68] The death of the primary victim[69] and his serious injury[70] constitute adequately causal events, whereas property damage[71] is deemed inadequate.

4.4 Although there is no decision expressly on the point, it has been inferred[72] that only very close relatives of the dead or injured person may claim damages in German law. Damages have been awarded to a fiancée[73] and an unborn child.[74] Involuntary participants may also claim.[75] Moreover, a "secondary victim" need not have witnessed the accident; communication by a third party is sufficient to found liability under German law. This approach has been followed in various cases[76] and, in the view of Markesinis, "places German law in a more pioneering position when compared with the English and American law."[77] Thus while German law may be deemed restrictive in one sense, it is relatively liberal on certain controversial issues.

4.5 In Germany, the thin skull rule extends to psychiatric injury cases.[78] In BGH 10 June 1958 NJW 1958 1579, the plaintiff committed suicide three years after a car crash. His psychological condition was a result of the accident and the court held that:

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[65] C von Bar, *The Common European Law of Torts* vol 2, 65.
[66] NJW 1971, 1883, 1884-1885, translated in B S Markesinis, *A Comparative Introduction to the German Law of Torts* 110.
[67] RGZ 133, 270, translated in B S Markesinis, *A Comparative Introduction to the German Law of Torts* 122.
[68] B S Markesinis, *A Comparative Introduction to the German Law of Torts* 124.
[69] NJW 1971, 1883.
[70] BGH, NJW 1985, 1391.
[71] LG *Hildesheim* VersR 1970, 720.
[72] C von Bar, *The Common European Law of Torts* vol 2, 66.
[73] BGH, NJW 1969, 2286.
[74] BGH 5.2.1985, BGHZ 93, 351. The child was born impaired due to a nervous shock suffered by the mother during pregnancy.
[75] BGH, NJW 1986, 777.
[76] RGZ 157, 11; BGH, NJW 1971, 1883; BGHZ 93, 351; NJW 1985, 1390.
[77] B S Markesinis, *A Comparative Introduction to the German Law of Torts* 124. Of course, since the time of writing, the Law Commission has recommended that the second and third *Alcock* requirements be abolished.
[78] BGH 29.2.1956, BGHZ 20, 137; BGH 19.12.1969, VersR 1970, 281; BGH 22.9.1981, NJW 1982, 168; OLG Frankfurt 1.9.1981, JZ 1982 201. M Janssens, "Nervous Shock Liability: A comparative study of the law governing the principles of nervous shock in England, the Netherlands, Germany and France" (1998) 6 ERPL 77 at 87.

> "Indemnity payment is not limited to physically ascertainable injuries only but also covers those damages which cause a decrease of work capacity traceable to the victim's psychological reaction to an accident and his physical injuries."[79]

Furthermore, Janssens claims that "[N]either a physical nor a psychical predisposition debars a plaintiff from recovering in full."[80]

4.6 On the issue of rescuers, German courts are generally willing to award damages to "Good Samaritans".[81]

4.7 In the leading case of BGH 11 May 1971, the issue arose of whether or not the secondary victim plaintiff's claim was dependent upon that of the primary victim. The plaintiff's husband was fatally injured in a car accident for which he was partly responsible. The Bundesgerichtshof held that the plaintiff's damages should be reduced accordingly as "his [the primary victim's] tragedy becomes hers".[82] Moreover, it was determined that secondary victims may recover the remaining portion of damages from primary victims:

> "In such a case, where it would be wrong to require the primary victim or his heirs to make contribution to the tortfeasor, it is only fair that the primary victim's causal contribution to the accident should be borne not by the stranger who triggered the harm but by the dependant who was hurt only because of her personal relationship with the primary victim and her identification with him."[83]

The Bundesgerichtshof made a further observation that in the circumstance where the primary victim's death or injury can be solely attributable to his failure to take care of himself, the plaintiff would have no claim for her consequent injury. The Bundesgerichtshof maintained:

> "[A] person is under no legal duty, whatever the moral position may be, to look after his own life and limb simply in order to save his dependants from the likely physical effects on them if he is killed or maimed: to impose such a legal duty…would be to restrict a person's self-determination in a manner inconsistent with our legal system."[84]

5. Ireland

5.1 It has been observed that:

> "[T]he Irish courts engage in no such judicial semantics as do the House of Lords. They employ a more objective approach to such cases, based on a proper judicial application of the laws of negligence to all the facts of the case. The Irish courts are also acutely aware that no immutable rule can establish the extent of liability for

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[79] BGH 10.6.1958, NJW 1958, 1579 at 1580.
[80] M Janssens, "Nervous Shock Liability: A comparative study of the law governing the principles of nervous shock in England, the Netherlands, Germany and France" (1998) 6 ERPL 77 at 87.
[81] See B S Markesinis, *A Comparative Introduction to the German Law of Torts* 104-105.
[82] NJW 1971, 1883, translated in B S Markesinis, *A Comparative Introduction to the German Law of Torts* 112.
[83] *Ibid*.
[84] NJW 1971, 1883 at 1886. However an exception was deemed acceptable in "peculiar cases" such as where a person commits suicide in a "deliberately shocking manner".

every circumstance of the future. This case-by-case approach leads to a more equitable outcome than that based on hard, policy-driven requirements.[85]

5.2 While case law in Ireland is limited,[86] it is of significance. The first two 19th century common law decisions in which compensation was awarded for nervous shock were Irish[87] and the law is distinct from that of the United Kingdom.

5.3 A leading modern case is *Kelly v Hennessy*.[88] The plaintiff's husband and daughter were severely brain damaged as a consequence of a road traffic accident caused by the defendant's negligence. She received the news by telephone and travelled to the hospital where she saw her family in a distressing condition. She incurred PTSD and alleged that she had exhibited symptoms immediately following the telephone call. The Supreme Court laid down five criteria required to be fulfilled by a plaintiff claiming damages for nervous shock:

(a) The plaintiff must establish that he suffered a recognisable psychiatric illness;

(b) The plaintiff must establish that his recognisable psychiatric illness was "shock induced";

(c) The plaintiff must prove that the nervous shock was caused by the defendant's act or omission;

(d) The nervous shock sustained by the plaintiff must be by reason of actual or apprehended physical injury to the plaintiff or a person other than the plaintiff;

(e) The plaintiff must show that the defendant owed him a duty of care not to cause him a reasonably foreseeable injury in the form of nervous shock.

On *Kelly*, McMahon J said in the later case of *Curran v Cadbury (Ireland) Ltd*[89]:

> "From the Supreme Court's reliance on the Australian authorities in *Kelly*, it would seem that the Irish Courts will not be overawed by *White* [*Frost v Chief Constable South Yorkshire Police*] and may well choose…to go its own road, especially since *White* has its critics."

5.4 While Irish courts have retained the traditional "shock induced" requirement, according to Mullany and Handford they take a much more "positive attitude to the aftermath problem". [90] In *Mullally v. Bus Éireann*,[91] for example the plaintiff, whose husband and three sons had been injured in a serious bus accident, was awarded damages even though she did not reach the hospital where her sons were until approximately four hours after the accident. Denham J held that in the circumstances her PTSD was foreseeable. She stated that the question of law was "whether the chain of causation from the crash caused by

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[85] G Kelly, "Haunted by Hillsborough" (2001) Law Soc (of Ireland) Gazette, No 7 at 21.
[86] N J Mullany and P R Handford *Tort Liability for Psychiatric Damage* 9.
[87] *Byrne v Great Southern and Western Railway Co of Ireland* Feb 1884 (unreported); *Bell v Great Northern Railway Co of Ireland* (1890) 26 LR Ir 428.
[88] [1995] 3 IR 253.
[89] [2000] ILRM 343.
[90] N J Mullany and P R Handford, *Tort Liability for Psychiatric Damage* 148.
[91] [1992] ILRM 722.

the defendants to the illness of the plaintiff is reasonably foreseeable by the reasonable man".[92]

5.5 Irish courts award damages for stress at work. In *McHugh v The Minister of Defence and the Attorney General*[93] the plaintiff was awarded £218,900 for chronic PTSD incurred as a result of exposure to traumatic incidents occurring in the course of his work as a soldier serving in Lebanon. His employer had not ensured he received appropriate treatment and was therefore liable for his subsequent illness. In *Curran v Cadbury (Ireland) Limited*[94] McMahon J held that the plaintiff was entitled to damages as an involuntary participant and awarded her £18,700. She worked in a chocolate factory and had restarted a machine which had been stopped. The employer failed to tell her why the machine had been stopped. She subsequently realised there was a fitter in the machine and thought she had killed or seriously harmed him. Although regarding Mrs Curran as a "primary victim", McMahon J added that he was not convinced that such categorisation "did anything to assist the development of legal principles that should guide the courts in this complex area of law".[95]

5.6 Rescuers who suffer from a psychiatric injury are entitled to claim damages in Ireland. This is in line with the policy of England and Wales prior to *Frost v Chief Constable of South Yorkshire Police*.[96] Comparing the decision of the House of Lords in *Frost* with the approach taken by Irish courts, Kelly says:

> "It is very evident that the rescuer's situation at law would be differently viewed by an Irish court. His case would be decided on its facts, and on the evidence of medical experts and of other witnesses in all the circumstances of the case; it would be irrelevant whether or not he had been exposed to physical danger during the rescue."[97]

6. New Zealand

6.1 The Accidents Compensation Act 1972 set up a statutory compensation scheme for, among other things, personal injury by accident.[98] Any common law right of action was abolished to the extent that a claim could be made under the accidents compensation legislation. Claims for pure psychiatric injury by primary victims were held to fall under the legislation in *Accident Compensation Commission v E*[99] (nervous breakdown sustained as the result of attending a challenging management course) and *King v Accident Compensation Commission*[100] (smoke phobia caused by fire-bombing of the claimant's home). Guidance notes by the Accident Compensation Commission expressed the view that claims for psychiatric injury by secondary victims should also be made to the Commission rather than the courts.

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[92] *Ibid* at 730.
[93] High Court, 28 Jan 2000 (unreported).
[94] [2000] ILRM 343.
[95] (2000) Law Soc (of Ireland) Gazette, No 4 at 38.
[96] [1999] 2 AC 455.
[97] G Kelly, "Haunted by Hillsborough" (2001) Law Soc (of Ireland) Gazette, No 7, 18 at 21.
[98] S 27. The 1972 Act was amended and consolidated by the Accidents Compensation Act 1982, s 2 of which defined accident to include "the physical and mental consequences of any such injury or of the accident".
[99] [1992] 2 NZLR 426.
[100] [1992] NZAR 65.

6.2 The Accident Rehabilitation and Compensation Insurance Act 1992[101] redefined the concept of personal injury so as to include in the statutory scheme mental injury only where it is the outcome of physical injuries to any person. In *Queenstown Lakes District Council v Palmer*[102] the Court of Appeal overruled earlier High Court decisions to the effect that the legislation covered claims by secondary victims. Mr Palmer sustained psychiatric injuries as a result of seeing his wife drown in a white-water rafting accident. The Court of Appeal held that such a claim was not within the scope of the 1992 Act and could therefore proceed at common law. Because of the accidents compensation legislation, the common law in the field of psychiatric injury is relatively undeveloped. As Mullany states:

> "[T[he New Zealand Court of Appeal has the luxury of an unsoiled local common law. Other ultimate courts of appeal might well wish they had the opportunity to start with a clean slate".[103]

6.3 To date, the courts have naturally been influenced by other jurisdictions. It has been held that a plaintiff must have a recognisable psychiatric illness and that grief per se is not the subject for a claim of damages.[104] It is unclear what position the courts will take on matters of proximity etc as there do not appear to have been any relevant cases. In *van Soest v Residual Health Management Unit*,[105] the relatives' claims were dismissed on different grounds. The majority, however approved of the approach in Alcock saying "Provided the particular relationship, whether family (de jure or de facto) or friend, is proven to be close and loving, there will be sufficient relational proximity."[106] They reserved their position on whether claimants had to be present at and see the accident or its immediate aftermath, but thought that it could well be that these requirements should be relaxed along the lines of the Law Commission's recommendations.[107] Thomas J (dissenting) was for abandoning the rules dependent on the geographical, temporal and relational proximity of the plaintiff to the accident and accepted reasonable foreseeability as the sole test of liability for nervous shock.[108]

7. South Africa

7.1 Prior to 1973, South African law "languished in the doldrums"[109] in that a claim for psychiatric injury was restricted to cases where the plaintiff was in fear for his or her own safety.[110] However this restrictive rule was abandoned in *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk*[111]. The Appellate Division held:

> "[T]here is no reason in our law why somebody who, as the result of the negligent act of another, has suffered shock or psychiatrical [sic] injury with consequent indisposition, should not be entitled to compensation, provided the possible

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[101] Ss 4 and 8.
[102] [2000] 1 NZLR 549.
[103] N J Mullany "Accidents and Actions for Damage to the Mind – Kiwi Style" (1999) 115 LQR 596.
[104] *The Queen v Moffat* [2000] NZCA 252; *van Soest v Residual Health Management Unit* [2000] 1 NZLR 179, but see Thomas J's dissent at 201 where he says that claims should be competent for mental suffering approaching the order of a psychiatric illness.
[105] [2000] 1 NZLR 179.
[106] *Ibid* at 199.
[107] *Ibid*.
[108] *Ibid* at 201.
[109] P Q R Boberg, *The Law of Delict Vol 1: Aquilian Liability* 174.
[110] See *Waring & Gillow Ltd v Sherbone* 1904 TS 340; *Sueltz v Bolttler* 1914 EDL 176 and *Mulder v South British Insurance Co Ltd* 1957 (2) SA 444 (W).
[111] 1973 (1) SA 769.

consequences of the negligent act should have been foreseen by the reasonable person who should find himself in the place of the wrongdoer. This does not refer to insignificant emotional shock of short duration which has no substantial effect on the health of the person, and in respect of which compensation would not ordinarily be recoverable."[112]

7.2 Since then the law has developed in a relatively relaxed manner. The *Alcock* control mechanisms are not so rigidly in place in South Africa. With respect to the first requirement of a close tie of love and affection, South African law accepts that the closer the relationship between primary victim and traumatised person, the more reasonable the inference that such shock is reasonably foreseeable.[113] There does not appear to be a strict line drawn as to which relationships are deemed sufficiently close. In *Bester* the victim's 11 year old brother was entitled to damages while in *Masiba & Anor v Constantia Insurance Co*[114] the relationship between a man and his car was effectively close enough to result in a successful claim.[115]

7.3 In *Barnard v Santam Bpk*[116] the Supreme Court of Appeal established that neither of the remaining *Alcock* requirements (physical and temporal proximity; direct perception of the accident) need be met in South African law. This case involved a motor vehicle accident in which the plaintiff's son was killed due to the negligence of the defendant. The plaintiff was not present at the accident and received the distressing news from her husband who had, in turn, received the information over the telephone. She did not actually perceive the accident and was not involved in the "immediate aftermath". The court determined that policy considerations should not necessarily exclude liability in all hearsay cases. The driver's conduct did in fact cause the mother's shock. It was reasonably foreseeable that the mother of a young child killed in an accident would suffer psychiatric trauma.[117] Accordingly, the fact that her "trauma" (regarded as more than "mere emotional grief") was brought about by the telephone call was in the circumstances immaterial. The court also considered that if the plaintiff's psychiatric injury had been sustained in the absence of any shock to her senses she would not have failed for that reason. Mullany considers *Barnard* to be the "most impressive appellate decision in recent years" and claims it "highlights how unnecessarily convoluted matters have become elsewhere".[118]

7.4 South Africa extends the thin skull rule to psychiatric injury cases where the psychiatric injury is a result of physical injury. In *Gibson v Berkowitz*,[119] while the "nervous

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[112] *Ibid* at 769.
[113] *Barnard v Santam Bpk* 1999 (1) SA 202.
[114] 1982 (4) SA 333.
[115] However it is suggested that Berman AJ felt sympathy for the plaintiff in this case and awarded damages in the only way open to him. The deceased (on behalf of whom the plaintiff was suing), his wife, niece, child and child's friend were travelling in his car when it stalled. While pushing the car, the deceased was attacked by a man attempting to steal his watch. A car (the driver of which was not negligent) then knocked down his wife and in helping her, the deceased saw another car hit his stationary vehicle with the children inside. In running towards his car he had a stroke and died three days later. The driver of the second car *was* negligent but could not have foreseen there were children inside. Instead Berman AJ held at 342 that the reasonable driver "ought to, and would, have foreseen that, among the bystanders there present, who must have been clearly visible standing about on the well-lit road, was the owner of that car, and that such owner might well suffer considerable shock at the sight of his car being hit…with every expectation of seeing it topple over onto the railway track below." This case can be distinguished from *Attia v British Gas plc* [1988] QB 304 as no contract existed between the driver of the car and the deceased.
[116] 1999 (1) SA 202.
[117] Although her claim for "mourning" was dismissed, her psychiatric disorder was allowed.
[118] N J Mullany, "Personal Perception of Trauma and Sudden Shock – South Africa Simplifies Matters" (2000) 116 LQR 29.
[119] 1996 (4) SA 1029 (W).

shock" actually resulted from a physical injury, it is significant that the plaintiff was able to recover damages attributable to pre-existing psychological weaknesses. It was held to be irrelevant whether the precise nature and extent of the plaintiff's psychological trauma were foreseeable.

8. United States of America (USA)

8.1 Generally speaking, a restrictive attitude is adopted regarding liability for psychiatric injury suffered by secondary victims, but the position varies from state to state. Traditionally, all victims were required to have been inside the "zone of danger". Indeed, it was as late as 1968 when, in *Dillon v Legg*,[120] the Supreme Court of California, by a bare majority, became the first court to extend the scope of liability to include claimants who were outside the zone. A young girl was fatally injured following a road accident in which her mother and sister had also been knocked down by the defendant. Both of them witnessed the accident and sued for psychiatric injury. The sister was regarded as having been within the zone of danger while the mother was not. Tobriner J (one of the majority) thought that the zone-of-danger rule was hopelessly artificial in that would deny recovery in the mother's situation and grant it in the sister's. The court adopted "control mechanisms" to be used in relation to secondary victims in order to determine whether the victim's psychiatric injury was reasonably foreseeable. These were physical proximity to the accident, direct perception of the accident and close relationship with the victim. Subsequent Californian cases have applied and refined these. For example, in *Thing v La Chusa*[121] it was held that a plaintiff must be present at the accident and know that the injury is in fact occurring.

8.2 Other states allowing liability for plaintiffs outside the zone of danger include Nebraska[122] and Wyoming.[123] Interestingly, a condition required to be satisfied for a successful claim in both these states is that the "primary victim" must sustain a serious or fatal injury. While Wyoming's control mechanisms parallel those of California, courts in Nebraska do not require contemporaneous observance of the accident or injury.[124] States retaining the zone of danger test include North Dakota,[125] Minnesota,[126] Missouri[127] and Colorado.[128] According to Markesinis and Deakin for some time after *Dillon v Legg*[129] the criteria of having been at or near the accident, direct and contemporaneous perception of the accident and a close relationship with the immediate victim were treated as guidelines in deciding whether the claimant's psychiatric injury was reasonably foreseeable. They have recently come to be regarded as requirements so that failure to satisfy any one of them is fatal to the claim.[130]

8.3 The terminology used in the USA to describe what constitutes "psychiatric injury" for legal purposes is inconsistent. It has been noted that courts in the USA:

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[120] (1968) 29 ALR 3d 1316.
[121] (1989) 48 Cal 3d 644.
[122] The zone of danger test was abandoned in *James v Lieb* (1985) 375 NW 2d 109.
[123] *Gates v Richardson* (1986) 719 P 2d 193 (Wyo).
[124] *Vosburg v Cenex-Land O'Lakes Agronomy Co* (1994) 513 NW 2d 870, 873 (Neb).
[125] *Whetham v Bismarck Hospital* (1972) 197 NW 2d 678 (ND).
[126] *Stadler v Cross* (1980) 295 NW 2d 552.
[127] *Asaro v Cardinal Glennon Memorial Hospital* (1990) 799 SW 2d 595.
[128] *James v Harris* (1986) 729 P 2d 986.
[129] (1968) 29 ALR 3d 1316 (Calif).
[130] B S Markesinis and S F Deakin, *Tort Law* 217-8.

> "…have adopted the undisciplined practice of referring to "emotional distress" and "mental distress" to cover both the initial emotional reaction to traumatic stimuli and the secondary more serious physical and psychiatric consequences which may flow from them."[131]

However, Markesinis and Deakin consider that[132]:

> "[A]ll courts try to restrict recovery to serious emotional distress and payment of claims for transient or slight distress is actively discouraged. Moreover, the precipitating event must have been one that would produce serious emotional distress…in a reasonably strong-minded person".

Thus, for example, it was held in *Asaro v Cardinal Glennon Memorial Hospital*[133] that in order to claim successfully as a "secondary victim" the emotional distress or mental injury must be medically diagnosable and must be of sufficient severity so as to be medically significant. In the Californian case of *Thing v La Chusa*[134] the court held that the plaintiff must suffer emotional distress beyond what would be expected in a disinterested witness.

8.4 Many states allow recovery for emotional injury produced by having witnessed the injury or death of a loved one provided the claimant had a close relationship with the loved one. Close relationships tend to be confined to the immediate family, ie parents, children, spouses and siblings.[135] In *Thing v La Chusa*[136] the Californian Supreme Court said that recovery should be limited to those who lived in the same household or parents, grandparents, siblings and children of the immediate victim. In the New York case of *Trombetta v Conkling et al*[137] the plaintiff witnessed an accident involving her aunt who had been killed instantly. The plaintiff's mother had died when she was a child and her aunt was allegedly the maternal figure in her life. The court took a restrictive view and disallowed the claim. Bellacosa J said:

> "On firm public policy grounds, we are persuaded that we should not expand the cause of action for emotional injuries to all bystanders who may be able to demonstrate a blood relationship coupled with significant emotional attachment or the equivalent of an intimate, immediate familial bond."[138]

Of course, it is significant that New York is restrictive within this area of law generally, retaining the zone of danger rule.

8.5 Regarding claims by secondary victims where the immediate victim was wholly or substantially responsible for his or her own death or injury, Handford states[139]:

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[131] NJ Mullany, "Fear for the Future: Liability for Infliction of Psychiatric Disorder", chapter 5 of Mullany (ed), *Torts in the Nineties* (LBC Information Services, 1997), quoted by Blanchard J in *van Soest v Residual Health Management Unit* [2000] 1 NZLR 179 at 196.
[132] B S Markesinis and S F Deakin, *Tort Law* 216.
[133] (1990) 799 SW 2d 595 (Missouri).
[134] (1989) 48 Cal 3d 644.
[135] See, for example, *Dillon v Legg* (1968) 29 ALR 3d 1316 (Calif); *Landreth v Reed* (1978) 570 SW 2d 486 (Texas); *Garrett v City of New Berlin* (1985) 362 NW 2d 137 (Wisc).
[136] (1989) 48 Cal 3d 644.
[137] (1993) 605 NYS 2d 678
[138] *Ibid*.
[139] P R Handford, "Psychiatric Damage Where The Defendant Is The Immediate Victim" (2001) 117 LQR 397 at 402.

"Though the development of liability for the negligent infliction of "emotional distress" has generally proceeded more slowly in the US than elsewhere in the common law, there does not seem to have been any difficulty with recognition of liability for self-inflicted harm in appropriate circumstances: see eg *Devereux v Allstate Insurance Co*;[140] *Guillory v Arceneux*;[141] *Camper v Minor*[142]".

8.6 In *Dillon v Legg*[143] the Californian Supreme Court allowed recovery for psychiatric injury suffered by the mother and older sister of a child killed by a car. They had both witnessed the accident. The older sister was also injured but the mother was not within the zone of danger. The driver claimed that the pursuers had been contributorily negligent which at that time was a complete defence. Tobriner J considered the issue of whether the secondary victim's claim should be dependent upon that of the immediate victim. He said:

"If any such defence is sustained and the defendant found not liable for the death of the child because of the contributory negligence of the mother, sister or child, we do not believe that the mother or sister should recover for the emotional trauma that they have allegedly suffered. In the absence of the primary liability of the tortfeasor for the death of the child, we see no ground for an independent and secondary liability for claims for injuries by third parties."

8.7 The approach to those who suffer psychiatric injury from feeling themselves responsible for unwittingly inflicting harm on others due to unknown defects in equipment (the so-called "unwilling participants") again varies from state to state. In California, for example, the plaintiff in *Kately v Wilkinson*[144] was deemed a "direct victim" on the basis that the defendant should have foreseen that operators of its defective boats like the plaintiff would feel responsible for injuries caused to the water-skiers they towed and that this sense of guilt could result in severe emotional distress. Conversely, in the Utah case of *Straub v Fisher and Paykel Health Care*[145] Mrs Straub was denied damages for her severe emotional distress. During the course of her employment as a respiratory therapist she had treated a patient with a ventilator manufactured by the defendants. The patient died due to the fact the ventilator was defective. It was held that a plaintiff cannot recover for negligent infliction of emotional distress unless a direct victim of the defendant's negligence.

[140] (1990) 557 So 2d 1091 (La).
[141] (1991) 580 So 2d 990 (La).
[142] (1996) 915 SW 2d 437 (Tenn).
[143] (1968) 29 ALR 3d 1316 at 1320 –1321.
[144] (1983) 195 Cal Rptr 902.
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Appendix B

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