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EXTENDED SHOCK

JONES & OTHERS \. *WRIGHT*[1]

ON 15 April 1989, Liverpool Football Club were to play Everton Football Club in a semi-final of the Football Association Cup. The venue was the Hillsborough Stadium (home of Sheffield Wednesday Football Club - a neutral ground). The game was watched "live" by people all over the world. Play commenced, but went on for barely six minutes before the police stopped the match. Overcrowding had created such intense pressure that thousands of spectators were crushed. Ninety-five of them died and hundreds were injured. Relatives of sixteen of the injured and dead brought a consolidated test case against the Chief Constable of South Yorkshire in an action for negligence.

The decison of the English Court of Appeal in *Jones & Others* v. *Wright* is either a signal to make renewed progress in the development of the law of negligence (which has seen some hasty retreats by the House of Lords in areas such as economic loss) or part of the continued slide back to the approach taken before the advances made in the late 1970s and early 1980s.

McLoughlin v. *O'Brian*[2] ("*McLoughlin*") represented the last major advance in the area of claims for nervous shock. Prior to that decision, it was generally accepted that damages for nervous shock could only be awarded to persons who feared for their own personal safety[3] or who feared for the safety of very close relatives such as their children[4] and then only if they in some way witnessed the tortious event at the time of its occurrence. Hence, the unfortunate fishwife in *Bourhill* v. *Young*[5] failed in her claim because the defendant's tortious conduct injured a third party unrelated to her and she herself did not fear for her own safety, but suffered nervous shock from seeing the blood of the third party. The only reported case prior to *McLoughlin* where a plaintiff succeeded when he was not actually at the scene of the accident was *Boardman* \. *Sanderson*.[6] This decision was justified on the ground that

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1 [1991] 3 All E.R. 88.
2 [1982] 2 W.L.R. 982.
3 *Dulieu* v. *White* [1901] 2 K.B. 669.
4 *Hambrook* v. *Stokes Bros.* [1925] 1 K.B. 141.
5 [1943] A.C. 92.
6 [1964] 1 W.L.R. 1317.

the plaintiff father who heard his son's scream suffered the injury of nervous shock through learning of the event by his own unaided senses at the time of the accident.[7] In *McLoughlin,* a woman was awarded damages for nervous shock suffered after she saw with her own eyes the extent of the injuries caused by the defendant to her husband and children even though she saw the injuries some time after the accident and some distance away from the scene. This modified the requirement that the plaintiff must be present at the scene of the accident to include plaintiffs who were not so present, but who witnessed the immediate aftermath of the accident.

Now, almost ten years after *McLoughlin,* the English courts have had the opportunity to consider its scope and effects when applied to the events at Hillsborough Stadium. Hidden J. in the High Court[8] allowed claims for nervous shock (defined as "psychiatric illness") suffered not only by parents or children of the injured, but also by their siblings. His decision is important in that he clearly defined the previously unclear line concerning proximity of relationship, and excluded similar claims by uncles, aunts, and grandparents. Where this line is to be drawn is, perhaps, one of the most controversial issues in the case. Debate can be endless when one talks about the basis for drawing this line, since categories such as, for example, fiances (arguably as close as newly-wed spouses) were excluded by Hidden J.[9]

The second novelty of Hidden J.'s decision is that he allowed claims for nervous shock even though the plaintiffs were not present at the scene of the accident and had not seen the injured persons personally but through the "eye" of television cameras. However, in this respect, Hidden J. applied a remarkable and significant limitation. The learned judge saw no difference between seeing the injuries or accident through a plaintiff's own eyes and watching the event through the eye of the camera, but held that the line has to be drawn between watching the event through television "live" and watching it through a delayed telecast. He also held that, while nervous shock caused by watching live coverage was recoverable, nervous shock caused by listening to a live broadcast over the radio was not. The implications of the decision in *Boardman* v. *Sanderson*[10] seem to have been ignored in this respect.

Hidden J. knew, and clearly indicated more than once that, whatever his decision, there was likely to be an appeal, probably going right up to the House of Lords. The importance of this case on appeal was to be not just whether Hidden J. was right or wrong in extending the concepts of proximity of relationship and of time and space, but whether, in matters of policy, the courts ought to defer to Parliament and avoid

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7 *Cf. King* v. *Phillips* [1953] 1 Q.B. 429.
8 [1991] 1 All E.R. 353.
9 This illogicality was exposed by the Court of Appeal, *supra,* note 1, at pp. 99, 113 and 120.
10 *Supra,* note 6.

development of the law. The House of Lords in *McLoughlin* considered this point and bravely ventured to establish new ground. Would the appellate courts in a more conservative era retreat in the way that, for example, *D. & F. Estates* \. *Church Commissioners*[11] retreated from *Anns* v. *Merton District Council*[12] prior to its demise at the hands of *Murphy* v. *Brentwood District Council*[13] in 1990?

At the second stage of the journey to the House of Lords, the plaintiffs met with disappointment when the Court of Appeal dismissed the appeals of those plaintiffs who were unsuccessful before Hidden J., and allowed the cross-appeal of the defendant in those cases where Hidden J. found for the plaintiffs.[14]

However, the prospects for applying (or even extending) *McLoughlin* have not necessarily been as adversely affected as this finding might suggest. With the exception of Parker L.J., the Court of Appeal seemed inclined to extend the category of persons who may claim for nervous shock. Nolan L.J. explained that the basis for awarding damages for nervous shock sustained by parents or spouses is that this category of plaintiffs is distinguished from ordinary bystanders because of "the depth of their love and concern."[15] He went on to say that he "saw no difficulty in principle in requiring a defendant to contemplate that the person physically injured or threatened by his negligence may have relatives or friends whose love for him is like that of a normal parent or spouse, and who in consequence may similarly be closely and directly affected by nervous shock where the ordinary bystander would not."[16] However, he held that the plaintiffs in this case could not succeed because neither the pleadings nor the judgment of Hidden J. depended "crucially and essentially upon the existence of a close tie of relationship, a special bond of love, between the plaintiffs and the immediate victims. Without that link, the necessary proximity of the relationship cannot be established as a matter of fact in any case before us."[17]

Parker L.J. agreed that the basis for awarding damages for nervous shock is "relationship and care" as expounded by Lord Wilberforce in *McLoughlin*, which meant that, on the face of it, it should therefore follow that the presumption in favour of parents and spouses was rebuttable while persons of no blood tie could be let in.[18] He held that he was prepared to accept that there could be a *prima facie* presumption in the case of a parent or spouse that a defendant can reasonably foresee that his act or omission will be likely to cause psychiatric illness to the plaintiff parent or spouse; and the plaintiff is someone so closely

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11 [1988] 3 W.L.R. 386.
12 [1978] A.C. 728.
13 [1990] 2 All E.R. 908.
14 *Supra*, note 1.
15 *Ibid*., at p. 120.
16 *Ibid*.
17 *Ibid*., at p. 121.
18 *Ibid*., at p. 99.

and directly affected by the defendant's act or omission that the defendant ought reasonably to have him in contemplation as being so being affected. However, he held that, apart from the category of parent and spouse, a defendant need not reasonably contemplate that others may be amongst those closely and directly affected by his act or omission and that a defendant could not, therefore, owe a duty to other categories of plaintiffs.[19]

It is clear that Parker L.J.'s approach differs substantially from that of Nolan L.J., who was prepared to follow through the logic of using "relationship and care" as a basis for bringing claims. Parker L.J. seemed hesitant, perhaps for fear of opening the proverbial floodgates. Stocker L.J. accepted the category of parent and spouse as fixed, with "flexibility being given to the law by allowing as an exception in any given case the claims of more remote relations, but only if close scrutiny justifies the extension."[20] Like Nolan L.J., he held that Hidden J. did not scrutinize the evidence relating to the degree of "love and affection" on the part of the plaintiffs for the dead and injured and, therefore, held that Hidden J. was wrong in holding that, in the circumstances of the case, he could regard the brothers and sisters as being within the relationship which entitled them to recover damages. However, unlike Nolan L.J. (who seemed to have reviewed the pleadings to see whether such facts were pleaded), Stocker L.J., made no mention of the absence of such pleadings.[21] The uncertainty evident in Stocker L.J.'s decision is reflected in his prayer for parliamentary intervention.[22]

In the judgment of the Court of Appeal, the witnessing of the traumatic events in this case through television and radio broadcasts failed the test of proximity. Nolan L.J. held that, while the defendant could foresee a live telecast of the game, he could not be expected to foresee that the horrifying and gruesome scenes would be shown. He noted that the impact of a transmitted incident can equal, if not exceed, that experienced by those on the spot, and he seemed to hold the view that, in some cases, such broadcasts could pass the test of proximity of time and space, but decided that, on the facts of this case, the broadcast was either not foreseeable or not sufficiently gruesome.[23] Without further guidance, this must be an invitation to more litigation. Furthermore, his Lordship placed great importance on the failure to prove that the element of immediate and horrifying impact on the viewer was foreseeable. This evidential approach necessarily gives rise to the possibility that some other television cases might succeed. Indeed, Nolan L.J. himself expressly illustrated an example of a publicity-seeking organisation making

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19 *Ibid.*, at p. 100.
20 *Ibid.*, at p. 113.
21 "It may be that had such scrutiny been carried out, the facts might have entitled [the brothers and sisters] to recover damages and the extension in their favour be justified." *per* Stocker L.J., *ibid.*, at p. 115.
22 *Ibid.*, at *p.* 113.
23 *Ibid.*, at p. 122.

arrangements for children to go up in a balloon and having the event televised for viewing by the children's parents. His Lordship was of the view that, if the balloon crashed as a result of the organisers' negligence, it would be hard to deny that they owed a duty of care to the parents watching the event on television.[24]

Stocker L.J. would not equate television broadcasts with a plaintiff being within sight and sound of the event or its aftermath. He considered that the ability of the television cameras to catch the event from many angles and also to show close-ups with a "zoom" lens made the process of television too artificial and selective to be equated with the perception of someone at the scene.[25] Parker L.J. also refused to allow a claim based on watching a television broadcast because he treated such broadcasts as a relay of information by a third party. "A person who informs a parent of a victim of his death or multiple injuries cannot be held liable for obvious reasons and the wrongdoer cannot in my view be held liable for psychiatric illness resulting from what the parent is told."[26]

The House of Lords will now have to endorse or reject Lord Wilberforce's principle of "relationship and care" in *McLoughlin*, and it will have to decide which (if any) of the differing approaches taken by members of the Court of Appeal in this case it prefers. It will also have to lay down clearer guidelines as to how foreseeability is to be defined in such cases. In relation to the test of proximity of time and space, their Lordships will have to define the status of radio and television broadcasts. Will they regard the camera's eye as being the same as a human eye (as Hidden J. did) or will they regard the camera's eye as abnormal, and, consequently, hold that a defendant may not foresee what will actually be broadcast? More importantly, will the House of Lords affirm the incremental approach[27] to the imposition of a duty of care in negligence or revert to the wider approach of *McLoughlin!* The people of Liverpool (and the Chief Constable of South Yorkshire), together with academics in the common law world, wait with bated breath.

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Postscript: While the above case comment was in press, the House of Lords reached a decision dismissing the appeal. See *The Times*, 29 November 1991, p. 31.

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24 *Ibid.*, at p. 122.
25 *Ibid.*, at p. 116.
26 *Ibid.*, at p. 101.
27 Recently embraced by the House of Lords in *Caparo industries Plc.* v. *Dickman* [1991] 1 All E.R. 568, at pp. 573-574.

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