Singapore Journal of Legal Studies
[1992] pp. 528 – 541

CASE COMMENTS

VINDICATION OF THE THREE PROXIMITIES

Alcock & Ors. v. *Chief Constable of the South Yorkshire Police*[1]

SINCE 1924[2] it has been judicially recognised that a person who has suffered a medically-recognised psychiatric illness due to his perception of an accident can in an appropriate case recover damages from the person whose negligence caused the accident. The typical issue in such "nervous shock" cases is whether a particular set of circumstances can give rise to a duty of care.

The landmark decision of *McLoughlin* v. *O'Brian*[3] sent out fairly strong signals in favour of expanding the boundaries of liability for nervous shock and these were gratefully utilised in subsequent cases.[4] Tortious liability for nervous shock thus embarked on a phase of fairly rapid expansion. However, the House of Lords in *Alcock* has effectively clamped down on such a trend, negating much of the impact of the more liberal approaches taken in the nine years between the two decisions.

In *McLoughlin* the plaintiff's husband and two of her children were seriously injured and a third child was killed in an accident caused by the defendant's negligence. The plaintiff was informed of the accident an hour later and was taken to the hospital where she saw her husband and one daughter in their injured condition and covered with dirt and oil. She also heard her son shouting and screaming and was told that her other daughter had died. She brought an action against the defendant claiming damages for the nervous shock, distress and injury to her health caused by seeing and hearing the results of the accident.

The House of Lords unanimously allowed the claim. The two notable and distinct approaches were those of Lord Wilberforce and Lord Bridge. Lord Wilberforce felt that foreseeability did not automatically lead to a

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1 [1991] 4 All E.R. 907 (hereafter *Alcock*).
2 *Hambrook* v. *Stokes Bros.* [1925] 1 K.B. 141.
3 [1982] 2 All E.R. 298, [1983] 1 A.C. 410, [1982] 2 W.L.R. 982 (hereafter *McLoughlin*).
4 See *infra,* note 6, *et seq.*

duty of care and that because nervous shock was capable of affecting a wide range of people some limitation had to be placed on the extent of admissible claims. His Lordship held that it was necessary in any claim to consider three proximities: the class of persons whose claims should be recognised (relational proximity), the temporal and spatial proximity of such persons to the accident (physical proximity), and the means by which the shock is caused (perceptional proximity). Spouses and parents of the accident victims would satisfy relational proximity while other relationships would be carefully scrutinised. Perceptional and physical proximity would be satisfied if the plaintiff perceived by sight or hearing the accident or its "immediate aftermath".

Lord Bridge on the other hand thought that the defendant's duty depended on bare reasonable foreseeability of injury by shock, as any attempt to limit liability by reference to criteria such as those mentioned by Lord Wilberforce would impose arbitrary limits.[5]

The cases after *McLoughlin* generally preferred Lord Bridge's test of reasonable foreseeability *simpliciter* to Lord Wilberforce's "three proximities" test and, perhaps not surprisingly, also demonstrated a marked expansion of the boundaries of liability for nervous shock.

In *Jaensch* v. *Coffey*[6] the High Court of Australia allowed recovery on facts similar to those of *McLoughlin.*[7] Brennan J. treated *McLoughlin* as based on the legal criterion of reasonable foreseeability.[8] In *Wigg* v. *British Railways Board*[9] Tucker J., after considering *McLoughlin,* held that the fundamental question in each case was whether the nervous shock was reasonably foreseeable.

A case which tried to set new boundaries was *Whitmore* v. *Euroways Express Coaches.*[10] The surprising decision of Comyn J. was that damages were recoverable for "ordinary shock", that is, shock in its ordinary, everyday meaning and not in a medical or psychiatric sense. However, it is virtually certain that this decision will not survive *Alcock.* It would also seem to fly in the face of the recent Court of Appeal decision in *Nicholls* v. *Rushton.*[11]

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5 Lord Scarman agreed with Lord Bridge. Lords Russell and Edmund-Davies felt that foreseeability was not a universal test and that in an appropriate case policy considerations might be relevant, but that on the facts of *McLoughlin* there were no policy reasons which justified refusal of the claim.

6 (1984) 54 A.L.R. 417.

7 A slight extension may be that the plaintiff here suffered nervous shock as a result of a combination of what she observed and what she was told at the hospital. The High Court of Australia held that this did not preclude recovery of damages.

8 Contrast the judgments of Gibbs C.J. and Deane J. who adopted but did not entirely agree with the general approach of Lord Wilberforce.

9 (1986) 136 N.L.J. 446. See also *Galt* v. *British Railways Board* (1983) 133 N.L.J. 870.

10 *The Times, 4* May 1984.

11 *The Times,* 29 June 1992.

In this case damages were refused to a plaintiff who was physically unhurt in an accident but claimed for a nervous shock reaction falling short of an identifiable psychological illness.

The controversial case of *Attia* v. *British Gas plc*[12] also attempted to extend considerably the existing boundaries of recovery for nervous shock. The defendants in that case negligently set fire to the plaintiff's house. The plaintiff allegedly suffered nervous shock as a result of witnessing her house on fire, and for this she claimed damages. The Court of Appeal unanimously refused to strike out the claim as disclosing no cause of action. The court appeared to treat the issue as one of remoteness,[13] but two of the judges favoured Lord Bridge's test.[14] Much more importantly, the possibility of a claim for nervous shock caused by witnessing property damage was judicially sanctioned.

Another two recent pre-*Alcock* decisions of the English High Court are worth mentioning : *Hevican* v. *Ruane*[15] and *Ravenscroft* v. *Rederiaktiebolaget.*[16] In *Hevican,* the plaintiff was told of his son's death less than two hours after the accident and he identified the body (not disfigured in any way) in the mortuary an hour later. Subsequently, he suffered reactive depression. Mantell J. admitted that the plaintiff's condition was not a result of coming upon the accident's aftermath but rather a consequence of the realisation in stages that his son was dead. Mantell J. noted the presence of *dicta* to the contrary, but felt justified in applying Lord Bridge's approach in *McLoughlin.* The plaintiff thus succeeded. In *Ravenscroft* the plaintiff was told of her son's death in an accident and she arrived at the hospital within twenty minutes but was not permitted by her husband to see her son's body. Ward J. allowed her claim for nervous shock. The learned judge noted the division of opinion in *McLoughlin* but concluded that the category of negligence pertaining to nervous shock was not closed and went on to hold that the boundaries of the duty of care could be extended for such a case.

The post-*McLoughlin* cases prior to *Alcock* thus showed a general willingness to extend the limits within which recovery for nervous shock could be allowed. In particular, *Attia, Hevican,* and *Ravenscroft* seemed eager to venture into unexplored territory. Of equal significance was the fact that no decision expressly supported or closely followed the "three proximities" test propounded by Lord Wilberforce in *McLoughlin. Alcock* thus marked a dramatic return to the approach of Lord Wilberforce.

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[12] [1987] 3 All E.R. 455 (hereafter *Attia*).
[13] Such an analysis is highly questionable. See *infra,* note 49.
[14] See *supra,* note 12, *per* Woolf L.J. at pp. 460-461 and Bingham L.J. at pp. 463-464.
[15] [1991] 3 All E.R. 65 (hereafter *Hevican*).
[16] [1991] 3 All E.R. 73 (hereafter *Ravenscroft*).

The Decision in Alcock

Shortly before the commencement of an FA Cup semi-final at Hillsborough Stadium the South Yorkshire police force, which was responsible for crowd control, allowed an excessively large number of people into a section of the ground which was already full. The result was that ninety-five people were crushed to death and over four hundred were injured. Footage of the tragedy was transmitted in simultaneous television broadcasts, but in accordance with broadcast guidelines the broadcasts did not depict the suffering of recognisable individuals.

Sixteen claims for nervous shock were brought,[17] based either on the effect of watching the television broadcasts or the effect of identifying the bodies of relatives at the mortuary some time later. The Chief Constable admitted liability in negligence for the deaths and physical injuries but denied owing any duty of care to the plaintiffs in respect of their nervous shock. Hidden J. held that the plaintiffs who were at the ground or who saw the accident on simultaneous television broadcasts could claim if the victim was a son, spouse or sibling. The result was that ten of the plaintiffs succeeded in their claims while six failed. The defendant appealed in the cases of nine of the ten successful plaintiffs[18] and the six unsuccessful plaintiffs cross-appealed to the Court of Appeal.

The Court of Appeal decided against the plaintiffs in all the appeals.[19] It was held that only victims' parents or spouses who were at the actual scene of the disaster could claim, and none of the plaintiffs came within these criteria. Viewing of the simultaneous television broadcasts was held to be insufficient. Like Hidden J., all three judges[20] quoted at length from Lord Wilberforce's judgment in *McLoughlin* and expressly[21] or impliedly made the "three proximities" approach the basis of their decisions. Ten of the plaintiffs, all of whom had relatives who died in the disaster, appealed to the House of Lords.

It is to be noted that within the claims were "a multiplicity of permutations of factual situations".[22] There were different relationships between the claimants and the victims[23] as well as variations of the medium through

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[17] *Sub nom. Jones* v. *Wright* [1991] 1 All E.R. 353.

[18] It is not known why there was no appeal in the case of Mr. William Pemberton, the remaining successful plaintiff.

[19] *Sub nom. Wright* v *Jones* [1991] 3 All E.R. 88. See Choo Han Teck, "Extended Shock" [1991] S.J.L.S. 491; 135 S.J. 620.

[20] Parker, Stocker and Nolan L.J.J.

[21] *Supra,* note 19, per Stocker L.J. at p. 111.

[22] *Per* Hidden J. in *Jones* v. *Wright, supra,* note 17, at p. 361.

[23] Namely, five brothers, a grandson, a brother-in-law, a fiance and two sons.

which the accident was perceived.[24] The diversity of the facts supporting each claim, the fact that no previous case dealt with such a major tragedy and the element of perception through a mass medium left the House of Lords with no choice but to embark on a comprehensive discussion of the relevant principles.

The House of Lords[25] rejected all the claims as they held that none of the plaintiffs satisfied all the criteria necessary for a nervous shock claim. The approach of Lord Wilberforce in *McLoughlin* was quoted by all four of the Law Lords who gave speeches[26] and the analyses made use of the same criteria as the three proximities.[27] It was abundantly clear that their Lordships did not consider that reasonable foreseeability could be the sole test of liability for nervous shock.[28]

However, it is to be noted that their Lordships were at pains to fit Lord Wilberforce's three proximities approach into the latest three-part test for formulation of duty generally, that is, foreseeability, proximity and, justice and reasonableness.[29] Their Lordships seemed to equate at least two[30] of Lord Wilberforce's three proximities with the notion of proximity as used in the context of the three-part test.[31] This sort of reconciliation is not entirely correct conceptually as Lord Wilberforce's three proximities were arrived at as a result of the application of the now-defunct two-stage test (foreseeability qualified by policy) as the basis for formulating duty. Lord Wilberforce's basis for the three proximities was thus arguably public policy, but their Lordships in *Alcock* have apparently transformed the proximities into legal benchmarks of "proximity" in the sense used in the three-part

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[24] Two plaintiffs were at the ground, six saw the event on "live" television broadcasts and two saw the event on delayed television broadcasts.

[25] *Supra,* note 1.

[26] Lord Keith of Kinkel, Lord Ackner, Lord Oliver of Aylmerton and Lord Jauncey of Tullichettle. Lord Lowry concurred in the conclusion of all their Lordships.

[27] Lord Oliver, though expressly stating that he accepted neither of the two "extreme" positions adopted by Lords Bridge and Wilberforce in *McLoughlin,* nevertheless appeared to apply Lord Wilberforce's three proximities in the context of the new three-part test of duty propounded in *Caparo Industries* v. *Dickman* [1990] All E.R. 568, [1990] 2 A.C. 605, [1990] 2 W.L.R. 358 (hereafter *Caparo*).

[28] See for example, *supra,* note 1, *per* Lord Keith at p. 914 and Lord Jauncey at p. 933. Lord Oliver, *ibid,* at p. 932, also indicated that policy considerations *per se* could exclude a claim against a defendant for nervous shock caused by seeing the defendant negligently inflict injury *on himself,* following *dicta* by Lord Robertson in *Bourhill* v. *Young* 1941 S.C. 395 at p. 399 and Deane J. in *Jaensch* v. *Coffey, supra,* note 6, at p. 458. Lord Ackner expressed the same view at pp. 918-919.

[29] The test propounded in *Caparo, supra,* note 27.

[30] Physical proximity and perceptional proximity. Compare the treatment of relational proximity, *infra,* note 35.

[31] See *supra,* note 1, *per* Lord Keith at p. 914, Lord Ackner at p. 918, Lord Oliver at p. 930 and Lord Jauncey at p. 933.

test.[32] One wonders whether it would have been more theoretically correct if the House of Lords had considered the proximities as part of the "justice and reasonableness" element of the three-part test which more appropriately incorporates policy considerations. "Proximity" in the three-part test is equated with the Atkinian concept of "close and direct relations"[33] and is determined by an incremental approach, that is, by analogy with the established categories where a duty has been held to exist.[34] But the boundaries of the three proximities are shaped by public policy considerations and not by logic: they are not amenable to the process of logical extension. An incremental approach by analogy may thus be entirely inappropriate as an analogical process must necessarily be a logical one.

A. *The Three Proximities*

1. *Relational proximity*

The members of the House of Lords were apparently of the view that the question of whether a particular relationship satisfied relational proximity was answered by applying a test of bare reasonable foreseeability.[35] As such, a particular plaintiff would be within the class of persons entitled to claim if it was reasonably foreseeable that he would suffer nervous shock by virtue of the close ties of love and affection which he had with the victim of the defendant's negligence. With this approach, it may be that relational proximity has ceased to exist as an independent limiting consideration as originally intended by Lord Wilberforce but has instead been incorporated into the threshold requirement of reasonable foreseeability.

What, then, were the relationships that satisfied the reasonable foreseeability test? Lord Keith held that the requisite bond of affection could be presumed from a parental and a fiance-fiancee[36] relationship (thus by implication a spousal relationship also). But his Lordship felt that the relationship between brothers did not suffice in the absence of evidence

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[32] "Proximity" in the three-part test probably does not encompass public policy considerations, as these are encapsulated under the "fairness and reasonableness" requirement: see Bingham L.J. in the Court of Appeal in *Caparo* [1989] 1 All E.R. 798 at p. 803. However, Lord Oliver in *Alcock* seemed to treat the boundaries of physical and perceptional proximity as being determined according to policy considerations: see supra, note 1, at pp. 931-932.

[33] See per Lord Atkin in *Donoghue* v. *Stevenson* [1932] A.C. 562 at p. 580, [1932] All E.R. Rep. 1 at p. 11.

[34] See *Caparo, supra,* note 27, approving the statement of Brennan J. in *Sutherland Shire Council* v. *Heyman* (1985) 60 A.L.R. 1 at pp. 43-44.

[35] See *supra,* note 1, Lord Keith at p. 914, Lord Ackner at pp. 919-920, Lord Oliver at p. 930 and Lord Jauncey at p. 936.

[36] Compare Lord Jauncey at p. 937, *ibid,* where he seemed impliedly to decide that a fiance-fiancee relationship is not enough in the absence of additional evidence.

of particularly close ties of love or affection.[37] Lord Ackner and Lord Jauncey took similar approaches.[38] This presumption of a sufficiently close relationship was rebuttable.[39] For plaintiffs who were not entitled to the benefit of the presumption, evidence that their ties with the victims were as strong as that in a parental or spousal relationship would be required.[40] Not surprisingly, all their Lordships, having proceeded on the basis that the test for relational proximity is reasonable foreseeability, emphasised that no hard and fast rules should be drawn by reference to particular blood relationships as the source of nervous shock was a relationship of affection which could exist irrespective of how the relationship arose.

It is laudable that explicit recognition was given to the fact that the essential element in relational proximity is the underlying emotional bond between the plaintiff and the accident victim. Nevertheless, it is arguable whether the ambit of the presumption of a relationship of affection has been too narrowly defined, especially with regard to the exclusion of the relationship between siblings. It is not logical to distinguish between spousal (*ie*. parent-parent), parent-child and child-parent (presumably involving sufficient relational proximity) relationships on the one hand, and relationships between siblings on the other. All are in the relationship of the entity of the nuclear family and it is in the normal course of events that the children, having grown up together, are extremely close within the family.[41] Not only would this arguably be a fairer point at which to draw the line, but there would also be no realistic danger of the floodgates opening if such a relationship were to be accomodated.

Certain of their Lordships also addressed the cases where recovery would be allowed even though there was no emotional bond of love and affection. Recovery in the case of an unrelated bystander was thought to be difficult, though he might succeed in his claim if the accident happening close to him were "particularly horrific",[42] or "if in the circumstances a reasonably strong-nerved person would have been so shocked."[43] In comparison, the case of a rescuer would be treated much more favourably. Lord Oliver and

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[37] *Ibid*., at p. 914 and p. 915. Compare the view of Hidden J. in the High Court, *supra,* note 17, who felt that the relationship between siblings satisfied relational proximity.

[38] *Supra,* note 1, *per* Lord Ackner at p. 919 and Lord Jauncey at p. 935.

[39] *Ibid*., *per* Lord Keith at p. 915 and Lord Ackner at p. 919.

[40] *Ibid*., *per* Lord Keith at p. 914, Lord Ackner at p. 919 and Lord Jauncey at p. 935. Does this implicitly exclude a purely platonic friendship where the parties are not also *in loco parentis* ?

[41] *Per* Hidden J. in the High Court, *supra,* note 17 at p. 375.

[42] *Supra,* note 1, *per* Lord Keith at p. 914.

[43] *Ibid*., *per* Lord Ackner at p. 919. Lord Oliver agreed with Lord Ackner on this point: *ibid*., p. 930.

Lord Jauncey accepted the principle of the "rescuer" cases,[44] that is, that a defendant responsible for an accident owes a duty to those who come to rescue and who may be shocked by what they see.[45] Both their Lordships also accepted as correct the difficult case of *Dooley* v. *Cammell Laird & Co Ltd,*[46] where recovery was allowed for a crane driver who suffered nervous shock when a rope snapped and the load fell into a ship's hold where his fellow employees were working. The plaintiff suffered nervous shock out of concern for the safety of his fellow employees, though no one was actually injured. Lord Jauncey thought that the defendant in that case could readily foresee that the plaintiff would have suffered nervous shock as a result of the accident since the plaintiff was "intimately involved" in the accident.[47] Lord Oliver explained *Dooley* on the ground that the defendant's negligent conduct had foreseeably put the plaintiff in the position of being an unwilling participant in the event.[48]

It was most unfortunate that none of their Lordships mentioned *Attia,* since the notion of allowing recovery for nervous shock caused by witnessing one's property being damaged seems totally inconsistent with the relational proximity concept as discussed by their Lordships. In so far as *Attia* can be said to have applied bare reasonable foreseeability as the test of duty for nervous shock cases,[49] it can safely be assumed to have been implicitly overruled by *Alcock.* However, it is also possible that *Attia* was decided on the issue of remoteness. The Court of Appeal in *Attia* reasoned that the undisputed duty owed by the defendant in respect of the property damage could extend to the nervous shock allegedly suffered by the plaintiff if, applying the test of remoteness, such nervous shock was reasonably foreseeable.[50] The Court of Appeal then declined to lay down as a matter of law that such illness was never foreseeable and refused the defendant's application to strike out the claim. With all due respect, this approach is fallacious. The question of duty is inextricably linked with the type of damage caused.[51] If the plaintiff in *Attia* had been in the burning house, the defendant would have been liable for any personal injury suffered by her, or, even if she did not sustain any physical injury, for any nervous shock suffered

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[44] The principal case cited was *Chadwick* v. *British Transport Commission* [1967] 2 All E.R. 945, [1967] 1 W.L.R. 912.

[45] *Supra,* note 1, Lord Oliver at p. 923 and Lord Jauncey at p. 934.

[46] [1951] 1 Lloyd's Rep. 271.

[47] *Supra,* note 1, at p. 934.

[48] *Ibid*., at p. 924.

[49] The judgments of Bingham L.J. and, possibly, Woolf L.J., *supra,* note 12, suggest such an approach.

[50] See especially the judgment of Woolf L.J., *ibid.*

[51] See *Caparo, supra,* note 27 at p. 599 *per* Lord Oliver and p. 581 *per* Lord Bridge. See also Michael Jones, *Textbook on Torts* (3rd ed., 1991), at p. 97.

by her *out offear of being injured.*[52] Such physical or mental injury is closely linked to the defendant's negligent act of setting fire to the house and need not, for practical purposes, be separated from the property damage. The position is totally different when the nervous shock suffered by the plaintiff is occasioned by the *mere witnessing of her house being damaged.* Nervous shock inflicted in this manner must be considered as a separate type of damage for which a duty must first be established. Such a duty cannot be established given the criteria for relational proximity laid down in *Alcock.*

It is thus preferable to treat *Attia* as a decision applying reasonable foreseeability *simpliciter* as the test of duty for nervous shock. Accordingly, *Attia can* and should be treated as having been implicitly disapproved of in *Alcock.* Remoteness of damage should not be utilised as a way of circumventing the duty issue and the relational proximity rule. If it is felt that recovery on the facts of *Attia* was deserving and justified, the correct approach is to seek a liberalisation of the relational proximity concept, not to "piggy-back"[53] the duty issue onto the issue of remoteness.

2. *Physical proximity*

The rule as enunciated in *McLoughlin* required spatial and temporal proximity to the accident or its immediate aftermath. The House of Lords in *Alcock* reaffirmed the rule[54] and declined any extension to the meaning of "immediate aftermath". Lord Ackner and Lord Oliver indicated that any extension beyond what was allowed in *McLoughlin* would be extremely unlikely.[55] In *Alcock,* the earliest cases of identification of bodies at the mortuary took place some eight to nine hours after the accident. This was clearly outside the immediate aftermath of the event[56] and, accordingly, such identification could not be relied upon as giving rise to nervous shock for which damages were recoverable.

Their Lordships did not discuss in detail what criteria were to be considered in determining what would constitute the immediate aftermath of an accident, realising that to do so would be "a fruitless exercise".[57] Lord Ackner appeared to distinguish the identification of bodies in *Alcock* from *McLoughlin* purely on the time lapse from the accident.[58] Lord Jauncey

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[52] This has been the position ever since *Dulieu* v. *White* [1901] 2 K.B. 669, [1900-3] All E.R. Rep. 353.

[53] See Michael Jones, *supra,* note 51.

[54] Lord Ackner seemed to be of the view that the basis of physical proximity, like relational proximity, was reasonable foreseeability : see *supra,* note 1, p. 920.

[55] *Ibid.*, *per* Lord Ackner at p. 921 and Lord Oliver at p. 931.

[56] *Ibid.*, *per* Lord Ackner at p. 921 and Lord Jauncey at p. 937.

[57] *Ibid.*, *per* Lord Jauncey at p. 936.

[58] *Ibid.*, at p. 921.

on the other hand held that the *purpose* for the visits to the mortuary as well as the times at which the visits were made took them outside the immediate aftermath.[59] His Lordship seemed to distinguish between a visit for the purpose of comforting or assisting the victim and a visit purely for the purpose of identification. It is not easy to understand why the purpose of the visit should be relevant: both situations could be equally traumatic for a plaintiff. Nor is there any policy ground for differentiating between the two.

It is suggested that the "immediate aftermath" by definition should encompass only the period when the accident victims are still emotionally affected by the physical impact of the accident and in substantially the same condition as they would have been at the scene of the accident. The time which has elapsed, though relevant, should not in itself be decisive. This would accord with the rationale of the "immediate aftermath" doctrine as enunciated by Lord Wilberforce. Whether the doctrine is sound in the first place is another matter.[60]

3. *Perceptional proximity*

The basic rule stated by Lord Wilberforce that the shock must be caused by sight or hearing of the accident or its immediate aftermath was also unanimously approved of by the House of Lords. In *McLoughlin,* Lord Wilberforce left open the question of whether this could be satisfied by viewing of simultaneous television broadcasts. In *Alcock* the Law Lords accepted that it could but only in exceptional circumstances. It was held by all the Law Lords that since the broadcasts in question did not show the suffering of recognisable individuals they could not be equated with the viewer being within sight or hearing of the accident.[61] Implicit in this reasoning is the acceptance that there would be perceptional proximity (and presumably physical proximity) in a case where the simultaneous television broadcast graphically depicted the fate of one's relative. Indeed, Lord Ackner and Lord Oliver accepted that perceptional proximity would be satisfied in a case where the broadcast depicted a balloon carrying children suddenly bursting into flames.[62]

It is unclear whether perceptional proximity was satisfied in the case of the two plaintiffs who were at Hillsborough Stadium itself. Neither

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[59] *Ibid.*, at p. 937.

[60] *Infra,* note 66, *et seq.*

[61] *Supra,* note 1, *per* Lord Keith at p. 915, Lord Ackner at p. 921, *Lord* Oliver at p. 931 and Lord Jauncey at p. 937.

[62] *Ibid.*, *per* Lord Ackner at p. 921 and Lord Oliver at p. 931. Lord Jauncey declined to express an opinion on the point: see p. 936, *ibid.* The "balloon" example was first cited by Nolan L.J. in the Court of Appeal, *supra,* note 19, at p. 122.

witnessed the fate of their relatives, though they saw the tragedy as it developed and realised that people had been killed or injured. Lord Ackner seemed to be of the view that they satisfied perceptional proximity[63] while Lord Oliver was of the opposite view as their perception of the consequences was gradual and only gave rise to worry and concern.[64]

Lord Keith and Lord Oliver also approved of Lord Wilberforce' s statement in *McLoughlin* that the law gave no recovery for nervous shock brought about by communication by a third party and, accordingly, seriously questioned the correctness of *Hevican* and *Ravenscroft.*[65] Thus there would be no claim for nervous shock caused mainly by the fact of a loved one's death or injury or by news of it.

B. *The "Sudden Impact" Theory*

The House of Lords has thus sketched restrictive boundaries for physical and perceptional proximity. Identifying a body at the mortuary eight hours after the accident would not satisfy the former while witnessing the actual accident or immediate aftermath on television broadcasts would not normally satisfy the latter. The underlying rationale is that the law should recognise only nervous shock caused by sudden and direct perception of the immediate consequences of the defendant's negligence.

This notion was given the most comprehensive treatment by Lord Oliver.[66] His Lordship felt that the television broadcasts did not provide the immediacy required for a claim for nervous shock as they would only give rise to worry and concern.[67] The confirmation of the victim's death and subsequent identification of the body at the mortuary took place hours later. The trauma of the plaintiff would be created partly by the confirmation and partly by the linking in the plaintiff s mind to the previously absorbed images. Damages for psychiatric illness caused by this gradual process would not be allowed as there was no pressing policy need for this and there would also be no logical stopping place once such a claim was allowed. Lord Ackner was also of the view that nervous shock involved the sudden appreciation by sight or sound of a horrifying event which violently agitated the mind, and did not include psychiatric illness caused by the accumulation over a period of time of more gradual assaults on the nervous system.[68]

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[63] *Supra,* note 1, at pp. 921-922.

[64] *Ibid*., at p. 931. This was consistent with his Lordship's view that the gradual perception of the consequences of an accident would be an insufficient basis of duty, see *infra,* note 66, *et seq.*

[65] *Ibid*., Lord Keith at p. 915 and Lord Oliver at pp. 931-932.

[66] *Ibid*., at pp. 930-931.

[67] Was this not the situation in *Dooley* v. *Cammell Laird, supra,* note 46 ?

[68] Supra, note 1, at p. 918.

It is respectfully submitted that reliance on such a concept is questionable. What is the distinction between suffering nervous shock on sudden perception of an accident to a loved one, and suffering the same nervous shock after a suspenseful and probably nerve-wracking wait of nine hours before the worst is confirmed? Should the law distinguish between a plaintiff who was fortuitously near enough to come onto the accident scene or its immediate aftermath and a plaintiff who was informed via telephone and who then made the journey in a state of panic? Why is perception of the state of the victims immediately after the accident sufficient for perceptional proximity while being told that a loved one is paralysed for life a week after a bloodless accident is not?[69] Such an injury is as much a consequence of the defendant's negligence as the state of the victims during the immediate aftermath.

It is unsatisfactory that the law should insist on there being perception of some immediate phenomenon of the accident or its aftermath and should exclude as irrelevant the fact of the injury or disability or death caused. The latter is the more long-lasting and probably more devastating effect of the accident with regard to the plaintiff. Numerous possibilities of injustice can be cited[70] as perceptional and physical proximity do indeed seem to "impose a largely arbitrary limit of liability".[71] Lord Oliver himself admitted that while extending recovery to nervous shock created by a more elongated process may be a logical analogical development, the law in this area was "not wholly logical", "entirely satisfactory" or "logically defensible".[72]

The position was no doubt brought about by a conscious judicial attempt to limit liability for nervous shock to a tolerable level, especially since the spectre of indeterminate liability loomed large on the facts of *Alcock.* Unfortunately, it would seem that in seeking to limit liability the House of Lords was driven to drawing lines with little reference to logic and fairness. Indeed, in a sense there has been no logical and fair stopping point since the courts extended beyond the clear position in *Dulieu* v. *White*[73] (recovery only for nervous shock caused by fear of injury to oneself) and allowed recovery for nervous shock caused by witnessing injury to another person.[74]

Perhaps one solution is a shift in emphasis to relational proximity, with resort to physical and perceptional proximity only if the relationship is not a close one.[75] The approach taken in respect of relational proximity, with

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[69] See *Jaensch* v. *Coffey, supra,* note 6, per Deane J. at p. 449.

[70] For example, see the examples cited by Lord Bridge in *McLoughlin, supra,* note 3, at p.319-320, and F. A. Trindade, "The Principles Governing The Recovery of Damages for Negligently Caused Nervous Shock" [1986] C.L.J. 476 at pp. 491-493.

[71] *Per* Lord Bridge in *McLoughlin, supra,* note 3, at p. 319.

[72] *Supra,* note 1, at p. 931 and p. 932.

[73] *Supra,* note 52.

[74] *Supra,* note 2.

[75] *Per* Deane J. in *Jaensch* v. *Coffey, supra,* note 6, at p. 463 and Trindade, *supra,* note 70. It is also to be noted that current legislation in some parts of Australia (*eg*., the Law Reform

its emphasis on underlying emotional bonds rather than blood relationships, is a logical one. Where there are close emotional ties, the plaintiff should be able to recover for nervous shock caused by knowledge of the mere fact of suffering or injury or death of the victim. The suffering or injury or death is as much caused by the defendant's negligence as is the condition of the victims immediately after the accident; sometimes the former can be of far greater impact. For those with no close emotional ties, the only impact of the accident would be that the plaintiff had observed a particularly gruesome scene and, as such, physical and perceptional proximity would become important.

Such a position would be logically defensible. However, once this position is achieved, should not the law logically also include claims for nervous shock caused in gradual stages after the fact has "sunk in", for example, for psychiatric illnesses caused by having to care for an invalid husband, or by having to cope with having lost a child? Again one faces the prospects of limitless liability. Ultimately, it has to be conceded that such a solution involves the mere substitution of one arbitrary line with another. As was pointed out, the law has seemingly gone past the last logical stopping point in *Dulieu* v. *White.*

Another possible solution which has the apparent attraction of being fair and logical is to re-embrace the test of reasonable foreseeability *simpliciter.* The great danger with such a test is that it is too easy to satisfy and would permit quite dramatic expansions of the area of liability within a short span of time, as *Attia, Hevican* and *Ravenscroft* showed. The "good sense of the judge"[76] may not be a sufficient safeguard in every case to ensure that the line is drawn at an appropriate point. In practice, the test may also be so wide and pliable that a certain amount of arbitrariness and non-uniformity in application may be inevitable.

C. *Conclusion*

The value of *Alcock* to lawyers is obvious. All four judgments laid down clear and fairly uniform guidelines for future claims for nervous shock. *Alcock* has injected a much-needed dose of certainty into this area of the law. *Alcock* has also given resonant approval to the "three proximities" approach and has demonstrated a general judicial reluctance to explore beyond the *McLoughlin* position. With this restrictive approach fear of the floodgates of litigation opening have vanished.

Miscellaneous Provisions) Act 1944 of New South Wales) allows a spouse or parent to recover for nervous shock without the need for sight or hearing of the accident.

[76] *Per* Lord Bridge in *McLoughlin, supra,* note 3, at p. 320g. See also the judgment of Bingham L.J. in *Attia, supra,* note 12, at p. 464.

However, in the end result the *Alcock* approach means that arbitrary treatment is meted out. The present state of the law is not something a lawyer would relish explaining to a lay plaintiff.

This is likely to remain the state of the law until more logical criteria can be developed to sort out deserving claims from the undeserving and, at the same time, to keep claims at an acceptable level. Achieving this end will be no mean feat. Alternatively, a return to the seemingly fairer reasonable foreseeability *simpliciter* test, for all its practical flaws, may be acceptable if the fear of indeterminate liability turns out in the future to be unfounded. The catch is that with the current restrictive approach it will probably take too long to determine whether there is actually water behind the floodgates.

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* The writer would like to express his thanks to Assoc. Prof. Tan Keng Feng and Margaret Fordham for their helpful comments on earlier drafts of this case note.