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NERVOUS SHOCK – EXTENDING THE BOUNDARIES

Pang Koi Fa v *Lim Djoe Phing*[1]

Introduction and Facts

THE High Court, in *Pang Koi Fa* v *Lim Djoe Phing* allowed, for the first time in Singapore, a claim for nervous shock as a result of medical negligence. In doing so, it did not limit a claim for shock to the traditional accident impact and aftermath situation where the plaintiff would have witnessed or come upon the aftermath of a sudden horrifying accident and suffered nervous shock as a result.

The facts were as follows. In 1985, the plaintiff's daughter consulted the defendant, a neurosurgeon, over fainting spells she had been suffering. The defendant recommended that she undergo an immediate operation. The operation, carried out on 6 June 1985, was performed negligently by the defendant. The defendant in fact removed healthy tissue and caused a tear in the membrane which covered the brain. As a result, the plaintiff's daughter leaked essential brain fluid and, after much pain and suffering, died sometime in September 1985, some three months after the operation.

The plaintiff's involvement was as follows. Her daughter, the deceased, was the plaintiff's sole confidante, with whom she shared all her worries. The relationship between the plaintiff and her daughter was very close.[2] When the defendant advised that her daughter should undergo an operation, the plaintiff persuaded her daughter to do so. After the operation, the plaintiff hired two nurses on twelve hour shifts to tend to her daughter. She was also constantly at her daughter's bedside, caring for her and observing her daughter's pain and suffering. She arranged for her daughter's readmission to hospital and also for a change of doctor. She sat through two additional operations carried out to rectify the damage caused by the defendant. Her daughter eventually died, and this left her distraught.

There was no doubt that the trauma of these events affected the plaintiff. She was treated for severe depression soon after her daughter's death. Medical

1 [1993] 3 SLR 317 (*Pang*'s case).
2 *Ibid*, at 328.

evidence tendered indicated that the plaintiff suffered from a mood disorder; the evidence also indicated that this was a depressive illness secondary to grief arising out of the circumstances surrounding her daughter's death.[3]

The defendant was absent and unrepresented at the trial. The learned judicial commissioner, Amarjeet JC, held that, in the field of negligence law, decisions of the House of Lords "should be highly persuasive if not practically binding".[4] As such, the two House of Lords decisions in *McLoughlin* v *O'Brian*[5] and *Alcock* v *Chief Constable of the South Yorkshire Police*[6] were considered as laying down the law in Singapore on liability for nervous shock. His Honour then went on to give an insightful review of the current developments on the law relating to the duty of care in the tort of negligence. First, Amarjeet JC reviewed *McLoughlin*'s case and referred to the three requirements which Lord Wilberforce laid down for a successful claim in nervous shock, ('the three proximities') *viz*, "the class of persons whose claims should be recognised; the proximity of such persons to the accident, and the means by which the shock is caused."[7] These three proximities must be examined and in his Honour's opinion, must be found present for a claim in nervous shock to succeed. His Honour observed that the three proximities were the result of applying policy considerations peculiar to nervous shock claims in the second stage of the *Anns*[8] two-stage test[9] for the determination of the existence of a duty of care. His Honour further observed that as Lord Wilberforce had expressed the three proximities as policy considerations, rather than legal requirements, they were vague and general, but flexible enough to apply to a variety of fact situations.[10]

Amarjeet JC then reviewed *Caparo* v *Dickman*,[11] the leading case on duty of care in the tort of negligence, and observed that, in that case, the House of Lords approved the test formulated by the Court of Appeal in

3 *Ibid*, at 322.
4 *Supra*, note 1, at 323.
5 [1983] AC 410 (*McLoughlin*'s case).
6 [1991] 4 All ER 907 (*Alcock*'s case).
7 *Supra*, note 1, at 324.
8 *Anns* v *London Borough of Merton* [1977] 2 All ER 492 (*Ann*'s case).
9 The two-stage test is exemplified by the following passage taken from *Anns* v *Merton London Borough Council* [1977] 2 All ER 492 at 498: "First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a *prima facie* duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or reduce or limit the scope of the duty or the class of persons to whom it is owed or the damages to which a breach of it may give rise."
10 *Supra*, note 1, at 324.
11 [1990] 1 All ER 568. (*Caparo*'s case).

the same case and developed three requirements to establish a duty of care to exist; *viz*, "first, the test of reasonable foreseeability must be satisfied, second, there must exist a relationship of proximity as between victim and tort-feasor, and third, the attachment of liability must be considered 'just and reasonable'."[12] This he termed as the 'three-stage test'.[13] *Alcock*'s case, his Honour observed, had approached the question of liability in nervous shock on the basis of the three-stage test. For nervous shock cases therefore, the three proximities were a necessary component of the three-stage test. His Honour also observed that, while in *McLoughlin*'s case Lord Wilberforce had expressed the three proximities as policy considerations, in *Alcock*'s case the House of Lords had expressed them as legal requirements forming part of the second stage ('the relationship of proximity' requirement) in the three-stage test.[14] *Ergo*, to determine whether there was a relationship of proximity under the three-stage test, the courts had to consider whether the three proximities, as legal requirements, were satisfied. His Honour concluded his review of the law on nervous shock by commenting on the effect of holding the three proximities as legal requirements:

> As legal requirements, the threshold for their fulfilment is thus a legal threshold, and the extension of liability would be on an incremental basis by analogy with established categories, rather than on general principles of reasonable foreseeability. The parameters of the scope of the duty to avoid inflicting nervous shock had thus been redefined.[15]

Amarjeet JC then found the defendant liable to the plaintiff for her nervous shock. The three proximities were satisfied. The first proximity, the requirement of a close relationship, was clearly satisfied. As regards the second proximity, closeness in time and space, his Honour held that it was inextricably linked to the third proximity, *ie,* that 'the shock must come through sight or hearing of the event or its immediate aftermath.'[16] Both of these proximities could therefore be discussed together. And, as the plaintiff had been with her daughter ever since she had had her operation and witnessed

[12] *Supra*, note 1, at 324.

[13] *Supra*, note 1, at 325. More accurately, it should be identified as a 'three part' test given the fact that the three requirements do not necessarily qualify each other.

[14] The difference between the two ways of dealing with the three proximities is a difference in degree rather than substance. A court would still have to consider the three proximities, whether as policy factors or under the relationship of proximity requirement, in a similar fashion. It is simply that, under the *Anns* test: "the approach adopted was flexible and openended, and the extension of the classes of persons and situations in which recovery was allowed would be by a consideration of vague and general principles of policy rather than strict requirements in law." (*Per* Amarjeet JC, *supra*, note 1, at 324.)

[15] *Supra*, note 1, at 326.

[16] *Ibid*, at 329.

the pain and suffering of her daughter after the accident, these two proximities were satisfied. Following the Supreme Court of California decision in *Gloria Ochoa et al* v *The Superior Court of Santa Clara County,*[17] Amarjeet JC held that the plaintiff was a "percipient witness, in terms of the elements of immediacy, closeness of time and space, visual and aural perception, of her daughter's pain and suffering."[18] Amarjeet JC recognised that the instant case was "different from the usual cases of nervous shock where there was a traffic accident causing the injury to the primary victim, but it [was] not so different as to compel the law to shut its eyes to a situation which so obviously needs redress."[19]

In the alternative, Amarjeet JC found that there was another category into which the present nervous shock claim could fall. This was the category where the plaintiff "was involved, either mediately or immediately, as a participant."[20] He held that the case fell within this category since the defendant had put the plaintiff in the position of thinking that she was the involuntary cause of her daughter's death. Through the defendant's negligence, the plaintiff had caused her daughter to submit to an operation which had not been necessary and then blamed herself for the death of her daughter.[21] The three proximities as modified in this situation, were also present so the plaintiff was entitled to succeed.[22]

[17] 39 Cal 3d 159; 216 Cal Rptr 661; 703 P (2d) 1 (*Ochoa*'s case). In this case a 13-year old boy was admitted to an infirmary for care and treatment after being taken ill. The plaintiff, who was the mother of the boy, visited him on 24 March 1981 and experienced extreme mental and emotional distress at seeing her son's illness and pain. On 25 March, the plaintiff again visited her son and witnessed him screaming, vomiting and complaining of pain. The son passed away in the early morning of 26 March 1981. The plaintiff suffered 'extreme mental and emotional distress' and was allowed to claim for nervous shock against the medical authorities taking care of her son.
Ochoa's case is not quite similar to the instant case, as the death of the boy was more sudden – he passed away within two days of being taken ill, while, in the instant case, the daughter died after about two months. The nervous shock in *Ochoa* can therefore be attributed to a sudden event which the nervous shock in this case cannot.

[18] *Supra*, note 1, at 334.

[19] *Ibid*, at 333.

[20] *Ibid*, at 334, 335.

[21] *Supra*, note 1, at 335. But in the instant case it was unclear how far the plaintiff had persuaded her daughter into undergoing the operation since the reason given for the defendant to undergo the operation was rather compelling – she would die or go blind if she did not go for the operation. The plaintiff therefore may not have been 'a participant' if submission to the operation was a reasonable and foreseeable result of the defendant's diagnosis even though she may have felt responsible for it. See *supra*, note 1, at 320.

[22] *Supra*, note 1, at 336.

Comment

This case is significant for the following reasons. First, as stated earlier on, it is the first case in Singapore which recognised a nervous shock claim for medical negligence. Second, it is a rare example of a situation in which a court allowed a claim for nervous shock in a non-accident type situation. In allowing the plaintiff's claim, the court extended, rather significantly, the limits of liability for nervous shock claims which had hitherto only been successful where psychiatric illness was 'shock induced'. Finally, it traced the development of the concept of duty of care in the English law of negligence and applied it in the local context. The first observation needs no comment. We will therefore examine the second and third observations.

Nervous Shock in a Medical Negligence Situation

A distinction may be drawn between the situation where a plaintiff suddenly witnesses some dramatic and distressing phenomenon (such as, say, a road vehicle collision where a close relation is fatally injured) and the situation where the plaintiff subsequently comes into contact with a person suffering from the effects of a negligently carried out medical operation, (as in the instant case.) In the former case, the direct, sensory and contemporaneous observation of a sudden distressing incident would more easily surmount the requirement that the negligent act of the defendant had in fact caused the shock injury sustained by the plaintiff. In contrast, in medical negligence cases, there can be no sudden accidental occurrence witnessed by the plaintiff.[23] The fact of going through an operation and the process of the operation itself are not sudden and horrifying events in themselves. In fact, two factors distinguish a medical negligence situation from the usual nervous shock situation. First, the parties to a medical operation are mentally prepared for the operation. It is usual for patients to consult with relatives and close friends, and sign a written consent to the operation. In *Pang*'s case, it was the plaintiff who persuaded the deceased to undergo the operation. Second, the negligence of the doctor in carrying out the operation will not be apparent until after the operation, when the victim does not show signs of recovery or when the victim's health deteriorates. In fact, his Honour, with respect, quite rightly pointed out that the negligent act of a doctor can hardly be witnessed. On the other hand, a traffic accident is sudden, and its immediate effects to a bystander are horrific. *Prima facie*, "[t]he scene of a road accident where an injured victim is to be seen is usually more distressing and dramatic,

[23] The learned judicial commissioner recognised this; *ibid*, at 332.

more inherently shocking, than the scene in a hospital ward where the victim is recovering from his injuries."[24]

His Honour in fact recognised that this case was different from the usual case where the plaintiff witnesses a sudden accident or tragedy and suffers nervous shock.[25] It is clear therefore that nervous shock cases arising from medical negligence are in quite a separate category from sudden accident nervous shock cases. But in principle, if nervous shock claims are allowed for sudden accidental occurrences, then similar claims should be allowed for all acts of negligence. The writer agrees with Amarjeet JC that there is no reason to exclude such claims.

However, in order to allow such claims, a number of issues ought to have been dealt with. First, the meaning of 'nervous shock'. Traditionally shock involves "the *sudden appreciation by sight or sound* of a horrifying event, which violently agitates the mind."[26] His Honour in fact observed that Lord Ackner in *Alcock*'s case stated that nervous shock claims had "yet to include psychiatric illness caused by the accumulation over a period of time of more gradual assaults on the nervous system."[27] This is the sort of nervous shock which is more likely to have arisen in *Pang*'s case, where shock arose as a result of a gradual realisation by the plaintiff that her daughter was not getting any better, a condition which was aggravated by the defendant's callous post-operation treatment. *Alcock*'s case, however, requires a sudden mental jolt by some horrific event which precipitates the psychiatric illness. It is doubtful whether this was present in the instant case. His Honour recognised that the element of suddeness was absent from the instant case, but held that this was not crucial, since, here, the mother had:

> suffered the consequences of the defendant's negligence, the distress and trauma of watching helplessly as her daughter was negligently managed and cared for by the Defendant, and who [had] realized the true impact of the Defendant's negligence only to have to witness and suffer the vain attempts to repair the damage he had wrought.[28]

[24] *Per* Brennan J, *Jaensch* v *Coffey* (1984) 54 ALR 417 at 431.

[25] *Supra*, note 1, at 333.

[26] *Per* Lord Ackner, *supra*, note 6, at 918. Emphasis added. See also Brennan J in *Jaensch* v *Coffey supra*, note 24, at 430 where his Honour defines shock as "the *sudden sensory perception* – that is, by seeing, hearing or touching – of a person, thing or event, which is so distressing that the perception of the phenomenon affronts or insults the plaintiff's mind and causes a recognizable psychiatric illness." Lord Oliver, *supra*, note 6, at 926 also states that there must be a "sudden and unexpected shock" for a nervous shock claim to be successful. See also Lord Oliver at 930.

[27] *Ibid,* at 918.

[28] *Supra*, note 1, at 333.

This, with respect, does not detract from the fact that the element of suddeness is not present. This issue should have been directly addressed.

Secondly, medical evidence, as set out in the judgment, indicated that the plaintiff suffered from "post-traumatic stress disorder and pathological *grief"* and a "mood disorder, a depressive illness secondary to *grief"* and the plaintiff displayed 'mummification', a symptom of a "severe *grief* reaction".[29] But Lord Ackner in *Alcock*'s case observed that "the law gives no damages if the psychiatric injury was not induced by shock. Psychiatric illnesses caused in other ways, such as from the experience of having to cope with the deprivation consequent upon the death of a loved one, attract no damages."[30] However, his Honour found, in spite of the medical evidence tendered, that the claim was not one of mere grief and suffering but one relating to nervous shock. So if, in fact, the plaintiff was suffering from severe grief, then the case is a significant extension because, traditionally, damages are not recoverable for nervous shock caused by grief over the loss of a loved one through over extended period of time.[31]

Thirdly, bearing in mind the differences between the sudden accident occurrences and medical negligence, it would have been preferable for Amarjeet JC to examine whether the three proximities test[32] was the appropriate one to limit a duty of care in medical negligence situations. The three proximities test was developed in a traffic accident case. It was not developed in response to nervous shock arising from a fact situation involving medical negligence. Consequently, the application of the test to a medical negligence situation may not be proper. Take, for example, the situation in *Alcock*'s case, where it was held that identification of a deceased's body, eight hours after the accident, was not considered part of the immediate aftermath. A claim for nervous shock arising therefrom failed. If one were to accept the three proximities test as applicable to medical negligence cases, then the 'immediate aftermath' for medical negligence cases must be allowed to extend to a time period of more than eight hours after the medical negligence of the defendant. But can the aftermath doctrine be applied in medical negligence situations?

Also, it should be noted that the test was developed not as a matter of principle, but as a matter of policy, to limit the various forms of nervous shock that would be claimable in a sudden accident situation if the test

29 *Supra*, note 1, at 322. (Emphasis added)

30 *Supra*, note 6, at 917. See also Lord Oliver at 931.

31 See, *eg*, the dictum of Lord Oliver in *Alcock*'s case *ibid*, at 924 and 931. But note, however, that a fixed sum damage of $10,000 for bereavement is of right claimable under s 13 of the Civil Law Act, Cap 43, 1988 Ed.

32 *Supra*, note 7.

was simply based on reasonable foreseeability simpliciter. The House of Lords in *McLoughlin*'s case debated extensively the policy reasons for and against allowing a nervous shock claim in that sort of case to succeed. With respect, the court in this case should have considered whether or not such a test is appropriate in medical negligence situations given (1) an assumption that, in principle, there ought to be a duty of care; (2) the recognition that there are significant differences between medical negligence and sudden accident occurrence situations; and (3) the recognition that the three proximities test is based on policy arguments which may not be applicable in medical negligence situations. Taking the cue from *McLoughlin*'s case, the court could then have examined the policy considerations relevant to nervous shock claims arising from medical negligence, and it could have considered whether the three proximities requirement ought to have been modified to suit medical negligence situations.

A further observation. Even if it can be said that the three proximities test was appropriate for the instant case, the court, in applying the test, did not distinguish between the accident and the immediate aftermath. What is the negligence complained of and to what period does the immediate aftermath extend? His Honour included the callous post-operative treatment as part of the negligence, but it is unclear when the negligence ended and the immediate aftermath actually began. As mentioned earlier on, for sudden accidental occurrences, the immediate aftermath is the very short period immediately after that occurrence, and it was held in *Alcock*'s case that eight hours after the accident could not be part of the immediate aftermath. It is important to draw such a distinction, since the three proximities test allows recovery only where the plaintiff was at the scene of the accident or its immediate aftermath. However, there may not have been a necessity for the court to say when the negligence ended and the when the aftermath began, since from the facts, the plaintiff was with her deceased daughter from the time of the operation until the date of her death.

Can the three proximities test be applied in *Pang's* case? There is no case law directly on point, so the writer tentatively suggests the following. Compare the instant case with, say, the archetypal situation of a traffic accident where a defendant motorist negligently knocks down a pedestrian and the loved one of that pedestrian comes immediately onto the scene a few minutes after the accident. A rough analogy can be drawn, on the assumption that the three proximities test would apply to medical negligence cases. The negligent operation in the instant case would correspond with the accident itself. Post-operative treatment within a reasonable time period thereafter, during which recovery would normally take place, would correspond to the aftermath of an accident. On this analysis, nervous shock emanating during this time period ought to be compensable.

The traditional policy objections to allowing a claim in nervous shock can now be examined. The first objection to the success of the nervous shock claim would be that this might be too onerous a burden on defendants performing negligent medical operations or, for that matter, any other forms of medical treatment. Given the fact that it is justifiable for the defendant to compensate the primary victim of negligence, would it be unfair to require the defendant to compensate a secondary victim, someone who merely witnessed the act of negligence? Would there be a flood of litigation if the courts were to become more lenient in awarding nervous shock claims? A second objection has to do with medical science. Is this form of nervous shock a recognised one, going beyond mere mental disturbance or grief? And even if it is, is the nervous shock caused solely by the defendant? The point is that the law, because of the fear of opening too widely the floodgates of litigation, will only permit claims which severly disturb the mind. There is also continued scepticism about relying on medical science and a fear of the fabrication of claims.

With regard to the first policy consideration, *Pang*'s case clearly has the effect of widening the scope of successful nervous shock claims. As mentioned earlier, the traditionally successful nervous shock claims have involved the witnessing of a sudden negligent act by the defendant, as, for example, the witnessing of a traffic accident. With *Pang*'s case, nervous shock arising from the witnessing of the gradual deterioration of the health of a loved one becomes claimable. There does not appear to be any limitations on this. Indeed, from this case, it can be argued that any mother who was with her child at the time of an operation, who visits her child every day, and who suffers some form of grief when her child fails to recover, can sue successfully if that operation was carried out negligently. This area is fertile for judicial development.

The second policy consideration has less impact. The death of a loved one would certainly evoke grief and a sense of loss. But, as stated earlier, it takes more than mere 'grief' for a claim in nervous shock to succeed, and it appears doubtful, from the facts of this case, that what would hitherto have been regarded as a recognisable form of nervous shock was suffered by the plaintiff. From the above, it is submitted that *Pang*'s case has the effect of setting aside these two policy considerations which restrain nervous shock claims.

The Duty of Care Principle

Amarjeet JC in his judgment traced extensively the development of the duty of care principle for nervous shock cases. His Honour noted that, when

McLoughlin v *O'Brien*[33] was decided, the current test for the determination of a duty relationship was the *Anns* two-stage test.[34] In that case, Lord Wilberforce applied the two-stage test to allow the claim for nervous shock. Amarjeet JC incisively pointed out that the three proximities, which were the relevant considerations in nervous shock cases, were first expressed by Lord Wilberforce in *McLoughlin*'s case as policy considerations under the second stage in the *Anns* two-stage test. Then his Honour noted that, in 1990, the House of Lords in *Caparo*'s case[35] had propounded a new test; "first, that the test of reasonable foreseeability must be satisfied, second, there must exist a relationship of proximity as between the victim and tort-feasor, and third, the attachment of liability must be considered just and reasonable."[36] Under the *Caparo* three-part test, the three proximities fell within the second part of the test – that of the relationship of proximity. They were no longer policy considerations (as was the case in *McLoughlin*) but "were legal requirements defining the classes wherein recovery may be permitted...."[37]

This is, with respect, not entirely accurate. The 'three-part test' is a misnomer. It may be said that the House of Lords in *Caparo*'s case did not really lay down any 'test' or legal requirement for the determination of a duty of care. Lord Bridge for example, stated that it was not possible for:

> any single general principle to provide a practical test which can be applied to every situation to determine whether a duty of care is owed and if so, what is its scope...the concepts of proximity and fairness...are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels...[38]

Lord Roskill, commenting on the meaning of, the expressions 'foreseeability', 'proximity' and 'just and reasonable', said: "...such phrases

[33] *Supra*, note 5.
[34] See note 11.
[35] *Supra*, note 11.
[36] *Supra*, note 1, at 324.
[37] *Ibid*, at 326. The difference between the three proximities as policy requirements and the proximities as legal requirements is unclear. His Honour mentions, at 326, that "As legal requirements, the threshold for their fulfilment is thus a legal threshold, and the extension of liability would be on an incremental basis by analogy with established categories, rather than on general principles of reasonable foreseeability." But he does not explain the difference, which is crucial to his Honour's application of the duty principle.
[38] *Supra*, note 11, at 574.

are not precise definitions. At best they are but labels or phrases descriptive of...factual situations..."[39]

Lord Oliver went further than the other judges by holding that the requirements of 'reasonable foreseeability', 'proximity' and the expression 'just and reasonable' are:

> merely facets of the same thing, for in some cases the degree of foreseeability is such that it is from that alone that the requisite proximity can be deduced, whilst in others the absence of that essential relationship can most rationally be attributed simply to the court's view that it would not be fair and reasonable to hold the defendant responsible. 'Proximity' is, no doubt, a convenient expression so long as it is realised that it is no more than a label which embraces not a definable concept but merely a description of circumstances from which, pragmatically, the courts conclude that a duty of care exists.... I think that it has to be recognised that to search for any single formula which will serve as a general test of liability is to pursue a will-o'-the wisp.[40]

In *Alcock*'s case, Lord Oliver, commenting on the concept of proximity, said:

> it has to be accepted that the concept of 'proximity' is an artificial one which depends more upon the court's perception of what is the reasonable area for the imposition of liability than upon any logical process of analogical deduction.[41]

So if the three-part test is not a test but a description, it is difficult to see what utility it may have. How is one to determine whether a duty of care exists in a given fact situation? In any given situation, how would a lawyer advise a client whether a duty of care exists on the facts? A majority of their Lordships (Lords Bridge, Oliver, Roskill) approved the dictum of Brennan J in *Sutherland Shire Council* v *Heyman* who had expressed the view that the law should develop incrementally and by analogy with established categories rather than by a "massive extension of a prima facie duty of care...."[42] This was a precedent-based approach in which previously decided cases are given greater weight in the determination of duty than a general test.

[39] *Ibid*, at 582.

[40] *Ibid*, at 585. Lord Oliver's comments are, with respect, inconsistent. It is a *non sequitur* to stipulate three requirements for the imposition of a duty and then suggest that they are facets of the same thing and are mere descriptions.

[41] *Supra*, note 6, at 926.

[42] (1985) 60 ALR 1 at 43-44.

But even an incremental approach would have its problems. The incremental approach simply requires that the courts proceed conservatively in imposing a duty of care in established categories. How is a court to know if its judgment is sufficiently 'incremental' and does not involve quantum leaps of logic or legal development? To suggest that one should adopt an incremental approach is rather vague, since, given the fact that the law develops by precedent, it is not impossible to suggest that any development in the law is an incremental one. Furthermore, the incremental approach, which is antithetic to the use of a general test of liability to determine the existence of a duty of care, requires the courts to refer to a previously decided authority; which authority was decided under the *Anns* two-stage test! Might this lead to a back door application of the two-stage test? Only time can provide the answer in this dynamic area of tort law.

Conclusion

The three proximities which Lord Wilberforce laid down in *McLoughlin*[43] were really arbitrary critera, the purpose of which was to limit the scope of the defendant's liability to the plaintiff in sudden accident situations. This case widens, significantly, the ambit of successful claims for nervous shock by extending it, arguably, to non-accident and non-shock situations. It will in the future be much easier for plaintiffs suffering from emotional disturbance from a defendant's act of negligence to claim against him. However, bearing in mind the above difficulties which this writer has sought to highlight, it is unclear whether courts in other jurisdictions will follow the decision. To determine whether the plaintiff should succeed, it will be important for the court to decide when the 'aftermath' of the medical negligence ended. This is one main difficulty created by *Pang's* case. But the writer would respectfully agree with Lord Oliver in *Alcock*'s case that "the ultimate boundaries within which claims for damages in such cases can be entertained must ... depend in the end upon considerations of policy...the limitation[s] must be based upon policy rather than upon logic for the suffering and shock of [a loved one.]"[44]

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[43] See Lord Bridge (with whom Lord Scarman agreed) in *McLoughlin, supra*, note 5, at 441.
[44] *Supra*, note 6, at 932.

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