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PSYCHIATRIC INJURY, SECONDARY VICTIMS AND THE 'SUDDEN SHOCK' REQUIREMENT

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The requirement that claims in negligence for psychiatric injury must stem from shock-induced damage is both artificial and arbitrary. For this reason, the "shock" requirement has been rejected by the High Court of Australia. However, shock-induced injury continues to be a key criterion in both the U.K. and Singapore, at least in cases not involving medical negligence. This article examines the history of the shock requirement and its application in all three jurisdictions. It concludes that, while the Australian position is to be preferred, there is no immediate indication that the law in either the U.K. or Singapore is likely to be modified to remove the requirement.

I. INTRODUCTION

Claims for psychiatric injury were historically regarded with scepticism, and even today courts demonstrate considerable caution when asked to extend the parameters of such actions. The reasons for this caution include concern about the difficulties inherent in identifying damage of a mental rather than a physical nature, fear that the number of people who might foreseeably suffer mental injury as a result of a single incident could far exceed those suffering physical injury, and fear that the large number of potential claims could place a disproportionate burden on defendants.[1]

One of the tools which has been employed to limit claims for psychiatric injury is the requirement that such claims be attributable to the 'sudden shock' of experiencing or witnessing a traumatic event caused by the defendant's negligence. The requirement,[2] which can be traced back to the earliest cases, is inextricably linked with the terminology used in framing such actions, which were, until comparatively

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1 While concerns about the potential number of claims continue to influence the courts, fears of false claims due to the unascertainable nature of mental, as opposed to physical, injury have receded as medical knowledge has expanded. It remains the case, however, that many genuinely debilitating mental conditions, including extreme grief, which fall short of organic damage are excluded from the definition of psychiatric injury.

2 See however, Harvey Teff, "The Requirement of 'Sudden Shock' in Liability for Negligently Inflicted Psychiatric Damage" (1996) 4 Tort Law Review 44 at 46, who argues that it is "open to question whether 'suddenness' was always taken to be a prerequisite of liability, as distinct from being merely a contingent feature".

recently, somewhat misleadingly[3] described as claims for 'nervous shock'.[4] In the majority of cases involving primary victims—*i.e.* those who are in the 'zone of danger' and who fear for their own safety during a calamitous event—psychiatric injury is shock-induced.[5] However, in cases involving secondary victims—*i.e.* those who suffer psychiatric injury due to a catastrophic event which occurs not to themselves but to others—psychiatric injury suffered as a result of the death or injury of a loved one (or the threat thereof) is quite frequently not attributable to a single moment of shock, and even when sudden shock is experienced, that shock is not always caused by witnessing the actual event in which the loved one is harmed.[6]

The past decade and a half has seen a level of jurisdictional divergence with respect to the situations in which claims for psychiatric injury may be recognised, with a more liberal approach being taken by the Australian courts than by their U.K. counterparts. One aspect of this divergence is the abandonment in Australia of the sudden shock requirement, which the U.K. courts continue to apply quite rigidly (at least outside the area of medical negligence) on the basis that only Parliament can decide whether or not to modify the existing restrictions on claims for psychiatric injury. This article will consider the reasons for these divergent positions. It will also examine the law in Singapore, where, notwithstanding a pragmatic approach to shock in cases of medical negligence, the Court of Appeal, like the U.K. courts, has indicated that the decision on whether or not to retain the sudden shock requirement in the law governing psychiatric injury should be left to the legislature.

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3 In his foreword to Nicholas J. Mullany & Peter R. Handford, *Tort Liability for Psychiatric Damage: The Law of "Nervous Shock"* (Sydney: Law Book Company, 1993)—referred to by Teff, *ibid.* at n. 29—Sir Thomas Bingham M.R. (as he then was) indicated a desire for the book to "hasten the interment of the label 'nervous shock', which is not only misleading and inaccurate but, with its echoes of frail Victorian heroines, tends to disguise that very serious damage which is, in many cases, under discussion".

4 Teff, *supra* note 2 at 48, argues that the persistence in the case law of "the increasingly disparaged, but not universally abandoned" term "nervous shock" is at least partly responsible for the assumption that shock-induced injury is required. He points out (at 46, n. 13) that the phrase apparently originated in the testimony of medical experts giving forensic evidence in the mid-nineteenth century, a conclusion which is shared by Marios C. Adamou & Anthony S. Hale, "PTSD and the Law of Psychiatric Injury in England and Wales: Finally Coming Closer?" (2003) 31 Journal of the American Academy of Psychiatry and the Law 327 at 327, 328, who suggest that "[t]his term dates back to 1882 when a purely physical syndrome that developed after railway accidents was originally described [this way] by Erichsen, a professor of surgery in London" and that "[i]n 1885, Page, another London surgeon, attributed nervous shock to psychological origins". For further discussion of the origins of the term, see Charles Pugh & Michael R. Trimble, "Psychiatric Injury after Hillsborough" (1993) 163 British Journal of Psychiatry 425. See also Des Butler, "A 'Kind of Damage': Removing the 'Shock' from 'Nervous Shock'" (1997) 5 Torts Law Journal 255 at 267. Butler suggests that, because all the early cases concerned single incidents involving vehicles, there may have been "a sense of *expressio unius*"—an assumption that all cases must involve a "sudden jolt to the nervous system". He concludes that injury through shock might have offered a means of determining compensable damage "by way of contrast with grief consequent upon the ultimate event such as the death of a loved one". Adamou and Hale, *ibid*. reach a similar conclusion (at 330).

5 See *e.g.*, *Dulieu v. White* [1901] 2 K.B. 669 (K.B.D.) [*Dulieu*]. In *Dulieu*, the claimant was a pregnant bar maid who suffered nervous shock, which caused her to give birth prematurely when a horse-driven van ploughed into the bar in which she was working. Note, however, that in claims for post-traumatic stress disorder ("PTSD"), the injury does not always flow from a single moment of shock. See the discussion at *infra* note 83.

6 This is particularly true in cases of medical negligence, where the consequences of the negligence may only gradually become apparent. For further discussion, see text accompanying note 32 *et seq*.

II. The United Kingdom

The early nervous shock cases involved primary victims, who either suffered or feared injury to themselves as a result of a dangerous event caused by the negligence of the defendant.[7] When the law developed to recognise the possibility of claims by secondary victims, sudden shock on witnessing the damage-causing event was incorporated as a key element of the claim.[8] The need to link the relevant psychiatric injury to a sudden shock was implicitly affirmed in the seminal secondary victim case of *McLoughlin v. O'Brian,*[9] in which the House of Lords allowed a claim for psychiatric harm brought by a woman who saw her family (including the dead body of one of her children) in hospital after an accident caused by the defendant's negligent driving. On the basis that shock was by its nature capable of affecting a wide range of persons, Lord Wilberforce famously articulated the "three proximities"[10]—limiting factors under which the secondary victim in a 'nervous shock' claim must have—'close ties of love and affection' with the victim of the physical event,[11] be able to establish sufficient temporal and spatial proximity to the event or its 'immediate aftermath',[12] and have witnessed the event or its aftermath with his own sight or

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7 See *Dulieu*, *supra* note 5. The current law with respect to primary victims is to be found in the controversial decision of the House of Lords in *Page v. Smith* [1996] A.C. 155 [*Page*], under which a primary victim need not establish that his psychiatric injury was a foreseeable consequence of the event in question as long as some physical injury was foreseeable.

8 See *e.g.*, *Hambrook v. Stokes Brothers* [1925] 1 K.B. 141 (C.A.) [*Hambrook*] in which a mother was awarded damages for the shock she suffered through fear that her children would be injured by a runaway lorry; *Bourhill v. Young* [1943] A.C. 92 (H.L.) [*Bourhill*] in which the claimant, who heard a crash in which the defendant (a stranger to her) was killed through his own negligence and later saw his blood on the road, was held not to have been owed a duty of care by the defendant for the shock which she suffered; and *King v. Phillips* [1953] 1 Q.B. 429 (C.A.) [*King*] in which a mother who suffered shock after hearing a scream and then—at a distance, from inside her home—seeing a taxi back down the road over her child's tricycle (though in fact the child turned out to be only slightly injured), failed in her claim on the basis that her presence was not foreseeable to the defendant. (Note what Teff, *supra* note 2, describes at 47 and 48 as "the notorious distinction" made by Denning L.J. in *King*, *ibid.* at 442, between the "terrifying descent" of the lorry in *Hambrook* and the "slow backing" of the taxi in *King*.)

9 [1983] 1 A.C. 410 (H.L.) [*McLoughlin*].

10 *Ibid.* at 421-423.

11 Known as "relational proximity", this is an important limiting factor in claims for psychiatric injury. While in the U.K. (and for Singapore, see text accompanying note 72), relational proximity is theoretically governed by the *McLoughlin* requirement that a claimant who suffers psychiatric injury must have "close ties of love and affection" with the victim of the physical event, this has effectively been narrowed so that only in husband/wife and parent/child situations will the ties of love and affection between the parties be presumed to be sufficiently close to satisfy the relational proximity requirement: see *infra* note 14. Other claimants have to establish a relationship with the victim of the physical event which is equivalent in closeness to a spousal or parent/child relationship. In Australia, legislation in a number of jurisdictions has, since the 1940s, allowed relational proximity to be established across a wider range of relationships. (For the legislation currently governing this area, see *e.g.*, Part 3 of the *Civil Liability Act 2002* (N.S.W.); section 25 of the *Law Reform (Miscellaneous Provisions) Act 1956* (N.T.); and Part 3 of the *Civil Law (Wrongs) Act 2002* (A.C.T.)). Note that since relational proximity is the only one of the three proximities which is not directly connected to the sudden shock requirement, a detailed discussion of the relational aspect of claims for psychiatric injury is outside the scope of this article.

12 In *McLoughlin*, *supra* note 9, the claimant was informed by a friend of a serious accident involving her husband and three children two hours after the accident occurred. She went to the hospital immediately and saw her husband and two of her children covered in oil and mud and was told that the third child was dead. This was held to fall within the definition of witnessing the immediate aftermath of the accident. By introducing the notion of the immediate aftermath, Lord Wilberforce relaxed the temporal

hearing. In the subsequent landmark case of *Alcock v. Chief Constable of South Yorkshire Police*,[13] which involved a number of secondary victim claims arising from the events of the Hillsborough Football Stadium disaster, the House of Lords confirmed the application of the *McLoughlin* proximities, while confining their ambit through a number of more specific requirements, now widely referred to as the *Alcock* "control mechanisms".[14] These control mechanisms included a reiteration of the need for the secondary victim's psychiatric condition to be induced by the shock of witnessing the accident itself or its immediate aftermath (a concept which the court applied in the narrowest terms).[15] On the need to establish shock, Lord Ackner stated that:[16]

> Even though the risk of psychiatric illness is reasonably foreseeable, the law gives no damages if the psychiatric injury was not induced by shock… "Shock," in the context of this cause of action, involves the sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind. It has yet to include psychiatric illness caused by the accumulation over a period of time of more gradual assaults on the nervous system.

And Lord Oliver observed that there had been no successful claim in which:[17]

> [T]he shock sustained by the [claimant] was not either contemporaneous with the event or separated from it by a relatively short interval of time. The necessary element of proximity… is furnished, at least in part, by both physical and temporal propinquity and also by the sudden and direct visual impression… of actually witnessing the event or its immediate aftermath.

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and spatial requirement, which had been applied more strictly in earlier cases such as *Hambrook*, *supra* note 8, and *Bourhill*, *supra* note 8.

13 [1992] 1 A.C. 310 (H.L.) [*Alcock*].

14 See the judgment of Lord Oliver, *ibid.* at 410-412, who suggested five proximity features common to all successful psychiatric injury claims by secondary victims. These were: (1) a marital or parental relationship between the claimant and the primary victim; (2) psychiatric injury attributable to a sudden and unexpected shock to the claimant's nervous system; (3) the claimant having been at the scene of the accident or having been in the more or less immediate vicinity of the accident and then having witnessed its immediate aftermath; (4) the claimant having sustained the relevant psychiatric injury on witnessing the death of, or injury or extreme danger to, the primary victim; and (5) a close temporal (as well as spatial) connection between the event and the claimant's perception of it, combined with a close relationship of affection between the claimant and the primary victim. However, his Lordship acknowledged that "in the end, it has to be accepted that the concept of 'proximity' is an artificial one which depends more upon the court's perception of what is the reasonable area for the imposition of liability than upon any logical process of analogical deduction" (at 411). Note that Teff, *supra* note 2, argues at 46 that it is "open to question" whether sudden shock (the second of the listed features) really was a prerequisite in all previously successful claims.

15 In *Alcock*, *ibid.*, 96 people were killed and many others injured in a crush which was caused when the police allowed too many spectators to enter an area of the Hillsborough Football Stadium. 16 claims were brought by the relatives of the dead or injured who suffered psychiatric illness as a result of the traumatic event—including claims by those who, after suffering hours of uncertainty as to whether their loved ones were alive or dead, subsequently identified their dead bodies in the mortuary. While their Lordships recognised that what constituted the immediate aftermath would have to be determined on a case-by-case basis, they concluded that seeing bodies in a mortuary eight or more hours after the disaster did not fall within the definition of the 'immediate' aftermath.

16 *Ibid.* at 400, 401.

17 *Ibid.* at 416.

Alcock is widely regarded as a heavily policy-driven decision, representing the low-watermark for psychiatric injury claims. In 1998, after a lengthy examination of the restrictive nature of the rules on psychiatric harm in the wake of *Alcock*, the U.K. Law Commission issued a report[18] recommending legislative reforms which would have allowed claimants with sufficiently proximate relationships to persons endangered by, or injured or killed in, events to bring claims for psychiatric injury regardless of the claimants' temporal and spatial proximity to those events or the means by which they learned of them.[19] Based on the evidence of medical experts, the Law Commission also concluded that the distinction between shock and non-shock-induced psychiatric illness was without "scientific or clinical merit",[20] and therefore recommended the removal, for both primary and secondary victims, of the sudden shock requirement.[21] However, none of the recommendations were implemented.

The result of *Alcock* has therefore been a strict application of the *McLoughlin* proximities and the sudden shock requirement by the U.K. courts. Decisions such as *Taylorson v. Shieldness Produce Ltd*,[22] in which the Court of Appeal refused a claim by parents who watched their son die over two days, demonstrate a rigid interpretation of the requirement that a secondary victim must suffer shock-induced psychiatric injury as a result of the sudden sight or sound of a single horrifying event. And although the decision in *Galli-Atkinson v. Seghal*,[23] in which the Court of Appeal allowed a claim by a mother who went looking for her daughter and later saw her body in the mortuary, appeared to presage a slightly more flexible approach to the definition of an event or its immediate aftermath—and thus tangentially to the notion of sudden shock—the recent decision (again of the Court of Appeal) in *Taylor v. A Novo (UK) Ltd*[24] to reject a claim by a woman who suffered shock-induced psychiatric injury on witnessing her mother collapse and die three weeks after an accident in which she had been injured, has reinforced the need both for shock-induced injury and for a strict temporal and spatial link between the damage-causing event and the shock.[25]

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[18] U.K., The Law Commission, *Liability for Psychiatric Illness*, (LAW COM No 249) (London: The Stationery Office, 1998) [*U.K. Law Commission Report*]. The Report was accompanied by a draft Bill, the *Negligence (Psychiatric Illness) Bill* [*Draft Bill*]. For a discussion of the Report, see Tan Keng Feng, "Liability for Psychiatric Illness – the English Law Commission" (1999) 7 Tort Law Review 165.

[19] See *Draft Bill*, *ibid.*, cls. 1(2), 1(3), 2(2), 2(3) and 4.

[20] See *U.K. Law Commission Report*, *supra* note 18 at para. 5.29.

[21] The *U.K. Law Commission Report*, *ibid.*, acknowledged at paras. 1.12, 1.13, that implementation of these recommendations could result in a 10% increase in the number of personal injury claims and a 2 to 5% increase in motor insurance premiums.

[22] [1994] EWCA Civ 16 [*Taylorson*]. In *Taylorson*, a 14-year-old boy suffered fatal injuries after he was negligently crushed by a vehicle. His parents sat at his bedside for the two days it took for him to die.

[23] [2003] EWCA Civ 697 [*Galli-Atkinson*]. In *Galli-Atkinson*, the claimant was looking for her daughter when she saw a police cordon on the road and was told that her daughter had been killed. She then went to the mortuary, where she saw her daughter's disfigured body. Her ensuing psychiatric illness was held to be attributable to shock sufficiently linked in time and space to the event to amount to the immediate aftermath, and her claim was therefore allowed.

[24] [2013] EWCA Civ 194 [*Taylor*].

[25] In *Taylor*, *ibid.*, the claimant's mother suffered injuries at work due to the negligence of her employers. It was common ground that these injuries caused the mother's death, and that the claimant's PTSD on seeing her mother die was shock-induced. The issue was not, therefore, whether the claimant had suffered shock, but whether, given that she had witnessed her mother's death but not the accident which

The Court of Appeal's judgment in *Taylor*, delivered by Lord Dyson M.R., embraced the conclusion of the House of Lords in *Frost v. Chief Constable of South Yorkshire Police*,[26] that a "thus far and no further"[27] approach must be taken to the law on psychiatric injury. In *Frost*, while recognising that "the search for principle" had been "called off in *Alcock*",[28] their Lordships nevertheless held that, for all its flaws and inconsistencies, the law must now be seen as settled, and that any substantial extension of the existing rules must be left to Parliament[29] and not the courts. Lord Dyson M.R. in *Taylor* endorsed this conclusion, observing that:[30]

> The courts have been astute for the policy reasons articulated by Lord Steyn to confine the right of action of secondary victims by means of strict control mechanisms. In my view, these same policy reasons militate against any further substantial extension. That should only be done by Parliament.

In view of the "thus far and no further" approach, Lord Dyson M.R. considered that it would strike an ordinary reasonable person as "unreasonable and indeed incomprehensible"[31] to allow a claimant who suffered shock several weeks after a negligently-caused event to recover when those whose shock was attributable to arriving at the scene of an accident just after its immediate aftermath would have no claim, and for this reason the action must fail.

Apart from the immediate aftermath decision in *Galli-Atkinson* (which must now, anyway, be seen in light of the views expressed in *Taylor*), the one area in which the U.K. courts have arguably taken a less rigid view of the "thus far and no further" approach is medical negligence—where errors in diagnosis or treatment often occur without a single momentous event leading to an instantaneous deterioration in a patient's condition or a corresponding moment of sudden shock on the part of the patient's loved ones. In this area, there are indications of a more flexible attitude to the requirement that there be a violent event which results in a 'sudden attack on the senses' of the secondary victim.[32]

One category of medical negligence cases in which this is particularly apparent is that relating to claims resulting from medical negligence during the birth of a child,

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led to that death or its immediate aftermath, the shock had been induced in the context of a sufficiently proximate relationship between her and the defendant. The trial judge, Halbert J., took the view that the relevant shock-inducing event was the death, not the accident. However, the Court of Appeal held that in order to satisfy the *Alcock* requirements, the shock-inducing event must be the accident itself or its immediate aftermath. Since the claimant had witnessed neither, there was insufficient proximity and the claim must fail.

26 [1999] 2 A.C. 455 (H.L.) [*Frost*]. *Frost* concerned claims by the police involved in trying to assist the victims of the Hillsborough Football Stadium disaster. The House of Lords held that the general rules restricting the recovery of damages for psychiatric injury applied to the claimants as employees, and none of the actions succeeded.

27 *Ibid.* at 500 (Lord Steyn).

28 *Ibid.* at 511 (Lord Hoffmann).

29 Such a course of actions now appears unlikely, given Parliament's failure to respond to the recommendations of the U.K. Law Commission in 1998. See text accompanying note 18 *et seq*.

30 *Taylor*, *supra* note 24 at para. 31.

31 *Ibid.* at para. 30.

32 The 'sudden attack on the senses' approach having been taken by Lord Ackner in *Alcock*, *supra* note 13 at 400, 401. See also text accompanying note 16.

where authorities dating back to *Kralj v. McGrath*[33] in the mid-1980s indicate a far less mechanistic view of the events which cause the claimant's psychiatric injury. While a number of these cases involve claims by mothers[34]—who might well be seen as primary victims—some of the claims are by fathers, who are clearly secondary victims. These have also succeeded in circumstances where the requirements with respect to time, space, perception and sudden shock have been relaxed.[35]

Outside the area of childbirth, a number of other medical negligence cases indicate a more nuanced attitude to the sudden shock requirement. In *Sion v. Hampstead Health Authority*,[36] for example, although the Court of Appeal ultimately refused a claim by a man who watched his son die over a 14-day period due to the hospital's negligence on the ground that there was no evidence of the claimant suffering shock, Peter Gibson L.J. observed that he saw "no reason in logic why… an incident involving no violence or suddenness, such as where the wrong medicine is negligently given to a hospital patient, could not lead to a claim for damages for nervous shock".[37]

And in *Walters v. North Glamorgan NHS Trust*,[38] the Court of Appeal allowed a mother's claim for a pathological grief reaction with respect to a 36-hour period during which she watched her son die as a result of the hospital's negligence. Ward L.J. described the events of the relevant day and a half as "a seamless tale with an obvious beginning and an equally obvious end… which for her both at the time and as subsequently recollected was undoubtedly one drawn-out experience".[39]

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[33] [1986] 1 All E.R. 54 (Q.B.D.) [*Kralj*]. In *Kralj*, the claimant succeeded in her action for the psychiatric illness she suffered on being told that one of her twin babies was very sick and subsequently being with him every day for the next eight weeks until he died, notwithstanding the indirectness of the initial perception and the prolonged period before the death.

[34] See *e.g.*, *Farrell v. Merton, Sutton and Wandsworth Health Authority* (2000) 57 Butterworths Medico-Legal Reports 158 (Q.B.D.), in which a claimant brought a successful action for the psychiatric injury she suffered when, due to the hospital's negligence during a caesarean section, her baby sustained serious and permanent brain damage. The judge in the High Court accepted the claimant's argument that the trauma of the birth and the experience of discovering her child's condition were part of one seamless event. Alternatively, he held that her visit the day after the birth to the hospital to which her baby had been taken fell within the 'immediate aftermath'.

[35] See *e.g.*, *Tredget and Tredget v. Bexley Health Authority* [1994] 5 Med. L. Rev. 178 (Central London County Court), in which both parents of a child who died within two days of a frightening and traumatic delivery succeeded in their claim for psychiatric harm on the basis that the period between the birth and death was effectively a single event; and *Farrell v. Avon Health Authority* [2001] Lloyd's Rep. Med. 458 (Q.B.D.), in which a father who was wrongly informed that his newborn child had died was awarded damages for psychiatric injury.

[36] [1994] 5 Med. L. Rev. 170 (C.A.) [*Sion*]. In *Sion*, the claimant sat by the bedside of his 23-year-old son as the son's condition gradually worsened and he died due to the negligence of the hospital.

[37] *Ibid.* at 176.

[38] [2002] EWCA Civ 1792 [*Walters*]. In *Walters*, the claimant witnessed the result of negligent medical treatment to her son, who died in her arms approximately 36 hours after suffering an epileptic seizure and irreversible brain damage following a negligent diagnosis. During the relevant period, the claimant and her husband were told that he would have no quality of life, decided that his life support should be terminated, and then stayed with him as he died.

[39] *Ibid.* at para. 34. Clarke L.J. agreed, observing that the *Alcock* control mechanisms should not be applied "too rigidly or mechanistically" (at para. 52). However, a number of medical negligence cases demonstrate a less flexible approach. See *e.g.*, *Taylor v. Somerset Health Authority* [1993] 16 Butterworths Medico-Legal Reports 63 (Q.B.D.), in which the High Court rejected the psychiatric injury claim of a woman who was told of her husband's heart attack (his heart condition having been negligently misdiagnosed), rushed to the hospital where she was informed by a doctor that he had died,

III. Australia

The Australian courts never embraced with the same enthusiasm as their U.K. counterparts the control mechanisms for psychiatric injury claims. In particular—even before the groundbreaking decision in *Tame v. New South Wales; Annetts v. Australian Stations Pty Limited*[40]—they placed little emphasis on the need to establish temporal and spatial proximity.[41] One consequence of this was the success of a number of actions arising from medical negligence in which the claimants were told of, rather than being present at, events in which their loved ones were harmed.[42]

Until the decision in *Tame/Annetts*, the leading psychiatric injury decision was that of the High Court in *Jaensch v. Coffey*,[43] in which the claimant succeeded in her action for the psychiatric injury she suffered as a result of seeing her husband in hospital after a road accident in which he had been injured. In contrast to the decision of the House of Lords in *McLoughlin*, decided just a couple of years earlier, in which their Lordships had discussed at length the period of time it took the claimant to reach the hospital in the context of what constituted the 'immediate aftermath', the High Court was largely unconcerned with such temporal and spatial details.[44] In addition,

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and then identified his dead body. The action failed on the basis that there was no 'event' on which to hinge the claim, and that the means of communication did not satisfy the rules on proximity. See also *Tan v. East London and City Health Authority* [1999] Lloyd's Rep. Med. 389 (Chelmsford County Court), which involved a claim brought by the father of a child who, due to the negligence of the hospital, died in the womb and was stillborn. The father's claim for psychiatric injury failed on a number of grounds, the most relevant here being his inability to show that his overnight vigil with his dead child's body and the removal of the body the next morning constituted a single event.

40 (2002) 211 C.L.R. 317 (H.C.A.) [*Tame* for the former, *Annetts* for the latter, and collectively as *Tame/Annetts*].

41 Carolyn Sappideen & Prue Vines, eds., *Fleming's The Law of Torts*, 10th ed. (Rozelle: Thomson-Reuters (Professional) Australia Limited, 2011) at 179, n. 231 suggest that the Australian courts generally paid less attention to temporal and spatial proximity because they were influenced by the focus of Deane J. in a number of High Court judgments on causal rather than physical proximity. That this approach has not found the same degree of favour elsewhere is apparent in the Canadian decision of *Rhodes v. Canadian National Railway* (1990) 75 D.L.R. (4th) 248 (B.C.C.A.), in which the Court of Appeal of British Columbia rejected its application in holding that a mother whose journey across the country to the scene of an accident took eight days could not be said to have witnessed its immediate aftermath.

42 See *e.g.*, *Brown v. The Mount Barker Soldier's Hospital Incorporated* [1934] S.A.S.R. 128 (S.C.), in which the claimant, who was told that her baby's hand had been burned due to the negligence of the defendant hospital, was successful in her claim for psychiatric injury notwithstanding the fact that she only heard about the accident some time after it occurred; and *Greco v. Dr Arvind* (24 February 1995), N.S.W. 14595 of 1990 (S.C.), in which liability was admitted to a father who was informed of the outcome of a negligent dilation and curettage, which resulted in his child being born alive but disabled. For further discussion, see Peter Handford, "Psychiatric Injury Resulting from Medical Negligence" (2002) 10 Tort Law Review 38 at 46.

43 (1984) 155 C.L.R. 549 (H.C.A.) [*Jaensch*]. In *Jaensch*, the claimant's husband was a motorcycle police officer, who sustained serious injuries in an accident caused by a negligent driver. His wife was called to the hospital, where she saw him in a distressing condition both before and after surgery. Following the surgery, she went home, but was then called and told that his condition was critical and that she should return to the hospital immediately. When she left the hospital on that occasion, she thought that her husband was going to die. Although he survived, the claimant suffered psychiatric injury as the result of her experience.

44 The *dicta* of Gibbs C.J. and Deane J., *ibid*. at 555, 608-609, even suggest that failure to be at the scene or the immediate aftermath of the relevant accident might not have been an absolute bar to recovery (though compare the *dicta* of Brennan J. at 567 and Dawson J. at 612).

although Brennan J. endorsed the shock requirement, which he described as "the sudden sensory perception… of a person, thing or event, which is so distressing that the perception… causes a recognisable psychiatric illness",[45] Deane J. referred to differing scientific opinions on the point, including evidence that there was "no necessary correlation" between psychiatric illness caused by "nervous shock" and the severity of the shock,[46] and the other judges, while using the term "nervous shock"[47] to describe the action, did not elaborate.

In the years following *Jaensch*, disenchantment with the various control mechanisms favoured by the U.K. courts grew, and while most judges paid lip service to Brennan J.'s requirement that there be a "sudden sensory perception",[48] some openly questioned its necessity.[49] It was, however, almost twenty years before the High Court of Australia had the opportunity, in the conjoined appeals in *Tame/Annetts*, to reconsider the law with respect to psychiatric harm. In *Annetts*[50] (the action which is relevant to this discussion), the parents of a 16-year-old boy who went missing in the outback due to his employers' negligence claimed for the psychiatric injury they suffered as a result of hearing that their son was missing and later receiving the news that he was dead. In a detailed re-evaluation of the existing law both in Australia and the U.K., the court concluded that the various control mechanisms were "unsound",[51] and that a duty of care in claims for psychiatric injury should be based purely on the notion of reasonable foreseeability. This conclusion led, *inter alia*, to the rejection of sudden shock and direct perception as critical requirements in psychiatric injury claims. Gummow and Kirby JJ. observed

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45 *Ibid.* at 567.

46 *Ibid.* at 600, 601.

47 *Ibid*. at 552 (Gibbs C.J.), at 558 (Murphy J.) and at 612 (Dawson J.).

48 See *e.g.*, *Spence v. Percy* [1992] 2 Qd. R. 299 (S.C.), in which the Queensland Full Court of the Supreme Court notionally approved Brennan J.'s *dictum* while allowing a claim by a mother who experienced a number of shocking events leading to the death of her daughter during a three-year period after her daughter was injured in a road accident.

49 See *e.g.*, the judgment of Kirby J. in *Campbelltown City Council v. Mackay* (1989) 15 N.S.W.L.R. 501 at 503 (C.A.), suggesting that 'nervous shock' is rarely if ever the result of an isolated shock. (In that case, newlyweds were unable to recover for the psychiatric injury which resulted from the collapse of their negligently constructed home, *inter alia*, because their injury was not shock-induced, though they recovered under a different head of damages). See also the decision in *Strelec v. Nelson* (13 December 1996), N.S.W. 12401 of 1990 (S.C.), in which a mother whose child died a month after a negligently performed delivery was successful in her claim for psychiatric injury notwithstanding the fact that such injury was not the result of a sudden shock. Similar doubts about the shock requirement were expressed in Canada (see Lambert J.A. in *Beecham v. Hughes* (1988) 52 D.L.R. (4th) 625 at 651, 652 (B.C.C.A.)) and New Zealand (see *Rowe v. Cleary* [1980] New Zealand Recent Law 71), both referred to by Teff, *supra* note 2 at nn. 74, 75. (Note that the first example of an Australian judge questioning the need for sudden shock is found in the dissenting judgment of Evatt J. in *Chester v. Waverley Municipal Council* (1939) 62 C.L.R. 1 at 8, 21 (H.C.A.) which suggested that liability could be based on an extended event which was still in progress and in which physical damage might or might not actually eventuate. For further discussion, see Butler, *supra* note 4 at 267).

50 While the search for him was underway, the boy's parents visited the station at which he had worked. However, they never went to the place where, four months after he disappeared, his body was eventually found, and their psychiatric illness resulted from a gradual realisation that he must be dead rather than from a moment of sudden awareness. The High Court nevertheless allowed their claims for psychiatric injury.

51 *Tame/Annetts*, *supra* note 40 at para. 188 (Gummow and Kirby JJ.).

that:[52]

> [T]he requirements of "sudden shock" and "direct perception" of a distressing phenomenon or its "immediate aftermath" have operated in an arbitrary and capricious manner. Unprincipled and artificial mechanisms of this type bring the law into disrepute… Moreover, the emergence of a coherent body of case law is impeded, not assisted, by such a fixed system of categories.
>
> …
>
> With respect to those who espouse it, a "sudden shock" requirement would have no root in principle and therefore would be arbitrary and inconsistent in application… individuals may sustain recognisable psychiatric illness without any particular "sudden shock"… liability in negligence… should turn on proof of a recognisable psychiatric disorder, not on the aetiology of that disorder.

Gleeson C.J. agreed, noting that, while the presence or absence of a shocking event would be relevant in determining whether it was reasonably foreseeable that a claimant might suffer psychiatric harm, the common law of Australia "should not, and does not" limit liability to situations involving psychiatric harm caused by a sudden shock.[53] Striking a similar chord, Gaudron J. concluded that there was:[54]

> [N]o principled reason why liability should be denied because, instead of experiencing sudden shock, [the claimants] suffered psychiatric injury as a result of uncertainty and anxiety culminating in the news of their son's death… no aspect of the law of negligence renders "sudden shock" critical either to the existence of a duty of care or to the foreseeability of a risk of psychiatric injury.

Although legislation has since been introduced in most Australian jurisdictions to reverse the holding in *Tame*[55] that it need not be foreseeable for the relevant psychiatric harm to be suffered by a person of 'normal fortitude',[56] it remains the case that, in Australia, actions for psychiatric injury may succeed regardless of whether the

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52 *Ibid.* at paras. 190, 191, 207, 208.

53 *Ibid.* at para. 18.

54 *Ibid.* at paras. 65, 66. See also the judgment of Hayne J., *ibid.* at para. 305, who, while not considering the "shocking" nature of an event necessary to determine duty, opined that it might be relevant to breach. And although Callinan J. endorsed the definition of "shock" espoused by Brennan J. in *Jaensch* (see text accompanying note 45) as a "sudden sensory perception", he considered it to have been satisfied when the claimants first heard by telephone that their son was missing (*ibid.* at paras. 363, 364).

55 The action in *Tame*, *ibid.*, was brought by a claimant who argued that she had suffered psychiatric harm as a result of the wrong breathalyser reading being inserted on an accident report form, even though the error had been corrected by the time she learnt of it.

56 Legislation introduced in six Australian jurisdictions as a result of the "insurance crisis" of 2002 states that, in what are described as "mental harm" cases, no duty of care is owed unless the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken. See *Civil Liability Act 2002* (N.S.W.), s. 32; *Civil Law (Wrongs) Act 2002* (A.C.T.), s. 34; *Civil Liability Act 1936* (S.A.), s. 33; *Civil Liability Act 2002* (Tas.), s. 34; *Wrongs Act 1958* (Vic.), s. 72; and *Civil Liability Act 2002* (W.A.), s. 55. For further discussion of the normal fortitude requirement, see text accompanying note 96. As Sappideen & Vines, *supra* note 41 at 185, n. 294, point out, the fact that the provisions refer to no duty being owed *unless* the necessary conditions are satisfied means that they have to be understood against the backdrop of the common law as settled in *Tame*/*Annetts*, *ibid*. Sappideen & Vines also suggest that on the facts of *Tame*, the High Court's decision on the 'normal fortitude' point probably made little difference, since it was not foreseeable under any test that the claimant would suffer psychiatric injury (at 182).

psychiatric injury in question arises from the sudden shock of directly perceiving[57] a single horrifying event.

IV. SINGAPORE

Despite there being few significant decisions on psychiatric injury in Singapore, the issue of shock is one to which the courts have paid considerable attention—particularly in the case of *Pang Koi Fa v. Lim Djoe Phing*,[58] where Amarjeet Singh J.C. in the High Court adopted a flexible interpretation of the sudden shock requirement in psychiatric injury cases when allowing a claim by a mother who suffered from PTSD after witnessing her daughter die slowly and in great pain over three months as a result of negligently performed and unnecessary surgery which, on the surgeon's advice, she had persuaded her daughter to undergo.

Pang Koi Fa was decided just before the introduction, in 1993, of the *Application of English Law Act*,[59] which loosened Singapore's legal ties with English law. In his judgment, Singh J.C. recognised the weight then normally accorded by the Singapore courts to decisions of the U.K. courts.[60] He therefore acknowledged the applicability of *McLoughlin* and Lord Wilberforce's "three proximities", as subsequently narrowed by the interpretation placed on those factors in *Alcock*. Notwithstanding this, however, he held that it would be wrong to conclude that the *McLoughlin* requirement for shock to arise "through sight or hearing of the event or its immediate aftermath"[61] was fatal to a claim based on seeing a loved one die slowly. While noting that in *Alcock* their Lordships had observed that 'sudden shock' had yet to extend to the "accumulation over a period of time of more gradual assaults to the nervous system",[62] Singh J.C. concluded that this did not actually preclude such a development.[63] Somewhat unusually for a Singapore judge, he turned for guidance to American jurisprudence, and, in particular, the decision of the Supreme Court of California in *Gloria Ochoa v. The Superior Court of Santa Clara County*,[64] in which

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[57] The removal of the direct perception requirement was confirmed in *Gifford v. Strang Patrick Stevedoring* (2003) 214 C.L.R. 269 (H.C.A.), where the children of a forklift operator who was killed due to his employers' negligence succeeded in their claim for psychiatric injury, even though they were only told of their father's death and did not see his body.

[58] [1993] 2 S.L.R.(R.) 366 (H.C.) [*Pang Koi Fa*].

[59] Cap. 7A, 1994 Rev. Ed. Sing.

[60] As Singh J.C. observed in *Pang Koi Fa*, *supra* note 58 at para. 22:

> The courts in Singapore are not strictly bound by [the] decisions of the English courts in the sense that the courts in England are not part of the hierarchy of courts in Singapore… nonetheless, in respect of decisions in common law, particularly in the area of tort in general and negligence in particular, decisions of the highest court in England should be highly persuasive if not practically binding. As such, full regard must be had to the position in the law as a result of *Alcock*.

[61] *Ibid.* at para. 46, quoting Lord Wilberforce in *McLoughlin*, *supra* note 9 at 421-423.

[62] *Pang Koi Fa*, *supra* note 58 at para. 60, quoting Lord Ackner in *Alcock*, *supra* note 13 at 400, 401. See also notes 16, 32 above.

[63] *Ibid.* at para. 60. Singh J.C. held that, since in this case the claimant had caused her daughter to submit to the unnecessary and ultimately fatal surgery, her case could also succeed on an alternative ground, applying authorities such as *Dooley v. Cammell Laird & Co Ltd* [1951] 1 Lloyd's Rep. 271 and *Galt v. British Railways Board* (1983) 133 N.L.J. 870. These authorities had allowed claims for nervous shock by claimants who, as a result of the negligence of the defendants, considered themselves in some way involved with and responsible for the deaths of the primary victims.

[64] 39 Cal.3d 159 (Sup. Ct. 1985).

a claim for nervous shock on witnessing the gradual effects of negligent medical treatment had succeeded. He concluded that in medical negligence cases it was necessary to take a different approach to the sudden shock requirement, since:[65]

> [I]n the case of an abnormal event or abnormal case involving medical negligence… a doctor's negligent act or acts… can hardly ever be witnessed. What can be witnessed, however… is the calamitous effect of that conduct on the primary victim… The resulting trauma and psychiatric injury arising in these cases… is nearly always from a close, constant and unremitting perception of the suffering, distress and pain of the primary victim where death is not immediate… This case is different from the usual cases of nervous shock where there was a traffic accident causing the injury to the primary victim, but it is not so different as to compel the law to shut its eyes to a situation which so obviously needs redress.

The judgment of Singh J.C. is significant for its liberal attitude, albeit in the limited area of medical negligence, to the *McLoughlin* proximities and the *Alcock* control mechanisms. This liberality was particularly prescient, given the subsequent trend in some U.K. decisions towards adopting a more flexible approach to the need to establish shock-induced psychiatric harm in the context of medical negligence.[66]

Whereas *Pang Koi Fa* focused on the particular issue of the need for sudden shock in a case involving medical negligence, the more recent decision in *Ngiam Kong Seng v. Lim Chiew Hock*[67] involved an exhaustive analysis by the Court of Appeal of all aspects of the duty of care in psychiatric harm cases, including the respective positions of primary and secondary victims.[68] *Ngiam* was decided just a year after the introduction of the test for determining the duty of care in Singapore in *Spandeck Engineering (S) Pte Ltd v. Defence Science & Technology Agency*.[69] In *Spandeck*, the then-Chief Justice, Chan Sek Keong C.J., had announced the adoption of a test, to be applied in an incremental manner, based on proximity and policy, preceded by

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65 *Pang Koi Fa*, *supra* note 58 at para. 56.

66 See text accompanying note 36. Note that although some of the U.K. cases with respect to medical negligence associated with childbirth pre-dated *Ngiam* (see *infra* note 67), those concerned with general medical negligence were decided later.

67 [2008] 3 S.L.R.(R.) 674 (C.A.) [*Ngiam*]. *Ngiam* involved a claim by a woman whose husband sustained severe injuries in a road accident which involved himself and the defendant, a taxi driver. Both immediately after the accident and subsequently, the defendant represented himself to the claimant as a helpful bystander, and she came to look on him as something of a "good Samaritan". She later discovered that the defendant had been one of the parties to, and was indeed alleged to have caused, the accident. She claimed that the feelings of betrayal she experienced on discovering this led her to suffer depression and suicidal tendencies. The Court of Appeal held that the defendant had not owed her a duty of care.

68 The decision in *Ngiam*, *ibid.* at paras. 95, 121, is notable for its rejection of *Page*, *supra* note 7, and its indication that the same test for determining the existence of a duty of care should apply to both primary and secondary victims (at para. 84). (It is not clear whether this means only that both categories of claimants in cases of psychiatric harm must establish that such harm was reasonably foreseeable in the circumstances—which, given the many criticisms levelled at *Page*, is uncontroversial—or whether this also means that the *McLoughlin* proximities must be satisfied in the case of primary as well as secondary victims—which is more problematic, given that the proximities were not designed for, and are indeed unnecessary to, claims by persons whose psychiatric injury is the result of the trauma of being personally involved in a dangerous situation).

69 [2007] 4 S.L.R.(R.) 100 (C.A.) [*Spandeck*].

a threshold requirement of factual foreseeability.[70] In delivering the judgment of the court in *Ngiam*, Andrew Phang Boon Leong J.A. confirmed that the new test for duty of care in Singapore applied to psychiatric harm just as it did to other forms of damage.[71] He also confirmed that the *McLoughlin* proximities (as applied in *Pang Koi Fa*) were the appropriate means by which to determine legal proximity in actions for psychiatric harm, albeit within the framework of the new test for duty.[72]

Phang J.A. recognised the criticisms which had been levelled against Lord Wilberforce's judgment in *McLoughlin*, particularly as subsequently interpreted and narrowed by the House of Lords in *Alcock*. However, while not questioning the validity of the approach which Singh J.C. had taken on the particular facts of *Pang Koi Fa*, he declined to consider more general and widespread changes to the law with respect to secondary victims, concluding that any such changes should be left to the legislature rather than the courts.[73] In this respect, Phang J.A. referred to the views expressed by Professor Tan Keng Feng to the Singapore Law Reform Committee in the *Discussion Paper on Liability for Negligently Inflicted Psychiatric Illness* in 2000.[74] In the *Discussion Paper*, published some eight years before the appeal in *Ngiam*, Professor Tan had observed that:[75]

> Legislative reform of the law, at this stage in its development, when the medical and legal knowledge is not sufficiently mature, may interrupt the proper development of the law on an incremental case-by-case basis and may give rise to legislative recovery in certain areas of psychiatric illness that could, on implementation, prove to be more generous than envisaged… This is not to say that

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70 See *ibid*. at para. 115 (Chan C.J.) [emphasis in original]:

> A *single* test to determine the existence of a duty of care should be applied regardless of the nature of the damage caused… This test is a two-stage test, comprising of, first, proximity and, second, policy considerations. These two stages are to be approached with reference to the facts of decided cases although the absence of such cases is not an absolute bar against finding a duty. There is, of course, the threshold issue of factual foreseeability but since this is likely to be fulfilled in most cases, we do not see the need to include this as part of the *legal* test for a duty of care.

71 As applied in cases of psychiatric illness, Phang J.A. indicated that there would be an additional threshold requirement that the claimant has suffered from a "recognisable psychiatric illness": *Ngiam*, *supra* note 67 at para. 97. In *Man Mohan Singh s/o Jothirambal Singh v. Zurich Insurance (Singapore) Pte Ltd (now known as QBE Insurance (Singapore) Pte Ltd)* [2008] 3 S.L.R.(R.) 735 (C.A.), the only other psychiatric injury case, decided by the Court of Appeal just after *Ngiam*, a claim by the parents of two teenage boys who were killed in a road accident due to the defendant's negligence failed on the ground that they had not established a recognisable psychiatric condition which went beyond grief, and that they had failed to satisfy the temporal and spatial and perceptional proximities, since although they had rushed to the hospital after the accident in which their sons were killed, they did not see their sons in pain before they died, nor did they see their sons' bodies in their badly injured state.

72 *Ngiam*, *ibid.* at para. 98.

73 *Ibid.* at para. 120.

74 Law Reform Committee, Singapore Academy of Law, *Discussion Paper on Liability for Negligently Inflicted Psychiatric Illness* (August 2000) [*Discussion Paper*]. For Professor Tan's views of the *U.K. Law Commission Report*, see also Tan, "Liability for Psychiatric Illness – the English Law Commission", *supra* note 18.

75 *Discussion Paper*, *ibid*. at 11. Professor Tan was referring primarily to the English law, there being (particularly at that time) a dearth of Singapore cases in the area. He expressed similar views with respect to the recommendations of the *U.K. Law Commission Report*, *supra* note 18, in his article, *ibid.*, where he observed (at 177) that "[t]he common law liability for negligent infliction of psychiatric illness is still evolving and has obviously not reached maturity. Comprehensive legislative reform at this time would undoubtedly result in 'freezing the law at a time before it is ready'."

> the common law liability for psychiatric illness, at this juncture, is satisfactory. Indeed, parts of the development are clearly controversial, but they are not so problematic or unsatisfactory as to require urgent legislative change.

Noting that the arguments made by Professor Tan in the *Discussion Paper* had been accepted by the then-Law Commission, Phang J.A. considered that those arguments still appeared to "hold good".[76] He went on to say, however, that:[77]

> What is important… is that whether or not reform in this area of the tort of negligence is to be effected is one that is best left to the Legislature. Indeed, many of the imponderables referred to above lie wholly outside the expertise of the court and relate to policy matters which require the Legislature's consideration.

On the specific question of whether psychiatric injury must be shock-induced, Phang J.A. referred to the changes which had resulted in Australia from the decision of the High Court of in *Tame/Annetts*, and observed that in the context of a wholesale re-evaluation of the area another issue "that might require legislative attention is the common law requirement prescribing the need for sudden shock as one of the prerequisites to recovery".[78]

Thus, the Singapore courts have taken the same approach as their U.K. counterparts: that reform of the law on psychiatric injury, including the need to establish sudden shock, must be left to Parliament.

V. Discussion

Social attitudes have undergone massive changes since the first nervous shock case[79] was decided at the beginning of the 20th century. In contemporary society, we recognise the many genuine manifestations of mental illness and—at least in theory—no longer treat with suspicion and insensitivity those who suffer from psychiatric conditions. In consequence, all jurisdictions nowadays accept the validity of, and need for, actions in tort to recover damages for negligently-inflicted psychiatric injury. However, notwithstanding the absence of compelling evidence to suggest the danger of an overwhelming number of claims by those who suffer psychiatric injury as secondary victims,[80] there remains, in both the U.K. and Singapore, a deep-seated fear that too liberal an approach to such actions could lead to a flood of litigation. For this reason, "the courts have erected a number of barriers to recovery, some of which

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76 *Ngiam*, *supra* note 67 at para. 120.

77 *Ibid*. [emphasis omitted].

78 *Ibid*.

79 *Dulieu*, *supra* note 5.

80 In *Alcock*, *supra* note 13, for example, although many thousands of people were at Hillsborough Stadium when 96 spectators were killed, and hundreds of thousands were watching the match on television, only 16 claims for psychiatric harm resulted, all from relatives of the deceased. This might, of course, be regarded as something of a chicken-and-egg argument, given that even before the decision in *Alcock*, the *McLoughlin* proximities restricted the likelihood of successful claims. On the other hand, the very fact that 16 people actually brought actions suggests that more could have done so, and the fact that more claims were not brought supports the conclusion that, even in terrible circumstances, most people of normal susceptibility do not suffer psychiatric injury. For further discussion, see text accompanying note 100.

are intrinsically unconvincing and virtually bound to produce invidious distinctions and indefensible decisions".[81]

These barriers involve the application of criteria which are, moreover, not only legally questionable but also out of step with the medical realities of psychiatric injury:[82]

> In many respects, the criteria do not correspond with the medical understanding of diagnosis, course and symptomatology resulting from psychiatric injury. This in particular refers to the criteria placed for secondary victims on grounds of policy. When these criteria are scrutinised for support with medical evidence, they are found to be arbitrary and indefensible, risking bringing the law into disrepute with the general public.

The need to establish sudden shock is one of the most notable of these "arbitrary" criteria. Notwithstanding the fact that it has been questioned in terms of both medical[83] and legal[84] principles, it remains a requirement in psychiatric injury claims in both the U.K. and Singapore. Moreover, even in cases where shock *can* be established, a claim for psychiatric injury by a secondary victim will still fail if the claimant cannot demonstrate that the shock was suffered through actually seeing the event in which a loved one was harmed. As the recent decision of the U.K. Court of Appeal in *Taylor* shows, the result is that even a secondary victim who suffers shock when witnessing a loved one die as a consequence of a defendant's negligence will not be able to claim for that shock if the death was attributable to an earlier event at which the secondary victim was not present.

The decision in *Taylor* not only demonstrates the circumscribed situations in which a secondary victim may bring a claim for shock-induced psychiatric injury. It also illustrates the close link between sudden shock and two of the *McLoughlin* proximities—temporal and spatial proximity and perceptional proximity. Notably, the High Court of Australia never considered the former to be particularly important, and did away with the latter at the same time as it abolished the requirement to establish sudden shock in *Tame/Annetts*.[85] Yet the courts in the U.K. and Singapore cling both to the shock requirement and the temporal and spatial and perceptional

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81 Teff, *supra* note 2 at 46.

82 Adamou & Hale, *supra* note 4 at 331.

83 See text accompanying notes 20, 21. See also *U.K. Law Commission Report*, *supra* note 18. And with respect to PTSD (one of the most common forms of psychiatric harm), see also Adamou & Hale, *ibid.* at 331, who state that "[t]here is no [medical] requirement that the assault on the patient's nervous system be sudden, for PTSD to develop. The traumatic event can also be chronic… Thus, the manner in which the injury is caused as seen in law is also medically unsubstantiated." The authors conclude (at 331) that [footnote numbers omitted]:

> [T]he "shock" criterion should be abolished and replaced with a "stressor" criterion measured with validated instruments, such as the Post-Traumatic Cognitions Inventory, that would reflect better the current research in the development of PTSD. The stressor criterion, consistent with the research evidence that the intensity of the trauma may have a bearing on the severity and chronicity of the syndrome, would allow a more valid calculation of the awarded damages.

Interestingly, one of the primary causes of chronic PTSD to which the authors refer is prolonged abuse as a child.

84 See the discussion on this point by the High Court of Australia in *Tame/Annetts* in the text accompanying note 52 *et seq*.

85 See text accompanying note 51 *et seq*.

proximities (as well as relational proximity, which requires a close familial connection between primary and secondary victims for claims to be sustainable),[86] taking the view that only the legislature may appropriately consider their modification or removal. Why should this be? Significant judicial determinations in both jurisdictions have resulted in actions being created or expanded in other areas of tort law in general, and negligence in particular, without any suggestion that the courts were not the appropriate forum to resolve such matters, even though these determinations have given rise to potentially far-reaching economic consequences.[87] Moreover, the High Court of Australia felt able to determine the basis on which psychiatric injury claims by secondary victims would be decided without deferring to the legislature.[88] So why do the U.K. and Singapore courts consider this to be a "no-go" area?

In the U.K., the answer appears to lie squarely in the fear of a plethora of claims, which has trumped any attempt to develop the law in a principled way. Lord Hoffmann admitted as much in *Frost* when he acknowledged that the search for principle had been "called off in *Alcock*",[89] and Lord Dyson M.R. echoed this sentiment in *Taylor*, observing that although the law in this area was "to some extent arbitrary and unsatisfactory",[90] only Parliament could now intervene to rationalise its application. In a sense, therefore, the sentiment appears to be: the worse the mess, the less the judiciary can now do about it. It should not be forgotten, either, that the U.K. Law Commission made a number of specific proposals for legislative reform in 1998, none of which was enacted.[91] While the absence of any parliamentary action could, on the one hand, be seen as leaving the ball in the court of the judiciary, it could, on the other, lead the judiciary to conclude that if the legislature has not chosen to act on the proposals, it is not now the place of judges to do so.

In Singapore, although the position is not identical in all respects to that in the U.K., concerns about the danger of opening the floodgates seem to be equally pivotal. So while Phang J.A. in *Ngiam* was willing to reject the English law on primary victims as represented by *Page*,[92] thus reducing the number of potential actions by such claimants in Singapore, he declined to consider any liberalisation of the rules with respect to secondary victims, on the basis that the policy considerations involved

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86 *Supra* note 11.

87 One such area is pure economic loss. In the U.K., the previously proscriptive law was changed to allow recovery for pure economic loss caused through negligent misstatements in *Hedley Byrne & Co Ltd v. Heller & Partners Ltd* [1964] A.C. 465 (H.L.). Recovery for pure economic loss was extended to cover defective premises in *Anns v. Merton London Borough Council* [1978] A.C. 728 (H.L.) [*Anns*]. And although *Anns* was subsequently overruled in *Murphy v. Brentwood District Council* [1991] 1 A.C. 398 (H.L.), and the U.K. courts have since remained cautious about any extension of recovery for pure economic loss outside the realm of negligent misstatements and professional responsibility, in *RSP Architects Planners & Engineers v. Ocean Front Ltd* [1995] 3 S.L.R.(R.) 653 (C.A.) and *RSP Architects Planners & Engineers v. MCST Plan No 1075 (Eastern Lagoon)* [1999] 2 S.L.R.(R.) 134 (C.A.), the Singapore courts followed the Australian decision in *Bryan v. Maloney* (1995) 182 C.L.R. 609 (H.C.A.), and claims for defective premises are therefore allowed in this jurisdiction.

88 Note that, as discussed above in note 11 above, there was already legislation governing relational proximity in a number of Australian jurisdictions when *Tame/Annetts* was decided. In addition, legislation enacted in the wake of *Tame/Annetts* has limited certain aspects of the decision in *Tame* (though not *Annetts*): see note 56 above.

89 *Supra* note 28.

90 *Taylor*, *supra* note 24 at para. 31.

91 See *U.K. Law Commission Report*, *supra* note 18.

92 *Supra* note 68.

lay "wholly outside"[93] the expertise of the court. In concluding that the question of effecting any change to the law on secondary victims must therefore be left to Parliament (in which respect, the time was not yet ripe for legislative reform),[94] Phang J.A. was influenced by a number of considerations, including the *Discussion Paper*,[95] to which he referred at some length. Nevertheless, Phang J.A. referred in only the most general terms to the reasons for the legislature being the sole arbiter of the law as it relates to the psychiatric injury suffered secondary victims, and provided no explanation of the rationale for this area of law being singled out for such particular treatment.

There are, of course, legitimate concerns about the possible ramifications—both for defendants and their insurers—of abolishing the need to establish shock through witnessing an event in which a loved one is injured or killed. In Australia, in the wake of *Tame/Annetts* and following the "insurance crisis" of 2002, concerns about the possibility of an increase in the number of claims were addressed by legislation to confine secondary victim claims to circumstances in which a person of reasonable fortitude could reasonably be foreseen to sustain psychiatric injury.[96] The normal fortitude requirement already applies in the U.K.,[97] and although it was not specifically espoused in *Ngiam*, the reasoning of the Court of Appeal with respect to the need to establish reasonable foreseeability of psychiatric injury in that case[98] indicates that it probably also applies in Singapore (although a specific pronouncement on this point would be welcome).[99] If, therefore, one assumes the presence of the normal fortitude requirement in both jurisdictions, the Australian model certainly suggests that abandonment of the sudden shock requirement would not lead to an exponential rise in the number of successful claims—if for no other reason than that most people of normal susceptibility do not actually suffer recognisable psychiatric injury, even when horrific things happen to their loved ones. In this respect it has been observed that, whether or not shock-induced harm is a factor, a secondary victim who brings a claim for psychiatric injury still has to establish that:[100]

> [A] recognisable illness has been suffered… in circumstances where the defendant should have foreseen injury to a person of normal susceptibility. Such an outcome

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93 *Ibid.* at para. 120.

94 *Ibid.*

95 *Supra* note 74.

96 *Supra* note 56.

97 In the U.K., this requirement can be traced back to the judgment of Lord Wright in *Bourhill*, *supra* note 8 at 110. See also Lord Wilberforce in *McLoughlin*, *supra* note 9 at 417, who based his judgment on the assumption that the claimant was a person of reasonable fortitude.

98 In *Ngiam*, *supra* note 67 at para. 104, the Court of Appeal accepted the need to establish that psychiatric injury was reasonably foreseeable. The court based the reasonable foreseeability requirement on both factual foreseeability and legal proximity.

99 See Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Singapore: Academy Publishing, 2011), who suggest (at 145) that:

> The reasonable foreseeability requirement under the *Spandeck* test, comprising both factual foreseeability and legal proximity, would suffice as a control mechanism for psychiatric harm cases. The requirement of 'normal fortitude' may be utilized as a factor to determine reasonable foreseeability at the duty-of-care stage in psychiatric harm cases, rather than as a precondition of liability.

In this respect, Chan and Lee refer to Harvey Teff, *Causing Psychiatric and Emotional Harm: Reshaping the Boundaries of Legal Liability* (Oxford: Hart Publishing, 2009) at 132, 133.

100 Teff, *supra* note 2 at 59.

is rare enough for persons with close ties to the primary victim and highly unlikely for anyone else.

Moreover, as the High Court of Australia in *Tame/Annetts* acknowledged,[101] there will be circumstances in which, even without shock being a specific requirement, the absence of a shocking event will reduce the foreseeability of psychiatric injury being suffered by a person of normal fortitude. For example, if, in a *Taylor*-type situation, a secondary victim were to witness his or her loved one die many years after the accident in which that loved one had been injured, and following a long period of slow decline, a court might well find it not to be reasonably foreseeable that the secondary victim would suffer psychiatric injury at all.[102] Whether this conclusion were to be reached in terms of the duty of care or as an issue relating to remoteness of damage,[103] the outcome would be the same, and the claim would fail.

VI. Conclusion

The sudden shock requirement is unsatisfactory. Based on the shakiest of legal and medical foundations, it places an artificial barrier in the path of secondary victims who seek damages for psychiatric injury. Even if one accepts the need for caution where such actions are concerned, the use of such an arbitrary and inflexible criterion is not an acceptable way to regulate the number of potential claims. The Australian approach—under which it must be reasonably foreseeable that a person of normal fortitude would suffer psychiatric injury in the relevant circumstances—offers a more principled and even-handed solution.

It is, however, unlikely that we will see the removal of the shock requirement in either the U.K. or Singapore in the foreseeable future. The courts in both jurisdictions have stated in unequivocal terms that any reform of the current rules must be left to the legislature, and in neither jurisdiction has the legislature shown any interest in taking action.[104]

Some comfort may be taken from the apparent trend towards a more liberal attitude to shock in cases of medical negligence, together with an associated relaxation of the temporal, spatial and perceptional proximities in such cases. It is hoped that this trend will continue. In other situations, though, it appears that we must continue to live with this most unfair and unnatural of legal contrivances—the rule that psychiatric harm will be recoverable only if it flows from a single shocking event.

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[101] *Tame/Annetts*, *supra* note 40 at para. 18 (Gleeson J.). See also text accompanying note 53.

[102] For a discussion of this and other points, see "A Secondary Psychiatric Victim of a Delayed Crisis: Taylor v. A. Novo Ltd [2013] EWCA Civ 194", online: tortox <http://tortox.wordpress.com/2013/03/20/a-secondary-psychiatric-victim-of-a-delayed-crisis-taylor-v-a-novo-ltd-2013-ewca-civ-194/>.

[103] See discussion in *Ngiam*, *supra* note 67 at para. 97, of the fact that, while the type of damage properly falls within the purview of remoteness, in psychiatric injury cases it is generally dealt with as an aspect of duty. For further discussion of the duty/remoteness issue, see Goh Yihan, "Duty of Care in Psychiatric Harm Cases in Singapore" (2008) 124 Law Q. Rev. 539.

[104] In the U.K., this is in spite of recommendations for change. See *U.K. Law Commission Report*, *supra* note 18. In Singapore, no proposals were made as a result of the *Discussion Paper*, *supra* note 74.