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**TEARING UP THE PATCHWORK QUILT:
AN EXAMINATION OF HOW, WHY AND
WHEN LIABILITY FOR PSYCHIATRIC INJURY
IN THE TORT OF NEGLIGENCE
IS IMPOSED**

Jordan Owen¹

Abstract

This paper grapples with the question of whether the law of psychiatric injury remains fit for purpose in the twenty-first century. Through analysing the historical development of this area of law an attempt is made to understand how it has come to be degradingly described as a patchwork quilt of distinctions. Once the history has been set out an attempt is made to learn from whatever historical mistakes there may have been and devise a way forward whereby the mistakes of the past can be avoided and a return to clarity can be achieved.

Keywords: negligence, psychiatric injury

Introduction

Despite being suggested by Brett MR in *Heaven v Pender*,² in 1883 it was not until *Donoghue v Stevenson*³ in 1932 that the principle of a general duty of care began to gain weight in the United Kingdom. The much-quoted passage by Lord Atkin from *Donoghue* laid the first stone for the foundation of the common law of negligence.⁴ Colloquially termed ‘the neighbour principle’ Lord Atkin stated:

The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, who is my neighbour? ...The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.⁵

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² *Heaven v Pender* (1883) 11 QBD 503 para.509.

³ *Donoghue v Stevenson* [1932] AC 562.

⁴ Thornton, L., ‘TORT – ‘Caparo’: duty and negligence’, (1990) *Law Society Guardian Gazette* at p.1.

⁵ *Donoghue*, at p.580

Even after this landmark case the courts were not prepared to fully recognise the existence of a general duty of care. As such, it was not until *Home Office v Dorset Yacht Co*⁶ that a pre-existing general duty of care became enshrined in law owing to the judgement of Lord Reid where he stated that the neighbour principle should apply unless there was a justification or valid explanation for its exclusion.⁷ The effect of this decision was that a duty of care was now automatically assumed between the parties and the claimant need only show that it should not be excluded, as opposed to the previous position where the claimant faced the challenge of proving that a duty existed in the first place. This was confirmed by *Anns v Merton London Borough Council*⁸ in which a straightforward two-part test was devised. In applying this test, the court would first ask whether the two parties had a sufficient relationship of proximity so that the damage caused could be deemed reasonably foreseeable. Then it would be asked whether there was any specific reason which should defeat a duty of care between the two parties. If the first was answered affirmatively and the second negatively then a duty of care would exist. This test, and the simple approach to imposing liability which it advocated, led to *Anns* being regarded as the 'apotheosis of the expansionist era'.⁹ However, the judiciary quickly moved away from this requirement with the implementation of the *Caparo* test and the requirement to ask whether the imposition of the duty would be fair, just and reasonable. The *Caparo* test was the end of the wide-ranging imposition of liability which was categorised by *Anns* and the beginning of the incremental development for categories of liability in the tort of negligence.¹⁰

1 Unintentionally Caused Psychiatric Injury within the Tort of Negligence

In the context of this article psychiatric injury refers to the infliction upon the claimant of a recognised psychiatric illness. The question of whether the symptoms experienced by the claimant constitute a recognised psychiatric illness is answered by seeking professional psychological advice and referring to either the DSM-V or the ICD-10.¹¹ Historically, trying to establish that a duty of care was owed not to unintentionally cause psychiatric harm has, over the course of its development, given rise to a plethora of difficulties. This is partly due to the fact that liability in this area of law has been plagued by a raft of policy considerations since

⁶ *Home Office v Dorset Yacht Co. Ltd.* [1970] 2 WLR 1140.

⁷ *Ibid.* at p.1027.

⁸ *Anns v Merton London Borough Council* [1978] AC 728.

⁹ Patten, K., 'Personal injury: Snail trail' (2012) 162 *New Law Journal* 643.

¹⁰ Stychin, C., 'The vulnerable subject of negligence law', (2012) 8 *International Journal of Law in Context* 337 at p.338.

¹¹ The DSM-V is an abbreviation for the 5th edition of the *Diagnostic and Statistical Manual of Mental Disorders* which is published by the American Psychological Association. The ICD-10 is an abbreviation for the 10th edition of the *International Classification of Diseases* and although published in North America the ICD-10 is most commonly used throughout the European continent.

its early conception. The first was the belief that psychiatric injury, or nervous shock as it was originally called, was an injury reserved for frail Victorian heroines.¹² This is perhaps due to the fact those who claimed a duty of care was owed to them were traditionally women who, as a result of fright, suffered either a miscarriage or some form of psychiatric harm.¹³ It has been commented that due to the first major cases all being concerned with females psychiatric injury was subconsciously confirmed as a phenomenon reserved for women which subsequently introduced gender into the law in 'a very subtle way'.¹⁴ Also, the courts have been concerned with the 'floodgates' of liability being opened along with the relative ease with which they seem to believe symptoms in this field of injury can be feigned. It has been stated that it may be difficult to guard against 'imaginary' claims¹⁵ and as recently as 1991 the fear of the floodgates opening played a central consideration in the reasoning of the House of Lords in *Alcock v Chief Constable of South Yorkshire*¹⁶ and was again one of the reasons for which compensation was not awarded in the 1999 case of *White v Chief Constable of South Yorkshire*.¹⁷

Victorian Railway Commissioners v Coultas was the first case to create a set method of imposing liability for psychiatric injury, namely the 'impact rule'. This case concerned the negligent act of a gatekeeper which caused a crash in Australia in 1866. The result of this crash was that Mrs Coultas suffered a miscarriage. Sir Richard Couch who gave the leading judgement spoke of an express judicial distrust towards the claimant who sought damages and his own personal concern that allowing damages in this scenario could open up a wide field for imaginary claims.¹⁸ At this point, it is important to note the social pressures of the time. The industrial revolution was in its infancy and in 1867 and 1873 there were two large-scale reports commissioned to examine the extent to which accidents of the kind in *Coultas* could be prevented.¹⁹ Of interest are the passages within the 1873 report at pages 12-13 where The Duke of Somerset, Lord Seymour, persistently expresses concern over the amount of accidents that are occurring on the railways and becomes particularly concerned with the amount of damages that arise from these accidents. Against this backdrop, it is no surprise

¹² Mullany, N., and Handford, P., '*Tort Liability for Psychiatric Damage*' (1993), p.vii.

¹³ Chamallas, M., and Kerber, L., 'Women, Mothers, and the Law of Fright: A History', (1989-1999) 88 *Michigan Law Review* 814.

¹⁴ *Ibid* at p.827.

¹⁵ *Victorian Railway Commissioners v Coultas* (1888) 13 AC 222.

¹⁶ *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310.

¹⁷ *White v Chief Constable of South Yorkshire* [1999] 2 AC 455 at p.492.

¹⁸ *Coultas*, at p.227.

¹⁹ Royal Commission on Railways 1867 and Select Committee of the House of Lords on the Regulation of Railways (Prevention of Accidents) Bill 1873.

that it has been suggested that the decision in *Coultas* was influenced by these external pressures.²⁰

The impact rule remained the leading principle surrounding imposition for liability with regards to psychiatric injury until the case of *Dulieu v White & Sons*²¹ undermined the impact rule and found that to bring a successful claim of psychiatric injury the claimant need only fear immediate personal injury.²² This principle became known as the 'fear of harm' or 'zone of danger' approach. The zone of danger approach was heavily critiqued as although it removed much of the unfairness surrounding the impact rule it continued to draw arbitrary lines when imposing liability such as the example given by Bankes LJ in *Hambrook v Stokes*.²³ Bankes LJ hypothesised a scenario where two mothers crossed the street both holding their child by the hand during a fictional accident. One mother fears only for her child whilst the other fears only for herself. Bankes LJ argued that it could not be right that the mother who cared only for herself, whom he regarded as 'less deserving', would be able to claim but the mother who feared only for her child could not.²⁴ Accordingly, the case of *Hambrook*, decided by the Court of Appeal, was the first in which a successful claim was allowed where the claimant feared only for the safety of another person, her daughter, as opposed to fearing for their own safety.

Though the case of *Hambrook* had settled who could claim for psychiatric injury a question remained as to what conditions were needed for liability to arise. In 1943, the case of *Bourhill v Young*²⁵ reached the House of Lords, and as a result, psychiatric injury was considered by the highest appellate court of the land for the first time. The case concerned a pregnant fishwife who witnessed the aftermath of a motor accident which subsequently caused her to suffer a miscarriage. The House of Lords decided that to bring a successful claim the type of injury caused must be a foreseeable consequence of the defendant's actions and the defendant must reasonably appreciate this.²⁶ As such the claimant was unable to bring a successful claim as a reasonable person would not have foreseen that the claimant would have suffered in the way that she did.

Finally, the case of *King v Phillips*²⁷ sees yet another doctrinal restriction begin to take hold with regards to liability in this area. The requirement that the claimant must suffer from shock

²⁰ Diaz, R., *Non-Physical Damage, A Comparative Analysis* (2010) Thesis (PhD) The University of Canterbury at pp.7-8.

²¹ *Dulieu v White and Sons* [1901] 2 KB 669.

²² *Ibid.* at p.682.

²³ *Hambrook v Stokes* [1925] 1 KB 141.

²⁴ *Ibid* at p.151.

²⁵ *Bourhill v Young* [1943] AC 92.

²⁶ *Ibid* at p.105.

²⁷ *King v Phillips* [1953] 1 Q.B. 429 (CA).

as a result of hearing or seeing something with their own unaided senses to be able to bring a successful claim.²⁸ In this case, a taxi driver slowly and inadvertently backed over a child on his tricycle while his mother watched from a window some 70 yards away. Lord Denning, in denying the claimant compensation, stated that the harm must be caused by a sudden shock not a slow and gradual realisation.²⁹ By looking back over the piecemeal development of this area of law it is possible to see the beginnings of the substantive rules that would be laid down by Lord Wilberforce in *Mc Loughlin v O'Brian* and subsequently affirmed as the method for imposing liability in *Alcock v Chief Constable of South Yorkshire*.

2 Primary Victims

With each new change in the law or change to the definition of a primary victim the courts have struggled to strike the balance between affording protection to claimants, keeping up with medical advances and not overburdening defendants. Perhaps it is the case of *Dulieu v White and Sons* which can be described as the first step on the slow road to gaining a deeper understanding of the medical knowledge concerning psychiatric injury. In this case, a pregnant barmaid suffered a miscarriage because a stage coach careered through the window of a pub where she was working. The claimant was not impacted upon in any physical sense but her claim was still successful. Through reading the judgement and the judgements of other jurisdictions which Kennedy J had relied upon, it is possible to see a shift in judicial thinking and a deeper understanding of the medical profession. One judgement relied upon by Kennedy J was the Irish case *Bell v The Great Northern and Western Railway Company*.³⁰ In that case Palles CB begins the idea that as the question of what caused the injury is to be decided entirely by the medical profession it is not for the courts to intervene and dictate it must be a physical act to bring about liability and that psychiatric harm would suffice. Yet although the court in *Dulieu*, agreed with the sentiment, they still imposed the requirement, that the harm must be caused by fear to oneself. Yet, the 'real confusion'³¹ with regards to primary victims began when the definition was again considered in *Alcock v Chief Constable of South Yorkshire*. In this case, Lord Oliver drew a distinction by saying that those claimants who are a 'participant' can bring a claim as a primary victim whereas those claimants which are classed as 'unwilling witness[es]' of the event must bring a claim as secondary victims.³² Since then the House of Lords have struggled to maintain a clear definition of what they

²⁸ *Ibid* at p.441.

²⁹ *Ibid* at p.442.

³⁰ *Bell v The Great Northern and Western Railway Company* (1890) 26 LR Ir.

³¹ Handford, P., 'When the Telephone Rings' (2001) 23 *Sydney Law Review* 597 at p. 602.

³² *Alcock* at p.407.

consider to be a primary victim, yet the one constant appears to be that, since *Alcock*, each offered definition is narrower than the last.³³

This is first noticeable in *Page v Smith*³⁴ where Lord Lloyd classifies a primary victim as a 'participant' but also provides that they must be 'within the range of foreseeable physical injury.' By construing a primary victim in such a way Lord Lloyd excluded those claimants who would have routinely been classified as a primary victim under the *Alcock* definition, such as the defendant police officers in *White v Chief Constable of South Yorkshire*, owing purely to the fact that they were not within the zone of foreseeable physical injury. The facts of *Page* involved a minor road accident in which neither driver was physically injured. A few hours after the accident Mr Page began to suffer from myalgic encephalomyelitis³⁵ which diagnosed some 20 years ago had been lying dormant. As a result of this condition returning he claimed damages as he was unable to return to work. The defendants argued that the claimant should not be awarded damages because although physical injury was reasonably foreseeable, psychiatric injury was too remote a consequence. The House of Lords by a bare majority of 3:2 opined that in circumstances where the claimant did not actually experience physical harm, but it was reasonably foreseeable that they could have, a claim for psychiatric injury could still succeed.³⁶ To do this Lord Lloyd was required to rule that with regards to psychiatric injury cases the 'eggshell skull' principle should be applied to place defendants in a situation where they are required to take their victim as they find them. This has the effect of rendering the unforeseeable aspect of the psychiatric injury meaningless because the physical injury itself was reasonably foreseeable. This is strongly criticised by Mullany who argues that a defendant should only be liable for that which can be reasonably foreseen just before the accident.³⁷

From a legal standpoint Bailey and Nolan, argue that by allowing compensation for psychiatric injury to be permitted by foreseeability of physical injury this is a return to the objective 'zone of danger' approach which was favoured in the case of *Dulieu v White* but was departed from by the definition offered by Lord Oliver in *Alcock*.³⁸ This is unfortunate owing to the fact the zone of danger approach was so heavily criticised for being unjust as it did not allow for claimants to claim for psychiatric injury where they could not have been physically hurt but

³³ Mulheron, R., 'The 'Primary Victim' in Psychiatric Illness Claims: Reworking the 'Patchwork Quilt' (2008) *King's Law Journal* 19 at p.84.

³⁴ *Page v Smith* [1996] AC 155 (HL).

³⁵ More commonly referred to as Chronic Fatigue Syndrome.

³⁶ *Page*, at p.187.

³⁷ Mullany, N., and Handford, P., *Mullany and Handford's Tort Liability for Psychiatric Damage*, (2006) as cited in Bailey, S., and Nolan, D., 'The Page v Smith Saga'.

³⁸ *Alcock*, at p.407.

suffered psychiatric injury all the same.³⁹ From a medical standpoint, Ahuja on one hand praises *Page v Smith* as it allows ‘anyone at risk of any sort of physical injury in any type of situation [to] claim damages for psychiatric injury of any sort of severity’ which she believes is a ‘generous’ decision in favour of those suffering from pre-existing psychiatric harm.⁴⁰ However, Ahuja also criticises *Page* for its ‘naivety’ in believing that psychiatric injury is somehow more worthy of compensation when coupled with physical injury which is shown by the requirement that the claimant must be within ‘the range of foreseeable physical injury.’⁴¹ Therefore, it appears *Page* has not only received criticism from the legal world but equally so from the medical one.

The working definition of a primary victim was again considered by the House of Lords in *White v Chief Constable of South Yorkshire*. Mulheron argues that this case does little more than ‘reiterate’ the decision in *Page* and as such she spares *White* from any further academic criticism opting instead to heavily critique the case of *W v Essex CC*⁴² which she describes as a ‘legal wrong turn’.⁴³ The case concerned a family who decided to foster a child from the local authority. They asked for a child which did not have any history of being sexually abusive so as to protect their daughter. However, the local authority provided them with a child who did have a history of being sexually abusive and the child proceeded to abuse the daughter over a period of four weeks. After having discovered this, the parents suffered psychiatric injury for having subjected their daughter to this ordeal. Though this was a striking out application, and their Lordships made it very clear they were offering no opinion on the merits of the case, Lord Slynn opined, and all four Justices agreed, that the parents should be allowed to proceed as primary victims. This was because they had been made ‘unwilling participants’ of the ordeal and subsequently, in line with *Alcock*, entitled them to primary victim status. When explaining his reasoning Lord Slynn states that *Alcock* only provided examples of scenarios which may be indicative of a primary victim and that the issue of who is a primary victim remains open.⁴⁴ Arguably this decision did more damage to clarity in the imposition of liability for psychiatric harm than any other case as it essentially creates a fall-back position upon which claimants can again try to bring a claim. Therefore, as the law currently stands the primary victim test is:

- 1 Was the claimant in the range of foreseeable physical injury? If not
- 2 Was the claimant an unwilling participant in the event?

³⁹ Bailey, S., and Nolan, D., ‘The Page v Smith Saga’ at pp.508-509.

⁴⁰ Ahuja, J., ‘Liability for Psychological and Psychiatric Harm: The Road to Recovery’ (2015) *Medical Law Review* 23 at p.41.

⁴¹ *Ibid* at p.43.

⁴² *W v Essex CC* [2001] 2 AC 592.

⁴³ Mulheron, R., ‘The ‘Primary Victim’ in Psychiatric Illness Claims’ at p.88.

⁴⁴ Lord Slynn in *W*, at p.601.

If none of the above are met, then it would appear as if the claimant would not be able to be classed as a primary victim and as such would be refused compensation.

3 Secondary Victims

Arising out of the Hillsborough disaster *Alcock v Chief Constable of South Yorkshire* has been described by Lord Steyn as the 'controlling decision' on secondary victims.⁴⁵ The case concerned 16 claims for psychiatric harm, these were test cases and in the court of first instance it was noted that these 16 claims were representative of approximately 150 other similar cases.⁴⁶ However, when the case reached the House of Lords on appeal, for various reasons, only 10 claims remained.⁴⁷ The House of Lords unanimously ruled that all 10 appeals should be dismissed reaching this opinion by applying what has become known as the *Alcock* criteria. These criteria provide that a claimant can bring a successful claim only when the following cumulative conditions are met:

- 1 The claimant suffered a recognisable psychiatric condition induced by shock because of witnessing the event.⁴⁸
- 2 The claimant was proximate to the event in both time and space or was present at its immediate aftermath.
- 3 The claimant had a close tie of love and affection with the imperilled victim.
- 4 The claimant witnessed the event with their own unaided senses.⁴⁹

Alcock has received negative commentary from the judiciary⁵⁰ and academics⁵¹ regarding the imposition of the above requirements which will be discussed further below. However, before doing so, to understand the criticism of *Alcock* it is first important to understand the judgement of *McLoughlin v O'Brian* which preceded it; the social context in which it was decided and the decisions of similar cases in other jurisdictions. The facts concerned a mother who was informed that members of her family had been involved in a car accident. She travelled to the hospital where they were being treated and she saw her husband and some of her children injured from the accident. She was then informed that her daughter had been killed. Mrs McLoughlin suffered psychiatric injury as a result and brought a claim for damages. Although their Lordships all sided with the claimant there are essentially two discernible *rationes* from the decision which, at the time, only served to further muddy the waters of an already disjointed area of law. Lord Bridge opined that once it had been proven that the claimant was suffering from a recognised psychiatric illness the only test which should be applied was whether the

⁴⁵ Lord Steyn in *White*, at p.496.

⁴⁶ Hidden J in *Alcock v Chief Constable of South Yorkshire* [1991] 1 All ER 353.

⁴⁷ *Alcock*, at p.388.

⁴⁸ Lord Ackner in *Alcock*, at p.399.

⁴⁹ *Ibid.*, at p.402.

⁵⁰ Lord Hoffman in *White*, at p.511.

⁵¹ Rajendran, R., 'Told Nervous Shock: Has the Pendulum Swung in Favour of Recovery by Television Viewers?' (2004) 9 *Deakin Law Review* 731 at p.734.

illness was a reasonably foreseeable consequence of the defendant's negligence.⁵² He reached this conclusion on the belief that the law should not seek to draw arbitrary lines to limit liability. Rather every case must be decided on its own merits and he advocated a return to 'the classic principles of negligence derived from *Donoghue v Stevenson*'.⁵³ In doing so he relied heavily on the decision of *Dillon v Legg*,⁵⁴ a case decided in the Supreme Court of California, where a simple test of factual reasonable foreseeability had also been adopted. Further, he stated that reasonable foreseeability should be assessed considering the relevant facts of each case such as: the claimant's proximity to the accident; the claimant's relationship to the victim and the way the claimant received the news.⁵⁵

Lord Wilberforce, opined that the claimant could bring a claim for damages only because Mrs McLoughlin met the criteria laid down in his judgement. The criteria he listed were essentially the guiding factors that Lord Bridge spoke of, but rather than remaining merely guiding factors as to the question of foreseeability, Lord Wilberforce saw fit to upgrade them to substantive rules of law.⁵⁶ Further, Lord Wilberforce stated he was diametrically opposed to the notion that liability for psychiatric injury should be imposed based solely upon reasonable foreseeability.⁵⁷ The disparate reasoning of the case was only worsened by the fact that the remaining Law Lords were also split. Lord Scarman sided with Lord Bridge, Lord Edmund-Davies with Lord Wilberforce and Lord Russell did neither and instead chose to 'remain on the fence'⁵⁸ attempting to strike a balance between the two competing judgements. The confusion that this judgement caused is highlighted by Nolan⁵⁹ in examples such as where two leading textbooks published after *McLoughlin* adopted completely opposite views as to the relevance of the case.

The purpose of examining the decision of *McLoughlin* is because those academics who are critical of *Alcock* often build their criticism upon the notion that *Alcock* was a restrictive and conservative case.⁶⁰ However, other academics, such as Teff, argue that *Alcock*, far from being restrictive, was merely an affirmation of precedent.⁶¹ Therefore, whatever view a person

⁵² *McLoughlin*, at p.443.

⁵³ *Ibid*.

⁵⁴ *Dillon v Legg* (1968) 441 P.2d 912.

⁵⁵ Lord Bridge in *McLoughlin*, at p.440.

⁵⁶ Lord Wilberforce in *McLoughlin*, at p.420.

⁵⁷ *Ibid* pp.421-422.

⁵⁸ Nolan, D., in Mitchell, P. and Mitchell, C. *Landmark Cases in the Law of Tort*, (2010), at p.282

⁵⁹ *Ibid* at p.284.

⁶⁰ LITIGATION - A nervous breakdown – the House of Lords ruling in *Page v Smith* will be essential reading for personal injury lawyers p.1; Wheat, K., 'Proximity and Nervous Shock' (2003) 32 *Common Law World Review* 313.

⁶¹ Teff, H., 'Liability for Negligently Inflicted Psychiatric Harm: Justifications and Boundaries' (1998) *The Cambridge Law Journal*, 57 at p.93.

adopts towards *Alcock*, with regards to its contribution towards the patchwork quilt, in large part, will be dictated by whichever *ratio* that person feels carried the day in *McLoughlin*.

Nolan has argued that the outcome in *Alcock* was potentially affected by the influx of manmade disasters before the House of Lords decision. In particular, he points to the Bradford Football stadium fire; the Marchioness pleasure boat disaster and the Herald of Free Enterprise disaster and provides a list in which a total of 979 people lost their lives by the time *Alcock* reached the House of Lords.⁶² Given the prevalence of the floodgates concern it is clear to see how these outside pressures could have caused concern to the House of Lords in *Alcock*. It is in this context that Davie states that the *ratio decidendi* was little more than a mask to hide their Lordships reliance on the 'flood of claims concern'.⁶³ Another notable change preceding the decision came about within the general tort of negligence itself. It is interesting to note that *McLoughlin v O'Brian* was decided at a time where a much wider duty of care was being considered by the courts as it was the *Anns* jurisprudence which was still being used. This may be why Lord Bridge and Lord Scarman advocated a simple test of reasonable foreseeability in *McLoughlin* as to do so was not too far a leap from the already established test. However, *Alcock* reached the House of Lords in 1992 when the general imposition of liability within the tort of negligence had contracted due to the new three-part test adopted in *Caparo*. It is in this context that Nolan argues that the decision of *Alcock* was almost inevitable.⁶⁴

Just as English jurisprudence shifted with regards to the imposition of liability within the general tort of negligence so too had jurisprudence for the imposition of liability for psychiatric harm in America. It has already been noted how Lord Bridge relied heavily upon *Dillon v Legg*⁶⁵ when deciding *McLoughlin v O'Brian*.⁶⁶ Yet, by the time of *Alcock* the Californian Supreme Court, in *Thing v La Chusa*,⁶⁷ had overruled *Dillon v Legg* instead opting for a more restrictive approach to imposing liability. Therefore, although not cited in the decision of *Alcock*, Nolan submits that the House of Lords would have been aware that the court upon which Lord Bridge had relied on in *McLoughlin* had now also departed from the simple test of reasonable foreseeability thereby suggesting a weakness of that position.

⁶² Nolan, D., in *Landmark Cases in the Law of Tort*, at p.291.

⁶³ Davie, M., 'Negligently Inflicted Psychiatric Illness: The Hillsborough Case in the House of Lords', (1992) 43 *Northern Ireland Legal Quarterly* 237 at p.238.

⁶⁴ Nolan, D., *Landmark Cases in the Law of Tort*, at p.274.

⁶⁵ *Dillon v Legg* (1968) 441 P.2d 912.

⁶⁶ *McLoughlin v O'Brian* [1983] 1 AC 410

⁶⁷ *Thing v La Chusa* 771 P 2d 814 (Cal 1989).

4 Problems with the Current Position

Recognised Psychiatric Illness Caused by Shock

Lord Ackner stated in *Alcock* that to bring a successful claim the claimant must be suffering from a recognised psychiatric injury.⁶⁸ The immediate problem with this requirement is the differentiation between what is psychiatric injury and what is a psychological condition or mere emotional distress and why the first should be compensable but the other two not. This problem is relevant in the context of both secondary and primary victims as primary victims must satisfy this requirement as well. Some academics argue this requirement is too restrictive in nature⁶⁹ Ahuja argues that the requirement for a recognised psychiatric injury can, in some cases, be too easily satisfied and that the courts sometimes reward the less deserving claimants in lieu of those who are not lucky enough to have their condition recognised by either DSM-V or ICD-10.⁷⁰ Alternatively, she suggests that the test should be one of severity of distress caused rather than a recognised psychiatric illness using the example of grief.⁷¹ According to Ahuja's account there is little difference between the non-diagnosable grief and bereavement and the diagnosable, and therefore compensable, clinical depression. She contends that if the latter would receive compensation then so too should the former.⁷² Finally, she highlights the injustice in how grief, no matter how severe, is not compensable yet a recognised psychiatric injury, such as a specific phobia, which causes 'milder or less pervasive distress' is.⁷³

The recognised psychiatric injury must be caused by a sudden shock and does not include a gradual assault on the mind.⁷⁴ Fordham criticises this requirement pointing to the case of *Sion v Hampstead HA*⁷⁵ where a father watched his son slowly die over the course of 14 days yet his claim failed because the shock of death was not sudden.⁷⁶ It is worth noting that Gibson LJ who presided over *Sion* appeared to also express a disagreement with the requirement stating that there is '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

⁶⁸ *Alcock*, at p.399.

⁶⁹ Mulheron, R., 'Rewriting the Requirement for a 'Recognized Psychiatric Injury' in Negligence Claims' (2012) 32 *Oxford Journal of Legal Studies* 77 at p.81.

⁷⁰ Ahuja, 'Liability for Psychological and Psychiatric Harm' at p.36.

⁷¹ Specific reference was made by Lord Griffiths in *White v Chief Constable of South Yorkshire* that grief is not compensable as it is 'a common condition of mankind'.

⁷² Ahuja, J., 'Liability for Psychological and Psychiatric Harm' at p.37.

⁷³ *Ibid.*

⁷⁴ Lord Ackner in *Alcock*, at p.401.

⁷⁵ *Sion v Hampstead HA* [1994] 5 Med. LR 17.0

⁷⁶ Fordham, M., 'Psychiatric Injury, Secondary Victims and the 'Sudden Shock' Requirement' (2014) *Singapore Journal of Legal Studies* at p.47.

a claim for damages for nervous shock'.⁷⁷ Given the criticism that this requirement has faced it is of little surprise that its abolition was advocated by the Law Commission's report of 1998.⁷⁸

Proximity

It has been argued that as the first major cases all concerned claimants who were near to the horrifying event this subliminally created the spatial proximity requirement. Wheat confirms this theory through conducting a close reading of *Hambrook v Stokes* concluding that the requirement of proximity essentially arose owing to the fact Lord Atkin implicitly implied it within the analogy he used where he cited that a duty was owed by drivers to those who use the highway.⁷⁹ Wheat contends that it is in this way, due to the physical references of the analogy, that proximity was introduced into the test.⁸⁰ Wheat has also stated that the immediate aftermath requirement is arbitrary and can create unjust results.⁸¹ It is submitted that this may be because of the way in which the courts have sought to curtail and modify the aftermath principle on what appears to be an almost irrational and *ad hoc* basis. A clear example of this can be found by contrasting the decisions of *McLoughlin v O'Brian* and *Alcock v Chief Constable of South Yorkshire*.

In *McLoughlin*, their Lordships allowed the claim of a mother who visited the hospital after the accident which injured her family by opining that in doing so she had witnessed the immediate aftermath of the event and as such her claim should be allowed. But in *Alcock* the House of Lords dismissed the claims of those parents who visited the mortuary on the belief that because they had visited the mortuary with the purpose of identifying a deceased loved one their claims were materially different from that of the defendants in *McLoughlin* because they visited with the intention to provide comfort. Nolan critiques this decision by saying that it is unclear why the purpose of the claimant in visiting the aftermath of the scene should play any part in whether compensation is awarded.⁸² Although there are numerous examples of the difficulty in applying this principle one of the most striking appears to be the notion that Mrs McLoughlin could only succeed in her case because her family members were still muddled from their accident. In the House of Lords, Lord Wilberforce uses the oil and dirt in which the claimant's family members were so begrimed to circumvent the fact that Mrs McLoughlin did not arrive at the actual immediate aftermath of the incident at the roadside where it happened.

⁷⁷ *Sion*, at p.176.

⁷⁸ Law Commission, *Liability for Psychiatric Illness Report*, (1998, Law Commission No.249) at para.5.33.

⁷⁹ *Hambrook*, at p.164.

⁸⁰ Wheat, K., 'Proximity and Nervous Shock' (2003) 32 *Common Law World Review* 313 at p.319.

⁸¹ *Ibid* at p.314.

⁸² Nolan, D., *Landmark Cases in the Law of Tort*, at p.280.

He opines that it makes no difference whether she comes upon her family on the roadside or, as in this case, in the hospital *when* they are in the same condition as they were at the roadside.⁸³ It therefore follows that if the claimant's family members had not been in the condition which they were there would have been no other factor upon which Lord Wilberforce could warrant an extension of the aftermath principle.

With One's Own Unaided Senses

Those viewing the Hillsborough disaster as it played out live were unable to bring a claim as they had not witnessed the event with their own unaided senses but rather through the medium of TV. Perhaps the most perturbing example of the arbitrary nature of this requirement comes from *Alcock* itself and the circumstances of Mr and Mrs Copoc. Both claimants suffered psychiatric harm yet their claims failed. Lord Keith opined that the mere knowledge that their son was at the stadium did not create the sufficient proximity and that as it was broadcast, at best, it could give rise to anxiety as opposed to the required psychiatric injury.⁸⁴ This is surprising considering that psychological studies have long reported that those relatives who chose to view their loved one's bodies after death were glad they did because the reality is often better than what they had imagined.⁸⁵ Based on this evidence it is hard not to agree with Mullany when she calls the refusal to compensate Mr and Mrs Copoc a low point in English tort law.⁸⁶ Also, in large part, the refusal to compensate those who viewed the event via live TV rested heavily upon the Broadcasting Code of Ethics which prevented the broadcast of distressing images and the fact that this was known to the defendant.⁸⁷ This decision has been described as 'absurd' and 'dangerous' as at any time the Broadcasting authority could amend the Code of Ethics or a conscientious broadcaster could, inadvertently, broadcast a distressing image.⁸⁸ Finally, with the rise in technology and access to online communication videos of distressing news appears to be more frequently recorded and broadcast by private individuals who are not subject to the Broadcasting Code of Ethics.⁸⁹ One example is the video which

⁸³ *McLoughlin* at p.419.

⁸⁴ Lord Keith in *Alcock*, at p.398.

⁸⁵ Chapple, A., and Ziebland, S., 'Viewing the body after bereavement due to a traumatic death: qualitative study in the UK' *British Medical Journal* (2010).
<http://www.bmj.com/content/340/bmj.c2032> accessed 13 April 2017.

⁸⁶ Mullany, N., 'Personal perception of trauma and sudden shock: South Africa simplifies matters.' (2000) 116 *Law Quarterly Review* at p.31.

⁸⁷ *Alcock*, at p.398.

⁸⁸ Rajendran, 'Told Nervous Shock' at p.745.

⁸⁹ It is unclear why reference to the Broadcasting Code of Ethics was included in this judgement at all. Even if the broadcasting company did inadvertently broadcast distressing images and constituted a *novus actus interveniens*, the claimant would still not have been present at the scene of the event so their claim should fail. Perhaps this is yet another indication that because this case concerned the police force special exemptions had to be made. This poses the question of what the outcome would have been if the negligent act at Hillsborough was committed by a private individual.

emerged online of a passenger who was visibly injured and distressed whilst being dragged off of the United Airlines flight.⁹⁰ That video was not broadcast by any news agency but could still have the potential, if viewed by his wife or children, to cause psychiatric injury as such, at present the *Alcock* requirements are unable to accommodate one of the fastest growing broadcasters of distressing images in today's society.

Ties of Love and Affection

To bring a claim, the claimant must prove that there is a close tie of love and affection between them and the victim. Teff argues that this requirement is 'a stipulation which represents an embarrassment to the legal process as well as to the substantive law'⁹¹. Yet, despite the apparent lack of humanity within this requirement commentators, in large part, believe it should remain provided it can be updated to include all other familial relationships as it is an effective way of preventing a flood of claims. It has even been suggested that this expansion should include everything from fiancées to co-workers.⁹² The Law Commission has argued for a *via media* of a fixed list of relationships, wider than that which currently exists, where close ties of love and affection are presumed but claimants who are not on the list have the opportunity to provide evidence of a close tie of love and affection in order to bring a claim.⁹³ This appears to be the most logical approach as it would create some certainty with regards to the class of people who could claim, prevent the embarrassing spectacle of trying to prove brotherly love in court, but at the same time would retain flexibility as those outside the list would still have the ability to bring a claim. In addition, this would appear to address the concerns of Stocker LJ in *Alcock* where he observes that relatives and friends might feel the same towards a primary victim as a spouse or parent would.⁹⁴

5 The Road to Reform

The Universal Criterion

It was highlighted above how in some cases the current requirement that primary and secondary victims must suffer from a recognised psychiatric injury can lead to situations of injustice. This occurs because those who suffer a psychological disorder are not entitled to bring a claim as they fall short of the recognised psychiatric illness requirement. This was highlighted as being illogical especially in circumstances as shown by *Ahuja*, where those

⁹⁰ United Airlines: Passenger forcibly removed from flight, *BBC News*, 10 April 2017 <http://www.bbc.co.uk/news/world-us-canada-39554421>.

⁹¹ Teff, 'Liability for Negligently Inflicted Psychiatric Harm' at p.93.

⁹² The Negligence and Damages Bill 2017 – a private members Bill currently being proposed by Andy McDonald MP.

⁹³ Law Commission, *Liability for Psychiatric Illness Report*, at para 6.28.

⁹⁴ Stocker LJ in *Alcock v Chief Constable of South Yorkshire* [1991] 3 All ER 88 at p.20 of the Official Transcript.

suffering from specific phobias can bring a claim yet those suffering from highly debilitating grief cannot. It is submitted that to remedy this situation a requirement that the claimant suffers from a mental disorder, caused by the defendant, as opposed to a recognised psychiatric illness, should be adopted. This would have the benefit of keeping in place some form of control mechanism, thereby holding back a flood of claims, yet it would also allow claims by those claimants who currently, although deserving, are not afforded any redress. Finally, it is worth noting that this adaptation would also be in line with the reform suggested by the Scottish Law Commission who favour the same approach.⁹⁵

Eggshell Skulls, Reasonable Foreseeability and Primary Victims

The accuracy of Lord Goff cannot be doubted when in *White v Chief Constable of South Yorkshire* he described *Page v Smith* as 'a remarkable departure from generally accepted principles [of the tort of negligence]'.⁹⁶ The most troubling aspect of *Page* is Lord Lloyd's finding that owing to the eggshell skull principle Mr Page need not have actually suffered a physical injury in order to bring a claim for psychiatric injury provided that it was proven reasonably foreseeable that Mr Page *could* have suffered a physical injury. There are two scenarios in which the egg shell skull rule can apply. First, where the claimant suffers an actual physical injury which is particularly worsened by a pre-existing physical condition, for example where a claimant suffers a fractured skull owing only to the fact they have a particularly thin skull.⁹⁷ Second, as Bailey and Nolan point out, where a claimant undergoes a physical injury and immediately thereafter suffers psychiatric harm owing to some pre-existing psychological disposition.⁹⁸ It can only apply in these two scenarios because in the absence of these two scenarios there is simply no actual injury to which the thin skull doctrine can attach.

In trying to understand why the eggshell rule was applied in this way it is useful to examine the analogy used by Lord Lloyd in *Page v Smith*. Lord Lloyd stated that if Mr Page had been travelling in the car with his wife, who suffered from a pre-existing depressive condition and, as a result of the accident, she suffered a cracked rib which was quickly followed by the onset of a psychiatric illness, she would clearly be able to claim damages for the psychiatric injury owing to the eggshell skull rule. He then reasoned that if Mrs Page would receive compensation, it would be unjust to deny Mr Page compensation for the psychiatric injury he sustained purely because he did not suffer an accompanying foreseeable physical injury.⁹⁹ However, that is arguably the exact reason why Mr Page's claim should have been denied. In

⁹⁵ Scottish Law Commission, *Report on Damages for Psychiatric Injury*, (2004, Scottish Law Commission No 196) at para 3.10.

⁹⁶ *White*, at p.473.

⁹⁷ *Owens v Liverpool Corporation* [1939] 1 KB 394 at p.401.

⁹⁸ Bailey, S., and Nolan, D., 'The Page v Smith Saga' at p.509.

⁹⁹ Lord Lloyd in *Page*, at p.187.

a vehicular collision, it would seem logical that a defendant should only be liable for that which is reasonably foreseeable to occur. Broken bones and fractured skulls can be foreseen by every reasonable driver. This is not the case for standalone pathological depression, myalgic encephalomyelitis or any other psychiatric illness. This interpretation of the eggshell skull rule appears to leave defendants with what seems to be an unfair burden of having to provide compensation for unforeseeable injuries as well as foreseeable ones. As such, it appears that the circumstances of *Page v Smith* are exactly those instances which Mulheron warns against where she states that 'all too frequently the courts have chosen to sacrifice doctrinal clarity to help unfortunate claimants'.¹⁰⁰ For these reasons, it is submitted that at least in the context of reasonable foreseeability *Page* should be overturned. Doing so would allow the courts to return to a method of imposing liability where a defendant is only liable for the damage which was reasonably foreseeable just before the event in question. Such a view finds favour with Bailey and Nolan¹⁰¹ and would also be in line with the method adopted by the Australian judiciary.¹⁰² To overrule *Page v Smith* would allow the law relating to primary victims to return to a logical method of imposing liability for psychiatric harm. It would also show that the law treats psychiatric injury with the same regard as physical injury and finally give meaning to the words of Lord Lloyd in *Page* where he advises that the law should not be seen to limp too far behind medical advances.¹⁰³

Gradually Caused Psychiatric Harm

The requirement that the recognised psychiatric illness must be caused by a sudden shock has clearly given rise to arbitrary applications of the law. Through case law examples highlighted above it has been shown to be a vehicle for dismissing otherwise deserving claims despite the fact that the origin of this requirement is unclear. In *Alcock*, the first case where the requirement was expressly confirmed, Lord Oliver opined that it was a common feature of all cases of psychiatric injury that the injury for which damages were being claimed must be shock induced.¹⁰⁴ If this is true then it would appear reasonable to suggest that the requirement may be an anachronism from the now embarrassing days of when liability was imposed via the much-criticised impact rule which, by its very nature, must be sudden. It could therefore follow that although the impact rule fell out of favour with the courts the requirement that the harm be caused in similarly quick manner remained. In any event, the mere fact it has always *been* present does not mean that it must always *be* present. If the sudden shock requirement

¹⁰⁰ Mulheron, 'The 'Primary Victim' in Psychiatric Illness Claims' at p.82.

¹⁰¹ Bailey, S., and Nolan, D., 'The Page v Smith Saga' at p.525.

¹⁰² *Tame v New South Wales* [2002] HCA 35 at para.16.

¹⁰³ *Page*, at p.187.

¹⁰⁴ *Alcock*, at p.411.

were disposed of then this would allow the rules pertaining to secondary victims to become less arbitrary in their application. Also, with its removal the unpalatable distinctions which have characterised this area of law would cease to exist such as the reasoning behind why the 'horrifying' descent of a runaway lorry is compensable but the slow backing of a taxi is not.¹⁰⁵

Lord Bridge or Lord Wilberforce?

In 1983, the law pertaining to secondary victims was arguably on the cusp of fairness and logic owing to *McLoughlin v O'Brian*. Yet unfortunately, the House of Lords cut short that prospect when the *ratio* of Lord Wilberforce was subsequently affirmed in *Alcock* which led to the adoption of the heavily criticised control mechanisms used throughout this area of law. It is submitted that the implementation of each one of Lord Wilberforce's proposed control mechanisms has created unreasonable and unjustifiable distinctions and that the way forward suggested by Lord Bridge would have been the more suitable path to follow. That is, a system whereby a defendant is liable only for those injuries which they can reasonably foresee and where the current control mechanisms are used as guiding factors in determining reasonable foreseeability. It is noted, that in order to progress down this path that the three-part test from *Caparo v Dickman Industries Plc*¹⁰⁶ will have to be overturned. However, doing so might address the various criticisms which have been raised above and, as argued below, could give rise to a more reasoned and logical method of imposing liability.

The Question of Proximity

It is clear that in order to strike a fair balance between the competing interests of the defendant and the claimant the law of psychiatric injury must have some way of curtailing otherwise frivolous claims. However, imposing strict requirements of physical proximity to the horrifying event is perhaps not the most effective vehicle through which to do it. To contrast the case of *Taylorson v Shieldness Produce Ltd*¹⁰⁷ with *Galli Atkinson v Seghal*¹⁰⁸ serves as a useful illustration of why previous applications of such a strict proximity requirement have given rise to so much criticism. In *Taylorson* the parents of a child were informed of an accident in which their son was involved. They arrived at the hospital where they were told their son was being transferred to another hospital. They followed the ambulance and once inside the mother saw her son's bruised face whilst the father saw his son's hand limply hanging off of the trolley.

¹⁰⁵ The distinction drawn by Lord Denning in *King v Phillips* [1953] 1 QB 429 (CA) at p.535. where distinguished the case from that of *Hambrook v Stokes* [1925] 1 KB 141 and in doing so refused the claim by a suffering mother because, in his mind, only a runaway lorry was capable of causing psychiatric harm but the slow reverse of a taxicab was not.

¹⁰⁶ *Caparo Industries Plc v Dickman and Others* [1990] 1 All ER 568.

¹⁰⁷ *Taylorson v Shieldness Produce Ltd* [1994] PIQR P329.

¹⁰⁸ *Galli Atkinson v Seghal* [2003] EWCA Civ 697.

After 8 hours, they saw their son with his face badly injured and with medical apparatus protruding from his skull, two days later they switched off their son's life support machine.¹⁰⁹ The Court of Appeal held they arrived at the hospital too late. Their claim failed.

Yet the rather similar facts of *Galli Atkinson* were interpreted very differently. In *Galli Atkinson*, a child was killed by a car mounting the pavement and died at 7:40 pm. The mother arrived at the police cordon at around 8:40 pm and although she saw nothing of the actual accident she was told her daughter was dead. She subsequently visited the mortuary at around 9:15 pm to identify her child which, in total, was 2 hours and 10 minutes after the fatal accident. The Court of Appeal found her to have arrived in time. Her claim succeeded.

Distinctions of this sort could be avoided if the idea of proximity were interpreted only in the sense in which it was interpreted in *Boardman v Sanderson*¹¹⁰ where the court held that as the claimant was nearby, and that as the defendant knew he was, it was more reasonably foreseeable that the claimant would suffer from psychiatric injury.¹¹¹

*From Cain and Abel to David and Jonathan*¹¹²

The views of several academics were referenced, all of whom agree that the requirement of a close tie of love and affection between the claimant and the immediate victim is unfair. In light of this revelation, this requirement can be categorised as perhaps the most unedifying of the requirements that currently exist. As such, if the simple reasonably foreseeable model is to be adopted then it is doubtful whether this requirement, even as a guiding principle, should have any part to play. However, the need to impose some form of a further restrictive factor upon the claims which can be brought cannot be ignored else the imposition of liability as a whole may spiral out of control if, for example, bystanders could bring successful claims. Therefore, it would appear logical to utilise some form of relational reference in establishing reasonable foreseeability because as Lord Wilberforce observed without any reference to relational factors, defendants may be required to compensate the world at large.¹¹³ In this vein, the Law Commission's fixed list recommendation, as highlighted above, would appear suitable.¹¹⁴ The sensitivity of the issues often encapsulated within claims for psychiatric injury suggest that if the relationship which forms the subject of the litigation should appear on this list then the court should consider that the harm caused was *prima facie* reasonably foreseeable, unless

¹⁰⁹ Notably, it was witnessing their son alive but in such a severe state in the hospital which caused their psychiatric harm not the fact that he died 2 days later.

¹¹⁰ *Boardman v Sanderson* [1964] 1 WLR 1317.

¹¹¹ *Ibid.*, at pp.1320-1321.

¹¹² A reference to the two sets of mythical brothers which Lord Ackner cited to support his view that not all brothers share a close tie of love and affection.

¹¹³ *McLoughlin*, at p.422.

¹¹⁴ Law Commission, *Liability for Psychiatric Illness Report*, at para.6.37.

there is an extremely compelling reason raised by the defendant as to why it should not be. It follows that those outside the list should not be able to bring a successful claim unless there is some incontrovertible evidence to suggest that there was a close tie of love and affection. Such an approach would create a true *via media* between affording protection to claimants and not allowing liability to spiral out of control.

Conclusion

In *Alcock* the claims by those relatives who witnessed the horrifying events unfold on live simultaneous TV were denied as they had not witnessed the event with their own unaided senses. The experiences of Mr and Mrs Copoc who watched the Hillsborough disaster unfold whilst worrying for their son's life have already been explicitly mentioned. Their claim was denied due to the belief that the worry which they must have been experiencing was only capable of giving rise to mere anxiety and not the required recognised psychiatric illness. It has already been shown that one of the potential problems with this distinction is that those who know their loved ones are in danger but are not near to them may in fact suffer more harm than those who are near to their endangered loved ones. If this is true, does it not follow that the experiences of claimants such as Mr and Mrs Copoc, should be compensable? With the advance of technology, the law must be able to adapt to the changing world. The plight of the passenger who was dragged off of a United Airlines flight has already been mentioned. There have also been instances of criminals using the 'live stream' feature on the popular social media site Facebook to instantaneously broadcast murders of innocent people¹¹⁵ and a case where a mother saw her 11-month-old daughter being hanged by the father via the Facebook live feature.¹¹⁶ It is submitted that the law should have in mind situations such as these as it is not inconceivable that such scenarios could occur in the UK. If a situation such as this did take place in the UK, it may be seen as unjust if the claimants in such cases were denied compensation owing purely to the fact they watched the murder take place via a phone or computer rather than in real life. This would unfortunately be the case and it is a position which has been criticised by both Butler¹¹⁷ and Rajendran¹¹⁸ who have highlighted the illogicality of curtailing claims based on whether or not they were viewed through some form of medium.

¹¹⁵ Facebook shooting: Manhunt under way in Cleveland after suspect shoots man while live streaming video, *Independent*, 17 April 2017
<http://www.independent.co.uk/news/world/americas/cleveland-ohio-steve-stephens-manhunt-facebook-live-robert-goodwin-sr-latest-a7686741.html> Date accessed: 25 April 2017

¹¹⁶ Thai man kills baby on Facebook Live then takes own life, *BBC News*, 25 April 2017
<http://www.bbc.co.uk/news/world-asia-39706205> Date accessed: 29 April 2017

¹¹⁷ Butler, D., 'Nervous Shock at Common Law and Third-Party Communications: Are Australian Nervous Shock Statutes at Risk of Being Outflanked?' (1996) 4 *Torts Law Journal* 12

¹¹⁸ Rajendran, 'Told Nervous Shock' at p.745

Given the above recommended move towards imposing liability through the application of the simple reasonably foreseeable test this requirement should have no part to play in the determination of liability for psychiatric injury. It should be neither a determinative requirement nor a guiding factor towards establishing reasonable foreseeability. As reasonable foreseeability will already be aided by factors such as nearness to the event which imperilled the immediate victim and relational ties between the claimant and the victim there is little else that the claimant witnessing the event with their own unaided senses could contribute.