PSYCHIATRIC ILLNESS AND THE LAW OF NEGLIGENCE: A HISTORICAL REVIEW

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The purpose of this article is to critically describe the way in which the courts have analysed claims for psychiatric illness.[1] In the last 200 years, the tort of negligence has grown exponentially, but it has failed to properly recognise injuries which manifest themselves in psychiatric illness. This article will review the history of claims for negligently inflicted psychiatric illness to explain why there has only been partial recognition of these claims.

In Part I of this article, attention is drawn to the problems that exist in determining the causation of psychiatric disorder for the purposes of deciding issues of compensation. What is at issue is the different standards of causation that operate in law and medical psychiatry. In the former, it is necessary to show only that, on the balance of probabilities, a chain of causation exists showing that the defendant's conduct caused the plaintiff's psychiatric illness. In the latter, issues of causation are confined to diagnosis of mental disorders, multifactorial aetilologies, and the degree of psychiatric impairment. In the absence of an actual physical lesion, the courts have become skeptical and wary of extending the defendant's liability to cover psychiatric illness.

In Part II, the discussion will turn to the decisions of English and Australian courts; in particular, the different categories of litigants and the varying tests for duty of care, foreseeability and

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[1] NC Andreasen and DW Black, *Introductory Textbook of Psychiatry*, 2nd ed, Washington DC, American Psychiatric Press, c1995.

proximity of relationship. This article argues that many of the principles and distinctions used in the current approach do not take sufficient account of a wide range of medical and social developments. This results in the law reflecting inappropriate policy considerations.

In Part III, references are made to the theoretical justifications for the imposition of liability for psychiatric illness, in particular Aristotelian notions of corrective and distributive justice. Ideas for reform of the law, including proposals for England and Australia, are also discussed.

As a finale, in Part IV the discussion turns to the state of English Law which is unsatisfactory. This is subject to the Law Commission proposals for reform, which have not materialised. The proposals may be viewed as a novel advancement in judicial thinking but their implementation may be politically difficult. It is envisaged that the Australian Courts will become unconcerned with the inconsistencies of the English approach for liability for psychiatric illness.

PART I - WHAT TYPES OF PSYCHIATRIC ILLNESS CAN BE INFLICTED NEGLIGENTLY?

Psychiatric illness can be caused by "shock" where the sufferer is suddenly affronted by a traumatic accident. Psychiatric illness, in this context, consists of Post Traumatic Stress Disorder (PTSD) which is defined by the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV).[2] PTSD is defined as the development of characteristic symptoms following exposure to an extreme traumatic event.

The formulation of PTSD was introduced in the third edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-III).[3] PTSD was conceptualised and defined psychologically. It was by definition "acute and reversible" and it was included in "transient situational personality disorders".

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[2]American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 4th ed, Washington DC, 1995 at 438.

[3]American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 3rd ed, Washington DC, 1980 at 236

No characteristic symptoms were specified.[4] The World Health Organisation (WHO) has also implemented an International Classification of Diseases (ICD-10) which mirrors the DSM IV.

Presently there are 17 diagnostic symptoms associated with PTSD. They include:

1. Recurrent, intrusive and distressing recollections of events;
2. Recurrent and distressing dreams of the event;
3. Acting or feeling as if the event were recurring;
4. Intense psychological distress; or
5. Psychological reactivity triggered by things or occurrences which remind the person of the event;
6. Avoidance of thoughts, feelings, or conversations associated with trauma;
7. Avoidance of activities, places or people associated with recollection of trauma;
8. Inability to recall an integral aspect of trauma;
9. Decreased interest or participation in activities;
10. Feeling of isolation from others;
11. Restricted range of effect (e.g., unable to have love feelings);
12. Feeling of foreshortened future in terms of livelihood;
13. Lack of sleep;
14. Irritability or outbursts of anger;
15. Difficulty in concentrating;
16. Hypervigilance; and
17. Exaggerated emotional response.[5]

These symptoms can cause disturbance in social, occupational or other important areas of life.[6]

Gradually, there was an expansion of the types of traumatic events which were recognised as causing PTSD. In 1984 DSM-IV

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[4]S O'Brien, "Post Traumatic Illness other than Post Traumatic Stress Disorder" in S O' Brien (ed), *Traumatic Events and Mental Health*, Cambridge, Cambridge University Press, 1998 at 144.
[5]n2 at 439.
[6]n2 at 438.

was introduced to require the sufferer to have experienced, witnessed or been confronted by a threat to physical integrity. The sufferer must have responded with intense fear, helplessness or horror. The trauma need not be unusual, dramatic or catastrophic.

A core development associated with PTSD has now been added to DSM-IV as a new diagnosis within the anxiety disorders: acute stress disorders. In short, acute stress disorder after the trauma can appear identical to PTSD. The exception is that at the time of the trauma or shortly thereafter, the victim must experience significant dissociative symptoms. It is this response of depersonalisation, in a state of "daze", detachment from one's surrounding or amnesia that seems to separate this severe acute reaction to trauma from PTSD.

PTSD often grades into, amongst other things, disorders such as generalised anxiety disorder, panic disorder, major depression, chronic dysthymia, alcoholism and somatoform. The existence of PTSD as a recognised category of mental disorder enables it to be used in legal considerations for such things as securing disability payments, pensions and compensation for injury, or as a form of legal defence in criminal proceedings.

Today it is believed that PTSD can be triggered by experience of an event that is outside the range of usual human experience and which is markedly distressing. This would include:

1. Serious threats to one's life or physical integrity;
2. Serious threats or harm to one's children, spouse, close relatives or friends;
3. Sudden destruction of one's home or community; or
4. Witnessing someone who has recently been, or is being, seriously injured or killed as the result of an accident or physical violence.[7]

There is still doubt about which stressful events (stressors)[8] produce which symptoms in which people. Advances in neuro-

[7]American Psychiatric Association , Quick Reference To The *Diagnostic Criteria From DSM-IV* (Washington, 5th ed, 1998) 209

radiological imaging techniques and improved understanding of the biochemistry of the brain have suggested the presence of subtle cerebral metabolic and structural abnormalities in patients with psychiatric illness. This suggests a physiological basis for PTSD.[9]

The Link Between Psychiatric Illness and the Law of Negligence

The law pertaining to psychiatric illness owes its modern existence to negligence. Negligence can be defined as careless conduct which results in an injury to another, in circumstances where a duty exists to avoid such injury. The breach of duty must have caused the injury and the injury must not be too remote from the breach.[10] In essence, the tort of negligence is concerned with protection of persons, property and economic interests from damage caused by another person's failure to take reasonable care.

In claims of negligently inflicted psychiatric illness, the plaintiff's reaction to a traumatic event is usually measured against a standard of normal susceptibility and disposition. This measurement is used to determine the question of whether the defendant should have reasonably foreseen the plaintiff's injury. If it is proved that the injury was reasonably foreseeable, it can be established that the defendant owed the plaintiff a duty of care.

However, the law of negligent infliction of psychiatric illness is fraught with judicial skepticism. Judges are cautious in awarding damages for the negligent infliction of psychiatric illness. Their reservations are caused primarily by the fact that psychiatric illness is an invisible injury. This is unlike physical injury where the patient is diagnosed and given the necessary surgical intervention or medication. In claims for psychiatric illness, judges are selective in their approach of awarding

[8] Note 2 at 438. A 'stressor' is defined as an exposure to a traumatic event. The severity, duration and proximity of an individual's exposure to the traumatic event are the most important factors affecting the likelihood of developing a disorder i.e. *PTSD*
[9] O'Brien, Note 4 at 286
[10] *Heaven v Pender* (1883) 11 QBD 503,507

damages, as they fear opening the "floodgates" and being drowned by spurious claims.[11]

When one compares the judicial process used to determine causation with the medical techniques used to diagnose the cause of psychiatric illness, one can discern a tension between "legalist" and "medicalist" approaches.[12] The legalist approach compares the cost of awarding damages to the litigant over the dangers of spurious claims and rising community costs. Such policy reasoning is used to determine whether a breach of legal duty caused the plaintiff's injury. The "medicalist" approach focuses on psychiatric evidence of illness, and has no regard to the wider social concerns about illegitimate claims.

PART II - THE LEGAL HISTORY OF PSYCHIATRY ILLNESS

Early Recognition of Psychiatric Injury

To properly understand the tension between "medicalist" and "legalist" approaches, we need to examine the legal history of psychiatric illness. While there has been a continuous development of the duty of care concept in other areas, in relation to psychiatric illness the development has been tortuously slow.[13] Originally, there was no duty of care in relation to psychiatric illness, but as we shall see there has been piecemeal recognition of liability in modern times.[14]

The earliest case in which damages were awarded for mental pain and suffering unaccompanied by physical injuries, was *I de S et ux v. W de S*[15]. This case involved an innkeeper who brought a successful case on his wife's behalf against a guest at the inn

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[11] Handford P, "A New Chapter in the foresight saga: psychiatric damage in the House of Lords" (1996) 4 *Tort Law Review* 5

[12] Casey P and Craven C, *Psychiatry and the Law* (Dublin, Oak Tree Press, 1999) 135

[13] A similar analogy can be drawn to awarding damages for negligently inflicted economic loss, which is still developing and where a cautious approach is favoured: see *Perre v. Apand Pty Ltd* (1999) 73 ALJR 1190 at 1206.

[14] *Victorian Railway Commrs v. Coultas* (1888) 13 App Cas 222.

[15] (1348) Y.B.22 Edw.III, f.99, pl.60. Kind acknowledgment to Prof Jane Stapleton at the ANU who managed to locate the original text of this case via access to the Bodlean Library, Broad St, Oxford.

who had thrown a hatchet at his wife. She dodged and was not physically injured but damages were awarded as the emotional effects of the fright had resulted from an intentional act.[16] This case demonstrates the point that, even in the absence of physical contact, damages are recoverable if the emotional response is brought about by the defendant's intentional conduct.

Much later, in *Wilkinson v. Downton*[17], the defendant by way of a practical joke, informed a woman that her husband had been involved in a traffic accident and was seriously injured. She suffered shock with serious physical symptoms which today would be considered similar to PTSD. Damages were awarded in her favour.[18] This decision is often seen as creating a new tort, the "infliction of nervous shock".[19]

The above cases appear to have been successful because of the intentionally wicked conduct of the defendants. It has proved more difficult for the common law to recognise mental distress when it was inflicted unintentionally.

In the late 18th century, the Privy Council decided in *Victorian Railways Commissioners v. James Coultas and Mary Coultas*[20] (*Coultas*) that there should be no recovery for nervous shock unaccompanied by physical injury.[21] The plaintiff suffered a miscarriage due to the fright she received when the defendant's train narrowly missed the light carriage that she was on. The Privy Council decision was made on the ground that the harm suffered was not a natural and probable consequence of he defendant's conduct. In a brief judgment, Sir Richard Couch LJ

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[16]J Robitscher, "Mental Suffering and Traumatic Neurosis" in J Robitscher, *Pursuit of Agreement, Psychiatry and the Law*, Philadelphia, Lippincott Co, 1966 at 94.
[17] [1897] 2 QB 57.
[18] H Luntz and D Hambly, *Torts Cases and Commentary*, 4th ed, Sydney, Butterworths, 1999 at 496.
[19]Also note in *Janvier v. Sweeney* [1919] 2 K.B. 316 the case concerned the negligent communication of news to the plaintiff which resulted in shock. The means of communication was by inducing the plaintiff by fear. This constituted a good cause of action against the defendant. Similarly in *Barnes v. Commonwealth* (1937) 37 SR (NSW) 511, bad news conveyed to the plaintiff in circumstances where the defendant should have known that it was false, but was probably not consciously aware of this, was held to provide a good cause of action for nervous shock.
[20] [1888] 13 AC 222.
[21]N Fox and F Tallis, "Adjustment Disorder" (1998) *New Law Journal* 164.

made reference to the dangers of a "…wide field opened for imaginary claims."[22] His Lordship spoke of an express judicial distrust of the malingering plaintiff and an implicit one of a medical charlatan who would furnish evidence to support him.[23]

By the turn of the 20th century, the English Courts recognised a cause of action for negligently inflicted psychiatric illness in *Dulieu v. White*.[24] Here, the defendant's servant negligently drove a pair-horse van into a bar. The plaintiff at the time was pregnant and sitting behind the bar during the accident. As a direct consequence she suffered shock and gave birth to a child with disabilities. She was successful in recovering damages against the defendant, as there was a reasonable apprehension of immediate bodily harm. Kennedy J suggested that recovery should only be available when the plaintiff's illness arose from a reasonable fear of injury to him or herself.[25] He also questioned whether there was an actionable breach of duty if the plaintiff "is made ill in body by [the defendant's] negligent driving as does not break his ribs but shocks his nerves".[26] In short, *Dulieu* established a right to recover for fright/non-physical injury. Proof of physical impact was unnecessary.

The Privy Council had the opportunity of reconsidering *Dulieu* in *Bell v. Great Northern Rly Co of Ireland*[27]. In this case a woman suffered from fright and nervous shock when she sat in a carriage that ran uncontrollably downhill. Although she did not suffer any bodily injury, the cause of the shock was found to be the result of the defendant's negligence. She was awarded damages and the defendant appealed. The Privy Council concluded in favour of the plaintiff. Palles CB opined as follows:

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[22] n20 at 226.
[23] Lord Bridge in *McLoughlin v. O'Brien* [1983] 1 AC 410 at 432; A Sprince, "Negligently inflicted psychiatric damage: a medical diagnosis and prognosis" (1998) 18 Legal *Studies* 59 at 60.
[24][1901] 2 KB 669.
[25]Ibid, 669.
[26]Ibid, 669.
[27](1890) 26 LR Ir 428.

> [A]s the relation between fright and injury to the nerve and brain structures of the body is a matter which depends entirely upon scientific and medical testimony, it is impossible for any court to lay down, as a matter of law, that if negligence causes fright, and such fright, in its turn, so affects such structures as to cause injury to health, such injury cannot be "a consequence which, in the ordinary course of things would flow from the negligence, unless such injury accompany such negligence in point of times."[28]

Palles CB's judgment is instructive. It shows an increasing acceptance that damage caused by fright should be compensable. Nevertheless, suspicion appears to remain in the judgment that psychiatric illness is not a legitimate form of illness.

The duty of care was later expanded to encompass fear for other people, including relatives, workmates, and rescuers and was also widened to cover fear of property damage. In *Hambrook v. Stokes Bros*[29], a mother suffered anxiety for the safety of her children when she saw a driverless truck career around a bend on the road. She miscarried and eventually died from the shock suffered. Recovery was permitted to her husband pursuant to provisions of the *Fatal Accidents Act* 1846(UK).[30] The question the courts were faced with was whether a bystander who witnessed peril or injury to another, and was fearful for that person's safety, could recover damages for injury caused by "shock". Alternatively, could a bystander, who witnessed an accident causing injury to another, similarly recover damages?

In *Hambrook* the Court of Appeal answered the first question in the affirmative and raised a possibility as to how the second question might be answered. The court stated, "if there is a duty not to shock by fear of the one kind there must equally be a duty not to shock by fear of the other".[31]

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[28]Ibid, 442.
[29][1925] I KB 141.
[30]Ibid, 141.
[31]Ibid, 144.

The Court of Appeal continued to expand liability in *Owens v. Liverpool Corporation*.[32] In *Owens*[33], the plaintiffs, who were mourners at a funeral, were travelling in a carriage directly behind the hearse. The hearse was negligently struck by a tramcar driven by the defendant's servant. As a direct consequence the coffin was overturned and the body spilt out onto the road. The plaintiffs claimed that they were horrified by what they witnessed and suffered shock. [34] The court held that the right to recover damages for mental shock was not limited "to cases in which apprehension as to human safety was involved (as in *Dulieu* or *Hambrook*)".[35] The court considered that the plaintiffs were in a special class as they were at risk of being "disastrously disturbed by an untoward accident to the trappings of mourning".[36]

The decision in this case is enlightening because of the way in which it expanded liability to situations beyond those who were in fear of physical injury.[37] MacKinnon LJ appeared to be prepared to allow a duty of care in situations where the shock was caused by apprehension for "something less important than human life (for example, the life of a beloved dog)…"[38]

After the decisions in *Hambrook* and *Owens* there remained some uncertainties, particularly in relation to the usefulness of reasonable foreseeability as a test for imposing a duty of care. This was illustrated in *Bourhill v. Young*[39], where the plaintiff heard a collision and suffered fright resulting in nervous shock. The House of Lords held that the defendant did not owe the plaintiff a duty of care as it could not be reasonably foreseen that a person instilled with the plaintiff's values would have suffered the kind of harm that she experienced. On the authority of *Bourhill*, a person's duty in respect of "nervous shock" was to

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[32] [1939] 1 KB 394 at 400.
[33] Ibid, 400.
[34] J Swanton, "Issues in Tort Liability for Nervous Shock", (1992) 6 Australian *Law Journal* 495 at 501.
[35] n32 at 401. The court was not concerned with opening the floodgates to unmeritorious cases not with individual sensitivities.
[36] n32 at 401.
[37] n32 at 396.
[38] n32 at 399.
[39] [1943] AC 92.

avoid causing injury by shock as distinct from causing "shock" that was reasonably foreseeable. The principle derived from this case is that recovery may be had where "shock" induces physical injury and the test of liability is breach of duty to avoid reasonably foreseeable injury by "shock".[40]

The distinction between physical and emotional injury raised in *Bourhill* was criticised in *King v Phillips*.[41] In this case a mother heard the cry of her infant child and then looked outside to see her son's tricycle under a taxi. The son was not injured but the fright caused psychiatric illness to the mother. Lord Denning stated that "the taxi driver cannot reasonably be expected to have foreseen that his backing would terrify a mother 70 yards away".[42] The Court of Appeal held that no duty was owed to the mother, as she could not be regarded as someone who might reasonably foreseeably be affected by the defendant's act.

A contrary result was achieved in *Boardman v. Sanderson.*[43] Here a car backed out from a garage and injured a young infant. The plaintiff heard the infant's scream, naturally ran to his assistance and suffered shock. This case extended duty to "near relatives of the infant". Therefore, it is not wholly unforeseeable that a parent will be somewhere nearby, and may suffer "shock".

In another case, *Hinz v. Berry*[44], a family went on a picnic. The mother heard a crash, which killed her husband and injured her children. She witnessed the immediate aftermath as she turned around. She recovered damages for suffering a recognisable psychiatric illness induced by shock. Lord Denning stated:

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[40]T Harvey, "Liability for Psychiatric Illness: Advancing Cautiously" (1998) 61 *Modern Law Review* 849 at 854. Furthermore, this case suggests that for the plaintiff to recover in such circumstances would stretch the legal consequences of a careless act beyond reasonable limits. Deane J endorsed that view in *Jaensch v. Coffey* (1984) 155 CLR 549, who opined for policy reasons, there would be deemed to be insufficient proximity of relationship. Lord Oliver in *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310 also shared this endorsement for similar reasons.

[41] [1953] 1 Q.B. 429. T Harvey, "Liability For Negligently Inflicted Nervous Shock" (1983) 100 *Law Quarterly Review* 101.

[42] Ibid, 101; [1953] 1 QB 429 at 442.

[43][1964] 1 WLR 1317.

[44][1970] 1 AII ER 1074.

> ...that it is settled law that damages can be given for nervous shock caused by sight of an accident...for any recognisable psychiatric illness caused by the breach of duty by the defendant...[45]

From this statement, his Lordship admitted that at one time there could be no damages for psychiatric illness, but it is settled law that damages can be awarded for psychiatric illness caused by sight of an accident, and the emphasis at any rate to a close relative.

The recognition of psychiatric illness reached a high water mark in *McLoughlin v. O'Brien*.[46] In this case the plaintiff mother was at home two miles away from the scene of an accident involving her husband and three children. She was rushed to the hospital within the hour by her neighbour and learned shortly after that her daughter had died, and she witnessed the extent of her injury. The House of Lords held that the nervous shock assumed to have been suffered by her had been the reasonably foreseeable result of the injuries to her family caused by the defendant's negligence. Their Lordships commented that policy considerations should not inhibit a decision in her favour and accordingly she was entitled to recover damages.[47]

This relaxation of policy was summarised by Lord Bridge, who stated:

> For too long earlier generations of judges have regarded psychiatry and psychiatrists with suspicion, if not hostility. Now, I venture to hope, that attitude has quite disappeared…I would suppose that the legal profession well understands that an acute emotional trauma, like a physical trauma, can well cause a psychiatric illness in wide range of circumstances and in a wide range of individuals whom it would be wrong to regard as having any abnormal

[45]Ibid, 1075.
[46][1982] 2 AII ER 298.
[47]Ibid, 367.

> psychological make-up. It is in comparatively recent times that these insights have come to be generally accepted by the judiciary. It is only by giving effect to these insights in the developing law of negligence that we can do justice to an important, though no doubt small, class of plaintiffs whose genuine psychiatric illnesses are caused by negligent defendants.[48]

Later cases adopted the *McLoughlin* relaxation. In *Ravenscroft v. Rederiaktiebolaget Transatlantic*[49], a mother suffered shock after hearing that her 24-year-old son had been crushed to death in a work accident and was awarded damages. Ward J ruled that because of her close relationship with the victim, her reaction to his death was reasonably foreseeable. In *Hevican v. Ruane*[50], a parent who succeeded in claim for nervous shock as a predictable result of the cumulative effect of learning some time after the accident that his son was involved in an accident and not present at the immediate aftermath.[51]

The Australian Approach

Australian judges were also cautious in recognising negligently inflicted psychiatric illness. Early Australian cases accepted liability in situations of intentional infliction of emotional distress, [52] but rejected negligently inflicted psychiatric illness. For example, in *Chester v. Waverley Municipality*[53] a mother suffered shock after seeing her dead son being lifted out of a trench. The High Court of Australia decided that a duty was not

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[48] Ibid, 433.
[49] [1991] 3 AII ER 73.
[50] [1991] 3 AII ER 65.
[51]C Witting, "A primer on the modern law of 'nervous shock" (1998) 22 *Melbourne University Law Review* 62 at 72. The author comments "on the statistical and medical evidence before me, psychiatric illness resulting from nervous shock, whether received as a result of witnessing an accident involving a loved one or hearing about it, can be no more than the most remote of possibilities..."
[52] For example, in *Bunyan v. Jordan* (1937) 57 CLR 1, the defendant's threats threw the plaintiff into an emotional state which caused a neurasthenic breakdown. It was said that the defendant, "in the course of socially worthless conduct, failed to exercise care to avoid causing nervous shock to the plaintiff": at 16. It was recognised that damages may be recovered for intentional infliction of psychiatric illness. See also Luntz and Hambly, n18 at 497.
[53](1939) 62 CLR 1.

owed to her, as her injury was not within the reasonable anticipation of the defendant.[54]

Criticism of *Chester* resulted in the passing of the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW). Section 3 of the Act abrogated the *Chester* case and gave the court authority to have regard to the negligent infliction of psychiatric illness arising from shock and award damages. Further, Section 4 defined the category of allowable claimants to include members of a family who suffer psychiatric injury as a result of a loved one being negligently killed, injured or put in peril. There is also similar legislation in force in the Australian Capital Territory[55] and the Northern Territory.[56]

This legislative reform did not stop the Australian common law from developing to a more open stance towards negligently inflicted psychiatric illness. Later cases saw a relaxation of the requirements of reasonable foreseeability to allow close family members to claim nervous shock after witnessing the occurrence and aftermath of accidents involving their relatives.[57] The widening of foreseeability to include witnessing the aftermath began in *Benson v Lee* [58], where the plaintiff was informed by a third party that her son was knocked down by a car and she rushed to the scene of the accident 100 yards away. Lush J stated:

> …if within the limits of foresight something is experienced through direct and immediate perception of the accident, or some part of the

[54]See *Abramzik v. Brenner* (1967) 65 DLR (2nd) 651. The Court of Appeal denied recovery to a mother who suffered 'nervous shock' on being informed by her husband that two of her children had been killed in a road accident. These decisions may have been decided differently today, sixty years from the majority decision would take into account the current legal developments and in particular a mother who witnesses the immediate aftermath and suffers shock as a result would have been a common experience of mankind.

[55] Law Reform (Miscellaneous Provisions) Act 1955, s.17, 22,23,24(1)(5), 32 clarifies the requirements for PTSD and categories of claimants.

[56] Law Reform (Miscellaneous Provisions) Act 1956, s.23, 24,25(5) clarifies the requirements for PTSD and categories of claimants.

[57]For example, a brother who watched his infant sibling involved in a terrible accident and the mother who was summoned to the aftermath, both recovered damages in *Storm v Geeves* [1965] Tas SR 252.

[58] [1972] VR 789.

> events constituting it, which imparts shock, that is all …the law requires.[59]

Similar issues were discussed by the High Court in the landmark case of *Jaensch v. Coffey*.[60] In this case the plaintiff saw her injured husband in a combination of events that led her to suffer psychiatric illness. The High Court of Australia dealt with the definition of an "aftermath" of an accident giving rise to a claim of nervous shock and found that it should not be restricted to the claimant being present at the actual site of the injurious event.[61] The definition of such an aftermath should extend to the hospital during the period of the immediate post-accident treatment of the person physically injured by the tortfeasor.[62] From this decision, it is important to note that the court was prepared to contemplate recovery where a plaintiff, so devastated by being told of an accident involving family members, that he or she was unable to attend the various scenes. This is viewed as a sensible extension of logical progression of the law.

The majority of the court allowed recovery. However, Deane J sought to impose a new test for the imposition of the duty of care in addition to the test of reasonable foreseeability. This test was the test of proximity.

The concept of proximity is related to a relationship of closeness in space and time. Deane J concurred with the speech of Lord Wilberforce in *McLoughlin*, which isolated closeness of time and space as an important element in establishing proximity.[63] According to Deane J, a duty of care could be established in cases of physical proximity (closeness of space and time), circumstantial proximity (close or overriding relationships) or causal proximity (close or direct causal relationships between

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[59] Ibid, 789.
[60] [1984] 155 CLR 549.
[61]D Mendelson, "The defendant's liability for negligently caused nervous shock in Australia-Qua Vadis?" (1992) 18 *Melbourne University Law Review* 16 at 37.
[62] Ibid, 37. .The High Court noted that, in view of today's fast and efficient ambulance services, it would be anomalous to allow recovery only to those plaintiff's who could "beat the ambulance to the scene of the accident." per Deane J (1984) ALJR 426 at 462
[63]n51 at 72.

acts and injuries or losses).[64] The defendant's negligence must be a primary and continuing[65] cause that must be proved to have resulted in the plaintiff's psychiatric illness. Whilst acknowledging the concepts of time and space are infinite, arbitrary lines of demarcation often need to be drawn with respect to them.[66]

> This exercise is complicated by…. (i) the different proximity limbs can have different weighting's in different cases; and (ii) there is a degree of overlap with the determination of causation itself, in so far as causation is a question of common sense and experience...[67]

Therefore, in Deane J's analysis to establish a duty of care one must prove:

(a) Reasonable foreseeability of a real risk of harm of the kind suffered by the plaintiff or a member of that class;

(b) Existence of the requisite element of proximity in the relationship between the parties; and

(c) Absence of any statutory provision or common law rule…which operates to preclude the imposition of such a duty of care in the circumstances of the case.[68]

Brennan J in *Jaensch* took an entirely different approach to the question of duty of care. Whilst appreciating the objective aspect to the foresight test, Brennan J "stressed that it was a question of fact whether a set of circumstances might induce psychiatric illness".[69] By that he meant a matter of impression as opposed to an evidentiary concept. Time and distance were viewed as

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[64]n60 at 584-585.
[65]In other words, what was the predominant causal factor that led to the illness?
[66] n51 at 72.
[67] n51 at 72.
[68]J Keeler, "The proximity of past and future: Australian and British approaches to analysing the duty of care" (1989) 12 *Adelaide Law Review* 93 at 97.
[69] D Gardiner, "*Jaensch v Coffey*, Foresight, Proximity and Policy in the Duty of Care for Nervous Shock" (1985) 1 *Queensland University of Technology Law Journal* 69 at 75.

matters going to causation and reasonable foresight. These were not matters of policy which limited liability.[70]

Brennan J drew a distinction between a sudden sensory perception and learning of an event in circumstances of a lesser degree of involvement in the aftermath.[71] The suggestion is that it is more plausible that persons will find difficulty in coping with, and will suffer injury as a result of being embroiled themselves in events.

Critical Analysis of Proximity Following *Jaensch*

While Deane J stood alone in *Jaensch* in his formulation of proximity, subsequent decisions of the court saw growing acceptance of the concept. However, in *Hill v. Van Erp*[72] the notion of proximity was open to criticism. It centred on not providing a discrete legal principle. Dawson J in the High Court of Australia expressed reservation about proximity as "a unifying theme".[73] He opined "[Proximity]… as expressing the proposition that in the law of negligence, reasonable foreseeability of harm may not be enough to establish a duty of care".[74] The objection to proximity also extended to include the notion of reasonable foreseeability of the risk of harm. Hence, it was also seen to formally incorporate policy considerations into the process of legal reasoning.[75] At first this was evident in Lord Wilberforce's two-stage test in *Anns v. London Merton Borough Council*.[76] Consequently through Deane J's notion of proximity in *Jaensch*, it continued to develop with Brennan J's "incremental approach" in *Sutherland Shire Council v. Heyman*.[77] The development of approaches articulated by the abovementioned judges is relevant to determine whether the rules themselves provided legal certainty for the law of negligence.

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[70] Ibid, 75.
[71] n51 at 72.
[72] (1997) 188 CLR 159.
[73] Ibid, 159-160.
[74] Ibid, 159.
[75] Ibid, 206, 220.
[76] [1978] AC 728.
[77] (1985) 157 CLR 1124.

The above discussion postulated a growing fear[78] of not adopting the proximity criterion in *Pyrenees Shire Council v. Day*[79], as laid down in *Jaensch*. The favoured approach was of foreseeability, proximity or neighbourhood, and policy. Subsequently in *Perre v. Apand Pty Ltd*[80], McHugh J of the High Court of Australia stated that, "Deane J's concept of proximity of closeness or nearness, is no longer seen as the unifying criterion of duties of care…"[81]

His honour opined:

> ...[T]he reason that proximity cannot be the touchstone of a duty of care is that it "is a category of indeterminate reference par excellence…"[82]

Nevertheless, in the recent decision of the New South Wales Court of Appeal, *Morgan v. Tame*[83], Spigelman CJ confirmed that the concept of proximity is no longer to be regarded as a unifying principle. Nonetheless, he went on to comment, the proximity criteria considered by Deane J in *Jaensch*, remain material in determining the existence of a duty of care.

The Impact of *Jaensch*

Since *Jaensch v. Coffey*, claims have been allowed in situations where the plaintiff hears of distressing news about accidents to loved ones. For example, in *Petrie v. Dowling*[84], damages were recoverable for the plaintiff's shock and consequent illness, which followed from the receipt of distressing news.[85] A gradual development of this extended to hearing about the death of a loved one incarcerated in a prison cell.

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[78] See also *San Sebastian Pty Ltd v. The Minister* (1986) 162 CLR 340, *Burnie Port Authority v. General Jones Pty Ltd* (1994) 179 CLR 520 and *Bryan v. Maloney* [1994] BCL 279 where there was a further erosion of the proximity criterion.
[79] (1998) 192 CLR 330.
[80] (1999) 73 ALJR 1190.
[81] Ibid, 1202.
[82] Ibid, 1202-1203.
[83] [2000] NSWCA 121; <http://www.lawlink.nsw.gov.au> 25 August 2000
[84] [1989] Aust Torts Rep 80-263.
[85](1989) Australian Torts Reports 80-263, the SC of Queensland applied the obiter comments of Deane J in *Jaensch v. Coffey* (1984) Aust Torts Rep 80-300.

In *Sloss v. New South Wales*[86], the New South Wales Supreme Court allowed recovery to a mother who suffered "shock" as a result of hearing of the death of her son who was incarcerated. The defendant, the State of NSW, did not contest that it owed a duty of care to the prisoner, but refused to accept liability for nervous shock suffered by the mother. The judge found that the duty of care to all persons in sufficient emotional proximity to suffer emotional shock. However, this did not extend to recovery for economic loss that had an adverse effect on the plaintiff's mental state to run her business.

Two other Supreme Court of Appeal cases followed *Sloss*. In *State of New South Wales v. Seedsman*[87], where a police officer in charge of investigating crimes against children suffered from PTSD as a result of exposure. There was no form of counselling or therapy given by the Police Department to alleviate any stress, anxiety or depression the officer may have had. The court allowed recovery for the negligent infliction of psychiatric illness against the Police Department. More recently, the NSW Court of Appeal in *Morgan v. Tame*[88] disallowed recovery to a plaintiff who suffered psychiatric illness as a result of incorrect information about her blood-alcohol reading, as this was too remote in law.

The Modern English Approach

While the decision in *McLoughlin v. O'Brien* appeared to usher in a new age of judicial acceptance of psychiatric illness, the modern English approach begins with the decision of *Alcock v. Chief Constable of South Yorkshire*. [89] This case re-established a very strict and cautious attitude toward claims for the negligent infliction of psychiatric illness.

The case was concerned with the Hillsborough Disaster. In the spring of 1989, a football match was to be played at the Hillsborough Stadium, the ground of Sheffield Wednesday

[86] [1999] NSWSC 995; <http://www.lawlink.nsw.gov.au> 6 October 1999
[87] [2000] NSWCA 119; <http://www.lawlink.nsw.gov.au>25 August 2000
[88] [2000] NSWCA 121; <http://www.lawlink.nsw.gov.au> 25 August 2000
[89] [1991] 4 AII ER 907.

Football Club. This game was televised and heard over the radio. The game came to a halt to everyone's surprise because the press of people in the Leppings Lane pens had created such intense pressure that some spectators were becoming trapped. They were unable to move voluntarily in any direction, and were losing the ability to breathe. Spectators in Pens 3 and 4 were receiving crushing injuries from the forces being exerted on their bodies. From such injuries, 95 spectators were killed and over 400 injured. Psychiatric illness and causation were assumed for the purposes of the hearing, which centred on the scope for recovery when the plaintiff was neither a parent nor spouse of the primary victim, and on whether a means of communication other than direct, unaided perception could ground a claim.

In the High Court, Hidden J took an incremental approach on both issues. Psychiatric illness was deemed "reasonably foreseeable in principle for claimants who had seen live television broadcasts but not for those who had been told of the disaster or had heard a live radio broadcast and only later saw recorded television footage".[90] On appeal, the Court of Appeal took a restrictive approach and disallowed recovery in fear of the floodgates of unmeritorious claims. The House of Lords affirmed the decision of the appellate court. The House also took a very restrictive view of simultaneous television, by rejecting it as a medium of cause.[91]

Firstly, the House limited the aftermath doctrine to the immediate aftermath. It did not include identification of the body of the victim at the mortuary.[92] Both mothers in *McLoughlin* and *Jaensch* succeeded because the shock they suffered was fairly contemporaneous. Two hours elapsed from the time of the accident when the plaintiff suffered shock as a result of learning the death of a loved one in *McLoughlin* and nine days elapsed in *Jaensch*. In the Hillsborough disaster, eight hours had elapsed after identifying the bodies at the mortuary. This was not considered to be contemporaneous enough, both in

[90] H Teff, "Liability for Psychiatric Illness after Hillsborough" (1992) 12 *Oxford Journal of Legal Studies* 440 at 445.
[91] [1992] 1 AC 310.
[92] Ibid, 396-397.

time and space, to allow recovery. Would the courts disallow recovery if the loved one residing on the other side of the world found it difficult to arrive at the aftermath of the accident? Based on the geographical and temporal limitations placed in *Alcock*, recovery would be denied.

Secondly, and more importantly, the House restricted the categories of plaintiffs who could make a claim for psychiatric illness. The House made a distinction between a primary and secondary victims. A primary victim was defined to be a person who participates or is directly involved in an accident. A secondary victim is one who is a passive and unwilling witness of injury caused to the others.

If a person is a secondary victim they will have to prove close ties of love and affection with the primary victim to succeed in their claim.[93] Moreover, they must have been present at the accident or immediate aftermath and the psychiatric injury must have been caused by direct perception of accident or immediate aftermath and not hearing about it from somebody else.[94]

What caused the change in approach from *McLoughlin* to *Alcock*? The decision is *Alcock* appears to be motivated by a returned fear of spurious claims. In *Alcock*, their Lordships' skepticism centred on the "authenticity of their symptoms and/or resentment over the money, time, and effort needed to treat them".[95]

A problem arises from the type of illness caused. It is not disputed that psychiatric illness was discussed, but this in essence was triggered by an immediate emotional shock. "Being apparently dependent on the individual plaintiff's degree of emotional resilience, this kind of damage has slowly been accepted by the courts as compensable, and the suspicion remains that it is still not fully recognised as a 'legitimate' form

[93] This is a derogatory approach as how can one measure ties of love and affection. The law requires correspondence between the parties if any; how close one lives in the family home, etc.
[94]M Bogie, "A Shocking Future?: Liability for Negligently Inflicted Psychiatric illness in Scotland" (1997) *Juridical Review* 38 at 45.
[95]H Teff, "Liability for negligently inflicted psychiatric harm: justifications and boundaries" (1998) 57 *Cambridge Law Journal* 91 at 93.

of illness".[96] The suspicion increases after reading Lord Ackner's approach in *Alcock*. His Lordship stated, " ... 'shock' relates not to effect, but to cause, and is purely a limiting device. Psychological injury may be lasting, it may be foreseeable, and it may result from a devastating emotional blow, but if it is not caused by witnessing a sudden and shocking event, it is not compensable."[97]

It is important that Judges give reasons for them to reach the appropriate decisions. Failure to do so leaves the law to develop according to untested legal principles as exemplified in *Alcock*.

The Aftermath of *Alcock*

The aftermath of *Alcock* was first felt in cases involving primary victims who experience psychiatric injury. In *Page v. Smith*[98], the occupant of a car suffered psychiatric illness after being involved in an accident. No physical injury was suffered but the plaintiff had a pre-existing illness called chronic fatigue syndrome, suffered for 20 years and which was reactivated by the accident. The House of Lords stated that in relation to primary victims of the defendant's negligence, the latter had to take his victim as he found him. The defendant was held liable for the plaintiff's psychiatric illness. The reasoning for the court's decision was that, if the defendant's tort created a foreseeable risk that plaintiff would suffer bodily injury, the defendant could be held liable for nervous shock suffered by the plaintiff, even if it was so abnormal a reaction to the tort that it could be described as "unforeseeable", and even if, in fact, the plaintiff suffered no bodily injury.[99]

The consequence of *Page* is that so long as a primary victim is proximate to what appears to be a tortious act or omission, the

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[96] Steele J, "Scepticism and the Law of Negligence" (1993) 52 *Cambridge Law Journal* 437 at 448.
[97] [1992] 1 AC 310 at 400,401.
[98] [1996] 1 AC 155.
[99] F Trindade and P Cane, *The Law of Torts in Australia*, 3rd ed, Melbourne, Oxford University Press, 1999 at 362. The author comments that if this is accepted in Australia, the decision would require courts to distinguish between primary victims of nervous shock who were subjected to a risk of foreseeable bodily injury and those who were not.

chance of succeeding against the tortfeasor or any heading of liability will not be questioned.

The decision was severely criticised because on its facts, the plaintiff, who had suffered from an "ill defined" medical condition for 20 years, was involved in a minor accident, following which he continued to suffer from the same condition.[100]

The English Law Commission Report on Psychiatric Illness[101] attempted to qualify it by stating that the test in *Page* is whether the defendant can reasonably foresee his conduct will expose the plaintiff to risk of physical or psychiatric injury. But according to Mullany, the distinction between psychiatric injury and physical injury is artificial, outmoded and contrary to common law cases.[102] Further, it was held that the plaintiff was a primary victim and stressed the importance of categorising primary and secondary victims. This distinction was important and carried with it significant legal consequences. The consequences of the distinction applied to other categories of claimants namely, to a rescuer and an employee.

Rescuers and Employees

The courts had the opportunity to expound the legal principles relating to recovery of damages for psychiatric injuries by rescuers and employees once again in the Court of Appeal and House of Lords decision of *Frost v. Chief Constable of South Yorkshire Police*[103] and very recently in *White v. Chief Constable of the South Yorkshire Police*.[104]

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[100]P Handford, "A New Chapter in the foresight saga: psychiatric damage in the House of Lords" (1996) 4 *Tort Law Review* 5; T Feng, "Nervous Shock to Primary Victims" [1985] *Singapore Journal of Legal Studies* 649; F Trindade, "Nervous Shock and Negligent Conduct" (1996) 112 *Law Quarterly Review* 22; A Sprince, "Page v Smith - being 'primary' colours House of Lords judgment" (1995) 11 *Professional Negligence* 124.
[101]Law Commission Report 137 (1995), Consultation Paper on Liability for Psychiatric Illness, HMSO, London. See: "Item 2 of the Sixth Programme of Law Reform: Damages"
[102]N Mullany, "Psychiatric Damage in the House of Lords-Fourth Time Unlucky" (1995) 3 *Journal of Law and Medicine* 112.
[103] [1997] 1 AII ER 540.
[104] [1999] 1 AII ER 1.

In *Frost*[105], no duty was owed to employees who suffered shock. The sequence of events consisted of one officer attending to victims at a temporary morgue, while another police officer attempted to extricate the victims from the overcrowded and crushing pens at the Hillsborough Stadium in April 1989. The officers were also assisting in the hospital and casualty bureau. Hence they saw the horrific and gruesome scenes of accumulating dead bodies and experienced the distress and horror suffered by the victims, their friends and relatives. Their Lordships found that the police officers were in fact secondary victims who failed to establish the requisite degree of proximity.[106] *Frost* involved participants actually present at the Hillsborough, whereas *White* involved claims of five police officers who were not present in the events but gave assistance in the aftermath of the Hillsborough Tragedy.

In *White*, the House of Lords held that police officers are not entitled to recover damages against their chief constable for debilitating psychiatric injury suffered as a result of assisting with the aftermath of a disaster in the course of their duties, either as employees or as rescuers.[107] Lord Steyn quoted a passage from Tony Weir's *Casebook on Torts*[108]:

> ...there is equally no doubt that the public...draws a distinction between the neurotic and the cripple, between the man who loses concentration and the man who loses his leg. It is widely felt that being frightened is less than being struck, that trauma to the mind is less than lesion to the body. Many people would consequently say that the duty to avoid injuring strangers is greater than the duty not to upset them. The law has reflected this distinction as one would expect, not only by refusing damages for

[105]L Luh and H Sy, "Nervous Shock, Rescuers and Employees-Primary and Secondary Victims?" [1998] *Singapore Journal of Legal Studies* 121 at 126. "The law commission consultation paper no.137 ...grouped rescuers under the category of persons with no tie of love and affection to the primary victim together with bystanders and involuntary participants...rescuers are effectively regarded as secondary victims."
[106] Ibid, 122-123.
[107]Bulletin of Legal Developments (No.23 and 24) 1998.
[108]n104 at 32. T Weir, *Casebook on Torts*, 7th ed, England, Butterworths, 1992 at 88.

> grief altogether, but by granting recovery for other than physical harm only late grudgingly, and then only in very clear cases. In tort, clear means close to the victim, close to the accident, close to the defendant.

However, it is difficult to agree with Lord Steyn's view. Whilst bereaved relatives were not allowed to recover as in *Alcock*, curious spectators, who assisted in some way in aftermath of the disaster, may not recover. On the contrary, Lord Hoffmann's view is radically different.

Lord Hoffmann[109] stated that some judges sympathetic to plaintiffs took the opportunity to find that as a fact psychiatric injury had been foreseeable. As a result, this made it difficult to explain why plaintiffs in other cases had failed. By way of ascendancy, the law of torts should in principle aspire to provide a comprehensive system of corrective justice, giving legal sanction to a moral obligation on the part of anyone who has caused injury to another without legal justification to offer restitution or compensation. Yet in this area, justice has been abandoned in favour of a cautious pragmatism. Lord Hoffmann referred to the case of *Page*, where liability was restricted and arbitrary control mechanisms were introduced which the plaintiff had to satisfy.

PART III - CORRECTIVE OR DISTRIBUTIVE JUSTICE

The former is concerned with the "distribution of honour, money and other things" which a community divides among its members, while the latter is concerned with "correcting any unfairness that may arise".[110] It is apparent that this Aristotelian idea of distributive justice in modern times is followed self-consciously by the courts in the law of torts.

Aristotle believes that corrective justice is divided into two categories, namely the voluntary and the involuntary.[111] The

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[109]n104 at 40.
[110] I McLeod, "The Natural Law Tradition" in I McLeod, *Legal Theory*, London, MacMillan Press, 1999 at 27.
[111] Ibid, 28-29.

voluntary category relates to transactions such as the sale and supply of goods and services, whilst the involuntary category may itself be further subdivided into two sub categories, namely the secret, i.e. theft, and the violent, i.e. assault and battery.

Aristotelian ideas of distributive justice, in modern times, are seen as the political concept of social justice. The underlying idea that injustice may result from a violation of proportion has been similarly enduring. For example, the modern English courts have self consciously appeared to follow Aristotelian lines in *White*, suggesting that justice remains the expression of proportion and the defendant should not be overtly burdened with unlimited liability.[112]

Therefore, if one applies economic analysis to the tort doctrine, one can understand or justify liability rules only on grounds of deterrence, insurance or both. To quote Cardozo CJ in *Ultramares Corporation v. Touche, Niven & Co*[113]:

> to create potential "liability" in an indeterminate amount, for an indeterminate time, to an indeterminate class.[114]

In view of the development of the law and in the interest of certainty, a balance needs to be achieved between distributive and corrective justice. When considering this, it is useful to consider Aristotle's concept of corrective and distributive justice in tort. This is pertinent to the doing and suffering of harm and viewed from distribution of burdens or benefits in accordance with a collectively determined purpose.[115] It is the concept of corrective justice that we are concerned about.

According to Fiss, who critiqued corrective justice, there is no escape from instrumental judgments. Further, he stated that a judge who applies corrective justice "must not only reflect upon

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[112] n104 at 43.
[113](1931) 255 NY 170.
[114]B Baxt, "Companies vulnerable to wider liability rule", *The Australian Financial Review* (12 November 1999) 33.
[115] J Weinrib, "Adjudication and Public Values: Fiss's Critique of Corrective Justice" (1989) 39 *University Of Toronto Law Journal* 1-17.

and come to understand the relationship that exists between the parties and give substance and context to the idea of freedom but must also generate a norm that preserve that relationship of equality".[116] The judge must be mindful of questions such as, "Does the relationship require the defence of contributory negligence?" or a lower or higher platform of compensation. Therefore, these are instrumental considerations. In psychiatric illness cases, a judge is mindful of these overriding considerations, especially when a novel case is before the courts and no previous precedents have been established. In other words, the law is silent and still in the stage of development. In *McFarlane and another v. Tayside Health Board*[117], Lord Steyn invoked the concept of distributive and corrective justice. He stated:

> The truth is that tort law is a mosaic in which the principles of corrective justice and distributive justice are interwoven. And in situations of uncertainty and difficulty a choice sometimes has to be made between the two approaches.[118]

In doing so, the courts invariably make a linguistic interpretation which affects the outcome of a hard case.[119]

Lord Hoffmann started from the proposition that in principle the law of torts is there to give legal force to an Aristotelian system of corrective justice. On such an assumption, no valid distinction can be drawn between physical and psychiatric injury.

On the contrary, if one starts from the imperfect reality of the law of torts, in which both physical and psychiatric injury go uncompensated, then questions of distributive justice tend to intrude, notably where the persons (if any) who caused the damage were not negligent, or because the potential defendant happens to have no money. In other words, why should X receive generous compensation for his injury when Y receives

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[116] Ibid, 3.
[117] [1999] 4 AII ER 961 at 978, 979.
[118] Ibid, 978.
[119] n 96 at 444.

nothing? Is the administration of justice, so arbitrary and imperfect a system of compensation, worth the very considerable cost? For Lord Hoffmann this point is decisive. Whilst this matter is not the foundation of Lord Steyn's judgment, it is implicit that he was also concerned with the imbalance the law of negligence had created. In the course of the House of Lords judgment, Lord Griffith *opined* that the police are trained to deal with catastrophic situation and are well compensated under terms of their service. Policemen and Firemen are less prone to suffer. It is unfortunate that the Police Officers in *White* were not successful[120] because:

> …fear is expressed that if foreseeability of psychiatric injury is sufficient it will open the floodgates to claims, many of unmeritorious kind... Trivial or peripheral assistance will not be sufficient: see *McFarlene v EE Caledonia Ltd*.[121]

The above approach permits a less invidious cut-off point than now obtains. The deficiencies of psychiatric illness analysis arise not from medical determinants but from arbitrary distinctions based on exaggerated concern about limitless liability. In *White*, control mechanisms were introduced: tie of love, proximity in time and space, and perception by sight or hearing or equivalent means were regarded as artificial barriers to recovery, placed by the House of Lords.[122] Looking back, the rule of liability in relation to psychiatric illness and physical injury according to Lord Hoffmann in *White*[123]:

> …has caused the smoothing of the fabric at one point but has produced an ugly ruck to another. This represents the legal thinking at different points in half a century of uneven development. Once the law has taken a wrong turning or otherwise fallen into unsatisfactory internal state

[120]Analogies in other courts, and persuasive precedents as well as authoritative pronouncements must be regarded.
[121]n104 at 7.
[122]J Stapleton, "In restraint of Tort" in P Birks (ed) , *Frontiers of Liability* ,Oxford, Oxford University Press, 1994 at 96
[123]n104 at 40-41.

> in relation to particular cause of action, incrementalism cannot provide an answer. It is a patchwork quilt of distinctions which are difficult to justify…[124]

Despite these limitations as discussed by Lord Hoffmann, "it is to be commended that in all the major English appellate decisions since *Alcock*, when deciding cases concerning psychiatric injury, judges have referred to medical literature, and in particular to DSM-IV, which, when used correctly, has been an important educative tool".[125] In a similar vein, the 1995[126] and 1998[127] English Law Commission's Consultative Document on Liability for Psychiatric Illness, with its insight and invaluable survey of medical aspects of psychiatric illness, have made an impact on the judiciary and the legal profession in general.

Proposals for England and Australia

The English Law Commission Consultation document has addressed these grey areas in terms of proximity and the immediate aftermath, but no positive resolution has been reached. Hence, the common law continues to develop

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[124]n104 at 49-50. There are three solutions, the first is to adopt Professor Jane Stapleton's view that "to wipe out recovery for pure psychiatric injury, although this is contrary to the doctrine of stare decisis and would prove to be adverse and controversial… Only Parliament could take such a step..." [Emphasis added]. Second to abolish the special limiting rules applicable to psychiatric harm as advocated by Mr.Mullany and Dr. Handford. [Emphasis added]. Alternatively to adopt the view of Nasir K, the best approach, accepting the law as it stands, would be to ignore it all together.' Nasir KJ, 'Nervous Shock and Alcock: the judicial buck stops here": 55 *Modern Law Review* 705 at 713.

[125] D Mendelson, *The Interfaces of Medicine And Law*: The history of the liability for negligently caused psychiatric injury(nervous shock) (Hants: 1998) 290

[126]n101.

[127] Law Commission Report 249 (1998), Consultation Paper on Liability for Psychiatric Illness, HMSO, London

incrementally by referring to policy reasoning.[128] The summary of the Consultative Document[129] is as follows:

(a) The injury must be a recognisable form of psychiatric illness, emotions such as fear and grief will not suffice;

(b) The Plaintiff suffered injury either because of reasonable fear of injury to oneself, reasonable fear of or a real injury to another;

(c) In relation to secondary victims, the plaintiff must stand in a special relationship to the person in danger or injury and present at the "causative shocking" aftermath;

(d) The event must be shocking to a person of normal fortitude, otherwise resulting illness not, in law would not be compensable.

The report strongly suggests that there should be a sufficient bond between the claimant and the person killed, injured or imperiled. The requirement of a sufficient bond appears to be a crucial test. Certain types of relationship including spousal relationship and possibly fiancés may fulfil this requirement. Claimants falling outside this category will have to prove that a prerequisite bond existed. Further, the requirement of "sudden shock" to the senses is to be abrogated and liability should not be denied to a claimant who suffers shock after learning about the "death, injury or imperilment of the tortfeasor".[130]

The Law Commission addressed the following areas to be reformed, namely, close ties, sudden shock requirement and the defendant as the immediate victim. Firstly, with reference to

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[128]Policy Decision here refers to the requirement of spatial and temporal proximity. One is a policy-based desire of the courts to limit the defendant's liability in non-physical-impact claims to those plaintiffs who had some physical proximity either to the scene of impact or its immediate aftermath. In *Chester* it was stressed, that any extension of the notion of proximity beyond an 'immediately created nervous shock' would be 'a step along a road which must ultimately lead to virtually limitless liability.

[129]n127, see executive summary.

[130]J Mullany and R Handford, "Moving the Boundary Stone by Statute: The Law Commission on Psychiatric Illness (1999) 22 *University of New South Wales Law Journal* 350 at 357-358.

close ties, the Law Commission was against the "adoption of a simple foreseeability test without additional policy limitations".[131] In this regard, the Law Commission recognises the issues of physical and temporal proximity as irrelevant when it refers to primary and secondary victims bound by love or affection. Secondly, it was acknowledged that it is no longer to be regarded as a pre-condition that psychiatric illness is induced by shock. This does not only extend to primary plaintiffs who learn about the death, injury or imperilment of another, but to plaintiffs who fear for their own safety, rescuers and employees. Such a novel recommendation is to be welcomed. Thirdly, where the plaintiff suffers psychiatric illness as a result of the defendant injuring or hurting himself or herself. In this regard, the Law Commission stressed, based on policy factors, that the courts would not impose a duty on the defendant where it is not just and reasonable to do so.[132]

The Draft Bill for Psychiatric Illness[133] that mirrors the Australian *Law Reform (Miscellaneous Provisions) Act 1944 (NSW)*[134], has not been legislated upon by the English Parliament as yet. No time has been specified for approximate date of implementation.

However, a short written answer given in the House of Commons on 9 Nov 1999 relating to the Psychiatric Illness Report by the Parliamentary Secretary, Lord Chancellor's Department (Mr. Lock) reads as follows:

> The Government have carefully considered the Law Commission's recommendations in its Report on "Liability for Psychiatric Illness" (Law Com Rep No. 249). They believe that it would be worthwhile to undertake a comprehensive assessment of the individual and aggregate

[131] Ibid, 357.
[132] Ibid, 396-397.
[133] n127 at 127 (Appendix A).
[134] To reiterate, this legislation was passed after the High Court of Australia decided on *Chester v Council of the Municipality of Waverly* (1939) 62 CLR 1. The legislation narrows down the categories of claimants. In particular the following categories of persons can claim for recognisable form of psychiatric illness. They are parents, siblings, grandparents, etc.

> effects of the proposals for legislation that are contained in this Report and "Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits" (Law Com Rep No. 262) and "Claims for Wrongful Death" (Law Com Rep. 263). I have asked my officials to undertake the assessment in co-ordination with officials from the other Departments which have an interest in the outcome. It is hoped that the full assessment will be available to inform the Government's final decision on the Law Commission's proposals early next year.[135]

Therefore one can conclude from the short answer given by the Parliamentary Secretary, that it is a question of time until the effects of the proposal are discussed in detail. In the interim, the Law Commission's policy is to treat the published Report as a final view on the matter.

Although there has been a proliferation of claims at an appellate level, the High Court of Australia has not had the opportunity to re-evaluate the rules in relation to psychiatric illness in the 16 years following *Jaensch*. However should such an opportunity arise, it would be preferable not to adopt the English common law approach as it is largely antiquated and outmoded.[136] The only development in this area was that of monetary compensation. The New South Wales Joint Select Committee on Victims Compensation in its report entitled "*Inquiry into Psychological Injury – Shock*"[137] inquired into the long-term financial viability of the victims compensation fund relating to "shock". Amongst the areas under discussion, there were the following concerns: "Whether the current categories of shock based on the arbitrary length of suffering are appropriate and equitable"[138] In terms of compensating the individual for shock suffered, whether monetary compensation is the most ideal solution or continued therapy after the shock is required. The

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[135]House of Commons, Hansard 10/99, *Short Answer to Psychiatric Illness,* 9th November 1999, Law Commission, London.
[136]n130 at 352.
[137] Parliament of NSW, December 1998.
[138] Ibid, 2.

purpose of the report is to set up a practical compensation scheme, "to ensure that the needs of genuine victims of injury are met at a reasonable cost to the community".[139]

PART IV - CONCLUSION

The issue of monetary compensation is important in the law of negligence pertaining to psychiatric illness. Nevertheless, the courts in Australia will come to be unconcerned whether the disorder arose because the claimant was at an accident, aftermath, learned about it from a third party or learned of it by other means of telecommunications. The means of transmission is immaterial but the true elements of the tort of negligence must be satisfied. However, it is inconceivable that the House of Lords would view communication of disheartening news following any of these circumstances as satisfying the requisite proximity to support recovery for consequent mental damage. Apart from the discontent "told rule"[140], under current English law, no liability lies for "distant shock": one must have experienced shock through one's unaided senses and second hand news conveyed by another will deny liability.

The judiciary should give careful consideration to the establishment of more unified principles in relation to this developing area. "Without some uniformity of approach to cases of psychiatric harm under English Law, there is likely to be further piecemeal development of illogical, unjust and seemingly arbitrary distinctions."[141] "If English law is to be hauled into some rational shape, it may be that Parliament will have to do it, however much in an ideal world one would prefer that this be left to the judges."[142] In the interim, it is envisaged that the Law Commission Report should be legislated upon to rectify the inconsistencies inherent in the common law. In the present century, psychiatric illness is on the increase. Its origins are frequently uncertain and invariably drawn from many other factors such as genetics or external to the claimant. Inevitably,

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[139] Ibid, 4-5.
[140] n130 at 387.
[141] L Dunford and V Pickford, "Nervous Shock: Another Opportunity Missed to Clarify the Law?" (1997) 48 *Northern Ireland legal Quarterly* 365 at 377.
[142] n130 at 416.

this is a fact-finding and decision-making process both for the psychiatrist and the judge. Merely because the present state of the law is unsatisfactory does not mean that it is necessarily irrational or indefensible.