The following is an extract and summary of the introduction to Markesinis and Deakin’s Tort Law fifth edition. I think it will be very helpful for you to keep these comments in mind when reading the cases and textbooks.

WARNINGS TO THE NOVICE TORT LAWYER

It seems to us that a need exists to warn students off some misapprehensions which are common to beginners, who tend to assume that tort law in practice is as one finds it in the books: neat, systematic and legalistic. The following propositions may thus be borne in mind:

1: WHAT INTERESTS ACADEMIC LAWYERS IS NOT ALWAYS OF SIMILAR IMPORTANCE TO PRACTITIONERS AND LITIGANTS.

The question of whether negligently inflicted pure economic loss should be compensated through tort law is an example of this. The academic literature on the subject is enormous and shows no sign of abatement. Yet the pages devoted to this subject are in no way an accurate reflection of the number of times this point comes before the higher courts. Supporters of the present non liability rule attribute this lack of case law to the strictness of the rule itself and talk of an opening of floodgates of litigation should the rule ever be changed. The fact remains however, that this has not happened in the liberal systems where compensation is allowed i.e. France. Lawyers in general and judges in particular are conservative by nature; they prefer the devil they know (injustice and artificiality in some cases) to the devil they do not know (uncertainty).

The gap between academic tort law and judge’s tort law is made ever greater by the lack of any effective dialogue between the Bench and universities. This lack of effective communication is aggravated by three factors:

1. Students and academics in this country, unlike in the US, are far too quick to accept without questioning judicial utterances on a particular subject.
2. When they so express a view, it is expressed in such muted terms that it has no effect whatsoever on the recipients of the critique; moreover, unless that critique is published in the literally one or two journals most judges read, it is unlikely to come to their attention. And if the objections are voiced strongly, the chances of them being published are rapidly diminished.
3. The insights that judges and academics have of the law are very different. Thus Lord Goff had this to say of the phenomenon:

“The judge’s vision of the law tends to be fragmented; so far as it extends, his vision is intense and it is likely to be strongly influenced by the facts of the particular case … jurists on the other hand, do not share the
fragmented approach of the judges. They adopt a much broader approach, concerned not so much with the decision of a particular case, but rather with the place of each decision in the law as a whole. They do not share our intense view of the particular; they have rather a diffused view of the general. This is both their weakness and their strength.”

A further note of warning for students comes from Lord Mustill:

“One cannot always be sure, as regards an individual judge, that the reasons published in the judgment are in fact his reasons for the decision. The reasons may have been constructed after the event to reconcile the decision with legal materials which appeared to stand in its way, and which played no part in his formulation of the conclusion, or to call up support from more favorable materials for a decision arrived at without recourse to them (for example a decision made intuitively, or on grounds of public policy). Many judges would, I believe, if pressed, acknowledge that the outcome of a difficult case may be evolved by an unperceived background working of mechanisms quite different from those employed when he sits down with the rule book and seeks to apply it to a simple solution.”

2: IVORY TOWER NEATNESS V. UNTIDINESS AND CONTRADICTION IN THE REAL WORLD.

Many an unfortunate student will be pushed in his or her tutorial to fit decisional law within a particular framework or theory that appeals to their tutors. Such exercise are not devoid of academic merit; but the student should be warned that, in most cases, the effort and the result will bear little resemblance to what happens in the real world.

This need for consistency and characterization is especially apparent in the most amorphous and most important of torts: negligence. As the courts have grappled with the immensely complex problems that confront them under the heading of negligence, they have shifted form one mutually inconsistent doctrine to another. Lord Mustill thus concluded:

“... it involves no disloyalty on my part to the legal system in which I have spent my working life, or to past present and future colleagues to say that the picture thus painted is not one of unqualified success ... The root of the problem is I believe a reluctance on the part of the judges to accept inwardly and afterwards to acknowledge outwardly that decisions in this field (negligence) are essentially concerned with social engineering.”

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3: TORT LAW IS USING OLD TOOLS TO MEET SOCIAL NEEDS OF A NEW AND DIFFERENT ERA.

The longevity of some tort rules is as admirable as it is remarkable. Thus in many cases much of what we do and how we think today can be traced back to the Middle Ages. In the Continent of Europe one can go back even further to the law of ancient Rome – parts of the modern French or German law being shaped on the basis of beliefs of what Roman law used to be. To a large extent this survival is due to the flexible, if not amorphous, content of some of these concepts. Yet this adaptability cannot conceal the fact that many of these rules were devised for human beings (the plaintiffs and defendants of the past) rather than corporations or legal entities. They were also developed at a time when risk-spreading techniques (like insurance) were weak or unknown; and had as their prime aim the shifting of losses at a time when a weak social conscience attributed no role to the state in the context of accidents at work and disease.

4: TORT LAW IS, IN PRACTICE, OFTEN INACCESSIBLE TO THE ORDINARY VICTIM

The multitude of cases that a student will encounter may lead him or her to believe that victims of accident have easy and frequent recourse to this branch of the law. In reality, nothing could be further from the truth. The unavailability of the class action system or the limited possibility of undertaking litigation on a contingency fee system (both possible in the US) thus enables culpable defendants not only to discourage litigation but also, if one starts, to drag it out so as to force weaker claimants into disadvantageous settlements. Actions against the pharmaceutical industry offer a good example. In this country (England) there has not been a single successful action against a drug manufacturer. This bizarre result must surely be as undesirable as the opposite extreme, found in the US, where many manufacturers – especially of contraceptive devices – have been forced into bankruptcy or out of the development or distribution of such products. The overall picture provided by the modern sociological surveys of the operation of the tort system in practice is a grim one. The Oxford Socio-Legal Studies Group likened the position of victims of accident to participants in:

“... a compulsory long distance obstacle race. The victims, without their consent, are placed at the starting line, and told that if they complete the whole course, the umpire at the finishing line will compel the race promoters to give them a prize; the amount of the prize, however, must remain uncertain until the last moment because the umpire has discretion to fix it individually for each finisher. None of the runners is told the distance he must cover to complete the course, nor the time it is likely to take. Some of the obstacles in the race are fixed hurdles (rules of law), while others can, without warning, be thrown into the path of the runner by the race promoters, who obviously have every incentive to restrict the number of runners who can complete the course. As the runners physical fitness and their psychological preparedness for the race varies greatly, the relative difficulty of the obstacles also varies form runner to runner. In
view of all the uncertainties ... many runners drop out; others press on ...
After waiting to see how many runners drop out at the early obstacles
without any inducement, the promoters begin to tempt the remaining
runners with offers of money to retire ... most runners accept ... The few
hardy ones who actually finish may still be disappointed with the prize
money.”

THE CASES:

In this tutorial we were asked to read and evaluate cases relating to the English and Irish
development of liability for negligently inflicted nervous shock.

English Approach:

• McLoughlin v. O’Brien [1982] 2 All ER 298
• White v. Chief Constable of South Yorkshire [1999] 1 All ER 1

Irish Approach:

• Kelly v. Hennessy [1996] 1 ILRM 321
• Curran v. Cadbury [2000] 2 ILRM 343
• Fletcher v. Commissioner of Public Works [2003] 2 ILRM 94 {BCL Only}

Brief History

In the latter part of the 19th century and the early 20th century the prevailing view
was that physical injuries were real and mental injuries were imagined. Mental injuries
were no doubt a reality to the sufferer, but they were considered subjective and variable,
incapable of scientific measurement, exposing the courts to the risk of self-deceiving or
even fraudulent claims. ¹ A further reason for segregating mental injury in Victorian
times, suggested by McMahon and Binchy, was the social stigma surrounding it and the
sense that people of strong moral character should not succumb to their emotions. All of
these factors encouraged the courts to remove mental injury form the category of physical
injury and treat it separately. Thus a century ago, the dominant view in common law
jurisdictions, except Ireland, was that there was no duty to avoid causing nervous shock
to another. Gradually, judicial opposition crumbled.

In modern times the issue of liability for psychiatric illness still provokes a range
of strongly held opinions. At one end of the spectrum is the view that psychiatric illness
should be treated no differently form physical injury to the person, and damages for the
former should be no less extensive than the latter. At the other end is a deep skepticism
about the reality of the conditions grouped together under the heading psychiatric illness
and about the need to provide compensation for them. Use of the derogatory term
‘nervous shock’ to describe the injuries in question may contribute to a tendency to

¹ Cf Victorian Railways Commissioners v. Coultas (1888) 13 Appeal Cas 222 (PC)
underestimate their gravity. English and Irish law has steered the middle course between these two extreme views.

The most controversial of all the claims in this area are the three party cases. The claimant witnesses the injury or threatened injury or the aftermath of the injury of another person as a result of the defendant’s negligence. For fear of an overwhelming number of claims, the law has restricted liability in such cases by imposing additional requirements onto the standard duty of care concept.

Would the duty arise when the witness had no relationship with the person injured or in danger? If not, what sort of relationship was required? Did it make any difference if the psychiatric illness arose not from the perception of a traumatic event, but from being told about it later? One might have expected that with increasing public knowledge of psychiatric conditions, psychiatric illness would be regarded over time as reasonably foreseeable in a wider and wider range of situations, and that the bound of liability would be increased accordingly. This happened for a time, but in the last twenty years, in England especially, the courts have sought to limit the scope of liability for psychiatric illness by using the concept of foreseeability in an artificially restricted sense and by making the existence of a duty of care depend also upon the satisfaction of various requirements of proximity.

**ENGLISH APPROACH:**

**McLoughlin v. O'Brien**

**Facts:** The plaintiff’s husband and three children were involved in a serious road accident. The car in which they were driving collided with a lorry. The accident was caused by the respondent’s negligence. The family suffered serious injuries and one of the children died instantly. The plaintiff was at home, 2 miles away, when the accident occurred. She arrived at the hospital one hour after the accident. She saw her injured family members, she heard her son shouting and screaming and they were still covered with mud and oil and blood form the accident. She suffered a psychiatric illness and she sued the defendants.

**Did she win? Yes.**

**Why?** The reasoning of the judges differs greatly in this judgment, Lord Wilberforce applying a much stricter test than that favored by the other judges. Lord Bridge and Lord Scarman seemed to adopt a much broader approach to recovery applying Lord Wilberforce’s 2-stage test in Anns under which reasonable foreseeability of psychiatric injury alone was sufficient to give rise to a prima facie duty of care.

Ironically this was clearly not Lord Wilberforce’s own approach in the case, indicating the perhaps Anns had been misinterpreted by the other members of the House. This case was decided in 1982, one year before the high water mark decision of Junior Books. Perhaps this was also an example of the misinterpretation of the Anns 2-stage test referred in the criticisms of Lord Keith in the Yun-keun Yu and Governors of Peabody decisions. McLoughlin was decided at the apex of the expansion of the duty of care concept, which is probably why the plaintiff was allowed to recover in a case which Lord
Wilberforce said was “on the margin of what the process of logical progression would allow.” For a more detailed discussion of this please refer to BCL Handout 1 on the Historical Development of the Duty of Care.

Lord Wilberforce:
It is the judgment of Lord Wilberforce that has been seized upon by later decisions in this area, it therefore deserves careful analysis. He set out a number of requirements that had to be satisfied by a plaintiff in order to recover for nervous shock.

1: First, one must establish that the injury one has suffered is a recognized psychiatric illness.

“While damages cannot at common law be awarded for grief and sorrow, a claim for damages for nervous shock caused by negligence can be made without the necessity of showing direct impact or fear of immediate personal injuries for oneself.”

2: Secondly, the claimant must show that their injury was reasonably foreseeable; however, “foreseeability does not of itself automatically lead to a duty of care.”

3: Thirdly, the claimant must satisfy a number of specific proximity requirements in order to recover for nervous shock. Lord Wilberforce felt that there was a real need for the law to place some limitation on the extent of admissible claims, because shock in its nature is capable of affecting a very wide range of people. There are three proximity elements inherent in any claim:

(i) **Proximity of relationship:** “... the possible range is between the closest of family ties, of parent and child, or husband and wife, and the ordinary bystander. Existing law recognizes the claims of the first; it denies the claims of the second (bystander) ... The closer the tie (not merely in relationship, but in care) the greater the claim for consideration.

(ii) **Proximity in time and place:** “As regards proximity to the accident, it is obvious that this must be close in both time and space ... direct perception of some of the events which go to make up the accident as an entire event, and this includes the immediate aftermath ... subject to this qualification, I think that a strict test of proximity by sight or hearing should be applied by the courts.”

(iii) **Communication of the shock:** “There is no case in which the law has compensated shock brought about by communication by a third party ... The shock must come through sight or hearing of the event or its immediate aftermath. Whether some equivalent of sight or hearing, e.g. through simultaneous television, would suffice may have to be considered.”

Therefore, in order to recover for nervous shock a plaintiff had to show: (1) That they were suffering a recognized psychiatric condition rather than mere grief or sorrow; (2)

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2 Page 140 BBLIS, second page of judgment, bottom left hand side.
That their psychiatric illness was reasonably foreseeably foreseeable; (3) That they had a close tie of love and affection with the accident victim; (4) That they witnessed the accident or its immediate aftermath; (5) That the shock was caused as a result of witnessing the accident or its immediate aftermath. The illness must result from direct perception of the accident, cannot recover if merely told about the accident by a third party.

Regarding the fourth requirement of witnessing the accident or its immediate aftermath, query whether Mrs. McLoughlin would have recovered if she had arrived at the hospital after her injured husband and children had been cleaned, operated upon, and bandaged. If not, one sees the force of the rhetorical question put by Jones:

“Should liability for psychiatric harm depend on a race between the claimant and the ambulance?”

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

**Facts:** This was one of the cases that arose out of the Hillsborough football stadium tragedy in which 96 people died and hundreds more were injured. It was a test case brought by friends and relatives of those caught in the crush at the Leppings Lane end of the ground; the case brought together a number of claims identified as representative of the different legal issues raised by the group of claims as a whole. Various relationships with those in the Leppings Lane pen were represented, including those between parent and child, brothers and fiancés. The selected plaintiffs were also situated in different locations at the time of the accident (some in the ground itself, some outside, some at home) and the experiences which caused their condition were contrasting (some had witnessed the events unfold form the other side of the stadium, some had seen live or recorded television coverage, some had identified bodies in the make shift mortuary erected at the ground). The defendants admitted negligence but disputed that they owed a duty of care to the plaintiffs in the test case. None of the plaintiffs succeeded. They all failed based on the application of Lord Wilberforce’s proximity criteria.

**The Decision:**

**Harrison** was present on the grounds and his two brothers were killed. He failed the close ties of love and affection requirement. The House of Lords refused to presume close ties of love and affection between brothers, and because no evidence was adduced to prove this especial love, their claims failed.

**Lord Keith:** “In neither of these cases was there any evidence of particularly close ties of love or affection with the brothers or brothers in law. In my opinion the mere fact of the particular relationship was insufficient to place the plaintiff within the class of persons to whom a duty of care could be owed by the defendant as being foreseeably at risk of psychiatric illness by reason of injury or peril to the individuals concerned.”

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Lord Ackner: “The quality of brotherly love is well known to differ widely—form Cain and Abel to David and Jonathan. I assume that Mr. Harrison’s relationship with his brothers was not an abnormal one. His claim was not presented upon the basis that there was such a close and intimate relationship between them as gave rise to that very special bond of affection which would make his shock-induced illness reasonably foreseeable by the chief constable.”

Therefore, as regards proximity of relationship, it is necessary for the claimant to establish a close tie of love and affection with the person injured or endangered. In the case of husband/wife or parent/child relationship, such a tie can be rebuttably presumed form the nature of the relationship. In all other cases, such a close tie must be proven by evidence. Weir has written that this requirement of proof ‘will be very messy in practice and risks causing perplexity to advisers and embarrassment to litigants.’ This decision was rather unfair. It had indeed been open to Harrison to plead a special tie of love and affection with his brothers, but before this decision, nobody would have realized that it was a precondition of liability. Its seems quite harsh to disallow a claim because it was not pleaded in a way that no one had previously suggested was necessary. In a subsequent action arising out of Hillsborough, when the plaintiff had the benefit of knowing what he needed to prove, the court accepted that he enjoyed a close tie of love and affection with his deceased half-brother. Like Weir, Professor Stapleton also finds this requirement of proof of love repulsive:

“That at present, claims can turn on the requirement of ‘close ties of love and affection is guaranteed to produce outrage. Is it not a disreputable sight to see brothers of Hillsborough victims turned away because they had no more than brotherly love towards the victim? In future cases will it not be a grotesque sight to see relatives scrabbling to prove their especial love for the deceased in order to win money damages and for the defendant to have to attack that argument?’

Mr. and Mrs. Copoc’s son died in the tragedy. They failed under the proximity of place and perception requirements because they had merely witnessed the disaster on television.

Lord Keith: “I would, however, place in the category of members to which risk of psychiatric illness was reasonably foreseeable Mr. and Mrs. Copoc, whose son was killed, and Alexandra Penn, who lost her fiancé. In each of these cases, the closest ties of love and affection fall to be presumed form the fact of the particular relationship, and there is no suggestion of anything which might tend to rebut that presumption. These three all watched scenes from Hillsborough on television, but none of these depicted suffering of recognizable individuals, such being excluded by the broadcasting code of ethics, a position known to the defendant. In

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3 McCarthy v. Chief Constable of South Yorkshire Police, unreported; noted in Daily Telegraph, 12 December 1996)
my opinion the viewing of these scenes cannot be equiparated with the viewer being within sight or hearing of the event or its immediate aftermath, nor can the scenes reasonably be regarded as giving rise to shock ... They are capable of giving rise to anxiety for the safety of relatives known or believed to be in the crush ... but that is very different form seeing the fate of the relative or his condition shortly after the event. The viewing of television scenes did not create the necessary degree of proximity.”

Lord Ackner: “Although the television pictures certainly gave rise to feelings of the deepest anxiety and distress, in the circumstances of this case the simultaneous television broadcasts of what occurred cannot be equated with sight or hearing of the event or its immediate aftermath. Accordingly shocks sustained by reason of these broadcasts cannot found a claim. I agree, however, with Nolan LJ that simultaneous broadcasts of a disaster cannot in all cases be ruled out as providing the equivalent of actual sight or hearing of the event or its immediate aftermath. Nolan LJ gave an example of a situation where it was reasonable to anticipate that the television cameras, whilst filming and transmitting pictures of a special event of children traveling in a balloon, in which there was media interest, particularly amongst the parents, showed the balloon suddenly bursting into flames.”

Do you think it would have made a difference if one of the plaintiffs, while watching live television coverage of the tragic events, had been able to identify a close relative being crushed against the fencing because the relative was wearing very distinctive clothing? Suppose the live television broadcasts coming form Hillsborough had included –in breach of the broadcasters’ code of practice- close up pictures of individuals caught in the crush and close to death. Could the relatives claim that the television company was at fault in showing the pictures and liable for the psychiatric illnesses suffered as a consequence of seeing them? It is far form obvious that the courts would recognize a duty of care in that case. The public interest in the dissemination of information might well be taken to preclude the imposition of liability on the negligent communication of distressing news. The imposition of such a duty would surely have a restricting effect on free speech and news reporting. Jones has said that the imposition of liability in such a situation would be bizarre. He asks: “which event is worse, being told (correctly) that someone has negligently killed your child or being negligently told (incorrectly) that your child has died?”

Alcock suffered a psychiatric illness because he identified his brother in law in a make shift mortuary at midnight. He failed because of the proximity of time requirement.

Lord Jauncey: “In these appeals the visits to the mortuary were made no earlier than nine hours after the disaster and were made not for the
purpose of rescuing or giving comfort to the victim but purely for the purpose of identification. This seems to me to be a very different situation form that in which a relative goes within a short time after an accident to rescue or comfort a victim. I consider that not only for the purpose of the visits to the mortuary but also the times at which they were made take them outside the immediate aftermath of this disaster.”

Professor Stapleton again finds this reasoning in the judgment particularly disagreeable:

“A mother who suffers psychiatric injury after finding her child’s mangled body in a mortuary might wonder why the law rules her child’s blood too dry to found an action.”

The Law Commission (England), in its report Liability for Psychiatric Illness at page 89 recommends that in the case of death, injury or imperilment of a person with whom the plaintiff has a close tie of love and affection the requirement of proximity in time and space to the accident or its immediate aftermath and the requirement in respect of the mans of perception should be removed.

The House of Lords made it clear in the judgments that it was following the approach of Lord Wilberforce in McLoughlin notwithstanding hints of a broader approach in one or two places in the earlier decision. It is evident that psychiatric illness is to be dealt with more restrictively than other forms of personal injury.

White v. Chief Constable of South Yorkshire Police

Facts: Again we are dealing with a situation which has arisen form the Hillsborough disaster except, this time the plaintiffs are the police officers who assisted in the aftermath of the disaster. They wanted compensation for psychiatric illnesses suffered as a result of helping victims after the crush.

Argument: They claimed that because they were rescuers they were in a special position in the law and should automatically be treated as ‘primary’ victims.

Distinction between Primary and Secondary Victims: The distinction began in Alcock, who were all secondary victims, but was cemented in the decision of Page v. Smith.

Primary Victims

Such victims are defined as participants in the original accident, embracing those in the actual area of danger, those that reasonably believe themselves to be in danger and those who, due to the defendant’s negligence, reasonably but wrongly believe themselves to have been involved in the death or injury of another person.

If you can satisfy the factual criteria, then all you have to prove is that your injury was reasonably foreseeable in order to recover for psychiatric illness.

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**Secondary Victims**

These victims are non-participants in the accident, i.e. witnesses, with no fear for their own safety, and those coming to the aftermath. On top of the reasonable foreseeability requirement, such victims must also satisfy Lord Wilberforce’s controlling proximity mechanisms. They must show: (1) that they have a close tie of love and affection with the person in the accident. Such a tie will be presumed in parent/child and husband/wife and fiancé relationships. However, other relationships must be proved by the claimant; (2) the claimant has to show that they were present at the accident or its immediate aftermath; (3) the injury must have been caused by direct perception of the accident or its immediate aftermath. The claimant cannot recover upon hearing about the tragedy form someone else.

**The Decision:** The House of Lords held that for the purposes of the distinction between primary and secondary victims, rescuers were not in a special position in the law. Thus Lord Steyn, on page 38 of the judgment, said this:

“In order to recover compensation for pure psychiatric harm as a rescuer it is not necessary to establish that his psychiatric condition was caused by the perception of personal danger ... but in order to contain the concept of rescuer in reasonable bounds for the purposes of the recovery of compensation of pure psychiatric harm the plaintiff must at least satisfy the threshold requirement that he objectively exposed himself to danger or reasonably believed that he was doing so. Without such limitation one would have the unedifying spectacle that, while bereaved relatives are not allowed to recover as in Alcock’s case, ghoulishly curious spectators, who assisted in some peripheral way in the aftermath of a disaster, might recover. For my part the limitation of actual or apprehended dangers is what proximity in this special situation means. In my judgment it would be an unwarranted extension of the law to uphold the claims of the police officers.”

Lord Hoffman hinted throughout his judgment that Alcock may have been wrongly decided:

“... the moment passed in Alcock ... [where] judicial attitudes ... changed. The view which had for some time been in the ascendency, that the law of torts should ... 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 justification to offer restitution or compensation, had been abandoned in favour of cautious pragmatism ... It is too late to go back on the control mechanisms as stated in Alcock ... Until there is legislative change, the courts must live with them and any judicial developments must take them into account ... It seems to me that in this area of the law, the search for principle was called off in Alcock ... No one can pretend that the existing law which your Lordships have to accept, is founded upon principle. I agree with Professor Jane Stapleton’s
remark that ‘once the law has taken a wrong turning or otherwise fallen into an unsatisfactory internal state in relation to a particular cause of action, incrementalism cannot provide an answer’. Consequently your Lordships are now engaged, not in a bold development of principle, but in a practical attempt, under adverse conditions, to preserve the general perception of the law as a system of rules which is fair between one citizen and another.’

Lord Steyn also felt that the law may have taken a wrong turn in Alcock, but like Lord Hoffman, felt that it was up to the legislature to remedy the error:

“In my view the only sensible strategy for the courts is to say thus far and no further. The only prudent course is to treat the pragmatic categories as reflected in authoritative decisions such as Alcock’s case ... as settled for the time being but by and large to leave any expansion or development in this corner of the law to Parliament.”

What a difference 16 years can make?

Contrast what Lord Steyn and Lord Hoffman said in White, to Lord Bridge in McLoughlin:

“To attempt to draw a line at the furthest point which any of the decided cases happen to have reached, and to say that it is for the legislature, not the courts, to extend the limits of liability any further, would be, to my mind, an unwarranted abdication of the court’s function of developing and adapting the principles of common law to changing conditions, in a particular corner of the common law which exemplifies par excellence the important and indeed necessary part which that function has to play.”

McLoughlin was decided at the apex of the development of the concept of the duty of care, in the heyday of the liberal interpretation (and misapplication) of Lord Wilberforce’s 2-stage test. The law of tort, especially negligence, was seen as an ever-expanding force of nature. How ironic that, less than ten years after his liberal and expansionist views in McLoughlin, Lord Bridge was to be the one to bring around the death of the expansionist era of the duty of care in Caparo. The retrenchment has been so dramatic in the 90’s that Lords Hoffman and Steyn believed in White that they no longer had the power to expand the duty of care. They felt that the law was frozen in its unsatisfactory state until Parliament deigned to legislate in the matter. Have we entered into the Dark Ages of the law of negligence?

Criticisms of the English Approach:

The English law of liability for psychiatric illness has attracted sever criticism. Almost everyone is agreed that the current state of the law is unsatisfactory. According to Stapleton, this is the area of the law of tort where the silliest rules now prevail. Todd too
finds the law ‘in a dreadful mess’. And for Jones, the result in practice is a ‘long list of anomalies’. Even the House of Lords in White viewed the law so far beyond judicial repair that the only sensible maxim to adopt was in Lord Steyn’s words, ‘thus far and no further’. (Was it not the House of Lords itself that was primarily responsible for the mess it now finds itself in.)

For some excellent criticism of the law please refer to the following sources:

Mullany and Handford, *Tort Liability for Psychiatric Damage*, 1993: The authors argue that the proximity requirements used to limit liability in this area should be abandoned. The same authors have criticized recent decisions from this perspective in the following articles:

(1997) 113 LQR 410
(1998) 114 LQR 380
(1999) 115 LQR 30


Similar Approach in Teff, ‘*Liability for Negligently Inflicted Harm: Justifications and Boundaries*’ [1998] CLJ 91


For a very unusual ‘girl power’ perspective on why recovery has been limited see:

Martha Chamallas with Linda K. Kerber, ‘*Women, Mothers and the Law of Fright: A History*’, 88 Mich L Rev 814 (1990) who argue that because traditionally more women than men sought recovery for this type of illness, the reason behind the exclusion for recovery lies in the oppression of women by an uncaring and chauvinistic all male judiciary!

It would also be worth reading the Law Commission Report on *Liability for Psychiatric Illness*, Report No. 249 (1998), which is available on their website. You can access their web page through the Links section on my website. Click on ‘Comprehensive Online Resources by Jurisdiction’ and scroll down to England.

**IRISH APPROACH:**

The Irish courts have addressed the issue in detail in four recent decisions:

- *Mullally v. Bus Eireann*
- *Kelly v. Hennessy*
- *Curran v. Cadbury*
- *Fletcher v. Commissioner of Public Works*
Mullally v. Bus Eireann

Facts: The husband and children of the plaintiff were involved in a serious bus accident caused by the negligence of the defendant’s employee. When the plaintiff arrived at the hospital she discovered a scene familiar to a field hospital. Denham J stated that: “there were bodies everywhere, people moaning and groaning and many distressed relatives around.” Paul had tubes attached and blood oozing from his wounds. His brain had been exposed in the accident. Francis was beyond recognition his face was so swollen and her husband was fighting for his life and had been anointed three times. The plaintiff began to show signs of post traumatic stress disorder (PTSD) almost immediately and had a complete personality shift after witnessing the scenes in the hospital.

The decision: Denham J applied the DSM III-R criteria for PTSD and said that they were a judicially acceptable test for the condition. These are:

- Exposure to a recognizable stress or trauma outside the range of usual human experience, which would evoke significant symptoms of distress in almost anyone.
- Re-experiencing the trauma through intrusive memories, nightmares or flashbacks or intensification of symptoms through exposure to situations resembling or symbolizing the event.
- Avoidance of stimuli related to the trauma or numbing of general responsiveness indicated by avoidance of thoughts or feelings, or situations associated with the trauma, amnesia for important aspects of the trauma, diminished interest in activities, feelings of estrangement form others, constricted effect, sense of foreshortened future.
- Increased arousal indicated by sleep disturbance, anger outbursts, difficulty concentrating, higher vigilance, exaggerated startle response, psychologically reactivity to situations resembling or symbolizing the trauma.
- Duration of disturbance at least one month.

Denham J accepted that for the purposes of nervous shock, PTSD was a ‘psychiatric disease’. She allowed the plaintiff to recover for her psychiatric injuries. She allowed recovery on the basis of Lord Wilberforce’s 2-stage test. She also said that she was guided more by Lord Bridge in McLoughlin. She therefore preferred a more liberal and expansive approach to nervous shock in Irish Law.

“... the question of law form this court is whether the chain of causation form the crash caused by the defendants to the illness of the plaintiff was reasonably foreseeable by the foreseeable man ... I consider it readily foreseeable that a mother exposed to the experiences herein, would break down and suffer illness ... I consider that there is no policy in Irish law opposed to the finding of nervous shock, an old term covering PTSD.”

McMahon and Binchy have said that it should be noted that at the time when Denham J delivered her judgment, the House of Lords had not yet handed down the judgment in Alcock. There is a striking contrast between Denham J’s approach and that favoured by
Lord Wilberforce and substantially endorsed in Alcock. She envinced no interest in prescribing the three proximity limitations applied by Lord Wilberforce.

**Kelly v. Hennessy**

**Facts:** There was a car involving the plaintiff’s husband and her two daughters. After receiving a phone call about the accident the plaintiff went into immediate shock and was taken to hospital to see her husband and daughters. Her husband and one of her daughters had been brain damaged and the plaintiff was now left to look after them.

**Did she win?** Yes.

**The Decision:** Even though all of the judges in this case came to the same decision, Hamilton CJ (with whom Egan J agreed) and Denham J used different criteria for establishing a duty of care for negligently inflicted nervous shock.

**Hamilton CJ:** Identified five requirements of a successful claim for nervous shock:

1. The plaintiff must establish that he or she has suffered a recognizable psychiatric illness.
2. This illness must have been ‘shock induced’.
3. The nervous shock must have been caused by the defendant’s act or omission.
4. The nervous shock must have been ‘by reason of actual or apprehended physical injury to the plaintiff or a person other than the plaintiff.
5. The plaintiff must show that “the defendant owed him or her a duty of care not to cause him [or her] a reasonably foreseeable injury in the form of nervous shock”. It is not enough to show that there was a reasonably foreseeable risk of personal injury generally.

Commenting on the decision, McMahon and Binchy had this to say about the opinion of the Chief Justice:

“It appears that he broadly favoured the notion that the rein should be applied to the scope of the duty of care and that there was merit in Lord Wilberforce’s approach in McLoughlin v. O’Brien but there is also evidence in his analysis suggesting that he did not favour resorting to policy considerations and that the parameters of liability he preferred were framed more broadly than those of Lord Wilberforce or of the House of Lords in Alcock.”

The first principle, that the injury must amount to a medically recognized psychiatric illness, is not new. This point was comprehensively dealt with in Mullally and is well established in other jurisdictions. In particular: McLoughlin v. O’Brian, Alcock v. Chief Constable of South Yorkshire (England) and Jaensch v. Coffey (Australia). Cases which will not succeed are those where the chain of causation of harm was the plaintiff’s continuing sense of loss.
The second, ‘shock’ requirement has been rejected in a number of jurisdictions. In *Pang Koi Fa v. Lim Djoie Phing* in Singapore a negligent operation caused brain damage to the plaintiff’s daughter, as leaking brain fluid led to the contraction of meningitis form which she died three months after the operation. Her mother suffered PTSD, having stayed with her daughter over the three months. Amarjeet J held this to be different form caring for an injury victim over a prolonged period, considering the present case as witnessing a protracted event. In Australia in *Annetts v. Australian Stations* the High Court of Australia has dispensed with the sudden shock requirement. The applicant’s 16 year old son went to work for the respondent at a remote cattle ranch, with an assurance that he would be constantly supervised and well looked after. The youth was assigned to work alone. The police notified the applicants that their son was missing in December 1986. In April 1987 they were informed that his vehicle was found in the desert. They were informed on the same day that his body had been found. The youth had died as a result of dehydration, exhaustion and hypothermia in December 1986. Despite the absence of sudden shock, the majority found that a duty of care was owed on the facts presented.

**Denham J:** Her judgment is particularly interesting because she seems to have moved to the polar opposite of her position in Mullally. Where once she favoured the liberal reasonable foreseeability approach, she now lays far greater emphasis on the matter of proximity:

“This case turns on the issue of proximity. These may include: (a) proximity of relationship between persons; (b) proximity in a spatial context; and (c) proximity in a temporal sense.”

She also seemed to introduce the language of primary and secondary victims into Irish law, although she did not appear to apply the concepts as stringently or arbitrarily as they do in England.

**The Effect of the Decision:**

In the wake of Kelly v. Hennessy it is not easy to state with any certainty the principles of law that govern the question of liability for negligently inflicted nervous shock in Ireland. It is apparent that the straightforward foreseeability test favoured by Denham J in Mullally has not sufficient judicial support. Hamilton CJ did not embrace it and Denham J herself seemed to favour an entirely different and opposite view in Kelly. The issue will therefore be determined by reference to proximity.

**Curran v. Cadbury**

**Facts:** The plaintiff sustained psychiatric injury when, on turning on a machine where she worked, she believed with good reason that she had killed or seriously injured a fellow employee who was working inside the machine without her knowledge. The plaintiff was a participant in the accident; therefore she was classified by the judge as a primary victim.
**Held:** The legal relationship between employer and employee imposes tortuous and contractual obligations on the defendant as employer.

“The duty of the employer towards his employee is not confined to protecting the employee from physical injury only; it also extends to protecting the employee from non-physical injury such as psychiatric illness …”

The injury in this case was reasonably foreseeably foreseeable and the employer had failed in his duty to take care to prevent such injury to the plaintiff.

**Commentary:** This decision is an excellent summary of the position in England and Ireland as of 2000. It is also useful because McMahon J clearly indicates that the distinction between primary and secondary victims is not one which is likely to find much support in Ireland:

“There has been a tendency in recent years, especially in English cases, to divide victims in these types of cases into two categories: primary victims and secondary victims … I am not convinced that the separation of victims into these two categories does anything to assist the development of legal principles that should guide the courts in this complex area of the law. Hamilton CJ did not refer to the distinction in Kelly v. Hennessy … [T]o recover for this type of injury in Ireland, the claimant must comply with the five conditions laid down by Hamilton CJ in Kelly v. Hennessy … Hamilton CJ also held that to recover in Ireland for nervous shock, the defendant had to foresee nervous shock and not merely personal injury in general … It would seem that the Irish Courts will not be overawed by White and may well choose … to go its own road, especially since White has its critics.”

**Fletcher v. Commissioner for Public Works**

**Facts:** The plaintiff was an employee of the defendant. During the course of his employment he was exposed to asbestos dust. The defendants had failed to take adequate precautions to protect the plaintiff. Plaintiff sought medical advice and was told that there was a risk that he could contract mesothelioma, an asbestos related illness. He was told however that the risk of contracting the illness was very remote. Nevertheless the plaintiff worried excessively about the risk and developed reactive anxiety neurosis, a psychiatric illness.

**Did he win?** No.
Keane CJ: “The fact that it is reasonably foreseeable that particular acts or omissions will cause loss or injury to another person does not, of itself, give rise to liability in negligence. There must also be a relationship of ‘proximity’.”

Keane CJ is therefore specifically rejecting the test set down in Mullally by Denham J. Reasonable foreseeability of psychiatric injury is not enough by itself. He also endorsed Hamilton’s five requirements for recovery for nervous shock as set out in Kelly v. Hennessy.

As regards the distinction between primary and secondary victims, he said:

“We are not in my view concerned with the distinction drawn in such cases between what have been described as primary victims and secondary victims.”

On page 106 he goes on to say that for the purposes of the present case there is no need to make the distinction between primary and secondary victims before recovery can be allowed.

“That nervous shock suffered by an employee who does not have to be characterized as a primary or secondary victim of negligence in the workplace is properly compensable where it is the result of such negligence is admirably demonstrated by the Circuit Court decision in Curran v. Cadbury.”

On the issue of reasonable foreseeability, he felt that the injury here was reasonably foreseeable and that “the fact that the psychiatric injury would not have been suffered by a person of ordinary fortitude is not material: the general principle is that the wrongdoer must take his victim as he finds him should, in the absence of other considerations, apply”.

The plaintiff failed here because he did not suffer a shock in the sense required by Hamilton’s test.

“In the present case, there was no shock … no sudden perception of a frightening event or its immediate aftermath, disturbing the mind of the witness to such an extent that a recognizable psychiatric illness supervened … [The] psychiatric disorder [in this case was] brought about otherwise than by ‘nervous shock’; in this case, by a combination of anger and anxiety which was the result of the plaintiff having been informed of his exposure to the risk of contracting mesothelioma because of his employer’s negligence … This is uncharted territory for our courts.”
Geoghegan J came to the same conclusion on broadly similar grounds. Both judgments endorse a policy based approach to constraining claims for negligently inflicted psychiatric illness. Both judgments use policy constraints as a justification for refusing to expand the law to cover the plaintiffs claim in this case, and suggest that this should be the general approach to novel categories of claim for psychiatric illness.