MOVING THE BOUNDARY STONE BY STATUTE – THE LAW COMMISSION ON PSYCHIATRIC ILLNESS

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I. INTRODUCTION

The battle to win legal protection from disruption to mental tranquillity has been hard fought. Casualties of the British campaign have been especially heavy. No higher price has been paid than that of relatives of spectators crushed at Hillsborough.[1] Law reports are littered with "a patchwork quilt"[2] of ludicrous distinctions of fact and principle illustrative of the morass through which litigants are compelled to manoeuvre. Saddled with a status unique among personal injury victims, those psychiatrically compromised due to the want of care by others combat an inherent and enduring "judicial bias" against claims for other than external harm.[3] Aversion to actions for disturbance to peace of mind unaccompanied by bodily injury and an "endemic distrust" of psychiatry[4] have ensured that preservation of psychiatric integrity remains a lower priority than compensation for physical loss.[5] Policy-directed restrictions on recovery

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1 See *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310; *Hicks v Chief Constable of the South Yorkshire Police* [1992] 2 All ER 65. Compare the decision of the English Court of Appeal in *Frost v Chief Constable of South Yorkshire Police* [1998] QB 254 permitting recovery by injured on-duty police officers. Criticism of this seemingly unpalatable result has been widespread: see Law Commission Report 249, *Liability for Psychiatric Illness*, 1998 (Report) at [1.1]. It appears to have played an unjustifiably large part in the decision of the majority of the House of Lords to reverse the Court of Appeal *sub nom White v Chief Constable of South Yorkshire Police* [1998] 3 WLR 1509 especially at 1542, 1545, 1547, per Lord Steyn; at 1556-67, per Lord Hoffmann. The problem of reconciling these apparently conflicting moral entitlements to compensation would be eliminated as a consequence of the Commission's recommendations: see *infra* Part VI Section A.

2 *White v Chief Constable of South Yorkshire Police*, note 1 *supra* at 1547, per Lord Steyn.

3 See JG Fleming, *The Law of Torts*, The Law Book Co Ltd (1st ed, 1957) p 175.

4 See JG Fleming, *An Introduction to the Law of Torts*, Clarendon Press (2nd ed, 1985) p 47. Note *McLoughlin v O'Brian* [1983] 1 AC 410 at 433, per Lord Bridge of Harwich: "For too long earlier generations of judges have regarded psychiatry and psychiatrists with suspicion, if not hostility."

5 See R Pound, "Interests of Personality" (1915) 28 *Harv L Rev* 343 at 359-62.

perpetuate myths that damage to the body is more debilitating than damage to the mind and more worthy of support in a climate of limited accident compensation resources and that it remains imperative to fortify the common law against charlatans alleging injury of a less readily verifiable nature. Barriers stem imaginary floods of fraudsters and opportunists seen as ready and able to fool psychiatrists and judges. Prejudice has proved pervasive, powerful and persistent.[6] Ignorance, preconceptions and misinformation concerning psychiatric disorder and its negligent infliction have combined to compel those debilitated few whose mental health has been impaired by an identifiable want of due care to satisfy the most stringent conditions to qualify for common law relief.[7] Otherwise valid suits for "pure"[8] psychiatric injury are rejected dependent on the often forced characterisation of the claimant as a "primary" or "secondary" victim of the tortfeasor's incompetence,[9] because the claimant and primary victim are deemed to have been insufficiently connected by blood or love, because exposure to traumatic stimuli occurred a few too many hours after an accident (perhaps because it involved the "late" identification of disfigured corpses of relatives or because there was no "aftermath" to perceive), because disorder followed what was communicated to, rather than seen or heard by, the

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6 Note the sentiments expressed by Birkett J in *Griffiths v R & H Green & Silley Weir Ltd* (1948) 81 Ll L Rep 378 at 380: "I quite recognise that when we are in this field, it is a very difficult one for laymen to understand. When witnesses speak about a man suffering from an anxiety neurosis ... when a man is not suffering organically but has hysteria, the ordinary, sound, healthy man is apt to look upon that with a little disdain or a little suspicion and to treat it sometimes rather lightly and to say: 'Well, if you have a little courage or determination you can overcome it. If you have a little will-power to go back to work and confront the difficulty, that would overcome it'. I say it is comparatively easy for healthy people to think and speak like that, but nobody who has undergone a very severe illness or, indeed, a slight illness can forget that people who are not in that happy state frequently look upon small matters as very important. They are fearful and nervous and apprehensive." For example, see *Victorian Railways Commissioner v Coultas* (1888) 13 App Cas 222 at 226, per Sir Richard Couch; *Dulieu v White & Sons* [1901] 2 KB 669 at 681, per Kennedy J; *Chester v Council of the Municipality of Waverley* (1939) 62 CLR 1 at 10, per Latham CJ; *Bourhill v Young's Executor*, 1941 SC 395 at 438, per Aitchison LJC; *McLoughlin v O'Brian*, note 4 *supra* at 421, per Lord Wilberforce; at 425, per Lord Edmund Davies; at 442, per Lord Bridge of Harwich.

7 Legislatures have been similarly influenced. For an example of statutory prejudice see s 93(17) of the *Transport Accident Act* 1986 (Vic) which draws a distinction between "serious" physical injuries and "severe" long-term mental or "severe" long-term behavioural disturbance or disorder. The latter word imports a stricter bar to the institution of common law claims for personal injury arising out of transport accidents in that state: see *Mobilio v Balliotis* [1998] 3 VR 833 at 834-5, per Winneke P; at 846, per Brooking JA; at 854, per Ormiston JA; at 858, 860, per Phillips JA; at 860-1, per Charles JA.

8 That is, psychiatric injury not consequent on physical injury.

9 Since *Page v Smith* [1996] 1 AC 155 primary victims in the English context need only prove reasonable foreseeability of *some* kind of personal injury rather than foreseeability of psychiatric disorder. This contrasts with the position in Australia and Canada where foreseeability of the kind of injury sustained (ie, psychiatric injury) remains a prerequisite to recovery irrespective of the status of the victim: see text accompanying notes 345-50 *infra*. For criticism of the English dichotomy see NJ Mullany, "Psychiatric Damage in the House of Lords - Fourth Time Unlucky" (1995) 3 *JLM* 112; A Sprince, "Page v Smith – being 'primary' colours House of Lords' judgment" (1995) 11 *PN* 124; P Handford, "A New Chapter in the Foresight Saga: Psychiatric Damage in the House of Lords" (1996) 4 *Tort L Rev* 5; FA Trindade, "Nervous Shock and Negligent Conduct" (1996) 112 *LQR* 22; NJ Mullany and PR Handford, "Hillsborough Replayed" (1997) 113 *LQR* 410; H Teff, "Psychiatric Injury in the Course of Policing: A Special Case?" (1997) 5 *Tort L Rev* 184; H Teff, "Liability for Negligently Inflicted Psychiatric Harm: Justifications and Boundaries" (1998) 57 *CLJ* 91 at 111.

claimant, or because it arose gradually or as a result of a combination of events rather than an isolated assault on the senses.[10] While quick to distance themselves from the "crude view" that the law should take cognisance only of physical injury resulting from actual impact and to acknowledge that it is "well established that an action will lie for injury by shock sustained through the medium of the eye or ear without direct contact",[11] modern English courts have resisted calls to embrace fully recovery in negligence for damage to the psyche and, generally speaking, preserved the traditional restrictions. These "infirmities" of "doctrinal fragility"[12] are a lamentable monument to the lack of maturity and confidence of the common law in this field.[13] Confessions as to the difficulties of the decision-making process caused by the application of rules known to be arbitrary and the need to draw indefensible distinctions between claims, pleas that Parliament refine principle and expressions of sympathy for unsuccessful mentally ill litigants do nothing to improve matters.[14]

While there has for some time been good reason to believe that fundamental judicial change to Australian psychiatric damage law is on the horizon,[15] there is

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10 For detailed consideration of the elements necessary to ground and the defences to a cause of action for the negligent infliction of psychiatric injury see NJ Mullany and PR Handford, *Tort Liability For Psychiatric Damage*, The Law Book Co Ltd (1993) chs 2-10, 12. See also NJ Mullany, "Fear for the Future: Liability for Infliction of Psychiatric Disorder" in NJ Mullany (ed), *Torts in the Nineties*, LBC Information Services (1997) pp 113-22; NJ Mullany, "Negligently Inflicted Psychiatric Injury and the Means of Communication of Trauma – Should it Matter?" in NJ Mullany and AM Linden (eds), *Torts Tomorrow – A Tribute to John Fleming*, LBC Information Services (1998) ch 11; P Handford, "Compensation for Psychiatric Injury: The Limits of Liability" (1995) 2 *Psychiatry, Psychology and Law* 37; H Teff, "The Requirement of 'Sudden Shock' in Liability for Negligently Inflicted Psychiatric Damage" (1996) 4 *Tort L Rev* 44; H Teff, "Liability for Negligently Inflicted Psychiatric Harm: Justifications and Boundaries", note 9 *supra*.

11 *Bourhill v Young* [1943] AC 92 at 103, per Lord Macmillan. See also the recognition of the inappropriateness of treating mental damage differently from other categories of personal harm in *Alcock v Chief Constable of South Yorkshire Police*, note 1 *supra* at 406-8, per Lord Oliver of Aylmerton; *Page v Smith*, note 9 *supra* at 182-3, per Lord Browne-Wilkinson; at 187-90, per Lord Lloyd of Berwick; *Frost v Chief Constable of South Yorkshire Police*, note 1 *supra* at 265, per Rose LJ; at 283, per Henry LJ; *R v Ireland* [1998] AC 147 at 156-7, per Lord Steyn. Compare *Leach v Chief Constable of Gloucestershire Constabulary* [1999] 1 WLR 1421 at 1429-31, per Pill LJ; at 1437-9, per Brooke LJ. For Australian authority see, for example, *APQ v Commonwealth Serum Laboratories Ltd* (unreported, SC Vic, Harper J, 2 February 1995) at 4; *Aboushadi v CIC Insurance Ltd* (1996) Aust Torts Reports 81-384 at 63,337, per Priestley JA; at 63,339, per Handley JA; at 63,340, per Cole JA.

12 See JG Fleming (1994) 2 *Tort L Rev* 202 at 203 (review of NJ Mullany and PR Handford, note 10 *supra*).

13 As Kennedy J observed in the early case of *Dulieu v White & Sons*, note 6 *supra* at 681, courts are quite capable of discerning the truth in psychiatric damage litigation; there is no need to erect a safety net of unique rules apt to deny redress in meritorious cases. See also *Frost v Chief Constable of South Yorkshire Police*, note 1 *supra* at 280, per Henry LJ; *FAI General Insurance Co Ltd v Curtin* (1997) Aust Torts Reports 81-442 at 64,500, per Lee J.

14 See, for example, *Alcock v Chief Constable of South Yorkshire Police*, note 1 *supra* at 411, per Lord Oliver of Aylmerton; *Sion v Hampstead Health Authority* [1994] 5 Med LR 170 at 173, per Staughton LJ; *Frost v Chief Constable of South Yorkshire Police*, note 1 *supra* at 283, per Henry LJ; *Tranmore v TE Scudder Ltd* (unreported, Eng CA, 28 April 1998) at 3, per Roche LJ; at 5-6, per Brooke LJ; *White v Chief Constable of South Yorkshire Police*, note 1 *supra* at 1545, 1547, per Lord Steyn; at 1551, 1557-8, per Lord Hoffmann; *Hunter v British Coal Corporation* [1999] QB 140 at 154-5, per Brooke LJ.

15 Although there has been a proliferation of trial and intermediate appellate court decisions, the High Court of Australia has not had the opportunity to re-evaluate the rules of psychiatric injury law for 15 years

every reason to be pessimistic about the future of the English common law, the source of the most antiquated restrictions on relief. Recent rare glimmers of hope[16] have been snuffed.[17] The appellate courts have not seen fit, despite the "compelling" nature of claims before them, to move the "doctrinal boundary stone" as predicted by the Lord Chief Justice more than a decade ago.[18] Since 1992, the House of Lords has reconsidered the principles limiting compensation for psychiatric damage on four occasions.[19] That is an incredible statistic in the modern era of special leave and petitions to appeal. We must say, respectfully, that quartet has been most disappointing, unnecessarily confusing and hindered overdue reform. The third of the series, the "revolutionary"[20] decision in *Page v Smith*,[21] was particularly discouraging, clouding settled issues of foresight of

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following *Jaensch v Coffey* (1984) 155 CLR 549. One of the most important contributions to the current debate is that made by the New South Court of Appeal in *Coates v Government Insurance Office of New South Wales* (1995) 36 NSWLR 1 where many of the flaws of orthodox principle were exposed by Kirby P. His Honour gave strong indications that he favours moving the boundaries of liability in appropriate circumstances. Gleeson CJ and Clarke JA did not rule out reform. The comments have assumed greater significance in the light of Kirby P's elevation to the High Court in February 1996 and the appointment of Gleeson CJ as Chief Justice in May 1998. Two members of the Full Court of the Supreme Court of South Australia in *Pham v Lawson* (1997) 68 SASR 124 indicated that they shared Kirby P's views, the third declining to declare his position. The Supreme Court of Canada has never been required to express its views. Its recent decisions on negligence generally (see, for example, *Canadian National Railway Co Ltd v Norsk Pacific Steamship Co Ltd* [1992] 1 SCR 1021; *Hall v Herbert* [1993] 2 SCR 159; *Ter Neuzen v Korn* [1995] 3 SCR 674; *Hollis v Dow Corning Corp* [1995] 4 SCR 634; *Winnipeg Condominium Corp No 36 v Bird Construction Co* [1995] 1 SCR 85; *Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd* [1997] 3 SCR 1210; *Fontaine v Lowen Estate* [1998] 1 SCR 424), the existence of a body of sound lower court decisions on psychiatric injury and the opportunity to reflect on developments elsewhere suggest that a modern approach to the subject is likely. The South Africans now lead the way: in an impressive unanimous decision on a stated case, the Supreme Court of Appeal in *Barnard v Santam Bpk*, 1999 (1) SA 202 surveyed a selection of international authority and literature which has emerged in the 26 years since *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk*, 1973 (1) SA 769 to adopt a simple yet sophisticated solution to problems plaguing courts elsewhere: see further text accompanying notes 226-9 *infra*.

16 The judgment of Henry LJ in *Frost v Chief Constable of South Yorkshire Police*, note 1 *supra*, reflects an appreciation of the essence of disorder and had the potential to provide the foundation for a new liability regime. The possibility existed that dubious policy considerations, utilised to justify "the ultimate boundaries within which claims for [mental] damage [have been able to] be entertained", would give way to legitimate demands for the attribution of legal accountability for psychiatric injury consequent on careless conduct and the need to deter irresponsible behaviour: see *Frost*, note 1 *supra* at 280-3. See also the decision of Morland J in *Andrews v Secretary of State for Health* (unreported, QBD, 19 June 1998), discussed note 232 *infra*.

17 See *White v Chief Constable of South Yorkshire Police*, note 1 *supra*.

18 See *Attia v British Gas plc* [1988] QB 304 at 320, per Bingham LJ: "It is submitted, I think rightly, that this claim breaks new ground. No analogous claim has ever, to my knowledge, been upheld or even advanced. If, therefore, it were proper to erect a doctrinal boundary stone at the point which the onward march of recorded decisions has so far reached, we should answer the question of principle in the negative and dismiss the plaintiff's action... But I should for my part erect the boundary stone with a strong presentiment that it would not be long before a case would arise so compelling on its facts as to cause the stone to be moved to a new and more distant resting place."

19 *Alcock v Chief Constable of South Yorkshire Police*, note 1 *supra*; *Hicks v Chief Constable of the South Yorkshire Police*, note 1 *supra*; *Page v Smith*, note 9 *supra*; *White v Chief Constable of South Yorkshire Police*, note 1 *supra*.

20 *White v Chief Constable of South Yorkshire Police*, note 1 *supra* at 1523, per Lord Goff of Chieveley.

21 Note 9 *supra*.

harm and perpetuating and further complicating the dissection of negligence victims into "primary" and "secondary" categories[22] incorporated into English law by Lord Oliver of Aylmerton in the first case of the series, *Alcock v Chief Constable of South Yorkshire Police*[23] - an interesting analysis but one which has produced regrettable results. The complexity and topicality of the subject are reflected in the fact that a fourth opportunity to renovate and vitalise English psychiatric damage law emerged recently. The appeal from the English Court of Appeal decision in *Frost v Chief Constable of South Yorkshire Police*[24] allowed their Lordships the luxury of revisiting this "most vexed and tantalising topic"[25] against a background of more than 20 decisions of the English Court of Appeal,[26] a major decision of the Inner House of the Court of Session,[27] a considerable compilation of academic literature and the views of a major law reform body.[28] Although *White v Chief Constable of South Yorkshire Police*[29] was concerned, in the main, with liability to employees and rescuers,[30] the opportunity existed to resurvey the landscape of English psychiatric damage jurisprudence, repudiate the unfortunate aspects of *Alcock*, jettison the otiose primary/secondary classification of *Page v Smith*, and restate the law along the lines indicated by Henry LJ in the English Court of Appeal.[31] That opportunity

22 See note 9 *supra*. It is ironic that *Page v Smith*, wherein it is expressly stated that the fear of suits justifies the control mechanisms imposed on claims by secondary victims in that decision, has increased the prospects of litigation: note H Teff, "Liability for Negligently Inflicted Psychiatric Harm: Justifications and Boundaries", note 9 *supra* at 111-15.

23 Note 1 *supra* at 406-11. Note *Burgess v Superior Court* (1992) 831 P 2d 1197.

24 Note 1 *supra*, discussed in NJ Mullany and PR Handford, note 9 *supra*.

25 See Sir Thomas Bingham MR in the foreword to NJ Mullany and PR Handford, note 10 *supra*, p vii.

26 See *Hicks v Chief Constable of the South Yorkshire Police*, note 1 *supra*; *Alcock v Chief Constable of South Yorkshire Police*, note 1 *supra*; *Calascione v Dixon* (1993) 19 BMLR 97; *Taylorson v Shieldness Produce Ltd* [1994] PIQR P329; *Sion v Hampstead Health Authority*, note 14 *supra*; *McFarlane v EE Caledonia Ltd* [1994] 2 All ER 1; *Bryant v London Fire and Civil Defence Authority* (1994) 22 BMLR 124; *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633; *Reilly v Merseyside Regional Health Authority* [1995] 6 Med LR 246; *Page v Smith* [1994] 4 All ER 522; *Page v Smith (No 2)* [1996] 1 WLR 855; *AB v John Wyeth & Brothers Ltd* (unreported, Eng CA, 13 December 1996); *Vernon v Bosley (No 1)* [1997] 1 All ER 577; *AB v Tameside & Glossop Health Authority* [1997] 8 Med LR 91; *Hegarty v EE Caledonia Ltd* [1997] 2 Lloyd's Rep 259; *Young v Charles Church (Southern) Ltd* (1997) 39 BMLR 146; *Duncan v British Coal Corp* [1997] 1 All ER 540; *Swinney v Chief Constable of Northumbria Police Force* [1997] QB 464; *Frost v Chief Constable of South Yorkshire Police*, note 1 *supra*; *Powell v Boladz* [1998] Lloyd's Rep Med 116; *Tranmore v TE Scudder Ltd*, note 14 *supra*; *Nobes v Schofield* (unreported, Eng CA, 14 May 1998); *Arrowsmith v Beeston* (unreported, Eng CA, 18 June 1998); *Leach v Chief Constable of Gloucestershire Constabulary*, note 11 *supra*; *Hunter v British Coal Corporation*, note 14 *supra*; *Palmer v Tees Health Authority* (unreported, Eng CA, 2 June 1999).

27 *Robertson v Forth Road Bridge Joint Board*, 1996 SLT 263.

28 Note Report, note 1 *supra* at [1.5], note 14: "[W]e hope that this Report will be of assistance to the House of Lords." This hope was fulfilled: see *White v Chief Constable of South Yorkshire Police*, note 1 *supra* at 1513, per Lord Griffiths; at 1518-20, 1522-3, 1525-7, 1529, 1536, per Lord Goff of Chieveley; at 1550-1, per Lord Hoffmann. Lord Steyn did not refer to the Report.

29 Note 1 *supra*.

30 See further text accompanying notes 405-20 *infra*.

31 See NJ Mullany and PR Handford, note 9 *supra* at 417.

has been squandered. The second consecutive 3:2 decision[32] of the House reflects a defeatist disposition which is incompatible with the role and obligation of appellate judges.[33] Declarations by ultimate courts that the "search for principle [has been] called off",[34] that they possess "no refined analytical tools" to shape coherent compromise,[35] that "settled"[36] precedent the subject of "severe criticism"[37] must rule to outlaw reform, that it is "too late to go back on ... control mechanisms"[38] stated a mere six years ago and delegations of the task of difficult development[39] are a dereliction of the duty to mould the common law for the modern world. Frank admissions of failure do not compensate traumatised litigants for unremediable consequences. Protestations that the process of change should proceed "thus far and no further"[40] are easily presented as the "only sensible" and "pragmatic" strategy.[41] "Bold innovation"[42] presents a more formidable challenge.

There has been a significant increase, well short of a flood, in England and elsewhere, in the number of "pure" and consequential[43] psychiatric injury suits instituted over the last decade, particularly the last five years. More telling than the number of cases emerging is the fact that courts are now being called on to determine liability for psychiatric injury in an increasingly diverse range of circumstances far removed from the traditional context of "accidents".[44] It is highly doubtful, for example, that the actions for damages for psychiatric injury in *AB v Tameside & Glossop Health Authority*,[45] *Allin v City & Hackney Health Authority*[46] and *Lew v Mount Saint Joseph Hospital Society*,[47] cases raising novel sub-issues in relation to the communication of trauma, would have been

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32 The majority in *White v Chief Constable of South Yorkshire Police*, note 1 *supra*, comprised Lords Browne-Wilkinson, Steyn and Hoffmann. Lords Goff of Chieveley and Griffiths (save in relation to PC Glave) dissented. *Page v Smith*, note 9 *supra* was also a 3:2 decision (Lords Lloyd of Berwick, Ackner and Browne-Wilkinson; Lords Jauncey of Tullichettle and Keith of Kinkel dissenting).

33 Note, for example, the comments of Mahoney JA in *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680 at 733; *Lowns v Woods* (1996) Aust Torts Reports 81-376 at 63,167; *Crampton v Nugawela* (1996) 41 NSWLR 176 at 194-5. See also *Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd*, note 15 *supra* at 1262, per McLachlin J.

34 *White v Chief Constable of South Yorkshire Police*, note 1 *supra* at 1557, per Lord Hoffmann.

35 *Ibid* at 1547, per Lord Steyn.

36 *Ibid*.

37 *Ibid* at 1523, per Lord Goff of Chieveley.

38 *Ibid* at 1551, per Lord Hoffmann.

39 *Ibid* at 1547, per Lord Steyn; at 1551, per Lord Hoffmann.

40 *Ibid* at 1547, per Lord Steyn.

41 *Ibid*.

42 *Ibid*.

43 That is, consequent on physical injury.

44 See NJ Mullany and PR Handford, note 10 *supra*, pp 207-15; NJ Mullany, "Fear for the Future: Liability for Infliction of Psychiatric Disorder", note 10 *supra* at 107-14; P Handford, note 10 *supra* at 37-8, 46-7. See also text accompanying notes 381-99 *infra*.

45 Note 26 *supra*. See NJ Mullany, "Liability for Careless Communication of Traumatic Information" (1998) 114 *LQR* 380.

46 [1996] 7 Med LR 167. See NJ Mullany, note 45 *supra*.

47 (1997) 36 CCLT (2d) 35; (1997) 44 BCLR (3d) 84; (1998) 55 BCLR (3d) 394. See NJ Mullany, "Negligently Inflicted Psychiatric Injury and the Means of Communication of Trauma – Should it Matter?", note 10 *supra* at 199.

advanced or even contemplated fifty, fifteen or five years ago. Until comparatively recently, many situations now confronting judges would not have been thought likely to give rise to claims in negligence for mental damage. In all probability this avenue of redress would not have even been considered. Far from this being a matter for concern for the future of the common law[48] or evidence of the growth of an unhealthy compensation culture,[49] it reflects an increasing community awareness of mental illness and its toll on human happiness and a belated recognition by legal advisers that the legitimate scope for psychiatric injury suits is much wider than traditionally envisaged. Many well-founded psychiatric injury actions still fail due to indefensible doctrinal restrictions on recovery. English litigants face the highest hurdles. We now know that they will not be lowered by the judiciary.[50]

The extensive process of reparation required to remedy the damage caused to English negligence jurisprudence through the avoidable confusion engendered by the judgments in the Lords' quartet has begun. It must be completed. The recent unanticipated[51] self-imposed freeze on judge-led development of principle[52] highlights the importance of two extensive and stimulating publications devoted exclusively to the reform of liability for psychiatric illness. In producing these contributions to the controversial debate, the Law Commission has affirmed the long overdue need to afford damage to the psyche a rightful place in the law of civil wrongs. Its Consultation Paper[53] and Final Report are the results of a reference to examine "the principles governing and the effectiveness of the present remedy of damages for monetary and non-monetary loss, with particular regard to personal injury litigation".[54] So widespread has been the concern over liability rules for damage to the mind that, in the course of work on the assessment of damages for non-pecuniary loss, the Commission concluded that a separate Consultation Paper and Report examining this pocket of personal injury litigation were warranted.[55] This important conclusion acknowledges that, absent appropriate analysis of the adequacy of governing

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48 Note *White v Chief Constable of South Yorkshire Police*, note 1 *supra* at 1539, 1543, 1547, per Lord Steyn. See also *AB v John Wyeth & Brothers Ltd*, note 26 *supra* at 19, per Stuart-Smith LJ; *Hegarty v EE Caledonia Ltd*, note 26 *supra* at 263-4, per Brooke LJ.

49 Note PS Atiyah, *The Damages Lottery*, Hart Publishing (1997) p 138, who refers to the "blame culture" for which the legal system is allegedly partly responsible; J Stapleton, "In Restraint of Tort" in P Birks (ed), *The Frontiers of Liability*, Oxford University Press (1994) Vol 2 at 83. See also J O'Connell and B Kelly, *The Blame Game*, Lexington Books (1987).

50 See *White v Chief Constable of South Yorkshire Police*, note 1 *supra* at 1547, per Lord Steyn.

51 See text accompanying notes 400-4 *infra*.

52 See *White v Chief Constable of South Yorkshire Police*, note 1 *supra* at 1547, per Lord Steyn; at 1557, per Lord Hoffmann.

53 See Law Commission Consultation Paper 137, *Liability for Psychiatric Illness*, 1995 (Consultation Paper).

54 See especially Item 11 of the Law Commission Report 200, *Fifth Programme of Law Reform*, 1991.

55 See Consultation Paper, note 53 *supra* at [1.1]. The number of formal and informal responses to the provisional recommendations received by the Commission confirmed this assessment: see Report, note 1 *supra* at [1.4]. For a summary of the provisional recommendations see A Burrows, "Liability For Psychiatric Illness: Where Should the Line be Drawn?" (1995) 3 *Tort L Rev* 220; K Wheat, "Law Commission Consultation Paper No 137 – Liability for Psychiatric Illness" [1995] 2 *Web JCLI*; MA Jones, "Liability for Psychiatric Illness – More Principle, Less Subtlety?" [1995] 4 *Web JCLI*.

liability rules, "progressive awareness of mental illness",[56] without more, can never constitute real advancement. It has resulted in the type of detailed exploration of principle integral to any rational system of law grappling with "the dynamic and evolving fabric of ... society".[57] The significance of formal recognition that mental injury is a "real", "debilitating" and potentially "life-shattering" consequence of exposure to trauma and that the restrictive rules governing recovery for its negligent infliction are worthy of the closest scrutiny cannot be understated.[58]

II. SUMMARY OF THE PROPOSED SCHEME

At the core of the recommended scheme lie the concepts of reasonable foreseeability and relationship. Focus is directed to recovery for reasonably foreseeable psychiatric disorder sustained "as a result of the death, injury or imperilment of a loved one".[59] The bond between the primary victim of the tortfeasor's negligence and the claimant is seen as crucial.[60] The principal recommendation of the Law Commission is that where there is a "close tie of love and affection" between the claimant and the person killed, injured or imperilled, restrictions based on the claimant's physical and temporal proximity to the accident or aftermath and the means by which he or she learned of it should be excised. The requirement of a sufficient bond is seen as an essential control. It is proposed that a fixed list of certain types of relationship be deemed conclusively to possess the requisite degree of love and affection. This represents an extension of the prevailing rebuttable presumption in relation to filial and spousal relationships[61] (and possibly fiancés[62]). Claimants in relationships with victims other than those falling within fixed categories would be required to prove the prerequisite bond existed. Two other recommendations are advanced. The more important is the proposed abolition of the pernicious requirement for recovery that disorder arise from a "sudden shock" to the senses as distinct from decompensation over time. It is also recommended that liability should not be denied when psychiatric illness resulted from the death, injury or imperilment of the tortfeasor. The central "doctrinal boundary stone" is to be moved by statute. Changes to those areas where the present law is "clearly

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56 *McLoughlin v O'Brian*, note 4 *supra* at 443, per Lord Bridge of Harwich.

57 *Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd*, note 15 *supra* at 1262, per McLachlin J.

58 Such recognition sits comfortably with the recent declaration by the Supreme Court of Canada in *New Brunswick (Minister of Health and Community Services) v G(J)* (unreported, SCC, 10 September 1999) that the citizen's right to security of the person enshrined in s 7 of the *Canadian Charter of Rights and Freedoms* protects the psychological, as well as the physical, integrity of the individual. See text accompanying note 101 *infra*.

59 See Report, note 1 *supra* at [1.7].

60 Note *Jaensch v Coffey*, note 15 *supra* at 600, per Deane J.

61 See *Alcock v Chief Constable of South Yorkshire Police*, note 1 *supra* at 398, per Lord Keith of Kinkel; at 403, per Lord Ackner; at 422, per Lord Jauncey of Tullichettle.

62 See *ibid* at 398, per Lord Keith of Kinkel.

unsatisfactory"[63] are incorporated in a Draft Negligence (Psychiatric Illness) Bill annexed to the Report. Other recommendations are directed to the judges rather than Parliament: the most important of these, that courts should abandon attaching practical significance to whether the plaintiff is a primary or secondary victim, clearly reflects the Law Commission's view that *Page v Smith*[64] has produced unwanted complexities and is not a desirable development. Reform of specific rules governing topical litigation by rescuers, employees (for exposure to trauma as well as "occupational stress"), involuntary participants and bystanders, and for disorder consequent on the fear of future events or the negligent communication of traumatic information, is seen as properly within the purview of the judiciary rather than the legislature. The House of Lords sees things differently.[65]

III. THE PARAMETERS OF INQUIRY

A. The Existing Tort System

Critics of calls for the expansion of liability for psychiatric injury have attacked attempts to modify what they see as a fundamentally flawed system of accident compensation. Efficiency and fairness, they assert, dictate that efforts should be directed to wholesale reform of the fault-based tort system rather than attempts to treat a moribund regime to the further advantage of a few privileged accident victims.[66] The changes to psychiatric damage jurisprudence which we have advocated for seven years are intended to operate within the existing tort system. We are not concerned with the long-running economic and other overworked arguments in relation to the abolition of tort, the merits of no-fault compensation or other radical reform of the current regime by which the injured are compensated.[67] Ours is a practical solution to a present problem designed to function while the tort system lives and survives in its current form and to assist those who prosecute, defend and determine actions for the negligent infliction of

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63 See Report, note 1 *supra* at [1.6].

64 Note 9 *supra*.

65 See *White v Chief Constable of South Yorkshire Police* note 1 *supra* at 1547, per Lord Steyn; at 1557, per Lord Hoffmann.

66 See, for example, PS Atiyah, note 49 *supra*; PS Atiyah, "Personal Injuries in the Twenty-First Century: Thinking the Unthinkable" in P Birks (ed), *Wrongs and Remedies in the Twenty-First Century*, Clarendon Press (1996) ch 1; J Stapleton, note 49 *supra*; J Stapleton, *Product Liability*, Butterworths (1994) pp 285-6.

67 For early suggestions to replace the tort system with a comprehensive compensation scheme see, for example, *Report of the Royal Commission of Inquiry on Compensation for Personal Injury in New Zealand*, 1967 ("Woodhouse Report"); TG Ison, *The Forensic Lottery: A Critique on Tort Liability as a System of Personal Injury Compensation*, Staples Press (1967); PS Atiyah, *Accidents, Compensation and the Law*, Weidenfeld and Nicolson (1st ed, 1970) ch 25 (see now P Cane, *Atiyah's Accidents, Compensation and the Law*, Weidenfeld and Nicolson (5th ed, 1993) ch 25). Atiyah, in a quite remarkable shift in position, now rejects this suggestion as "hopelessly dated": see PS Atiyah, note 49 *supra*, pp 180-5, 190. For a cogent rebuff of the latest assault by Atiyah and his unconvincing "leave it all to the free market" proposal, see A Burrows, "In Defence of Tort" in *Understanding the Law of Obligations*, Hart Publishing (1998) ch 6.

mental injury. This is true also of the legislative reform proposed by the Law Commission. It was charged with the task of improving rather than championing replacement of the current compensation system.[68]

B. The Negligent Infliction of Psychiatric Illness

While there is undoubtedly scope for claims for "pure" psychiatric injury consequent upon the commission of other torts such as private and public nuisance, breach of statutory duty, deceit, false imprisonment, malicious prosecution, intimidation, defamation and, in the United Kingdom, *Rylands v Fletcher*,[69] as well as breach of contract, authorities are rare, perhaps reflecting ignorance among practitioners of the compass of potential liability and a belief that "nervous shock" suits are available for "accident" victims only. It is exclusively in relation to negligence that the special restrictions on recovery for psychiatric illness have been imposed,[70] although an attempt to extend these to other causes of action is not unforeseeable.[71] The Law Commission's recommendations for legislative intervention are concerned solely with liability in negligence, broader coverage considered to be premature and counterproductive.[72]

C. The Nature of Actionable Damage

The recommendations advanced are premised on the basis that the general precondition for recovery that there be proof of a "recognisable psychiatric illness"[73] (as distinct from "mere"[74] mental or emotional distress) is

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68 See Report, note 1 *supra* at [1.1]; Law Commission Report 200, *Fifth Programme of Law Reform*, 1991.

69 In Australia this action has been subsumed by negligence: see *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520.

70 Liability for psychiatric injury caused by an intentional tort lies in the absence of special rules: see *Wilkinson v Downton* [1897] 2 QB 57.

71 One predictable argument for extension is that confining limits on liability to negligence may encourage the forced recategorisation of claims: note the comments of Brooke LJ in *Hegarty v EE Caledonia Ltd*, note 26 *supra* at 268; *Young v Charles Church (Southern) Ltd*, note 26 *supra*; *Dooley v Cammell Laird & Co Ltd* [1951] 1 Lloyd's Rep 271. However, the objections to the orthodox rules are equally (some would say more) compelling outside the realm of negligence: see Report, note 1 *supra* at [1.10].

72 See Report, note 1 *supra* at [1.9].

73 The numerous expressions of this fundamental prerequisite to liability can be traced to the comments by Lord Denning MR in *Hinz v Berry* [1970] 2 QB 40 at 42-3. The leading Australian enunciation is that of Windeyer J in *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 394. Proof of actionable injury depends on supportive psychiatric evidence. Note, however, the remarkable (and seemingly isolated) decision of the Saskatchewan Court of Appeal in *Peters-Brown v Regina District Health Board* (1996) 148 Sask R 248 at 250 rejecting the contention that a court must be presented with medical evidence to find "nervous shock". This contention would receive short shrift from Australian and British courts. The requisite evidentiary foundation is critical. It appears that the Court was speaking of true disorder rather than distress, referring to suffering which "greatly transcended ... noncompensable emotional upset". A related question arises: if distress short of disorder should be compensable in principle, should liability lie in the absence of any medical evidence as to its presence and effect? Is it only claims for recognised psychiatric illness which need to be supported or discredited by objective expert opinion? Some support for this view is found in *Vanek v Great Atlantic & Pacific Co of Canada* [1997] OJ No 3304, discussed text accompanying notes 94-7 *infra*.

unquestionably sound. Common law principle is rarely set in sacred stone: "A belief which represented unquestioned orthodoxy in year X may have become questionable by year Y and unsustainable by year Z."[75] Notwithstanding the imposing wall of authority insisting on evidence of clinically valid disorder, inroads into this rule have been made by way of certain dicta and the granting of awards for states and conditions incapable of classification as recognised psychiatric damage.[76] Consultees' views as to appropriateness of permitting limited recovery for negligently caused emotional disruption were not sought. Regrettably, in outlining the position in relation to the present law and the nature of actionable damage, the Law Commission referred only to the controversial case of *Whitmore v Euroways Express Coaches Ltd*,[77] dismissing it as an

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74 Note *Coates v Government Insurance Office of New South Wales*, note 15 *supra* at 14, per Kirby P: "Acknowledging fully the difficulty of differentiating 'mere grief' (if any grief may be described as 'mere') and 'psychological injury' or 'psychiatric injury'...". For an overview of the medical literature discussing the distinction see NJ Mullany and PR Handford, note 10 *supra*, pp 24-42. See also NJ Mullany, "Fear for the Future: Liability for Infliction of Psychiatric Disorder", note 10 *supra* at 114-22; Consultation Paper, note 53 *supra*, Pt III; Report, note 1 *supra*, Pt III.

75 *R v Ministry of Defence; Ex parte Smith* [1996] QB 517 at 554, per Sir Thomas Bingham MR. See also *Fitzpatrick v Sterling Housing Association Ltd* [1998] Ch 304 at 340, per Ward LJ; *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq)* (1999) 73 ALJR 306 at 327, per Kirby J; *Perre v Apand Pty Ltd* (1999) 164 ALR 606 at 629, per McHugh J: "[I]n the area of judge-made law, the duty of judges to be faithful to the past is weaker. Whilst stare decisis is a sound policy because it promotes predictability of judicial decision and facilitates the giving of advice, it should not always trump the need for desirable change in the law".

76 The relevant cases include *Whitmore v Euroways Express Coaches Ltd*, *The Times*, 4 May 1984; *Brown v Mount Barker Soldiers' Hospital* [1934] SASR 128; *Swan v Williams (Demolition) Pty Ltd* (1987) 9 NSWLR 172; *McDermott v Ramadanovic Estate* (1988) 27 BCLR (2d) 45; *Rhodes Estate v Canadian National Railway* (1990) 50 BCLR (2d) 273, which are discussed in NJ Mullany and PR Handford, note 10 *supra*, pp 18-21. Authorities raising the issue of the nature of actionable damage which have emerged since late 1992 include *Cox v Fleming* (1993) 13 CCLT (2d) 305 (referring to the British Columbia authorities and allowing recovery for "emotional scars"); *Government Insurance Office v Best* (1993) Aust Torts Reports 81-210 at 62,092, per Kirby P (suggesting that the "unrealistic and highly arbitrary distinction" between compensation for grief caused by the loss of a spouse in a car accident and compensation for depression caused by injuries suffered in the same accident "may need to be reconsidered"); *Coates v Government Insurance Office of New South Wales*, note 15 *supra* at 12-13, 15, per Kirby P; *Bryan v Philips New Zealand Ltd* [1995] 1 NZLR 632 (where Barker J, the senior puisne judge of the High Court of New Zealand, declined to rule in an interlocutory proceeding that New Zealand courts would not follow the United States lead and allow recovery for mental or emotional distress); *Mason v Westside Cemeteries Ltd* (1996) 135 DLR (4th) 361 at 380, per Molloy J; *Vanek v Great Atlantic & Pacific Co of Canada*, note 73 *supra* at [11], per Cosgrove J; *Anderson v Wilson* (1998) 37 OR (3d) 235 (Divisional Court) at 245-6, per Campbell J; [1999] OJ No 2494 (Court of Appeal) at [13], [18]-[19], per Carthy JA.

77 *The Times*, 4 May 1984. Comyn J drew a distinction between "ordinary" shock, which he considered did not need to be proved by medical evidence, and "psychiatric" shock, where such evidence is required. The plaintiff and her husband were injured in a coach crash in France. The husband suffered very serious injury. The plaintiff's claim for physical injuries included a plea for relief both for the trauma and shock in respect of her own experiences and the immediate and continuing shock suffered as a consequence of her husband's injuries. What is of interest is not that the Court distinguished between the "profound" shock occasioned to the plaintiff by the injured husband's state (for which damages were recoverable), and the worry, strain and distress suffered as a result of those injuries and their continuing debilitating effects (for which damages were not recoverable), but what it was prepared to include within the compensable category. Comyn J expressed the view that the law was harsh in categorically excluding emotions as a recoverable head of damages. The evidence was that the shock was not psychiatric in

"aberration".[78] Although that classification may have been appropriate when the decision emerged,[79] it has now become strained in the light of the growing list of Commonwealth authorities taking a similar line, particularly the express rejection in British Columbia[80] and Ontario[81] of Lord Denning MR's limitation in *Hinz v Berry*,[82] Kirby P's progressive comments in the New South Wales case of *Coates v Government Insurance Office of New South Wales*[83] and the groundbreaking refusal of Barker J in *Bryan v Philips New Zealand Ltd*[84] to rule out recovery for mental or emotional distress for "cancerphobia" in New Zealand. When the more liberal philosophies prevailing in some continental systems[85] and United States jurisdictions[86] permitting recovery are added to the equation, the case for re-examination is strengthened. In "field[s]" of tort law "in which the common law is still in course of development ... [c]ourts ... must act in company and not alone. Analogies in other courts, and persuasive

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nature but "shock in the ordinary, general, everyday meaning of the word and not in any medical or psychiatric sense". The plaintiff was awarded £2,000 for some state which amounted to more than emotional upset but less than medical incapacitation. Separate damages were awarded for the shock suffered in relation to the plaintiff's own experiences and were subsumed within the £4,500 awarded for general damages. No indication was given how "ordinary shock" differs from grief or distress. The only clue provided was the statement that it is "a concept known to all of us" which is to be measured by reference to the evidence of the particular sufferer. It is not susceptible to medical proof and must be decided by the judge using common sense. The decision was clearly influenced by Comyn J's expressed wish to judge damages claims in an ordinary, "down to earth" and realistic manner rather than subject them to legal technicalities. His Lordship wanted to make litigation comprehensible to ordinary people who have suffered ordinary accidents. It is not possible to dismiss the decision as an unconscious slip on his part. The reasoning indicates a clear appreciation of the uniqueness of the case in involving a "shock, not psychiatric in character, which endured beyond the moment of impact".

78 See Consultation Paper, note 53 *supra* at [2.4]; Report, note 1 *supra* at [2.3].

79 Note MA Jones, "Ordinary shock – thin skull rules OK?" (1985) 4 *Lit* 114.

80 See *McDermott v Ramadanovic Estate*, note 76 *supra*; *Rhodes Estate v Canadian National Railway*, note 76 *supra*. Note also *Cox v Fleming*, note 76 *supra*.

81 See *Mason v Westside Cemeteries Ltd*, note 76 *supra*, which was followed in *Vanek v Great Atlantic & Pacific Co of Canada*, note 73 *supra*. See also the approach of the Ontario Court of Appeal in *Anderson v Wilson*, note 76 *supra* rejecting the conclusion reached by the Divisional Court that a claim for mental distress "standing alone" would obviously fail in Ontario, discussed note 84 and text accompanying notes 98-100 *infra*. It appears that, although Greer J referred repeatedly in *Boudreau v Benaiah* (1998) 37 OR (3d) 686 to the "mental distress" suffered by a former client of a criminal barrister he ordered to pay $30,000 for the consequences of the negligent handling of the client's defence to a charge of child abduction, the client's condition had deteriorated such as to permit classification as psychiatric disorder.

82 Note 73 *supra* at 42-3.

83 Note 15 *supra* at 12-13, 15.

84 Note 76 *supra*. His Honour refused to strike out a claim for "distress" allegedly suffered by the plaintiff caused by knowledge that he had a high chance of developing asbestos-related cancers due to his exposure to and ingestion of asbestos while he was an employee gas bender of a company which made neon lights. Compare the approaches of the Ontario Divisional Court and the Court of Appeal in *Anderson v Wilson*, note 76 *supra*. Three members of the lower court struck out the "distress" claims of patients and their dependents who underwent blood tests for hepatitis B following the receipt of notice from a health department that they may have been exposed to infection at clinics providing electroencephalograms (EEGs) because there was no allegation or evidence of the infliction of recognised disorder as a consequence of receiving the notices or taking the blood tests. The Court of Appeal unanimously recertified this class of claimant.

85 These include France (*Code Civil*, Art 1382).

86 See NJ Mullany and PR Handford, note 10 *supra*, pp 56-8.

precedents as well as authoritative pronouncements, must be regarded".[87] The wisdom of global consideration in the formulation of principle governing liability for mental injury has been reconfirmed at the highest level.[88] The nature of actionable injury in suits for damage to the mind should have been explored by the Law Commission.

The Canadian courts have been the most direct in their challenge to traditional thought. In *McDermott v Ramadanovic Estate*[89] a young girl saw her parents die in the front seat of their car. Could she recover for the impact that witnessing this event had on her mind? The medical evidence was that she had not suffered a recognised psychiatric disorder. Notwithstanding this, Southin J ruled that the emotional pain, as distinct from grief, sounded in damages and awarded her $20,000, a significant sum when compared to the $5,000 awarded for her physical injuries. Southin J queried:

> What is the logical difference between a scar on the flesh and a scar on the mind? If a scar on the flesh is compensable although it causes no pecuniary loss, why should a scar on the mind be any the less compensable? In both cases there are serious difficulties of assessment. That has not been allowed to stand in the way of the courts making awards for non-pecuniary losses. Nor has it prevented awards for pain caused by physical injury which is a bad memory.
>
> And too, pain from a physical injury is not the result of a 'recognisable psychiatric illness'. It is the result of the interplay of tissue, nerves and brain. But to the sufferer, what is the difference between physical pain and emotional pain? Indeed the former may be easier to bear, especially with modern analgesics, than the latter.
>
> Therefore, with the greatest of respect, I reject Lord Denning's limitation of recovery to cases of recognisable psychiatric illness.[90]

Following her elevation to the British Columbia Court of Appeal, Southin JA reiterated her views in *Rhodes Estate v Canadian National Railway*:

> An argument can be made for the proposition that to award damages as I did in *McDermott* is, as a matter of policy, wrong. There are all sorts of people throughout the world who have gone through the horrors of war and somehow got on with their lives without compensation for the terrible memories with which they have to live. In my opinion, the question of policy is better answered not by saying that scars on the flesh are compensable but scars on the mind are not, but by making all awards for scars on the mind, including scars said to lead to psychiatric illness, conventional, even as damages for pain and suffering have been made conventional.[91]

In *Cox v Fleming*[92] these two decisions were relied on to justify a similar award for "emotional scarring". A young man was killed when the car in which he was a passenger crashed into a tree. His death was not instantaneous. It occurred after many hours of struggle with gross and disfiguring head injuries. This increased the distress of his parents who were in constant attendance at the

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87 *Mount Isa Mines Ltd v Pusey*, note 73 *supra* at 396, per Windeyer J.

88 See *White v Chief Constable of South Yorkshire Police*, note 1 *supra* at 1521, per Lord Goff of Chieveley.

89 Note 76 *supra*.

90 *Ibid* at 53.

91 Note 76 *supra* at 289.

92 Note 76 *supra*.

hospital. After the young man's death, his father underwent drastic and permanent personality change. The damage was allegedly the direct result of being required to view and identify his son at the hospital. He claimed for "nervous shock" against the driver and owner of the car. The Supreme Court of British Columbia drew a distinction between the father's emotional suffering and his grief. It observed that the line drawn in the authorities between grief and actionable "nervous shock" was extremely problematic, involving as it did a seemingly artificial dissection of intense human suffering. It was said that a direct and immediate impact upon the father's mind, inflicted by the accident itself, must be shown, rather than a traumatic reaction to the impact which the accident had upon another. The medical evidence did not clearly state the mechanism or source by which the father's injury had been inflicted. It had not been established on a balance of probabilities that the condition was a direct result of seeing the aftermath of the accident. His loss was such that he would have probably suffered whether he had seen his son or not. But the added horror of seeing his son's disfigured body in the hospital had added a further and emotionally scarring dimension to his current condition which sounded in $20,000 damages. That dimension represented the sole compensable facet of the claim for "nervous shock".

An Ontario judge has relied on Southin J's comments in *McDermott v Ramadanovic Estate* to grant modest relief for emotional distress consequent on a cemetery's negligent loss of urns containing the ashes of the plaintiff's parents. In *Mason v Westside Cemeteries Ltd* Molloy J said:

> I agree with the observations and conclusions of Southin J in *McDermott v Ramadanovic Estate*... Although the plaintiff's emotional suffering did not amount to a psychiatric condition, it was nevertheless real and more painful to her than the physical injuries she sustained. Southin J observed that damages are awarded for physical scars even if there is no ongoing pain or associated pecuniary loss. She then stated:
>
> > 'But what is the logical difference between a scar on the flesh and a scar on the mind? If a scar on the flesh is compensable although it causes no pecuniary loss why should a scar on the mind be any the less compensable?'
>
> I agree. And I would add that it seems equally illogical to me that mental distress damages should be recoverable in a case based on contract but not in a negligence case. We recognize the undesirability of lawsuits based on nothing more than fright or mild upset. However, in my view the more appropriate way to control these frivolous actions is by limiting recovery based on foreseeability (and perhaps proximity or directness) and by awarding limited damages and imposing cost sanctions in cases of a trivial nature.[93]

This approach was in turn endorsed by Cosgrove J in *Vanek v Great Atlantic & Pacific Co of Canada*.[94] Damages were awarded for mental distress to a father and a mother who suffered "anxiety" (in the lay sense of the term) after their young daughter swallowed contaminated grape juice packed in her school lunch. The girl recovered $2,000. She had been transferred to hospital by the parents, released after examination, and returned to school the following day.

93 Note 76 *supra* at 380.

94 Note 73 *supra*.

The evidence suggested that she was most unlikely to suffer any long-term health consequences of her consumption. This notwithstanding, the father, who was pre-disposed to physical and psychiatric injury, suffered chronic "anxiety" "detracting from his ability to enjoy some normalcy in his living habits".[95] His distress flowed directly from the incident involving his daughter, which also contributed to a debilitating angina attack. Although the father suffered no psychiatric disorder, Cosgrove J was persuaded by Molloy J's reasoning, described as of "unassailable logic and good sense",[96] to award him $12,500 for his "moderate" (albeit chronic) "mental and emotional distress". The sum is not insignificant when it is appreciated that it represents more than six times what the primary child victim received and that it compensates the secondary victim for a state short of recognised illness. The mother was awarded, inter alia, $2,500 for her "anxiety" and "distress" despite the absence of any supportive medical opinion.[97]

It is of particular significance that appellate courts in Canada have considered the nature of damage necessary to ground relief for negligence in the context of trauma litigation. *Anderson v Wilson*[98] concerned the certification of a class action in negligence proceedings. Three members of the Ontario Divisional Court were not prepared to endorse the sentiments of Molloy J in *Mason v Westside Cemeteries Ltd* or to sanction a shift in the law of that Province to allow a large group of patients and dependents who underwent blood tests for hepatitis B following possible infection from EEGs conducted at five clinics to recover for mental distress. The absence of an allegation or evidence of the infliction of recognised disorder as a consequence of receiving notice by post of possible infection from a health department and taking the blood tests was considered to be fatal to the claims. No actionable injury had been sustained. Significantly, their Lordships did not rule out reconsideration of the current law in litigation other than cases involving thousands of claimants such as the large class action before them:

> It may be that the law, when ripe for change, will permit such claims in the future. But that kind of judicial legislation should take place incrementally on a case by case basis. Judge-made law should evolve in a way that permits the experience of each case to be considered in the next case until the correct path of the law becomes clear. This case by case experiential evolution cannot take place in a mass class nervous shock proceeding with over 10,000 claimants. There are enough complicated issues to manage in this case already without turning it into an experimental laboratory for fundamental change in the law of tort.[99]

On a further appeal to the Ontario Court of Appeal, their Lordships were less guarded. Unlike the Divisional Court, the Court of Appeal referred to *Vanek v Great Atlantic & Pacific Co of Canada*, as well as *Mason v Westside Cemeteries Ltd*, to support the unanimous conclusion that the lower court had erred in excluding from the class action those patients who were fearful of contracting

95 *Ibid* at [21].
96 *Ibid* at [11].
97 *Ibid* at [18].
98 Note 76 *supra*.
99 *Ibid* at 245-6.

hepatitis B but not psychiatrically compromised as a consequence. This class was recertified. That the contrary view in relation to the nature of damage had been endorsed by the House of Lords was not determinative of the position in Ontario. Carthy JA (with whom McMurtry CJO and Weiler JA agreed) said:

> Given the uncertain state of the law on tort relief for nervous shock, it is not appropriate that the court should reach a conclusion at this early stage and without a complete factual foundation. It cannot be said ... that it is plain and obvious that the claim for the tort of mental distress standing alone will fail. On the assumption that a legal obligation may exist, this segment of the class proceeding is ideally suited for certification. There are many persons with the same complaint, each of which would typically represent a modest claim that would not itself justify an independent action. In addition, the nature of the overall claim lends itself to aggregate treatment because individual reactions to the notices would likely be similar in each case – fear of a serious infection and anxiety during the waiting period for a test result...
>
> Thus, in my view, the claim in tort for mental distress for this group of persons should proceed as the preferable mode of bringing these claims forward.[100]

This is a major development from a major court.

Of perhaps even greater significance is the Supreme Court of Canada's recent recognition that psychological integrity is a right to which citizens are entitled as part of their right to security of the person embodied in s 7 of the *Canadian Charter of Rights and Freedoms*. In *New Brunswick (Minister of Health and Community Services) v G(J)*, an appeal concerning the refusal of government to fund wardship proceedings, Lamer CJ (with whom a majority of the Court agreed) stated:

> The Minister's application to extend the original custody order ... threatened to restrict the appellant's right to security of the person...
>
> [T]he right ... protects both the physical and psychological integrity of the individual ... and the protection accorded by this right extends beyond the criminal law and can be engaged in child protection proceedings ...
>
> For a restriction of security of the person to be made out, the impugned state action must have a serious and profound effect on a person's psychological integrity. The effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility. *This need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety.*[101]

It is not a large step from recognition of a constitutional entitlement to peace of mind to recognition of the case for common law protection from significant disturbance to mental and emotional harmony incapable of classification as psychiatric disorder.

The most recent judicial questioning in Australia of the orthodox limiting of recovery to cases where proof of established psychiatric disorder exists is that of Kirby P in *Coates v Government Insurance Office of New South Wales*. The appeal concerned the dismissal of claims by two children for alleged shock-

100 *Ibid* at [18]-[19].

101 Note 58 *supra* at [55]-[62] (emphasis added).

induced psychiatric injury suffered on being informed of the death of their father in a car accident. His Honour observed:

> One might criticise the scarcely delineated distinction made between grief and suffering following tragic news and psychological or psychiatric injury...
>
> Nineteenth century notions of psychological illness and an abiding suspicion of such claims (not so susceptible to objective scrutiny and determination) lurk in the cases to forbid recovery where prolonged grief is shown, extending beyond the norm deemed acceptable to our society. The changing composition of the Australian community and different cultural attitudes to the demonstration of profound grief, afford yet another reason for reconsidering this area of the law. To adhere to stereotypes expressed in terms of abnormal grief derived from England, may work an injustice upon Australian litigants for whom the norms are different and grief reaction more variable than was hitherto expressed to be the case...
>
> *If* it be the case that grief alone does not afford a basis for recovery by family members and others deeply distressed by the consequences of the wrong of a tortfeasor to someone in close relationship to them and if reasons of legal public policy restrain the expansion of a remedy to such persons, such policy scarcely operates to deny recovery in this case.[102]

For the purposes of the appeal before him and without committing himself, his Honour assumed that the traditional "stringent"[103] rule requiring proof of recognised psychiatric disorder represents the law in Australia. Clearly unconvinced of the sanctity of the limitation, Kirby P appears to have been comforted by his assessment that the damage in question satisfied the higher threshold.[104] One is left with the impression that, in the right case and right circumstances, his Honour may be prepared to reject the traditional rule and allow recovery, presumably modest, for mental or emotional distress or suffering incapable of classification as psychiatric disorder.[105] As noted, a senior New Zealand judge has permitted an action for "mental anguish or emotional distress" to proceed, notwithstanding that there was no allegation and no evidence before

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102 Note 15 *supra* at 12, 15 (emphasis added).

103 *Ibid* at 13.

104 Gleeson CJ and Clarke JA thought otherwise, with the result that the appeal was dismissed.

105 Reference should also be made to his Honour's obiter and minority views in the earlier case of *Government Insurance Office v Best*, note 76 *supra*. Mrs Best suffered severe orthopaedic, dental and cosmetic injuries when a car driven by her husband, in which she was a passenger, ran off the road and collided with a tree. Her husband was killed. Uncontested medical evidence established that Mrs Best developed severe depression and anxiety state which had a marked incapacitating effect upon her six years after the accident. Experts stated that there were two inextricably linked causes for her depression, one related to the accident and her own injuries, the other related to the grief experienced on the loss of the husband. Clarke and Handley JJA ruled out recovery in respect of grief resulting from the death of the husband, and reduced general damages awarded by the trial judge accordingly. Kirby P dissented, observing: "The distinction drawn by law between compensation for grief (caused by the loss of a spouse in a car accident) and compensation for depression (caused by injuries suffered in the same accident) is highly artificial" (at 62,092). His Honour went on to comment that although the validity of this "rather unrealistic and highly arbitrary distinction" between psychological reaction caused by grief for the death of a spouse and the depression resulting naturally from a reaction to the trauma of the accident was not challenged in the case before him, "one day (if common law damages survive) it may need to be reconsidered." Note also *Stergiou v Citibank Savings Ltd* (unreported, SC ACT, 16 December 1998) at 24-6, per Crispin J who rejected the submission that claims for "mental anguish or stress" not amounting to or causing physical or psychiatric injury "could not possibly succeed".

him that the plaintiff had suffered a recognised disorder, based entirely on the cause of action for emotional distress available in some United States jurisdictions.[106]

It is significant that earlier this year the Full Court of the Supreme Court of Tasmania was asked expressly in *Wilson v Horne*[107] to reconsider the type of damage necessary to sustain an action in negligence for exposure to trauma. Their Honours refused to lower the threshold. Limitation of actions issues caused the matter to assume importance. When aged 25 years the respondent developed post-traumatic stress disorder (PTSD) on the revival of memories of sexual assaults committed against her by her uncle, the appellant, between the ages of five and 12 years. Prior to the onset of this psychiatric illness, the respondent had experienced abnormal sexual development and behavioral patterns during her teens consistent with earlier abuse but not diagnosable as a recognised psychiatric disorder. She was successful at first instance in establishing negligence.[108] On appeal it was argued that the trial judge erred in law in ruling that the evidence supported that claim: he was said to have wrongly held that evidence of disorder was required before actionable damage could be said to have been sustained sufficient to give rise to the accrual of the action; he had not considered whether the respondent's condition prior to the onset of PTSD could be classified as more than *de minimis* and sufficient to give rise to the tort even if that condition did not amount to a recognisable disorder; there was clear evidence of compensable "damage" to the respondent's development, personality and character prior to her diagnosis with PTSD. Adopting the conventional approach, the Full Court disagreed: the trial judge was correct in his conclusion that the respondent had not suffered injuries for which damages might be awarded in negligence until she was diagnosed with recognised illness in the form of PTSD, symptoms having become manifest on the release of her repressed memories.[109] Actionable injury not having been sustained until 1994, s 5(1) of the *Limitation Act* 1974 (Tas) did not operate to bar her claim in negligence commenced in May 1996 even though the tortious conduct had concluded by 1980. In considering this difficult question, their Honours were not afforded the luxury of referral to the complete catalogue of international caselaw challenging traditional thought. Orthodoxy was embraced by reference to *Hinz v Berry*[110] and the well-known old local dicta endorsing it. Armed only with this line of authority, its reaffirmation was inevitable. Had the Full Court been made aware that the nature of actionable damage issue is not as settled as some would have it, that a wide cross-section of judges have been troubled by a rigid approach to the identification of minimum compensable injury in the context of mental health, and of the extraordinarily difficult policy

106 See *Bryan v Philips New Zealand Ltd*, note 76 *supra*.

107 (1999) Aust Torts Reports 81-504.

108 *Horne v Wilson* (unreported, SC Tas, Underwood J, 4 March 1998); *Horne v Wilson (No 2)* (unreported, SC Tas, Underwood J, 30 April 1998).

109 Note 107 *supra* at 65,789, per Cox CJ; at 65,792-4, per Wright J; at 65,796-7, per Evans J.

110 Note 73 *supra* at 42-3, per Lord Denning MR.

considerations competing in that exercise, the outcome may have been different.[111]

The valuable chance to analyse the issue of actionable damage in the light of the modern authorities and contemporary society has similarly been missed by the Law Commission. The rule that the common law does not compensate emotional distress has been repeated so often in England that is generally accepted as inviolate. It is frequently stated as a truism without explanation of any kind. Lord Ackner in *Alcock v Chief Constable of South Yorkshire Police* simply declared: "Mere mental suffering, although reasonably foreseeable, if unaccompanied by physical injury, is not a basis for a claim for damages."[112] Why is this so? Should it be so? The traditional principle cannot be sustained on the basis that emotional distress is too difficult to value. Every award for non-pecuniary loss in every physical injury judgment could be so categorised. Compensation for pain and suffering and loss of the amenities of life is routinely made – losses of this kind are by their very nature incapable of precise valuation.[113] Suggestions that it is proper that emotional damage does not sound in compensation because it is something experienced by any normal person when someone they love is killed or injured reduce to the fatuous argument that the fact an injury is commonly experienced is, of itself, a reason for denying recovery. No such policy operates in relation to the universally experienced sensation of physical pain. If it is accepted that the pain of grief and bereavement, for example, can be "an appalling experience",[114] does it follow necessarily that its negligent infliction should be non-actionable? These emotions might be "a part of the common condition of mankind which we will all endure at some time in our lives", we might "accept [them] as a part of the price of our humanity",[115] but must we accept them where the exercise of reasonable care would have saved us from such despair? Why, if anguish is attributable solely to the incompetence of another, should the common law leave

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111 Note, for example, the reasoning process of Wright J who appears to have been initially attracted to the application of different minimum damage standards required to support claims by primary and secondary victims: "Perhaps the 'nervous shock' cases have not been concerned with the occurrence of recognisable injury or damage of a kind which would entitle a person directly and immediately subjected to tortious conduct to sue, but rather with the question of the scope and extent of the tortfeasor's liability to the third parties affected thereby, ie, remoteness of damage. Perhaps it is one thing to say that a person may not recover damages for distress or grief occasioned by observation of tortiously caused harm to a third party, and may only recover for proved nervous shock, but something very different to say that a person directly and immediately affected by tortious conduct cannot recover for distress or grief and must prove nervous shock or physical injury before being entitled to recover": note 107 *supra* at 65,792. The opportunity to thoroughly scrutinise all relevant authority, literature and competing issues would have made it more difficult for his Honour to declare "with confidence" that in all cases "nervous shock" must be suffered to sustain an action in negligence: see note 107 *supra* at 65,792.

112 Note 1 *supra* at 401. See also *White v Chief Constable of South Yorkshire Police*, note 1 *supra* at 1515, per Lord Griffiths: "[T]he law has never recognized it as a head of damage."

113 See, for example, *Wise v Kaye* [1962] 1 QB 638; *H West & Son v Shephard* [1964] AC 326; *Lim Poh Choo v Camden Area Health Authority* [1980] AC 174; *Teubner v Humble* (1963) 108 CLR 491; *Skelton v Collins* (1966) 115 CLR 94.

114 See *White v Chief Constable of South Yorkshire Police*, note 1 *supra* at 1515, per Lord Griffiths.

115 *Ibid.* It might also be argued that the death or injury of loved ones through identified fault may be harder to bear than loss consequent on unavoidable events.

us to recover without assistance? True, "no sum of money can provide solace or comfort" for emotional pain.[116] But this is a problem inherent with monetary compensation for all personal injury. The essence of the demand that there be proof of damage of a recognisable psychiatric nature appears to be a conviction that it is required as an essential safeguard against trivial or illegitimate claims. Is such an argument valid? In 1915 Roscoe Pound, discussing the interest in the physical person, suggested that immunity of the mind and the nervous system from injury, and freedom from annoyance interfering with mental poise and comfort, were interests which had become more important with the progress of civilisation, as opposed to more basic interests such as immunity of the body from direct and indirect injury.[117] True in 1915, is this not even more apposite in relation to society in 1999?

The fact that emotional distress is often of relatively short-lived duration when compared with psychiatric disorder to which it may give rise is no justification for refusing to recognise it as compensable. The fact that a reaction is short-lived does not necessarily mean it is not worthy of legal recognition. Temporary imbalances can be very intense. They can also be very damaging. Courts have recognised this in relation to physical and psychiatric injury. The current English position fails to appreciate that there may be genuine cases of very serious all-consuming emotional upheaval which leave a person in a compromised state falling short of psychiatric illness. He or she may not be able to work or function satisfactorily even though they remain psychiatrically intact. Kirby P has accepted that such deserving cases do exist. These victims fall through the gaps under the current system. The desire to filter the system of trivial lawsuits has this unfortunate consequence. That objective could be achieved by the adoption of the controls advocated by Molloy J in *Mason v Westside Cemeteries Ltd*, particularly the award of modest damages and imposition of costs sanctions for truly trivial claims. It must be highly doubtful that litigants would incur the unrecoverable costs of litigation and run the risk of exposure to adverse costs orders for the chance of recovery of very small awards. In considering the appropriate quantum Molloy J stated:

> [T]he general theme is that damages for mental distress, when allowed, have been relatively low. That seems to me to be appropriate. The plaintiff in this case is genuinely and understandably upset. He has lost some peace of mind. However, in the general scheme of things, his suffering has not been extreme. Indeed, I would place this case within the general category of claims for relatively minor mental distress which are so trivial in nature that they ought not to be encouraged. It is important in our society that all citizens have access to our courts of civil justice to redress wrongs committed against them. That does not mean that a civil action for damages is the appropriate solution to every instance of emotional upset or hurt feelings caused by somebody else's civil wrong. While those claims may, on the application of general legal principles, be valid, if the injury suffered is trivial in nature, the damages awarded should reflect that fact. The plaintiff in this case

116 *Ibid.*

117 See R Pound, note 5 *supra* at 355-6.

> ignored his parents ashes for 23 years. While he is clearly upset, I consider the emotional harm done to him to be minor.[118]

The Court awarded $1000 for general damages for emotional stress for the negligent loss of urns containing his parents' ashes.

Whether the common law should automatically bar relief to those who suffer serious emotional distress is open to question. Other jurisdictions do not baulk at compensating negligently caused emotional disruption,[119] a fact acknowledged by the Law Commission.[120] It may be that as this area of personal injury law evolves Commonwealth courts will more readily grant recovery for the negligent infliction of mental and emotional states falling short of recognised psychiatric illness. It may be that they will be able to be persuaded that there is a basis for recognising disruption to emotional peace of mind not classifiable as psychiatric disorder as more than *de minimis* and as actionable loss and for addressing issues of severity by way of assessment of compensation only. An argument may run like this: if a negligently caused very minor physical injury (say a cut finger) is compensable why should not a comparatively minor emotional one be? Is the latter not worth, say, $100? If the passengers in *Cameron v Qantas Airways Ltd*[121] who were not warned that they might not be allocated a non-smoking seat recovered $50-$750 at first instance for the passive smoking experience, why should not the person emotionally upset due to the negligence of a tortfeasor be allowed to recover something? Is it really right that Mr Reilly and his claustrophobic wife who, due to identified negligence, were trapped in a hospital lift for an hour and 20 minutes were denied *any* relief for their apprehension, fear, discomfort and shortness of breath on the basis that their physical and emotional reactions to the trauma did not amount to recognised psychiatric injuries?[122] Could the relativities between the "classes of claims that rank for consideration"[123] not be preserved by a comparatively small award? The fact that I can recover for my disappointment on enduring an unsatisfactory holiday does not sit well with the traditional insistence on proof of disorder.[124] This type of inconsistency in the common law troubled Molloy J in *Mason v Westside Cemeteries Ltd*:

> It is difficult to rationalize awarding damages for physical scratches and bruises of a minor nature but refusing damages for deep emotional distress which falls short of a psychiatric condition. Trivial physical injury attracts trivial damages. It would seem logical to deal with trivial emotional injury on the same basis, rather than by denying the claim altogether. Judges and juries are routinely required to fix monetary damages based on pain and suffering even though it is well-known that the degree of pain is a subjective thing incapable of concrete measurement. It is

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118 Note 76 *supra* at 381-2. Note also the comments of the Ontario Court of Appeal in *Anderson v Wilson*, note 76 *supra* at [18], that the complaints of those patients fearful of infection with hepatitis B "would typically represent a modest claim" suited to aggregate action rather than independent litigation.

119 See NJ Mullany and PR Handford, note 10 *supra*, pp 56-8.

120 See Consultation Paper, note 53 *supra*, Appendix at [33], [42]-[44].

121 (1995) 55 FCR 147; on appeal (1996) 66 FCR 246.

122 See *Reilly v Merseyside Regional Health Authority* [1995] 6 Med LR 246.

123 *White v Chief Constable of South Yorkshire Police*, note 1 *supra* at 1539, per Lord Steyn.

124 See, for example, *Jarvis v Swans Tours* [1973] QB 233; *Ichard v Frangoulis* [1977] 1 WLR 556. These and other authorities are discussed in NJ Mullany and PR Handford, note 10 *supra*, pp 52-4.

> recognized that emotional pain is just as real as physical pain and may, indeed, be more debilitating. I cannot see any reason to deny compensation for the emotional pain of a person who, although suffering, does not degenerate emotionally to the point of actual psychiatric illness. Surely emotional distress is a more foreseeable result from a negligent act than is a psychiatric illness.[125]

This reasoning has an attraction. It may well prove attractive to some appellate judges in other corners of the Commonwealth. Consider these anomalies. Emotional upset of various types not amounting to disorder is regularly compensated within awards of damage for pain and suffering where physical injury has been caused by the defendant's negligent conduct.[126] From at least the fourteenth century, the common law has countenanced recovery for emotional injury consequent on assault. From that period the courts have recognised that a direct threat and intentional and outrageous conduct could give rise to an immediate emotional response compensable at law even in the absence of physical contact.[127] In recent years Australasian courts have awarded damages for emotional and mental distress (in the absence of evidence of psychiatric illness) for unintentional torts protecting economic interests and, in particular, for the negligent performance of professional services. For example, in *Mouat v Clarke Boyce*,[128] due to the negligence of her solicitors, an elderly widow was confronted with the threat of losing her home when a mortgage given to her son as security for a loan was called in. The New Zealand Court of Appeal upheld an award of $25,000 for mental anguish she endured as a consequence of that incompetence. The plaintiff received this notwithstanding that she had suffered no recognised psychiatric reaction. In *Rowlands v Collow*[129] three plaintiffs were awarded substantial sums for the mental suffering resulting from an engineer's negligent performance of a contract to construct a driveway to their houses. In *Campbelltown City Council v Mackay*[130] the New South Wales Court of Appeal awarded damages to the plaintiff for grief and mental anguish consequent on the collapse of her dream home. In *Gabolinscy v Hamilton City Corporation*[131] damages were awarded for distress resulting from the subsidence of a house. In *RA & TJ Carll Ltd v Berry*[132] damages for mental distress were awarded following the receipt of negligent advice from a health inspector that a coffee lounge, milk bar and confectionery business had a clean

125 Note 76 *supra* at 379-80, followed in *Vanek v Great Atlantic & Pacific Co of Canada*, note 73 *supra* at [11], per Cosgrove J.

126 Note *Wilson v Horne*, note 107 *supra* at 65,789, per Cox CJ; at 65,792, per Wright J; at 65,796, per Evans J.

127 See *I de S et ux v W de S* (1348) YB 22 Edw III, f 99, pl 60 (where the defendant was found liable for assault and ordered to pay compensation for the fright caused when he threw a hatchet at a tavern keeper's wife). See also AH Throckmorton, "Damages for Fright" (1921) 34 *Harv L Rev* 260; HF Goodrich, "Emotional Disturbance as Legal Damage" (1922) 20 *Mich L Rev* 497; C Magruder, "Mental and Emotional Disturbance in the Law of Torts" (1936) 49 *Harv L Rev* 1033; PR Handford, "Tort Liability for Threatening or Insulting Words" (1976) 54 *Can Bar Rev* 563.

128 [1992] 2 NZLR 559 at 569, 573-5.

129 [1992] 1 NZLR 178.

130 (1989) 15 NSWLR 501. Note the similar Nova Scotia case of *Stoddard v Atwil Enterprises Ltd* (1991) 105 NSR (2d) 315.

131 [1975] 1 NZLR 150.

132 [1981] 2 NZLR 76.

bill of health when in fact it was heavily infested with cockroaches. In *Snodgrass v Hammington*[133] a residential property was purchased by the Hammingtons allegedly in reliance on representations by the Snodgrasses and their agents as to the absence of subsidence problems. When the Hammingtons found evidence of modest subsidence, they complained to the Snodgrasses and ultimately cancelled the contract. The Snodgrasses sued for loss on the resale and the Hammingtons counterclaimed for the return of their deposit. The Hammingtons succeeded at first instance. The New Zealand Court of Appeal upheld this finding and awarded $15,000 to the wife and $5,000 to the husband for "anxiety and worry" about the transaction and subsequent litigation in the absence of evidence of any recognised disorder.[134] In *Duvall v Godfrey Virtue & Co (a firm)*[135] the Chief Justice of Western Australia awarded $5,000 against a firm of solicitors for distress precipitated by the plaintiff's discovery of a writ of fi fa affixed to his house following the solicitors' failure to properly advise as to costs. In a similar case in Ontario the plaintiff, who had earlier been represented by a prominent silk in relation to a charge of criminal negligence causing death, recovered $2,500 for "emotional harm" suffered after his release from prison consequent on viewing a television programme on the case as part of a series on the administration of justice in which the silk participated in breach of his continuing fiduciary duty.[136] The programme was, generally speaking, factually accurate but exaggerated the plaintiff's culpability. And in *Broken Hill City Council v Tiziani*[137] the New South Wales Court of Appeal upheld an award of $5,000 for emotional distress in favour of a homeowner whose house flooded through the negligence of a council in designing and constructing public roadworks. There was no evidence of psychiatric illness. Their Honours said that the trial judge's award for emotional distress was neither contrary to principle nor excessive in amount.[138] There are numerous other decisions which reflect a willingness to compensate emotional upheaval in certain circumstances.[139] The owner of a vehicle unlawfully towed away, detained and damaged was entitled to $2,000 for associated worry, anxiety, annoyance, angst and mental upset in *Private Parking Services (Vic) Pty Ltd v Huggard*.[140] It is not only in tort that this approach is evident: the High Court of Australia has said that, at least where contracts expressly or impliedly promise freedom from anxiety, damages for distress and disappointment are recoverable for their

133 [1996] ANZ Conv 597.

134 *Ibid* at 603.

135 Unreported, SC WA, Malcolm CJ, 18 September 1996.

136 *Stewart v Canadian Broadcasting Association* (1997) 150 DLR (4th) 24.

137 (1997) 93 LGERA 113.

138 *Ibid* at 119.

139 *Quaere* whether in all cases allowing recovery for "occupational stress" damages were awarded for true disorder: see, for example, *Walker v Northumberland County Council* [1995] 1 All ER 737; *Johnstone v Bloomsbury Health Authority* [1992] QB 333. See also the authorities cited note 435 *infra*.

140 (1996) Aust Torts Reports 81-397. See also *Jamieson's Tow Salvage Ltd v Murray* [1984] 2 NZLR 144 at 152, per Quilliam J.

breach.[141] There has been an increase in statutory protection from emotional disturbance and injury to feelings.[142]

How do we reconcile the preparedness to protect emotional health and to compensate states falling short of psychiatric disorder in some contexts but not in others? It is suggested that, at this stage in the development of the law, prudent counsel will consider dual pleas for recognised disorder and emotional or mental distress. Where there is doubt whether it will be able to be proved that a claimant has sustained recognised psychiatric injury, but no doubt that he or she has suffered emotionally, an alternative claim is appropriate. Any Commonwealth court which strikes out summarily a claim for distress will, in the light of the dicta referred to, stifle impermissibly the potential development of principle.[143] "Public and professional opinion are a continuum":[144] appellate judges "must ever be on ... guard that we have not reached [a] new time without noticing it."[145] Re-examination of long accepted principle "in the light of social and technological changes and changes which have occurred in the administration of justice since the rules were first expressed" is often a "useful" exercise.[146] It is inevitable that the issue of the nature of actionable loss in claims for negligent disruption to peace of mind will be debated at length at highest levels in the foreseeable future. The time was ripe for reconsideration of the compensability of states such as grief[147] and fear which are not forms of mental illness. That the Law Commission chose not to analyse the case for legal recognition of emotional or mental distress and the inter-relationship between the nature of actionable damage and other restrictions on recovery is disappointing.

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141 See *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 359-60, 395-6. Note *Weinberg v Connors* (1994) 21 OR (3d) 62 (plaintiff who cared for homeless cats recovered $1,000 for breach of "adoption agreement" by defendant who failed to keep her advised about the location and condition of a cat).

142 See, for example, *Protection from Harassment Act* 1997 (UK), s 3(2) which provides for damages for "any anxiety" caused by apprehended, *unintentional* harassment; *Sex Discrimination Act* 1975 (UK); *Race Relations Act* 1976 (UK). Note also the *Crime and Disorder Act* 1998 (UK), s 1 which provides for an "anti-social behaviour order" (of potentially indefinite duration) where, on a preponderance of probabilities, someone has acted "in a manner that ... was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself". Breach of the terms of the order is punishable by imprisonment or a fine.

143 See, for example, *Hospitals Contribution Fund of Australia v Hunt* (1982) 44 ALR 365; *Gibson v Parkes District Hospital* (1991) 26 NSWLR 9.

144 *R v Ministry of Defence; Ex parte Smith*, note 75 *supra* at 554, per Sir Thomas Bingham MR.

145 *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq)*, note 75 *supra* at 327, per Kirby P.

146 *Ibid.*

147 This is distinct from "pathological grief". Note the erroneous suggestion of Lord Steyn in *White v Chief Constable of South Yorkshire Police*, note 1 *supra* at 1539 that "pathological grief" is not a recognised disorder. Although there is no specific entry in the *Diagnostic and Statistical Manual of Mental Disorders*, American Psychiatric Association (4th ed, 1994), the condition has been held to qualify as a "recognised" and "legitimate" disorder, both in England and in Australia, on too many occasions to document. See *Vernon v Bosley (No 1)*, note 26 *supra*; *Arrowsmith v Beeston*, note 26 *supra* at 19, per Brooke LJ.

IV. THE "FLOODGATES" OBSESSION

The Law Commission elected to attempt to tread the middle path between those of us who argue that physical and psychiatric injury should be treated equally by the common law and that liability should depend, in the main, on reasonable foreseeability of loss, and those who, fearful of boundless liability, disincentives to rehabilitation and fraudulent or exaggerated claims, would outlaw recovery for negligently inflicted psychiatric illness altogether.[148] It "inclines somewhat to [our] point of view."[149] Both the Consultation Paper and Report make detailed and informative contributions to the current debate, advance proposals which are a dramatic improvement on the liability rules prevailing in the United Kingdom, and will doubtless be perceived as radically liberalising by the sceptics and those disenchanted with the tort system generally; but the underlying strategy chosen to achieve the declared aim is flawed. Removal of "unnecessary constraints on claims" in order to "alleviat[e] the arbitrariness of the current law"[150] requires the most substantial re-evaluation, reassessment and remodelling of the liability rules. No other area of the English common law is in such desperate need of reparation. We are loath to use the term "radical"[151] because it has a pejorative connotation which we do not believe is appropriate to describe the modernisation necessary. Although the suggestion that there be a return to a pre- *Dulieu v White & Sons Ltd*[152] position was rejected at the consultative stage as neither "desirable nor realistic",[153] it is clear that the perceived need to adopt an approach of "minimalist intervention" by way of legislative reform of the most serious defects was fuelled, most regrettably, by the unsubstantiated but, it seems, ever present and resilient "fears of uncontrolled liability".[154]

If, as the appellate courts have repeatedly conceded,[155] it is inappropriate to treat mental damage differently from other categories of personal injury, why should there be any special rules restricting recovery for psychiatric illness? If senior judges are now cognisant of "the medical reality that psychiatric harm

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148 See, for example, J Stapleton, note 49 *supra*; PS Atiyah, note 49 *supra*.

149 *White v Chief Constable of South Yorkshire Police*, note 1 *supra* at 1551, per Lord Hoffmann.

150 See Report, note 1 *supra* at [1.3].

151 Note *White v Chief Constable of South Yorkshire Police*, note 1 *supra* at 1547, per Lord Steyn; at 1550, per Lord Hoffmann.

152 Note 6 *supra*.

153 See Consultation Paper, note 53 *supra* at [5.3]. The prediction that "nowadays not even the most conservative ... English judge would espouse a complete retreat" to the law as stated in *Victorian Railway Commissioners v Coultas*, note 6 *supra* has proved accurate: see NJ Mullany, "Fear for the Future: Liability for Infliction of Psychiatric Disorder", note 10 *supra* at 106-7. Even the majority of the House of Lords in *White v Chief Constable of South Yorkshire Police*, note 1 *supra*, which reversed the decision to compensate the police officers on duty at Hillsborough have rejected this proposal, acknowledging that it "would be contrary to precedent and, in any event, highly controversial": at 1547, per Lord Steyn. Perhaps we can assume we have now heard the last of it. It is interesting to note, however, that, extra-curially, Lord Steyn has described the latest extremist proposals advanced by Atiyah to outlaw litigation for *all* personal injury as "important, constructive proposals for reform": see note 49 *supra*, back cover. Note also his Lordship's comments in *Wells v Wells* [1999] 1 AC 345 at 382-9.

154 See Report, note 1 *supra* at [1.3], [1.6].

155 See note 11 *supra*.

may be more serious than physical harm" and "far more debilitating",[156] why are they unwilling to contemplate identical tortious principles governing recovery of damages for the two types of personal loss? How can the introduction and preservation of unique stringent preconditions to liability for psychiatric injury be justified as "pragmatic"[157] in the light of judicial recognition that the Cartesian dichotomy of body and mind[158] has no place in common law compensation and modern medical opinion which acknowledges the absence of a clear division between physical and psychiatric harm? Within three decades of the Privy Council's categorical rejection of negligence liability for "nervous shock" in *Victorian Railways Commissioner v Coultas*,[159] Lord Shaw of Dunfermline highlighted the lack of foundation for this division:

> On principle, the distinction between cases of physical impact or lesion being necessary as a ground of liability for damage caused seems to have nothing in its favour – always on the footing that the causal connection between the injury and the occurrence is established. If compensation is to be recovered under the statute or at common law in respect of an occurrence which has caused dislocation of a limb, on what principle can it be denied if the same occurrence has caused unhinging of the mind? The personal injury in the latter case may be infinitely graver than in the former, and to what avail – in the incidence of justice, or the principle of law – is it to say that there is a distinction between things physical and mental? This is the broadest difference of all, and it carries with it no principle of legal distinction. Indeed it may be suggested that the proposition that injury so produced to the mind is unaccompanied by physical affection or change might itself be met by modern physiology or pathology with instant challenge.[160]

The latest decisions reiterate this truism:

> Nowadays courts accept that there is no rigid distinction between body and mind. Courts accept that a recognizable psychiatric illness results from an impact on the central nervous system. In this sense therefore there is no qualitative difference between psychiatric harm and physical harm.[161]

Why, then, is it thought to be vital to keep in check the class of persons able to recover in tort by barring a sizable group who are seriously injured through negligence based solely on the nature of their loss?[162] Why is it thought that insistence on immediacy in the form of physical injury or the apprehension of it

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156 *White v Chief Constable of South Yorkshire Police*, note 1 *supra* at 1540-1, per Lord Steyn.

157 *Ibid* at 1547.

158 See R Descartes, "The Passions of the Soul" in *The Philosophical Works of Descartes* (translated by ES Haldane and GRT Ross) Cambridge University Press (1911) Vol 1. See also TM Brown, "Cartesian Dualism and Psychosomatics" (1989) 30 *Psychosomatics* 322; LL Langley and JL Brand, "The Mind-Body Issue in Early Twentieth-Century American Medicine" (1972) 46 *Bull Hist Med* 171; W McCartan, "Monism and Dualism: New Lamps for Old" (1961) 107 *J Ment Sci* 809.

159 Note 6 *supra*.

160 *Brown v John Watson Ltd* [1915] AC 1 at 14. Although this was a workers' compensation case which did not raise the issue of negligence liability for psychiatric injury, the House of Lords was moved to conclude that physical impact was not a prerequisite to recovery in tort and to reject the policy reasons which underlined the Privy Council's decision in *Victorian Railways Commissioner v Coultas*, note 6 *supra*, to deny relief to Mrs Coultas for the mental consequences of narrowly avoiding a collision between the horse-drawn buggy in which she was riding and a train. Note also *Owens v Liverpool Corporation* [1939] 1 KB 394 at 400, per MacKinnon LJ.

161 *White v Chief Constable of South Yorkshire Police*, note 1 *supra* at 1539-40, per Lord Steyn. Note also at 1513, per Lord Griffiths.

162 *Ibid* at 1542-3, per Lord Steyn.

is essential to efficacy of the system?[163] Convictions of this nature are far from "cogent" or "compelling".[164] To expect that, while the current compensation scheme operates, available resources will be distributed without unjustified discrimination is not to seek Utopian or impractical legal redress.[165] The moment attempts are made to justify the exclusion of those psychiatrically injured from the protection of the common law or the insulation of tortfeasors from the full consequences of their incompetence,[166] the moment one confesses to the devaluation of peace of mind. Observations that tort has long been shaped by distinctions drawn between different forms of damage do not legitimise the schizophrenic nature of personal injury law. The fact that "judicial scepticism" concerning a general principle governing recovery for economic loss has produced a far more restrictive regime than that governing recovery for physical damage is poor precedent for the prejudice:[167] *Murphy v Brentwood District Council*[168] has not been viewed as the finest hour of English negligence law by the ultimate courts of the dominions.[169] What other covert considerations have been at work in psychiatric injury litigation?

Five policy-based justifications for special controls on liability were identified by the Law Commission in the Consultation Paper:[170] (i) the "floodgates" risk; (ii) the potential for fraudulent or exaggerated claims; (iii) the scope for conflicts in medical opinion; (iv) the view that psychiatric harm is less serious than physical harm and therefore less worthy of legal support; and (v) the "secondary" nature of "relational" claims. A sixth concern emerged from the process of consultation: that litigation may adversely affect the prognosis of mentally ill litigants delaying rehabilitation.[171] None of these objections are of sufficient merit in this branch of personal injury jurisprudence to warrant the retardation of principle or outweigh the desirability of extending recovery to permit legitimate actions hitherto barred. The Consultation Paper itself "firmly rejected" the arguments that limiting factors are necessary because psychiatric illness is less grave than physical injury or secondary in nature. It "cast doubt"

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163 *Ibid* at 1542.

164 *Ibid* at 1540, 1547.

165 *Ibid* at 1539.

166 Note the novel reservation expressed by Lord Steyn that "the imposition of liability for pure psychiatric harm ... may result in a burden of liability on defendants which may be disproportionate to tortious conduct involving perhaps momentary lapses of concentration, eg, in a motor car accident": see *ibid* at 1542. There is no basis to suggest that breach of duty does or should operate in any way different in psychiatric injury suits than in physical injury suits.

167 *Ibid* at 1540.

168 [1991] 1 AC 398.

169 The English approach to economic loss has been rejected in Australia (see, for example, *Bryan v Maloney* (1995) 182 CLR 609), Canada (see, for example, *Winnipeg Condominium Corporation No 36 v Bird Construction Co*, note 15 *supra*) and New Zealand (see, for example, *Invercargill City Council v Hamlin* [1994] 3 NZLR 513).

170 See Consultation Paper, note 53 *supra* at [4.1]-[4.13].

171 See Report, note 1 *supra* at [6.6]. The overstated concern that expansion of liability threatens to enhance unconscious disincentives to rehabilitation was voiced by Lord Steyn in *White v Chief Constable of South Yorkshire Police*, note 1 *supra* at 1541. Suing someone is inherently stressful: litigation takes its toll on sound and sick claimants.

on the arguments based on fraud,[172] exaggeration and medical conflict. The Report recognised that any adverse consequence of the litigious process on the health and recovery of claimants is not confined to those seeking relief for psychiatric injury. There is simply no compelling evidence to support the lingering suspicion that unconscious disincentives to rehabilitation "may play a larger role in cases of pure psychiatric harm, particularly if the categories of potential recovery are enlarged".[173] It was readily observed that "it is not suggested that liability should be restricted [on any of the identified policy bases] when the plaintiff is *physically* injured".[174] Nor should it be thought that a favourable judgment or compromise guarantees or increases the prospects of a return to normal mental health: that long-held false premise belies the most complex of human processes and the seriousness of chronic disorder.[175] This leaves as the sole justification for the imposition of restrictions on liability for injury to the psyche the belief that courts will be swamped with suits. After "much deliberation", the Law Commission remains "persuaded that at this point in time, ... the 'floodgates argument', requires special policy limitations to be imposed over and above the test of reasonable foreseeability".[176] This is the most dissatisfying conclusion in the Report. The pertinent observation made in relation to the other alleged policy justifications is not advanced in answer to the floodgates complaint. It would be repugnant to suggest that any person who suffered a negligently-caused physical injury at Hillsborough should be deprived of his or her legal remedy.[177] We do not even attempt to bar multiple claims for

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172 Referring to Lord Wilberforce's four heads of policy relevant to the duty to prevent psychiatric damage enunciated in *McLoughlin v O'Brian*, note 4 *supra* at 421, Henry LJ in *Frost v Chief Constable of South Yorkshire Police*, note 1 *supra* at 280 gave short shrift to the first three floodgates arguments and exposed the fundamental flaw in the fraud objection: "[C]laims involving the identification of and compensation for psychiatric damage are today relatively commonplace in road traffic and workplace accidents. The risk of fraudulent claims succeeding is greatly reduced by objective psychological tests... Overall, I would put such risks as being no greater than in, say, cases involving back injuries where there is often a wide gap between observable symptoms and complaints - yet the courts manage satisfactorily, or so I believe. It would in any event be curious to deny the majority of genuine claims for fear that a fraudulent claim might slip through the net." See NJ Mullany and PR Handford, note 10 *supra*, pp 308-15, where the bad back example is given and these other points are made; NJ Mullany, "Fear for the Future: Liability for Infliction of Psychiatric Disorder", note 10 *supra* at 105-7.

173 *White v Chief Constable of South Yorkshire Police*, note 1 *supra* at 1541, per Lord Steyn.

174 Report, note 1 *supra* at [6.7] (emphasis added).

175 Note the summary of expert evidence by Brooke LJ (with whom Morritt and Hirst LJJ agreed) in *Arrowsmith v Beeston*, note 26 *supra* at 14-15: "One old belief, which featured so prominently in adversarial personal injuries litigation up to the 1980s (and perhaps beyond) that an award of compensation is likely to bring an end to a depressed patient's symptoms, was firmly rejected by both [doctors]. Dr [X] told the judge that a series of authoritative studies had shown conclusively that the actual rate at which people recover after they receive compensation on settling their litigation is low and that the prognosis is generally poor if a patient's symptoms have gone on for more than a couple of years."

176 See Report, note 1 *supra* at [6.8].

177 Note *Potter v Firestone Tire & Rubber Co* (1993) 863 P 2d 795 at 832-3; 25 Cal Rptr 2d 550 at 587, 590, per George J (dissenting): "[T]here is no justification for limiting ... recovery ... simply because the defendant's wrongful conduct has endangered the personal safety of a large number of individuals... Under well-established negligence principles ... a defendant's liability for a particular category of negligent conduct does not *contract* as the number of persons injured *increases*" (emphasis in original). Note also *Perre v Apand Pty Ltd*, note 75 *supra* at 633, 643, per McHugh J.

physical injury because there were thousands of fans at the football stadium, because the airline which crashed was fully booked,[178] or because trains, coaches and buses which collided[179] were crammed to capacity. The Law Commission's commitment to change and equal legal protection and treatment of physical and psychiatric integrity is properly questioned. For all the progressive rhetoric, the veneration of the floodgates objection reflects the same inherent scepticism and misconceptions evident in the decisions criticised for preserving overly conservative principle. Just when appropriate attention has finally been focused on this neglected area of negligence law, the floodgates fear propaganda has prevailed to again frustrate the reform process and assimilation of personal harm.

The Law Commission appears to have placed much store in the responses received from some medical consultees. It has been influenced by the fact that diagnosis of disorder is inherently difficult, open-textured in nature, and that the division between clinical entities and less serious mental disturbance is sometimes blurred. The majority of the House of Lords in *White v Chief Constable of South Yorkshire Police* also attached weight to these features of psychiatry.[180] This is an unremarkable insight into the profession – the parameters within which clinicians operate have been recognised repeatedly in the authorities and the medical literature. The problem of distinguishing between certain emotional and psychiatric states is well known.[181] Diagnosis is not, however, inevitably fraught with uncertainty: not all disorders are extreme versions of common human frames of mind and experience. More often than not the presence of mental illness is apparent to experts. Where the divide between disorder and distress is hazy opinions will differ. Difficulties of diagnostic classification or high rates of comorbidity do not in any way justify the imposition of policy limitations on recovery for proven disorder. As in many areas of law, and particularly personal injury law, the courts must simply do the best they can aided by the expert and counsel. Controversy is commonplace in the courtroom. Experience confirms that the need for and cost of expert medical testimony is no greater in psychiatric injury litigation than in many other personal injury or medical malpractice suits.[182] Variations in psychiatric opinion are able to be evaluated by experienced judges as in any other technical or highly specialised litigation without any adverse "implications for the administration of justice".[183] If the presence of recognised psychiatric illness is

178 Note H Teff, "Liability for Negligently Inflicted Psychiatric Harm: Justifications and Boundaries", note 9 *supra* at 122.

179 Note *White v Chief Constable of South Yorkshire Police*, note 1 *supra* at 1542, per Lord Steyn.

180 *Ibid* at 1541.

181 See NJ Mullany and PR Handford, note 10 *supra*, pp 29-30, 39-40. The difficulty is illustrated by the different views of the evidence adopted by the judges in *Coates v Government Insurance Office of New South Wales*, note 15 *supra*, concerning the distinction between ordinary grief and "pathological grief". Note also *Majiet v Santam Ltd* [1997] 4 All SA 555 at 567-8, per Cleaver J.

182 Note *White v Chief Constable of South Yorkshire Police*, note 1 *supra* at 1541, per Lord Steyn.

183 *Ibid*. It is vital, however, that courts receive proper assistance from doctors (and counsel guiding them) on critical issues. See the observation of Brooke LJ in *Arrowsmith v Beeston*, note 26 *supra* at 19: "[T]he increasingly antagonistic proclivities of some medico-legal experts do not always provide judges

an issue in real dispute particular attention can be expected to be devoted to it at trial. Should the court be satisfied that actionable damage has been sustained, all other elements being present, the tort will be complete and liability must lie. Should the court not be so satisfied, the plaintiff will, as the law now stands,[184] rightly fail. Restricting recovery to cases of recognised psychiatric illness is a deceptively effective limitation of litigation for mental disturbance: the reality is that only those mental injuries as equally disabling as many physical injuries the subject of successful suits will be entertained. Proof of actionable injury and the problems it presents are part and parcel of the forensic process. Why should the nature of this species of damage and the onus to prove its existence impinge on the right to relief in a way different from actions for other personal harm?

Emphasis is placed also on recent research that demonstrates an increase in lifetime prevalence rates for PTSD to support the curious conclusion that the "concept of psychiatric illness has widened significantly over the past few years".[185] It might equally be observed that it has decreased – for example, homosexuals were, until relatively recently, widely regarded as mentally ill.[186] The diagnostic criteria for PTSD and other entities may have altered over the last decade but that does not diminish the legal entitlement of all those who prove they have suffered the requisite injury by reference to current learning. Nor does the fact that the diagnostic manuals are revised continually to reflect developments in research and the literature support the suggestion that psychiatric illness is an indistinct or obscure category of personal harm. Psychiatry is a unique branch of medical science. Practitioners contend with limitations unknown in other disciplines. Hampered by the nature of disorder, they are reliant to a large degree on patient accounts and presentation. But the fact remains that there are sophisticated ever-improving diagnostic methods and that mental illness is not the nebulous complaint it appears to have been characterised as: it is a broad and recognisable medical category of complaint, of which there are numerous identified and identifiable subcategories.[187] There is no evidence to suggest that the normal interlocutory mechanisms designed to excise baseless physical injury and other types of common law claims or the

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with the completely objective help they badly need." Note also Meagher JA's criticism of the imprecision in language and internal inconsistency of the medical evidence adduced in *Zinc Corporation v Scarce* (1995) 12 NSWCCR 566 at 573-4; Doyle CJ and Nyland J's criticisms of the failure to lead medical evidence to clarify the precise aetiology of disorder in *Davis v Scott* (1998) 71 SASR 361 at 381.

184 See Part III Section C *supra*.

185 Report, note 1 *supra* at [6.8].

186 It was not until 1973 that homosexuality was eliminated as a diagnostic category by the American Psychiatric Association: see *Diagnostic and Statistical Manual of Mental Disorders*, American Psychiatric Association (2nd ed, 1968) at [302.0], p 44. In 1980 it was removed from the *Diagnostic and Statistical Manual of Mental Disorders* (3rd ed). The implication of the removal of homosexuality as a diagnosis from the nomenclature is that it is regarded as a normal variant of sexual behaviour. Differences of opinion persist, however, as to whether homosexuality is a normal variation or a pathological sexual deviation: see NQ Brill, "Is Homosexuality Normal?" (1998) 26 *Journal of Psychiatry and Law* 219.

187 For a recent summary of the medical literature concerning PTSD written for civil litigators see G Glumac, "Post-Traumatic Stress Disorder: A Review of the Psychiatric Literature for the Legal Profession" (1999) 21 *Adv Q* 336.

inherent judicial power to supervise proceedings are somehow inadequate in the context of suits for psychiatric injury.

As the Law Commission acknowledges, the studies relied on are open to different interpretations, produced different results and, in the main, were undertaken for treatment and research purposes only.[188] No consideration was given to how many of those identified as suffering from psychiatric illness sought compensation or succeeded or were likely to have succeeded. Moreover, the bulk of these studies concern the aftermath of direct participation in violent events such as warfare (particularly the Vietnam conflict) or rape. It is exposure to this type of extreme stressor which is most closely associated with the onset of PTSD. There is limited evidence of a prevalence of chronic PTSD in emergency service crews who participate in the aftermath of disasters in circumstances where risk of personal injury is low and a dearth of literature detailing rates of this illness in those who are informed by others of the death, injury or imperilment of loved ones or strangers. The same is true in relation to the prevalence of other psychiatric disorders. The mind is adept at self-preservation. The incontrovertible medical fact of the matter is that the psychiatric equilibrium of the vast majority of people is not disturbed by exposure to the even the most severe traumatic stimuli. Psychological disturbance is a common consequence of trauma but psychiatric illness remains relatively rare. More significant than the resilience of the human psyche is that no support can be found for the speculation that those who are psychiatrically injured will pursue litigation with any greater degree of vigour or prevalence than those physically injured. The same checks and balances which operate in the decision to pursue a legal remedy for any loss will apply: indeed, they are likely to be more influential in the context of deliberations to sue for damages for psychiatric injury given the continued medical and other consultations which claimants will be required to attend in the lead up to trial, the drama of the forensic experience and the lingering societal stigma associated with mental illness.[189] There is no lure of a windfall: it is another illustration of the prevailing prejudice against injury to the mind that successful suits give rise to awards markedly lower than those for equally debilitating physical injuries.[190] They may not always be "modest",[191] but there is inevitably inequity with compensation for comparable bodily harm. Notwithstanding the developing nature of psychiatry and the difficulties associated with the diagnosis of certain conditions, it is submitted that it is a quantum leap, in the absence of convincing evidence of the litigious behaviour of psychiatrically impaired negligence victims, to conclude that there exists a

188 See Report, note 1 *supra* at [3.33].

189 Note P Byrne, "Psychiatric Stigma: Past, Passing and to Come" (1997) 90 *J Roy Soc Med* 618.

190 Note Judicial Studies Board, *Guidelines for the Assessment of General Damages in Personal Injury Cases*, Blackstone Press (3rd ed, 1996). This is true also of the Australian and Canadian experiences. The discrimination has been acknowledged and its weak basis revealed: "Because we think it more important to compensate for bodily injury than for mental injury ... we are more willing to impose large liabilities in respect of the former than the latter": see P Cane, *The Anatomy of Tort Law*, Hart Publishing (1997) p 70.

191 *White v Chief Constable of South Yorkshire Police*, note 1 *supra* at 1543, per Lord Steyn.

"serious risk that the floodgates of litigation would be opened"[192] in the absence of additional restrictions on liability.[193] The stance adopted by the Law Commission for rejecting a reasonable foreseeability test is, it accepts, based on conjecture[194] and does grave disservice to both psychiatry and, perhaps more importantly, the judiciary. If there is an increase in *meritorious* claims the process of reform will have achieved its very purpose. The feared flood of *unmeritorious* claims is mythical. There is no sound foundation for the suggestion that there would be increased attempts to present every trivial emotional disturbance as recognised illness deserving of compensation or that psychiatrists would be conned into supporting, and courts conned into making, such awards. The risk of these practices has, again, been grossly exaggerated. The faith expressed through long experience by Lord Griffiths when speaking of liability to rescuers is well founded:

> The fear is expressed that if foreseeability of psychiatric injury is sufficient it will open the floodgates to claims, many of an unmeritorious kind, from those who give assistance at any accident. I believe the courts are well capable of controlling any such flood of claims.[195]

Confidence can be placed in the capacity of Commonwealth courts to control matters generally. As Fleming observed:

> The question here, as in most other contexts of the law of torts, is to fix a temporary resolution of the tension between opposing pulls of compensating deserving victims and protecting negligent defendants from inordinate burdens of liability. Especially the latter factor is largely speculative, prone to be promoted by the often hyperbolic rhetoric of defendants and the all too reticent prejudices of judges. How far is enough, or in the inimitable French phrase 'jusqu'ou peut-on aller trop loin?'... Perhaps, the fears are after all largely imaginary, certainly exaggerated, particularly where jury trial has been abandoned, judges can be trusted to be evenhanded in evaluating the evidence of psychiatric injury.[196]

V. THE METHOD OF REFORM

Is psychiatric damage law an area suited to reform by statute? In principle, we would prefer to see the law continue to develop through the judicial process. The law of torts has always been judge-made law, apart from occasional and very minor statutory reforms, and over the past century it has been the courts who first recognised the need for redress in psychiatric illness claims and then gradually widened the field of recovery in the wake of developing medical knowledge. At no time during that period could the manifold themes and variations of these cases have been satisfactorily encapsulated in statute; any

192 Report, note 1 *supra* at [3.33].

193 It is noteworthy that, other than the police plaintiffs on duty at the ground, not one stranger to the primary victims of the Hillsborough disaster sought legal advice concerning a claim for psychiatric injury let alone commenced an action for such injury: see S Hughes, "How Great is Their Suffering?", *The Independent*, 4 October 1991, p 9.

194 See Report, note 1 *supra* at [3.33], [6.8].

195 *White v Chief Constable of South Yorkshire Police*, note 1 *supra* at 1514.

196 JG Fleming, note 12 *supra* at 204.

such legislation would have been out of date within a very short time, since new kinds of claim are continually being brought before the courts. At the present day, this is truer than it has ever been.

The Law Commission would not disagree with any of this. Its Report states that: "in such a turbulent area – where medical knowledge and society's understanding are growing apace – there is much to be said for allowing the common law to develop by incremental judicial decision".[197] However, as the Report points out, in a number of respects the English common law has taken a wrong turn, and this applies in particular to the decision in *Alcock v Chief Constable of South Yorkshire Police*,[198] in which the House of Lords erected a number of barriers which will make further development exceedingly difficult. It was this which convinced the Commission that there was a case for legislative intervention.[199] It is now clear that a majority of the Law Lords are not prepared to reconsider their position, at least in the foreseeable future.[200]

The Commission has rightly refrained from recommending a comprehensive codification which, as it says, "would result in a freezing of the law at a time before it is ready"[201] – indeed, we doubt whether such a move could ever be justified. Pursuing a policy of "minimal legislative intervention curing serious defects in the present law but otherwise leaving the common law to develop",[202] the Commission recommends a statutory codification of the law governing claims by secondary victims who have close ties with the immediate victim of the tortfeasor's negligence.[203] Both because this area is much more well-developed than any other, and because it is in relation to such cases that *Alcock* has entrenched unwarranted restrictions which are operating to preclude desirable expansion, at the time of publication of the Report it seemed that if there was to be legislation it made good sense to confine it to such cases.[204] In the wake of the latest House of Lords decision,[205] which erects new obstacles to recovery in other areas and calls a halt to further doctrinal development by the courts, the Law Commission's recommendation that in areas outside the proposed codification the law should be allowed to develop by judicial decision-making[206] may be unduly sanguine. Within a year of the publication of the Report, one of two contemplated routes to reform has been effectively blocked.

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197 Report, note 1 *supra* at [2].

198 Note 1 *supra*.

199 In similar circumstances, the New South Wales legislature moved to pass the *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) in the wake of the restrictive High Court of Australia decision in *Chester v Council of the Municipality of Waverley*, note 6 *supra* and the continuing effect of the Privy Council decision in *Victorian Railways Commissioner v Coultas*, note 6 *supra*.

200 See *White v Chief Constable of South Yorkshire Police*, note 1 *supra*.

201 Report, note 1 *supra* at [4.1].

202 *Ibid* at [4.2].

203 *Ibid* at [6.16]. See also at [6.53].

204 See NJ Mullany and PR Handford, note 10 *supra*, p 245. The legislation enacted in three Australian jurisdictions is similarly confined: see *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW): *Law Reform (Miscellaneous Provisions) Act* 1955 (ACT); *Law Reform (Miscellaneous Provisions) Act* 1956 (NT).

205 *White v Chief Constable of South Yorkshire Police*, note 1 *supra*.

206 Report, note 1 *supra* at [4.3].

The Report devotes considerable attention to the technique for enacting its central recommendations. In the end, rather than simply abolishing inconvenient common law restrictions,[207] the Commission preferred to replace the common law duty with a statutory one. It rejected the former method because of uncertainty whether the removal of barriers would leave the right to recover in existence, and because it might leave the courts free to impose new restrictions.[208] The chosen approach makes it quite clear that a duty exists in the stated circumstances. The Report emphasises the novelty of the Commission's approach. Unlike other instances in which civil liability has been engrafted onto the law of tort by statute,[209] the Commission's recommendations simply make statutory one element of liability in negligence – the duty of care – while leaving breach, causation and remoteness to be supplied by the common law, as formerly.[210] In order to carry this policy through to its logical conclusion, the Commission recommends that the legislation provide that no duty of care should be imposed where the plaintiff voluntarily accepted the risk of psychiatric illness, where the duty was excluded, and where it would not be just and reasonable to impose the duty because the plaintiff was involved in conduct that is illegal or contrary to public policy.[211] Given the ambivalence in the case law, some decisions suggesting that in these situations there is no breach of duty,[212] rather than simply giving rise to a defence, this is a wise precaution. The Commission also recommends that the proposed statutory duties should have no application where the defendant's liability is governed by a statutory regime, such as the conventions governing the international carriage of passengers or goods by air, sea or rail[213] and liability for nuclear accidents.[214] The same should

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207 The method adopted in the United Kingdom by the *Highways (Miscellaneous Provisions) Act* 1961 (UK), s 1 (see now *Highways Act* 1980 (UK), s 58) and the *Animals Act* 1971 (UK), s 8(1) and in Australia by the *Wrongs Act* 1958 (Vic), s 33, the *Law of Animals Act* 1962 (Tas), s 19, the *Animals Act* 1977 (NSW), s 7(2) and the *Civil Liability (Animals) Act* 1984 (ACT), s 6.

208 Report, note 1 *supra* at [6.19].

209 The method adopted in the United Kingdom by the *Occupiers' Liability Act* 1957 (UK), s 2, the *Animals Act* 1971 (UK), ss 2-4, the *Congenital Disabilities (Civil Liability) Act* 1976 (UK), s 1 and the *Occupiers' Liability Act* 1984 (UK), s 1. To the extent that they impose a tortious duty, the *Misrepresentation Act* 1977 (UK), s 2(1) and the *Defective Premises Act* 1972 (UK), s 1 could also be assigned to this category. In Australia this method has been adopted in reform of the law of occupiers' liability: see the *Wrongs Act* 1936 (SA), s 17C, the *Wrongs Act* 1958 (Vic), s 14B and the *Occupiers' Liability Act* 1985 (WA), s 4; and of liability for animals: see the *Wrongs Act* 1936 (SA), s 17A.

210 Report, note 1 *supra* at [6.19]-[6.23].

211 *Ibid* at [6.41].

212 See, for example, the voluntary assumption of risk cases on participation in sport (see *Murray v Harringay Arena Ltd* [1951] 2 KB 529; *Wooldridge v Sumner* [1963] 2 QB 43), and on drunken drivers (see *Dann v Hamilton* [1939] 1 KB 509; *Morris v Murray* [1991] 2 QB 6; note also the views of the High Court of Australia in *Insurance Commissioner v Joyce* (1948) 77 CLR 39 and *Roggenkamp v Bennett* (1950) 80 CLR 292). The High Court has clearly endorsed the view that illegality negates a duty of care: see, for example, *Gala v Preston* (1991) 172 CLR 243. See also *Ashton v Turner* [1981] QB 137 at 146, per Ewbank J; *Kirkham v Chief Constable of the Greater Manchester Police* [1990] AC 282; *Pitts v Hunt* [1991] QB 24. Note also that the *Unfair Contract Terms Act* 1977 (UK), s 13(1) covers exclusions both of liability and of duty.

213 Listed in the Report, note 1 *supra* at [6.43], note 76. It is not certain whether these conventions provide an exclusive regime in respect of the carrier's liability for psychiatric injury to secondary victims. There is Australian appellate authority suggesting that such plaintiffs retain a right to sue at common law: see

apply to the statutory liability of occupiers of premises, to the extent that the provisions in question cover psychiatric illness.[215]

The Commission recommends that these new statutory duties of care should replace the common law duty of care to the extent that the two would overlap.[216] The aim of this proposal is to reduce complexity and uncertainty, and to prevent plaintiffs needlessly framing their actions under both common law and statute.[217] This seems a justifiable solution, since no plaintiff who can show close ties of love and affection is worse off under the Commission's proposed scheme than under the present law.[218] The Commission specifically recommends that where there is no overlap with the proposed new statutory duties of care, the common law duty of care should continue to exist, and that none of its legislative proposals should be construed as impeding the judicial development of the common law duty of care in relation to psychiatric illness.[219] The Draft Bill appended to the Report preserves the common law duty, but the path of its future development will depend on the willingness of appellate courts to take notice of the sentiments expressed by the Commission – a willingness which must now be open to serious question. The same applies to the Commission's occasional homilies on points where it does not feel that a legislative provision is appropriate.[220]

South Pacific Air Motive Pty Ltd v Magnus (1998) 157 ALR 443 holding that the *Civil Aviation (Carriers' Liability) Act* 1959 (Cth) (which applies the Warsaw Convention regime to domestic air travel in Australia) was not intended to preclude claims by non-passengers seeking damages for psychiatric injury under the general law. The Full Court of the Federal Court of Australia did not follow *Sidhu v British Airways plc* [1997] AC 430 (which held that passengers who suffered psychiatric injury due to their detention by Iraqi authorities at the time of the Gulf War could not claim except under the Convention) to the extent that it suggests that the Convention provides an exclusive regime. For discussion of the viability of common law claims for "pure" and consequential disorder by primary victims see *American Airlines Inc v Georgeopoulous* (unreported, NSW CA, 5 August 1998); (unreported, NSW CA, 26 September 1998); *Kotsambasis v Singapore Airlines Ltd* (1997) 42 NSWLR 110 at 112, 114-15.

214 See *Nuclear Installations Act* 1965 (UK).

215 The Commission notes that the *Occupiers' Liability Act* 1984 (UK), s 1(9) specifically defines "injury" to include mental as well as physical impairment, but that the *Occupiers' Liability Act* 1957 (UK) is more equivocal: see the Report, note 1 *supra* at [6.48].

216 Report, note 1 *supra* at [8.7].

217 *Ibid* at [8.5].

218 Contrast the position in New South Wales, the Australian Capital Territory and the Northern Territory, where the statutory schemes and the common law coexist: see NJ Mullany and PR Handford, note 10 *supra*, pp 241-2. The *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW) when first enacted extended liability well beyond the limits of the common law, but nonetheless placed important limits on liability to all relatives other than parents and spouses by requiring that the immediate victim should be killed, injured or put in peril within their sight or hearing: see s 4(1)(b). This limitation (a political compromise: see New South Wales, Legislative Council 1944, Debates, vol 175, pp 1489-91) justified the courts in holding that the common law remained in existence, the statutes being silent on this matter: see *Anderson v Liddy* (1949) 49 SR (NSW) 320; *Smee v Tibbetts* (1953) 53 SR (NSW) 391; *Scala v Mammolitti* (1965) 114 CLR 153 at 157, per Kitto J; *Coates v Government Insurance Office of New South Wales*, note 15 *supra* at 7-8, per Kirby P. Experience and the authorities suggest that ignorance of the statutory regime is widespread amongst the New South Wales profession.

219 Report, note 1 *supra* at [8.3].

220 See *ibid* at [5.20] (use of hindsight), [5.27] (the test of reasonable fortitude), [5.54] (primary and secondary victims).

VI. THE MAJOR RECOMMENDATIONS

A. Close Ties

The Law Commission recommended against the adoption of a simple foreseeability test without additional policy limitations. Though it accepted that "it is difficult to be sure that a move to a pure reasonable foreseeability test would open the floodgates of litigation",[221] it believed that this approach "*could* result in a significant increase in the number of claims which, at least at this point in time, would be unacceptable. This in turn *might* lead the courts to make use of policy considerations, concealed beneath the foreseeability test, in an attempt to restrict the number of successful claims. Such confusion could only result in an increased volume of litigation".[222] This again displays an undeserved lack of faith in the courts' capacity to cope with a new single order of personal injury liability. The central additional control on psychiatric injury litigation identified as essential by the Law Commission is closeness of the tie between the victims of the defendant's negligence. It recognised that where the primary and secondary victim are bound by love or affection issues of physical and temporal proximity and the means by which the latter learns of the fate of the former are insignificant.

The proposal to jettison these restrictions, albeit only in relation to "core" claimants, is to be applauded. Powerful support for this reform has been provided in the recent rejection by the Full Bench of the South African Supreme Court of Appeal in *Barnard v Santam Bpk*[223] of the orthodox requirement that psychiatric injury must be induced by direct personal perception of traumatic stimuli to be actionable in negligence. Judicial recognition of the lack of foundation for this chief impediment to compensation for the infliction of mental injury diminishes significantly the gap between medical knowledge and legal principle in South Africa. The facts in *Barnard* are not uncommon. A father received a telephone call from a doctor at a hospital informing him that his teenage son had been killed in a bus accident. He told his wife, the appellant. Neither parent saw the accident or the death. Neither visited the crash site. The child being dead, there was no bedside vigil at hospital. There was no inspection of the corpse at the mortuary. No question of "aftermath" arose. Psychiatric injury was sustained by the appellant solely as a consequence of the receipt of distressing information orally from the third party. Did her consequent mental injury sound in damages in the same way that disorder caused on seeing an accident or participation in its immediate aftermath does? Old South African

221 *Ibid* at [6.8].

222 *Ibid* (emphasis added).

223 Note 15 *supra*. Unfortunately, the reasons for decision are in Afrikaans only. In the light of their importance, it is to be hoped that the publishers of the *South African Law Reports* make an English translation available in order that they may become more easily accessible to a wider local and international audience. For further commentary see NJ Mullany, "Personal Perception of Trauma and Sudden Shock – South Africa Simplifies Matters" (2000) 116 *LQR* (forthcoming).

law denied compensation to "hearsay victims".[224] The key question came before the Supreme Court of Appeal by way of a stated case. It was assumed for this purpose that psychiatric disorder consequent on "nervous shock" had been sustained.

Influenced by liberal obiter comments in Australian caselaw,[225] the South African Court concluded that psychiatric injury was a reasonably foreseeable consequence of informing a mother of the death of her child; that relationship was very close and the closer the tie between the primary victim and the traumatised person, the more reasonable the inference that disorder was reasonably foreseeable by the tortfeasor.[226] There may be a sufficient relationship of proximity between the plaintiff and the defendant to give rise to a duty of care where there is a close bond between the plaintiff and the primary victim of the defendant's negligence, notwithstanding that the plaintiff is merely informed of the accident and the primary victim's injury or death. The means by which trauma comes to be appreciated is inconsequential. Their Honours were alive to the transparency of the policy arguments said to legitimise insistence on direct personal perception. The very small number of claims in more than a quarter of a century since the last appellate division decision in *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk*[227] (which finally abandoned the requirement that there be fear for personal safety in order to ground liability) exposes the exaggerated assertion that courts would be inundated with actions. Earlier acceptance of the fallacy was rejected.[228] There was no reason to suspect that the current state of affairs would change significantly with the rejection of the "told" rule. The facile suggestion that this would encourage fraud was deservedly given equally short shrift. Sound medical evidence is required in every suit, whether based on direct or indirect perception of trauma.[229]

It follows from acceptance that the oral communication of distressing news by a third party can be as equally devastating to the recipient as direct personal perception of the subject of the news, that it can in certain circumstances satisfy

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224 See *Waring & Gillow Ltd v Sherborne*, 1904 TS 340.

225 Their Honours were mindful of Kirby P's reasoning in *Coates v Government Insurance Office of New South Wales*, note 15 *supra* at 9-11, who accepted the logic of Deane J's criticism of the traditional rule in *Jaensch v Coffey*, note 15 *supra* at 608-9, noting the reliance placed on it by the District Court of New South Wales in *Quayle v State of New South Wales* (1995) Aust Torts Reports 81-367 (see NJ Mullany, "Recovery for Psychiatric Injury by Report: Another Small Step Forward" (1996) 4 *Tort L Rev* 96). The facts in *Coates* were the inverse of those in *Barnard*: there it was children who learned of the death of their father in a car crash. They suffered psychiatric injury due solely to receipt of that news. They did not see the collision or its aftermath; they did not attend the scene or view their father's body. Kirby P refused to deny liability because of the lack of physical proximity. Gleeson CJ (at 5, 7) and Clarke JA (at 22-3) left open the issue of the status of the "told" rule in Australia. Two South Australian Supreme Court justices have endorsed Kirby P's sentiments: see *Pham v Lawson* (1997) 68 SASR 124 at 145, 148, per Lander J; at 125, per Bollen J. A third has declined to rule out recovery: at 125, per Cox J. See NJ Mullany, "Negligently Inflicted Psychiatric Injury and the Means of Communication of Trauma – Should it Matter?", note 10 *supra*, ch 11.

226 Note 15 *supra* at 214-15.

227 Note 15 *supra*.

228 See *Clinton-Parker v Administrator, Transvaal*, 1996 (2) SA 37 at 63.

229 *Barnard v Santam Bpk*, note 15 *supra* at 215-16.

the requirements of proximity of time and space, and that it cannot, of itself, operate to deny a duty to take care to prevent the infliction of disorder, that the *medium* of third party communication is irrelevant. It is the overall context in which bad news is communicated which is significant. As Kirby P has observed, the traditional rule is "hopelessly out of contact with the modern world of telecommunications".[230] Telephones often summon family to the scene of an accident or its aftermath (like a hospital). The call is the precursor to closer contact and involvement. This was not the position in *Barnard*: injury was sustained solely as a consequence of what was communicated orally. There was a twist: news of the death was broken via telephone to the husband who suffered no injury on receipt. He passed the message on to his wife who was injured thereby. There was no direct link between the caller and the injured appellant. Suits for trauma by telephone are a rarity.[231] As Kirby P had refused in *Coates v Government Insurance Office of New South Wales*[232] to endorse exclusion of liability in these foreseeable circumstances, so too did the Supreme Court of Appeal. Although not discussed, it can be assumed that the South African justices agree with Kirby P's refusal to demarcate actions according to whether perception of trauma occurred by way of telephone, television, video or oral message. We predict that courts in Australia and South Africa will come to be unconcerned whether disorder arose because a claimant was at an accident scene or its aftermath or learned of it from a third person face-to-face or in writing, through the internet, by email, fax, telegraph, over the telephone, or through watching television or videos or listening to the radio. The means of transmission will be recognised as immaterial where the truly essential elements of the tort are satisfied.

Given the current position in England, it is inconceivable that the House of Lords would view communication of bad news in any of these circumstances as satisfying the requisite proximity to support recovery for consequent mental damage. Although there have been rumblings of judicial discontent with the traditional "told" rule,[233] under current English law,[234] no liability lies for

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230 See *Coates v Government Insurance Office of New South Wales*, note 15 *supra* at 11.

231 Note *Kelly v Hennessy* [1993] ILRM 530. See NJ Mullany, "Negligently Inflicted Psychiatric Injury and the Means of Communication of Trauma – Should it Matter?", note 10 *supra* at 203-6.

232 Note 15 *supra* at 11.

233 Lord Bridge of Harwich's example in *McLoughlin v O'Brian*, note 4 *supra* at 442 is often referred to: a mother knows that her husband and children are staying in a certain hotel and reads in a newspaper of a fire there and that her family have perished. His Lordship's view has been preferred in Ireland: see *Mullally v Bus Eireann* [1992] ILRM 722. Note also *Kelly v Hennessy*, note 231 *supra*. Well-known also are the dicta of Gibbs CJ and Deane J in *Jaensch v Coffey*, note 15 *supra* at 555 and 608-9 respectively. Deane J pointed out that the traditional rule had not "enjoyed unqualified support" and was sceptical of the logic behind the traditional attitudes. For a survey of the authorities and analysis of the cases supporting abandonment of the orthodox rule see NJ Mullany, "Negligently Inflicted Psychiatric Injury and the Means of Communication of Trauma – Should it Matter?", note 10 *supra*, ch 11.

234 See, for example, *McLoughlin v O'Brian*, note 4 *supra* at 423, per Lord Wilberforce; *Alcock v Chief Constable of South Yorkshire Police*, note 1 *supra* at 398, per Lord Keith of Kinkel; at 400, per Lord Ackner; at 416, 418, per Lord Oliver of Aylmerton; at 423, per Lord Jauncey of Tullichettle. Recent decisions in the Creuzfeldt-Jakob Disease (CJD) litigation are difficult to reconcile with the position adopted by the House of Lords. In *Andrews v Secretary of State for Health*, note 16 *supra*, six recipients of human pituitary gonadotrophins (prescribed to stimulate normal growth patterns) were psychiatrically

"distant shock":[235] plaintiffs who claim for psychiatric damage suffered through witnessing an accident to someone else must have experienced what happened through their own senses. No duty to prevent damage to the psyche is owed to someone who learns of the accident through being told by someone else and who, therefore, experiences it only second hand.[236] However, once it is appreciated that the "aftermath" concept has been assigned a role in recovery for psychiatric damage, difficulties with the orthodox means of communication rule become immediately apparent. Plaintiffs who come to the aftermath of an accident, unless they happen upon an accident scene by chance, will be there because they have learnt about what has occurred from someone else. This, in itself, does not preclude recovery: it is accepted that someone who sees the aftermath of an accident and suffers psychiatric damage can claim even if told about it before they get there,[237] and that recovery can be had even if the harm is caused by a combination of what a person sees and what he or she is told.[238] However, it is very often the traditional prohibition against recovery for damage resulting from third party communication which forces plaintiffs and their advisers to try to bring the claim within the boundaries of the aftermath concept, a strategy fraught with difficulty. The problems associated with the aftermath doctrine are legendary.[239] That Mr and Mrs Copoc, whose son was killed at Hillsborough, failed in their claims for consequent psychiatric injury, even though they had a close tie of love and affection with him, simply because they were not at the ground, is an enduring embarrassment.[240] Numerous unsound

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injured consequent on the fear that they would contract the disease. Recovery was permitted notwithstanding that the illnesses were triggered during adulthood, years after treatment, on learning of the risk to which they had been exposed. Knowledge was acquired via the receipt of letters from hospitals, through watching television programmes showing victims and their families or listening to radio. No reference was made to the orthodox proximity limitations. It is surprising, but satisfying, that these primary victims recovered. Note the trial of preliminary issues in *Group B Plaintiffs v Medical Research Council* (1998) 41 BMLR 157.

235 See JG Fleming, "Distant Shock in Germany (and Elsewhere)" (1972) 20 *AJCL* 485.

236 See, for example, *Hambrook v Stokes Bros* [1925] 1 KB 141 at 152, per Bankes LJ; at 159, per Atkin LJ; at 165, per Sargant LJ; *Bourhill v Young's Executor*, note 6 *supra* at 399, per Lord Robertson; *Bourhill v Young*, note 11 *supra* at 103, per Lord Macmillan; *King v Phillips* [1953] 1 QB 429 at 441, per Denning LJ. Even Evatt J, who in *Chester v Council of the Municipality of Waverley*, note 6 *supra* at 43 adopted the most liberal approach in a dissenting judgment now preferred, ruled out recovery in such circumstances.

237 See, for example, *McLoughlin v O'Brian*, note 4 *supra*; *Jaensch v Coffey*, note 15 *supra*. For a recent illustration see *Scrase v Jarvis* (1998) Aust Torts Reports 81-471.

238 See, for example, *Jaensch v Coffey*, note 15 *supra* at 609, per Deane J; at 613, per Dawson J; *Pham v Lawson*, note 225 *supra* at 145, per Lander J. *Taylor v Somerset Health Authority* [1993] 4 Med LR 34 seems to take a narrower view. Apart from ruling out the plaintiff widow's claim on the ground that visiting the hospital to identify the body of her husband was not within the aftermath, Auld J noted that the plaintiff first learnt of the news of the death through her doctor and that the law does not compensate where the news is communicated through a third party.

239 See NJ Mullany and PR Handford, note 10 *supra*, pp 136-52.

240 *Alcock v Chief Constable of South Yorkshire Police*, note 1 *supra* at 398, per Lord Keith of Kinkel; at 424, per Lord Jauncey of Tullichettle.

decisions can be cited to illustrate the absurdity of the current criteria.[241] Three recent judicial analyses reveal the morbid condition of English law.

In *Tranmore v TE Scudder Ltd*[242] a father was informed that the building in which his son was working as a demolition worker had collapsed. He went immediately to the site, arriving about two hours after the accident - which had occurred due to the negligence of contractors. He entered the building with an employee of the defendant and viewed rubble for a few minutes. The conditions of the site prevented immediate rescue efforts and the father endured a further two hours of uncertainty, knowing all the while that his son was trapped. He was then informed that his son had been killed. He viewed his crushed corpse in the morgue 24 hours later. His claim for damages for subsequent psychiatric illness arising from his presence at the "immediate aftermath" was dismissed. Brooke LJ[243] drew these unseemly distinctions:

> I do not find it possible to hold that this plaintiff could successfully bring himself within the immediate aftermath line of cases. He did not go to the accident site for two hours after the accident happened. By that time all the immediate work of the police and the emergency services had finished. Even during the brief period when he was inside the shattered building, his son was buried in rubble two floors above him. He never saw any part of his son's body until he visited the mortuary about 24 hours later. I do not consider that any of these matters, taken in isolation, would necessarily be decisive, but their combined effect is in my judgment overwhelming.[244]

The view that none of this matters has been endorsed by the Law Commission. Under its proposals Mr Tranmore would have recovered.

Mrs Palmer's negligence claim for the adverse psychiatric consequences of the abduction, rape and murder of her daughter would still fail if governed by the proposed regime but, importantly, for a legitimate rather than illegitimate reason. *Palmer v Tees Health Authority* was an action by the mother against a health authority which, it was alleged, had failed to detect the propensity of the criminal concerned to commit such acts and to treat him appropriately. The English Court of Appeal[245] confirmed the trial judge's decision that a duty of care was not established by reference to the three *Caparo*[246] criteria, in particular for the policy reasons expressed in *Hill v Chief Constable of West Yorkshire*.[247] Gage J at first instance[248] also rejected the mother's claim for "severe and disabling" psychiatric injury on the ground that it arose as a consequence of what she learned, what she was told by the police and what she imagined had taken place. He emphasised that she did not witness the child's abduction. Not even her identification of the "mutilated corpse" was thought to justify relief: the fact that

241 For two recent Canadian examples see *Talibi v Seabrook* (1995) 28 CCLT (2d) 254; *Devji v District of Burnaby* (1998) 158 DLR (4th) 747.

242 Note 14 *supra*. See NJ Mullany, "English Psychiatric Injury Law – Chronically Depressing" (1999) 115 *LQR* 30.

243 His Lordship was chairman of the Law Commission at the date of publication of the Consultation Paper.

244 Note 14 *supra* at 5-6.

245 Note 26 *supra*.

246 *Caparo Industries plc v Dickman* [1990] 2 AC 605.

247 [1989] AC 53.

248 [1998] Lloyd's Rep Med 447.

this "shocking experience" occurred three days later was held not to satisfy the requirement of proximity. In the Court of Appeal Stuart-Smith LJ, though he admitted it was unnecessary to deal with the issue, also ruled out the claim on traditional grounds, notably the absence of "sudden appreciation by sight or sound of the horrifying event". To deny recovery in negligence *on this basis* is, with respect, as absurd as it is abhorrent. The action is just the type of psychiatric damage suit which should be dismissed on broad policy grounds, an argument we have envisaged and advocated.[249] We support its rejection for the same sorts of reasons as those expressed in *Hill*. We decry the tortured use of proximity and the concept of "aftermath" to outlaw compensation. So would the Commission.

Its proposals would not remedy the wrong committed in *Hunter v British Coal Corporation*[250] where, by majority, the English Court of Appeal confirmed that plaintiffs who are not present at the scene of an accident or its immediate aftermath cannot recover as primary victims for psychiatric injury consequent upon being informed of events later. A coal miner was denied recovery for reactive depression and "survivor's guilt" sustained following an underground explosion which killed a colleague of which he was told some 15 minutes later, even though he had been with that colleague until a short time beforehand.[251] Absent a particularly close relationship of love and affection between the miner and his dead colleague, the Law Commission would not countenance recovery in these circumstances. Ignoring the fact that the plaintiff in *Hunter* believed he had been responsible for the death of his colleague,[252] and the issue of any special rule applicable to "involuntary participants" following the divisions drawn in *Alcock v Chief Constable of South Yorkshire Police*,[253] the question arises: why should the miner fail? Why should recovery for reactive depression in such circumstances depend on whether he was related to or in love with or had

249 See NJ Mullany and PR Handford, note 10 *supra*, pp 84, 312.

250 Note 14 *supra*. See NJ Mullany, note 242 *supra*. For a similar Australian case in the context of workers compensation see *Zinc Corporation v Scarce*, note 183 *supra*. Two work colleagues and friends (one of whom was the "best mate") of the respondent were killed in an underground mining accident. He did not witness this. He allegedly sustained psychiatric injury on being informed off site of their deaths. His claim failed due to absence of proof of the requisite causal nexus. It is interesting to speculate what the result of a common law action would have been. See also *Stewart v NSW Police Service* (1998) 17 NSWCCR 202 (psychiatric disturbance resulting from the death of a close friend and work colleague did not constitute an injury arising out of or in the course of the worker's employment).

251 The decision was handed down four weeks before the publication of the Report. This fact influenced the majority not to "push forward the frontiers of liability" in relation to such a "policy-charged matter" pending the publication: see note 14 *supra* at 154-5, per Brooke LJ.

252 The reliance placed on the highly controversial, and it is suggested erroneous, majority decision of the New South Wales Court of Appeal in *Rowe v McCartney* [1976] 2 NSWLR 72 is problematic. An impermissible distinction was drawn between the *categories* of psychiatric illness required to have been foreseen by the defendants. That case was not referred to in argument: see *Hunter v British Coal* Corporation, note 14 *supra* at 168, per Hobhouse LJ. Note NJ Mullany and PR Handford, note 10 *supra*, p 71.

253 Note 1 *supra* at 408, per Lord Oliver of Aylmerton. See further text accompanying notes 425-9 *infra*.

affection for the deceased?[254] His injury was equally severe. It was equally debilitating. It was caused by the proven carelessness of the defendant. It was foreseeable. Any physical loss sustained by the miner in the explosion would have been unquestionably compensable. In all probability it would not have even generated a trial. Such cases undermine the rationale for putting actions involving close ties in a separate category and applying a legislative regime which is much more favourable to plaintiffs than the rules of the common law. There is no logical or valid policy reason to deny recovery to those who are not closely related to or romantically involved with the primary accident victim and who sustain injury through what is communicated to them in circumstances lacking temporal or spatial proximity provided that the other prerequisites to relief are satisfied.

For many, the prospect of mentally ill litigants forced to swear to the strongest feelings of love and affection for the dead or injured is obscene. Where close ties between victims are the key control on the limits of liability, the challenge is to identify appropriate criteria to satisfy that requirement without transforming trauma litigation into a farce. The Law Commission recommends the introduction of an *irrebuttable* statutory presumption of a close tie of love and affection in the cases of spouses, parents, children, siblings and cohabitees.[255] This "fixed list" represents an extension of the prevailing rebuttable presumption in relation to filial and spousal relationships[256] (and possibly fiancés[257]). It is proposed to include adoptive relationships but to exclude step-relationships such as step-parents, step-children and half-brothers[258] and half-sisters. A "cohabitant" is defined as "a person who, although not married to the immediate victim, had lived with him or her as man or wife ... for a period of two years". Homosexual cohabitants are included and are subject to the same test. One wonders how proof is to be obtained to satisfy the requirement that cohabitants lived as if married: is it proposed that counsel be permitted to probe the nature of past sexual relations between a traumatised plaintiff and his or her dead de facto? That is as unpalatable as requiring a psychiatrically compromised fiancé, uncle, niece, cousin, grandchild, grandmother or lifelong friend to declare their bond to the primary victim in order to ground a duty of care to them as individuals. The latter group would be subjected to this distasteful process because they fall outside the "fixed list". It is proposed that every other claimant prove the existence of the requisite tie of love and affection in order to be

254 In *Robertson v Forth Road Bridge Joint Board*, note 27 *supra*, Lord President Hope held that the pursuers, one of whom had spent the majority of his working life with a colleague blown over the bridge to his death and had socialised with him on a weekly basis, failed to show that the requisite tie of love and affection existed. Note MJM Bogie, "A Shocking Future? Liability for Negligently Inflicted Psychiatric Illness in Scotland" [1997] *Jur Rev* 39.

255 See Report, note 1 *supra* at [6.26]-[6.27].

256 See *Alcock v Chief Constable of South Yorkshire Police*, note 1 *supra* at 398, per Lord Keith of Kinkel; at 403, per Lord Ackner; at 422, per Lord Jauncey of Tullichettle.

257 See *ibid* at 398, per Lord Keith of Kinkel.

258 Note *McCarthy v Chief Constable of South Yorkshire Police* (unreported, QBD, Sachs J, 11 December 1996).

eligible to recover.[259] By reference to what point in time is the strength of the bond to be tested? If all traditional controls linking the claimant to the accident or its aftermath are to be dispensed with, is a person who is a stranger to another as at the date of the accident, but who forms close ties over time (perhaps through daily care and supervision), able to recover for psychiatric illness sustained on the eventual death of the primary victim or as a consequence of the grind of constant contact? Concerned that a test at the time of the negligent act or omission would exclude recovery in scenarios of this type, the Law Commission opted to recommend that, where appropriate, it should suffice that the requisite bond existed "at the onset of the plaintiff's psychiatric illness".[260] The exact requirements of the concept of "love and affection" remain as indistinct as they did following its introduction in *Alcock v Chief Constable of South Yorkshire Police*,[261] no attempt having been made by the Law Commission to formulate a definition. Ideally, rather than encapsulate all this in a statutory scheme, it should remain subject to the common law and be treated as part of the reasonable foreseeability inquiry.

B. The "Sudden Shock" Requirement

The Law Commission recommends that it should no longer be a condition of liability that psychiatric illness be induced by shock.[262] Unlike the previous recommendation, which is limited to a particular group of mental damage claimants, this is to apply to all claims for psychiatric damage. This initiative is very much to be welcomed. Though prior to *Alcock v Chief Constable of South Yorkshire Police*[263] the requirement of "sudden shock" had not received express judicial ratification in England, the speeches of the Law Lords in that case affirmed the need for "a sudden assault on the nervous system"[264] and suggested that this requirement was implicit in all the previous cases.[265] From this obscure beginning, the "sudden shock" requirement has emerged as perhaps the most crippling limitation on the scope of liability.[266] As the Law Commission's

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259 See Report, note 1 *supra* at [6.26], [6.32]-[6.33].

260 *Ibid* at [6.34]-[6.35].

261 Note 1 *supra*. Note also *McCarthy v Chief Constable of South Yorkshire Police*, note 258 *supra*.

262 See Report, note 1 *supra* at [5.33].

263 Note 1 *supra*.

264 *Ibid* at 398, per Lord Keith of Kinkel. See also at 401, per Lord Ackner ("the sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind"); at 416, per Lord Oliver of Aylmerton ("the sudden and direct visual impression on the plaintiff's mind").

265 *Ibid* at 411, per Lord Oliver of Aylmerton. This is doubtful: see H Teff, note 10 *supra* at 49. Moreover, liability has been imposed in the absence of sudden impact: see, for example, *Kralj v McGrath* [1986] 1 All ER 54 where a mother suffered psychiatric injury as a result of watching her infant son slowly die in hospital; *Tredget v Bexley Health Authority* [1994] 5 Med LR 178 where the concept of "shock" was construed very broadly to permit an award to parents for pathological grief due to the death of their child within two days of a traumatic and frightening delivery. For additional authorities see NJ Mullany and PR Handford, note 10 *supra*, pp 202-5. In other cases, the rule is evaded because the primary victim's condition contributes to the continuing effect of the initial shock: see pp 196-9.

266 Cases denying liability on this basis include *Calascione v Dixon*, note 26 *supra*; *Taylor v Somerset Health Authority*, note 238 *supra*; *Taylorson v Shieldness Produce Ltd*, note 26 *supra*; *Sion v Hampstead Health Authority*, note 14 *supra*.

analysis shows,[267] the requirement has now been affirmed not only where plaintiffs have suffered psychiatric injury as a result of death, injury or imperilment to another (as in *Alcock* itself) but also in cases involving plaintiffs who fear for their own safety[268] and has been considered relevant in cases involving rescuers and employees.[269] Australian authorities, particularly the judgment of Brennan J in the High Court in *Jaensch v Coffey*,[270] have given impetus to the development of this requirement, and affirm that it also applies in cases of damage to property[271] and under the Australian "nervous shock" statutes.[272]

Interestingly, the traditional limitation has been ignored in isolated areas. Successful claims have been advanced by employees psychiatrically injured due to "occupational stress" over time rather than exposure to isolated traumatic incidents in the workplace.[273] English plaintiffs who fall within the area of reasonably foreseeable physical injury are not hampered by the restriction.[274]

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267 Report, note 1 *supra* at [2.62].

268 See *Hegarty v EE Caledonia Ltd*, note 26 *supra* at 266, per Brooke LJ.

269 See *Frost v Chief Constable of South Yorkshire Police*, note 1 *supra* at 270, per Henry LJ; *contra White v Chief Constable of South Yorkshire Police*, note 1 *supra* at 1537, per Lord Goff of Chieveley.

270 Note 15 *supra* at 565 (referring consistently to "shock-induced psychiatric injury"). See also at 606, per Deane J. *Davis v Scott*, note 183 *supra* is a recent Australian example. The Full Court of the Supreme Court of South Australia reassessed the damages awarded at first instance for disorder to the parents of an 11 year old boy who witnessed a plane in which he was a passenger crash on his uncle's farm. The father drove immediately to the accident site. The mother arrived separately a short time later. They saw their severely injured son stabilised and removed by ambulance. The Full Court accepted that the trial judge had erred in failing to distinguish between the mental consequences of the "shock" of seeing the injured boy immediately after the accident and the mental consequences of the disruption, disappointment and anxiety caused by later observation of his disability. Only the former was compensable. Damages were reduced, although Doyle CJ and Nyland J observed that, on the evidence, it was "difficult to differentiate between those symptoms suffered by [the mother], which can be directly related to the aftermath of the accident, as opposed to those which may simply be associated with her need to care for her badly injured son... [Her later] difficulties ... appear to a large extent to relate to her distress and concern of caring for her injured son... A similar difficulty arises with respect to the assessment of [the father]": at 381. The High Court has granted special leave to appeal *sub nom Scott v Davis* (1999) 13 Leg Rep SL 2. For other Australian authorities see NJ Mullany and PR Handford, note 10 *supra*, pp 193-4; NJ Mullany, "Fear for the Future: Liability for Infliction of Psychiatric Disorder", note 10 *supra* at 113, note 37.

271 *Campbelltown City Council v Mackay*, note 130 *supra*.

272 See *Chiaverini v Hockey* (1992) Aust Torts Reports 81-223.

273 Note, for example, *Walker v Northumberland County Council*, note 139 *supra*; *Johnstone v Bloomsbury Health Authority*, note 139 *supra*. Australian cases affirming liability for psychiatric damage caused by continued exposure to occupational stressors similarly leave no room for any requirement of "sudden shock": see *Gillespie v Commonwealth* (1991) 104 ACTR 1; affirmed (1993) Aust Torts Reports 81-217 (no liability on facts); *Wodrow v Commonwealth* (1993) 45 FCR 52 (no liability on facts); *Arnold v Midwest Radio Ltd* (1998) Aust Torts Reports 81-472; *Gallagher v Queensland Corrective Services* (unreported, SC Qld, Jones J, 30 July 1998); *Zammit v Queensland Corrective Services Commission* (unreported, SC Qld, Muir J, 1 September 1998) (prison officer psychiatrically injured through exposure to constant stress accumulating over time; although some attention was devoted to one decompensating "watershed" event in the light of his claim for PTSD, there was no discussion of "sudden shock"). See P Handford, "Psychiatric Injury in the Workplace" (1999) 7 *Tort L Rev* 126 at 155-7, 161-4.

274 See Report, note 1 *supra* at [2.62], note 177, discussing *M (a Minor) v Newham London Borough Council* [1995] 2 AC 633 at 633-64, per Sir Thomas Bingham MR (dissenting); *Sion v Hampstead Health Authority*, note 14 *supra*.

The "sudden shock" requirement has been subjected to forceful criticism on the grounds that it does not accord with modern medical views of how psychiatric injury is incurred and is an unjustifiable limitation because it cuts out many deserving cases, such as the long-term "carer claims".[275] A leading judicial critic, Kirby P, stressed the artificiality of the restriction a decade ago in *Campbelltown City Council v Mackay*:

> [P]sychiatric injury ... is very unlikely to result from the single impact upon the psyche of the claimant of an isolated event. Since the tort of nervous shock was fashioned, there have been substantial advances in the understanding of human psychology. It is highly artificial to imprison the legal cause of action for psychiatric injury in an outmoded scientific view about the nature of its origins. The causes of action at common law should, in my opinion, be released from subservience to 19th century science... [P]sychological injury is a ... complex process. It is rarely (if ever) explicable as the result of an isolated 'shock'.[276]

Perhaps in response to such criticisms, there has been indication of a softening of insistence on "shock"-induced disorder.[277] The New South Wales Court of Appeal may have given a hint of things to come. In its recent decision in *Buljabasic v Ah Lam* reference was made to the attack on the sudden impact rule which was described as having "some force".[278] The opportunity to remove the limitation from the common law was denied to the Court, it not having been challenged below, a fact reiterated more than once by Priestley JA,[279] with whom Mason P and Powell JA agreed.[280] Significantly, abolition was not ruled out. The beginning of the end of the requirement of "sudden shock" may have been signalled earlier in the impressive judgment of Henry LJ in *Frost v Chief Constable of South Yorkshire Police*.[281] He found that the traumatic experience which caused the police officers involved at Hillsborough to suffer psychiatric illness was the length and circumstances of the exposure to the horrors of the day, rather than perception of any isolated, sudden and immediate shocking event. If this conflicted with the statements in *Alcock* he was nevertheless prepared to expand liability, saying:

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275 See NJ Mullany and PR Handford, note 10 *supra*, pp 199-201; H Teff, note 10 *supra*. Some courts have refused to sanction this inequity: see, for example, *Pang Koi Fa v Lim Djoe Phing* [1993] 3 SLR 317 at 332-3. The plaintiff mother pressed her daughter to submit to surgery she was reluctant to undergo, relying on the advice of the defendant neurosurgeon. The daughter died three months after surgery from post-operative complications. It transpired that the surgery had been unnecessary and that the defendant had been negligent in diagnosis, surgery and post-operative care. The plaintiff maintained a bedside vigil watching helplessly while her daughter was negligently managed until her death. The High Court of Singapore allowed recovery notwithstanding the absence of a single shocking occurrence because there was a high degree of foreseeability of injury to the mother and that injury flowed from the defendant's carelessness. Note also *O'Neill v Campbell* (1995) 161 NBR (2d) 1.

276 Note 130 *supra* at 503.

277 See Report, note 1 *supra* at [2.65].

278 Unreported, NSW CA, 3 September 1997 at 2, per Priestley JA, referring to NJ Mullany, "Fear for the Future: Liability for Infliction of Psychiatric Disorder", note 10 *supra* at 113ff.

279 *Ibid* at 2-4, 7.

280 *Ibid* at 7.

281 Note 1 *supra*.

> [W]hat matters is not the label on the trigger for psychiatric damage, but the fact and foreseeability of psychiatric damage, by whatever process ... Clearly the law should accept PTSD rather than exclude it whether it is caused by sudden shock (properly defined) or not.[282]

When, as *White v Chief Constable of South Yorkshire Police*,[283] the case reached the House of Lords, Lord Goff of Chieveley, the only member of the Court to deal with the point, endorsed the views of Henry LJ and expressly rejected the requirement of "sudden shock". In his view, "the nature of PTSD illustrates very clearly the need to abandon the requirement of nervous shock in these cases, and to concentrate on the requirement that the plaintiff should have suffered from a recognised psychiatric illness".[284] The inappropriateness of the requirement is arguably even more apparent in relation to other forms of mental illness: for example, the search for evidence of sudden exposure to traumatic stimuli is out of place in the context of claims for bipolar disorder which is not inevitably triggered by direct personal experience of extreme stressors.[285] The same is true in relation to claims for numerous other types of mental disorder. Counsel should not be forced in every action for psychiatric injury to attempt to identify and attribute particular medical significance to a specific event. The hunt for magical triggers will usually be contrived. Illness, not aetiology, is all that courts should be concerned with.

Such refocus has proved attractive to the Full Bench of the South African Supreme Court of Appeal which, in *Barnard v Santam Bpk*,[286] recently rejected the rule that disorder must, in every case, be consequent on sudden assault to the senses to be compensable. Critical of the "outmoded and misleading" concept of "nervous shock", the Court contemplated recovery for mental damage not induced by an isolated unexpected "shock".[287] In a judgment reminiscent of that of Henry LJ in *Frost* (which was not cited), attention was redirected to the one pertinent inquiry in psychiatric injury proceedings lost sight of in other jurisdictions where the quest to limit liability has assumed priority: has the claimant sustained a "detectable" psychiatric injury? Once the causal nexus is established between the tortious act or omission and the plaintiff's proven disorder, the psychological process by which the condition arose is properly to be regarded as irrelevant.

The Law Commission's Report subjects the "sudden shock" requirement to a rigorous analysis, summarising in detail the arguments for abandoning and retaining it.[288] Among the former are the difficulties the rule causes from a medical viewpoint, the fact that it has made some forms of psychiatric illness

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282 *Ibid* at 271. See also NJ Mullany and PR Handford, note 9 *supra* at 411-12.

283 Note 1 *supra*.

284 *Ibid* at 1537.

285 Note *Diagnostic and Statistical Manual of Mental Disorders*, note 147 *supra* at [309.81], p 424; *International Statistical Classification of Diseases and Related Health Problems*, World Health Organization (10th ed, 1992) at [F43.1], p 147.

286 Note 15 *supra*. For further commentary see NJ Mullany, note 223 *supra*.

287 The matter came before the Court by way of a stated case. Psychiatric disorder consequent on "nervous shock" was assumed for this purpose.

288 See Report, note 1 *supra* at [5.29]-[5.30].

(such as PTSD) more readily compensable than others,[289] and the harsh decisions that it has produced, excluding deserving cases such as those who suffer psychiatric damage through watching someone slowly die in hospital[290] or as a result of long-term caring for an injured relative.[291] The contrary arguments are unconvincing by comparison, consisting mainly of fears of the floodgates opening and that the shock test facilitates proof of causation. These, as the Commission noted,[292] could all be countered: abandoning the requirement will not open the floodgates in the sense of causing a proliferation of claims arising out of a single event – in any case, we question the legitimacy of reliance on any aspect of the floodgates argument – and ordinary causation principles can deal with any problems arising in that area.

The Commission's conclusion that the "sudden shock" requirement is unnecessary is a most important reform. If implemented, it will have a dramatic effect on psychiatric injury law, giving redress not only to the mother who suffers psychiatric illness as a result of seeing or hearing about her son's sudden death, but also to one who suffers such illness through caring for her injured son or watching him slowly die in hospital. It will ensure that a number of harsh decisions of recent years are not repeated.[293] The fact that it is now contemplated that plaintiffs should recover in such cases shows how far the law has advanced in the few short years since the "sudden shock" requirement was first identified.

C. The Defendant as the Immediate Victim

Is there any duty where the plaintiff suffers psychiatric injury as a result of the defendant negligently injuring or endangering himself or herself, rather than a third party? The courts have had difficulties with this proposition ever since Mrs Euphemia Bourhill, the "pregnant fishwife", claimed damages for a severe shock to her nervous system, allegedly resulting in the birth of a still-born child, as a result of hearing the impact of a collision between the defendant's motor-cycle and a car caused by the defendant's negligence. Liability was denied by the Scottish courts on the basis that the plaintiff had to fear for her own personal safety[294] and by the House of Lords because, although the law had progressed beyond such limitations, it was still necessary to show that Mrs Bourhill was a foreseeable plaintiff.[295] The closest approach to the immediate issue was the well-known dictum of Lord Robertson in the Court of Session that a window

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289 *Ibid* at [3.2].

290 See, for example, *Sion v Hampstead Health Authority*, note 14 *supra* and *Taylorson v Shieldness Produce Ltd*, note 26 *supra*, discussed in the Report, *ibid* at [2.63]-[2.64]. Note also *Pang Koi Fa v Lim Djoe Phing*, note 275 *supra*.

291 An Australian example is *Pratt and Goldsmith v Pratt* [1975] VR 378. See the problems created by the perceived need to compartmentalise disorder based on aetiology apparent in cases like *Davis v Scott*, note 183 *supra*.

292 Report, note 1 *supra* at [5.31].

293 For example, the authorities cited at note 290 *supra*.

294 *Bourhill v Young's Executor*, note 6 *supra*. See NJ Mullany and PR Handford, note 10 *supra*, p 9, note 54.

295 *Bourhill v Young*, note 11 *supra*.

cleaner negligently impaling himself on spiked railings would not be liable for the harm occasioned to a pregnant woman watching from the other side of the street. However, he provided no justification for such an attitude beyond saying that there must be some end to the legal consequences of a careless act.[296]

An influential dictum of Deane J in the High Court of Australia also denies liability in such a situation. In *Jaensch v Coffey*[297] his Honour, in the course of setting out the limitations on liability for psychiatric injury imposed in the name of proximity, said that liability would not arise unless "the reasonably foreseeable psychiatric injury was sustained as the result of the death, injury or peril of someone other than the person whose carelessness is alleged to have caused the injury". Again, no real attempt was made to say why this should be so.

In recent years, judges have begun to question whether it is really so self-evident that liability should be denied in such circumstances. Even though the issue was not raised on the facts of *Alcock v Chief Constable of South Yorkshire Police*,[298] it was the subject of comment in two of the judgments. Lord Ackner was content to repeat the dictum of Lord Robertson,[299] but Lord Oliver of Aylmerton, while accepting that an English court would probably decide the issue in the same way as Deane J, was clearly unimpressed with such doctrinaire denials. He suggested that the limitation must be based on policy rather than logic, since the suffering of a wife or mother at witnessing the death of a husband or son was just as immediate and just as foreseeable whether the accident was due to his own or another's negligence. There might be problems where responsibility for the accident was shared by the relative and the other party involved.[300] The issue has arisen more than once in Australia in the last decade. Some judges have looked no further than Deane J's dictum,[301] but in *Klug v Motor Accidents Insurance Board*[302] Zeeman J, while considering himself bound by Deane J's policy limitation, suggested that as a matter of principle such plaintiffs ought not to be denied relief and that, unfettered by precedent, he would have found liability to exist providing the other prerequisites were satisfied.[303] In the two most recent cases judges have gone even further, pointing out that Deane J's view did not command the support of a majority in the High Court and refusing to accept that no cause of action exists in such circumstances.[304]

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296 *Bourhill v Young's Executor*, note 6 *supra* at 399.

297 Note 15 *supra* at 604.

298 Note 1 *supra*.

299 *Ibid* at 401.

300 *Ibid* at 418.

301 See, for example, *Harrison v State Government Insurance Office* (1985) Aust Torts Reports 80-723. See also *Dwyer v Dwyer* (1969) 90 WN (Pt 2) (NSW) 86 at 88, per Wallace P (Asprey and Mason JJ agreeing); *Kohn v State Government Insurance Commission* (1976) 15 SASR 255 at 256, per Bray CJ. The issue potentially arose on the facts of *Rowe v McCartney*, note 252 *supra*, but the decision was based on another ground.

302 (1991) Aust Torts Reports 81-134.

303 *Ibid* at 69,274.

304 See *Churchill v Motor Accidents Insurance Board* (unreported, SC Tas, Green CJ, 29 September 1993) (limitation period extended); *Shipard v Motor Accident Commission* (1997) 70 SASR 240 (application to

The Law Commission is to be commended for subjecting this issue to an in-depth examination and for exploding the theory that some vague notions of policy compel denial of liability.[305] In its view, the most persuasive argument in favour of immunity is that placing liability on the defendant would fetter the right of self-determination, but this is balanced by the contention that persons who deliberately or negligently place themselves in danger should foresee the possible consequences of their actions for others and take responsibility for them. In the standard road accident case at least, the self-determination argument does not carry much weight. Recognition of liability is also seen as the best approach to the difficult contributory negligence problems alluded to by Lord Oliver.[306] In other situations, such as participation in dangerous sports, the Commission suggests that the self-determination argument is stronger, and it also points out the problems arising in cases where the defendant has deliberately chosen to bring about his or her own death, for example, by refusing life-saving medical treatment on grounds of conscience. However, the balance between these factors can be maintained even if the blanket immunity which has hitherto existed is removed and the justice of the claims of such plaintiffs recognised.

The Law Commission's recommendations combine the two different techniques adopted in response to the issues considered in the two previous sections of this commentary. Running in tandem with the statutory regime imposing a duty of care in favour of those plaintiffs who are presumed to have, or who can establish, close ties of love and affection in cases involving the death, injury or imperilment of a relative at the hands of a third party, the Commission recommends a similar statutory duty to avoid causing psychiatric illness where the defendant causes his or her own death, injury or imperilment. The policy considerations noted would be taken care of by a provision to the effect that the duty should not be imposed where a court is satisfied that it would not be just and reasonable because the defendant chose to cause such harm.[307] Outside the area of close ties of love and affection, the legislation would remove the bar preventing liability for psychiatric illness where it results from defendants injuring or endangering themselves, subject to a similar

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strike out statement of claim refused). In the latter case, a decision of the Full Court of the Supreme Court of South Australia, the plaintiff was involved in the accident but suffered no physical injury. Doyle CJ said that the exclusionary principle stated by Deane J referred to a plaintiff who did not suffer bodily injury and did not apprehend immediate bodily injury as a result of the defendant's negligence: at 245. He suggested that any reliance which might be placed on the views of Lords Ackner and Oliver in *Alcock v Chief Constable of South Yorkshire Police*, note 1 *supra* had been eroded by *Page v Smith*, note 9 *supra* because in that case their Lordships had accepted that in relation to persons actually involved in an accident the control mechanisms necessary in secondary victim cases had no part to play: at 247. See further text accompanying notes 310-26 *infra*. In *Mavor v Hall* (1995) 14 SR (WA) 163 it appears that neither the parties' legal advisers nor the Court appreciated the potential relevance of Deane J's dictum: the defendant admitted liability and the court proceeded to an assessment of damages.

305 Report, note 1 *supra* at [5.34]-[5.42], [6.50]-[6.52]. Note also NJ Mullany and PR Handford, note 10 *supra*, pp 215-20.

306 *Alcock v Chief Constable of South Yorkshire Police*, note 1 *supra* at 418. See also NJ Mullany and PR Handford, note 10 *supra*, pp 219-20, 251-6.

307 Report, note 1 *supra* at [6.53].

qualification.[308] As the Commission notes, this reform will have far-reaching implications, in terms of the kinds of cases in which liability might henceforth exist, while preserving a means of exonerating defendants in proper cases.[309] The Commission is to be congratulated on having the strength of purpose to recommend removal of this irrational barrier to recovery. We agree with them.

VII. PRIMARY AND SECONDARY VICTIMS AND *PAGE v SMITH*

It was only when the Law Commission's inquiry was well advanced – only, indeed, after the publication of the Consultation Paper – that the House of Lords created a new and unpredictable complication for the Commission by recognising fundamental differences between the duties owed to primary and secondary victims, a distinction which has now become the most pernicious issue complicating personal injury litigation in this country. *Page v Smith*[310] changed the face of English psychiatric damage law. The House of Lords, led by Lord Lloyd of Berwick, held that, in cases where the plaintiff is directly involved in an accident and well within the range of foreseeable physical injury, it is unnecessary to show foresight of psychiatric injury on the part of the defendant: it is enough that physical injury was foreseeable. In contrast to cases where the plaintiff is in the position of a spectator or bystander, and suffers some form of psychiatric damage as the result of an injury to another, such a plaintiff is a participant in the accident, a primary victim. The majority considered it essential in all cases to distinguish between primary and secondary victims. Only in secondary victim cases is it necessary to establish reasonable foreseeability of psychiatric damage.[311] This holding was a major departure from the law as previously understood, according to which it was necessary to establish that psychiatric injury was reasonably foreseeable in all such cases.[312]

This view owes something to early cases recognising liability for "nervous shock", such as *Dulieu v White & Sons*,[313] which allowed recovery on the basis that the plaintiff was within the area of physical danger created by the defendant's negligence and suffered shock through reasonable fear of physical harm to himself or herself. This requirement, in days when understanding of

308 *Ibid* at [5.43].

309 For example, where a person chooses to cause his or her own death, injury or imperilment by refusing a life-saving blood transfusion, electing to take a known dangerous path while mountain-climbing, or accepting a ride with a drunken driver: see Report, *ibid* at [6.66]-[6.68]. But Mrs Bourhill would fare no better: she had no close ties of love and affection with the immediate victim, and would still be denied recovery on common law principles: see Report, *ibid* at [6.75].

310 Note 9 *supra*.

311 *Ibid* at 187-8, reversing the view of the Court of Appeal, note 26 *supra* and restoring the decision of Otton J. Lords Ackner and Browne-Wilkinson concurred in the view of Lord Lloyd of Berwick. Lord Keith of Kinkel and Lord Jauncey of Tullichettle dissented, maintaining the previously accepted view that foreseeability of psychiatric injury was a necessary requirement in all cases.

312 For the difficulty of reconciling Lord Lloyd of Berwick's views with earlier case law see NJ Mullany, note 9 *supra* at 113-16; P Handford, note 9 *supra*.

313 Note 6 *supra*.

psychiatric injury was in its infancy, provided some guarantee of the genuineness of the claim.[314] But once *Hambrook v Stokes Bros*[315] rejected the limitations of *Dulieu* and held that a duty might be owed to persons not within the zone of physical danger who suffered shock through fear for the safety of others and not themselves, the law recognised reasonable foreseeability of psychiatric illness as a prerequisite to liability.[316] For many years prior to *Page v Smith* this was accepted as the universal test.[317]

For seven years the conviction that it is essential to pigeonhole victims has diverted judicial attention from eradicating ingrained error from the common law to cope with the uncertainty, inconsistency and confusion which followed the introduction of the distinction between primary and secondary claimants and its subsequent distortion. There is no doubt that Lord Lloyd's division of victims of psychiatric damage into these two classes was inspired by the similar division made by Lord Oliver of Aylmerton in *Alcock v Chief Constable of South Yorkshire Police*,[318] but Lord Lloyd had a different purpose in view and the two attempts at classification in the end are somewhat different.[319] Lord Oliver was concerned with the limitations which should be imposed on the foreseeability test in the name of proximity and distinguished between cases in which the injured plaintiff was involved in the accident, directly or indirectly, as a participant, and those in which the plaintiff was no more than the passive or unwilling witness of injury caused to others. Given the traditional principle that the common law generally compensates only the accident victim, and not relatives or others who suffer loss consequential on the accident[320] (such as loss of financial support, or profits lost from time taken from work to care for

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314 In the same way, the "impact rule" in force in some jurisdictions prior to recognition of liability for "nervous shock" required some contemporaneous physical injury to provide a guarantee of genuineness: see NJ Mullany and PR Handford, note 10 *supra*, pp 1, 10-12.

315 Note 236 *supra*.

316 Report, note 1 *supra* at [2.5]. In fact, the statements in earlier cases do not always make this clear: see NJ Mullany and PR Handford, note 10 *supra*, pp 69-70. *Bourhill v Young*, note 11 *supra* is perhaps the turning point: see at 102, per Lord Russell of Killowen; at 105, per Lord Macmillan; at 117, per Lord Porter.

317 See, for example, *Alcock v Chief Constable of South Yorkshire Police*, note 1 *supra* at 396, per Lord Keith of Kinkel; at 400, per Lord Ackner; at 406, per Lord Oliver of Aylmerton; Consultation Paper, note 53 *supra* at [2.9]. This was the test adopted even in cases that Lord Lloyd of Berwick would categorise as involving primary victims: see, for example, *Mount Isa Mines Ltd v Pusey*, note 73 *supra* at 402, per Windeyer J; *Brice v Brown* [1984] 1 All ER 997 at 1007, per Stuart-Smith LJ.

318 Note 1 *supra* at 406-11. See *Page v Smith*, note 9 *supra* at 184, per Lord Lloyd of Berwick. Lord Lloyd refers to earlier recognition of the division between primary and secondary victims, for example, *Bourhill v Young*, note 11 *supra* at 101, per Lord Russell of Killowen. Note also the use of the terms by psychologists: see, for example, AJW Taylor and AG Frazer, *Psychological Sequelae of Operation Overdue following the DC-10 Aircrash in Antarctica*, Victoria University of Wellington (1981) pp 5-6: "primary victim" denotes a person who has experienced maximum exposure to the catastrophic event, "secondary victim" includes the rescuers and the grieving friends and relatives of the primary victims.

319 See *Frost v Chief Constable of South Yorkshire Police*, note 1 *supra* at 273-6, per Henry LJ; NJ Mullany and PR Handford, note 9 *supra* at 416; C Hilson, "Nervous Shock and the Categorisation of Victims" (1998) 6 *Tort L Rev* 37.

320 As exemplified by cases such as *Kirkham v Boughey* [1958] 2 QB 338. See NJ Mullany and PR Handford, note 10 *supra*, pp 90-9; P Handford, "Relatives' Rights and Best v Samuel Fox" (1979) 14 *UWAL Rev* 79.

victims), a reason has to be found for making an exception in the case of those psychiatrically impaired plaintiffs who are allowed to recover, even though it is paramount that such claimants must prove that an independent duty was owed to them. He did not propose a different foreseeability test for primary victims. For Lord Lloyd, the distinction between primary and secondary victims was a means of limiting liability to the latter, and he distinguished between the two classes not only in relation to foresight of harm but also by stating other rules limited to secondary victims.[321] His restriction of the class of primary victims to persons directly involved in the accident and well within the range of foreseeable physical injury may relegate to the second division at least some rescuers and involuntary participants who for Lord Oliver are clearly primary.

It is interesting to ask why *Page v Smith* gave the House of Lords the opportunity to restate the law relating to foreseeability in psychiatric damage cases. The fact situation was highly unusual and Lord Lloyd clearly found it compelling. A very minor car accident, in which no one was physically injured, caused a recurrence of the chronic fatigue syndrome from which the plaintiff had suffered for some years. Lord Lloyd saw no need to complicate an ordinary motor vehicle collision by requiring foresight of psychiatric illness, rather than simple physical harm, and felt that it would not be sensible, in an age when medical and psychiatric knowledge were expanding fast, "to commit the law to a distinction between physical and psychiatric injury, which may already seem somewhat artificial, and may soon be altogether outmoded".[322] The decision may be commendable in some respects, but it has had a severely damaging effect on English law. It may be argued that it makes it easier for one group of psychiatric injury sufferers to recover, and that it lends support to the notion that psychiatric illness need not be treated any differently from physical harm, but it does so by stressing the purely geographical consideration of whether the plaintiff was within the range of physical injury. Psychiatric illness occurs in a broad spectrum of differing circumstances and should not be constrained by spatial boundaries. Moreover, recent cases show how the law on damage to the mind is escaping from the confines of the "accident" situation in which it was first recognised, and may arise in a wide range of other scenarios.[323] *Page v*

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321 See text accompanying note 324 *infra*.

322 Note 9 *supra* at 188.

323 See, for example, *S v Distillers Co (Biochemicals) Ltd* [1969] 3 All ER 1412 (marketing of the defective drug thalidomide which caused appalling injuries to children when taken by pregnant women); *Al-Kandari v J R Brown & Co* [1988] QB 665 (solicitor's negligence in allowing a Kuwaiti husband to regain his confiscated passport which allowed him to abscond with his two children); *Miller v Royal Derwent Hospital Board of Management* (1992) Aust Torts Reports 81-175; *State Rail Authority of New South Wales v Howell* (unreported, NSW CA, 19 December 1996) (failure to provide counselling following hospital tragedy); *Walker v Northumberland County Council*, note 139 *supra* (failure to alleviate "occupational stress"); *Palmer v Tees Health Authority*, note 26 *supra* (mother of girl raped and murdered sued health authority for failure to properly assess and treat the killer for psychiatric injuries sustained on learning of and imagining her daughter's fate); *Leach v Chief Constable of Gloucestershire Constabulary*, note 11 *supra* (unpaid volunteer who acceded to police requests to attend interviews of suspect in "house of horrors" investigation permitted to pursue claim for psychiatric injuries consequent on failure to counsel her). For other examples see NJ Mullany and PR Handford, note 10 *supra*, pp 212-15; P Handford, note 10 *supra*; NJ Mullany, "Fear for the Future: Liability for Infliction of Psychiatric

Smith retards that development by identifying involvement in an "accident" as justifying preferential treatment.

Lord Lloyd went on to compound the unfortunate effects of imposing this distinction by creating various differences in the rules that apply to primary and secondary plaintiffs in the interest of imposing "control mechanisms" on liability to the latter group, as a matter of policy, to limit the number of potential claimants. In such cases, the defendant will not be liable unless psychiatric injury is foreseeable in a person of normal fortitude, a restriction that has no place where the plaintiff is the primary victim: the tortfeasor must take his or her victim as found, whether they be psychiatrically robust or fragile.[324] It may be legitimate to use hindsight in applying the test of reasonable foreseeability of psychiatric illness, something which has no part to play in the different foreseeability test which applies where the plaintiff is directly involved in the accident.[325] These differences written into the law by Lord Lloyd have prompted much academic criticism.[326]

These developments received a mixed reception in *White v Chief Constable of South Yorkshire Police*.[327] Of the judges in the majority, Lord Steyn accepted the distinction between primary and secondary victims,[328] but Lord Hoffmann, who as a member of the English Court of Appeal in *Page v Smith*[329] had

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Disorder", note 10 *supra*, ch 5.

324 This represented a major shift from the traditional English view enunciated in cases like *Bourhill v Young*, note 11 *supra* at 110, per Lord Wright; at 117, per Lord Porter and *McLoughlin v O'Brian*, note 4 *supra* at 422, per Lord Wilberforce: ie, in the absence of knowledge of unusual susceptibility, the prior mental fragility of *all* types of psychiatric injury victims is relevant to quantum and not to duty of care. The majority should have jettisoned the presumption of normal fortitude in all cases: tortfeasors should have to take *all* their physically injured victims and *all* their psychiatric victims as they find them. Lord Goff of Chieveley has suggested the majority in *Page v Smith* may have misunderstood the eggshell skull rule: see *White v Chief Constable of South Yorkshire Police*, note 1 *supra* at 1524; note also at 1512, per Lord Griffiths. The view has been expressed that the relevant principles are still to be authoritatively settled in Australia: see *Petrie v Dowling* [1992] 1 Qd R 284 at 287, per Kneipp J. Whether the Australian courts retain or remove the standard of normal mental fortitude, it can be expected that they will adopt a uniform approach to both categories of claimant. We suspect that *Page v Smith* will be largely ignored by the High Court in relation to the issue of the susceptible claimant and, in all likelihood, generally. It is most regrettable that the English (double) split has found favour with one Queensland judge: see *FAI General Insurance Co Ltd v Curtin*, note 13 *supra* at 64,500, per Lee J. Expressing the opinion that the starting position is that the negligent defendant must take the victim as he or she is found (an opinion with which we agree), his Honour appeared to then confine his views to the case of the primary victim. Macrossan CJ and Fryberg J disagreed. Australian courts may have regard to *Yoshikawa v Yu* (1996) 21 BCLR (3d) 318 where two members of the British Columbia Court of Appeal considered that the "thin skull" rule applies as fully to cases of psychiatric injury as it does to cases of physical injury; ie, to *all* species of personal injury claim. The third, by implication, agreed with this. There was no discussion of the traditional English view, the presumption of normal mental fortitude, or of *Page v Smith* and the perceived need to split claimants into two groups and to apply different rules to each group to determine the foreseeability of damage.

325 Note 9 *supra* at 188-9. These may not be the only differences: there is some authority in favour of the non-application of the "sudden shock" requirement: see text accompanying note 274 *supra*.

326 Inter alia, by the present authors: see note 9 *supra*. For other critical comment see the Report, note 1 *supra* at [5.14], note 26.

327 Note 1 *supra*.

328 *Ibid* at 1544.

329 Note 26 *supra*.

affirmed orthodox principle, refused to commit himself.[330] Since the third member of the majority, Lord Browne-Wilkinson, simply agreed with the reasons of the other two, his latest view on the legitimacy of the division and its interpretation remains obscure, although he did concur with Lord Lloyd's reasoning in *Page v Smith*.[331] One of the minority judges, Lord Griffiths, referred shortly to *Page v Smith* as "a sensible development of the law".[332] Lord Goff of Chieveley, however, labelled it "a remarkable departure from ... generally accepted principles"[333] and subjected Lord Lloyd's judgment to sustained criticism of a kind rarely meted out by one member of the House to another, before finally suggesting that Lord Lloyd's strategy was to extend recovery by primary victims, not restrict it,[334] and that much of what was said with regard to secondary victims was obiter.[335] He specifically reaffirmed the previously accepted foresight test,[336] and accepted that the requirements of reasonable fortitude and viewing with hindsight should continue to apply in all cases.[337] The result of these divergences of opinion is that *Page v Smith* may now rest on slightly shaky foundations.

The Law Commission was quite clearly uncomfortable with the developments stemming from *Page v Smith*. The Report deals with the problems of the decision at some length and makes some recommendations designed to limit its effects, but it refuses to take the final fence and undo the decision altogether, either by recommending legislation or by voicing its disapproval. The Commission recommends that under its proposed legislation, in establishing the duty of care owed by the defendant to the plaintiff, "it should be a requirement that, *at least* where the plaintiff is outside the area of reasonably foreseeable physical injury, it was reasonably foreseeable that the plaintiff might suffer psychiatric illness".[338] It then makes two recommendations designed to narrow the gap between primary and secondary victims: it expresses the view that in the case of secondary victims the reasonable foreseeability of the plaintiff's psychiatric illness should not always be judged with hindsight,[339] and that while in applying the test of reasonable foreseeability of psychiatric illness it may be helpful to continue to assume that the plaintiff is a person of reasonable fortitude, this should be regarded as merely an aspect of the standard approach to reasonable foreseeability that is applied in physical injury cases, and not as a

330 Note 1 *supra* at 1551.

331 Note 9 *supra* at 180.

332 Note 1 *supra* at 1513.

333 *Ibid* at 1522.

334 *Ibid* at 1528.

335 *Ibid* at 1522-3. Note also *Leach v Chief Constable of Gloucestershire Constabulary*, note 11 *supra* at 1429, per Pill LJ.

336 Note 1 *supra* at 1518-20, 1525.

337 *Ibid* at 1525-6.

338 Report, note 1 *supra* at [5.10] (emphasis added).

339 *Ibid* at [5.20]. However, the Commission is of the view that in assessing whether the psychiatric illness was foreseeable the court should consider whether the harm to the immediate victim was reasonably foreseeable prior to the accident. As an example, they suggest that if a mother suffers psychiatric illness as a result of an accident to her son that the defendant could not reasonably have foreseen, it should be held that the defendant could not have foreseen the consequential illness of the mother.

special rule peculiar to secondary victims.[340] In what is arguably the most significant recommendation in the Report, the Commission suggests that the courts should abandon attaching practical significance to whether the plaintiff may be described as a primary or secondary victim.[341] However, it refuses to carry this recommendation through to its logical conclusion by advocating the reversal of the rule laid down in *Page v Smith* that reasonable foreseeability of psychiatric illness is not required where physical injury to the plaintiff is reasonably foreseeable.[342] In so doing, the Commission deferred to the views of those consultees (mainly legal practitioners and judges) who saw the relaxation of the foreseeability test as convenient.[343] It concluded that there was no strong support for the reversal of the decision, and that there had been insufficient time to assess its full impact.[344] We disagree. In the short time since it was handed down, *Page v Smith* has wrought a destructive influence on English psychiatric damage law. Increased litigation, uncertainty, inconsistency and confusion have been the by-products of this disastrous detour in the development of principle.

It is of particular concern that the deleterious impact of the decision has been felt beyond Britain. It led to a remarkable concession in *Cleary v Congregation of the Sisters of the Holy Family at Nazareth*[345] which altered radically the analysis always undertaken in Australian psychiatric injury trials and, there are reasons to believe, the outcome. Lee J found that a nurse predisposed to psychiatric injury who (erroneously) believed that she was about to be raped by an elderly frail patient who had fallen and clutched hold of her could recover for resulting depressive illness. The path to this conclusion was paved by the approach adopted by the defendants. Counsel wrongly considered the Supreme Court of Queensland to be bound by the decision of the House in *Page v Smith*.[346] Because the plaintiff was, on the English (and, it was said, binding) classification of claimants, a primary victim, the fact that the defendants had admitted liability for some of her physical injuries led to the conclusion that liability had to be admitted for all physical and psychiatric injury sustained, assuming that those injuries were caused by the admitted carelessness. It was conceded that it was not possible in Australia to admit liability for physical injury only. This belief was premised on the English notion that once personal

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340 *Ibid* at [5.27]. This contrasts with the approach of Lord Lloyd of Berwick in *Page v Smith*, note 9 *supra*, who saw it as a special control mechanism for secondary victim cases.

341 Report, note 1 *supra* at [5.54]. Neither this nor the preceding two recommendations is proposed as the subject of legislation; the Commission is seeking to exercise its influence over the future conduct of the courts.

342 *Ibid* at [5.16].

343 "It appears however that the responses from practitioners were simply expressions of view, unsupported by any analysis": see *White v Chief Constable of South Yorkshire Police*, note 1 *supra* at 1523, per Lord Goff of Chieveley.

344 Report, note 1 *supra* at [5.12]-[5.15].

345 Unreported, SC Qld, Lee J, 23 December 1996.

346 *Ibid* at 33. Australian courts of first instance would normally follow decisions of the House of Lords, in the absence of contrary Full Court or High Court authority, but it is quite wrong to regard such decisions as *binding*: the House of Lords is not part of the same court hierarchy. In any event, there is abundant Australian authority contrary to *Page v Smith* and no such authority supporting it: see NJ Mullany, note 9 *supra*.

injury of some kind was foreseeable, it was unnecessary to consider the "difficult" question of whether, in the particular circumstances under which physical injury was sustained, injurious psychiatric consequences were reasonably foreseeable: duty and breach were admitted. Not only is this reasoning inconsistent with a long line of earlier English authority,[347] it is entirely at odds with Australian negligence law according to which foreseeability of disorder is integral to liability for its infliction.[348] The significance of the concession is revealed by the following passage:

> The defendants ... had no way of knowing, at the time she was employed, of her past serious psychiatric breakdown, or of her particular susceptibility to any such injury. By virtue of the duties she was required to perform, it would have been difficult for an employer in the position of the defendants to have reasonably foreseen that psychiatric injury might be caused to the plaintiff. However, as indicated, the concession already made ... indicates the existence and breach of the relevant duty of care.[349]

If the Court had been required to embark on the usual threshold inquiry in Australia to determine whether the risk of the infliction of disorder was reasonably foreseeable in the particular circumstances, the strong possibility is that Lee J would have answered in the negative. The admission that some minor ligamentous damage had been caused by the incident operated, through the misapplication of *Page v Smith*,[350] to derail the hearing.

It is not easy to see how the Law Commission's recommendation that courts should abandon attaching significance to the distinction between primary and secondary victims can coexist with the retention of the *Page v Smith* test for persons who are directly involved in the accident. Whether they are expressly categorised as primary victims or not, such persons are being singled out for special treatment, in that the foreseeability hurdle which they have to surmount is a lot lower. The result is that counsel will still be looking to squeeze plaintiffs into the primary category wherever possible. If the courts retain the other special rules for secondary victims, this merely exacerbates the problem. The existence of the two different categories has caused tremendous disarray in the seven years since the House of Lords decision.[351] Lord Oliver in *Alcock*[352] unequivocally classified rescuers as primary victims, but in the judgments in *Frost v Chief Constable of South Yorkshire Police*[353] much energy was expended in deciding whether the police officers who suffered psychiatric illness as a result of their involvement in the Hillsborough football disaster were primary or secondary victims. It was eventually decided that five of the six plaintiffs came within the

347 See *White v Chief Constable of South Yorkshire Police*, note 1 *supra* at 1522, per Lord Goff of Chieveley; NJ Mullany, note 9 *supra*.

348 See NJ Mullany, note 9 *supra*.

349 Note 345 *supra* at 9, per Lee J.

350 Note also Lee J's reliance on the decision in *FAI General Insurance Co Ltd v Curtin*, note 13 *supra* at 64,500, discussed note 324 *supra*.

351 As the Commission acknowledges: see Report, note 1 *supra* at [2.57]-[2.60]. For cases since the Report see *Nobes v Schofield*, note 26 *supra*; *Hunter v British Coal Corporation*, note 14 *supra*.

352 Note 1 *supra* at 408.

353 Note 1 *supra* especially at 264-7, per Rose LJ; at 271-9, per Henry LJ; at 284-93, per Judge LJ (dissenting).

primary category, two as rescuers, two as employees and one in both capacities, but the majority judges expressed considerable doubt whether it was necessary or desirable to go through this classification process in such cases.[354] Involuntary participants in accidents were also placed in the primary category by Lord Oliver,[355] but it now appears that this will not always be so. In *Hunter v British Coal Corporation*[356] the plaintiff struck a hydrant while using his vehicle for excavation, and rushed off to get help, leaving a fellow-worker to try to close the valve and stem the flow of water. Ten minutes later, when the plaintiff was 30 metres away, the hydrant burst and killed the other worker. The plaintiff believed that he was responsible for the death. The English Court of Appeal ruled that he was not a primary victim because he was not present at the accident and only suffered psychiatric injury when told of the death 15 minutes later. In somewhat more charitable mood, the same Court in *Young v Charles Church (Southern) Ltd*[357] held that a construction worker who suffered psychiatric illness after witnessing the electrocution of a colleague from a distance of six to ten feet qualified as a primary victim, even though the illness was caused by viewing the harm to another, because he was within the area of foreseeable physical risk, and in *Nobes v Schofield*[358] that a police officer who developed PTSD when a fellow-officer in her presence suddenly discharged a confiscated firearm six times was a primary victim, even though she testified that she did not fear any personal danger. It is hard to discern a uniform thread running through these three cases. Turning to personal involvement in the accident, in the pre-*Page v Smith* case of *McFarlane v EE Caledonia Ltd*,[359] Stuart-Smith LJ distinguished between cases where the plaintiff was in the actual area of danger but escaped physical injury by chance or good fortune, and those who were not actually in danger, but because of the sudden or unexpected nature of events reasonably believed that they were. In the first case the plaintiff would now be able to rely on the *Page v Smith* foresight test, but the status of those in the second category is not certain. Though Lord Oliver in *Alcock*[360] had classified the old case of *Dulieu v White & Sons*[361] as one where the plaintiff was actually within the zone of danger, Stuart-Smith LJ suggested that it should be placed in the second category. *McFarlane* involved a worker on board a support vessel who suffered psychiatric illness as a result of viewing the Piper Alpha oil rig fire. He failed to qualify under either category. However, in a second case brought by another man on board the same vessel, *Hegarty v EE Caledonia*

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354 In the House of Lords only Lord Steyn unequivocally asserted that primary victims had to be within the range of foreseeable injury and all other victims were secondary victims: see *White v Chief Constable of South Yorkshire Police*, note 1 *supra* at 1544.

355 *Alcock v Chief Constable of South Yorkshire Police*, note 1 *supra* at 408.

356 Note 14 *supra*. See NJ Mullany, note 242 *supra*.

357 Note 26 *supra*. Note the comments of Lord Goff of Chieveley in *White v Chief Constable of South Yorkshire Police*, note 1 *supra* at 1530.

358 Note 26 *supra*.

359 Note 26 *supra*.

360 Note 1 *supra* at 407.

361 Note 6 *supra*.

Ltd,[362] the English Court of Appeal accepted that the plaintiff fell into the second category but held that his fears were not reasonable. In this case the Court tried to reconcile the Lloyd and Oliver definitions by holding that a primary victim was either directly involved in the accident and well within the range of foreseeable physical injury, or involved as a participant and feared for his or her own safety.[363] But, as the Law Commission points out,[364] the addition would exclude the police officers at Hillsborough and the involuntary participants in a string of earlier cases[365] – a forecast now confirmed, at least in the case of the police, by *White v Chief Constable of South Yorkshire Police*.[366] It is not beyond the bounds of possibility that this classification mania is spreading even further: it has recently been hinted that "bad news" cases may turn on whether the plaintiff is a primary or secondary victim.[367] This is a dangerous and undesirable development.

It would have been better for the Law Commission to urge the elimination of the *Page v Smith* foresight test and so give full operation to its recommendation that the courts cease distinguishing primary and secondary victims.[368] If *Page v Smith* must remain, we suggest that the primary victims who benefit from the modified foresight rule be confined to those within the zone of likely physical injury, as outlined by Lord Lloyd, and secondary victims to those who suffer psychiatric injury as a result of injury or danger to another, as contemplated in Lord Oliver's original formulation. In all other cases – rescuers, employees, involuntary participants – the law should abandon the attempt to classify plaintiffs as primary or secondary (but should, of course, retain the test of reasonable foreseeability of psychiatric illness). This should apply *a fortiori* to non-accident cases. By far the most preferable course is to discard *Page v Smith* altogether, and return to the orthodox position as now restated by Lord Goff.[369]

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362 Note 26 *supra*.

363 How would the plaintiff in *Lynch v Commonwealth* (unreported, SC NSW, Master Harrison, 16 October 1998) fare on this analysis? He was a 17 year old seaman on HMAS *Melbourne* when it collided with HMAS *Voyager* in 1964 while on manoeuvres east of Jervis Bay. At the time of the collision the plaintiff was on duty in the laundry tending a clothes press. He felt the impact and was thrown against the press causing him burns. He and another crew member were directed to search for stretchers. He found none, went to the weather deck, assisted in bringing survivors aboard, gave them tea and cigarettes and checked for those with whom he had started training and who he knew were on board HMAS *Voyager*. He could not find five mates and was told later they had died. He seeks compensation for chronic PTSD allegedly sustained due to this experience.

364 Report, note 1 *supra* at [2.58].

365 *Dooley v Cammell Laird & Co Ltd*, note 71 *supra*; *Galt v British Railways Board* (1983) 133 NLJ 870; *Wigg v British Railways Board*, *The Times*, 4 February 1986. See also the Scottish case of *Robertson v Forth Road Bridge Joint Board*, note 27 *supra*, where it was held that no duty was owed to two workers who saw their workmate and close friend blown off the back of a vehicle while travelling over the Forth Road Bridge. Note also *Rogers v Brambles Australia Ltd* [1998] 1 Qd R 212.

366 Note 1 *supra*.

367 See *AB v Tameside & Glossop Health Authority*, note 26 *supra* at 99, per Brooke LJ. Note also the disturbing suggestion in Australia that the distinction may be relevant in cases where the defendant is the immediate victim: see *Shipard v Motor Accident Commission*, note 304 *supra* at 247, per Doyle CJ.

368 Australian courts have so far resisted the temptation to classify victims and impose a differential foresight test: see the discussion of *Page v Smith*, note 9 *supra* in *FAI General Insurance Co Ltd v Curtin*, note 13 *supra* at 64,496-501, per Lee J.

369 *White v Chief Constable of South Yorkshire Police*, note 1 *supra* at 1518-29.

VIII. AREAS TO BE LEFT TO THE COMMON LAW

Under the Law Commission's strategy of minimalist intervention, legislative reform (save for proposals relating to "sudden shock" and defendants who are immediate victims) is to be restricted to the "core area" involving those who suffer psychiatric illness as a result of the death, injury or imperilment of another with whom they have close ties of love and affection. The other areas of psychiatric damage law were not thought to be suitable for codification, and were to be left for common law development. This is partly because it was only in relation to the "close ties" cases that *Alcock v Chief Constable of South Yorkshire Police*[370] was thought to have imposed unwarranted restrictions which impair the future judicial development of the law,[371] and partly because those other areas were still developing and any attempt to codify them was thought to be premature.[372] Accordingly, the Commission recommends that there is no need for legislation dealing specifically with rescuers,[373] bystanders,[374] involuntary participants,[375] employees who suffer psychiatric illness as the result of the death, injury or imperilment of another[376] or through "stress" at work,[377] danger or damage to property[378] and the negligent communication of distressing news.[379] As the Commission recognises,[380] these are by no means the only areas in which liability for psychiatric illness may be incurred. Recent case law canvasses the possibility of imposing a duty of care in a wide range of other instances where such harm may result, including the failure of employers to provide post-trauma counselling,[381] the supply of defective products,[382] and the negligent acts and omissions of lawyers,[383] banks,[384] psychiatrists,[385] doctors,[386]

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370 Note 1 *supra*.

371 Report, note 1 *supra* at [4.2].

372 *Ibid* at [4.1].

373 *Ibid* at [7.4].

374 *Ibid* at [7.16].

375 *Ibid* at [7.8].

376 *Ibid* at [7.10].

377 *Ibid* at [7.23].

378 *Ibid* at [7.31].

379 *Ibid* at [7.34].

380 *Ibid* at [7.19].

381 See, for example, *Miller v Royal Derwent Hospital Board of Management*, note 323 *supra*; *Hind v Attorney-General (Tas)* (unreported, SC Tas, Cox J, 29 September 1995); *State Rail Authority of New South Wales v Howell*, note 323 *supra*; *Zammit v Queensland Corrective Services Commission*, note 273 *supra*; *Leach v Chief Constable of Gloucestershire Constabulary*, note 11 *supra*.

382 See, for example, *S v Distillers Co (Biochemicals) Ltd*, note 323 *supra*; *McMullin v F W Woolworth & Co Ltd* (1974) 9 NBR (2d) 214; *Vince v Cripps Bakery Pty Ltd* (1984) Aust Torts Reports 80-668; *Vanek v Great Atlantic & Pacific Co of Canada*, note 73 *supra*. See also the authorities referred to notes 396-7 *infra*.

383 See, for example, *Rowe v Cleary* [1980] NZ Recent Law 71; *Al-Kandari v J R Brown & Co*, note 323 *supra*; *Dickinson v Jones Alexander & Co* [1993] FLR 521; *Duvall v Godfrey Virtue & Co (a firm)*, note 135 *supra*; *Stewart v Canadian Broadcasting Association*, note 136 *supra*; *Boudreau v Benaiah*, note 81 *supra*.

health authorities,[387] caring institutions,[388] churches,[389] prisons,[390] police,[391] and local[392] and central[393] government authorities.[394] Confined to a footnote in the Report were the topical claims for psychiatric illness caused by the fear or worry that the defendant's negligence may cause the plaintiff to suffer insidious diseases such as cancer,[395] AIDS,[396] CJD,[397] or hepatitis B[398] at some time in the

384 See, for example, *Pavlovic v Commonwealth Bank of Australia* (1991) 56 SASR 587; *Stergiou v Citibank Savings Ltd*, note 105 *supra*; on appeal (unreported, Fed Ct, Full Ct, 24 September 1999).

385 See, for example, *M (a Minor) v Newham London Borough Council*, note 274 *supra*.

386 See, for example, *Ibrahim (a Minor) v Muhammad* (unreported, QBD, Taylor J, 21 May 1984); *X and Y v Pal* (1991) 23 NSWLR 26; *Pang Koi Fa v Lim Djoe Phing*, note 275 *supra*; *A v D* (1995) 127 FLR 372; *Woods v Lowns* (1995) 36 NSWLR 344; on appeal *sub nom Lowns v Woods*, note 33 *supra*; *Powell v Boladz*, note 26 *supra*; *Mickle v Salvation Army* [1998] OJ No 4683; *Anderson v Wilson*, note 76 *supra*; *Harriton v Macquarie Pathology Services* (1998) Aust Torts Reports 81-489.

387 See, for example, *Bagley v North Herts Health Authority* (1986) 136 NLJ 1014; *Biles v Barking Health Authority* [1988] CLY 1103; *G v North Tees Health Authority* [1989] FCR 53; *Ackers v Wigan Health Authority* [1991] 2 Med LR 232; *Grieve v Salford Health Authority* [1991] 2 Med LR 295; *Goorkani v Tayside Health Board* [1991] 3 Med LR 33; *Doughty v North Staffordshire Health Authority* [1992] 3 Med LR 81; *Kerby v Redbridge Health Authority* [1993] 4 Med LR 175; *Smith v Barking, Havering and Brentwood Health Authority* [1994] 5 Med LR 285; *Millicent & District Hospital Inc v Kelly* (unreported, SC SA, Full Ct, 10 September 1996); *Peters-Brown v Regina District Health Board*, note 73 *supra*; *Allin v City & Hackney Health Authority*, note 46 *supra*; *AB v Tameside & Glossop Health Authority*, note 26 *supra*; *Brown v University of Alberta Hospital* (1997) 48 Alta LR (3d) 1; *Marchlewski v Hunter Area Health Service* (unreported, SC NSW, Dowd J, 14 August 1998); *Palmer v Tees Health Authority*, note 26 *supra*.

388 See, for example, *Mallon v Monklands District Council*, 1986 SLT 347; *Jacobi v Griffiths* (1999) 174 DLR (4th) 71.

389 See, for example, *Reidy v Trustees of the Christian Brothers* (1994) 12 WAR 583; *Clark v Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane* [1998] 1 Qd R 26.

390 See, for example, *R v Deputy Governor of Parkhurst Prison, ex parte Hague* [1992] 1 AC 58; *Gallagher v Queensland Corrective Services*, note 273 *supra*; *Zammit v Queensland Corrective Services Commission*, note 273 *supra*.

391 See, for example, *Swinney v Chief Constable of Northumbria Police Force*, note 26 *supra*; *Tame v Morgan* (1998) Aust Torts Reports 81-483; *Leach v Chief Constable of Gloucestershire Constabulary*, note 11 *supra*. See also *Hind v Attorney-General (Tas)*, note 383 *supra*.

392 See, for example, *P v Harrow London Borough Council* [1993] 2 FCR 341; *Avenhouse v Council of the Shire of Hornsby* (1995) Aust Torts Reports 81-351; *Barrett v London Borough of Enfield* [1999] 3 WLR 79.

393 See, for example, *Williams v Minister for Aboriginal Land Rights Act 1983* (unreported, SC NSW, Studdert J, 25 August 1993); on appeal (1994) 35 NSWLR 497; (unreported, SC NSW, Abadee J, 26 August 1999); *Racz v Home Office* [1994] 2 AC 45; *Hillman v Black* (1996) 67 SASR 490; *Cubillo v Commonwealth* (1999) 163 ALR 395.

394 For further cases see NJ Mullany and PR Handford, note 10 *supra*, pp 212-15; NJ Mullany, "Fear for the Future: Liability for Infliction of Psychiatric Disorder", note 10 *supra* at 107-14.

395 See, for example, *Dinnison v Commonwealth* (unreported, Fed Ct, Foster J, 4 March 1994); on appeal (1995) 56 FCR 389; *Sandstrom v Commonwealth* (unreported, Fed Ct, Foster J, 18 May 1994); *Dingwall v Commonwealth* (unreported, Fed Ct, Foster J, 18 May 1994); *Napolitano v CSR Ltd* (unreported, SC WA, Seaman J, 30 August 1994); *Bryan v Phillips New Zealand Ltd*, note 76 *supra*.

396 See, for example, *Fritz v Queensland Corrective Services Commission* (unreported, SC Qld, Derrington J, 24 April 1995); *Graham v Australian Red Cross Society* (unreported, SC Tas, Master, 31 January 1994); (unreported, SC Tas, Cox J, 3 June 1994).

397 See, for example, *APQ v Commonwealth Serum Laboratories Ltd*, note 11 *supra*, on appeal (unreported, SC Vic App Div, 28 April 1995); *N v United Kingdom Medical Research Council* [1996] 7 Med LR 309; *Newman v Secretary of State for Health* (unreported, Eng CA, 18 November 1997); *Group B Plaintiffs v Medical Research Council*, note 234 *supra*; *Andrews v Secretary of State for Health*, note 16 *supra*.

future.[399] It will be necessary to devote further attention to claims for present mental consequences of apprehended harm from actual or potential exposure to disease-causing agents. Commonwealth and American litigation reveals the utter inadequacy of traditional principles confined by relational, spatial and temporal considerations to accommodate actions of this nature.

The Commission cannot have anticipated that the decision of the House of Lords in *White v Chief Constable of South Yorkshire Police*,[400] given less than a year after the publication of the Report, would deal a severe blow to its strategy. The holding of the majority on the facts denies any duty to employees who suffer psychiatric illness through witnessing injury to others and imposes a major limitation on recovery by rescuers; but the damage it inflicts goes much further than this. Although only called on to determine the entitlement of claimants in these limited categories, the tenor of the majority judgments is clear: the House of Lords will not participate further in the development of common law principle governing liability for the negligent infliction of psychiatric disorder generally. Lords Steyn and Hoffmann, with the agreement of Lord Browne-Wilkinson, have abandoned the pursuit of principle and put up the shutters against any further extension of liability pending any legislative intervention:[401] "Thus far and no further" is the current catchcry of the Court.[402] In the face of such negative and entrenched positions, it is hard to see how English courts will be able to take on the role the Law Commission envisaged, unless on some future occasion a differently constituted House of Lords, encouraged by the scholarly dissent of Lord Goff of Chieveley,[403] and Lord Griffiths' well-placed confidence in the ability of courts to control claims,[404] is prepared to undertake a complete reappraisal. That a fifth appeal inside ten years will be required to remedy deficiencies both within and outside the "core regime" speaks volumes.

In some of the case categories identified by the Commission, the plaintiffs suffer psychiatric illness through their involvement in an accident situation in which others are killed, injured or endangered. Of these, it was probably to rescuers that the law was most ready to recognise a duty – at any rate before *White v Chief Constable of South Yorkshire Police*,[405] in which the House of Lords by majority rejected the argument that police officers involved at Hillsborough could recover as rescuers. The English Court of Appeal decision

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398 Note *Anderson v Wilson*, note 76 *supra*, where a class action by claimants who feared infection but who had not decompensated as a consequence was certified, discussed text accompanying notes 98-100 *supra*.

399 See NJ Mullany, "Fear for the Future: Liability for Infliction of Psychiatric Disorder", note 10 *supra*; NJ Mullany "Compensation for Fear and Worry-Induced Psychiatric Illness: The Australian Position" (1997) 4 *Psychiatry, Psychology and Law* 147; J O'Sullivan, "Liability for Fear of the Onset of Future Medical Conditions" (1999) 15 *PN* 96. For a recent overview of the diverging positions taken in American jurisdictions to claims for the fear of acquiring AIDS see ES Fisher, "Aidsphobia: A National Survey of Emotional Distress Claims for the Fear of Contracting AIDS" (1997) 33 *Tort & Ins LJ* 169.

400 Note 1 *supra*.

401 *Ibid* at 1547, per Lord Steyn; at 1551, 1557, per Lord Hoffmann.

402 *Ibid* at 1547, per Lord Steyn.

403 *Ibid* especially at 1518-29.

404 *Ibid* at 1514.

405 Note 1 *supra*.

in that case[406] showed the scope of the rescue principle as previously understood. It held that professional rescuers are not excluded,[407] a view confirmed by Lord Hoffmann[408] and not dissented from by any other member of the House. The Court of Appeal also said that whether a particular plaintiff was a rescuer was a question of fact to be decided in the circumstances of each case,[409] and the Law Commission commented that it would not be helpful to define in legislation who may be classified as a rescuer, since the courts have been able to set the boundaries appropriately.[410] The House of Lords again did not dissent. However, the majority held (despite the soundly argued and convincing dissents of Lords Goff of Chieveley[411] and Griffiths[412]) that rescuers are owed no duty of care unless they either were, or thought they were, exposed to personal danger,[413] or were within the range of foreseeable personal injury.[414] If this is now the English judicial definition of who constitutes a rescuer, it is a most regrettable development. The Law Commission was rightly troubled by the similar suggestion in the Piper Alpha cases.[415] It said that any argument that rescuers had to be in physical danger should be rejected. It cannot be assumed that the majority of rescuers will satisfy the new requirement. Though in *Chadwick v British Railways Board*[416] the rescuer may have been in physical danger from the debris of the crashed train, the case was decided on the basis that the plaintiff suffered psychiatric injury as a result of the horror of the entire experience.[417] The Law Commission expressed confidence that the courts would soon dispel this confusion: they have, but not in the manner the Commission anticipated. The House of Lords decision substantially narrows the law as previously understood. As Lord Griffiths said, no rescuer ever thinks of his or her own safety,[418] but those who incur psychiatric illness through the horror of assisting at major disasters such as Hillsborough can no longer expect compensation. The law should be doing more to encourage rescue attempts than this. Lord Steyn's protestation that restrictions are needed lest there be many claims from those who assist at "gruesome scenes" of tragic "everyday occurrence" (such as car collisions) is, with respect, an entirely unconvincing justification for the erosion of the rights of rescuers.[419] It is no answer to Lord Griffiths' pertinent inquiry:

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406 *Frost v Chief Constable of South Yorkshire Police*, note 1 *supra*.

407 Though establishing that psychiatric injury was foreseeable may be harder: see *ibid* at 261, per Rose LJ.

408 *White v Chief Constable of South Yorkshire Police*, note 1 *supra* at 1557.

409 *Frost v Chief Constable of South Yorkshire Police*, note 1 *supra* at 265, per Rose LJ.

410 Report, note 1 *supra* at [7.2].

411 *White v Chief Constable of South Yorkshire Police*, note 1 *supra* at 1532-6.

412 *Ibid* at 1514-15.

413 *Ibid* at 1546-7, per Lord Steyn.

414 *Ibid* at 1555-6, per Lord Hoffmann.

415 *McFarlane v EE Caledonia Ltd*, note 26 *supra* at 10, per Stuart-Smith LJ; *Hegarty v EE Caledonia Ltd*, note 26 *supra* at 265-6, per Brooke LJ.

416 [1967] 1 WLR 912.

417 Report, note 1 *supra* at [7.3]. See also *Frost v Chief Constable of South Yorkshire Police*, note 1 *supra* at 264, per Rose LJ; *White v Chief Constable of South Yorkshire Police*, note 1 *supra* at 1532, per Lord Goff of Chieveley.

418 *White v Chief Constable of South Yorkshire Police*, note 1 *supra* at 1514.

419 *Ibid* at 1542.

"If it is foreseeable that the rescuer may suffer personal injury in the form of psychiatric injury rather than physical injury, why should he not recover for that injury?"[420] He is unquestionably right in his conviction that courts can curb any inappropriate attempts to claim for illness suffered through such assistance.

Bystanders have not been much in favour in recent years. Though the House of Lords in *Alcock v Chief Constable of South Yorkshire Police*[421] did not rule out the possibility of recovery by mere bystanders, unrelated to the immediate accident victim and not present in any other capacity, in totally exceptional circumstances (such as viewing the inferno resulting from a petrol tanker careering into a school in session), subsequent cases have, for all practical purposes, excluded recovery in any circumstance.[422] Since these cases involve employees, they should not be regarded as conclusive on the bystander issue. The Commission expressed the hope that their legislative proposals would not be construed as impeding the judicial development of liability to bystanders,[423] but in view of the latest House of Lords pronouncements this seems most unlikely.[424]

The Commission identified three separate categories of potential plaintiffs who incur psychiatric illness in work situations: involuntary participants, employees so injured as a result of the death, injury or imperilment of another, and those who suffer "stress" at work. The categorisation is interesting in itself.[425] A few years ago, the law recognised only the first category, which stems from *Dooley v Cammell Laird & Co Ltd*[426] where a crane driver recovered damages for the "shock" caused on seeing his load drop into the hold of a ship where others were working, but which, according to Lord Oliver in *Alcock v Chief Constable of South Yorkshire Police*,[427] is to be explained on the basis that the defendant's negligent act put Dooley, and other similar plaintiffs,[428] in the position of being or thinking that they were about to be or had been the

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420 *Ibid* at 1514.

421 Note 1 *supra* at 397, per Lord Keith of Kinkel; at 403, per Lord Ackner; at 416, per Lord Oliver of Aylmerton.

422 *McFarlane v EE Caledonia Ltd*, note 26 *supra* at 14, per Stuart-Smith LJ. See also *Robertson v Forth Road Bridge Joint Board*, note 27 *supra* at 268-9, per Lord President Hope. Note *Spence v Biscotti* (1999) Aust Torts Reports 81-513 in the context of s 77 of the *Motor Accidents Act* 1988 (NSW).

423 Report, note 1 *supra* at [7.15].

424 In *White v Chief Constable of South Yorkshire Police*, note 1 *supra* at 1547, Lord Steyn rejects the path of reform we have advocated on the ground, inter alia, that we "would allow claims for pure psychiatric damage by mere bystanders", referring to NJ Mullany and PR Handford, note 9 *supra* at 415. This may overstate our position. We suggest that bystanders should be able to recover only in exceptional circumstances akin to those envisaged by the House of Lords in *Alcock v Chief Constable of South Yorkshire Police*, note 1 *supra*: see note 421 *supra*. The House made no reference to this "particularly horrific" exception. The requirement of reasonable foreseeability would operate to keep successful bystander claims a rarity. Note NJ Mullany and PR Handford, note 10 *supra*, pp 128-33.

425 See generally P Handford, note 273 *supra*.

426 Note 71 *supra*.

427 Note 1 *supra* at 408.

428 See, for example, *Carlin v Helical Bar Ltd* (1970) 9 KIR 154; *Galt v British Railways Board*, note 365 *supra*; *Wigg v British Railways Board*, note 365 *supra*. See now *Hunter v British Coal Corporation*, note 14 *supra* where the English Court of Appeal held on the facts that the plaintiff worker's participation had ceased before the accident which killed his colleague. Note *Rogers v Brambles Australia Ltd*, note 365 *supra*.

involuntary cause of another's death or injury, and the illness complained of resulted from the shock so caused.[429] Then in *Frost v Chief Constable of South Yorkshire Police*[430] the English Court of Appeal recognised that an employer might owe a more general duty to employees who were directly involved in the course of their employment in an accident caused by their employer's negligence and suffered psychiatric injury in consequence,[431] and allowed some of the police plaintiffs to recover on this ground. This development was expressly based on the rejection in *Page v Smith*[432] of any distinction between physical and psychiatric injury where a duty already exists between tortfeasor and victim.[433] The Court of Appeal reached its decision without reference to the third category of case. In *Walker v Northumberland County Council*[434] Colman J held that where it was reasonably foreseeable an employee might suffer a nervous breakdown because of the stress of his workload, the employer's obligation to provide a safe system of work involved a duty not to cause the employee psychiatric damage by reason of the volume or character of the work he was required to perform. As Australian authority shows,[435] the two categories of case are closely connected, a connection underlined by the discussion of them in close proximity in the Law Commission's Report.[436] In *White v Chief Constable of South Yorkshire Police*[437] four out of five members of the House of Lords, without dissenting from the involuntary participant or "occupational stress" cases, have eliminated the employment category recognised by the Court of Appeal – despite the fact that two out of the four affirmed the decision in *Page v Smith* on which it was based[438] and a third[439] was a member of the majority in that case. According to Lord Steyn, to assert that because an employer owed his employee a duty not to cause him physical injury there was a concomitant duty not to cause him psychiatric injury is a non sequitur.[440] We do not advocate special treatment for employees with a view to circumventing the current restrictions on recovery for the negligent infliction of disorder: like his Lordship,

429 See Consultation Paper, note 53 *supra* at [5.37]; Report, note 1 *supra* at [7.5]-[7.8]. As *Dooley v Cammell Laird & Co Ltd*, note 71 *supra* itself shows, this category is not in fact restricted to employees, though it has sometimes been explained on that basis: see, for example, *Frost v Chief Constable of South Yorkshire Police*, note 1 *supra* at 277, per Henry LJ.

430 Note 1 *supra*.

431 Such a duty had been ruled out in *Robertson v Forth Road Bridge Joint Board*, note 27 *supra*.

432 Note 9 *supra*.

433 *Frost v Chief Constable of South Yorkshire Police*, note 1 *supra* at 265, per Rose LJ.

434 Note 139 *supra*.

435 See *Gillespie v Commonwealth*, note 273 *supra* (cited in *Walker v Northumberland County Council*, note 139 *supra*); *Wodrow v Commonwealth*, note 273 *supra* (in each case the court affirmed the duty not to cause "occupational stress", but ruled against the plaintiffs on foreseeability and causation grounds); *Arnold v Midwest Radio Ltd*, note 273 *supra*; *Gallagher v Queensland Corrective Services*, note 273 *supra*; *Zammit v Queensland Corrective Services Commission*, note 273 *supra*. See P Handford, note 273 *supra* at 161-4.

436 Report, note 1 *supra* at [7.9]-[7.10]; [7.20]-[7.23].

437 Note 1 *supra*.

438 *Ibid* at 1513, per Lord Griffiths; at 1544, per Lord Steyn.

439 Lord Browne-Wilkinson.

440 Note 1 *supra* at 1545, per Lord Steyn. See also at 1552-4, per Lord Hoffmann.

we look to the "ordinary rules of the law of tort"[441] when analysing employees' claims; unlike him we contend that it is those rules which are fundamentally flawed. It may be that the appellant police officers argued by reference to the involuntary participant cases without distinguishing them from more directly relevant authorities,[442] particularly Australian cases such as *Mount Isa Mines Ltd v Pusey*.[443] Australian courts have never had particular problems with the employment category and it is a pity that their decisions were not exposed to a more searching analysis.

The Commission attempted to explore some of the difficulties which arise where psychiatric illness is caused by an appreciation of danger or damage to property. It suggested that the issue becomes more problematic where the property belonged to the plaintiff,[444] although one would have thought that this would be the situation where mental injury would be more readily foreseeable than any other.[445] It also attempted to grapple with the problem of whether recognising liability in this area means affording better protection to property than the person.[446] However, it seems better not to try and draw analogies between witnessing damage to property and people, since the latter situation raises the special problems already discussed.[447] There is no doubt that the common law is capable of resolving the issues of liability in property cases, as a number of Australian decisions show.[448] Minimal attention was devoted to the vexed issue of suits for psychiatric illness consequent on the negligent communication of "bad news". Conflicting views expressed by consultees were cited by the Commission as one reason for not attempting to codify this area.[449] There are signs that the courts are beginning to explore its possibilities.[450] Only a few years ago, there was little authority:[451] now the courts are beginning to

441 *Ibid* at 1545.

442 See *ibid* at 1553-4, per Lord Hoffmann.

443 Note 73 *supra*. See P Handford, note 273 *supra* at 157-61.

444 Report, note 1 *supra* at [7.26]. The Law Commission did not consider more complex cases of property ownership, such as where the plaintiff has a leasehold interest.

445 This was the situation in the leading case, *Attia v British Gas plc*, note 18 *supra*. It seems likely that courts will allow recovery for psychiatric illness caused by injury to pets: see *Owens v Liverpool Corporation*, note 160 *supra* at 399, per MacKinnon LJ; *Cox v McIntosh* [1992] CLY 1523 (injury to pet dog; distress suffered by plaintiff did not amount to psychiatric illness). It is unlikely that the old case of *Davies v Bennison* (1927) 22 Tas LR 52, where the plaintiff was shocked on seeing the defendant shoot her pet cat but failed to recover, would be decided the same way today.

446 Report, note 1 *supra* at [7.27].

447 See text accompanying notes 310-26 *supra*.

448 See, for example, *Campbelltown City Council v Mackay*, note 130 *supra*; *Electricity Trust of South Australia v Renault* (unreported, SC SA, Duggan J, 1 July 1993); *Electricity Trust of South Australia v Carver* (unreported, SC SA, Duggan J, 2 July 1993); *Broken Hill City Council v Tiziani*, note 137 *supra*; *Bonacristiano v Bulla Shire Council* (unreported, Vic CA, 13 February 1998). See also *Mason v Westside Cemeteries Ltd*, note 76 *supra*.

449 Report, note 1 *supra* at [7.32]-[7.33].

450 See NJ Mullany, "Negligently Inflicted Psychiatric Injury and the Means of Communication of Trauma – Should it Matter?", note 10 *supra* at 195-202.

451 See NJ Mullany and PR Handford, note 10 *supra*, pp 183-91.

suggest that there may be a duty both not to communicate false bad news[452] and not to break true bad news badly.[453]

IX. CONCLUSION

In much of this commentary on the Law Commission's recommendations for the reform of the law of psychiatric damage we have focused on what we see as the shortcomings of what has been proposed. Unfortunately, a generally progressive report has been far too influenced by the seemingly entrenched floodgates dogma, with the result that the proposals are more muted than might otherwise have been the case. For so long as deeply rooted scepticism and misconceptions concerning mental illness are given a voice via the floodgates myth, true equality in legal protection and treatment of physical and psychiatric injury will remain elusive. The commitment to "minimalist intervention" and misplaced homage paid to unsubstantiated concerns of an inundation of unmeritorious actions have combined to generate a regime of reform which falls short of the comprehensive overhaul so desperately required to remedy the appalling state of English psychiatric damage law.

The Law Commission has not done enough to solve the enormous problems which arise from the decision in *Page v Smith*[454] and it has missed a valuable opportunity to explore the concept of actionable damage in the context of psychiatric illness. Parliament is seen as the potential saviour, all hope abandoned that courts are capable of sorting the chaos they have created. Though it is hard to see how a statutory scheme could satisfactorily be extended beyond the "core regime" which liberates the position of relatives and those with close ties to the accident victim, the position of other plaintiffs will not change very much should the proposals become law. The anomalous distinctions that will continue to plague the decision-making process are all too apparent.

The need for thorough purification rather than partial remodelling of the common law has been re-emphasised by the regressive majority decision of the House of Lords in *White v Chief Constable of South Yorkshire Police*.[455] Not only has the highest appellate court passed up the chance to undo some of the problems created by its earlier rulings and place the English law of psychiatric damage on a sounder doctrinal footing, the decision in several respects is a step backwards rather than forwards, with the notable qualification that the important

452 See *Allin v City & Hackney Health Authority*, note 46 *supra* (the defendants did not dispute that a duty of care existed), discussed by NJ Mullany, note 45 *supra*.

453 See *AB v Tameside & Glossop Health Authority*, note 26 *supra* (the defendants' counsel conceded that they could owe a duty of care in the circumstances; given the approach adopted, the Court of Appeal refused to be drawn on this issue), discussed by NJ Mullany, note 45 *supra*; *Lew v Mount Saint Joseph Hospital Society*, note 47 *supra*. The issues to which these difficult actions give rise were thought of such intricacy and complexity that it was not appropriate to burden a jury with the task of adjudication of fact or the judge with the formulation of a charge: see (1998) 55 BCLR (3d) 394. See also *Strong v Moon* (1992) 13 CCLT (2d) 296.

454 Note 9 *supra*.

455 Note 1 *supra*.

dissenting opinion of Lord Goff of Chieveley is a masterly statement of what ought to have been done and is the lodestar by which courts should steer in future. Other courts of final appeal, such as the High Court of Australia and the Supreme Court of Canada, must be vigilant to avoid the pitfalls which have ensnared the appellate courts in England. Careful note should be taken of the complications and limitations of the English case law and a framework of principle produced more in keeping with prevailing psychiatric learning and what the community expects as we near the twenty-first century.

In England, for the present, the disappointing decision in *White* has had the regrettable consequence that the judicial development looked for by the Law Commission is unlikely to materialise. It has significantly undermined part of the path to progress envisaged. 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. Legislative assistance should never be required to modernise the common law. It should be possible to trust the appellate judiciary to embrace, rather than shirk, this onerous responsibility and to accomplish the task set. The fact that legislation may now be the only answer to the woes of English jurisprudence highlights the importance of the Law Commission's Report. The law of psychiatric illness has been subjected to an overdue and most searching examination. The generally enlightened and progressive view of the needs and rights of those who suffer such harm is much to be welcomed. The work of the Law Commission deserves to be regarded as "compulsory reading for Judges and legal practitioners"[456] concerned with this "very difficult field".[457] It may, perhaps, one day provide a basis for legislative reform which moves the boundary stone onwards to a more appropriate resting place.

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456 *Hegarty v EE Caledonia Ltd*, note 26 *supra* at 263, per Brooke LJ.

457 *Arrowsmith v Beeston*, note 26 *supra* at 19, per Brooke LJ. His Lordship continued: "The Commission's report is available to everyone, free of charge on its Internet website [www.gtnet.gov.uk/lawcomm/library/library.htm] so that there is no excuse for lawyers to be unfamiliar with the psychiatric learning set out in it, if they hold themselves out as competent to practise in personal injuries litigation of this type": at 19-20.