CHICHESTER UNIVERSITY LECTURE

LIABILITY FOR MENTAL INJURY

Lord Briggs of Westbourne, Justice of the UK Supreme Court

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1. For some time now, your excellent Law School has been asking me to speak to you about liability in the tort of negligence for the careless causing of mental injury. I am asked to focus upon a particular and contentious aspect of this form of liability, which arises when a person (let's call them D) causes the death of, or life threatening injury to, another person, usually called the primary victim, which (or the immediate aftermath of which) is witnessed by someone with particularly close ties to the primary victim (the secondary victim) who suffers a recognised form of mental injury as a result. This used to be called liability for nervous shock, and was so described in all the major textbooks, at least when I was learning the law. As will appear, that admirably concise label has long since passed its shelf life.

2. The typical fact-set which gives rise to this form of liability (slightly adapted from a famous case[1]), is a road accident. D carelessly crashes his car into a family picnic by the roadside, killing the father and seriously injuring one of the children. The mother sees the accident and, although she is some way away and in no danger to herself, suffers permanent mental injury as the result of witnessing the death of her husband and the injury to her child. The husband and child are the primary victims but the mother can sue D for damages for her mental injury as the secondary victim.

3. The development over more than a century of this form of negligence liability is interesting enough, purely as an episode in legal history. But its greater interest lies in the way in which it illustrates the enduring strengths (and some would say weaknesses) of the common law in adapting itself to developments in human understanding and perceptions of what is or should be a fair and just legal regime governing

[1] *Hinz v Berry* [1970] 2 Q.B. 40.

people's relations with each other, in areas where parliament has either failed, or decided not to, intervene. The common law is often called judge-made law. That simply means law not made by parliament. In reality the common law is made and constantly developed by judges, litigation lawyers and legal academics working together, listening to each other (both here in the UK and around the common law world) and coming to practical solutions to the never-ending difficulties of reconciling case by case fairness on the one hand with reasonable predictability and public consent on the other.

4. This is an unusually convenient moment in which to conduct this exercise. A seven judge panel of the Supreme Court, over which I had the privilege to preside, has just handed down its judgment in *Paul v Royal Wolverhampton NHS Trust* .[2] It concerned a particular aspect of this form of liability, namely the question whether its originally accident-based model can be used where mental injury to the secondary victim arises from witnessing the death of a loved-one due to illness caused by medical negligence. But we were not invited to re-write any wider aspects of the common law relating to liability for mental injury, and it is first to those principles, and the history of their development, that I now turn.

5. Let's start with the basic principles. We probably all began our learning about the tort of negligence with the evergreen House of Lords 1932 decision in *Donoghue v Stevenson*,[3] in which the manufacturer of a bottle of ginger beer left a dead snail in the bottle. On its being drunk by the ultimate consumer, the snail eventually fell out of the bottle and the consumer suffered both shock (at the sight of it) and gastro-enteritis because of its pollution of the contents. She sued the manufacturer, necessarily in tort rather than contract, because she had not even been the purchaser of the bottle, a friend having bought it for her. Lord Atkin said:

[2] [2024] UKSC 1.
[3] [1932] A.C. 562.

> "The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour ? receives a restricted reply."[4]

It may fairly be said that most of the law about liability for mental injury to secondary victims is about the question whether the secondary victim is my neighbour. Do they come within the circle of people to whom, in conducting a particular activity, I owe a duty to take care?

6. The common law tort of negligence was not of course invented in *Donoghue v Stevenson*. It had been developing for many decades by then, and there had already been important developments in relation to liability for mental injury. In the 19th century there was no scope at all for liability for causing purely mental injury. Some sort of physical impact was necessary. This is best illustrated by the Privy Council case of *Victorian Railways Commissioners v Coultas*,[5] on appeal from Australia. A woman was being driven in a horse-drawn buggy across a level crossing, and was very narrowly missed by a steam locomotive due to the gatekeeper negligently allowing the buggy to cross when the train was too close. Thinking she was about to be killed, she suffered what was then called nervous shock, which itself in turn caused her physical injury, including impaired eyesight. It was held that damages arising from pure nervous shock (without any original physical impact or injury) were not reasonably foreseeable, and therefore too remote. The decision was plainly impelled by a perception that to allow such a claim would open the floodgates to speculative or, in the words of their Lordships, "imaginary"[6] claims which would be hard to adjudicate.

7. It did not take long for a more sensible view to prevail. The founding authority for liability for causing mental injury is *Dulieu v White & Sons*.[7] The plaintiff (who was pregnant) was serving behind the bar of her husband's pub when the defendant firm's employee negligently crashed a two-horse van right into the pub. There was no physical impact with the plaintiff, but she suffered shock, which led to physical illness and a premature birth. She was held to be entitled to recover, the court being

[4] *Donoghue v Stevenson* at 580.
[5] (1888) 13 App Cas 222 ("*Victorian Railways*").
[6] *Victorian Railways* at 226.
[7] [1901] 2 K.B. 669 ("*Dulieu v White*").

unimpressed with the floodgates argument which had prevailed in the *Victorian Railways* case.

8. Pausing there, neither Mrs Coultas nor Mrs Dulieu were secondary victims. Their mental injuries arose from being terrified for their own lives, not from witnessing the death, or imminent risk of death, of a loved-one. But the new ground broken in *Dulieu v White* was to permit a claim arising from mental injury caused by what the plaintiff saw, rather than just impact injury. And it is not quite clear whether Ms Dulieu actually recovered damages for her mental rather than physical injury. But the physical injury was entirely consequential upon the effect upon her mind of seeing the accident.

9. It took almost another quarter century before a secondary victim succeeded in a claim. *Hambrook v Stokes Bros*[8] was a Fatal Accidents Act claim. It depended upon the plaintiff's deceased wife having had a claim against the defendants. Their employee had negligently left a lorry at the top of a steep narrow street, unattended but with its engine running. The plaintiff's pregnant wife was walking up the street with her children, who had gone on ahead of her round a sharp corner, and she met the driverless lorry careering down. It crashed into a wall shortly before reaching her. She suffered shock out of fear for the lives of her children, not fear for herself, from which, after a miscarriage, she eventually died. In fact the lorry had narrowly missed two of her children and injured rather than killed the third. The judge had directed the jury that fear for the life of someone else was insufficient to ground liability, but the Court of Appeal, by a majority, disagreed.

10. Apart from the awful facts (which spring to my mind whenever someone says nervous shock) two features of the case are memorable. The first is that fear for the life of someone other than the plaintiff was sufficient to ground liability. That is what opens up liability in negligence for mental injury suffered by secondary victims. The second is that it matters not whether the primary victims are in fact killed or injured at all, if the fear that they might be is foreseeably sufficient to be likely to cause mental injury to the onlooker. Mrs Hambrook's children were out of her sight round a corner in the street when the lorry reached them, and her

[8] [1925] 1 K.B. 141 ("*Hambrook v Stokes*").

husband's claim was based upon her apprehension of the dire risk of death to all three of them, rather than on being told later that her daughter had been taken to hospital. The importance of this second point (constantly emphasised in later dicta) is that it shows that liability to secondary victims arises entirely from a duty of care owed by the defendant directly to them (i.e. a duty not by a lack of care to cause them foreseeable mental injury). It is not parasitic upon a claim by the primary victims, and does not depend upon them even having a claim at all.

11. All this development had occurred before *Donoghue v Stevenson* in 1932, and it is not therefore surprising to find that the House of Lords did not turn a hair at the fact that the plaintiff's claim was in part for nervous shock, although she was of course a primary rather than secondary victim. But shortly thereafter the capacity for the extension of negligence liability for mental injury to secondary victims to get out of hand was illustrated and then addressed by two cases. The first was *Owens v Liverpool Corporation*.[9] A corporation tram collided as the result of its driver's negligence with a hearse, and overturned the coffin being carried in it. Family mourners who suffered nervous shock at the sight succeeded against the corporation, even though they apprehended no risk to the lives or health of themselves or anyone else. The only potential candidate for primary victim was already deceased, in the coffin. The plaintiffs were his mother, uncle, cousin and the cousin's husband.

12. The second was *Bourhill v Young*.[10] A negligent motorcyclist collided with a car and was killed. No-one else was injured. A heavily pregnant woman standing behind a nearby tram heard but did not see the crash, suffered nervous shock and miscarried. The House of Lords rejected her claim against the motorcyclist's estate on the basis that, on the facts, he could not have had the plaintiff in reasonable contemplation as someone likely to suffer personal injury (physical or mental) as the result of his negligence. In passing, their Lordships heavily criticised the Court of Appeal in *Owens v Liverpool Corp* as having gone too far. But apart from foreseeability as a controlling factor they laid down no more specific

[9] [1939] 1 K.B. 394 ("*Owens v Liverpool Corp*").
[10] [1943] A.C. 92.

limiting principles. Some of them would have overruled *Hambrook v Stokes.* Many have since observed that the alleged duty of care owed by the driver to Mrs Hambrook was admitted on the pleadings.

13. There matters rested (so far as the House of Lords was concerned) for some forty years. In the meantime there were some worrying contrasts in attitude to the boundaries of this type of negligence liability at Court of Appeal level: compare for example *King v Phillips*[11] with *Boardman v Sanderson*.[12] In the first case a mother who, from a window in her home, heard her son scream from being run over by a taxi reversing outside recovered nothing for her consequential mental injury. The taxi driver could not be held liable in negligence on the facts., either because (per Singleton and Hodson LJJ) no duty of care was owed to her or, (per Lord Denning) because the injury was too remote. In the second case by contrast a father who heard his young son scream through being run over by a car reversing out of a garage workshop recovered in full. Neither child was seriously injured. In both cases a differently constituted Court of Appeal purported loyally to follow *Bourhill v Young*, yet with opposite results on very similar facts.

14. In terms of developing the relevant principles it was at least established, by the Court of Appeal in *Hinz v Berry* in 1953, that damages were available in the typical case only for a recognisable form of mental injury, not for worry, grief, sorrow or stress occasioned from witnessing the sudden death of a loved-one in an accident. The case is perhaps more memorable for Lord Denning MR's opening line:

> "It was bluebell time in Kent."

15. So thus far the common law had managed to accommodate the notion that a person whose negligence causes an accident may owe a duty of care not only to persons who thereby suffer physical injury, but also mental injury, and in particular secondary victims who witness (by sight or sound) a loved-one being killed or injured, or even just exposed to a real risk of death or serious injury by the accident. To the extent that any specific principled boundary had been established, it was only that mental injury to the plaintiff had to be a consequential risk foreseeable

[11] [1953] 1 Q.B. 429.
[12] [1964] 1 W.L.R. 1317.

to a reasonable person in the position of the defendant. But that test was earning no brownie-points for producing fair or predictable outcomes.

16. There then followed a trilogy of House of Lords cases which may be said, in conjunction, to have placed this form of negligence liability on a properly predictable footing, offering conditions for liability for mental injury arising from accidents which have stood the test of time. The first, in 1983, *McLoughlin v O'Brian*,[13] arose from a typical road accident, in which the plaintiff's husband and three of their children were all seriously injured, and from which one of the children died. What makes the case ground-breaking is the fact that the plaintiff mother was at home, two miles away from the accident. She only learned of the accident two hours later from a neighbour, and only witnessed its awful consequences when she saw her shattered family in hospital, still covered in dirt, oil and blood. But she then suffered serious mental injury in consequence of seeing them in their injured state, including shock, depression and personality disorder.

17. The trial judge dismissed her claim, following *Bourhill v Young*, on the basis that the injury to the mother was not foreseeable, since she had neither seen nor heard the accident. The Court of Appeal held that the mother's mental injury was foreseeable, but that, as a matter of policy, English law limited the class of those to whom the negligent driver owed a duty of care to persons at or near the scene of the accident. The House of Lords unanimously allowed the plaintiff's appeal, holding that the circle of those to whom the negligent driver owed a duty of care extended to persons who witnessed the immediate aftermath of the accident, and that the plaintiff was (just) within that circle. In so doing they introduced a deliberate extension of the circle to whom a duty of care is recognised, which has come to be known as the aftermath principle. They did so partly by reference to two Commonwealth cases in which that had already been done, namely *Marshall v Lionel Enterprises Inc*.[14]and *Benson v Lee*,[15] and partly by parity of reasoning with rescuer cases, where a person who comes upon the scene of an

[13] [1983] 1 A.C. 410 ("*McLoughlin*").
[14] [1972] 2 O.R. 177.
[15] [1972] V.R. 879.

accident after it has happened and helps rescue its primary victims may recover for mental injury incurred in doing so: see *Chadwick v. British Railways Board*.[16]

18. *McLoughlin* is noteworthy for a number of additional reasons. First, Lord Wilberforce deprecated as outdated the use of the concept of "nervous shock" as a descriptor of the type of mental injury for which damages may be recovered. He said:

> "… English law, and common understanding, have moved some distance since recognition was given to this symptom as a basis for liability. Whatever is unknown about the mind-body relationship (and the area of ignorance seems to expand with that of knowledge), it is now accepted by medical science that recognisable and severe physical damage to the human body and system may be caused by the impact, through the senses, of external events on the mind. There may thus be produced what is as identifiable an illness as any that may be caused by direct physical impact."[17]

19. Secondly, Lord Wilberforce examined at some length the apparent policy factors which may be said to require great caution before extending the boundaries of this type of negligence liability. They include (i) the risk of a proliferation of claims, some fraudulent (ii) unfairness to defendants in increasing liability out of proportion to the gravity of the negligence, with consequential increases in insurance premiums (iii) evidentiary difficulties and extended litigation and (iv) parliament being better equipped than the courts to weigh policy considerations, and to conduct or commission the necessary research.[18] Lord Scarman would have gone further. In his view parliament should be the sole arbiter of policy, leaving the courts free to develop the common law purely in accordance with logic and principle.[19] But both he and Lord Bridge said that the law on this subject was in need of review.[20] None of their Lordships thought

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[16] [1967] 1 W.L.R. 912.
[17] Lord Wilberforce in *McLoughlin* at 418.
[18] Lord Wilberforce in *McLoughlin* at 421.
[19] Lord Scarman in *McLoughlin* at 429-431.
[20] Lord Scarman and Lord Bridge in *McLoughlin* at 431.

that policy should stand in the way of the recognition of the aftermath extension in English law.

20. Finally Lord Wilberforce tentatively laid the ground for the development of clear boundaries to this type of negligence liability, namely(i) the class of persons whose claims should be recognised (by reference to their relationship with the primary victim), (ii) the proximity of such persons to the accident and (iii) the means by which the shock is caused, the receipt of a verbal report of the accident being insufficient.[21] This proved to be fertile ground, as the next two House of Lords cases demonstrated.

21. Both the second and third cases in this House of Lords trilogy arose from perhaps the most famous "accident" in recent English history, namely the disaster at the Hillsborough Football Stadium in April 1989, where at least 95 people were crushed to death and over 400 injured due to overcrowding caused by negligent policing. Thousands of people saw the tragedy unfold before their eyes. Millions more watched it on television, then or thereafter. Many suffered mental injury as a result. Several of those who died and were injured had loved-ones watching the awful scene either from elsewhere in the stadium or on TV, or listening to reports of it on the radio. In *Alcock v Chief Constable of South Yorkshire*,[22] 16 test cases were tried before Hidden J. He upheld ten and dismissed the remainder. But the Court of Appeal found in the defendant's favour on appeal and dismissed cross-appeals by the unsuccessful plaintiffs. The House of Lords subsequently unanimously dismissed appeals brought by ten of the test plaintiffs.

22. The case was treated, at all levels, as a trial run of the three conditions tentatively laid down by Lord Wilberforce in *McLoughlin.* Two of the test plaintiffs before the House of Lords had been present at the stadium, and had witnessed scenes resulting in the death, respectively, of two brothers and a brother in law. They failed because their relationship was not proved to be one of sufficiently close ties of love and affection, such as is generally presumed between spouses and between parents and children. All the other plaintiffs witnessed the accident on television, through which (in accordance with editorial policy) it was not possible to

[21] Lord Wilberforce in *McLoughlin* at 422-423.
[22] [1992] 1 A.C. 310 ("*Alcock*").

identify the features of individual primary victims. So, although they witnessed the accident in general terms, they did not witness the death or injury of their relatives, in the sense of being able to identify them on screen. Mr Alcock himself first saw his son at the mortuary hours later. They all failed because their perception of the accident which befell their relatives was not sufficient to amount to presence at the accident or its immediate aftermath.

23. The case is important for the following reasons. First, an attempt to treat the three Wilberforce conditions merely as aspects of foreseeability of damage was unanimously rejected. Rather, they were held to constitute the necessary basis for a relationship of proximity with the defendant sufficient to found a duty of care.[23] Secondly, the House rejected a rigid set of personal relationships (spouses and parent / child) outside which no duty could be owed. The question depended upon the presence of ties of mutual love and affection which might be presumed between those two relationships, but could be proved in others.[24] Thirdly, in developing Lord Wilberforce's second condition (proximity to the accident), the claimant had to be present at the accident or its immediate aftermath.[25] Fourthly, Lord Oliver proposed for the first time the distinction between primary and secondary victims, but subject to the overriding caveat that what had to be shown was a duty of care owed directly to the secondary victim.[26] Finally, some of their Lordships expressed disquiet about where the courts had thus far set the boundaries for nervous shock-type liability, and a view that any further development of this area of liability should be undertaken by the legislature, as it had been in some other common law jurisdictions.[27]

24. The three conditions for the existence of a duty of care in relation to mental injury to secondary victims as originally suggested by Lord Wilberforce and developed in *Alcock* may now be summarised as follows:

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[23] Lord Keith in *Alcock* at 396-398; Lord Ackner at 402; Lord Oliver at 406, 410-412; Lord Jauncey at 419-420.
[24] Lord Keith in *Alcock* at 397; Lord Ackner at 403; Lord Oliver at 415-416; Lord Jauncey at 422.
[25] Lord Keith in *Alcock* at 397; Lord Ackner at 403; Lord Oliver at 411; Lord Jauncey at 423-424.
[26] Lord Oliver in *Alcock* at 411.
[27] See, for example, Lord Oliver in *Alcock* at 417-419, and Lord Keith at 398.

(1) that the claimant (the secondary victim) had a close tie of love and affection with the person killed, injured or imperilled (the primary victim);

(2) that the claimant was close to the accident in time and space; and

(3) that the claimant directly perceived the accident rather than, for example, hearing about it from a third person.

I will call them "the *Alcock* conditions", since it is by reference to *Alcock* that they derive their authority. Some would say that Lord Oliver added a fourth, namely that the injury for which damages were claimed arose from the sudden and unexpected shock to the claimant's nervous system.[28] I will call that the shock condition. It is more to do with causation than proximity.

25. The second of the Hillsborough cases to come before the House of Lords was *Frost v Chief Constable of South Yorkshire*.[29] Many of the police officers who had assisted in tending the victims of the Hillsborough disaster brought claims for damages for pure mental injury (mainly post-traumatic stress disorder or PTSD). Liability to some of them was admitted, but five test claimants were identified as having been in no personal danger of physical injury, or perception of such personal danger, while tending the primary victims. None of them satisfied the first of the *Alcock* conditions (close ties of love and affection with the primary victims). But they all relied on having been rescuers, rather than mere bystanders. All five lost at first instance, but four of them succeeded before the Court of Appeal. The House of Lords by a majority restored the decision of the first instance judge.
26. The ratio of the case is that, to be within the favoured class of rescuer in relation to an accident, the claimant had to have been exposed to physical injury, or at least to have reasonably believed himself to have been so exposed, in going to the rescue. Otherwise he was just a secondary victim, subject to the same *Alcock* conditions for recovery for mental injury as any bystander who witnessed the accident. The detail

[28] Lord Oliver in *Alcock* at 411.
[29] [1999] 2 A.C. 455 ("*Frost*").

of that analysis lies outside the subject matter of this address, but some passing comments of their Lordships are worthy of note.

27. The first is that the House was powerfully influenced by their perception that the general public would find it hard to understand why the common law enabled police officers to obtain legal redress for the psychological consequences of having witnessed the Hillsborough disaster when bystanders including members of the families of the primary victims should have been refused relief for the same type of injury, caused by the same accident. Lord Hoffmann concluded that:

> "… the ordinary person … would think it wrong that policemen, even as part of a general class of persons who rendered assistance, should have the right to compensation for psychiatric injury out of public funds while the bereaved relatives are sent away with nothing."[30]

28. Secondly, the House concluded that the courts had, by the development of the *Alcock* conditions, gone as far as they could in formulating coherent limits to this type of liability in negligence, and that any further development of them by analogy (or otherwise) should be left to parliament. Rejecting the invitation from counsel to admit a logical, principled, incremental extension of liability, Lord Hoffmann said:

> "My Lords, I disagree. It seems to me that in this area of the law, the search for principle was called off in *Alcock* …"[31]

29. Lord Steyn, giving one of the two leading speeches, said, under the heading "Thus far and no further":

> "The only prudent course is to treat the pragmatic categories as reflected in authoritative decisions such as the *Alcock* case [1992] 1 A.C. 310 and *Page v. Smith* [1996] A.C. 155 as settled for the time being but by and large to leave any expansion or development in this corner of the law to Parliament".[32]

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[30] Lord Hoffmann in *Frost* at 510.
[31] Lord Hoffmann in *Frost* at 511.
[32] Lord Steyn in *Frost* at 500.

30. This was said just after the publication of a report by the Law Commission, recommending modest statutory reform, to which I must now refer.

31. The Law Commission published its report, entitled Liability for Psychiatric Illness, in 1998.[33] It had been prepared by a team led by my friend and colleague Lord Burrows, then Professor Burrows, with all the benefits of research, expert input and public consultation that is denied to the courts when reforming the common law. It recommended modest statutory intervention, in accordance with an accompanying draft Bill, designed to leave the underlying common law basis of the liability intact, so as to be capable of being further developed and refined by the judges as changes in social conditions and psychiatric learning should require.[34]

32. The report contained, for the first time, a description of the (by then) recognised types of mental injury likely to be caused by witnessing accidents to loved-ones, namely PTSD, depression, anxiety disorders and adjustment disorders.[35] Up to date medical learning demonstrated, contrary to judicial dicta in most of the reported cases, that "shock" in the sense of "a sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind"[36] was not a reliable qualifying trigger for any of those psychiatric illnesses, even PTSD.[37]

33. In the Law Commission's view neither logic, medical learning or any compelling policy concern justified the imposition of shock as a qualifying condition, nor the second or third of the *Alcock* conditions (proximity to, and direct perception of, the accident). They produced distinctions between comparable cases which did not correspond with fairness, justice or with the perceptions of the general public as to an acceptable limit to legal liability. The Commission recommended that the second and third *Alcock* conditions be removed, but that the first condition (close ties of love and affection with the primary victim) be retained, so as to prevent a flood of claims – provided that the class of those presumed to have those ties should be expanded to include

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[33] Law Commission, *Liability for Psychiatric Illness* (Law Com No. 249, 1998) (the "Law Commission Report").
[34] See the Law Commission Report at [8.2].
[35] Law Commission Report at [3.1]-[3.33].
[36] Lord Ackner in *Alcock* at 401.
[37] Law Commission Report at [5.28]-[5.33].

siblings and cohabitees. This was to address the virulent criticism of *Alcock* by Jane Stapleton, among others, that requiring a brother to prove his ties of affection with the deceased primary victim was both absurd and unpalatable. But the Commission recommended that the requirement that recognised mental injury to a person of reasonable fortitude should be reasonably foreseeable should also be retained.[38]

34. Alas, parliament did not pick up the proffered baton. In 2009 the Ministry of Justice responded, after public consultation, saying:

> "The arguments in this complex and sensitive area are finely balanced. On balance the Government continues to take the view that it is preferable for the courts to have the flexibility to continue to develop the law rather than attempt to impose a statutory solution."[39]

35. So, as Lord Burrows ruefully put it in his dissenting judgment in the recent *PPP* case, the Government has therefore thrown back to the courts the challenge of developing the law in this difficult area. There is no realistic prospect of legislation.[40]

36. Defining liability in tort within a set of policy-induced rules may keep closed one set of floodgates, but it may equally open others. Thus far, all the reported cases in which claims for damages for mental injury by secondary victims had succeeded arose from witnessing "accidents", such as road or rail crashes, similar events on building sites and, as described above, the Hillsborough disaster. In this context "accident" has been defined as meaning an unexpected and unintended event which caused injury (or a risk of injury) by violent external means to one or more primary victims.[41] But enterprising lawyers asked themselves whether the same *Alcock* conditions might be satisfied in relation to mental injury caused by the death of a loved-one, not in an accident, but as the result of medical negligence, such as a failure to diagnose or treat a life-threatening illness in good time. A series of reported cases emerged in which the courts struggled to make sense of the *Alcock*

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[38] Law Commission Report at [5.27]-[5.33], [6.10]-[6.16], [6.27]-[6.31]; Jane Stapleton, 'In Restraint of Tort' in Peter B H Birks, *The Frontiers of Liability* (OUP 1994), p. 95.
[39] Ministry of Justice, *The Law on Damages, Response to Consultation* (CP(R) 9/07, 2009), p. 51.
[40] Lord Burrows in *PPP* at [146].
[41] Lord Leggatt and Lady Rose in *PPP* at [24].

conditions in the context of death (or serious injury) of a loved-one caused by medical negligence. They include *Taylor v Somerset Health Authority*,[42] *Sion v Hampstead Health Authority*,[43] *North Glamorgan NHS Trust v Walters*,[44] *Shorter v Surrey and Sussex Healthcare NHS Trust*[45] and *Liverpool Women's Hospital NHS Foundation v Ronayne*.[46] They span a 22 year period from 1993 to 2015.

37. All the claims failed except *Walters.* In the first in time, *Taylor*, the plaintiff's husband died in hospital after a heart attack at work, caused by a negligent failure in diagnosis many months earlier. The plaintiff first saw his body in the mortuary. Her claim failed because her husband's death had not been an accident, because seeing her dead husband in the mortuary was not the "immediate aftermath" of the death even if it was an accident, and because she would have failed to satisfy the third *Alcock* condition of direct perception.

38. In *Sion,* the plaintiff sat by his dying son's bedside for two weeks after a failure to diagnose damage to his kidney caused by an earlier road accident. His claim failed because the process involved no sudden shock to the claimant (Lord Oliver's supposed extra condition in *Alcock*), but it was expressly doubted whether there was a need to show that there had been an accident in a case of death due to medical negligence.[47]

39. Mrs Walters suffered the awful experience of being with her baby for the 36 hours which elapsed between his suffering an epileptic fit in her presence and then dying due to misdiagnosis thereafter. The whole experience was described by the judge as one horrifying event and by the Court of Appeal as a horrifying series of sudden events. The fact that neither the fit nor the death was an accident did not preclude recovery.

40. In both *Shorter* and *Ronayne* the claimants failed because they could not identify a single horrifying event as having caused their mental injury. In neither case was the difference between an accident and a death or serious illness caused by medical negligence treated as a reason why

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[42] [1993] P.I.Q.R. P262 ("*Taylor*").
[43] [1994] 5 Med. L.R. 170 ("*Sion*").
[44] [2002] EWCA Civ 1792; [2003] P.I.Q.R. P16 ("*Walters*").
[45] [2015] EWHC 614 (QB); (2015) 144 B.M.L.R. 136 ("*Shorter*").
[46] [2015] EWCA Civ 588; [2015] P.I.Q.R. P20 ("*Ronayne*").
[47] Peter Gibson LJ in *Sion* at 176.

their claims should fail. If in either of them there had simply been a sudden horrifying death, the claimant would probably have succeeded, on the jurisprudence being developed by this series of cases, apart from the first, *Taylor.*

41. The importance of an accident as lying at the centre of this type of claim resurfaced in 2013 in *Taylor v A Novo (UK) Ltd*,[48] although it was not a case about medical negligence. The claimant's mother was injured in an accident at work when a carelessly stored stack of racking boards fell on her. She appeared to be making a good recovery until, three weeks later, she suddenly collapsed and died at home, from a pulmonary embolism resulting from a deep vein thrombosis suffered as the result of injuries sustained at the accident. The claimant was nowhere near the accident, but witnessed her mother's sudden death and suffered consequential mental injury. She succeeded at trial because the judge treated the death itself as the relevant event, in relation to which the claimant satisfied all the *Alcock* conditions.

42. But she lost in the Court of Appeal, precisely because the accident and not the later death was held to be the only qualifying event. Seeing her mother die was far too long after the accident at work, and the death itself was not an accident, although it was both sudden and unexpected. If her mother had died at the scene of the accident and the claimant attended shortly after the "immediate aftermath" period (e.g. when going to see her mother in the morgue a day later) she could not have recovered, and no ordinary person would understand how she could fail in that case, but succeed as the result of witnessing her mother's death three weeks later. Furthermore, a finding in her favour would substantially extend the boundaries of liability for mental injury to secondary victims, an extension which went against the "[T]hus far and no further" warning of Lord Steyn in *Frost.* Such an extension was a matter for parliament alone.

43. Thus was the stage set for the recent trilogy of medical negligence cases heard together by the Supreme Court last year. I will call them *Paul, Polmear* and *Purchase* or *PPP* for short. In each of them, on the facts assumed at the strike out hearings which led to the appeals, the

[48] [2013] EWCA Civ 194; [2014] Q.B. 150 ("*Novo*").

claimants witnessed or came upon the sudden and unexpected death of a parent or child in circumstances which anyone would describe as shocking and horrifying, and which caused them mental injury. In each case the death was due to medical negligence, which occurred respectively 14 months, six months and three days previously. But for the negligence, each of the patients would have survived.

44. In *Paul* the two claimants' father died suddenly of a heart attack in the street while the family was out shopping together. In *Polmear* the claimants' seven year old daughter died at school in their presence due to pulmonary veno-occlusive disease which had been misdiagnosed.

45. In *Purchase*, perhaps the most distressing of all, the claimant's daughter died at home from severe pneumonia which had been misdiagnosed. Her mother found her motionless but still warm on her bed, with a telephone in her hand, on her return from an engagement. She then discovered that she had just missed her daughter's last call, on which (when her mother re-played it) her dying breaths could be heard for several minutes.

46. These three claims had mixed fortunes at first instance, but they were all struck out by the Court of Appeal, reluctantly following *Novo,* on the basis that there could be no claim by a secondary victim based on mental injury if there was a gap in time between the negligence and the horrific event, in these cases constituted by the death of the primary victim.

47. The Supreme Court convened a seven judge panel because it was initially anticipated that the claimants might ask us not to follow the *McLoughlin, Alcock* and *Frost* trilogy of previous decisions of its predecessor, the House of Lords. As is acknowledged in Practice Directions 3.1.3 and 4.2.4, the Supreme Court can, exceptionally, depart from its own previous decisions and those of the House of Lords where it appears right to do so.[49]

48. In our judgments handed down at the beginning of this term we dismissed the appeal, by a majority of 6-1. We were fortunate to have among our number Lord Burrows, who led the Law Commission's review

[49] *Austin v Mayor and Burgesses of the London Borough of Southwark* [2010] UKSC 28; [2011] 1 A.C. 355 at [24]-[25].

already described. But he turned out to be the only dissenter. In his view, contrary to *Taylor* and *Novo*, there was nothing wrong in treating a sudden and unexpected death of a loved-one as a qualifying event, even if the death had been caused by earlier medical negligence rather than by an accident. Doing so could be justified on two alternative grounds. First there was nothing in the earlier cases which required the qualifying event to be an accident, in the sense of something external and violent happening to the primary victim. Secondly, even if there was, the extension of liability to a case where there was no accident in that sense, but rather a horrifying death or serious illness caused by medical negligence, was a legitimate incremental extension of the common law, the task of doing so having been handed back to the courts by parliament. In passing he considered that the Court of Appeal were wrong to impose, as a bar to claims, a gap in time between the negligence and the death, and that *Novo* had been wrongly decided. I think that something along Lord Burrows' reasoning was what the Court of Appeal had been hoping for in exceptionally giving permission to appeal to the Supreme Court.

49. But the majority were, you may think, made of sterner stuff, although not without great sympathy to the individual claimants. Lord Leggatt and Lady Rose gave a joint judgment, with which the remaining members of the panel simply agreed (with Lord Carloway providing a short judgment on Scots law). Our reasons may be summarised in this way. The starting point (often forgotten or ignored) is that the common law does not generally give a remedy to the claimant for death or personal injury caused by the defendant to someone else. Leaving aside statutory intervention (as in the Fatal Accidents Act 1976, as amended in 1991), affording a remedy to a secondary victim who has suffered metal injury as a result of the primary victim's death or injuries is therefore an exception to the general law. It calls for clear boundaries, and for the most cautious review of any supposed incremental extension.

50. Thus far, at least prior to the recent series of medical negligence cases, claims for mental injury by secondary victims have all arisen from accidents, and their boundaries defined in terms which only make sense in relation to accidents, even if the need for an accident is not generally expressed as a separate condition.

51. In addition, the existing boundaries have been set for the purpose of defining with reasonable certainty the class of persons, witnessing an accident, properly to be regarded as having the requisite proximity to the accident to be persons to whom the defendant owes a duty of care. Because accidents are discrete events, it is usually clear and straightforward to determine whether someone was present at the scene or its immediate aftermath and directly perceived an accident rather than hearing about it from someone else.[50] Proximity is the almost invariable basis for the recognition of a duty of care in negligence. It answers the question who is my neighbour? The *Alcock* conditions are now a settled way of recognising and applying those boundaries.

52. Liability to secondary victims for mental injury caused by witnessing death, serious injury of the risk of it to loved-ones grew out of the liability for mental injury caused by fear by the participant in an accident for their own safety. Fear for the safety of a loved-one simply could not be distinguished: see *Hambrook v Stokes*, not in that respect following *Dulieu v White.* This is a further defining feature of accidents: it is often difficult or arbitrary in accident cases to distinguish between primary and secondary victims, when it comes to mental injury.[51] But there is no way to compare that analysis with the mental injury caused by witnessing the death of a loved-one in a medical negligence context where no accident occurs. That does not rule out the possibility that there may occur accidents in a medical negligence context, but we will have to await cases where that has occurred.

53. In the current jurisprudence it will often be the accident itself, rather than the physical injury which may thereby be sustained by the primary victim, which is the central element in the fact-set creating liability to secondary victims. Injury to the primary victim is neither necessary nor sufficient. It is their perception of an accident which puts their loved-one in danger of physical injury, rather than the injury itself, which may cause the mental illness. Contrary to her fear for them, none of Mrs Hambrook's children were killed by the runaway lorry, and only one was injured. And seeing the injury after the event will not found liability unless the seeing occurred during the accident or its immediate

[50] Lord Leggatt and Lady Rose in *PPP* at [108].
[51] Lord Leggatt and Lady Rose in *PPP* at [110].

aftermath. Thus you cannot simply treat non-accidental illness or even death caused by medical negligence as being on all fours with the current extent of the accident-based liability. In the medical context, even where there is death, there is often no discrete event comparable to an accident: the symptoms of disease or injury may develop over weeks or even years and may vary in their severity.[52]

54. We were in agreement with the reasons why the Court of Appeal in *Novo* regarded witnessing a death, rather than an accident, as likely to cause distinctions which ordinary people would think unfair, as I have already described. But we did not consider that *Novo* required proximity in time between the negligence and the relevant event (which the Court of Appeal in *PPP* thought was the case). The carelessly stacked boards could have been waiting to fall on someone for weeks before the accident, without affecting the legal analysis.

55. We reached the same conclusion that the claims must fail when considering liability to secondary victims as a potential extension of a doctor's duty of care to their patient. Rather than being a natural incremental extension, it crosses an important line, going beyond what contemporary society considers to be the doctor's role. A further, separate consideration is that, in opening up liability in this area, medical professionals may be disincentivised from allowing family members to visit and stay with patients who are receiving end-of-life care. It is undesirable for decisions about end-of-life care to be complicated by the risk of legal liability to family members.[53]

56. Our decision to identify the need for an accident as a core condition for liability has enabled us to discard the recent trend (in the Court of Appeal and below) towards erecting, as an alternative in the context of medical negligence, the condition that the medical crisis be sudden and horrifying, and also to discard the supposed *Alcock* condition that the mental injury be caused by a sudden shock to the nervous system. The requirement that the event be sudden creates ambiguity about its edges, while the epithet horrifying is too subjective to operate with reasonable predictability. The requirement for a shock has been completely

[52] Lord Leggatt and Lady Rose in *PPP* at [112]-[113].
[53] Lord Leggatt and Lady Rose in *PPP* at [117].

undermined by the development in medical learning about mental injury, as explained in the Law Commission's report.

57. So, what do these cases show about the strengths and weaknesses of the way in which the English common law (here the law of tort) is developed and kept up to date? Standing right back, it is extraordinary, and would be incomprehensible to a civil lawyer how, without any legislative intervention at all, the common law has moved from not recognising pure mental injury at all as a subject for compensation (even in primary victims) to recognising it in secondary victims (i.e. mere onlookers at an accident) and has at the same time erected quite detailed boundaries and conditions, so as to enable practitioners to advise victims with reasonable confidence when the law will and will not come to their aid. During that process the courts have shown themselves astute to ensure both that the boundaries and conditions operate in a way which the general public would find understandable, fair and acceptable, and which acknowledge developments in our understanding of mental illness and its causes. Thus the development of this important part of the tort of negligence to a point of settled maturity is a major strength of the way in which the common law is developed by judges, advocates and academics.

58. But the process took more than a century, with large gaps in time between each stage in the development. This can only be attributed in part to the slow progression in the scientific understanding of mental illness. It took almost 25 years to get from a recognition in *Dulieu v White* that pure mental injury could found a claim by the primary victim to the upholding of a claim by a bystander, suffering from fear of injury to her children, in *Hambrook v Stokes*. And that decision was never of much solidity because of the admission of liability by the defendant. 18 years later the House of Lords may be said to have grudgingly recognised in *Bourhill v Young* that such a claim could succeed in principle, but no clear boundaries were laid down beyond foreseeability, so that subsequent cases on indistinguishable facts tended to produce opposite outcomes. Only in 1982, in *McLoughlin*, did the House of Lords begin to embark on the process of defining the proximity boundaries in terms narrower than mere foreseeability, and the process was not completed until the impetus created by the mega-accident of the Hillsborough

disaster, in the 1990s, in *Alcock* and *Frost*. Even then the failure expressly to describe the occurrence of an accident as a condition of liability to a secondary victim led to a blind alley constituted by a series of medical negligence cases, which was only closed off this year by the *PPP* case. A man from Mars would say that this was a very slow and haphazard way of carrying out law reform. By comparison with legislation, that must be accepted as an inherent weakness in the common law.

59. So must the fact that the common law does not always speak with one voice. There may be conflicting decisions of the Court of Appeal on the same issue of principle. Ot there may be more than one judgment given in the same case in the Supreme Court, sometimes making it hard for the reader to identify the precise ratio. In recent years, following the disastrous example of *Stone v Rolls v Moore Stephens*[54], the Supreme Court justices have tried to ensure as far as possible that the ratio of their decision is clearly set out in a single leading judgment. But we don't always succeed, even now. But it should not lightly be assumed that the statutory alternative is free from ambiguity. A major part of the work of the Supreme Court is concerned with wrestling with the uncertainties of meaning to be found in statutory language. And the really big problem with statutory law reform is that, if it goes wrong, there is no certainty when, if ever, parliamentary time will be found to put it right.

60. The biggest problem is that those judges, advocates and academics to whom the task of developing the common law is entrusted have virtually no control of the speed or even consistency of advance. Whether cases with the critical facts are fought all the way or settled before trial or appeal is ultimately in the hands of the parties, who are likely to blench at being told by enthusiastic advisors with a missionary gleam in their eyes that theirs is a case which could lead to a real development in the law. At what cost, they no doubt want to know, and rush to engage a mediator. But even when suitable cases reach the appellate courts the outcome is dependent upon the different views on where the law should go which may be entertained by differently constituted panels of judges. There are many examples of major developments in the common law

[54] [2009] UKHL 39

which were decided by a bare majority, and which could have gone the other way if one member of the panel had gone sick and been replaced by a colleague.

61. There are some signs that robust case management is beginning to play a useful part in grouping suitable test cases for determination on appeal in a way which can bring certainty and maturity to developing areas of the law. The grouping of the *Alcock* and *PPP* cases are good examples, as is the grouping of a large number of cases about unlawful camping by Gypsies and Travellers for the purpose of testing the legitimacy of injunctions against persons unknown, in the *Wolverhampton v Gypsies* case decided by the Supreme Court at the end of last year.[55] So are cases where appeals are leapfrogged to the Supreme Court, by-passing the Court of Appeal, where it has already had its say in another case.

62. It may be said that the reasonably well-understood boundary between the courts and the legislature for the purpose of reforming the common law is a strength of the system, viewed as a whole. That boundary is well described in the cases reviewed in this talk. If it can be said that the proposed development is more a matter of policy than the incremental development of legal principle, then the courts should, and usually do, give way to parliament as the best-placed reformer. But as this study reveals, even that process can go wrong. Successive panels of the House of Lords stated in terms that in this area of the law the courts had gone as far as they could go, and that further development should be carried out by parliament. The Law Commission agreed and proposed a draft Bill. But parliament (or rather Government) disagreed, and nothing has happened since. Leaving aside the tangential issue of medical negligence cases, the search for principle in this area of the law ended with *Alcock*, and shows no sign of being revived, by parliament or by the courts. Conversely parliament sometimes chooses to intervene when the need for principled development of the law would better have been left to the courts, and the resulting legislation leads to endless litigation about what it means, or yawning gaps which the courts struggle to fill by

[55] *Wolverhampton City Council and others v London Gypsies and Travellers and others* [2023] UKSC 47; [2024] 2 W.L.R. 45.

what many would describe as over-ambitious exercises in the interpretation of silence.

63. But when all that is said and done, and making due allowance for the fact that I may be said to be *parti pris*, I wonder whether, in this small area of the common law, we have done all that badly. Once it is recognised that mental injury is not something inherently different from physical injury, it was never going to be possible to limit the recovery of damages for negligence to physical injury alone, or even to mental injury caused or accompanied by physical injury. And if fear of danger to oneself is enough to ground a claim for mental injury, how can the law rationally exclude fear of danger to one's own child? Once that critical boundary is crossed, as it was in *Hambrook v Stokes*, the general rule of the common law that no-one can recover for injury done to someone else has been breached. The uncertainties inherent in whether a particular onlooker of an accident will be foreseeably likely to suffer mental injury are almost limitless. Both floodgates and crippling uncertainties in the law loom, if the only limit on claims is foreseeability.

64. What the cases leading up to and concluding with *Alcock* (interpreted in *Frost* and *PPP*) have done is to confine a limited exception to that general common law rule so as to create a small and reasonably well-defined class of persons witnessing an accident who are sufficiently proximate to the accident for its perpetrator to owe them a duty of care, extending to mental injury. That may be only a tiny fraction of people who suffer real distress, grief and even recognisable mental injury from witnessing the death, serious injury or peril of another. But that distress, grief and mental injury is part of what it means to be human, living in society. Millions must have been grieved and distressed by watching the Hillsborough disaster on TV, or even from reading about it, and many of them, maybe thousands, probably suffered mental illness as a result. But the law cannot require those responsible for the accident to compensate them all. A line, necessarily rough and ready, has to be drawn somewhere. Many will probably disagree with where it has actually been drawn. Some, like my good friend Lord Burrows would have preferred something more generous, but as a line drawn by fallible human beings to bring some sense, justice and order into the

relationships between members of society, it does not strike me as being too bad.