

NERVOUS SHOCK - WHEN IS IT COMPENSABLE?

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1. BACKGROUND

1.1 In the 90 odd years since the Courts first recognised that negligently caused psychiatric illness could give rise to a claim for damages (Dilieu v White and Sons (1901) 2 KB 669) the opportunity for "incremental judicial development" by the House of Lords has occurred on only four occasions:

Bourhill v Young (1943) AC92

McLoughlin v O'Brian (1983) 1AC 410

Alcock v Chief Constable of South Yorkshire Police (1992) 1 AC 310

Page v Smith (1995) The Times (12th of May)

1.2 Running through these cases and those considered by the Court of Appeal it is possible to discern various key factors that have affected the Court's thinking:

(a) Fear of floodgates

This is a basic fear of proliferation of claims from a single event which would:

- (i) Clog up the Court system
- (ii) Bring the law into disrepute - if burden of costs so great that cannot be met
- (iii) Impact of awards of insurance company and premiums of road users, employers, tax payers (where D's are public authorities)
- (iv) Feelings of unfairness to D - impose a burden disproportionate to his negligent conduct

? Is flood of claims in any event mitigated by strain of adverse serial Court appearance plus fact that emotional stress of litigation may inhibit healing process i.e. not able to face it or medically advised that it could be harmful to a company.

(b) Fear of bogus claims

Since identity and assessment of symptoms are often based on P's complaints — suspicions of malingering

Difficulty of ordinary healthy people, particularly those who have been through trauma of second world war, to credit allegations of psychiatric illness.

Belief that such symptoms can be easily faked

Certain disdainful and ambivalence about compensating secondary victims

Feeling that P should be able to pull himself together and that National

Service should be re-introduced.

NB a number of objective psychological tests now exist to ascertain whether symptoms faked, exaggerated.
Court should be capable of weighing competing evidence in this sphere, just as they have to for an alleged back injury

(c) Re expert psychiatric evidence

Judicial hostility based on perception of psychiatry as a relatively new discipline

Vast advances in psychiatric knowledge and a greater willingness of doctors support such claims and a greater acceptance that psychiatric illness can be life shattering, as largely overcome this hostility

A number of high profile disasters resulting in a number of genuine claimants (who no longer consider it shameful or disgraceful to seek psychiatric treatment) have enhanced the legitimacy of such claims before the Courts:

Hillsborough

Zeebrugge

Kings Cross fire

Piper Alpha

Marchioness

(d) Sympathy for individual Plaintiff

McLAUGHLIN v O'BRIAN (1983) 1 AC410

Mother told of accident involving her husband and children one hour after it occurred. On arrival at hospital told youngest daughter dead. Husband and other children in state of acute distress, covered in oil and mud and still awaiting treatment. Obvious case where Court wished to compensate mother if possible. Reason that if rescuer following human instincts/moral compulsion in going to scene of accident could recover, why not a mother if, acting under same motives, goes to place where family had been taken.

In effect had to get around requirement of physical proximity and so invented the "immediate aftermath" concept.

FUTURE LEGISLATION

Commission concluded understandably after Alcock, but only way to ease the stringent restrictions upon claims by secondary victims there imposed, was by legislation. Further, as some of the overriding considerations in this area of law are based on public policy, it is right that they should be spelt out in legislation, so that the public has a chance of commenting upon it.

Should it replace P's rights at common law? If so would that leave the law unnecessarily complex and uncertain - particularly if claims advanced both at statute and at common law.

PAGE v SMITH: COURT OF APPEAL: (1994) 4 All ER 522

P in a car collision of moderate severity. No one physically injured. P suffering from ME - became chronic and permanent as a result of accident.

Hoffmann L.J. considered (page 549) that the existing law enabled the following propositions to be stated:

1. Damage caused by "mental trauma" is a separate head of damage in the law of negligence with its own conditions of liability.
2. Those conditions are foreseeability, proximity and causation.
3. Foreseeability = foreseeability of damage caused by mental trauma. Foreseeability of physical injury neither necessary nor sufficient.
4. Whether foreseeable is asked with hindsight i.e. in the light of the accident as it actually happened.
5. P must be assumed to be a person of normal fortitude.
6. Whether or not he is such a person is a matter of judicial notice, not of medical or statistical enquiry.
7. If some damage by mental trauma foreseeable, P entitled to be compensated for all his damage, whether the precise nature and extent is foreseeable or not.
8. Whether P a participant or a bystander goes only to proximity. Proximity is not a substitute for foreseeability - it is an additional

requirement.

All three members of the Court of Appeal held that P suffered only such fright and shock as might reasonably be expected in a collision of moderate severity, and injury was not foreseeable in a person of ordinary fortitude.

The House of Lords (The Times. 12th of May 1995) held by three to two:

1. P was a primary victim: a "participant" i.e. directly involved in the accident and well within the range of foreseeable physical injury (as viewed before the event)
2. If a primary victim, foreseeability of psychiatric injury is not necessary.

Rationale: all consequences flow from physical injured P are recoverable - why should it be different if fortuitously P not physically injured.

Since Page it is vital to determine whether P is a primary or secondary victim

Consider expert evidence re whether within range of physical injury (expert engineer: fire expert etc.)

NB1. reasonably foreseeable in this context means a real even if unlikely risk, not a probability/possibility test (Attia v British Gas (1988) QB 304: Dillon L.J. at 313; Bingham L.J. at 319)

NB2. Control mechanisms impose on secondary victims as a matter of policy have no place where P a primary victim i.e.:

- (i) he does not have to be a person of ordinary phlegm
- (ii) you take your victim as you find him
- (iii) hindsight has no part when considering reasonable foreseeability of physical harm to primary victim.

One possible reform considered by the Commission is to restrict claims to P's whose illness resulted from a reasonably sustained fear for his own safety. Such P's would be within the range of foreseeable physical injury and thus there would be no secondary victim claims

ESSENTIAL QUESTIONS WHEN CONSIDERING PROSPECTS OF SUCCESSFUL NERVOUS SHOCK CLAIM BY A SECONDARY VICTIM.

Secondary victim = where D has negligently injured or imperiled someone other than P and P has as a result foreseeability suffered a shock-induced psychiatric illness.

1. RECOGNISED PSYCHIATRIC ILLNESS

Those which have been accepted by the Court:

This reactive depression (Hedican v Ruane (1991) 3 All ER 65)

Pathological grief (Alcock (1992) 1AC 310 at 365; Stocker L.J.)

Hysterical personality disorder (Brice v Brown (1984) 1 All ER 997)

P.T.S.D. (Alcock)

? Anxiety neurosis (Lord Bridge in McLaughlin at 431; Sir Thomas Bingham MR. dissenting in M v Newham LBC (1994) 2 WLR 554)

Need to prove recognised psychiatric illness constitutes a considerable hurdle which P has to surmount.

Lord Lloyd in Page stressed that the Court would as ever have to be vigilant to discern genuine shock resulting in "recognised psychiatric illness"

Surveys suggest only 20% of those who go through severely distressing events develop severe psychiatric disorders. (If this is correct again this is a significant limiting factor in such claims).

Evidence

Expert psychiatric opinion is vital. Ensure:

- (i) report asserts that psychiatric illness in secondary victim is shock induced
- (ii) if there are other predisposing factors (e.g. revealed in the medical records) that these are discounted
- (iii) that the trauma is considered such as to be likely to cause nervous shock in person of reasonable fortitude
- (iv) whether the expert believes P to be such and, if not, to explain the nature and extent of P's personal vulnerability
- (v) that P's psychiatric illness or illnesses (as he may suffer from more than one following trauma e.g. reactive depression, PTSD) are categorised in line with recognised diagnostic complications i.e.:

DSM - 1V (American diagnostic and statistical manual for mental disorders 1994, published by the American psychiatric association)

NB this states that it was developed for clinical, educational and research purposes and will not in itself suffice to establish the existence of a mental disorder for legal purposes.

ICD - 10 (published by the World Health Organisation 1993)

Look up the diagnostic factors rehearsed in the publication attributable to the ascribed psychiatric illness and check whether such are rehearsed in the psychiatrist's report. If not, get their absence explained.

- (vi) Ensure that extent of P's suffering and disability ascribable to the shock induced psychiatric illness is quantified and distinguish

from other factors which do not sound in damages e.g.:

Grief and the sorrow at being bereaved

Anxiety over welfare of injured children

Financial stress due to loss of family breadwinner

NB1. Lord Denning's 50 mile test in Hinz v Berry (1970) 2 QB 40 at 43 i.e. in order to draw the line between sorrow and grief etc and recoverable psychiatric illness, estimate how much P would have suffered if 50 miles away and compare with how much has suffered by being present at trauma.

NB2. There is much room for differences of opinion between medical experts as to gravity of P's illness and his prognosis
The precise effects and nature of the illness may vary widely from individual to individual even where the same diagnosis is involved

Thus battle of the experts is likely to be featured in such cases and a strong well reasoned report(s) is vital if first hurdle in advancing claim for secondary victim is surmounted.

It is also important in seeking to quantify the non-pecuniary loss element of any claim and determining where it comes in the range of between £500 to £45,000.

Note discrepancy of a maximum in the region of £45,000 as opposed to £125,000 for physical injury.

Law commission asks whether a different method or regime in assessing damages for psychiatric illness than that adopted for other types of personal injury could be devised.

Severity threshold

One way of avoiding floodgates is to require that the psychiatric illness has crossed a certain severity threshold e.g. is disabling for more than three months.

Commission against this on the basis that it is difficult enough for the Plaintiff to establish a physical illness as opposed to mere mental/emotional stress, and this is sufficient to avoid floodgates

2. NERVOUS SHOCK THEN INDUCES PSYCHIATRIC ILLNESS

Nervous shock =

"Sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind" (Alcock; Lord Atner 918B; Lord Oliver 926B)

"Sudden assault on the nervous system" (Alcock; Lord Keith 398)

NB Term nervous shock deprecated by some: Sir Thomas Bingham M.R. - misleading and inaccurate, with his echoes of frail victorian heroines, tends to disguise the very serious damage which is, in many cases, under discussion; Hoffman L.J. in Page preferred the term

"mental trauma".

NB the requirements of suddenness and violence rule out more gradual assault on the nervous system e.g. being worn down by caring for injured spouse or brain damaged child.

The commissioner asked whether the requirement that psychiatric illness be induced by sudden shock should be abandoned. It points out that claimable physical injury can be acquired over a period of time e.g. asbestosis, industrial deafness, dermatitis. Why should a mother not recover who suffers psychiatric illness as a result of caring for an injured son or watching him die.

It points out, however, that recovery for psychiatric illness resulting from subsequent contact with a primary victim would involve a large extension of the scope of liability and number of claims. Would not, for example, those entitled to claim under FAA also claim for psychiatric illness caused by bereavement. How would the Courts distinguish that bereavement from ordinary grief bereavement for which £7,500 is recoverable under FAA.

The commission comes to no conclusions

3 REASONABLE FORESEEABILITY

1. Can requirement of foreseeability be negated by establishing liability on a basis other than the negligence e.g. strict liability under statute
Section 14 Factories Act 1961: dangerous parts of machinery "shall" be securely fenced. If someone employed in the factory suffers psychiatric illness as a result of seeing a fellow employee's hand cut off by reason of a breach of this strict liability, should he not recover for breach of that section?
Section 7 Construction (Working Places) Regulations 1966 - say scaffold shall be provided
Section 11 Animals Act 1971
Section 1 (9) Occupiers Liability Act 1984
Section 45 (1) Consumer Protection Act 1987
Rylands v Fletcher

Commission asks whether anyone has experienced of attempts by Courts to impose special restrictions in

2. That chain of causation between D's negligence and P's psychiatric illness, considered ex post facto, was reasonably foreseeable by a reasonable man (A reasonably possible result even if unlikely: page: Ralph Gibson L J at 554).

2.2 In applying the reasonable foreseeability test, these assume to be a person of a reasonable fortitude (reasonably strong nerves: Alcock - Atner at 403). *Commission asked whether this requirement should persist. Is the distinction between reasonable fortitude and abnormal sensitivity too crude? Should be nowadays reasonably foreseen that there will be among the secondary victims abnormally sensitive persons?*

2.3 Once it is established that a person of reasonable fortitude might reasonably have suffered psychiatric illness, the normal eggshell personality rule applies, so that P can recover for the full extent of his illness, even if it goes beyond what would normally have been suffered by a robust individual.

The view favoured by the Association of Personal Injury Lawyers on Preliminary Consultation was that the reasonable forcibility test governing recovery in physical injury should also govern recovery for psychiatric illness, on the basis that such a test rests on found logic and will give Courts greater flexibility to do justice and deal with each individual case on its merits.

Some argue that this would lead to uncertainty, each case turning on its own facts, so that it would be difficult to discern the criteria to be applied. It is also feared that if foreseeability was the only test, there could be multiple secondary victims for a single event.

"In cases of shock ... if we go by foreseeability alone, we are in for a large increase in litigation - expensive for the Defendant if, as in physical injury cases, we virtually presume that the harm was forceable if it occurs as a result of unduly dangerous conduct". (Tony Weir (1993) CLJ 520).

ARTIFICIAL CONTROL MECHANISM OF PROXIMITY (FAMILIAL, SPATIAL, TEMPORAL)

House of Lords in Alcock decided proximity was relevant not simply to the determination of whether a particular P's psychiatric illness was foreseeable, but was an additional limitation designed to restrict the P's who could claim even though they satisfied the reasonable foreseeability test.

RELATIONSHIP TO PRIMARY VICTIM

The quality of the relationship has to be proved by P by reference to bonds of love and affection (the tie must be comparable to that normally existing between spouse, parent, child and primary victim (Alcock: Lord Atner at 403)).

Such love and affection will be rebuttable presumed in the cases of:

- Spouses
- Parents
- Children
- ?Fiances
- Lord Keith at 398

Such a relationship is not presumed for:

- Siblings (Lord Atner at 406: quality of brotherly love is well known to differ widely, from Kane and Abel to David and Jonathan)
- Grandparents
- Grandchildren
- ? Co-habitees
- ? Homosexual couples

This requirement as interpreted in Alcock is considered by many to be far too restrictive and negates many meritorious claims, including those of the Plaintiffs in Alcock e.g.

Brian Harrison : In West Stand of Stadium at Hillsborough knowing his two brothers in pens behind goal. Saw horrifying scene developing - realised people there being killed or injured. Stayed up all night waiting for news. At 11:00am informed his brother is dead.

How did he feel when he read the judgment of Lord Keith when he said that there was no evidence of a particularly close kind of love and affection between him and his brothers. How do brothers prove it anyhow? They are really demonstrative of their affection. If a brother suffers a recognised psychiatric illness as a result of seeing his sibling killed, is that itself not enough evidence of the closeness of their relationship? If Brian Harrison could not succeed, is there any point in pursuing secondary victim claims for anyone other than a spouse, parent, child or fiancée?

Why shouldn't a workman on a nearby vessel to the Piper Alpha platform, who sees areas of the rig being enveloped in balls of fire where he knows his workmates will be (workmates who are close friends), and sees flaming bodies falling into the sea and people falling from the structure of the rig to certain death, be compensated for psychiatric illness that results, if he comes within the requirements of reasonably foreseeability, time, place and perception through his own unaided senses?

Is the need to pull love and affection in any event an unacceptable burden for somebody already considerably traumatised psychiatrically by the tragedy, and who has called into question by cross-examination and possibly the activities of inquiry agents, the quality of his relationship with someone in respect of whom he has recently been bereaved.

To avoid this, the Commission point out that it would be a reasonably simple matter to draw up and enact by legislation a fixed list of qualifying relationships (which is in effect what Alcock did although restricted away) - e.g. those that come within the description of a Defendant under Section 1(3) of the FAA 1976. Clearly should the list be taken to be conclusive of a close relationship or be rebukable? Note that bereavement damages are awarded to a spouse or child irrespective of the actual quality of the relationship that existed between them.

Such legalisation would however still exclude friends, or leave them having to continue to prove their closeness of love and affection which, as presently defined, would be impossible for them.

Some argue that the requirement of love and affection should be abandoned altogether and that the requirements of spatial and temporal proximity are sufficient to avoid floodgates. Some jurisdictions (e.g. New South Wales) have established a halfway house i.e. by allowing all those in the sight and hearing of the accident to claim on the basis solely of the foreseeability test, and have added a fixed list of those who complain if they were not in the sight or hearing of the accident (irrespective of whether they were owed a duty of care).

BYSTANDERS

A realisation that the strict love and affection test may prevent meritorious claims led to certain judicial differ? in *Alcock* to suggest that in exceptional circumstances a bystander may be able to recover (although in recent years they never have).

This is the difficulty of definition - what is exceptional?

"Such horror as is likely to traumatise the pragmatic spectator" (Lord Oliver at 416).

"If the circumstances of a catastrophe occurring very close to him were particularly horrific" (Lord Keith at 397).

"If a reasonably strong nerved person would have been so shocked" (Lord Atner at 403) e.g. if a petrol tanker careered out of control into a school in session and burst into flames causing shock to a passer by.

NB: The Court of Appeal in *McFarlane v EE Caledonia Ltd* (I1994) 2 ALLER 1 would have none of this. The Piper Alpha catastrophe was about as horrific as could be imagined. The bystanders were very close in place and time. If ever a bystander was going to succeed, this was the case. The Plaintiff failed at the love and affection hurdle.

The Commission considers that there are basically three options in relation to bystanders:

1. *Rule them out in all circumstances.*
2. *Allow recovery where the accident is particularly horrific and the shock results from perception through Ps own unaided senses and closeness of time and space.*
3. *The same as 2., but no requirement that accident be particularly horrific.*

Commission points out that 2 and 3 could result in an enormous number of bystanders being able to claim at a tragedy at e.g. an air show or sporting event.

The Commission invite debate.

RESCUERS

Public policy requires that persons should be encouraged and not discouraged from rescue activities.

However, such persons will rarely satisfy the requirements of love and affection and will rarely be there when the horror happens and so will only be part of the aftermath.

The Court of Appeal in *McFarlane* insisted on considering the quality of the involvement of the rescuer, finding P's involvement insufficient, being on a vessel which approached near to the blazing rig in order to try and put a rescue bridge across and who assisted in moving blankets, helping to clear space for the reception of casualties and helping to walk in casualties.

If a rescuer such as the P in *McFarlane* comes within the range of foreseeable physical injury, is he able to recover as a primary victim under Page?

THE PROFESSIONAL RESCUER

The damages for physical injury are not reduced by reasonable fact that such fell within the ordinary risk of P's occupation, although such risks are reflected to some extent in his remuneration. Why should it be any different where the injury is a psychiatric one?

NB: P's accepted liability to 14 police officers who went into the pens at Hillsborough to pull out fans.

D accepted liability to professional firemen who sustained PTSD in the Kings Cross fire (*Hale v London Underground Ltd* (1993) PIQR 30).

Six South Yorkshire police officers who suffered PTSD after Hillsborough and had to retire on medical grounds sued for the effects of having to deal with the Hillsborough victims in the temporary mortuaries and with the relatives as well as having to be on the pitch amongst an often hostile crowd, trying to resuscitate the dead.

Waller J decided that the police were in fact in the position of a bystander of this horrific incident and were not entitled to claim for psychiatric damage. He went on to state that it was part of police officer's duty to deal with situations which might cause injury to ordinary people, being persons of extraordinary phlegm (11th April 1995). Queried why he had not simply announced a general rule that those in uniform (professional rescuers) could not recover for psychiatric illness or injuries by nervous shock.

The Chief Constable of South Yorkshire pointed out that police officers took an oath of allegiance, which they do of their own choice, and must expect hardship, danger, death and disaster.

The Commission believes that it would be unhelpful to lay down in legislation a definition of what amounts to a rescue. Asked whether a professional rescuer should be excluded on the base of valenti, or on the basis that they should be expected to cope and in fact to some extent are paid to cope. Do, however, professionals really consent to the giving up of their legal entitlement to recover damages for injury or illness where the danger is brought about by another's wrong, simply by enlisting in one of the professional rescue occupations?

If they were excluded, might this have the effect of discouraging professional rescuers from pushing themselves beyond their minimum legal obligations? Would it not be invidious if a professional rescuer could claim if he was off duty, but not if he was doing precisely the same thing during his working day?

One possible solution is, when applying foreseeability tests, to expect professional rescuers to be of extraordinary fortitude i.e. particularly thick skinned, and thus require the horror to be of such magnitude that it was foreseeable that even such hardened professionals might suffer psychiatric illness.

Of course, in reality, a professional rescuer will often have difficulty in establishing that a particular rescue was the cause of his psychiatric illness.

CLOSENESS IN TIME AND PLACE

Presence at the accident, horrific event, is obviously sufficient. This may be over in seconds, such as in a car accident or may continue for a number of hours, such as the raging fire in the Piper Alpha disaster. Presumably one is "present" whilst people are still being or are at the risk of being injured.

Immediate after-mark

i.e. " a direct perception of some of the events which go to make up the accident as an entire event, and this includes the (McCloughlin: Lord Wilbforce at 422 - it included the hospital to which the relatives were taken).

Immediate aftermath was narrowly construed in Alcock, so that seeing the broken and blue bodies in the temporary mortuary eight hours or so after the accident was considered insufficient.

Lord Jauncey also considered that as the visit to the mortuary had a very primary purpose to identify the victims rather than rescue and comfort, they could not in any event be within the immediate aftermath (at 424).

CASES SINCE ALCOCK

Taylor v Sommerset Health Authority (1993) PIQR P262

Deceased died of heart attack, final consequence of heart condition which D failed to diagnose. D, his wife, went to hospital within hour of death, told of death 20 minutes later. Then visited hospital mortuary to identify the body but also because she did not believe what she had been told.

Aul B J held fact did not fall within immediate aftermath but shock brought on by being told of death. Primary purpose of visiting mortuary was to settle this belief which went to the fact of the death as distinct from circumstances in which the death came about. Also body bore no signs which could conjure up the circumstances of the death.

He also rejected claim on the alternative ground that although shock induced, the shock was not a consequence of a violent and sudden event.

(One of the problems is that the judges are almost spoilt for choice as to grounds for rejecting a claim by a secondary victim for shock induced psychiatric illness. In order to justify a claim succeeding, a judge has to pick himself through the minefield of artificial and illogical requirements.

Taylorson v Shieldness Produce Limited 91994) PIQR P329

Clients informed of zero faction to sun soon after it occurred and went straight to hospital. Length of sun briefly as being rushed to ICU. Not allowed to see him until some time after treatment. In mother's case, 24 hours after accident.

Court of Appeal held that psychiatric illness due to parent's grief and not shock, but in any event immediate aftermath did not extend to witnessing deteriorating condition following post-accident treatment.

CASES SINCE ALCOCK

Siom v Hamstead Heath Authority (Unreported 27 May 1994 transcript number QBENI 93/0122/E)

Father stayed by his injured son's hospital bedside for 14 days watching him deteriorate and finally die. Suffered psychiatric illness which he alleged was caused by negligence of hospital staff who were looking after his son.

Court of Appeal struck out claim on basis that psychiatric illness must be shock induced where claim by secondary victim.

This finding was disapproved of by Sir Thomas Bingham NR in his dissenting judgment in:

M v Newham London Borough Council (1994) 2WLR 554

Ps, a child and her mother, allegedly suffered anxiety neurosis as a result of being separated for a year on the basis of a false psychiatric report that the child was being sexually abused by the mother's boyfriend.

He considered the claim should not be struck out even though the psychiatric illness was not the result of a sudden occurrence.

Alcock accepted Lord Wilby's requirement in *McCloskey*, that shock must come through sight or hearing of the event or its aftermath.

No liability where shock resulted from being told of accident or event by a third party.

Would P in Schneider v Eisovitch (1960) 2QB43 succeed today?

P rendered unconscious in car accident in which husband killed. Told of his death when regained consciousness in hospital. Paull J held entitled to recover from resulting psychiatric illness because reason of death was a consequence which flowed directly from the breach of duty towards P.

Rationale: unfair to compensate a P who is less seriously injured and so witnesses what happens to other victims, while depriving those whose injuries were so severe as to render them insensible.

Can it be argued, following Page, that she is a primary victim who had actually suffered physical injury in the accident, so that all sacral flow, even though, because of the nature of her physical injury, the psychiatric consequences did not result from what she perceived at the actual accident scene?

The law on Commission recommends that, on the basis of the requirement for love

and affection being retained, the requirements of closeness of time and place and perception by own senses can be abandoned, the argument being that the requirement of love and affection is sufficiently restrictive to avoid any floodgates, and it is essentially the closeness of the loving relationship which explains the nervous shock in secondary victims, so that it should be immaterial whether the shock was suffered at the scene or by learning of the tragedy from a third party.

PERCEPTION THROUGH A LIVE TV BROADCAST

Alcock decided that watching the Hillsborough scenes on TV could not be equated with being within the sight or hearing of a disaster or its aftermath.

NB: Lords Atner and Oliver considered that witnessing the actual injury to a primary victim on simultaneous TV could be equivalent or greater than actually seeing or hearing it at the scene.

Rationale:

1. The Broadcasting Code of Ethics prohibited transmission of scenes depicting suffering of recognisable individuals and thus be entitled to expect not to be observed and therefore not reasonably foreseeable that viewers would suffer shock as opposed to grave concern and worry.

Both Lords Atner and Oliver averted to the example given by Nolan L J in the Court of Appeal (somewhat pathetic in view of his present job) of a balloon going up and bursting into flames, shown on a simultaneous TV broadcast with a number of children in the basket beneath.

Thus in such situations as sufficiently close relationship to the primary victim may enable recovery. It seems that a radio broadcast even if simultaneous will not do as it would not accrete with being there, and the recorded TV broadcast would not be sufficiently immediate. (Could valenti be argued re the latter as the TV can always be turned off and usually there is a warning that the scenes may be distressing)

IS DAMAGE TO PROPERTY ENOUGH?

Alcock did not expressly rule out recovery for shock induced psychiatric illness suffered as a result of apprehended or actual harm to property. In Attia v British Gas PLC (1988) QB 304, the Court of Appeal refused to accept that there was any rule of policy excluding such liability.

However the criteria remain uncertain. Does the value or kind of property matter?

Does the property have to belong to P? If not, is there a need for a close relationship to the property e.g. that he lives in it?

It could be said to be an odd result if one could recover more easily the psychiatric illness caused by apprehended harm to your property than for harm to another person.

The Commission saw no good reason to deny all liability to secondary victims for psychiatric illness arising out of apprehended or actual damage to property, but considered that the requirements of the three elements of proximity should be retained and that psychiatric illness should be shock induced

Is reform legislation likely?

The present restricted and to some extent uncertain stage of the law will have the effect of limiting the number of claims actually brought, particularly as limits are put on Legal Aid budgets and contingency fee cases have to be considered

I suspect that it is because of this and an awareness that many people who should be compensated will be left without resource, that the Law Commission has prepared its consultation paper and does intend to effect reform by legislation, attempting to clarify the law and to extend the boundaries which at present restrict the number of people who have any hope of bringing a successful claim.

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