TIME TO CUT TIES: REFORMING THE SECONDARY VICTIM 'CONTROL MECHANISMS' IN PURE PSYCHIATRIC INJURY

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1. Introduction

Nearly twenty years ago, Jane Stapleton cut right to the heart of what is wrong with the law's approach to claims for compensation by people who witness events so shocking that they suffer a psychiatric illness as a result, when she said:

> the area of nervous shock is … the area where the silliest rules now exist and where criticism is almost universal.[2]

Two decades later, her words ring just as true, perhaps even more so. For over that period, the 'control mechanisms' on such claims ossified into rigid rules that now draw hard, but incoherent, lines between which claims will succeed and which will fail.

Her observation was part of a wider critique of the impacts of incrementalism on the development of the law. She argued that 'doctrinal developments have now produced areas of intolerable embarrassment with which incrementalism — in particular, incrementalism of the 'pre-judged pockets' form — is inadequate to deal'.[3] As she put it, in her inimitable style:

> P.R. Glazebrook has already eloquently attacked the 'affront to public decency' represented by awards of damages for [95] the upkeep of 'unwanted' children. But a class of claims which even more obviously offends this principle is that concerning nervous shock.[4]

Even Lord Oliver, she noted, lamented that the law in this area was not 'logically defensible'.[5] In Stapleton's view, it is 'no small irony' that this area of silly rules is also 'the best historical example of incremental development'.[6] We agree. And we agree that a solution to this might well be, as she has suggested, to wipe out the current rules and start afresh, potentially via a legislative approach.[7] In line with this general position, we explain here why the control mechanisms for secondary victim claims for negligently-induced psychiatric injury should be fundamentally reformed, and indeed potentially abolished altogether. Incrementalism, we suggest, has led the law away from the early approach to such claims, wherein the courts drew on the fundamental logic of reasonable foreseeability in determining who might claim for the harm caused by seeing the dreadful impact of another's negligence. We demonstrate how over time, and particularly in response to some highly unusual events, the courts have moved away from the general principles grounding the duty of care inquiry, and replaced them with what is essentially a line-drawing exercise undertaken without reference to defensible principle. Such an approach is problematic not only because it is inherently

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[2] Jane Stapleton, "In Restraint of Tort" in P.B.H. Birks (ed.), *The Frontiers of Liability (Volume 2)* (Oxford: Oxford University Press, 1994) 95.

[3] ibid 94.

[4] ibid 94–95.

[5] *Alcock and Others v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, 418 (Lord Oliver).

[6] Stapleton (n 2) 95.

[7] We have made the argument for starting afresh elsewhere: I Goold and C Kelly, 'Time to Start *De Novo*: The *Paul, Purchase and Polmear* litigation and the temporal gap problem in secondary victim claims for psychiatric injury' (2023) 39(1) *Journal of Professional Negligence* 24.

indefensible, but also because the law in this area has consequently lost its ability to respond to new challenges. This has occurred precisely because the option of drawing on the broader principle of reasonably foreseeability has been effectively closed off by the rigid 'control mechanisms' approach. In short, incrementalism in this area represents a series of retrograde steps away from the broad, open approach of *Hambrook v Stokes* (1925),[8] and towards the blunt inflexibility of *Alcock v Chief Constable of South Yorkshire Police* (1992)[9] and *White v Chief Constable of South Yorkshire* (1999)[10] that now binds the courts so unhelpfully.

We start, then, by returning to the very beginning, outlining the origins of the law on negligently induced psychiatric injuries. We trace this back to *Dulieu v White* (1901)[11] and *Hambrook* and offer a brief overview of the original thinking in the English (Scottish and Irish) courts on secondary victim claims particularly. From here, we explain the current position, and then detail the problematic implications of that position generally, before critically evaluating each control mechanism. As part of this evaluation, we tease out early thinking on each mechanism, and draw on a detailed examination of many unreported decisions from the early period. These offer insights into the general views among the various courts at the time as to how such witnesses to tragedy ought to be treated. We conclude with our suggestions for the direction in which the law should move, namely a rejection of the rigid control mechanisms and return to the fundamental principles of negligence. Such an approach would remove the overly simplistic distinction that has grown up between physical and psychological harms, and bring the law on psychiatric injuries more in-line with the rest of negligence. It would also afford courts greater discretion and flexibility, allowing them to respond to situations of the kind they have faced in the 25 years post-*Alcock* with compassion and rationality, rather than binding them to controls that produce perverse results and considerable injustice.

2. Defining Secondary Victims and Controlling Their Claims

Until the early 20th century, the English courts had refused to permit recovery for nervous shock occasioned without physical impact.[12] Psychological injury was accepted as a real injury, but was seen as in some way connected to a physical injury. Psychological injury arising without any physical impact was recognised in *Wilkinson v Downton* in 1897,[13] but it was not until 1901, following the decision in *Dulieu* that a claimant who had been shocked by fear for their personal safety due the negligence of another and where there was no physical injury could make a successful claim for damages. The Irish courts had made this step some decades earlier, in *Byrne v Great Southern and Western Railway Co*,[14] and *Bell v Great Northern Railway Co of Ireland*,[15] and these decisions were influential on the English courts.[16]

Nearly a quarter of a century later, the Court of Appeal extended the law in *Hambrook* to allow compensation for nervous shock occasioned by fear for the safety of another if the claimant perceived the shocking event with their own eyes or ears. This position was applied in *Owens v Liverpool Corporation* (1939)[17] and in a number of unreported cases[18] but was then restricted in *Bourhill v*

[8] [1925] 1 KB 141.
[9] [1992] 1 AC 310
[10] [1999] 2 AC 455.
[11] [1901] 2 KB 669.
[12] *Victorian Railways Commissioners v Coultas* (1888) 13 App. Cas. 222. For a detailed discussion of the early cases and the complex contemporary understandings of the relationship between physical and psychological injury in the early to mid twentieth century see Imogen Goold and Catherine Kelly, 'Who's Afraid of Imaginary Claims? Common Misunderstandings of the Origin of the Action for Pure Psychiatric Injury in Negligence 1888–1943' (2022) *Law Quarterly Review* 58.
[13] [1897] 2 QB 57.
[14] Unreported 1884 Court of Appeal (Ireland).
[15] (1890) 26 LR Ir 428.
[16] The Scottish courts had also accepted that a psychological injury could arise without a physical injury: *Pugh v London, Brighton and South Coast Railway Co* [1896] 2 QB 248; *Wallace v Kennedy* (1908) 16 SLT 485.
[17] [1939] 1 KB 394.
[18] *Henderson v Middlesbrough Corporation*, unreported, (1928) 72 *Solicitors' Journal* 229.

Young (1943) when the House of Lords refused recovery for a bystander who had merely heard the sound of an accident nearby.[19]

Over the course of the next forty years, the courts continued to allow recovery for claimants who suffered injury due to fear for others, and over time they developed positions on how the principles of reasonable foreseeability and proximity would apply. We explore this development in later sections, but for now it suffices to say that by the early 1980s, the more open and flexible approach of the early courts had been replaced by what would come to be known as the 'control mechanisms' for limiting liability to secondary victims. While they had been emerging for some time, they were most clearly crystallised into 'controls' or 'elements' in the first case dealing with the claims of psychiatric injury brought by the families of those injured and killed in the Hillsborough disaster — *Alcock*. The Law Commission reviewed the law on psychiatric injuries in the wake of the decision, and in 1998 described the controls as unnecessarily tight, producing 'arbitrary results'.[20] Despite this, the House of Lords confirmed the 'control mechanism' approach in the second Hillsborough case, *White*, a short time later.

Lord Oliver explained the controls in *Alcock* as follows:

> [F]irst, that in each case there was a *marital or parental relationship between the plaintiff and the primary victim*; secondly, that the injury for which damages were claimed *arose from the sudden and unexpected shock* to the plaintiff's nervous system; thirdly, that the plaintiff in each case was either personally present at the scene of the accident or was in the *more or less immediate vicinity and witnessed the aftermath shortly afterwards*; and, fourthly, that the injury suffered arose from *witnessing the death of, extreme danger to, or injury and discomfort suffered by the primary victim*. Lastly, in each case there was not only an element of physical proximity to the event but *a close temporal connection between the event and the plaintiff's perception* of it combined with a close relationship of affection between the plaintiff and the primary victim". (our emphasis)[21]

It is also a requirement that the secondary victim's injury is a 'recognised psychiatric illness'. These requirements are necessarily interrelated, and perhaps the most helpful way to break them down is the structure proposed by the Law Commission in its 1998 report on *Liability for Psychiatric Illness*.[22] Explaining that they form part of the proximity inquiry, it separated them into three main elements:

1. The claimant's tie of love and affection with the immediate victim

2. The claimant's closeness in time and space to the incident or its aftermath; and

3. How the claimant perceived the event or its aftermath.

As Stapleton has pointed out, 'a popular but obvious criticism' of these controls is that they do not represent 'sine-qua-non factors to the causation of actionable damage'.[23] People can perfectly foreseeably come to suffer psychiatric illnesses or pathological grief in situations where there are no relational ties, or where they are not physically present at the event, or slowly over time. Indeed, the cases in which the courts have struggled with these control mechanisms offer excellent examples of exactly such factual scenarios.

For example, *W v Essex County Council* (2001) concerned a couple whose children were sexually abused by a boy to whom they had given foster care after the local authority and social worker negligently failed to warn them of his past history of sexually abusive behaviour.[24] The parents felt

[19] [1943] AC 92.
[20] Law Commission, *Liability for Psychiatric Illness* (Law Com No 249, 1998) iii.
[21] *Alcock* (n 5) 411F–H (Lord Oliver), where Lord Oliver described the common features of the reported cases at that time. Sir Geoffrey Vos' emphasis included.
[22] Law Commission (n 24) Chapter 2.
[23] Stapleton (n 2) 95.
[24] [2001] 2 AC 592.

considerable guilt as a result of the role they inadvertently played in exposing their children to this risk, and as a consequence of this both suffered psychiatric injuries. Their situation fell well outside the bounds laid down by the control mechanisms, as they neither witnessed the event(s), nor their 'immediate' aftermath. But the harm to the parents was certainly foreseeable, particularly as the defendants *knew* that the parents did not want to expose their children to such a risk, and were aware of the boy's history. The House of Lords found for the parents by taking a broad view of the concept of 'aftermath', but it had to do so *in spite of* the recognised stringency of the control mechanisms. In doing so, the court placed emphasis on the foreseeability of the risk of harm.[25]

In other contexts, the courts have had to resort to arguably quite problematic reasoning to avoid the otherwise unjust impact of the control mechanisms. In the case of *Yearworth v North Bristol NHS Trust* the claimants were all men who had stored their semen to preserve their fertility before undergoing treatment for cancer. [26] All suffered various forms of psychiatric harm upon learning that their semen had been negligently destroyed by the Trust, as this left them potentially unable to conceive genetically related children. Despite having clearly suffered a psychiatric injury as a result of the Trust's negligence, the control mechanisms created insurmountable barriers to their claims. This, coupled with the fact that the Court of Appeal refused to regard the damage to their semen as 'personal injury', left them with no clear avenue for redress. Only because the court was prepared to take a broad approach to whether the semen was a form of property (and then, further, an rather open-minded attitude to the principles of recovery for a breach of bailment) were they able to obtain a remedy. Such is the stringency of the control mechanisms, then, that the court had to stretch another area of law to achieve what it considered a just outcome. In other situations, where the court has not been willing to 'stretch' principles, the stringest control mechanisms have denied relief to claimants who have clearly suffered harm as a result of the defendant's negligence. This was the case in *AB and others v Leeds Teaching Hospital NHS Trust* (2004), in which a property-based argument in support of the claims of parents distressed at the mishandling of their children's remains failed.[27]

Even in cases that present more straightforward negligence claims, the control mechanisms have acted as an impenetrable barrier. The cases that turned on shock and aftermath, such as *Sion v Hampstead Health Authority* (1994)[28] and *Liverpool Women's Hospital NHS Foundation Trust v Ronayne* (2015),[29] are, in our view, two good examples where the defendant's negligent actions caused entirely foreseeable harm to the claimants but no remedy could be given. In both cases, the claimants witnessed harm to their close relation in hospital resulting from medical negligence, but the courts considered the sight to be not 'a shock' or temporally proximate enough to the negligence as required to meet the criteria. The logic in both seems to be that there is a point of shortly after medical negligence occurs where one should almost expect to see horrible things and be sufficiently prepared to do so.

There has been some recognition in the courts that the controls should not be rigidly applied, such as Lord Scarman's assertion in *McLoughlin* v *O'Brian* that the 'elements' he outlined should be seen only as factors that might point to when an injury was foreseeable,[30] and Lord Slynn's invocation to the same approach in *W v Essex* many years later.[31] But the usual approach of the courts reflected in the cases cited above demonstrates the very reason *why* they felt the need to emphasise this — because the courts do, in fact, apply them rigidly, and they do because they have been repeatedly framed in a rigid manner in cases that have come before. This makes it exceptionally difficult for any court to now take an open-minded or inclusive approach to cases that do not fit in these controls and certain narrow categories. This is precisely what Lord Slynn was concerned about in *W v Essex* when

[25] *W v Essex* (n 24) 598F.
[26] *Jonathan Yearworth and Others v North Bristol NHS Trust* [2009] EWCA Civ 37.
[27] [2004] EWHC 644 (QB).
[28] [1994] 5 Med LR 170.
[29] [2015] EWCA Civ 586.
[30] [1983] 1 AC 410, 431 (Lord Scarman). This is not, of course, to suggest that Lord Wilberforce considered foreseeability as in and of itself sufficient to ground a duty.
[31] *W v Essex* (n 24) 599–601 (Lord Slynn).

End of Excerpt

[1] https://academic.oup.com/pages/authoring/books/author-reuse-and-self-archiving