

FIRST DRAFT

Negligent infliction of emotional distress: a view of the proposed Restatement provisions from England

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Why an English perspective is perhaps the first question raised by the title of this paper? It can be answered quickly. The Reporter's Note to the proposed provisions of the Restatement Third which are under consideration here refers to the similarity in structure between the law in Great Britain and the proposals in the Restatement. The current English state of affairs² may tell us something about the Restatement proposals³, although institutional differences – one obvious example is the difference in the use of juries - may mean rules work better in one jurisdiction than another;⁴ indeed, it has been argued that the prevalence of jury trial and the system of funding lawyers in the US create a need for clearer rules than in the UK system.⁵

I shall emphasise English law but as Great Britain comprises Scotland and England⁶, it is only fair to acknowledge the Scottish Law Commission's paper on this topic⁷.

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² For books dealing with the subject of recovery for psychiatric illness, see Mullany and Handford, *Tort Liability for Psychiatric Injury* 2nd edn., 2006 by P. Handford (hereafter *Mullany and Handford*) and H. Teff, *Causing Psychiatric and Emotional Harm. Reshaping the Boundaries of Legal Liability* (2008) (hereafter *Teff*).

³ Jones, p.113 in *Emerging Issues in Tort Law* edited by Neyers, Chamberlain and Pitel (2007) argues that '[d]espite their supposedly 'pragmatic' basis, they fail to provide a "bright line" rule by which practitioners can give legal advice to their client'. Given the concern for bright lines expressed by the Reporter, this may not be encouraging. The proposals are, however, as we shall see, not identical.

⁴ On comparative tort reasoning, see Stapleton, *Journal of Tort Law* Vol 1 [2007] Iss 3, Art 6 and note the comments of Lord Steyn in *McFarlane v Tayside Health Board* [2000] 2 AC 59 at 81.

⁵ See Robertson, p. 285 in *Markesinis and Deakin's Tort Law* 6th edn., 2007 by Deakin, Johnston and Markesinis.

⁶ England for this purpose includes Wales. The United Kingdom, on the other hand, means England (including Wales), Scotland and Northern Ireland.

⁷ *Damages for Psychiatric Injury*, Scot Law Com. No. 196, 2004, noted by D. Nolan, (2005) 68 MLR 983.

Some years before the Scottish Commission reported, the subject of recovery for psychiatric illness had also been considered by the Law Commission in England⁸, but there was no legislative action in response. More recently, the Department of Constitutional Affairs produced a Consultation Paper in 2007 on the law of damages⁹, and this paper did contain some discussion of recovery for psychiatric illness¹⁰. The Government's stated preference was for any reform to occur through case law, although it should be noted that English judges have on occasions expressed a contrary wish i.e. favouring legislative reform¹¹. Academic writings expressing dissatisfaction with the state of English law have not gone unnoticed in the courts. In *White v Chief Constable of South Yorkshire Police*¹² reference was made in the House of Lords to the differing views of Stapleton¹³ (arguing for abolition of liability for negligently inflicted psychiatric illness) and those in *Mullany and Handford*¹⁴ (arguing for liability based on reasonable foreseeability), but the House took the view that it could not alter the law so radically in either direction

A. *General approach to the area*

The choice referred to in the Reporter's Memorandum – that between specific rules and more flexible provisions - is reminiscent of the debate that has occurred at a more general level in England as to the role of principle in the tort of negligence. A more pragmatic, instrumental approach is now the order of the day.¹⁵ More than 25 years

⁸ *Liability for Psychiatric Illness*, Law Com No 249, 1998.

⁹ *The Law of Damages* CP 9/07

¹⁰ In chap. 3 and Annex B.

¹¹ See Lord Oliver in *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310.

¹² [1999] 2 AC 455.

¹³ In chap. 7 of vol 2 of *The Frontiers of Liability*, edited by Birks.

¹⁴ This reference was to the first edition of *Mullany and Handford*, published in 1993. Note also Jones, *op cit*, chap.5; Teff, chap. 6.

¹⁵ *Caparo Industries plc v Dickman* [1990] 2 AC 605 and the rejection of the approach to the duty of care laid down by Lord Wilberforce in *Anns v Merton London Borough Council* [1977] AC 728. Cf. the approach in *Henderson v Merrett Syndicates Ltd* [1995] AC 145.

ago, at a time when principle held greater sway, it was only by a bare majority that English law, in *McLoughlin v O'Brian*¹⁶, rejected liability solely on a basis of reasonable foreseeability in the particular area being considered in this paper. This rejection was confirmed in *Alcock v Chief Constable of South Yorkshire Police*¹⁷; indeed, Lord Hoffmann stated, in an oft-quoted remark in his judgment in *White*¹⁸, that 'in this area of the law, the search for principle was called off in *Alcock*...'. Nevertheless, the question of recovery for negligently inflicted psychiatric illness is a duty question in English law, and, outside the area governed by the ruling in *Page v Smith* (i. e. where immediate personal injury to the claimant is reasonably foreseeable), reasonable foreseeability of psychiatric illness will be required. Specific reference to such reasonable foreseeability is not to be found in the Restatement proposals.¹⁹

B The Restatement proposals

§46 provides as follows:

Negligent Conduct Directly Inflicting Emotional Disturbance on Another

An actor whose negligent conduct causes serious emotional disturbance to another is subject to liability to the other if the conduct:

(a) places the other in immediate danger of bodily harm and the emotional disturbance results from the danger; or

(b) occurs in the course of specified categories of activities, undertakings, or

¹⁶ [1983] 1 AC 410. At the time this case was decided, the approach in *Anns* (see n.15 above) was still accepted.

¹⁷ See n.11 above

¹⁸ [1999] 2 AC at p. 511

¹⁹ On foresight, duty and the Restatement, see Cardi and Green, (2008) 82 S. Calif. Law Rev. 671.

relationships in which negligent conduct is especially likely to cause serious emotional disturbance.

Points of particular interest

i) ‘*serious emotional disturbance*’. This term is not defined in the Restatement proposals, but it is important to realise that it is not within the definition of ‘physical harm’ in §4 of the Restatement²⁰. English law has traditionally required emotional disturbance to constitute a ‘recognisable psychiatric illness’, before it is actionable in the absence of physical harm. It would seem that not every ‘recognisable psychiatric illness’ would qualify as a *serious* emotional disturbance²¹, but the opposite would also appear to be true. On balance, it may well be that the US rule is wider: the Comment to the proposed §46 of the Restatement acknowledges ‘a modest difference’, the inference here being that the English position is more restrictive. ‘Recognisable’ means recognisable by the medical profession and so the primary decision maker would seem to be different in the two alternatives (i.e. the medical profession in the English doctrine, but the judge and jury, guided by medical evidence, on an apparently overall wider concept on the Restatement proposal).

Lord Bridge in *McLoughlin v O’Brian*²² referred to the English position as follows:

²⁰ §4 defines physical harm as ‘the physical impairment of the human body or of real property or tangible personal property. The physical impairment of the human body includes physical injury, illness, disease or death’. For a recent decision in England where the House of Lords decided that pleural plaques did not qualify as physical injury (and hence allow recovery of consequent mental distress), see *Rothwell v Chemical and Insulating Co Ltd* [2007] UKHL 39; [2008] 1 AC 281. Since three High Court decisions in the 1980s, insurers had been settling cases on the basis that this injury was actionable : see Lord Hoffmann’s judgment at [3] – [6]. For legislative proposals to reverse the effect of *Rothwell*, see the Damages (Asbestos-related Conditions) Bill 2009 in the Scottish Parliament and the Damages (Asbestos-related Conditions) Bill 2009 in the UK Parliament. On what counts as personal injury, see further *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37.

²¹ *Teff*, p. 172

²² [1983] 1 AC at p. 431

‘The common law gives no damages for the emotional distress which any normal person experiences when someone he loves is killed or injured. Anxiety and depression are normal human emotions. Yet an anxiety neurosis or a reactive depression may be recognisable psychiatric illnesses, with or without psychosomatic symptoms. So, the first hurdle which a plaintiff claiming damages of the kind in question must surmount is to establish that he is suffering, not merely grief, distress or any other normal emotion, but a positive psychiatric illness’²³

Referring to this distinction, Lord Hoffmann stated in *White*:²⁴

‘Current medical opinion suggests that this may be a somewhat arbitrary distinction; the limits of normal reaction to stressful events are wide and debatable, while feelings of terror and grief may have as devastating an effect upon people’s lives as the ‘pain and suffering’ consequent upon physical injury for which damages are regularly awarded.’

However, as the Restatement specifically acknowledges that arbitrary lines are being drawn in this area, the criticism may be thought not to have the same force in this context; furthermore, it could be argued²⁵ that the English threshold requirement may

²³ This passage was quoted recently by Stanley Burnton LJ in *Mazhar Hussain v The Chief Constable of West Mercia Constabulary* [2002] EWCA Civ 1025 (albeit in the context of a different tort and not in a negligence suit) where his Lordship thought that the requirement of a recognised psychiatric illness in negligence was also necessary for distress to constitute ‘material damage’ in the tort of misfeasance in public office. Compare, however, the judgment of Maurice Kay LJ who at [20] interpreted this passage from Lord Bridge’s judgment as intended to exclude ‘“normal human emotions”, not significantly abnormal manifestations of non-physical sequelae’. Maurice Kay LJ did not wish to exclude a claim in the tort of misfeasance in public office by a claimant who has the ‘robustness’ to avert recognised psychiatric illness, but who nevertheless foreseeably suffers a grievous non-physical reaction as a consequence of the misfeasance’. The third member of the Court of Appeal (the Master of the Rolls) expressed no final view on the matter as the facts did not so require. The claimant in the position envisaged by Maurice Kay LJ would be excluded in a negligence suit under English law but not under the Restatement.

²⁴ [1999] 2 AC at p. 501. Cf Teff [1998] CLJ 91 at p.103; (1998) 61 MLR 849 at p.851.

²⁵ See *Tame v New South Wales* (2002) 211 CLR 317 at [373] – [375], although the comparison here seems to be between emotional distress and a recognizable psychiatric illness, whereas the Restatement proposal involves *serious* emotional disturbance. Compare the views expressed by Robertson (1994) 57 MLR 654 at pp. 660-662 and Partlett (1997) 45 Am. J. Comp. L. 171 at pp. 178-187, but these views are (at least in part) focusing on and directed against a proposal whereby a recognizable psychiatric illness and reasonable foresight would be the only criteria for liability.

better satisfy the need for ‘bright-lines’ in this area, a need which is accepted by the Restatement’s Reporter. Perhaps such a change would go beyond the remit of a Restatement described recently as to ‘synthesise, rationalize and on occasion, improve on what might otherwise be nose counting among all relevant jurisdictions’²⁶

ii) *immediate danger of bodily harm*

This strikes a chord, albeit a currently controversial one, with the English lawyer. In *Page v Smith*²⁷ the claimant was driving his car at approximately 30mph when a collision occurred with another car. The claimant was not physically hurt, although it was reasonably foreseeable that there could have been some personal injury. In the House of Lords’ view, this was sufficient for liability for psychiatric illness resulting from the crash: psychiatric illness did not have to be reasonably foreseeable, just as it would not be required in this situation under the Restatement proposals²⁸. A later ruling has established that English law is close to the Restatement proposal. In *Rothwell v Chemical and Insulating Co Ltd*²⁹ the claimants had been subjected to exposure to asbestos and had developed pleural plaques. The House of Lords held that this did not qualify as physical injury. However, the presence of pleural plaques did indicate exposure to asbestos and the risk of illness in the future, and in one of the cases before the House the claimant had suffered from a psychiatric illness as a consequence of being so informed after an x-ray many years after the exposure. The claimant had been negligently exposed to the risk of physical illness by the defendant and consequently endeavoured to avail himself of the *Page v Smith* doctrine. This

²⁶ Cardi and Green, *op cit*, p.726

²⁷ [1996] AC 155

²⁸ There is a question which might perhaps be raised here about the requirement in the Restatement of the emotional disturbance resulting from the danger. This presumably involves both factual causation and proximate cause: might some element of foreseeability arise at the stage of proximate cause?

²⁹ See n. 20 above. Cf. *Simmons v British Steel plc* [2004] UKHL 20; [2004] ICR 585, though note the comment made by Lord Mance in *Rothwell* about the artificiality of the distinction.

was, however, unsuccessful as that case was distinguished on two linked grounds: these were that any future illness would not be the *immediate* result of the exposure and also that it came about as the result of information received after the x-ray. However, the status of the ruling in *Page* - that it was enough for a psychiatric illness claim that personal injuries were reasonably foreseeable – received further discussion in *Rothwell*. Although Lord Hoffmann did not think the House should depart from it when confined to a foreseeable event which has caused physical harm, Lords Hope and Mance raised doubts about the decision. The former referred to the argument that psychiatric injury itself should have to be reasonably foreseeable as ‘attractive’, but did not need to decide the matter. Lord Mance, seeing force in some of the criticisms that had been raised, left open its correctness for decision on another occasion; indeed, his Lordship maintained this position, along with Lord Neuberger, in the later case of *Corr v IBC Vehicles Ltd.*³⁰ Lord Walker, on the other hand, referred to it as providing a ‘much simpler’ test for judges in this area (although it would seem that Lord Mance would not agree³¹). There is, therefore, a chance that English law may change and require reasonable foresight of psychiatric illness even where personal injury is threatened. Nevertheless, Lord Walker’s point in *Corr* in favour of the *Page* ruling, if accepted, might have greater weight in the US, where bright-lines are sought.

iii) the ‘relationship’ category in §46(b)

It is envisaged that the ‘telegraph’ and ‘corpse’ cases³² would be accommodated by this provision. However, this category is not restricted to those two types of case and

³⁰ [2008] UKHL 13; [2008] 1 AC 884;

³¹ *Ibid.*, [104].

³² See Dobbs, *The Law of Torts* (2000), pp. 836-837. For a case on corpses, see *Owens v Liverpool Corporation* [1939] 1 KB 394, but note the comments of Lord Oliver in *Alcock* [1992] 1 AC at p.412

the interesting question is what other relationships will be encompassed. There is clearly the possibility of growth.

A similar ‘relationship’ idea can be found in the English case law, although without a specific restriction to situations where emotional stress is ‘especially likely’. In fact, one could argue that all cases that do not involve the claimant suffering psychiatric illness solely from witnessing injury caused negligently to another (cases which are subject to restrictive criteria³³) fall under this heading and turn on the particular relationship between the claimant and the defendant³⁴. Thus, for example, a duty of care encompassing psychiatric illness may be owed by a solicitor to a client³⁵ and by a prison officer to a prisoner³⁶. One important area which fits here and which has blossomed in recent times in England involves cases by employees against their employer alleging negligence in relation to stress at work³⁷. The prevalence of workmen compensation schemes in the US, however, renders this an unlikely point of comparison within the tort of negligence..³⁸

B. §47 of the Restatement provides as follows:

Negligent Infliction of Emotional Disturbance Resulting from Bodily Harm to a Third Person

An actor who negligently causes serious bodily injury to a third person is subject to liability for serious emotional disturbance thereby caused to a

³³ See below p. xxx.

³⁴ See *Butchart v Home Office* [2006] 1 WLR 1155; Hepple and Matthews, *op cit*, p.xxx

³⁵ *McLoughlin v Jones* [2002] 1 QB 1312

³⁶ *Butchart*, n.34 above. See further *Leach v Chief Constable of Gloucestershire Constabulary* [1999] 1 WLR 1421; *N v Agrawal* [1999] PNL 939; *In re Organ Retention Group Litigation* [2005] QB 506; Handford (2007) 27 Legal Studies 26; Hepple and Matthews, *op cit*, p.xxx

³⁷ See for example, *Hatton v Sutherland* [2002] 2 All ER 1 and on appeal *sub nom Barber v Somerset County Council* [2004] UKHL 13, though note *Dickins v O2 Plc* [2008] EWCA Civ 1144 at [46]

³⁸ One US case involving an employee is mentioned in the Reporter’s Note, but it is a case of intentional emotional distress.

person who:

(a) perceives the event contemporaneously, and

(b) is a close family member of the person suffering the bodily injury

The case that will leap to the English lawyer's mind at this point is *Alcock v Chief Constable of South Yorkshire Police*³⁹ which arose out of the tragedy at the Hillsborough football stadium. The case laid down various restrictions on recovery by those who suffered psychiatric illness as a result of what they had seen or heard of the events. In outline, these were a requirement of a 'sudden shock', a loving relationship between the claimant and the victim, presence at the scene or the immediate aftermath and awareness of the events through the claimant's 'own unaided senses'.

Particular points of interest

i) serious bodily injury

This seems to be a *requirement* i.e. if there is in fact no such injury, then the claim will not be allowed even if the claimant reasonably believed that the injury had occurred. The Reporter's Note refers to the 'skimpy' US law on balance taking this line. This seems to produce unfair distinctions between claimants, and an unnecessary one as the floodgates argument is not really an issue and the 'bright-line' would not be greatly dimmed if such cases were included. English law probably takes a more sympathetic line⁴⁰

ii) third person

a) The Restatement would exclude a case where the person in peril is in such a

³⁹ See n. 11 above..

⁴⁰ See *Alcock*[1992] 1 AC at p.412 *per* Lord Oliver

position as a result of their own negligence i.e. there is no third party involved⁴¹. At the moment English law would concur. In *Alcock* Lord Oliver inclined to this opinion⁴² and the matter was so decided by the High Court in *Greatorex v Greatorex*⁴³. In this case Cazalet J accepted that there was no binding authority on the point, but took the view that the weight of Commonwealth authority was against a duty of care being owed by a person who negligently injured himself to someone who suffered nervous shock from witnessing the event (though see *Mullany and Handford*, chap. 17). His Lordship went on to decide that, on policy grounds, no duty of care was owed, even if the claimant fulfilled the *Alcock* criteria for secondary victims to recover. One factor was the restriction on a person's freedom of action that any such duty would impose; however, of more weight for the judge, was the fact that the *Alcock* criteria meant that a claimant would normally be a member of the same family as the defendant, and that claims in such a situation with the potential for claims of contributory negligence could harm family relations. In Cazalet J's opinion, the policy arguments outweighed the unfairness to a joint tortfeasor to which Lord Oliver had pointed in *Alcock*. (This is the point that in a jurisdiction such as England where there is joint and several liability, another person who is jointly at fault for putting the victim in peril will pay more than his or her share of the responsibility.) Any solution was thought by the judge to require legislative intervention⁴⁴. Despite this view, there must be a chance that English courts will reverse this ruling and the developments in other jurisdictions referred to in *Mullany and Handford* might assist this process⁴⁵. In

⁴¹ There has not been a great deal of debate of this position in the US case law: see *Mullany and Handford*, [17.260] – [17.230].

⁴² [1992] 1 AC at p. 418.

⁴³ [2000] 1 WLR 1970: see generally Markesinis [2002] CLJ 386

⁴⁴ Compare s.1(7) of the Congenital Disabilities (Civil Liability) Act 1976.

⁴⁵ The (English) Law Commission, *op cit.*, paras 5.34–5.43 had been in favour of allowing the possibility of recovery when the defendant has injured himself, but, recognising the restriction this would place on self-determination, also recommended that the court should be able to deny a duty of

the US, the case for covering these two-party situations is not as strong (though still, it is suggested, a strong one) as there is less likely to be a joint and several liability regime in operation. It should also be acknowledged that insofar as any inter-familial immunities still exist (they are not in general found in English law⁴⁶), those jurisdictions adopting them might be attracted by the reasoning in *Greatorex*.

b) property damage cases. Serious emotional disturbance suffered as a result of witnessing damage to property (for example, a pet) would not be caught by the Restatement: English law may be more generous. In *Attia v British Gas plc*⁴⁷ the defendants admitted that their employees had negligently caused a fire at the claimant's house. The claimant alleged that she had suffered nervous shock by virtue of seeing her home and its contents on fire, but did not allege that she feared for anyone else's safety. The case raised as a preliminary issue whether such a claim could, as a matter of law, successfully be made, and the Court of Appeal thought it could. However, the judgments of both Dillon LJ and Woolf LJ laid stress on the fact that a duty of care was already owed to the claimant not to start a fire. Bingham LJ, agreed that the claim should not be struck out as a matter of law, but seemed less influenced by a duty of care already being owed to the claimant. It might at first sight seem that a satisfactory solution could be found by adapting the Restatement criteria, for example, requiring a legal interest in the property rather than a close family link and requiring serious injury to property rather than serious bodily injury. However,

care where it was not just and reasonable to impose one because of the defendant's exercise of a choice to put himself or herself in danger (for example, participating in a dangerous sport)

⁴⁶ Though see the position of a mother under the Congenital Disabilities (Civil Liability) Act 1976. On the other hand, Cazalet J did acknowledge that in cases of physical damage family members can sue each other in England

⁴⁷ [1988] QB 304. See also *Owens v Liverpool Corporation*, n 32 above, but note the comments of Lord Oliver in *Alcock* [1992] 1 AC at p.412. Consider further the very recent case of *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37 where the decision was based on bailment: it can perhaps, therefore, best be seen as a 'relationship' case, especially as it involved information being communicated after the event.

the problem would appear to be that, in the absence of any reasonable foresight test - which would be thought to offend the 'bright-line' requirement - this would still be too wide (i.e. what sort of property?) and it would be necessary to introduce some over-complicated definition.

ii) *serious emotional disturbance*. The same comments apply here as above in relation to §46.

iii) *perceives contemporaneously*. One issue here is the extent to which perception via live television coverage will qualify⁴⁸. Another issue vis-a vis England is the extension in English law to the concept of the 'immediate aftermath'. This was, for example, the situation in *McLoughlin v O'Brian*⁴⁹ where the successful claimant was not at the scene of the accident but arrived at the hospital two hours later. This can cause problems and is potentially capable of including a much longer period than that in *McLoughlin*. In *W v Essex County Council*⁵⁰ the psychiatric illness alleged was said to have come about on parents learning about the sexual abuse of their children by a child who had been fostered in their home: this information was obtained from their children four weeks after the period during which the abuse had occurred. Such a situation was not regarded by the House of Lords as necessarily going outside the 'immediate aftermath' concept.⁵¹ The English experience might suggest that there is too much elasticity in the 'aftermath' doctrine for it to be a satisfactory 'bright-line' rule; indeed, in *Alcock*⁵² Lord Jauncey ventured the view that any attempt at a comprehensive definition of the phrase 'the immediate aftermath' would be fruitless.

⁴⁸ This was left open in *Alcock*.

⁴⁹ See n.16 above.

⁵⁰ [2001] 2 AC 592

⁵¹ As this was a strike-out application, there was no need for a definitive ruling on the point..

⁵² [1992] 1 AC at p. 423

iv) *close family member* At first sight this would appear to be narrower than is permitted in England under the *Alcock* criteria. However, the Reporter's Note indicates that a functional approach should be taken to this phrase and it may extend beyond the more traditional concept of family. A particular contrast with England seems to be the lack of any requirement of a loving relationship. Under *Alcock* it is necessary to prove this, and although it will be presumed in suitable cases (for example, a parent) it is a rebuttable presumption. The Restatement's position might be thought to have the advantage of avoiding a potentially invidious inquiry into family relationships, but this is negated since the nature of the relationship will affect the measure of damages and, therefore, is brought into play at that stage.

a) §47 does not allow the mere bystander i.e. the witness of an event (even a horrific one) to claim in the absence of a relationship with a victim. Certain dicta⁵³ in *Alcock* had expressly left this point open in English law. The Court of Appeal, however, in *McFarlane v E.E. Caledonia Ltd*⁵⁴ surprisingly regarded the possibility of such bystander recovery as inconsistent with the requirement for a loving relationship in *Alcock* and rejected any such claim. This view against mere bystander recovery has met with approval later⁵⁵. On this later approach, there is a coincidence of view.

b) the 'unwilling participant' category. This idea can be found in Lord Oliver's speech in *Alcock*. A person may be involved in the events leading to the accident to the victim but not be a family member. For example, in *Dooley v Cammell Laird and Co Ltd*⁵⁶, the claimant was operating a crane when a piece of rope snapped and the load being carried fell into the hold of a ship where people were working. The claimant

⁵³ See Lord Keith at p. 397, Lord Ackner at p. 403 and Lord Oliver at p. 416

⁵⁴ [1994] 2 All ER 1

⁵⁵ See Lord Steyn in *White v Chief Constable of South Yorkshire* [1999] 2 AC at p. 418.

⁵⁶ [1951] 1 Ll. L. R. 271. The other cases often cited in this regard are *Galt v British Railways Board* (1983) 133 NLJ 870 and *Wigg v British Railways Board* (1986) 136 NLJ 446

recovered damages for a psychiatric illness (termed in those days ‘nervous shock’) suffered as a result of fear for the safety of his fellow workmen whom he could not actually see from his position on the crane.⁵⁷ This case, and two others like it (in legal terms), were treated in *Alcock* by Lord Oliver as within the group of what has come to be known in English law as the category of ‘primary’ victims as opposed to ‘secondary’ victims; compare Lord Hoffmann’s approach to these cases in *White* where he states that ‘there may be grounds for treating such a rare category of case as exceptional and exempt from the *Alcock* control mechanisms’.⁵⁸

This ‘primary’/ ‘secondary’ victim distinction in general has proved to be difficult and controversial, and cannot be explored in detail here. Later case law has treated the category of ‘primary’ victims as only including those who were reasonably foreseeably physically endangered by the defendant’s negligence and on this view the ‘unwilling participant’ category cases would be excluded. However, subsequent case law also lends support to the claims of such people. In *W v Essex County Council*⁵⁹, which was referred to earlier, the House of Lords thought that it was arguable⁶⁰ that the parents might be regarded as ‘primary’ victims on this ground since they had invited the foster child into their home. One safeguard is that where the psychiatric illness results from the belief that the claimant may have caused the victim’s injuries, this must be a reasonable one⁶¹, although according to *Salter v UB Frozen & Chilled Foods Ltd*⁶², there is no need for an active participant to feel any sense of blame for the accident⁶³. This is a category of claimant which merits

⁵⁷ On whether it matters if the apprehended victim is not in fact injured, see p.xxx.

⁵⁸ [1999] 2 AC at 508. His lordship noted that Lord Oliver’s treatment had been adopted by Lord Hope in *Robertson v Forth Road Bridge Joint Board* 1996 SLT 263

⁵⁹ See n. 50 above.

⁶⁰ See n.51 above.

⁶¹ *Monk v PC Harrington Ltd* [2008] EWHC 1879 (QB)

⁶² [2003] Scots CS 212

⁶³ See further the debate in *Gregg v Ashbrae Ltd* [2005] NIQB 37.

consideration for inclusion within the fold of the Restatement: it may be a more satisfactory place to draw the admittedly arbitrary line.

Linked to the above is the category of rescuers. Their position was discussed in *White*. Prior to that decision, the view seemed to be that reasonable foresight of psychiatric illness would suffice (*Chadwick v British Railways Board*⁶⁴). They fell into Lord Oliver's 'primary' victim category. However, a different approach prevailed in *White*, in which the policemen⁶⁵ claimants argued that they fell into the rescuer category and, as a consequence, did not have to meet the *Alcock* criteria. The House of Lords rejected any such special category. They would be classified as 'primary' or 'secondary' on the same basis as anyone else. On the facts the police fell into the second category and their claims failed. One reason was the perceived difficulty in categorisation, but the more important reason was based on what was termed 'distributive justice' - that the public would not find fair a system in which the relatives in *Alcock* had failed but that the police had recovered. Given the existence of the 'firemen's rule' in the US, this perception would perhaps be rather different, and that policy of the law which usually smiles benevolently on rescuers could be reflected in allowing this limited class (i.e. after the exclusionary effect of the 'firemen's rule') to recover even if not physically endangered.

C. Conclusion

In various (though not all) respects English law is more favourable to claimants than the Restatement proposals, and it is suggested that some of these situations might be accommodated without too adverse an effect on the floodgates or 'bright-line' issues. If the problem is one of cost, then perhaps raising the threshold from serious

⁶⁴ [1967] 1 WLR 912

⁶⁵ English law has no 'firemen's rule': see *Ogwo v Taylor* [1988] AC 431, cited in *White*

emotional disturbance might provide some relief; furthermore, it is arguable that this might also assist the floodgates/ 'bright-line' questions. To an English lawyer, leaving the determination of 'serious emotional disturbance' in the hands of a jury looks rather a dangerous proposition in terms of the scope of liability. Even if there is agreement with these difficult questions of balance, however, the extent to which they are achievable within the job description for the Restatement is a matter for those better qualified than this writer to judge.