[HOUSE OF LORDS]

ALCOCK AND OTHERS . . . . . APPELLANTS

AND

CHIEF CONSTABLE OF SOUTH YORKSHIRE POLICE . . . . . RESPONDENT

1990 June 19, 20, 21, 22, 25; July 31
1991 April 11, 12, 16, 17, 18; May 3
Oct. 7, 8, 9, 10, 14; Nov. 28

Hidden J.
Parker, Stocker and Nolan L.JJ.
Lord Keith of Kinkel, Lord Ackner, Lord Oliver of Aylmerton, Lord Jauncey of Tullichettle and Lord Lowry

Negligence—Foreseeability of consequential injury—Nervous shock—Disaster at football stadium caused by defendant's negligence—Relatives of victims at disaster or watching live television broadcasts or hearing radio reports—Whether nervous shock to victims' relatives reasonably foreseeable—Whether relationship sufficiently proximate

The defendant was responsible for the policing of a football match at which, as a result of overcrowding in part of the stadium, 95 people died and many more sustained crushing injuries. As the disaster became apparent live pictures of the events at the stadium were broadcast on television. The plaintiffs were all related to, or friends of, spectators involved in the disaster. Some witnessed events from other parts of the stadium. One plaintiff, who was just outside the stadium, saw the events on television and went in to search for his missing son. Other plaintiffs were at home and watched the events on live television broadcasts or heard of them from friends or through radio reports but only later saw recorded television pictures. All the plaintiffs, alleging that the impact of what they had seen and heard had caused them severe shock resulting in psychiatric illness, claimed damages in negligence against the defendant. On the issue of liability the judge held that the category of plaintiffs entitled to claim damages for nervous shock included a sibling as well as a parent or spouse of a victim, and that those plaintiffs present in or immediately outside the stadium at the time of the disaster or who watched it live on television were sufficiently close in time and place for it to be reasonably foreseeable that what they had seen would cause them to suffer psychiatric illness. Accordingly, nine of the plaintiffs, who were either parents, spouses or siblings of the victims and who were eye-witnesses of the disaster or who saw it live on television, were held to be entitled to claim damages for nervous shock. The remaining six plaintiffs were excluded as claimants because they were in a more remote relationship or because they had heard about the disaster by some means other than live televison broadcasts. The Court of Appeal allowed the defendant's appeal and dismissed the unsuccessful plaintiffs' cross-appeal.

On appeal by the plaintiffs:—

Held, (1) that in order to establish a claim in respect of psychiatric illness resulting from shock it was necessary to show not only that such injury was reasonably foreseeable, but also that the relationship between the plaintiff and the defendant was sufficiently proximate; that the class of persons to whom a duty of care was owed as being sufficiently proximate was not limited by reference to particular relationships such as husband and wife or parent and child, but was based on ties of love and affection, the closeness of which would need to be proved in each case; that remoter relationships would require careful scrutiny; and that a plaintiff also had to show propinquity in time and space to the accident or its immediate aftermath (post, pp. 396H–397E, F–G, 398A–B, 401B, 403E–G, 404D–E, 404G–405B, 415G–416A, E–F, 418A, 419F–G, 422E–H, 424D–E).

Dicta of Lord Wilberforce in *McLoughlin v. O'Brian* [1983] 1 A.C. 410, 421–423, H.L.(E.) applied.

Hevican v. Ruane [1991] 3 All E.R. 65 and *Ravenscroft v. Rederiaktiebølaget Transatlantic* [1991] 3 All E.R. 73 doubted.

(2) Dismissing the appeal, that in the cases of the plaintiffs who had been present at the football match the mere fact of the relationship shown was insufficient to give rise to a duty of care; that the viewing of the disaster on television could not be said to be equivalent to being within sight and hearing of the event or its immediate aftermath; and that, accordingly, the plaintiffs' claims failed (post, pp. 398D–H, 405E–F, 406A–C, 416H–417B, F–418A, 423E–G, 424B–D, D–E).

Decision of the Court of Appeal post, pp. 351B et seq.; sub nom. *Jones v. Wright* [1991] 3 All E.R. 88 affirmed.

The following cases are referred to in their Lordships' opinions:

Bell v. Great Northern Railway Co. of Ireland (1890) 26 L.R.Ir. 428

Best v. Samuel Fox & Co. Ltd. [1952] A.C. 716; [1952] 2 All E.R. 394, H.L.(E.)

Bourhill v. Young [1943] A.C. 92; [1942] 2 All E.R. 396, H.L.(Sc.)

Caparo Industries Plc. v. Dickman [1990] 2 A.C. 605; [1990] 2 W.L.R. 358; [1990] 1 All E.R. 568, H.L.(E.)

Chadwick v. British Railways Board [1967] 1 W.L.R. 912; [1967] 2 All E.R. 945

Dillon v. Legg (1968) 29 A.L.R. 3d 1316

Donoghue v. Stevenson [1932] A.C. 562, H.L.(Sc.)

Dooley v. Cammell Laird & Co. Ltd. [1951] 1 Lloyd's Rep. 271

Dulieu v. White & Sons [1901] 2 K.B. 669, D.C.

Galt v. British Railways Board (1983) 133 N.L.J. 870

Hambrook v. Stokes Brothers [1925] 1 K.B. 141, C.A.

Hevican v. Ruane [1991] 3 All E.R. 65

Heaven v. Pender (1883) 11 Q.B.D. 503, C.A.

Hinz v. Berry [1970] 2 Q.B. 40; [1970] 2 W.L.R. 684; [1970] 1 All E.R. 1074, C.A.

Jaensch v. Coffey (1984) 155 C.L.R. 549

King v. Phillips [1953] 1 Q.B. 429; [1953] 2 W.L.R. 526; [1953] 1 All E.R. 617, C.A.

Kirkham v. Boughey [1958] 2 Q.B. 338; [1957] 3 W.L.R. 626; [1957] 3 All E.R. 153

McKew v. Holland & Hannen & Cubitts (Scotland) Ltd. [1969] 3 All E.R. 1621, H.L.(Sc.)

McLoughlin v. O'Brian [1981] Q.B. 599; [1981] 2 W.L.R. 1014; [1981] 1 All E.R. 809 C.A.; [1983] 1 A.C. 410; [1982] 2 W.L.R. 982; [1982] 2 All E.R. 298, H.L.(E.)

Owens v. Liverpool Corporation [1939] 1 K.B. 394; [1938] 4 All E.R. 727, C.A.

Ravenscroft v. Rederiaktiebølaget Transatlantic [1991] 3 All E.R. 73

Schneider v. Eisovitch [1960] 2 Q.B. 430; [1960] 2 W.L.R. 169; [1960] 1 All E.R. 169

Wagner v. International Railway Co. (1921) 232 N.Y. 176

Wigg v. British Railways Board, The Times, 4 February 1986

The following additional cases were cited in argument in the House of Lords:

Attia v. British Gas Plc. [1988] Q.B. 304; [1987] 3 W.L.R. 1101; [1987] 3 All E.R. 455, C.A.

Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964] A.C. 465; [1963] 3 W.L.R. 101; [1963] 2 All E.R. 575, H.L.(E.)

Marshall v. Lionel Enterprises Inc. (1971) 25 D.L.R. (3d) 141

Mount Isa Mines Ltd. v. Pusey (1970) 125 C.L.R. 383

Norwich City Council v. Harvey [1989] 1 W.L.R. 828; [1989] 2 All E.R. 1180, C.A.

Peabody Donation Fund (Governors of) v. Sir Lindsay Parkinson & Co. Ltd. [1985] A.C. 210; [1984] 3 W.L.R. 953; [1984] 3 All E.R. 529, H.L.(E.)

Storm v. Geeves [1965] Tas.S.R. 252

Wilkinson v. Downton [1897] 2 Q.B. 57

Yuen Kun Yeu v. Attorney-General of Hong Kong [1988] A.C. 175; [1987] 3 W.L.R. 776; [1987] 2 All E.R. 705, P.C.

The following cases are referred to in the judgments of the Court of Appeal:

Attia v. British Gas Plc. [1988] Q.B. 304; [1987] 3 W.L.R. 1101; [1987] 3 All E.R. 455, C.A.

Bourhill v. Young [1943] A.C. 92; [1942] 2 All E.R. 396, H.L.(Sc.)

Caparo Industries Plc. v. Dickman [1990] 2 A.C. 605; [1990] 2 W.L.R. 358; [1990] 1 All E.R. 568, H.L.(E.)

Donoghue v. Stevenson [1932] A.C. 562, H.L.(Sc.)

Dooley v. Cammell Laird & Co. Ltd. [1951] 1 Lloyd's Rep. 271

Hambrook v. Stokes Brothers [1925] 1 K.B. 141, C.A.

Hevican v. Ruane [1991] 3 All E.R. 65

Hinz v. Berry [1970] 2 Q.B. 40; [1970] 2 W.L.R. 684; [1970] 1 All E.R. 1074, C.A.

Jaensch v. Coffey (1984) 155 C.L.R. 549

McLoughlin v. O'Brian [1981] Q.B. 599; [1981] 2 W.L.R. 1014; [1981] 1 All E.R. 809, C.A.; [1983] 1 A.C. 410; [1982] 2 W.L.R. 982; [1982] 2 All E.R. 298, H.L.(E.)

Ravenscroft v. Rederiaktiebølaget Transatlantic [1991] 3 All E.R. 73

Storm v. Geeves [1965] Tas.S.R. 252

Ultramares Corporation v. Touche (1931) 255 N.Y. 170

The following additional cases were cited in argument in the Court of Appeal:

Chester v. Waverley Corporation (1939) 62 C.L.R. 1

Victorian Railways Commissioners v. Coultas (1888) 13 App.Cas. 222, P.C.

Yuen Kun Yeu v. Attorney-General of Hong Kong [1988] A.C. 175; [1987] 3 W.L.R. 776; [1987] 2 All E.R. 705, P.C.

The following cases are referred to in the judgment of Hidden J.:

Abramzik v. Brenner (1968) 65 D.L.R. (2d) 651
Bell v. Great Northern Railway Co. of Ireland (1890) 26 L.R.Ir. 428
Benson v. Lee [1972] V.R. 879
Boardman v. Sanderson [1964] 1 W.L.R. 1317, C.A.
Bonnington Castings Ltd. v. Wardlaw [1956] A.C. 613; [1956] 2 W.L.R. 707; [1956] 1 All E.R. 615, H.L.(E.)
Bourhill v. Young [1943] A.C. 92; [1942] 2 All E.R. 396, H.L.(Sc.)
Caparo Industries Plc. v. Dickman [1990] 2 A.C. 605; [1990] 2 W.L.R. 358; [1990] 1 All E.R. 568, H.L.(E.)
Chadwick v. British Railways Board [1967] 1 W.L.R. 912; [1967] 2 All E.R. 945
Chester v. Waverley Corporation (1939) 62 C.L.R. 1
Currie v. Wardrop, 1927 S.C. 538
Dillon v. Legg (1968) 29 A.L.R. 3d 1316
Donoghue v. Stevenson [1932] A.C. 562, H.L.(Sc.)
Dooley v. Cammell Laird & Co. Ltd. [1951] 1 Lloyd's Rep. 271
Dulieu v. White & Sons [1901] 2 K.B. 669, D.C.
Galt v. British Railways Board (1983) 133 N.L.J. 870
Hambrook v. Stokes Brothers [1925] 1 K.B. 141, C.A.
Haynes v. Harwood [1935] 1 K.B. 146, C.A.
Hinz v. Berry [1970] 2 Q.B. 40; [1970] 2 W.L.R. 684; [1970] 1 All E.R. 1074, C.A.
Jaensch v. Coffey (1984) 155 C.L.R. 549
King v. Phillips [1953] 1 Q.B. 429; [1953] 2 W.L.R. 526; [1953] 1 All E.R. 617, C.A.
Le Lievre v. Gould [1893] 1 Q.B. 491, C.A.
McLoughlin v. O'Brian [1983] 1 A.C. 410; [1982] 2 W.L.R. 982; [1982] 2 All E.R. 298, H.L.(E.)
Marshall v. Lionel Enterprises Inc. [1972] 2 O.R. 177; 25 D.L.R. (3d) 141
Owens v. Liverpool Corporation [1939] 1 K.B. 394; [1938] 4 All E.R. 727, C.A.
Reg. v. Maqsud Ali [1966] 1 Q.B. 688; [1965] 3 W.L.R. 229; [1965] 2 All E.R. 464, C.C.A.
Storm v. Geeves [1965] Tas.S.R. 252
Taylor v. Chief Constable of Cheshire [1986] 1 W.L.R. 1479; [1987] 1 All E.R. 225, D.C.
Victorian Railways Commissioners v. Coultas (1888) 13 App.Cas. 222, P.C.
Wigg v. British Railways Board, The Times, 4 February 1986
Wilsher v. Essex Area Health Authority [1988] A.C. 1074; [1988] 2 W.L.R. 557; [1988] 1 All E.R. 871, H.L.(E.)

The following additional cases, provided by the courtesy of counsel, were cited in argument:

Attia v. British Gas Plc. [1988] Q.B. 304; [1987] 3 W.L.R. 1101; [1987] 3 All E.R. 455, C.A.
Clough v. Bussan [1990] 1 All E.R. 431
Dorset Yacht Co. Ltd. v. Home Office [1970] A.C. 1004; [1970] 2 W.L.R. 1140; [1970] 2 All E.R. 294, H.L.(E.)
Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964] A.C. 465; [1963] 3 W.L.R. 101; [1963] 2 All E.R. 575, H.L.(E.)

Leigh and Sillavan Ltd. v. Aliakmon Shipping Co. Ltd. [1986] A.C. 785; [1986] 2 W.L.R. 902; [1986] 2 All E.R. 145, H.L.(E.)
Sutherland Shire Council v. Heyman (1985) 157 C.L.R. 424

ACTION

By separate writs dated 19 December 1989, 22 March 1990, 29 March 1990, 6 April 1990 and 10 April 1990 the plaintiffs, Stephen Jones, Joseph Kehoe, Harold Copoc, Brenda Hennessey, Brian Harrison, William Pemberton, Alexandra Penk, Robert Spearrit, John O'Dell, Karen Hankin, Catherine Jones, Agnes Copoc, Denise Hough, Robert Alcock, Maureen Mullaney and Peter Coldicutt claimed damages for nervous shock and/or other injury loss and damage arising out of an incident at Hillsborough Stadium in Sheffield on 15 April 1989 which it was alleged occurred by reason of the negligence and/or breach of statutory duty of the defendant, Peter Wright, the Chief Constable of South Yorkshire Police. On 14 May 1990 Rose J. ordered that all 16 actions be consolidated and that the trial proceed without pleadings pursuant to R.S.C., Ord. 18, r. 21. The hearing was in Liverpool and judgment given there.

The facts are stated in the judgment.

B. A. Hytner Q.C. and *Timothy King* for the plaintiffs.
W. C. Woodward Q.C. and *Patrick Limb* for the defendant.

Cur. adv. vult.

31 July. HIDDEN J. read the following judgment. Just over 15 months ago on Saturday, 15 April 1989, a football match was to be played at Hillsborough Stadium, the ground of Sheffield Wednesday Football Club. Though it was their ground the match did not involve their team, but was to be played between Liverpool and Nottingham Forest Football Clubs. It was a semi-final of the F.A. Cup, and therefore had to be played on a neutral ground.

Simply because it was a semi-final, and because of the support attracted by the two particular clubs, it was a match which was bound to attract a great deal of interest. It was a sell-out as an all ticket match; it was also to be televised by the B.B.C. later in the evening.

The match that afternoon was begun but not finished. It began shortly after 3 p.m. The players had been on the pitch for a little under six minutes when the match kicked off, and ironically they had only played for just the same period—a little under six minutes—when the match was stopped. A superintendent of police, Mr. Greenwood, ran on to the pitch to the referee who brought the game to a halt.

The tragic reason for the stopping of the game is now common knowledge. The press of people in the Leppings Lane pens had created such intense pressure that some spectators were becoming trapped. They were unable to move voluntarily in any direction, and were losing the ability to breathe. Spectators in pens 3 and 4 were receiving crushing injuries from the forces being exerted on their bodies. From such

injuries the horrifying total of 95 people were to die, and more than 400 others were to need hospital treatment. Still more, to be counted in their thousands, were luckier in that they were not to be injured but were, nonetheless, caught up in the events as spectators present at, and involved in, the disaster.

Still more—this time to be counted in millions who were not at the scene—were to witness what was happening in live broadcasts through the medium of their television screens, or were to hear on their radios what was going on at Hillsborough. Among those millions were a number who were already aware, or quickly became aware, that they had loved ones at the match. Some actually knew the position where their loved ones would be standing; some thought they knew. The knowledge or presumed knowledge led them to fear that, at best, their loved ones might be having a dreadful time, or, at worst, as the events unfolded, that they might be facing the prospect of injury, or even of losing their lives.

The 95 who died, the hundreds who were injured, and the thousands who emerged unscathed had many loved ones who observed what was happening, either from their presence elsewhere in the ground, their presence outside the ground, or their position as viewers of television broadcasts either simultaneous or recorded. Still others listened to their radios. Of these loved ones of the dead, the injured and the unscathed, 16 are before the court as plaintiffs in separate actions which are brought as test cases. In all of these actions the defendant is the Chief Constable of South Yorkshire Police. He it was who was responsible for the policing arrangements for Hillsborough Stadium on the day in question. It is against him that each of the 16 plaintiffs by their respective writs, allege a cause of action in negligence and/or breach of statutory duty.

The course of these actions has been speedy. On 14 May 1990 it was ordered by Rose J. that each plaintiff serve an amended statement of facts, with a generic medical report related to the post traumatic stress disorder, and an individual medical report. The judge ordered that the trial proceed without pleadings pursuant to R.S.C., Ord. 18, r. 21, and that all 16 actions be consolidated. So it was that I began to hear these 16 actions on Tuesday, 19 June, and concluded the hearings the following Monday, 25 June.

Each plaintiff claims damages for personal injuries and/or physical harm, and consequential losses and expenses. In each plaintiff's case the damages alleged concern what the law has conventionally known as "nervous shock," but is more accurately described as "psychiatric illness." That is something more than the sad, but inevitable, human emotions of grief, sorrow, compassion and anxiety which occur in all bereavements. All these emotions are felt as sharply and deeply in such a situation as any human emotion can be. For these emotions, however, the law gives no compensation. It is important to realise that it is only for a defined psychiatric illness, which actually causes psychiatric damage, that the law may give a recompense, and only in certain circumstances at that.

These test cases are brought by the plaintiffs in order to seek to establish that in the case of each separate plaintiff the circumstances are such that the law permits him or her to obtain an award of damages for psychiatric illness which it is asserted that he or she has suffered. Each case is defended by the defendant on the basis that there is in law no such liability to compensate the particular plaintiff in the particular circumstances. The defendant says that either no such damage has, in fact, been proved or, alternatively, if it has been proved, then it was not foreseeable by the defendant and is too remote.

For the purposes of these actions the defendant has admitted negligence—that is to say a breach of duty of care—in certain specific circumstances. It was formally admitted on behalf of the defendant that he was in breach of his duty of care to those who died, or were injured by crushing, at Hillsborough on 15 April 1989.

A further admission was to this effect; on production by each plaintiff of a medical report to the effect that, on or after 15 April 1989, that plaintiff had suffered some such psychiatric illness which was caused, at least in part, by the plaintiff's awareness of the events at Hillsborough, and, provided that the defendant owed the plaintiff a duty of care in relation to nervous shock, and that the plaintiff could show causation, then the defendant admits liability for the breach of duty of care involved.

Other admissions as to evidential matters were made by the parties, which have reduced the oral evidence before me to that of a single witness. Those admissions were that: (1) the facts, but not opinions, contained in the proofs of evidence of the plaintiffs, in so far as they are relevant and admissible, were admitted by the defendant; (2) the statements of Detective Inspector Charles and Detective Inspector Timms were likewise admitted; (3) chapters 1 to 5 of the Interim Report of the Inquiry by Taylor L.J. into the Hillsborough Stadium Disaster were agreed so far as they related to the facts therein set out; (4) extracts from B.B.C. and I.T.V. television guidelines were admitted without formal proof; and (5) photographs of the physical layout of the Medico-Legal Centre at Sheffield were admitted without formal proof.

It is in these circumstances that I have to try the issue of liability—and of liability only—in respect of these 16 plaintiffs in actions which are said to be representative of some 150 similar claims. I am told by counsel that the trial of these 16 cases will enable the settlement of the liability issue in respect of each one of those 150 claims.

The sole witness I heard was Dr. Morgan O'Connell, who is a Surgeon Commander in the Royal Navy, and a consultant psychiatrist at the Royal Naval Hospital, Hasler, at Gosport in Hampshire. He has extensive experience in the recognition and management of cases of post traumatic stress disorder, in particular during the Falklands conflict in 1982 and thereafter. I accept both his expertise and his evidence.

He produced a single "Generic Report on Psychological Casualties Resulting from the Hillsborough Disaster" as well as 16 separate individual reports, one on each plaintiff. He then gave oral evidence before me. That then is the totality of the evidence which I have, and upon which to decide these 16 claims.

I have referred to the expertise and the evidence of Dr. O'Connell. It would probably be helpful if, at the outset, I identified the particular form of "nervous shock" (which I shall hereafter refer to as "psychiatric illness") which he said was produced in all save one of these cases.

Dr. O'Connell's generic report stated that: "The most common diagnosis made was post-traumatic stress disorder . . . a new concept (1980) for an old problem," and he indicated earlier names such as neurasthenia, shell shock and nastalgia.

> "It is classified as an anxiety disorder. It follows on a painful event which is outside the range of normal human experience, the disorder includes preoccupation with the event—that is intrusive memories—with avoidance of reminders of the experience. At the same time there are persistent symptoms of increased arousal—these symptoms not being present before the event. The symptoms may be experienced in the form of sleep difficulty, irritability or outburst of anger, problems with memory or concentration, startle responses, hypervigilance and over-reaction to any reminder of the event. The characteristics of post-traumatic stress disorder identified amongst the casualties seen included apprehension, with the person being on edge, tense and jumpy. There appears to be a need to talk a great deal about the incident and where physical pain or injury was experienced in association with the disaster, it appears to have become disproportionate to the actual injury incurred. Almost all the casualties suffering post-traumatic stress disorder complained of sleep disturbance, with associated tiredness and fatigue. Flashbacks and nightmares of the event with similar emotional reactions as if the disaster was actually happening again, were commonly recorded. Many described an inability or difficulty in carrying out normal life activities such as work, family responsibilities or any activity normally engaged in before the disaster. Phobia or an irrational fear leading to avoidance behaviour was commonly reported and in particular, any queuing activity was avoided if at all possible—especially with those who were involved in the crush. All those in whom post-traumatic stress disorder was identified appear to have undergone a personality change, the significant features of which were that of being moody, irritable, forgetful and withdrawn within themselves, frequent unprovoked outbursts of anger and quarrelsome behaviour was reported. The majority of cases were either depressed or had experienced significant depression at some time and I wrote to a number of general practitioners drawing attention to a need for more active treatment of this depression."

Dr. O'Connell also identified a further psychiatric illness known as pathological grief which he defined as: "grief of greater intensity and duration than normal grief, it is more likely to occur where death is sudden, unexpected and brutal in nature." He noted that of the people he had seen all but one had more than one illness. Thus he identified in respect of each of the plaintiffs a specific psychiatric illness suffered by them. In the case of every plaintiff there was, in addition, an individual medical report by Dr. O'Connell. Some of the plaintiffs filed

additional medical reports from other practitioners. The defendant called no medical evidence and filed no medical reports, but instead relied simply on cross-examination of Dr. O'Connell when he gave evidence. It follows that it is upon that evidence that I have to come to the conclusion in the case of each separate plaintiff as to whether it is proved that psychiatric illness was in fact suffered.

I say at once that for the purposes of this judgment I am going to make the assumption that this matter is in fact proved by each plaintiff. I was not asked to make this assumption, I was asked to try the issue but for reasons I will now identify it seems to me that at this stage in what is going to be protracted litigation, it is in all ways, and for all parties, preferable that I make the assumption rather than find the facts.

There are good reasons for dealing with the finding of the causation of a psychiatric illness in each plaintiff on the basis of assumptions. These are 16 test cases and I have been told by counsel on both sides, not in any sense in terrorem (to frighten me) that, whatever my findings, there will be appeals to the Court of Appeal. They added, realistically, that it is almost inevitable that the cases will reach the House of Lords.

In those circumstances it would be an intolerable burden for any court having to consider this judgment, if the judgment were to be cluttered up with (and weighed down by) a detailed analysis in relation to each of the plaintiffs' individual psychiatric symptoms and progress. Since I should have to review all the evidence and make such findings for each of the 16 plaintiffs, whether I were finding in their favour or not, in order to provide findings for any successful appeal, a judgment which should be a judgment of principle on test cases would become even more verbose than it already is, and hugely unwieldy. Further, in the interests of the plaintiffs themselves, it cannot help their mental states to have their psychiatric conditions minutely examined in a judgment that is bound to have so public a circulation. These are novel cases and I have attempted to adopt a sensible course accommodating to the circumstances. If any problem were to arise in the future as a result of this approach, then the matter can always come back before me, or can be incorporated into any trial of psychiatric issues which may take place in relation to the assessment of damages.

That then is the first issue which a plaintiff has to prove in seeking to establish liability against the defendant in negligence. Is it proved that actual damage of a type for which the law allows recompense has been suffered by the individual plaintiff? I stress again, because it does need stress, that it is not enough that emotional hurt—even of the sharpest degree—has been inflicted. What must be proved by each plaintiff is that he or she has suffered actual psychiatric illness. That is the first hurdle which the plaintiff must surmount. On the assumptions I have made, each of them has proved the infliction of the actual psychiatric illness.

Next the plaintiff must establish that it was the defendant's actions which caused the infliction of that psychiatric illness. That is the second hurdle which the plaintiff has to surmount, namely, the proof of the chain of causation between the defendant's actions and the damage

A suffered by the plaintiff. Again on the assumptions I have made, that second hurdle has been cleared by all the plaintiffs.

It might seem, at first, as though a plaintiff who had successfully cleared both those hurdles had now proved all that was necessary to entitle him to succeed in a claim for damages in negligence against the defendant. That, however, is not so. It is not enough in law to prove only that damage to a plaintiff has been done by the actions of the B defendant. If that were so our system of law would call for the payment of damages to a plaintiff by a defendant against whom no fault at all had ever been proved. The fault which has to be proved is known in our system of law as negligence.

To establish liability against a defendant in respect of damage which has undoubtedly been caused by the defendant's acts, the plaintiff must C additionally prove that the defendant has been guilty of negligence. This really means that the plaintiff must establish three further things: (1) that the plaintiff comes within the range of persons to whom the defendant owes a duty of care, (2) that the defendant has breached that duty of care to the plaintiff, and (3) that it was reasonably foreseeable that such a breach would cause damage to the plaintiff.

As to the first, that the plaintiff comes within the range of persons to D whom the defendant owes a duty of care, it is vital to realise that it is a fundamental concept of our law that a defendant does not owe a duty of care to the world at large. It is important to stress at this stage that none of these plaintiffs sues for *physical* injuries done to their person by direct actions of the defendant. Rather, they sue in respect of *mental* injuries done to them as a result of physical injuries actually inflicted, or E feared to have been inflicted on someone else, whom I have described as "a loved one." It is thus not the injury, actual or perceived, caused to the original victim, but the subsequent and consequent psychiatric illness of the plaintiff which must fall squarely within the ambit of the defendant's duty of care to the plaintiff, and of his reasonable foreseeability of the consequences of his actions.

I have tried to set out these basic principles of English law, which F are as familiar to lawyers as they are unfamiliar to others, in order to demonstrate at the outset that a defendant does not owe a duty of care to the world at large, but only to a category of persons which the law strictly defines.

The central question which arises in all of these 16 cases is: does the plaintiff fall within that category? As the law stands at present, the G common law draws a line between those who are related by various ties to the victim of a defendant's negligence. The line is drawn in order to decide whether or not those so related should be able to claim damages for psychiatric illness which they have suffered consequent upon that negligence to that loved one.

That line is at present drawn to permit claims which, in the words of Lord Wilberforce in *McLoughlin v. O'Brian* [1983] 1 A.C. 410, 418: "do H not extend beyond the spouse or children of the plaintiff." These 16 claims seek to have that line extended and drawn elsewhere in order to include plaintiffs in other relationships to the victims. Even with the line drawn here, it is not every spouse or parent of such a victim who can

succeed in an action for psychiatric illness consequent upon the defendant's negligence. The law has evolved slowly over the last 100 years or so, and I shall have later to look, I hope reasonably concisely, at the way in which it has progressed, and at some of the cases which have been the milestones upon that road.

Suffice it to say for the moment that in addition to being within the category of the particular relationship, there had to be some immediacy of observation by the plaintiff of the infliction of the injury upon the loved one, immediacy of observation such as presence at, or near the scene of injury, or, as the law developed, some close involvement with its immediate aftermath, before a spouse or parent of a victim could recover. Again, in these cases the plaintiffs seek to have that line drawn elsewhere in order to include awareness, not as an eye witness, but through the medium of simultaneous television of the circumstances of the infliction of the injury. There are claims also in relation to participation in the events, by reason of live radio broadcasting and/or recorded television.

These are, therefore, in every sense test cases, and that is why I have sought to set out in simple terms what I understand existing law to be, and what the plaintiffs would wish it to be at the end of this judgment. It will now be my task to decide where that line should be drawn in relation to these 16 actions. It goes without saying that although so far I have been trying to talk in general terms about all 16 of the actions, no two are the same. Each has its individual characteristics and distinctions. The plaintiffs differ from each other in many different ways, but they differ particularly in three important categories in relation to their own particular loved one.

The first is the fate of the loved one. The second is their relationship to the loved one, and the third is the medium through which they became involved in the events happening to their loved one. As to the first category it is a tragic fact that in all but three cases the plaintiffs' loved ones died; two were injured, and one happily emerged safely from the disaster.

As to the second category, the respective relationships to the loved one, five fell within the closeness of relationships already known to the law, that is to say within the category of spouse or parent: there was a wife, two mothers, and two fathers.

Of the categories of relationship where the English law so far has not produced a case of a successful claim, there were seven different relationships. There were sisters of three different victims, brothers of two, uncles of two, a grandfather of one, a brother-in-law of one, a fiancée—unofficial as it was said—of one, and a friend.

As to the third category—the medium through which the events were perceived—here, too, there were many variations. Four plaintiffs witnessed the occurrence as eye witnesses sitting in the West Stand at Hillsborough, and a fifth was sitting in a coach outside the ground and saw the events, or some of them, on the coach's television. There were a further nine plaintiffs who saw the disaster as it evolved, not as eye witnesses at the scene, but by watching television. Another plaintiff became aware of what was happening by hearing it broadcast

A simultaneously on the radio, and later saw it through the medium of recorded film broadcast on television. The final plaintiff was first told in conversation, then heard a news item broadcast by radio, and lastly saw it when recorded film was put out on television.

It follows that within these 16 cases there is a multiplicity of permutations of factual situations to which the law must be applied. I have already said that the law in relation to this particular aspect of the B tort of negligence, namely that dealing with damages for psychiatric illness in one person caused as a result of injury or apprehended injury to another, has evolved gradually over the last 100 years or so. I must go straight to the leading case on the subject, as the law stands today.

The leading case in our jurisdiction is *McLoughlin v. O'Brian* [1983] 1 A.C. 410 in which the House of Lords dealt comprehensively with the C history and development of the subject. I cannot hope to achieve, nor would it be sensible to embark upon, an equivalent exercise, and I expressly do not seek so to do. However, I have to remind myself that there is no reason why the plaintiffs in these cases, and the many others interested in their outcome, should be familiar with *McLoughlin v. O'Brian* and its predecessors. Therefore, for this judgment to be at all comprehensive to those who are actually listening to it today, and for it D not to have the effect of being given almost in a foreign language, it might be helpful if I seek first to set in its proper context the law as I understand it to be. That, and only that, is the limited exercise upon which I now seek to embark.

The first thing to say is that, though we sit here in Liverpool in the summer of 1990, the journey will take us around the world and back E over the years. It will involve Australian buggies, Irish trains, and even Canadian snowmobiles. It may be asked: "What have these to do with Hillsborough?" The answer is, "Surprisingly, everything."

Just over a century ago, and in a far away place, there happened what to a bystander would have been not so much an accident as a near miss. In the State of Victoria in Australia in 1886 a railway level crossing keeper permitted a buggy to cross the line in the path of an F approaching train. The buggy got across in the nick of time, but the pregnant lady passenger suffered, "a severe nervous shock," and a subsequent miscarriage. She brought a case in Australia; she lost but appealed the decision to the Privy Council in London. The case was *Victorian Railways Commissioners v. Coultas* (1888) 13 App.Cas. 222. Her appeal failed too, the Privy Council holding, at p. 225:

G > "Damages arising from mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot under such circumstances, their Lordships think, be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gate-keeper. If it were held that they can, it appears to their Lordships that it would be H extending the liability for negligence much beyond what that liability has hitherto been held to be."

That is where the line was held to be in 1888. The court was refusing to extend the line for fear that the floodgates might open. Two years

later in another railway case, this time in Ireland, a different result was achieved. The Irish court declined to follow the decision of the Privy Council in the Australian case.

The plaintiff in *Bell v. Great Northern Railway Co. of Ireland* (1890) 26 L.R.Ir. 428 was again a lady and she was unfortunate enough to be a passenger in a railway carriage which ran backwards downhill in terrifying circumstances. Medical witnesses testified that she was suffering from fright and nervous shock, one of them describing it as "profound impression on the nervous system" and stating that the shock from which she suffered would be a natural consequence of the fright. Another said he was unable to detect any physical damage, and put down her symptoms to nervous shock. The court held that the negligent management by the defendants of the carriage in which she was seated was admittedly the cause of the injury she sustained. Murphy J. said, at p. 443: "It appears . . . immaterial whether the injuries may be called nervous shock, brain disturbance, mental shock, or bodily injury." Thus, that lady was awarded damages for her "nervous shock," although she had suffered no physical damage in the accident. The line had been moved on to include a plaintiff who would not have succeeded in the earlier Australian case.

Back in England, and moving into this century, 11 years later in 1901 a pregnant lady plaintiff obtained damages as a result of nervous shock occasioned by fright. In *Dulieu v. White & Sons* [1901] 2 K.B. 669, 674, Kennedy J. considered the argument put before him "both unreasonable and contrary to the weight of authority." That was an argument that fright, where physical injury is directly produced by it, cannot be a ground of action merely because of the absence of any accompanying impact. He thought that argument, as I have indicated, unreasonable and contrary to the weight of authority.

However, he limited the type of shock for which damages were recoverable to that suffered from fear for oneself only. He said, at p. 675: "The shock, where it operates through the mind, must be a shock which arises from a reasonable fear of immediate personal injury to oneself." Thus the line had moved, but not that far. On the basis of the law as stated by Kennedy J. in 1901 the 16 plaintiffs in the case before me would not have been able to succeed because their nervous condition did not arise "from a reasonable fear of an immediate personal injury to themselves," but from such a fear in relation to their loved ones.

Nearly a quarter of a century later the law moved on again, and the line was redrawn in *Hambrook v. Stokes Brothers* [1925] 1 K.B. 141. A mother who saw an empty lorry running downhill towards her round a bend past which her children had just disappeared was able to recover damages for shock produced by fear, not for her own safety, but for the safety of her children. The court held that the damages were recoverable on the basis that the shock was caused by what she saw with her own eyes, as distinguished from what she was told by bystanders. In what might be regarded as a prophetic passage, Atkin L.J. said, at p. 158:

> "In my opinion it is not necessary to treat this cause of action as based upon a duty to take reasonable care to avoid administering a

A shock to wayfarers. The cause of action, as I have said, appears to be created by breach of the ordinary duty to take reasonable care to avoid inflicting personal injuries, followed by damage, even though the type of damage may be unexpected—namely, shock. The question appears to be as to the extent of the duty, and not as to remoteness of damage. If it were necessary, however, I should accept the view that the duty extended to the duty to take care to B avoid threatening personal injury to a child in such circumstances as to cause damage by shock to a parent or guardian then present, and that the duty was owed to the parent or guardian; but I confess that upon this view of the case I should find it difficult to explain why the duty was confined to the case of parent or guardian and child, and did not extend to other relations of life also involving intimate C associations; and why it did not eventually extend to bystanders."

The 16 plaintiffs in this case do indeed seek to make the duty of care "extend to other relations of life also involving intimate associations," but they do not seek to extend it to bystanders.

It is important to note exactly what was the shock to Mrs. Hambrook which her counsel was relying upon in that case. He was one of the D ablest and most loved counsel of his day, and Sargant L.J. quoted him thus, at pp. 160–161:

> "But Serjeant Sullivan, in his able argument before us, expressly disclaimed any suggestion that the shock to Mrs. Hambrook, which is said to have been the cause of her subsequent death, was due to or aggravated by her finding that the little girl was missing from the school, or by her afterwards tracing her to and seeing her in the E hospital. He relied upon the shock occasioned to Mrs. Hambrook by the original apprehension of the imminent danger to her little girl, or rather perhaps of the imminent danger to her three children; . . ."

So counsel, in that case was not seeking to rely on anything else that happened after the accident, such as going to a hospital or matters of F that sort. Later on we shall see that the law moved on in that direction, and matters of that sort came to be known as the doctrine of the aftermath.

In *Hambrook v. Stokes Brothers* [1925] 1 K.B. 141 it should also be noted that that particular judge, Sargant L.J., who was in the minority, would have sought to keep the line resting on the basis of shock caused by fear of injury to oneself, and not to have extended it to that caused G by fear of injury to another. He said, at p. 163:

> "In my judgment, it would be a considerable and unwarranted extension of the duty of owners of vehicles towards others in or near the highway, if it were held to include an obligation not to do anything to render them liable to harm through nervous shock caused by the sight or apprehension of damage to third persons."

H He would not have allowed Mrs. Hambrook to win; however, she did win. It is interesting, too, that he went on to say:

> "It seems to me that, when once the requirement is relaxed, that the shock is to be one caused by the plaintiff's apprehension of

damage to himself, the defendant is exposed to liability for a consequence which is only reached by a new and quite unusual link in the chain of causation, and which cannot therefore properly be held to have been within his ordinary and reasonable expectation. And the extent of this extra liability is necessarily both wide and indefinite, in as much as it may vary with the precise degree of connection between the person injured and the plaintiff, and also, perhaps, with the circumstances attending the realisation by the plaintiff of actual or apprehended injury to the third person."

And then he asked this question, at pp. 163–164:

"For instance, should it extend to a shock occasioned to a daughter by apprehended danger to a mother, or to a sister by apprehended danger to a brother? And where, as in this case, the apprehended danger is out of the sight of the plaintiff, ought the plaintiff to be entitled to recover for the illness by shock, if the facts were that the person whose safety was in question had turned off the dangerous highway, or had for some other reason never been in imminent danger at all?"

The questions posed in those last two sentences arise to be answered in the cases before me today, both in the relationship of sister to brother, and in relation to a plaintiff's loved one who had, "never been in imminent danger at all." And that judge, disagreeing with the majority of his fellow judges, was using those questions to demonstrate why he believed that the line should stay where it was, and not be moved.

The questions which were troubling him centred upon, "the extent of the duty of the defendant towards the public in or near the highway." The next case in point of time had nothing to do with accidents, whether of the railway or highway variety. It concerned the unpleasant discovery of the decomposed remains of a snail in a bottle of ginger beer. It was *Donoghue v. Stevenson* [1932] A.C. 562. Lord Atkin stated in a celebrated passage, at p. 580:

"the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

He went on to deal with the notion of proximity—an important word—which he expressed in the words of Lord Esher M.R. in *Le Lievre v. Gould* [1893] 1 Q.B. 491, 497:

"If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property."

In the same case A. L. Smith L.J. had referred to the principle, at p. 504:

> "that a duty to take due care did arise when the person or property of one was in such proximity to the person or property of another that, if due care was not taken, damage might be done by the one to the other."

Lord Atkin then went on [1932] A.C. 562, 581:

> "I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act."

Thus, in a case involving a ginger beer bottle, Lord Atkin was historically defining who, in law, was to be regarded as a defendant's neighbour, and ruling that the principle of proximity was not to be confined to mere physical proximity, but was to be extended to include proximity of relationships between people.

That classical exposition of the "neighbour" principle fell to be considered in *Bourhill v. Young* [1943] A.C. 92, when yet another lady plaintiff, who was pregnant at the time of an accident, sued for damages in respect of fright resulting in severe nervous shock occasioned by being in the vicinity of a fatal crash to a motor cyclist. She became immortalised in the law reports and the text books, somewhat unfairly, as the "pregnant fishwife," and she failed in her action. The reason she failed was that since she was not within the area of potential danger arising as a result of the motor cyclist's negligence, she was not within the ambit of such persons he, the motorcyclist, could reasonably foresee might be injured by his failure to exercise his duty of care. Lord Porter said, at p. 117:

> "In the present case the appellant was never herself in any bodily danger nor reasonably in fear of danger either for herself or others. She was merely a person who, as a result of the action, was emotionally disturbed and rendered physically ill by that emotional disturbance. The question whether emotional disturbance or shock, which a defender ought reasonably to have anticipated as likely to follow from his reckless driving, can ever form the basis of a claim is not in issue. It is not every emotional disturbance or every shock which should have been foreseen. The driver of a car or vehicle, even though careless, is entitled to assume that the ordinary frequenter of the streets has sufficient fortitude to endure such incidents as may from time to time be expected to occur in them, including the noise of a collision and the sight of injury to others, and is not to be considered negligent towards one who does not possess the customary phlegm."

That expression, "the customary phlegm" is an expression which we shall come across again in other cases. Lord Porter concluded his speech

by holding, at p. 120, that "shock occasioned by reasonable apprehension of injury to oneself or others, at any rate, if those others are closely connected with the claimant," affords a valid ground of claim.

Despite that, in *King v. Phillips* [1953] 1 Q.B. 429, 10 years on in 1953, a mother still failed in her action against a cab driver who backed his cab into her small boy. The boy was only slightly damaged, as was his tricycle, but the mother had heard his scream and had looked out of an upstairs window 70 to 80 yards away only to see the tricycle under the cab, and no sign of the boy. It was held in *King v. Phillips*, applying the test in *Bourhill v. Young* [1943] A.C. 92, that the driver owed the mother no duty and was not negligent. The reason was said to be that no "hypothetical reasonable observer" could reasonably or probably have anticipated injury being caused to the mother, whether physical or nervous, by the backing of the taxi without due attention to where it was going.

Eleven years later—and we are now in the 1960s—as the law developed an opposite result was achieved in *Boardman v. Sanderson* [1964] 1 W.L.R. 1317 when the defendant backed his car out of the garage and negligently injured a young boy whose father was, to the defendant's knowledge, within earshot of his son's screams and who naturally ran to his assistance. Ormrod L.J. said, at p. 1322:

> "I think I need say no more than that if the facts of this particular case are fitted to the concept of negligence, it is clear that a duty was owed by the defendant not only to the infant but also to the near relatives of the infant who were, as he knew, on the premises, within earshot, and likely to come upon the scene if any injury or ill befell the infant."

It is interesting to note that while it was not necessary for the particular judgment, Ormrod L.J. was extending the duty to "near relatives of the infant," who, while not actually witnessing the accident, were close by and likely to come upon the scene.

In *Hinz v. Berry* [1970] 2 Q.B. 40, a picnicking mother heard a crash which killed her husband, and injured her children. She turned round and saw the scene of the disaster. She recovered damages for the recognisable psychiatric illness caused by her shock. The manner in which the law had moved on in the previous quarter of a century, and the fact that the line had been drawn in a different place was emphasised by Lord Denning M.R. when he said, at p. 42:

> "The law at one time said that there could not be damages for nervous shock: but for these last 25 years, it has been settled that damages can be given for nervous shock caused by the sight of an accident, at any rate to a close relative. . . . In English law no damages are awarded for grief or sorrow caused by a person's death. No damages are to be given for the worry about the children, or for the financial strain or stress, or the difficulties of adjusting to a new life. Damages are, however, recoverable for nervous shock, or, to put it in medical terms, for any recognisable psychiatric illness caused by the breach of duty by the defendant."

Twelve years on from *Hinz v. Berry* brings us to 1982, and *McLoughlin v. O'Brian* [1983] 1 A.C. 410, which I have already indicated set out the state of English law as their Lordships found it to be.

I hope that this short survey of some important cases has shown that seeking to find where the line should fall between those who are entitled to succeed and those who are not in an action such as this, is no easy task. In the result there must be, indeed, some hard cases, and hard results. It is often said that hard cases make bad law. Indeed, in some states of Australia once the courts have come to their decisions in what may have been felt to be particularly hard cases, the legislatures of those states have enacted laws to specify to what degrees of relationship the law allows a remedy.

It is not for me to make any comment on whether or not that course is appropriate in this country. I have already indicated that at the very outset of this case I was told politely, but firmly, by counsel on both sides that, whatever I decided in these 16 cases, there would inevitably be appeals from my judgment to higher courts. I find that to be totally understandable. As a result I can be confident that it will be for others to consider the questions raised in the House of Lords by their Lordships in *McLoughlin v. O'Brian* [1983] 1 A.C. 410 as to whether policy limitations are indeed justiciable, that is, capable of being decided by the courts at all, or whether they must be left to Parliament. It is significant that early on in his speech in *McLoughlin v. O'Brian*, Lord Bridge of Harwich said, at p. 431:

> "The impression with which I am left, after being taken in argument through all the relevant English authorities, a number of Commonwealth authorities, and one important decision of the Supreme Court of California, is that this whole area of English law stands in urgent need of review."

In the landmark case, if I may so call it, of *McLoughlin v. O'Brian*, Mrs. McLoughlin was at home two miles away from the scene of an accident involving her husband and three children. More than an hour after the accident she was told of it by a neighbour who drove her from Suffolk to Addenbrooke's Hospital at Cambridge. There she learned that her youngest daughter had been killed, and she actually saw her husband and the other children and witnessed the nature and extent of their injuries. She had failed before the High Court, the trial judge holding that the defendants owed her no duty of care because it was not reasonably foreseeable that she would suffer injury by nervous shock.

The Court of Appeal disagreed, holding that this was reasonably foreseeable, but they still dismissed her appeal on the basis that it was settled law that a driver's duty of care was limited to persons or owners of property at or near the scene of an accident, and directly affected by his negligence. They held that considerations of policy limited the duty of care, and required that it be not extended, and that accordingly, since the plaintiff had been two miles from the accident and had not heard of it until some time later, and had not seen its consequences until still later, she was not entitled to recover damages for nervous shock. That

was what the Court of Appeal decided. The case went to the House of Lords.

The House of Lords found in her favour and allowed the appeal, holding that the nervous shock assumed to have been suffered by her had been the reasonably foreseeable result of the injuries to her family caused by the defendant's negligence. Their Lordships held that policy considerations should not inhibit a decision in her favour, and that accordingly she was entitled to recover damages. Their Lordships made powerful observations upon the state of English law in relation to such claims, in cases to which I shall shortly have to refer.

Before I do that, however, it is necessary to see how the courts of some other countries have in this century been dealing with the problems thrown up by such cases in their own jurisdictions.

Three months before the outbreak of the second World War, the High Court of Australia came to a majority decision in *Chester v. Waverley Corporation* (1939) 62 C.L.R. 1, which denied a plaintiff mother damages. Her seven-year-old son had gone out to play and had not returned. A long search eventually found his body floating in a trench. The search had lasted for some hours, but the mother was only present for the last half hour when the body was recovered. As a result of her experiences she suffered shock which impaired her health. The majority decision of the court was that the defendant council had no duty of care towards her. In words which today, 50 years on, might sound a touch unrealistic, not to say unfeeling, Latham C.J. said, at p. 10:

> "it cannot be said that such damage (that is, nervous shock) resulting from a mother seeing the dead body of her child should be regarded as 'within the reasonable anticipation of the defendant.' 'A reasonable person would not foresee' that the negligence of the defendant towards the child would 'so affect' a mother. A reasonable person would not antecedently expect that such a result would ensue . . . . Death is not an infrequent event, and even violent and distressing deaths are not uncommon. It is, however, not a common experience of mankind that the spectacle, even of the sudden and distressing death of a child, produces any consequence of more than a temporary nature in the case of bystanders or even of close relatives who see the body after death has taken place."

A powerful, and for my part, totally convincing judgment of Evatt J., would have found the other way, and have awarded the plaintiff damages.

In Canada in 1967, the Saskatchewan Court of Appeal dealt in *Abramzik v. Brenner* (1968) 65 D.L.R. (2d) 651 with the claim of a mother who suffered nervous shock and resulting physical illness on being told that two of her children had been killed as a result of the defendant's driving. The court held that the defendant had no duty of care because a reasonable man in the defendant's position would not have foreseen nervous shock resulting to her from his conduct.

Culliton C.J.S. held, at p. 658, that the plaintiff could only recover damages in respect of nervous shock "if it can be proved that the

A defendant ought, as a reasonable man, to have foreseen nervous shock (as opposed to physical injury) to the plaintiff as the result of his conduct."

However, in America in 1968 we see a case of much more importance. In *Dillon v. Legg* (1968) 29 A.L.R. 3d 1316 the Supreme Court of California decided in favour of a mother who had sustained emotional shock and physical injury from witnessing in close proximity B the death of her child, as the result of the defendant motorist's negligent driving. Tobriner J. recognised past American decisions had barred the mother's recovery, but after a masterly survey of American, English and Commonwealth decisions, concluded, at p. 1332:

> "To deny recovery would be to chain this state to an outmoded rule of the 19th century which can claim no current credence. No good C reason compels our captivity to an indefensible orthodoxy."

So far as the Californian courts were concerned, the line was being firmly redrawn.

In Canada in 1971 *Marshall v. Lionel Enterprises Inc.* [1972] 2 O.R. 177 decided that where a husband suffered grievous injury when the clutch on a snowmobile broke, and his wife suffered severe D nervous shock when she came upon him badly injured shortly after the accident, it could be said that nervous shock to the wife was reasonably foreseeable by a defendant.

Haines J. in the Ontario High Court held that the test must be the foreseeability of nervous shock itself, and went on to say, at pp. 186–187:

> E "There should exist a duty not to cause nervous shock to others when it can be foreseen as the likely result of certain conduct. Since our state of knowledge is constantly broadening, the scope of the duty of care must expand accordingly. Since it is the knowledge of an average man that is to be attributed to the defendant and since his knowledge is constantly changing, it is to be expected that earlier judges will have discovered no duty F where one is found to exist today. . . . Questions will no doubt arise, as they have throughout the history of cases like these, as to how far the law can go in compensating victims of nervous shock. Close relatives will no doubt pose little problem but what of sweethearts, fiancées or perhaps even close friends? And too, what about the unrelated bystander who merely witnesses the carnage? In answer to these nagging worries, I can do little better G than to quote the statement of Lord Wright in *Bourhill v. Young*: 'The lawyer likes to draw fixed and definite lines and is apt to ask where the thing is to stop. I should reply it should stop where in the particular case the good sense of the jury or of the judge decides.' The 'good sense' of the judge or jury must, of course, take into account the knowledge of the time. It is this type of H inquiry which has kept the common law a vibrant and vital force for so many centuries."

The following year, 1972, in Australia, and, indeed, in the State of Victoria where this historical journey began, *Benson v. Lee* [1972]

V.R. 879, dealt with the claim of a mother who was at her home approximately 100 yards away from the scene of an accident in which her son was left unconscious in the roadway as a result of the driving of the defendant. She did not see or hear the accident, but her eldest son ran home and told her about it. She then ran to the scene and saw the victim unconscious and went with him in an ambulance to a hospital, where she was informed that he was dead. She instituted proceedings for damages for nervous shock, and the court held that the defendant did owe a duty of care.

The judgment of Lush J. in *Benson v. Lee* was expressly approved by Lord Wilberforce in the House of Lords in *McLoughlin v. O'Brian* [1983] 1 A.C. 410, 422. He found the result of the case "correct and indeed inescapable," and the conclusion of the Australian court "to reflect developments in the law." He adopted, at p. 422, the words of the Australian judge, Lush J., in finding the decision based soundly upon "direct perception of some of the events which go to make up the accident as an entire event, and this includes . . . the immediate aftermath."

I shall break off this exercise to point out that one of the cases to which reference was made in *Benson v. Lee* [1972] V.R. 879 deserves to be mentioned at this stage. It was not referred to in *McLoughlin v. O'Brian* [1983] 1 A.C. 410, nor was it cited in argument in the instant case, but it is worthy of note in that it is the only case that I have been able to discover which deals with the relationship between brother and sister in a claim for nervous shock. It is *Storm v. Geeves* [1965] Tas. S.R. 252, a Tasmanian case. The plaintiff's three children were waiting for a school bus outside their home, a lorry hit and killed one of the plaintiff's daughters, another daughter and brother were standing close to their sister, saw the accident but were themselves physically uninjured. The boy ran into the house and told his mother who rushed out and saw the daughter who had been hit pinned underneath the lorry.

In the action mother, brother and sister of the dead child claimed damages for nervous shock. Burbury C.J. summed up the factual and legal situation in these words, at pp. 266–267:

> "It needs no imagination to realise how the terrible picture of the child's body squashed underneath the truck with no hope of quick relief must have burned into the brains of the child's mother, brother and sister and the anguish and grief they must have suffered. But the law wisely stops short of any attempt to assess human grief and anguish in terms of money—these things cannot be the subject of compensation in money. It remains true that death of itself is not a cause of action. A bereft relative in a case like the present is only entitled to damages if it is established by acceptable evidence that he or she has suffered from some form of medically recognisable neurosis or damage to the mind going beyond ordinary human grief or anguish. Where one begins and the other ends may be a difficult task for the judge or psychiatrist—to say nothing of the task of attempting to disentangle

A the two for the purpose of assessing a proper amount for damages."

The judge had already found, at p. 266, that injury by nervous shock was reasonably foreseeable, as was the fact that:

> "a mother, brother or sister of a beloved child as a result of
B witnessing its sudden and tragic death in an accident of this kind would suffer a deep psychic impact resulting in some kind of injury to the mind."

After a careful review of common law authorities he awarded damages for nervous shock in relation to the mother and the brother. Interestingly he found otherwise in relation to the sister, saying, at
C p. 270:

> "As to the girl Elsina I am not satisfied that she suffered any assignable neurosis or mental injury. Her condition and behaviour subsequent to the accident is I think consistent with ordinary emotional upset from seeing the accident. The evidence falls short of establishing anything further in her case."
D

This case is of significance, not only in demonstrating that a court in a common law jurisdiction has widened the categories of relationship where damages can be recovered for nervous shock caused by injury to a loved one beyond the conventional relationships of spouse and parent, to include also those of brother and sister. Interestingly, it is
E a further demonstration that it is not merely the fact of the relationship which will suffice to sustain a claim for damages, but that there must also be proved nervous shock in the sense of psychiatric illness, rather than an understandable emotional reaction, and that such illness may be proved to be present in the brother of a deceased but not similarly proved in the case of the sister. This may be a timely reminder of the
F way in which courts can deal with such problems when they are presented with them, and the way in which, even when the lines as to particular relationships is extended by a court, that court can nevertheless differentiate between genuine and unestablished claims.

This case, therefore, where there was a difference between the finding as to the brother from the finding as to the sister, has
G relevance when arguments against extending the line fall to be considered, and in particular the "floodgates" argument, that to extend the line at all will open the floodgates to permit a torrent of dubious claims.

Storm v. Geeves [1965] Tas. S.R. 252 is, therefore, a convenient bridge between the starting point of this review, *Victorian Railways Commissioners v. Coultas*, 13 App.Cas. 222 and *McLoughlin v.*
H *O'Brian* [1983] 1 A.C. 410. The floodgates argument was central to the thinking of their Lordships in the 1888 Privy Council case in refusing to award damages, "arising from mere sudden terror unaccompanied by an actual physical injury, but occasioning a nervous

or mental shock:" 13 App.Cas. 222, 225. Sir Richard Couch had used the words which I have already quoted, at p. 226:

> "The difficulty which now often exists in cases of alleged physical injuries of determining whether they were caused by the negligent act would be greatly increased, and a wide field opened for imaginary claims."

It was entirely upon that basis that the Privy Council held that the damages were too remote.

In *McLoughlin v. O'Brian* [1983] 1 A.C. 410 Lord Edmund-Davies joined with Lord Wilberforce to reject the floodgates argument. Lord Russell of Killowen joined with them both in being unimpressed by a fear of floodgates opening, and Lord Bridge of Harwich, at p. 442, affirmed his belief that the argument, "is, as it always has been, greatly exaggerated."

Their Lordships' attitude appeared to them to be encapsulated in the words of Kennedy J. in *Dulieu v. White & Sons* [1901] 2 K.B. 669 which commended themselves particularly strongly to Lord Edmund-Davies. Kennedy J. had said, at p. 681:

> "I should be sorry to adopt a rule which would bar all such claims on grounds of policy alone, and in order to prevent the possible success of unrighteous or groundless actions. Such a course involves the denial of redress in meritorious cases, and it necessarily implies a certain degree of distrust, which I do not share, in the capacity of legal tribunals to get at the truth in this class of claim."

Lord Bridge expressed strong approval of the judgment of Tobriner J. in *Dillon v. Legg*, 29 A.L.R. 3d 1316 which I have recently read, and went on to deal with the question of whether it is right on the grounds of policy, to draw a strict line excluding a plaintiff from his remedy and leaving to Parliament to legislate for a change in the law. He said, [1983] 1 A.C. 410, 441:

> "To attempt to draw a line at the furthest point which any of the decided cases happen to have reached, and to say that it is for the legislature, not the courts, to extend the limits of liability any further, would be, to my mind, an unwarranted abdication of the court's function of developing and adapting principles of the common law to changing conditions, in a particular corner of the common law which exemplifies, par excellence, the important and indeed necessary part which that function has to play."

He concluded, at p. 443:

> "My Lords, I have no doubt that this is an area of the law of negligence where we should resist the temptation to try yet once more to freeze the law in a rigid posture which would deny justice to some who, in the application of the classic principles of negligence derived from *Donoghue v. Stevenson* . . . ought to succeed, in the interests of certainty, where the very subject matter is uncertain and continuously developing, or in the

A interests of saving defendants and their insurers from the burden of having sometimes to resist doubtful claims."

From their Lordships speeches in *McLoughlin v. O'Brian* [1983] 1 A.C. 410 I deduce the important principle that a court of first instance, when facing this problem, is entitled not to conclude that a line restricting a potential liability of a defendant is already firmly and B inexorably drawn, but, rather, is entitled to redraw that line where, in the particular case, the court, enlightened by progressive awareness of mental illness, decides.

From the speeches of their Lordships in *McLoughlin v. O'Brian*, it is clear that it is not only in the proximity of the relationship between the plaintiff and the victim of the accident that the common law must C be free to move on, it is also in the degree of proximity in time and space to the accident, and also the medium by which the shock deriving from the accident is communicated. But if the common law has the licence to move on with changing times, then that licence must also be subject to a certain degree of limitation if the defendant who is guilty of some negligence is not to be made liable to the world at large.

D If the common law is entitled to extend the right to recovery for damages for nervous shock, or rather psychiatric illness, then one is forced to consider the three elements which are right for extension, namely: (1) the relationship between the plaintiff and the original victim of the defendant's negligence—the loved one, (2) the relationship in time and space between the plaintiff and the scene of the original negligence, (3) the medium through which the plaintiff E becomes conscious of the original negligence.

Just as *McLoughlin v. O'Brian* shows that the common law should not remain frozen but should consider in any given case whether it is right to extend the line in relation to any of these elements, so must it in consequence be right to consider what and where new limitations should be put upon the right to recover damages for psychiatric F illness.

Lord Wilberforce set out the position in such cases. He said, at pp. 418–419:

> "As the result of that and other cases, assuming that they are accepted as correct, the following position has been reached: 1. While damages cannot, at common law, be awarded for grief G and sorrow, a claim for damages for 'nervous shock' caused by negligence can be made without the necessity of showing direct impact or fear of immediate personal injuries for oneself. The reservation made by Kennedy J. in *Dulieu v. White & Sons* . . . though taken up by Sargant L.J. in *Hambrook v. Stokes Brothers* . . . has not gained acceptance, and although the respondents, in the courts below, reserved their right to revive it, they did not do H so in argument. I think that it is now too late to do so . . . 2. A plaintiff may recover damages for 'nervous shock' brought on by injury caused not to him or herself but to a near relative, or by the fear of such injury. So far (subject to 5 below), the cases do

not extend beyond the spouse or children of the plaintiff . . . including foster children . . . 3. Subject to the next paragraph, there is no English case in which a plaintiff has been able to recover nervous shock damages where the injury to the near relative occurred out of sight and earshot of the plaintiff. In *Hambrook v. Stokes Brothers* an express distinction was made between shock caused by what the mother saw with her own eyes and what she might have been told by bystanders, liability being excluded in the latter case. 4. An exception from, or I would prefer to call it an extension of, the latter case, has been made where the plaintiff does not see or hear the incident but comes upon its immediate aftermath."

And he referred to a number of cases I have referred to already.

"5. A remedy on account of nervous shock has been given to a man who came upon a serious accident involving numerous people immediately thereafter and acted as a rescuer of those involved. (*Chadwick v. British Railways Board* [1967] 1 W.L.R. 912) 'Shock' was caused neither by fear for himself nor by fear or horror on account of a near relative. The principle of 'rescuer' cases was not challenged by the respondents and ought, in my opinion, to be accepted. But we have to consider whether, and how far, it can be applied to such cases as the present."

Then he went on, at p. 419:

"Throughout these developments, as can be seen, the courts have proceeded in the traditional manner of the common law from case to case, upon a basis of logical necessity. If a mother, with or without accompanying children, could recover on account of fear for herself, how can she be denied recovery on account of fear for her accompanying children? If a father could recover had he seen his child run over by a backing car, how can he be denied recovery if he is in the immediate vicinity and runs to the child's assistance? If a wife and mother could recover if she had witnessed a serious accident to her husband and children, does she fail because she was a short distance away and immediately rushes to the scene. . . . I think that unless the law is to draw an arbitrary line at the point of direct sight and sound, these arguments require acceptance of the extension mentioned above under 4 in the interest of justice."

Lord Wilberforce then followed the process of logical progression, and concluded, at p. 419, in the case of Mrs. McLoughlin that her claim was "upon the margin of what the process of logical progression would allow." He went on to say:

"To argue from one factual situation to another and to decide by analogy is a natural tendency of the human and the legal mind. But the lawyer still has to inquire whether, in so doing, he has crossed some critical line behind which he ought to stop."

Thereafter Lord Wilberforce reviewed the various policy arguments against a wider extension, and accepted that there was a real need for

A the law to place some limitation upon the extent of admissible claims. As to the degrees of relationship he said, at p. 422:

> "As regards the class of persons, the possible range is between the closest of family ties—of parent and child, or husband and wife—and the ordinary bystander. Existing law recognises the claims of the first; it denies that of the second, either on the basis
B that such persons must be assumed to be possessed of fortitude sufficient to enable them to endure the calamities of modern life, or that defendants cannot be expected to compensate the world at large. In my opinion, these opinions are justifiable, and since the present case falls within the first class, it is strictly unnecessary to say more. I think, however, that it should follow that other cases involving less close relationships must be very carefully
C scrutinised. I cannot say that they should never be admitted. The closer the tie, (not merely in relationship, but in care) the greater the claim for consideration. The claim, in any case, has to be judged in the light of the other factors, such as proximity to the scene in time and place, and the nature of the accident."

As to proximity to the scene in time and place, he accepted that:

D

> "Experience has shown that to insist on direct and immediate sight or hearing would be impractical and unjust and that under what may be called the 'aftermath' doctrine one who, from close proximity, comes very soon upon the scene should not be excluded."

E He went on to include within the scope of sight and duty people "of whom it could be said that one could expect nothing else than what he or she would come immediately to the scene—normally a parent or a spouse . . ." and concluded: "Subject only to these qualifications, I think that a strict test of proximity by sight or hearing should be applied by the courts." Finally, as to the third element, namely the manner of communication of the shock inducing material, Lord
F Wilberforce firmly excluded communication by a third party and said, in words which have since proved to be tragically prophetic, at p. 423:

> "The shock must come through sight or hearing of the event or of its immediate aftermath. Whether some equivalent of sight or hearing, e.g. through simultaneous television, would suffice may have to be considered."

G

Lord Bridge gave similar helpful guidance as to where he saw the line to be at the time he was speaking, and as to where it might move in the future. Having dealt with the various arguments put forward in relation to limitations dictated by policy he considered what was the correct criterion of liability. He said, at p. 442:

H

> "On the one hand, if the criterion of liability is to be reasonable foreseeability simpliciter, this must, precisely because questions of causation in psychiatric medicine give rise to difficulty and uncertainty, introduce an element of uncertainty into the law and open the way to a number of arguable claims which a more

precisely fixed criterion of liability would exclude. I accept that the element of uncertainty is an important factor. I believe that the 'floodgates' argument, however, is, as it has always been, greatly exaggerated. On the other hand, it seems to me inescapable that any attempt to define the limit of liability by requiring, in addition to reasonable foreseeability, that the plaintiff claiming damages for psychiatric illness should have witnessed the relevant accident, should have been present at or near the place where it happened, should have come upon its aftermath and thus have had some direct perception of it, as opposed to merely learning of it after the event, should be related in some particular degree to the accident victim—to draw a line by reference to any of these criteria must impose a largely arbitrary limit of liability. I accept, of course, the importance of the factors indicated in the guidelines suggested by Tobriner J. in *Dillon v. Legg* as bearing upon the *degree* of foreseeability of the plaintiff's psychiatric illness."

Having set out the problems there, Lord Bridge then went on to give examples of what might be the position in a particular case. He said:

"But let me give two examples to illustrate what injustice would be wrought by any such hard and fast lines of policy as have been suggested. First, consider the plaintiff who learned after the event of the relevant accident. Take the case of a mother who knows that her husband and children are staying in a certain hotel. She reads in her morning newspaper that it has been the scene of a disastrous fire. She sees in the paper a photograph of unidentifiable victims trapped on the top floor waving for help from the windows. She learns shortly afterwards that all her family have perished. She suffers an acute psychiatric illness. That her illness in these circumstances was a reasonably foreseeable consequence of the events resulting from the fire is undeniable. Yet, is the law to deny her damages as against a defendant whose negligence was responsible for the fire simply on the ground that an important link in the chain of causation of her psychiatric illness was supplied by her imagination of the agonies of mind and body in which her family died, rather than by direct perception of the event?"

Mr. Hytner, for the plaintiffs, rightly points out that this is a more extreme example than the case of any of the plaintiffs in the cases before me.

I have quoted extensively from *McLoughlin v. O'Brian* [1983] 1 A.C. 410 for the purpose of indicating what, as I see it, are the guiding principles which should direct my approach to the complex problems facing me in this case. It would serve no useful purpose for me to cite at greater length from that important and helpful authority, but I have all the speeches of their Lordships firmly in mind.

I turn, therefore, to consider how those principles should affect my decision in these 16 cases where negligence is admitted on behalf

of the defendant, in relation to the actual victims who were killed or injured in the Hillsborough disaster. I have to look beyond those victims, and at what is the reasonable foreseeability possessed by the defendant in relation to the loved ones of those victims. As I have already indicated, I deal with my findings on the assumption that it is proved in each case that, in particular, they did suffer a form of psychiatric illness consequent upon the events that befell a loved one in the course of the Hillsborough disaster. It follows that if I make that assumption at this stage, I must move to the consideration of whether the relationship of the plaintiff to that loved one was sufficient in law for the plaintiff to fall within that class of persons entitled to succeed in a claim for damages for psychiatric illness.

English law, as we have seen, permits only those within the relationship of spouse and parent so to recover. The reasons for this are abundantly clear. It is only in cases where the relationship is of the closest known to man that it is reasonably foreseeable that the doing of physical harm to the one may cause mental harm amounting to true psychiatric illness to the other. It has, until now, been considered that in the spectrum of human relationships ranging from the closest of ties known to man, through all degrees of relationship to that of the mere bystander, it is only in the former in which it is reasonably foreseeable that such damage may follow. For all other relationships it is reasonably foreseeable that the possession of "reasonable phlegm," as the law puts it, will prevent the onset of a psychiatric illness. I have to ask myself, and then answer the question: "Ought that still to be the position in the light of modern knowledge and modern circumstances, and in particular in the circumstances of this case?"

On the basis of where the line is at present drawn, it is sensible first to consider the closest relationship which falls immediately outside that line, that of brother and sister. For a number of reasons I have concluded that the line should include the brother or sister of the victim of negligence. I can see no basis in logic, or in law, why that relationship should be excluded. If we take, as an example, a family of four consisting of a mother, father, son and daughter, each of the four is already within the line for certain purposes. The mother and father are within that line downward towards their children. They are also within that line in their relationship as husband and wife. The son and daughter are, again, within that line in that their relationship upwards to their parents entitles their parents to come within the line. Although no case was cited to me where a child had succeeded in a claim for psychiatric illness occasioned by the injury or death of a parent caused by the defendant's negligence, the mirror image of claims by a parent for such damage to a child, I cannot think that the principle would be different.

They are, therefore, human beings in the relationship of the one entity, the family, who for certain purposes already fall within the line drawn by the law. While it is trite to say that a family can exist where there is only one child, so soon as a second child is born he becomes every bit as much a member of the nuclear family as the first born.

The same is true of those born later, by which use of language I hope to avoid the use of the word "sibling" elsewhere in this judgment. Once there are two or more children of a family it is the normal and hoped for (though realistically not inevitable) course of events, that they grow up together through their years as tiny tots on into their teens, and further on into adulthood. It is the normal course of events that they are extremely close within the family. Of course, as in any family situation, there are "spats" between one child and another, so there are in most marriages, and most relationships between parent and child. It is the normal instance of family life as to which any defendant is properly fixed with reasonable foreseeability, that the relationships between mothers and fathers, sons and daughters are of the closest known to mankind. Further, when children have grown up together and have got to their late teens or early twenties, their brothers and sisters will usually be the very people with whom they have spent virtually their entire lives; the human beings they know best apart from their parents. That is a general remark which can be applied to all groups. But when we consider the particular groups in these cases, it is all the more true.

It goes without saying that a goodly proportion of the crowd at any major football match will consist of young unmarried men. Those young men there who are married will have known their wives a far shorter length of time than they have known their brothers or sisters. All those young men will be at the stage in their lives when their ties to their family—their original family—not just to their fathers and mothers, but also to their brothers and sisters, will be of the strongest. They will have had the longest number of years to grow into adulthood, and the least number of years to go their separate ways as the fresh and competing demands of their own now working and married lives develop.

To go from the general to the particular, it was a sad fact noted in the Taylor Inquiry, that of the 95 people who were killed at Hillsborough 38 were under 20 years of age, and 39 were between 20 and 29 years; that is, 77 were in their teens or twenties. Those figures, and the proportions they represent are probably representative on a very rough basis of the overall age ranges of those at the match. Eighty-eight of the victims were male, and seven female. Those figures, too, tell their own story.

I consider that it was reasonably foreseeable that a large proportion of those attending the match would be young males. I consider that it was reasonably foreseeable that the brothers and/or sisters of any such victims of the disaster might be so affected by the death or injury of their loved one as to suffer psychiatric illness.

I turn now to other degrees of relationship, and it is right that I say at once that I have concluded, as a result of my deliberations, that the line should not be extended any further. Once it is extended to include brother and sister, I consider it has reached the margin of what the process of logical progression would allow. I appreciate the closeness, the fondness, the love and affection which can flow in all of the other relationships before me. Such love can be strong and

compelling, but the various relationships are not so immediate, in my view, as to make it reasonably foreseeable to a defendant that psychiatric illness, rather than grief and sorrow, would follow death or damage to the loved one. I realise this finding may seem harsh and hard, but, as I conceive it, the law has to draw lines of limitation, and that is the duty of a judge. It follows that I conclude that the law, as it stands today, allows the claim of a sister or a brother, but not that of a grandfather, an uncle, a fiancee, a brother-in-law or a friend. I stress that nobody doubts the love of the latter group. It is a question of law, of the reasonable foreseeability of the defendant, of the reasonable phlegm of the individual, of concepts of remoteness of damage, and/or of the defendant's duty of care.

Mr. Woodward referred me to *Caparo Industries Plc. v. Dickman* [1990] A.C. 605 a case relating to negligent mis-statement in financial matters for the criteria for the imposition of a duty of care, namely foreseeability of damage, proximity of relationship, and the reasonableness or otherwise of imposing a duty. While that case is of considerable interest I do not think it affects the principles laid down in *McLoughlin v. O'Brian* [1983] 1 A.C. 410.

I turn now to the question of proximity of time and place. I consider first the four plaintiffs who were actually attending the match, and were seated in the West Stand above the pens at the Leppings Lane end. I hold that such a position complied in this case with the requirements of proximity of time and space, to the scene of the negligence towards the loved one. However, of the four plaintiffs who were in that stand only one, Brian Harrison, possessed the required degree of proximity of relationship. He was the brother of Gary and Stephen Harrison, both of whom sadly died in the disaster.

One plaintiff, William Pemberton, was actually at the match but not inside the ground. He had travelled with his son, Roy Pemberton, to Hillsborough by coach and had stayed on the coach intending to watch its television, but fell asleep 20 minutes before the kick off. As a result of what he was told soon after 3 p.m., he watched the events on the coach television, and made the search for his son (in the circumstances clearly set out in his statement of facts), which was to culminate in his identification of the body of his son at the temporary mortuary some time after midnight. I will not refer further to that statement of facts, but I wish to say that it is an example of the agonies into which many of these plaintiffs were propelled. I conclude that Mr. Pemberton is within the requisite degree of proximity of time and place.

Nine of the 16 plaintiffs in the cases before me saw the disaster unfold as it was happening, not as eye witnesses, but through the medium of television broadcasts. I shall soon come to consider their cases, but it is convenient first to deal with the final two plaintiffs. Mr. Kehoe heard the news of the Hillsborough disaster on the radio during the live broadcast of another football match. He later saw recorded footage of the disaster broadcast on the television. His grandson, Tommy, was at the match, as was Tommy's father, Mr. Kehoe's son-in-law. Sadly both died in the disaster. I have already indicated that I cannot include the relationship of grandfather within the line of proximity

of relationship. I have to say, even if I had been able so to do, I could not find that Mr. Kehoe was within the requisite proximity of time and place, and his claim accordingly fails.

The last plaintiff, Catherine Jones, is the sister of Gary Jones, who lost his life at Hillsborough. She learned of some trouble at Hillsborough while she was out shopping at about 3.30 p.m. but nothing to indicate that anyone had been injured. An hour later, while still shopping, she heard that there had been some deaths. She got home about 5.15 p.m. and listened to the radio; the television was not turned on because she did not wish to see the scenes. At about 10 p.m. she saw recorded pictures on television. She learned of her brother's death at 5 a.m. on the Sunday morning, from her parents. Her statement of facts sets out that her nervous shock is consequent upon the scenes she saw on television, that is to say, recorded television at 10 p.m. that night, and knowing that her brother was in an area of the ground where the death toll had risen to 85 by approximately 5.30 p.m. I have, regretfully, to conclude that this plaintiff, though as a sister within the degree of proximity of relationship, is not within the proximity of time and space which would give rise to a valid claim. It follows that her claim too fails.

I turn now to consider the cases of the nine plaintiffs who observed the events through the medium of their television screens. They were seeing the events as they happened through the simultaneous broadcasting of pictures captured by a television camera. Do their cases fall within the necessary degree of proximity in time and space to the events at Hillsborough which so affected their loved ones? No case in any common law jurisdiction has yet had to grapple with the question. Indeed, Lord Wilberforce in *McLoughlin v. O'Brian* [1983] 1 A.C. 410, in words I have recently read, expressly identified the problem as one for the future. These tragic cases, however, have made it one for the present. It is therefore necessary to approach the new question from old principles and, therefore, to travel back to first principles.

From the review of the various authorities which I have sought to make, it can be seen that, once it was established that a claim for damages lay for nervous shock resulting from a fear not for one's own safety, but for that of someone else, the courts originally demanded of the plaintiff both presence at the scene and sight of the event. Gradually those rigid requirements were relaxed to extend to presence near the scene without any actual sight of the accident. As time and the law moved on even that requirement of presence at or near the accident was relaxed, until, by the time it came to the case of Mrs. McLoughlin, she was two miles and more than an hour away from the accident when she was told of it, and she was still further away from the scene of the accident, both in time and space, before she saw the terrible after effects of the accident upon her husband and children once she got to the hospital.

In his speech in *McLoughlin v. O'Brian* [1983] 1 A.C. 410 Lord Bridge was, moreover, prepared to consider favourably the example of the mother to which I have recently referred. That hypothetical mother was at a far greater remove in both time and space than is the position in this case.

Further, since then there has been the Australian case *Jaensch v. Coffey* (1984) 155 C.L.R. 549, in which again the female plaintiff had her first visual awareness of the effects of the accident on her husband, not at the scene of the accident, but hours later at a hospital.

I would venture to think it beyond peradventure that the common law has moved on to the stage where it no longer requires in such cases presence at the scene of the accident and actual sight of it. The line has been moved to incorporate into the accident its immediate aftermath as defined and explained by Lord Wilberforce in *McLoughlin v. O'Brian* [1983] 1 A.C. 410. If that be the case, what guidance can that give in a world in which simultaneous television transmission of events into the living rooms of that world is now an everyday event?

Again, it is necessary to go back to first principles and to analyse exactly what it is that is being observed by an eye witness, and what it is that is being observed by a watcher of television. The eye witness receives images at the back of his eye of events that are taking place immediately before him in his presence. The watcher of television does not. For the eye witness those images are seen as life size, for the television viewer they are not. The eye witness can change those images by altering his field of vision, by the turn of a head or the movement of his body by, for instance, moving closer to the scene. The watcher of television is unable to do that, for whichever way he moves, the images on the screen will be the same, albeit seen at a different angle. The eye witness is seeing something which is taking place actually where he is. The television watcher is enhancing his sight by "borrowing" the images collected by the lens of a camera somewhere else. That camera lens, metaphorically, transports him from his actual physical position to the different location of the camera, and allows him to receive at the back of his eyes the images he would receive were he standing in the position of the camera. He may, in fact, metaphorically be slightly nearer than the camera when one makes allowance for the power to focus. In a sense his metaphorical feet are mid-way between the camera and the image.

His is a similar situation to that of the watcher through binoculars, or a telescope, whose metaphorical feet have been moved closer to the object than his actual feet, and who is seeing a picture which he could not possibly receive from his actual position. I accept at once that in the case of the watcher through binoculars, or a telescope, it may be said that it is only the detail of what he is seeing which he could not see from his actual position. That detail, however, may disclose to his sight something which he could not see without the binoculars, such as the concealed figure of a man. Hence, binoculars, like television, may allow a person to see something in a distant position which he could not have seen with his own unaided eyesight.

If the television watcher has set up or switched on that camera himself in, for instance, the next room or the next house his brain will tell him that what his eyes are seeing is actually happening at the moment his eyes see it. This is the familiar situation of the security monitoring camera used against shoplifters or intruders. The television watcher's brain will have the same information about the immediacy of

what is being seen by his eyes, whether it comes from the brain's own knowledge, as in the instance of the security camera, or from the brain's perception of a statement by a commentator that, for instance, "These pictures are coming live from Hillsborough." In either case the brain of the watcher will tell him that what he is watching is what is happening at the time he watches.

Thus, the television watcher in those circumstances is aware that he is augmenting his own eyesight by the lens of a camera in a distant position, but that his eyes are receiving, through the intervention of that camera lens, images of what is actually happening as he sees them. Just as the store detective sees the goods being put in the pocket and not in the basket, although he is not physically present at the scene of the theft, so it is that the television watcher sees the crowds surge forward in pen 3 at the Leppings Lane end, though he is not at Hillsborough.

I note, in passing, the way in which the criminal law has approached the problem of the value and effect of observation of events on a video screen. In *Taylor v. Chief Constable of Cheshire* [1986] 1 W.L.R. 1479, it was held that there was no effective distinction for the purpose of admissibility between a direct view of the actions of an alleged offender by a witness, and a view of those actions on a visual display unit of a camera, or on a video recording, of what the camera recorded, provided that what was seen on the visual display unit or video recording was connected by sufficient evidence to the alleged action of the accused at the time and place in question.

The court referred to *Reg. v. Maqsud Ali* [1966] 1 Q.B. 688, 701, where Marshall J. commented that: "Evidence of things seen through telescopes or binoculars which otherwise could not be picked up by the naked eye have been admitted . . . ." Though not, of course, in any way decisive of the issue before me, these cases are interesting examples of the approach of the criminal law.

It is argued by Mr. Woodward, on behalf of the defendant, that what is transmitted, even when it is transmitted live, is not what is happening at the scene, and not what the observer there would have observed. He submits that perception via a television broadcast, though it be live, is not the direct perception of the event by the plaintiff, but is as seen through the eye of a third party—the cameraman. He says it may be enhanced or rendered presentable and interesting by close-up or by panning shots, and is likely to be attended by extraneous commentary which can colour the visual impression.

He submits further, that the reception of such a broadcast is in a context outside the control of a tortfeasor. He argues that the plaintiff must show both a sudden and direct sensory involvement with the event, or its immediate aftermath, for such engagement of his senses and emotions arising from his close family relationship (parent or spouse) with the victim of the event, and from his own physical involvement therein.

He argues that, therefore, there is a distinction between the happenings at Hillsborough and that which is received instantly on television or through another medium. He points out that a radio broadcast might, on the one hand, represent the matter in a more

graphic form than it really justified, or might, alternatively, sanitise it so as to make it bland.

He further argues that since the law allows no recovery of damages for nervous shock induced by merely hearing of the death or injury of a loved one from a messenger, then the same considerations should apply to hearing the message from a radio broadcast, since what is broadcast goes from the mouth of a reporter or newsreader. He goes on from there to make the further jump to apply the same principle as to what is broadcast on television, and to conclude that the law should not afford a remedy in such circumstances.

So far as simultaneous television is concerned I am not impressed by such arguments, ably and attractively put though they were. It is in my view the visual image which is all important. It is what is fed to the eyes which makes the instant effect upon the emotions, and the lasting effect upon the memory. This was confirmed by the evidence of Dr. O'Connell on this matter, which I entirely accept. I am satisfied that the observation through simultaneous television of the scenes of what was happening during the disaster at Hillsborough is sufficient to satisfy the test of proximity of time and space required in such actions as these.

Mr. Woodward also relied on the "floodgates" argument in relation to the question of simultaneous television. He said that the events were broadcast to millions, and here there were real floodgates, rather than any figures involved in the question of a road traffic accident. He said that there was the potential not only to identify the floodgates argument, but also to open the floodgates. With those propositions, again, I cannot agree. There will not, under our system of law, be suddenly opened to the millions who were watching television that day an opportunity to obtain damages, as the defendant's submission suggests. Those millions will have no proximity of relationship, and, therefore, any claim by them would fall at the first fence, or fall of its own inanition as it has elsewhere been put. Again, there would be the hurdle of reasonable forseeability to be cleared, as it must in any event, even in those cases where I have already found there is proximity of relationship and proximity of time and space.

Let us look, then, at that hurdle of reasonable forseeability. Was it reasonably forseeable to the defendant that any negligence of his in respect of persons killed or injured at Hillsborough might lead to psychiatric illness in loved ones of theirs who saw the events live on television? I am satisfied that it was, and will explain why. It is accepted that to the defendant it was not merely reasonably foreseeable that the television crews would be at Hillsborough for the semi-final, but that, in fact of course, he had full knowledge that they would be there. It must be accepted, and I so find, that it was reasonably foreseeable that the cameras would be turning long before the match, collecting footage which might be used later. It was reasonably foreseeable, as I find, that if unfortunate events took place which changed the event from a joyful sporting occasion to a tragic piece of disastrous news, those cameras would, or might, be used to transmit live pictures. It was also reasonably foreseeable that those live pictures would be seen by many of the nearest and dearest of those involved in the disaster. It was not merely

reasonably forseeable, it was a pound to a penny that on the afternoon of two F.A. Cup semi-finals in which Liverpool and Everton Football Clubs were both separately engaged, the television sets of the city would have been switched on and eagerly watched for the latest news, even though the matches themselves were not to be transmitted live. In those circumstances I find that all those who saw the disaster live on television do come within the line of proximity of time and space, and I can, therefore, bring together the effect of my findings so far.

I began by making the assumption that it was proved that each of these plaintiffs had suffered psychiatric illness as the result of the death of, injury to, or apprehended injury to their loved one caused by the negligence of the defendant. I then considered where it was necessary to draw the line in relation to the need to prove proximity of relationship, and made my findings accordingly. I then moved on to consider where it was necessary to draw the line in relation to proximity of time and space, and have made my findings.

It follows that by this stage, on the important assumption that the psychiatric illness be proved, that there would be established liability in the case of the plaintiff, Brian Harrison, who was in the West stand, in the case of the plaintiff, William Pemberton, who was at the match but in a coach outside the ground, and in the case of eight out of nine who saw the disaster on live television, namely: Stephen Jones, Maureen Mullaney, Karen Hankin, Agnes Copoc, Denise Hough, Robert Spearrit, Harold Copoc and Brenda Hennessey. There are, however, first, some other matters to deal with before I conclude finally the question of liability.

I have come to my conclusion in relationship to proximity of time and space on the basis that such proximity has been established through the medium of simultaneous television. Had I been unable to reach such a finding it would have been necessary for me to consider the submissions made by Mr. Hytner in relation to the doctrine of "the aftermath," dealt with by Lord Wilberforce in *McLoughlin v. O'Brian* [1983] 1 A.C. 410.

Mr. Hytner made various submissions to me in relation to the effect on specific plaintiffs of their activities in trying to discover what had happened to their loved ones, whether by telephone inquiries or by travelling from Liverpool to Sheffield, or in the harrowing experience of having to attend at the mortuary to seek to find out what had happened to their loved ones, and in the worst cases to identify the body. Five of the plaintiffs had that unenviable task. Mr. Hytner equated the search for information by telephone with the search for a body, and argued that there was no difference in law between them, and he asserted that the "search for the truth" was a fact tending to precipitate post traumatic stress disorder.

Mr. Woodward, on the other hand, asserted that Mr. Hytner's label, "search for the truth" was a misuse of the language. He argued that the aftermath only extended the length of time taken by the accident to a period which he would have expressed as the time "while the dust is in the air." For reasons which I have indicated already, I find it unnecessary to make any pronouncement on this subject. Indeed, it would be positively unwise, since the aftermath for any particular incident will

A depend entirely on the circumstances of that incident, and no pronouncements of mine on the subject of the aftermath are likely to assist in relation to cases as yet unbrought.

I should also refer to other problems with which it is not necessary for me to deal. An example occurs in the case of the plaintiff Robert Spearrit whose brother, Edward Spearrit, received severe crushing injuries in the disaster. Robert, as brother to Edward, was therefore B also the uncle of Edward's son Adam, who was, sadly, killed. In this case the plaintiff saw the events unfold on television, and thereafter attempted unsuccessfully, to contact the emergency telephone numbers. Thereafter he travelled to Sheffield, and spent two hours searching for his brother, and nephew, before eventually discovering his brother in the intensive care unit of a Sheffield hospital some hours later. At the C temporary mortuary, still later, he first identified a photograph of his nephew, and he then identified his nephew's body.

His statement of facts pleads that his condition was caused by:

> "(a) seeing the events live on television, (b) finding his brother in the intensive care unit at the Sheffield Hospital, (c) identifying the body of his nephew at the temporary mortuary."

D On the assumption which I make that the plaintiff is suffering from psychiatric illness which is the consequence of the negligence of the defendant, in relation to both his loved ones the situation would be thus: (1) the relationship with his brother who was injured would fall within the necessary degree of proximity; (2) the relationship with his 14-year-old nephew who was killed would be outside the necessary E degree of proximity. The exercise of seeking to analyse what part of the plaintiff's psychiatric illness was brought on by his reaction to the events befalling his brother, and what to those befalling his nephew, would be as unattractive as it would be pointless. While it might form an interesting part of an academic exercise for examination in psychiatry, the distinction could and should have no place in the common law.

F I am fortified by the decisions of the House of Lords in *Bonnington Castings Ltd. v. Wardlaw* [1956] A.C. 613 and in *Wilsher v. Essex Area Health Authority* [1988] A.C. 1074, that such an exercise is unnecessary. The proper test is whether the plaintiff's psychiatric illness was caused, or materially contributed to, by the relevant breach of duty of the defendant. Quite clearly in this plaintiff's case his illness was caused, or materially contributed to, by the defendant's breach of duty in G relationship to his brother.

I have not, of course, attempted to refer to each and every one of the many authorities cited to me, nor do I seek to set out on that exercise now. However, I am conscious that I have found against several of the plaintiffs upon the basis that their relationship with the loved one who was the victim of the defendant's negligence is too remote.

H I am conscious that many of the plaintiffs to whom I have refused a remedy will be aware of the arguments addressed to me in relation to various authorities where plaintiffs have won damages for nervous shock, despite their not being within the line as I have drawn it. Indeed, plaintiffs have won damages for nervous shock where there has been no

relationship at all of blood, marriage, or of any other kind. It would not be right for me to leave this judgment where it is without indicating how I have approached those various cases, so that those that I have held must fail in their claims should at least know, today, the basis upon which I hold that they do fail.

In my view each of those cases, when properly looked at, is not strictly speaking a case where the plaintiff wins damages by reason of a particular relationship, but, rather, where the damages fall to be awarded because of the plaintiff's particular activity. The first activity I look at is the activity of rescue. In *Haynes v. Harwood* [1935] 1 K.B. 146 a policeman actually in a police station saw what was happening outside in a Stepney Street and ran out to stop a runaway horse which might have hit women and children in the street outside. He was therefore on an act of rescue. His action was an errand of mercy, and it was by reason of that activity that he fell within the categories of persons for whom the defendant owed a duty of care.

In *Chadwick v. British Railways Board* [1967] 1 W.L.R. 912, Mr. Chadwick lived close to the Lewisham railway line where there was a disaster in December 1957. As soon as he heard of the disaster he rushed to the scene and spent the whole night amid horrific surroundings doing what he could to help. His was an errand of mercy, an act of rescue, which caused in him nervous shock. It was that activity which brought him, together with passengers on the train, into the category of those to whom the defendants owed a duty of care.

A different category of case was cited to me by Mr. Hytner, in support of the submission that there were cases where a relationship of nothing more than friendship had entitled the plaintiff to succeed. For reasons I shall indicate shortly, I do not consider that it was a relationship with a person but, rather, again, a relationship with an activity which caused these plaintiffs to be successful.

Let us take, for instance, *Dooley v. Cammell Laird & Co. Ltd.* [1951] 1 Lloyd's Rep. 271. There the plaintiff was a crane driver whose load, without any fault on his part, fell into the hold of a ship. No one was actually injured but the plaintiff knew that fellow workers were then in the hold, and he suffered nervous shock. In the course of his judgment Donovan J. said, at p. 277: "I suppose I may reasonably infer that his fellow workmen down the hold were his friends," but it would seem that the real basis for his finding for the plaintiff was that Mr. Dooley was the unwitting agent of the defendant's negligence. He was the crane driver who, without any fault, was party to an accident which could have killed his fellow workers. It was his activity in operating the crane which caused the actual and potential damage. It was that activity which brought him into the category of persons for whom the defendants owed a duty of care, not really any question of relationships of friendships.

Again, in *Galt v. British Railways Board* (1983) 133 N.L.J. 870, the plaintiff was a train driver who rounded a bend at a proper speed of 65 miles per hour and suddenly saw two railway men in front of him. He thought he had killed them, but fortunately he had not. The defendants were held liable for his nervous shock because they owed him a duty to

take reasonable care not to expose him to that injury. Again, it was the activity of driving the train which he believed had killed his fellow workers that brought him within the category, not any degree of relationship.

In *Wigg v. British Railways Board*, The Times, 4 February 1986, the plaintiff, similarly, was a train driver, who this time looked after a passenger who had been hit by the door of his train.

In all these cases it can be seen that the courts are really dealing with a plaintiff who is engaged on the activity of operating some sort of equipment in circumstances where, if there is negligence on the part of the defendant, it is reasonably foreseeable that there will be an accident involving that equipment in which there will be injury or death to persons, caused in the sight and hearing of the plaintiff. It is, therefore, reasonably foreseeable that the plaintiff may suffer nervous shock. That, I believe, to be the true extent and basis for the decisions on this line of cases.

Next, *Currie v. Wardrop*, 1927 S.C. 538, a case from Scotland, where the fiancée, who was walking arm in arm with her young man, recovered damages for nervous shock involving apprehension for her own safety and the safety of her fiancé, though he was hit and she was not, by a vehicle. Those circumstances are, of course, very different indeed from those of a plaintiff in this case, Alexandra Penk, who was unofficially engaged to one of the deceased. Miss Currie was not only at the scene, but suffered nervous shock through anxiety for her own safety. It would have been a task as Herculean as hopeless, to attempt to work out what proportion of her nervous shock flowed from anxiety for herself, and what for her fiancé.

It is probably appropriate that I deal last of all with *Owens v. Liverpool Corporation* [1939] 1 K.B. 394. It was a macabre case in which a hearse was hit by a tramcar, the coffin was overturned and the mourners suffered shock. They were of various relationships to the deceased, some of them outside the line that I have drawn. Suffice it to say that, while I regard it as an interesting case, it did not involve injury to a fellow human being. It has been heavily criticised in the past, and in seeking to deal with questions that were hypothetical, such as the loss of the life of a beloved dog, it moved into realms which cannot, I think, with respect, assist me in this case.

I conclude this judgment by indicating that I have the greatest of human sympathy with all these 16 plaintiffs and all the other persons and families who have suffered in similar ways. The human tragedy that afternoon represented can never be over emphasised. My task, however, is to attempt to interpret the law, and I hope that it will be clearly understood that sympathy alone is not enough.

May I also indicate what I am sure is already manifest. In the cases where I have not found for the plaintiff, but have found for the defendant, there is no suggestion that there is anything false or insincere about the nature of the claim advanced. These are test cases. The law itself has to be tested and this can only be done by the bringing of an action. There is no shame, no ignominy, no lack of respect of the dead in the bringing of any of these actions.

It follows that in these test cases on liability I find for the plaintiff in the cases of Brian Harrison, Stephen Jones, Maureen Mullaney, Karen Hankin, Agnes Copoc, Denise Hough, Robert Spearrit, William Pemberton, Harold Copoc and Brenda Hennessey. There will be judgment accordingly for the plaintiffs in those cases on the question of liability, and the cases will be adjourned for damages to be assessed.

In the remaining six cases there will be judgment for the defendant in each case.

Order accordingly.

Solicitors: Brian Thompson & Partners, Liverpool for Ford & Warren, Leeds, Silverman Livermore, Liverpool, Mackrell & Thomas, Liverpool, Lees Lloyd Whitley, Liverpool, Morecroft Dawson & Garnetts, Liverpool, Kennan Gribble and Bell, Crosby and Mace & Jones, Huyton; Hammond Suddards, Bradford.

[Reported by JILL CARLEN, Barrister]

APPEAL from Hidden J.

By a notice of appeal dated 8 November 1990 the defendant appealed against the decision of the judge in respect of nine of the ten successful plaintiffs, Brian Harrison, Harold Copoc, Agnes Copoc, Maureen Mullaney, Karen Hankin, Brenda Hennessey, Denise Hough, Stephen Jones and Robert Spearritt. By a respondent's notice dated 26 October 1990 the six unsuccessful plaintiffs, namely, Robert Alcock, Peter Coldicutt, Catherine Jones, Joseph Kehoe, John O'Dell and Alexandra Penk, cross-appealed from the judge's decision dismissing their actions against the defendant on the ground that they did not fall within the range of persons to whom the defendant owed a duty of care.

The facts are stated in the judgment of Parker L.J.

B. A. Hytner Q.C. and *Timothy King Q.C.* for the plaintiffs. Relationship and proximity are not discrete aspects of foreseeability, but in considering whether a psychiatric illness may be caused to a plaintiff by a tortfeasor's negligence to a third party the two aspects should be considered both separately and as being interlinked, and further, as being linked with the foreseeable results of the negligence. If it is reasonably foreseeable that the negligent act or omission will result in a scene of carnage, even an unrelated bystander will be able to recover; but if only mild injury is foreseeable, even a brother may not be able to recover. It follows that there is no category of relationship which on grounds of general principle or policy should exclude a plaintiff.

The aftermath of the scene of injury includes the search for a missing loved one. A stranger who searches and finds a body may recover as a rescuer. To deny a searcher who has an emotional tie would be illogical and unfair. There is a distinction between identification of a body when the fact of death is known and identification as the culmination of a

search, particularly when the circumstances are foreseeably gruesome: see the dissenting judgment of Evatt J. in *Chester v. Waverley Corporation* (1939) 62 C.L.R. 1. Such of the plaintiffs as suffered from post-traumatic stress disorder by reason of travelling to Sheffield to find out whether their loved ones were alive or dead and who witnessed scenes likely to be etched in the brain and memory should be entitled to recover. There should be no fixed rules or categories. The governing principle should be reasonable foreseeability.

A tortfeasor whose act or omission has caused death or injury to a third party, or was likely to cause such death or injury, will be liable in damages to a plaintiff provided that (a) the plaintiff has suffered a psychiatric illness; (b) it was reasonably foreseeable that the plaintiff would suffer such illness or a psychiatric illness of some sort as a result of the death or injury, whether actual or feared of the third party; and (c) the psychiatric illness has been caused by the death or injury, whether actual or feared.

In considering reasonable foreseeability the court will take into account (a) the relationship, if any, between the third party or victim and the plaintiff (b) the proximity in time and place between the plaintiff and the tortious act, including the medium through which the plaintiff is proximate to the act and (c) the nature of the foreseeable consequence of the tort. The court will balance the relationship with the other two factors. Policy has no place in these matters. A sensible application of the principles to any given set of facts will in practice restrict the number of actions which can be successful.

Victorian Railways Commissioners v. Coultas (1888) 13 App.Cas. 222 and *McLoughlin v. O'Brian* [1983] 1 A.C. 410 show that the scope of the action for nervous shock has been gradually widening. The law has developed step by step and is still developing. [Reference was made to *Attia v. British Gas Plc.* [1988] Q.B. 304; *Hevican v. Ruane* [1991] 3 All E.R. 65; *Hinz v. Berry* [1970] 2 Q.B. 40 and *Ravenscroft v. Rederiaktiebølaget Transatlantic* [1991] 3 All E.R. 73.]

W. C. Woodward Q.C. and *Patrick Limb* for the defendant. To establish liability for nervous shock the plaintiff must prove (i) foreseeability of injury by nervous shock, (ii) a duty of care owed by the defendant to the plaintiff, (iii) a breach of that duty whereby nervous shock is caused to the plaintiff and (iv) that it is fair, just and reasonable for liability to be imposed: see *Caparo Industries Plc. v. Dickman* [1990] 2 A.C. 605, 617–618; *Yuen Kun Yeu v. Attorney-General of Hong Kong* [1988] A.C. 175 and *McLoughlin v. O'Brian* [1983] 1 A.C. 410, 420H.

Unusually in negligence, liability for nervous shock requires a double test to be satisfied, namely, foreseeability of harm to the victim in respect of whom the defendant has a duty of care to avoid such harm and foreseeability of nervous shock being suffered by a person in the position of the plaintiff arising from a breach or apprehended breach of duty causing or liable to cause harm to the victim. In the present case, actual or apprehended harm to the victim arose by reason of what, for the purpose of these proceedings, was admitted to be a breach of duty

in failing to prevent third parties hastening into the crush in crowded pens where the victims were.

Foreseeability of harm in relation to nervous shock is determined by the court, not in the light of expert evidence adduced in the case, but according to the consensus of informed judicial opinion. To treat the question of foreseeable causation and, hence, the scope of the defendant's duty as a question of fact to be determined in the light of the expert evidence would be to depart from practice and would be too large an innovation in the law: see *McLoughlin's* case, at p. 432E–H. Foreseeability of nervous shock has been limited to the spouse or parent of a victim. The rescue cases and cases such as *Dooley v. Cammell Laird & Co. Ltd.* [1951] 1 Lloyd's Rep. 271 were rightly distinguished by the judge on the ground that it was the plaintiff's relationship with an activity rather than a relationship with a person which caused each of them to succeed. The category of persons to whom the duty of care is owed should not be extended beyond those having the closest of family ties, such as parent and child or husband and wife. [Reference was made to *Hambrook v. Stokes Brothers* [1925] 1 K.B. 141.] The present category is clear and certain. It avoids the necessity of scrutinising the plaintiff's relationship with the victim. Such scrutiny would not be practicable and is not an exercise that the court should be encouraged to embark upon. Extension of the category to include brothers and sisters, or any other relationship, would require that the degree of caring should be determined and the relationship scrutinised.

The duty of care arises only in circumstances of proximity: see *McLoughlin's* case [1983] 1 A.C. 410, 422. The strict test of proximity by sight or hearing, subject to the extension in respect of immediate aftermath, should be applied. All those plaintiffs not present at the event or its immediate aftermath were not owed a duty of care or, if owed a duty of care, no breach thereof was made out. Some direct perception of the event or its aftermath is required: see *Jaensch v. Coffey* (1984) 155 C.L.R. 549 and *McLoughlin's* case [1983] 1 A.C. 410, 423. Perception via television broadcast, though the broadcast be live, is not sufficient. The relationship of the defendant with the plaintiff created by the means of television is the very antithesis of the directness required by the criteria given in *Donoghue v. Stevenson* [1932] A.C. 562, 581, 582, 599, 603, 620–621. The defendant's responsibility should end when his control ceases or when some intermediary comes between the defendant and the plaintiff.

There are no reasons of policy for extending the category or the circumstances beyond those declared and found necessary to have warranted judgment for the plaintiff in *McLoughlin's* case. To extend the category and so erode the requirements of directness and proximity would be liable to give rise to a potentially indeterminate liability to an indeterminate class for an indeterminate period of time: see *Ultramares Corporation v. Touche* (1931) 255 N.Y. 170, 179. To adjust the line declared by the cases to exist in order to admit those hitherto outside it would not be just and reasonable and ought not to be done without regard to the possible economic consequences of such a decision. [Reference was made to *Bourhill v. Young* [1943] A.C. 92; *Heavican v.*

Ruane [1991] 3 All E.R. 65 and *Ravenscroft v. Rederiaktiebølaget Transatlantic* [1991] 3 All E.R. 73.]

Hytner Q.C. replied.

Cur. adv. vult.

3 May. The following judgments were handed down.

PARKER L.J. We have before us for determination appeals in 15 cases in which the plaintiffs claim to be entitled to damages for "nervous shock" alleged to have been sustained as a result of negligence on the part of the police leading to the disaster at the Hillsborough Football Stadium which occurred on the occasion of the F.A. Cup semi-final between Liverpool and Nottingham Forest on 15 April 1989. The defendant in each case is the Chief Constable of South Yorkshire Police.

I have used the expression "nervous shock" at the outset because it has been used in many earlier cases. It is, however, necessary at once to point out that that which attracts damages is not the shock itself but any recognisable psychiatric illness or disorder resulting from the shock which, in appropriate cases, has that effect. It is nevertheless convenient to use the term "nervous shock" as a term embracing both elements which have, amongst others, to be established in order successfully to ground a claim of this type.

At the trial before Hidden J. in July 1990, 16 cases were considered. Ten of the plaintiffs succeeded and six failed. The six who failed appeal. The defendant appeals in the cases of nine of the ten who succeeded. Their success is however limited. This is because the issue before the judge was, and before us is, a narrow one. It was and is admitted by the defendant that the deaths and injuries suffered by those in pens 3 and 4 at the West End of the ground occurred as a result of the negligence of the police culminating in the opening of a gate known as gate C at the south west corner of the ground when pens 3 and 4 were already full. This action permitted the masses then outside the ground to gain access to those pens through a tunnel under the West Stand and create thereby a developing crush situation which led to the tragic result of some 95 people being killed and more than 400 being injured, some very seriously. It was, further, assumed by the judge, for reasons which he identified and which and not challenged, and is assumed before us that each of the plaintiffs did suffer nervous shock leading to psychiatric illness as a result of the fact upon which they based their claims. The issue decided by the judge and to be determined by us is therefore whether on the basis of such admission and assumption any and which of the 15 plaintiffs who are parties to the appeals are entitled in law to recover damages should they hereafter prove that they suffered psychiatric illness from the facts set up. Any plaintiff who succeeds in his or her appeal or successfully repels the defendant's appeal may therefore yet fail. All questions of causation will remain open.

The 15 cases with which we are concerned have been described as being test cases, but it is common ground that this is not strictly accurate. They are better described as cases, the resolution of which will

probably enable most if not all of very many other claims for psychiatric illness to be settled by agreement.

The basic background facts

Pens 3 and 4 at the west or Leppings Lane end of the stadium are immediately behind the goal at that end of the ground. They, their adjacent pens and the West Stand immediately behind them together with the North Stand were reserved for Liverpool supporters. The lower seats of the West Stand are separated from the pens in front of them by a wall several feet high.

The match was an all ticket match and was a sell out. It was intended that a B.B.C. television recording of the match should be broadcast in the evening, but the system was that events at any ground where there was some significant event would be shown live on the B.B.C. afternoon programme "Grandstand."

In the event live broadcasts of the scene in pens 3 and 4 were shown on television as the crush developed to its disastrous and horrifying conclusion and, as I understand it, the scenes or some of them were repeated as recorded news items from time to time thereafter.

In addition to those suffering death and injuries in pens 3 and 4 there were of course thousands in such pens involved in the crush and its horror but who, happily, escaped injury, either physical or psychiatric. Many thousands more who attended the match witnessed what was going on with varying degrees of comprehension according to their position in the ground, those in the West Stand, particularly in the front rows, having the greatest appreciation of the scale of what was happening. Many millions more saw what was happening on live television or thereafter saw what had happened by viewing later recorded broadcasts. Amongst those who were at the ground, but not in pens 3 and 4 or who watched television, there were of course many who knew or believed that relations or others dear to them were or might be in those pens and might be amongst those dead or injured.

The basic facts of the individual cases

A. The nine successful plaintiffs

Only one, Brian Harrison, was at the ground. He was in the West Stand. He knew both of his brothers would be in the pens behind the goal. He saw the horrifying scene as it developed and realised that people in the two pens had been either killed or injured. When, six minutes after the start, the match was abandoned he tried to find his brothers. He failed to do so. He stopped up all night waiting for news. At 6 a.m. he learnt that his family were setting off for Sheffield. At 11 a.m. he was informed by telephone that both his brothers were dead.

The remaining eight saw the scenes on live television and heard the commentary. All were related to persons whom they knew to be or believed to be in the pens behind the goal. All knew that there had been deaths or injuries suffered by many in those pens.

The relationships and fate of the relatives were as follows. Mr. and Mrs. Copoc lost their son. They saw the scenes on live television. Mrs.

Copoc was up all night. She was informed by police officers at 6 a.m. that her son was dead. Mr. Copoc went to Sheffield at 4 a.m. with his nephew. He was informed at 6.10 a.m. of his son's death and later identified the body.

Mrs. Mullaney's two sons were both injured. She knew they were at the match. When watching television she identified both in the part of the crowd where there were casualties. At 7 p.m. one of her sons telephoned to say he was in hospital. She did not hear until 10 p.m. that her other son was safe, albeit slightly injured.

Mrs. Hankin lost her husband. She knew he was at the match and would be at the Leppings Lane end. She expected he would be behind the goal. She watched television at about 3 p.m. She was not then worried because she thought there was just crowd trouble in which her husband would not be involved. Some 15 minutes later she again watched and learned that there had been deaths and injuries and that there was an emergency number. She was informed that her husband was dead at 2 a.m.

Brenda Hennessey lost her brother. She watched television from about 3.30 p.m. and, although she then realised there had been deaths and injuries in the pens, she was not worried because she believed her brother to be in a stand seat. However, at about 5 p.m. she learnt from her brother's wife that he had a ticket in the Leppings Lane terrace. At 6 p.m. she learnt from members of the family who had gone to Sheffield that her brother was dead.

Denise Hough lost her brother. She was 11 years older than her brother and had fostered him for several years although he no longer lived with her. She knew he had a ticket at the Leppings Lane end and would be behind the goal. She was told by a friend that there was trouble at the game. She watched television. At 4.40 a.m. she was informed by her mother that her brother was dead. Two days later, on 17 April, she went with her mother to Sheffield and confirmed an earlier identification of the body. His face was bruised and swollen.

Stephen Jones lost his brother. He knew that his brother was at the match. He watched television and saw bodies and believed them to be dead. He did not know his brother was dead until 2.45 a.m. when, having gone to the temporary mortuary at Hillsborough, he found his parents there in tears.

Robert Spearitt lost a nephew aged 14 and his brother suffered severe crushing injuries. He knew both would be at the match behind the goal at the Leppings Lane end. He watched television from about 3 p.m. He knew as a result that there were many dead and injured. In the late evening he went to Sheffield. He found his brother in the intensive care unit in hospital. He finally found his nephew in the temporary mortuary at Hillsborough.

B. The unsuccessful plaintiffs

Robert Alcock lost his brother-in-law. He was in the West Stand, with his nephew, the brother-in-law's son. He witnessed the scenes from the West Stand and was sickened by what he saw but was not then concerned for his brother-in-law whom he believed to be in the stand

because, on the way to the match, he had swapped a terrace ticket which he held for a stand ticket. Tragically, however, the brother-in-law had, unknown to the plaintiff, returned to the terrace. After the match the plaintiff left the ground for a rendezvous with the brother-in-law who did not arrive. He and his nephew became worried and searched without success. At about midnight they went to the mortuary where the plaintiff identified the body which was blue with bruising and the chest of which was red. The sight appalled him.

Peter Coldicutt's particular friend, a Mr. Carny, suffered minor crushing injuries. Mr. Coldicutt was in the West Stand and knew Mr. Carny would be in the Leppings Lane terraces. From the West Stand he could see that there were bodies. He heard a rumour that Mr. Carny had been crushed to death. As a result he did not sleep all night. He later discovered this was not so.

Catherine Jones lost a brother. She knew he was at the match and would normally be behind the goal. At 3.30 p.m. whilst shopping she heard that there was trouble at the match and at 4.30 p.m. that there were deaths. At 5.15 p.m. she went home and heard on the radio that the death toll was mounting. At 7 p.m. a friend telephoned from Sheffield to say that people at the hospital were describing someone who might be her brother. At 9 p.m. her parents set off for Sheffield. At 10 p.m. she watched recorded television in the hope of seeing her brother alive. She thought, mistakenly, she saw him collapsed on the pitch. At 5 a.m. her father returned from Sheffield and told her that her brother was dead.

Joseph Kehoe lost a 14-year-old grandson, the son of his daughter and her divorced husband. Unknown to the grandfather the boy had gone to the match with his father. In the afternoon the plaintiff heard on the radio that there had been deaths at Hillsborough. He later saw scenes of the disaster on recorded television. He later still learned that his grandson was at the match. He become worried. At 3 a.m. he was telephoned by another daughter to say that both the boy and his father were dead.

John O'Dell was in the West Stand. He knew his nephew Roy Creighton was on the Leppings Lane terraces. He saw what was happening. He went to the rear of the West Stand to search for his nephew. He searched amongst the bodies there and assisted those who staggered out from the terraces. He continued his search. He later found his nephew uninjured.

Alexandra Penk lost her fiancé, Carl Rimmer. They had known each other for four years and recently became engaged. They planned to marry in late 1989 or at the latest early in 1990. She knew he was at the match and would be on the Leppings Lane terraces. She saw television in her sister's house and knew instinctively that her fiancé was in trouble. She continued to watch in the hope of seeing him but did not do so. She was told at about 11 p.m. that he was dead.

The above brief facts are taken from an agreed statement provided for us. There can be no doubt whatever that all the plaintiffs suffered a period of acute anxiety or fear for the safety of someone dear to them until that person was found safe or known to be dead, nor can there be

A any doubt that, where knowledge of death came through identification of the body, there must have been added distress, particularly in cases where the condition of the body was itself distressing. Further there can be no doubt that each one of those who lost the person held dear suffered great grief and, if it is different, a sense of loss. I have deliberately excluded the details which establish this, because it is not necessary to do so for the purpose of these appeals and because to do so B could only cause further distress to the plaintiffs. I turn now to the law.

The law

The law as to the liability for damages for nervous shock had developed over about a century from a rejection of any such claim through a serious of stages until it came to be considered by the House C of Lords in *McLoughlin v. O'Brian* [1983] 1 A.C. 410. In that case the plaintiff was at home some two miles from a road accident in which, owing to the negligence of a lorry driver, his lorry collided with a car driven by her husband in which three of her children, George, aged 17, Kathleen, aged 7, and Gillian, aged nearly 3, were passengers. Another child, Michael, aged 11, was in a following car which was not involved D in the collision.

Lord Wilberforce said, at pp. 416–417:

> "It is necessary to state what followed in full detail. As a result of the accident, the appellant's husband suffered bruising and shock; George suffered injuries to his head and face, cerebral concussion, fractures of the both scapulae and bruising and abrasions; Kathleen suffered concussion, fracture of the right clavicle, bruising, abrasions E and shock; Gillian was so seriously injured that she died almost immediately. At the time, the appellant was at her home about two miles away; an hour or so afterwards the accident was reported to her by Mr. Pilgrim, who told her that he thought George was dying, and that he did not know the whereabouts of her husband or the condition of her daughter. He then drove her to Addenbrooke's F Hospital, Cambridge. There she saw Michael, who told her that Gillian was dead. She was taken down a corridor and through a window she saw Kathleen, crying, with her face cut and begrimed with dirt and oil. She could hear George shouting and screaming. She was taken to her husband who was sitting with his head in his hands. His shirt was hanging off him and he was covered in mud and oil. He saw the appellant and started sobbing. The appellant G was then taken to see George. The whole of his left face and left side was covered. He appeared to recognise the appellant and then lapsed into unconsciousness. Finally, the appellant was taken to Kathleen who by now had been cleaned up. The child was too upset to speak and simply clung to her mother. There can be no doubt that these circumstances, witnessed by the appellant, were H distressing in the extreme and were capable of producing an effect going well beyond that of grief and sorrow."

I have set out the above passage because the detailed facts are of importance not only for the purpose of determining what is the true

ambit of the decision in the case but because they can, and in my view must, be borne in mind in determining the impact of that case upon the appeals now before this court.

Lord Wilberforce summarised the position in law as it then stood, saying, at pp. 418–419:

> "Although in the only case which has reached this House (*Bourhill v. Young* [1943] A.C. 92) a claim for damages in respect of 'nervous shock' was rejected on its facts, the House gave clear recognition to the legitimacy, in principle, of claims of that character. As the result of that and other cases, assuming that they are accepted as correct, the following position has been reached: 1. While damages cannot, at common law, be awarded for grief and sorrow, a claim for damages for 'nervous shock' caused by negligence can be made without the necessity of showing direct impact or fear of immediate personal injuries for oneself. The reservation made by Kennedy J. in *Dulieu v. White & Sons* [1901] 2 K.B. 669, though taken up by Sargant L.J. in *Hambrook v. Stokes Brothers* [1925] 1 K.B. 141, has not gained acceptance, and although the respondents, in the courts below, reserved their right to revive it, they did not do so in argument. I think that it is now too late to do so. The arguments on this issue were fully and admirably stated by the Supreme Court of California in *Dillon v. Legg* (1968) 29 A.L.R. 3d 1316. 2. A plaintiff may recover damages for 'nervous shock' brought on by injury caused not to him or herself but to a near relative, or by the fear of such injury. So far (subject to 5 below), the cases do not extend beyond the spouse or children of the plaintiff (*Hambrook v. Stokes Brothers* [1925] 1 K.B. 141, *Boardman v. Sanderson* [1964] 1 W.L.R. 1317, *Hinz v. Berry* [1970] 2 Q.B. 40—including foster children—(where liability was assumed) and see *King v. Phillips* [1953] 1 Q.B. 429). 3. Subject to the next paragraph, there is no English case in which a plaintiff has been able to recover nervous shock damages where the injury to the near relative occurred out of sight and earshot of the plaintiff. In *Hambrook v. Stokes Brothers* an express distinction was made between shock caused by what the mother saw with her own eyes and what she might have been told by bystanders, liability being excluded in the latter case. 4. An exception from, or I would prefer to call it an extension of, the latter case, has been made where the plaintiff does not see or hear the incident but comes upon its immediate aftermath. In *Boardman v. Sanderson* the father was within earshot of the accident to his child and likely to come upon the scene: he did so and suffered damage from what he then saw. In *Marshall v. Lionel Enterprises Inc.* [1972] 2 O.R. 177, the wife came immediately upon the badly injured body of her husband. And in *Benson v. Lee* [1972] V.R. 879, a situation existed with some similarity to the present case. The mother was in her home 100 yards away, and, on communication by a third party, ran out to the scene of the accident and there suffered shock. Your Lordships have to decide whether or not to validate these extensions. 5. A remedy on account of nervous shock has been given to a man who came upon a serious accident

involving numerous people immediately thereafter and acted as a rescuer of those involved (*Chadwick v. British Railways Board* [1967] 1 W.L.R. 912). 'Shock' was caused neither by fear for himself nor by fear or horror on account of a near relative. The principle of 'rescuer' cases was not challenged by the respondents and ought, in my opinion, to be accepted. But we have to consider whether, and how far, it can be applied to such cases as the present."

With one qualification I respectfully accept and adopt that summary. The qualification which it is necessary to make is that Lord Wilberforce's numbered paragraph 2 overlooks the decision in *Dooley v. Cammell Laird & Co. Ltd.* [1951] 1 Lloyd's Rep. 271, a decision of Donovan J. at first instance. That case was cited in argument in *McLoughlin's* case [1983] 1 A.C. 410 but was not mentioned in any of the speeches of their Lordships. I assume therefore that all considered it was rightly decided. The plaintiff was a crane driver employed by the first defendants who had loaned the crane and driver to the second defendants for the purpose, inter alia, of hoisting certain materials weighing 32 cwt. from the quay and lowering them into No. 2 hold of the vessel "Ceramic" which was being fitted out at the first defendant's yard. For the purpose of the operation the materials were loaded into a canvas and manila sling which was attached to the crane by a rope known as a snotter. The materials having been loaded into the sling the plaintiff hoisted the load from the quay and swung it into position over No. 2 hold. He knew people were working there. He could not see into the hold, so, having positioned the load, he awaited instructions to lower. Whilst so waiting he saw that the snotter was about to break. He started to swing the load away from the hold and over the vessel's side but before he could do so the snotter snapped and the load fell into the hold. He stayed in the crane in case he might be required to hoist any injured men from the hold. No one was in fact injured. He suffered nervous shock. He claimed damages against the first defendants on the basis that the shock was caused by their breach of certain statutory regulations and against the second defendant on the ground that it was due to the breach of a duty of care owed to him. The plaintiff was held entitled to recover under both heads, although he was not within the categories set out in Lord Wilberforce's numbered paragraph 2.

It will be seen from my earlier recital of the facts that in each of the cases of both the successful and unsuccessful plaintiffs the claim went beyond the law as it stood in 1983. Of the nine successful plaintiffs one only was at the scene of the catastrophe but he was not within the category of those then recognised as being entitled to claim in respect of nervous shock brought about for fear or another, nor did he witness the death of his brothers or subsequently identify their bodies. Of the remainder of those successful none was at or near the scene of the catastrophe but they were put in fear by what they saw on television many miles from the scene. Only four were within the categories then recognised as being entitled to claim, and only two identified the bodies of the victims. One of those was within the recognised categories but

had been told of death prior to identification, the other was not within such categories. Of the six unsuccessful plaintiffs, only two were at the scene, none was in the recognised categories, only one identified the victim's body. It is thus clear that for any of the plaintiffs to succeed involves an extension of the law as it stood in 1983.

I return to *McLoughlin v. O'Brian* [1983] 1 A.C. 410. That which had to be considered in that case was whether the plaintiff who was within the recognised categories was entitled to succeed although she was not at or near the scene of the accident when it happened. She had been told of it about one hour later. She had not then gone to the scene of the accident but to the hospital where she had seen her family in the appalling condition described by Lord Wilberforce.

Their Lordships, reversing the decision of the trial judge and the unanimous decision of this court all held that she was so entitled. This decision clearly established that neither presence at or near the catastrophe, nor immediate resort to the scene on being told, whether as a rescuer or not, are essential elements of a successful claim but that resort to a hospital to find what can, as I think, only be described as the immediate aftermath by a person in a recognised category is sufficient. I regard the scene at the hospital in that case as part of the catastrophe itself for none of the victims had been cleaned up or attended to.

Although their Lordships' decision was unanimous there were considerable differences in approach and substance between them. Not only have these differences not been resolved by later decisions of this court and courts of first instance but to some extent they have, as it seems to me, led to a situation when it is of vital importance that the law on the subject should again be reviewed by their Lordships in the light of the facts in the cases before us. In *Caparo Industries Plc. v. Dickman* [1990] 2 A.C. 605 for example, a case involving financial damages, their Lordships, and in particular perhaps Lord Bridge of Harwich, have somewhat changed direction in their approach to problems of the ascertainment of a duty of care from that taken by the majority in *McLoughlin's* case [1983] 1 A.C. 410. Furthermore the decisions of Mantell J. in *Hevican v. Ruane* [1991] 3 All E.R. 65 and Ward J. in *Ravenscroft v. Rederiaktiebølaget Transatlantic* [1991] 3 All E.R. 73 have gone further in extending the permissible ambit of a claim for nervous shock than has any previous case either in this court or in their Lordships' House.

The authorities have been extensively reviewed and analysed by their Lordships in *McLoughlin v. O'Brian* [1983] 1 A.C. 410, in *Caparo Industries Plc. v. Dickman* [1990] 2 A.C. 605 and in the only previous case on nervous shock which reached them, namely *Bourhill v. Young* [1943] A.C. 92. They have also been considered in this court in *Attia v. British Gas Plc.* [1988] Q.B. 304 and in the judgments of Hidden J. in the present case [1991] 2 W.L.R. 814, of Mantel J. in *Hevican v. Ruane* [1991] 3 All E.R. 65 and Ward J. in *Ravenscroft's* case [1991] 3 All E.R. 73. It would in my view serve no useful purpose were I to repeat the process in this judgment. I shall instead go directly to consider each of the issues which fall for determination in these appeals and express my

A conclusions upon them together with brief mention of the basis upon which I have reached such conclusions.

Issue 1

Can anyone who is not either within the already recognised categories of parent or spouse of a victim or potential victim or a rescuer bring a
B claim?

Mr. Hytner submits that anyone at all can claim, even a bystander if the scene is sufficiently horrific. Support for this view can be found in particular in the speech of Lord Bridge of Harwich in *McLoughlin's* case [1983] 1 A.C. 410. It is also supported, he submits, by the decision in *Dooley v. Cammell Laird & Co. Ltd.* [1951] 1 Lloyd's Rep. 271. I do not accept this. Dooley was the employee of the defendant. It was
C therefore plain that a duty of care was owed towards him. Furthermore he was directly involved in the accident there in question. For the defendant it is submitted that no extension at all should be made.

It is, I think, necessary first to consider the basis upon which parents and spouses are permitted to claim. It can in my view only be on the basis that, normally, the parent–child and the husband–wife relationship
D can be presumed to be so close that fear for the child or spouse can be reasonably foreseen by the wrongdoer as likely to result in nervous shock to a parent or spouse of ordinary phelgm who witnesses or comes upon the immediate aftermath of catastrophe involving, or which appears likely to involve, the child or other spouse. This however is a presumption and is not based on expert evidence as to the susceptibility of parents or spouses of ordinary phlegm to suffer shock followed by
E psychiatric illness from such situations.

In *McLoughlin's* case [1983] 1 A.C. 410, 422 Lord Wilberforce said:

> "As regards the class of persons, the possible range is between the closest of family ties—of parent and child, or husband and wife—and the ordinary bystander. Existing law recognises the claims of the first: it denies that of the second, either on the basis that such
F persons must be assumed to be possessed of fortitude sufficient to enable them to endure the calamities of modern life, or that defendants cannot be expected to compensate the world at large. In my opinion, these positions are justifiable, and since the present case falls within the first class, it is strictly unnecessary to say more. I think, however, that it should follow that other cases involving less close relationships must be very carefully scrutinised. I cannot
G say that they should never be admitted. The closer the tie (not merely in relationship, but in care) the greater the claim for consideration. The claim, in any case, has to be judged in the light of the other factors, such as proximity to the scene in time and place, and the nature of the accident."

H Logically and respectfully this must be right but if, as is inherent in Lord Wilberforce's observation, the basis of the current qualified categories is relationship and care, two things appear to me to follow. First, the presumption in favour of parents and spouses should be rebuttable. What, for example, of the mother who has handed over her 16-year-old

child to foster parents shortly after its birth, has never seen it or communicated with it or inquired after it ever since? It is submitted that these matters need not and cannot be canvassed. If a mother in fact suffers nervous shock from witnessing the death of her child the very fact, it is said, establishes the correctness of the presumption. I do not accept this. The mother may witness the death of a child without even knowing it is hers and may suffer nervous shock, not because it was her child but because she was not possessed of ordinary phlegm. What also of the husband and wife who are still legally married but have been parted for years and are well known to hate each other?

Secondly, it would on the face of it appear to follow that remote blood relations or even persons with no blood tie at all should be let in if they can prove a sufficient degree of care. A godfather or friend who has taken on the care and custody of a small baby on the death of its parents and has brought it up as his own would appear to be every bit as deserving as the parent. So too one of two people who have lived together as man and wife for 30 years but have not married because of some legal or religious impediment or a rooted objection to marriage should logically be treated in the same way as husband and wife.

These problems have not hitherto been considered by any court. For my part I consider that the presumption should be rebuttable. Indeed in practice it must be. When causation is being considered it must I think be open to the defendant to show, by cross-examination or evidence, that the plaintiff mother had abandoned her child 15 years earlier and had not seen or communicated with it or inquired after it ever since. Moreover since the question to be determined is whether the defendant owed a duty of care to the actual plaintiff it must as it seems to me be relevant to consider any special facts relating to a plaintiff mother. It is one thing to say that what I may call the ordinary mother is owed a duty of care. It is quite another to say that a duty is owed to a mother in respect of whom the facts instanced above exist.

What then of extension of the categories. If the basis upon which parents and spouses are entitled to recover is as I believe it to be, it appears clearly logical at first sight to allow anyone, blood relation or otherwise, to claim if they can establish a factual close relationship similar to that of an ordinary parent–child or husband–wife relationship.

The matter is however not as simple as this. The problem is not the mere equating of the position of the plaintiff in relation to the particular victim or potential victim. That is or may be of importance but the root question is whether a duty of care was owed by the defendant to the plaintiff. I go therefore to the classic passage in Lord Atkin's speech in *Donoghue v. Stevenson* [1932] A.C. 562, 580:

> "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. You must take *reasonable* care to avoid acts or omissions which you can *reasonably foresee* would be *likely* to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are *so closely and directly* affected by my act that I ought *reasonably* to have them in contemplation as being so affected when I am directing my mind

A to the acts or omissions which are called in question." (Emphasis mine.)

The questions therefore are (a) could the defendant *reasonably* forsee that his acts or omissions would be *likely* to cause psychiatric illness to the plaintiff and (b) is the plaintiff someone so closely and directly affected by the act or omission complained of that the defendant B ought *reasonably* to have had him in contemplation as being so affected.

It seems to me to be acceptable to make a prima facie presumption in favour of a plaintiff parent or spouse in relation to both questions, indeed we are bound to do so, but is it acceptable to do so in respect of other plaintiffs? Ought a defendant reasonably to foresee that any other persons of ordinary phlegm (in addition to rescuers) would be likely to suffer psychiatric disorder from shock? How does the judge decide? In C *McLoughlin's* case [1983] 1 A.C. 410, 432 this question was considered by Lord Bridge of Harwich. He observed that there were two possible approaches. Either the judge should decide the question on expert evidence or

> "relying on his own opinion of the operation of cause and effect in psychiatric medicine, as fairly representative of that of the educated D layman, should treat himself as the reasonable man and form his own view from the primary facts as to whether the proven chain of cause and effect was reasonably foreseeable."

He regarded the first approach as having much to commend it but considered it as too late to depart from the second and concluded that the best yardstick was the consensus of *informed* judicial opinion. There E is, of course, no doubt that judges recognise that the shock suffered by the sight or horrific events may in some cases lead to psychiatric injury and the courts are presently to assume reasonable foreseeability in the case of the recognised categories, but I see no justification for going further and no consensus of informed judicial opinion which could justify so doing. No doubt *some* persons may suffer such injury but ought a wrongdoer reasonably to contemplate such persons as being F likely to be amongst those affected by his act or omission? It is of course true that he must take the plaintiff as he finds him and that if the act or omission would be likely to cause some injury to an ordinary person he must take the consequences if the particular plaintiff suffers additional harm. Here however we are in my view considering a different situation. The vast majority of ordinary persons do not suffer G psychiatric illness from this sort of shock. Ought then a defendant reasonably to contemplate that there will or may be amongst those so closely and directly affected by this act or omission some persons other than recognised categories or rescuers who are likely to suffer such injury? I do not think so. I would therefore reject the appeals of the unsuccessful plaintiffs and allow the appeals in the case of the successful plaintiffs who are not within the recognised categories.

H

Issue 2

The next major question is whether the effect of watching television miles away from the catastrophe can be regarded as satisfying the test of

proximity. It was, I have no doubt, clearly foreseeable that the scenes at Hillsborough would be broadcast both live and as recorded news items later in the day, that millions would be watching and that amongst those watching there would be likely to be parents and spouses and other relatives and friends of those in the pens behind the goal at the Leppings Lane end. In *McLoughlin's* case [1983] 1 A.C. 410, 423 Lord Wilberforce envisaged the possibility that watching live or simulataneous television might satisfy the test of proximity.

I can see force in the plaintiffs' contention. On the face of it there may appear to be little difference between two mothers, one of whom is in the West Stand and the other of whom sees the scenes on television. There is however in my view a great difference. The mother in the West Stand sees only that which she can see through her own eyes from her position in that Stand. The watcher of television sees what the cameras and producer choose between them to broadcast. They may, and probably will, move from one part of the scene to another which seem best to convey the increasing horror of what was taking place. Zoom lenses will be used, not to record and sent out pictures of mangled corpses or dreadfully injured persons, but simply to demonstrate to the viewer more clearly what was happening than could be appreciated by an actual watcher. A watcher from the far end of the North Stand would, for example, see and appreciate far less of what was happening than a television viewer 60 miles away or perhaps even hundreds or thousands of miles away. Such a watcher might not appreciate that there was anything more than the crowd trouble which regrettably occurs all too often at football matches, whereas the television viewer would at an early stage realise the true position.

I have said that a viewer of television might well be thousands of miles away. This is by no means fanciful. If for example the final of the World Cup were played at Wembley between Korea and Argentina the live television broadcast would no doubt go by satellite to millions in those two countries and, indeed, in many other countries. In those countries those watching would probably include parents, spouses, other relatives and friends of the players and of fans known or believed to be watching the match.

For my part I am unable to consider the television viewer as so closely and directly connected with the police negligence in the present cases that the defendant ought to have had them in mind. Their connection was established by the intervention of a third party and was of course accompanied by a commentary the terms of which were devised by a third party.

Mr. Hytner submitted that the police could and should have insisted that there should be no television coverage except of the pitch itself as a term of undertaking crowd control and were therefore or could have been in effect in control of what was broadcast. He further submitted that it was in any event no answer to say that they had no control. The negligent garage mechanic, who, for example, defectively repairs the steering system of a motor car, has no control of what happens after the car leaves his garage. He does not, and cannot, control by whom or in what manner it is driven or what will be the circumstances if and when an accident results

A from his negligence. This is of course true, but the analogy is not in my view valid. The negligence in this sort of case closely and directly affects the original victims or potential victims together with those who themselves perceive the disaster or potential disaster. A perception through the broadcast of selective images accompanied by a commentary is not in my judgment such as to satisfy the proximity test.

B A person who informs a parent of a victim of his death or multiple injuries cannot be held liable for obvious reasons and the wrongdoer cannot in my view be held liable for psychiatric illness resulting from what the parent is told. In so holding I respectively differ from the decision of Ward J. in *Ravenscroft v. Rederiaktiebølaget Transatlantic* [1991] 3 All E.R. 73. It is, moreover, to be noted that in *McLoughlin v. O'Brian* [1983] 1 A.C. 410 the House of Lords proceeded on the basis C that liability resulted from what the plaintiff had seen on arrival in the hospital on being told of the accident, not on the information of the accident which had led to her presence there.

It appears to me that if it can be reasonably foreseen that psychiatric illness can result from the shock of being told what has happened but the defendant is not liable, so also the defendant is not liable if the injury results from information conveyed by means of television and its D commentary. If this is not correct it would, as it seems to me, follow that anyone who reports, at any rate promptly, the fact of death or serious injury would be liable for psychiatric illness resulting, as would the television company.

What then of the cases where there was subsequently identification of the body or sight of the injured victim as in *McLoughlin's* case? It is E clear from that case that there may be liability if the identification can be regarded as part of the immediate aftermath. The only one of the present cases which comes anywhere near an aftermath case is that of Mr. Alcock who identified his brother-in-law in a bad condition in the mortuary at about midnight on the same day. In my judgment that is not enough. I would regard it as unlikely and not reasonably foreseeable that a person of ordinary phlegm would suffer psychiatric injury from F viewing the corpse of a brother-in-law even if badly damaged.

In the case of all plaintiffs it must be borne in mind that except in the identification cases the plaintiffs' cases were based solely on the fear, anxiety and worry, engendered by watching television and for the possible fate of someone held high in their affections together with receipt of information as to the fate of such person. Assuming, as I do G for present purposes, that each of them did suffer psychiatric illness from what they saw or were told, or a combination of both, I do not consider that the defendant was in breach of any duty of care towards them for I do not consider such duty existed towards any of them.

Issue 3: the place of policy in such cases

H In *McLoughlin v. O'Brian* [1983] 1 A.C. 410, 420 Lord Wilberforce, in referring to the judgment of this court in that case, said:

> "I am impressed by both of these arguments, which I have only briefly summarised. Though differing in expression, in the end, in my opinion, the two presentations rest upon a common principle,

namely that, at the margin, the boundaries of a man's responsibility for acts of negligence have to be fixed as a matter of policy. Whatever is the correct jurisprudential analysis, it does not make any essential difference whether one says, with Stephenson L.J., that there is a duty but, as a matter of policy, the consequences of breach of it ought to be limited at a certain point, or whether, with Griffiths L.J., one says that the fact that consequences may be foreseeable does not automatically impose a duty of care, does not do so in fact where policy indicates the contrary."

In that case there was a difference of opinion between Lord Scarman, who regarded the question of policy as not justiciable, and, as I see it, all the other four of the judicial committee who with, as I think, different degrees of emphasis regarded it as justiciable albeit not such as to bar the remedy in that case. Policy came in, principally, on the "floodgates" argument which was considered in that case to be of no weight even if justiciable. (There were other differences which it is unnecessary for present purposes to mention.)

As to policy, it is of assistance to refer to the speech of Lord Bridge of Harwich in *Caparo Industries Plc. v. Dickman* [1990] 2 A.C. 605, 617–618:

"What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other. But it is implicit in the passages referred to that the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope. Whilst recognising, of course, the importance of the underlying general principles common to the whole field of negligence, I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes."

This is in my view a clear departure from *McLoughlin v. O'Brian* [1983] 1 A.C. 410 and, albeit in different words, appears to me to put judicial policy in the van of considerations. Although the case itself concerned a claim for financial loss resulting from a negligent misstatement, Lord Bridge was at that stage dealing with the duty of care generally. Later, when dealing with the specific question before the House, he cited with approval [1990] 2 A.C. 605, 621 the words of Cardozo C.J. in *Ultramares Corporation v. Touche* (1931) 255 N.Y. 170, 179 that to hold that there was a duty of care such as there contended

for would subject the defendant to "liability in an indeterminate amount for an indeterminate time to an indeterminate class." This appears to me to be no more and no less than the affirmation that it is proper for the courts to place limits upon a liability which might otherwise arise because it would not be fair and reasonable to put such a liability on the defendant. This appears to me the exercise of judicial pragmatism which is in my view the same as judicial policy.

In my judgment, to put upon the defendant liability not merely to parents and spouses but to an indeterminate class beyond them for an indeterminate amount would be unfair and it would be equally unfair to make the defendant liable even to parents and spouses who, far removed from the incident in question, happened to watch and hear either a contemporaneous broadcast of selective scenes or a later recorded news item.

I would, therefore, whilst having such sympathy for each of the plaintiffs as would lead me if possible to uphold the claim, allow all the defendant's appeals and dismiss all the appeals of the plaintiffs.

I should perhaps add that, like Hidden J. in this case and Mantell J. in *Hevican v. Ruane* [1991] 3 All E.R. 65 and Ward J. in *Ravenscroft's* case [1991] 3 All E.R. 73, I have found this matter one of great difficulty. My concern has been not only to reach a conclusion which, right or wrong I hope to have been intelligible, but also to indicate some of the difficulties which have not yet been, but urgently need to be, considered and resolved by their Lordships.

Finally I should express my thanks to counsel for their valuable assistance.

STOCKER L.J. This appeal is concerned with 15 out of 16 plaintiffs, whose claim for damages for personal injuries arose out of the events which took place on Saturday 15 April 1989 at Hillsborough Stadium on the occasion of the F.A. Cup semi-final between Liverpool and Nottingham Forest Football Clubs. Some 95 people were killed in pens at the Leppings Lane end of the ground and some 400 others needed hospital treatment as a consequence of crushing injuries due to overcrowding in those pens. None of the plaintiffs sustained physical injury in the sense of direct damage to their bodies, but claim damages for psychiatric illness resulting upon the shock to which they were subjected in various circumstances which differed in respect of individual plaintiffs. For the purposes of the trial and in this appeal it was assumed that in each case the shock inflicted upon each caused a recognised psychiatric illness in the form of post-traumatic stress disorder or pathological grief and that each suffered from the symptoms of those disorders. Thus no investigation was made at trial or before this court as to whether or not the individual plaintiffs had in fact suffered from psychiatric illness caused by shock, a matter which in some instances at least, may have to be decided. But the assumption in favour of each plaintiff has been made and the issue of liability determined upon the basis of an assumption that psychiatric illness through shock has been proved to have been suffered. The assumption was necessary since the cases before the court have been regarded, for some purposes at least, as test cases. The judge found that in the case of 10 plaintiffs liability had been proved, but in the case of six others their actions failed. The six plaintiffs who failed appeal against the finding against them, and in the case of nine of the ten who succeeded the defendant cross-appeals, contending that they too should have had judgment given against them.

The judge reviewed the relevant authorities in detail and with clarity and based his judgment upon a case in the House of Lords, *McLoughlin v. O'Brian* [1983] 1 A.C. 410, in which their Lordships also extensively reviewed the relevant authorities and the propositions derived from them. I have not found it an easy matter to decided whether or not the conclusions reached by their Lordships, which were unanimous as to the outcome of the case, differed in material respects with regard to the proper approach to be adopted in future cases in which psychiatric illness is suffered through fear or apprehension as to the survival or safety of persons other than themselves, or whether they agreed as to the principles to be applied, but stated those principles in widely differing terms. This distinction is important since upon it depends the question whether or not the proper approach to the resolution to each case as it arises should remain as it has been in this country in the past by reference to categories of relationship between the victim who has died or for whom apprehension as to his safety was felt and the plaintiff, subject to any limitation of proximity in time and space to the occurrence. All the cases hitherto decided in this country and in Scotland were reached by reference to this "categorisation" approach. This was clearly the approach of Lord Wilberforce and Lord Edmund-Davies. The alternative approach is that the degree of family relationship and the time and space factor are not the sole criteria by which the existence of the duty and the right to recover damages for psychiatric illness are to be judged, but are no more than two of the factors amongst many which determine whether or not the injuries were reasonably foreseeable as likely, having regard to the conjoint effect of all the relevant factors, the weight to be given to each being dependent upon the circumstances of the case under consideration.

I therefore turn to the *McLoughlin* decision. The questions raised by that decision seem to me to be (1) what was the issue that fell for decision by their Lordship's House; (2) what was the basis of that decision; and (3) how should the decision be applied in future cases?

In order to decide what the issue was which fell to be decided, it is necessary very shortly to state the facts of the *McLoughlin* case. At about 4 p.m. on 19 October 1973, the plaintiff's husband and her three children were in a motor car which was in collision with a motor lorry driven by one of the defendants. The plaintiff was at home some two miles from the scene and at about 6 p.m. she was told of the accident and was driven by her informant to the hospital to which the victims had been taken. She found that her youngest child had been killed and she saw her husband and the surviving children injured and in great pain and distress. It is unnecessary to describe precisely what she saw, but it was clearly a most harrowing and distressing sight. She suffered from psychiatric illness through the shock of this sight.

Since the plaintiff was the wife of one victim and the mother of the others, she clearly fell within the category of relationship in respect of which the law as it then stood permitted damages to be recovered if the limitation factors of time and space did not debar her. The trial judge found that no duty was owed by the tortfeasor to the plaintiff on the grounds that psychiatric illness was not a reasonably foreseeable

consequence of the careless act of the tortfeasor. In the Court of Appeal [1981] Q.B. 599, Stephenson L.J. found that the possibility of the plaintiff suffering psychiatric illness was reasonably foreseeable and that a duty of care was owed, but that considerations of policy prevented the plaintiff from recovering damages. Griffiths L.J. also found that the injury was readily foreseeable, but that the tortfeasor owed no duty of care since that was limited to those on the roadside nearby and was a limitation imposed by consideration of policy. The issue before their Lordships was concerned solely with the question whether or not the "time and space" limitation operated to prevent the recovery of damages by the plaintiff, or whether it fell within the ambit of previous decisions in any event, or whether those decisions could properly be extended to include the plaintiff's visit to hospital as forming part of the immediate aftermath of the collision. The House was not concerned, at least directly, with any extension or modification to the category of relationship which as a mother and spouse would permit her to recover damages, subject to the limitation factors of time and space. Their Lordships were unanimous that the plaintiff should recover in such circumstances, though their reasons were expressed in different terms and may indicate a difference of view with regard to the proper approach to be adopted in future cases. The issue was therefore in a very narrow compass and concerned the limiting factor of time and space and the question whether or not that limiting factor was imposed by reason of public policy.

The second issue, as to what was the basis of the decision, requires some analysis of their Lordships speeches. Lord Wilberforce accepted as correct the categorisation approach, that is to say that in order to be entitled to claim damages a plaintiff had to show proximity in family relationship between himself and the victim, and proximity in time and space.

As to the former, Lord Wilberforce said [1983] 1 A.C. 410, 418:

> "A plaintiff may recover damages for 'nervous shock' brought on by injury caused not to him or herself but to a near relative, or by the fear of such injury. So far (subject to 5 below), the cases do not extend beyond the spouse or children of the plaintiff."

As to the latter limitation, he said:

> "Subject to the next paragraph, there is no English case in which a plaintiff has been able to recover nervous shock damages where the injury to the near relative occurred out of sight and earshot of the plaintiff. In *Hambrook v. Stokes Brothers* [1925] 1 K.B. 141 an express distinction was made between shock caused by what the mother saw with her own eyes and what she might have been told by bystanders, liability being excluded in the latter case."

He also observed, at pp. 418–419:

> "4. An exception from, or I would prefer to call it an extension of, the latter case, has been made where the plaintiff does not see or hear the incident but comes upon its immediate aftermath. In *Boardman v. Sanderson* [1964] 1 W.L.R. 1317 the father was within earshot of the accident to his child and likely to come upon the

scene: he did so and suffered damage from what he then saw. In *Marshall v. Lionel Enterprises Inc.* [1972] 2 O.R. 177, the wife came immediately upon the badly injured body of her husband. And in *Benson v. Lee* [1972] V.R. 879, a situation existed with some similarity to the present case. The mother was in her home 100 yards away, and, on communication by a third party, ran out to the scene of the accident and there suffered shock. Your Lordships have to decide whether or not to validate these extensions.

"5. A remedy on account of nervous shock has been given to a man who came upon a serious accident involving numerous people immediately thereafter and acted as a rescuer of those involved (*Chadwick v. British Railways Board* [1967] 1 W.L.R. 912). 'Shock' was caused neither by fear for himself nor by fear or horror on account of a near relative. The principle of 'rescuer' cases was not challenged by the respondents and ought, in my opinion, to be accepted. But we have to consider whether, and how far, it can be applied to such cases as the present.

"Throughout these developments, as can be seen, the courts have proceeded in the traditional manner of the common law from case to case, upon a basis of logical necessity. If a mother, with or without accompanying children, could recover on account of fear for herself, how can she be denied recovery on account of fear for her accompanying children? If a father could recover had he seen his child run over by a backing car, how can he be denied recovery if he is in the immediate vicinity and runs to the child's assistance? If a wife and mother could recover if she had witnessed a serious accident to her husband and children, does she fail because she was a short distance away and immediately rushes to the scene (cf. *Benson v. Lee*)? I think that unless the law is to draw an arbitrary line at the point of direct sight and sound, these arguments require acceptance of the extension mentioned above under 4 in the interests of justice."

And he observed in the context of the facts of the case then under consideration, at p. 419:

"I could agree that a line can be drawn above her case with less hardship than would have been apparent in *Boardman v. Sanderson* [1964] 1 W.L.R. 1317 and *Hinz v. Berry* [1970] 2 Q.B. 40, but so to draw it would not appeal to most people's sense of justice. To allow her claim may be, I think it is, upon the margin of what the process of logical progression would allow. But where the facts are strong and exceptional, and, as I think, fairly analogous, her case ought, prima facie, to be assimilated to those which have passed the test."

He then referred to the basis of the decision in the Court of Appeal upholding the trial judge and the reasoning of Stephenson and Griffiths L.JJ. and observed, at p. 420:

"I am impressed by both of these arguments, which I have only briefly summarised. Though differing in expression, in the end, in my opinion, the two presentations rest upon a common principle,

A namely that, at the margin, the boundaries of a man's responsibility for acts of negligence have to be fixed as a matter of policy."

He cited the classic speech of Lord Atkin in *Donoghue v. Stevenson* [1932] A.C. 462, 580 and he concluded [1983] 1 A.C. 410, 420:

"This is saying that foreseeability must be accompanied and limited by the law's judgment as to persons who ought, according to its B standards of value or justice, to have been in contemplation. Foreseeability, which involves a hypothetical person, looking with hindsight at an event which has occurred, is a formula adopted by English law, not merely for defining, but also for limiting, the persons to whom duty may be owed, and the consequences for which an actor may be held responsible. It is not merely an issue of C fact to be left to be found as such. When it is said to result in a duty of care being owed to a person or a class, the statement that there is a 'duty of care' denotes a conclusion into the forming of which considerations of policy have entered. That foreseeability does not of itself, and automatically, lead to a duty of care is, I think, clear."

D With regard to the policy argument, he observed, at p. 421:

"We must then consider the policy arguments. In doing so we must bear in mind that cases of 'nervous shock,' and the possibility of claiming damages for it, are not necessarily confined to those arising out of accidents on public roads. To state, therefore, a rule that recoverable damages must be confined to persons on or near the E highway is to state not a principle in itself, but only an example of a more general rule that recoverable damages must be confined to those within sight and sound of an event caused by negligence or, at least, to those in close, or very close, proximity to such a situation."

Having reviewed the policy arguments against further expansion and the reasons why such arguments should not prevail, he said, at pp. 421–422:

F "But, these discounts accepted, there remains, in my opinion, just because 'shock' in its nature is capable of affecting so wide a range of people, a real need for the law to place some limitation upon the extent of admissible claims. It is necessary to consider three elements inherent in any claim: the class of persons whose claims should be recognised; the proximity of such persons to the accident; G and the means by which the shock is caused. As regards the class of persons, the possible range is between the closest of family ties—of parent and child, or husband and wife—and the ordinary bystander. Existing law recognises the claims of the first: it denies that of the second, either on the basis that such persons must be assumed to be possessed of fortitude sufficient to enable them to endure the calamities of modern life, or that defendants cannot be expected to H compensate the world at large. In my opinion, these positions are justifiable, and since the present case falls within the first class, it is strictly unnecessary to say more. I think, however, that it should follow that other cases involving less close relationships must be

very carefully scrutinised. I cannot say that they should never be admitted. The closer the tie (not merely in relationship, but in care) the greater the claim for consideration. The claim, in any case, has to be judged in the light of the other factors, such as proximity to the scene in time and place, and the nature of the accident. As regards proximity to the accident, it is obvious that this must be close in both time and space. It is, after all, the fact and consequence of the defendant's negligence that must be proved to have caused the 'nervous shock.' Experience has shown that to insist on direct and immediate sight or hearing would be impractical and unjust and that under what may be called the 'aftermath' doctrine one who, from close proximity, comes very soon upon the scene should not be excluded. In my opinion, the result in *Benson v. Lee* [1972] V.R. 879 was correct and indeed inescapable. It was based, soundly, upon—'direct perception of some of the events which go to make up the accident as an entire event, and this includes . . . the immediate aftermath . . .' (p. 880)."

And he gives as his opinion, at p. 422:

"Subject only to these qualifications, I think that a strict test of proximity by sight or hearing should be applied by the courts. . . . The shock must come through sight or hearing of the event or of its immediate aftermath. Whether some equivalent of sight or hearing, e.g. through simultaneous television, would suffice may have to be considered."

The instant appeals call for consideration of the effect of "simultaneous television," since many of the plaintiff suffered the relevant shock through this medium, and the judge's conclusion upon the effect of viewing the scenes shown on television were relevant to his conclusion.

I do not consider that it would assist this judgment to attempt to analyse in detail the speeches of Lord Edmund-Davies, who agreed that policy considerations formed the limiting factor to the general rule but that no relevant policy existed to prevent the plaintiff from recovering damages in the case they were then considering. In general he agreed with Lord Wilberforce. I do not read the speech of Lord Russell as disapproving the basis upon which Lord Wilberforce expressed his opinion, and Lord Scarman seems to have accepted, with Lord Bridge of Harwich, that the test of "reasonable foreseeability" should be untrammelled by spatial, physical or temporal limits. He had reservations as to the social consequences of these matters in a passage to which I will refer in another context.

It is the speech of Lord Bridge which seems to me to give rise to the main difficulty. Since the plaintiff founded much of the argument upon that speech, I must consider it in some detail. He observed, at p. 432:

"Clearly it is desirable in this, as in any other, field that the law should achieve such a measure of certainty as is consistent with the demands of justice."

A He poses the question, at pp. 433–434:

> "The question, then, for your Lordships' decision is whether the law, as a matter of policy, draws a line which exempts from liability a defendant whose negligent act or omission was actually and foreseeably the cause of the plaintiff's psychiatric illness and, if so, where that line is to be drawn. In thus formulating the question, I B do not, of course, use the word 'negligent' as prejudging the question whether the defendant owes the plaintiff a duty, but I do use the word 'foreseeably' as connoting the normally accepted criterion of such a duty. Before attempting to answer the question, it is instructive to consider the historical development of the subject as illustrated by the authorities, and to note, in particular, three features of that development. First, it will be seen that successive C attempts have been made to draw a line beyond which liability should not extend, each of which has in due course had to be abandoned. Secondly, the ostensible justification for drawing the line has been related to the current criterion of a defendant's duty of care, which, however expressed in earlier judgments, we should now describe as that of reasonable foreseeability. But, thirdly, in so far as policy considerations can be seen to have influenced any of D the decisions, they appear to have sprung from the fear that to cross the chosen line would be to open the floodgates to claims without limit and largely without merit."

He cites with approval, at p. 436, a passage from the speech of Lord Porter in *Bourhill v. Young* [1943] A.C. 92, 117:

> E "The question whether emotional disturbance or shock, which a defender ought reasonably to have anticipated as likely to follow from his reckless driving, can ever form the basis of a claim is not in issue. It is not every emotional disturbance or every shock which should have been foreseen. The driver of a car or vehicle, even though careless, is entitled to assume that the ordinary frequenter of the streets has sufficient fortitude to endure such incidents as F may from time to time be expected to occur in them, including the noise of a collision and the sight of injury to others, and is not to be considered negligent towards one who does not possess the customary phlegm."

For the reasons I shall express later, it seems to me that this passage G expresses the rationale of the existing limitation with regard to proximity of relationship. It is a passage in Lord Bridge's speech which was relied upon by Mr. Hytner, on behalf of the plaintiffs, as indicating that the proper approach to the problem in cases of psychiatric illness are no longer to be decided by categorisation, but upon more general principles of foreseeability. The passage reads [1983] 1 A.C. 410, 441–442:

> H "In approaching the question whether the law should, as a matter of policy, define the criterion of liability in negligence for causing psychiatric illness by reference to some test other than that of reasonable foreseeability it is well to remember that we are concerned only with the question of liability of a defendant who is,

ex hypothesi, guilty of fault in causing the death, injury or danger which has in turn triggered the psychiatric illness. A policy which is to be relied on to narrow the scope of the negligent tortfeasor's duty must be justified by cogent and readily intelligible considerations, and must be capable of defining the appropriate limits of liability by reference to factors which are not purely arbitrary. A number of policy considerations which have been suggested as satisfying these requirements appear to me, with respect, to be wholly insufficient. I can see no grounds whatever for suggesting that to make the defendant liable for reasonably foreseeable psychiatric illness caused by his negligence would be to impose a crushing burden on him out of proportion to his moral responsibility. However liberally the criterion of reasonable foreseeability is interpreted, both the number of successful claims in this field and the quantum of damages they will attract are likely to be moderate. I cannot accept as relevant the well known phenomenon that litigation may delay recovery from a psychiatric illness. If this were a valid policy consideration, it would lead to the conclusion that psychiatric illness should be excluded altogether from the heads of damage which the law will recognise. It cannot justify limiting the cases in which damages will be awarded for psychiatric illness by reference to the circumstances of its causation. To attempt to draw a line at the furthest point which any of the decided cases happen to have reached, and to say that it is for the legislature, not the courts, to extend the limits of liability any further, would be, to my mind, an unwarranted abdication of the court's function of developing and adapting principles of the common law to changing conditions, in a particular corner of the common law which exemplifies, par excellence, the important and indeed necessary part which that function has to play. In the end I believe that the policy question depends on weighing against each other two conflicting considerations. On the one hand, if the criterion of liability is to be reasonable foreseeability simpliciter, this must, precisely because questions of causation in psychiatric medicine give rise to difficulty and uncertainty, introduce an element of uncertainty into the law and open the way to a number of arguable claims which a more precisely fixed criterion of liability would exclude. I accept that the element of uncertainty is an important factor. I believe that the 'floodgates' argument, however, is, as it always has been, greatly exaggerated. On the other hand, it seems to me inescapable that any attempt to define the limit of liability by requiring, in addition to reasonable foreseeability, that the plaintiff claiming damages for psychiatric illness should have witnessed the relevant accident, should have been present at or near the place where it happened, should have come upon its aftermath and thus have had some direct perception of it, as opposed to merely learning of it after the event, should be related in some particular degree to the accident victim—to draw a line by reference to any of these criteria must impose a largely arbitrary limit of liability. I accept, of course, the importance of the factors indicated in the guidelines suggested by Tobriner J. in

A *Dillon v. Legg*, 29 A.L.R. 3d 1316 as bearing upon the *degree* of foreseeability of the plaintiff's psychiatric illness."

He gives two examples in support of these propositions and continues, at pp. 442–443:

> "Secondly, consider the plaintiff who is unrelated to the victims of the relevant accident. If rigidly applied, an exclusion of liability to B him would have defeated the plaintiff's claim in *Chadwick v. British Railways Board* [1967] 1 W.L.R. 912. The Court of Appeal treated that case as in a special category because Mr. Chadwick was a rescuer. Now, the special duty owed to a rescuer who voluntarily places himself in physical danger to save others is well understood, and is illustrated by *Haynes v. Harwood* [1935] 1 K.B. 146, the case C of the constable injured in stopping a runaway horse in a crowded street. But in relation to the psychiatric consequences of witnessing such terrible carnage as must have resulted from the Lewisham train disaster, I would find it difficult to distinguish in principle the position of a rescuer, like Mr. Chadwick, from a mere spectator as, for example, an uninjured or only slightly injured passenger in the train, who took no part in the rescue operations but was present at D the scene after the accident for some time, perforce observing the rescue operations while he waited for transport to take him home."

I have cited this passage at length because it forms the main basis for Mr. Hytner's argument on behalf of the plaintiffs, but in view of the issues that were before the House, it seems to me that Lord Bridge was E doing no more than expressing his logical reasons for rejecting the "time and space" factors depriving the plaintiff of her remedy and was not intending thereby to substitute for the category approach accepted by Lord Wilberforce and in previous authorities, a more general approach based on foreseeability in which these factors would be relevant factors amongst many others and not themselves decisive as limiting factors for recovery of damages. He was also concerned in this context with the F question of policy. It seems to me that had it been the purport of the passage cited that the "category" approach should be superseded, then all of their Lordships, and in particular Lord Wilberforce, would have so regarded it and have made comment, either critical or approving, on this approach. None of them did so. Nor did Lord Bridge comment in terms upon the speech of Lord Wilberforce or say that he disagreed G with it.

The approach of Lord Wilberforce was applied by the High Court of Australia in *Jaensch v. Coffey* (1984) 155 C.L.R. 549, 555 where Gibbs C.J. said:

> "Lord Wilberforce pointed out in *McLoughlin v. O'Brian* [1983] 1 A.C. 410, 422 that in deciding on the limits that should be placed upon the extent of admissible claims for nervous shock it is H necessary to consider three elements: 'the class of person whose claims should be recognised; the proximity [in time and space] of such persons to the accident; and the means by which the shock is caused.' I would agree that these are the relevant elements, and I

incline to think that the first is of the greatest importance. Where the relationship between the person killed or physically injured and the person who suffers nervous shock is close and intimate, not only is there the requisite proximity in that respect, but it is readily defensible on grounds of policy to allow recovery. There are cases which persons who do not stand in any such relationship have been held entitled to recover, including the case of rescuers (*Chadwick v. British Railways Board* [1967] 1 W.L.R. 912) and that of fellow employees (*Mount Isa Mines Ltd. v. Pusey* (1970) 125 C.L.R. 383) but they do not now fall for consideration."

If Lord Bridge was intending to substitute for the category approach a wider and more general test, he seems to have changed his view, at least in the context of economic loss, for in *Caparo Industries Plc. v. Dickman* [1990] 2 A.C. 605, 618, he said:

"Whilst recognising, of course, the importance of the underlying general principles common to the whole field of negligence, I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes. We must now, I think, recognise the wisdom of the words of Brennan J. in the High Court of Australia in *Sutherland Shire Council v. Heyman* (1985) 157 C.L.R. 424, 481, where he said: 'It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable "considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed.'"

For my part, therefore, I accept that the speech of Lord Wilberforce in *McLoughlin v. O'Brian* [1983] 1 A.C. 410 represents the law in this field at the time of that decision and today, since there has been no reconsideration of that case, in the context of psychiatric illness, in the House of Lords. The decision was considered and applied by this court in *Attia v. British Gas Plc.* [1988] Q.B. 304, in which issues not related to the facts of this case arose. It was not suggested that the speeches of Lord Wilberforce and Lord Bridge differed in principle or led to different conclusions according to which approach was applied. It is not, in my view, a consequence that the law has become fixed or immobile so as to prevent the category approach from stultifying the law. It seems to me that the rationale of limiting the category of those entitled to recover to spouse/parent relationship, and the consequent exclusion of relationship outside that category, is that the law excludes the latter on the basis that with relationships which are more remote, the law assumes that such relatives will possess such fortitude and phlegm as will protect that person from psychiatric injury from shock, whereas the close relationship of spouse/parent is so basic to all human relationships and reactions that in those cases it is reasonably foreseeable that the shock of the event may cause psychiatric illness. Thus it seems to me that the

A "line" at a point which excludes more remote relationship is fixed as a matter of policy. It may also be justified by logical and justifiable grounds apart from policy. It is at this point that the flexibility can be achieved by applying the obiter dicta of Lord Wilberforce [1983] 1 A.C. 410, 422:

> "Existing law recognises the claims of the first: it denies that of the
> B second, either on the basis that such persons must be assumed to be possessed of fortitude sufficient to enable them to endure the calamities of modern life, or that defendants cannot be expected to compensate the world at large. In my opinion, these positions are justifiable, and since the present case falls within the first class, it is strictly unnecessary to say more. I think, however, that it should follow that other cases involving less close relationships must be
> C very carefully scrutinised. I cannot say that they should never be admitted. The closer the tie (not merely in relationship, but in care) the greater the claim for consideration. The claim, in any case, has to be judged in the light of the other factors, such as proximity to the scene in time and place, and the nature of the accident."

D For example, let us consider the case where the victim's parents are dead and the victim himself was brought up by grandparents who have fulfilled the parental role since early infancy. A careful scrutiny might, in such a case, involve no more than the assertion and proof of those facts. The same position might be established without difficulty in the case of other relationships.

It is argued on behalf of the defendant that such an investigation
E might involve prolonged and protracted investigations which would complicate already difficult cases and greatly prolong trials. Such investigation might be embarrassing. I agree, and it is at this point that public policy becomes again relevant. This problem was expressed by Lord Scarman in *McLoughlin's* case, at p. 431:

> "common law principle requires the judges to follow the logic of the
> F 'reasonably foreseeable test' so as, in circumstances where it is appropriate, to apply it untrammelled by spatial, physical, or temporal limits. Space, time, distance, the nature of the injuries sustained, and the relationship of the plaintiff to the immediate victim of the accident are factors to be weighed, but not legal limitations, when the test of reasonable foreseeability is to be applied. But I am by no means sure that the result is socially
> G desirable. The 'floodgates' argument may be exaggerated. Time alone will tell: but I foresee social and financial problems if damages for 'nervous shock' should be made available to persons other than parents and children who without seeing or hearing the accident, or being present in the immediate aftermath, suffer nervous shock in consequence of it. There is, I think, a powerful case for legislation
> H such as has been enacted in New South Wales and the Australian Capital Territories."

Though difficulties due to the inclusion of more remote relationships than that of spouse/parent may be encountered, this approach has at

least the benefit of a degree of certainty in the law. If I understand Lord Wilberforce's dicta correctly, he is not suggesting that the existing category of spouse/parent relationship should be advanced as a category or the existing line drawn in a different place, but that accepting prima facie that this category is determinate of the ability to recover damages, that a more remote relationship might justify departure from the rule in any given case where circumstances, after scrutiny, indicate that those relationships give rise to similar reaction of love and affection which are attributed to the spouse/parent relationship.

If I am right that the rationale of the present law limiting the right to recover damages to those within the parent/spouse relationship and the exclusion of more remote relationships is based, apart from policy, on a presumption that love and affection normally to be expected in the former category is so powerful that psychiatric injury through shock is foreseeable, whereas those whose relationship is more remote can be expected to withstand the shock without injury is correct, then I would expect that the presumption can be rebutted in appropriate cases. For example, in the case of a mother whose child is the victim but who had not seen or communicated with such child since birth who nonetheless claims damages for psychiatric shock. This is such an unlikely situation that it need hardly be considered. On that hypothesis, on what basis would she be likely to be "at the scene or its immediate aftermath" or to suffer psychiatric illness from shock if she were so present? If it is necessary to consider such a situation, then it seems to me that it would be permissible to challenge the basis of the presumption, at least for the purposes of medical causation.

In my view, therefore, the law as stated by Lord Wilberforce requires that the category of spouse/parent be regarded as fixed, flexibility being given to the law by allowing as an exception in any given case the claims of more remote relations, but only if close scrutiny justifies the extension. Where such close scrutiny indicates that the relationship, coupled with the care of the victim, indicates that the relative should be in the same position, vis-à-vis the victim, as a parent/spouse would have been so to render foreseeable the conclusion that psychiatric injury might result from shock to such relative, then in any given case that relative would be in the same position as a spouse/parent and would be able to claim damages. In so far as this may in some cases greatly complicate and enlarge claims for psychiatric illness so that policy considerations arise, it does not seem to me that such policy considerations should be applied by judicial process, but should be the subject of consideration by Parliament and legislation if thought appropriate.

Whatever the relationship, the consequences must still be reasonably foreseeable if a duty of care is to be established. This involves an examination of foreseeability at the time the careless act giving rise to the duty was committed. Since a duty in tort does not arise in vacuo but must be related to the specific plaintiff claiming damages, as against the defendant who owes the duty, reasonable foresight of the defendant as tested through the eyes of the reasonable man in the person of the judge must involve a degree of hindsight before the question whether or not the consequence of psychiatric injury was foreseeable, since it is

only when the relationship of the plaintiff to the victim and the identity of both have been identified in the context of the alleged negligence that the question whether or not the consequence is reasonably foreseeable can be answered or even posed. This can involve problems of some difficulty. What has to be reasonably foreseeable is that the shock of the incident might cause psychiatric illness to the particular plaintiff identified. It is usually a simple matter to establish whether or not the injury to the victim was foreseeable. What is the position with regard to foreseeability where in fact hindsight indicates that there has been no breach of duty of care to the victim where, for example, he is not in fact injured? If the question of reasonable foreseeability is to be tested, as it must, at the time of the negligent act, then it must be irrelevant that no breach of duty in fact occurred with respect to the victim. If this be correct, then Mrs. Hambrook (*Hambrook v. Stokes Brothers* [1925] 1 K.B. 141) would have recovered damages even if, contrary to the fact, none of the children had in fact been injured. Thus, accepting that the classification of persons who can recover damages for psychiatric illness are restricted by the basic principle to cases where the victim and plaintiff relationship is that of spouse/parent, what must be reasonably foreseeable is that psychiatric illness may result from shock from the consequences of the careless act to a person within that close relationship, and that such a person might be at the scene or its immediate aftermath. At first sight such an approach would exclude all other persons of more remote relationship. This approach, however, if correct, would preclude a person outside the parent/spouse relationship from recovering, even if they would otherwise be entitled to do so in the circumstances envisaged by Lord Wilberforce.

If the facts in any given case justify the conclusion, foreseeability will have to embrace all those who by reason of their relationship and care might have such close bonds of affection as to render them susceptible to psychiatric illness through shock and that such a person might be present at the scene or its immediate aftermath. For the purposes of this argument I will not consider the contemporaneous television as a factor relevant to foreseeability, but will consider that factor when considering the effect of television on the limitations imposed by the time and space factor.

Some limitations must be put upon what is reasonably foreseeable if a duty of care is not to be owed to the whole world at large which would impose unacceptable burdens on the tortfeasor and would not accord with the general principles enunciated in *Donoghue v. Stevenson* [1932] A.C. 562. Mr. Hytner submitted that, since the proper approach to questions which arise in cases of psychiatric illness through shock is that contained in the speech of Lord Bridge in which relationship is only one factor, other factors, such as the magnitude of the event, might indicate that bystanders should be included as within the ambit of reasonable foreseeability. He asserts that bystanders have succeeded in a number of cases which he cited. I do not propose to go through these in detail, since in my view each constituted a "rescue" case, with perhaps one exception. That exception is *Dooley v. Cammell Laird & Co. Ltd.* [1951] 1 Lloyd's Rep. 271, a case decided on assizes by Donovan J.

Mr. Hytner submits that the plaintiff, who was the crane driver involved in the incident, was for this purpose a bystander, yet he recovered damages on the basis that it was reasonably foreseeable that he might suffer psychiatric illness through shock. I do not agree that the plaintiff in that case could for this purpose be considered a bystander. He was an active participant in the event. Moreover, the question of the existence of a duty of care arose out of the master and servant relationship which existed between the plaintiff and the defendant and the question whether or not damages were recoverable could have been resolved by considerations of the remoteness of damage. In any event, the judge found as a fact that psychiatric illness was a foreseeable consequence of the defendant's negligence. In my view, therefore, the categories of person who the tortfeasor at the time of the negligent act should reasonably foresee as being likely to sustain psychiatric illness is confined to persons who he could foresee might be present at the scene or its immediate aftermath and who might have that relationship with the victim with respect to love, affection and care as to put them in a similar position as persons in the spouse/parent relationship. In my view, foreseeability of psychiatric illness through shock to persons should not be extended to persons who do not have any family relationships, even if such persons did as a fact entertain feelings of love and affection towards the victim. If such persons, such as bystanders, are included within the ambit of those to whom a duty is owed, then a duty might be owed to the whole world and thus impose a duty which would place an intolerable burden on a tortfeasor.

To summarise, in my view, the law is that, save in exceptional circumstances, only those within the parent/spouse relationship can recover damages for psychiatric shock sustained by a plaintiff not himself involved as a victim. This defines the category. The exceptions considered on a case to case basis are limited to relatives who meet the criteria of that relationship and who are present at the scene or its immediate aftermath. What has to be foreseeable is that someone may be present at the scene or its immediate aftermath who possesses that love and affection which a parent/spouse is assumed to possess, even if in fact that relative is less closely related to the victim than a parent or spouse. It does not seem to me that such a formulation causes any particular difficulty—it is a slight reformulation of the test of foreseeability to meet the cases referred to by Lord Wilberforce, not any change or addition to what has to be foreseeable in the case of a parent/spouse who suffers psychiatric injury by shock. The judge found that in the case before him brother and sister were entitled to recover. He did so, if I correctly interpret his judgment, by reference to the circumstances of the Hillsborough disaster and by the relationship which might be expected in most cases between brother and sister. He did not carry out any close scrutiny by reference to the love and affection in fact to be attributed to them, having regard in particular to any care (in the sense of custody or maintenance) which they had performed. It may be that had such a scrutiny been carried out, the facts might have entitled them to recover damages and the extension in their favour be justified under the principles enunciated by Lord Wilberforce. I therefore consider that the

judge was in error in holding that in the circumstances of the case before him he could regard the brothers and sisters as within the relationship which would entitle them to claim damages.

The effect of television on the limitation of time and space

Lord Wilberforce in the *McLoughlin* case [1983] 1 A.C. 410 raised the possibility that watching live television might be the same as attendance at the scene or its immediate aftermath and thus satisfy the test of proximity in time and space.

In my view, if the relevant television broadcast performed no function in relation to the plaintiff than communicating the fact that an accident had occurred at a place at which the plaintiff knew that his relative was, it would be a mere communication of that fact and would place the plaintiff in a similar position to that in which he would have been had the information been communicated to him by any other media, oral or telephonic. This information could not found a claim based on shock since the mere receipt of information with no more could not do so. In that case if it was followed by actions on the part of the plaintiff which brought him within the scene or its aftermath, then limitations of proximity and space would not debar him from recovering damages.

It is unlikely that any television broadcast would do no more than communicate the fact of the accident or disaster, particularly when the occurrence is on an occasion of national or international interest. For some years past television has been available worldwide to a vast number of people. It is of course foreseeable that events such as a Football Association Cup semi-final would be broadcast by television worldwide, or at least to a national audience. It is also foreseeable that a view of the events broadcast on television would provide at least as good a view of the events taking place as would be likely to be obtained by presence at the stadium, and that some of the events would be seen in close up, slow motion or replay from a number of different viewpoints. These factors are readily foreseeable and they were in fact foreseen by the relevant police officers concerned. It would also be readily foreseeable that those watching television would include parents, spouses or relatives of those present at the ground.

Some of these factors themselves indicate that viewing on television does not equate with presence at the scene. No person present can view events more or less simultaneously from several different viewpoints. The fact that the television transmission does so (there were at least four cameras in different locations at Hillsborough) in itself requires some form of editorial or selective process in a decision which cameras be operated at any given moment. The broadcast is likely to, and in this case did, include commentary which may itself be emotive. The "zoom" lens enables an incident to be viewed in close-up, even though individual victims are excluded from such close-ups.

Moreover, whereas a plaintiff present at the scene or its immediate aftermath must ex hypothesi have been fairly close at hand, the television broadcast may well be viewed worldwide and thus might be seen by relatives in a foreign country, perhaps on the other side of the

world. Thus the time and space limitation would be enormously enlarged and might involve close relatives who would almost certainly be outside the limitation of time and space being brought within it.

Thus, in my view, television broadcast of the type which it seems occurred is not to be equated with the plaintiff being within "sight or hearing of the event or its immediate aftermath" and therefore shock sustained by reason of the broadcast would not suffice to found a claim. Such a broadcast, containing substantial elements of editing together with a commentary, is in my view a "novus actus interveniens."

None of the plaintiffs who base their claim on shock sustained by reason of the broadcast, still less if the broadcast is repeated, can found their claim on shock from this source.

I do not consider it necessary to comment upon the recent cases to which we have been referred, *Hevican v. Ruane* [1991] 3 All E.R. 65 tried by Mantell J. and *Ravenscroft v. Rederiaktiebølaget Transatlantic* [1991] 3 All E.R. 73 tried by Ward J., save to say that if the views I have expressed are correct, the extensions which were made in those cases would not be justified.

Of the successful plaintiffs, all but one saw the scene live on television. The one who was present was the brother of two of the victims. It thus follows that in my view none of them was entitled to succeed for the reasons I have endeavoured to give. Of the six unsuccessful plaintiffs, each failed on the basis of relationship. In my view, this was determinative of the outcome and I would reject their appeals. It follows that in my view the appeals of the defendant in respect of the nine successful plaintiffs should be allowed and the appeals of the six unsuccessful plaintiffs fail.

In reaching this conclusion I am conscious that all the plaintiffs, both successful and unsuccessful, suffered very genuine grief and distress and have been assumed to have suffered psychiatric injury through the shock and horror of the events. They are entitled to universal sympathy in no way mitigated by the fact that they are not entitled, in my view, to recover damages in law.

NOLAN L.J. It is more than two years since the Hillsborough disaster occurred, but even now, and even for those with no personal involvement it is impossible to contemplate what took place without a sense of shock. Much of the detailed evidence of suffering and death is harrowing. I shall refer to it no more than is necessary for the purposes of this judgement, but I must start by considering the circumstances in which the psychiatric illnesses of the plaintiffs arose. For this purpose I refer to the "Generic Report on psychological casualties resulting from the Hillsborough disaster" which was prepared on behalf of the plaintiffs by Dr. Morgan O'Connell. When he wrote it, he had examined and assessed 39 cases. In paragraph 5 he begins his account of what he had learnt from his examinations and from the Interim Report of Taylor L.J. on the Hillsborough Stadium Disaster (1989) (Cm. 765). He says:

> "What was most striking in the history taking was how a normal social occasion in a familiar setting, on a fine sunny day, should suddenly become a horrific experience and almost as suddenly be

A over. It was as if it were a worst case of nightmare, were it not for the dead, injured and bereaved who remained after the event. The live television and radio brought the happenings into the homes, clubs and High Streets of those who were not at the match. Up to this time I had not been aware of how much football is a way of life for families in Liverpool. This factor I believe, has served to compound the problem, as many who were not at the match B unwittingly identified all that they witnessed on the terracing through the media, such was their familiarity with the scene."

In paragraph 9, Dr. Morgan O'Connell confessed to great difficulty in deciding which of the 39 psychological casualties was most affected by his or her experience. He referred in particular to:

C "The fan whose outstretched arm became an obstruction against which his neighbour's throat was crushed . . . A grandfather, partially sighted, coming from the other side of the pitch and believing that his grandson was at the bottom of a pile of horribly mangled, dead, young bodies. The wife at home compelled to watch television knowing that her husband's favourite spot was behind the goal, and then subsequently seeing him disappear in the D midst of the crush of bodies when asked to view the video by the police."

He continues:

"10. Of the people seen, all but one had more than one illness—in one case in question I diagnosed suffering pathological grief. E 11. Pathological grief is grief of greater intensity and duration than normal grief, it is more likely to occur where death is sudden, unexpected and brutal in nature. In the case of the grandmother who had effectively reared her grandson as a son, she remains pre-occupied with the gap caused in her life through his death—a death which she feels was totally unnecessary. 12. The most common diagnosis was post-traumatic stress disorder. Post-traumatic stress F disorder, a new concept (1980) for an old problem (neurasthenia, shell-shock, nastalgia) is classified as an anxiety disorder. It follows on a painful event which is outside the range of normal human experience, the disorder includes preoccupation with the event—that is intrusive memories—with avoidance of reminders of the experience."

G None of the four individual cases referred to by Dr. Morgan O'Connell—the fan, the grandfather, the wife at home, and the grandmother—is among the plaintiffs whose cases are before us, but the passages which I have quoted from his report are, I hope, sufficient to illustrate the type of psychiatric illness resulting from nervous shock with which this case is concerned. There is no dispute that

H "Damages are . . . recoverable for nervous shock, or, to put it in medical terms, for any recognisable psychiatric illness caused by the breach of duty by the defendant:" see *per* Lord Denning M.R. in *Hinz v. Berry* [1970] 2 Q.B. 40, 42.

The problem in the present case is to identify the limits of the duty of which the defendant is said to have been in breach.

The law of negligence has become so refined that it is difficult to make any general statement without qualifying it: but this much at least I think is still clear, namely that the duty of care does not extend beyond what is reasonably foreseeable. In many cases, the question of what was reasonably foreseeable can be approached simply and directly by establishing what injury the plaintiff has suffered, and how it was caused, and then inquiring whether that kind of injury, thus caused, was reasonably foreseeable by the defendant. In cases of psychiatric illness caused by nervous shock this approach must always be of greater difficulty because in such cases "there are elements of greater subtlety than in the case of an ordinary physical injury" (see *per* Lord Macmillan in *Bourhill v. Young* [1943] A.C. 92, 103) and these elements may not be readily predictable. In the present case, there is the further difficulty that the judge, for entirely understandable reasons, declined to make findings as to whether the individual plaintiffs had suffered psychiatric illness caused by the act or omission of the defendant, but assumed that all of them had done so. We are driven, therefore, to approach the matter by what as it seems to me must in any event be the strictly correct route (since the test for the defendant is foresight, not hindsight) and ask whether immediately before the crucial acts or omissions which occurred at Hillsborough on the afternoon of 15 April 1989 it could reasonably have been foreseen that those acts or omissions would be likely to cause nervous shock leading to the kinds of illness described by Dr. Morgan O'Connell in his generic report. The problem cannot be solved by the medical evidence; the criterion is "the consensus of informed judicial opinion:" see *per* Lord Bridge of Harwich in *McLoughlin v. O'Brian* [1983] 1 A.C. 410, 432.

The defendant has admitted liability for negligence in respect of those who died or were physically injured at Hillsborough. That is to say, he has admitted that he owed them a duty of care, that he was in breach of that duty, and that their deaths or injuries resulted from the breach. If it could reasonably have been foreseen, as I think it could, that the crucial acts and omissions would not only be likely to lead to physical injury and death, but to a very large number of horrifying injuries and deaths, then to my mind it must inevitably follow that the defendant ought reasonably to have anticipated in addition the likelihood of nervous shock amongst those who were not physically but were mentally affected by the occurrence.

If the extent of the defendant's duty depended upon foreseeability alone, it would be almost infinite. It is well settled, however, that foreseeability alone, although essential to the existence of a duty of care, is not enough. In the familiar words of Lord Atkin in *Donoghue v. Stevenson* [1932] A.C. 562, 580, the duty is owed only to "persons who are so closely and directly affected" by the defendant's act that he "ought reasonably to have them in contemplation as being so affected" when directing his mind to the acts or omissions which are called in question. This may be paraphrased as reducing the extent of the duty from what is foreseeable to what is "reasonably" foreseeable, but the

A concept of reasonableness is elusive. As I understand the decided cases, the law has developed not so much by reference to what the defendant's reason should tell him was foreseeable, but by reference to the practical limits which the law imposes upon the foreseeable consequences for which the defendant should be saddled with responsibility: see, for example, *Caparo Industries Plc. v. Dickman* [1990] 2 A.C. 605, 618–619, *per* Lord Bridge of Harwich. These limits may be justified either on the B grounds of public policy—for example, so as to avoid the floodgates opening—or as a matter of fairness and justice to potential defendants. The word "policy," in the sense of the policy of the law, is sometimes used to describe the latter considerations as well as those of public policy in its more normal sense. I agree with Mr. Hytner that it is necessary to distinguish between the two different uses of the word, but C I suspect that in most cases they will largely overlap. The practical course followed by the courts has been to restrict the ambit of the duty of care by placing fairly narrow limits upon the classes of potential plaintiffs who, in Lord Atkin's words, are "so closely and directly affected" as to be within the defendant's reasonable contemplation. The question in any given case is how "closely and directly affected" the particular potential plaintiff has to be. The possibility of the floodgates D opening will depend upon the breadth of the terms in which that question is answered. In this country at least, the floodgates appear to have remained shut in spite of the increasing breadth of the court's approach to the question of liability, and for present purposes at least I am prepared to accept Mr. Hytner's submission that they would still remain shut if the claims of the plaintiffs in the present case were E upheld.

Floodgates apart, however, there remains the question whether the narrower, policy criteria of closeness and directness were satisfied by the plaintiffs in the present case. I would refer in this connection to the speech of Lord Wilberforce in *McLoughlin v. O'Brian* [1983] 1 A.C. 410, 421–422 where, after setting out a number of general limitations on the scope of the duty of care he continues:

F

> "But, these discounts accepted, there remains, in my opinion, just because 'shock' in its nature is capable of affecting so wide a range of people, a real need for the law to place some limitation upon the extent of admissible claims. It is necessary to consider three elements inherent in any claim: the class of persons whose claims should be recognised; the proximity of such persons to the accident; G and the means by which the shock is caused. As regards the class of persons, the possible range is between the closest of family ties—of parent and child, or husband and wife—and the ordinary bystander. Existing law recognises the claims of the first: it denies that of the second, either on the basis that such persons must be assumed to be possessed of fortitude sufficient to enable them to endure the calamities of modern life, or that defendants cannot be expected to H compensate the world at large. In my opinion, these positions are justifiable, and since the present case falls within the first class, it is strictly unnecessary to say more. I think, however, that it should follow that other cases involving less close relationships must be

very carefully scrutinised. I cannot say that they shall never be admitted. The closer the tie (not merely in relationship, but in care) the greater the claim for consideration. The claim, in any case, has to be judged in the light of the other factors, such as proximity to the scene in time and place, and the nature of the accident."

In the present case, the judge felt able to extend the range to brothers and sisters, but no further. He did so on the basis of general propositions about the relationships within the normal family, with which I would entirely agree. But in my judgment these general propositions do not provide an acceptable answer by reference either to authority or to human experience. The decided cases in which damages have been recovered for nervous shock sustained by a parent or spouse have all been cases in which the reactions of the particular parent or spouse have been assumed or proved to have been those which one would normally expect of an individual in the closest and most loving of relationships with the person physically injured or threatened. What has distinguished the parent or spouse from the ordinary bystander in such cases has been the depth of their love and concern, causing them to be affected by nervous shock even though they were of normal fortitude. It is, I feel sure, despite Mr. Hytner's arguments to the contrary, the bonds of love and affection which Lord Wilberforce had in mind when envisaging the possibility that those having a less close relationship than parent or spouse might come within the scope of the duty of care. His words, at p. 422, "The closer the tie (not merely in relationship, but in care) the greater the claim for consideration" can bear no other meaning. And, of course, in a number of earlier cases the possibility had been canvassed that not merely parents and spouses but relatives or even friends might be distinguished from bystanders and brought within the scope of the duty of care—a possibility which could only be contemplated by reference to a bond of love or affection. For example, in *Bourhill v. Young* [1943] A.C. 92, 117 Lord Porter said:

"The duty is not to the world at large. It must be tested by asking with reference to each several complainant: Was a duty owed to him or her? If no one of them was in such a position that direct physical injury could reasonably be anticipated to them or their relations or friends normally I think no duty would be owed . . ."

The difficulty lies in defining the degree of closeness which is sufficient to bring the individual within the same category as a parent or spouse. Both Mr. Hytner and Mr. Woodward urged us not to embark on this course, for fear of the uncertainty which would result. For my part, I would accept at once that no general definition is possible. But I see no difficulty in principle in requiring a defendant to contemplate that the person physically injured or threatened by his negligence may have relatives or friends whose love for him is like that of a normal parent or spouse, and who in consequence may similarly be closely and directly affected by nervous shock where the ordinary bystander would not. The identification of the particular individuals who come within that category, like that of the parents and spouses themselves, could only be carried out ex post facto, and would depend upon evidence of the "relationship"

in the broad sense which gave rise to the love and affection. Proof of causation would require evidence as to the link between that relationship and the psychiatric illness sustained. The evidence might be difficult to obtain, and would certainly require close scrutiny, as Lord Wilberforce envisaged, but I see no reason in principle why identification should not be possible on a case by case basis. I have in mind such examples as the grandparents or uncles and aunts who, upon the premature death of the parents, bring up the children as their own; or Mrs. Hinz (see *Hinz v. Berry* [1970] 2 Q.B. 40) whose feelings for her foster children were assumed without question to be the same as those for her natural children. I have in mind also the judgment of Burbury C.J. in *Storm v. Geeves* [1965] Tas.S.R. 252, 266 in which he felt able to identify the brother and sister as well as the mother as coming within the scope of the duty of care, and was further able to find on the evidence that whereas the mother and the brother had suffered nervous shock caused by the defendant's acts or omissions, the sister had not. In the present case itself, I have referred to Dr. Morgan O'Connell's generic report in which he describes, amongst others, the case of the grandmother who had effectively reared her grandson as a son, and who was suffering from pathological grief. I have no means of knowing whether in other respects this lady's case satisfies the conditions for bringing her within the scope of the duty of care, but in so far as the extent of the duty depends upon proximity in terms of personal relationship I can see no reason in principle why she should be excluded.

The difficulty remains that neither the plaintiffs' cases as pleaded nor the judgment of the judge depend crucially and essentially upon the existence of a close tie of relationship, a special bond of love, between the plaintiffs and the immediate victims. Without that link, the necessary proximity of the relationship cannot be established as a matter of fact in any of the cases before us. I do not doubt for one moment the depth of genuineness of the love and affection felt by the plaintiffs for the victims but what is lacking is evidence that the closeness of the tie was so similar to that of a loving parent or spouse that it was foreseeably likely to bring them into the same category. I cannot agree with the judge that the line should be drawn around what is called the nuclear family. The criterion is loving care, not blood relationship, still less legal relationship. Unfortunately, people within those relationships do not always care for each other. Fortunately people outside those relationships often care for each other very much. If the law is to reflect these familiar realities it must follow that just as a plaintiff in my judgment could bring himself within the scope of the defendant's duty by establishing a sufficient tie of care, so it must be open to a defendant to disapprove the existence of that tie in the case of a particular spouse or parent. There is no support in law or in logic for the proposition that an uncaring parent or spouse should stand in any different position from a stranger. It follows that in so far as the defendant's appeals are based upon the judge's inclusion of all brothers and sisters within the requisite proximity of relationship I would feel bound to allow them.

It remains to consider the questions of proximity to the accident in time and space, and the means by which the shock was caused. In

McLoughlin v. O'Brian [1983] 1 A.C. 410, 422–423 Lord Wilberforce concluded that a strict test of proximity by sight or hearing should be applied, that no liability should arise where nervous shock had been brought about by communication by a third party, and that:

> "The shock must come through sight or hearing of the event or of its immediate aftermath. Whether some equivalent of sight or hearing, e.g. through simultaneous television, would suffice may have to be considered."

The judge held that the parents, spouses, brothers and sisters who saw the scenes at Hillsborough on live television and heard the commentaries upon it should be regarded as sufficiently close to the accident in time and space to fall within the scope of the duty of care. We have not seen the television programme, and therefore do not know precisely what was shown, but a reasonably clear idea can be gained from the statements of admitted facts. For example, Stephen Jones knew his brother was at the match and expected him to be standing behind the goal, saw the live television pictures coming from Hillsborough, saw bodies and believed them to be dead. Maureen Mullaney actually saw her sons in a section of the crowd where there were casualties, though mercifully they survived without serious injury. It is easy to imagine the feelings of appalling anxiety and distress experienced by the television watchers, aggravated by their uncertainty as to what was happening, but on the basis of the available evidence I am unable to conclude that they fell within the scope of the defendant's duty of care. I accept Mr. Hytner's submission that the defendant should reasonably have foreseen that the scenes at Hillsborough would be transmitted live on television, and would be seen by relatives. I also accept, however, Mr. Woodward's submission that the basis of this cause of action is shock in the ordinary sense of that word, resulting from the direct perception of an actual or threatened physical impact. The defendant could, I think, reasonably expect that the television cameras would not show shocking pictures of suffering by recognisable individuals. I bear in mind, of course, that the sight and sound of an incident can be transmitted and reproduced with a vividness which can equal, or even exceed, that experienced by those on the spot. In the present case, however, the element of immediate and horrifying impact on the viewer does not seem to me to have been established either as being reasonably foreseeable or as having happened. It follows that in my judgment the law provides no remedy for those plaintiffs, even the most closely related, who watched the live television transmissions, still less for those who heard the news on the radio or later saw the recorded television transmission. The same apparently harsh conclusion must, I think, follow on the alternative and simpler basis that the damage is too remote for the law to be able to cope with.

I would not exclude the possibility in principle of a duty of care extending to the watchers of a television programme. For example, if a publicity seeking organisation made arrangements for a party of children to go up in a balloon, and for the event to be televised so that their parents could watch, it would be hard to deny that the organisers were under a duty to avoid mental injury to the parents as well as physical

injury to the children, and that there would be a breach of that duty if through some careless act or omission the balloon crashed. But that would be a very different case.

Mr. Hytner urged us in relation to all of the plaintiffs to have regard to the whole of the facts—the "concatenation of circumstances" as it has been called—and not to treat a single factor such as personal relationship or the medium of communication as being alone decisive. He referred, by way of example, to the case of Harold Copoc. Mr. Copoc knew that his son was at the match and believed that he would be behind the goal. With Mrs. Copoc he watched the television at home from 3.30 p.m. onwards. Both were in fear for the welfare of their son. Mr. Copoc made telephone calls throughout the night vainly seeking information, until 4 a.m. when he set off with his nephew for Sheffield. He looked for his son at the Sheffield hospital, again without success. His nephew telephoned home, to learn that the police had called bringing news of the son's death. Mr. Copoc went to the mortuary at Sheffield and identified his son's body. Mr. Hytner submitted that this traumatic sequence of events was readily foreseeable by the defendant. The aftermath of the initial tragedy continued for Mr. Copoc until the identification of the body. His case, submitted Mr. Hytner, could not realistically be distinguished from that of Mrs. McLoughlin in *McLoughlin v. O'Brian*. This, I think, is probably the nearest of the plaintiffs' cases to the case of Mrs. McLoughlin, but I still feel bound to conclude that it is on the other side of the line. When Mrs. McLoughlin arrived at the hospital, to hear that her youngest child aged three was dead, she found her other children and her husband in a state of acute distress and still undergoing or awaiting treatment "covered with oil and mud, and distraught with pain," in much the same condition as they had been by the roadside. It was a situation of the kind which is all too readily foreseeable as a consequence of a serious road accident. Even so, Lord Wilberforce regarded her case as being upon the margin of what the process of logical progression from case to case would allow. If that is right, Mr. Copoc's case must in my judgment fall beyond the margin of what, as a matter of law, was reasonably foreseeable.

This is perhaps another way of saying again that to my mind the expression "nervous shock," as used in the decided cases, connotes a reaction to an immediate and horrifying impact. I have no doubt that the kinds of psychiatric illness to which nervous shock may give rise could equally be brought about by an accumulation of more gradual assaults upon the nervous system, but the law as it stands does not appear to me to provide for the latter category. I fully accept Mr. Hytner's submission that the foreseeable limits of nervous shock in any given situation cannot be determined by reference to any one factor. That is why the normal parent or spouse (and possibly others with similar personal relationships) must be foreseen as possible sufferers even though only present at the aftermath. At the other end of the scale, a stranger may recover because his physical involvement with the horrifying human consequences of the tragedy are in themselves foreseeably sufficient to produce nervous shock, even in a person of normal fortitude. The inclusion of rescuers in the category of those to

whom the duty of care is owed may be supported on this basis. The same considerations might apply to someone, such as the "fan" described by Dr. Morgan O'Connell, who though not a rescuer nor himself physically injured, was directly and physically involved in the horrifying incidents which occurred. But I repeat that his case is not before us. Nor are we concerned with the case of an ordinary bystander. We are concerned solely with the relatives and friends who are parties to the appeals before us. In their cases I agree that the appeals of the plaintiffs must fail and the appeals of the defendant must succeed.

Appeal allowed with costs.
Cross-appeal dismissed.
Leave to appeal.

Solicitors: Hammond Suddards, Bradford; Brian Thompson & Partners, Liverpool for Ford & Warren, Leeds, Silverman Livermore, Liverpool, Mackrell & Thomas, Liverpool, Lees Lloyd Whitley, Liverpool, Morecroft Dawson & Garnetts, Liverpool, Kennan Gribble and Bell, Crosby and Mace & Jones, Huyton.

M. F.

APPEALS from the Court of Appeal.

This was an appeal by 10 plaintiffs, namely Robert Alcock, Harold Copoc, Agnes Copoc, Brian Harrison, Brenda Hennessey, Denise Hough, Stephen Jones, Catherine Jones, Joseph Kehoe and Alexandra Penk, from an order dated 3 May 1991 of the Court of Appeal (Parker, Stocker and Nolan L.JJ.), ante, pp. 351B et seq., with leave of that court. By that order the court allowed an appeal by the defendant, Peter Wright, sued as the Chief Constable of South Yorkshire Police, from an order dated 31 July 1990 made at Liverpool by Hidden J. ante, pp. 314E et seq.

The facts are stated in the opinion of Lord Keith of Kinkel.

B. A. Hytner Q.C. and *Timothy King Q.C.* for the plaintiffs. The basic test of liability for psychiatric injury is foreseeability of such injury: *King v. Phillips* [1953] 1 Q.B. 429. Foreseeability involves neighbourhood in law. The law has evolved categories of neighbourhood in negligence. Where it is established that legal neighbourhood exists; e.g. between driver and passenger, or occupier and visitor, the only issue will be reasonable foreseeability of injury. Where such a category has not previously existed the court must determine whether to create a new one based on the principles developed in *Governors of Peabody*

Donation Fund v. Sir Lindsay Parkinson & Co. Ltd. [1985] A.C. 210 and *Caparo Industries Plc. v. Dickman* [1990] 2 A.C. 605. Since *Donoghue v. Stevenson* [1932] A.C. 562, a duty of care arises if it is demonstrated that a defendant could reasonably have foreseen that the plaintiff would suffer psychiatric illness as a result of the defendant's act or omission in relation to a third party. The law does not limit the liability for injury to primary victims: *Heaven v. Pender* (1883) 11 Q.B.D. 503.

In determining whether damage by psychiatric illness arising from shock was reasonably foreseeable the court will consider and weigh a number of factors, including (i) the relationship of the plaintiff to the victim, (ii) the proximity in time and place of the plaintiff to the accident or its aftermath, (iii) the means of sensory perception of the accident or its aftermath and (iv) the circumstances of the accident. These factors will be judged against the background of contemporary social and economic conditions and technological developments. Although they are sometimes called policy considerations, in fact the factors relate only to the particular parties and not to the public at large: see *Bourhill v. Young* [1943] A.C. 92; *Storm v. Geeves* [1965] Tas.S.R. 252; *Chadwick v. British Railways Board* [1967] 1 W.L.R. 912; *Dillon v. Legg* (1968) 29 A.L.R. 3d 1316; *McLoughlin v. O'Brian* [1983] 1 A.C. 410 and *Jaensch v. Coffey* (1984) 155 C.L.R. 549.

None of the stated factors is conclusive in isolation. It is their combination which is considered and weighed. If the court determines that damage by psychiatric illness caused by shock was reasonably foreseeable, the defendant should be held liable to a plaintiff even though he was a bystander and was a total stranger to a victim, unless there is some aspect of public policy which justifies the court in depriving the plaintiff of his remedy: *Hambrook v. Stokes Brothers* [1925] 1 K.B. 141; *Bourhill v. Young* [1943] A.C. 92; *Dooley v. Cammell Laird & Co. Ltd.* [1951] 1 Lloyd's Rep. 271; *Marshall v. Lionel Enterprises Inc.* (1971) 25 D.L.R. (3d) 141; *Chadwick v. British Railways Board* [1967] 1 W.L.R. 912 and *McLoughlin v. O'Brian* [1983] 1 A.C. 410.

Public policy for present purposes affects the public at large and justifies the overriding of the rights and remedies of particular plaintiffs. If there are circumstances in which a stranger can recover then it follows that a right of action must be available to, e.g. a sibling, grandfather, a brother-in-law, or a fiancée of the victim, provided that there is a sufficient combination of other relevant circumstances. The restriction of the right of action to parents and spouses of the victim would be arbitrary and without any rational justification based on love. The test should be objective and based on reasonable foreseeability. The court has to decide whether the defendant could have foreseen that the plaintiff was likely to suffer psychiatric illness by the sight of an injury to a third party: *Hambrook v. Stokes Brothers* [1925] 1 K.B. 141. There should not be any artificial exclusion of persons entitled to claim. [Reference was made to *Hinz v. Berry* [1970] 2 Q.B. 40; *Galt v. British Railways Board* (1983) 133 N.L.J. 870; *Wigg v. British Railways Board*, The Times, 4 February 1986 and *Mount Isa Mines Ltd. v. Pusey* (1970) 125 C.L.R. 383.]

In *Bell v. Great Northern Railway Co. of Ireland* (1890) 26 L.R.Ir. 428; *Dulieu v. White & Sons* [1901] 2 K.B. 669 and *Schneider v. Eisovitch* [1960] 2 Q.B. 430 the plaintiffs had feared for their own safety. By contrast, *Hambrook v. Stokes Brothers* [1925] 1 K.B. 141 shows that a claim can be brought for nervous shock arising from fear for another's safety. In *Owens v. Liverpool Corporation* [1939] 1 K.B. 394 a number of plaintiffs succeeded in their claims where they witnessed a scene of horror and suffered shock; *cf. Bourhill v. Young* [1943] A.C. 92, where the claim failed because of lack of proximity. [Reference was made to *Best v. Samuel Fox & Co. Ltd.* [1952] A.C. 716; *Kirkham v. Boughey* [1958] 2 Q.B. 338 and *Attia v. British Gas Plc.* [1988] Q.B. 304.] The presence of the television cameras would be known to the tortfeasor. An immediate recording of the plaintiff's loved ones injured at a disaster would be sufficient to affect the plaintiff. There is no difference between a television image and a view of the actual site of the disaster. It should make no difference whether the plaintiff is a few miles away or a long way away.

Where there is sufficient relationship of proximity or neighbourhood between the plaintiff and the defendant to show that the plaintiff should have been in the reasonable contemplation of the defendant, the question arises whether there are any public policy considerations which negative, reduce or limit, the scope of the defendant's duty of care. The categories of cases where this consideration applies are limited: see *Yuen Kun Yeu v. Attorney-General of Hong Kong* [1988] A.C. 175, 193G. The only public policy consideration relevant to the instant cases is the "floodgates" argument, which, as a defence, has frequently been treated with scorn and rarely accepted as valid.

However, where there is an existing category of neighbourhood there is no need for the court to consider the question of proximity. The test of liability for psychiatric illness is foreseeability. Once that hurdle is overcome the plaintiff is entitled to sue for negligence: *Norwich City Council v. Harvey* [1989] 1 W.L.R. 828.

W.C. Woodward Q.C. and *Patrick Limb* for the defendant. The burden is on the plaintiff to satisfy the court that his or her condition is due to the defendant's acts and that but for the defendant's negligence the plaintiff would have been healthy. The law distinguishes between "normal human emotions" and psychiatric illness. Damages are not awarded for fear, grief or distress and, in "nervous shock," only for psychiatric illness that is produced by "shock." Damages are not awarded for psychiatric illness the result of grief or sorrow or for adjusting to a new way of life or as a consequence, for example, of caring for a grievously injured spouse. In determining quantum, this was illustrated by the decision of the Court of Appeal in *Hinz v. Berry* [1970] 2 Q.B. 40: see also Brennan J. in *Jaensch v. Coffey*, 155 C.L.R. 549, 565. Mere foreseeability will not suffice.

Nervous shock is not in the same category of cases as injuries caused by motor cars and other machinery where there is usually, in the circumstances, no issue as to the existence of a duty of care. If there is no duty owed by the defendant to the direct victim in nervous shock cases then no matter what injuries the victim has suffered his relations

A can have no claim against the tortfeasor. The situation that is capable of shocking is of itself neutral and does not per se give rise to a claim. It is not every shock that can be foreseen: see *McLoughlin v. O'Brian* [1983] 1 A.C. 410, 436D. The law expects all persons to have enough fortitude to withstand accidents which occur from time to time in normal life. There are no damages for anxiety or depression, and the law does not enter the area of grief and bereavement resulting in depression: B *McLoughlin v. O'Brian*, at p. 431G and *Jaensch v. Coffey*, 155 C.L.R. 549. [Reference was made to *McKew v. Holland & Hannen & Cubitts (Scotland) Ltd.* [1969] 3 All E.R. 1621.]

Rescuers, although they are not in close relationship with the victims, are compensated because it is in the public interest that people should be rescued from disasters and because injury to rescuers should be C foreseen: see *Wagner v. International Railway Co.* (1921) 232 N.Y. 176 and *Chadwick v. British Railways Board* [1967] 1 W.L.R. 912. The other categories of persons who are compensatable, as decided by the Court of Appeal, are those in particular relationship with the victims, namely, parents and spouses. If those categories are not adhered to any person who has witnessed an accident and has suffered psychiatric illness may be able to claim compensation. If the categories were to be D enlarged, the court would have to inquire into personal relationships and would intrude upon private lives in a way which would be against public policy. There would be no criteria by which the matter could be reliably determined. If "love" were to be the determining factor what kind of love would be required, over what period and how intense for example would it be required to be? The law, therefore, has drawn a E line, although the line is arbitrary. The policy of the law is to achieve certainty. Thus, by section 1A of the Fatal Accidents Act 1976, inserted by section 3 of the Administration of Justice Act 1982, Parliament has given a limited category of relatives a statutory right to claim damages for bereavement.

Caparo Industries Plc. v. Dickman [1990] 2 A.C. 605, 627–629 shows that the law has moved towards attaching greater significance to the F more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and limits of the varied duties of care the law imposes. Development of new categories in the present context is no different from extending the existing ones. The question is always whether there is sufficient proximity between the plaintiff and the tortfeasor to make a negligent act foreseeable: *Donoghue v. Stevenson* G [1932] A.C. 562.

In dealing with television transmissions, even allowing for any horror in the image one has to take into account the remoteness of it from the event, the influence of others, the camera work, the input of commentators, the context in which it is received and the concentration and selection by third parties of what it is that is broadcast. The broadcast is no longer the "product" of the tortfeasor. Television H programmes should be regarded as a form of communication, like a telephone call, a photograph or an oral account and they do not give rise to direct perception of the incident. It is not reasonably foreseeable that such transmissions will shock the plaintiff. As to aftermath, that has

to be related to the event and not what the plaintiff is experiencing. The plaintiff's imagination can take over and his anxiety can be fed by his own imaginings. One has to decide where aftermath ends as an issue of fact in each case. There has also to be considered the question of control over the events. In certain circumstances others will participate and may take over the control of events whether, for example, by broadcasting or by clearing away the immediate effects. The further in time and in place one is from the event the less it is the product of the tortfeasor and the greater is the opportunity for if not the fact of the intervention of others. In other circumstances the very tortfeasor may have an obligation to become and remain involved in the event, for example as in this case, the police in their organising of the mortuary, rescue services and identification. Such tortfeasor ought not to be liable in those circumstances for the consequence of that activity.

Public policy does play a significant part in the determination of the duty of care, both generally and in nervous shock, and the scope of such duty. Public policy must have regard to, inter alia, certainty in law, finality in litigation, avoiding liability to the whole world, the difficulties of investigating and the implications of challenging assertions of relationships of love and affection, and the implications of liability for television. In that context the event bears a close resemblance to the negligent misstatement: see *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465, 483, 535.

Hytner Q.C., in reply, referred to *Wilkinson v. Downton* [1897] 2 Q.B. 57; *Hevican v. Ruane* [1991] 3 All E.R. 65 and *Ravenscroft v. Rederiaktiebølaget Transatlantic* [1991] 3 All E.R. 73.

Their Lordships took time for consideration.

28 November. LORD KEITH OF KINKEL. My Lords, the litigation with which these appeals are concerned arose out of the disaster at Hillsborough Stadium, Sheffield, which occurred on 15 April 1989. On that day a football match was arranged to be played at the stadium between the Liverpool and the Nottingham Forest football clubs. It was a semi-final of the F.A. Cup. The South Yorkshire police force, which was responsible for crowd control at the match, allowed an excessively large number of intending spectators to enter the ground at the Leppings Lane end, an area reserved for Liverpool supporters. They crammed into pens 3 and 4, below the West Stand, and in the resulting crush 95 people were killed and over 400 physically injured. Scenes from the ground were broadcast live on television from time to time during the course of the disaster, and recordings were broadcast later. The Chief Constable of South Yorkshire has admitted liability in negligence in respect of the deaths and physical injuries. Sixteen separate actions were brought against him by persons none of whom was present in the area where the disaster occurred, although four of them were elsewhere in the ground. All of them were connected in various ways with persons who were in that area, being related to such persons or, in one case, being a fiancé. In most cases the person with whom the plaintiff was concerned was killed, in other cases that person was injured, and in one

case turned out to be uninjured. All the plaintiffs claimed damages for nervous shock resulting in psychiatric illness which they alleged was caused by the experiences inflicted on them by the disaster.

The actions came on for trial before Hidden J. on 19 June 1990, and he gave judgment on 31 July 1990, ante, pp. 314E et seq. That judgment was concerned with the question whether the defendant owed a duty of care in relation to nervous shock to any, and if so to which, of the plaintiffs. The defendant admitted that if he owed such a duty to any plaintiff, and if that plaintiff could show causation, then the defendant was in breach of duty and liable in damages to that plaintiff. For purposes of his judgment Hidden J. assumed in the case of each plaintiff that causation was established, leaving that matter to be dealt with, if necessary, in further proceedings. In the result, he found in favour of ten out of the sixteen plaintiffs before him and against six of them. The defendant appealed to the Court of Appeal in the cases of nine out of the ten successful plaintiffs, and the six unsuccessful plaintiffs also appealed to that court. On 3 May 1991 the Court of Appeal (Parker, Stocker and Nolan L.JJ.) gave judgment allowing the defendant's appeals in the cases of the nine formerly successful plaintiffs and rejecting the appeals of the six unsuccessful ones. Ten only of these fifteen plaintiffs now appeal to your Lordships' House, with leave granted in the Court of Appeal.

The circumstances affecting each of the 10 plaintiffs were thus summarised in the judgment of Parker L.J., ante, pp. 352–354:

> "one, Brian Harrison, was at the ground. He was in the West Stand. He knew both of his brothers would be in the pens behind the goal. He saw the horrifying scene as it developed and realised that people in the two pens had been either killed or injured. When, six minutes after the start, the match was abandoned he tried to find his brothers. He failed to do so. He stopped up all night waiting for news. At 6 a.m. he learnt that his family were setting off for Sheffield. At 11 a.m. he was informed by telephone that both his brothers were dead. . . .
>
> "Mr. and Mrs. Copoc lost their son. They saw the scenes on live television. Mrs. Copoc was up all night. She was informed by police officers at 6 a.m. that her son was dead. Mr. Copoc went to Sheffield at 4 a.m. with his nephew. He was informed at 6.10 a.m. of his son's death and later identified the body. . . .
>
> "Brenda Hennessey lost her brother. She watched television from about 3.30 p.m. and, although she then realised there had been deaths and injuries in the pens, she was not worried because she believed her brother to be in a stand seat. However, at about 5 p.m. she learnt from her brother's wife that he had a ticket in the Leppings Lane terrace. At 6 p.m. she learnt from members of the family who had gone to Sheffield that her brother was dead.
>
> "Denise Hough lost her brother. She was 11 years older than her brother and had fostered him for several years although he no longer lived with her. She knew he had a ticket at the Leppings Lane end and would be behind the goal. She was told by a friend that there was trouble at the game. She watched television. At

4.40 a.m. she was informed by her mother that her brother was dead. Two days later, on 17 April, she went with her mother to Sheffield and confirmed an earlier identification of the body. His face was bruised and swollen.

"Stephen Jones lost his brother. He knew that his brother was at the match. He watched television and saw bodies and believed them to be dead. He did not know his brother was dead until 2.45 a.m. when, having gone to the temporary mortuary at Hillsborough, he found his parents there in tears. . . .

"Robert Alcock lost his brother-in-law. He was in the West Stand, with his nephew, the brother-in-law's son. He witnessed the scenes from the West Stand and was sickened by what he saw but was not then concerned for his brother-in-law whom he believed to be in the stand because, on the way to the match, he had swapped a terrace ticket which he held for a stand ticket. Tragically, however, the brother-in-law had, unknown to the plaintiff, returned to the terrace. After the match the plaintiff left the ground for a rendezvous with the brother-in-law who did not arrive. He and his nephew became worried and searched without success. At about midnight they went to the mortuary where the plaintiff identified the body which was blue with bruising and the chest of which was red. The sight appalled him. . . .

"Catherine Jones lost a brother. She knew he was at the match and would normally be behind the goal. At 3.30 p.m. whilst shopping she heard that there was trouble at the match and at 4.30 p.m. that there were deaths. At 5.15 p.m. she went home and heard on the radio that the death toll was mounting. At 7 p.m. a friend telephoned from Sheffield to say that people at the hospital were describing someone who might be her brother. At 9 p.m. her parents set off for Sheffield. At 10 p.m. she watched recorded television in the hope of seeing her brother alive. She thought, mistakenly, she saw him collapsed on the pitch. At 5 a.m. her father returned from Sheffield and told her that her brother was dead.

"Joseph Kehoe lost a 14-year-old grandson, the son of his daughter and her divorced husband. Unknown to the grandfather the boy had gone to the match with his father. In the afternoon the plaintiff heard on the radio that there had been deaths at Hillsborough. He later saw scenes of the disaster on recorded television. He later still learnt that his grandson was at the match. He became worried. At 3 a.m. he was telephoned by another daughter to say that both the boy and his father were dead. . . .

"Alexandra Penk lost her fiancé, Carl Rimmer. They had known each other for four years and recently became engaged. They planned to marry in late 1989 or at the latest early in 1990. She knew he was at the match and would be on the Leppings Lane terraces. She saw television in her sister's house and knew instinctively that her fiancé was in trouble. She continued to watch in the hope of seeing him but did not do so. She was told at about 11 p.m. that he was dead."

The question of liability in negligence for what is commonly, if inaccurately, described as "nervous shock" has only twice been considered by this House, in *Bourhill v. Young* [1943] A.C. 92 and in *McLoughlin v. O'Brian* [1983] 1 A.C. 410. In the latter case the plaintiff, after learning of a motor accident involving her husband and three of her children about two hours after it had happened, went to the hospital where they had been taken. There she was told that one of the children had been killed, and saw her husband and the other two in a distressed condition and bearing on their persons the immediate effects of the accident. She claimed to have suffered psychiatric illness as a result of her experience, and at the trial of her action of damages against those responsible for the accident this was assumed to be the fact. This House, reversing the Court of Appeal, held that she was entitled to recover damages. The leading speech was delivered by Lord Wilberforce. Having set out, at pp. 418 and 419, the position so far reached in the decided cases on nervous shock, he expressed the opinion that foreseeability did not of itself and automatically give rise to a duty of care owned to a person or class of persons and that considerations of policy entered into the conclusion that such a duty existed. He then considered the arguments on policy which had led the Court of Appeal to reject the plaintiff's claim, and concluded, at p. 421, that they were not of great force. He continued, at pp. 421–423:

> "But, these discounts accepted, there remains, in my opinion, just because 'shock' in its nature is capable of affecting so wide a range of people, a real need for the law to place some limitation upon the extent of admissible claims. It is necessary to consider three elements inherent in any claim: the class of persons whose claims should be recognised; the proximity of such persons to the accident; and the means by which the shock is caused. As regards the class of persons, the possible range is between the closest of family ties—of parent and child, or husband and wife—and the ordinary bystander. Existing law recognises the claims of the first: it denies that of the second, either on the basis that such persons must be assumed to be possessed of fortitude sufficient to enable them to endure the calamities of modern life, or that defendants cannot be expected to compensate the world at large. In my opinion, these positions are justifiable, and since the present case falls within the first class, it is strictly unnecessary to say more. I think, however, that it should follow that other cases involving less close relationships must be very carefully scrutinised. I cannot say that they should never be admitted. The closer the tie (not merely in relationship, but in care) the greater the claim for consideration. The claim, in any case, has to be judged in the light of the other factors, such as proximity to the scene in time and place, and the nature of the accident.
>
> "As regards proximity to the accident, it is obvious that this must be close in both time and space. It is, after all, the fact and consequence of the defendant's negligence that must be proved to have caused the 'nervous shock.' Experience has shown that to insist on direct and immediate sight or hearing would be impractical

and unjust and that under what may be called the 'aftermath' doctrine one who, from close proximity, comes very soon upon the scene should not be excluded. . . .

"Finally, and by way of reinforcement of 'aftermath' cases, I would accept, by analogy with 'rescue' situations, that a person of whom it could be said that one could expect nothing else than that he or she would come immediately to the scene—normally a parent or a spouse—could be regarded as being within the scope of foresight and duty. Where there is not immediate presence, account must be taken of the possibility of alterations in the circumstances, for which the defendant should not be responsible.

"Subject only to these qualifications, I think that a strict test of proximity by sight or hearing should be applied by the courts.

"Lastly, as regards communication, there is no case in which the law has compensated shock brought about by communication by a third party. In *Hambrook v. Stokes Brothers* [1925] 1 K.B. 141, indeed, it was said that liability would not arise in such a case and this is surely right. It was so decided in *Abramzik v. Brenner* (1967) 65 D.L.R. (2d) 651. The shock must come through sight or hearing of the event or of its immediate aftermath. Whether some equivalent of sight or hearing, e.g. through simultaneous television, would suffice may have to be considered."

Lord Bridge of Harwich, with whom Lord Scarman agreed, at p. 431D–E, appears to have rested his finding of liability simply on the test of reasonable foreseeability of psychiatric illness affecting the plaintiff as a result of the consequences of the road accident, at pp. 439–443. Lord Edmund-Davies and Lord Russell of Killowen both considered the policy arguments which had led the Court of Appeal to dismiss the plaintiff's claim to be unsound: pp. 428, 429. Neither speech contained anything inconsistent with that of Lord Wilberforce.

It was argued for the plaintiffs in the present case that reasonable foreseeability of the risk of injury to them in the particular form of psychiatric illness was all that was required to bring home liability to the defendant. In the ordinary case of direct physical injury suffered in an accident at work or elsewhere, reasonable foreseeability of the risk is indeed the only test that need be applied to determine liability. But injury by psychiatric illness is more subtle, as Lord Macmillan observed in *Bourhill v. Young* [1943] A.C. 92, 103. In the present type of case it is a secondary sort of injury brought about by the infliction of physical injury, or the risk of physical injury, upon another person. That can affect those closely connected with that person in various ways. One way is by subjecting a close relative to the stress and strain of caring for the injured person over a prolonged period, but psychiatric illness due to such stress and strain has not so far been treated as founding a claim in damages. So I am of the opinion that in addition to reasonable foreseeability liability for injury in the particular form of psychiatric illness must depend in addition upon a requisite relationship of proximity between the claimant and the party said to owe the duty. Lord Atkin in

Donoghue v. Stevenson [1932] A.C. 562, 580 described those to whom a duty of care is owed as being:

> "persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

The concept of a person being closely and directly affected has been conveniently labelled "proximity," and this concept has been applied in certain categories of cases, particularly those concerned with pure economic loss, to limit and control the consequences as regards liability which would follow if reasonable foreseeability were the sole criterion.

As regards the class of persons to whom a duty may be owed to take reasonable care to avoid inflicting psychiatric illness through nervous shock sustained by reason of physical injury or peril to another, I think it sufficient that reasonable foreseeability should be the guide. I would not seek to limit the class by reference to particular relationships such as husband and wife or parent and child. The kinds of relationshp which may involve close ties of love and affection are numerous, and it is the existence of such ties which leads to mental disturbance when the loved one suffers a catastrophe. They may be present in family relationships or those of close friendship, and may be stronger in the case of engaged couples than in that of persons who have been married to each other for many years. It is common knowledge that such ties exist, and reasonably foreseeable that those bound by them may in certain circumstances be at real risk of pyschiatric illness if the loved one is injured or put in peril. The closeness of the tie would, however, require to be proved by a plaintiff, though no doubt being capable of being presumed in appropriate cases. The case of a bystander unconnected with the victims of an accident is difficult. Psychiatric injury to him would not ordinarily, in my view, be within the range of reasonable foreseeability, but could not perhaps be entirely excluded from it if the circumstances of a catastrophe occurring very close to him were particularly horrific.

In the case of those within the sphere of reasonable foreseeability the proximity factors mentioned by Lord Wilberforce in *McLoughlin v. O'Brian* [1983] 1 A.C. 410, 422, must, however, be taken into account in judging whether a duty of care exists. The first of these is proximity of the plaintiff to the accident in time and space. For this purpose the accident is to be taken to include its immediate aftermath, which in *McLoughlin's* case was held to cover the scene at the hospital which was experienced by the plaintiff some two hours after the accident. In *Jaensch v. Coffey* (1984) 155 C.L.R. 549, the plaintiff saw her injured husband at the hospital to which he had been taken in severe pain before and between his undergoing a series of emergency operations, and the next day stayed with him in the intensive care unit and thought he was going to die. She was held entitled to recover damages for the psychiatric illness she suffered as a result. Deane J. said, at p. 608:

> "the aftermath of the accident extended to the hospital to which the injured person was taken and persisted for so long as he remained in the state produced by the accident up to and including immediate

post-accident treatment. . . . Her psychiatric injuries were the result of the impact upon her of the facts of the accident itself and its aftermath while she was present at the aftermath of the accident at the hospital."

As regards the means by which the shock is suffered, Lord Wilberforce said in *McLoughlin v. O'Brian* [1983] 1 A.C. 410, 423 that it must come through sight or hearing of the event on or of its immediate aftermath. He also said that it was surely right that the law should not compensate shock brought about by communication by a third party. On that basis it is open to serious doubt whether *Hevican v. Ruane* [1991] 3 All E.R. 65 and *Ravenscroft v. Rederiaktiebølaget Transatlantic* [1991] 3 All E.R. 73 were correctly decided, since in both of these cases the effective cause of the psychiatric illness would appear to have been the fact of a son's death and the news of it.

Of the present plaintiffs two, Brian Harrison and Robert Alcock, were present at the Hillsborough ground, both of them in the West Stand, from which they witnessed the scenes in pens 3 and 4. Brian Harrison lost two brothers, while Robert Alcock lost a brother-in-law and identified the body at the mortuary at midnight. In neither of these cases was there any evidence of particularly close ties of love or affection with the brothers or brother-in-law. In my opinion the mere fact of the particular relationship was insufficient to place the plaintiff within the class of persons to whom a duty of care could be owed by the defendant as being foreseeably at risk of psychiatric illness by reason of injury or peril to the individuals concerned. The same is true of other plaintiffs who were not present at the ground and who lost brothers, or in one case a grandson. I would, however, place in the category to members of which risk of psychiatric illness was reasonably foreseeable Mr. and Mrs. Copoc, whose son was killed, and Alexandra Penk, who lost her fiancé. In each of these cases the closest ties of love and affection fall to be presumed from the fact of the particular relationship, and there is no suggestion of anything which might tend to rebut that presumption. These three all watched scenes from Hillsborough on television, but none of these depicted suffering of recognisable individuals, such being excluded by the broadcasting code of ethics, a position known to the defendant. In my opinion the viewing of these scenes cannot be equiparated with the viewer being within "sight or hearing of the event or of its immediate aftermath," to use the words of Lord Wilberforce [1983] 1 A.C. 410, 423B, nor can the scenes reasonably be regarded as giving rise to shock, in the sense of a sudden assault on the nervous system. They were capable of giving rise to anxiety for the safety of relatives known or believed to be present in the area affected by the crush, and undoubtedly did so, but that is very different from seeing the fate of the relative or his condition shortly after the event. The viewing of the television scenes did not create the necessary degree of proximity.

My Lords, for these reasons I would dismiss each of these appeals.

LORD ACKNER. My Lords, if sympathy alone were to be the determining factor in these claims, then they would never have been

A contested. It has been stressed throughout the judgments in the courts below and I would emphasise it yet again in your Lordships' House that the human tragedy which occurred on the afternoon of 15 April 1989 at the Hillsborough Stadium when 95 people were killed and more than 400 others received injuries from being crushed necessitating hospital treatment, remains an utterly appalling one.

B It is, however, trite law that the defendant, the Chief Constable of South Yorkshire, is not an insurer against psychiatric illness occasioned by the shock sustained by the relatives or friends of those who died or were injured, or were believed to have died or to have been injured. This is, of course, fully recognised by the appellants, the plaintiffs in these actions, whose claims for damages to compensate them for their psychiatric illnesses are based upon the allegation that it was the C defendant's negligence, that is to say his breach of his duty of care owed to them as well as to those who died or were injured in controlling the crowds at the stadium, which caused them to suffer their illnesses. The defendant, for the purposes of these actions, has admitted that he owed a duty of care *only* to those who died or were injured and that he was in breach of only that duty. He has further accepted that each of the D plaintiffs has suffered some psychiatric illness. Moreover for the purpose of deciding whether the defendant is liable to pay damages to the plaintiffs in respect of their illnesses, the trial judge, Hidden J., made the assumption that the illnesses were caused by the shocks sustained by the plaintiffs by reason of their awareness of the events at Hillsborough. The defendant has throughout contested liability on the ground that, in all the circumstances, he was not in breach of any duty of care owed to E the the plaintiffs.

Since the decision of your Lordships' House in *McLoughlin v. O'Brian* [1983] 1 A.C. 410, if not earlier, it is established law that (1) a claim for damages for psychiatric illness resulting from shock caused by negligence can be made without the necessity of the plaintiff establishing that he was himself injured or was in fear of personal injury; (2) a claim F for damages for such illness can be made when the shock results: (a) from death or injury to the plaintiff's spouse or child or the fear of such death or injury and (b) the shock has come about through the sight or hearing of the event, or its immediate aftermath.

To succeed in the present appeals the plaintiffs seek to extend the boundaries of this cause of action by: (1) removing any restrictions on G the categories of persons who may sue; (2) extending the means by which the shock is caused, so that it includes viewing the simultaneous broadcast on television of the incident which caused the shock; (3) modifying the present requirement that the aftermath must be "immediate."

A recital of the cases over the last century show that the extent of the liability for shock-induced psychiatric illness has been greatly H expanded. This has largely been due to a better understanding of mental illness and its relation to shock. The extension of the scope of this cause of action sought in these appeals is not on any such ground but, so it is contended, by the application of established legal principles.

Mr. Hytner for the plaintiffs relies substantially upon the speech of Lord Bridge of Harwich in *McLoughlin v. O'Brian* [1983] 1 A.C. 410, 431, and on the judgment of Brennan J. in the Australian High Court decision *Jaensch v. Coffey*, 155 C.L.R. 549, 558, for the proposition that the test for establishing liability is the unfettered application of the test of reasonable foreseeability—viz. whether the hypothetical reasonable man in the position of the defendant, viewing the position ex post facto, would say that the shock-induced psychiatric illness was reasonably foreseeable. Mr. Woodward for the defendant relies upon the opinion expressed by Lord Wilberforce supported by Lord Edmund-Davies in *McLoughlin v. O'Brian*]1983] 1 A.C. 410, 420F, that foreseeability does not of itself, and automatically, lead to a duty of care:

> "foreseeability must be accompanied and limited by the law's judgment as to persons who ought, according to its standards of value or justice, to have been in contemplation."

He also relies on similar views expressed by Gibbs C.J. and Deane J. in *Jaensch v. Coffey*, 155 C.L.R. 549, 552, 578.

The nature of the cause of action

In *Bourhill v. Young* [1943] A.C. 92, 103, Lord Macmillan said:

> "in the case of mental shock there are elements of greater subtlety than in the case of an ordinary physical injury and these elements may give rise to debate as to the precise scope of the legal liability."

It is now generally accepted that an analysis of the reported cases of nervous shock establishes that it is a type of claim in a category of its own. Shock is no longer a variant of physical injury but a separate kind of damage. Whatever may be the pattern of the future development of the law in relation to this cause of action, the following propositions illustrate that the application simpliciter of the reasonable foreseeability test is, today, far from being operative.

(1) Even though the risk of psychiatric illness is reasonably foreseeable, the law gives no damages if the psychiatric injury was not induced by shock. Psychiatric illnesses caused in other ways, such as by the experience of having to cope with the deprivation consequent upon the death of a loved one, attracts no damages. Brennan J. in *Jaensch v. Coffey*, 155 C.L.R. 549, 569, gave as examples, the spouse who has been worn down by caring for a tortiously injured husband or wife and who suffers psychiatric illness as a result, but who, nevertheless, goes without compensation; a parent made distraught by the wayward conduct of a brain-damaged child and who suffers psychiatric illness as a result also has no claim against the tortfeasor liable to the child.

(2) Even where the nervous shock and the subsequent psychiatric illness caused by it could both have been reasonably foreseen, it has been generally accepted that damages for merely being informed of, or reading, or hearing about the accident are not recoverable. In *Bourhill v. Young* [1943] A.C. 92, 103, Lord Macmillan only recognised the action lying where the injury by shock was sustained "through the medium of the eye or the ear without direct contact." Certainly

Brennan J. in his judgment in *Jaensch v. Coffey*, 155 C.L.R. 549, 567, recognised:

> "A psychiatric illness induced by mere knowledge of a distressing fact is not compensable; perception by the plaintiff of the distressing phenomenon is essential."

That seems also to have been the view of Bankes L.J. in *Hambrook v. Stokes Brothers* [1925] 1 K.B. 141, 152. I agree with my noble and learned friend, Lord Keith of Kinkel, that the validity of each of the recent decisions at first instance of *Hevican v. Ruane* [1991] 3 All E.R. 65 and *Ravenscroft v. Rederiaktiebølaget Transatlantic* [1991] 3 All E.R. 73 is open to serious doubt.

(3) Mere mental suffering, although reasonably foreseeable, if unaccompanied by physical injury, is not a basis for a claim for damages. To fill this gap in the law a very limited category of relatives are given a statutory right by the Administration of Justice Act 1982, section 3 inserting a new section 1A into the Fatal Accidents Act 1976, to bring an action claiming damages for bereavement.

(4) As yet there is no authority establishing that there is liability on the part of the injured person, his or her estate, for mere psychiatric injury which was sustained by another by reason of shock, as a result of a self-inflicted death, injury or peril of the negligent person, in circumstances where the risk of such psychiatric injury was reasonably foreseeable. On the basis that there must be a limit at some reasonable point to the extent of the duty of care owed to third parties which rests upon everyone in all his actions, Lord Robertson, the Lord Ordinary, in his judgment in the *Bourhill* case, 1941 S.C. 395, 399, did not view with favour the suggestion that a negligent window-cleaner who loses his grip and falls from a height, impaling himself on spiked railings, would be liable for the shock-induced psychiatric illness occasioned to a pregnant woman looking out of the window of a house situated on the opposite side of the street.

(5) "Shock," in the context of this cause of action, involves the sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind. It has yet to include psychiatric illness caused by the accumulation over a period of time of more gradual assaults on the nervous system.

I do not find it surprising that in this particular area of the tort of negligence, the reasonable foreseeability test is not given a free rein. As Lord Reid said in *McKew v. Holland & Hannen & Cubitts (Scotland) Ltd.* [1969] 3 All E.R. 1621, 1623:

> "A defender is not liable for a consequence of a kind which is not foreseeable. But it does not follow that he is liable for every consequence which a reasonable man could foresee."

Deane J. pertinently observed in *Jaensch v. Coffey*, 155 C.L.R. 549, 583:

> "Reasonable foreseeability on its own indicates no more than that such a duty of care will exist if, and to the extent that, it is not precluded or modified by some applicable overriding requirement or

limitation. It is to do little more than to state a truism to say that the essential function of such requirements or limitations is to confine the existence of a duty to take reasonable care to avoid reasonably foreseeable injury to the circumstances or classes of case in which it is the policy of the law to admit it. Such overriding requirements or limitations shape the frontiers of the common law of negligence."

Although it is a vital step towards the establishment of liability, the satisfaction of the test of reasonable foreseeability does not, in my judgment, ipso facto satisfy Lord Atkin's well known neighbourhood principle enuniciated in *Donoghue v. Stevenson* [1932] A.C. 562, 580. For him to have been reasonably in contemplation by a defendant he must be:

> "so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

The requirement contained in the words "so closely and directly affected . . . that" constitutes a control upon the test of reasonable foreseeability of injury. Lord Atkin was at pains to stress, at pp. 580–582, that the formulation of a duty of care, merely in the general terms of reasonable foreseeability, would be too wide unless it were "limited by the notion of proximity" which was embodied in the restriction of the duty of care to one's "neighbour."

The three elements

Because "shock" in its nature is capable of affecting such a wide range of persons, Lord Wilberforce in *McLoughlin v. O'Brian* [1983] 1 A.C. 410, 422, concluded that there was a real need for the law to place some limitation upon the extent of admissible claims and in this context he considered that there were three elements inherent in any claim. It is common ground that such elements do exist and are required to be considered in connection with all these claims. The fundamental difference in approach is that on behalf of the plaintiffs it is contended that the consideration of these three elements is merely part of the process of deciding whether, as a matter of fact, the reasonable foreseeability test has been satisfied. On behalf of the defendant it is contended that these elements operate as a control or limitation on the mere application of the reasonable foreseeability test. They introduce the requirement of "proximity" as conditioning the duty of care.

The three elements are (1) the class of persons whose claims should be recognised; (2) the proximity of such persons to the accident—in time and space; (3) the means by which the shock has been caused.

I will deal with those three elements seriatim.

(1) *The class of persons whose claim should be recognised*

When dealing with the possible range of the class of persons who might sue, Lord Wilberforce in *McLoughlin v. O'Brian* [1983] 1 A.C.

410 contrasted the closest of family ties—parent and child and husband and wife—with that of the ordinary bystander. He said that while existing law recognises the claims of the first, it denied that of the second, either on the basis that such persons must be assumed to be possessed with fortitude sufficient to enable them to endure the calamities of modern life, or that defendants cannot be expected to compensate the world at large. He considered that these positions were justified, that other cases involving less close relationships must be very carefully considered, adding, at p. 422:

> "The closer the tie (not merely in relationship, but in care) the greater the claim for consideration. The claim, in any case, has to be judged in the light of the other factors, such as proximity to the scene in time and place, and the nature of the accident."

I respectfully share the difficulty expressed by Atkin L.J. in *Hambrook v. Stokes Brothers* [1925] 1 K.B. 141, 158–159—how do you explain why the duty is confined to the case of parent or guardian and child and does not extend to other relations of life also involving intimate associations; and why does it not eventually extend to bystanders? As regards the latter category, while it may be very difficult to envisage a case of a stranger, who is not actively and foreseeably involved in a disaster or its aftermath, other than in the role of rescuer, suffering shock-induced psychiatric injury by the mere observation of apprehended or actual injury of a third person in circumstances that could be considered reasonably foreseeable, I see no reason in principle why he should not, if in the circumstances, a reasonably strong-nerved person would have been so shocked. In the course of argument your Lordships were given, by way of an example, that of a petrol tanker careering out of control into a school in session and bursting into flames. I would not be prepared to rule out a potential claim by a passer-by so shocked by the scene as to suffer psychiatric illness.

As regards claims by those in the close family relationships referred to by Lord Wilberforce, the justification for admitting such claims is the presumption, which I would accept as being rebuttable, that the love and affection normally associated with persons in those relationships is such that a defendant ought reasonably to contemplate that they may be so closely and directly affected by his conduct as to suffer shock resulting in psychiatric illness. While as a generalisation more remote relatives and, a fortiori, friends, can reasonably be expected not to suffer illness from the shock, there can well be relatives and friends whose relationship is so close and intimate that their love and affection for the victim is comparable to that of the normal parent, spouse or child of the victim and should for the purpose of this cause of action be so treated. This was the opinion of Stocker L.J. in the instant appeal, ante, p. 376E–G, and also that of Nolan L.J. who thus expressed himself, ante, pp. 384–385:

> "For my part, I would accept at once that no general definition is possible. But I see no difficulty in principle in requiring a defendant to contemplate that the person physically injured or threatened by

his negligence may have relatives or friends whose love for him is like that of a normal parent or spouse, and who in consequence may similarly be closely and directly affected by nervous shock . . . The identification of the particular individuals who come within that category, like that of the parents and spouses themselves, could only be carried out ex post facto, and would depend upon evidence of the 'relationship' in the broad sense which gave rise to the love and affection."

It is interesting to observe that when, nearly 50 years ago, the New South Wales legislature decided to extend liability for injury arising wholly or in part from "mental or nervous shock" sustained by a parent or husband or wife of the person killed, injured or put in peril, or any other member of the family of such person, it recognised that it was appropriate to extend significantly the definition of such categories of claimants. Section 4(5) of the Law Reform (Miscellaneous Provisions) Act 1944 provides:

"'Member of the family' means the husband, wife, parent, child, brother, sister, half-brother or half-sister of the person in relation to whom the expression is used. 'Parent' includes father, mother, grandfather, grandmother, stepfather, stepmother and any person standing in loco parentis to another. 'Child' includes son, daughter, grandson, granddaughter, stepson, stepdaughter and any person to whom another stands in loco parentis."

Whether the degree of love and affection in any given relationship, be it that of relative or friend, is such that the defendant, in the light of the plaintiff's proximity to the scene of the accident in time and space and its nature, should reasonably have foreseen the shock-induced psychiatric illness, has to be decided on a case by case basis. As Deane J. observed in *Jaensch v. Coffey*, 155 C.L.R. 549, 601:

"While it must now be accepted that any realistic assessment of the reasonably foreseeable consequences of an accident involving actual or threatened serious bodily injury must, in an appropriate case, include the possibility of injury in the form of nervous shock being sustained by a wide range of persons not physically injured in the accident, the outer limits of reasonable foreseeability of mere psychiatric injury cannot be identified in the abstract or in advance. Much may depend upon the nature of the negligent act or omission, on the gravity or apparent gravity of any actual or apprehended injury and on any expert evidence about the nature and explanation of the particular psychiatric injury which the plaintiff has sustained."

(2) The proximity of the plaintiff to the accident

It is accepted that the proximity to the accident must be close both in time and space. Direct and immediate sight or hearing of the accident is not required. It is reasonably foreseeable that injury by shock can be caused to a plaintiff, not only through the sight or hearing of the event, but of its immediate aftermath.

Only two of the plaintiffs before us were at the ground. However, it is clear from *McLoughlin v. O'Brian* [1983] 1 A.C. 410 that there may

A be liability where subsequent identification can be regarded as part of the "immediate aftermath" of the accident. Mr. Alcock identified his brother-in-law in a bad condition in the mortuary at about midnight, that is some eight hours after the accident. This was the earliest of the identification cases. Even if this identification could be described as part of the "aftermath," it could not in my judgment be described as part of the *immediate* aftermath. *McLoughlin's* case was described by Lord B Wilberforce as being upon the margin of what the process of logical progression from case to case would allow. Mrs. McLoughlin had arrived at the hospital within an hour or so after the accident. Accordingly in the post-accident identification cases before your Lordships there was not sufficient proximity in time and space to the accident.

C *(3) The means by which the shock is caused*

Lord Wilberforce concluded that the shock must come through sight or hearing of the event or its immediate aftermath but specifically left for later consideration whether some equivalent of sight or hearing, e.g. through simultaneous television, would suffice: see p. 423. Of course it is common ground that it was clearly foreseeable by the defendant that D the scenes at Hillsborough would be broadcast live and that amongst those who would be watching would be parents and spouses and other relatives and friends of those in the pens behind the goal at the Leppings Lane end. However he would also know of the code of ethics which the television authorities televising this event could be expected to follow, namely that they would not show pictures of suffering by recognisable individuals. Had they done so, Mr. Hytner accepted that E this would have been a "novus actus" breaking the chain of causation between the defendant's alleged breach of duty and the psychiatric illness. As the defendant was reasonably entitled to expect to be the case, there were no such pictures. Although the television pictures certainly gave rise to feelings of the deepest anxiety and distress, in the circumstances of this case the simultaneous television broadcasts of what F occurred cannot be equated with the "sight or hearing of the event or its immediate aftermath." Accordingly shocks sustained by reason of these broadcasts cannot found a claim. I agree, however, with Nolan L.J. that simultaneous broadcasts of a disaster cannot in all cases be ruled out as providing the equivalent of the actual sight or hearing of the event or its immediate aftermath. Nolan L.J. gave, ante, pp. 386G–387A, an example of a situation where it was reasonable to anticipate that the G television cameras, whilst filming and transmitting pictures of a special event of children travelling in a balloon, in which there was media interest, particularly amongst the parents, showed the balloon suddenly bursting into flames. Many other such situations could be imagined where the impact of the simultaneous television pictures would be as great, if not greater, than the actual sight of the accident.

H *Conclusion*

Only one of the plaintiffs, who succeeded before Hidden J., namely Brian Harrison, was at the ground. His relatives who died were his two

brothers. The quality of brotherly love is well known to differ widely— from Cain and Abel to David and Jonathan. I assume that Mr. Harrison's relationship with his brothers was not an abnormal one. His claim was not presented upon the basis that there was such a close and intimate relationship between them, as gave rise to that very special bond of affection which would make his shock-induced psychiatric illness reasonably foreseeable by the defendant. Accordingly, the judge did not carry out the requisite close scrutiny of their relationship. Thus there was no evidence to establish the necessary proximity which would make his claim reasonably foreseeable and, subject to the other factors, to which I have referred, a valid one. The other plaintiff who was present at the ground, Robert Alcock, lost a brother-in-law. He was not, in my judgment, reasonably foreseeable as a potential sufferer from shock-induced psychiatric illness, in default of very special facts and none was established. Accordingly their claims must fail, as must those of the other plaintiffs who only learned of the disaster by watching simultaneous television. I, too, would therefore dismiss these appeals.

LORD OLIVER OF AYLMERTON. My Lords, in each of these appeals the question raised is whether the defendant is to be held responsible for psychiatric injury suffered by a plaintiff who was not himself or herself directly involved in the accident (for which, for present purposes, the defendant accepts responsibility) but who was connected to a victim by the bonds of an affectionate relationship such that he or she suffered extreme shock or anguish leading to the condition of which the plaintiff complains.

The tragic circumstances out of which the present appeals arise have already been set out in the speech of my noble and learned friend, Lord Keith of Kinkel, and no purpose would be served by repeating them. In each case damages are sought for psychiatric illness, which, for present purposes, must be assumed to have been caused by the nervous impact on the plaintiff of the death or injury of a primary victim with whom he or she had a strong bond of affection. In each case it is admitted for the purposes of these proceedings that the defendant was in breach of a tortious duty of care owed to the primary victim and that each plaintiff has suffered psychiatric illness. It is in issue whether the illness of which each plaintiff complains is causally attributable to the circumstances in which he or she became aware of the death of the primary victim. But such a causal link is assumed for the purposes of these appeals. What remains in issue is whether the defendant owed any duty in tort to the plaintiffs to avoid causing the type of injury of which each plaintiff complains. In essence this involves answering the twin questions of (a) whether injury of this sort to each particular plaintiff was a reasonably foreseeable consequence of the acts or omissions constituting the breach of duty to the primary victim and (b) whether there existed between the defendant and each plaintiff that degree of directness or proximity necessary to establish liability.

There is, to begin with, nothing unusual or peculiar in the recognition by the law that compensatable injury may be caused just as much by a direct assault upon the mind or the nervous system as by direct physical

contact with the body. This is no more than the natural and inevitable result of the growing appreciation by modern medical science of recognisable causal connections between shock to the nervous system and physical or psychiatric illness. Cases in which damages are claimed for directly inflicted injuries of this nature may present greater difficulties of proof but they are not, in their essential elements, any different from cases where the damages claimed arise from direct physical injury and they present no very difficult problems of analysis where the plaintiff has himself been directly involved in the accident from which the injury is said to arise. In such a case he can be properly said to be the primary victim of the defendant's negligence and the fact that the injury which he sustains is inflicted through the medium of an assault on the nerves or senses does not serve to differentiate the case, except possibly in the degree of evidentiary difficulty, from a case of direct physical injury.

It is customary to classify cases in which damages are claimed for injury occasioned in this way under a single generic label as cases of "liability for nervous shock." This may be convenient but in fact the label is misleading if and to the extent that it is assumed to lead to a conclusion that they have more in common than the factual similarity of the medium through which the injury is sustained—that of an assault upon the nervous system of the plaintiff through witnessing or taking part in an event—and that they will, on account of this factor, provide a single common test for the circumstances which give rise to a duty of care. Broadly they divide into two categories, that is to say, those cases in which the injured plaintiff was involved, either mediately or immediately, as a participant, and those in which the plaintiff was no more than the passive and unwilling witness of injury caused to others. In the context of the instant appeals the cases of the former type are not particularly helpful, except to the extent that they yield a number of illuminating dicta, for they illustrate only a directness of relationship (and thus a duty) which is almost self-evident from a mere recital of the facts.

Thus, *Dulieu v. White & Sons* [1901] 2 K.B. 669 where the plaintiff was naturally and obviously put in fear for her own safety when a runaway vehicle broke through the front of the public house where she was employed, is, at any rate to modern eyes, a tolerably obvious case. Had she sustained bodily injury from the incursion there could never have been the slightest doubt about the defendant's liability and the fact that what brought about the injury was not an actual contact but the imminent threat to her personally posed by the defendant's negligence could make no difference to the result. As the person directly threatened, she was quite clearly in a sufficiently direct and proximate relationship with him. The principal interest of the case lies in the view expressed by Kennedy J., apparently following an earlier, unreported decision of Wright J., that illness caused by fear for the safety of anyone other than the plaintiff herself was not capable of grounding liability—a view clearly now unsustainable in the light of subsequent authority. The earlier Irish case of *Bell v. Great Northern Railway Co. of Ireland* (1890) 26 L.R.Ir. 428, where the plaintiff was personally threatened by a terrifying experience, was similarly a case where there was no difficulty

at all in ascertaining the existence of a proximate relationship. There was, indeed, in that case, a contractual relationship as well, for the event occurred in the course of the carriage of the plaintiff as a passenger on the defendant's railway. So too *Schneider v. Eisovitch* [1960] 2 Q.B. 430, where the plaintiff was herself directly involved as a victim in the accident in which her husband was killed.

Into the same category, as it seems to me, fall the so called "rescue cases." It is well established that the defendant owes a duty of care not only to those who are directly threatened or injured by his careless acts but also to those who, as a result, are induced to go to their rescue and suffer injury in so doing. The fact that the injury suffered is psychiatric and is caused by the impact on the mind of becoming involved in personal danger or in scenes of horror and destruction makes no difference.

> "Danger invites rescue. The cry of distress is the summons to relief . . . the act, whether impulsive or deliberate, is the child of the occasion:" *Wagner v. International Railway Co.* (1921) 232 N.Y. 176, 180–181, *per* Cardozo J.

So in *Chadwick v. British Railways Board* [1967] 1 W.L.R. 912, the plaintiff recovered damages for the psychiatric illness caused to her deceased husband through the traumatic effects of his gallantry and self-sacrifice in rescuing and comforting victims of the Lewisham railway disaster.

These are all cases where the plaintiff has, to a greater or lesser degree, been personally involved in the incident out of which the action arises, either through the direct threat of bodily injury to himself or in coming to the aid of others injured or threatened. Into the same category, I believe, fall those cases such as *Dooley v. Cammell Laird & Co. Ltd.* [1951] 1 Lloyd's Rep. 271, *Galt v. British Railways Board* (1983) 133 N.L.J. 870, and *Wigg v. British Railways Board*, The Times, 4 February 1986, where the negligent act of the defendant has put the plaintiff in the position of being, or of thinking that he is about to be or has been, the involuntary cause of another's death or injury and the illness complained of stems from the shock to the plaintiff of the consciousness of this supposed fact. The fact that the defendant's negligent conduct has foreseeably put the plaintiff in the position of being an unwilling participant in the event establishes of itself a sufficiently proximate relationship between them and the principal question is whether, in the circumstances, injury of that type to that plaintiff was or was not reasonably foreseeable.

In those cases in which, as in the instant appeals, the injury complained of is attributable to the grief and distress of witnessing the misfortune of another person in an event by which the plaintiff is not personally threatened or in which he is not directly involved as an actor, the analysis becomes more complex. The infliction of injury on an individual, whether through carelessness or deliberation, necessarily produces consequences beyond those to the immediate victim. Inevitably the impact of the event and its aftermath, whether immediate or prolonged, is going to be felt in greater or lesser degree by those with

whom the victim is connected whether by ties of affection, of blood relationship, of duty or simply of business. In many cases those persons may suffer not only injured feelings or inconvenience but adverse financial consequences as, for instance, by the need to care for the victim or the interruption or non-performance of his contractual obligations to third parties. Nevertheless, except in those cases which were based upon some ancient and now outmoded concepts of the quasi-proprietorial rights of husbands over their wives, parents over their children or employers over their menial servants, the common law has, in general, declined to entertain claims for such consequential injuries from third parties save possibly where loss has arisen from the necessary performance of a legal duty imposed on such party by the injury to the victim. Even the apparent exceptions to this, the old actions for loss of a husband's right to consortium and for loss of servitium of a child or menial servant, were abolished by the Administration of Justice Act 1982.

So, for instance, in *Kirkham v. Boughey* [1958] 2 Q.B. 338, a husband, whose wife had been severely injured in a road accident as a result of the defendant's negligence, failed to recover damages for a reduction in his earnings due to his having, because of his anxiety for his wife, declined to resume more remunerative employment abroad; although in that case Diplock J. was prepared to allow his claim for the expenses incurred in providing medical care for his wife on the ground that the plaintiff was under a legal duty to provide it. So too in *Best v. Samuel Fox & Co. Ltd.* [1952] A.C. 716, 734, Lord Morton of Henryton observed:

> "it has never been the law of England that an invitor, who has negligently but unintentionally injured an invitee, is liable to compensate other persons who have suffered, in one way or another, as a result of the injury to the invitee. If the injured man was engaged in a business, and the injury is a serious one, the business may have to close down and the employees be dismissed; a daughter of the injured man may have to give up work which she enjoys and stay at home to nurse a father who has been transformed into an irritable invalid as a result of the injury. Such examples could be easily multiplied. Yet the invitor is under no liability to compensate such persons, for he owes them no duty and may not even know of their existence."

A fortiori the law will not compensate such a person for the mental anguish and even illness which may flow from having lost a wife, parent or child or from being compelled to look after an invalid, although there is a statutory exception to this where the victim dies as a result of the accident and the plaintiff is his widow or minor unmarried child. In such circumstances section 1A of the Fatal Accidents Act 1976 (substituted by section 3 of the Administration of Justice Act 1982) gives a limited right of compensation for bereavement.

Beyond this, however, the law in general provides no remedy, however severe the consequences of the distress or grief may be to the health or well-being of the third party and however close his relationship

to the victim. I doubt whether the reason for this can be found by an appeal to logic, for there is, on the face of it, no readily discernible logical reason why he who carelessly inflicts an injury upon another should not be held responsible for its inevitable consequences not only to him who may conveniently be termed "the primary victim" but to others who suffer as a result. It cannot, I think, be accounted for by saying that such consequences cannot reasonably be foreseen. It is readily foreseeable that very real and easily ascertainable injury is likely to result to those dependent upon the primary victim or those upon whom, as a result of negligently inflicted injury, the primary victim himself becomes dependent. If one goes back to what may be regarded as the genesis of the modern law of tortious negligence—that is to say, the judgment of Sir Baliol Brett M.R. in *Heaven v. Pender* (1883) 11 Q.B.D. 503, 509—there is nothing in it which necessarily limits the liability of the tortfeasor to compensating only the primary victim of the event. What was there postulated was a simple test of attributed foresight of that which the ordinary person, given the hypothetical situation of his pausing to think about the consequences before acting, would see to be a likely consequence of his conduct. That simple test, described by Lord Atkin in his classical exposition in *Donoghue v. Stevenson* [1932] A.C. 562, 580 as "demonstrably too wide"—as indeed it clearly was—was, however, refined by him into the more restricted "neighbour" test which introduced, in addition to the element of reasonable foreseeability, the essential but illusive concept of "proximity" or "directness." Citation of a principle so familiar may justly be described as trite but it is, I think, of critical importance in the context of the instant appeals.

The failure of the law in general to compensate for injuries sustained by persons unconnected with the event precipitated by a defendant's negligence must necessarily import the lack of any legal duty owed by the defendant to such persons. That cannot, I think, be attributable to some arbitrary but unenunciated rule of "policy" which draws a line as the outer boundary of the area of duty. Nor can it rationally be made to rest upon such injury being without the area of reasonable foreseeability. It must, as it seems to me, be attributable simply to the fact that such persons are not, in contemplation of law, in a relationship of sufficient proximity to or directness with the tortfeasor as to give rise to a duty of care, though no doubt "policy," if that is the right word, or perhaps more properly, the impracticability or unreasonableness of entertaining claims to the ultimate limits of the consequences of human activity, necessarily plays a part in the court's perception of what is sufficiently proximate.

What is more difficult to account for is why, when the law in general declines to extend the area of compensation to those whose injury arises only from the circumstances of their relationship to the primary victim, an exception has arisen in those cases in which the event of injury to the primary victim has been actually witnessed by the plaintiff and the injury claimed is established as stemming from that fact. That such an exception exists is now too well established to be called in question. What is less clear, however, is the ambit of the duty in such cases or, to

A put it another way, what is the essential characteristic of such cases that marks them off from those cases of injury to uninvolved persons in which the law denies any remedy for injury of precisely the same sort.

Although it is convenient to describe the plaintiff in such a case as a "secondary" victim, that description must not be permitted to obscure the absolute essentiality of establishing a duty owed by the defendant directly to him—a duty which depends not only upon the reasonable B foreseeability of damage of the type which has in fact occurred to the particular plaintiff but also upon the proximity or directness of the relationship between the plaintiff and the defendant. The difficulty lies in identifying the features which, as between two persons who may suffer effectively identical psychiatric symptoms as a result of the impression left upon them by an accident, establish in the case of one C who was present at or near the scene of the accident a duty in the defendant which does not exist in the case of one who was not. The answer cannot, I think, lie in the greater foreseeability of the sort of damage which the plaintiff has suffered. The traumatic effect on, for instance, a mother on the death of her child is as readily foreseeable in a case where the circumstances are described to her by an eye witness at the inquest as it is in a case where she learns of it at a hospital D immediately after the event. Nor can it be the mere suddenness or unexpectedness of the event, for the news brought by a policeman hours after the event may be as sudden and unexpected to the recipient as the occurrence of the event is to the spectator present at the scene. The answer has, as it seems to me, to be found in the existence of a combination of circumstances from which the necessary degree of E "proximity" between the plaintiff and the defendant can be deduced. And, in the end, it has to be accepted that the concept of "proximity" is an artificial one which depends more upon the court's perception of what is the reasonable area for the imposition of liability than upon any logical process of analogical deduction.

The common features of all the reported cases of this type decided in this country prior to the decision of Hidden J. in the instant case and in F which the plaintiff succeeded in establishing liability are, first, 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 G 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. It H must, I think, be from these elements that the essential requirement of proximity is to be deduced, to which has to be added the reasonable foreseeability on the part of the defendant that in that combination of circumstances there was a real risk of injury of the type sustained by the

particular plaintiff as a result of his or her concern for the primary victim. There may, indeed, be no primary "victim" in fact. It is, for instance, readily conceivable that a parent may suffer injury, whether physical or psychiatric, as a result of witnessing a negligent act which places his or her child in extreme jeopardy but from which, in the event, the child escapes unharmed. I doubt very much, for instance, whether *King v. Phillips* [1953] 1 Q.B. 429, where a mother's claim for damages for shock caused by witnessing a near accident to her child was rejected, would be decided in the same way today in the light of later authorities. It would, for instance, have made no difference to the result in *Hambrook v. Stokes Brothers* [1925] 1 K.B. 141, if the plaintiff's child had not, as she did in fact, suffered any injury at all. In that case, the Court of Appeal, by a majority, held that a plaintiff who, while using the highway, had seen a runaway lorry which threatened, and indeed subsequently caused, injury to her child, was entitled to recover so long as the shock from which she claimed to be suffering was due to her own visual perception and not to what she had been subsequently told by third persons. The primary difficulty here was that of establishing the foreseeability of the injury which the plaintiff suffered rather than the proximity of her relationship to the defendant, who owed her the same duty as he owed to any other users of the highway. It is interesting to note, however, that Atkin L.J. (at p. 158) clearly contemplated the possibility of a successful action at the suit of a mere bystander given sufficiently horrifying circumstances. In *Owens v. Liverpool Corporation* [1939] 1 K.B. 394, mourners at a funeral, apparently relatives of the deceased, recovered damages for shock allegedly occasioned by negligence of the defendant's tram driver in damaging the hearse and upsetting the coffin. Although this lends support to the suggestion that such damages may be recoverable by a mere spectator, it is doubtful how far the case, which was disapproved by three members of this House in *Bourhill v. Young* [1943] A.C. 92, 100, 110 and 116, can be relied upon.

In *Bourhill v. Young* the pursuer was neither related to or known to the deceased cyclist, who was the victim of his own negligence, nor did she witness the accident, although she heard the crash from some 50 feet away and some time later saw blood on the road. She had no apprehension of injury to herself but simply sustained a nervous shock as a result of the noise of the collision. That injury sustained through nervous shock was capable of grounding a claim for damages was never in doubt, but the pursuer's claim failed because injury of that type to her was not within the area of the deceased's reasonable contemplation. The physical proximity of the pursuer to the point of collision was outside the area in which the deceased could reasonably have contemplated any injury to her and that answered both the question of whether there was reasonable foresight and whether there was any relationship with the deceased inferring a duty of care. The case is thus a good illustration of the coalescence of the two elements of reasonable foreseeability and proximity, but otherwise it affords little assistance in establishing any criterion for the degree of proximity which would establish the duty of care, save that it implies necessity for a closer

degree of physical propinquity to the event than has been thought necessary in subsequent cases. It is, however, worth noting that the pursuer's claim was not dismissed in limine on the ground that she was no more than, at highest, a mere spectator.

Hinz v. Berry [1970] 2 Q.B. 40 was a case where the only issue was not recoverability of damages but the correct quantum in the particular circumstances. It is a useful illustration of the extreme difficulty of separating the compensatable injury arising from the presence of the plaintiff at the scene of an accident from the non-compensatable consequences flowing from the simple fact that the accident has occurred, but it is of little assistance otherwise, save for a hint in the judgment of Lord Denning M.R. that an award of damages for shock caused by the sight of an accident may be restricted to cases where the plaintiff is "a close relative."

The principal argument in the appeal has centred round the question whether, as the plaintiffs contend, the decision of this House in *McLoughlin v. O'Brian* [1983] 1 A.C. 410, establishes as the criterion of a duty owed by the defendants to the plaintiff a simple test of the foreseeability of injury of the type in fact sustained or whether, as the defendant maintains, that case imports also a necessary requirement, either as a matter of public policy or as a measure of proximity, of the existence of some close blood or marital relationship between the appellants and the victims of the negligent conduct. In that case the primary victims of the accident caused by the respondent's negligence were the husband and two children of the appellant, who were injured, and another child of hers who was killed. At the time of the accident she was some two miles away but she was taken about an hour later to the hospital where the injured were being treated and saw them in more or less the state in which they had been brought in. She claimed damages for the psychiatric injury which she alleged to be the result. The trial judge having held that the injury complained of was not reasonably foreseeable, his decision was upheld by the Court of Appeal [1981] Q.B. 599 on the rather different grounds (Stephenson L.J.) that although both the tests of reasonable foreseeability and proximity were satisfied, a duty of care was precluded by considerations of public policy and (Griffiths L.J.) that no duty was owed to those who are nowhere near the scene of an accident when it occurs. In this House, although the members of the Committee were unanimous in allowing the appeal the speeches displayed distinct differences of approach. All were agreed that actually witnessing or being present at or near the scene of an accident was not essential to ground liability in an appropriate case, but that the duty might equally be owed to one who comes upon the immediate aftermath of the event. Thus such a person, given always the reasonable foreseeability of the injury in fact sustained and of such persons witnessing it, may be within the area of proximity in which a duty of care may be found to exist.

The diversity of view arose at the next stage, that is to say that of ascertaining whether the relationship between the plaintiff and the primary victim was such as to support the existence of such a duty. That can be expressed in various ways. It may be asked whether, as a

matter of the policy of the law, a relationship outside the categories of those in which liability has been established by past decisions can be considered sufficiently proximate to give rise to the duty, quite regardless of the question of foreseeability. Or it may be asked whether injury of the type with which these appeals are concerned can ever be considered to be reasonably foreseeable where the relationship between the plaintiff and the primary victim is more remote than that of an established category. Or, again, it may be asked whether, even given proximity and foreseeability, nevertheless the law must draw an arbitrary line at the boundary of the established category or some other wider or narrower category of relationships beyond which no duty will be deemed to exist. Lord Wilberforce, at p. 422, appears to have favoured the last of these three approaches, but found it, in the event, unnecessary to determine the boundary since the case then before the House concerned a claim within a category which had already been clearly established. He did not altogether close the door to an enlargement of the area of the possible duty but observed:

> "other cases involving less close relationships must be very carefully scrutinised. I cannot say that they should never be admitted. The closer the tie (not merely in relationship, but in care) the greater the claim for consideration. The claim, in any case, has to be judged in the light of the other factors, such as proximity to the scene in time and place, and the nature of the accident."

In so far as this constituted an invitation to courts seized of similar problems in the future to draw lines determined by their perception of what public policy requires, it was an invitation accepted by Parker L.J. in the Court of Appeal in the instant case, ante, pp. 359H–360G. It was his view that liability should, as a matter of policy, determine at the relationship of parent or spouse and should be restricted to persons present at or at the immediate aftermath of the incident from which injury arose. The approach of Lord Edmund-Davies and Lord Russell of Killowen, as I read their speeches, was similar to that of Lord Wilberforce. On the other hand, Lord Bridge of Harwich, with whom Lord Scarman agreed, rejected an appeal to policy considerations as a justification for fixing arbitrary lines of demarcation of the duty in negligence. Lord Bridge propounded simply a criterion of the reasonable foreseeability by the defendant of the damage to the plaintiff which had occurred without necessarily invoking physical presence at or propinquity to the accident or its aftermath or any particular relationship to the primary victim as limiting factors, although, of course, clearly these elements would be important in the determination of what, on the facts of any given case, would be reasonably foreseeable. He expressed himself as in complete agreement with Tobriner J. in *Dillon v. Legg* (1968) 29 A.L.R. 3d 1316, 1326, that the existence of the duty must depend on reasonable foreseeability and

> "must necessarily be adjudicated only upon a case-by-case basis. We cannot now predetermine defendant's obligation in every situation by a fixed category; no immutable rule can establish the extent of that obligation for every circumstance of the future."

A Counsel for the plaintiffs and for the defendant respectively have invited your Lordships to accept or reject one or other of these two approaches on the footing that they represent mutually exclusive alternatives and to say on the one hand that the only criterion for the establishment of liability is the reasonable foreseeability of damage in accordance with the views expressed by Lord Bridge (which, it is urged, existed in the case of each of the plaintiffs) or, on the other hand, that B liability must, as a matter of public policy, be decreed to stop at the case of a spouse or parent and in any event must be restricted to injury to a person who was physically present at the event or at its aftermath and witnessed one or the other.

My Lords, for my part, I have not felt able to accept either of these two extreme positions nor do I believe that the views expressed in C *McLoughlin v. O'Brian* [1983] 1 A.C. 410, are as irreconcilable as has been suggested. If I may say so with respect, the views expressed by Lord Bridge are open to the criticism that, on their face, they entirely ignore the critical element of proximity to which reference has been made, taking us back to the "demonstrably too wide" proposition of Brett M.R. in *Heaven v. Pender*, 11 Q.B.D. 503. But the critical part played by this element is very clearly expressed by Lord Bridge himself D in his speech in *Caparo Industries Plc. v. Dickman* [1990] 2 A.C. 605, 618, 621, 623, and I do not believe for one moment that, in expressing his view with regard to foreseeability in *McLoughlin v. O'Brian* [1983] 1 A.C. 410, he was overlooking that element which is, after all, implicit in any discussion of tortious negligence based upon Lord Atkin's classical statement of principle, or was doing more than meeting the argument E which had been advanced that, even given foreseeability, an immutable line either had been or ought to be drawn by the law at the furthest point reached by previously decided cases. Equally, I do not read Lord Wilberforce (whose remarks in this context were, in any event, obiter since the question of fixing lines of demarcation by reference to public policy did not in fact arise) as excluding altogether a pragmatic approach to claims of this nature. In any event, there is in many cases, as for F instance cases of direct physical injury in a highway accident, an almost necessary coalescence of the twin elements of foreseeability and proximity, the one flowing from the other. But where such convergence is not self evident, the question of proximity requires separate consideration. In deciding it the court has reference to no defined criteria and the decision necessarily reflects to some extent the court's G concept of what policy—or perhaps common sense—requires.

My Lords, speaking for myself, I see no logic and no virtue in seeking to lay down as a matter of "policy" categories of relationship within which claims may succeed and without which they are doomed to failure in limine. So rigid an approach would, I think, work great injustice and cannot be rationally justified. Obviously a claim for damages for psychiatric injury by a remote relative of the primary victim H will factually require most cautious scrutiny and faces considerable evidentiary difficulties. Equally obviously, the foreseeability of such injury to such a person will be more difficult to establish than similar injury to a spouse or parent of the primary victim. But these are factual

difficulties and I can see no logic and no policy reason for excluding claims by more remote relatives. Suppose, for instance, that the primary victim has lived with the plaintiff for 40 years, both being under the belief that they are lawfully married. Does she suffer less shock or grief because it is subsequently discovered that their marriage was invalid? The source of the shock and distress in all these cases is the affectionate relationship which existed between the plaintiff and the victim and the traumatic effect of the negligence is equally foreseeable, given that relationship, however the relationship arises. Equally, I would not exclude the possibility envisaged by my noble and learned friend, Lord Ackner, of a successful claim, given circumstances of such horror as would be likely to traumatise even the most phlegmatic spectator, by a mere bystander. That is not, of course, to say that the closeness of the relationship between plaintiff and primary victim is irrelevant, for the likelihood or unlikelihood of a person in that relationship suffering shock of the degree claimed from the event must be a most material factor to be taken into account in determining whether that consequence was reasonably foreseeable. In general, for instance, it might be supposed that the likelihood of trauma of such a degree as to cause psychiatric illness would be less in the case of a friend or a brother-in-law than in that of a parent or fiancé.

But in every case the underlying and essential postulate is a relationship of proximity between plaintiff and defendant and it is this, as it seems to me, which must be the determining factor in the instant appeals. No case prior to the hearing before Hidden J. from which these appeals arise has countenanced an award of damages for injuries suffered where there was not at the time of the event a degree of physical propinquity between the plaintiff and the event caused by the defendant's breach of duty to the primary victim nor where the shock sustained by the plaintiff was not either contemporaneous with the event or separated from it by a relatively short interval of time. The necessary element of proximity between plaintiff and defendant is furnished, at least in part, by both physical and temporal propinquity and also by the sudden and direct visual impression on the plaintiff's mind of actually witnessing the event or its immediate aftermath. To use Lord Wilberforce's words in *McLoughlin's* case [1983] 1 A.C. 410, 422–423:

> "As regards proximity to the accident, it is obvious that this must be close in both time and space. . . . The shock must come through sight or hearing of the event or of its immediate aftermath."

Grief, sorrow, deprivation and the necessity for caring for loved ones who have suffered injury or misfortune must, I think, be considered as ordinary and inevitable incidents of life which, regardless of individual susceptibilities, must be sustained without compensation. It would be inaccurate and hurtful to suggest that grief is made any the less real or deprivation more tolerable by a more gradual realisation, but to extend liability to cover injury in such cases would be to extend the law in a direction for which there is no pressing policy need and in which there is no logical stopping point. In my opinion, the necessary proximity cannot be said to exist where the elements of immediacy, closeness of

A time and space, and direct visual or aural perception are absent. I would agree with the view expressed by Nolan L.J. that there may well be circumstances where the element of visual perception may be provided by witnessing the actual injury to the primary victim on simultaneous television, but that is not the case in any of the instant appeals and I agree with my noble and learned friend, Lord Keith of Kinkel, that, for the reasons which he gives, the televised images seen B by the various plaintiffs cannot be equiparated with "sight or hearing of the event." Nor did they provide the degree of immediacy required to sustain a claim for damages for nervous shock. That they were sufficient to give rise to worry and concern cannot be in doubt, but in each case other than those of Brian Harrison and Robert Alcock, who were present at the ground, the plaintiff learned of the death of the victim at C secondhand and many hours later. As I read the evidence, the shock in each case arose not from the original impact of the transmitted image which did not, as has been pointed out, depict the suffering of recognisable individuals. These images provided no doubt the matrix for imagined consequences giving rise to grave concern and worry, followed by a dawning consciousness over an extended period that the imagined consequence had occurred, finally confirmed by news of the D death and, in some cases, subsequent visual identification of the victim. The trauma is created in part by such confirmation and in part by the linking in the mind of the plaintiff of that confirmation to the previously absorbed image. To extend the notion of proximity in cases of immediately created nervous shock to this more elongated and, to some extent, retrospective process may seem a logical analogical development. E But, as I shall endeavour to show, the law in this area is not wholly logical and whilst having every sympathy with the plaintiffs, whose suffering is not in doubt and is not to be underrated, I cannot for my part see any pressing reason of policy for taking this further step along a road which must ultimately lead to virtually limitless liability. Whilst, therefore, I cannot, for the reasons which I have sought to explain, accept Mr. Woodward's submission that it is for your Lordships to lay F down, on grounds of public policy, an arbitrary requirement of the existence of a particular blood or marital relationship as a pre-condition of liability, I equally believe that further pragmatic extensions of the accepted concepts of what constitutes proximity must be approached with the greatest caution. *McLoughlin v. O'Brian* [1983] 1 A.C. 410 was a case which itself represented an extension not, as I think, wholly G free from difficulty and any further widening of the area of potential liability to cater for the expanded and expanding range of the media of communication ought, in my view, to be undertaken rather by Parliament, with full opportunity for public debate and representation, than by the process of judicial extrapolation.

In the case of both Brian Harrison and Robert Alcock, although both were present at the ground and saw scenes which were obviously H distressing and such as to cause grave worry and concern, their perception of the actual consequences of the disaster to those to whom they were related was again gradual. In my judgment, the necessary proximity was lacking in their cases too, but I also agree with my noble

and learned friend, Lord Keith of Kinkel, that there is also lacking the necessary element of reasonable foreseeability. Accordingly, I too would dismiss the appeals and it follows from what I have said that I agree that the correctness of the decisions in *Hevican v. Ruane* [1991] 3 All E.R. 65 and *Ravenscroft v. Rederiaktiebølaget Transatlantic* [1991] 3 All E.R. 73 must be seriously doubted.

I would only add that I cannot, for my part, regard the present state of the law as either entirely satisfactory or as logically defensible. If there exists a sufficient degree of proximity to sustain a claim for damages for nervous shock, why it may be justifiably be asked, does not that proximity also support that perhaps more easily foreseeable loss which the plaintiff may suffer as a direct result of the death or injury from which the shock arises. That it does not is, I think, clear from *Hinz v. Berry* [1970] 2 Q.B. 40 (see particularly the judgment of Lord Pearson, at p. 44). But the reason why it does not has, I think, to be found not in logic but in policy. Whilst not dissenting from the case-by-case approach advocated by Lord Bridge in *McLoughlin's* case, the ultimate boundaries within which claims for damages in such cases can be entertained must I think depend in the end upon considerations of policy. For example, in his illuminating judgment in *Jaensch v. Coffey*, 155 C.L.R. 549, Deane J. expressed the view that no claim could be entertained as a matter of law in a case where the primary victim is the negligent defendant himself and the shock to the plaintiff arises from witnessing the victim's self-inflicted injury. The question does not, fortunately, fall to be determined in the instant case, but I suspect that an English court would be likely to take a similar view. But if that be so, the limitation must be based upon policy rather than upon logic for the suffering and shock of a wife or mother at witnessing the death of her husband or son is just as immediate, just as great and just as foreseeable whether the accident be due to the victim's own or to another's negligence and if the claim is based, as it must be, on the combination of proximity and foreseeability, there is certainly no logical reason why a remedy should be denied in such a case. Indeed, Mr. Hytner, for the plaintiffs, has boldly claimed that it should not be. Take, for instance, the case of a mother who suffers shock and psychiatric injury through witnessing the death of her son when he negligently walks in front of an oncoming motor car. If liability is to be denied in such a case such denial can only be because the policy of the law forbids such a claim, for it is difficult to visualise a greater proximity or a greater degree of forseeability. Moreover, I can visualise great difficulty arising, if this be the law, where the accident, though not solely caused by the primary victim has been materially contributed to by his negligence. If, for instance, the primary victim is himself 75 per cent. responsible for the accident, it would be a curious and wholly unfair situation if the plaintiff were enabled to recover damages for his or her traumatic injury from the person responsible only in a minor degree whilst he in turn remained unable to recover any contribution from the person primarily responsible since the latter's negligence vis-à-vis the plaintiff would not even have been tortious.

Policy considerations such as this could, I cannot help feeling, be much better accommodated if the rights of persons injured in this way were to be enshrined in and limited by legislation as they have been in the Australian statute law to which my noble and learned friend, Lord Ackner, has referred.

LORD JAUNCEY OF TULLICHETTLE. My Lords, for some 90 years it has been recognised that nervous shock sustained independently of physical injury and resulting in psychiatric illness can give rise to a claim for damages in an action founded on negligence. The law has developed incrementally. In *Dulieu v. White & Sons* [1901] 2 K.B. 669, a plaintiff who suffered nervous shock as a result of fears for her own safety caused by the defendant's negligence was held to have a cause of action. However Kennedy J. said, at p. 675, that if nervous shock occasioned by negligence was to give a cause of action it must arise "from a reasonable fear of immediate personal injury to oneself." In *Hambrook v. Stokes Brothers* [1925] 1 K.B. 141, Kennedy J.'s foregoing limitation was disapproved by the majority of the Court of Appeal who held that a mother who had sustained nervous shock as a result of fear for the safety of her three children due to the movement of an unmanned lorry had a cause of action against the owner of the lorry. Until 1983 however there had in England been no case in which a plaintiff had been able to recover damages for nervous shock when the event giving rise to the shock had occurred out of sight and out of earshot. I use the word "event" as including the accident and its immediate aftermath. In *McLoughlin v. O'Brian* [1983] 1 A.C. 410, a wife and a mother suffered nervous shock after seeing her husband and children in a hospital to which they had been taken after a road accident. The wife was not present at the locus but reached the hospital before her husband and son and daughter had been cleaned up and when they were all very distressed. This was the first case in the United Kingdom in which a plaintiff who neither saw nor heard the accident nor saw its aftermath at the *locus* successfully claimed damages for nervous shock. These appeals seek to extend further the circumstances in which damages for nervous shock may be recovered.

I start with the proposition that the existence of a duty of care on the part of the defendant does not depend on foreseeability alone. Reasonable foreseeability is subject to controls. In support of this proposition I rely on the speech of Lord Wilberforce in *McLoughlin v. O'Brian* [1983] 1 A.C. 410, 420F–421A and on the carefully reasoned judgment of Deane J. in the High Court of Australia in *Jaensch v. Coffey*, 155 C.L.R. 549, 578–586. In a case of negligence causing physical injury to an employee or to a road user reasonable foreseeability may well be the only criterion by which liability comes to be judged. However in the case of negligence causing shock different considerations apply because of the wide range of people who may be affected. For this reason Lord Wilberforce said in *McLoughlin v. O'Brian* [1983] 1 A.C. 410, 421–422:

> "there remains . . . a real need for the law to place some limitation upon the extent of admissible claims. It is necessary to consider

three elements inherent in any claim: the class of persons who claim should be recognised; the proximity of such persons to the accident; and the means by which the shock is caused."

The class of persons with recognisable claims will be determined by the law's approach as to who ought according to its standards of value and justice to have been in the defendant's contemplation: again *McLoughlin v. O'Brian, per* Lord Wilberforce, at p. 420F. The requisite element of proximity in the relation of the parties also constitutes an important control on the test of reasonable foreseeability: *Jaensch v. Coffey*, 155 C.L.R. 549, 578–586, *per* Deane J. The means by which the shock is caused constitutes a third control, although in these appeals I find it difficult to separate this from proximity.

The present position in relation to recognisable claims is that parents and spouses have been held entitled to recover for shock caused by fear for the safety of their children or the other spouse. No remoter relative has successfully claimed in the United Kingdom. However a rescuer and a crane driver have recovered damages for nervous shock sustained as a result of fear for the safety of others in circumstances to which I must now advert.

In *Dooley v. Cammell Laird & Co. Ltd.* [1951] 1 Lloyd's Rep. 271, Donovan J. awarded damages to a crane driver who suffered nervous shock when a rope connecting a sling to the crane hooks snapped causing the load to fall into the hold of a ship in which men were working. The nervous shock resulted from the plaintiff's fear that the falling load would injure or kill some of his fellow workmen. Donovan J. drew the inference that the men in the hold were friends of the plaintiff and later stated, at p. 277:

> "Furthermore, if the driver of the crane concerned fears that the load may have fallen upon some of his fellow workmen, and that fear is not baseless or extravagant, then it is, I think, a consequence reasonably to have been foreseen that he may himself suffer a nervous shock."

Although Donovan J. treated the matter simply as one of reasonable foreseeability, I consider that the case was a very special one. Unlike the three cases to which I have referred in which the plaintiff was merely an observer of the accident or its immediate aftermath, Dooley was operating the crane and was therefore intimately involved in, albeit in no way responsible for, the accident. In these circumstances the defendants could readily have foreseen that he would be horrified and shocked by the failure of the rope and the consequent accident which he had no power to prevent. I do not consider that this case is of assistance where, as here, the plaintiffs were not personally involved in the disaster. In *Chadwick v. British Railways Board* [1967] 1 W.L.R. 912, the plaintiff recovered damages for nervous shock sustained as a result of his prolonged rescue efforts at the scene of a serious railway accident which had occurred near his home. The shock was caused neither by fear for his own safety nor for that of close relations. The

position of the rescuer was recognised by Cardozo J. in *Wagner v. International Railway Co.*, 232 N.Y. 176, 180:

> "Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognises them as normal. It places their effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperilled victim; it is a wrong also to his rescuer."

Lord Wilberforce in *McLoughlin v. O'Brian* [1983] 1 A.C. 410, 419B considered that the principle of rescuers ought to be accepted. This is a particular instance where the law not only considers that the individual responsible for an accident should foresee that persons will come to the rescue and may be shocked by what they see but also considers it appropriate that he should owe to them a duty of care. I do not however consider that either of these cases justify the further development of the law sought by the plaintiffs.

Of the six plaintiffs who were successful before Hidden J. only one, who lost two brothers, was present at the ground. The others saw the disaster on television, two of them losing a son and the remaining three losing brothers. Of the four plaintiffs who were unsuccessful before the judge, one who lost his brother-in-law was at the ground, one who lost her fiance saw the disaster on television, another who lost her brother heard initial news while shopping and more details on the wireless during the evening and a third who lost a grandson heard of the disaster on the wireless and later saw a recorded television programme. Thus all but two of the plaintiffs were claiming in respect of shock resulting from the deaths of persons outside the categories of relations so far recognised by the law for the purposes of this type of action. It was argued on their behalf that the law has never excluded strangers to the victim from claiming for nervous shock resulting from the accident. In support of this proposition the plaintiffs relied on *Dooley v. Cammell Laird & Co. Ltd.* and *Chadwick v. British Railways Board* as well as upon the following passage from the judgment of Atkin L.J. in *Hambrook v. Stokes Brothers* [1925] 1 K.B. 141, 157:

> "Personally I see no reason for excluding the bystander in the highway who receives injury in the same way from apprehension of or the actual sight of injury to a third party."

However the suggested inclusion of the bystander has not met with approval in this House. In *Bourhill v. Young* [1943] A.C. 92, 117, Lord Porter said:

> "It is not every emotional disturbance or every shock which should have been foreseen. The driver of a car or vehicle, even though careless, is entitled to assume that the ordinary frequenter of the streets has sufficient fortitude to endure such incidents as may from time to time be expected to occur in them, including the noise of a collision and the sight of injury to others, and is not to be considered negligent towards one who does not possess the customary phlegm."

In *McLoughlin v. O'Brian* [1983] 1 A.C. 410 Lord Wilberforce said, at p. 422, that existing law denied the claims of the ordinary bystander:

> "either on the basis that such persons must be assumed to be possessed of fortitude sufficient to enable them to endure the calamities of modern life, or that defendants cannot be expected to compensate the world at large."

While it is not necessary in these appeals to determine where stands the ordinary bystander I am satisified that he cannot be prayed in aid by the plaintiffs.

Should claims for damages for nervous shock in circumstances such as the present be restricted to parents and spouses or should they be extended to other relatives and close friends and, if so, where, if at all, should the line be drawn? In *McLoughlin v. O'Brian* Lord Wilberforce in the context of the class of persons whose claim should be recognised said:

> "As regards the class of persons, the possible range is between the closest of family ties—of parent and child, or husband and wife—and the ordinary bystander. Existing law recognises the claims of the first: it denies that of the second . . . In my opinion, these positions are justifiable, and since the present case falls within the first class, it is strictly unnecessary to say more. I think, however, that it should follow that other cases involving less close relationships must be very carefully scrutinised. I cannot say that they should never be admitted. The closer the tie (not merely in relationship, but in care) the greater the claim for consideration. The claim, in any case, has to be judged in the light of the other factors, such as proximity to the scene in time and place, and the nature of the accident."

I would respectfully agree with Lord Wilberforce that cases involving less close relatives should be very carefully scrutinised. That, however, is not to say they must necessarily be excluded. The underlying logic of allowing claims of parents and spouses is that it can readily be foreseen by the tortfeasor that if they saw or were involved in the immediate aftermath of a serious accident or disaster they would, because of their close relationship of love and affection with the victim be likely to suffer nervous shock. There may, however, be others whose ties of relationship are as strong. I do not consider that it would be profitable to try and define who such others might be or to draw any dividing line between one degree of relationship and another. To draw such a line would necessarily be arbitrary and lacking in logic. In my view the proper approach is to examine each case on its own facts in order to see whether the claimant has established so close a relationship of love and affection to the victim as might reasonably be expected in the case of spouses or parents and children. If the claimant has so established and all other requirements of the claim are satisfied he or she will succeed since the shock to him or her will be within the reasonable contemplation of the tortfeasor. If such relationship is not established the claim will fail.

A I turn to the question of proximity which arises in the context of those plaintiffs who saw the disaster on television either contemporaneously or in later recorded transmissions and of those who identified their loved ones in the temporary mortuary some nine or more hours after the disaster had taken place. I refer once again to a passage in the speech of Lord Wilberforce in *McLoughlin v. O'Brian*, at p. 422:

B "As regards proximity to the accident, it is obvious that this must be close in both time and space. It is, after all, the fact and consequence of the defendant's negligence that must be proved to have caused the 'nervous shock.' Experience has shown that to insist on direct and immediate sight or hearing would be impractical and unjust and that under what may be called the 'aftermath' doctrine one who, from close proximity, comes very soon upon the C scene should not be excluded. In my opinion, the result in *Benson v. Lee* [1972] V.R. 879 was correct and indeed inescapable. It was based, soundly, upon 'direct perception of some of the events which go to make up the accident as an entire event, and this includes . . . the immediate aftermath . . .' (p. 880)"

D Lord Wilberforce expressed the view, at p. 422H, that a "strict test of proximity by sight or hearing should be applied by all courts." Later, he said, at p. 423:

"The shock must come through sight or hearing of the event or of its immediate aftermath. Whether some equivalent of sight or hearing, e.g. through simultaneous television, would suffice may have to be considered."

E

My Lords, although Lord Wilberforce in *McLoughlin v. O'Brian* did not close the door to shock coming from the sight of simultaneous television I do not consider that a claimant who watches a normal television programme which displays events as they happen satisfies the test of proximity. In the first place a defendant could normally F anticipate that in accordance with current television broadcasting guidelines shocking pictures of persons suffering and dying would not be transmitted. In the second place, a television programme such as that transmitted from Hillsborough involves cameras at different viewpoints showing scenes all of which no one individual would see, edited pictures and a commentary superimposed. I do not consider that such a programme is equivalent to actual sight or hearing at the accident or its G aftermath. I say nothing about the special circumstances envisaged by Nolan L.J. in his judgment in this case, ante, pp. 386G–387A. If a claimant watching a simultaneous television broadcast does not satisfy the requirements of proximity it follows that a claimant who listens to the wireless or sees a subsequent television recording falls even further short of the requirement.

H What constitutes the immediate aftermath of an accident must necessarily depend upon the surrounding circumstances. To essay any comprehensive definition would be a fruitless exercise. In *McLoughlin v. O'Brian* the immediate aftermath extended to a time somewhat over an hour after the accident and to the hospital in which the victims were

waiting to be attended to. It appears that they were in very much the same condition as they would have been had the mother found them at the scene of the accident. In these appeals the visits to the mortuary were made no earlier than nine hours after the disaster and were made not for the purpose of rescuing or giving comfort to the victim but purely for the purpose of identification. This seems to me to be a very different situation from that in which a relative goes within a short time after an accident to rescue or comfort a victim. I consider that not only the purpose of the visits to the mortuary but also the times at which they were made take them outside the immediate aftermath of this disaster.

Only two plaintiffs, Mr. and Mrs. Copoc, lost a son, but they saw the disaster on television and Mr. Copoc identified the body on the following morning having already been informed that his son was dead. No plaintiff lost a spouse. None of the other plaintiffs who lost relatives sought to establish that they had relationships of love and affection with a victim comparable to that of a spouse or parent. In any event only two of them were present in the ground and the remainder saw the scenes on simultaneous or recorded television. In these circumstances none of the plaintiffs having satisfied both the tests of reasonable foreseeability and of proximity I would dismiss all the appeals.

LORD LOWRY. My Lords, I have enjoyed the advantage of reading in draft the speeches of your Lordships, all of whom have reached the same conclusion, namely, that these appeals should be dismissed. Concurring as I do in that conclusion, I do not consider that it would be helpful to add further observations of my own to what has already been said by your Lordships.

Appeal dismissed.
Defendant's costs in House of Lords and Court of Appeal (so far as related to legally aided plaintiffs) to be paid out of Legal Aid Fund.
Order for costs suspended for four weeks to allow Legal Aid Board to object, if they wished.

Solicitors: Sharpe Pritchard for John Pickering, Liverpool, Cuff Roberts, Liverpool, Silverman Livermore, Liverpool, Ford & Warren, Leeds, Alexander Harris & Co., Sale, Mace & Jones, Huyton; Penningtons for Hammond Suddards, Bradford.

A. R.