AN ANALYSIS AS TO WHETHER THE CURRENT LAW ON NEGLIGENTLY CAUSED PSYCHIATRIC HARM STRIKES A FAIR BALANCE BETWEEN COMPENSATING CLAIMANTS, TAKING INTO ACCOUNT RELEVANT POLICY CONSIDERATIONS

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Abstract

This article will focus upon the law on negligently caused psychiatric harm. It will investigate whether the current law strikes a fair balance between compensating those who suffer psychiatric harm as a result of another's negligence, keeping in line with the policy considerations that surround this area. Policy arguments have been used regularly to justify restricting the circumstances in which a successful claim can be made in this area of law. This article will consider however whether too much weight has been given to these arguments, and whether a less restrictive legal framework could be considered fairer to those who suffer psychiatric illness at the expense of another's actions.

Introduction

This article will explore the law on negligently caused psychiatric harm. It aims to consider whether the requirements a claimant must meet are too restrictive, or whether the current law is justified in relation to the policy considerations surrounding this area.

1 The Key Areas of Law

Within the law of negligently caused psychiatric harm, there are two categories of individuals who can make a claim. They are separated into primary victims and secondary victims. This section will set out the current law and give an overview as to the requirements each type of claimant must meet for a successful claim.

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1.1 The law on primary victims

Primary victims are individuals who are 'physically endangered or injured'[1] by the defendant's negligent actions. This is often described as being in the 'zone of danger'.[2] If a claimant is found not to have been at risk of harm themselves, their claim as a primary victim will fail.[3] It is important to note that the claimant need not be physically injured, it is only required that they experience 'a reasonable fear of immediate personal injury to oneself'.[4] The word 'immediate' is important as a fear of future harm occurring due to the negligence is not sufficient for a claim.[5] For example, where a claimant has been negligently exposed to asbestos and fears for their future health, this will not be sufficient to establish a fear for their immediate safety.[6]

Claimants must show that they suffered 'some recognisable psychiatric illness'.[7] An individual must be suffering 'outside the range of normal human experience',[8] and 'normal human emotion'[9] will not suffice for a successful claim. Examples of recognised psychiatric illnesses include Post Traumatic Stress Disorder (PTSD)[10] and anxiety neurosis.[11] A claim will fail where this requirement cannot be met.[12] For example, in *Reilly v Merseyside Health Authority* [1995][13] a recognised psychiatric illness could not be proved. The court emphasised that 'normal human emotion in the face of an unpleasant experience'[14] is not compensable.

To establish a duty of care, it must have been reasonably foreseeable to the defendant that the claimant would suffer 'personal injury of some kind'[15] as a result of their actions. This requirement is easier to meet as a primary victim only needs to prove that some form of personal injury was foreseeable and not the specific type suffered.[16] A duty of care will however only be established if it is 'reasonably foreseeable that a person of ordinary phlegm

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[1] Jonathan Glasson, Butterworth Personal Injury Litigation Service, Division XXIII Psychiatric Injury (LNUK 2022) [9]
[2] White v Chief Constable of South Yorkshire [1999] 2 AC 455, 470
[3] Robertson v Forth Road Bridge Joint Board [1995] IRLR 251
[4] Dulieu v White & Sons [1901] 2 KB 669
[5] Rothwell v Chemical and Insulating Co Ltd and others [2007] UKHL 39
[6] ibid
[7] Page v Smith [1995] 2 All ER 736
[8] ibid 740
[9] Hicks and another v Chief Constable of the South Yorkshire Police [1992] 2 All ER 65, 69
[10] Leach v Chief Constable of Gloucestershire Constabulary [1999] 1 WLR 1421
[11] Chadwick v British Transport Commission [1967] 2 All ER 945
[12] Brock and another v Northampton General Hospital NHS Trust and another [2014] EWHC 4244 (QB)
[13] Reilly v Merseyside Health Authority [1995] 23 BMLR 26
[14] ibid 27
[15] Page (n7) 737
[16] *Page* (n7) 737

would so suffer'.[17]

1.2 The law on secondary victims

A secondary victim 'suffers psychiatric injury solely as a result of witnessing the injury or endangerment of another'.[18] The case of *Alcock v Chief Constable of South Yorkshire Police* [1992][19] distinguished secondary victims from primary, building on the requirements laid down in *McLoughlin v O'Brian* [1983][20] that need to be met for a successful claim. The requirements implemented were an attempt, as McManus notes, 'to whittle down the potential number of claimants'[21] after the Hillsborough disaster.

The rules on foreseeability are different from those for primary victims, as 'foreseeability of psychiatric injury remains a crucial ingredient when the plaintiff is the secondary victim'.[22] This is a harder and more specific threshold to meet. For example, in *Bourhill v Young*[23] the claim failed as it was not reasonably foreseeable that the claimant would suffer psychiatric harm. Once it is reasonably foreseeable that some form of psychiatric harm could be suffered, it does not matter whether the exact scope of psychiatric illness was foreseeable.[24] It is however necessary to establish that the psychiatric injury would be reasonably foreseeable in a person of 'normal fortitude'.[25]

A secondary victim must be able to show a 'close tie of love and affection to the immediate victim'.[26] The requirement was laid down in *McLoughlin*[27] with Lord Wilberforce holding that "cases involving less close relationships must be very carefully scrutinised".[28] A close tie is presumed in cases involving parents and children for example, but in many cases, it is necessary for the claimant to evidence the relationship.[29] From an anti-positivist perspective, who believe that the law should take into account moral considerations,[30] it could be considered immoral and unjust for claimants to have to seek to prove this relationship.

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[17] *Vernon v Bosley* (No 1) [1997] 1 All ER 577
[18] Glasson (n1) [10]
[19] Alcock v Chief Constable of the South Yorkshire Police [1992] 1 AC 310
[20] McLoughlin v O'Brian [1983] 1 AC 410
[21] Francis McManus, 'The Sports Arena and the Law of Delict' (2001) Vol. 5 Contemporary Issues in Law 298
[22] *Page* (n7) 759
[23] Bourhill v Young [1943] AC 92
[24] *Brice v Brown* [1984] 1 All ER 997, 1007
[25] *Alcock* (n19) 385
[26] Glasson (n1) [10]
[27] McLoughlin (n20)
[28] ibid 422
[29] Glasson (n1) [10]
[30] Hasan Dindjer, 'The New Legal Anti-Positivism' (2020) Vol. 26, Legal Theory 181, 181

It is also necessary for a secondary victim to establish proximity. They must be 'close both in time and space'[31] to the incident. In *Taylor v A Novo (UK) Ltd* [2013][32] the claimant was not present at the time of the accident but witnessed her mother's deterioration in the weeks following, before her death. It was held that the accident and the death were two separate incidents and hence the claimant was not sufficiently close in time or space to the negligent incident.[33] From the perspective of a natural law theorist, it could be considered unfair and immoral for a defendant to not be held liable, just because a claimant was not able to fit this criteria.

It is important to note however that proximity can still be established when the claimant does not directly see or hear the incident themselves.[34] If the claimant is present at the 'immediate aftermath'[35] of the incident, proximity can be established, and a secondary victim can still succeed.[36] Difficulties have arisen however in determining what constitutes immediate aftermath.

A secondary victim's harm must be suffered as a result of a 'nervous shock'.[37] This has been described as a 'sudden appreciation by sight or sound of a horrifying event'.[38] A claim will not succeed if the psychiatric illness is caused by a number of events over a duration of time.[39] For example, in one case, the claim failed as the death of the claimant's son occurred over a period of weeks and thus no sudden shock occurred.[40] Similarly in another case, it was held that the claimant realising that his baby had died in the womb due to the defendant's negligence was not the same as 'actually witnessing horrific events leading to a death or serious injury'.[41] From the perspective of an anti-positivist, this would be considered unfair. The law allows a negligent defendant to escape liability if their actions did not produce one single shock to the claimant.

1.3 Policy considerations

The law in relation to psychiatric harm can be restrictive and arbitrary at times. This is often attributed to the many policy considerations taken into account when restricting liability in this

[31] *Alcock* (n19) 404
[32] Taylor v A Novo (UK) Ltd [2013] EWCA Civ 194
[33] ibid [30]
[34] *Alcock* (n19) 404
[35] ibid
[36] Galli-Atkinson v Seghal [2003] EWCA Civ 697
[37] Glasson (n1) [10]
[38] *Alcock* (n19) 401
[39] ibid
[40] Sion v Hampshire Health Authority [1994] EWCA Civ 26
[41] Wild and another v Southend University Hospital NHS Foundation Trust [2014] EWHC 4053 [47]

area.

The most commonly referred to policy consideration for restricting liability in claims for psychiatric harm is the floodgates argument. After the Hillsborough disaster, there was the potential for a huge number of claims to be brought to the courts. The concern was that there would be 'a torrent of dubious claims'[42] if it were made too easy to successfully claim. This led to the courts implementing rigid requirements to be met, thus limiting the number of individuals who could make a claim.[43] Many academics have argued that the floodgates argument is 'overstated',[44] and has led to 'arbitrary distinctions'[45] being created. These viewpoints will be considered in further depth in subsequent sections.

Another commonly cited policy reason for restricting liability in this area is to counteract a fear of fraudulent claims.[46] Throughout previous years, there has been concern that it would perhaps be easier to make a false claim of psychiatric harm than it would be for physical harm for example. This is because physical injuries are often easier to prove, and throughout history there has been a higher stigma around mental illnesses.[47] This has led to the belief that psychiatric harm symptoms may be exaggerated in order to secure compensation.[48] However, as will be discussed in section 2, the need for a claimant to be diagnosed with a recognised psychiatric illness by a medical practitioner makes this unlikely.

It has also been suggested that individuals cannot always expect that they should be compensated when something bad happens to them.[49] The courts have been quick to point out that anything less than a recognised psychiatric illness will not suffice for a successful claim, and that individuals should not expect to be compensated for feelings that are normally expected to arise from the suffering of loss or unfortunate events.[50] Some commentary has been of the opinion that mental suffering is 'part of the price of being alive and having feelings'.[51] Whilst the law may need to draw the line at what type of suffering is compensable, this seems a harsh statement for individuals who psychiatrically suffer as a result of another's

[42] *Alcock* (n19) 331
[43] ibid
[44] Stelios Tofaris, 'Limping Into the Future: Negligence Liability for Mental Injury to Secondary Victims' (2022) Vol. 81, Cambridge Law Journal 452, 455
[45] Lesley Lomax, 'Closing the floodgates' (1999) Vol. 141, New Law Journal 664
[46] Law Commission, *Liability for Psychiatric Illness* (Law Com No 249, 1998) para 6.6
[47] H Teff, 'Liability for negligently inflicted psychiatric harm: justifications and boundaries' (1998) Vol. 57 No. 1 Cambridge Law Journal 91
[48] Rachel Mulheron, 'Rewriting the Requirement for a 'Recognized Psychiatric Injury' in Negligence Claims' (2012) Vol. 32 No. 1 Oxford Journal of Legal Studies 77, 82
[49] Michael Jones, 'Liability for fear of future disease?' (2008) Vol 24, Journal of Professional Negligence 13, 13
[50] *RK and MK v Oldham NHS Trust* [2003] Lloyd's Rep Med 1 [20]
[51] Teff (n47) 92

actions.

In summary, individuals seekng to make a claim for psychiatric harm will be subject to a number of control mechanisms. If an individual cannot be classed as a primary victim, they will be subject to a number of additional requirements to claim as a secondary victim. This restrictiveness has been attributed to the policy considerations surrounding this area. Whether these arguments justify restricting liability to its current position will be considered in the following sections.

2 Primary Victims

Claimants classified as primary victims have a number of potentially problematic requirements to meet. For example, proving a recognised psychiatric illness can be difficult if a claimant is suffering just under the level of this threshold. Claims are also difficult to succeed in when there is question about whether a claimant was led to fear for their immediate safety, or only for their future health. This section will discuss how the law on primary victims has progressed, discuss the current issues and policy concerns and consider potential reforms. It will also examine different legal theoretical perspectives.

2.1 How has the law progressed?

Whilst the English tort law system dates back for hundreds of years, claims for negligently caused psychiatric harm have not long been recognised by the courts.[52] In previous years, it was not possible for individuals to claim for pure psychiatric damage unless this was paired with physical injuries.[53] This has been attributed to the fact that psychiatric illness was not taken very seriously and the idea that claims could be made for psychiatric harm shocked many.[54] It has been suggested that this was due to the religious beliefs and attitudes that were more prevalent in the past centuries.[55] Many believed that psychiatric illness was a 'punishment for sin'[56] and this led to a lack of sympathy and support towards those enduring it. Some practitioners were of the opinion that offering treatment to mentally ill patients would lead to them 'exaggerating incapacitating symptoms in the hope of obtaining greater

[52] Kirsty Horsey & Erika Rackley, *Tort Law* (6th edn, 2019 OUP) 103
[53] ibid 104
[54] Kristin Savell, 'Book Reviews: The Interfaces of Medicine and Law: The History of the Liability for Negligently Caused Psychiatric Injury (Nervous Shock)' (1999) Vol. 58, Cambridge Law Journal 639, 640
[55] Teff (n47) 92
[56] ibid

compensation'.[57] There was a general fear that recognising psychiatric illness to such a degree could eventually lead to a host of fraudulent litigation.[58]

In more recent years, views surrounding psychiatric illness have evolved to some degree.[59] For example, comments from judges have suggested that 'psychiatric harm may be more serious than physical harm'.[60] This represents a huge shift in viewpoint from judicial attitudes seen in previous years. It also seems that society's attitudes have become more sympathetic and understanding towards those mentally suffering in today's world. If society's attitudes continue to develop further over time, this could mean that the law may begin to progress further alongside it.

For primary victims, the law has progressed quite significantly over the years. This is in particular due to the case of *Page v Smith* [1995][61] which changed the requirements for establishing foreseeability of harm. Before this decision, for a claimant to prove that a defendant owed them a duty of care, they had to show that it was reasonably foreseeable that they would suffer psychiatric harm as a result of the defendant's actions.[62] This meant that unless a claimant could show that the exact type of harm that they suffered was reasonably foreseeable, their claim would fail. However, in the case of *Page*,[63] the requirements for establishing foreseeability changed. It was held that primary victims would now only need to show that it was reasonably foreseeable that they would suffer 'personal injury of some kind'.[64] This broadened the scope of liability, making it considerably easier to make a successful claim. However, this only applies to primary victims, and so the decision did not progress the law any further for secondary victims (this will be discussed further in section 3).

2.2 Criticisms of the current requirements

The law on primary victims has not however gone uncriticised. Ahuja notes that whilst the courts have progressed in terms of recognising the seriousness of psychiatric harm, they still 'remain reluctant to abandon the archaic principles that govern this area'.[65] As mentioned, it

[57] Jyoti Ahuja, 'Liability for Psychological and Psychiatric Harm: The Road to Recovery' (2015) Vol 23 Medical Law Review 27, 30
[58] ibid 30
[59] *White* (n2) 493
[60] ibid
[61] *Page* (n7)
[62] Claire McIvor, 'Liability for psychiatric harm' (2007) Vol 23 Journal of Professional Negligence 249, 251
[63] *Page* (n7)
[64] ibid 737
[65] Ahuja (n57) 30

has been suggested that the courts unwillingness to treat psychiatric harm in the same way as physical harm demonstrates that there are still negative viewpoints in society about the seriousness of psychiatric harm.[66]

One requirement that has been subject to criticism is the need for claimants to show a recognised psychiatric illness. Over the past century, many claims have failed to meet this threshold.[67] It has been long established that claims will not succeed if anything less than a recognised psychiatric illness has been suffered.[68] Feelings and emotions such as mere shock and nervousness will not be sufficient to make out a successful claim.[69] This was emphasised in the case of *Reilly and another v Merseyside Heath Authority* [1994].[70] The two claimants were trapped in a lift that was known to be malfunctioning, and the defendants continually ignored warnings about the dangers of this.[71] Despite both claimants suffering disturbing after-effects such as insomnia, chest pains and extreme panic, both their claims failed. Their experiences fell short of a recognised psychiatric illness and were therefore not compensable.[72] The judge held that their reactions were 'only normal human emotion in the face of an unpleasant experience'.[73] Similarly in another case,[74] anxiety and depression suffered as a result of a potential delay in medical treatment being undertaken was not sufficient enough to amount to a recognised psychiatric illness. These cases, in particular the former, can appear unjust in their outcomes. In *Reilly,*[75] the defendants were aware of the malfunction, and acted negligently in omitting to fix the lift or prevent individuals from using it. It was reasonably foreseeable based on the defendants' knowledge that individuals using the lift could suffer some harm as a result of doing so. It appears unjust that their claim would then fail due to the claimant's reaction being slightly under the threshold of a recognised psychiatric illness. The general purpose of tort law is to hold defendants' accountable when their actions fall 'below an acceptable standard or level',[76] and in this case, the defendants fell below this level.

Mulheron notes that in other jurisdictions, suggestions have been made that the recognised psychiatric illness threshold is too high and that it excludes too many claims.[77] For example,

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[66] Teff (n47) 92
[67] *Nicholls v Rushton* [1992] 4 WLUK 267
[68] ibid
[69] *Reilly* (n13) 29
[70] ibid
[71] *Reilly* (n13) 27
[72] ibid 29
[73] ibid 26
[74] Bancroft v Harrogate HA [1997] 5 WLUK 444
[75] *Reilly* (n13)
[76] Horsey & Rackley (n52) 30
[77] Mulheron (n48) 96

a New Zealand case considered that mental suffering 'outside the range of ordinary human experience'[78] should actually be compensable, even if it is not sufficient enough to be considered a recognised illness. Individuals such as the claimants in *Reilly*[79] experienced significant detriments on their health, failing in their claims only because of their inability to meet a recognised illness. This strict threshold appears arbitrary when it continues to act as a barrier preventing seemingly deserving claims from succeeding. From the perspective of an anti-positivist, this could be considered immoral and unfair. Whilst it is clear that the line must be drawn someplace, it does seem that the current threshold prevents successful claims where it appears unjust to do so.[80] For this reason, it has been suggested that a re-examination of the distinction should take place.[81] It is possible that a lower threshold could be implemented, allowing those who suffer significant health detriments that fall below a recognised psychiatric illness to succeed, such as the claimants in *Reilly*.[82]

Criticism has also focused on the method used to determine a recognised psychiatric illness. Psychiatrists and courts in England have for the most part referred to the ICD-10 classifications.[83] Some reference has also been made to the DSM-IV classifications which whilst similar, are used more so in America.[84] Both systems are used by psychiatrists to diagnose psychiatric illnesses in patients. For harm to be considered a recognised psychiatric illness for the purpose of a claim, it is necessary that the illness falls into the classification system.[85] The use of this method has been criticised, with the general opinion being that the classifications were not designed to be used in a legal setting, but instead for diagnosis in clinical setting and for medical research purposes.[86] Mulheron notes that the psychiatrist's role in a clinical setting is wholly different to the role of the courts.[87] Whilst a psychiatrist is looking to diagnose a patient to plan clinical treatment, 'the court is seeking to ascertain whether the claimant has suffered any compensable damage'.[88] These are two completely different aims and so there is always the possibility that information can be 'misused or misunderstood'.[89]

Another issue surrounding the use of the classification system is that viewpoints on what

[78] ibid 97
[79] *Reilly* (n13)
[80] ibid
[81] Savell (n54) 641
[82] *Reilly* (n13)
[83] Ahuja (n57) 36
[84] ibid
[85] David Gill, 'Proving and Disproving Psychiatric Injury' (2009) Vol. 76 Medico-Law Journal 143
[86] Mulheron (n48) 87
[87] ibid 88
[88] ibid 88
[89] Gill (n85)

constitutes a psychiatric illness have changed and may continue to change over time.[90] At one time, homosexuality was included in the DSM classification as a psychiatric disorder, regardless of whether an individual was suffering any mental illness symptoms at all.[91] PTSD was only recognised as a psychiatric illness recently, along with a number of other disorders as a result of the World Wars.[92] This demonstrates the reluctance for society to recognise changes in time and human vulnerability.[93] Whilst it would have been clear that an individual suffering with PTSD was mentally unwell, it took time before this was recognised in both the clinical and legal settings. This could mean that individuals who are suffering currently are denied a claim because their illness has not yet been recognised by the classifications.

Making a psychiatric harm claim can be uncomfortable for claimants, in particular for those who have suffered extreme trauma.[94] They may feel intimidated by the process, and this could discourage an individual from seeking compensation. Additionally, as Teff notes, victims of negligently caused psychiatric harm may feel embarrassed at the idea of being labelled with a diagnosis and having it made public.[95] They may have worries about how the label could affect their future, in particular in relation to their career prospects.[96]. For those who are not well-versed with the process of diagnosis, the fear of the unknown and the possibly intimidating nature of a clinical setting could act as a deterrent to bringing a claim.

The decision in *Page*[97] has been described as 'controversial… and hard to analyse'.[98] As mentioned, the case changed the requirements for primary victims to meet. It established that primary victims would only have to prove that 'personal injury of some kind'[99] was reasonably foreseeable. Some argue that this decision has actually expanded the scope of liability too far. Lord Keith was of the opinion that a defendant should only be liable if it was reasonably foreseeable to them that psychiatric harm would occur as a result of their actions.[100] It has been contended that the case places an unfair burden on potential defendants in making them negligent for something they did not foresee.[101] The decision can also be said to have conflicted with well-established negligence principles. For example, *The*

[90] Ahuja (n57) 36
[91] ibid
[92] Mulheron (n48) 93
[93] Teff (n47) 91
[94] Paula Case, Secondary Iatrogenic Harm: Claims for Psychiatric Damage Following a Death Caused by Medical Error (2004) Vol. 67, Modern Law Review 561, 572
[95] Harvey Teff, 'Personal injury: Righting mental harms' (2009) Vol. 159, New Law Journal 1243
[96] ibid
[97] *Page* (n7)
[98] Stephen Bailey and Donal Nolan, 'The Page V. Smith Saga: A Tale of Inauspicious Origins and Unintended Consequences' (2010) Vol. 69, The Cambridge Law Journal 495, 495
[99] *Page* (n7) 737
[100] ibid 741
[101] Bailey and Nolan (n98) 525

Wagon Mound (No 2) [1966][102] established that a defendant would only be liable if the exact type of damage caused was reasonably foreseeable to them.[103] The decision in *Page*[104] therefore conflicts with this in allowing a broader scope of foreseeability for claims involving primary victims.

There were concerns that in making the requirement of foreseeability easier to meet, the courts could experience a surge in claims.[105] The criticisms of this case take a different stance than much of the other surrounding commentary. Whilst it is most often argued that the law is too restrictive to claimants, many agree that the decision in *Page*[106] went too far in the opposite direction, and that it is unjust to expect defendants to foresee such a large bracket of harm. This is a fair perspective to adopt, as the decision does contrast with the ordinary principles of foreseeability in negligence law. From the perspective of a natural law theorist, it could be considered unfair and immoral to expect a defendant to foresee such a large bracket of harm.

As mentioned, a primary victim must be able to prove that they were led to fear for their immediate safety.[107] This raises issues for those who develop psychiatric conditions as a result of concerns about their future health.[108] In *Rothwell,*[109] the claimants had been negligently exposed to asbestos. One claimant suffered a recognisable psychiatric condition due to his contemplation of the fact that he was now likely to develop a serious physical disease.[110] He relied upon the decision in *Page*[111] arguing that in exposing him to asbestos, it was reasonably foreseeable to his employers that he could suffer some kind of harm.[112] The claim was rejected and distinguished from the decision in *Page*[113] in that the exposure did not lead to a fear for the claimant's immediate safety.[114] To allow the claim to succeed would allow compensation to be paid for a potential outcome which had not actually happened.[115] Many academics were critical of this decision, arguing that the way in which

[102] *The Wagon Mound* (No 2) [1966] 2 All ER 709
[103] ibid
[104] *Page* (n7)
[105] Barbara Harvey and Andy Robinson, 'Traffic accidents and nervous shock' (1995) Vol. 145 New Law Journal 1100
[106] *Page* (n7)
[107] Rothwell (n5)
[108] Jones (n49)
[109] Rothwell (n5)
[110] ibid
[111] Page (n7)
[112] Susan Ghaiwal, 'Lords Dash Pleural Plaques Claimants Compensation Hopes 2006/07' (2007) Vol. 15, Health and Safety at Work Newsletter 7, 8
[113] Page (n7)
[114] Sophie Allan, 'Pleural plaques test litigation – judgment in the House of Lords' (2008) Vol. 16, Environmental Liability, Law Practice and Policy 28, 31
[115] Ghaiwal (n112) 8

the case was distinguished was 'unprincipled'.[116] Jones notes that whilst there were factual differences between the two cases, it is unclear as to why one was successful and the other was not.[117] However, some commentary has welcomed the case for bringing clarity to the law.[118] Turton argues that the judgment will help to ensure that only those who are suffering actual loss will be compensated.[119] Whilst it does appear fair that only those who are suffering actual loss are compensated, it is important to recognise that the fear of future harm can be very damaging, in particular for those who already suffer with mental illnesses. As Irwin and Glasson argue, whilst some may argue that an extension of the law in this area would contribute to 'compensation culture…those of us who have come to understand the pressure of living with a fear…will be very slow to take that line'.[120] If a defendant has negligently put a claimant at risk, it does appear unjust that a claim would fail because that risk did not materialise immediately. The argument that the law can only compensate those who have suffered actual loss has some strength. However, that argument fails to acknowledge that the contemplation of developing a disease could cause actual loss, if it subsequently causes psychiatric illness in a claimant.

2.3 How valid are the policy concerns restricting liability?

The Law Commission in their report set out six policy-based arguments for potentially justifying the restrictiveness of the law surrounding psychiatric harm.[121] These include, as mentioned, the fear of opening the floodgates and the fear of fraudulent claims.[122]

Many academics have argued that these are not actually valid concerns. For example, in *McLoughlin v O'Brian* [1982],[123] Lord Wilberforce predicted that the decisions made in that case would lead to a surge of fraudulent claims.[124] However, as Teff notes, this did not seem to be the case with statistics from insurance companies showing no 'dramatic increase in psychiatric injury claims' four years after the decision.[125] This could suggest that making the law more accessible for claimants may not necessarily lead to a flood of claims brought to the courts.

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[116] Bailey and Nolan (n98) 522-523
[117] Jones (n49) 26
[118] Gemma Turton, 'Defining Damage in the House of Lords' (2008) Vol. 71, Modern Law Review 1009, 1009
[119] ibid 1014
[120] Stephen Irwin QC and Jonathan Glasson, 'Psychiatric injury claims' (1998) Vol. 148, New Law Journal 1816
[121] Law Commission (n46) para 6.6
[122] ibid para 6.6
[123] *McLoughlin* (n20) 421
[124] ibid 421
[125] Teff (n95)

Other academics have argued however that the policy-based arguments are valid concerns.[126] Stapleton argues that allowing individuals compensation for psychiatric illness acts as a 'powerful disincentive to rehabilitation'.[127] Other academics have expressed similar concerns, with Gill noting that exaggeration of symptoms is not uncommon in those seeking to make a claim.[128] Stapleton also argues that the adversarial nature of a legal claim can be a particularly detrimental environment for someone who is seeking to recover.[129] It is for these reasons, amongst others, that she ultimately suggests that claims for negligently caused psychiatric harm are done away with in their entirety.[130] This seems to be a somewhat extreme suggestion provoking strong reactions from other academics. The commentary has been described as lacking in sympathy and labelled 'particularly disappointing in so distinguished an academic'.[131] It has been argued that the idea that litigation could inhibit rehabilitation is not a valid concern.[132] Teff notes that the courts have never appeared to be concerned with this idea, and so this argument should not be used to advocate for abolishing claims for psychiatric harm.[133] For some individuals, obtaining compensation for their condition could actually assist them with getting better. It may provide closure about what has happened and allow them to move forward. This is a strong counter-argument to the idea that the prospect of litigation could act as a disincentive to recovery from a psychiatric illness.

The floodgates argument is the most commonly referred to policy concern. This is predominately due to the aftermath of the Hillsborough disaster, in which there was the potential for huge numbers of cases to be brought to the courts.[134] It has been argued however that the courts have rarely considered whether the concern is actually valid or not,[135] and some have argued that the concern has been exaggerated.[136] With psychiatric harm, some believe it to be harder to prove and perhaps easier to fake than physical harm for example. However, it has been argued that making a claim for psychiatric harm is possibly not as attractive as people may think. There can be high costs associated with the litigation, and knock-on effects in terms of being diagnosed on future life and potential career prospects.[137] It has been suggested that, for these reasons, the floodgates argument is not

[126] Jane Stapleton 'In Restraint of Tort', in P. Birks, *The Frontiers of Liability* (1994) Vol. 2 95
[127] ibid 95
[128] Gill (n85)
[129] Stapleton (n126) 95
[130] ibid
[131] Ahuja (n57) 38
[132] Teff (n47) 95
[133] ibid 95
[134] *Alcock* (n19)
[135] Keith Patten, 'Patchwork quilt law' (2013) Vol. 163, New Law Journal 11
[136] Ahuja (n57) 48
[137] Teff (n95)

perhaps as strong as many may believe. It is possible that not everyone affected by psychiatric harm is likely to bring a claim due to these 'powerful disincentives'.[138]

In summary, it is possible that the policy considerations restricting liability for primary victims are not entirely valid concerns. There is no evidence to suggest that there has been any significant increase in claims since the law has been made more accessible.[139] The idea that litigation could act as a disincentive can be counter-argued with the idea that compensation could allow an individual to move on and improve their health. It is possible that the floodgates argument has been exaggerated and an expansion of liability would not necessarily lead to a flood of claims but would in fact strike a fairer balance for claimants.

2.4 Reform and legal theory

Many suggestions have been made about how the current issues with the law for primary victims could be resolved. This subsection will consider these and comment upon how different legal theory perspectives would view these proposals.

In terms of the need to show a recognised psychiatric illness, researchers have considered the possibility of adding new disorders to the classification systems.[140] The introduction of a diagnosis that would be known as 'prolonged grief disorder' has been proposed for those suffering further than the normal grieving process.[141] Whilst it is often re-iterated that ordinary emotions surrounding grief will not be compensable,[142] it is important to recognise that for some individuals, bereavement can develop into psychiatric illness.[143] The introduction of new disorders would allow more claimants currently excluded by the criteria to succeed with their claim.[144] This would perhaps begin to create a fairer balance between compensating claimants and taking into account the relevant policy considerations.

Another interesting proposal is the idea that claimants could fall into two different categories in terms of damage suffered: 'severe and moderately severe'.[145] This would allow individuals who are suffering from psychiatric harm just shy of a recognised psychiatric illness to be compensated. From an anti-positivist perspective, who believe that the law should be

[138] Teff (n95)
[139] ibid
[140] Kari S. Carstairs and Nicholas Tubb, 'Personal injury: Grief-stricken' (2013) Vol. 163 New Law Journal 158
[141] ibid
[142] *Hicks* (n9) 69
[143] Case (n94) 562
[144] Carstairs and Tubb (n140)
[145] Teff (n95)

'grounded in moral considerations',[146] this would be a good reform proposal. It would prevent those who acted negligently from avoiding being held liable just because the claimant's suffered slightly below the threshold. However, this suggestion fails to recognise that this could be difficult to implement. There are widespread fears of opening the floodgates to claims, and the courts would likely be concerned that reducing the psychiatric illness threshold could lead to a significantly increased amount of litigation.

Other academics have considered whether psychiatric harm should be treated any differently than physical harm. Ward argues that psychiatric harm cases have no 'special quality which could justify imposing more restrictive rules as to liability than apply to ordinary personal injury'.[147] Other commentary takes a similar viewpoint suggesting that equating psychiatric injury to physical injury would put the law on a better standing.[148] Whilst this would expand the scope for making a successful claim, it has been argued that using the ordinary principles of negligence law, such as the finding of a duty of care and foreseeability, would still ensure that claims remain in an acceptable number.[149] This seems a sensible approach. Whilst psychiatric harm can be more difficult to prove than physical harm, the fact that the two are still treated differently can be said to contribute to longstanding negative attitudes around mental illness. Reforming the law to treat both types of harm in the same way could be favoured from a legal formalist perspective, which disagrees with the application of policy considerations to the law.[150] This suggestion does however fail to acknowledge the chance that the courts could see a huge increase in potentially fraudulent claims.

To summarise, the suggestion of introducing new disorders to the classification system would allow more claimants to be successful in their claims, whilst still maintaining a threshold to meet in line with the relevant policy considerations. Commentary that has suggested equating psychiatric harm with physical makes some valid points, however it is possible that this suggestion could tip the balance in the opposite direction, and lead to the policy considerations being discarded completely.

3 Secondary Victims

A secondary victim suffers a recognised psychiatric illness from being 'no more than a

[146] Dindjer (n30) 181
[147] Tony Ward, 'Psychiatric evidence and judicial fact-finding' (1999) Vol. 3, International Journal of Evidence and Proof 180
[148] Patten (n135)
[149] ibid
[150] Patrick Shaunessy, 'A Matter of Choice: Rethinking Legal Formalism's Account of Private Law Rights' (2017) Vol. 37, Oxford Journal of Legal Studies 163, 185

passive and unwilling witness or spectator to the injury caused to another'.[151] They are 'not within the range of foreseeable physical injury'.[152] Issues can arise when a claimant is required to provide evidence of a close relationship. Problems of uncertainty occur when a secondary victim is not present at the scene of an incident but arrives in the aftermath of the event. This section will discuss the criticisms of the law on secondary victims as well as the policy concerns surrounding the area. It will also seek to determine whether the distinction between the two categories of victims is one that is justified and consider relevant legal theoretical perspectives on the fairness of the law.

3.1 Criticisms of the current requirements

In *Alcock*,[153] the Court implemented a number of additional requirements for secondary victims to meet in an attempt to limit the number of claimants.[154] This decision has been subject to extensive criticism, with the general consensus being that the case created 'a complex and arbitrary set of limitations on liability'.[155]

A secondary victim must show that they have a 'close tie of love and affection to the immediate victim'.[156] Some relationships will give rise to a presumption of the close tie, for example relationships between parents and children.[157] Other relationships can succeed, but the claimant would have to 'prove a sufficient degree of care'.[158] The presumed relationship of close ties can even be rebutted, if evidence is shown to the contrary.[159] As Case argues, when an individual is already suffering from a psychiatric illness as a result of seeing injury caused to another, the requirement to prove their relationship with the primary victim could be traumatic.[160] This will often involve a claimant having to dig up their past in attempts to show how close they were to someone. If the claimant is mourning the death of the primary victim, the process could be damaging to their recovery. Stapleton also notes the difficulties that may arise when the defence have to attack the relationship, and when individuals are turned away for not quite meeting the close tie.[161] This could be considered unjust from the

[151] North Glamorgan NHS trust v Walters [2002] EWCA Civ 1792 [12]
[152] Brenda Barrett, 'Policy Issues Concerning Compensation for Psychiatric Injury' (2001) Vol. 30, Industrial Law Journal 110, 110
[153] *Alcock* (n19)
[154] Laura Cox QC and Patricia Hitchcock, 'Psychiatric damage following death: the legal perspective' (2000) Vol. 6, Journal of Patient Safety and Risk Management 245,
[155] Ward (n147)
[156] Glasson (n1) [10]
[157] *Alcock* (n19) 359
[158] ibid 360
[159] ibid
[160] Case (n94) 572
[161] Stapleton (n126) 95

perspective of an anti-positivist.

Additionally, seeing a primary victim come to harm in a shocking way could still lead to an individual suffering psychiatric harm, even if the victim was unknown to them. In one case, the claimant witnessed explosions from a distance knowing that many deaths would be occurring[162]. It was held that, inter alia, the claimant could not succeed in his claim as no close tie could be established between him and any of the 164 victims.[163] Similarly, a claimant who saw a dead motorcyclist was not successful in their claim, one reason being that this close relationship did not exist between her and the deceased.[164] The decisions within these cases appear unjust. It is perhaps possible that an individual may be more psychiatrically affected by witnessing harm occur to a family member. However, harm could be provoked in many after coming across a dead body for example, regardless of whether the victim was known to the claimant. For this reason, it could be argued unjust to restrict claims to those who have a sufficiently close relationship with a primary victim.

A secondary victim must also show that they were within sufficient proximity of the incident.[165] They must have been close in time and space, or present at the aftermath of the event.[166] If an individual hears what has happened through a phone call for example, this will not be sufficient.[167] This requirement has been described as producing 'arbitrary and wholly unjust results'.[168] It has led to the failure of many claims, in particular where family members witness the deterioration and subsequent death of a primary victim.[169] The courts have often held that the event and the death are two separate incidents and so a presence at the scene of death does not suffice for proximity to be established.[170] Many have argued that this requirement lacks logic, and exists solely to limit the number of claims that can succeed.[171] Even judicial commentary has suggested that the proximity 'depends more on the court's perception of what is the reasonable area for the imposition of liability than any process of logic'.[172] However, other academics have taken an alternative view, and argue that the courts have been flexible and willing to stretch the proximity requirement to allow claims to succeed

[162] McFarlane v EE Caledonia Ltd [1994] 2 All ER 1
[163] ibid 2
[164] Bourhill (n23)
[165] Alcock (n19)
[166] Ruth Hewitt, 'More than a bystander?' (2015) Vol. 165, New Law Journal 12
[167] Shorter v Surrey and Sussex Healthcare NHS Trust [2015] EWHC 614 (QB)
[168] Kay Wheat, 'Proximity and Nervous Shock' (2003) Vol.32, Common Law World Review 313
[169] Taylorson v Shieldness Produce Limited [1994] PIQR 329,
[170] Taylor (n32)
[171] Donal Nolan, 'Horrifying events and their consequences: clarifying the operation of the Alcock criteria' (2014) Vol. 30, Journal of Professional Negligence 176, 179
[172] ibid 179

when needed.[173] For example, in a very recent case where a primary victim died over a year after the negligence occurred, a secondary victim claim still succeeded.[174] Commentary has argued that the law in relation to this particular requirement is confusing.[175] There is no definition to suggest what will constitute presence at the immediate aftermath of an event and this is argued to have created uncertainty in the law.[176] It has been suggested that the courts impose a defined time limit to create more certainty for those seeking to make a claim.[177] This suggestion does however fail to acknowledge the problems that this could cause. It would require a claimant to prove exactly what time they arrived at the aftermath of an incident. If they arrived, for example, one minute after the defined time limit, it could be difficult for a court to decide whether the claimant should be allowed to succeed, or whether they should stick rigidly to the defined time limit and deny the claim. If the courts chose the latter, the law would continue to be criticised for being too arbitrary, but the former could be criticised for not producing certainty. Sticking to a strict time limit would be favoured by a legal formalist, as it would require judges to apply rigid law to a set of facts, without using discretion.[178]

A secondary victim must also experience a 'sudden, shocking event'.[179] This requirement has been subject to extensive criticism, with the Law Commission suggesting its abandonment over 20 years ago.[180] The Law Commission's opinion was that every argument in support of the requirement could be counter-argued.[181] Academically, the requirement has been described as an 'unnecessary and arbitrary restriction'.[182] Many claims have failed at this stage as it is necessary that the claimant suffers a single sudden shock, rather than a series of 'gradual assaults'.[183] This can be argued unjust. As Burrows notes, the effect on a claimant suffering a psychiatric illness is the same regardless of whether it was caused 'by a sudden shocking event or by a sequence of unpleasant events over a period of time'.[184] It

[173] Lionel Stride, 'Back to square one?' (2021) Vol. 171 New Law Journal 12
[174] P (a child, by her mother and litigation friend) and another v Royal Wolverhampton NHS Trust [2020] EWHC 1415
[175] Simon Allen, 'Personal injury law' The Law Society Gazette (Sheffield, 13 June 2003) <https://www.lawgazette.co.uk/news/personal-injury-law/39682.article> accessed 17 Feb 2023
[176] ibid
[177] ibid
[178] Brian Leiter, 'Legal Formalism and Legal Realism: What is the Issue?' (2010) Vol. 16, Legal Theory 111, 114
[179] Wells and another v University Hospital Southampton NHS Foundation Trust [2015] EWHC 2376 (QB) [85]
[180] Law Commission (n46) para 5.29
[181] ibid para 5.31
[182] Andrew S. Burrows, 'A Shocking Requirement in The Law on Negligence Liability for Psychiatric Illness: Liverpool Women's NHS Foundation Trust v Ronayne [2015] Ewca Civ 588' (2016) Vol. 24 Medical Law Review 278, 283
[183] Liverpool Women's Hospital NHS Foundation Trust v Ronayne [2015] EWCA Civ 588 [40]
[184] Burrows (n182) 283

seems unjust to deny a claim solely because the negligence caused a series of events as opposed to a single shocking one.

It has also been suggested that this requirement is particularly unfair to those who witness a primary victim's deterioration in a hospital.[185] Case argues that because a hospital 'is a highly controlled space',[186] individuals who witness someone's deterioration within a hospital are unlikely to be considered to have experienced a sudden shocking event. In hospitals, shocking events are often hidden from a secondary victim, and they learn of what has happened through a clinician.[187] Other academics have seconded this perspective, suggesting that unless the victim is seen 'covered in blood, success may be tricky'.[188]

It has only been in exceptional cases that secondary victim claims have succeeded in a hospital setting.[189] In some circumstances, the courts have been willing to find a sudden shocking event, even where the event has run for longer than 36 hours.[190] Some cases do appear to show the courts willingness to find a sudden shocking event to allow a claim to succeed.[191] As Thomas notes, the finding of a sudden shock depends upon the circumstances in each case.[192] What is not clear however, is why some claimants have succeeded and some failed, when the facts are relatively similar to each other.[193] It seems that what constitutes a sudden shocking event is not defined with any certainty. This could prove difficult for those providing legal advice.

It has also been considered that, with changes in today's society, this requirement could potentially be easier to meet.[194] As discussed, this requirement can be particularly difficult to meet.[195] However, with a huge increase in the usage of live news streams, and people's ability to record with mobile devices, there is a chance that footage of horrifying events could be more easily posted online.[196] Hewitt notes that this could lead to individual's witnessing a sudden shocking event involving someone close to them without actually being present at

[185] Case (n94) 562
[186] ibid 562
[187] Dan Clarke, 'Trust liable for hypoxic birth injury and psychiatric injury caused to mother and grandmother: RE v Calderdale & Huddersfield NHS Foundation Trust [2017] EWHC 824 (QB) (High Court, 12 April 2017 – Goss J)' (2018) Vol. 23, Journal of Patient Safety and Risk Management 115
[188] Andrew Ritchie, 'Damages for psychiatric injuries' (1995) Vol. 145, New Law Journal 64
[189] Clarke (n187)
[190] Stephen Webber, 'Case in focus: 'Psychiatric injury of a secondary victim – Ceri Ann Walters v North Glamorgan NHS Trust' (2003) Vol. 9, Journal of Patient Safety and Risk Management 157
[191] Froggart & Others v Chesterfield & North Derbyshire Royal Hospital NHS Trust [2002] EWHC 3027
[192] Clive Thomas 'Satisfying the Hearness Test' (2003) Vol. 153, New Law Journal 953
[193] Allen (n175)
[194] Hewitt (n166)
[195] Case (n94) 562
[196] Hewitt (n166)

the scene.[197] This could mean that after large-scale events of negligence, more secondary victims would now be able to meet this requirement. It will be interesting to see whether the courts will implement further restrictions around this requirement as a result.

3.2 How valid is the 'floodgates' argument?

After the Hillsborough Disaster, as mentioned, it was seen necessary to close the floodgates by implementing a number of 'artificial barriers'[198] to a successful claim. The conditions that secondary victims must meet have been described as being 'designed to exclude all but the most exceptional of secondary victim claims'.[199]

The floodgates argument has been referred to regularly in case law.[200] As Teff notes, it is the policy consideration that 'resonates most with the public'.[201] In recent years, the media has focused on society's concerns surrounding a compensation culture and the idea that we live in a 'blame and claim society'.[202] These perspectives have led to 'fierce debate'[203] and have fuelled the idea that the law must restrict the number of successful claims. This has ultimately led to a stump in the development of the law.[204]

The alternative viewpoint however is the possibility that the floodgates concern is not as strong as it is often stated.[205] Many academics have considered the argument to be overexaggerated and lacking in evidence.[206] As mentioned, decisions that were estimated to open the floodgates did not lead to a higher influx of claims.[207] Additionally, regardless of changes in attitudes surrounding psychiatric harm, this has not appeared to lead to an opening of the floodgates.[208] Statistical data appears to support these viewpoints, with general patterns showing a decrease in personal injury compensation claims in recent years.[209] Other commentary has considered the idea that the floodgates concern is

[197] ibid
[198] Diana Brahams, 'Claiming for Nervous Shock Due to Negligence in the Workplace' (2004) Vol. 72, Medico-Legal Journal 31
[199] McIvor (n62) 251
[200] *Alcock* (n19) 331
[201] Teff (n95)
[202] ibid
[203] Lomax (n45)
[204] ibid
[205] Tofaris (n44) 455
[206] Ahuja (n57) 48
[207] Teff (n95)
[208] Ahuja (n57) 48
[209] John Hyde, 'Compensation culture? Stats reveal claims numbers in freefall' *The Law Society Gazette* (London, 24 April 2018) <https://www.lawgazette.co.uk/news/compensation-culture-stats-reveal-claims-numbers-in-freefall/5065804.article> accessed 16 February 2023

overstated based on evidence from other jurisdictions with differing laws.[210]

As mentioned, it is also possible that making a claim for psychiatric harm is perhaps not as appealing as some may think.[211] It involves claimants having to be publicly diagnosed with a psychiatric illness and have their version of events attacked in court.[212] This can be extremely daunting and traumatic, and is likely to already be acting as a deterrent to individuals bringing a claim.

It has been argued that whilst it is necessary to contain the number of successful claims, the courts should consider less arbitrary ways of doing so. Tofaris argues that whilst the floodgates consideration 'may support some restrictions, it does not support *Alcock*'.[213] It has been suggested that the ordinary principles of negligence, such as foreseeability and the finding of a duty of care, are sufficient enough to 'block unmeritorious claims'. [214]

However, it is important to consider the alternative perspective. The Law Commission disregarded most of the policy considerations but acknowledged the floodgates argument as one that 'requires special policy limitations to be imposed over and above the test of reasonable foreseeability'.[215] Mehta notes that many cases involving psychiatric harm provoke strong emotions in those reading about them.[216] In her opinion however, sympathy is not a justification for making a 'substantial extension of the existing principles of law'.[217] Other commentary has taken a similar stance arguing that sympathy and legal liability 'are two very distinct and separate concepts'.[218] This is an interesting point to consider. It is possible that if cases were to be decided on a more subjective basis, claims could be determined based on judges' feelings and emotions. However, it would allow more flexibility in the law, and somewhat arbitrary decisions could more easily be avoided.

It has also been argued that whilst the outcome of many secondary victim cases may appear unjust, to allow a claim to be met too easily could lead to one party being liable to a 'very

[210] Tofaris (n44) 455
[211] Teff (n95)
[212] Stapleton (n126) 95
[213] Tofaris (n44) 455
[214] Sharon Levy, 'Psychiatric harm following death – the sacrifice of justice?' (2000) Vol. 6, Journal of Patient Safety and Risk Management 247
[215] Law Commission (n46) para 6.8
[216] Sejal Mehta, 'Secondary victim claim fails: Wild v Southend University Hospitals NHS Foundation Trust (High Court, 3/2/2014 – Michael Kent QC) (2015) Vol. 21 Journal of Patient Safety and Risk Management 16
[217] ibid
[218] John Mead, 'Further important ruling on secondary victim claim: Ronayne v Liverpool Women's Hospital NHS Trust (Court of Appeal, 17 June 2015) (2015) Vol. 21, Journal of Patient Safety and Risk Management 127

wide spectrum of individuals'.[219] It has been argued that this would be 'economically unsustainable'.[220] The courts would continuously be hearing cases about the same matter, and this would come at a cost to all parties involved. The defendant would likely become insolvent, and so even if claims were successful, it is unlikely that sufficient funds would be available for claimants to be awarded with. In cases involving the NHS or the police, for example the very proceedings that led to the control mechanisms being implemented,[221] any damages awarded would be paid from public funds. If public services were losing funding to litigation claims, this would be at a huge detriment to the public.[222]

Other commentary has focused on the dangers of opening the floodgates in medical situations. Lindsey discusses a case in which a secondary victim claim succeeded against an NHS Trust.[223] In this case it was held that the childbirth itself satisfied the requirement for a sudden shocking event.[224] Lindsey criticises this decision, arguing that childbirth is a 'normal life experience which the human species relies upon for its very existence'.[225] It has been suggested that to allow it to be considered a sudden shocking event could have implications on the scope of liability in medical situations.[226] This could be problematic considering the UK has a National Health Service, and so any successful claim would be at expense of the public.[227] Lindsey notes that expanding the scope of recovery in these types of situations could have a 'detrimental impact'[228] on the already strained NHS. One commentator argues that when negligence claims against the NHS succeed, the 'lawyers are the main winners, the public the main losers'.[229] Other academics have argued that the courts should take into account how underfunded the NHS is when determining whether a claim against them should succeed.[230] This argument does have some strength, considering that any compensation paid out by the NHS is less funding available for patients. However,

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[219] John Mead, 'Husband unable to recover for psychiatric injuries – John Harris -v- Liverpool Women's Hospital NHS Foundation Trust (High Court, 2/4/2014 – Judge Platts) (2014) Vol. 20 Journal of Patient Safety and Risk Management 90
[220] ibid
[221] *Alcock* (n19)
[222] Jaime Lindsey, 'Psychiatric Injury Claims and Pregnancy: Re (a Minor) and Others v Calderdale & Huddersfield NHS Foundation Trust [2017] Ewhc 824' (2018) Vol. 26, Medical Law Review 117, 124
[223] ibid
[224] Re (A minor by her mother and Litigation Friend LE) and others v Calderdale & Huddersfield NHS Foundation Trust [2017] EWHC 824
[225] Lindsey (n222) 121
[226] ibid 123
[227] ibid 123
[228] ibid 123
[229] Polly Toynbee, 'When the NHS spends billions on personal injury cases, it's the public that loses' *The Guardian* (3 May 2022) <https://www.theguardian.com/commentisfree/2022/may/03/nhs-billions-personal-injury-cases-public-loses> accessed 17 Feb 2023
[230] Christian Witting, 'National Health Service Rationing: Implications for the Standard of Care in Negligence' (2001) Vol. 21, Oxford Journal of Legal Studies 443, 443

it is important to recognise the detrimental effects that psychiatric harm can have on individuals, and compensation can help them to move forward with their lives.

In summary, there is evidence to suggest that the floodgates concern is overexaggerated. Commentary often fails to acknowledge that litigation is not appealing to all, especially in those who have experienced particularly traumatic events. It is only fair however to acknowledge that making psychiatric harm claims too accessible could be damaging on the economy,[231] and the publicly funded NHS.[232] Perhaps the most preferable view is that whilst the floodgates concerns may support *some* restrictions, it does not support the restrictiveness of the law as it stands.[233] A less restrictive structure could operate more preferably in claimants' interests, whilst still taking into consideration the floodgates concerns, creating a more equal balance.

3.3 Is the distinction between primary and secondary still required?

The distinction itself between primary and secondary victims has been criticised. Commentary has considered whether this distinction is one that is actually required at all.

Levy has labelled the distinction as artificial.[234] She notes that whilst it is far easier for primary victims to make a successful claim, they are 'often no more deserving'[235] of compensation than secondary victims. She notes that two people witnessing the same horrifying event are often subject to different requirements, based on the distance they were from the incident.[236] An individual who suffers psychiatric harm as a result of fearing that they would be harmed will recover damages relatively easily, whereas an individual who witnesses harm coming to somebody else knowing that they were not at risk themselves will be subject to arbitrary requirements.[237] It has been argued that the distinction leads to the law being overly generous to one class of people, and overly restrictive to another.[238] The reality is that psychiatric harm can very easily occur to individuals who witness harm come to another, in the same way that it can occur after them fearing for their own safety. In some situations, an individual may be more distressed at witnessing harm coming to somebody other than themselves. For example, many claims have seen parents severely distressed from

[231] Mead (n219)
[232] Lindsey (n222) 123
[233] Tofaris (n44) 455
[234] Sharon Levy (n214)
[235] ibid
[236] ibid
[237] ibid
[238] McIvor (n62) 251

witnessing harm occur to their child.[239] This could be more distressing than being a primary victim themselves and so it seems unfair to subject them to far tougher restrictions.

Teff argues that the barriers faced by secondary victims 'reinforce the belief that harm suffered through passively experiencing injury inflicted on others is in some sense peripheral'.[240] Similarly, Case argues that the terminology used to label victims as secondary suggests that their experiences are somewhat 'second-hand'.[241] It has been suggested that this leads to an opinion that those who fall into the secondary victim category are not so deserving of receiving compensation.[242] It is true that the law treats secondary victims in a much less favourable way, and this could suggest that those who witness horrifying events second-hand are not expected to suffer in the same way as primary victims. It could be argued however that within recent years, many secondary claims have succeeded, and this demonstrates the court's willingness to acknowledge the damage that can be caused from witnessing harm occurring to another.

It has also been argued that the distinction leads to more litigation, the very thing the courts were seeking to reduce.[243] As discussed, the case of *Page*[244] made claims for primary victims significantly easier to meet, in that they would only have to show that it was reasonably foreseeable that some kind of harm could occur to them.[245] Teff argues that this concept increases litigation.[246] In large scale negligent events, it is still possible that the courts could see a flood of claims resulting from it, if all of the claimants were deemed to be in the zone of danger.[247] It has been argued that in creating a distinction between two classes of claimants, and making the requirements for one class significantly easier to meet, there are likely to be more claims from individuals who are able to fall into that category.[248] Bailey and Nolan similarly state that the decision has the potential to significantly 'undermine the *Alcock* restrictions on secondary victim claims'.[249] It is possible that the decision makes claims too accessible for primary victims.[250]

Judicial commentary has suggested that there is 'no magic'[251] in the terminology used for the

[239] *Re (A minor by her mother and Litigation Friend LE) and others* (n224)
[240] Teff (n47) 114
[241] Case (n94) 564
[242] Teff (n47) 114
[243] ibid 111
[244] *Page* (n7) 737
[245] ibid
[246] Teff (n47) 112
[247] Teff (n47) 112
[248] ibid 112
[249] Bailey and Nolan (n98) 515
[250] McIvor (n62) 251
[251] French and others v Chief Constable of Sussex Police [2006] EWCA Civ 312 [31]

distinction. The courts are however typically more concerned with determining the status of the individual, when they could determine the outcome on a more subjective and flexible approach, based upon whether a duty of care should have been owed in the circumstances.[252] This approach could however create less certainty in the law, and it may be more difficult for legal advice to be given.

In summary, there is a possibility that the distinction between primary and secondary victims is not actually necessary. There are strong arguments for retaining a divide, such as to prevent the opening of the floodgates after large-scale negligence events. However, as one academic notes, in the event a train crashing, 'how many traumatised but physically unharmed passengers…will recover for psychiatric illness because they are deemed to be within the range of foreseeable physical injury?'[253] The ease at which primary victims can recover is counteractive to the floodgates policy consideration. Additionally, individuals may be more psychiatrically distressed as a result of seeing a loved one harmed, and so making them subject to additional restrictions does not seem fair. Removing the distinction between different classes of claimant would enable the law to strike a fairer balance between compensating individuals and taking into account the policy arguments.

3.4 Reform and legal theory

The law in relation to secondary victims has been described as 'far from clear, logical and consistent'.[254] However, as Tofaris notes, 'what is less readily acknowledged is what to do about it'.[255] This subsection will consider the potential ways the criticisms with the law discussed could be reformed, considering how these would fit in with different legal theory perspectives.

Academic commentary has called upon Parliament to legislate in order to reform this area of the law.[256] It has been argued that this would help to bring clarity for potential claimants.[257] This would be the preferential outcome for legal formalists who believe that judges should not make law, and should simply apply the relevant facts of a case to the relevant law.[258] However, a Law Commission report was published in 1998, and Parliament is yet to legislate

[252] Teff (n47) 114
[253] ibid 112
[254] Brahams (n198)
[255] Tofaris (n44) 452
[256] Patten (n135)
[257] Simon Allen, 'Rescuers and employees – primary victims of nervous shock' (1997) Vol. 147, New Law Journal 158
[258] Leiter (n178) 114

on the matter.[259] It seems the government is of the opinion that 'it is preferable to allow the courts to continue to develop the law in this area'.[260] Despite this statement, the courts have not appeared to show any signs of progressing the law in any way since.

As mentioned, some academics have suggested making psychiatric harm claims equal to physical harm.[261] This idea would likely be favoured by a legal formalist perspective, as the law would not take account of the relevant policy considerations.[262] A judge would be required only to apply the facts of a particular case to predetermined legal rules, without any consideration given to relevant policy concerns.

However, Nolan, labelling this the 'ultra-liberal position',[263] notes that this argument was rejected by both the English and Wales Law Commission, and the Scottish one.[264] The former report maintained the opinion that there should still be limitations for secondary victim claims.[265] However, they rejected the idea that all three current requirements were necessary, suggesting the abolishment of the requirements for proximity and a sudden shock.[266] The report argued that these were the requirements that have led to the 'most arbitrary decisions'.[267] It was proposed however that the need to show a relationship of close ties should remain, in order to limit the number of claims arising from one event.[268] Interestingly, the Scottish Law Commission came to a similar conclusion.[269] In their opinion, compensation would be justified when a victim has a close relationship with a person injured or killed in an incident.[270] It has been argued that in some circumstances, not being close in proximity to the incident could cause a higher level of psychiatric harm, if an individual hears about an event and imagines it to be worse than it actually is.[271] These recommendations would certainly make a successful claim more attainable for secondary victims, and they would be more certain about whether or not they would be successful with their claim. However, this suggestion fails to acknowledge that the requirement to show a close relationship can also be difficult for individuals. As mentioned, proving this close tie can be

[259] Tofaris (n44) 456
[260] Ministry of Justice, *The Law on Damages* (CP 9/07, 2009) 7
[261] Patten (n135)
[262] Shaunessy (n150) 185
[263] Donal Nolan 'Reforming Liability for Psychiatric Injury in Scotland: A Recipe for Uncertainty? (2005) Vol. 68, Modern Law Review 983, 983
[264] Scottish Law Commission, *Report on Damages for Psychiatric Injury* (Scot Law Com No 196, 2004)
[265] Law Commission (n46) para 6.10
[266] ibid para 6.10
[267] ibid
[268] ibid
[269] Scottish Law Commission (n264) para 3.54
[270] ibid para 3.54
[271] Law Commission (n46) para 6.10

traumatic for claimants.[272] It may be necessary for the defence to attack this relationship, and this could be uncomfortable for those involved.[273] From an anti-positivist perspective, this could be considered immoral. Additionally, individuals could still suffer psychiatric harm from witnessing particularly horrifying events occur to someone who they do not have a close relationship with.

In Mead's view, 'no sensible or realistic alternatives have every been proposed which maintain a fair balance between claimant and defendant'.[274] This is a fair statement as some suggestions for reform would result in further inequality between the parties. However, many would agree that currently, the law on psychiatric harm does favour defendants, and reform is necessary to make the balance more even. One suggestion is that the courts' objective should be to examine 'the nature and extent of the claimant's involvement with the incident'[275] without classifying them as a primary or secondary victim. This would allow the courts to consider cases based on their merits and the surrounding circumstances.[276] This would be a flexible approach and could lead to potentially fairer outcomes. An anti-positivist may favour this suggestion, as it could take into account moral considerations.[277] However, this suggestion could lead to uncertainty in the law and offering legal advice to claimants could prove challenging. Judges could allow emotions to influence their decisions, and this could lead to the law becoming overly claimant friendly. This would not be a good reform suggestion from the perspective of legal positivists, who believe that morality should not be considered when legal decisions are made.[278]

To summarise, the reform proposals put forward by the Law Commission would make the balance significantly fairer for claimants. It would be easier for them to make a successful claim, whilst still maintaining some control mechanisms to keep in line with policy. The suggestion that the law considers cases on a more subjective basis makes some good points, however it is possible that this process could lead to the policy considerations not being taken into account at all.

Conclusion

It is clear that the law on psychiatric harm provokes differing strong opinions. Most agree

[272] Case (n94) 572
[273] Stapleton (n126) 95
[274] Mead (n218)
[275] Teff (n47) 114
[276] ibid 114
[277] Dindjer (n30) 181
[278] Andrei Marmor, 'Legal Positivism: Still Descriptive and Morally Neutral' (2006) Vol. 26, Oxford Journal of Legal Studies 683, 683

however that the current law is unsatisfactory.[279] It has been suggested that the law is overly-restrictive to claimants, and that this has led to unfairness in the law.

As we have seen, the control mechanisms that secondary victims are subject to can be particularly problematic. Issues can arise when individuals witness harm coming to somebody who they are not able to show a sufficiently close relationship with, or when they are not deemed to have been within sufficient proximity of the incident. Whilst some are of the opinion that it is significantly easier for primary victims to make a successful claim,[280] this class of claimants can also experience difficulties when seeking to establish liability. This article has considered that the primary/secondary distinction is not actually required and that the process of classifying individuals leads to unfairness in the law. From an anti-positivist perspective, it can be considered immoral to make people subject to vastly different requirements based on whether they were in the zone of danger or not.

The restrictiveness of the law has been attributed, as discussed, to the policy considerations surrounding this area.[281] These considerations include a concern that psychiatric harm claims are perhaps easier to fake, and that a single defendant may be subject to a flood of claims after large events of negligence.[282] Most emphasis has been on the floodgates argument, arguing that allowing too many claims to succeed could be detrimental to society at large.[283]

However, as this article has considered, it is possible that these policy considerations are not as strong as they are often portrayed to be. Whilst the floodgates argument was acknowledged by one report as the only argument with any valid concern,[284] many academics have argued that it is not as valid as some believe.[285] It has been suggested that the idea that an expansion of liability would lead to a flood of claims is an exaggeration, and that the concern has been overstated.[286] It has been considered that the current law, from the perspective of a natural law theorist, is unfair. Too much consideration is given to keeping the law in line with policy, without considering the effects psychiatric harm can have on individuals' lives.

Other academics have considered that whilst the policy considerations may support some

[279] Tofaris (n44) 453
[280] McIvor (n62) 251
[281] Law Commission (n46) para 6.6
[282] ibid para 6.6
[283] Lindsey (n222) 123
[284] Law Commission (n46) para 6.8
[285] Tofaris (n44) 455
[286] ibid 455

restrictions on recovery, they do not justify the restrictiveness of the law as it stands.[287] This has led to reform proposals suggesting the abandonment of some of the more 'arbitrary'[288] requirements, whilst maintaining others to keep in line with policy. For example, the Law Commission's suggestion of maintaining only the need to show a sufficiently close relationship and abandoning the other two control mechanisms.[289] As considered, this would perhaps make the balance fairer between compensating those suffering and considering policy.

In summary, this article has considered that the current law on psychiatric harm does not strike a fair balance between compensating claimants and taking into account relevant policy considerations. As Lomax puts it, 'the fear of opening the floodgates seems to have prevailed'.[290] Tort law has however developed notably since its beginning, and attitudes surrounding psychiatric illness appear to be constantly evolving. It is hoped that because of this, at some point in the future, less weight will be given to the policy arguments discussed, and more weight will be given to making the law more accessible and fairer to claimants.

[287] Tofaris (n44) 455
[288] Law Commission (n46) para 6.10
[289] ibid
[290] Lomax (n45)