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Revisiting pure psychiatric injury - Weddle v Glasgow City Council

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The author revisits the law in respect of recovery of damages for pure psychiatric injury[1] with particular reference to the recent decision of the Sheriff Appeal Court in Weddle v Glasgow City Council.[2] *She concludes that the decision in* Weddle *- to the effect that the pursuer was not a primary victim- was unsurprising in view of the key findings of fact which had been made by the sheriff and which remained undisturbed by the Sheriff Appeal Court. The author goes on to consider whether a claim as a secondary victim might have been advanced successfully on the basis of certain dicta in the* Alcock[3] *case concerning bystanders.*

1.INTRODUCTION

The recovery of damages in respect of psychiatric injury[4] has traditionally been more problematic than recovery of damages in respect of physical injuries.[5] A certain judicial scepticism has prevailed in relation to claims in respect of mental harm and policy considerations have exerted considerable influence in this area of the law.[6] The question arises as to why different rules should apply in relation to recovery of the two kinds of loss. Weir has offered the following explanation:

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[1] The discussion in this article is limited to the matter of *negligently* inflicted psychiatric injury. It is not concerned with *intentional* infliction of psychiatric harm. For discussion of that matter, see Elspeth Christie Reid, *The Law of Delict in Scotland,* (Edinburgh: Edinburgh University Press, 2021), pp. 548-554. Nor is this article concerned with psychiatric injury resulting from breach of statutory duty-in that regard, see Nigel Tomkins, "Psychiatric injury - extra routes to recovery?" (2006) 3 J.P.I. Law 251.

[2] *Weddle v Glasgow City Council* [2021] SAC (Civ) 17; 2021 S.L.T. (Sh. Ct.) 277.

[3] *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 A.C. 310.

[4] In older authorities, the term "nervous shock" is often encountered but "[j]udges have in recent years become increasingly restive at the use of this misleading and inaccurate expression" (per Bingham LJ in *Attia v British Gas Plc* [1988] Q.B. 304 at 317).

[5] "[T]he common law has been reluctant to equate psychiatric injury with other forms of personal injury" (per Lord Hoffmann in *Frost v Chief Constable of South Yorkshire Police* [1999] 2 A.C. 455 at 501). Writing in 1971, Prosser observed: "The reluctance of the courts to enter this field even where the mental injury is clearly foreseeable, and the frequent mention of the difficulties of proof, the facility of fraud, and the problem of finding a place to stop and draw the line, suggest that here it is the nature of the interest invaded and the type of damage which is the real obstacle." (William Lloyd Prosser, *Torts*, 4th edn. (West Publishing Company, 1971), p.256).

[6] This article is not concerned with situations where psychiatric injury is a concomitant of physical injury. Policy based arguments have no role in such cases and damages for such psychiatric injury are routinely recoverable. This article is instead concerned with *pure* psychiatric injury (i.e. mental harm which is unaccompanied by physical injury). The Scottish Law Commission has observed that "[s]uch claims generally arise where people are caught up in serious incidents from which they emerge physically unscathed or where close relatives are

> "[T]he public . . . draws a distinction between the neurotic and the cripple, between the man who loses his concentration and the man who loses his leg. It is widely felt that being frightened is less than being struck, that trauma to the mind is less than lesion to the body. Many people would consequently say that the duty to avoid injuring strangers is greater than the duty not to upset them. The law has reflected this distinction as one would expect, not only by refusing damages for grief altogether, but by granting recovery for other psychical harm only late and grudgingly, and then only in very clear cases."[7]

In *Frost v Chief Constable of South Yorkshire Police*[8], however, Lord Steyn asserted[9] that "nowadays we must accept the medical reality that psychiatric harm may be more serious than physical harm"[10] and adverted to four policy considerations which might justify the difference in treatment between the two types of claim. First, not only is there the difficulty of distinguishing between acute grief (which is non-recoverable at common law) and psychiatric harm but there is also greater diagnostic uncertainty in psychiatric injury cases than in physical injury cases. The leading of expert evidence from consultant psychiatrists is costly and time consuming and, if claims for psychiatric injury were to be admitted in the same way as those for physical injury, it would have implications for the administration of justice. Secondly, Lord Steyn was mindful of the effect of opening up claims to those who have witnessed gruesome events, with litigation sometimes acting as an unconscious disincentive to rehabilitation.[11] Thirdly, any relaxation of the rules governing the recovery of damages for psychiatric harm would greatly increase the class of persons who can recover damages in tort or delict. In cases of pure psychiatric harm (i.e. psychiatric harm unaccompanied by physical injury) there is potentially a wide class of claimants/pursuers involved. Fourthly, the imposition of liability for pure psychiatric harm in a wide range of situations may result in a burden of liability which may be disproportionate to the wrongful conduct in question. That conduct might have involved only a momentary lapse of concentration, such as in a motor car accident. The everyday occurrence of serious collisions may

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killed or injured." (Scottish Law Commission, *Report on Damages for Psychiatric Injury* (Scot. Law Com. No.196, 2004), p.1).

[7] Tony Weir, *A Casebook on Tort*, 7th edn (London: Sweet & Maxwell, 1992) p.88.

[8] *Frost* [1999] 2 A.C. 455.

[9] *Frost* [1999] 2 A.C. 455 at 493.

[10] In *Bourhill v Young* 1942 S.C. (H.L.) 78, Lord Macmillan acknowledged (at 87) that "a mental shock may have consequences more serious than those resulting from physical impact."

[11] See, also, *McLoughlin v O'Brian* [1981] Q.B. 599 at 624, where Griffiths LJ voiced his suspicion that "the recovery of health may be seriously delayed by the litigation."

result in gruesome scenes and many claims may arise from those who witness or lend assistance at the scene.

The policy arguments which ring-fence this area of law had been rehearsed some years earlier by Lord Wilberforce in *McLoughlin v O'Brian.*[12] He identified the policy considerations against an extension of liability for nervous shock as follows. First, a proliferation of claims would ensue (including potentially fraudulent ones).[13] Secondly, it would be unfair to defendants to impose damages out of proportion to the negative conduct and this would impose a large additional burden on insurers. Thirdly, an increase in evidentiary difficulties and lengthening of litigation would result. Finally, extending the scope of liability ought only to be done by the legislature after careful research.

Lord Wilberforce, it must be said, did not accept the cogency of all those policy arguments, stating:

> "Fraudulent claims can be contained by the courts, who, also, can cope with evidentiary difficulties. The scarcity of cases which have occurred in the past, and the modest sums recovered, give some indication that fears of a flood of litigation may be exaggerated."

His Lordship continued, however:

> "[T]here 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."[14]

2.DEVELOPMENT OF THE LAW

The issue of negligently inflicted psychiatric injury has been a frequent visitor to the courtrooms of the United Kingdom and the law has witnessed some significant developments over time. An early claim in respect of such injury was rejected by the Privy Council in *Victorian Railways Commissioners v Coultas.*[15] There, a close shave occurred at a level crossing. One of the plaintiffs, a passenger in a buggy, saw a train approaching and thought she was going to be killed. She suffered nervous shock

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[12] *McLoughlin v O'Brian* [1983] 1 A.C. 410 at 421.
[13] See, also, *Currie v Wardrop* 1927 S.C. 538 where the Lord Justice-Clerk (Alness), warned (at 545) that the recognition of claims arising from shock caused by fear for the safety of another, would "open the door to an illimitable multitude of new and unsubstantial claims." His Lordship continued (at 546): "I do not see where this sort of thing is to take end."
[14] *McLoughlin* [1983] 1 A.C. 410 at 421-422.
[15] *Victorian Railways Commissioners v Coultas* (1888) 13 App Cas 222.

as a result. The injury was considered too remote to permit recovery. Delivering the judgment of the Board, Sir Richard Couch stated:[16]

> "Damages arising from mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot under such circumstances…be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gate-keeper."

In *Victorian Railways Commissioners*, the floodgates argument was clearly a central concern of the Board which was reluctant to see "a wide field opened for imaginary claims."[17]

Although Anglo-American jurisdictions, historically, might have been unwilling to afford reparation in cases of psychiatric injury, Scots law appears to have adopted a less hostile approach to such claims[18] as is apparent from a number of Scottish cases at the turn of the nineteenth century.[19] By 1927, Lord Murray, in *Currie v Wardrop*,[20] took it to be "quite settled in law that no valid distinction can be drawn between injury due to bodily harm and injury due to nervous shock."[21] A few years later, in *Cowie v London Midland and Scottish Railway Co*[22] Lord Justice-Clerk Aitchison stated that it was "quite clearly and definitely settled that shock may be a good ground of action, even where the pursuer is unable to aver any outward physical or visible hurt."[23] In 1942, in the leading Scottish case

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[16] *Victorian Railways Commissioners* (1888) 13 App Cas 222 at 225.

[17] *Victorian Railways Commissioners* (1888) 13 App Cas 222 at 226. In more recent times, such judicial scepticism about fabricated claims has been deprecated-see *Dulieu v White & Sons* [1901] 2 K.B. 669 where Kennedy J (at 681) refused to share such "distrust…in the capacity of legal tribunals to get at the truth in this class of claim." See, also, *Owens v Liverpool Corp* [1939] 1 K.B. 394 at 400; *McLoughlin* [1983] 1 A.C. 410 at 421. For further discussion, see Imogen Goold and Catherine Kelly, "Who's afraid of imaginary claims? Common misunderstandings of the origin of the action for pure psychiatric injury in negligence 1888-1943" (2022) 138 L.Q.R. 58.

[18] It must be remembered that liability in negligence in Scotland is treated as a species of *culpa,* whereas, in England, negligence is treated as a distinct tort. Indeed, Reid has observed that "the 'intellectual superstructure' has remained separate and distinct as between the law of delict and the law of torts." (E.C. Reid, *The Law of Delict in Scotland,* (2021), p.25).

[19] See *Cooper v Caledonian Railway Company* (1902) 4 F. 880; *Fowler v North British Railway Company* 1914 S.C. 866: *Gilligan v Robb* 1910 S.C. 856. Analysis based on the concept of remoteness is evident in the early Scottish decisions on nervous shock. The pursuers in both *Cooper* and *Fowler* regarded themselves as being at risk of injury and the shock occasioned was not considered too remote to be recoverable.

[20] *Currie,* 1927 S.C. 538.

[21] *Currie,* 1927 S.C. 538 at 553.

[22] *Cowie v London Midland and Scottish Railway Co* 1934 S.C. 433.

[23] *Cowie,* 1934 S.C. 433 at 437.

of *Bourhill v Young*,[24] Lord Macmillan stated: "The crude view that the law should take cognizance only of physical injury resulting from actual impact has been discarded".[25]

In the years which followed *Victorian Railways Commissioners*, the English courts, too, would permit recovery, in certain circumstances, for pure mental harm. In *Dulieu v White & Sons*[26] the plaintiff was held to have a cause of action in circumstances where she suffered nervous shock as a result of fear for her own safety when a runaway vehicle broke through the front of the public house in which she was working. Fear for the safety of *another person* was said not to sound in damages. This limitation was stated by Kennedy J in the following terms:[27] "The shock, where it operates through the mind, must be a shock which arises from a reasonable fear of immediate personal injury to oneself."
In a later development, however, in *Hambrook v Stokes Bros*,[28] fear for the safety of one's children (when a runaway lorry headed in the direction of where they had been left) was held by the English Court of Appeal to found a right of action.[29] Atkin LJ said it would be "discreditable to any system of jurisprudence"[30] to distinguish between a mother who feared for herself and a mother who feared for her children. In observations which might now be considered prescient, Atkin LJ continued:[31]

> "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. There may well be cases where the sight of suffering will directly and immediately physically shock the most indurate heart; and if the suffering of another be the result of an act wrongful to the spectator, I do not see why the wrongdoer should escape."

Atkin LJ continued:[32]

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[24] *Bourhill,* 1942 S.C. (H.L.) 78.
[25] *Bourhill*, 1942 S.C. (H.L.) 78 at 87.
[26] *Dulieu v White & Sons* [1901] 2 K.B. 669.
[27] *Dulieu* [1901] 2 K.B. 669 at 675.
[28] *Hambrook v Stokes Bros* [1925] 1 K.B. 141.
[29] In a powerful dissent, Sargant, LJ stated that "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" (at 163). !
[30] *Hambrook* [1925] 1 K.B. 141 at 157-158.
[31] *Hambrook* [1925] 1 K.B. 141 at 157-158.
[32] *Hambrook* [1925] 1 K.B. 141 at 158-159.

> "The cause of action…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 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 associations; and why it did not eventually extend to bystanders."

Prior to *Hambrook*, no case in Scotland or England had permitted recovery in respect of shock occasioned through witnessing injury to another.[33] In the later Scottish case of *Currie*,[34] Lord Hunter[35] and Lord Anderson[36] did not express a definite and final opinion as to whether *Hambrook* accorded with Scots law. Lord Justice-Clerk Alness[37] and Lord Ormidale[38] expressed disapproval of *Hambrook.* Lord Murray[39] reserved his opinion as to the scope of the duty of care, and whether it extends to others than the parties immediately concerned, as, for example, to mere spectators, bystanders, whether nearly or more remotely related to the injured party.[40]

In Scotland, the question of liability for nervous shock fell for determination once again in the landmark case of *Bourhill*.[41] The pursuer claimed to have suffered nervous shock having heard (but not seen) an accident which resulted in the death of a motorcyclist on an Edinburgh street. The

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[33] See, for example, *Smith v Johnson & Co* 1897 (unreported); *Campbell v James Henderson Ltd* 1915 1 S.L.T. 419. See, also, the observations of Lord Hunter in *Brown v Glasgow Corporation* 1922 S.C. 527 at 532 to the effect that a shock resulting from the sight of an accident, apart from injury to the pursuer herself, was not a good ground of action.

[34] *Currie,* 1927 S.C. 538.

[35] *Currie,* 1927 S.C. 538 at 550.

[36] *Currie,* 1927 S.C. 538 at 553. Lord Anderson's impression, however, was that *Hambrook* did not accord with Scots law, and that a safer rule was to be found in the English case of *Dulieu* [1901] 2 K.B. 669 and the Scottish case of *Brown,* 1922 S.C. 527.

[37] *Currie,* 1927 S.C. 538 at 545.

[38] *Currie,* 1927 S.C. 538 at 547-548.

[39] *Currie,* 1927 S.C. 538 at 555.

[40] A number of English cases which followed *Hambrook* confirmed that damages could be recovered in certain circumstances for nervous shock occasioned as a result of accidents involving relatives. See *Boardman v Sanderson* [1964] 1 W.L.R. 1317 ; *Hinz v Berry* [1970] 2 Q.B. 40.

[41] *Bourhill,* 1942 S.C. (H.L.) 78.

pursuer had alighted from a tramcar, and was standing on the offside of it, when the accident occurred. She was frightened by the noise of the impact, but had no reasonable fear of immediate bodily injury to herself. She surveyed the accident scene after the dead body had been removed and saw blood on the road. Her action of damages against the motorcyclist's executor failed. The speeding motorcyclist was found to have owed no duty to the pursuer. The pursuer's position, some 45-50 feet away, meant that she was not "so placed"[42] that it was foreseeable that she would suffer injury. Injury to the pursuer could not reasonably and probably have been anticipated. The incidents of duty, namely foreseeability and proximity, were absent. Opinions were reserved upon the question of whether injury through mental shock is actionable only when the shock arises from a reasonable fear of immediate personal bodily injury to the person experiencing the shock. The House of Lords had not yet been called upon to pronounce on the question.

Such an opportunity would arise in *McLoughlin v O'Brian.*[43] There, the plaintiff witnessed the aftermath of a road traffic accident involving her husband and three of her children. The accident occurred outwith the sight and earshot of the plaintiff. Having been advised of the accident, she attended the hospital to which her family members had been taken. This she did some one to two hours after the accident had occurred. At the hospital, she was told that one of her children had died and she saw the survivors who remained covered in oil and mud and were distraught with pain. She claimed to have suffered severe shock, organic depression and a change of personality as a result. She sought damages both from the driver of the lorry with which her family's car had collided and from the lorry driver's employer. The trial judge found for the defendants on the basis that no duty of care was owed to the plaintiff as injury by shock was not reasonably foreseeable. The plaintiff appealed. The Court of Appeal found that it *was* reasonably foreseeable that injury by shock could be caused to a person in the plaintiff's position but dismissed the claim on grounds of public policy. In the Court of Appeal's view, the duty of care could not be extended beyond persons at or near the scene of the accident. On further appeal to the House of Lords, the question for the court was articulated by Lord Wilberforce as being: "whether a person in the position of the appellant, i.e. one who was not present at the scene of grievous injuries to her family but who comes upon those injuries at an interval

[42] *Bourhill,* 1942 S.C. (H.L.) 78 per Lord Russell at 86 and Lord Macmillan at 88 (quoting Lord Jamieson in the Inner House at 1941 S. C. 395 at 429).
[43] *McLoughlin* [1983] 1 A.C. 410.

of time and space, can recover damages for nervous shock."[44] Recovery for nervous shock was permitted by the Appellate Committee, Lord Wilberforce stating:

> "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."[45]

The plaintiff was proximate to the accident in terms of time and space. It was also significant that she was the wife and mother of the immediate victims. In other words, she belonged to a class of persons whose claims should be recognised. As regards communication, Lord Wilberforce stated that the shock must come through sight or hearing of the event or its immediate aftermath, no previous case having compensated shock brought about by communication by a third party. For Lord Wilberforce, the drawing of a line above Mrs McLoughlin's claim "would not appeal to most people's sense of justice."[46] Lord Edmund-Davies stated that it was both natural and probable that the plaintiff would visit her family in hospital as soon as she heard of the accident and that policy should not disentitle her to recover. He was unconvinced that an explosion of shock cases would follow if liability were to be imposed in this case. Lord Russell of Killowen took the view that policy may feature in a judicial decision but was not sufficiently impressed by the floodgates fear to deprive the plaintiff of compensation for the reasonably foreseeable damage done to her. In Lord Scarman's judgment, however, the policy issue as to where to draw the line was not justiciable. In his view, "the court's function is to adjudicate according to principle, leaving policy curtailment to the judgment of Parliament".[47] For Lord Bridge, the *sole* test of liability was the reasonable foreseeability of injury to the plaintiff through nervous shock resulting from the defendants' conceded default. This was a matter to be adjudicated on a case-by-case basis. In his view, public policy ought not to be invoked.[48] For him, the imposition of criteria additional to reasonable foreseeability would be to "impose a largely arbitrary limit of liability".[49] Although their Lordships may have expressed differing opinions in relation

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[44] *McLoughlin* [1983] 1 A.C. 410 at 417-418.
[45] *McLoughlin* [1983] 1 A.C. 410 at 422.
[46] *McLoughlin* [1983] 1 A.C. 410 at 419.
[47] *McLoughlin* [1983] 1 A.C. 410 at 430.
[48] Lord Edmund-Davies could not agree saying that if reasonable foreseeability was the only test of liability the defendant would be hard placed to escape liability. He did however express the view that "any invocation of public policy calls for the closest scrutiny" (*McLoughlin* [1983] 1 A.C. 410 at 426).
[49] *McLoughlin* [1983] 1 A.C. 410 at 442.

to the role of policy in judicial decision-making in this area, they were unanimous in allowing the appeal.

3. THE MODERN APPROACH

The above excursus through the case law illustrates the development and liberalisation of the law in the realm of negligently inflicted psychiatric injury. It remains the case, however, that, for the reasons articulated by Lord Steyn in *Frost*, claims for pure mental harm are tightly controlled. Before outlining the relevant rules as expounded in the more recent case law, it is important to make some preliminary observations.

To recover damages for psychiatric injury, the pursuer must have suffered a recognisable psychiatric condition.[50] Grief or distress alone is insufficient[51] as is a mere fright[52] or irritation and worry.[53] In addition, the psychiatric injury must have been induced by shock, namely "the sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind."[54]

Assuming that a recognised psychiatric condition has been so caused, what then determines whether a duty of care arises in relation to that psychiatric injury? At one time, it was said that "there can be no

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[50] *Page v Smith* [1996] A.C. 155 per Lord Lloyd at 189; *Hinz* [1970] 2 Q.B. 40 per Lord Denning MR at 42. This requirement has been described as "neither legally nor medically supportable"-see Rachael Mulheron, "Rewriting the Requirement for a 'Recognized Psychiatric Injury' in Negligence Claims" (2012) 32 OJLS 77 at 79.

[51] *McLoughlin* [1983] 1 A.C. 410 per Lord Bridge at 431; *Frost* [1999] 2 A.C. 455 per Lord Hoffmann at 501. It has been judicially stated that "[t]his distinction serves to demonstrate how the law cannot compensate for all emotional suffering even if it is acute and truly debilitating" (per Lord Steyn in *Frost* at 491). See, also, *Reilly v Merseyside Regional Health Authority* [1995] 6 Med LR 246.

[52] *Simpson v ICI Ltd* 1983 S.L.T. 631.

[53] *Pridie v Dick* (1857) 19 D 287.

[54] Per Lord Ackner in *Alcock* [1992] 1 A.C. 310 at 401. Lord Ackner observed (at 401) that the law does not permit recovery for "psychiatric illness caused by the accumulation over a period of time of more gradual assaults on the nervous system." His Lordship provided various examples of the latter category (at 400) including that of a parent succumbing to psychiatric injury owing to the wayward behaviour of a child who has suffered brain damage through another's wrongful conduct. In *Young v McVean* 2016 S.C. 135, Lord Brodie described the position (at [26]) as not entirely logical. See, also, the critical observations of Ralph Gibson LJ in *Taylorson v Shieldness Produce Ltd* [1994] P.I.Q.R. P329 at 336. Milligan has described the distinction drawn between a sudden shock and a more elongated process as one "based on legal policy rather than sound psychiatric evidence" (Robert Milligan, "Primary victims, secondary victims, nervous shock and possible reform" (2022) 165 Rep. B. 2 at 4) while Mullany has described the "sudden shock" requirement as "invidious" (Nicholas J. Mullany, "English psychiatric injury law-chronically depressing" (1999) 115 L.Q.R. 30, 34). Both the Law Commission and the Scottish Law Commission have recommended that the sudden shock requirement be abandoned (Law Commission, *Liability for Psychiatric Illness* Law Com No. 249 (1998), paras 1.7 and 5.31; Scottish Law Commission, *Report on Damages for Psychiatric Injury*, para 1.10(i)). The requirement has certainly produced harsh results-see *Sion v Hampstead Health Authority* [1994] 5 Med LR 170 where a father who nursed his dying child and suffered an abnormal grief reaction did not recover. His condition resulted from a gradual process rather than having been occasioned by shock. See, also, *Wood v Miller* 1958 S.L.T. (Notes) 49.

doubt since *Bourhill…*that the test of liability for shock is foreseeability of injury by shock."[55] Lord Bridge and Lord Scarman in *McLoughlin* suggested the test should be one of reasonable foreseeability simpliciter. Such an approach was, however, rejected in the leading modern authority of *Alcock v Chief Constable of South Yorkshire Police.*[56] Following *Alcock,* the test of duty to be adopted will depend on whether the pursuer is a primary or secondary victim. Indeed, Lord Oliver warned that the use of a single generic label, "liability for nervous shock", may be misleading to the extent that it might lead one to conclude (wrongly) that a single common test applies to the duty of care analysis. Lord Oliver continued:[57]

> "Broadly [the cases] divide into two categories…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."

Those in the first category are known as primary victims, whereas those in the second category are known as secondary victims.[58] *Alcock* was the first psychiatric injury case in which the primary/ secondary victim categorisation was expressly articulated.[59]

The first category (primary victims) embraces those who were directly involved in the accident, including those who were directly involved as an actor[60] and those who were personally threatened.[61]

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[55] Per Denning LJ in *King v Phillips* [1953] 1 Q.B. 429 at 441. In the later case of *Page* [1996] A.C. 155, Lord Lloyd would state (at 193) that Denning LJ's dictum was too narrow in relation to primary victims and too wide in relation to secondary victims.

[56] *Alcock* [1992] 1 A.C. 310.

[57] *Alcock* [1992] 1 A.C. 310 at 407.

[58] This categorisation has been described as both a "disastrous dissection" and a "modern mistake" (see Mullany, "English psychiatric injury law-chronically depressing" (1999) 115 L.Q.R. 30, 32). Mullany argues (at 33) that victim status should be irrelevant "[i]f want of due care, actionable damage in the form of a recognised psychiatric disorder and the causal connection between them is established". See, also, Law Commission, *Liability for Psychiatric Illness*, where it is stated (at para 5.54) that "the courts should abandon attaching practical significance, in psychiatric illness cases, to whether the plaintiff may be described as a primary or a secondary victim." See, also, Scottish Law Commission, *Report on Damages for Psychiatric Injury*, para 1.10 (ii).

[59] For example, in *McLoughlin*, the terminology of secondary victim was not applied to the plaintiff although that is undoubtedly how she would be characterised today. The pursuer in *Bourhill* would be similarly characterised.

[60] See *Dooley v Cammell Laird & Co Ltd* [1951] 1 Lloyd's Rep 271, a decision which, Leverick notes, appears to rest on the basis that it was reasonably foreseeable that a person who fears that he has caused injury to his fellow workers might himself suffer psychiatric injury. (Fiona Leverick, "Counting the ways of becoming a primary victim: Anderson v Christian Salvesen Plc" 2007 Edin LR 258). See, also, *Salter v UB Frozen and Chilled Foods Ltd* 2004 S.C. 233; *Anderson v Christian Salvesen Plc* [2006] CSOH 101; 2006 S.L.T. 815.

[61] *Page* [1996] A.C. 155.

It also includes those who have witnessed an accident at close hand and feared for their own physical safety, if that fear was a reasonable one.[62] The question of whether the pursuer did so fear for her own physical safety would become the central question in *Weddle,* as will be discussed below.[63]

In the leading case of *Page v Smith*[64], the plaintiff's car was struck by another vehicle as a result of the defendant's negligence. He sustained no physical injury but alleged that the accident caused a recrudescence of myalgic encephalomyelitis (ME) from which he had suffered in the past. Lord Lloyd described the plaintiff as a participant, saying "[h]e was himself directly involved in the accident, and well within the range of foreseeable physical injury. He was the primary victim."[65] The House of Lords held (Lord Keith and Lord Jauncey dissenting) that, as far as primary victims are concerned, foreseeability of *physical* injury alone is sufficient to allow recovery in respect of psychiatric injury.[66] One need not explore whether the wrongdoer should reasonably have foreseen injury by shock.[67] In addition, it is irrelevant that the victim suffers no tangible physical injury.[68]

The category of secondary victims would clearly embrace the pursuer in *Bourhill* (although she was not expressly categorised in that manner at the time). She had no reasonable fear of immediate bodily injury to herself and failed to recover damages for nervous shock. Lord Porter stated:[69]

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[62] See *Dulieu* [1901] 2 K.B. 669; *Wallace v Kennedy* (1908) 16 SLT 485 per Lord Johnston at 486; *Currie,* 1927 S.C. 538; *Campbell,* 2000 S.C.L.R. 373 per Lord Reed at 381.

[63] That question had also arisen in *McFarlane v EE Caledonia Ltd* [1994] PIQR P154 where it was answered in the negative by the Court of Appeal. The plaintiff had been aboard a support vessel which went to assist following a fire on the Piper Alpha Oil Rig. The support vessel was never in actual danger. The plaintiff was at no time closer than 100 metres from the platform and did not seek the refuge which was available to him.

[64] *Page* [1996] A.C. 155.

[65] *Page* [1996] A.C. 155 at 184.

[66] It has been judicially stated that "determining the range of foreseeable physical injury may not always be as straightforward as it was in [*Page*]" (per Lord Reed in *Campbell v North Lanarkshire Council* 2000 S.C.L.R. 373 at 380).

[67] In *Frost* [1999] 2 A.C. 455, Lord Goff, in his dissenting opinion (at 473), described the decision in *Page* as constituting "a remarkable departure" from previously accepted principles and one in which "Lord Lloyd dethroned foreseeability of psychiatric injury from its central position as the unifying feature of this branch of the law" (at 474).

[68] *Page* was applied by the Court of Appeal in *Donachie v Chief Constable of Greater Manchester Police* [2004] EWCA Civ 405. It was also accepted as part of Scots law in *Simmons v British Steel plc* [2004] UKHL 20; 2004 S.C. (H.L.) 94 -see [21], [53] and [67]. *Page* has, however, attracted sustained criticism-see, for example, Stephen Bailey and Donal Nolan, "The Page v Smith saga: a tale of inauspicious origins and unintended consequences" (2010) 69 C.L.J. 495 where *Page* is described (at 512) as having "made the law both more complex and more irrational".

[69] *Bourhill*, 1942 S.C. (H.L.) 78 at 98.

> "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."

The plaintiff in *McLoughlin* would similarly fall within the secondary victim category. Unlike Mrs Bourhill, however, the plaintiff in *McLoughlin* was allowed to recover in respect of psychiatric injury because she satisfied three conditions. She belonged to the class of persons whose claims should be recognised (wife and mother of the primary victims), she had the requisite proximity to the accident in terms of time and space and the shock came through her own sight of the immediate aftermath of the accident.[70]

The "control mechanisms"[71] to be applied to the claims of secondary victims were further explored by the House of Lords in *Alcock v Chief Constable of South Yorkshire Police.*[72] The case resulted from the tragic crushing incident at the Hillsborough football stadium which was caused when the defendant allowed overcrowding to occur at a football match. The crush resulted in the death of 97 people[73] and injury to more than 400 others. The plaintiffs in *Alcock* were not themselves directly involved in the crush. Some of them witnessed the events from elsewhere in the stadium, while others saw the events live on television or heard of the events from third parties. The plaintiffs, who had various relationships to those in the area of the crush, claimed to have suffered psychiatric injury as a result of what they had seen or heard. Accordingly, the plaintiffs were attempting to recover as secondary victims. The claims of the ten plaintiffs whose cases proceeded to the Appellate

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[70] In permitting this extension to the scope of liability, Lord Bridge stated that the floodgates argument had been "greatly exaggerated" (*McLoughlin* [1983] 1 A.C. 410 at 442) and (at 443) that "we should resist the temptation to try…to freeze the law in a rigid posture which would deny justice to some who…ought to succeed." Lord Wilberforce observed that the courts had developed the law upon a basis of logical necessity and, for him, to allow this claim was "upon the margin of what the process of logical progression would allow" (at 419).

[71] This phrase was coined by Lord Lloyd in *Page* [1996] A.C. 155 at 189.

[72] *Alcock* [1992] 1 A.C. 310. *Alcock* has been described as both "the controlling decision" in this area (per Lord Steyn in *Frost* [1999] 2 A.C. 455 at 496) and as "the codifying event for secondary victim claims" (Richard Baker, "Secondary victims: accidents and clinical negligence" (2020) 1 J.P.I. Law 1, 2).

[73] See David Conn and Robyn Vinter, "Liverpool fan's death ruled as 97th of Hillsborough disaster" (*The Guardian*, 28 July 2021), available at https://www.theguardian.com/football/2021/jul/28/liverpool-fans-death-ruled-as-97th-victim-of-hillsborough-disaster (last accessed 29 September 2022).

Committee were rejected. The House of Lords' approach reflected what was subsequently referred to as "a cautious pragmatism".[74] Their Lordships held that, as far as secondary victims are concerned, it had to be reasonably foreseeable that the plaintiff would suffer *psychiatric* injury. There must be a close tie of love and affection between the plaintiff and the person killed, injured or imperilled.[75] Such a tie would be assumed in spousal and parent/child relationships, but would require proof in other cases.[76] Moreover, two additional factors for proximity required to be satisfied[77] — (1) proximity in terms of time and space and (2) direct perception (i.e. sight or hearing) of the event or its immediate aftermath[78] (rather than hearing about it from a third party).[79] Lord Oliver stated:[80]

> "I cannot…regard the present state of the law as either entirely satisfactory or as logically defensible…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." [81]

The distinction between primary and secondary victims would become a central issue in *Frost*, another case which arose as a result of the Hillsborough disaster. Members of the South Yorkshire

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[74] Per Lord Hoffmann in *Frost* [1999] 2 A.C. 455 at 502.

[75] Some of their Lordships did not rule out a claim for psychiatric injury by a strong nerved bystander if the circumstances were particularly horrific. (See *Alcock*, [1992] 1 A.C. 310, per Lord Keith at 397, Lord Ackner at 403 and Lord Oliver at 416).

[76] This requirement has been criticised as "guaranteed to produce outrage"- see Jane Stapleton "In Restraint of Tort" in Peter Birks (ed), *The Frontiers of Liability* (Oxford: Oxford University Press, 1994), p.95. The author further observed (at p.95): "Is it not a disreputable sight to see brothers of Hillsborough victims turned away because they had *no more* than brotherly love towards the victim? In future cases will it not be a grotesque sight to see relatives scrabbling to prove their especial love for the deceased in order to win money damages and for the defendant to have to attack that argument?"

[77] Lord Oliver stated (at 411) 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".

[78] Mullany argues that "[i]t is repugnant to continue to evaluate actions for this type of personal injury based on the exact location of the claimant at the time of the relevant "event"…and the means by which knowledge of the trauma is acquired." (see Mullany, "English psychiatric injury law-chronically depressing" (1999) 115 L.Q.R. 30, 33).

[79] The Scottish Law Commission has observed: "The second and third *Alcock* criteria (presence at the incident or its immediate aftermath and perception of it with own unaided senses) are difficult to justify except as a blunt way of restricting liability." (Scottish Law Commission, *Report on Damages for Psychiatric Injury*, para 2.24).

[80] *Alcock* [1992] 1 A.C. 310 at 418.

[81] For application of the *Alcock* criteria, see *McFarlane* [1994] P.I.Q.R. P154 (a bystander who witnessed the Piper Alpha disaster from a support vessel failed to recover); *Robertson v Forth Road Bridge Joint Board* 1995 S.C 364 (two men who witnessed the death of a fellow employee did not recover as secondary victims owing to their failure to establish a close tie of love and affection with the deceased (their argument that they were participants in the event (and hence primary victims) having been rejected); *Young v MacVean* 2016 S.C. 135 (action by mother of deceased son failed where shock was not sustained as a result of what she had perceived with her own senses). In none of these cases were the *Alcock* criteria satisfied.

Police Force who were on duty at the football stadium and who became involved in the dreadful aftermath of the crush sought damages in respect of psychiatric injury. Their activities included carrying the dead and dying, attempting (unsuccessfully) to resuscitate the injured and assisting at the hospital mortuary. Their Lordships held that rescuers who had not been exposed to the risk of physical injury or who did not reasonably believe themselves to have been so exposed were to be classed as secondary victims. In order to recover damages for pure psychiatric injury, they were required (along with spectators and bystanders) to satisfy the additional control mechanisms.

Lord Hoffmann stated:[82]

> "No one can pretend that the existing law, which your Lordships have to accept, is founded upon principle…Consequently your Lordships are now engaged, not in the bold development of principle, but in a practical attempt, under adverse conditions, to preserve the general perception of the law as system of rules which is fair between one citizen and another."

In Lord Hoffmann's view, fairness ultimately demanded that the policemen's claims should be rejected.

A few years after *Frost,* an eye witness to a fatal road accident failed to recover in respect of psychiatric injury in the English case of *Fagan v Goodman*.[83] The accident was caused by the defendant pulling out into the path of an overtaking police motorcyclist. The motorcyclist collided with the central barrier, became separated from his motorcycle and slid along the road for some 100 yards. He was killed. The claimant, who was travelling some 5 cars' length behind the defendant at the time of the incident, pulled off the road and returned to the scene to offer assistance. She subsequently sought damages for post-traumatic stress disorder. Turner J observed that the claimant could only recover if she was a primary victim. She was not, however, a participant in the incident. She was merely a witness to it. The claimant was categorised as a secondary victim. She failed to recover. Turner J stated: "The result for the claimant would have been otherwise if she had been forced to take emergency action to avoid the results of the defendant's negligence." [84]

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[82] *Frost* [1999] 2 A.C. 455 at 511.
[83] *Fagan v Goodman* [2001] 11 WLUK 829.
[84] *Fagan* [2001] 11 WLUK 829 at [26].

Although *Fagan* was not discussed in *Weddle*, it will be seen from the discussion which follows that it does bear some similarity to the Scottish case. In both cases, recovery was denied on the basis of "victim status" to individuals who had suffered psychiatric sequelae following their witnessing of gruesome scenes on or around the highway. Significantly, both Ms Fagan and Ms Weddle were unrelated to the immediate victims of the incidents. In that respect, their circumstances clearly differed from those of the plaintiff in *McLoughlin* who was the wife and mother of the immediate victims of the road traffic accident.

4.WEDDLE v GLASGOW CITY COUNCIL

Having set out the law in relation to recovery for pure psychiatric injury, attention is now turned to the case of *Weddle v Glasgow City Council*.[85]

(a)The facts

On 22 December 2014, the pursuer, Danielle Weddle, was standing on the pavement at a junction in Glasgow city centre, when she witnessed the final stages of the notorious Glasgow bin lorry accident. She later saw the shocking effects of the multiple fatality incident and developed severe psychiatric consequences. She raised an action of damages in the All-Scotland Sheriff Personal Injury Court against Glasgow City Council, the employer of the driver of the bin lorry. The driver had fallen unconscious at the wheel of the lorry and had lost control of it. The lorry had mounted a pavement in Queen Street before striking a number of pedestrians and street furniture. It then collided with three vehicles at the junction of George Square and West George Street. The lorry proceeded (now travelling at 5 mph) to cross the junction in a diagonal north-eastwards direction, while pushing one of those vehicles, a private hire taxi, and striking and coming to a halt against the Millennium Hotel on the north side of George Square.

The pursuer was standing at the pedestrian crossing on the north side of the junction waiting for the lights to change. She was composing a text message on her mobile phone. She saw the last part of the accident, namely the bin lorry and taxi traversing the junction and the collision with the hotel. The direction of travel of the vehicles - north-easterly on the part of the bin lorry and northwards on the part of the taxi - meant that neither vehicle came straight towards her at any point. The resting position of

[85] *Weddle v Glasgow City Council* 2021 S.L.T. (Sh Ct) 277.

the taxi (which was the closer of the two vehicles to the pursuer) was 12 metres to her left and east. She was not at actual risk of physical harm where she was positioned at the pedestrian crossing.

The pursuer waited where she was for a few moments before continuing on her way. Her route took her past distressing scenes, including dead bodies. She spoke to her parents on the telephone and was persuaded to visit a pharmacy which she did. She was distraught. The pharmacy assistant arranged for her to be seen by a doctor and she was given diazepam. She was subsequently diagnosed as suffering from post-traumatic stress disorder (PTSD). During her counselling, she gave no indication that she had feared for her own safety at the time of the accident. Shortly before the initial writ was warranted, the pursuer was seen by Dr Fraser Morrison, a consultant clinical psychologist, and she did not mention seeing vehicles coming towards her or being in fear for her own safety. However, when she saw Dr Morrison again (shortly before the proof in the action) she told him that, when she had later considered the accident, she recalled being worried that one of the vehicles would strike her and she would be either seriously injured or killed.

(b)The decision at first instance[86]

It will be remembered that, in *Alcock,* Lord Oliver stated that claims in respect of psychiatric injury could be categorised as either those of primary victims or secondary victims. Broadly speaking, a primary victim is involved as a participant in the relevant event whereas a secondary victim witnesses injury caused to others. Secondary victims are only entitled to recover damages upon satisfaction of the *Alcock* criteria. The pursuer in *Weddle* did not seek to advance any claim to the effect that she ought to recover as a secondary victim. Rather, she accepted that she could only succeed if she qualified as a primary victim, that is, if she proved that she feared personal injury to herself during the accident and that fear was a reasonable one.[87]

Following proof in the All-Scotland Sheriff Personal Injury Court, Sheriff Kenneth J McGowan stated:[88]

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[86] *Weddle v Glasgow City Council* 2019 S.L.T. (Sh Ct) 206.
[87] If the pursuer could be categorised as a primary victim, the *Alcock* criteria would have no application. See *Page* [1996] A.C. 155, where Lord Lloyd stated (at 189): "None of [the *Alcock* control] mechanisms are required in the case of a primary victim. Since liability depends on foreseeability of physical injury, there could be no question of the defendant finding himself liable to all the world."
[88] *Weddle* 2019 S.L.T. (Sh Ct) 206 at [297].

> "[A] combination of the CCTV footage and the terms of the agreed police report taken along with the pursuer's evidence about distances demonstrates that the pursuer is in error in suggesting that either the bin lorry or the silver taxi was coming towards her or ever placed her in physical danger."

The sheriff went on to emphasise the scope of the duty, stating that "[t]he duty is owed to somebody who was placed in danger, or reasonably believed themselves to be so."[89] The sheriff observed that the pursuer was not at risk of physical injury. He stated:[90]

> "[N]either the bin lorry nor the silver taxi were moving fast. They were not heading towards [the pursuer]: if anything, their trajectory was away from her. They did not come very close to her. On no view could this be regarded as a 'near miss'."

As to whether the pursuer *reasonably believed* that she was at risk of physical injury at the relevant time, Sheriff McGowan stated:[91]

> "Neither the bin lorry nor the car was ever heading straight towards her. They did not come particularly close to her. The initial collision took place over 30 metres away (at least) from her. Thereafter, both vehicles were moving relatively slowly and came to rest at least 12 metres away from her. There was no explosion, fire or other such risk... What she was aware of at that stage was of relatively small scale... It was a road accident involving a collision between two vehicles. At that stage, she did not see — and in my view was net yet aware of — any pedestrians being injured or worse. She saw people get out of the car, assumed they were okay and she left the vicinity. In my opinion, assuming that she did believe that she was in danger, I am not persuaded that that was a reasonable belief."

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Sheriff McGowan concluded:[92]

> "I am satisfied that the pursuer did suffer PTSD — this was not in dispute. However, I am not satisfied that she was in fear of physical injury at the relevant time. If she did suffer fear at

[89] *Weddle,* 2019 S.L.T. (Sh Ct) 206 at [301].
[90] *Weddle,* 2019 S.L.T. (Sh Ct) 206 at [317].
[91] *Weddle,* 2019 S.L.T. (Sh Ct) 206 at [333].
[92] *Weddle,* 2019 S.L.T. (Sh Ct) 206 at [349].

some stage, that was attributable to the horror of the aftermath of the incident and not to the terror of the accident involving the bin lorry and the silver taxi."

He continued:[93]

"[T]he defender's employee would not have reasonably foreseen that his driving at the relevant time would have given rise to the risk of physical injury to the pursuer; and in any event…the pursuer did not in fact suffer fear of physical injury to herself at the relevant time."

Accordingly, the sheriff concluded that the pursuer was not a primary victim and could not recover damages for psychiatric injury. He granted decree of absolvitor. The pursuer appealed.

(c)The decision on appeal[94]

The appeal was heard by Sheriff Principal Stephen and Appeal Sheriffs Murphy and McFadyen. In handing down the judgment of the Sheriff Appeal Court, Sheriff McFadyen noted that "in the absence of some other identifiable error…an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."[95]

In her appeal to the Sheriff Appeal Court, the appellant challenged various findings of fact made by the sheriff on the basis that they could not reasonably be explained or justified by the evidence.

The appellant made the following submissions: the sheriff did not have full regard to her evidence as to what she saw and heard and her account of fear and terror; he had failed to treat her conversations with her father as supporting her account of fear for her own safety; his findings did not record the full significance of the pharmacy assistant's evidence as to her fear for her own safety; he wrongly held that her father and the pharmacy assistant were not able to distinguish fear from other emotional reactions; he was wrong to hold that the appellant's first account to Dr Morrison fitted better with other evidence; he had placed undue reliance on the CCTV footage which did not show matters clearly.

The appellant also submitted that the sheriff had applied too high a test to the question of reasonable belief. The accident was a significant one. The appellant was within the proximity of two vehicles (one an HGV) both travelling at speed and out of control towards where she stood. The appellant genuinely

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[93] *Weddle,* 2019 S.L.T. (Sh Ct) 206 at [377].
[94] *Weddle,* 2021 S.L.T. (Sh Ct) 277.
[95] *Henderson* v *Foxworth Investments Ltd* 2014 SC (UKSC) 219 per Lord Reed at [67].

believed herself to be at risk of physical injury. She did not exhibit a physical response because she was in fear and, in any event, the CCTV image was from behind. The sheriff had failed to apply his mind to what reasonable belief means. The issue was whether the appellant's conclusion was reasonable or irrational. Had the sheriff approached the evidence correctly and applied the correct test by considering the question of reasonable belief from the appellant's perspective, he should have found the appellant's case to be established. He erred in holding that the appellant did not suffer fear of physical injury. The evidence indicated that the appellant was a primary victim. She fell within the range of foreseeable physical injury and was owed a duty of care. The findings of the sheriff were plainly wrong. He had reached a decision which no reasonable judge could have reached.

The respondents, on the other hand, argued that the appellant had failed to meet the test to allow an appellate court to interfere with the sheriff's findings. Those findings were supported by the CCTV evidence and police plans. It was clear that the appellant was not in a position of danger. It had been held in *Campbell v North Lanarkshire Council*[96] that the psychiatric injury must arise from a reasonable fear for one's own safety. Reasonableness required to be objectively justified.

The Sheriff Appeal Court refused the appeal. Giving the court's decision, Appeal Sheriff McFadyen stated:[97]

> "[A] major problem for the appellant at proof was that the CCTV recording appeared to show her still absorbed with her telephone as the bin lorry entered the junction, turning her head towards the area of the ongoing accident at a stage where it appeared she was at no immediate risk, turning her head back to her phone, and then immediately back towards the vehicles; and even after the lorry and taxi came to a halt she did not show any physical reaction to what had happened. [The sheriff] did not accept, on the basis of the CCTV footage, that the appellant showed any awareness of what was happening until the bin lorry collided with the Skoda taxi."

Appeal Sheriff McFadyen observed that the bin lorry's GPS recorded a speed of five mph at the junction. It was proceeding relatively slowly when it traversed the junction, pushing the taxi until it struck the hotel. Five mph was not "very fast", the description ascribed to the speed in the appellant's evidence.

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[96] *Campbell,* 2000 S.C.L.R. 373 at 376.
[97] *Weddle,* 2021 S.L.T. (Sh Ct) 277at [53].

Rather, it was a brisk walking pace. Appeal Sheriff McFadyen stated:[98]

> "The appellant argued that the sheriff had not given sufficient weight to or had misinterpreted the evidence of the appellant. Much of this submission was directed to her evidence that she thought at the time that the vehicles were heading towards her out of control…the sheriff has acknowledged that that was her clear position in evidence; but it is at odds with the real evidence, including the evidence of the direction of the comparatively slowly travelling vehicles (the bin lorry and the Skoda taxi) and the evidence of the appellant's reactions and behaviour as we have just described. While terrible things had happened in Queen Street and the west side of George Square - and she came to see the aftermath of these things - the appellant did not witness them happening."

The Sheriff Appeal Court acknowledged the appellant's distress after viewing the aftermath of the incident but observed that the question was when that distress arose and what caused it. In that respect her father's evidence did not assist her. Similarly, it was "scarcely surprising that the sheriff did not find [the pharmacy assistant's] evidence to be of assistance in addressing what it was had caused the appellant's state of distress".[99] In June 2018, the appellant had been seen by Dr Jacqueline Scott, a consultant psychiatrist. The appellant had conceded in cross examination that the record of her conversation with Dr Scott contained no suggestion that she was terrified that she was going to be struck. Accordingly, the sheriff had been entitled to find that the appellant did not tell Dr Scott that she had been in fear for her own safety.

The Sheriff Appeal Court then alighted on the matter of the differing accounts which the appellant had given to Dr Morrison. Dr Morrison had proffered an explanation for the appellant's failure to disclose her fear for her own safety at the first assessment, namely that she had suppressed details owing to survivor's guilt. Appeal Sheriff McFadyen noted that the sheriff had to take account of that explanation but continued:[100]

> "[I]t was not binding on [the sheriff], especially where there was, on the evidence, a distinct

[98] *Weddle,* 2021 S.L.T. (Sh Ct) 277 at [56].
[99] *Weddle,* 2021 S.L.T. (Sh Ct) 277 at [64].
[100] *Weddle,* 2021 S.L.T. (Sh Ct) 277 at [73].

alternative explanation - that the appellant was not in fact at any time in fear that she was going to be hit by a vehicle. That alternative explanation is supported by the real evidence, which negates this "new" account by the appellant - and, inconveniently for her, is entirely consistent with and essentially corroborative of her earlier and highly detailed account given to Dr Morrison."

Appeal Sheriff McFadyen continued:[101]

> "An expert witness's explanation as to why a witness may say or have said something may in certain circumstances be very compelling - but it is not so when it is contradicted by the real evidence in the case, as was recognised by the sheriff in his careful consideration of the matter… That contradictory evidence…presents an insuperable difficulty for the appellant in maintaining that the facts and her reaction to them were other than as were demonstrated by that evidence."

Appeal Sheriff McFadyen continued:[102]

> "We cannot find that the sheriff was…in error in finding that the appellant did not in fact suffer fear of physical injury to herself at the relevant time, which in this case was the time up to that when the vehicles same to a halt. Given the compelling real evidence we cannot see how the sheriff could have come to any other conclusion."

Appeal Sheriff McFadyen stated that if the court was wrong in that regard, and the pursuer did fear for her own safety, such fear could not be regarded as reasonable in view of the direction and slow speed of travel of the two vehicles. The sheriff's conclusion was not inconsistent with the line of authority to which the appellant had made reference, namely *Campbell*, *Dulieu* and *Bourhill*. In *Campbell*, Lord Reed had said:[103]

> "[O]ne has to identify the range of foreseeable physical injury. This includes not only situations in which the pursuer was in fact objectively exposed to danger, but also situations in which he could reasonably believe that he was exposed to danger…If the pursuer was within that range,

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[101] *Weddle,* 2021 S.L.T. (Sh Ct) 277 at [74].
[102] *Weddle,* 2021 S.L.T. (Sh Ct) 277 at [79].
[103] *Campbell,* 2000 S.C.L.R. 373 at 381.

then he can recover for psychiatric injury. If he was not within that range, then he can recover for psychiatric injury only if he meets the *Alcock* requirements."

In *McFarlane,* Stuart-Smith LJ had made reference to a situation where the plaintiff is not actually in danger but, owing to the sudden and unexpected nature of the event, reasonably thinks that he is. In *Dulieu,* the barmaid was not in fact in danger of physical injury but reasonably feared for her own safety. Stuart-Smith LJ thought that a person who, in the agony of the moment, reasonably believes herself to be in danger plainly ought to be in the contemplation of a defendant who negligently allows his vehicle to run out of control. In *Weddle*, Appeal Sheriff McFadyen stated that an allowance has to be made for the agony of the moment and that the factfinder must not take too narrow a view as to when a pursuer can be said to have reasonably thought she was in danger. The court could find no indication however that the sheriff had taken an excessively narrow view or had applied the wrong test.

Appeal Sheriff McFadyen stated:[104]

> "It was for the appellant to demonstrate that any fear was reasonable and the sheriff has…explained…why he concluded that she did not have such a reasonable belief…Among other factors justifying his decision he has correctly noted that neither vehicle was ever heading straight towards her, the vehicles did not come particularly close to her, the initial collision took place over 30m at least away from her and the vehicles thereafter were moving relatively slowly and came to rest at least 12m away from her. These factors, in our opinion, clearly demonstrated that the appellant had failed to establish that any belief that she did have was a reasonable one."

He concluded:[105]

> "We have no doubt that the appellant has suffered significant psychological and psychiatric injury in consequence of the terrible things she saw that day, but we cannot conclude that the sheriff was in error in finding that such injury was not in any way referable to a fear of personal injury to her reasonably held by her at the time of the accident."

Given that the Sheriff Appeal Court refused to interfere with the findings of fact made by the sheriff, the Sheriff Appeal Court's conclusion that Ms Weddle did not satisfy the definition of a primary victim

[104] *Weddle,* 2021 S.L.T. (Sh Ct) 277 at [83].
[105] *Weddle,* 2021 S.L.T. (Sh Ct) 277 at [84].

appears unassailable. Like the claimant in *Fagan*, she witnessed grisly scenes as a result of a fatal road traffic incident but was not herself in physical danger. Neither litigant was in the same category as *Page.*

5. AN ALTERNATIVE APPROACH?

Ms Weddle failed to satisfy the courts that she was a primary victim.[106] She was not at actual risk of physical harm while she was standing at the pedestrian crossing, nor did she fear for her own safety at the relevant time. Had she feared for her own safety, such a fear would not have been a reasonable one.

Might she have had any better chance of recovery as a secondary victim?[107] Ms Weddle's legal advisers chose not to advance such a claim, presumably taking the view that it would be futile to do so.[108] To recover as a secondary victim, one must, of course, satisfy the stringent *Alcock* control mechanisms. As well as reasonable foreseeability of *psychiatric* injury, one must have a close tie of love and affection with the primary victim. In addition, there must be proximity to the accident in terms of time and space and direct visual or aural perception of the event or its immediate aftermath.[109]

It is suggested that Ms Weddle would have encountered little difficulty in satisfying the "time and space" and "direct perception" criteria. She was clearly close to the accident in terms of time and space having witnessed its immediate aftermath. Actual sight of the mowing down of pedestrians would not have been required –it would be sufficient, in view of the decision in *McLoughlin*, for Ms Weddle to witness the immediate aftermath. Although there is no definitive guidance as to what constitutes the "immediate" aftermath, the requirement would almost certainly have been met in *Weddle* given that the time lapse until sight of the casualties was of shorter duration than was the case in *McLoughlin*. Lord Wilberforce's speech in *McLoughlin*[110] suggests that the immediate

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[106] This is not the first failed attempt to characterise a claimant or pursuer as a primary victim. Similar outcomes resulted in *McFarlane* [1994] P.I.Q.R. P154 (where the personal jeopardy argument failed) and *Robertson,* 1995 S.C 364, (where the active participant argument failed).

[107] Goodhart has stated that "the area of risk of physical injury may extend to only X yards, while the area of risk of emotional injury may extend to Y yards." (A.L. Goodhart, "The Shock Cases and Area of Risk" (1953) 16 M.L.R. 14, 16).

[108] That decision was not questioned by the Sheriff Appeal Court itself – see *Weddle,* 2021 S.L.T. (Sh Ct) 277 at [4].

[109] These requirements are, of course, additional to those of sudden shock and a recognised psychiatric condition.

[110] *McLoughlin* [1983] 1 A.C. 410 at 418.

aftermath is determined not only by the period of time which has elapsed but also by the condition of the casualties. The casualties in *Weddle* (like those in *McLoughlin*) had not been attended to.

As far as the "direct perception" criterion is concerned, Ms Weddle witnessed the scene of carnage with her own unaided senses. The means of communication was direct. The events were not something which Ms Weddle saw on television or heard about from a third party.

The main stumbling block for Ms Weddle would, certainly at first sight, appear to be the class of persons to which she belonged. She did not appear to have any tie of love and affection to the immediate victims of the bin lorry tragedy. She would appear to fall into the category of the "unrelated bystander who merely witnesses the carnage" (to borrow the words of Haines J in *Marshall* v *Lionel Enterprises Inc*.[111]) Would that necessarily have excluded her claim however?

An appropriate starting point for discussion is the dictum of Lord Porter in *Bourhill*[112] to the effect that a vehicle driver is entitled to assume that the "ordinary frequenter of the streets"' (i.e. a bystander) has "sufficient fortitude" to withstand road accidents "including the noise of a collision and the sight of injury to others" and is not negligent towards persons who do not "possess the customary phlegm". That dictum suggests that it is not foreseeable that a mere bystander would suffer shock as a result of accidents on the street. Some decades later, in *McLoughlin*, Lord Wilberforce asserted 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."[113]

These dicta from *Bourhill* and *McLoughlin* led Lord Jauncey, in *Alcock,* to assert that "the suggested inclusion of the bystander has not met with approval in this House."[114] It was not, of course, necessary in *Alcock*, (as Lord Jauncey acknowledged[115]) to determine the position of the ordinary bystander. Yet there are dicta in some of the speeches in *Alcock* which would lend support to the claim of an ordinary bystander in certain circumstances. Thus, Lord Ackner stated:[116]

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[111] *Marshall* v *Lionel Enterprises Inc* [1972] 2 OR 177 at [33].
[112] *Bourhill,* 1942 S.C. (H.L.) 78 at 98.
[113] *McLoughlin* [1983] 1 A.C. 410 at 422.
[114] *Alcock* [1992] 1 A.C. 310 at 421.
[115] *Alcock* [1992] 1 A.C. 310 at 422.
[116] *Alcock* [1992] 1 A.C. 310 at 403.

> "I respectfully share the difficulty expressed by Atkin LJ in *Hambrook v Stokes Brothers (1925) 1 KB 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."

Lord Ackner was therefore prepared to countenance a claim for psychiatric injury by a "reasonably strong-nerved" passer-by in certain circumstances. Lord Oliver was of a similar view, stating:[117]

> "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."

Lord Keith said:[118]

> "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."

[117] *Alcock* [1992] 1 A.C. 310 at 416.
[118] *Alcock* [1992] 1 A.C. 310 at 397.

Although Cameron has stated that this is "doubtful"[119] and the Law Commission has stated that the position of the bystander is "not certain",[120] nonetheless it is suggested that a potential lifeline was extended to bystanders in *Alcock*. A secondary victim claim might have presented an alternative route for recovery for Ms Weddle given that the court would ultimately reject the primary victim analysis. Had a secondary victim claim been advanced, it is interesting to speculate as to whether the court would have considered the circumstances to be "particularly horrific" or "of such horror as would be likely to traumatise even the most phlegmatic spectator" (to borrow the words of Lord Keith and Lord Oliver respectively). It is notable that the circumstances which confronted the pursuer in *Weddle* included the sight of dead bodies and spilled intestines. The pursuer could have argued that the "most phlegmatic"'[121] and "reasonably strong-nerved"[122] person would be traumatised by such a grisly scene. Although the sheriff and Sheriff Appeal Court in *Weddle* were not required to consider this point, it is notable that Sheriff McGowan made reference to the "horror of the aftermath of the incident"[123] while, in the Sheriff Appeal Court, Appeal Sheriff McFadyen expressed no doubt that Ms Weddle had suffered psychiatric injury as a consequence of the "terrible things" she saw that day.[124]

How might the defenders have responded to such a claim, had it been advanced? The terminology "particularly horrific" is, of course, not devoid of difficulty.[125] The defenders might well have argued that the circumstances were not sufficiently horrific to afford redress to the pursuer and that she ought to have had sufficient fortitude to withstand the sight of the aftermath of the accident.[126] The defenders would doubtless have argued that it was not reasonably foreseeable that a mere bystander would succumb to psychiatric illness in this situation and that the possession of "reasonable phlegm" should have prevented such an outcome. As far as secondary victims are concerned, it must be

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[119] Gordon Cameron, *Thomson's Delictual Liability* (Haywards Heath: Bloomsbury, 6th edn, 2021) p.90. Cameron cites *Robertson* 1995 S.C 364 and *McFarlane* [1994] P.I.Q.R. P154 in support of his position, stating (at p.90) "what could have been more horrific than the accidents in *Robertson* and *McFarlane*?"

[120] Law Commission, *Liability for Psychiatric Illness*, paras 2.45 and 7.11.

[121] *Alcock* [1992] 1 A.C. 310 per Lord Oliver at 416.

[122] *Alcock* [1992] 1 A.C. 310 per Lord Ackner at 403.

[123] *Weddle,* 2019 S.L.T. (Sh Ct) 206 at [349].

[124] *Weddle,* 2021 S.L.T. (Sh Ct) 277 at [84]. Reference to the pursuer seeing the aftermath of the "terrible things" that happened that day was also made at [56].

[125] The Law Commission, for example, has noted that 'the definition of "particularly horrific" would be problematic.' ⁅Law Commission, *Liability for Psychiatric Illness*, para 7.12).

[126] The expectation of ordinary fortitude (which finds its origin in *Bourhill*) applies only to secondary victims. It does not apply to primary victims-see *Page* [1996] A.C. 155. The Scottish Law Commission has noted that the concept of ordinary fortitude is "a legal construct that is difficult to evaluate" (Scottish Law Commission, *Report on Damages for Psychiatric Injury*, para 1.5).

remembered that, in determining whether the psychiatric injury is foreseeable, no account is taken of the unusual susceptibility of the victim.

No doubt the defenders would have prayed in aid *McFarlane v EE Caledonia Ltd*[127] and *Robertson v Forth Road Bridge Joint Board*[128] which some commentators have stated "virtually ruled out recovery".[129] In *McFarlane*, the plaintiff witnessed the holocaust on the Piper Alpha oil rig from a support vessel. He sought damages for psychiatric injury but his claim was rejected. It was held not to have been reasonably foreseeable that the plaintiff would suffer psychiatric harm nor could it be shown that a man of ordinary fortitude in a similar position would have been so affected. Stuart–Smith LJ (with whom McCowan LJ and Ralph Gibson LJ agreed) stated:[130]

> "[B]oth as a matter of principle and policy, the Court should not extend the duty to those who are mere bystanders or witnesses of horrific events unless there is a sufficient degree of proximity, which requires both nearness in time and place and a close relationship of love and affection between plaintiff and victim."

The Court of Appeal also took the view that "great practical problems" would arise in deciding which accidents were sufficiently horrific, since "reactions to horrific events are entirely subjective".[131]
In the later Scottish case of *Robertson*, recovery was denied to two workers who witnessed a colleague, Smith, being blown from the back of a van over a bridge to his death. The pursuers failed to establish a close tie of love and affection with the deceased. It was held that a bystander who was a fellow employee was in no different position from any other bystander. He must therefore be assumed to possess sufficient fortitude to enable him to endure the shock caused by witnessing the accident in question. Accordingly, psychiatric injury to the pursuers was not reasonably foreseeable by their employers. Lord President Hope said that there was no "evidence to show that the accident which caused Smith's death, although tragic and very sudden, was so horrific as to cause a person of ordinary disposition to sustain psychiatric injury".[132]

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[127] *McFarlane* [1994] P.I.Q.R. P154.
[128] *Robertson,* 1995 S.C 364.
[129] N.J. Mullany and P.R. Handford, "Hillsborough replayed" (1997) 113 L.Q.R. 410 at 415.
[130] *McFarlane* [1994] P.I.Q.R. P154 at 166.
[131] *McFarlane* [1994] P.I.Q.R. P154 at 166.
[132] *Robertson,* 1995 S.C 364 at 370.

Had a secondary victim claim been advanced by Ms Weddle, the defenders might also have sought support from the decision in *Keen v Tayside Contracts.*[133] There, a road worker suffered psychiatric injury after seeing a car with four burned and crushed bodies in it while he was setting up a road diversion. It was not disputed that the pursuer had no close ties of love and affection with those victims and the absence of such a tie resulted in the refusal of the pursuer's claim.

What, then, can be said of those authorities (*McFarlane*, *Robertson* and *Keen*)? Mullany and Handford condemn *McFarlane* as "flawed in its approach to bystanders."[134] It should also be noted that *McFarlane* is a decision of the English Court of Appeal, *Robertson* is a decision of the Inner House while *Keen* is a decision of the Outer House of the Court of Session. These cases, accordingly, do not carry the same weight as *Alcock* which, being a House of Lords' decision, is a decision from the highest judicial level. Against that, it should be said that the appeals to the House of Lords in *Alcock* did not seek to extend the duty to mere bystanders. The ten appellants were relations (of various sorts) to those caught up in the crush. No case law to date has actually applied the dictum of Lord Keith (quoted above) in *Alcock.*

6.CONCLUSION

For various reasons, prominent among which is the floodgates fear,[135] the law adopts a cautious approach to claims for psychiatric injury. The boundaries for recovery have been gradually extended over time and the rules for recovery are now authoritatively stated in *Page* (primary victims) and *Alcock* (secondary victims).[136] If a person was within the range of foreseeable physical injury (or had a reasonable apprehension of physical injury), he can recover for psychiatric injury. If the person was not within that range, (and assuming that he was not an active participant in events) he can recover for psychiatric injury only on satisfaction of the *Alcock* requirements. Undoubtedly, attempts have been made to elevate litigants to primary victim status in an effort to evade the stringent *Alcock* requirements (*McFarlane* being an obvious example) and, indeed, Ms Weddle's claim was presented

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[133] *Keen v Tayside Contracts* 2003 S.L.T. 500.
[134] Mullany and Handford, "Hillsborough replayed" (1997) 113 L.Q.R. 410, 415.
[135] The fear of the floodgates opening was succinctly described by Lord Russell of Killowen in *McLoughlin* [1983] 1 A.C. 410 at 429 as "the tacit question What next?" (although his Lordship declared himself not sufficiently impressed by that fear to deprive the plaintiff of compensation).
[136] Teff has stated that "the prevailing liability rules are a source of embarrassment…At times it almost seems as if they have been crafted with an eye to untenable distinctions." (H. Teff, "Liability for Negligently Inflicted Psychiatric Harm: Justifications and Boundaries" (1998) 57 C.L.J. 91 at 94).

as being one of a primary victim. In essence, she claimed that, on that fateful day in December 2014, she feared for her own safety. The Sheriff Appeal Court did not accept that claim. That conclusion is unsurprising in view of the evidence (in particular the compelling real evidence) which was accepted by the court below. The Sheriff Appeal Court declined to interfere with the sheriff's findings of fact based on that evidence. As an examination of the evidence did not support the pursuer's contention that she feared for her own safety, the pursuer failed to establish that she was a primary victim.

It is suggested, however, that there was scope to argue in *Weddle* that the pursuer ought to have recovered as a secondary victim given that *Alcock* clearly left open the possibility that, in exceptionally horrific circumstances, a bystander might recover without having a tie of love and affection to the primary victim. *Weddle* might have presented an ideal opportunity to further explore that matter.[137] Whether a case pled on those grounds would have succeeded is uncertain, the likely arguments having been rehearsed above. In particular, it is not clear whether the scene which Ms Weddle encountered would have satisfied the "particularly horrific" threshold. It is clear, however, that the position of the unrelated bystander would benefit from judicial elucidation. Developments in this area of law (which is considered to be deeply flawed in many quarters) will be awaited with interest.

[137] Indeed, the Law Commission has stated that the position of the bystander "should be left to judicial development" (Law Commission, *Liability for Psychiatric Illness*, para 7.15).