DISCUSSION PAPER ON LIABILITY FOR NEGLIGENTLY INFLICTED PSYCHIATRIC ILLNESS

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(1) Introduction

Until recently it was generally assumed that there was no recovery for negligently inflicted psychiatric illness in tort law. Psychiatric illness was differentiated from physical injury and considered non-compensable. The courts have changed this and have allowed, subject to certain restrictions, recovery for such damage. This drew the attention of the English Law Commission. In 1995 the Commission published a Consultation Paper (No 137 of 1995) to seek views on legislative reform of this area of the law. The Consultation Paper drew an unusually large number of responses from lawyers, doctors, academics, insurers and others. Indeed this area of tort liability has received more academic comments and articles than any other area of tort law. In March 1998, three years after publishing the Consultation Paper, the Commission produced a Report on "Liability for Psychiatric Illness" (No 249 of 1998) with an accompanying draft Bill, the Negligence (Psychiatric Illness) Bill (attached below in Appendix I and henceforth referred to as the "Draft Bill"). The Report considered whether the restriction drawn at common law for the recovery of psychiatric illness, as opposed to physical injury, is satisfactory and, if not, whether reform is required by legislation. The same question arises in Singapore as our tort law is derived from the English common law. It must be noted at the onset that the liability that is discussed in the Report is confined to the bare or pure psychiatric illness that is unconnected with physical injury. The restriction imposed by tort law on recovery is not relevant to psychiatric illness that arises as a consequence of physical injury.

In an ideal world all human misfortunes should be catered for and rectified. But we live in a less than perfect world and difficult choices have to be made. The Commission acknowledged that for the critics of the fault-based tort system only a wholesale reform of the current compensation system would render it fairer and more efficient and that, for them, enhancing the recovery of psychiatric illness would merely favour the already privileged minority of accident victims. The Commission's mandate was, however, only to improve the existing system and not to replace it by other alternative non-fault systems.

* **Afternote:**	This paper was prepared by Assoc Prof Tan Keng Feng at the request of the Justice of Appeal L P Thean, Chairman of the Law Reform Committee of the Singapore Academy of Law. The Law Reform Committee (with Assoc Prof Tan present) considered this discussion paper at its meeting on 9 September 2000. After deliberating, the Committee agreed with the recommendations of Assoc Prof Tan.

Liability in negligence for psychiatric illness covers a wide field and is “one of the most vexed and tantalising topics in the modern law of tort” (Sir Thomas Bingham MR, Foreword to N J Mullany and P R Handford, *Tort Liability for Psychiatric Damage* (1993), p vii). In England recovery of psychiatric illness began in 1901 when a pregnant barmaid in *Dulieu v. White & Sons* [1907] 2 KB 669 recovered damages for nervous shock from fright caused to her on seeing a horse van being driven negligently into her bar. Over the greater part of the century this liability did not evolve any further, but litigation in the area escalated more recently culminating in five House of Lords decisions. The first three being *Bourhill v Young* [1943] AC 92, *McLoughlin v O’Brian* [1983] 1 AC 410, and *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310. *Page* v. *Smith* [1996] AC 155 came after the 1995 Consultation Paper and *White v Chief Constable of Police* [1998] 3 WLR 1509 was recently decided after the 1998 Report itself (all these cases will be discussed). The Law Commission acknowledges that this area of liability in negligence is highly controversial: evoking "strongly-held opposing views” (Report, para 4.1), and that neither the medical nor legal understanding of psychiatric illness has reached a stage of sufficient maturity for "complete codification" (ibid). The Report, therefore, recommends a "minimalist intervention" (Report, para 1.6) to reform the present law by legislation only in one area of the law where the common law is perceived to have taken a "wrong turn" (Report, para 4.2). This is identified in the recent House of Lords decision in *Alcock* v *Chief Constable of South Yorkshire Police* in respect of the class of secondary victims who suffer psychiatric illness from the imperilment, injury or death of loved ones. All the other areas of psychiatric illness where the common law is perceived by the Commission as not being obviously unsatisfactory are left outside the proposed legislative reform for development by incremental judicial decision.

In personal injury, psychiatric illness is differentiated from the usual kind of physical injury and the courts have traditionally restricted the recovery of psychiatric illness for a number of public policy reasons. This injury is a mental one and is not caused by physical contact. There is no physical impact limit to liability and such non-physical injury raises the danger of indeterminate liability in negligence just as in the case of purely economic loss that is not linked to physical damage. Psychiatric illness is also perceived by the courts as being less serious and less worthy of legal support than physical injury, although it is generally acknowledged that the more severe form of such illness can be as, if not more, debilitating and life-shattering than physical injury. Victims are generally expected, in the ordinary circumstances of living, to have the customary fortitude to pull themselves together and overcome such difficulty without needing compensation. Unlike physical injury, a claim for psychiatric illness can be of the “parasitic” type: that is, arising not out of fear for the plaintiff’s own safety, but from the fear for the safety of others. Psychiatric illness is also believed to be more open to faking (feigning and malingering) than physical injury, and given the prevalence of conflicting medical opinions in ascertaining psychiatric illness, concern is often raised of fraudulent and exaggerated claims.

The most cogent reason, however, for limiting liability for psychiatric illness is the fear of opening the floodgates of litigation. In *McLoughlin v O’Brian* [1993] 1 AC 410, 421-2, Lord Goff said: “because ‘shock’ in its nature is capable of affecting so wide a range of people, [there is] a real need for the law to place some limitation upon the extent of admissible claims”. The Commission accepts this “floodgates risk” as the only valid reason for restricting liability for

psychiatric illness. Others who are for fuller recovery of psychiatric illness feel strongly against restricting liability and would more readily equate liability for psychiatric illness with that of physical injury. A leading commentator said that this is the area of liability in negligence "where the silliest rules now exist and where criticism is almost universal". The mental and physical kinds of personal injury are, by nature, not too dissimilar as both kinds cause some recognisable disturbances to a sufferer's body or system. But the effect of allowing a similar recovery for psychiatric illness as for physical injury will likely extend such liability beyond what is, perhaps, tolerable under a fault-based scheme of negligence liability, even when this is insurance-backed, as such claims arise through the mind without physical contact. Non-impact psychiatric illness undoubtedly induces wider claims than impact physical damage. It is better to accept some inevitable arbitrariness in drawing a line somewhere on the liability for psychiatric illness than to endure unmanageable chaos from an unfettered recovery of such damage. The Commission accepts that liability for psychiatric illness must be more limited (but without unjustifiable constraints) than that for physical injury.

At common law a distinction is drawn between what is merely the ordinary emotion of grief, anxiety, fear and transient shock which does not constitute sufficient damage and the recognisable psychiatric illness that is established by expert medical evidence. Lord Bridge in *McLoughlin v O'Brian*, for example, required that a plaintiff must not merely suffer "grief, distress or any other normal emotion, but a positive psychiatric illness". Mere mental distress is not compensable, although it is acknowledged that what constitutes this and the recoverable psychiatric illness is medically unclear. The distinction is a matter of degree rather than kind. The Commission acknowledges this (Report, para 3.33), and accepts that this is a medical difficulty which the law cannot better by providing a statutory definition of what is a recognisable psychiatric illness as this would not be "practicable" (Report, para 3.33).

(2) <u>The Areas Not Covered by the Proposed Legislative Reform</u>

(i) The Primary Victims

At common law the courts drew a distinction between two classes of plaintiffs: the primary and secondary victims. The primary victim is a plaintiff who suffers psychiatric illness from the fear of physical injury to himself or herself and the secondary victim is one who suffers psychiatric illness from the fear for the safety of another person. Claims for psychiatric illness were traditionally brought by plaintiffs who either fear for their own safety or for the safety of others. The House of Lords (by a majority) in *Page v Smith*, which was decided after the 1995 Consultation Paper, enhanced the recovery of the primary victim over the secondary victim. A primary victim can now recover for psychiatric illness even when this is not reasonably foreseeable, so long as the physical injury, which need not actually occur, is foreseeable, and exceptionally, the plaintiff, as a primary victim, need not be a person of normal susceptibility. Indeed, the majority in the House of Lords sought to demolish the distinction between the psychiatric and the physical kinds of personal injury in respect of the primary victim. Lord Lloyd in the case ([1996] AC 155, 188) said that, "[n]othing will be gained by treating them [the psychiatric and physical injury] as different 'kinds' of personal injury, so as to require the application of different tests in law", and Lord Browne-Wilkinson pointed out that the recent

medical developments "suggest a much closer relationship between physical and mental processes than had previously been thought" (at p 188). The recovery of a primary victim for psychiatric illness is now close to that of the physically injured. Recovery, on the other hand, for a secondary victim is differentiated and is much more restricted. Until *Page v Smith* it was assumed that reasonable foreseeability of psychiatric illness was required in all cases of negligently inflicted psychiatric illness and that all such plaintiffs must be persons of normal disposition. It was assumed that there was a difference between the psychiatric and the physical kinds of personal injury, and that plaintiffs with "thin personalities" were less deserving of compensation than those with "thin skulls", and further that the foreseeability test provided for these differences. The primary victim is now elevated to a privileged league with its own special rules that are wider and conceptually different from the liability to the secondary victims. It may be that the common law has become too generous with respect to the class of primary victims (unchanged by the Report) and is too restrictive in respect of some of the secondary victims (changed by the Report). The Commission, however, feels that, at worst, *Page v Smith* really only benefits a small category of "the susceptible plaintiff who suffers psychiatric illness as a result of a minor accident in which he or she is not physically harmed and which the defendant could not reasonably have foreseen would cause psychiatric illness" (Report, para 5.15).

(ii) The Non-Relative Secondary Victims

At common law the secondary victims (like the bystanders or spectators) who suffer psychiatric illness as a result of witnessing a defendant negligently endangering or injuring others who are unrelated to them in love and affection cannot recover. A rescuer or an employee suffering such psychiatric illness is also classified as a secondary victim (unless they are themselves endangered in the event). However, these two categories of secondary victims are exceptionally allowed to recover at common law even without a close tie of love and affection between them and the immediate victims, as required of other secondary victims (see for examples: *Chadwick v British Railways Board* [1967] 1 WLR 912, *Dooley v Cammell Laird* [1951] 1 Lloyd's Rep 271, *Galt v British Railways Board* [1983] 113 NLJ 870, *Wiggs v British Railways Board* (The Times, 4 February 1986) and *Mount Isa Mines v Pusey* [1971] 125 CLR 382)). In *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, 407, Lord Oliver introduced a broader classification of the "primary victims" as including those "involved, either mediately or immediately, as a participant" in the event causing them psychiatric illness. These would include those victims participating as primary victims out of fear for their own safety, and those participating as rescuers or as employees (who are involuntarily involved in their employers' negligence). In using this wider criterion of participation, the Court of Appeal (by a majority) in *Frost v Chief Constable of South Yorkshire Police* [1997] 3 WLR 1194 held that the police officers who were allowed to recover for their psychiatric illness as a result of carrying out their professional duties as rescuers and/or employees at the disastrous Hillsborough football stadium stampede were classifiable as primary victims. As a result these police officers were better treated than the relatives of many of those injured or killed in the disaster despite the fact that they were expected to encounter traumatic events in the course of their work. None of the relatives when they sued earlier in *Alcock* [1992] 1 AC 310, as secondary victims, recovered. There was immense public disquiet over the cases. The precise degree of the "participation" that is required for classification as primary victim is unclear. Some employees are participants, others are not, depending on the extent of their involvement,

and they may or may not be themselves endangered. Rescuers are participants by definition, but they need not always be endangered. There are different degrees of participation too.

The Commission acknowledges that there is "confusing inconsistency" (Report, paras 2.60 and 5.45) in the use of the primary/secondary classification by the courts, and the distinction is now more of a "hindrance than a help" (Report, para 5.51). The problem is a common one of judges using the same terminology in different senses and for different policy purposes. The Commission itself uses the narrower criterion of being endangered (not participation) in its own exposition, and although it considers legislating against using the primary/secondary victim distinction as inappropriate, it hopes that the courts will, in the future refrain from attaching too much policy or practical significance to the description of a plaintiff as a primary or secondary victim in order to avoid compounding the confusion (Report, paras 2.52-2.60 and 5.45-5.54).

On appeal from *Frost*, the House of Lords deciding after the Report, in *White v Chief Constable of South Yorkshire Police* [1998] 3 WLR 1509, by a majority, used the narrower criterion of being within or outside the area of physical danger (i.e. whether endangered) to distinguish between the primary and the secondary victims. Reversing the Court of Appeal, all the police officers in the case were denied recovery of damages for their psychiatric illness on the basis of their status as employees and/or rescuers. They could only recover if they were exposed to physical danger as primary victims. Since they were not endangered in the discharge of their service or in rescuing, as employees and/or rescuers, the police officers were only secondary victims. As secondary victims they, like the bystanders or spectators, were not entitled to recover damages for their psychiatric illness. The majority of the House of Lords took a more restrictive stand with the result that the Commission's interpretation of the common law that employees or rescuers (considered by the Commission as participants in contrast to the position of the passive bystanders) can recover for psychiatric illness even without a close tie of love and affection with the immediate victims, as an exceptional category of non-relative secondary victims, is no longer correct. The House of Lords decided that being in employment does not entitle employees to a better claim in negligence against their employers for psychiatric illness. The restriction limiting liability in negligence for psychiatric illness applies equally to employees. On this point the House of Lords was unanimous: otherwise employees will be entitled, for example, to recover in negligence for purely economic loss as employees from their employers when this is ordinarily disallowed under the tort. However, as a consequence of the majority decision, the position of the rescuers is seriously undermined. Their position is now worse-off compared to the position of close relatives in that as rescuers at the scene of an accident they must be exposed to physical danger as primary victims to recover damages for their psychiatric illness, whereas the close relatives of the immediate victims present at the accident need not be so endangered (after the proposed legislative reform, need not even be at the scene – see below) and can readily recover as secondary victims. It seems also from the majority decision that a rescuer who fears for his or her own safety is better treated than one who is outside the zone of danger but who, nevertheless, disregards his or her own safety, and suffers psychiatric illness out of fear for the safety of others. Rescuers who are more concerned for others than themselves are unjustly rendered worse-off than less brave rescuers. This seems so iniquitous that one of the two dissenting Law Lords in *White*, Lord Goff, allowed all the six police officers participating as rescuers in the disaster to recover as primary victims and,

the other, Lord Griffiths, allowed two of them identified as "rescuers" by his Lordship to recover as an exceptional class of secondary victims, irrespective of whether they were endangered or not.

(iii) Psychiatric Illness arising from Negligent Property Damage or Communication

In *Attia v British Gas Plc* [1988] QB 304 it was decided that psychiatric illness arising from witnessing the negligent destruction of a person's property (here the burning of the plaintiff's home) is recoverable without imperilment or injury to any person. When the case was decided, it seemed overly generous to the plaintiff because recovery for psychiatric illness from fear of injury to self or other persons, even loved ones, was closely circumscribed at common law and very few plaintiffs who sued in such cases actually succeeded. Other cases of psychiatric illness from negligent damage to property include the overturning of a coffin in *Owens v Liverpool Corporation* [1939] 1 KB 394 and the shooting of a pet cat in *Davies v Bennison* (1927) 22 Tas L R 52. A higher value appears to be attached in all these cases to feelings for property than for human limb and life. Lately, the courts appear to be equally liberal in allowing liability in respect of a similar form of psychiatric illness that arises out of communicating distressing medical news (the negligent communication of false news or, if true, the negligently insensitive manner of communicating it) where the duty of care for this is somehow admitted *(*see *Allin v City & Hackney Heath Authority* [1996] 7 Med L R 167 and *AB & Others v Tameside & Glossop Health Authority and Trafford Health Authority* [1997] 8 Med L R 91).

(iv) Comment

The common law is still developing liability for the negligent infliction of psychiatric illness and the law is far from being settled. At this stage, complete codification of liability in negligence for psychiatric illness is neither necessary nor a sensible option for the Commission. The Commission, therefore, only recommends a minimal legislative intervention in the area where the present common law is perceived to be noticeably unsatisfactory. This is in respect of the particular class of secondary victims who suffer psychiatric illness as a result of imperilment or injury to loved ones. Its recommended legislative reform is not intended to impede the development of the common law liability for psychiatric illness in respect of all others: the primary victims; the unrelated secondary victims including those who are rescuers, employees or bystanders; those suffering psychiatric illness brought about by property damage or negligent communication of distressing news; and those suffering psychiatric illness in "non-accident" cases like that from stress at work or out of fear for the future (where no person has been actually imperilled or injured – see discussion immediately below). However, as can be seen, from the review above, the area of liability in negligence for psychiatric illness that is left at common law is wide and the unpredictable development here will have profound and unanticipatable consequences on the Commission's proposed legislation.

(3) <u>The Areas Covered by the Proposed Legislation</u>

(i) The Exclusion of the Shock Requirement

Originally common law appeared to require that recoverable psychiatric illness must be induced by a shock following from directly experiencing a threatening or horrifying event. For examples, Lord Keith in *Alcock* alluded to "a sudden assault on the nervous system" [1992] 1 AC 310,398 and Lord Ackner "the sudden appreciation by sight or sound of a horrifying event, which agitates the mind" (at p 401). This requirement of a sudden assault or affront on the plaintiff's nervous system was initially imposed in an attempt to distinguish between non-shock induced sorrow and grief occurring after a traumatic event which is seen as an unfortunate part of the ordinary vicissitudes of life and nervous shock that is obtained at the scene of the accident which is considered as something exceptional and unbargained for in everyday living and therefore compensable. The Commission through its medical experts showed that this distinction between shock and non-shock induced psychiatric illness has "no scientific or clinical merit" (Report, para 5.29). Medically, sudden shock and gradual grief cannot be properly differentiated. Psychiatric illness is not confined to post-traumatic stress disorder (PTSD) involving intense fear, helplessness or horror following upon exposure to a catastrophic event or stressor (on average about one quarter of individuals who are exposed to exceptionally threatening or horrifying events develop PTSD: see Report, para 3.7). It also extends to "depressive", "adjustment" or "anxiety" disorders which can be consequent upon trauma or unrelated to it: "it is preferable not to concentrate exclusively on PTSD.... [T]his diagnosis has wrongly upstaged other conditions, such as anxiety disorder and depression ...." (Report, para 3.3). In the past the courts have awarded damages for pathological grief disorder (*Vernon v Bosley* [1997] 1 All ER 577), morbid depression (*Hinz v Berry* [1970] 2 QB 40), hysterical personality disorder (*Brice v Brown* [1984] 1 All ER 997) and chronic fatigue syndrome (*Page v Smith* [1996] AC 155). In *Walker v Northumberland County Council* [1995] 1 All ER 737, in an employment context, the court allowed recovery for non-shock psychiatric illness induced through stress at work from over-burdening an employee. Since psychiatric illness is sometimes recoverable even when not shock induced, the term "nervous shock", which was originally employed at common law to describe this area of negligence liability, has been gradually replaced in later cases by the wider and more appropriate medical phrase of "recognisable psychiatric illness". The Commission recommends that legislation should provide that it is no longer a condition of liability that recoverable psychiatric illness be induced by a shock (Draft Bill, clause 5(2)). This should apply generally to all cases of liability for negligently inflicted psychiatric illness. If, by this, the shock requirement is categorically removed, the common law will have to contend with allowing recovery for possible newer and wider areas of psychiatric illness that are not induced by shock. A unique example of this is the anxiety or phobic type of psychiatric disorders arising from fear as to what might happen in the future: like "AIDS phobia" following upon negligent exposure to the virus (see N J Mullany, "Fear for the Future: Liability for Infliction of Psychiatric Disorder" in N J Mullany (ed), *Torts in the Nineties* (1997), Ch 5, who anticipates, in great detail, the development of such liability). The extension of liability to include such non-shock "fear for the future" type of psychiatric illness where no person, be it the plaintiff or others, has been actually imperilled, injured or killed, will widen the liability for psychiatric illness beyond what is assumed as presently recoverable at common law. The local case of *Pang Kai Fa v Lim Djoe Phing* [1993] 3 SLR 317 which allowed a mother to recover psychiatric illness from witnessing over a period of about three months the slow death of her daughter as the

result of a negligent brain surgery would be more in line with this proposed legislative exclusion of the shock requirement in the law.

(ii) The Related Secondary Victims

The Report recommends legislative reform with respect to one selected class of plaintiffs: the plaintiffs who, as secondary victims, suffer psychiatric illness as a result of death, injury or imperilment of persons (the immediate victims) with whom the plaintiffs have a close tie of love and affection. At common law such a plaintiff can recover for psychiatric illness that is reasonably foreseeable, if he or she, in addition, satisfies the three "proximity" requirements of a close tie of love and affection with the immediate victim, a sufficient closeness to the accident or its immediate aftermath in time and space, and a direct perception of this through unaided senses of sight or hearing (the "relational", "temporal-spatial" and "perceptional" requirements). The Commission considers the last two limitations on closeness to and means of perception of the accident as legally arbitrary and medically unsound. It is purely fortuitous whether a person happens to be at the scene of an accident or its immediate aftermath, and a person away from the accident can medically suffer recognisable psychiatric illness on learning of the unexpected injury or death of a loved one. Only the first requirement based on the relationship between the plaintiff and the immediate victim is legitimately required to meet the fear of a proliferation of claims for psychiatric illness arising out of each single negligent event of a defendant endangering or injuring an immediate victim. The Commission agrees with Deane J in *Jaensch v Coffey* (1984) 155 CLR 549 that: "the most important explanation of nervous shock resulting from injury to another is the existence of a close, constructive and loving relationship with that person (a close 'relative') and ... it is largely immaterial whether the close relative is at the scene of the accident or how he or she learns of it" (Report, para 6.11). It, therefore, recommends the abandonment by legislation of the requirements of closeness in time and place and perception through unaided senses. This is the central recommendation of the Report which will allow a person as a secondary victim to recover for psychiatric illness following from death, injury or imperilment of a loved one without being at the accident in time, place or the perception of it, as is presently required at common law (Draft Bill, clause 1(2), 1(3), 2(2), 2(3) and 4).

A close tie of love and affection is deemed to exist in a list of relationships fixed by legislation. This list includes the spouse, parent, child, sibling and cohabitant of the immediate victim. This covers the nuclear family and those cohabitants living as man and wife for at least two years, and also those of the same gender in an equivalent relationship (recognising the presence of many such committed and stable couples - Draft Bill, clause 3(1)-(5)). At common law under *Alcock* a close tie of love and affection is refutably presumed (not deemed) in a narrower range of family relationships in respect of a spouse (and possibly fiance(e)), parent, or child of the immediate victim. Plaintiffs outside the statutory fixed list (like more distant relatives, friends or carers) are allowed to recover by proving a relationship with the immediate victims that is equally close. Mere bystanders or witnesses without any love or affection for the immediate victims cannot recover. The relevant time for establishing a tie of love and affection is the time of the defendant's negligence (as provided under common law) or the onset of the plaintiff's psychiatric illness (by proposed legislation). The extended time, beyond that given at common law, is to cater for a person who forms a close tie of love and affection after the

defendant's negligence, for example, in caring for an immediate victim who was initially a stranger (Draft Bill, clause 3(1)-(5)). This lengthened time may, however, result in an over-extension of such liability that is not intended.

The equivalent Australian legislative provisions in this area were enacted in three jurisdictions (attached in Appendix II): the New South Wales (Law Reform (Miscellaneous Provisions) Act 1944, s 4, the Australian Capital Territory (Law Reform (Miscellaneous Provisions) 1955, s 24, and the Northern Territory (Law Reform (Miscellaneous Provisions) Act 1956, s 25. These earlier Australian legislation guided the Commission, but the proposed English legislation is more extensive in that a new statutory duty of care replacing the common law is created, and a wider class of relatives is deemed to have a close tie of love and affection, and that the shock requirement (see above) together with the perceived bar to recovery when the defendant is the immediate victim (see immediately below) are specifically removed under the proposed English legislative reform. The Australian legislation did not, surprisingly, lead to any surge in liability for psychiatric illness.

(iii) Recovery where the Immediate Victims are the Defendants

At common law there are several dicta which suggest that where a plaintiff suffers psychiatric illness as a result of the death, injury or imperilment of another, the plaintiff is barred from recovery where that other is the defendant himself or herself. In *Jaensch v Coffey* (1984) 155 CLR 549, 604 Deane J said, " a duty of care will not exist unless the reasonably foreseeable psychiatric injury was sustained as a result of the death, injury, or peril of someone other than the person whose carelessness is alleged to have caused the injury". Lord Oliver in *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, 418 agreed with this dictum. A plaintiff's claim for psychiatric illness, for example, is barred if it is caused by a loved one's own careless self-injury or suicide. The Commission is against this limitation which it views as curtailing undesirably the right to self-determination of a defendant to engage in dangerous or risky activities. The restriction has the effect of imposing an obligation on a defendant not to negligently harm himself or herself so as to avoid distressing others, and the unintended effect of defeating any right of contribution against the defendant and any insurance that may be available to those distressed. The Commission, therefore, recommends the removal of this restriction at common law to the recovery of psychiatric illness by loved ones where the defendant causes his own danger or injury and is the immediate victim (see Draft Bill, clause 5(3) – but clause 2(4(a) leaves the courts with the discretion to exclude a duty of care where a defendant chose deliberately to self-injure).

(iv) Comment

If the Commission's reform is legislated, the plaintiffs who failed in some of the past cases to recover for psychiatric illness will be enabled to recover. All the plaintiffs in *Alcock* (those within the statutory fixed list – the parents, brothers and sisters of the immediate victims, and those outside – the brother-in-law, grandfather and fiance(e), on proving love and affection) will be entitled to recover damages for their psychiatric illness even though they were not close to the accident or its immediate aftermath in time, place or perception. In *Sion v Hampstead Health Authority* [1994] 5 Med L R 170 and *Taylorson v Shieldness Produce Ltd* [1994] PIQR

P329 the parents will be able to recover even though their psychiatric illness arising from the death of their sons in road accidents was not shocking but expected. And in *Ravenscroft v Redreriaktiebolaget Transatlantic* [1992] 2 All ER 470 (Note) the mother will be entitled to recover for psychiatric illness inspite of only being told of her son's fatal injury. The plaintiff in *Bourhill v Young* [1943] AC 92, the first House of Lords' decision on negligently inflicted psychiatric illness, would still, however, be unable to recover as a bystander.

The removal of the shock requirement and bars of nearness to the accident and unaided perception of it in respect of plaintiffs suffering psychiatric illness pursuant to imperilment or injury of loved ones (together with, but to a lesser extent, the bar to recovery where the defendant's injury is negligently self-inflicted) will increase the number of such claimants as secondary victims. All the defendants of accidents that are negligently caused (predominantly road) will, as a result of the legislative reform, not only have to compensate the immediate victims who are injured or killed, but also their relatives or other loved ones who suffer recognisable psychiatric illness, even when the latter are not at the scene of the accident. For every accident there will be two sets of plaintiffs: those physically injured (the immediate victims) and those close to the immediate victims in love and affection who suffer psychiatric illness as a result of this whether at or away from the accident (the related secondary victims). Psychiatric illness claims will automatically accompany the claims of those injured or killed if their loved ones can prove by expert psychiatric evidence that they actually suffered recognisable psychiatric illness as a result of the accident. Presently, with the existing common law restriction, such claims for psychiatric illness are exceptional. With the proposed legislative change these psychiatric claims will become a regular additional feature in the relevant accident cases. The Commission guesstimates that extending the liability for psychiatric illness here will result in about a ten per cent increase in the number of personal injury claims and an increase of between two to five per cent in motor insurance premiums (Report, paras 1.12 and 1.13). The escalation of liability may be much more than what is estimated by the Commission as the real increase in the number of such claims, after widespread public awareness of this liability and a greater claim consciousness of it, is difficult to quantify accurately at this stage.

(4) Evaluation of the Proposed Legislation

It can be seen from the review that what is proposed for legislation by the Commission in respect of liability for negligently inflicted psychiatric illness covers only a small part (in the law, but not necessarily in the amount of claims) of a wider field of such liability that is left at common law. If this liability for psychiatric illness that is left at common law is extended by the courts, the Commission's legislative reform will be rendered too narrow, incongruent and even obstructive. On the other hand, if the courts were to retract from the expansion of such liability, the proposed legislation will be rendered too wide and generous, and especially favourable to the class secondary victims preferred by the Commission. For example, close relatives, after the Commission's legislative reform, will be able to recover damages for their psychiatric illness even when they are not at the accident which imperils or injures their loved ones, but rescuers helping at the scene of the accident cannot now, after *White* (decided after the Report), recover unless they themselves are endangered by the accident while rescuing. It seems unfair that such relatives should be so much better treated under the proposed legislation than the rescuers. The common law liability for negligent infliction of psychiatric illness is fast evolving and has not

reached a mature stage of development. Comprehensive legislative reform at this time will undoubtedly result in "freezing the law at a time before it is ready" (Report, para 4.4). The question is whether, instead, the proposed minimalist legislative intervention by the Commission to cure what is perceived as a serious defect in the present common law is necessary and useful. The Commission should be praised for doing its work with characteristic thoroughness, clarity and perception that is incomparable. However, the Commission in proposing, at this juncture, the reform of the liability for negligently inflicted psychiatric illness was faced with the insoluble dilemma of either doing too little too late, or doing too much too soon, even by their minimalist intervention. The proposed legislative reform may introduce an unsuspected rigidity in the complex and developing law relating to the liability in negligence for psychiatric illness. It is highly unlikely that the Commission's proposal will be adopted by the English Parliament. To date the English courts, including the House of Lords, have referred to the Report favourably as a legislative matter, but the response of the government to the Commission's recommendation is still awaited.

(5) Implication for Singapore

Given the stage of development of the common law on liability for negligently inflicted psychiatric illness, the issue for Singapore is whether it is necessary (in need, or by rationality, justice or policy) to consider legislative reform of the law as has been undertaken in Australia or as proposed in England. There are very few successful claims at common law for psychiatric illness – a handful in Australia and England, and one in Singapore. This area has attracted more attention than recovery. Legislative reform of the law, at this stage of its development, when the medical and legal knowledge is not sufficiently mature, may interrupt the proper development of the law on an incremental case-by-case basis and may give rise to legislative recovery in certain areas of psychiatric illness that could, on implementation, prove to be more generous than envisaged. The latter could be a more serious problem for Singapore given that the accident victims are already preferred as a class and are in many ways better catered for compared to the others who suffer similar hardship from non-accident circumstances as a consequence of socio-economic insecurity or natural misfortunes. This is not to say that the common law liability for psychiatric illness, at this juncture, is satisfactory. Indeed, parts of the development are clearly controversial, but they are not so problematic or unsatisfactory as to require urgent legislative change.

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