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NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS:  
A VIEW OF THE PROPOSED *RESTATEMENT (THIRD)*  
PROVISIONS FROM ENGLAND

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INTRODUCTION

“Why an English perspective?” is perhaps the first question raised by the title of this Article. It can be answered quickly. The Reporters’ Notes to the proposals in the 2007 draft *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* sections 46–47 that are under consideration here refers to the similarity in structure between the law in Great Britain and the proposals in the *Restatement (Third)*. The current English state of affairs<sup>1</sup> may tell us something about the *Restatement (Third)*’s proposals,<sup>2</sup> although institutional differences—one obvious example is the difference in the use of juries—may mean rules work better in one jurisdiction than another.<sup>3</sup> Indeed, it has been argued that the prevalence of the

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1. For books dealing with the subject of recovery for psychiatric illness, see NICHOLAS J. MULLANY & PETER R. HANDFORD, *TORT LIABILITY FOR PSYCHIATRIC DAMAGE* (2d ed. 2006); HARVEY TEFF, *CAUSING PSYCHIATRIC AND EMOTIONAL HARM: RESHAPING THE BOUNDARIES OF LEGAL LIABILITY* (2009).

2. Michael A. Jones argues that “[d]espite their supposedly ‘pragmatic’ basis, [the rules of recovery] fail to provide a ‘bright line’ rule by which practitioners can give clear legal advice to their clients.” Michael A. Jones, *Liability for Psychiatric Damage: Searching for a Path Between Pragmatism and Principle*, in *EMERGING ISSUES IN TORT LAW* 113, 113 (Jason W. Neyers, Erika Chamberlain & Stephen G.A. Pitel eds., 2007). Given the concern for bright lines expressed by the Reporters, this may not be encouraging. The proposals are, however, as we shall see, not identical.

3. On comparative tort reasoning, see Jane Stapleton, *Benefits of Comparative Tort Reasoning: Lost in Translation*, in TOM BINGHAM AND THE TRANSFORMATION OF THE LAW: A LIBER AMICORUM 773 (Mads Andenas & Duncan Fairgrieve eds., 2009); cf. Basil Markesinis, *Goethe, Bingham and the Gift of an Open Mind*, in TOM BINGHAM AND THE TRANSFORMATION OF THE LAW: A LIBER AMICORUM, *supra*, at 729. Also note the comments of Lord Steyn in *McFarlane v. Tayside Health Board*, [2000] 2 A.C. 59, 81 (H.L.) (appeal taken from Eng.).

jury trial and the system of funding lawyers in the United States creates a need for clearer rules there than in England.<sup>4</sup>

I shall emphasize English law, but as Great Britain comprises Scotland and England,<sup>5</sup> it is only fair to acknowledge the Scottish Law Commission's paper on this topic.<sup>6</sup> Some years before the Scottish Law Commission reported, the subject of recovery for psychiatric illness had also been considered by the Law Commission in England,<sup>7</sup> but there was no legislative action in response. More recently, the Department of Constitutional Affairs<sup>8</sup> produced a Consultation Paper in 2007 on the law of damages,<sup>9</sup> and this Article contained some discussion of recovery for psychiatric illness.<sup>10</sup> The Government's stated preference was for any reform to occur through case law, although it should be noted that English judges have on occasion expressed a contrary wish, that is, favoring legislative reform.<sup>11</sup> Academic writings expressing dissatisfaction with the state of English law have not gone unnoticed in the courts. In *White v. Chief Constable of South Yorkshire Police*,<sup>12</sup> reference was made in the House of Lords to the differing views of Stapleton<sup>13</sup> (arguing for abolition of liability for negligently inflicted psychiatric illness) and those in *Tort Liability for Psychiatric Damage*<sup>14</sup> (arguing for liability based on reasonable foreseeability), but the House took the view that it could not alter the law so radically in either direction.<sup>15</sup>

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4. See D.W. Robertson, *An American Perspective*, in TORT LAW 285 (6th ed. 2008).

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

6. SCOTTISH LAW COMM'N, PUB. NO. 196, REPORT ON DAMAGES FOR PSYCHIATRIC INJURY (2004); see also Donal Nolan, *Reforming Liability for Psychiatric Injury in Scotland: A Recipe for Uncertainty?*, 68 M.L.R. 983 (2005) (U.K.).

7. THE LAW COMM'N (U.K.), PUB. NO. 249, LIABILITY FOR PSYCHIATRIC ILLNESS (1998).

8. The Ministry of Justice has now taken over the responsibilities of this Department.

9. See generally DEP'T OF CONSTITUTIONAL AFFAIRS (U.K.), THE LAW OF DAMAGES, CP/07 (2007).

10. *Id.* at 36–43, app. B.

11. See Lord Oliver's opinion in *Alcock v. Chief Constable of South Yorkshire Police*, [1992] 1 A.C. 310, 419 (H.L.) (appeal taken from Eng.).

12. *White v. Chief Constable of S. Yorkshire Police*, [1999] 2 A.C. 455 (H.L.) (appeal taken from Eng.).

13. Jane Stapleton, *In Restraint of Tort*, in 2 THE FRONTIERS OF LIABILITY 83, 83–102 (Peter Birks ed., 1994).

14. NICHOLAS J. MULLANY & PETER R. HANDFORD, TORT LIABILITY FOR PSYCHIATRIC DAMAGE 65 (1993). For further academic opinion, see Jones, *supra* note 2, at 113; TEFF, *supra* note 1, at 171–89.

15. *White*, [1999] 2 A.C. at 500.

## I. GENERAL APPROACH TO THE AREA

The choice referred to in the Reporters' Memorandum<sup>16</sup>—that between specific rules and more flexible provisions—is reminiscent of the debate that has occurred at a more general level in England as to the role of principle in the tort of negligence. A more pragmatic, incremental approach is now the order of the day.<sup>17</sup> More than twenty-five years ago, at a time when principle held greater sway, it was only by a bare majority that English law, in *McLoughlin v. O'Brian*,<sup>18</sup> rejected liability solely on the basis of reasonable foreseeability in the particular area being considered in this Article. This rejection was confirmed in *Alcock v. Chief Constable of South Yorkshire Police*.<sup>19</sup> Indeed, Lord Hoffmann stated, in an oft-quoted remark in his judgment in *White*, that “in this area of the law, the search for principle was called off in *Alcock*.”<sup>20</sup> Nevertheless, the question of recovery for negligently inflicted psychiatric illness is a duty question in English law, and, unless within the area governed by the ruling in *Page v. Smith* (that is, where immediate personal injury to the claimant is reasonably foreseeable), reasonable foreseeability of psychiatric illness is required.<sup>21</sup> Specific reference to such reasonable foreseeability is not to be found in the *Restatement (Third)* provisions.<sup>22</sup>

A. *Direct Negligent Infliction of Emotional Disturbance (“NIED”)*

Section 46 of the *Restatement (Third)*<sup>23</sup> provides as follows:

An actor whose negligent conduct causes serious emotional disturbance to another is subject to liability to the other if the conduct: (a) places the other in immediate danger of

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16. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM reporters' memorandum, xxi–xxiii (Tentative Draft No. 5, 2007).

17. See *Caparo Indus. v. Dickman*, [1990] 2 A.C. 605 (H.L.) (appeal taken from Eng.); *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.) (appeal taken from Eng.) (rejecting the approach to the duty of care as laid down in Lord Wilberforce's opinion). Cf. *Henderson v. Merrett Syndicates Ltd.*, [1995] 2 A.C. 145 (H.L.) (appeal taken from Eng.) (where principle may be thought to have been more prominent).

18. *McLoughlin v. O'Brian*, [1983] 1 A.C. 410 (H.L.) (appeal taken from Eng.). At the time this case was decided, the approach in *Anns* was still accepted.

19. See *Alcock v. Chief Constable of S. Yorkshire Police*, [1992] 1 A.C. 310 (H.L.) (appeal taken from Eng.).

20. *White*, [1999] 2 A.C. at 511.

21. See *Alcock*, [1992] 1 A.C. 310.

22. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 46 reporters' note cmt. f (Tentative Draft No. 5, 2007); *id.* § 47 reporters' note cmt. f. On foresight, duty, and the *Restatement (Third)* more generally, see W. Jonathan Cardi & Michael D. Green, *Duty Wars*, 81 S. CAL. LAW REV. 671 (2008).

23. This is denominated as section 46 in Tentative Draft No. 5 but will be section 47 when published in the final version.

bodily harm and the emotional disturbance results from the danger; or (b) occurs in the course of specified categories of activities, undertakings, or relationships in which negligent conduct is especially likely to cause serious emotional disturbance.<sup>24</sup>

1. *Points of Particular Interest*

a. *Serious Emotional Disturbance.* The term “serious emotional disturbance” is not defined in the *Restatement (Third)*, but it is important to realize that it is not within the definition of “physical harm” in section 4 of the proposed *Restatement (Third)*.<sup>25</sup> English law has traditionally required emotional disturbance to constitute a “recognizable psychiatric illness” before it is actionable in the absence of physical harm.<sup>26</sup> It would seem that not every “recognizable psychiatric illness” would qualify as a *serious* emotional disturbance,<sup>27</sup> but the opposite would also appear to be true. On balance, it may well be that the *Restatement (Third)*’s proposal is wider: the comment to the proposed section 46 of the *Restatement (Third)* acknowledges “a modest difference,” the inference here being that the English position is more restrictive.<sup>28</sup> “Recognizable” means recognizable by the medical profession, and so

24. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 46 (Tentative Draft No. 5, 2007).

25. Section 4 defines physical harm as “the physical impairment of the human body (‘bodily harm’) or of real property or tangible personal property (‘property damage’). Bodily harm includes physical injury, illness, disease, and death.” RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 4 (Tentative Draft No. 5, 2007). In the final version of the *Restatement (Third)*, section 45 will define “emotional harm” as impairment or injury to a person’s “emotional tranquility.” For a recent decision in England where the House of Lords decided that pleural plaques (an asbestos-related condition) did not qualify as physical injury (and hence allow recovery of consequent mental distress), see *Rothwell v. Chemical & Insulating Co.*, [2007] UKHL 39, [2008] A.C. 281 (appeal taken from Eng.). Since three High Court decisions in the 1980s, insurers had been settling cases on the basis that this injury was actionable. See *id.* at 288–89. The Ministry of Justice issued a Consultation Paper on the subject. See MINISTRY OF JUSTICE, PLEURAL PLAQUES, CP14/08 (2008). For legislation in Scotland to reverse the effect of *Rothwell*, see Damages (Asbestos-related Conditions) (Scotland) Act, 2009, (A.S.P. 4). On the position in England, note that the Damages (Asbestos-related Conditions) Bill, 2008–09, Bill [33] (Eng.) has passed the House of Commons in the United Kingdom Parliament and has received a first reading in the House of Lords. On what counts as personal injury, see further *Yearworth v. North Bristol NHS Trust*, [2009] EWCA (Civ) 37, [2009] 3 W.L.R. 118 (Eng.).

26. *Alcock*, [1992] 1 A.C. 310.

27. *TEFF*, *supra* note 1, at 172.

28. Consider the facts in the English case of *Reilly v. Merseyside Regional Health Authority*, (1995) 6 Med. L.R. 246 (C.A. Civ.) (Eng.). See also Des Butler, *Identifying the Compensable Damage in “Nervous Shock” Cases*, 5 TORTS L.J. 67, 74–79 (1997) (Austl.).

the primary decision maker would seem to be different in the two alternatives (that is, in effect, the medical profession in the English doctrine, but the judge and jury, guided by medical evidence (when presented), on an apparently overall wider concept in the *Restatement (Third)*'s proposal). Lord Bridge in *McLoughlin v. O'Brian*<sup>29</sup> referred to the English position as follows:

The common law gives no damages for the emotional distress which any normal person experiences when someone he loves is killed or injured. Anxiety and depression are normal human emotions. Yet an anxiety neurosis or a reactive depression may be recognisable psychiatric illnesses, with or without psychosomatic symptoms. So, the first hurdle which a plaintiff claiming damages of the kind in question must surmount is to establish that he is suffering, not merely grief, distress or any other normal emotion, but a positive psychiatric illness.<sup>30</sup>

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

Current medical opinion suggests that this may be a somewhat arbitrary distinction; the limits of normal reaction to stressful events are wide and debatable, while feelings of terror and grief may have as devastating an effect upon people's lives as the "pain and suffering" consequent upon physical injury, for which damages are regularly awarded.<sup>31</sup>

However, as the *Restatement (Third)* specifically acknowledges that arbitrary lines are being drawn in this area, the criticism may be thought not to have the same force in this context. Furthermore,

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29. *McLoughlin v. O'Brian*, [1983] 1 A.C. 410, 431 (H.L.) (appeal taken from Eng.).

30. *Id.* This passage was quoted recently by Lord Justice Stanley Burnton in *Hussain v. Chief Constable of West Mercia Constabulary*, [2008] EWCA (Civ) 1025, where his Lordship thought that the requirement of a recognizable psychiatric illness in negligence was also necessary for distress to constitute "material damage" in the tort of misfeasance in public office. Compare, however, the judgment of Lord Justice Maurice Kay, who interpreted this passage from Lord Bridge's judgment as intended to exclude "normal human emotions," not significantly abnormal manifestations of non-physical sequelae." *Id.* at [20]. Lord Justice Maurice Kay did not wish to exclude a claim in the tort of misfeasance in public office by "a claimant who has the robustness to avert recognized psychiatric illness but who nevertheless foreseeably suffers a grievous non-physical reaction as a consequence of the misfeasance." *Id.* The third member of the Court of Appeal expressed no final view on the matter, as the facts did not so require. A claimant in the position envisaged by Lord Justice Maurice Kay would be excluded in a negligence suit under English law but not under the *Restatement (Third)*'s proposals.

31. *White v. Chief Constable of S. Yorkshire Police*, [1999] 2 A.C. 455, 501 (H.L.) (appeal taken from Eng.); see Harvey Teff, *Liability for Negligently Inflicted Psychiatric Harm: Justifications and Boundaries*, 57 CAMBRIDGE L.J. 91, 103 (1998) (Eng.); Harvey Teff, *Liability for Psychiatric Illness: Advancing Cautiously*, 61 M.L.R. 849, 851 (1998) (U.K.).

it could be argued<sup>32</sup> that the English threshold requirement may better satisfy the need for “bright lines” in this area, a need which is accepted by the *Restatement (Third)*’s Reporters. Perhaps such a change would go beyond the remit of a *Restatement* described recently as to “synthesize, rationalize, and, on occasion, improve on what might otherwise be nose counting among all relevant jurisdictions.”<sup>33</sup>

b. *Immediate Danger of Bodily Harm.* This strikes a chord, albeit a currently controversial one, with the English lawyer. In *Page v. Smith*,<sup>34</sup> the claimant was driving his car at approximately thirty miles per hour when a collision occurred with another car. The claimant was not physically hurt, although it was reasonably foreseeable that there could have been some personal injury. In the House of Lords’ view, this was sufficient for liability for psychiatric illness resulting from the crash: psychiatric illness did not have to be reasonably foreseeable, just as it would not be required in this situation under the *Restatement (Third)* proposal.<sup>35</sup> A later ruling established that English law is close to the *Restatement (Third)* proposal. In *Rothwell v. Chemical & Insulating Co.*,<sup>36</sup> the claimants

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32. See *Tame v. New South Wales* (2002) 211 C.L.R. 317, 373–75 (Austl.). However, the comparison here seems to be between emotional distress and a recognizable psychiatric illness, whereas the *Restatement (Third)* proposal involves *serious* emotional disturbance. Compare the views expressed in David W. Robertson, *Liability in Negligence for Nervous Shock*, 57 M.L.R. 649, 660–62 (1994) with those in David F. Partlett, *Tort Liability and the American Way: Reflections on Liability for Emotional Distress*, 45 AM. J. COMP. L. 171, 178–87 (1997). However, these views are (at least in part) focusing on and directed against a proposal whereby a recognizable psychiatric illness and reasonable foresight would be the only criteria for liability.

33. *Cardi & Green*, *supra* note 21, at 726.

34. *Page v. Smith*, [1996] A.C. 155 (H.L.) (appeal taken from Eng.).

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

36. Compare *Simmons v. British Steel Plc*, [2004] UKHL 20, [2004] I.C.R. 585 (appeal taken from Eng.), with *Rothwell v. Chemical & Insulating Co.*, [2007] UKHL 39, [2008] A.C. 281 (appeal taken from Eng.). Note, however, the comment made by Lord Mance in *Rothwell*:

On the one hand psychiatric illness resulting over time from the exacerbation of a physical condition contributed to by anger about the occurrence of a *past* accident (in which the claimant did, it is true, suffer a physical injury) was held recoverable irrespective of foreseeability in *Simmons v. British Steel plc*, [2004] I.C.R. 585, in reliance on *Page v. Smith*. On the other hand, the present case establishes that psychiatric illness arising from the stress of belated discovery of a *continuing* risk of future physical illness arising from past exposure to asbestos dust is not actionable, in the absence of special foreseeability. Some artificiality may be a necessary result of the controls on which the law insists in this area. But this distinction,

had been subjected to exposure to asbestos and had developed pleural plaques. The House of Lords held that this did not qualify as physical injury.<sup>37</sup> However, the presence of pleural plaques did indicate exposure to asbestos and the risk of illness in the future, and in one of the cases before the House, the claimant had suffered from a psychiatric illness as a consequence of being so informed after an X-ray many years after the exposure.<sup>38</sup> The claimant had been negligently exposed to the risk of physical illness by the defendant and consequently endeavored to avail himself of the *Page v. Smith* doctrine.<sup>39</sup> This was, however, unsuccessful, as that case was distinguished on two linked grounds: that any future illness would not be the *immediate* result of the exposure and also that it came about as the result of information received after the X-ray.<sup>40</sup>

However, the status of the ruling in *Page*—that it was enough for a psychiatric illness claim that personal injuries were reasonably foreseeable—received further discussion in *Rothwell*. Although Lord Hoffmann did not think that the House should depart from *Page* when confined to a foreseeable event that has caused physical harm, two of his brethren raised doubts about the decision.<sup>41</sup> Lord Hope referred to the argument that psychiatric injury itself should have to be reasonably foreseeable as “attractive,” but did not need to decide the matter.<sup>42</sup> Lord Mance, seeing force in some of the criticisms that had been raised, left open the correctness of the *Page* ruling for decision on another occasion;<sup>43</sup> indeed, his Lordship maintained this position, along with Lord Neuberger, in the later case of *Corr v. IBC Vehicles Ltd.*<sup>44</sup> Lord Walker, on the other hand, referred to it as providing a “much simpler” test for judges in this area<sup>45</sup> (although it would seem that Lord Mance would not agree<sup>46</sup>). There is, therefore, a chance that English law may change and require reasonable foresight of psychiatric illness even where personal injury is threatened. Nevertheless, Lord Walker’s point in *Corr* in favor of the *Page* ruling, if accepted, might have greater weight in the United States, where bright-line rules are sought.

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although one that I endorse if necessary, is not, I think, particularly happy.

*Rothwell*, [2008] A.C. at 315.

37. See generally *Rothwell*, [2008] A.C. 281.

38. *Id.* at 293–94.

39. *Id.* at 295–96, 301, 309, 312–13, 315.

40. *Id.* at 296, 301–02, 309, 313, 315.

41. *Id.* at 296, 301, 315.

42. *Id.* at 301.

43. *Id.* at 315.

44. *Corr v. IBC Vehicles Ltd.*, [2008] UKHL 13, [2008] A.C. 884 (appeal taken from Eng.).

45. *Id.* at 911–12.

46. *Rothwell*, [2008] A.C. at 315.

c. *The “Specified Categories of Activities, Undertakings, or Relationships” Inclusion.* It is envisaged that the “telegraph” and “corpse” cases<sup>47</sup> would be accommodated by this provision. However, this category is not restricted to those two types of cases, and one interesting question is what particular relationships will be encompassed. There is clearly the possibility of growth.

A similar “relationship” idea can be found in the English case law, although without a specific restriction to situations where psychiatric illness is “especially likely.” In fact, one could argue that cases that do not involve the claimant suffering psychiatric illness solely from witnessing injury caused negligently to another (cases that are subject to restrictive criteria<sup>48</sup>) fall under this heading and turn on the particular relationship between the claimant and the defendant.<sup>49</sup> Thus, for example, a duty of care encompassing psychiatric illness may be owed by a solicitor to a client<sup>50</sup> and by a prison officer to a prisoner.<sup>51</sup> One important area that fits here and that has developed in recent times in England involves cases brought by employees against their employer alleging negligence in relation to stress at work.<sup>52</sup> The prevalence of workmen’s compensation schemes in the United States, however, renders this an unlikely point of comparison within the tort of negligence.<sup>53</sup>

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47. See DAN B. DOBBS, *THE LAW OF TORTS* § 308, at 835–38 (2000). For an English case on a corpse, see *Owens v. Liverpool Corp.*, [1939] 1 K.B. 394, but note the comments of Lord Oliver in *Alcock v. Chief Constable of South Yorkshire Police*, [1992] 1 A.C. 310, 412 (H.L.) (appeal taken from Eng.).

48. See *infra*, pp. 1188–89.

49. See *Butchart v. Home Office*, [2006] EWCA (Civ) 239, [2006] 1 W.L.R. 1155 (Eng.); MARTIN MATTHEWS, JONATHAN MORGAN & COLM O’CINNEIDE, *HEPPLE & MATTHEWS’ TORT: CASES AND MATERIALS* 145–47 (6th ed. 2008) (by permission of Oxford University Press).

50. *McLoughlin v. Jones*, [2001] EWCA (Civ) 1743, [2002] Q.B. 1312 (Eng.).

51. *Butchart*, [2006] EWCA (Civ) 239, [2006] 1 W.L.R. 1155; see also *Leach v. Chief Constable of Gloucestershire Constabulary*, [1999] 1 W.L.R. 1421 (C.A. Civ.) (Eng.); *N. v. Agrawal*, [1999] P.N.L.R. 939 (C.A. Civ.) (Eng.); *In re Organ Retention Group Litig.*, [2004] EWHC (QB) 644, [2005] Q.B. 506 (Eng.); *Peter Handford, Psychiatric Injury in Breach of a Relationship*, 27 *LEGAL STUD.* 26 (2007) (U.K.).

52. See, e.g., *Hatton v. Sutherland*, [2002] EWCA (Civ) 76, [2002] I.C.R. 613, *appealed sub nom Barber v. Somerset County Council*, [2004] UKHL 13, [2004] I.C.R. 457; see also MULLANY & HANDFORD, *supra* note 1, at 539–72; TEFF, *supra* note 1, at 161–65. *But see Dickins v. O2 PLC*, [2008] EWCA (Civ) 1144, [2009] I.R.L.R. 58, [46].

53. One American case involving an employee is mentioned in the Reporters’ Note, but, as is acknowledged there, it is an intentional emotional distress case. See *RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM* § 46 reporters’ note cmt. f (Tentative Draft No. 5, 2007) (citing *Pratt v. Brown Mach. Co.*, 855 F.2d 1225 (6th Cir. 1988)).

B. *NIED Resulting From Bodily Harm To Third Persons*

Section 47<sup>54</sup> of the *Restatement (Third)* provides as follows:

An actor who negligently causes serious bodily injury to a third person is subject to liability for serious emotional disturbance thereby caused to a person who: (a) perceives the event contemporaneously, and (b) is a close family member of the person suffering the bodily injury.<sup>55</sup>

The case that will leap to the English lawyer's mind at this point is *Alcock v. Chief Constable of South Yorkshire Police*,<sup>56</sup> which arose out of the tragedy at the Hillsborough football (soccer) stadium. The case laid down various restrictions on recovery by those who suffered psychiatric illness as a result of what they had seen or heard of the events.<sup>57</sup> In outline, these were a requirement of a "sudden shock," a loving relationship between the claimant and the victim, presence at the scene or the immediate aftermath, and awareness of the events through the claimant's "own unaided senses."<sup>58</sup>

1. *Particular Points of Interest*

a. *Serious Bodily Injury.* This seems to be a *requirement*, that is, if there is in fact no such injury, then the claim will not be allowed, even if the plaintiff reasonably believed that the injury had occurred. The Reporters' Note refers to the "skimpy" American law on balance taking this line.<sup>59</sup> This seems to produce unfair distinctions, and unnecessarily so, as the floodgates argument is not really an issue and the "bright line" would not be greatly dimmed if such cases were included. English law probably takes a more sympathetic line.<sup>60</sup>

b. *The Need for a Third Party.* The *Restatement (Third)*'s proposals would exclude a case where the person in peril is in such a position as a result of his or her own negligence, that is, there is no third party involved.<sup>61</sup> At the moment English law would concur. In

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54. This will be section 48 in the final version of the *Restatement (Third)*.

55. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 47 (Tentative Draft No. 5, 2007).

56. *Alcock v. Chief Constable of S. Yorkshire Police*, [1992] 1 A.C. 310 (H.L.) (appeal taken from Eng.).

57. *See generally id.*

58. *Id.*

59. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 47 cmt. d (Tentative Draft No. 5, 2007).

60. *See Alcock*, [1992] 1 A.C. at 412.

61. There has not been a great deal of debate of this position in the U.S. case law. *See MULLANY & HANDFORD, supra* note 1, at 455–56.

*Alcock*, Lord Oliver inclined to this opinion,<sup>62</sup> and the matter was so decided by the High Court in *Greatorex v. Greatorex*.<sup>63</sup> In this case, Mr. Justice Cazalet accepted that there was no binding authority on the point but took the view that the weight of Commonwealth authority was against a duty of care being owed by a person who negligently injured himself to someone who suffered nervous shock from witnessing the event.<sup>64</sup> His Lordship went on to decide that, on policy grounds, no duty of care was owed, even if the claimant fulfilled the *Alcock* criteria for secondary victims to recover.<sup>65</sup> One factor was the restriction on a person's freedom of action that any such duty would impose; however, of more weight for the judge was the fact that the *Alcock* criteria meant that a claimant would normally be a member of the same family as the defendant, and that claims in such a situation with the potential for claims of contributory negligence could harm family relations.<sup>66</sup> In Mr. Justice Cazelet's opinion, the policy arguments outweighed the unfairness to a joint tortfeasor to which Lord Oliver had pointed in *Alcock*.<sup>67</sup> This is the point that in a jurisdiction, such as England, where there is joint-and-several liability, another person who is jointly at fault with the victim for putting the victim in peril will pay more than his or her share of the responsibility.<sup>68</sup> Such a person will be liable for all of the damages, being unable to obtain any contribution from the victim.<sup>69</sup> Any solution was thought by the judge in *Greatorex* to require legislative intervention.<sup>70</sup> Despite this view, there must be a chance that English courts will reverse this ruling and that the developments in other jurisdictions referred to in *Tort Liability for Psychiatric Damage* might assist this process.<sup>71</sup>

In the United States, the case for covering these two-party situations is not as strong, as there is less likely to be a joint-and-

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62. *Alcock*, [1992] 1 A.C. at 418.

63. *Greatorex v. Greatorex*, [2000] 1 W.L.R. 1970 (Q.B.) (Eng.). See generally Basil Markesinis, *Foreign Law Inspiring National Law: Lessons from Greatorex v. Greatorex*, 61 CAMBRIDGE L.J. 386 (2002) (Eng.).

64. *Greatorex*, [2000] 1 W.L.R. at 1982. But see MULLANY & HANDFORD, *supra* note 1, at 455–70.

65. *Greatorex*, [2000] 1 W.L.R. at 1983–87.

66. *Id.* at 1984–86.

67. *Id.* at 1986.

68. *Id.*

69. *Id.*

70. See, e.g., Congenital Disabilities (Civil Liability) Act, 1976, c. 28, § 1(7) (Eng.).

71. See *supra* note 1. The (English) Law Commission had been in favor of allowing the possibility of recovery when the defendant had injured himself, but, recognizing the restriction this would place on self-determination, has also recommended that the court should be able to deny a duty of care where it was not just and reasonable to impose one because of the defendant's exercise of a choice to put himself or herself in danger (for example, by participating in a dangerous sport). See THE LAW COMM'N, *supra* note 7, ¶¶ 5.34–5.43.

several-liability regime in operation.<sup>72</sup> It should also be acknowledged that insofar as any interfamilial immunities still exist (they are not, in general, found in English law<sup>73</sup>), those jurisdictions adopting them might be attracted by the reasoning in *Greatorex*.

c. *Serious Emotional Disturbance and Property Damage.* So far as serious emotional disturbance in itself is concerned, the same comments apply here as above in relation to section 46. Serious emotional disturbance suffered as a result of witnessing damage to property (for example, a pet) would not be caught by the *Restatement (Third)*.<sup>74</sup> English law may be more generous if a recognizable psychiatric illness results. In *Attia v. British Gas Plc*,<sup>75</sup> the defendants admitted that their employees had negligently caused a fire at the claimant's house. The claimant alleged that she had suffered nervous shock by virtue of seeing her home and its contents on fire, but she did not allege that she feared for anyone else's safety.<sup>76</sup> The case raised as a preliminary issue whether such a claim could, as a matter of law, successfully be made, a question to which the Court of Appeal gave an affirmative answer.<sup>77</sup> However, the judgments of both Lord Justice Dillon and Lord Justice Woolf stressed the fact that a duty of care was already owed to the claimant not to start a fire.<sup>78</sup> Lord Justice Bingham agreed that the claim should not be struck out as a matter of law but seemed less influenced by a duty of care already being owed to the claimant.<sup>79</sup> It might at first sight seem that a satisfactory solution could be found by adapting the *Restatement (Third)*'s proposed criteria<sup>80</sup> by, for example, requiring a legal interest in the property rather than a close family link and requiring serious injury to property rather than serious bodily injury. However, the problem would appear to be that, in the absence of any reasonable-foresight test—which

72. See DOBBS, *supra* note 46, § 390, at 1077–91.

73. Though see the position of a mother under the Congenital Disabilities (Civil Liability) Act of 1976. On the other hand, Mr. Justice Cazalet did acknowledge that in cases of physical damage, family members can sue each other in England. See *Greatorex*, [2000] 1 W.L.R. at 1985.

74. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 46 cmts. i–j (Tentative Draft No. 5, 2007).

75. *Attia v. British Gas Plc*, [1988] Q.B. 304 (C.A. Civ.) (Eng.); see also *Owens v. Liverpool Corporation*, [1939] 1 K.B. 394 (C.A. Civ.) (Eng.). But note the comments of Lord Oliver in *Alcock v. Chief Constable of South Yorkshire Police*, [1992] 1 A.C. 310, 412 (H.L.) (appeal taken from Eng.). Consider further the very recent case of *Yearworth v. North Bristol NHS Trust*, [2009] EWCA (Civ) 37, [2009] 3 W.L.R. 118 (Eng.), where the decision was based on bailment. It can perhaps, therefore, best be seen as a “relationship” case, especially as it involved information being communicated after the event.

76. *Attia*, [1988] Q.B. at 318.

77. *Id.* at 312, 317, 320–21.

78. *Id.* at 312, 314–15, 317.

79. *Id.* at 317–21.

80. See *supra* note 54 and accompanying text.

would be thought to offend the “bright-line” requirement—this could still be too wide (for example, what sort of property?) and it would be necessary to introduce some over-complicated definition.

d. *Perceives Contemporaneously*. One issue here is the extent to which perception via live television coverage will qualify.<sup>81</sup> Another issue vis-a-vis England is the extension in English law to the concept of the “immediate aftermath.” This was, for example, the situation in *McLoughlin v. O’Brian*,<sup>82</sup> where the successful claimant was not at the scene of the accident but arrived at the hospital two hours later. This can cause problems and is potentially capable of including a longer period than that in *McLoughlin*. In *W. v. Essex County Council*,<sup>83</sup> the allegation was that psychiatric illness had come about after parents learned of the sexual abuse of their children by a child who had been fostered in their home. This information was obtained by the parents at the end of the four-week period during which the alleged abuse had occurred.<sup>84</sup> Such a situation was not regarded by the House of Lords as necessarily going outside the “immediate aftermath” concept.<sup>85</sup> The English experience might suggest that there is too much elasticity in the “aftermath” doctrine for it to be a satisfactory “bright-line” rule; indeed, in *Alcock* Lord Jauncey ventured the view that any attempt at a comprehensive definition of the phrase “the immediate aftermath” would be fruitless.<sup>86</sup>

e. *Close Family Member*. At first sight this would appear to be narrower than is permitted in England under the *Alcock* criteria.<sup>87</sup> However, a Reporters’ comment indicates that a functional approach should be taken to this phrase, and it may extend beyond the more traditional concept of family.<sup>88</sup> A particular contrast with England seems to be the lack of any requirement of a loving relationship. Under *Alcock* it is necessary to prove this, and although it will be presumed in suitable cases (for example, a

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81. In England this was left open in *Alcock*. See *Alcock v. Chief Constable of S. Yorkshire Police*, [1992] 1 A.C. 310, 405, 417, 423 (H.L.) (appeal taken from Eng.).

82. *McLoughlin v. O’Brian*, [1983] 1 A.C. 410 (H.L.) (appeal taken from Eng.).

83. *W. v. Essex County Council*, [2001] 2 A.C. 592 (H.L.) (appeal taken from Eng.).

84. *Id.* at 601.

85. *Id.* As this was a strike-out application (i.e., a motion to dismiss), there was no need for a definitive ruling on the point.

86. *Alcock*, [1992] 1 A.C. at 423. For further case law on the “immediate aftermath” concept, see *Galli-Atkinson v. Seghal*, [2003] EWCA (Civ) 697.

87. See *Alcock*, [1992] 1 A.C. 310.

88. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 47 cmt. e (Tentative Draft No. 5, 2007).

parent), it is a rebuttable presumption.<sup>89</sup> The *Restatement (Third)*'s position might be thought to have the advantage of avoiding a potentially invidious inquiry into the nature of the relationships, unless perhaps it is relevant to the assessment of the measure of damages.

Section 47 does not allow the mere bystander, i.e., the witness of an event (even a horrific one), to bring a claim in the absence of a relationship with a victim.<sup>90</sup> Certain dicta in *Alcock* had expressly left this point open in English law.<sup>91</sup> The Court of Appeal, however, in *McFarlane v. E.E. Caledonia Ltd.* surprisingly regarded the possibility of such bystander recovery as inconsistent with the requirement for a loving relationship in *Alcock* and rejected any such claim.<sup>92</sup> This view against mere bystander recovery has been met with approval.<sup>93</sup> On this later approach, there is a coincidence of view.

## 2. Additional Considerations

a. *Participants.* This idea can be found in Lord Oliver's speech in *Alcock*. His Lordship distinguished between "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."<sup>94</sup> The former were classed as "primary" victims and the latter were "secondary" victims, and the *Alcock* criteria were only applicable to the latter.<sup>95</sup> A person may, of course, be involved in the events associated with an accident but not be physically endangered or be a family member. For example, in *Dooley v. Cammell Laird & Co.*,<sup>96</sup> the claimant was operating a crane when a piece of rope snapped and the load being carried fell into the hold of a ship where people were working. The claimant recovered damages for what was termed in those days "nervous shock" that was suffered as a result of fear for the safety of his fellow workmen, whom he could not actually see from his position on the crane.<sup>97</sup> This case, and two

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89. *Alcock*, [1992] 1 A.C. at 397, 403.

90. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 47 cmt. e (Tentative Draft No. 5, 2007).

91. See *Alcock*, [1992] 1 A.C. at 397, 403, 416.

92. *McFarlane v. E.E. Caledonia Ltd.*, [1995] 1 W.L.R. 366 (Q.B.) (Eng.).

93. See *White v. Chief Constable of S. Yorkshire Police*, [1999] 2 A.C. 455, 500 (H.L.) (appeal taken from Eng.).

94. *Alcock*, [1992] 1 A.C. at 407.

95. *Id.* at 408, 411–12.

96. *Dooley v. Cammell Laird & Co.*, [1951] 1 Lloyd's List L.R. 271 (Eng.). The other cases often cited in this regard are *Galt v. British Railways Board*, (1983) 133 N.L.J. 870 (Q.B.) (Eng.), and *Wigg v. British Railways Board*, (1986) 136 N.L.J. 446 (Q.B.) (Eng.).

97. On whether it matters if the apprehended victim is not in fact injured, see *supra* p. 1185.

others like it (in legal terms) were treated in *Alcock* by Lord Oliver as involving “unwilling participant[s]” who were within the primary, as opposed to secondary, victim category.<sup>98</sup>

This primary/secondary victim distinction in general has proved to be difficult and controversial, and it cannot be explored in detail here.<sup>99</sup> There is later authority that the category of “primary” victims only includes those who were reasonably foreseeably physically endangered by the defendant’s negligence,<sup>100</sup> and on this view not everybody in the “participant” category of cases would be included in this primary status. In *White*, Lord Hoffmann’s approach to these cases was that “there may be grounds for treating such a rare category of case as exceptional and exempt from the *Alcock* control mechanisms.”<sup>101</sup> Furthermore, subsequent case law does lend a measure of support to the claims of such people to be classed as primary victims. In *W. v. Essex County Council*<sup>102</sup> the House of Lords thought that it was arguable<sup>103</sup> that the parents in that case might be regarded as primary victims (and hence avoid the *Alcock* criteria) on this ground since they had invited the foster child into their home. One safeguard is that where the psychiatric illness results from the belief that the claimant may have caused the victim’s injuries, this must be a reasonable one,<sup>104</sup> although according to *Salter v. UB Frozen & Chilled Foods Ltd.*,<sup>105</sup> there is no need for an active participant to feel any sense of blame for the accident.<sup>106</sup> This is a category of claimant which merits consideration for inclusion within the fold of the *Restatement (Third)*. It may be a more satisfactory place to draw the admittedly arbitrary line, although it might be a question whether such an extension should be associated with section 47 or section 46.

b. *Rescuers*. Linked to the above is the category of rescuers. Their position was discussed in *White*.<sup>107</sup> Prior to that decision, the view seemed to be that reasonable foresight of psychiatric illness

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98. *Alcock*, [1992] 1 A.C. at 408.

99. See MULLANY & HANDFORD, *supra* note 1, 153–82; TEFF, *supra* note 1, at 75–77.

100. *White v. Chief Constable of S. Yorkshire Police*, [1999] 2 A.C. 455, 496–97 (H.L.) (appeal taken from Eng.); *Page v. Smith*, [1996] A.C. 155, 184 (H.L.) (appeal taken from Eng.).

101. *White*, [1999] 2 A.C. at 508. His Lordship there noted that Lord Oliver’s treatment had been adopted by Lord Hope in *Robertson v. Forth Road Bridge Joint Board*, [1995] I.R.L.R. 251 (Sess.) (Scot.).

102. *W. v. Essex County Council*, [2001] 2 A.C. 592 (H.L.) (appeal taken from Eng.).

103. *Id.* at 602.

104. See *Monk v. PC Harrington Ltd.*, [2008] EWHC (QB) 1879 (Eng.).

105. *Salter v. UB Frozen & Chilled Foods Ltd.*, [2003] S.L.T. 1011 (Scot.).

106. *Id.* at 1019; see also *Gregg v. Ashbrae Ltd.* [2005] NIQB 37 (N. Ir.).

107. *White v. Chief Constable of S. Yorkshire Police*, [1999] 2 A.C. 455, 464 (H.L.) (appeal taken from Eng.).

would suffice.<sup>108</sup> They were within Lord Oliver's primary victim category. However, a different approach prevailed in *White*, in which the policemen claimants argued that they fell into the rescuer category and, as a consequence, did not have to meet the *Alcock* criteria.<sup>109</sup> The House of Lords rejected any such special category.<sup>110</sup> They would be classified as primary or secondary on the same basis as anyone else.<sup>111</sup> On the facts, the police fell into the second category and their claims failed.<sup>112</sup> One reason for the approach in the House of Lords was the perceived difficulty in categorizing claimants as rescuers or not, but the more important reason was based on what was termed "distributive justice"—that the public would not find fair a system in which the relatives in *Alcock* had failed but the police had recovered.<sup>113</sup> Given the existence of the "firefighter's rule"<sup>114</sup> in the U.S., this perception would perhaps be rather different, and that policy of the law which often looks favorably on rescuers could be reflected in allowing this limited class (i.e., after the exclusionary effect of the "firefighter's rule") to recover even if not physically endangered.<sup>115</sup>

#### CONCLUSION

In various (though not all) respects, English law is more favorable to claimants than the *Restatement (Third)*'s proposals, and it is suggested that some of these situations might be accommodated without too adverse an effect on the floodgates or bright-line issues. If the problem is one of cost, then perhaps raising the threshold from serious emotional disturbance to a recognizable psychiatric illness might provide some relief; furthermore, it is arguable that this might also assist the floodgates and bright-line questions. To an English lawyer, leaving the determination of "serious emotional disturbance" in the hands of a jury looks to be a potentially dangerous proposition in terms of the scope of liability, although this may be overestimating the freedom that juries have.<sup>116</sup> Even if

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108. *Chadwick v. British Rys. Bd.*, [1967] 1 W.L.R. 912 (Q.B.) (Eng.).

109. English law has no "firefighter's rule." See *Ogwo v. Taylor*, [1988] A.C. 431 (H.L.) (appeal taken from Eng.). The firefighter's rule is an American legal doctrine "holding that a firefighter, police officer, or other emergency professional" may not hold a property owner liable for any unintentional injuries sustained in the process of responding to an emergency on that property. BLACK'S LAW DICTIONARY 1463 (8th ed. 2004).

110. See generally *White*, [1999] 2 A.C. 455.

111. *Id.* at 498, 508–11.

112. *Id.*

113. *Id.*

114. See *supra* note 108.

115. Rescuers are dealt with in section 32 of the *Restatement (Third)* proposals, but the proposals there are confined to cases where rescuers suffer physical harm. RESTATEMENT (THIRD): LIAB. FOR PHYSICAL & EMOTIONAL HARM § 32 (Tentative Draft No. 5, 2007).

116. If expert witnesses are called, then the control that can be exercised by

there is agreement on these difficult questions of balance, however, the extent to which they are achievable within the job description for the *Restatement (Third)* is a matter for those better qualified than this writer to judge.

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the judge under the Supreme Court decision in *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579, 593 (1993), needs to be borne in mind. Furthermore, in the Reporters' Note to section 45, which deals with *intentional* infliction of emotional disturbance, it is stated that "[t]he court . . . plays a more substantial screening role on the questions of extreme and outrageous conduct and the severity of the harm . . . than on other questions of fact." RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 45 reporters' note cmt. f (Tentative Draft No. 5, 2007).