

## Rethinking *Alcock* in the new media age\*

Whilst the English law of tort is generally favourable towards the psychiatric damage claims of primary victims, claims from secondary victims are treated in a much more restrictive manner. The leading case of *Alcock v Chief Constable of South Yorkshire Police (Alcock)* arising from the Hillsborough disaster establishes that amongst other things, secondary victims must overcome a number of control mechanisms in order to found a duty of care in negligence: There must be a close proximity of relationship with the immediate victim; and proximity in time, space and perception in relation to the shocking event. In relation to the means by which the shock is caused, the House of Lords in *Alcock* emphasised that perception was generally expected to be with one's own unaided senses and that the viewing of a television broadcast of events would not normally suffice. However, the decades since the judgment have witnessed an explosion of new media platforms and technologies which have arguably transformed the dissemination of imagery. In light of this transformation, this article seeks to consider the implications of such technologies for the legal framework arising from *Alcock*, suggesting that the current approach fails to recognise the realities of the modern age in a number of ways. Looking to Australian jurisprudence as a basis for change, this article proposes how the law might be reformed to better reflect the contemporary world.

*Key words* – *Alcock*, Hillsborough, negligence, new media, technology, psychiatric damage, secondary victims, tort.

## I. INTRODUCTION: WHY REVISIT *ALCOCK* NOW?

Described as ‘one of the greatest peacetime tragedies of the last century’,<sup>1</sup> the basic account of the Hillsborough disaster is well known. On 15<sup>th</sup> April 1989, an FA Cup semi-final was scheduled between Liverpool and Nottingham Forest and over 50,000 football fans travelled to Hillsborough stadium to watch. Unable to attend, millions of others watched the match live on television or heard radio broadcasts and repeats of the event. Yet even before the match started it became apparent that the stadium was dangerously overcrowded at the Liverpool end. Just prior to kick-off, even more Liverpool fans were admitted through an exit-gate opened by the South Yorkshire Police. The additional numbers led to fatal overcrowding in the forward enclosures. Of the 96 fans who lost their lives, the youngest was just 10 years old. Hundreds of others were injured and still more were traumatised. In the years since the event, campaign groups have tirelessly fought for justice amid a growing suspicion of authorities deliberately deflecting blame and colluding with the press to mask their own culpabilities.<sup>2</sup> Only recently has the fuller picture surrounding the disaster begun to

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\*Corresponding author: Bela Bonita Chatterjee, Lecturer in Law, Lancaster University Law School, Lancaster, LA1 4YN. I thank Paula Giliker, Catherine Easton, Agata Fijalkowski, Jane Wright and John Murphy and the anonymous reviewers for their comments on previous versions of this article, and Lorna Pimperton for librarian assistance. Ideas in this article were previously explored at the University of Westminster Law and the Senses Conference 2013, my thanks to the organisers and audience for their feedback. Unless otherwise stated all URLs were last accessed 29/04/2016.

<sup>1</sup> Prime Minister David Cameron, Hansard, HC Deb 12<sup>th</sup> Sept 2012 Col 283.

<sup>2</sup> See eg Hillsborough Justice Campaign <http://www.contrast.org/hillsborough/>

emerge, serving to bring the events of Hillsborough under a renewed spotlight. Prompted by manifest public anger at the 20th anniversary memorial event in Liverpool, the normal 30 year rule prohibiting the publication of certain official documents was waived and a fresh investigation was instituted by the Hillsborough Independent Panel.<sup>3</sup> The Panel's Report in 2012 revealed that there had indeed been a systematic attempt to cover up the police's mistakes, including significant revision of police statements so as to remove references to inadequate police responses, leadership and communications.<sup>4</sup> In response to the report, the Independent Police Complaint's Commission has opened what is, at the time of writing, the largest inquiry ever conducted into alleged police criminality in England and Wales.<sup>5</sup> The original inquest verdicts have also been overturned as a result of a legal challenge founded on the new evidence revealed by the Report, and new inquests were initiated.<sup>6</sup> The results, published at the time of writing and attracting significant press coverage, found that the 96 victims were unlawfully killed.<sup>7</sup>

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Numerous celebrities have lent public support and considerable finances to the effort, including comedians Russell Brand and John Bishop, and footballer Stephen Gerrard.

<sup>3</sup> Hillsborough Independent Panel (HIP) Report 2012, see <http://hillsborough.independent.gov.uk/>

<sup>4</sup> Ibid.

<sup>5</sup> See <http://www.ipcc.gov.uk/hillsborough;>

[http://www.ipcc.gov.uk/sites/default/files/Documents/investigation\\_commissioner\\_reports/IPCC\\_DECISION\\_I\\_N\\_RESPONSE\\_TO\\_HILLSBOROUGH\\_REFERRALS.pdf](http://www.ipcc.gov.uk/sites/default/files/Documents/investigation_commissioner_reports/IPCC_DECISION_I_N_RESPONSE_TO_HILLSBOROUGH_REFERRALS.pdf)

<sup>6</sup> *Attorney General v HM Coroner of South Yorkshire (West)* [2012] EWHC 3783 (Admin); see also <http://hillsboroughinquests.independent.gov.uk/>

<sup>7</sup> See further for example the Hillsborough section in The Guardian's news archive, <http://www.theguardian.com/football/hillsborough-disaster>

Whilst these recent events suggest fresh criminal action,<sup>8</sup> the heightened focus on Hillsborough also suggests a timely opportunity to re-examine the disaster's legacy for the law of negligence.<sup>9</sup> The case of *Alcock* arose directly from Hillsborough, having been brought against the South Yorkshire Police by the loved ones of those who died at the stadium. *Alcock* provides the framework for the current law on recovery for psychiatric damage by secondary victims, these being those who suffer psychiatric damage through witnessing the negligent infliction of harm or the risk thereof on a loved one.<sup>10</sup> In brief, *Alcock* established that in order for secondary victims to recover, psychiatric damage must be reasonably foreseeable, but claimants would also have to establish a close relationship with the immediate victim, plus proximity in time, space and perception in relation to the event.<sup>11</sup> In relation to the means by which the shock was caused, the viewing of events through live broadcasting in *Alcock* was not generally considered to be sufficient because recognisable suffering was not shown due to broadcasting codes of ethics, and the fact that the collage of viewpoints depicted by the media was not felt to be equivalent to personal perception. The disaster must be

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<sup>8</sup> The headline 'Hillsborough families to sue police for 'abuse on industrial scale' aptly captures the public sentiment at the time of writing in late April 2016. See <http://www.theguardian.com/football/2016/apr/28/hillsborough-families-to-sue-police-for-abuse-on-industrial-scale> The chief constable of the South Yorkshire police has been suspended, commentators consider his return to post unlikely: <http://www.theguardian.com/football/2016/apr/28/is-south-yorkshire-police-worth-saving-after-hillsborough>

<sup>9</sup> Whilst this article focuses on psychiatric damage claims, arguably the criminal review has wider relevance for tort law. As the original inquest verdicts are reviewed, arguably the case of *Hicks v Chief Constable of South Yorkshire Police* [1992] 2 All ER should be revisited due to fresh inquest evidence on time of deaths. Potential claims of misfeasance in public office and libel might also be considered.

<sup>10</sup> *Alcock v Chief Constable of South Yorkshire Police* [1992] AC 310.

<sup>11</sup> On the distinction between primary and secondary victims see further *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455; *Page v Smith* [1996] AC 155. The term 'immediate victim' is used to describe the person whose imperilment is witnessed by the secondary victim.

experienced directly, through the claimant's own 'unaided senses'.<sup>12</sup> As stated by Lord Oliver, 'The necessary element of proximity between plaintiff and defendant is furnished, at least in part, by both physical and temporal propinquity and also by the sudden and direct visual impression on the plaintiff's mind of actually witnessing the event or its immediate aftermath.'<sup>13</sup>

Yet arguably the reasoning in *Alcock* was influenced by the limited development of broadcasting technology at the time. This landscape is now profoundly transformed, not least by the near-ubiquitous and unedited mass dispersal of images online. The hallmark of the contemporary disaster is blanket media coverage which is instantly uploaded and proliferated online in real time; high definition images which immediately reach us — regardless of distance and location — and connect us to our loved ones through a multitude of platforms and on a range of increasingly sophisticated devices. Location technologies embedded in these devices alert us to precisely where our loved ones are, while tagging and automatic recognition apps zero in on their unique features.<sup>14</sup> Particularly in times of disaster, the first response of governments and relief organisations as well as that of the wider populace is to turn to the smartphone and the internet for an understanding of events.<sup>15</sup> As Giliker has recently observed, '*Alcock* was decided in November 1991 and technology has moved on.

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<sup>12</sup> *Hambrook v Stokes* [1925] 1 KB 141, p 152.

<sup>13</sup> fn 10 above, p 416.

<sup>14</sup> The term 'app' is an abbreviation of 'application', otherwise known as a computer programme; a small piece of software that is downloadable to and runs on computers, mobiles and tablets. The app executes a particular task, for example enabling the phone to recognise specified faces. Tagging describes online labels that link to favoured images, text or profiles. This helps to create instant connectivity and awareness, so for example when a person's Facebook profile is tagged, automatic updates on their activities and status are sent to the chosen audience when anything in the profile changes.

<sup>15</sup> The term 'smartphone' describes a mobile phone which hosts non-telephonic functions such as GPS, internet and apps.

It remains an interesting question to what extent the courts can continue to distinguish between the “unaided senses” of the secondary victim and the dispersal of live images through modern technology.<sup>16</sup> Engaging directly with this observation, this article seeks to consider the import of technological advances for *Alcock*’s control mechanisms in three stages. Firstly, it outlines the relevant law, giving particular attention to the requirements on the means by which the shock is caused. Secondly, it outlines relevant developments in new media and technology and explains how these challenge the legal position in *Alcock*. Thirdly, having identified the points of tension in the law, the article considers Australian jurisprudence, using it as a basis for suggesting reform to the domestic legal framework on psychiatric damage which would better reflect contemporary developments in technology. It concludes that reform along the lines of the Australian jurisprudence would arguably make the domestic law in this area more suitable and — more importantly given the rate of technological change — sustainable for the 21<sup>st</sup> century.

## **II. Recovery for secondary victims: the development of the law**

In order to provide a framework for the discussion, it is first useful to outline the law on negligently inflicted psychiatric damage in relation to secondary victims. Whereas a primary victim is one who has suffered psychiatric damage as a result of being placed in immediate danger or in reasonable fear thereof, a secondary victim may be described as being ‘once removed’ from the event, suffering psychiatric damage because of witnessing the infliction of physical injury (or the risk of such) upon a loved one. The claims of primary victims are more readily admitted than those of secondary victims.<sup>17</sup> To establish the existence of a duty of care, the claimant must show not only that it is reasonably foreseeable that they would be harmed by the defendant’s negligence but also that there is sufficient proximity between the claimant and the defendant. Where the claimant is

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<sup>16</sup> *P Giliker*, *Tort* (5<sup>th</sup> edn 2014: Sweet & Maxwell) p 151.

<sup>17</sup> For discussion see *Page* and *White*, fn 11 above.

immediately involved in a disaster, i.e. as a primary victim, proximity is not normally considered to be problematic.<sup>18</sup> However, in the case of secondary victims, the courts have feared the prospect of open-ended liability, thus in addition to a higher foreseeability threshold (namely that psychiatric damage would have been suffered by a person of ordinary fortitude in the circumstances), a number of control mechanisms, variously couched in the language of proximity and specific to secondary victims, have also been laid down so as to confine the scope of the duty of care.<sup>19</sup>

Until *Alcock*, the best conspectus of the law in this area was located in the case of *McLoughlin*, which concerned a mother whose husband and children had been involved in a car crash.<sup>20</sup> She had not witnessed the event itself, but, upon learning of the crash from a friend, had travelled to the hospital where she was informed that her daughter was dead. Her surviving family members were also at the hospital, which was where she found them; distressed, dishevelled, dirty and bloodstained. Witnessing this harrowing scene had caused her to suffer psychiatric damage. The Court in *McLoughlin* confirmed that foreseeability alone was not enough to ground a duty of care. More was required. Specifically, their Lordships said, careful consideration had to be given to three independent considerations, namely (1) the class of persons whose claims ought to be recognised; (2) the proximity of the claimants to the traumatic event, and (3) the means by which the shock was caused.

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<sup>18</sup> Ibid.

<sup>19</sup> The lack of clarity in relation to the terminology of psychiatric harm has been commented on elsewhere, for example *Murphy* notes that there is some degree of slippage in the use of the term proximity, and that proximity in the strict Atkinian sense can only correctly concern the connection between the claimant and the defendant. See *J Murphy* 'Negligently inflicted psychiatric harm: a re-appraisal' 15 *Legal Studies* 415 ff.

<sup>20</sup> *McLoughlin v O'Brian* [1983] 1 AC 410.

In relation to (1) the class of persons those claims ought to be recognised (this being the question of proximity of relationship) the Court recognised a spectrum of claims. According to Lord Wilberforce:

As regards the class of persons, the possible range is between the closest of family ties – of parent and child, or husband and wife – and the ordinary bystander. Existing law recognises the claims of the first: it denies the claims of the second, either on the basis that such persons must be assumed to be possessed of fortitude sufficient to enable them to endure the calamities of modern life, or that defendants cannot be expected to compensate the world at large...it should follow that other cases involving less close relationships must be carefully scrutinised. I cannot say that they should never be admitted. The closer the tie (not merely in relationship, but in care) the greater the claim for consideration.<sup>21</sup>

In any case, a claim would also have to be evaluated in light of (2) the proximity of the claimant to the traumatic event. Lord Wilberforce stated that ‘As regards proximity to the accident, it is obvious that this must be close in both time and space...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.’<sup>22</sup> The limits of the “immediate aftermath” were not precisely defined in the case but were held on the facts to cover the claimant personally witnessing her family around two hours after the accident in essentially the same state as they would have been at the site of the accident itself.<sup>23</sup>

Regarding (3) the means by which the damage was caused, it was reiterated that the law did not compensate for psychiatric damage that arose from third party communication. Lord Wilberforce

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<sup>21</sup> fn 20 above, p 422.

<sup>22</sup> Ibid.

<sup>23</sup> fn 20 above, p 419.

stated that 'The shock must come through the sight or hearing of the event or of its immediate aftermath. Whether some equivalent of sight or hearing, e.g. through simultaneous television, would suffice may have to be considered.'<sup>24</sup>

In declining to extend the law further, the court was clearly motivated by policy considerations. Quoting Dean Prosser, Lord Wilberforce noted that the arguments were best encapsulated as follows: 'the reluctance of the courts to enter this field even where the mental injury is clearly foreseeable, and the frequent mention of 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.'<sup>25</sup> The Court noted that since Dean Prosser's comments times had changed, so for example the type of damage was now more familiar, fraudulent claims and evidentiary issues could be dealt with by the courts, and the scarcity of cases combined with the modest sums awarded suggested that the floodgates fear was exaggerated. However, these objections aside, Lord Wilberforce was still of the view that as psychiatric damage could affect a wide range of people, the additional restrictions in the area were justified.<sup>26</sup>

It was against this background that the claims in *Alcock* were to be determined. A total of 10 cases were examined by the House of Lords, claims which encompassed a complex matrix of circumstances. Certain claimants were at the ground but in enclosures some distance from their loved ones. They had witnessed the disaster unfolding at first hand but did not see the actual infliction of injury to their relatives, learning of their deaths some eight or more hours after the event either by telephone or from identifying their bodies in the temporary mortuary that had been set up at the site. Other claimants were not present at the event but either saw the scene unfold on

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<sup>24</sup> fn 20 above, p 423.

<sup>25</sup> fn 20 above, p 421.

<sup>26</sup> fn 20 above, pp 421-422.

live television or learnt of it from later radio and television coverage of the disaster. They feared for their loved ones whom they knew were at the match, but again learnt only later of their deaths from being informed by the police or friends, and/or subsequently identifying their bodies in the mortuary. The personal connections of the claimants to the deceased also varied. The relatives included parents, siblings, grandparents, an uncle, a brother-in-law and a fiancée. In the light of *McLoughlin*, their Lordships in *Alcock* had to determine the question, considering (1) whether the relationships in the present case were sufficiently close, (2) if the time limits came within the concept of the immediate aftermath, and (3) whether perception via live television might be considered equivalent to direct sight or hearing. What emerges from the judgments is a complicated Venn diagram of requirements in which none of the claimants, on the facts of their individual cases, could be placed at the centre.

In terms of how to define proximity of relationship, it was held in *Alcock* that the core requirements of *McLoughlin* still represented the accepted position. Lord Keith was of the view that he would not seek to limit the class by reference to the set categories of presumptive closeness (these being parental and spousal) in *McLoughlin*.<sup>27</sup> Where broader relationships were in question, he espoused the view that in each case the closeness of the tie would need to be proven by the claimant. In the case itself, as no specific evidence of particularly close ties of affection was put forward for the remoter relationships, these claims failed.<sup>28</sup>

Proximity in time and space to the event or its immediate aftermath had also to be satisfied. Two of the plaintiffs, who had lost brothers and a brother-in-law, were actually at the event. Perhaps surprisingly, their presence at the ground did not suffice. Only one plaintiff who was at the match also found his loved one at the scene, but this was some eight hours later, when he identified his

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<sup>27</sup>fn 10 above, p 397.

<sup>28</sup>fn 10 above, p 398.

brother-in-law's body at the temporary mortuary. Although this might be thought capable of falling within the 'aftermath', Lord Ackner thought otherwise.<sup>29</sup> Given that *McLoughlin's* case was considered to be on the margins of recovery, he did not feel that post-accident identification cases, where identification happened after eight hours at the earliest, would be permissible.<sup>30</sup> For Lord Jauncey, a distinction could be drawn between the circumstances of *Alcock* and *McLoughlin* as, in the latter, the mother encountered her family very soon after the incident in the same condition as they would have been at the roadside, whereas the purpose and timings of the visits to the mortuary in *Alcock* were different, being for identification as opposed to rescue and comfort, and some eight to nine hours later.<sup>31</sup> The other claimant was informed of his two brothers' death the next day by telephone, following a fruitless personal search on the day of the disaster. His claim, too, was unsuccessful. Neither claimant had established a sufficiently close relationship with the immediate victim, nor, as Lord Oliver observed, was their presence at the ground sufficient to establish the necessary proximity in time and space.<sup>32</sup>

It will be recalled that *McLoughlin* had been generous in extending the temporal and spatial limits of the event to encompass its 'immediate aftermath' but had passed over the question of whether its perception via live television would be considered equivalent to direct sight or hearing.<sup>33</sup> Whilst the view that it should met with favour in the High Court, it was rejected in the Court of Appeal and

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<sup>29</sup> fn 10 above, pp 404-405.

<sup>30</sup> *Ibid.*

<sup>31</sup> fn 10 above, pp 423-424.

<sup>32</sup> fn 10 above, pp 417-418.

<sup>33</sup> As observed by Hidden J at first instance in *Alcock* (fn 10 above, p 340), to that point no case in any common law jurisdiction had considered the question.

House of Lords, where such arguments were unanimously declined.<sup>34</sup> Lord Keith found that viewing live television scenes did not provide the requisite proximity or sudden sense of shock that the law demanded. Lord Keith stated that in the cases where perception was via television:

none of these depicted suffering of recognisable individuals, such being excluded by the broadcasting code of ethics, a position known to the defendant. In my opinion the viewing of these scenes cannot be equiperated with the viewer being within "sight or hearing of the event or of its immediate aftermath," to use the words of Lord Wilberforce [1993] 1 A.C. 410, 423B, nor can the scenes reasonably be regarded as giving rise to shock, in the sense of a sudden assault on the nervous system. They were capable of giving rise to anxiety for the safety of relatives...and undoubtedly did so, but that is very different from seeing the fact of the relative or his condition shortly after the event. The viewing of the television scenes did not create the necessary degree of proximity.<sup>35</sup>

Lord Ackner broadly agreed, considering that any depiction of recognisable suffering would constitute a *novus actus interveniens*, breaking the causal chain between the defendant's alleged breach of duty and the claimants' loss:

it is common ground that it was clearly foreseeable by the defendant that the scenes at Hillsborough would be broadcast live and that amongst those who would be watching would be parents and spouses and other relatives and friends of those in the pens behind the goal...However he would also know of the code of ethics which the television authorities televising this event could be expected to follow, namely that they would not show pictures of

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<sup>34</sup> By extension, repeats of live television were also excluded as being even further away from the boundaries of proximity. See fn 10 above, p 386 (Lord Nolan).

<sup>35</sup> fn 10 above, p 398.

suffering by recognisable individuals. Had they done so, Mr. Hytner accepted that this would have been a “novus actus”...As the defendant was reasonably entitled to expect to be the case, there were no such pictures.<sup>36</sup>

Drawing on obiter comments from Lord Nolan in the Court of Appeal, Lord Ackner envisaged that in exceptional circumstances, recovery by viewing simultaneous television images might be entertained, such as for example if a publicity-seeking organisation were to show a live broadcast of a children’s balloon ride bursting into flames, but it is evident that he did not view the disaster before him as coming into such a category.<sup>37</sup> Lord Jauncey declined to comment on the possibility of the door being left open to television claims, but agreed that in the present case the defendants could expect that in accordance with television guidelines, individual suffering would not be shown, and concluded that the fact of editing, commentary and a collage of viewpoints that could not represent what any one person could see on their own served to reinforce his decision that television could not be considered as furnishing the requisite proximity.<sup>38</sup> Lord Oliver also declined to accept the television claims on the grounds that aggregated and gradual perception arising from viewing televised scenes was not the same as immediate sight or hearing of the event. In the cases

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<sup>36</sup> fn 10 above, p 405.

<sup>37</sup> Ibid. See also Lord Oliver, p 417, who also saw scope for admission of such claims, although again not in the present case. Arguably the Court’s conclusion on this point runs counter to the principle’s own logic. As evidence presented to the Court shows, a significant number of victims (77) were in their teens or twenties, the youngest being just 10 years of age. Moreover, as widely acknowledged, even at the time, the events were extremely horrific, a fact not as vividly illustrated in the case report as it could have been but graphically brought home by the Taylor Interim Report; see

<http://hillsborough.independent.gov.uk/repository/HWP000000180001.html>

<sup>38</sup> fn 10 above, p 423. The door is now arguably closed following *McFarlane v EE Caledonia Ltd* [1994] 2 All ER 1.

before him the shock had not been originated by the perception of the television scenes themselves, and whilst they might have contributed to a 'matrix for imagined consequences' founding a dawning realisation of disaster over time, they did not provide the immediacy of impression or 'shock' that the proximity tests required.<sup>39</sup> In the words of Lord Oliver:

These images provided no doubt the matrix for imagined consequences giving rise to grave concern and worry, followed by a dawning consciousness over an extended period that the imagined consequence has occurred, finally confirmed by the death and, in some cases, subsequent visual identification of the victim. The trauma is created in part by such confirmation and in part by the linking in the mind of that confirmation to the previously absorbed image. To extend the notion of proximity in cases of immediately created nervous shock to this more elongated and, to some extent, retrospective process may seem a logical analogical development. But, as I shall endeavour to show, the law in this area is not wholly logical and whilst having every sympathy with the plaintiffs...I cannot for my part see any pressing reason of policy for taking this further step along a road which must ultimately lead to virtually limitless liability.<sup>40</sup>

If mediated perception were to be accepted, Lord Oliver was of the view that this was a step for Parliament to take, with the proper opportunity for public debate and consultation.<sup>41</sup>

### **III. New media technology and the means by which the shock is caused: Some challenges**

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<sup>39</sup> fn 10 above, p 417.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

Since *Alcock*, over two decades have passed without legislative intervention, with the result that the case still represents the current law. Recommendations suggested by the English Law Commission's 1998 report remain unadopted.<sup>42</sup> Looking forwards, there appears to be no legislative intervention on the horizon, as the Government's most recent comment on the matter has been to express a preference for judicial development of the law.<sup>43</sup> However, it is arguable that the law is now wholly unsatisfactory. Developments in new media technology postdating the case suggest that the *Alcock* framework, particularly the generic and default exclusion of live television claims, increasingly fails to match the contemporary realities of a culture which is not just dominated but arguably *defined* by new media technology and the proliferation of live and unedited imagery.<sup>44</sup> For post-internet, smartphone and 'selfie' generations,<sup>45</sup> the differences between the present technological landscape and that of *Alcock* may not be readily appreciated, but are they unquestionably profound. The disaster's contemporaneous incident reports, which describe the rapid meltdown of the relief

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<sup>42</sup> Law Commission, 'Liability for Psychiatric Illness' Law Com. 249. See <http://www.lawcom.gov.uk/wp-content/uploads/2015/04/LC249.pdf>

<sup>43</sup> Ministry of Justice, The Law of Damages: Response to Consultation CP9(R) 9/7, 1 July, 2009. This response is no longer online but is cited in *Giliker* fn 16 above, p 165 ff.

<sup>44</sup> For a sample of critiques that note pre-internet technology, see, from an Australian perspective, *R Rajendran*, 'Told Nervous Shock: Has the Pendulum Swung in Favour of Recovery by Television Viewers?' *Deakin Law Review* (2004) 9 (2) 732; *P Handford* 'When the Telephone Rings: Restating Negligence liability for Psychiatric Illness' *Sydney Law Review* (2001) 23, 597; More generally, see *H Teff* *Causing Psychiatric and Emotional Harm: Reshaping the Boundaries of Legal Liability* (2009, Hart Publishing); *N Mullany* and *P Handford* 'Moving the Boundary Stone By Statute: The Law Commission on Psychiatric Illness' *UNSW Law Journal* (1999) 22 (2), 350.

<sup>45</sup> A selfie is a picture that one takes (normally by smartphone) of oneself which is then shared on social media. Selfies have become popular even for intimate or personal moments such as funerals. An example of the trend's popularity can be seen in President Obama and friends' selfie at Nelson Mandela's funeral. <http://www.bbc.co.uk/news/world-africa-25322260>

effort's communication networks and the frantic attempts of relatives to get information with only land line telephones at the nearby Vicarage and Youth Club to depend on, provide the starkest illustration of the changes.<sup>46</sup> At the time of writing, technology is in a phase of such rapid transition that it has moved from beyond the portable in the form of smartphones to the wearable (such as Google Glass) and even the implantable, where technologies can now become embedded in the flesh to augment or replace the sensory organs. Recognising and accepting such technology as accurately representative of everyday life and/or the likely shape of things to come, the next section in this article considers whether the law *per Alcock* can nowadays be regarded as appropriate. As noted above, the denial of live television claims is broadly based on two lines of reasoning. The first is that broadcasts would not depict any identifiable suffering, due to compliance with the broadcasting codes of ethics. The second is that the requirement of viewing a collage of images and commentary of the disaster or its immediate aftermath is not the same as viewing it with one's own unaided senses. Both lines of argument are clearly underpinned by a third consideration, this being the fear of opening the floodgates. These issues will be examined in turn.

#### A. The impact of technology on broadcasters, codes of ethics and identifiable suffering

At the time of the Hillsborough disaster there were two television broadcasters, these being the BBC and ITV. Between them they provided just three terrestrial services. However, what we understand by a 'broadcast' and a 'broadcaster' in the present day is arguably more complicated than in the era of *Alcock*, as there are now many more modes of broadcasting and more broadcasters, if broadcasting — a concept not discussed in any significant detail in *Alcock* - is understood as the transmission of images. A veritable explosion of live visual imagery has emerged as a result of the deregulation of the traditional broadcasting sector and the entry into the market of online content platforms and social media sites such as Facebook and YouTube. 2015 alone saw the simultaneous

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<sup>46</sup> See HIP report fn 3 above at paras 2.4.150, 2.4.161, 2.4.162.

launch of two live streaming video apps — Meerkat and Periscope - both linking directly to Twitter feeds.<sup>47</sup> Such online broadcasting apps are by no means trivial alternatives to established televisual reporting. Twitter is estimated to have around 500 million users, with the same number of tweets per day. It is also estimated that if Facebook were a nation, it would be the world's third most populous. YouTube boasts over 1 billion unique users every month and 300 hours of video uploaded every minute.<sup>48</sup> The emergence of 'Smart television' (internet content received on a traditional television with internet capability) further blurs the line between traditional broadcast reception and online content.

The advent of citizen journalism combined with the new media platforms further serves to complicate the question of who the broadcaster is and what precisely is being broadcast. The term citizen journalism describes 'the spontaneous actions of ordinary people, caught up in extraordinary

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<sup>47</sup> Facebook is the world's largest online social networking site where users can share personal details, videos and pictures of themselves and their interests, see <https://www.facebook.com/> . YouTube is an online video sharing site, see <https://www.youtube.com/?gl=GB&hl=en-GB> . Meerkat and Periscope are both live video streaming apps, permitting the user to view live video from anywhere around the globe on their smartphone, see <https://www.periscope.tv/about> and <http://meerkatapp.co/> . Twitter is an online microblogging/social networking site where users can share their thoughts, images and videos with each other using 140 characters per message or 'tweet', see <https://twitter.com/>

<sup>48</sup> On Facebook see <http://www.digitaltrends.com/social-media/facebook-could-be-larger-than-china-in-three-years-time/> ; other sites report that it has now 'overtaken' the US to become effective second largest, see <http://www.business2community.com/facebook/state-social-1q14-facebook-second-largest-country-world-4-5-users-mobile-0858685>; see also *N Lee*, *Facebook Nation: Total Information Awareness* (2014, 2<sup>nd</sup> Ed, Springer). On twitter see <http://www.telegraph.co.uk/technology/twitter/9945505/Twitter-in-numbers.html> on YouTube see <http://www.youtube.com/yt/press/en-GB/statistics.html>

events, who [feel] compelled to adopt the role of a news reporter'.<sup>49</sup> Contemporary disasters are increasingly characterised by graphic smartphone coverage from citizen journalists, material which is broadcast instantaneously and ubiquitously as journalism moves in ever-accelerated frequencies: 'from the weekly to the daily paper, from the nightly news to rolling news, and with the liveness of satellite TV now competing with Bloomberg terminals and Twitter for the fastest possible circulation of updates and information'.<sup>50</sup> Experience is showing that coverage from citizen journalism, such as that of the 7/7 bombings, is not only instrumental but increasingly definitive of global events.<sup>51</sup> Non-state and non-commercial outlets increasingly threaten to eclipse traditional television as the

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<sup>49</sup> C Greer and E McLaughlin, 'We predict a riot? Public order policing, new media environments and the rise of the citizen journalist' *British Journal of Criminology* (2010) 1041 at 1045 citing *Allan and Thorsen; A Reading*, 'Mobile Witnessing: Ethics and the Camera Phone in the 'War on Terror'' *Globalisations* (2009), 6 (1), 61; see also G David 'Camera phone images, videos and live streaming: a contemporary visual trend' *Visual Studies* (2010) 25 (1), 89; A Ekström, 'Exhibiting Disasters: mediation, historicity and spectatorship' *Media, Culture, Society* 2013 (34), 472; Z Tufekci and C Wilson, 'Social Media and the Decision to Participate in Political Protest: Observations from Tahrir Square' *Journal of Communication* (2012) 62, 636; P Lange, 'Publicly Private and Privately Public: Social Networking on YouTube' (2008) 13, 361; T Dwyer, *Media Convergence* (2010, OUP); G Meikle and S Young, *Media Convergence: Networked Digital Media in Everyday Life* (2012: Palgrave Macmillan).

<sup>50</sup> Meikle and Young fn 49 above, citing McNair and Hartley.

<sup>51</sup> Greer and McLaughlin, fn 49 above. The apparent footage of the Germanwings air disaster and the broadcast of the Walter Scott shooting give the most recent illustration of the point. Indeed, news via social media may increasingly outpace information from public officials such as the police, especially in tragic circumstances, see eg <http://www.dailymail.co.uk/news/article-3114110/Father-tragic-Amber-Peat-learned-13-year-old-daughter-run-away-home-read-Facebook.html>. More recently in relation to the Shoreham Air disaster (footage of which was widely available on social media) several policemen resigned following their publication of selfies at the site: <http://www.standard.co.uk/news/uk/shoreham-air-disaster-selfie-police-officers-quit-before-they-are-sacked-a3084416.html>

primary channel of information as opposed to just providing those broadcasters with minor elements of newsfeed. As Meikle and Young note, whereas the traditional understanding of broadcast media signifies a distinct organisation who is responsible for the content of the broadcast, contemporary media is more in the nature of a dialogue than a one-way dissemination of information.<sup>52</sup> With Wikileaks being memorably described as ‘the world’s first stateless news organisation’, it is clear that broadcasting is no longer the exclusive prerogative of the establishment.<sup>53</sup>

Some television broadcasting organisations (such as established national channels) have established user-generated content hubs which may have some degree of editorial control, whilst vast numbers of other online live imagery and information outlets do not organise material in such a manner and lack any effective oversight at all, nor do they necessarily appear to come under the existing regulatory and ethical framework of television broadcasting.<sup>54</sup> The shift from traditional television broadcasting to social media means that editing is what now happens *after* (as opposed to before) an event is aired, if indeed there is any editing at all. Indeed, recognising the growing phenomenon of citizen journalism, certain user-generated content platforms overtly and explicitly acknowledge that violent or graphic content may be both inevitable and unavoidable, and simply request that such imagery is sufficiently contextualised and not uploaded gratuitously or for sensationalism as

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<sup>52</sup> Meikle and Young, fn 49 above, pp 54-55.

<sup>53</sup> Meikle and Young, fn 49 above, p 8. Wikileaks is a non-profit news organisation which releases anonymous information and source material to a global audience. According to its website it has released more classified information than the world’s intelligence services combined: <https://wikileaks.org/About.html>

<sup>54</sup> See further Reading, fn 49 above, who cites, amongst others, Yahoo!’s ‘youwitnessnews’ hub which is specifically designed for cameraphone imagery. See also L Dencik, ‘Alternative news sites and the complexity of space’ *New Media and Society* (2013) 15, 1207. The independent regulator OFCOM does not appear to cover online content such as that on Yahoo! or other mobile sites.

part of a broad 'community standards' agreement.<sup>55</sup> More longstanding standards themselves may be questioned, in that from a post-Leveson perspective, the ethical frameworks of the traditional media itself are arguably of little relevance, strength or efficacy and are customs more honoured in the breach than in the observance.<sup>56</sup> In sum, the current lack of editorial control across the media spectrum in its entirety significantly undermines the assumptions made in *Alcock* that a degree of restraint would be exercised and could be readily and reasonably relied upon.

Developments in media hardware also serve to challenge the suitability of the *Alcock* stance on perception for the contemporary age, in that the state of hardware at the time of the decision bears little if any relation to the viewing apparatus now available. In the 1980s, broadcast images were of relatively poor quality typically viewed on 14-inch cathode ray tube sets. It was thus not entirely illogical to insist that the unaided senses might provide a more vivid and traumatic impression of events. However, contemporary technological advances have arguably completely transformed the viewing experience. 3D and ultra-high definition screens measuring larger than a king-sized bed are now available for use in the private home, whilst stadium televisions can accommodate over 20,500

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<sup>55</sup> See, for example, the guidance and user agreements on violent and graphic content on YouTube, <https://support.google.com/youtube/answer/2802008> Meerkat's Rules are apparently 8 lines long and include the following: 'Streams will be pushed to followers in real time via push notifications...everything is live, no reruns...everyone can watch on the web. Be kind.' <http://meerkatapp.co/rules>

<sup>56</sup> The Leveson inquiry was a public inquiry launched into the ethics and conduct of the press and police following revelations of widespread phone hacking in 2011. It was largely condemnatory of the way in which the press was regulated at the time, see <http://webarchive.nationalarchives.gov.uk/20140122145147/http://www.levesoninquiry.org.uk/about/>

square feet of HD LED lights broadcasting around 5 million pixels and 280 trillion colours, bringing an unparalleled level of intensity and detail to live broadcasting.<sup>57</sup>

*Alcock's* dated terminology of 'television' is further challenged by the advent of smartphone and mobile devices, which are becoming increasingly prevalent as a mode of viewing, being used for half of YouTube views.<sup>58</sup> Mobile devices mean that the act of viewing is no longer tethered to a single static or private/domestic geographical location. As Meikle and Young note, 'mobile phones enact a breaking open of public and private spaces...the private can always intrude into any social environment now. There is no social space that can't be privatized with a phone'.<sup>59</sup> The current era is characterised by the obsessive online documenting or 'compulsory communication' of the self and the phenomenon of 'omni-accessibility' — a term which describes a state of near-permanent contactability and connectivity.<sup>60</sup> In the present day, any emerging disaster is thus more than likely to be viewed synchronously and in detail on a multitude of sophisticated viewing technologies and from a multitude of providers with questionable or non-existent editorial control; a prospect that is far removed from the circumstances of *Alcock*.

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<sup>57</sup> See *D Austerberry*, 'Beyond HD' Broadcast Engineering (2010) <http://broadcastengineering.com/hdtv/ultra-high-definition-video-1110> (url no longer active but file on copy with author); World's largest TV: 370-inch screen on sale for £1m <http://www.itv.com/news/update/2014-06-10/worlds-largest-tv-yours-for-1million/> ; *M Franco* 'World's Largest TV, 'Big Hoss,' is as long as a jet' CNET.com <http://www.cnet.com/news/worlds-largest-tv-big-hoss-is-as-long-as-a-jet/>

<sup>58</sup> Smart television describes televisions that also provide internet content. Increasingly televisions are now smart as standard. On mobile viewing statistics and YouTube see <http://www.youtube.com/yt/press/en-GB/statistics.html>

<sup>59</sup> *Meikle and Young*, fn 49 above, p 154.

<sup>60</sup> I borrow the term 'compulsory communication' from Jodi Dean via Sean Cubbit, see Sean Cubbit's Blog, [http://seancubitt.blogspot.co.uk/2013\\_04\\_01\\_archive.html](http://seancubitt.blogspot.co.uk/2013_04_01_archive.html) 'Omni-accessibility' is taken from Levinson as cited in *Meikle and Young*, fn 49 above.

Added to the ubiquity of live imagery described above and lack of editorial oversight, developments in imaging and location technology further bring into question whether the showing of recognisable suffering will be necessarily or easily avoided. Facial recognition and biometric apps are now increasingly popular as integral features of smartphones, as are phone location technologies, targeted feed push and tailored news subscriptions which update us in real time on our preferred individuals and interests.<sup>61</sup> RFID tags and other wearable technologies as well as advances in biomedical engineering such as fitbits, subdermal implants, smart watches, smart heart monitors and smart tattoos (flat, stretchable micro-electronic sensors which can be used to monitor the electrical signals of the heart, brain and muscular system) can also help to accurately pinpoint an individual's precise physical co-ordinates and wellbeing.<sup>62</sup> As noted by Lee, 'the social networks are

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<sup>61</sup> See eg Facebook facial recognition app <https://www.facebook.com/facialrecognitionapp> ; Family locator and kids tracker app <https://play.google.com/store/apps/details?id=com.zoemob.gpstracking&hl=en> . Targeted feed push refers to an app which sends information to users on pre-selected information or interests, for example the reader could set up a feed push to alert them of breaking information on tort.

<sup>62</sup> RFID tags refer to Radio Frequency Identification tags, best described as intelligent bar codes that can be affixed to items of choice and which transmit information about them, however unlike bar codes they do not need to be visible and as they are tiny can be embedded within objects. Most recently they have been embedded in employees to enable monitoring and access to equipment such as opening security doors – see <http://www.i24news.tv/en/news/technology/59666-150201-swedish-firm-implants-microchips-in-workers> ; see also <http://www.strath.ac.uk/rkes/fly/smarttattoosanovelapproachtoglucosemonitoring/> Smart watches are the latest development in mobile computing devices, being watches that have similar capabilities to those of smartphones. Smartwatches may also have biometric capacity, linking in with health monitoring. See eg *E Tseklevs*, 'The rise of wearable health tech could mean the end of the sickie' Lancaster University News 26<sup>th</sup> May 2015 <http://www.lancaster.ac.uk/news/blogs/emmanuel-tseklevs/the-rise-of-wearable-health-tech-could-mean-the-end-of-the-sickie/> . A fitbit is a smart bracelet that tracks health and fitness data which may be synced to a smartphone.

leading the way towards Total Information Awareness’, a phrase which aptly describes the qualities that contemporary communications technologies can bring to us in terms of our comprehension of unfolding events.<sup>63</sup> Indeed, some of these technologies are already being depended upon in disaster scenarios in order to aid and co-ordinate relief efforts and government agencies, with the result that it is now entirely feasible if not increasingly likely that the face - and fate - of a loved one can be accurately tracked anywhere, in real time and in high-definition throughout the course of a single catastrophe.<sup>64</sup> The proliferation of media images and developments in technology discussed here clearly challenge the desirability and practicality of excluding live imagery claims in the modern age.

Once the insistence on direct perception is abandoned, the requirement that there be close spatial and temporal proximity to the accident is also uncoupled, as it makes little sense to permit some claimants to recover by viewing events live but miles away, whilst simultaneously insisting others must directly and immediately apprehend the scene or aftermath in person. If these objections are accepted, the logic insisting on the restriction to ‘live’ images only is also brought into question. To admit cases on the basis of seeing repeats raises the spectre of floodgates and removes the requirement of ‘sudden shock’, a prospect met with short shrift in *Alcock*. However, it is now well established that medical understandings of psychiatric damage do not turn on particular modes or timings of perception, and accepting that shock may be gradual.<sup>65</sup> In the current context, even in small countries families are increasingly geographically dispersed due to pressures of work, housing or educational opportunities and are thus ever more likely to rely on social media to sustain their ties of love and affection.<sup>66</sup> Likewise, even the most intimate relationships are now frequently

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<sup>63</sup> *Lee* fn 48 above, p 7.

<sup>64</sup> See eg Facebook safety check <http://rt.com/news/196616-facebook-safe-disaster-tool/> ; <http://www.theguardian.com/sustainable-business/social-media-hurricane-sandy-emergency-planners>

<sup>65</sup> See further *Teff*, fn 44 above. Floodgates will be specifically critiqued in the following section.

<sup>66</sup> See further *M Castells*, *The rise of the Network Society* (2000: Wiley).

initiated and maintained online as part of an effort to overcome physical distance. Thus to insist on direct perception and proximity in time and space is not only to ignore the proliferation of live imagery in general but also a failure to recognise the specific and central role it plays in maintaining family life and close relationships.<sup>67</sup>

In *Alcock*, it will be recalled that the depiction of identifiable suffering would be seen as a *novus actus interveniens* - a new and intervening act that would break the chain of causation between the defendant's act and the claimant's harm. As stated in the *Oropesa*, '[t]he question is not whether there was new negligence, but whether there was a new cause...To break the chain of causation it must be shown that there is something which I will call ultroneous, something unwarrantable, a new cause which disturbs the sequence of events, something which can be described as either unreasonable or extraneous or extrinsic.'<sup>68</sup> Yet the arguments above surely beg the question as to whether the graphic and unedited broadcasting of a disaster is, in any way, realistically unforeseeable, or indeed unreasonable. On the contrary, in the current context it is surely something that is not only probable but highly likely to be the case, and as observed in *Street on Torts*, 'the more foreseeable the intervening cause, the more likely that the court will not treat it as breaking the chain of causation.'<sup>69</sup>

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<sup>67</sup> It might also be observed how the current legal understanding of proximity of relationship may not readily accommodate ties formed and sustained purely online, which are not unknown in the current age. It is also highly culturally specific; for example it is difficult to imagine how it might accommodate an arranged marriage, which might well found psychiatric damage in the bereaved partner due to the loss in family/community standing and expectation, but which does not sit comfortably within the specifically western romantic narrative of close ties of love and affection as tacitly envisaged by the courts.

<sup>68</sup> Lord Wright, *The Oropesa* [1943] P 32, 39ff.

<sup>69</sup> *C Witting*, *Street on Torts* (2015, 14<sup>th</sup> Ed. OUP) p 169. This counterargument was itself initially suggested in the lower courts in *Alcock* in a persuasive judgment by Hidden J, which - in marked contrast to the opinions of

B. The impact of technology on viewing the event or immediate aftermath with the unaided senses

Further challenges to the *Alcock* framework are provided by other advances in technology which bring into question whether the 'unaided senses' will continue to be a meaningful category. Such technologies promise to disturb significantly the formerly clear division between the aided and unaided senses - a division which is crucial to the guidelines in *Alcock*. Such technologies, grouped under the broad heading of 'augmented reality', may describe portable or wearable apps and technology that provide real-time enhancement of the everyday environment via smartphones and watches, as well as similar technologies that are more closely integrated with current prosthetics such as glasses and contact lenses so as to overlay the senses with digital information to produce further layers of information in the world's perception.<sup>70</sup>

Perhaps the best current example of wearable augmented reality technology is the Google Glass, which was launched in 2013. Google Glass describes a computer integrated into glasses which enables the wearer to view a screen within their usual field of vision. The glasses have Bluetooth and Wi-Fi connectivity and a tiny computer inside the frame enables the wearer to instruct software by

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the House of Lords - gave a detailed analysis of the complexity of media perception. Given the popularity of the Hillsborough match, in his words, (at pp 343-344) 'it was not merely reasonably foreseeable, it was a pound to a penny that...the television sets of the city would have been switched on and eagerly watched for the latest news'. In the current contexts, these are odds which can only be increasing.

<sup>70</sup> On augmented reality see eg <http://www.theguardian.com/technology/augmented-reality>

For augmented humanity studies, see the [Augmented Human International Conference series](#) and the newly-instituted (2016) Springer's *Augmented Human Research Journal* which covers such things as: Exoskeletons; human sensory substitution and fusion, and interactions between augmented humans and smart cities.

voice command, for example to film or take a picture through a 5 megapixel camera, whilst other apps available enable operation by motion such as winking, or can provide facial recognition features, being in essence a stripped-down version of a smartphone worn as spectacles. According to Google, the Glass's high resolution display is 'equivalent [to] a 25 inch high definition screen from eight feet away'.<sup>71</sup> More recently Google have moved to patent the smart contact lens, which aims to incorporate the benefits of the Google Glass in a more wearable form, with the added benefits of ocular health monitoring as well as augmentation features such as facial recognition features for the visually impaired.<sup>72</sup>

Implantable technologies, which may fully or partially replace particular sensory organs in the body and are which linked directly into the body's neurosystem, may also be considered. One example of such technology is the development of a miniature telescope which is implantable into the eye in a similar manner to an artificial lens, and which projects images in the field of view onto receptive areas in the eye.<sup>73</sup> Externally worn biomedical technologies that connect with the brain via implanted microchips are also being developed in order to replace or augment senses affected by disease or injury.<sup>74</sup> Given the current trajectory of technological development towards wearables, as well as an increasing acceptance of piercing, tattooing and body modification, it is by no means outlandish that augmented reality technologies, both wearable and implantable, will move beyond

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<sup>71</sup> See <http://www.theguardian.com/technology/google-glass> ;  
<http://www.techradar.com/news/video/google-glass-specs-revealed-as-android-app-goes-live-1144865>

<sup>72</sup> See <http://www.cnet.com/news/after-google-glass-google-developing-contact-lens-camera/>

<sup>73</sup> See [http://en.centrasight.com/centrasight\\_technology](http://en.centrasight.com/centrasight_technology)

<sup>74</sup> See <http://s.telegraph.co.uk/graphics/projects/the-future-is-android/index.html> . As noted at fn 70 above there is now a sizeable literature on cyborg studies/augmented humanity studies (considering the physical and/or prosthetic combination of humans and technology) both within the academy and beyond.

the medical sphere and become more mainstream as physical enhancements as much as disability and/or medical aids, leaving the concept of 'unaided' senses increasingly redundant.

### C. Challenging the policy arguments in *Alcock*

Policy arguments against extending the scope of the duty of care have long been discussed in cases concerning secondary victims. To recap, in *McLoughlin*, four factors were identified, namely (1) floodgates and the risk of fraudulent claims; (2) the risk of imposing damages on the defendant that were disproportionate to the negligent conduct; (3) the risk of increasing evidentiary difficulties and length of litigation and (4) the need for legislation as opposed to judicial development of the law. It will be recalled that the Court in *McLoughlin* itself accepted the increasing challenge to the last three factors, but reiterated the force of the first. The fear of opening the door to a mass of claims and extending the law 'in a direction where there is no pressing policy need and in which there is no logical stopping point' is a persistent concern, clearly underpinning the ratio of *Alcock*.<sup>75</sup>

With regard to the apparent lack of logical stopping point, it is arguable that abandoning the insistence of direct and immediate viewing of the event/aftermath with the unaided senses would not throw the floodgates open. It is worth recalling that it would not be everybody viewing every disaster that would be able to claim. Whilst there is a plethora of suitably horrific events to view online, only those events occasioned by the defendant's negligence would initially found an action. For those cases, it is arguable that the secondary victim's higher threshold of reasonable foreseeability would provide an initial hurdle to overcome. The requirement that the claimant must suffer a recognised kind of psychiatric harm would provide a further filter on claims, as would the

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<sup>75</sup> fn 10 above, p 416 (Lord Oliver).

requirement of a close proximity of relationship to the immediate victim.<sup>76</sup> The law of limitations would also protect the defendant from claims raised too long after the event.

The appeal of the floodgates argument as a limiting device can also be challenged. The floodgates argument has long been subject to extensive critique, much of which is relevant here.<sup>77</sup> As Stevens has observed in a trenchant critique of the use of policy by the judiciary, the Court in *Alcock* have, to all intents and purposes, effectively acted by legislative fiat to deny claimants their prima facie rights; a role that is more properly taken by Parliament.<sup>78</sup> As in similar cases where policy is used to deny claims, no empirical evidence is furnished to support the conclusion that the floodgates would be opened and the argument stands by virtue of its rhetorical force alone.<sup>79</sup> As Lord Oliver himself observed in *Alcock*, 'the concept of 'proximity' is an artificial one which depends more on the court's perception of what is the reasonable area for the imposition of liability than on any logical process of analogical deduction'.<sup>80</sup>

We may also look to the broader aims of the law to support a move away from the restrictive position in *Alcock*. As Lord Bingham has suggested (writing extra-judicially), the primary function of tort law, apart from its deterrent function, is to secure compensation for those who have had their

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<sup>76</sup> Arguably the admission of live media claims has implications for the requirement of proximity in time and space, as discussed below.

<sup>77</sup> See for example *Mullany* and *Handford* fn 44 above; *K Oliphant*, 'Against Certainty in Tort Law' in *SGA Pitel, J Neyers and E Chamberlain* (eds) *Tort Law: Challenging Orthodoxy* (2013: Hart) p 7ff.

<sup>78</sup> *R Stevens*, *Torts and Rights* (2007: OUP) p 310ff. See also *Teff*, fn 44 above.

<sup>79</sup> See most recently Lord Kerr (dissenting) in *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, 160.

<sup>80</sup> fn 10 above, p 411.

rights violated.<sup>81</sup> If this principle is accepted, the denial of claims by virtue of their apprehended (as opposed to actual) volume appears to run counter to the primary purpose of the law. As large scale disasters, by definition, potentially involve a wide range of people, raising a floodgates objection to prevent a large number of people from claiming from the outset seems particularly unfair. Newark has observed (in a different context, although arguably relevant here) that 'if a hundred private wrongs have been done a hundred private actions may well be brought',<sup>82</sup> but if this is accepted, given that *Alcock* itself demonstrates that consolidated cases can be brought for a single incident, we might question the actual volume of litigation that the courts would realistically face. Moreover, in *X v Bedfordshire*, the Court has argued that '[I]t would require very potent considerations of public policy...to override the rule of public policy which has first claim on the loyalty of the law: that wrongs should be remedied.'<sup>83</sup> The contemporary context surely calls for a rebalancing of the policy considerations in *Alcock* so as to favour the paramount principle of remedying wrongs.

#### **IV. Reforming the law**

##### **A. The Australian Jurisprudence**

Thus far, it has been suggested that the *Alcock* framework is inadequate on a number of grounds. Developments in new technology mean that the control mechanisms of proximity in time and space, as well as perception via the unaided senses ought to be abandoned. Policy considerations underpinning these restrictions have also been critiqued. In this section, the article looks to the

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<sup>81</sup> Lord Bingham, 'The uses of Tort' (2010) 1 JETL 1, p 3 ff.

<sup>82</sup> *JR Spencer* citing *Newark* in 'Public Nuisance, a critical examination' Cambridge Law Journal (1989) 48 (1), pp 55, 73 fn 100.

<sup>83</sup> *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 663 *per* Lord Bingham.

Australian jurisprudence to augment the arguments in favour of abandoning the insistence on sudden shock; direct, unaided perception, and, by extension, proximity in time and space.

Australian law has been sent down a different path to that of domestic law following the case of *Annetts*.<sup>84</sup> *Annetts* concerned a boy of 16 who had left his home in August 1986 in New South Wales to be a cattlehand on a station in Western Australia. His parents, worried by his inexperience, were assured by his employers that he would be working under close supervision on the station. However, a short time into his employment he was sent to work alone on another station 100km away. Apparently unable to cope with the isolation, he ran away. In December, the police telephoned his parents to inform them that he was missing. His father collapsed upon hearing the news, and his mother had to continue the conversation. At the turn of the year his parents had a number of telephone conversations with the police and other agencies and in the months that followed, the parents visited the area a number of times, during which they were shown some of their son's possessions, including a bloodstained hat. In April 1987, they were informed by telephone that skeletal remains had been found by their son's abandoned vehicle. Upon travelling to a police station nearby the ranch, they identified the remains as those of their son. He had died in the desert in early December from dehydration, exhaustion and hypothermia.

A preliminary issue was whether there was a duty of care to avoid negligently inflicted psychiatric damage, a duty which was dismissed on appeal by the Full Court of Western Australia, who declined it in part because there was a lack of sudden and direct sensory perception of events as the claimants were separated in time and space from what occurred, and learnt of his disappearance and death by telephone.<sup>85</sup> Yet in disagreeing with the Full Court, the High Court considered that unlike the English position, which remains governed by *Alcock*, the Australian law did not - and

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<sup>84</sup> *Annetts v Australian Stations Pty Ltd* [2002] HCA 35.

<sup>85</sup> *Annetts v Australian Stations Pty Ltd* (2000) 23 WAR 35

should not - recognise sudden shock and direct perception as preconditions of liability. Such requirements, it was observed, had operated in a capricious and arbitrary manner, being 'unprincipled distinctions and artificial mechanisms [which brought] the law into disrepute'.<sup>86</sup> As emphasised by the High Court:

A rule that renders liability in negligence for psychiatric harm conditional on the geographic or temporal distance of the plaintiff from the distressing phenomenon, or on the means by which the plaintiff acquires knowledge of that phenomenon, is apt to produce arbitrary outcomes and to exclude meritorious claims...The rule is also disjoined from the realities of modern telecommunications which have developed greatly since this control factor was propounded.<sup>87</sup>

Such statements echo the comments of Kirby P in the earlier case of *Coates* (also concerned with telephone communications), which emphasise that the contemporary context must inform how proximity is understood:

The rule of actual perception is in part a product of nineteenth century notions of psychology and psychiatry. In part, it was intended as a shield of policy against expanding the liability of wrongdoers for the harm they caused. And in part, it was a reflection of nineteenth century modes of communicating information... [Direct perception] is ... hopelessly out of contact with the modem [sic] world of telecommunications. If any judge has doubts about this, he or she should wander through the city streets and see the large number of persons linked by mobile telephones to the world about them. Inevitably such telephones may bring, on occasion,

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<sup>86</sup> *Annetts* (HCA) fn 84 above, §190.

<sup>87</sup> *Annetts* (HCA) fn 84 above, §221. The High Court in *Annetts* notes that the South African Supreme Court in the case of *Barnard v Santam* (1999) 1 SA 202 has reached the same conclusion and abandoned direct perception as a condition of liability.

shocking news, as immediate to the senses of the recipient as actual sight and sound of catastrophe would be. This is the reality of the world in which the law of nervous shock must now operate.<sup>88</sup>

Of course, the reality of the communications world as described in *Coates* and *Annetts* has been further eclipsed by the internet age and has moved from the aural to the visual; a fact that makes the observations in those cases even more compelling.

#### B. Methods of reform – incrementalism or something more radical?

Whilst the Australian jurisprudence is thus set on a more sensible path, the difficulty apparently besetting the domestic position is that we are to go ‘thus far and no further’,<sup>89</sup> bound as we are by *Alcock*. Yet the cry of ‘no further’ is somewhat undermined by the fact that whilst the courts have continually emphasised that to engage in judicial activism in this field is simply not within their gift, they have made notable incremental advances when cases have come before the lower courts. In *Walters*, the claimant’s baby was subject to negligent misdiagnosis, as a result of which he suffered a major epileptic seizure and irreparable brain damage.<sup>90</sup> As he would have no quality of life, his life support was terminated and he died in his mother’s arms some 36 hours after the initial seizure. Although at first instance it was held that a 36 hour period could not amount to a single horrifying event, the Court of Appeal was prepared to consider the event as a whole, thus stretching the ‘sudden shock’ concept. A liberal approach was again seen in *Galli-Atkinson*, where the court was prepared to accept that a series of events stretching over several hours might be considered as the

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<sup>88</sup> *Coates v Government Insurance Office of New South Wales* (1995) 36 NSWLR 1 at 16-18.

<sup>89</sup> *White* fn 11 above, p 500 (Lord Steyn).

<sup>90</sup> *Walters v Glamorgan NHS Trust* [2002] EWCA Civ 1792. See also *W v Essex CC* [2001] 2 AC 529 (strike out procedure).

‘immediate aftermath’.<sup>91</sup> In the case, a mother had learned of her daughter’s death in a road accident from a police officer at the scene. Upon being informed of her daughter’s death, she was taken on her request to see the body in the mortuary. At this stage, it was evident that she was in denial. When she viewed her daughter’s body, although the worst injuries were hidden, it was clearly disfigured and distorted. Guided by the approach in *Walters*, the Court found that unlike the situation in *Alcock*, where the visit to the mortuary was for identification, the events before them could be viewed (arguably somewhat artificially) as an uninterrupted sequence and as such could all be considered part of the immediate aftermath where the visit to the mortuary provided the last piece of a picture that the mother did not want to believe. Arguably the willingness to view psychiatric damage as founded by aggregated moments of perception in *Walters* and *Galli-Atkinson* might be seen as the start of a move away from a rigid insistence on sudden shock and immediate and direct perception of events.

In the more recent case of *Taylor*, the Court reviewed the long-held judicial sense of dissatisfaction with the law that has been in place since *Alcock* yet reiterates its conclusion that incrementalism cannot provide the answer and that reform should be left to Parliament.<sup>92</sup> Yet Parliament has clearly provided its response in deliberately and consistently electing not to act. It has overtly stated a preference for judicial development of the law in this field.<sup>93</sup> As Oliphant notes, the passivity of the judiciary in the face of ‘blatantly unsatisfactory outcomes’ is extremely regrettable: ‘Faced with such intransigence, it might well to remind ourselves of who created the mess in which the House of Lords found itself. Even a child knows the maxim, ‘You broke it— you fix it’...We seem...to be stuck in a game of legal pass-the-parcel in which the music never stops’.<sup>94</sup> If the law is not to remain in

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<sup>91</sup> *Galli-Atkinson v Seghal* [2003] EWCA Civ 697.

<sup>92</sup> *Taylor v A Novo (UK) Ltd.* [2013] EWCA Civ 194.

<sup>93</sup> See fn 43 above.

<sup>94</sup> *Oliphant* fn 77 above, pp 10, 11.

stalemate, judicial adjustment can — and should — be the only productive way forward. The reluctance of the courts to develop the law is an inertia at odds with the nature of the common law as a jurisprudential body developed over time by the judiciary to reflect the needs of the contemporary age.<sup>95</sup> Indeed, as noted in *Donoghue* itself, the very quality of attentiveness to context and ability to respond to it lies at the very heart of the common law: ‘[t]he conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life.’<sup>96</sup> In the light of the legislature’s explicit preference for judicial development, the more liberal stance of the lower courts and the persuasive precedent of the Australian approach and the changing technological field, there is arguably a mandate for judge-led reform and the courts should take their cue accordingly. As Lord Kerr (albeit dissenting) has recently observed of *Alcock in Michael*:

It is, I believe, important to be alive to the true nature of these decisions, especially when one comes to consider the precedent value of earlier cases in which such judgments have been made. A decision based on what is considered to be correct legal principle cannot be lightly set aside in subsequent cases where the same legal principle is in play. By contrast, a decision which is not the product of, in the words of Lord Oliver, “any logical process of analogical deduction” holds less sway, particularly if it does not accord with what the subsequent decision-maker considers to be the correct instinctive reaction to contemporaneous standards and conditions. Put bluntly, what one group of judges felt was the correct policy answer in 2009, should not bind another group of judges, even as little as five years later.<sup>97</sup>

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<sup>95</sup> A point trenchantly argued by *Mullany* and *Handford*, fn 44 above; see also *Teff* and *Handford* *ibid*.

<sup>96</sup> *Donoghue v Stevenson* [1932] AC 562, p 619 (Lord Macmillan).

<sup>97</sup> fn 79 above, § 161.

Given that wholesale reform would appear to be stretching the bounds of incrementalism, it should arguably be achieved by invoking the 1966 Practice Statement.<sup>98</sup> The Statement allows for departure from established House of Lords and Supreme Court decisions where ‘too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law’<sup>99</sup> — precisely the situation that is broadly acknowledged by the judiciary and commentators alike to be the result of *Alcock* even before the challenges of new technology are considered. Abandoning physical and temporal proximity, direct and immediate perception by the unaided senses, and sudden shock, are reforms that could all be justified on the increasingly pressing policy grounds that the law needs to reflect contemporary technological reality. Such reform would also have the effect of more closely aligning the law with medical understandings of psychiatric damage which question the centrality of a ‘sudden’ shock and the primacy of any particular means by which the shock is caused. Moreover, abandoning the controls identified above would have the benefit of sparing the courts having to increasingly distort the ‘immediate aftermath’ concept as seen in *Galli-Atkinson* and *Walters*. Contrary to the concerns in *Alcock*, liability would not be unlimited in that it could still be sufficiently controlled by the remaining mechanisms of the higher foreseeability threshold, the requirement of psychiatric damage and proximity of relationship, as well as the requirements of causation and remoteness which could deal with cases of more protracted perception such those involving drawn-out illnesses or injuries. The rules on limitation would also provide a temporal cut-off point. Should these arguments not be sufficiently persuasive, the Australian experience arguably provides clear evidence that the removal of certain *Alcock* control mechanisms does not cause the floodgates to open, in that their courts have not been inundated with claims.

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<sup>98</sup> As noted by *Oliphant*, incrementalism in itself is not necessarily the best way to create certainty in the law and brings its own problems. See *Oliphant*, n 79 above.

<sup>99</sup> Practice Statement (Judicial Precedent) HL [1966] 3 All ER 77

## V. Conclusion

In relation to secondary victims' claims for psychiatric damage, this article has argued that *Alcock* fails to provide a suitable legal framework for the present day for a number of reasons. The decision predates key technological developments and thus does not accurately describe the current state of the art. In the contemporary age, the unexpurgated filming and online viewing of extreme events is highly foreseeable to all concerned. Broadcasting and broadcasters have been transformed by the entry into the field of unregulated broadcasters transmitting graphic and unedited material with little or no effective editorial or ethical control. Such imagery readily reaches viewers on a range of highly sophisticated devices which can easily and clearly track specifically identified individuals and their suffering. The continued presumption of a singular television broadcaster obediently abiding by a code of ethics where identifiable suffering is not (and would not be) depicted is clearly open to challenge. The proliferation of high quality images online and the embedding of a heavily visual culture into everyday life make it increasingly unrealistic to exclude such claims by default, whilst other advances in biomedical and media technology also begin to blur the line between the 'aided' and 'unaided senses'. As observed in the lower court in *Alcock*, the law to that point had been on an expansive trajectory and if, as observed in *McLoughlin*, it would be 'impractical' as well as 'unjust' to insist on direct and immediate perception of the event itself, then the logical development would surely be to expand as opposed to contract liability, particularly in the current age.

Looking to the Australian jurisprudence as a guide, the article has sought to suggest that abandoning the requirements of sudden shock, direct and immediate perception, and proximity in time and space are not necessarily at odds with the underlying principles of the law and indeed would make it more fitting for the modern age. It is arguably not a question of if, but rather when a case challenging *Alcock's* stance on direct perception via the unaided senses will be made, and the law must reflect modern realities. As noted in *Taylor*, 'In this area of law, the perception of the ordinary

reasonable person matters. That is because where the boundaries of proximity are drawn in this difficult area should, so far as possible, reflect what the ordinary reasonable person would regard as acceptable.<sup>100</sup> Arguably, contemporary litigants — the ordinary and reasonable people for whom the law of negligence must make sense — increasingly live their lives online. Such litigants will be increasingly dismayed and frustrated by a legal system that permits papers to be served via Facebook and defamation claims to be based on Twitter, but that would doggedly continue to insist on sudden shock, proximity in time and space to the incident, and the direct perception of horrifying events for the purposes of psychiatric damage.<sup>101</sup> If, as the courts have elsewhere been at pains to emphasise, the contemporary understanding of psychiatric damage should not lag behind medical knowledge,<sup>102</sup> then arguably the framing of the law should equally avoid lagging behind developments in media technology. As Kirby P has commented in the Australian case of *Campbelltown City Council v Mackay*: ‘The causes of action at common law should, in my opinion, be released from subservience to 19<sup>th</sup> century science’.<sup>103</sup> Echoing his sentiments in the context of domestic recovery for psychiatric damage, it is concluded that by abandoning the requirements of direct perception by the unaided senses, sudden shock and proximity in time and space, the law can be released from subservience to 20<sup>th</sup> Century technology and recognise the realities of the 21<sup>st</sup>.

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<sup>100</sup> *Taylor*, fn 92 above, §30 (Master of the Rolls).

<sup>101</sup> See <http://www.access-legal.co.uk/legal-news/papers-served-facebook-lu-3384.htm> ; *The Lord McAlpine of West Green v Sally Bercow* [2013] EWCA Civ 1342.

<sup>102</sup> *Page*, fn 11 above.

<sup>103</sup> *Campbelltown City Council v Mackay* (1989) 15 NSWLR 501, 503, see discussion in *Handford* fn 44 above.