SHOCK AND POLICY:

McLOUGHLIN v. O'BRIAN

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The story of nervous shock can be said to begin, both for English and for Australian law, with two cases decided nearly a century ago. In 1888 the Privy Council in *Victorian Railways Commissioners v. Coultas* (on appeal from the courts of New South Wales) denied that liability could exist; but only thirteen years afterwards, in *Dulieu v. White & Sons* an English court rejected the Coultas decision and recognised that there could be liability for nervous shock, a decision that was accepted by Australian courts. Since then, subsequent authorities have progressively widened the ambit of liability. However, *McLoughlin v. O'Brien*, which has now extended liability further than ever before, is only the second occasion on which the House of Lords has had the opportunity to consider the question of liability for nervous shock — the first being *Bourhill v. Young* some forty years ago.

Lord Bridge, who made this point in his judgment, was of the opinion that this whole area of liability was in urgent need of review. The judgments of Lord Bridge and Lord Wilberforce in this case now, hopefully, fulfil this need, insofar as it can be met by the courts — as we will see, there was some suggestion that the time might have come for the legislature to step in. One of the reasons why this case is of particular interest for Australian lawyers is that the judge devoted considerable attention to the Australian example of legislation on nervous shock found in New South Wales and in the two Territories. Also, as befits only the

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1. (1888) 13 App. Cas. 222.
2. [1901] 2 K.B. 669
CASE COMMENT

second case on nervous shock to reach the House of Lords, there is a full review not only of most of the English authorities, but also of many important United States, Canadian and Australian decisions. Strangely, however, no mention is made of Mount Isa Mines v. Pusey. This is very unfortunate. Although most of the judgments in Mount Isa Mines are fairly brief and limited to the particular facts of the case, the judgment of Windeyer J. reviews the whole of the law on nervous shock for Australia just as McLoughlin now does for England, and the general approach of the two decisions, which both stress foreseeability as the touchstone of liability, is very similar. It seems appropriate, therefore, in an Australian journal considering what is now the leading English decision, to pay particular attention to the extent to which that decision is consistent with the leading Australian case, which was not cited in it.

The Facts

The facts of McLoughlin v. O'Brian are as follows. The plaintiff, Mrs. Rosina McLoughlin, was the mother of four children. She remained behind when her husband and the children went off on an expedition in the family car. Her seventeen-year-old son George was driving the car, which also contained her husband and the two youngest children, Kathleen, aged seven, and Gillian, aged three. The other son, Michael, aged eleven, was in another car driven by a family friend, Mr. Pilgrim, which was following behind. About two miles away from home, a lorry, owned by the second defendant and negligently driven by the first defendant, collided with the McLoughlin car. The results of this accident were tragic for the McLoughlin family. Gillian was so seriously injured that she died soon afterwards. George, Kathleen and Mr. McLoughlin all suffered injuries of varying severity.

The first Mrs. McLoughlin knew of all this was when she heard the siren of a passing ambulance. Some time later, Mr. Pilgrim arrived to tell her that there had been an accident. He said he thought George was dying, but could not tell her what had happened to the others. He drove her to the hospital, where the first person she saw was Michael, uninjured but crying, who told her that Gillian was dead. She was taken to see George, Kathleen and her husband. George was badly injured, and

was shouting and screaming. Kathleen and her husband were crying and were covered in mud and oil.

This tragic experience deeply affected Mrs. McLoughlin. She suffered what was described as severe shock, organic depression and a change of personality. Numerous physiological symptoms were said to have occurred, and she remained under medical treatment for a considerable time. Her condition was not investigated in detail at the trial because the court was asked to assume that her condition was caused by shock, rather than grief and sorrow, and did so. Obviously, the defendants were liable for Gillian's death and for the injuries to the other members of the family involved in the accident. The question that the court had to decide was whether they were also liable for the injuries suffered by Mrs. McLoughlin. At first instance, Boreham J. held that the defendants did not owe Mrs. McLoughlin a duty of care, because injury to her by shock was not foreseeable in the circumstances. This was a conclusion to which Lord Bridge suggested he must have been driven by the authorities, which Boreham J. fully reviewed. All the judges both in the Court of Appeal and in the House of Lords agreed that Mrs. McLoughlin's injuries were foreseeable in the circumstances, though the Court of Appeal nevertheless felt constrained to deny the existence of a duty of care, since she was not present at the accident, and none of the existing authorities recognised liability in such a situation. The House of Lords felt no such constraint, and held the defendants liable.

Two judgments were delivered in the Court of Appeal, Cumming-Bruce L.J. saying simply that he agreed with both of them. Though they differ considerably in method and approach, in the end in each of these judgments the denial of liability is based on similar grounds. Stephen-son L.J. adopted the general approach outlined by Lord Wilberforce in Anns v. Merton London Borough Council. He held that since it was foreseeable that a mother might suffer shock in the circumstances of this case, there was a "relation of proximity or neighbourhood" between the defendants and the plaintiff, and thus a prima facie duty of care was established. However, the Anns approach necessitated then asking whether there were considerations which ought to negative or limit the scope of liability, and in this case Stephenson L.J. felt that the duty ought to be limited to those on or near the scene of the accident. He did not find it easy to say why this was the point at which the line should be drawn, but in the end put it down to "judicial instinct" and the lack of precedents extending liability any further. Griffiths L.J., on the other hand,

adopted a one-stage, rather than a two-stage, approach to the question of duty. He did not see foreseeability as a universal solution to the duty problem, and held that the duty of care of a driver was limited to persons and owners of property on the road or near it who might be affected by his bad driving, a conclusion which he reached with the aid of the nervous shock cases and two obiter dicta in *Best v. Samuel Fox & Co.*

It is interesting to note that in the House of Lords Lord Wilberforce emphasised the differences between the two Court of Appeal judgments, saying that Griffith L.J. denied the existence of a duty while Stephenson L.J. recognised the duty but sought refuge in policy considerations. This seems hardly fair, since Stephenson L.J. was simply adopting the two-stage approach for determining the existence of a duty of care which had been outlined by Lord Wilberforce himself. Both judgments, in the end, deny liability on policy grounds. Griffiths L.J. was more impressed by the problems of a multiplicity of actions than Stephenson L.J., but both suggested that to encourage claims such as this would have the effect of prolonging the plaintiff's suffering — an argument, surely, that applies not just to nervous shock suffered by non-bystanders but to all cases of nervous shock, and yet there was no suggestion of going back on older authorities. Both were impressed by the idea of a legislative solution to the problem such as the one enacted in some Australian jurisdictions.

The judgments raise the issue not just of policy in relation to nervous shock but of policy in negligence generally. Five judgments were delivered, but that of Lord Russell of Killowen is very short, and Lord Scarman's judgment, which is nearly as short, is devoted entirely to the more general questions of policy — on the nervous shock issue he agrees with Lord Bridge. Our restatement of the law of nervous shock, therefore, is really derived from three judgments — those of Lord Wilberforce, Lord Bridge, and Lord Edmund-Davies. Lord Bridge provides a splendid review of the development of the case-law, which will surely find its way into all the casebooks. Lord Edmund-Davies' judgment is fairly brief and looks at the problem a little differently from the judgments of Lord Bridge and Lord Wilberforce, which are substantially uniform. It is the Bridge-Wilberforce approach, fortified by the support of Lord Scarman, which constitutes the most authoritative part of the decision.

13. Id. at 623.
17. Id. at 616 (Stephenson L.J.), 624 (Griffiths L.J.).
The Law of Nervous Shock

How then, does the House of Lords now see the law of nervous shock? — and, reverting to our initial point, is its attitude the same as that of the High Court of Australia?

An initial point made in the House of Lords judgments is that the expression ‘nervous shock’, hallowed by long judicial usage, has long ago ceased to be consistent with the medical facts. As Lord Wilberforce says, "it is now accepted by medical science that recognisable and severe physical damage to the human body and system may be caused through the impact, through the senses, of external events on the mind. There may thus be produced what is as identifiable an illness as any that may be caused by direct physical impact." Lord Bridge, who described the term ‘nervous shock’ as “quaint”, obviously agreed. The judgments, then, endorse the statement of Lord Denning M.R. in Hinz v. Berry which attempts to put the problem into its modern medical content by saying that what must be proved is a “recognisable psychiatric illness”. The judgment of Windeyer J. in Mount Isa Mines, which we can take as representative of the Australian attitude to this area, is in absolute agreement.

Second, the judgments confirm an important general principle that was first hinted at by the House of Lords in Bourhill v. Young, then endorsed by Denning L.J. in King v. Phillips, and finally stated definitively by the Privy Council in The Wagon Mound (No. 1) — that the test of liability for shock is foreseeability of injury to the plaintiff by shock. The earlier and more restrictive test, that what had to be shown was foreseeability of injury by impact, was discarded. The Wagon Mound (No. 1) was binding on Australian courts, and all the judgments in Mount Isa Mines accept this principle without question. The test is, of course, simply an example of the general principle of The Wagon Mound (No. 1) that what must be foreseen is the kind of damage in suit, but only the kind of damage, and not its exact nature and degree; and accordingly submissions in Mount Isa Mines that the particular injuries suffered by the plaintiff in that case were not foreseeable were very properly rejected.

18. (1962) 2 All E.R. 298, at 301.
19. Id. at 312.
22. Lord Wilberforce did not expressly mention this point, but obviously agreed with it.
It was Lord Edmund-Davies who used this test to point out a crucial deficiency in the Court of Appeal judgments.\textsuperscript{27} Both Stephenson L.J. and Griffiths L.J. placed limits on the duty owed in shock cases by using the notion of physical proximity to the accident — and though they were not actually requiring that the plaintiff be within what American courts call the zone of danger, so that harm to her by impact would have been foreseeable, they were still assessing liability for shock by reference to considerations concerned with impact, and physical proximity seems just as inappropriate here as it does in cases of economic loss.\textsuperscript{28}

The application of this foreseeability test came in for some comment. Normally, what is in issue is whether particular consequences are foreseeable by a reasonable man in the defendant's position, but Boreham J., and Stephenson L.J. in the Court of Appeal, seem to be introducing a different test, that of the reasonable bystander,\textsuperscript{29} and Lord Russell of Killowen in his short judgment in the House of Lords exposed this error.\textsuperscript{30} The House of Lords judgments and the judgments in \textit{Mount Isa Mines} are at one in judging foresight according to the view of a reasonable man in the position of the defendant.\textsuperscript{31} Lord Bridge wondered whether or not the reasonable man needed to possess knowledge of psychiatric medicine, and declared himself to be in favour of judges hearing psychiatric evidence on the question, but recognised that the authorities were against it.\textsuperscript{32} Something like this issue was, of course, very important in \textit{The Wagon Mound (No. 1)} itself, since it was on the basis of evidence that furnace oil was unlikely to ignite when spilt on water that it was found that a reasonable man would not foresee this happening, while in \textit{The Wagon Mound (No. 2)}\textsuperscript{33} it was found that a reasonable man unencumbered by this special knowledge would view the matter differently.

Both Lord Wilberforce and Lord Bridge then suggest that in assessing the question of foreseeability consideration must be given to three factors, namely, the class of persons whose claims must be recognised, their proximity to the accident, and the means by which the shock is caused.\textsuperscript{34} These three factors are derived from the leading United States case

\textsuperscript{27} [1982] 2 All E.R. 298, at 306.
\textsuperscript{28} "Physical propinquity" and "physical effect" were the limitations resorted to by Jacobs J. in \textit{Gallex Oil v. Dredge 'Willenstad'} (1976) 136 C.L.R. 529.
\textsuperscript{29} [1981] Q.B. 599, at 604-605, 613. Stephenson L.J. first quotes Boreham J.'s test and then states his own.
\textsuperscript{31} E.g. [1982] 2 All E.R. 298, at 312 (Lord Bridge); (1970) 125 C.L.R. 383, at 391-398 (Windeyer J.).
\textsuperscript{32} [1982] 2 All E.R. 298, at 312.
\textsuperscript{33} [1967] 1 A.C. 617.
\textsuperscript{34} [1982] 2 All E.R. 298, at 304 (Lord Wilberforce), 318-319 (Lord Bridge).
of *Dillon v. Legg*. In that case Tobriner J. made it clear that these factors only affect the degree of foreseeability, and Lords Wilberforce and Bridge clearly endorse his view that artificial limitations are best avoided. These factors, however, helped the judges to reach their conclusions, and they will help us to analyse those conclusions.

The problem of physical proximity bulked large in the minds of the judges, since it was this that had led the Court of Appeal to raise the barriers in front of Mrs. McLoughlin. It was clear law that a relation who actually saw the accident happen and suffered shock could recover, and Lord Wilberforce drew attention to three cases which went slightly further than this by allowing recovery to relations who did not see or hear the accident but came upon its immediate aftermath. Of these three cases, the one that went furthest was an Australian case, *Benson v. Lee*, and Lord Wilberforce pointed out the similarity between it and the present case — a mother, in her home a hundred yards away, was told of the accident by someone else, ran out to the scene of the accident and there suffered shock. In addition, it is worthy of note that in *Hambrook v. Stokes*, the first case to allow recovery for shock caused by fear for the safety of someone else, the plaintiff again did not see the ac-

35 (1968) 69 Cal. Rptr. 72. Lord Bridge expressly acknowledges this by quoting a large section of the judgment of Tobriner J. *Dillon v Legg* is a most influential decision, but citation of it by the House of Lords should not lead us to assume that the attitude taken by the court in this case represents the attitude of all 51 United States jurisdictions, which in fact vary considerably in the extent to which they permit recovery for shock. At one extreme are jurisdictions like Illinois or Ohio, which still uphold the impact rule and so permit no recovery whatsoever, and at the other is Hawaii, which allows recovery for mere mental distress (without resulting shock) in all cases in which recovery may be had for nervous shock in England and Australia plus some others, e.g. *Campbell v. Animal Quarantine Staton* (1981) 632 P.2d 1066 (Haw.), in which five family members recovered a total of $1,000 for mental distress caused by the death of Princess, the family dog, due to the defendants' negligence, even though the event was not witnessed by any of the plaintiffs. (Compare Davies v. Bennison [1927] Tas. S R. 52, according to which even shock caused by witnessing the killing of a pet is not actionable.) However, neither of these extremes is typical of the attitude of the majority of United States jurisdictions. Most recognize liability for shock suffered through fear of injury to oneself, i.e. they have advanced as far as *Dulieu v. White & Sons* [1901] 2 K.B. 669, but many still refuse recovery to 'bystanders' who are outside the 'zone of danger'. *Dillon v. Legg* is the first case of any importance to grant recovery to bystanders, and has been followed in other jurisdictions, but even now does not represent the majority view: Wagner, "Pretium Doloris — Pain and Suffering" (1982) 30 A.J.C.L. (Supp.) 117, at p.119, although this may eventually change. It is certainly true to say that at the present time the ambit of liability for shock is wider in England and Australia than it is in most United States jurisdictions.

41. [1925] 1 K.B. 141.
cident but came on the scene soon afterwards. The question, as Lord Wilberforce put it, was whether the line had to be drawn below these cases but above the present one: whether the extra distance and time, as compared with Benson, made the vital difference. Both Lord Wilberforce and Lord Bridge considered that it did not. Lord Bridge said that, once the law had decided to grant recovery for shock at all, and once it had decided to grant recovery to plaintiffs outside the area of physical danger, refusal of recovery to persons such as Mrs. McLoughlin could not be logically defended, and Lord Wilberforce agreed. This, of course, was where the Court of Appeal judgments went wrong, as Lord Edmund-Davies pointed out.

There is one element of possible dissent between Lord Wilberforce and Lord Bridge on this matter. In Chester v. Waverley Corporation where a mother suffered shock on seeing the dead body of her son recovered from a water-filled trench after he had been missing for several hours, the High Court of Australia held that she could not recover because harm to her was not foreseeable. Lord Wilberforce thought that the case might be justifiable on its facts, although he did hint that it might be an out-of-date decision. Lord Bridge, on the other hand, clearly thought that Chester would now be decided differently, saying that he found the dissenting judgment of Evatt J. "wholly convincing". It seems that it is Lord Bridge's view, rather than Lord Wilberforce's, which would be upheld by Australian courts given that Chester was virtually by-passed in Mount Isa Mines.

The position as stated in McLoughlin v. O'Brien, then, seems to be that any relative who suffers shock on seeing an accident or its aftermath may recover provided the shock is foreseeable. Encouraged by the importance attached to pure foreseeability in Mount Isa Mines and by the reliance placed on Benson in McLoughlin, some Australian courts would probably be prepared to go as far. But some might not be able to. The legislation passed in New South Wales and in the two Territories, presumably as

43. Id at 317.
44. Id. at 302-303.
45 See supra, text at n 27
46 (1939) 62 C.L.R. 1.
47. [1982] 2 All E.R. 599, at 304-305
48. Id at 316-317.
49. Windeyer J. did not mention Chester at all, and the only judge to give it more than a passing reference was Walsh J. who recognised its authority on matters of general principle but did not see it as determining the decision on the particular facts: see (1970) 125 C.L.R. 383, at 416.
50. A case which seems to confirm this view is Fagan v Crimes Compensation Tribunal (1982) 56 A L.J R 781, dealt with in n. 64 infra.
a result of Chester, grants recovery to parents and spouses without any requirement that they should view the accident or its aftermath, and without any need to prove a duty owed to themselves — a duty owed to the accident victim is sufficient. In these respects, the legislation is still ahead of the common law even after McLoughlin. Other family members, however, can recover if — and, presumably, only if — the accident happens within their sight or hearing, and in the light of McLoughlin this now seems unnecessarily restrictive.

We have so far spoken only of relatives, and one of the factors mentioned by Lords Wilberforce and Bridge was the class of persons who would be permitted to recover. The fact that the plaintiff is related to the accident victim now seems to be very important, and indeed according to Lord Wilberforce’s judgment seems to be a mandatory requirement. He speaks of relatives throughout, allows an exception only for rescuers, and suggests that existing law would deny the claim of the ordinary bystander. The pregnant fishwife who failed to recover in Bourhill v. Young would fall into this category, but so also would the crane driver who recovered damages in Dooley v. Cammell Laird & Co., a case not cited either by the Court of Appeal or by the House of Lords in McLoughlin, but which is looking every bit as isolated as it did when it was first decided. Lord Bridge, however, would probably not be as rigid on the question of the ordinary bystander, since he was all for not freezing the law in any rigid posture. An exception for rescuers had to be made because of Chadwick v. British Transport Commission, where the plaintiff suffered shock after helping victims of the Lewisham train disaster and was held to be owed a duty of care. Lord Edmund-Davies, who did not approach Mrs. McLoughlin’s problem through the ‘aftermath’ cases at all, was prepared to extend the rescue concept to include

51. Or near-accident — the legislation refers to seeing someone being “killed, injured or put in peril.” Likewise, at common law, there is no requirement that an accident should actually occur: there was no actual accident in Dooley v. Cammell, Laird & Co. [1951] 1 Lloyd’s Rep. 271 (infra, text and nn.56-57), and only a very minor one in King v. Phillips [1953] 1 Q.B. 429.
52. Thus in State Railway Authority of New South Wales v. Sharp [1981] 1 N.S.W.L.R. 240, a mother recovered damages for shock caused by hearing that her child had been killed in an accident. At no stage was she present, either at the time of the accident or afterwards. (In addition, her husband recovered damages for loss of consortium brought about by the shock his wife suffered).
53. But according to Sheppard J. in Rowe v. Macartney [1975] 1 N.S.W.L.R. 544, at 549, the statute should not be construed as exhaustive so as to preclude recovery on common law principles.
57. Though a similar decision was reached on similar facts in Carlin v. Helical Bar (1970) 9 K.I.R. 154.
persons such as Mrs. McLoughlin, since she came to bring aid and comfort to the injured.\textsuperscript{60} Such an extension had been expressly rejected by Griffiths L.J. in the Court of Appeal,\textsuperscript{61} and although the House of Lords reversed the Court of Appeal decision it seems unlikely that the silence of Lords Wilberforce and Bridge on this issue indicates agreement with Lord Edmund-Davies.

*Mount Isa Mines*, like *Chadwick*, was a rescue case, so the Australian courts permit recovery in the absence of family relationship in at least this situation. It seems, however, that they would go further. Windeyer J., dealing with the problem of lack of relationship in *Mount Isa Mines*, held on the basis of *Dooley* and *Chadwick* that the courts have quite definitely rejected relationship as a limit on recovery.\textsuperscript{62} If foreseeability was the criterion, relationship was an illogical limitation — just as illogical, presumably, as proximity was said to be in *McLoughlin*. Again, however, it is hard to see how courts in New South Wales and the two Territories can go as far given the limitations of their statutory provisions. Various unresolved difficulties therefore remain. Rescuers recover in England and Australia, but perhaps not in jurisdictions which have the statute. Other unrelated bystanders may recover in the non-statutory Australian jurisdictions but seemingly not in England, while related non-bystanders recover in England and may do so in some Australian jurisdictions but cannot always do so in those with the statute. Only further cases can iron out these difficulties.

The last factor referred to by Lords Wilberforce and Bridge, the means by which the shock is caused, can be disposed of fairly briefly. It is accepted by all concerned that shock caused by hearing of the accident from someone else, as opposed to viewing the accident or its aftermath for oneself, does not give rise to liability. Mrs. McLoughlin heard about the accident before she saw its results, but she seems to have suffered shock from seeing rather than hearing, and the House of Lords extends a duty of care to her only on the basis that she did see for herself.\textsuperscript{63}

That no liability will exist for shock suffered when the bad news is passed on by a third party is supported by a Canadian case, *Abramzik v. Brenner*,\textsuperscript{64} cited by Lord Bridge, and also by a statement of Windeyer J. in *Mount Isa Mines*.\textsuperscript{65} The only exception to this rule is where there is

\textsuperscript{60} [1982] 2 All E.R. 298, at 306.
\textsuperscript{63} [1982] 2 All E.R. 298, at 302 (Lord Wilberforce), at 316 (Lord Bridge). In the Court of Appeal Griffiths L.J. perhaps thought in terms of a possible liability for hearing as well as seeing, [1981] Q.B. 599, at 617; Stephenson L.J. did not, at 605-607.
\textsuperscript{64} (1967) 65 D.L.R. (2d) 651.
already a breach of duty to the plaintiff and so recovery for nervous shock is parasitic upon that.\textsuperscript{66} Cases where the shock arises from the negligent communication of untrue bad news raise different problems, and will not be further dealt with here.\textsuperscript{67}

The McLoughlin case then, provides a comprehensive review of the problems of liability for nervous shock — but it is unfortunate that Mount Isa Mines was not cited to the House of Lords. There may be a few cases where English and Australian law may now differ; and in particular McLoughlin is making the limitations of the statutory provision in New South Wales and the Territories more and more significant. These statutes may yet provide the pattern for the future, since their provisions commended themselves to several of the judges in the House of Lords as a way in which Parliament might step in to draw the lines of recovery in a way in which the courts could not.\textsuperscript{68} This brings us to the issue of how questions of policy are best implemented in negligence cases.

Policy

Once upon a time it was fashionable to try and disguise policy issues in cases concerned with duty of care in negligence.\textsuperscript{69} However, perhaps since \textit{Hedley Byrne v. Heller}\textsuperscript{70} nearly twenty years ago, there has been a

\textsuperscript{66} As in Schneider v. Eisovitch [1960] 2 Q.B 430, Andrews v Williams [1967] V.R. 831, Brown v Mount Barker Hospital [1934] S A.S.R. 128. “However, Fagan v. Crimes Compensation Tribunal (1982) 56 A.L.J.R. 781 suggests that the limitation dealt with in the text may also eventually disappear. In this case the High Court had to decide whether compensation was payable under the Criminal Injuries Compensation Act 1972 (Vic.) to a five-year-old child whose mother was stabbed to death. The Act provided for the payment of compensation for, among other injuries, nervous shock, to “a person injured to killed by or as a result of the criminal act or omission of any other person.” The High Court, having decided that this provision allowed them to award compensation to persons other than the immediate victim of the crime, held that no distinction could be made between the three older children who discovered their mother’s body when they returned home from school and the fourth child, the appellant in the present case, who did not see the body, but was not picked up from school by his mother, was eventually collected by relatives, and learnt of his mother’s murder during the next few days. Although all members of the court were agreed that they did not have to apply tort principles of causation and foreseeability in dealing with cases under this statute, Brennan J in particular held that in the circumstances of this case it was foreseeable, in tort terms, that the appellant would suffer nervous shock. The case thus not only supports McLoughlin v. O’Brien in refusing to limit compensation to those who see the accident or its immediate aftermath, but indeed seems to go further, suggesting as it does that a duty may be owed to persons who suffer shock merely by hearing of the accident. However, it may be significant that in this case the appellant had also experienced its effect in a more direct way, through his mother failing to appear at school to collect him.


\textsuperscript{68} [1982] 2 All E.R. 298, at 304 (Lord Wilberforce), 311 (Lord Scarman), 317 (Lord Bridge).

\textsuperscript{69} Which is why a Canadian case which admitted the relevance of policy, Nova Mink v. Trans-Canada Airlines [1951] 2 D.L.R. 241, stood out so prominently.

\textsuperscript{70} [1964] A.C. 465.
great change, and judges are now much happier to expose to public view policy issues that were formerly kept hidden. Lord Denning has been to the fore in this development, and he has influenced many Court of Appeal decisions; but the House of Lords has also been active, as witnessed by cases such as Rondel v. Worsley, Lauchbury v. Morgans, and above all Anns v Merton London Borough Council, in which Lord Wilberforce restated the Donoghue v. Stevenson neighbour principle as a prima facie duty of care subject to extra limitations which might be imposed for policy reasons, and so also has the Australian High Court, as evidenced by cases such as Caltex Oil v. The Dredge Willemstad.

In such a general context, therefore, it is not surprising to find policy issues to the fore in McLoughlin. It would, however, be very surprising to find judges in that case denying that policy has a part to play, and yet according to Lord Edmund-Davies two of his colleagues are guilty of just such an offence. On examination, however, there is not so much difference of view as at first appears, and the whole thing may simply be a storm in the judicial teacups.

Lord Edmund-Davies had evidently read the judgments of both Lord Bridge and Lord Scarman in draft, and he criticises them both for saying that no regard should be had to questions of policy and goes on to detail the importance of policy in negligence. This latter part of his judgment is an impressive demonstration of the truth of this argument, but in accusing Lord Bridge and Lord Scarman of disagreeing with it he may have been a little wide off the mark.

He says of Lord Bridge that the latter doubted that any regard should have been had to questions of public policy and thought that the Court of Appeal were wrong in paying attention to it. Lord Bridge, according to Lord Edmund-Davies, considered that foreseeability was the sole test of liability. This seems rather hard on Lord Bridge. Having talked about the foreseeability test, and having concluded that the plaintiff's injuries were foreseeable, he then said:

73 [1969] 1 A.C. 191
76 [1976] 136 C.L.R. 529
77. [1982] 2 All E R 298 at 307
The question, then, for your Lordships' decision is whether the law, as a matter of policy, draws a line which exempts from liability a defendant whose negligent act or omission was actually and foreseeably a cause of the plaintiff's psychiatric illness . . . 78

This seems to be an approach very similar to that of Lord Wilberforce in Anns case. Then, after a historical review of the authorities, he comes back to the question of policy. There follows an excellent discussion of the possible policy reasons against extending liability for shock, at the end of which he concludes that none of the reasons put forward is sufficient to deny liability. 79 At the very end of his judgment he refers to Lord Edmund-Davies' criticism of this conclusion, and says that he regrets that Lord Edmund-Davies stops short of indicating where the limits of liability should be drawn or the nature of the policy considerations which Lord Edmund-Davies regards as important 80 — a fair criticism in the circumstances.

Lord Edmund-Davies also criticises Lord Scarman along similar lines. 81 Here, perhaps, there may be more substance in the criticism. Lord Scarman said that judges were concerned with matters of principle rather than matters of policy, and that if principle dictated an extension of liability it was best to follow those dictates and leave any curtailment of liability on policy grounds to Parliament. 82 He justifies this statement by reference to the successive extensions of liability in the shock cases, and the Australian legislation — although of course, the Australian legislation, when passed, extended, rather than limited, liability. It may be, however, that Lord Scarman is really doing no more than agreeing with Lord Bridge that it is hard for the courts to draw artificial lines limiting the ambit of recovery but easier for Parliament, and that he is not denying the relevance of policy issues in negligence cases. The non-protagonists in this particular affair, Lords Wilberforce and Russell, both affirm the relevance of policy, 83 and perhaps Lord Edmund-Davies is guilty of over-reacting. It was unnecessary for this dispute to cloud an important case on liability for shock.

78. Id. at 313.
79. Id. at 319-320.
80. Id. at 320.
81. Id. at 308.
82. Id. at 310-311.
83. Id. at 303 (Lord Wilberforce), 310 (Lord Russell).