

Support Materials

Law of Torts Special Study (G148)

These materials should be read alongside the approved specimen question paper and mark schemes and specification.

Question:

- 1) Discuss the extent to which the precedent in *Page v Smith* [Source 11 pages 7 Special Study Materials] represents a development of the law on nervous shock (psychiatric damage).

[12]

Example Grade A Answer:

Page v Smith involved a man who suffered a recurrence of ME after being in a car crash in which he was not otherwise injured. Page was clearly a primary victim because, like in *Dulieu v White* he was present at the scene of the single traumatic event and he was at risk of some foreseeable harm, and he suffered foreseeable harm. *Dulieu v White* was the first case to allow a claim for nervous shock but only for primary victims. This limitation was later criticised in *Hambrook v Stokes*.

With a primary victim it does not matter that the claimant suffered psychiatric rather than physical injury. As Lord Lloyd says in lines 18 to 19 of the Source 'a distinction should not be drawn between physical and psychiatric injury' and he repeats the same point in lines 34 to 35.

The case represents a major development in the law because the House of Lords was prepared to accept Page's claim despite him already suffering from ME and therefore being more susceptible to psychiatric injury. The judges are applying the thin skull rule. This contrasts with the rules on secondary victims where a person can only claim if they have the same phlegm and fortitude as a reasonable person.

Examiner's commentary

The candidate achieves maximum marks for this. The candidate is careful not to rely too heavily on the facts of the case when there are only AO2 marks available but does give enough information to put the claim in context.

The candidate shows a clear understanding of the definition of primary victim and has shown the similarity with the principle in *Dulieu v White*. The point on *Hambrook* is tangential but useful critical context.

The candidate scores high marks also by understanding that the point of the question is development of the law, by using an appropriate linked case, and by explaining effectively two other key points on the development of the law on primary victims: that only some harm need be foreseeable, and the application of the thin skull rule.

The candidate has also appreciated the nature of source based exams and made useful references back to the source.

Example Grade E Answer:

Page v Smith concerned a fairly minor road accident in which one of the drivers negligently turned out of a junction and caused the other driver to run into him. Page had suffered from myalgic encephalomyelitis (ME). He said that he had been recovering from the illness and hoped to go back to work as a teacher. Page was a primary victim and he suffered foreseeable harm as a result of the accident and it didn't matter that it was psychiatric harm. Lord Lloyd gives five propositions regarding nervous shock in the source.

Examiner's commentary

This candidate has realised that it is important to refer back to the source but has not used it very wisely. The first four lines merely repeat almost verbatim from the source the basic facts of the case when it is the principle and developments that come out of the case that are important.

There is some merit in the answer. The candidate has recognised that Page is a primary victim, although gets limited credit for this because there is no explanation why. The best part of the answer is the recognition that Page suffers foreseeable harm and that it does not matter that it is psychiatric harm, although again it would have gained more marks to develop this further.

The blanket reference to the five points that appear in lines 26–42 can gain little credit because even if there is some relevant material there it is being left to the examiner to extract it.

The candidate could have secured higher marks by focusing on the issue of development of the law.

Question:

- 2) As Lord Ackner observed in *Alcock* [Source 9 page 5 lines 1-3 Special Study Materials] “*Because shock is capable of affecting such a wide range of persons, Lord Wilberforce in *McLoughlin v O’Brien* concluded that there was a real need for the law to place some limitation upon the extent of admissible claims.*”

Consider the extent of the limitations applied to secondary victims and whether they to do in fact meet a ‘*real need*’.

[30]

Example Grade A Answer:

The law on secondary victims has developed in a very restrictive way in contrast to primary victims. The law has created many limitations on claims by secondary victims and all of these limitations are because of the fear of opening the floodgates to claims. However, it can also be said that because of the inherent differences between primary victims and secondary victims that the law has developed fairly.

Firstly nervous shock or psychiatric damage is where the claimant must prove that he or she is suffering from a ‘recognisable psychiatric illness’, so mere emotions like distress and grief are insufficient. According to the case of *Alcock* ‘psychiatric injury encompasses all form of mental neuroses and personality change’. It was in this leading case that Lord Oliver introduced the terms ‘primary victim’ and ‘secondary victim’ which means the first are those victims who are directly affected by the accident or were in the zone of physical danger whereas the second of these are those people who have suffered psychiatric illness as a result of witnessing another’s exposure to physical injury. In fact both categories were explained in the earlier case *Bourhill v Young*.

A common criticism of nervous shock is that secondary victims are treated much more harshly than primary victims. Primary victims only have to prove that they have suffered foreseeable harm and were present at the incident causing the shock. It also does not matter if they are already suffering from a psychiatric illness they can still claim because of the thin skull rule. Secondary victims on the other hand have to prove a wide range of things before they can claim successfully. Primary victims originally only had to show that they feared for their own safety (*Dulieu v White*). Gradually however a process evolved so that in *Hambrook v Stokes* a mother saw a lorry going down hill without a driver towards where she had left her children. She suffered psychiatric illness and the court allowed her claim. *Chadwick* shows how the courts have been more lenient to primary victims when the court compensated a rescuer by saying that he was a primary victim. This has changed however in *White*. So primary victims find it much easier to claim but secondary victims find it much harder.

In *McLoughlin v O’Brien* Lord Wilberforce laid down the criteria for secondary victims in his landmark decision. In the case some time after an accident a mother arrived at a hospital to find her family (husband and children) covered with mud and blood (so their condition was the same as it would have been at the scene of the accident). The mother suffered psychiatric damage and a personality change. According to Lord Wilberforce the mother was a secondary victim and could be compensated in the circumstances. She had satisfied the requirements of (a) proximity of relationship i.e. she had a close and loving relationship with her family and the law recognises that this exists between spouses and between parents and children (b) proximity in time and space to the event or its ‘immediate aftermath’ as was the case here (c) perceiving the events

with her own unaided senses.

These requirements show that the law is restrictive in relation to secondary victims. Besides this in *Page v Smith* a highly significant concept of 'normal fortitude and phlegm' was identified that applies to secondary victims but not to primary victims. Secondary victims must also prove that the incident induced the shock.

The cases show that it is necessary to impose strict requirements on secondary victims and to preserve the divide between secondary victims and primary victims in order to prevent the floodgates from opening and also to distinguish between genuine claims and fraudulent claims which would be far easier in the case of secondary victims. Judges have applied discretion when considering cases and have borne in mind policy considerations in reaching decisions. *Alcock*, where the judges approved the criteria set in *McLoughlin*, concerned the Hillsborough disaster and the friends and relatives of the victims who died who were claiming for psychiatric injury suffered as a result of the deaths of the victims. Some of these friends and relatives arrived at the mortuary 8 to 9 hours after incident. The court held that they were secondary victims and could not satisfy proximity in time and space or 'immediate aftermath'. Others could not say that they had witnessed the event with their own unaided senses because they had seen it on TV and a brother who had been at the ground failed in his claim because the court said he did not have a close enough tie of love and affection to his brother who died in the disaster. The decision was justified because with the number of potential friends and relatives of the dead if the court had allowed these claims the floodgates really would have opened.

It has also been criticised that it is far easier to recover damages for a physical injury than it is for a secondary victim to recover for genuine psychiatric injury. The Law Commission in its 1998 Report 'Liability for Psychiatric Harm' has presented proposals for reform, particularly of the *McLoughlin* criteria. They say that only the close tie of love and affection requirement should be retained and this should be extended to brothers and sisters and to cohabiters.

Therefore there are strict limitations on claiming as a secondary victim which may have produced harsh results but these are justified to limit the number of claims particularly since the categories of primary and secondary victims are expanding. In *Walters* for instance a mother was able to claim when the court stated that the shocking events leading up to her baby's death was a single event lasting 36 hours and in *W v Essex* parents who discovered that their children had been abused by a boy they were fostering were also able to claim.

Examiner's commentary

The candidate has been able to write at length and to include extensive comment for AO2 as well as much detail for AO1. In fact the candidate begins to comment as early as the first paragraph and lays out the basis of an argument.

For AO1 the candidate has included a wide range of cases. Not all are dealt with in detail and many more could have been used. However, the most critical cases are dealt with in detail and a good understanding of the definitions of primary and secondary victims and of the Alcock criteria are also evident. Besides this the candidate has been able to make reference to some fairly recent cases such as *Walters* and *W v Essex* which do not conform absolutely to the way in which the criteria are usually applied.

There is also critical comment in most paragraphs and the candidate engages in a balanced argument for AO2 and deals with both aspects of the question set, not just the limitations on secondary victims but the justifications for those limitations. There is also reference to the Law Commission's proposals for reform.

The candidate has gone beyond the pure information given in the sources and scores high marks.

Example Grade E Answer:

Nervous shock is when a person suffers from a psychiatric illness after a traumatic event. To get damages for nervous shock the victim has to prove the following: close ties of love and affection with the people involved which could be a married partner or children. It is hard for siblings to get damages. The court must also look at proximity, was the victim in the vicinity of the accident or far away from it or heard about the incident some time after. If it was far away or after then they can't receive damages. The rules for secondary victims are in a case called *Alcock* which involved the Hillsborough disaster.

There are two types of victim in nervous shock: primary and secondary. Primary are those who were actually involved in the accident and then suffered from psychiatric illness. Secondary victims are those that saw something horrific and then suffered shock as a result. There is a case, *McLoughlin v O'Brien* where a husband and his children were in a car crash and taken to hospital and his wife was phoned and rushed to the hospital and found her youngest daughter was dead and her other daughter and son were badly injured and bloody and dirty from the crash and her husband. She suffered from severe shock and changed personality and was awarded compensation because it was like being present at the accident.

Cases where secondary victims try to claim don't tend to succeed as much as primary victims. For instance there was a woman in the Hillsborough disaster who saw televised scenes of the disaster and who knew a relative was in the stadium but her claim failed because she hadn't witnessed the disaster by being there and seeing it and hearing it. This is another thing that secondary victims have to prove. If she had been there it might have been different.

There is another case, *Bourhill v Young* where a lady miscarried her baby after she got off a tram heard a crash and went round the tram and saw blood on the road where a motorcycle accident happened. Under nervous shock she couldn't claim because she had no close ties with the motorcyclist and she didn't see the accident with her own unaided senses. So she could not get damages for nervous shock.

Overall when they are looking at secondary victims the courts are understandably more concerned with not opening the 'floodgates' to claims than they are with justice. Primary victims are treated far more reasonably than secondary victims they only have to prove they were there and at risk of some harm secondary victims have many more hurdles to cross. It seems that the number of primary victims at an incident is less than the number of secondary victims who potentially might have a claim. So the courts must strike a balance between rewarding compensation to deserving claimants and opening the 'floodgates' to too many people.

Examiner's commentary

The answer is a bit disorganised, for instance two of the Alcock criteria are introduced in the first paragraph while the third requirement is not mentioned until the end of the third paragraph. The essay would have also benefited from more explanation and expansion in places. Besides this it is fairly narrative and lacks critical comment which is typical of a grade E answer.

However, the candidate gains a reasonable amount of credit for AO1. There is a partial definition of nervous shock and some reasonable definitions of primary and secondary victims. The candidate also has a reasonable understanding of the Alcock criteria and has included other cases with some reasoning of why the claimant succeeded in *McLoughlin v O'Brien*. So there is adequate knowledge just about.

Critical comment tends to be limited and mainly appears in the final paragraph, although the floodgates argument is referred to and there is some comparison drawn with the treatment of primary victims by contrast, and some attempt at justifying the reason for the limitations. Nevertheless the argument is not developed or applied to the cases used so there can only be limited marks for AO2, the candidate getting most of their marks from AO1. Higher marks would have come with more comment.

Question:

- 3) A large crane is being used in building work immediately adjacent to the law school where Chris works as a lecturer. Through the negligence of the construction firm, Bodgejob, part of the crane falls off and drops on Chris as he is walking into the law school causing him severe injuries.

Consider the possibility of each of the following succeeding if they claim against Bodgejob:

- a) Jennifer, a lecturer and Chris' friend, is in the law school at the time of the accident, and on hearing of the accident looks through the window and seeing the extent of Chris's injuries suffers post traumatic stress disorder. [10]
- b) Sukhy, another lecturer and close friend of Chris', on hearing of the accident rushes out of the law school and realising that Chris's heart has stopped, resuscitates him and keeps him alive until the emergency services arrive. While Sukhy is doing this there is always a danger that more of the crane will drop. Sukhy suffers severe depression as a result and cannot return to work. [10]
- c) Karen, Chris' wife, is called immediately and is at the hospital entrance when Chris arrives in the ambulance. She suffers grief when Chris is pronounced dead. [10]

[30]

Example Grade A Answer:

(a)

Jennifer has a recognised psychiatric illness (PTSD).

Jennifer is a secondary victim – under White by looking through the window she is not at risk so is not a primary victim.

She passes two Alcock tests – present at the scene and witnesses the event with her own unaided senses.

But she fails Alcock on close tie of love and affection – she is only Chris's work friend (Piper Alpha case) so has no claim.

(b)

Sukhy has a recognised psychiatric illness (severe depression).

Unlike Jennifer Sukhy may be a primary victim because the crane may fall so he is in danger and he is also a rescuer as in Chadwick so he may claim.

Otherwise he would fail under Alcock on close tie.

(c)

Karen's case is like McLoughlin v O'Brien – she sees Chris at the hospital in the same state soon after so falls in immediate aftermath.

Karen is a secondary victim as a wife her close tie is presumed.

But grief is not a recognised psychiatric injury so Karen's claim fails.

Examiner's commentary

The candidate has answered in a brief note form which is perfectly acceptable for question 3. The important thing is whether the principles of law are correctly applied.

The candidate secures sufficient marks for grade A because appropriate principles are applied to all three scenarios and because most marks for question 3 are given for AO2. In each answer for instance there is a reasoned explanation of why the claimant is a primary or secondary victim. The reference to rescuer in (b) of course could have been expanded on, whereas the reference to McLoughlin in (c) includes some reason for the comparison being made.

The candidate has not always backed up the principles with citation for AO1, for example when deciding whether there is a recognised psychiatric injury, but has used appropriate case law in places (e.g. 'the Piper Alpha case' is an acceptable reference to *McFarlane v EE Caledonia*). With one or two more cases the candidate would have secured maximum marks.

Example Grade E Answer:

(a)

Jennifer is a secondary victim so she has to pass the Alcock three part test in order to claim. This is the class of persons whose claims should be recognised, the proximity of the claimant in time and space to the accident, and the means by which the shock is caused to the claimant. Jennifer passes the last two parts of the test but she fails the first one because she is only Chris' friend not his wife so she cannot claim.

(b)

Sukhy is a rescuer because he is trying to keep Chris alive until the emergency services arrive. After *White* rescuers are secondary victims. Sukhy will not be able to claim as a secondary victim because he is only Chris' friend.

(c)

Karen is a secondary victim. She is not at the scene but she gets to the hospital straight away so she passes the Alcock test. She is Chris' wife so unlike Jennifer and Sukhy she can claim because wives are presumed to have a close tie of love and affection with their husbands.

Examiner's commentary

This candidate generally understands the difference between primary and secondary victims and has been able to use the Alcock test taking the three parts from the headings in Source 9.

Application is not generally detailed but the candidate does identify that Jennifer is a secondary victim with no obvious close tie to Chris and that a close tie is presumed in Karen's case.

The candidate also gains credit for the reasoning in part (b) although would have gained higher marks for recognising the possibility of Sukhy being a primary victim because he is at risk.

The reasoning is also correct as far as it goes in part (c). However, the conclusion is wrong

because of the lack of a recognised psychiatric injury. The candidate has omitted to mention the injury in all three and clearly could have got much higher marks for doing so.