NERVOUS SHOCK, NERVOUS COURTS: THE *ANNS/KAMLOOPS* TEST TO THE RESCUE?

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This article examines the tests employed by the courts in determining liability in tort in cases of psychiatric damage or nervous shock. The author explores the current controversy surrounding what criteria should be used in determining if and when a duty of care should be established. The article focuses on the development of an analytical framework to be used in establishing a duty of care in cases of psychiatric damage. The author begins with an examination of the development of the law in this area and how the courts in Canada are addressing the issue today. Here the author explains that Canadian courts have not adopted a uniform approach in determining issues of establishing a duty of care. The author then moves on to a discussion of the new primary/secondary victim paradigm recently developed in the United Kingdom, but argues against its incorporation as a model for Canada. Instead the author argues that the Anns/Kamloops *test should be adopted as the standard test to determine issues of duty of care in tort cases of psychiatric damage. In reaching this conclusion the author is supported by the approach of the courts in duty of care issues on pure economic loss cases.*

Le présent article examine les critères qu'utilisent les tribunaux pour déterminer la responsabilité délictuelle en matière de troubles psychiatriques ou de chocs nerveux. L'auteure examine la controverse actuelle portant sur les critères qui devraient servir à déterminer si et quand il convient d'établir un devoir de diligence. L'article est axé sur l'élaboration d'un cadre analytique à utiliser en cas de troubles de stress post-traumatique. L'auteure étudie d'abord l'évolution du droit dans ce domaine et la façon dont les tribunaux canadiens traitent de la question aujourd'hui. Elle relève à cet égard que les tribunaux canadiens n'ont pas adopté d'approche uniforme. L'auteure entame ensuite une discussion sur le paradigme victime primaire-secondaire récemment développé au Royaume-Uni, mais en rejette le modèle pour le Canada et se fonde sur des cas de purs préjudices financiers pour préconiser l'adoption des critères utilisés dans Anns *et* Ville de Kamloops.

TABLE OF CONTENTS

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I. INTRODUCTION

In negligence law, compensation for psychiatric damage, or nervous shock as it is sometimes called,[1] has often posed a challenge for common law courts. The concerns are numerous. They range from the danger of false claims,[2] to the belief that a single accident will lead to a mass of claims and thus unfairly burden the tortfeasor,[3] to the possible burden on the insurance industry should liability be unduly extended.[4] Incomprehension of the true nature of mental illness may also be a factor.[5]

These preoccupations are particularly important where the plaintiff is the *indirect* victim of the defendant's negligent act or omission.[6] This simply means that the plaintiff's psychiatric illness is sustained in reaction to injury to others. Mothers who arrive on the scene of an accident shortly after its occurrence to witness their children's distress;[7] rescuers assisting the victims of serious disasters;[8] employees witnessing the suffering of fellow workers[9] all belong to this category of claimants.[10] On the other

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1 Disapproval of this expression has been constant for the past few years. See *Rhodes* v. *Canadian National Railway* (1990), 75 D.L.R. (4th) 248 at 272 (B.C.C.A.) [hereinafter *Rhodes*]; A.M. Linden, *Canadian Tort Law*, 6th ed. (Toronto: Butterworths, 1997) at 386; N.J. Mullany & P.R. Handford, *Tort Liability for Psychiatric Damage* (Sydney: Law Book, 1993) at 14.

2 This was most apparent in early cases on the subject. See *e.g. Victorian Railway Commissioners* v. *Coultas* (1888), 13 App. Cas. 222 (P.C.) [hereinafter *Coultas*].

3 *Alcock* v. *Chief Constable of the South Yorkshire Police*, [1991] 4 All E.R. 907 at 918, 925 (H.L.) [hereinafter *Alcock*]. See also Law Commission, *Liability for Psychiatric Illness*, Consultation Paper No. 137 (London: H.M.S.O., 1995) at 51-52 [hereinafter *Liability for Psychiatric Illness*].

4 *Liability for Psychiatric Illness*, *ibid.* at 52; Mullany & Handford, *supra* note 1 at 2.

5 See H. Teff, "Liability for Negligently Inflicted Psychiatric Harm: Justifications and Boundaries" (1998) 57 C.L.J. 91 at 92-93 [hereinafter *Justifications and Boundaries*].

6 The expression 'indirect victim' has been preferred to that of 'secondary victim,' the terminology presently used in English law. Given recent developments in that jurisdiction, of which more will be said below, we have chosen to avoid the English terminology. Moreover, as Teff has pointed out, *ibid.* at 114, the word 'secondary' has a negative connotation, intimating that the psychiatric illness suffered in reaction to the injury inflicted on others is "in some sense peripheral, and perhaps less deserving of compensation than 'primary' harm."

7 *McLoughlin* v. *O'Brian*, [1983] 1 A.C. 410, [1982] 2 All E.R. 298 (H.L.) [hereinafter *McLoughlin* cited to All E.R.]; *Bruneau* v. *Bruneau*, [1997] B.C.J. No. 30 (S.C.) (QL).

8 *Chadwick* v. *British Transport Commission*, [1967] 2 All E.R. 945, (*sub nom. Chadwick* v. *British Railways Board)* [1967] 1 W.L.R. 912 (Q.B.D.) [hereinafter *Chadwick*].

9 *Hunter* v. *British Coal Corp.*, [1998] 2 All E.R. 97 (C.A.); *Frost* v. *Chief Constable of the South Yorkshire Police*, [1997] 1 All E.R. 540 (C.A.) [right of appeal to the House of Lords granted, [1997] 3 W.L.R. 1194 at 1229] [hereinafter *Frost*]; *Mount Isa Mines Ltd.* v. *Pusey* (1970), 125 C.L.R. 383 (H.C. Aust.) [hereinafter *Pusey*].

hand, plaintiffs who are immediately injured by the negligent act of the defendant will be considered *direct* victims. The latter are very seldom denied compensation as their injuries are seen to be clearly foreseeable. Policy considerations invoked to reject the claims of indirect victims are less relevant when a direct victim seeks recovery.[11]

The concerns just mentioned, especially the danger of opening the floodgates of litigation, have led courts to limit the scope of the defendant's responsibility. It is generally agreed that in order to recover damages the plaintiff must suffer from a recognized psychiatric illness[12] caused by a sudden impact or "sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind."[13] Moreover, the existence of a duty of care towards the plaintiff must be established.[14] This has proven to be a controversial issue. The debate centres on which criteria the courts will apply when determining whether or not a duty of care should be imposed on the defendant when the plaintiff's injury is psychiatric in nature.

While Canadian courts have contributed to this debate,[15] they have not been particularly successful in finding a viable solution. "The law as it now stands is hardly a model of clarity," wrote Zuber J. in a recent Canadian case.[16] The main difficulty

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[10] Occasionally, a person who suffers direct physical injury will also sustain some form of psychiatric damage upon witnessing the death or injuries of others involved in the same incident. In such cases, the person is the indirect victim of the defendant's negligent act. This situation must be distinguished from cases where the psychiatric damage flows directly from physical injuries. In the latter case, the recovery of such losses is not particularly problematic. It will not be studied in this article. See *e.g. Andrews* v. *Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Lindal* v. *Lindal*, [1981] 2 S.C.R. 629; and K. Cooper-Stephenson, *Personal Injury Damages in Canada*, 2d ed. (Scarborough, Ont.: Carswell, 1996) c. 7.

[11] See Mullany & Handford, *supra* note 1 at 90-91 and the discussion of English authorities below.

[12] Grief, sorrow, fear, anxiety and distress will not be compensated. This principle has been confirmed in recent Canadian case law. See *e.g. Bechard* v. *Haliburton Estate* (1991), 5 O.R. (3d) 512; 10 C.C.L.T. (2d) 156 (C.A.) [hereinafter *Bechard* cited to O.R.]; *Cox* v. *Fleming* (1995), 15 B.C.L.R. (3d) 201 (C.A.), aff'g (1993), 13 C.C.L.T. (2d) 305 at 317 (B.C.S.C.); *Dube* v. *Penlon Ltd.* (1994), 21 C.C.L.T. (2d) 268 at 301 (Ont. Ct. (Gen. Div.)) [hereinafter *Dube*]; *Kardan* v. *Bartholdt* (1995), 83 O.A.C. 158 at 160; *Rhodes*, *supra* note 1 at 264; *Strong* v. *Moon* (1992), 13 C.C.L.T. (2d) 296 at 299 (B.C.S.C.) [hereinafter *Strong*]; and *Talibi* v. *Seabrook* (1995), 177 A.R. 299 at 305 (Q.B.) [hereinafter *Talibi*].

[13] *Alcock*, *supra* note 3 at 918, Ackner L.J.

[14] According to J.G. Fleming, *The Law of Torts*, 8th ed. (Sydney: Law Book, 1992) at 135, the duty concept can be defined as "an obligation, recognised by law, to avoid conduct fraught with unreasonable risk of danger to others." It is meant to restrict the potential liability of the tortfeasor. With respect to psychiatric damage, reasonable foreseeability, proximity between parties and questions of policy are some of the most common concepts put forward by the courts when they attempt to determine whether or not a duty of care should be imposed on the defendant.

[15] It must be noted that the Supreme Court of Canada has rendered no judgment in this area of negligence law for many years. See *Vana* v. *Tosta*, [1968] S.C.R. 71. Appeal courts have been more active and have written some of the few Canadian decisions where a detailed analysis of the various issues involved has been attempted. See *e.g. Abramzik* v. *Brenner* (1967), 65 D.L.R. (2d) 651 (Sask. C.A.) [hereinafter *Abramzik*]; *Duwyn* v. *Kaprielian* (1978), 22 O.R. (2d) 736, 94 D.L.R. (3d) 424 (C.A.) [hereinafter *Duwyn* cited to D.L.R.]; *Beecham* v. *Hughes*, [1988] 6 W.W.R. 33 (B.C.C.A) [hereinafter *Beecham*]; *Rhodes*, *supra* note 1; *Bechard*, *supra* note 12; and very recently *Nespolon* v. *Alford* (1998), 40 O.R. (3d) 355 (C.A.) [hereinafter *Nespolon*].

[16] *Dube*, *supra* note 12.

appears to be the lack of uniformity in the courts' approaches to the duty of care question, especially when the plaintiff is an indirect victim. As we will see subsequently, a survey of recent Canadian psychiatric damage cases reveals at least three distinct approaches in dealing with this issue. Consequently, uncertainty as to the state of the law prevails. Criteria identified as essential in one case are ignored in the next.[17] Similar facts lead to compensation in one province, but not in another.[18]

This article will focus on the development of an analytical framework to be used when establishing the existence of a duty of care.[19] Relying on the Supreme Court of Canada's latest efforts in the area of compensation for pure economic loss,[20] we will suggest that the *Anns/Kamloops* formula be adopted as the methodology of choice in deciding whether a duty of care is owed to a victim of psychiatric damage.[21]

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17 Two recent cases can usefully be compared. In *Ashley Estate* v. *Goodman*, [1994] O.J. No. 1672 (Gen. Div.) (QL) [hereinafter *Ashley Estate*] the court relies solely on the criterion of reasonable foreseeability, whereas in *Dube*, *ibid.*, the court specifically rejects the sole use of reasonable foreseeability and insists on an additional criterion, that of proximity.

18 Compare results in *Beecham*, *supra* note 15, where compensation is denied to a young man who suffered a reactive depression arising out of his life companion's injuries, and *O'Neill* v. *Campbell* (1995), 161 N.B.R. (2d) 54 (Q.B.) where a mother is compensated for the reactive depression related to her daughter's injuries and the care and attention she gave her.

19 Suggested reforms have focused mostly on the content of the rules rather than methodology. See Mullany & Handford, *supra* note 1, who suggest that recovery should be based solely on reasonable foreseeability of nervous shock. In *Liability for Psychiatric Illness*, *supra* note 3, the Law Commission argues that in cases where there are close ties of love and affection between the plaintiff and the direct victim of the defendant's negligence, other requirements of proximity, *e.g.* closeness of the victim to the accident, should be abandoned. This is also the view of J.M. Appleberry, "Negligent Infliction of Emotional Distress: A Focus on Relationships" (1995) 21 Am. J. L. & Med. 301. Another author proposes to replace the reasonable foreseeability criterion with a focus on the "emotional involvement in the traumatic event." Thus, a court would look to the specific nature of the event itself. See J.K. Sandine, "The Wavering Line in Invisible Ink: Negligent Infliction of Emotional Distress in North Carolina" (1991) 26 Wake Forest L. Rev. 741. Yet another suggests that reasonable foreseeability should be the criterion of choice, but damages should be limited to the economic losses suffered as the result of the psychiatric illness. See G.W. VanDeWeghe, Jr., "California Continues to Struggle with Bystander Claims for the Negligent Infliction of Emotional Distress: *Thing* v. *La Chusa*" (1990) 24 Loyola L. Rev. 89 at 109-10. Some of the proposals for change are more far reaching. One author believes the law is in such a state that serious consideration should be given to abolishing this type of action. See J. Stapleton, "In Restraint of Tort" in P. Birks, ed., *The Frontiers of Liability*, vol. 2 (Oxford: Oxford University Press, 1994) 83 at 95. Yet others suggest that this is a matter for legislatures to resolve. See *e.g.* *Alcock*, *supra* note 3 at 932, Lord Oliver; *Liability for Psychiatric Illness*, *supra* note 3 at 86-87.

20 See *Hercules Managements Ltd.* v. *Ernst & Young*, [1997] 2 S.C.R. 165 [hereinafter *Hercules*].

21 The *Anns/Kamloops* formula will be discussed in detail below. Suffice it to say for the moment that in the case of *Anns* v. *Merton London Borough Council*, [1978] A.C. 728, [1977] 2 All E.R. 492 (H.L.) [hereinafter *Anns* cited to All E.R.], Lord Wilberforce proposed that the duty of care issue be resolved by way of a two-part test. First, the court must consider whether there is a sufficient relationship of neighbourhood between the tortfeasor and the plaintiff. In the affirmative, a *prima facie* duty of care arises. Secondly, it should consider various policy factors which may negate the duty in question. This test was adopted by the Supreme Court of Canada in *Kamloops* v. *Neilsen*, [1984] 2 S.C.R. 2 [hereinafter *Kamloops*].

In the first part of this article, we examine how Canadian courts are presently approaching psychiatric damage cases, focusing on the framework of analysis. We will conclude that some courts rely on criteria identified in older case law, while others favour specific approaches developed in other jurisdictions. Since there is no single framework of analysis, we consider in the second part of the article the adoption of a model recently developed in the United Kingdom. In that jurisdiction, much has been made of a new primary/secondary victim paradigm. After canvassing the advantages and disadvantages of this approach, we ultimately argue against its incorporation into Canadian law. Consideration is then given to the manner in which the *Anns/Kamloops* formula has been used by Canadian courts in contexts of personal injury and pure economic loss. A more in-depth study of the application of the formula and its elements to psychiatric damage cases follows. In our conclusion, we argue that this new paradigm can provide a uniform framework of analysis, and allow the law to develop in a manner more in tune with the needs of victims of psychiatric injury. Concerns regarding the unwarranted extension of liability and the danger of increased uncertainty in the law are also addressed.

Although at times recovery for psychiatric damage has been viewed in terms of remoteness of damage,[22] according to most authorities it is now better understood as a duty of care issue.[23] This is the point of view which we choose to adopt. In fact, only then will the proposed use of the *Anns/Kamloops* test take on a useful meaning.

II. PSYCHIATRIC DAMAGE SUSTAINED BY INDIRECT VICTIMS: THE STATE OF THE LAW IN CANADA[24]

Prior to *McLoughlin*, an English case considered as a landmark in the development of the law related to psychiatric injury, most Canadian cases relied on the test of reasonable foreseeability of psychiatric injury in order to determine whether or not a duty of care should be recognized.[25] For example, in *Abramzik* v. *Brenner*,[26] the

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22 This appears to be the position adopted in early English authorities such as *Coultas*, *supra* note 2 and *Dulieu* v. *White & Sons*, [1901] 2 K.B. 669 [hereinafter *Dulieu*]. Remoteness is the fourth element of the tort of negligence. The other elements are: 1) duty of care, 2) breach of the duty and 3) causation. See Linden, *supra* note 1 at 99; Fleming, *supra* note 14 at 103.

23 In *Bourhill* v. *Young*, [1943] A.C. 92 (H.L.) [hereinafter *Bourhill*], the House of Lords clearly indicated that the issue was one of duty: Lord Thankerton at 98, Lord Wright at 106. For recent Canadian decisions confirming this point, see *e.g. Beecham*, *supra* note 15; *Rhodes*, *supra* note 1; *Lew* v. *Mount Saint Joseph Hospital Society*, [1997] B.C.J. No. 2461 (C.A.) (QL). See also Mullany & Handford, *supra* note 1 at 59-64 where the authors fully discuss this issue. In their view, at 64, the remoteness requirement "means the extent of liability once psychiatric damage is foreseeable."

24 As noted above, in the context of negligent infliction of psychiatric damage, compensation will be granted if: 1) the victim sustains a recognized psychiatric illness, 2) the illness is caused by sudden shock or impact to the nervous system, and 3) the defendant owes a duty of care to the plaintiff. Although controversial at times, the first two requirements will not be fully discussed in this text. For a short discussion of the relevant case law, see L.N. Klar, *Tort Law*, 2d ed. (Scarborough, Ont.: Carswell, 1996) at 342-43; Linden, *supra* note 1 at 389-90.

25 See *e.g. Marshall* v. *Lionel Enterprises Inc.*, [1972] 2 O.R. 177 at 185 (H.C.) [hereinafter *Marshall*]; *Fenn* v. *Peterborough* (1979), 25 O.R. (2d) 399 (C.A.), aff'g (1976), 1 C.C.L.T. 90 (Ont. H.C.); *Duwyn*, *supra* note 15 at 435.

Saskatchewan Court of Appeal considered the case of a mother who developed a psychiatric illness after being told of the death of her two children following an accident at a railway crossing. She did not witness the accident nor its results. The resolution of the case was seen as a duty of care issue, based on the reasonable foreseeability of nervous shock.[27] In applying this test to the facts, the court felt that the psychiatric illness of the plaintiff would not have been foreseeable by a reasonable person in the position of the defendant.

As noted by one author, the reasonable foreseeability test has not been particularly helpful to indirect victims of psychiatric damage who, except in a few cases such as *Marshall*, have been unable to convince authorities that their illness was sufficiently foreseeable.[28] Inevitably, although definitely not acknowledged openly at the time, questions of policy have influenced the results in many cases. In the words of Klar, foreseeability was used

> as a shield behind which all of the law's concerns about extending duty could be hidden. Thus a plaintiff would be described as unforeseeable and hence owed no duty, not because the plaintiff was actually unforeseeable in the literal sense but because negligence law's protection would not be extended to that victim due to policy considerations.[29]

In 1982, the House of Lords was given the opportunity to review the law on compensation for psychiatric damage. In *McLoughlin*, their Lordships had to determine whether a mother, who arrived at the hospital two hours after a serious road accident to find one of her children dead and her spouse and other children seriously injured, was entitled to compensation for the psychiatric damage she subsequently suffered. The members of the court were unanimous in granting her relief. However, two views clearly emerged as to the manner in which the duty of care question should be resolved. On the one hand, Lord Wilberforce was of the view that "there remains, ... just because 'shock' in its nature is capable of affecting so wide a range of people, a real need for the law to place some limitation on the extent of admissible claims."[30] Consequently, foreseeability of the psychiatric damage and factors such as closeness of family ties, proximity of the victim to the accident and the means by which the shock is caused must be considered. For his part, Lord Bridge, with whom Lord Scarman agreed, concluded that reasonable foreseeability of psychiatric injury was sufficient unto itself to establish liability in such cases.[31] However, Lord Edmund-Davies disagreed with this proposition. In his view, one cannot rely on foreseeability alone; public policy

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26 *Supra* note 15.

27 The court also concluded that "nervous shock" was a substantive tort, a view which has been clearly repudiated since. See *Marshall*, *supra* note 25, where Haines J. states: "Negligence requires that there be a duty, a breach of this duty by the defendant and damage to the plaintiff resulting from the breach. Nervous shock is nothing more than a particular type of damage which may be suffered by a plaintiff."

28 G.H.L. Fridman, *The Law of Torts in Canada*, vol. 1 (Toronto: Carswell, 1989) at 260.

29 *Supra* note 24 at 142. See also *Marshall*, *supra* note 25 at 183; *Kienzle* v. *Stringer* (1981), 35 O.R. (2d) 85 at 90 (C.A.); and *Dube*, *supra* note 12 at 300.

30 *McLoughlin*, *supra* note 7 at 304.

31 *Ibid.* at 310, 319-20.

issues must be considered.[32] Finally, Lord Russell concluded that, although in some circumstances policy decisions can be relevant, on the particular facts before him no policy considerations were sufficiently cogent to deny compensation to the plaintiff.[33]

In *Alcock*, the House of Lords built upon the approach proposed by Lord Wilberforce. The Lords clearly indicated that the element of reasonable foreseeability of psychiatric illness was insufficient *per se* to determine whether a duty of care was owed to indirect victims.[34] They agreed that the three "proximity factors" identified by Lord Wilberforce should apply with the proviso that, as to the class of persons to whom a duty is owed, it was not necessary to limit the class by reference to particular relationships such as spouses, parents or children.

What has been the Canadian response to these English developments? Recent case law seems to suggest that many courts render their decisions without investigating every aspect of the duty of care issue. Analytical approaches differ and reveal the palpable inconsistency of the utilized criteria. Generally, Canadian decisions fall into three categories.

Decisions which find their inspiration in the pre-*McLoughlin* era make up the first identifiable group. Essentially, the approaches propounded in English case law remain unexplored. Here courts have elected to limit their inquiries to the reasonable foreseeability of psychiatric injury. No explanation is given to justify the use of this criterion, nor is the choice based on Lords Bridge and Scarman's position in *McLoughlin*. This jurisprudential trend is also characterized by a tendency to shroud social policy considerations behind the veil of foreseeability.[35]

The second major category comprises decisions that cite the respective approaches found in *McLoughlin*, but without indicating which analytical scope is preferred. In *Bechard*, after establishing that liability for nervous shock rests upon the reasonable foreseeability of such an injury, Griffiths J.A. stated for the court: "Whether one applies the rule of foreseeability as the principal exercise as suggested by Lord Scarman in *McLoughlin* ... or whether one resorts to policy considerations to place some limit on the foreseeability rule, it seems to me that [the plaintiff] should recover in the circumstances of this case."[36] In *Szeliga Estate* v. *Vanderheide*, a similar affirmation was made: "What is not yet clear is whether as a matter of policy the courts will seek to place some limits on recovery even in cases where the harm is foreseeable and causation is proved."[37]

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32 *Ibid.* at 308-09.

33 *Ibid.* at 310.

34 *Alcock*, *supra* note 3 at 914, 916-17, 926-29 and 933.

35 Recent decisions included in this group are: *Macartney* v. *Islic* (1996), 34 C.C.L.I. (2d) 119 (Ont. Ct. (Gen. Div.)) [hereinafter *Islic*]; *McCartney* v. *Andrews*, [1987] O.J. No. 1092 (H.C.) (QL) [hereinafter *Macartney*]; and *Ashley Estate*, *supra* note 17.

36 *Supra* note 12 at 524.

37 [1992] O.J. No. 2856 at 19 (Gen. Div.) (QL).

The third category consists of decisions which tend to place a strong emphasis on the concept of proximity. Usually more thoroughly reasoned and meticulously considered, these judgments bear a common mark: the unequivocal concession that foreseeability per se is insufficient to determine whether a duty of care should be owed to victims of psychiatric illness. However, the notion of proximity is not given a uniform meaning. For example, in *Beecham*, Taggart J.A. spoke of "causal proximity," which was seen as "an objective basis for limiting the undue expansion of liability which would flow from the unfettered application of reasonable foreseeability."[38] For his part, Wallace J. in *Rhodes* argued that "[i]t is the proximity relationship ... which provides the evidentiary base from which the court may conclude, as a question of law, that a reasonable person should foresee that his conduct, in such circumstances, could create a risk of 'direct' psychiatric injury and so give rise to a duty of care to avoid such a result."[39] Accordingly, the general notion of proximity implies the inferred concepts of relational proximity (the closeness of the relationship between the direct and the indirect victims), locational proximity (the victim witnesses the accident or perceives the aftermath) and temporal proximity (the relation between the time of the event and the moment the illness starts to develop).[40] This position has been followed in a few recent decisions.[41] In a recent Ontario case,[42] Zuber J., citing *Alcock*, acknowledged the inadequacy of the foreseeability rule. In his view, the relationship between the direct and indirect victims, the spatiotemporal proximity and the fact that the injury must be induced by shock must also be considered.

This survey of recent Canadian cases reveals that the framework chosen by the courts to analyze the duty of care issue varies from case to case. Some courts rely on reasonable foreseeability alone, others acknowledge the various points of view expressed in *McLoughlin* almost mechanically, applying the limiting factors outlined by Lord Wilberforce without much explanation. Some have emphasized the importance of the proximity criterion. The absence of a uniform analytical framework makes it difficult to evaluate the courts' true reasoning. Moreover, policy considerations are not discussed as openly as they should be. As noted previously, the state of the law in Canada in not a model of clarity. Before considering whether the *Anns/Kamloops* formula would provide a useful solution to these difficulties, recent developments in the United Kingdom will be examined briefly in order to evaluate whether or not they should be incorporated into Canadian law.

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38 In this, Taggart J.A. is influenced by Deane J.'s judgment in *Jaensch* v. *Coffey* (1984), 54 A.L.R. 417, 155 C.L.R. 549 (H.C.) [hereinafter *Jaensch* cited to A.L.R.]. It must be noted that for this Australian judge, proximity operates as "an anterior general requirement which must be satisfied before any duty or care to avoid reasonably foreseeable injury will arise," *ibid.* at 587. This is quite different from the English position where proximity is mostly a consideration relevant to whether there is a reasonably foreseeable risk of injury. For a thorough explanation of the differences between the Australian and the English approaches, see P. Vines, "Proximity as Principle or Category: Nervous Shock in Australia and England" (1993) 16 U.N.S.W.L.J. 458.

39 *Rhodes*, *supra* note 1 at 264.

40 *Ibid.* at 265.

41 See *e.g. Strong*, *supra* note 12; *Talibi*, *supra* note 12.

42 *Dube*, *supra* note 12.

III. A NEW FOCUS IN ENGLISH LAW: PRIMARY AND SECONDARY VICTIMS

As previously mentioned, the legal principles currently guiding English courts have been outlined by the House of Lords in both *McLoughlin* and *Alcock*. The latter decision also serves to reinforce the distinction between primary and secondary victims. According to Lord Oliver, a distinction must be drawn between a *primary* victim, who is a person "involved, either mediately or immediately, as a participant" and a *secondary* victim, who is "no more than the passive and unwilling witness of injury caused to others."[43] The primary victim class includes individuals who are personally involved in the incident and either fear for their own safety[44] or that of others involved in the same accident,[45] individuals who come to help others as rescuers[46] or employees who, as in the *Dooley* v. *Cammell Laird & Co. Ltd.*[47] case, suffer psychiatric damage after some negligent act on the part of their employer leads them to believe they are the cause of a fellow worker's injuries. In all other cases, plaintiffs are secondary victims. According to Lord Oliver, although compensating the primary victim is not particularly problematic, the situation is quite different for secondary victims. The duty of care must be based upon not only reasonable foreseeability of psychiatric damage but also proximity between the plaintiff and the defendant, such proximity being established by considering the three elements proposed by Lord Wilberforce in *McLoughlin*.[48]

The characteristics of the two categories of claimants have been further developed in *Page* v. *Smith*,[49] a House of Lords' decision dealing with the compensation of an individual who suffered psychiatric illness after being involved in a minor car collision which did not result in any physical injuries. Writing for the majority, Lord Lloyd reiterated the importance of classifying the plaintiff as a primary or secondary victim. He indicated that as a primary victim, the plaintiff does not have to prove that his psychiatric illness was foreseeable. Foreseeability of physical injury is enough to enable the victim to recover damages.[50] Moreover, Lord Lloyd was of the view that it was inappropriate to require that the victim be a person of ordinary phlegm and fortitude. However, such a requirement is essential for secondary victims, as are all the other control mechanisms devised by the courts through the years.[51] Therefore, according to the majority decision in *Page*, there is now a clear distinction between a primary and secondary victim: the former encounters very few barriers in the recovery of damages, whereas the latter faces considerable obstacles.

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43 *Alcock*, *supra* note 3 at 923.

44 See *e.g. Dulieu*, *supra* note 22.

45 Lord Oliver refers to *Schneider* v. *Eisovitch*, [1960] 1 All E.R. 169 (Q.B.D.). Recent Canadian cases include *Campbell* v. *Varanese* (1991), 102 N.S.R. (2d) 104 (S.C. App. Div.); *Kwok* v. *B.C. Ferry Corp.* (1987), 20 B.C.L.R. (2d) 318 (S.C.) [hereinafter *Kwok*]; *Bechard*, *supra* note 12.

46 *Chadwick*, *supra* note 8.

47 [1951] 1 Lloyd's Rep. 271 (Liverpool Assizes).

48 See *Alcock*, *supra* note 3 at 926.

49 [1996] 1 A.C. 155, [1995] 2 All E.R. 736 (H.L.) [hereinafter *Page* cited to All E.R.].

50 *Ibid.* at 758.

51 *Ibid.*

The primary/secondary victim classification was next applied by the Court of Appeal in *Frost* v. *Chief Constable of South Yorkshire Police.*[52] This case arises out of the infamous Hillsborough disaster where some ninety-six football fans were crushed to death in the stadium's end bullpen, which had been allowed to become too full as a result of a negligent decision by the local police force. As we have seen, the *Alcock* case dealt exclusively with claims by relatives and friends, characterized as secondary victims. In *Frost*, the claims are by police officers working on the grounds at the time of the disaster. Some of the officers suffered nervous shock after being engaged in emergency operations.[53] They sued their employer, arguing that they were owed a duty of care, both as employees and as rescuers. Five of the officers appealed the dismissal of their action at trial. Of the five, one individual had attempted to free spectators from the pens, one had rendered assistance at a makeshift morgue at the stadium gymnasium, two had helped on the grounds of the stadium, and one had assisted the wounded at a nearby hospital. The appeal was allowed in the first four cases.[54]

In his judgment, Rose L.J. stated that: "courts have long recognised a duty of care to guard employees and rescuers against all kinds of injury, whereas, in deciding whether any duty of care exists towards plaintiffs who are not employees, rescuers or primary victims, the courts have, in recent years, imposed specific criteria in relation to claims for psychiatric injury."[55] However, not all rescuers or employees are entitled to recover for the psychiatric illness they may suffer because of the defendant's negligence. In the case of rescuers, consideration will be given to factors such as "the character and extent of the initial incident ...; whether that incident has finished or is continuing; whether there is any danger ...; the character of the plaintiff's conduct in itself and in relation to the victim; and how proximate, in time and place, the plaintiff's conduct is to the incident."[56] As for employees, they must show that they were of normal fortitude and that they were within the area of risk of injury when the incident occurred.[57] According to Rose L.J., the four police officers entitled to recover damages were within the area of risk and were rescuers participating in the immediate aftermath of the incident.

Henry L.J. studied the issue from a different perspective. First, he conceded that, on the basis of Lord Oliver's definition of primary victim in *Alcock*, the police on duty at Hillsborough were primary victims because they participated in the incident caused by their employer's negligence. However, he then referred to a passage in *Page* where Lord Lloyd had indicated that the primary victim was usually "within the area of physical

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52 *Supra* note 9.

53 In the aftermath of the disaster, police officers played different roles. Some thirty-seven officers brought legal action for the psychiatric damage they suffered. Liability was admitted in fourteen cases. These officers had entered the pens and had been actively involved in rescue efforts. None of the remaining twenty-three claimants had been directly threatened, but to some degree, they had been involved in the rescue operations.

54 All three judges wrote separate opinions. Judge L.J. dissented.

55 *Frost*, *supra* note 9 at 551.

56 *Ibid.* at 555.

57 *Ibid.* at 550.

impact."[58] Therefore, reasoned Henry L.J., given that the police officers before the court had not been directly threatened or in fear of physical injuries to themselves, they were "secondary victims unless their employer's duty of care not to cause them injury (whether physical of psychiatric) renders them primary victims."[59] Later in his judgment, he stated that "all active participants in the events causing the psychiatric damage should be regarded as primary victims when the defendant is in breach of a pre-existing duty of care to them."[60] Since the employer had a duty to take reasonable care not to expose his employees to physical and psychological injuries, he is liable for the psychiatric illness which was sustained. Moreover, in four of the five cases, the police officers actively participated in the events flowing from their employer's negligent act. They were therefore entitled to compensation. This was not the point of view of Judge L.J., for whom the plaintiffs were essentially seen as secondary victims, because they were outside the range of physical injury.[61]

The latest Court of Appeal decision in *Hunter* v. *British Coal Corp.*[62] has only added to the confusion. After leaving temporarily the site where he had inadvertently hit a water hydrant, the plaintiff was told that his co-worker had been killed when the hydrant in question burst. The plaintiff felt responsible and suffered from shock and depression. By a majority of 2 to 1, the Court indicated that the plaintiff could not be compensated for his psychiatric damage. He could not be considered as a primary victim as defined by Lord Oliver in *Alcock*, because he did not fear for his own safety or witness the accident. He was not a rescuer, nor could it be said that, as an employee, he had sufficiently "participated" in the events causing the psychiatric damage. Categorizing the plaintiff as a secondary victim did not change the result since some of the "proximity requirements" outlined in *Alcock* were not present. In our view, the case only serves to underline the inherent difficulties created by the primary/secondary classification. How does the plaintiff's "participation" in the event differ from that of the police officers in *Frost*? He was away from the scene for ten minutes, frantically searching for a water valve! How did his feelings of guilt differ from those of the plaintiff in *Dooley*? As noted by Hobhouse L.J. in his dissent, in *Alcock*, Lord Oliver specifically referred to the *Dooley* case. According to Hobhouse L.J., employees who believe that they are somehow responsible for their co-workers injuries are properly considered as primary victims because, in the employer/employee relationship, the employer must "contemplate that his breaches of duty may involve his employee as an unwilling participant in an accident which may cause injury to others, typically fellow employees."[63]

What the House of Lords will make of these various points of view remains to be seen. However, one thing is certain: although as dictated by *McLoughlin* and *Alcock*, the proximity requirements (namely a relationship of love and affection, and proximity

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58 *Page*, *supra* note 49 at 758.
59 *Frost*, *supra* note 9 at 561.
60 *Ibid.* at 563.
61 *Ibid.* at 573.
62 *Supra* note 9.
63 *Ibid.* at 118.

to the event in time and space) were the main focus of attention, more recently, considerable emphasis has been placed on the victim's primary or secondary status, prompting some authors to speak of a new paradigm where "every plaintiff wants to be a primary victim."[64]

The courts' new focus has not been particularly well received by commentators. Many concerns have been expressed, especially following the decision in *Frost*.[65] As shown by the diverse opinions expressed in that case, the distinction between the primary and secondary victim may be quite difficult to make. Establishing whether a rescuer or an employee "participated" in an accident can also be difficult. And what of the decision to place rescuers in the primary victim category? They are not the direct or immediate victims of the defendant's negligence. If, for policy reasons, courts feel that rescuers should be compensated for the psychiatric illness which they sustain because of assistance given to the direct victims of a negligent act, then they should make that clear. Resorting to a primary/secondary paradigm simply camouflages the policy choices that must be made. Recognition must be given to the fact that the primary/secondary distinction is a product of the courts in their ever present desire to control the possible increase of litigation. Arguably, the untenable distinctions which are now being drawn could bring about the opposite result.[66] As demonstrated by Henry L.J.,

> [a]gonising over whether to categorise the plaintiff as a primary or secondary victim does not only make for convoluted analysis. In the end, like rigidly categorising the familial relationships that ground an action or trigger a presumption of close ties, it allows artificial criteria to displace the more natural question: should the defendant be liable to the plaintiff in all the circumstances?[67]

Given the concerns expressed above, it appears that incorporating the primary/secondary dichotomy in Canadian law would not prove particularly useful nor would it serve to achieve the analytical uniformity that we are seeking. Fortunately, in Canada, another avenue remains open: the use of the two-part test developed by Lord Wilberforce in *Anns* and later adopted with minor alterations by the Supreme Court of Canada in *Kamloops*.

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64 C. Hilson, "Nervous Shock and the Categorisation of Victims" (1998) 6 Tort L. Rev. 37 at 37.

65 Critics of this approach are H. Teff, "Psychiatric Injury in the Course of Policing: A Special Case?" (1997) 5 Tort L. Rev. 184; N.J. Mullany & P.R. Handford, "Hillsborough Replayed" (1997) 113 L.Q. Rev. 410; S. Woollard, "Liability for Negligently Inflicted Psychiatric Illness: Where Should We Draw the Line?" (1998) 27 Anglo-Am. L. Rev. 112 at 114-16, 130-31; *Justifications and Boundaries*, *supra* note 5 at 111-14; Hilson, *ibid.*

66 See *Justifications and Boundaries*, *ibid.* at 111-14 where the author convincingly argues that litigation will increase.

67 *Ibid.* at 113.

IV. THE *ANNS/KAMLOOPS* TEST IN CANADIAN LAW

In 1978, in the landmark decision *Anns* v. *London Borough of Merton*, Lord Wilberforce proposed the use of a two-pronged test to solve the duty of care issue in matters involving the liability of public authorities.[68] The test was also seen as a formula of general application to be used to elucidate the duty of care question in a large variety of situations. In fact, the test's apparent flexibility initially led the courts to open up new areas of liability.[69] However, in reaction to this sudden expansionary phase, reservations began to appear.[70] Finally, in 1990, in the case of *Murphy* v. *Brentwood*,[71] the House of Lords explicitly rejected the two-part test suggested by Lord Wilberforce and adopted an exclusionary rule for the recovery of pure economic loss.[72] Moreover, the court rejected the use of a general formula to determine the duty of care issue. Incrementalism, whereby cases are decided by reference to classes of decided cases, was seen as the preferable alternative.[73]

Canadian courts have been much more receptive to Lord Wilberforce's proposition. The *Anns* test was first applied by the Supreme Court of Canada in *Barratt* v. *North*

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[68] *Anns*, *supra* note 21 at 498-99. The test reads as follows:

> First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a *prima facie* duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.

[69] See *e.g. Ross* v. *Caunters*, [1979] 3 All E.R. 580 (liability of solicitors to persons other than their clients) and *Junior Books* v. *Veitchi*, [1983] 1 A.C. 520 (H.L.) (liability of manufacturers for economic loss suffered by a consumer).

[70] See *Governors of the Peabody Donation Fund* v. *Sir Lindsay Parkinson & Co.*, [1985] A.C. 210 (H.L.); *Leigh & Sillavan Ltd.* v. *The Aliakmon Shipping Co. Ltd. (The Aliakmon)*, [1986] A.C. 785 (H.L.); *Curran* v. *Northern Ireland Co-ownership Housing Association*, [1987] A.C. 718 (H.L.); *Yuen Kun Yeu* v. *A.G. Hong Kong*, [1988] A.C. 175 (H.L.); *D & F Estates* v. *Church Commissioners for England*, [1989] 1 A.C. 177 (H.L.); *Caparo Industries Plc* v. *Dickman*, [1990] 2 A.C. 605 (H.L.) [hereinafter *Caparo*]. In Australia, *Sutherland Shire Council* v. *Heyman* (1985), 60 A.L.R. 1 (H.C.).

[71] [1990] 2 All E.R. 908 (H.L.) [hereinafter *Murphy*].

[72] With the exception of cases based on a special relationship of reliance such as *Hedley Byrne & Co.* v. *Heller & Partners Ltd.*, [1964] A.C. 465 (H.L.). For a more complete analysis of *Murphy*, see *e.g.* B. Feldthusen, *Economic Negligence*, 3d ed. (Toronto: Carswell, 1994) at 4-5, 10 and generally c. 6 [hereinafter *Economic Negligence*]; B.S. Markesinis & S.F. Deakin, *Tort Law*, 3d ed. (Oxford: Clarendon Press, 1994) at 79-80, 82-83, 100-05; D. Howarth, "Negligence After Murphy: Time to Rethink" (1991) 50 C.L.J. 58; G. McLennan, "Recovery for Pure Economic Loss" (1991) 70 Can. Bar Rev. 175.

[73] In an earlier decision, *Caparo*, *supra* note 70, the House of Lords had clearly signalled a return to the categories-based approach to resolve the duty of care question. Foreseeability, proximity and whether it was "fair, just and reasonable" to impose a duty were identified as the three important criteria when attempting to decide if a duty of care should be imposed. See G.S. Morris, "The Liability of Professional Advisers: Caparo and After" (1991) Bus. L.J. 36, and K.M. Stanton, "Incremental Approaches to the Duty of Care" in N.J. Mullany, ed., *Tort in the Nineties* (Sydney: Law Book, 1997) 34 at 42-44.

Vancouver (District),[74] but its official endorsement occurred in *Kamloops*,[75] a case involving the economic loss caused by the negligent act of a municipality. Lord Wilberforce's test was slightly reformulated as follows:

> (1) is there a sufficiently close relationship between the parties ... so that in the reasonable contemplation of [one person], carelessness on [her] part might cause damage to [the other] person ? If so,
>
> (2) are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?[76]

This test has been applied by the Supreme Court of Canada in a variety of contexts, including personal injury and pure economic loss, both of which will now be considered. In this section of the article, we will simply attempt to discover how widely the *Anns/Kamloops* test has been used by Canadian courts. A more in-depth study of the test's elements will be undertaken in the next section.

An analysis of the manner in which the two-pronged test has been applied to personal injury cases will provide a valuable lead as to the possible use of the test when the damage is psychiatric in nature. Without ignoring completely the special considerations that inhere when the indirect victim of a negligent act sustains psychiatric injury, the fact remains that this type of damage can be considered as a form of injury to the person. As noted in *Page*:

> [i]n an age when medical knowledge is expanding fast, and psychiatric knowledge with it, it would not be sensible to commit the law to a distinction between physical and psychiatric injury, which may already seem somewhat artificial, and may soon be altogether outmoded. Nothing will be gained by treating them as different "kinds" of personal injury, so as to require the application of different tests in law.[77]

In many cases, psychiatric illness is accompanied by physical injury. It appears logical to apply the same rules to all consequences of the tortfeasor's act, whether the damage be physical or psychological in nature.[78] In addition, in many instances, the very

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74 [1980] 2 S.C.R. 418.

75 *Supra* note 21.

76 *Ibid.* at 10-11.

77 *Page*, *supra* note 49 at 759. As will be discussed below, these comments apply to direct victims only. For a similar point of view, see Mullany & Handford, *supra* note 1 at 27-32, and at 309 where the authors state: "The fact that an injury cannot always be seen by the naked eye does not mean that it is any less of a 'real' injury than those which involve the breaking of bones, the spilling of blood, the scarring of tissue or 'physical' pain." See also, N.J. Mullany, "Fear for the Future: Liability for Infliction of Psychiatric Disorder" in N.J. Mullany, *Torts in the Nineties*, *supra* note 73 at 101-02, and *Justifications and Boundaries*, *supra* note 5 at 91 where the author writes: "[I]t would be absurd to contend that such harm is somehow intrinsically less serious than physical injury."

78 See *Economic Negligence*, *supra* note 72 at 13 and more generally at 9-20. The author presents convincing and interesting comments on the differences between economic loss, physical damage and property damage. Some of his arguments can be transposed to the psychiatric injury setting.

conduct which causes physical injuries also poses a risk of psychiatric damage.[79] This has led to the argument that when courts consider the duty of care issue in psychiatric damage cases, they should be guided by the same criteria as in personal injuries cases.[80]

Although psychiatric and physical injuries share many common features, a study of relational economic loss cases[81] may be instructive because, in some respects, this type of economic loss is similar to the loss sustained by *indirect* victims of psychiatric damage. In both situations, the damage flows from the consequences of the defendant's negligence on a direct victim (a third party). In addition, in relational loss situations the defendant is already liable to the direct victim. In fact, in both relational economic loss cases and in psychiatric damages cases the main preoccupation is the extension of the defendant's liability to more remote parties.[82] We are mindful of Feldthusen's point of view when he argues that distinctions between pure economic loss and physical damage are too substantial to justify the application of the *Anns/Kamloops* formula to pure economic loss as a whole. However, as we shall see, the most recent Supreme Court of Canada decisions *are* applying the formula to pure economic loss generally and to relational economic loss in particular. Moreover, we are simply suggesting that some insight can be gained from the manner in which the courts handle the duty of care issue in other, *i.e.* economic, relational loss situations.

A. PERSONAL INJURY AND THE *ANNS/KAMLOOPS* FORMULA

In Canada, Lord Wilberforce's test was first applied in the area of personal injuries by the British Columbia Court of Appeal in *Barratt* v. *The Corporation of the District of North Vancouver*,[83] a case dealing with the responsibility of a public authority for the injuries of a cyclist who fell after striking a large pothole. Since then, many courts have made use of the test, including the Supreme Court of Canada, which, to date, has applied it in personal injury cases no less than seven times. Four of the seven cases involve the liability of public authorities.[84] All four judgments confirm that where

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79 *Ibid.* at 14.

80 Mullany & Handford, *supra* note 1 at 310. See also Lambert J.A. in *Beecham*, *supra* note 15 at 72.

81 Feldthusen has been instrumental in proposing that pure economic loss cases be divided in five specific categories. Each category raises unique and distinct policy considerations. Therefore, grouping all the cases together should be avoided. The categories are: 1) negligent misrepresentation, 2) negligent performance of a service, 3) relational economic loss, 4) independent liability of statutory public authorities and 5) negligent supply of shoddy goods or structures. See B. Felthusen, "Economic Loss in the Supreme Court of Canada: Yesterday and Tomorrow" (1990-91) 17 Can. Bus. L.J. 356 at 357-58 and *Economic Negligence*, *supra* note 72, c. 1. This classification has been adopted by the Supreme Court of Canada. See *Winnipeg Condominium Corporation No. 36* v. *Bird Construction Co.*, [1995] 1 S.C.R. 85 at 96-97 [hereinafter *Winnipeg*].

82 C.F. Stychin, "'Principled Flexibility': An Analysis of Relational Economic Loss in Negligence" (1996) 25 Anglo-Am. L. Rev. 318 at 319.

83 [1980] 2 S.C.R. 418, aff'g (1978), 6 B.C.L.R. 319 (S.C.).

84 *Just* v. *British Columbia*, [1989] 2 S.C.R. 1228; *Swinamer* v. *A.G. Nova Scotia*, [1994] 1 S.C.R. 445; *Brown* v. *British Columbia*, [1994] 1 S.C.R. 420; and *Lewis (Guardian ad litem of)* v. *British Colombia*, [1997] 3 S.C.R. 1145.

personal injuries are the result of the negligent act of a public authority, the duty of care issue will most certainly be resolved by the application of the *Anns/Kamloops* two-part test, as adjusted to reflect the particular concerns relating to the tort liability of public bodies.[85] It seems safe to assume that, in the case of psychiatric injury resulting from the negligent act of a public authority, the same methodology would apply to resolve the duty of care issue.

The remaining three cases[86] involve litigation between private individuals. Although the *Anns/Kamloops* formula serves as the general model of analysis, one notes that in this particular context, the courts are quick to conclude as to the reasonable foreseeability of the victims' damage, thus rendering the analysis of the second branch of the test fairly rare.

In *Hall*, the main issue involved the applicability of the doctrine *ex turpi causa non oritur actio* to the personal injury setting. While Cory J. relied on the *Anns/Kamloops* test to resolve the issue, viewing the illegality of the plaintiff's act as a question of policy to be addressed under the second part of the test, McLachlin J., writing the main judgment, considered that the principle of *ex turpi causa* operates as a defence to frustrate the complete cause of action. Therefore, she concluded that an analysis of the duty of care was inappropriate in the circumstances. However, in expressing this point of view, McLachlin J. did not expressly deny that the two-pronged test in *Anns* could be used in the general context of personal injuries.

In his dissenting judgment, Sopinka J. argued that common law courts, faced with deciding whether to recognize a new category of negligence, have retained two distinct approaches: the traditional approach, adopted by the House of Lords in *Caparo*[87] and *Murphy*,[88] which involves the development of novel categories of negligence by analogy to existing cases, and the *Anns/Kamloops* approach which entails the recognition of a broad *prima facie* duty of care restrained by policy considerations. According to Sopinka J., although the latter has been relied on to resolve matters relating to the liability of public authorities, the former has been the method of choice when dealing with private individuals. *Jordan House Ltd.* v. *Menow*[89] and *Crocker* v. *Sundance Northwest Resorts Ltd.*[90] are offered as cases in point. Although Sopinka J. ended up applying both methods to the facts of the case before him, the question he raised is interesting from a methodological point of view. However, other justices in *Hall* did not address this particular point. Moreover, the distinction made by Sopinka J. does not seem to be recognized by anyone else. In fact, the *Anns/Kamloops* formula

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[85] Special considerations apply to the analysis of the duty of care issue when the defendant is a public authority. Special criteria, such as the policy/operational dichotomy, have been developed by the Supreme Court of Canada and elsewhere. See Klar, *supra* note 24, c. 8; Linden, *supra* note 1, c. 17.

[86] *Hall* v. *Hebert*, [1993] 2 S.C.R. 159 [hereinafter *Hall*]; *Galaske* v. *O'Donnell*, [1994] 1 S.C.R. 670 [hereinafter *Galaske*]; and *Stewart* v. *Pettie*, [1995] 1 S.C.R. 131 [hereinafter *Stewart*].

[87] *Supra* note 70.

[88] *Supra* note 71.

[89] [1974] S.C.R. 239.

[90] [1988] S.C.R. 1186.

is commonly applied to a variety of personal injury situations where public authorities are not involved as parties.

For example, in *Galaske*, the Supreme Court of Canada had to decide whether the driver of a car had a specific duty to ensure that the seat belt of his eight year old passenger was securely fastened. Cory J., writing for the majority, began his analysis by discussing the notion of duty of care. After confirming that the starting point is the two-stage *Anns/Kamloops* test, he applied the first branch of the test and concluded that the defendant had a duty of care towards the child. Consideration was then given to the question whether or not the presence of the parent negated the duty just found. In concluding that it did not, Cory J. examined various policy questions including the responsibility of statutory legislation pertaining to seat belts, the importance of fostering the welfare of children and the need to reduce the cost of health care.[91] In *Stewart*, a case involving the liability of a commercial host who failed to take the necessary steps to ensure that a client did not drive after leaving the premises of the commercial establishment, Major J. applied what he termed the "modern" approach to determining the existence of a duty of care: the *Anns/Kamloops* test.[92]

Recent decisions of the lower courts confirm the use of the test to determine the duty of care question in a variety of personal injury settings: the duty of gymnasium owners toward a patron who injured himself while lifting weights,[93] the duty of a motel owner toward a person assaulted by an intoxicated client,[94] the duty of a shoe store owner toward a client who injured himself while trying on a pair of shoes,[95] the duty of an employer toward his employees when it provides free beer to an employee who then injures himself,[96] and the duty of the owner of a gun toward a person injured through the act of a third party to whom the gun had been entrusted.[97] Taking into consideration the number of decisions where courts have relied on the *Anns/Kamloops* case to resolve the duty of care question in the context of personal injuries, it seems quite safe to conclude that Sopinka J.'s perception of the applicable rules, as expressed in *Hall*, are not shared by other judges. In fact, it seems difficult to conclude that Canadian courts are proceeding incrementally, understood here in its "narrow sense" as suggested by Mullender.[98] Rather, the application of the two-part test to a variety

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91 *Galaske*, *supra* note 86 at 690.

92 *Stewart*, *supra* note 86 at 141. The Supreme Court concluded that there was sufficient proximity between the commercial establishment and the plaintiff injured by the intoxicated client to lead to the existence of a duty of care on the part of the former. However, because of the absence of causation, no liability was imposed on the defendant.

93 *Horne* v. *Industrial Estates Ltd.*, [1997] N.S.J. No. 243 (S.C.) (QL).

94 *Temple* v. *T & C Motor Hotel Ltd.*, [1998] A.J. No. 107 (Q.B.) (QL).

95 *Bossin* v. *Florsheim Canada Inc.*, [1997] O.J. No. 3527 (QL).

96 *Jacobsen* v. *Nike Canada Ltd.*, [1996] 6 W.W.R. 488 (B.C.S.C.).

97 *Anderson* v. *Williams* (1997), 36 C.C.L.T. (2d) 1 (N.B.C.A.).

98 R. Mullender, "The Concept of Incrementalism in Anglo-Canadian Negligence Law: *Spring* v. *Guardian Assurance Plc*" (1995) 74 C.B.R. 143. The author considers that the approach adopted by the House of Lords in *Murphy* amounts to "narrow incrementalism," *ibid.* at 146. The *Anns* formula is not relied on. Rather, this approach demands that the judge "be satisfied that there exists a tight analogy between the facts of the case at hand and a set of facts which are comprehended by an existing liability rule," *ibid.* For a full discussion of the notion of incrementalism, see

of situations shows that the *Anns/Kamloops* test has the potential to be used as a flexible tool of analysis.

B. THE *ANNS/KAMLOOPS* FORMULA IN THE CONTEXT OF RELATIONAL ECONOMIC LOSSES

Following the rejection of the *Anns* formula in *Murphy*, there was some question as to the nature of the treatment that would be reserved for the test in Canada. The Supreme Court of Canada provided its answer in *Canadian National Railway Co.* v. *Norsk Pacific Steamship Co.*[99] Damage was caused by the defendant's tug boat when it collided with a bridge owned by Public Works Canada. The bridge was used by the plaintiff railway company, pursuant to a contract with the owner, to carry goods over the Fraser River to Vancouver. The damage resulted in closure of the bridge for several weeks, and the plaintiff suffered financial losses. The Supreme Court granted relief to the plaintiff but was not unanimous in doing so.[100] However, all members of the Court rejected the absolute exclusionary rule approved in *Murphy*. They were prepared to recognize that in some instances recovery for pure economic loss was possible. For her part, McLachlin J. clearly endorsed the *Anns/Kamloops* approach. La Forest J., although of the view that recovery for contractual relational economic loss resulting from damage to a third party's property should not be allowed, did not specifically denounce the possible application of the *Anns/Kamloops* formula to other pure economic loss categories. Two years later, in *Winnipeg Condominium Corporation No. 36* v. *Bird Construction Co.*,[101] this time writing for the full Court, La Forest J. applied the two-pronged test to the "negligent supply of shoddy goods or structures" category.

The next case we consider is the latest decision of the Supreme Court of Canada in the area of negligent misrepresentations. In *Hercules*,[102] the Court had to decide whether statutory auditors owed a duty of care to shareholders who incurred investment losses and losses in the value of existing shareholdings after relying on audited financial statements. Although the decision is of interest with respect to auditors'

Stanton, *supra* note 73 at 41-42, who describes the same phenomenon as "gradualism."

99 [1992] 1 S.C.R. 1021, 91 D.L.R. (4th) 289 [hereinafter *Norsk* cited to S.C.R.].

100 McLachlin J. (L'Heureux-Dubé and Cory JJ. concurring) wrote the judgment in favour of the plaintiff while La Forest J. (Sopinka and Iacobucci JJ. concurring) wrote the dissenting opinion. Stevenson J. offered his own reasons for allowing recovery of the plaintiff's losses. The case has been the subject of many commentaries. See *e.g.* Stychin, *supra* note 82; B. Feldthusen, "The Recovery of Pure Economic Loss in Canada: Proximity, Justice, Rationality, and Chaos" (1996) 24 Man. L.J. 1 at 17-21.

101 *Supra* note 81.

102 *Supra* note 20. In *Bow Valley Husky* v. *Saint John Shipbuilding*, [1997] 3 S.C.R. 1210 at 1243 [hereinafter *Bow Valley*], McLachlin J. claims that *Hercules* is a case of relational economic loss "owing to the fact that the services were performed pursuant to a contract with the company." However, one could just as easily argue that it belongs to the "negligent misrepresentations" category.

liability in negligence,[103] it also serves to confirm the importance of the *Anns/Kamloops* test as a useful tool in approaching the duty of care question in the context of negligent misrepresentations causing pure economic loss. After pointing out that the basic approach embodied by the *Anns* test has been accepted and endorsed by the Supreme Court of Canada in numerous cases, La Forest J. wrote: "I see no reason in principle why the same approach should not be taken in the present case. Indeed, to create a 'pocket' of negligent misrepresentation cases ... in which the existence of a duty of care is determined differently from other negligence cases would, in my view, be incorrect."[104] In this, the Supreme Court appears to be moving towards a uniform approach to the duty of care issue in pure economic loss cases.

La Forest J. then proceeded to outline the elements that will comprise the first branch of the *Anns/Kamloops* test. In his opinion, in cases of negligent misrepresentations the close relationship between the parties must be expressed in terms of reliance by the plaintiff on the defendant's words. Reliance will be present if "a) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation; and b) reliance by the plaintiff would, in the particular circumstances of the case, be reasonable."[105] As to the second branch of the *Anns/Kamloops* test, it is to be reserved to the analysis of relevant policy considerations. This point will be developed in detail below.

In *Bow Valley Husky* v. *Saint John Shipbuilding*,[106] the Supreme Court had the opportunity to revisit the question of compensation for contractual relational economic loss. The plaintiff corporations entered into a series of contracts with the owner of an offshore oil rig. They incurred economic losses when the rig had to be shut down for repairs for a few months. One of the issues before the court was whether the defendants, a supplier and a manufacturer of Thermaclad wrap, had a duty to warn the plaintiffs of the inflammability of the product. The case allowed the Supreme Court to clarify the position previously taken in *Norsk*.[107] McLachlin J., writing for the full court, first considered La Forest J.'s point of view in *Hercules*, which she argued, "set[s] out the methodology that courts should follow in determining whether a tort action lies for relational economic loss."[108] Therefore, the first step requires an inquiry into the relationship of proximity of the parties. Whether a *prima facie* duty arises will depend on the nature of the case and on the facts. As for policy concerns, they must be dealt with under the second branch of the test.

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103 See M.E. Deturbide, "Liability of Auditors — *Hercules Managements Ltd. et al* v. *Ernst & Young et al.*" (1998) 77 Can Bar Rev. 260; H. Lefebvre, "Responsabilité professionnelle des comptables agréés: un vent de fraîcheur en provenance de la Cour suprême du Canada" (1997) 3 Assurances 447; M. Paskell-Mede & D. Selman, "Point, Counterpoint" *CA Magazine* 130:7 (September 1997) 39.

104 *Hercules*, *supra* note 20 at 186.

105 *Ibid.* at 188.

106 *Supra* note 102.

107 See *supra* note 100 for a summary of how the court divided on the issue of recovery for contractual relational economic loss.

108 *Supra* note 102 at 1244.

The approach that emerges from the judgments of McLachlin J. in *Norsk*, La Forest J. in *Winnipeg*, Major J. in the Supreme Court's more recent decision of *D'Amato* v. *Badger*,[109] La Forest J. in *Hercules*, and McLachlin J. in *Bow Valley* is a clear endorsement of the methodology proposed by Lord Wilberforce in *Anns*. The use of the formula is to be preferred to the incremental approach propounded by the House of Lords in *Murphy*. As stated by McLachlin J. in *Norsk*, when confronted with the question whether recovery for economic loss should be allowed in a new category of cases, courts should adopt "an approach at once doctrinal and pragmatic."[110] Accordingly, the approach adopted in Canada "is more consistent with the incremental character of the common law. It permits relief to be granted in new situations where it is merited. Finally, it is sensitive to danger of unlimited liability."[111] Described as "wide incrementalism" by Mullender,[112] the adjudicative stance of the Supreme Court of Canada, based on the *Anns* methodology, has allowed it to be receptive to novel claims in this particular area of negligence law. Through the use of the second stage of the two-pronged test, the court has been able to weigh the merits of the plaintiff's action and the danger of opening the "floodgates of litigation."[113] This is precisely the type of analysis that must be embarked upon in psychiatric damage cases.

In closing this short study of the treatment given to the *Anns/Kamloops* test in Canadian negligence law, we suggest that three important leads have been identified. First, in *Hercules* the Supreme Court of Canada has emphasized the importance it attaches to a uniform approach when resolving the duty of care question. Negligent misrepresentations and psychiatric damage have both been allowed, by accident rather than by design, to develop and grow in their own little niche, almost at the margin of other areas of duty of care. However, in *Hercules*, the Supreme Court of Canada has indicated that, insofar as negligent misrepresentations are concerned, the time has come to abandon this isolation and to adopt a general framework of analysis of the duty of care issue. We argue that the same reasoning applies to psychiatric damage cases. Second, both recent Supreme Court of Canada decisions and lower courts' decisions confirm the wide use of the two-pronged test in personal injury cases. Finally, the judgments in *Norsk* and *Bow Valley*, although dealing with pure economic loss, establish that the *Anns/Kamloops* test can easily be applied to relational-type losses. In our opinion, the three leads point to the possible use of Lord Wilberforce's two-part test when a plaintiff sustains psychiatric damage, a question which we are now going to explore more fully.

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[109] [1996] 2 S.C.R. 1071 [hereinafter *D'Amato*]. The issue before the Supreme Court of Canada was whether a corporate plaintiff could be compensated for the pure economic loss it incurred when an employee became unable to work as a result of the defendant's negligent act. The Court held the loss was neither foreseeable nor sufficiently proximate to the act of negligence to warrant the imposition of liability on the defendant. Even if one considered that, under the first stage of the *Anns* test, the loss was reasonably foreseeable, there were sound policy reasons, namely indeterminacy, that limited the scope of the defendant's liability.

[110] *Supra* note 99 at 1145.

[111] *Ibid.* at 1149.

[112] See Mullender, *supra* note 98 at 146. Wide incrementalism essentially corresponds to the approach in *Anns*. It shows a "readiness to impose a duty of care in circumstances not obviously like any in which a duty has previously been imposed."

[113] *Ibid.* at 151.

V. APPLICATION OF THE *ANNS/KAMLOOPS* FORMULA TO PSYCHIATRIC DAMAGE CASES

In the area of psychiatric damage, courts have seldom applied the *Anns/Kamloops* test to determine whether a duty of care should be imposed on a defendant. Arguably, criteria presently used, namely reasonable foreseeability and proximity, can be seen to correspond to the first part of the *Anns/Kamloops* test. However, no attempts have been made to apply it in a manner as thorough and systematic as that undertaken by the Supreme Court of Canada in *Hercules* for example.

It does not appear that the test has been specifically rejected either. In 1982, when the House of Lords was finally given the chance to hear a psychiatric damage case, various questions and considerations were discussed by their Lordships, but no particular emphasis was placed on *Anns*.[114] Subsequently, the specific rules outlined by Wilberforce in *McLoughlin* were widely followed, eliminating the need and interest to adopt another test.

A few older Canadian psychiatric damage cases do mention the *Anns* test, but they have not used it as a tool to analyze the validity of a plaintiff's claim. For example, in *Rhodes*, the British Columbia Court of Appeal refused to compensate a mother who suffered psychiatric damage after receiving news of her son's death in a railway accident for which the defendant railway company was responsible. In his judgment, Wallace J. reviewed the relevant case law. He referred to *Anns* but only to emphasize the fact that Lord Wilberforce did not consider the first part of his two-pronged test as being based on reasonable foreseeability alone. Therefore, concluded Wallace J.A., the *prima facie* duty of care can only be established if the required relationship of proximity between the tortfeasor and the victim of the psychiatric damage exists. For his part, Taylor J.A. referred to *Anns* as a case where "more complex and sometimes controversial rules have been formulated."[115] He preferred to resolve the issue before him by reference to the case of *Donoghue* v. *Stevenson*[116] and its neighbourhood principle. In a more recent case, *Clark* v. *Royal Canadian Mounted Police*,[117] the court considered an action for wrongful dismissal against the R.C.M.P., wherein the question of the defendant's duty of care was raised. Although the *Anns/Kamloops* test was referred to, no attempt was made to analyze its components. The court simply mentioned the test's existence and proceeded to decide whether or not a duty of care should be recognized.[118]

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[114] See *McLoughlin*, *supra* note 7 at 303, where Lord Wilberforce refers to *Anns* to confirm the fact that foreseeability does not unto itself lead to a duty of care. His Lordship goes on to assert that policy arguments must also be considered.

[115] *Rhodes*, *supra* note 1 at 295.

[116] [1932] A.C. 562 (H.L.).

[117] (1994), 20 C.C.L.T. (2d) 241 (F.C.T.D.).

[118] Readers should note that in the recent case of *Nespolon*, *supra* note 15, the Court of Appeal of Ontario applied the *Anns/Kamloops* test in part. The case was published after this article was submitted for publication and will therefore not be discussed in detail in the present text.

English and Australian cases contain occasional references to the *Anns* test. For example, in *Jaensch*,[119] Gibbs J. referred to *Anns* when explaining the need to resolve the duty of care issue by resorting to factors other than reasonable foreseeability. As outlined in the first part of this article, the decisions of the House of Lords in *McLoughlin* and *Alcock* are the authorities by which English courts have been guided for the last few years.

The possible application of the *Anns/Kamloops* formula must now be analyzed in more detail. Consideration will be given to the test's two branches: a) whether a *prima facie* duty of care exists, and b) whether that duty, if it exists, is negated or limited by policy considerations.

A. THE *PRIMA FACIE* DUTY OF CARE

The first part of the *Anns/Kamloops* test requires an investigation into the closeness of the relationship between the plaintiff and the defendant. The parties must be sufficiently connected so that "in the reasonable contemplation of the [defendant], carelessness on [his or her] part might cause damage to [the plaintiff]."[120] What does this imply in the context of psychiatric damage? The three leads identified above provide useful indications as to the manner in which one may analyze the first branch of the test.

Let us first consider the context of personal injuries. According to Cory J., in *Hall*, "[t]he notion of 'legal proximity' has been set out in terms of whether the risk of harm ought to have been reasonably foreseeable to the defendant."[121] This means that reasonable foreseeability is sufficient to establish a *prima facie* duty of care. This approach has been endorsed by La Forest J., albeit in *obiter*, when he stated:

> In the context of actions based on negligence causing physical damage, determining whether harm to the plaintiff was reasonably foreseeable to the defendant is alone a sufficient criterion for deciding proximity or neighbourhood under the first branch of the *Anns/Kamloops* test because the law has come to recognize (even if only implicitly) that, absent a voluntary assumption of risk by him or her, it is always reasonable for a plaintiff to expect that a defendant will take reasonable care of the plaintiff's person and property.[122]

Therefore, when personal injuries are involved, the issue at stake in the first branch of the test is not reliance as in *Hercules* but whether the defendant ought reasonably to have foreseen that the plaintiffs might suffer loss as a result of a negligent action or omission.

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119 *Supra* note 38.

120 *Kamloops*, *supra* note 21 at 10.

121 *Hall*, *supra* note 86 at 201. See also Klar, *supra* note 24 at 143: "[T]he first stage of the duty test is the relationship of proximity based on foreseeability."

122 *Hercules*, *supra* note 20 at 189.

Suggesting that a similar approach be adopted when the damage is of a psychiatric nature becomes quite tempting. In other words, reasonable foreseeability would suffice to create an adequate degree of closeness between plaintiff and defendant in such cases and to allow the conclusion that a *prima facie* duty of care has been established.

What constitutes foreseeability in the context of psychiatric damage is widely known. First, the plaintiff must be foreseeable in the sense that a duty of care must be owed to him or her, either individually or as a member of a class. The plaintiff cannot build on a duty owed to another person.[123] Secondly, the psychiatric damage itself must be foreseeable.[124] The court must be convinced that a reasonable person, placed in the defendant's situation at the time the tort was committed, would have foreseen that the victim would suffer from a recognized psychiatric illness.[125] The precise nature of the psychiatric disorder need not be foreseen so long as some form of psychiatric damage is likely to occur.[126]

Establishing the existence of a *prima facie* duty of care in psychiatric damage cases, based solely on the reasonable foreseeability criterion, is not a novel idea. As noted above, in *McLoughlin*, Lord Bridge was of the opinion that the defendant's duty should depend on reasonable foreseeability. He rejected the notion that policy considerations be used to define the limits of liability in such cases. We know that Lord Bridge's opinion has not been endorsed in subsequent cases, at least in the United Kingdom[127] and in Australia.[128] However, in the recent House of Lords decision of *Page* v. *Smith*,[129] Lord Lloyd concluded that when the plaintiff is a direct or primary victim, foreseeability of psychiatric injury is unnecessary. Liability for psychiatric injury depends upon the reasonable foreseeability of *physical* injury. In the words of his Lordship, "[s]ince liability depends on foreseeability of physical injury, there could be no question of the defendants finding himself liable to all the world. Proximity of relationship cannot arise, and proximity in time and space goes without saying."[130]

In Canada, the state of the law is much more convoluted. To begin, the principle outlined in *Page* has not been adopted by Canadian courts, at least for the moment.

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123 See the well-known case of *Palsgraf* v. *Long Island Rail Co.* (1928), 162 N.E. 99 (N.Y.) [hereinafter *Palsgraf*]. In the context of psychiatric damage, see *Bourhill*, *supra* note 23. See also Mullany & Handford, *supra* note 1 at 65.

124 Recent Canadian decisions confirming the principle are: *Bechard*, *supra* note 12 at 518, where the Ontario Court of Appeal states: "Under Canadian and English law reasonable foresight of nervous shock to the plaintiff is the touchstone of liability"; *Dube*, *supra* note 12 at 300; *McCartney*, *supra* note 35 at 29; *Islic*, *supra* note 35 at 41.

125 *Bourhill*, *supra* note 23; *Palsgraf*, *supra* note 123.

126 *Pusey*, *supra* note 9 at 390, 392, 393, 402 and *Jaensch*, *supra* note 38 at 427. See also Mullany & Handford, *supra* note 1 at 71-72.

127 See *Alcock*, *supra* note 3.

128 See *Jaensch*, *supra* note 38.

129 *Supra* note 49.

130 *Ibid.* at 760 and 758 where his Lordship adds: "Foreseeability of psychiatric injury remains a crucial ingredient when the plaintiff is the secondary victim, for the very reason that the secondary victim is almost always outside the area of physical impact, and therefore outside the range of foreseeable physical injury."

This means that reasonable foreseeability of psychiatric illness must still be established, even in the case of direct victims. While some courts rely on reasonable foreseeability to determine whether a duty of care arises,[131] this is not done in the context of the application of the *Anns/Kamloops* test. Rather, it is based on the approach adopted in pre-*McLoughlin* decisions.

The issue that must now be explored is whether reasonable foreseeability suffices to resolve the first branch of the *Anns/Kamloops* test. Insofar as direct victims are concerned, indications are that, in Canada, the reasonable foreseeability criterion will be adequate. The law has come to recognize that it is reasonable for a defendant to foresee that a negligent action or omission on his or her part may cause damage in the nature of psychiatric illness to a person directly affected by the negligence.[132] Recent actions brought by direct victims who have sustained only psychiatric illness, confirm this result.[133] When such illness accompanies physical injury, the foreseeability of the injury is considered as being even more obvious. Courts seldom deny the existence of a duty of care in such cases.[134]

Therefore, insofar as direct victims are concerned, one may assume that the first branch of the *Anns/Kamloops* test can be set out in terms of reasonable foreseeability. Could the same conclusion be reached in the case of indirect victims? The answer from across the Atlantic is a resounding "no." Such is the essence of the judgment of the House of Lords in *Alcock*. Lord Keith was of the opinion that "in addition to reasonable foreseeability liability for injury in the particular form of psychiatric illness must depend in addition upon a requisite relationship of proximity between the claimant and the party said to owe the duty."[135] According to Lord Ackner, "[a]lthough it is a vital step towards the establishment of liability, the satisfaction of the test of reasonable foreseeability does not ... *ipso facto* satisfy Lord Atkin's well-known neighbourhood principle."[136] And this from Lord Oliver: "[the duty of care] depends not only upon the reasonable foreseeability of damage ... but also upon the proximity or directness of the relationship between the plaintiff and the defendant."[137] Recent English decisions express similar opinions. For example, in *Page*, even if, as seen previously, Lord Lloyd was quite willing to eliminate entirely the requirement of reasonable foreseeability of psychiatric damage for direct victims, he was of the view that "in the case of secondary [indirect] victims, foreseeability of injury by shock is not enough. The law also requires

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131 See the first category of cases outlined at the beginning of this article, *supra* note 35 and accompanying text.

132 In fact, most courts acknowledge the foreseeability of psychiatric damage for both direct and indirect victims. Therein lies the difficulty. Many judges believe that another criterion is essential if the liability of the tortfeasor is to be kept within reasonable bounds, especially when the victim is indirect.

133 See *Mason* v. *Westside Cemeteries Ltd.* (1996), 29 C.C.L.T. (2d) 125 (Ont. Div. Ct.); *Weinberg* v. *Connors* (1994), 21 O.R. (3d) 62 (Gen. Div.); *Peters-Brown* v. *Regina* (1996), 31 C.C.L.T. (2d) 302 (Sask. C.A.).

134 See *e.g. Kwok*, *supra* note 45.

135 *Alcock*, *supra* note 3 at 914.

136 *Ibid.* at 918.

137 *Ibid.* at 926.

a degree of proximity."[138] According to Henry L.J. in *Frost*, "when the plaintiff was outside the area of risk of physical damage and suffered psychiatric damage, foreseeability of that damage was not enough."[139] The Australian point of view is best expressed by Deane J. in *Jaensch* where he stated: "[t]he requirement of a relationship of 'proximity' ... should, in my view, be accepted as a continuing general limitation or control of the test of reasonable foreseeability as the determinant of a duty of care."[140]

Some Canadian courts have followed the opinions expressed abroad. These decisions make up the third category of cases identified in the first part of this text. For example, in *Beecham* the court endorsed the point of view expressed by Deane J. in *Jaensch*. According to Taggart J.A., "the concept of causal proximity provides an objective basis for limiting the undue expansion of liability which would flow from the unfettered application of reasonable foreseeability."[141] Subsequently in *Rhodes*, Wallace J.A. argued that "to resolve the issues of foreseeability and causation, some factors beyond the psychiatric illness sustained by the plaintiff and the foreseeability of injury must be established."[142] In a more recent decision, Zuber J. alluded to the ambivalence of Canadian law on this issue. He stated:

> The law as it now stands is hardly a model of clarity. It is sometimes asserted that the simple test is one of foreseeability, ie., if the negligent defendant can reasonably foresee nervous shock as a consequence of his conduct then he is liable for the damages that flow from the injury.[143]

After indicating that foreseeability may not be a particularly useful concept in psychiatric damage cases, Zuber J. referred to *Alcock* and proceeded to apply its principles to the facts before him.

It must be noted at the outset that the concept of proximity has proven to be quite a challenge for the courts. As pointed out by Bloom, this phenomenon can be traced to the ambiguity that appears in the first branch of the *Anns* test. He writes:

> On one reading of Lord Wilberforce's formulation the [proximity] concept is defined by the words that follow it, so that *if* the defendant can reasonably contemplate that carelessness on his part may be likely to cause the plaintiff loss, *then* a relationship of proximity or neighbourhood is established. On another reading, the notion of proximity or neighbourhood, in different factual situations, can encompass other considerations besides just that of the reasonable foreseeability of harm.[144]

The case law we have just discussed seems to take the latter view. Courts see the notion of proximity as a substantive and independent element of the duty of care issue. Proximity is seen as the requirement which governs the first stage of the

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138 *Supra* note 49 at 759.

139 *Frost*, *supra* note 9 at 557.

140 *Supra* note 38 at 443.

141 *Beecham*, *supra* note 15 at 70.

142 *Supra* note 1 at 264.

143 *Dube*, *supra* note 12 at 300.

144 J. Bloom, "Slow Courier in the Supreme Court: A Comment on *B.D.C. Ltd.* v. *Hofstrand Farms Ltd.*" (1986-87) Can. Bus. L.J. 43 at 50.

Anns/Kamloops test. Viewing proximity as a distinct concept serves to incorporate policy considerations into the equation.[145] As admitted by Lord Wilberforce in *McLoughlin*, inquiring into matters such as the nature of the relationship between plaintiff and defendant, the closeness of the victim to the accident and the manner in which the information about the accident has been relayed to the victim is, in reality, nothing more than attempting to limit the scope of the defendant's liability.[146] In the words of La Forest J. in *Hercules*, these requirements "serve a policy based limiting function with respect to the ambit of the duty of care."[147] Further in his judgment, La Forest J. stated: "criteria that in other cases have been used to define the legal test for the duty of care can now be recognized for what they really are — policy-based means by which to curtail liability — and they can appropriately be considered under the policy branch of the *Anns/Kamloops* test."[148]

Admittedly, La Forest J. made these comments in the context of the analysis of the duty of care in negligent misrepresentation actions. However, his words can easily be transposed to the area of psychiatric damage. Therefore, legitimate policy considerations that arise when indirect victims of psychiatric damage are seeking compensation should properly be addressed under the second branch of the two-pronged test. In the words of Mullany, "[t]he sooner the proximity smokescreen clears to allow the truly important issues to be clearly seen the better."[149] In concluding that policy considerations must be separated from the reasonable foreseeability inquiry, we are mindful that some have argued that doing so confuses principle and rule.[150] However, in our opinion, incorporating policy considerations into the "reasonableness" element of reasonable foreseeability prevents an open and considered discussion of the relevant policy issues.

Of course, a court may very well conclude that a *prima facie* duty of care is not owed by the defendant. In our view, this conclusion should be limited to situations where, on the facts, it is totally unreasonable to conclude that the damage is foreseeable. The example of a complete stranger who sustains a psychiatric illness after being told of a minor car accident in which no one is injured comes to mind. Arguably, his illness may be foreseeable, but it is not *reasonably* so. The inherent danger that accompanies the foreseeability criteria lies in the possibility that it will simply be used to conceal underlying policy issues. To avoid this unwarranted result, courts must be especially mindful of the need to separate policy issues from the reasonable foreseeability inquiry. Undoubtedly, in some instances, the fine line between the two will not be easy to draw. Given that the same preoccupation arises in the context of pure economic loss, where the *Anns/Kamloops* formula is commonly used, one may take comfort in the fact that Canadian courts appear to have been able to deal quite

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145 See Howarth, *supra* note 72 at 60, 81-84; J.A. Smillie, "The Foundation of the Duty of Care in Negligence" (1989) 15 Monash U. L. Rev. 302 at 315; J. Steele, "Scepticism and the Law of Negligence" (1993) 52 C.L.J. 437 at 450-53.

146 *Supra* note 7 at 304.

147 *Supra* note 20 at 191.

148 *Ibid.* at 192.

149 *Supra* note 1 at 85.

150 See J. Stone, *Precedent and Law* (Sydney: Butterworths, 1985) at 254-63. See also, Vines, *supra* note 38 at 473-74.

successfully with this problem. One can only hope that the spirit of the *Anns* test, namely attempting to bring into the open the debate on relevant policy issues, will prevail.

Admittedly, relying solely on reasonable foreseeability to establish the *prima facie* duty of care will probably lead to an increase in the number of situations where such a duty is found. However, courts wishing to limit a defendant's liability will be able to use the second branch of the test to explain the policy considerations that lead them to adopt such a point of view. Hopefully, this process will bring into focus the policy issues that are presently used to limit the possible compensation of many victims of psychiatric injury, thus allowing a thorough examination of the legitimacy of the courts' most common preoccupations.[151]

Support for the approach we are advocating can be gleaned from the Supreme Court of Canada's most recent decisions in relational economic loss cases. According to *Hercules*, the first branch of the *Anns/Kamloops* test necessitates an investigation into the relationship of neighbourhood between plaintiff and defendant. The term "proximity" is seen as "a label expressing a result, judgment or conclusion ... intended to connote that ... the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs."[152] This point of view is reiterated by McLachlin J. in *Bow Valley*. She added, "Whether the duty arises depends on the nature of the case and its facts. Policy concerns are best dealt with under the second branch of the test. Criteria that in other cases have been used to define the legal test for the duty of care can now be recognized as policy-based ways by which to curtail indeterminate or inappropriate recovery."[153]

In *Hercules*, the Supreme Court concluded that in negligent misrepresentation cases reliance — by the defendant, who must foresee that the plaintiff will rely on his or her representation, and by the plaintiff, for whom the reliance on the defendant must be reasonable — is part of the inquiry under the first branch of the *Anns/Kamloops* formula. On the other hand, in *Bow Valley*, where the relational economic loss is incurred because of an alleged breach of a duty to warn, the relationship of closeness or neighbourhood is seen to be established by asking whether the defendants ought reasonably to have foreseen that the plaintiffs might suffer loss as a result of the use of the product about which the warning should have been made.[154] Thus, the content of the first branch of the *Anns/Kamloops* test differs in both cases. Whereas proximity may previously have been seen as the requirement which governed the operation of the first branch of the test,[155] *Hercules* and *Bow Valley* appear to be suggesting that courts adopt a more flexible approach when dealing with the first branch of the test. If

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151 Steele, *supra* note 145 at 466-67, argues that "it is just as important for judges to give the 'real' reasons for their decisions as it is for them to try to reach the 'best' decisions." She advocates greater openness in discussions: courts should not hesitate to explore controversial avenues and novel approaches to legal issues.

152 *Supra* note 20 at 187-88.

153 *Supra* note 102 at 1244.

154 *Ibid.* at 1248.

155 See especially *Norsk*, *supra* note 99 at 1150-55, McLachlin J.

reasonable foreseeability is a sufficient criterion in the context of a 'duty to warn' case where relational economic losses are incurred, one is hard pressed to argue against the appropriateness of its application to psychiatric damage cases, where relational loss is also sustained.

B. POLICY CONSIDERATIONS

As previously suggested, the *Anns/Kamloops* test will be applied whether the plaintiff is a direct or indirect victim of the defendant's negligence. However, analysis of the second branch of the test will become especially important in the case of an indirect plaintiff. Because of the relational nature of the loss sustained, important policy considerations arise.

The very first cases dealing with compensation for psychiatric illness[156] alluded to the fundamental policy considerations which are still of concern today: (1) the danger that an extension of liability may lead to a proliferation of claims (the floodgates argument); (2) the concern that a defendant may face a burden out of proportion to the negligent conduct complained of (the indeterminate liability argument); and (3) the fear of groundless and fraudulent claims. Scholars have identified other concerns. Stapleton suggests that the possibility of compensation can deter efforts towards rehabilitation.[157] Others mention the problem of conflicting medical opinions, which point to the scientific uncertainties regarding the etiology and other aspects of a given psychiatric disorder.[158] Adepts of the economic analysis of law argue that overdeterrence occurs where defendants are held liable for psychiatric injuries that can best be avoided by plaintiffs.[159] For his part, Guido Calabresi suggests that the litigation process may aggravate or extend the injuries of a plaintiff, or that greater flexibility in the law may create an increased sensitivity to psychiatric illness, thus encouraging more individuals to litigate.[160]

A thorough discussion of these policy concerns is beyond the ambit of this text. We will comment only on the first two points as therein usually lie the major preoccupations of the courts. The floodgate argument and the indeterminate liability argument are often discussed in the same breath. According to Lord Wilberforce in *McLoughlin*, a restrictive approach to recovery for psychiatric damage is necessary "because 'shock' in its nature is capable of affecting so wide a range of people."[161] In *Alcock*, their Lordships referred to the danger of a proliferation of actions to justify

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156 *Coultas*, *supra* note 2.

157 Stapleton, *supra* note 19 at 94-95. Compare *Justifications and Boundaries*, *supra* note 5 at 95-100.

158 See *Liability for Psychiatric Illness*, *supra* note 3 at 56; D.F. Partlett, "Tort Liability and the American Way: Reflections on Liability for Emotional Distress" (1997) 45 Am. J. of Comp. L. 171 at 181.

159 For a full explanation and critique of this argument, see P.A. Bell, "The Bell Tolls: Toward Full Tort Recovery for Psychic Injury" (1984) 36 U. Florida L. Rev. 333 at 357-60.

160 See G. Calabresi, *Ideals, Beliefs, Attitudes and the Law* (Syracuse: Syracuse University Press, 1985) at 76-86. For criticism of this approach, see Bell, *ibid.* at 370-73.

161 *Supra* note 7 at 304.

their approach to psychiatric damage cases.[162] Canadian courts have shown similar preoccupations.[163] According to the Law Commission, the main concern appears to be the fact that a single negligent event could lead to a mass of claims, a result which they feel would be unfair to the defendant.[164]

Are these concerns valid? What is the incidence of psychiatric disorder in people exposed to trauma? Is the fear that a great number of individuals will be affected by an extreme event justified? Curiously, and unfortunately, courts have seldom attempted to answer these important questions. In referring to a number of medical studies consulted in preparing the draft of its consultation paper on liability for psychiatric illness, the Law Commission summarizes the hurdles which must be overcome:

> It is clear that these studies, taken as a whole, are open to more than one interpretation and that, indeed, different surveys have produced different findings. It is also important to note that the studies were compiled primarily for treatment and research purposes and that they do not give any indication of the proportion of those who develop PTSD [post-traumatic stress disorder] or related psychiatric injury following trauma who then seek compensation for their injury, nor the proportion of those whose claims are likely to succeed. Furthermore, ... most of the studies are concerned with situations in which the psychiatric illness was suffered by people who were themselves exposed to risk.[165]

Despite this *caveat*, the Commission does not hesitate to conclude that: "[t]here is serious risk that the floodgates of litigation would be opened if the sole test for liability in negligence was whether it was reasonably foreseeable that psychiatric illness would be caused to the plaintiff."[166] On the other hand, Mullany & Handford, who also canvass the medical and scientific literature on the subject in their book, conclude:

> Liberalisation will not see a deluge of psychiatric damage claims because most claimants will be unable to clear the still significant hurdles to relief. There has to date been a paucity of litigation in this area ... and it is submitted that even if the law develops along the lines advocated in this work [namely liability based solely on reasonable foreseeability with no provision for canvassing policy issues] this will continue to be the case.[167]

In the end, what we have is a lack of accurate data and an absence of meaningful research, and thus, uncertainty prevails. It is our contention that because of these doubts as to the incidence of psychiatric disorders in the general population, courts should not jump to conclusions and assume that psychiatric damage will be suffered by every bystander and every sympathetic stranger. Should proliferation of claims be a concern? Possibly. In some cases, indeterminate liability may also pose a problem. In these situations, courts should address the issue head on. And this is where the second branch of the *Anns/Kamloops* test becomes useful.

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162 *Supra* note 3 at 918, 925.

163 See *e.g. Rhodes*, *supra* note 1 at 264, 296; *Dube*, *supra* note 12.

164 *Liability for Psychiatric Illness*, *supra* note 3 at 51-52. The fact situation in *Alcock* is a good example.

165 *Ibid.* at 49.

166 *Ibid.* at 50.

167 *Supra* note 1 at 314.

In *Hercules*, La Forest J. concluded that in the general area of auditors' liability, the prospect of limitless liability was susceptible to arise quite often. Thus, "the problem of indeterminate liability will frequently result in the duty being negated by ... policy considerations."[168] Similarly, assuming for the moment that indeterminacy of liability is also a problem in psychiatric damage cases, under the second branch of the *Anns/Kamloops* test, a court would have the possibility of canvassing the problems and deciding that they are of such importance that the *prima facie* duty of care found to inhere under the first branch of the test must be negated.

The three factors identified by Lord Wilberforce in *McLoughlin* could also be taken into consideration at this stage. After all, both the closeness of the relationship between the direct and indirect victims and the temporal and physical connection between the plaintiff and the accident may provide useful guidelines to the courts in their endeavour to identify and deal with legitimate policy concerns and the need to control access to the judicial system.

There may be situations where indeterminate liability is not an issue, in which case, according to La Forest J., a positive finding under the first branch of the *Anns/Kamloops* test would not be overridden.[169] This point of view is reiterated in *Bow Valley*. According to McLachlin J.:

> The specific factual matrix of a given case may bring it within a category which, for policy reasons, is identified as an exception to the exclusionary rule; considerations of proximity may militate in favour of finding a *prima facie* duty of care at the first stage, and the policy considerations which usually negate it may be absent. In such cases, liability would appropriately lie.[170]

The merit of this approach is to allow the court to openly canvass and analyze positive and negative policy considerations. For example, in *Bow Valley*, after concluding that there was a *prima facie* duty of care on the part of the defendants who ought reasonably to have foreseen that their failure to warn would cause financial loss to the plaintiffs, McLachlin J. considered whether this *prima facie* duty was negatived by policy considerations. Before deciding that the problem of indeterminate liability was sufficiently serious to negate the *prima facie* duty of care, she examined positive policy considerations, such as questions of deterrence against negligence and of allocation of risk, on which the conclusion as to the existence of the duty could be based. Thus, the analysis of the second branch of the *Anns/Kamloops* test becomes a flexible tool which allows courts to fully explore *all* the policy concerns inherent to a specific fact situation. In the context of psychiatric damage actions, one would hope that this methodology would encourage judges to complete a more in depth study of

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168 *Supra* note 20 at 200.

169 *Ibid.* at 202. He writes: "It should be equally clear, however, that in certain cases, this problem [indeterminacy] does not arise because the scope of potential liability can adequately be circumscribed on the facts." See also *Winnipeg*, *supra* note 81, where La Forest J. concluded that there are no policy considerations that are sufficiently compelling to negate the duty of care owed by builders to the subsequent purchaser of a building who disbursed money to repair defects that were dangerous for the health and safety of the building's occupants.

170 *Supra* note 102 at 1245.

the floodgates and indeterminate liability arguments rather than relying on vague impressions and perceptions as it seems to be the case presently.

C. TESTING THE APPLICATION OF THE NEW PARADIGM

How would the *Anns/Kamloops* test apply to the facts found in some of the Canadian cases previously discussed? Applying the first branch of the test to the facts in *Rhodes*, one would most probably conclude it is reasonably foreseeable that a mother would suffer some form of psychiatric illness upon learning that her son has been killed in a horrific train collision.[171] Thus, a *prima facie* duty of care would be established. The court's main preoccupation in *Rhodes* resided in the fact that the plaintiff was not at the scene of the accident to view its horror and mediate repercussions. She heard of the train crash indirectly, by listening to a radio report. By the time she arrived on the site of the crash, eight days had passed. Traditionally, recovery of psychiatric illness induced solely by being told of a traumatic event by a third party has not been compensated.[172] This is probably so because of the perceived concern that indeterminate liability would lie if defendants were responsible for the psychiatric illness resulting from a third party's account of a tortious event. However, indeterminacy of liability is not necessarily present in all situations. For example, in cases where only one or two individuals are likely to develop some form of psychiatric illness upon learning of a traumatic event, for example, close relatives of the victims, it may very well be that the danger of "opening the floodgates" is almost nonexistent. These are the type of considerations that a court would examine under the second branch of the *Anns/Kamloops* test.

In our view, proceeding in this manner would be a marked improvement over the present methodology. Consider the decision in *Abramzik*, a case where the fact situation is very similar to *Rhodes*. A mother suffered psychiatric illness upon being told of the death of her two children following an accident at a railway crossing. The court denied the mother's claim on the basis of a lack of reasonable foreseeability. In fact, foreseeability was not the problem; as we have just noted, the real issue revolved around the possible indeterminacy of liability. In *Rhodes*, the court struggled with the same dilemma. This time, the policy concerns were subsumed either under the requirement of proximity (Macfarlane J.A., Taylor J.A, Wallace J.A. and Wood J.A), or under the requirement that the plaintiff suffer fright, terror or horror (Southin J.A., with whom Taylor J.A. and MacFarlane J.A. also agreed). MacFarlane J.A. could not state the matter more clearly: "considerations of policy must enter into the determination of the foreseeability issue."[173]

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171 As stated by Lord Oliver in *Alcock*, *supra* note 3 at 925, "[i]t is readily foreseeable that very real and ascertainable injury is likely to result to those dependent upon the primary victim or those upon whom, as a result of negligently inflicted injury, the primary victim himself becomes dependent."

172 Such was the result in *Abramzik*, *supra* note 15. See also *Dietelbach* v. *Public Trustee* (1973), 37 D.L.R. (3d) 621 (B.C.S.C.); *Babineau* v. *MacDonald (No 2)* (1975), 59 D.L.R. (3d) 671 (N.B. C.A.); *Rowe Estate* v. *Hanna* (1988), 102 A.R. 88 (Q.B.); *Strong* v. *Moon*, *supra* note 12.

173 *Supra* note 1 at 250.

In *Beecham*, the court's main concern related to the fact that the plaintiff's reactive depression had not been induced by sudden shock or horror, but by the gradual realization that his companion would never recover from the severe brain damage she suffered because of the defendant's negligence. The court recognized that the illness was reasonably foreseeable. However, in its view, the evidence did not support the conclusion that there was sufficient causal proximity between the tortious conduct and the class of victims to which the plaintiff belonged. The interval between the accident and the onset of the illness was too long. The depression was seen to stem from sorrow rather than from shock. In this case, policy considerations were subsumed under the notion of causal proximity.[174]

As noted at the very beginning of this text, under the present state of the law, psychiatric illness must have been caused by a sudden impact to the senses in order for the plaintiff to be compensated. This is probably so because of the perceived concern that to allow recovery for psychiatric illness that develops slowly over time would result in an extension of the scope of liability. At times, the danger of increasing the number of fraudulent claims is also mentioned. However, the sudden-shock requirement has often been criticized.[175] It can certainly be argued that creating a distinction between psychiatric damage caused by sudden shock and gradually sustained psychiatric illness is artificial and unfair and does not reflect the underlying merits of claims.[176] Clearly, further discussion is required. Ideally, under the second branch of the *Anns/Kamloops* test, all points of view would be canvassed before a court would reach a conclusion on the merits of this type of claim.

VI. CONCLUSION

The aim of this article has been to argue that the *Anns/Kamloops* test should be adopted by Canadian courts as the analytical tool of choice when dealing with claims by plaintiffs who wish to be compensated for psychiatric illness caused by a negligent act or omission. Under this proposal, analysis of the first branch of the test would be based on the reasonable foreseeability of psychiatric illness criterion; the test's second branch would serve to explore the relevant policy considerations. This approach is based on the premise that, for the moment, Canadian courts have failed to develop a common framework of analysis for such claims, thus leading to uncertainty and inconsistency in the law. It is suggested that the use of a common framework will provide courts and practitioners alike with better tools to evaluate the merit of the various claims with which they must deal. The widespread use of the *Anns/Kamloops* formula will also serve to eliminate the division of Canadian cases in categories such

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[174] The approach just described was that of Taggart J.A. with whom Carrothers J.A. concurred. Lambert J.A., *ibid.* at 73, who agreed with the final result, concluded that the notions of foreseeability, proximity, causation and remoteness were "interlocked" and that the facts had to be analyzed in the same manner as if the injuries were physical in nature. In his view, expressed *ibid.* at 74, "[t]here may well be an implicit policy element in the decision making, but it is well within the kind of policy question that is inherent in the judicial function."

[175] See *e.g.* Mullany & Handford, *supra* note 1 at 205; H. Teff, "The Requirement of 'Sudden Shock' in Liability for Negligently Inflicted Psychiatric Damage" (1996) 4 Tort Law R. 44.

[176] *Liability for Psychiatric Illness*, *supra* note 3 at 75-76.

as those identified in the first part of this article. More importantly, analyzing the duty of care issue according to standard criteria could allow Canadian courts to develop a more cohesive body of rules in the area of compensation for psychiatric injury.

Several objections to our proposal may be anticipated. Some will argue that claimants will be encouraged to litigate because an element of uncertainty is introduced into the law. Others will point to the almost certain extension of the scope of liability in negligence. The social costs of further expansion of liability will also be alluded to. Each of these important concerns will be addressed briefly.

Preoccupations about uncertainty and the application of the *Anns/Kamloops* formula have also been raised in the context of pure economic loss. Many authors have identified the proximity requirement as the main culprit.[177] Because proximity is such a vague concept that "can be asserted in every case to require whatever result is convenient,"[178] ensuring predictability in the law becomes extremely difficult. This is particularly problematic for practitioners who must advise their clients as to the state of the law and guide them in their decision whether or not to proceed with an action before the courts.[179]

Would matters improve if the *Anns/Kamloops* formula was adopted by Canadian courts? Since we have suggested placing the emphasis on reasonable foreseeability rather than on proximity, the problems surrounding the latter notion should disappear. Nevertheless, recognition must be given to the fact that reasonable foreseeability is also a fairly vague concept, which may easily be manipulated by judges. As previously explained, courts will have to pay particular attention not to conceal policy issues under the reasonable foreseeability inquiry. It may very well be that when policy questions are properly identified and analyzed, courts will find that recovery for psychiatric damage should not take place. This result may be warranted if, for example, scientific studies convincingly showed that very high rates of psychiatric illness in the general population were a certainty. However, what matters the most is to ensure that an in-depth analysis of all the relevant issues occurs. Our contention is that the *Anns/Kamloops* formula can ensure the realization of this objective. Moreover, as stated by McLachlin J. in *Norsk*, it may very well be that some uncertainty in the law is inevitable, at least for some time to come. She wrote: "uncertainty ... is inherent in the common law generally. It is the price the common law pays for flexibility, for the ability to adapt to a changing world. If past experience serves, it is a price we should willingly pay, provided the limits of uncertainty are kept within reasonable bounds."[180]

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177 See text and case law mentioned at *supra* note 145. See also Stychin, *supra* note 82 at 333-34, 339; R. Martin, "Categories of Negligence and Duties of Care: Caparo in the House of Lords" (1990) 53 M.L.R. 824 at 827.

178 Howarth, *supra* note 72 at 60.

179 This concern is identified by Howarth, *ibid.*; Stychin, *supra* note 82 at 333-34; D.W. Robertson, "Liability in Negligence for Nervous Shock," *Book Review of Tort Liability for Psychiatric Damage: The Law of 'Nervous Shock'* by N.J. Mullany & P.R. Handord (1994) 57 M.L.R. 649 at 662-63.

180 *Supra* note 99 at 1150.

To argue that applying the *Anns/Kamloops* test to psychiatric injury cases will inevitably lead to an extension of liability is a powerful argument. In fact, one would be hard pressed to deny that such a result may not occur. As indicated by Klar, relying on the *Anns/Kamloops* formula, as opposed to using the English criteria of foreseeability, proximity and whether it is "just and reasonable," is not only a question of semantics. He writes: "creating a *prima facie* duty based on a relationship of neighbourhood, and seeing policy only as a way to negate the duty, is to encourage the expansion of tort. Conversely, viewing policy as integral to the relationship of proximity itself, is to discourage negligence law's extension. This, at any event, has been the experience to date."[181]

The history of Lord Wilberforce's two-pronged test lends support to the view expressed by Klar. From 1978 to 1984, courts proceeded, almost enthusiastically, to expand the tort liability of public authorities and other defendants faced with claims for recovery of economic loss.[182] Although the House of Lords eventually viewed this extension of liability as almost catastrophic, Canadian courts have been much more sedate about the issue. The experience provided by economic loss recovery in Canada has shown that the cause of action has been contained within reasonable bounds, at least so far.[183] Nothing indicates that the situation would be different when dealing with psychiatric damage, even when the victim is indirect.

Moreover, an eventual extension of liability for psychiatric illness is not necessarily undesirable. "If some increase does occur, that may only reveal the existence of a genuine social need," concluded Lord Wilberforce in *McLoughlin*.[184] In fact, many have argued that an expansion is necessary and justified. As noted throughout this text, the principles presently applied by the courts lead to arbitrary and unfair results. This has convinced many prominent scholars to recommend various changes to the law.[185]

However, if an extension of liability occurs, social costs will be incurred. For example, scarce judicial resources must be employed to resolve disputes. This creates delays in other important cases which cannot be resolved by means other than litigation.[186] Stychin argues that uncertainty in the law also leads to social costs. Divergent results mean that cases that would not otherwise be brought before the courts are nevertheless pursued because lawyers are unable to confidently evaluate the

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181 *Supra* note 24 at 145.

182 *Supra* note 69 and the cases cited therein.

183 Recent Supreme Court of Canada decisions dealing with pure economic loss reveal that, even with the application of the *Anns/Kamloops* formula, defendants are not necessarily successful in their claims. See *e.g. D'Amato*, *supra* note 109; *Bow Valley*, *supra* note 102. The plaintiff's action was rejected after the analysis of the second branch of the *Anns/Kamloops* test revealed policy considerations important enough to negate the *prima facie* duty of care found to inhere under the first branch of the test. See also G.T. Stanley, "Economic Loss in Maritime Law: On Course for Reevaluating the Exclusionary Rule" (1995) 53 U.T. Fac. L. Rev. 312 at 344. *Contra* B. Feldthusen, *supra* note 100 at 22, who argues that litigation is bound to increase because of the uncertainty created by Supreme Court of Canada decisions.

184 *Supra* note 7 at 304.

185 See the authors and suggestions mentioned *supra* note 19.

186 See *Economic Negligence*, *supra* note 72 at 11.

potential outcome of litigation.[187] In addition, there is the cost of additional insurance coverage that must be obtained by parties who want to protect themselves against potential liability. Given that certain costs will inevitably be incurred, they must be balanced against the advantages of the extension of liability to which we have previously alluded. When personal injuries are involved, the cost of shifting the loss from plaintiffs to defendants may be justified because the latter, "as a class, are in a better position than the class of potential loss victims to anticipate, evaluate, and spread the risk of loss."[188] Although this argument may not be valid when pure economic loss is considered, it certainly applies when the injuries are psychiatric in nature.

Expanding the application of the *Anns/Kamloops* test to psychiatric damage implies the acceptance of negligence law in general as the vehicle through which compensation for injury can best be achieved. However, the shortcomings of the tort system itself cannot be ignored. Many criticisms have been expressed over the last twenty years.[189] The regime's effectiveness in deterring harm has been questioned.[190] Some argue that insurance schemes will more efficiently spread losses and ensure compensation of victims.[191] Without entering the debate on the effectiveness of negligence law in general, we wish to point out that, although a no-fault scheme may very well be preferable to the present system, there is very little likelihood that the instauration of such a system will occur in the immediate future in Canada. From a practical standpoint a no-fault system of compensation for injuries caused by negligence is not an option.

Some of the authors who object to the extension of liability, either in the context of psychiatric damage sustained by indirect victims or in the context of relational economic loss, argue in favour of a broad exclusionary rule against recovery of damages in these instances.[192] This "no compensation" solution certainly creates certainty. Social costs may also be contained. But what of fairness? For too long, tort law has relegated psychiatric damage to a position of secondary importance. In the case of indirect victims, Teff argues that "[t]he very notion of compensating people whose suffering derives from their reaction to the injuring of others often evokes surprise,

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187 *Supra* note 82 at 334. See also Robertson, *supra* note 179 at 662.

188 J.A. Smillie, "Negligence and Economic Loss" (1982) 32 U.T.L.J. 231 at 236-37.

189 See *e.g.* T.G. Ison, *The Forensic Lottery* (London: Staples Press, 1967); J. O'Connell & C.B. Kelly, *The Blame Game* (Lexington, Mass.: Lexington Books, 1978); J.G. Fleming, "Is There a Future for Tort?" (1984) 58 A.L.J. 131; S.D. Sugarman, "Doing Away with Tort Law" (1985) 73 Cal. L. Rev. 555; *Symposium, Alternative Compensation Schemes and Tort Theory* (1985) 73 Cal. L. Rev. 548; P. Cane, *Atiyah's Accidents, Compensation and the Law*, 5th ed. (London: Butterworths, 1993).

190 See *e.g.* J.G. Fleming, "The Role of Negligence in Modern Tort Law" (1967) 53 Virginia L. Rev. 815 at 823-25; G.T. Schwartz, "Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter" (1994) U.C.L.A. L. Rev. 377; Sugarman, *ibid.* at 559-73.

191 Sugarman, *ibid.* at 573-81; *Economic negligence*, *supra* note 72 at 12.

192 In the context of pure economic loss, especially relational economic loss, see *e.g.* Stychin, *supra* note 82 at 338-40; Smillie, *supra* note 188 at 239-40; *Economic Negligence*, *ibid.* at 211-28. In the context of psychiatric damage sustained by indirect victims, see *e.g.* T. Weir, Book Review of *Tort Liability of Psychiatric Damage* by J. Mullany & P. Handford (1994) 23 Anglo-Am. L. Rev. 249; Robertson, *supra* note 179.

indignation and disdain."[193] This may be due to courts' lack of awareness of the relevant medical science, to suspicions of malingering, or it may simply reflect society's fears and insecurity vis-à-vis mental illness in general. Whatever the reason, the fact remains that recovery for psychiatric damage has been fraught with difficulties, uncertainty and arbitrary distinctions.

The *Anns/Kamloops* formula is not necessarily the perfect answer to the problem of compensation for psychiatric damage, but we contend that it is a solution which can improve the present state of the law in Canada. Our courts have the opportunity to rely on a truly Canadian solution; they should not hesitate to explore it. The time has come to bring the *Anns/Kamloops* test to the rescue of psychiatric damage victims.

[193] *Justifications and Boundaries*, *supra* note 5 at 91.