

Example 1

Carlill v Carbolic Smoke Ball Co Ltd (1892)

Facts

Mrs Carlill made a retail purchase of one of the defendant's medicinal products: the 'Carbolic Smoke Ball'. It was supposed to prevent people who used it in a specified way (three times a day for at least two weeks) from catching influenza. The company was very confident about its product and placed an advertisement in a paper, *The Pall Mall Gazette*, which praised the effectiveness of the smoke ball and promised to pay £100 (a huge sum of money at that time) to:

... any person who contracts the increasing epidemic influenza, colds, or any disease caused by taking cold, having used the ball three times daily for two weeks according to the printed directions supplied with each ball.

The advertisement went on to explain that the company had deposited £1,000 with the Alliance Bank, Regent Street, London as a sign of its sincerity in the matter. Any proper plaintiffs could get their payment from that sum. On the faith of the advertisement, Mrs Carlill bought one of the balls at the chemists and used it as directed, but still caught the 'flu. She claimed £100 from the company, but was refused it, so she sued for breach of contract. The company said there was no contract for several reasons, but mainly because:

- (a) the advert was too vague to amount to the basis of a contract – there was no time limit and no way of checking the way the customer used the ball;
- (b) the plaintiff did not give any legally recognised value to the company;
- (c) one cannot legally make an offer to the whole world, so the advert was not a proper offer;
- (d) even if the advert could be seen as an offer, Mrs Carlill had not given a legal acceptance of that offer because she had not notified the company that she was accepting;
- (e) the advert was a 'mere puff', that is, a piece of insincere sales talk not meant to be taken seriously.

Decision

The Court of Appeal found that there was a legally enforceable agreement, a contract, between Mrs Carlill and the company. The company would have to pay damages to the plaintiff.

Ratio decidendi

The three Lord Justices of Appeal who gave judgments in this case all decided in favour of Mrs Carlill. Each, however, used slightly different reasoning, arguments and examples. The process, therefore, of distilling the 'reason for the decision' of the court is quite a delicate art. The *ratio* of the case can be put as follows.

Offers must be sufficiently clear to allow the courts to enforce agreements that follow from them. The offer here was 'a distinct promise expressed in language which is perfectly unmistakable'. It could not be a 'mere puff' in view of the £1,000 deposited specially to show good faith. An offer may be made to the world at large and the advert was such an offer. It was accepted by any person, like Mrs Carlill, who bought the product and used it in the prescribed manner. Mrs Carlill had accepted the offer by her conduct when she did as she was invited to do, and started to use the smoke ball. She had not been asked to let the company know that she was using it.

Obiter dictum

In the course of his reasoning, Bowen LJ gave the legal answer to a set of facts which were not in issue in this case. This answer was thus an *obiter dictum*. He did this because it assisted him in clarifying the answer to Mrs Carlill's case. He said:

If I advertise to the world that my dog is lost, and that anybody who brings the dog to a particular place will be paid some money, are all the police or other persons whose business it is to find lost dogs to be expected to sit down and write me a note saying that they have accepted my proposal? Why, of course, they at once look [for] the dog, and as soon as they find the dog they have performed the condition.

If such facts were ever subsequently in issue in a court case, then the words of Bowen LJ could be used by counsel as persuasive precedent.

This decision has affected the outcome of many cases. The information system LEXIS, for example, lists 70 cases in which *Carlill* is cited. It was applied in *Peck v Lateu* (1973) and distinguished in *AM Satterthwaite & Co v New Zealand Shipping Co* (1972).

Example 2

Psychiatric harm

In what circumstances can someone who has suffered psychiatric injury as a result of having witnessed a terrible accident successfully sue the person whose negligence has caused the accident?

The leading case on recovery of compensation in such circumstances is *Alcock v Chief Constable of South Yorkshire Police* (1992), which arose from the Hillsborough Stadium disaster. At the FA Cup semi-final match at Hillsborough Stadium in Sheffield between Nottingham Forest and Liverpool in April 1989, 96 people were killed and over 400 physically injured in a crush which developed owing to poor crowd control by the police. The Chief Constable admitted liability towards those physically harmed. Many more people variously related to, or connected with, the dead and injured suffered psychiatric illness resulting from the shock of witnessing the event, seeing it on television or identifying the bodies. Sixteen claims were heard at first instance, of which 10 succeeded in 1991. Hidden J held: (1) that brothers and sisters, as well as parents and spouses, could sue, but that grandfathers, uncles, brothers-in-law, fiancées and friends could not; and (2) that seeing the scene on television was equivalent to being at the scene itself. The Court of Appeal (1991) dismissed all the claims on the ground that, apart from rescuers, only parents and spouses could claim and that 'a perception through the broadcast of selective images accompanied by a commentary is not such as to satisfy the proximity test'. Ten plaintiffs then appealed unsuccessfully to the House of Lords.

Where was the line to be drawn between sufferers of psychiatric harm who could sue those responsible for the disaster and those who could not? The House of Lords refused to prescribe rigid categories of the potential plaintiffs in nervous shock claims. It ruled that there must generally be a close and intimate relationship between the plaintiff and the primary victim (for example, in the Hillsborough setting, someone who was crushed or asphyxiated) of the sort generally enjoyed by spouses and parents and children. The House of Lords ruled that siblings and other more remote relatives would normally fall outside such a relationship in the absence of special factors. But, for example, a grandmother who had brought up a grandchild since infancy might qualify. Therefore, claims by brothers, sisters and brothers-in-law failed in *Alcock*, while the claim on the part of a fiancée was allowed. One of the judges, Lord Ackner, suggested that in cases of exceptional horror where even a reasonably strong-nerved individual might suffer shock-induced psychiatric injury, a bystander unrelated to the victim might recover damages.

Their Lordships went on to rule that a degree of proximity in time and space between the plaintiff and the accident is required. The plaintiff must therefore either actually be at the accident itself and witness it, or come upon the aftermath in a very short period of time. Identifying a relation several hours after death was not sufficient to pass the legal test. Witnessing the accident via the medium of television will not generally be enough either.

Parents who watched the Hillsborough disaster on television had their claims rejected. This is because television pictures would not normally be equated with actual sight or hearing at the event or its aftermath. Lords Keith and Oliver, did, however, recognise that there might be exceptional cases where simultaneous broadcasts of a disaster were equivalent to a personal presence at the accident. In the Court of Appeal, Nolan LJ gave the example of a balloon carrying children at some live broadcast event suddenly bursting into flames.

The harm for which the person sues, the psychiatric illness, must be shown to result from the trauma of the event or its immediate aftermath. Psychiatric illness resulting from being informed of a loved one's death, however shocking the circumstances, is not recoverable. The approach taken by the House of Lords in *Alcock* is a very pragmatic one. It rejected the simple approach based on strict categories of those who could and could not recover and in what circumstances. In his judgment, Lord Keith said:

... as regards the class of person to whom a duty may be owed to take reasonable care to avoid inflicting psychiatric illness through nervous shock sustained by reason of physical injury or peril to another, I think it is sufficient that reasonable foreseeability should be the guide. I would not seek to limit the class by reference to particular relationships such as husband and wife or parent and child. The kinds of relationship which may involve close ties of love and affection are numerous, and it is the existence of such ties which lead to mental disturbance when the loved one suffers a catastrophe. They may be present in family relationships or those of close friendship, and may be stronger in the case of engaged couples than in that of persons who have been married to each other for many years. It is common knowledge that such ties exist, and reasonably foreseeable that those bound by them may in certain circumstances be at real risk of psychiatric illness if the loved one is injured or put in peril. The closeness of the tie would, however, require to be proved by a plaintiff, though no doubt being capable of being presumed in appropriate cases. The case of a bystander unconnected with the victim of an accident is difficult. Psychiatric injury to him would not, ordinarily, in my view, be within the range of reasonable foreseeability, but could not perhaps be entirely excluded from it if the circumstances of a catastrophe occurring very close to him were particularly horrific.

Thus, the *ratio decidendi* of this case, while being one which is reasonably clear, is one nevertheless whose precise application in future cases is difficult to predict. In a subsequent case, *McFarlane v EE Caledonia Ltd* (1994), the Court of Appeal had to apply the general principle expounded by the Lords in *Alcock*. In this case, the plaintiff witnessed the destruction of an oil rig (the Piper Alpha) from aboard a support vessel which had been involved in attempts to rescue survivors of the explosion which tore apart the rig. The plaintiff was not himself involved directly in the rescue effort, and was far enough away from the burning rig to avoid any personal danger to himself. Even so, the events which he witnessed were horrific almost beyond imagining. He had to watch people in agony, burning to death, as the rig was devastated by fire and explosions. Although technically a 'bystander' to the incident because he was neither a relative of any of the primary victims nor a rescuer, he does seem to fit within the last category of possible claimants described above by Lord Keith. His case, though, was rejected by the Court of Appeal, which suggested that practical and policy reasons militated against allowing him to recover.