THE COURT OF APPEAL
UNAPPROVED
NO REDACTION NEEDED

Record Number: 2020/109
High Court Record Number: 2018/652P

Noonan J.

Neutral Citation Number [2022] IECA 28

Collins J.

Binchy J.

BETWEEN/

LISA SHEEHAN

PLAINTIFF/RESPONDENT

-AND-

BUS ÉIREANN/IRISH BUS AND VINCENT DOWER

DEFENDANT/RESPONDENT

JUDGMENT of Mr. Justice Noonan delivered on the 4th day of February, 2022

1. Liability for purely psychiatric injury is an area of law that has presented the courts with significant challenges over the years. In the case of physical injuries, it is normally relatively straightforward to identify the victim(s) of the event complained of, which will usually be a small number of people. Where purely psychiatric injury is concerned however, the range of victims may be potentially unlimited.

2. Defining the scope of the duty of care and the person or classes of persons to whom it is owed has been the subject of much judicial analysis both here and throughout the common law world. The results have not always been consistent or satisfactory. Judges have wrestled with difficult issues of definition and policy and have adopted a variety of approaches, some perhaps more successful than others.

3. The law has attempted to keep pace with the rapid advance of technology in the field of instantaneous global communication. The widespread use of personal devices such as smart phones has meant that horrific events can often be witnessed as they happen or within seconds by a worldwide audience of millions. The psychological effects on those who witness such things can be significant. The law has struggled to develop coherent policies, or what have been sometimes called control mechanisms, to limit what would otherwise be the liability of the wrongdoer to compensate the world at large.

4. This appeal concerns a claim brought by the respondent ("the plaintiff") for purely psychiatric injuries suffered by her in consequence of witnessing scenes of horror following a road traffic accident.

The Facts

5. On the evening of the 28th January, 2017, during the hours of darkness, a motor car driven by a Mr. John O'Connor was travelling west on the N72 national secondary road near Mallow in County Cork when it collided head on with a bus coming in the opposite direction. Mr. O'Connor was tragically killed in the accident. It is not in dispute that Mr. O'Connor's negligence was solely responsible for the collision and his insurer, FBD Insurance plc, nominated Vincent Dower to represent Mr. O'Connor's estate as defendant. The proceedings have been discontinued against the owners of the bus, Bus Éireann/Irish Bus.

6. The plaintiff was driving from work in Cork city to her home in the village of Banteer and was travelling in the same direction as Mr. O'Connor, some short distance behind him. The plaintiff did not see the collision occur but her car was struck by flying debris from the impact which caused her to brake to a halt. Her evidence to the High Court was that she also heard a loud bang, although she was challenged on this as it was not mentioned in the statement given by her to the gardaí, some nine days after the accident.

7. When she stopped her car, she saw Mr. O'Connor's severely damaged stationary vehicle on the road a short distance ahead. She ran to the car and looked in. She saw, in the back of the car, what initially appeared to be the partially decapitated body of a child. In fact, it was the remains of Mr. O'Connor, propelled to the rear of the car by the huge force of the impact. She suffered a great fright and shock on witnessing this but managed to call the emergency services on her mobile phone. She then searched the surrounding area for other victims who might have been thrown from the car. She also saw the bus driver whose face was covered with blood. After the emergency services arrived and the plaintiff had rendered what assistance she could, she went home.

8. It is not disputed that as a result of these events, the plaintiff suffered psychiatric injury for which she was awarded damages by the High Court. The quantum of these damages is not contested in this appeal.

The High Court

9. Only two witnesses gave evidence at the hearing before the High Court (Keane J.) sitting in Cork, the plaintiff herself and a consulting engineer called on her behalf, Mr. John G. Sullivan. The medical reports were agreed. Mr. Sullivan's evidence established that the debris which struck the plaintiff's car had punched a hole in the near side front bumper. He

also noted that a head lamp washer cover was missing and there was a slight scratch close to the wheel arch.

10. Mr. Sullivan's evidence was to the effect that he estimated that the plaintiff's vehicle was approximately 100 metres from the point of impact when the collision between the car and the bus occurred. He was also of the view that having regard to the forces involved in the crash and his experience of similar collisions, he would not have expected debris to have travelled much more than 100 metres from the point of impact. The trial judge accepted this evidence which does not appear to have been put in issue by the defence.

11. While there was therefore little or no factual dispute between the parties, the case was defended on a purely legal basis, namely that Mr. O'Connor owed no relevant duty of care to the plaintiff in the circumstances of the case. Two arguments were advanced in support of this contention. The first was that the plaintiff was properly to be regarded in law as a "secondary victim" in the sense discussed in the authorities analysed by the trial judge and she did not satisfy the criteria that would entitle a secondary victim to damages. The second argument rested on the premise that where the primary victim suffers injury as a result of his own negligence, the psychiatric injury suffered by the plaintiff as a result of witnessing the defendant's self-inflicted injury is not compensable in law as a matter of policy.

12. In an eloquent judgment, Keane J. first turned to an analysis of the development of the law in relation to liability for negligently inflicted psychiatric injury. He identified the leading modern authority in this jurisdiction, being the judgment of the Supreme Court in *Kelly v. Hennessy* [1995] 3 IR 253, recently applied by this court in *Harford v. ESB* [2021] IECA 112.

13. The five principles identified in the judgment of Hamilton C.J. as being essential prerequisites to the establishment of liability, represent the touchstone in Ireland:

(1) A plaintiff must establish that he or she actually suffered "nervous shock". This term has been used to describe "any recognisable psychiatric illness" and the plaintiff must prove that he or she has suffered a recognisable psychiatric illness if he or she is to recover damages for "nervous shock".

(2) A plaintiff must establish that his or her recognisable psychiatric illness was "shock-induced" – see further in this regard the discussion in *Harford*.

(3) A plaintiff must prove that the nervous shock was caused by a defendant's act or omission.

(4) The nervous shock sustained by a plaintiff must be by reason of actual or apprehended physical injury to the plaintiff or a person other than the plaintiff.

(5) If a plaintiff wishes to recover damages for negligently inflicted nervous shock, he must show that the defendant owed him a duty of care not to cause him a reasonably foreseeable injury in the form of nervous shock.

14. The judge noted that the resolution of the case turned on the application of the fifth limb of the test, *i.e.*, did the deceased owe the plaintiff a duty of care? He referred to the test for the existence of a duty of care discussed in the judgment of Keane C.J. in *Glencar Exploration plc v. Mayo County Council (No. 2)* [2002] 1 IR 84. He then turned to analyse the first argument that because the plaintiff was a "secondary victim", she could not satisfy the test for establishing liability set out in a succession of judgments of the House of Lords in the U.K., in particular *Alcock v. Chief Constable of South Yorkshire Police* [1992] 1 AC 310, *Page v. Smith* [1996] AC 155 and *White v. Chief Constable of South Yorkshire Police* [1999] 2 AC 455.

15. He summarised the effect of these decisions as being, in the first instance, to divide claimants into two categories, that of primary and secondary victims. Secondly, the House of Lords recognised that for a secondary victim to succeed, the plaintiff would have to establish (1) a close tie of love and affection with the person killed, injured or imperilled, (2) that the plaintiff was close to the incident in time and space and (3) that the plaintiff directly perceived the incident rather than, for example, hearing about it from a third person. These have become known as the *Alcock* control mechanisms.

16. The defendant here suggests that the plaintiff is a secondary victim who cannot satisfy the first *Alcock* control mechanism. The distinction between primary and secondary victims was posited in *Alcock* by Lord Oliver (at p. 407) as being "those cases in which the injured plaintiff was involved, either mediately or immediately, as a participant, and those in which the plaintiff was no more than the passive and unwilling witness of injury caused to others."

17. Turning to an examination of the position in Irish law, the judge found the decision of His Honour Judge McMahon, then a Circuit Court judge, in *Curran v. Cadbury (Ireland) Ltd.* [2000] 2 ILRM 343, to be a most persuasive authority in its analysis of the legal position in both jurisdictions. The judge referred to a number of subsequent Irish decisions including *Fletcher v. Commissioners of Public Works* [2003] 1 IR 465 and *Devlin v. The National Maternity Hospital* [2008] 2 IR 222. In particular, he noted (at para. 47), by reference to a quotation from *Charlesworth & Percy on Negligence* (13th ed., Sweet & Maxwell 2014) that "the primary/secondary victim distinction has failed to take root in other common law jurisdictions including Australia, New Zealand and Canada. More recent judgments of the UK Supreme Court have questioned whether the distinction should be retained."

18. Having considered these authorities, the judge concluded that the test for liability for negligently inflicted psychiatric injury is that set out by Hamilton C.J. in *Kelly*, and the fifth

requirement of that test, the existence of a duty of care, fell to be determined by reference to the dicta of Keane C.J. in *Glencar*. He concluded that an inflexible adherence to the rigid primary/secondary victim distinction articulated in *Alcock* has no role to play in Irish jurisprudence. His view accordingly was that nothing turned on the alleged primary/secondary distinction in the present case, rejecting the defendant's argument on the point.

19. However, lest he be mistaken in that regard, he addressed the issue and concluded that the plaintiff was in fact a primary victim so that the control mechanisms had no application.

20. Separately, the court discussed the position of the plaintiff as a rescuer before reaching the conclusion that she was entitled to succeed in that capacity also and rejected the argument, advanced on foot of English authority, that there is a threshold requirement for a rescuer to objectively expose herself to danger in order to qualify. Here again, the judge concluded that he was satisfied that she had, in fact, so exposed herself and therefore, in any event, qualified.

21. Turning to the second argument, the judge noted that this was entirely predicated on a judgment of the High Court of England and Wales in *Greatorex v. Greatorex* [2000] 1 WLR 1970. In that case, Cazalet J. held that where the primary victim suffered his injuries as a result of his own negligence, as in the present case, the requirements of policy dictated that the secondary victim, in that case the plaintiff's father, who saw his son, the defendant, in a severely injured condition, could not recover for the psychiatric injury he sustained as a result. The judge was of the view that this did not represent the law in Ireland and he declined to follow it for the reasons he gave.

The Appeal

22. In his admirably concise grounds of appeal, the defendant in essence re-agitates the contentions advanced in the High Court, arguing that the trial judge fell into error in holding that a duty of care was owed to the plaintiff in the circumstances.

23. An essential ingredient of liability in negligence is reasonable foreseeability, but it is not the only one. While it is central, it has never, of itself, been sufficient. Although notions of proximity tend to feature more prominently in nervous shock cases of the kind here, it has always been a vital component of the duty of care.

24. The celebrated judgment of Lord Atkin in *Donoghue v Stevenson* [1932] AC 562 established the "neighbour principle" which embodies the test of reasonable foreseeability. That proximity is an indispensable part of this test is well explained by Lord Ackner in his speech in *Alcock* (at 402): -

> "Although it is a vital step towards the establishment of liability, the satisfaction of the test of reasonable foreseeability does not, in my judgment, *ipso facto* satisfy Lord Atkin's well known neighbourhood principle enunciated in *Donoghue v Stevenson* [1932] A.C. 562, 580. For him to have been reasonably in contemplation by a defendant he must be:
>
> > 'so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.'
>
> The requirement contained in the words 'so closely and directly affected… that' constitutes a control upon the test of reasonable foreseeability of injury. Lord Atkin was at pains to stress, at pp. 580 – 582, that the formulation of a duty of care, merely in the general terms of reasonable foreseeability, would be too wide unless it were

'limited by the notion of proximity' which was embodied in the restriction of the duty of care to one's 'neighbour'."

25. Much judicial erudition and scholarship has, over the years, been engaged in the attempt to define the concept of proximity, described by Keane C.J. in *Glencar* as "notoriously difficult and elusive" (para. 122). He came to the conclusion in the same case that courts were not obliged to hold that a duty of care arises in every case where injury or damage is foreseeable and the proximity test is satisfied, but should take the further step of considering whether the imposition of liability is, in all the circumstances of the case, just and reasonable.

26. The *Alcock* control mechanisms represented an attempt by the English courts to define proximity in the context of nervous shock cases where "secondary" victims are concerned. Although *Alcock* and the later judgments of the House of Lords have been considered in this jurisdiction on many occasions, all the judgments in which they are considered have stopped short of adopting the primary/secondary classification.

27. *Mullaly v Bus Éireann* [1992] ILRM 722 appears to have been the first aftermath case to come before our Superior Courts. Of course, it pre-dated *Alcock*. Denham J. (then a judge of the High Court) relied on some of the early Irish cases including *Byrne v Great Southern and Western Railway Company of Ireland* (unreported, February 1884), cited in the judgment in *Bell v Great Northern Railway Company of Ireland* (1896) 26 L.R. Ir. 428, in support of her conclusion that damages could be awarded for purely psychiatric injury.

28. The plaintiff in *Mullaly* had witnessed distressing scenes involving her husband and children in hospital in the aftermath of a road traffic accident, in consequence of which she suffered post-traumatic stress disorder. Denham J. held that this was reasonably foreseeable and that the duty of care extended to injuries which are reasonably foreseeable. She found

the judgment of the House of Lords in *McLoughlin v O'Brian* [1982] 2 All ER 298 of assistance and, in particular, the judgment of Lord Bridge.

29. In that case, Lord Bridge was in the majority in considering that reasonable foreseeability was the primary criterion, whereas Lord Wilberforce, in the minority, was of the view that policy considerations should be applied to limit the scope of liability. The views of Lord Wilberforce proved very influential in *Alcock* and the later judgments of the House of Lords.

30. *Kelly v Hennessy* was also an aftermath case. The leading judgment was delivered by Hamilton C.J. with whom Egan J. agreed. A separate judgment was delivered by Denham J. (as she then was), concurring on the liability finding but dissenting on the issue of damages. The Chief Justice identified the five criteria, already set out, that had to be satisfied for the plaintiff to succeed. Like *Mullaly*, the plaintiff in *Kelly* suffered nervous shock as a result of witnessing severe injuries to her husband and children who she saw in hospital in the aftermath of a road traffic accident.

31. In his judgment, the Chief Justice did not refer to *Alcock* or make any reference to the primary/secondary victim classification. He instead placed particular reliance on *McLoughlin v O'Brian* and the judgment of the Australian High Court in *Jaensch v Coffey* [1984] 155 C.L.R. 549. In several passages in the judgment, the Chief Justice noted that the plaintiff came within the defendant's duty of care, importantly observing that this was not in issue in the appeal. While he did not expressly refer to proximity, he said that the relationship between the plaintiff and the person injured must be close.

32. In the later case of *Fletcher*, Geoghegan J. in his judgment commented on the judgment of Hamilton C.J. in *Kelly* noting (at p. 492-3): -

> "Without necessarily endorsing the terminology 'primary victim' and 'secondary victim' which has received judicial and academic criticism, it is not entirely clear whether the judgment of Hamilton C.J. applies only to a so-called secondary victim or whether it applies to a claim for damages for psychiatric injury only, brought by any victim, whether primary or secondary."

33. In her judgment in *Kelly*, Denham J. expressly referred to the issue of proximity and more particularly, proximity of relationship, proximity in a spatial context and proximity in a temporal sense. She appears to have derived this from the judgment of Lord Wilberforce in *McLoughlin v O'Brian*, in contrast somewhat to her earlier views in *Mulally*. However, she went on to say that it was not necessary to choose between what she described as either the general or the more restricted approach in common law to decide the appeal. She did however refer to the plaintiff as a secondary victim to the accident. Notably, Denham J. did not refer in terms to *Alcock* or expressly approve the primary/secondary classification which arose in that case.

34. As noted above, considerable reliance was placed by the trial judge on the influential judgment of His Honour Judge McMahon, then a judge of the Circuit Court, in *Curran v Cadbury Ireland Limited* [2000] 2 ILRM 343. As acknowledged by the trial judge, the judgment in *Curran* also has significance in the context of Judge McMahon being one of the authors of the leading work on the law of torts in this jurisdiction.

35. The plaintiff in *Curran* was working at a conveyor belt carrying chocolate bars in the defendant's factory. The machine was turned off because, unknown to the plaintiff, there was a fitter inside the machine repairing it. The plaintiff turned the machine on and immediately became aware of the screams of the fitter inside. She immediately turned it off

thinking she had killed or seriously injured the fitter, who was in fact unharmed. She suffered psychiatric injury as a result.

36. Judge McMahon noted that unlike other nervous shock cases to have recently come before the Irish courts, including *Mullally* and *Kelly*, the plaintiff was a participant in, and not a mere observer of, the accident. If the primary/secondary victim classification were to be employed, she would thus be a primary victim. In commenting on the distinction, the judge said (at p. 3-4): -

> "Primary and secondary victims
>
> It is appropriate at this juncture to say a word about this terminology since some of the problems that beset this area are language based, as the continued use of the term 'nervous shock' itself clearly shows.
>
> There has been a tendency in recent years, especially in English cases, to divide victims in these type of cases into two categories: primary victims and secondary victims (see Lord Oliver in *Alcock v. Chief Constable of South Yorkshire Police* [1992] 2 AC 310 and Lord Lloyd in *Page v. Smith* [1996] 1 AC 155). Such categorisation is not without difficulties and has been criticised (see Law Commission Report (England), Liability for Psychiatric Illness [1998] Law Com No. 249, at para. 5.50, which followed the Law Commission's Consultation Paper No. 137 (1995), where the suggestion is that the distinction should be abandoned as it is unhelpful). For my own part, I am not convinced that the separation of victims into these two categories does anything to assist the development of legal principles that should guide the courts in this complex area of the law. Hamilton C.J. (with whom Egan J. agreed) did not refer to the distinction in *Kelly v Hennessy* [1995] 3 IR 253; [1996] 1 ILRM 321 the leading Irish case on the matter, and while Denham J., in the

same case, used the term 'secondary victims' to describe the aftermath relatives who were plaintiffs in that case, her primary focus was naturally on the plaintiff before her rather than on persons who were more directly involved in the accident. She did, however, give a clear definition as to what she meant by the terms when she said of the victim before her (at p. 269): -

> 'the plaintiff was not a primary victim; that is to say she was not a participant in the accident. Her case is that she is a secondary victim; that is to say one who did not participate in the accident, but was injured as a consequence of the event.' "

37. The judge said that naturally plaintiff lawyers would try to ensure that their clients were classified as primary victims to get into what the judge described as a policy free zone. He felt that the development of the classification arose from floodgate fears, fears of fraud and evidentiary questions.

38. He noted that Denham J. in *Kelly* appeared to consider whether liability should be determined on principles of reasonable foreseeability *simpliciter*, as suggested by Lord Bridge in *McLoughlin v O'Brian* and which she appeared to favour in *Mullally*, or whether the reasonable foreseeability test for nervous shock cases should be restricted by proximity factors i.e. on policy grounds as suggested by Lord Wilberforce in *McLoughlin v O'Brian*. In the end, she concluded that it was unnecessary to choose between the two to decide the case.

39. Judge McMahon considered that the Supreme Court in *Kelly* had approached the case on basic principles and what he described as the basic concepts of neighbourhood and proximity. He approached the case on the same basis. He considered that whether one applied the proximity test or the "close and direct criterion", the plaintiff was clearly within

the range of persons to whom a duty of care was owed. Control mechanisms did not arise for consideration.

40. A factor of significance in *Curran* was that, as Judge McMahon pointed out, the defendant was the plaintiff's employer who owed her specific duties arising from that legal relationship. The foreseeability of the injury to the plaintiff meant that liability should follow unless policy reasons operated against it, of which there were none. He said that most of the English authorities on this topic were aftermath cases where the plaintiffs were not participants in the accident. The English cases were concerned with the aftermath of accidents as they affected bystanders and rescuers, subsequently classified as "secondary victims". Policy limitations, relational, spatial, temporal and perceptional, might be imposed, which one academic commentator described as "nearness, hearness and dearness" factors - see Mullany and Hanford, *Tort Liability for Psychiatric Damage* (The Law Book Co. Ltd, 1993) at p. 12.

41. Judge McMahon also highlighted the difficulties that have arisen in England in the context of claims by employees and rescuers for purely psychiatric injury. In the post-*Alcock* case of *Frost v Chief Constable of South Yorkshire Police* [1997] 1 All ER 540, another Hillsborough disaster claim, police officer rescuers at the football ground brought claims for psychiatric injury against their employer, the Chief Constable. They succeeded before the Court of Appeal on the basis that the *Alcock* control mechanisms did not apply to them because of an employer's duty of care to guard against injury to his employees.

42. This gave rise to the rather unedifying result that police officers obtained compensation in circumstances where claims by close relatives of the same primary victims were denied. On appeal to the House of Lords sub nom *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, the House of Lords recognised the perceived injustice in

this outcome, feeling compelled to introduce the further restriction that only rescuers within the area of physical risk were entitled to succeed, even against their employer. The Lords accordingly allowed the appeals and dismissed the claims. As Judge McMahon points out, this in turn has led to further criticism of this approach on the basis that it constitutes an unjustified limitation on the rights of workers.

43. Another post-*Alcock* case decided by the House of Lords, *Page v Smith* [1996] AC 155 involved a primary victim so that the control mechanisms did not arise but threw up a different issue. In that case, the plaintiff was involved in a road traffic accident where he suffered a purely psychiatric injury that was not foreseeable. However, he was held entitled to succeed on the basis that because he was within the range of foreseeable physical injury, that was sufficient to found a claim for purely psychiatric injury. That too has been the subject of considerable criticism.

44. This does not appear to represent the law in this jurisdiction, as Hamilton C.J. made clear in *Kelly*, at least insofar as aftermath victims are concerned. However, Geoghegan J. subsequently in *Fletcher* pointed to an apparent ambiguity in the judgment of Hamilton C.J. in *Kelly* in this regard as it is unclear whether the foreseeability of purely psychiatric injury is a limitation on claims for such injury by only secondary victims or all victims.

45. At the end of his judgment, Judge McMahon provided an extremely helpful summary of the position in both English and Irish law as it then stood. He said (at p. 359): -

> "After *White* the English position is as follows: persons who suffer negligently inflicted psychiatric illness are divided into two groups: primary victims and secondary victims. Primary victims are variously defined as those who were also exposed to physical injury or who were in the area of risk of physical injury or who were participants or directly involved in the accident. Secondary victims include

> mere bystanders or spectators. There appear to be no other categories, so that all claimants are either primary or secondary victims. The law views secondary victims as being less deserving and consequently, it demands that those victims must, for policy reasons, satisfy the courts in addition to the ordinary negligence requirements, that there was a 'close' relationship between the claimant and the victim, that they were spatially and temporally near the accident and that they perceived the events through their own senses."

46. He went on to say that employee and rescuer claimants in England now had to satisfy the control mechanisms.

47. Many of the authorities both here and in England speak of participating or being a participant in the accident or directly involved in it. In this passage, Judge McMahon suggests, in effect, that a "participant" is a person who was exposed to physical injury or in the area of risk of such injury. For that reason, in general, aftermath claimants cannot be primary victims. It is suggested by the defendant in the instant appeal that the plaintiff cannot succeed as she is an aftermath, and thus secondary, victim.

48. In contrast to the English position, Judge McMahon points out that the Irish law is significantly different. He draws attention to the fact that there is no reference in *Kelly* in the majority judgment of the Chief Justice to primary or secondary categories. He points out that the Irish courts have been more influenced by the approach in Australia in cases such as *Jaensch v Coffey.* which has been expressly rejected in England. He says that the divergence of approach between the two jurisdictions is becoming increasingly obvious and perhaps inevitable.

49. Ultimately, while Judge McMahon was undoubtedly sceptical of the primary/second classification, he acknowledged that the question whether such a classification should be

accepted as a matter of Irish law was one of several questions arising in this area of the law that "had yet to be confronted by the Irish courts" (at p. 360).

50. The judgment in *Curran* was subsequently referred to with approval in the judgments delivered in the Supreme Court in *Fletcher* by Keane C.J. and Geoghegan J. In *Fletcher*, the plaintiff developed a psychiatric illness as a result of an irrational fear of contracting a form of cancer due to his exposure to asbestos in the course of his employment. Keane C.J. approved the judgment of Hamilton C.J. in *Kelly* as setting out the circumstances in which damages for nervous shock are recoverable.

51. Keane C.J. recognised, however, that *Fletcher* was not in fact a nervous shock case in the sense that no sudden traumatic event had occurred. He noted that while the House of Lords decisions, to which I have referred, described the primary/secondary victim classification, Hamilton C.J. did not refer to it at all, although it was mentioned by Denham J. Although the distinction did not arise for consideration in *Fletcher* because the sole victim was the plaintiff, Keane C.J. recognised that policy considerations had a role to play in limiting the extent of claims for psychiatric injury.

52. He referred to Judge McMahon's decision in *Curran* in the following terms (at p. 476): -

> "That 'nervous shock' suffered by an employee who does not have to be characterised as a 'primary' or 'secondary' victim of negligence in the workplace is properly compensatable where it is the result of such negligence is admirably demonstrated by the Circuit Court decision of His Honour Judge McMahon in *Curran v Cadbury (Ireland) Limited* [2000] 2 ILRM 343, where the legal issues are analysed with his customary erudition."

53. He then turned to an analysis of the foreseeability of psychiatric injury as discussed in many of the cases I have already mentioned. He noted that the traditional view in the English courts was that for liability for psychiatric injury to arise, it must have been reasonably foreseeable. A different view was taken in *Page v Smith* by the majority which decided that where the plaintiff was a primary victim, it was sufficient that some injury was foreseeable, even if psychiatric injury *per se* was not.

54. Where secondary victims were concerned, the position remained that they could not recover unless the psychiatric injury was foreseeable. He noted the subsequent criticism of the majority decision in *Page v Smith*, observing that it does not appear to have been shared by the majority in *White*. He felt it unnecessary to consider the wider implications of the decision in *Page v Smith* as it did not arise on the facts of the instant appeal. The Chief Justice saw little difficulty in concluding that it was reasonably foreseeable that the plaintiff would suffer a psychiatric injury on being informed of the risk of contracting the disease, irrespective of the extent of that risk.

55. Despite that however, Keane C.J. recognised that because the injury in the case did not arise from nervous shock in the traditional sense, the case fell into uncharted territory where policy considerations had a role to play. He discussed those in some detail, although I think it is fair to say that the policy issues he considered are not of particular relevance in the context of the instant appeal. He was however satisfied that those considerations meant that the law should not be extended in this jurisdiction to allow recovery for psychiatric injury resulting from an irrational fear of contracting a disease. It might thus be said that Keane C.J. answered the question he had posited in *Glencar*, namely whether despite the presence of reasonable foreseeability and sufficient proximity, it was reasonable to impose a duty of care, in the negative.

56. In his concurring judgment, Geoghegan J., perhaps echoing the views of Lord Ackner in *Alcock*, said that reasonable foreseeability is not the only determining factor and elements such as proximity, reasonableness in the imposition of a duty of care and public policy may all play a role. He cited the five guiding criteria identified by Hamilton C.J. in *Kelly* while noting the potential ambiguity arising. It was not necessary to resolve that however because Geoghegan J. considered that *Kelly* did not govern the appeals before him. There was no "accident", unlike *Kelly*.

57. He embarked on a detailed analysis of many of the authorities which in his view demonstrated clearly the necessity for control mechanisms in relation to psychiatric injury claims. He looked in detail at the two schools of thought in *McLoughlin v O'Brian,* exemplified in the speeches respectively of Lord Bridge and Lord Wilberforce, noting that in *Jaensch v Coffey*, heavily relied upon by Hamilton C.J. in *Kelly*, the views of Lord Wilberforce were taken as "realistic and correct" by Gibbs C.J. He also found strong support for the introduction of policy considerations in the judgment of Deane J. in the same case. The foreseeability of the injury did not equate to a duty of care in itself. The views of Brennan J. were to like effect and consistent with the judgment in *Kelly*.

58. He referred to *Alcock* for the purpose only of eliciting some general principles which might be applicable generally to claims for psychiatric injury. However, he said that there were "great problems" arising out of the actual decision in that case and he was not to be taken in any way as either approving or disapproving of it.

59. He noted that Lord Oliver had introduced the distinction between primary and secondary victims in the same case but considered it to be of little importance to the index appeal. Even where courts did not refer to policy expressly, it could be found in concepts of proximity or foreseeability as an underlying "hidden agenda"- see p. 506. Geoghegan J.

went on to consider the decision of the House of Lords in *Page v Smith*, describing (at p. 507) the views of the majority as "highly controversial". It did not however assist the analysis in *Fletcher*.

60. Again noting the ambiguity in *Kelly*, Geoghegan J. said that the House of Lords had rather arbitrarily held that, in the case of secondary victims but not in the case of primary victims, the defendant will not be liable unless psychiatric injury is foreseeable in a person of normal fortitude. That is, he said, also the law here in relation to secondary victims and it may well be the law in relation to primary victims, having regard to the decision of the Supreme Court in *Kelly*.

61. The last of the English nervous shock cases considered by Geoghegan J. was *White* and he quoted *in extenso* from the speech of Lord Hoffmann essentially advocating the necessity for pragmatic control mechanisms in actions for purely psychiatric injuries, with which he expressed agreement. On the question of extending liability for psychiatric injuries to rescuers, Lord Hoffmann was against taking this step for two reasons, the second of which Geoghegan J. felt was of some relevance.

62. He quoted (at p. 512) a passage from Lord Hoffmann's speech which included the following: -

> "But I think that such an extension would be unacceptable to the ordinary person because (though he might not put it this way) it would offend against his notions of distributive justice. He would think it unfair between one class of claimants and another, at best not treating like cases alike and, at worst, favouring the less deserving against the more deserving. He would think it wrong that policemen, even as part of a general class of persons who rendered assistance, should have the right to

> compensation for psychiatric injury out of public funds while the bereaved relatives are sent away with nothing."

63. Geoghegan J. felt that issues of distributive justice were involved in considering whether to allow the claims in *Fletcher*. He then turned to the fear of disease cases, primarily from the US, and derived a number of public policy reasons for denying redress in such cases which are not particularly germane here beyond the fact that they demonstrate clearly that policy considerations, whether so described or not, have an important role to play in the context of claims for purely psychiatric injury. In summarising his conclusions, Geoghegan J. made a number of pertinent observations, the first of which was (at p. 519): -

> "Reasonable foreseeability is not the only determining factor in establishing a duty of care. 'Proximity' which is given an elastic definition in the decided cases, the reasonableness of the imposition of a duty of care and questions of public policy can be additional determining factors."

64. Concerning whether the plaintiff before him was to be regarded as a "secondary victim" as the defendants argued, he said: -

> "Having regard to the view I have taken as to the trial judge's finding, I do not find it necessary to express any final opinion on this matter not least because the primary/secondary distinction has been criticised (see for instance the judgment of His Honour Judge McMahon in *Curran v Cadbury (Ireland) Limited* [2000] 2 ILRM 343)."

65. He took the view, in the circumstances of the case, that it would be unreasonable to impose a duty of care upon employers to guard against mere fear of a disease even if such fear might lead to a psychiatric condition.

66. Finally on this issue, it seems to me that each of these considerations fed into the decision of the High Court (Kearns J. as he then was) in *Cuddy v Mays* [2003] IEHC 103 which followed shortly after the judgment in *Fletcher*. In *Cuddy*, the plaintiff was a hospital porter who witnessed scenes of devastation involving close relatives following a road traffic accident where the victims were brought to the hospital at which he was working. In referring to the discussion of the case law appearing in both *Curran* and *Fletcher*, Kearns J. said (at p. 4): -

> "In those cases, lengthy and detailed consideration was given to various legal concepts which bear in on this issue, including foreseeability, control mechanisms for limiting the category of persons entitled to recover, the circumstances in which recovery can take place, the reasonableness of the imposition of a duty of care and questions of public policy which may be taken into account by judges in determining whether or not it is appropriate in any given case to make an award in damages."

67. On the facts of the case, Kearns J. felt that it was necessary to look no further than the decision in *Kelly* to decide the issue. Much of the defendant's argument in that case turned on the fact that the victims were not the spouse or child of the plaintiff and policy considerations should exclude his claim. Kearns J. rejected that contention, considering that the case turned on the issue of proximity of relationships as identified by Denham J. in *Kelly*. His view was that there was undoubtedly a close proximate relationship between the plaintiff and the victims which entitled him to succeed. He felt there was merit in a clear policy defining the limits of the category of person to whom a duty was owed, as in for example the categories of statutory dependants entitled to claim in fatal injury cases under the terms of the Civil Liability Act, 1961 as amended.

Conclusions

68. An analysis of all these authorities leads me to conclude, as did the trial judge, that the primary/secondary classification developed by the English courts, and by extension the associated control mechanisms, have not, at least to date, been adopted into the law of this jurisdiction. As the judge recognised, the imposition of liability in this case is to be approached from the standpoint, approved in both *Glencar* and *Fletcher*, of reasonable foreseeability, proximity and the reasonableness of the imposition of a duty of care on the facts of the case.

69. I also agree with the conclusion of the High Court that even if one were to accept the primary/secondary victim classification, the plaintiff would be properly regarded as a primary victim. As her car was struck by flying debris from the accident, she was clearly within the area of risk of physical injury and thus properly regarded as a participant, or involved, in the accident. Counsel for the defendant fairly conceded that the defendant would undoubtedly be liable had the debris gone through the windscreen and struck the plaintiff, instead of going through the bumper. It might equally have pierced a tyre and caused a blowout.

70. It seems to me that it is beyond argument that it was reasonably foreseeable by Mr. O'Connor that the plaintiff might suffer personal injury, either physical, psychiatric, or both, as a result of his negligence. It is therefore not an aftermath case like *Mullally* or *Kelly*, although the defendant has sought to characterise it as such, seizing on the plaintiff's description in her pleadings and evidence of "coming upon" the accident. This language is used descriptively and cannot I think be intended as importing some form of legal classification. The facts speak for themselves and are undisputed.

71. Proximity considerations only arise in the sense intended by Lord Atkin of the plaintiff being a person so closely affected by the actions of the defendant as to be reasonably within his contemplation when directing his mind to those actions. Other proximity factors discussed in the context of the English cases dealing with secondary victims, and in particular, proximity of relationship, are irrelevant here. The defendant concedes that the plaintiff meets the first four criteria in *Kelly* and the case turns entirely on the final criterion, the duty of care. I am satisfied, from the uncontested facts as found by the trial judge, that Mr. O'Connor did owe a duty of care to the plaintiff who accordingly satisfies the last element of the *Kelly* test. In my judgment, it is just and reasonable to impose such a duty in this case and there are no relevant policy factors which would suggest otherwise.

72. In his judgment, the trial judge considered in some detail, as part of the first question, whether the plaintiff ought properly be regarded as a rescuer. The relevance of this appears to lie in the fact that if the plaintiff was to have been regarded as a secondary victim, who, without more, might fall foul of the *Alcock* control mechanisms, she might yet qualify under the English rules that have evolved concerning psychiatric injury suffered by rescuers.

73. These authorities suggest that rescuers are to be treated as belonging to a different category than mere bystanders. The decision of the Law Lords in *White* concerned police rescuers and has given rise to the issues identified earlier in this judgment. As is evident in particular from the speeches of Lord Steyn and Lord Hoffmann in *White*, the court was acutely conscious of the very real danger of bringing the law into disrepute in the eyes of the public by allowing policemen doing their duty to obtain compensation while distraught relatives and friends could not. Perhaps to deal with this glaring anomaly, the Lords introduced the additional requirement for recovery that the rescuer should him or herself be placed in physical danger to qualify. The trial judge clearly had difficulty with that concept

but held that, in any event, the plaintiff was indeed exposed to such danger and would thus qualify even were this additional stricture to be applied.

74. Having regard to the conclusion I have already reached that the plaintiff was owed a duty of care in this case, I do not find it necessary or useful to express any concluded view on this point. That should, I think, await a case in which it requires to be decided.

75. The same applies to the final issue considered by the trial judge on the second argument advanced by the defendant. It will be recalled this argument goes that where the primary victim is the negligent defendant and the plaintiff suffers psychiatric injury from witnessing the defendant's self-inflicted injury, policy dictates that no recovery should be permitted. This argument rests primarily on the first instance judgment of the English High Court in *Greatorex*.

76. The plaintiff was the father of the defendant. The defendant son drove a car while under the influence of alcohol and crashed, becoming trapped in it. He suffered severe injuries caused by his own negligence. The fire brigade was summoned to assist and the plaintiff, a fire officer, came to the scene and attended to his son. This experience caused him to suffer a significant psychiatric injury for which he brought proceedings against the son or, in effect, the insurers of the car being driven by the son.

77. In an interesting judgment, Cazalet J. found that while there were some *obiter dicta* of relevance to be found in English and Australian cases, the issue had never actually been decided by the courts of England and Wales. His conclusion was that, despite the plaintiff satisfying the conditions in English law for claiming damages for psychiatric injury as a secondary victim, no duty of care was owed to him on the facts of the case. He found particularly persuasive a decision of the German Bundesgerichtshof (Sixth Civil Division) (11 May 1971) in *I.S. Hu. w Ha.* where the court reasoned (at p. 113): -

> "A person is under no legal duty, whatever the moral position may be, to look after his own life and limb simply in order to save his dependants from the likely psychical effects on them if he is killed or maimed: to impose such a legal duty, except in very peculiar cases, for instance, wherever a person commits suicide in a deliberately shocking manner, would be to restrict a person's self-determination in a manner inconsistent with our legal system."

78. Cazalet J. recognised that there was a duty in such circumstances not to cause foreseeable physical injury but in his judgment, to extend that duty so as to bring within its compass purely psychiatric injury would be to create a significant further limitation upon an individual's freedom of action. He identified what he considered to be public policy reasons for adopting this stance. Among these, for example, were the undesirability of litigation between family members, such as had arisen in the case at hand.

79. Although this judgment does not of course bind this court, or indeed the High Court, as the trial judge said, I have to say I share his misgivings about it. Even in England, it has been doubted, for example by the Law Commission in that jurisdiction which noted that there was no bar to recovery for physical injury in such circumstances. The policy considerations identified seem difficult to rationalise. The justification for treating physical and psychiatric injuries differently has often been criticised and even the German court recognised that there could be recovery in the case of shocking injuries deliberately inflicted, but not accidentally. It is hard to see how our law of negligence can be reconciled with the concept that liability should be imposed for personal injury caused deliberately but not negligently.

80. As the trial judge explained, deterring litigation between members of the same family is hardly a sound basis for refusing recovery. Slip and fall cases, for example, in the home

of family or friends are commonplace and family harmony is rarely relevant to claims which many lay people regard as being brought against insurance companies. In the present case, I for one would have difficulty in accepting the proposition that the deceased's insurers or estate would be liable if the plaintiff looked into the wrecked car and saw the mutilated body of a passenger but not liable where the body was that of the driver. I agree entirely with the views of the trial judge that such an anomalous and plainly unjust outcome does not represent the law in this jurisdiction. Indeed, the decision in *Greatorex* gives rise to the further peculiarity that the claim failed because the plaintiff, as a rescuer, was not exposed to physical danger.

81. It is strictly unnecessary to reach a concluded view on this point, however, in circumstances where the plaintiff in *Greatorex* was classified as a secondary victim. Here, the judge was of the view that the plaintiff (who, unlike the position in *Greatorex* was not related to the deceased) was a primary victim and I have already expressed my agreement with that conclusion. Accordingly, even if the additional restrictions on recovery identified in *Greatorex* were to be recognised in Irish law – and I have already made clear my difficulties with the approach taken there – they would have no application in the circumstances here.

82. Accordingly, I am satisfied that the trial judge was correct not to follow it and I agree with his reasoning in that regard.

Order

83. For the reasons given therefore, I am satisfied that the trial judge correctly concluded that the plaintiff was entitled to succeed by an application of the *Kelly* principles and a duty of care was owed to her by the deceased. I would accordingly dismiss this appeal.

84. With regard to costs, as the plaintiff has been entirely successful, my provisional view is that she is entitled to her costs of the appeal but if the defendant wishes to contend for a different order, he will have liberty to notify the Court of Appeal Office to that effect within 14 days of the date of this judgment and a short supplemental hearing on costs will be convened. In the event that such a hearing is requested and results in an order in the proposed terms being made, the defendant may be liable for the costs of such additional hearing.

85. As this judgment is delivered electronically, Binchy J. has indicated his agreement with it. I have had the opportunity of reading the judgment of Collins J. also delivered herein and I agree with it.