**THE COURT OF APPEAL**

**Record Number: 2020/109**

**High Court Record Number: 2018/652**

**Neutral Citation No [2021] IECA 28**

**Noonan J.**

**Collins J.**

**Binchy J.**

**BETWEEN/**

**LISA SHEEHAN**

***Plaintiff/Respondent***

**AND**

**BUS ÉIREANN/IRISH BUS AND VINCENT DOWER**

***Defendants/Appellants***

**JUDGMENT of Mr. Justice Maurice Collins delivered on 4th February 2022**

1. I agree with the judgment of Noonan J and accordingly I agree that this appeal should be dismissed. I wish to add a few brief observations of my own.
2. There was no dispute here that the road traffic accident that occurred on 28 January 2017 was caused by the negligent driving of the late Mr O’ Connor (*“the Deceased”*). (represented in these proceedings by the Second Defendant). So much was admitted by his insurers (High Court Judgment, para 8). Neither was there any dispute that the accident caused injury to Ms Sheehan. Having heard evidence from her and from the consultant psychiatrist called on her behalf (the Defendants not having called any evidence), the High Court Judge concluded that she had sustained *“a significant psychiatric injury*” and noted that that was not disputed by the Defendants (Judgement, para 26). That injury has had has a very significant impact on Ms Sheehan’s life (Judgment, para 80). Thus the admittedly negligent driving of the deceased caused admitted and significant injury to Ms Sheehan.
3. The Deceased owed a duty of care to other road users not to cause injury to them by reason of his driving. Again, that is not disputed. Ms Sheehan was such a road user. It might seem to follow that, in causing injury to Ms Sheehan, the Deceased was in breach of that duty of care and the Second Defendant must therefore be liable to Ms Sheehan. Here, however, the Second Defendant demurs. What is said is that, whereas the Deceased undoubtedly was under a duty not to cause any *physical* injury to Ms Sheehan, he owed no duty to her not to cause her *psychiatric* injury. Ms Sheehan was not, the Second Defendant says, a “*direct participant”* in the accident and as a mere secondary victim, policy considerations operate to exclude recovery by her.
4. I do not agree. None of the Irish authorities to which we were referred – which are discussed in detail by Noonan J – appear to me to support the position of the Second Defendant. Furthermore, I cannot identify any policy considerations that might justify leaving Ms Sheehan uncompensated for the significant and foreseeable injury sustained by her as a direct and immediate result of the negligence of the Deceased.
5. On the facts, Ms Sheehan was far from being a “*mere bystander or spectator*” here:

(1) She was close enough to the collision that debris struck and damaged her car (within 100 metres of the point of impact according to Mr O' Sullivan, her engineer). In her evidence she described hearing a *“loud bang”* (Day 1, page 20) She was, the Judge found, *“in the area of risk of foreseeable physical injury*” (High Court Judgement, para 53)

(2) She brought her car to a halt *“for no reason other than that she perceived something disturbing or alarming had occurred in the immediate vicini*ty” (Judgment, para 53);

(3) As she approached the crashed vehicles she noted that “*there was diesel all over the road*” (Day 1, page 22);

(4) She appears to have been the first person on the scene (other than those involved in the collision);

(5) She approached the Deceased’s car to see whether she could give aid or comfort to its occupants and saw what she thought was a child in the back (it was a dark winter’s evening) but then realised that it was someone *“with very bad facial injuries*” who *“looked slightly decapitated”* and *she “got such a fright”* (Day 1, page 23). In her statement to the Gardaí shortly after the accident (confirmed by her in her evidence to the High Court) she said that “*there was blood everywhere*”. It is clear from the evidence that the Deceased had sustained horrific injuries and, unfortunately, was beyond assistance. That fact does not, in my view, affect how Ms Sheehan’s conduct is to be seen.

(6) Ms Sheehan then called the emergency services and was told to check on the people on the bus;

(7) She then looked to see whether there might have been anyone else in the car who might have been thrown out of it (Day 1, page 24).

(8) What Ms Sheehan experienced at the scene of the accident triggered an acute stress reaction and the diagnosis of “*classic post-traumatic stress disorder*”. (Judgment, para 20).

1. Having regard to this continuum of intense (and injurious) involvement in the accident and its immediate aftermath, Ms Sheehan must in my view be regarded as a primary victim (or, as it is sometimes put, an “*immediate victim*”) of the accident. She is therefore entitled to recover damages for the injury sustained by her. That is so even if one were to assume that the rigid primary/secondary classification that is a feature of the law of England and Wales in this area (though not, it seems, of the law of Australia: see *Tame v New South Wales* [2002] HCA 35 and, more recently, *King v Philcox* [2015] HCA 19) is also part of Irish law.
2. That conclusion opens no floodgates and creates no risk of “*liability in an indeterminate amount for an indeterminate time to an indeterminate clas*s”, in the oft-quoted formulation ofCardozo CJ in *Ultramares Corporation v. Touche*, 174 N.E. 441 (1932).
3. In the circumstances, it is not strictly necessary to consider as a distinct issue whether Ms Sheehan is properly regarded as a “*rescuer*”. However, if that question fell to be decided, I would hold that she was a rescuer in the circumstances here and entitled to recover on that basis. I agree with the Judge's analysis of this issue.
4. The Second Defendant relies on the view of the majority of the House of Lords in *White v Chief Constable of South Yorkshire* [1999] 2 AC 455 (also known as *Frost v Chief Constable of South Yorkshire)* that, for a rescuer to be regarded as a primary victim, it must be shown that they were exposed to the risk of physical injury or reasonably believed themselves to have been so exposed (though, curiously, it is *not* necessary to establish any causal connection between the rescuer’s perception of danger - if indeed they perceived any danger - and the psychiatric injury suffered by them).[[1]](#footnote-1)
5. Here the Judge in fact found that Ms Sheehan exposed herself to danger in providing assistance at the scene of the crash on the dark roadway and that she came within the range of foreseeable physical injury in doing so (Judgment, para 65). Quite apart from that finding, I would not in any event be prepared to apply any such threshold requirement in the circumstances here.
6. No such requirement appears to have been identified in the authorities prior to *White.* The decisionof Waller J in*Chadwick v British Railways Board* [1967] 1 WLR 912 had long been regarded as correctly stating the law in this area. There is no suggestion in *Chadwick* that exposure to danger was a threshold requirement for recovery *qua* rescuer. While Waller J noted that there was *“clearly an element of personal danger in what Mr. Chadwick was doing”[[2]](#footnote-2)* that fact played no role in his analysis of liability. The *ex post facto* rationalisation of *Chadwick* adopted by Lord Steyn and Lord Hoffman in *White* – that a duty of care only arose because Mr Chadwick might have been injured by the collapse of a wrecked train carriage on him – seems wholly unconvincing, a device cut from whole cloth so as to deny recovery to the plaintiffs in circumstances where it was considered that it would be “*unacceptable*” to the public if the police were allowed to recover “*while the bereaved relatives are sent away with nothing*” (Lord Hoffman, at 510D-H).
7. There may be an argument for imposing a higher threshold for recovery where the rescuer is a professional such a member of the Garda Síochana or the Emergency Services. While the so-called “*firemen’s rule*” was rejected in Ogwo v. Taylor [[1988] A.C. 431](https://www.lexisnexis.com/uk/legal/search/enhRunRemoteLink.do?linkInfo=F%23GB%23AC%23sel1%251988%25year%251988%25page%25431%25&A=0.43183843345185946&backKey=20_T434670871&service=citation&ersKey=23_T434670870&langcountry=GB), where psychiatric injury is concerned such persons may, in practice, find it more difficult to satisfy the foreseeability requirement. As Lord Goff observed in his dissenting speech in *White*, (at 471D-E) it is *“generally accepted that, in considering whether psychiatric injury suffered by a plaintiff is reasonably foreseeable, it is legitimate to take into account the fact that the plaintiff is a person, such as for example a policeman, who may by reason of his training and experience be expected to have more resilience in the face of tragic events in which he is involved, or which he witnesses, than an ordinary member of the public possesses who does not have the same background*.” That no doubt is so. But Ms Sheehan was not such a person. She did not go to the Deceased’s aid because it was her job to do so. She did not have the benefit of the training and support that such professionals presumably receive in coping with trauma. She was an ordinary member of the public from whom the law demanded “*normal fortitude*” and no more.
8. While the scene that confronted Ms Sheehan here clearly did not compare with the scene that had confronted Mr Chadwick, the Judge was entitled to take the view that the circumstances were such that personal injury to Ms Sheehan in the form of psychiatric injury was reasonably foreseeable. On that basis she was entitled to succeed in her claim and, even if Ms Sheehan had not been in danger of physical injury (as the Judge found she was) that would not be a ground for excluding recovery here in my view.
9. Finally, I come to the argument advanced by the Second Defendant in reliance on *Greatorex v Greatorex* [2000] 1 WLR 1970. I agree with Noonan J that it does not assist the Second Defendant’s case. It involved a number of preliminary issues to be decided on agreed facts. The essential issue was whether a victim of self-inflicted injuries owes a duty of care to a third party not to cause him psychiatric injury (1971H). The facts weresingular. The plaintiff (the father of the first defendant) was a fireman. In that capacity he attended at the scene of a road traffic accident involving a vehicle driven by his son (the first defendant) whose negligent driving had caused the accident (and who was subsequently convicted of careless driving, driving without insurance and failing to provide a specimen). The father “*was nowhere near the scene of the accident when it happened*.” The son received a head injury and was unconscious for about an hour. He was initially trapped inside his vehicle. The father attended to his son and was later diagnosed with long term severe PTSD. The father sued his son and the Motor Insurers’ Bureau was subsequently joined as a co-defendant in circumstances where the son was uninsured.
10. The father advanced a number of grounds as to why he should recover, all premised on an acceptance that he was a secondary victim only. He argued that he was entitled to recover as a rescuer. Cazalet J rejected that argument on the basis that it was accepted that he was never in any physical danger nor in fear of such danger and that it followed from *White* that his claim *qua* rescuer must fail (1976D). Even if he were to follow the minority view in *White*, the judge stated that on the agreed facts the father would not have been entitled to recover damages. Although the accident involved a potentially serious injury to the son, the circumstances in which the rescuers involved in the aftermath of the accident *“in no way approached the horror of the circumstances in which the rescuers found themselves in the Lewisham train disaster or the Hillsborough football stadium disaster*.” (1976E-F). Though not said expressly, I take this to mean that the judge considered that psychiatric injury was not reasonably foreseeable on the particular facts.
11. The plaintiff also argued that he was entitled to recover *qua* father on the basis that he satisfied all of the control mechanisms applicable to claims by secondary victims identified in *Alcock* and *White.* Cazalet J agreed that he did. He then proceeded to address the issue of whether a victim of self-inflicted injuries owes a duty of care to a third party not to cause him psychiatric injury. Having referred to a number of authorities, including *Alcock*, *Jaensch v Coffey* (1984) 155 CLR 549 (a decision of the High Court of Australia) and a number of other Australian decisions at state level, Cazalet J thought that it appeared that “*the preponderance of opinion*” was unfavourable to the concept of a victim of self-inflicted injuries owing a duty of care to a third party not to cause him psychiatric harm in consequence of those injuries, there was no decision on the point binding on the court. It therefore had to reach its own conclusion and in that context “*policy considerations come into play*” (1984A-B).
12. The first such consideration identified by the judge was that “*it will normally only be in cases where close family ties exist between the primary and secondary victim that the particular issue with which this case is concerned will arise.”* That of course is not the case here.
13. The judge next referred to the issue of self-determination, referring to a decision of the German Bundesgerichtshof (the Federal Court of Justice) of 11 May 1971, *IS Hu w. Ha*, a translated extract from which had been produced to the court. The German court considered that *“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 (sic) effects on them if he is killed or maimed*” as to impose such a duty, other than in exceptional cases, *“would be to restrict a person’s self-determination in a manner inconsistent with our legal system.”*
14. The decision in *IS Hu w. Ha* was not provided to the Court. However, it is discussed in some detail in Markesinis, “*Foreign law inspiring national law. Lessons from Greatorex v Greatorex”* (2002) 61 CLJ 386. It involved a claim for damages for psychiatric injury suffered by a wife when she was told of her husband’s death in a road traffic accident. It does not appear that she witnessed the accident or attended the scene of it afterwards. The accident was caused in part by the fault of the husband and in part by the fault of the other driver. Under German law, in any fatal accident claim by the wife *qua* dependant (the equivalent of a claim under Part IV of the Civil Liability Act 1961 here), the claim would have been reduced by reference to the contributory fault of her husband (as is also the case under the 1961 Act: section 35(1)(b)). While the claim made by her was not *qua* dependant, but a claim in her own right, the court considered that her damages should nonetheless be reduced in proportion to the husband’s fault. It did so in reliance on section 242 BGB (German Civil Code) which imposes a general obligation of good faith. In the court’s view, given that the wife’s claim was founded on her close personal relationship to her husband “*it was thus only fair that her claim should be affected by his fault in contributing to the accident.”* According to Markesinis (who was the author of the textbook on German law referred to in *Greatorex*) the passage relied on by Cazalet J was effectively an *obiter dictum* intended to reinforce the essential reasoning of the court.
15. This analysis appears to indicate that the principle of self-determination did not play as decisive a role in *IS Hu w. Ha* as the discussion in *Greatorex* might suggest. In any event, counsel for the Motor Insurers’ Bureau relied on the decision to argue that imposing liability for psychiatric harm caused to another through acts of self-harm *“would be to curtail the right of self-determination and the liberty of the individual”.* Acknowledging that there was a duty not to cause foreseeable physical injury to another in such circumstances, the judge thought that *“to extend that duty so as to bring it within its compass purely psychiatric injury would indeed be to create a significant further limitation upon an individual’s freedom of action*” and that appeared to him to be “*a powerful objection*” to the imposition of any such duty (1984G-h).
16. I confess that I do not find this analysis at all persuasive. It appears to me to border on the fanciful to suggest that the Deceased’s actions in causing the crash here – his negligent driving - ought properly to be understood as an exercise in self-determination or personal autonomy. More significantly, it is not at all clear why, even if so regarded, that should trump Ms Sheehan’s right to compensation for the injury that those actions caused to her (assuming that she would otherwise have such a right, as here she does given that she was an immediate victim of the accident). To the extent that there is a conflict between the right of Ms Sheehan to obtain compensation for her injury and the Deceased’s right of self-determination and freedom of action, the former must prevail. Considerations of self-determination and personal autonomy are not a basis for excluding liability where physical damage is concerned. That the injury here was psychiatric rather than physical does not, in my view, provide a principled or satisfactory basis for excluding recovery in the circumstances here. Perhaps there are good policy reasons for drawing a hard and fast distinction between physical and psychiatric injury in this context but the right to self-determination of drivers does not supply one in my view.
17. Cazalet J next considered a related point which he considered to be of some importance, namely that to allow a cause of action in the circumstances presented would be to open up the possibility of a particularly undesirable type of litigation within the family, involving questions of relative fault between family members (1985E-F) and “*would be potentially productive of acute family strife*” (1986A). It is not necessary to consider this aspect of the judge’s analysis because it has no application here given that Ms Sheehan and the Deceased were unrelated.
18. As the High Court Judge noted, the issues that arose in *Greatorex* have also been considered in Australia. In *FAI General Insurance Co Ltd v Lucre* [2000] NSWCA 346, (2000) 50 NSWLR 261, the New South Wales Court of Appeal (per Mason P) rejected the submission “*that the duty of care is negated simply because the primary victim is the defendant or the defendant's deceased”* (para 16). In his view, the *“mere fact that the death, injury or peril is that of the defendant (or the defendant’s deceased) cannot justify invariable rejection of a claim for damages for negligently inflicted psychiatric injury”* (para 13) and there was “*no reason in principle or logic why a primary tortfeasor, who may even have acted intentionally as well as negligently, should escape liability to another who suffers psychiatric injury simply because no third party was also injured”* (para 14(c)). I fully agree.
19. The facts in *Lucre* differed somewhat from the facts here. The plaintiff was driving a very large truck when on an oncoming car suddenly swerved across the road and crashed into it. The plaintiff went to the assistance of the other driver but she died shortly after the collision. He did not suffer any physical injury but developed PTSD. It was argued by the insurers that, in the circumstances, the plaintiff was merely a bystander but Mason P rejected that argument on the basis of “*the immediacy of his involvement in the accident that caused the death that caused the psychiatric injury*” which was “*quite obvious in both time and space.”* There was also a “*deeper connection*” arising from the fact that the vehicle under the control of the plaintiff had contributed directly to the death of the deceased which generated a sense of unresolved anxiety and guilt. In the circumstances, it was reasonable, fair and just to impose a duty of care upon the deceased (para 25). Ms Sheehan did not contribute to the death of the Deceased and her psychiatric injury did not have precisely the same aetiology but that seems to me to be a difference of degree rather than of principle.
20. Ms Sheehan was involved as a participant in the accident caused by the negligence of the Deceased and its immediate aftermath and in my view the Judge was correct to conclude that the Deceased owed a duty to Ms Sheehan not to cause her psychiatric injury. The fact that the fatal injuries suffered by the Deceased were caused by his own negligence is not a basis for excluding or restricting such duty here. Insofar as *Greatorex* may suggest the contrary (and as I have already observed, the plaintiff in *Greatorex* was not a primary or immediate victim, in contrast to the position of Ms Sheehan) I would not follow it.
21. In my view, for the reasons set out already, Ms Sheehan was a primary/immediate victim of the negligent driving of the Deceased and, as such, was entitled to recover against the Second Defendant. In the circumstances, it is not necessary for this Court to determine whether the primary/secondary victim classification is part of Irish law. I would dismiss the appeal.

*Binchy J has indicated his agreement with this judgment.*

1. Per Lord Steyn, at 499G. [↑](#footnote-ref-1)
2. At 918. [↑](#footnote-ref-2)